

(2012) 07 DEL CK 0659

In the Delhi High Court

Case No : CS (OS) 1530 of 2003 and CS (OS) 1173 of 2004

Dr.(Ms.) V.L. Bhargava and Another

APPELLANT

Vs

Shri Balwant Singh and Another
 Shri Balwant Singh
Vs Dr.(Ms.) V.L. Bhargava and Another

RESPONDENT

Date of Decision : 11-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 6 Rule 9, Order 7 Rule 14, Order 7 Rule 17, Order 7 Rule 9

Citation : (2012) 07 DEL CK 0659

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Sudhanshu Batra, with Mr. Bhuvan Gugnani and Mr. Harish Gupta, for the Appellant; Sudhanshu Batra with Mr. Bhuvan Gugnani, Advocate and Mr. Harish Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—This judgment shall dispose of the suit of Dr. Bhargava & Anr., hereinafter referred to as "owner's"/Plaintiff; suit for recovery of Rs.22,69,894.50 with pendente lite and future interest at the rate of 18% per annum and the cross suit of Balwant Singh, hereinafter referred to as "Builder"/Defendants for recovery of Rs.2,67,150/- with pendent lite and future interest at the rate of 24 % per annum on the principal amount from 1.5.2003 till the decision of the suit.

CS (OS) No.1530/2003

The owners contended that plaintiff No.1 is a well known gynecologist and plaintiff No.2 is a retired Army Officer and brother of plaintiff No.1. They jointly purchased a land measuring 743.15 sq.mtrs. bearing No.49 on Pine Drive in Malibu Town, District Gurgaon, Haryana, by a registered sale deed dated 29th March, 2000. The physical possession of the plot was handed over on 5th May, 2000. After getting the possession, the plaintiffs contemplated the construction

of a residential house on the said plot and, therefore, they arranged for a loan to the tune of Rs.27,00,000/- from HDFC Limited.

2. For the purposes of construction, a contractor was also required and since defendant No.1, Shri Balwant Singh, had been doing contract job for Sita Ram Bhartia Institute of Science and Research where plaintiff No.1 was working as a Senior Consultant, he was asked to quote his rates for material and labor, so that the construction could be carried out. According to the owners, the builder/defendant No.1 gave an item-wise list of rates for construction of structure of the proposed house. The rates quoted by the defendant No.1 were accepted and he also promised to complete the construction by April 2002. The defendant No.2, is the son of defendant No.1 and he also works with him and he also acted as an agent of defendant No.1, his father, from time to time.

3. The plans for the construction of house were sanctioned on/or about 19th June, 2000 and initial working drawings were handed over to defendant No.1 on 27th June, 2000. On 17th July, 2000, the plaintiff had requested for the advance payment for purchase of stores and, therefore, a sum of Rs.4,00,000/- was paid by an account payee cheque drawn on HDFC Bank, New Delhi. The structural drawings for the basement were submitted to the defendants by M/s. Space Combine on/or about 15th August, 2000 and excavation was completed by the defendants for construction in the first week of October, 2000.

4. During the construction, defendant No.1 requested for more funds and consequently the amounts were paid in three installments by cheques dated 12th January, 2001; 18th January, 2001 and 20th February, 2001 for Rs.2,00,000/-, Rs.3,00,000/- and Rs.4,00,000/- respectively. The plaintiffs had already paid a sum of Rs.4,00,000/- on 17th July, 2000 and, therefore, by 20th February, 2001, the defendant No.1 had been paid Rs.13,00,000/-.

5. In March 2001, the basement structure foundation walls and pillars were near completion and, therefore, defendant No.1 demanded more money and he was asked to submit a written bill. The defendant No.1, therefore, submitted a bill of Rs.10,59,798/- for the work done till March 2001. After the said bill, the defendant No.1 claimed a further sum of Rs.2,00,000/- in advance towards the estimated costs for the construction of a backside boundary wall. The defendants represented that in case the advance demanded by them is not paid, they would be unable to speed up the work. Consequently, in the interest of work and without verifying the actual measurements at the site and in good faith, the owners gave a sum of Rs.1,00,000/- in cash to defendant No.2 and another sum of Rs.1,00,000/- was paid in cash to defendant No.2 on 9th April, 2001 as "on account" payment.

