

Item-
1. 06-03-2025

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Ct. 37

**In The High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side
Commercial Division**

FMA 1183 of 2024

M/s. Sahida Construction
Versus
M/s. RCS Universal & Co. & Ors.

Mr. Kallol Basu, Sr. Adv.
Mr. Samik Sarkar
Mr. Aurin Chakraborty
Mr. Ayushman Dasgupta
...for the appellant

Mr. Sudip Ghosh
Mr. Apurba Kumar Datta
Mr. Bidish Ghosh
...for the respondents

1. The appeal is arising out of a judgment dated 14th August, 2024 passed by the learned Judge, Commercial Court at Asansol in Money Suit (Commercial) No. 34 of 2024.
2. We have heard the learned Counsel for the parties. The claim in this suit is in respect of two bills dated 11th May, 2019 and 24th October, 2019 for Rs.1,30,95,000/- and Rs.77,80,312.50/- respectively.
3. The plaintiff has specifically pleaded in paragraphs 8 and 11 of the plaint with regard to said two claims. The defendants have not specifically denied the said allegations. On the contrary, the defendants have pleaded excess payment of Rs.12 lakhs under the contract. The defendants did not make any counter claim. In any event, the proof of excess payment was not established at the trial.

4. The learned Single Judge has taken note of the said facts including the effect of evasive denial. The learned Single Judge disbelieved the evidence of PW-4, Supervisor of the plaintiff, who worked from 20th April, 2018 to 20th April, 2019 since the bills are dated 11th May, 2019 and 24th October, 2019.
5. PW-4 was employed as supervisor of the plaintiff and in his affidavit in chief in paragraph 11, he has stated set out
“I say that in course of time, we completed the construction of third floor roof casting and brick work of entire ground floor and 50% brick work of Second floor. However on 26.10.2019 at the wee hours of morning when we were sleeping a few un-indentified Gundas broke open the construction site with iron rods, sticks and threatened and assaulted us with dire consequences and we were compelled to flee from the site. Those goons declared that the defendants have decided to complete the finishing work of construction with their own. We went to lodge a complaint about the incident to the Salanpur P.S. and requested to take necessary action against the defendants and their men, agents but our request was declined.”
6. In his cross-examination he has stated that he worked with the plaintiff firm till 20th April, 2019. Hence, his presence on 26th October, 2019 when it is alleged that few unidentified goons had entered and took over the project may not be believed. However, insofar as his evidence with regard to construction of the third floor

roof casting and brick work of entire ground floor and 50% brick work of second floor is concerned, if it is borne by the bills or any of the bills, it cannot be fully discarded.

7. At least for the period during which PW-4 worked as a Supervisor ought to have been taken into consideration. It does not appear that his evidence for the period during which he worked as a Supervisor could be discarded.
8. The evidence of the mason being PW5 was not accepted on the ground that he is illiterate and in his cross examination he deposed that he is unaware of the contents. In chief however, he has stated that the deposition-in-chief was prepared as per his instruction. However, he worked in the project was not disproved. His deposition corroborates the evidence of PW4 with regard to the construction made pursuant to an agreement.
9. DW-2 is the site engineer appointed by the defendants. In his cross-examination stated that the site engineer of the plaintiff firm although was present during measurement of the work done, did not sign in the measurement book. For completing the remaining part of the construction and the contract was given to Nuvoco under his advice. The measurement book was not been produced in court. The measurement book is in possession of the defendants and it has not been established that the defendants had made payment of Rs.12 lakhs in excess of the work done by the plaintiff. The witness had no personal knowledge of payment of such excess amount. He claimed to have

given the measurement book to his employer. He claimed to have filed a report regarding the bill dated 24th October, 2019. However, the said report was not produced. Although he deposed that the defendant firm had communicated the reasons to the plaintiff for non-payment of the bills dated 24th October, 2019 and 11th May, 2019 however, the letters were never exhibited. He admitted that the measurement book records the work done by the plaintiff. The said measurement book if produced would have establish the nature and extent of the work executed by the plaintiff and the balance work left unexecuted has been executed by the new contractor.

10. The measurement book as the measurement book is not in possession of the plaintiff. The parties in possession of the best evidence is required to produce the said evidence failing which the court can draw an adverse inference. The completion certificate is to be issued to the plaintiff on successful completion of the work. The plaintiff has produced the best evidence available in this regard through its witnesses and their evidence cannot be discarded merely because the defendants did not produce the measurement book or the plaintiff did not file any application in court for direction upon the defendants to produce the measurement book.

11. Limited to the said issue, we feel that the court is required to re-examine the basis of the claim raised in the bills dated 11th May, 2019 and 24th October, 2019 on the basis of the existing record and evidence. The defendants

have disputed the quantum of work executed by the plaintiff covered under the said two bills as also the basis of the claim. The quantum of the work will be reflected from the measurement book. The site engineer in his evidence has stated that the plaintiff had refused to sign the measurement book. The production of the measurement book would have decided the matter conclusively.

12. During the pendency of the appeal, we directed the parties to have a discussion in order to settle the dispute. The settlement has failed.
13. We do not find any specific denial that the construction of third floor roof casting and brick work of entire ground floor and 50% brick work of second floor was not executed by the plaintiff. We do not also find any reasonable explanation from the defendants for not producing the measurement book. It is not in dispute that the plaintiff was in the site till 26th October, 2019. In such conspectus of facts, the findings in Issue no.4, insofar as the non-payment of two bills is concerned, requires reconsideration.
14. The learned Judge, Commercial Court, Asansol, is requested to decide the issue with regard to two bills only. Rest of the findings on Issue no. 4 has not been touched.
15. In the event the defendants fail to produce the measurement book on which reference was made by DW-2, the Learned Single Judge may draw adverse

inference and decide the claim with reference to the agreement. It is needless to mention that if the plaintiff could prove the quantum of work executed before it was terminated and assigned to a third party in accordance with the agreement or even otherwise and defendants had taken benefit of it, the defendants cannot deny its obligation to pay for the work executed.

16. In the event the measurement book is produced, the parties shall be allowed to lead evidence confined to the measurement book and for that purpose the parties may be permitted to adduce additional evidence.

17. We request the learned Judge, Commercial Court to dispose of the aforesaid issue limited to the two bills only as expeditiously as possible. All other issues decided by the Learned Commercial Judge is not been interfered with and affirmed.

18. With the aforesaid directions, the appeal is disposed of accordingly.

19. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)