6. So that the work could be completed within time, the plaintiffs continued to make payments from time to time and by 12th January, 2002, the plaintiffs had paid a sum of Rs.48,00,000/- though the defendants had raised only outer walls of the first floor rear portion and had laid the roof slab, while the plastering of

the basement and the ground floor was still under progress.

7. The owners contended that they had asked their Architect, Mr. Paschim Tiwari, to ascertain whether the payments made by the plaintiffs commensurate with the actual work done by the builder, the defendants. However, the Architect could not do so as the bills had not been submitted by the defendants to him. The owners had to appoint another Architect, Mr. Khushroo Kalyanwala, in the first week of January 2002 as the earlier Architect of the plaintiff, Ms. Garela had to leave for London. The subsequent Architect visited the premises on/or about 14/15th January, 2002. The defendant No.1 was requested to be present at the site and the Architect had asked the defendant No.1 to prepare a bill of quantities for the floor-wise total structure constructed until then. However, the defendant No.1 did not prepare the bill till the middle of February 2002, and rather he demanded another sum of Rs.5,00,000/- from the plaintiffs. The defendant No.1 ultimately handed over a bill to the Architect of the plaintiff, Mr. Khushroo, on 12th February, 2002 in an essay form. The Architect of the plaintiffs, therefore, asked the defendant No.1 to submit the bill in an appropriate format. The defendant No.1 did not submit the bill in the appropriate format and rather had showed lump sum charges, which were not in consonance with the rates which had been quoted by the defendant No.1 before the commencement of the construction.

8. In these circumstances, it is contended by the plaintiffs that they appointed M/s. Inderjeet Maitra (hereinafter referred to as "IMA") as yet another Architect for evaluating the construction of the building and to prepare a bill of quantities. On perusing the bill prepared by IMA, it transpired that the work executed at the site was only for the sum of Rs.29,00,000/- though an amount of Rs.48,00,000/- had been paid to the defendant No.1. Defendant No.1 was, therefore, contacted and the plaintiffs had three meetings between March 2002 to June 2002 with the representatives of IMA and two meetings at the site for joint assessment of the quantity of work executed.

9. In the bill which was prepared by IMA at the instance of the plaintiffs, defendant No.1 pointed out only the discrepancy about the kota stone used. It is asserted that since the said item related to execution of hidden items, IMA accepted the quantities proposed by defendant No.1 of the said item and corrected his abstracts of the bill of quantities. The plaintiffs contended that thereafter defendants submitted fresh bills on 4th March, 2002; 9th May, 2002; 26th June, 2002 and 4th July, 2002. The bills submitted by the defendants were an attempt to justify the excess payment received by the defendants and the rates quoted in the bills were at variance with the rates which were given by the defendant to the plaintiff. Even in these bills submitted by the defendants, certain items were quoted on lump sum basis. Therefore, plaintiff no.2 sent a letter to defendant No.2 to clarify the discrepancies/hidden cost. The letter of 9th July, 2002 was replied by defendant No.1 by letter dated 17th July, 2002, however, till August 2002 no response was given to the bill of quantities and cost prepared by IMA despite various requests by the plaintiffs.

10. In order to minimize the disputes and resolve them, the plaintiffs appointed yet another surveyor, Mr. Ankur Aggarwal, registered Architect with Haryana Urban Development Authority to assess the extent of construction carried out. The defendant No.1, however, refused to be present at the time of joint inspection.

11. The plaintiffs contended that the assessment done by Mr. Ankur Aggarwal, was almost the same as the bill of quantities which was assessed by IMA.

12. On examining the bills of quantities that was prepared by assessors appointed by the plaintiffs, it transpired that the defendants had misappropriated about Rs.16,00,000/-.

13. According to the bill of Shri Ankur Aggarwal, a sum of Rs.32,70,778/- was payable by the plaintiffs to the defendants for the work done by the defendants, however, the defendants were paid a sum of Rs.48,00,000/-. When defendant No.1 was confronted with the bill, he represented to submit a fresh bill and consequently in October 2002 another bill was submitted which was, however, also based on per sq.mtr. cost rather item-wise agreed upon at the time of awarding the contract. In the end of November, it is asserted that another bill was given which gave some details of quantities for the basement, however, again the demand was for lump sum payment for the work of ground floor and first floor executed by the defendants. The bills submitted by the defendants also had glaring discrepancies as per the plaintiffs.

14. The plaintiffs also asserted that the defendants had constructed a building only up to the first floor, with the work of plastering and flooring still remaining incomplete and thereafter, he abandoned the work, due to which reason the construction work had come to a complete standstill. Therefore, the plaintiffs demanded the amount paid in excess to the defendants by a legal notice dated 23rd November, 2002 and also the damages which were caused to the plaintiffs on account of the non-execution of the work.

15. The plaintiff pleaded that defendant No.1, thereafter, filed a fraudulent suit for recovery of Rs.2,67,150/- being suit No.209 of 2003 before in the District Court. The plaintiffs also contended that they were left with no option but to engage another agency to complete the construction of work at the risk and cost of the defendant and thereafter, they too filed a suit for recovery, of the amount of Rs.15,82,715/- with interest at the rate of 18% amounting to Rs.4,74,814.50 and thus they filed the present suit for recovery of Rs.22,69,894.50 along with pendente lite and future interest at the rate of 18% per annum.

16. The suit is contested by the defendants. The defendants contended that the rate list filed by the plaintiffs is not the rate list given by the defendants to the plaintiffs. According to them, the said list was never prepared by the defendants and given to the plaintiffs. It was contended that the rate list had been fabricated by the plaintiffs and the defendants had not even signed the said rate list. The defendants denied that they had represented to complete the work up to 2002.

It was also contended that it was agreed with the plaintiffs that the defendants would carry out construction on the basis of lump sum rates mutually agreed between the parties. The defendants asserted that the Architects of the plaintiffs gave different drawings for different works at different times and the plan was changed frequently. It is contended that two different plans were given to the defendants of the basement. The structure drawing prepared by M/s. Space Combine which is filed in the court, was stated to be incorrect and fake than what was given to the defendants. It was also asserted that the plaintiffs and their Architects used to visit regularly and apprise the work and only after proper appraisal, the demands were released by the plaintiffs to the defendants from time to time. Defendants denied that the demands were made "on account" basis or that the plaintiffs made the payments without verifying the actual measurement and it was instead contended that the demands were made only after physically verifying the actual measurements. The defendants, however, admitted that a total sum of Rs.48,00,000/- had been paid to the defendants by the plaintiffs up to 12th January, 2002. It was also contended that Shri Paschim Tiwari regularly visited the site and checked the construction and that neither the plaintiffs nor Mr. Tiwari had ever asked for any bills from the defendants.

17. The defendants further disclosed that they received Rs.33 lakhs from 9th April, 2001 to 12th January, 2002 as claimed by the petitioners. It is asserted that the payments were made only after seeing the construction (both quality and quantity). The defendant asserted that the payments were made by the plaintiffs on floor wise basis and after finishing different phases of constructions which had been mutually agreed between them. In the circumstances, it is contended that the payments were after the plaintiff/architect/agent had visited the site and had appraised the construction. Thus, it is urged that the payments were directly co-related to the progress of work.

18. The defendant alleged that Mr. Khushroo Kalyanwala wanted to make some illogical changes in the already constructed building against the site plan. The defendant had not agreed to the changes suggested by Mr. Khushroo Kalyanwala, since the proposed changes were in complete violation of the site plan and Municipal bye-laws and also since the changes proposed would have increased the cost of the construction for which the plaintiff would have never agreed. The defendants asserted that they refused to oblige Mr. Khushroo Kalyanwala who wanted the cost of construction to increase as his fees was based on the cost of construction. Suggestion given by Mr. Khushroo Kalyanwala would have enhanced the cost of Rs.12/- lakhs to Rs.15/- lakhs as per the defendants. As the defendants did not agree to Mr. Khushroo Kalyanwala's proposal, it is contended that perhaps at his instance the work was stopped and it was he who sowed the seeds of discontents between the plaintiffs and the defendants.

19. The defendant contended that they had submitted a bill dated 12th February, 2002 which was based on the mutually agreed lump sum rate floor wise and extra item/work/expenses which were incurred by the defendant, on the oral

assurance of the plaintiffs. Payments were also received by the defendants on the basis of the said bill. Since, it was not agreed to carry out the construction on the basis of the rate list therefore, the bills submitted by the defendant could not be on the basis of the same, but instead it was on the basis of mutually agreed lump sum rate floor wise. The defendant denied the report of the valuer, Ms. Inderjit Maitra, (IMA), since according to them the report was false and on the basis of concocted measurements multiplied by impossible and improper rate and the report was therefore, factually and technically incorrect. According to the defendant the alleged report takes the rate from a tender which does not exist. The defendant emphasized that even according to the plaintiff the report had taken wrong measurements with regard to the Kota stone and a wrong extract of cost was made, which was later on corrected. The defendant also denied the meeting between them and the valuer, Ms. Inderjit Maitra.

20. The defendants also denied that they had raised four different bills dated 4th March, 2002, 9th May, 2002, 26th June, 2002 and 4th July, 2002. According to the defendants they had raised bill dated 4th March, 2002 which was with regard to the construction in the basement and the ground floor and it was not with regard to the first floor and certain other constructions and expenses, which had already been incurred by the defendant and it was also argued that the plaintiffs in principle had agreed to them to the defendant. According to the defendant the bills produced by the plaintiffs are false and fabricated/tempered. The defendant also highlighted the differences in the revalue rate of the plaintiffs' valuer inasmuch Ms. Indrajit Maitra had assessed the bill amounting to Rs.29/- lakhs, whereas, valuation by Mr. Ankur Agarwal was of Rs.32,70,000/-. Thus, there was a difference of more than Rs.3,70,000/-. The defendant had, however, raised bills on the covered area basis i.e. per square fit and not per square meter. The defendant also denied that they gave any handwritten bill to the plaintiff. The defendant also contended that in the construction business termite treatment is generally called "Aldrine". According to the defendant 98% of the work entrusted to the defendant was completed i.e. structural work. It was also urged that the charges framed by the plaintiff is incorrect and that the rates taken by the plaintiff are not according to the rate list supplied by the defendant before starting the work. The defendant, however, agreed that the so far as the covered area bill was concerned, the measurements agreed in the site plan signed by both the parties on 29th March, 2003 is correct. In the circumstances, the defendant denied that any amount is due to plaintiff from the defendant. The defendant also denied that they are liable to pay interest and the salary of Chowkidar, Electricity Bill, fees of Architect, rent amount and cost of termite treatment.

21. The plaintiff filed the replication dated 17th December, 2003 and denied the pleas and contentions of the defendant and the allegations made by the defendant against the plaintiff.

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22. Before the plaintiffs had filed their suit for recovery of Rs.22, 69,894.50/-, the defendant, Sh. Balwant Singh had filed a suit for recovery of Rs.2, 67,150/- in the Court of District Judge on 27th May, 2003 contending, inter-alia that 98% of the total work of structural construction had been completed by the defendant and the work was stopped on account of Mr. Khushroo Kalyanwala, employed by the plaintiff, who had wanted to enhance the cost of construction as his fees was based on percentage basis on the total cost of construction, which is why, he also wanted to bring his own contractors.

23. The defendant, Sh. Balwant Singh, contended in his suit that as he had completed 98% of the work, he raised a bill of Rs.53,05,000/- as on 11th February, 2002. According to the said defendant an amount of Rs.5,05,000/- is outstanding and as the matter could not be resolved and the plaintiff asked for a bill only for the basement, ground floor, Chhajja and boundary wall, therefore, the defendant raised a new bill dated 4th March, 2002 which did not include the construction on the first floor and certain other construction/work.

24. According to the defendant, Sh. Balwant Singh in October, 2002, a meeting was held at the residence of the Colonel S.N.Bhargava, plaintiff No.2, and it was decided that the defendants would raise a bill on the basis of the covered area and rate per square ft. Consequently a bill dated 19th October, 2002 for Rs.50,67,150/- only was raised out of which Rs.2,67,150/- has remained due to the defendants. Since the plaintiffs/owners failed to pay the amount, a notice was given and thereafter, the suit for recovery of Rs.2,67,150/- was filed. The plaintiffs/owners filed the written statement dated 9th September, 2003 in the suit filed by the defendant/builder, reiterating all the pleas and contentions which were raised by them later on in the suits filed by the owners against the builder for recovery of Rs.22,69,894.50/-.

25. The suit of the defendant - Sh. Balwant Singh for recovery of Rs.2,67,150/- was transferred from the District Court to High Court and was renumbered as CS(OS) No.1173/2004.

26. On the basis of the pleadings the following issues were framed on 18th November, 2004:-

1. Whether the suit is barred by limitation? OPP
2. Whether the contract between the parties was on item wise/lump sum basis and/or rate list? OP Parties
3. Whether the parties had exchanged any rate list and if so which one? OP Parties
4. Whether excess payments have been made by the Plaintiffs for work down by the Defendants? OPP
5. Whether the Defendant is entitled to recover a sum of Rs.2,67,150/-? OPD
6. Whether the Defendant had given the Bill for Rs.10,59,798/- for the

basement? OPP

7. Whether the Defendant had completed 98 per cent of the contracted work?
OPD

8. Whether Dr. V.L. Bhargava had agreed to pay Shri Balwant Singh Bill dated 19.10.2002? OPD (Balwant Singh)

9. Relief?

27. Later on an additional issue was also framed by this Court on 15th December, 2004. Whether the plaintiffs are entitled to recover a sum of Rs.22,69,894.50/- together with interest and at what rate? OPP.

28. During the trial, the plaintiff examined Dr. (Mrs.) V.L.Bhargava, PW1; Sh. Satindra Nath Bhargava, PW2; Ms. Veena Garella, PW3; Sh. Arvind Deshraj, PW4; Sh. Ankur Aggarwal, PW5; Sh. Khushroo Kalyanwala, PW6; Sh. Anil Kumar Joshi, PW7 and Sh. Brij Pal, PW8.

29. The builder/contractor examined Sh. Hardeep Singh, DW1; Sh. Balwant Singh, DW2 and Sh. Dhanwant Singh, DW3.

30. This Court has heard the learned counsel for the parties and has perused the pleadings, documents and evidence produced by both the parties. For adjudicating the controversies the findings on different issues are as under:

Issue No.1

31. The contract for the house was awarded to the contractor/builder allegedly on the basis of the photocopy of the rate list on 3rd May, 2000 and the contractor had commenced the work on or after 27th June, 2000, when, according to the owners, the initial work drawings were submitted to the builder, for excavation through their architect. A sum of Rs.4/- lakhs was given as advance on 17th July, 2000. The structural drawings were given to the builder/contractor on 15th August, 2000, thereafter, the amounts were paid to the builder/contractor from time to time and by 12th January, 2002 the builder/contractor were paid a sum of Rs.48/- lakhs. According to the owners, since the builder/contractor had not raised any bill of the work done, they had demanded to submit a bill, pursuant to which a handwritten bill for Rs.10,59,798/- for the work done till March, 2001 (Ex. PW1/31) was given.

32. According to the plaintiffs though the work done till March, 2001 was worth Rs.10/- lakhs, however, the builder/contractor had been paid Rs.13/-lakhs and since the builder/contractor had pleaded for more amount, more advance was given up till 12th January, 2002 amounting to Rs.48/-lakhs. Since the builder/contractor delayed in preparing the bill of quantity and had allegedly submitted a bill dated 12th February, 2002 in SA form (Ex. PW4) which was also incorrect and showed the rate on lump sum basis which was not agreed to by the parties, therefore, Mr. Khushroo Kalyanwala had given a format for preparation of bill to the builder/contractor which is Ex. PW3, however, the builder/contractor did not

prepare the bill in the said format.

33. According to the plaintiffs, the disputes arose between the parties in relation to the work done and excess payment made in January, 2002, and thereafter a notice was sent by plaintiffs/owners dated 23rd November, 2002 and the reply was received from the defendants through their lawyer dated 10th December, 2002.

34. Relying on State of Haryana Vs. Bharat Steel Tubes Ltd., , learned counsel for the plaintiffs has contended that the time for suit will begin to run from when the opposite party refused to pay the claim. In this case, since the claim was declined by the builder/contractor by their lawyer's reply dated 10th December, 2002, therefore, the time will start from that point and as the suit was filed in July, 2003, and the limitation started running from 10th December, 2002, therefore, the suit is well within the time. The issue No.1 is, therefore, decided in favor of the plaintiffs and against the defendants. It is held that the suit is within time.

Issue No.2.

35. This is the most crucial and relevant issue. The plea of the learned counsel for the defendants is that the plaintiffs ought to have mentioned in the plaint that the rate list which was allegedly given by the defendants to the plaintiffs was in fact a photocopy of the rate list and not the original rate list. Learned counsel has contended that a photocopy of the alleged rate list, which was marked as X-1 and later on exhibited as Ex. PW1/31 was annexed with a list of documents filed with the plaint, however, this document was described as original at the time of filing of documents in the said list of documents. Learned counsel for the defendants relied on Order 7 Rule 14 read with Order 13 Rule 1 of CPC to contend that it was incumbent upon the plaintiffs to have stated either in the plaint or in the list of documents filed along with the plaint in compliance of Rule 14 of CPC that the plaintiffs had not filed the original rate list, but a photocopy of the rate list.

36. Learned counsel for the defendants has relied on Delhi High Court (Original Side) Rules, 1997, specially, Chapter-II dealing with Institution of Suits, Rule 8 Sub rule (x) contemplates that when a party sues on the basis of documents in his possession or powers then the documents must be produced along with the plaint with a proper list thereof. Rule 8 Sub rule (x) is as under:-

(x) Whether the document or documents on which the plaintiff sues or the documents in his possession or powers are produced along with the plaintiff and with a per list thereof."

37. Learned counsel has also relied on Rule 9 of Chapter II stipulating that it was necessary for the plaintiffs to verify the list of documents produced along with the plaint. Chapter II Rule 9 of the Delhi High Court (Original Side) Rules, 1967 is as under:-

9. While examining the plaint, it is also necessary to (a) verify the list of documents produced along with the plaint; (b) ascertain the correctness of the concise statements, if any, (Order 7 Rule 9); (c) whether a copy of the plaint has been filed for the purpose of drawing up of a decree at the relevant stage; (d) check whether as many copies of the plaint or concise statements on plain paper as there are defendants have been furnished (Order 7 rule 9); (e) compare with the original any copy of account book produced under Order 7 rule 17 and mark the relevant entries therein; (f) get a true copy of the entry together with its translation either in English or in the language of the Court, supported by an affidavit of the person who translated it where such entry is in a language other than English or the language of the Court; and (g) check whether the plaintiff has paid the requisite fee for the service of summons on the defendants, (Order 7 rule 9).

The officer should also see that for every India date mentioned in the plaint, the corresponding date according to the Gregorian Calendar has been given.

38. Learned counsel has further relied on Part-C Direction regarding the examination of the plaint (Part-C 1(vii) & (x) and 2(e)) to contend that the plaintiffs ought to have disclosed that they are filing the photocopy of the rate list and not the original rate list. Part C Direction, regarding examination of the plaint as relied on by the defendant is as under:-

1. (vii) Whether the documents attached to the plaint (if any) are accompanied by lists in the prescribed form and are in order;

(x) Whether the plaintiff has stated in his plaint regarding the documents, on which he relates his claim and, are not in his possession and a statement in whose possession or power they are:

2. (e) It is not necessary to set out the whole or any part of a document unless the precise words thereof are necessary. It is sufficient to state the effect of the document as briefly as possible (Order 6 Rule 9).

39. Learned counsel referred to the statement of PW1, Dr. Ms. V.L. Bhargava, wherein she admitted that rough estimate was given of the total Electricity, Wood Work, etc. which amounted to Rs.17 Lakh for basement, Rs.20 Lakh for ground floor and Rs.11 Lakh for first floor and the statement given by the PW2 Satyendra Nath Bhargava wherein he stated that he had the rate list so he did not ask the defendants about the rough estimate of the total cost of construction before awarding the contract and contended that both the witnesses have contradicted themselves as PW1 had categorically submitted that rough cost of construction was given to him while, PW2 has deposed that a rough estimate of total cost of construction was not disclosed before awarding the contract or before commencement of the construction.

40. The learned counsel for the plaintiffs has contended that the writer of the bill Exhibit PW-1/3 is the same as the writer of exhibit PW-7/2 which is a bill dated

5th November, 2002 which was submitted by Sh. Balwant Singh to Sita Ram Bhartia Institute. According to him Exhibit PW-1/3 though has been denied by the defendants, however, comparison of the handwriting especially some of the characteristics of some of the letters demonstrates unequivocally that the writer of these two bills is the same person namely Sh. Hardeep Singh. Learned counsel has also relied on the testimony of Sh. Balwant Singh as DW-2, who deposed that PW-7/2 is in the handwriting of his son Sh. Hardeep Singh, however, the said bill is signed by him and he did not identify the handwriting of the bill Exhibit PW1/3 which was allegedly given to the plaintiffs. On behalf of plaintiffs" a specific suggestion was also given that PW1/3 is not being identified by him deliberately and intentionally and in fact it is in the handwriting of Sh. Hardeep Singh. The learned counsel has also pointed out the testimony of DW-1 Sh. Hardeep Singh who has rather deposed that PW7/2 is in the handwriting of Sh. Balwant Singh. The said witness DW1 rather denied the suggestion that the writer of documents exhibit PW1/3 and PW7/2 are the same. The learned counsel has emphatically contended that there can be no dispute as to in whose handwriting PW7/1, PW7/2 and PW1/3 are written, since if one takes into consideration the signatures on PW7/1 to PW7/5 which are admitted by DW2 Sh. Balwant Singh to be in his handwriting and if the said signatures on PW7/1 to PW7/5 are compared with the photocopies of the signatures on PW1/31, it would be apparent that the signatures on PW1/31 are by the same person who has signed the Exhibit PW7/1 to PW7/5 i.e. Mr. Balwant Singh. The learned counsel has also drawn the attention of this Court to the signatures of Sh. Balwant Singh on exhibit PW4, the bill dated 12th February, 2002. It was also allegedly submitted by the defendants to the plaintiff, Sh. V.L.Bhargava that the bill dated 4th March, 2002 is also a bill which is signed by Sh. Balwant Singh, DW2 which is Exhibited as PW.5 and the signatures on exhibit PW5 are the same as the signatures on PW7/1 to PW7/5. Similarly, Exhibit P7 bears the signatures of Sh. Balwant Singh at point D6 which is admitted by DW2, which is same as the signatures on Exhibit P8 which is a bill dated 19th October, 2002 submitted to the plaintiff.

41. The learned counsel has contended that though the bills which were submitted by the defendants were not signed, however, the letters written by the plaintiff in respect of those bills were acknowledged by the defendants. Attention has been drawn to the letter dated 9th July, 2002 which was addressed to Sh. Balwant Singh on behalf of the plaintiff by Sh. Satyendra Nath Bhargava which has been exhibited as P6 which were admitted by the defendants as well. In reply to letter dated 9th July, 2002 the defendant had sent a letter dated 17th July, 2002 which has also been admitted by the defendants and is marked as Exhibit P7.

42. The learned counsel for the plaintiff has contended that in reply to communication dated 9th July, 2002 on behalf of plaintiffs, a reply dated 17th July, 2002 was received which refers to the surveyor's reports exhibit PW1/4 and PW1/4A. In the cross examination of DW2, Sh. Balwant Singh it was admitted by

him that Exhibit P6 letter dated 9th July, 2002 was received by him after an abstract cost which are exhibits PW1/4 and PW1/4A. In the circumstances it is asserted that even if it has not been categorically admitted by the defendants that PW1/4 and PW1/4A were received by them, however, a conjoint reading of P6 and P7 will make it amply clear that the defendants have acknowledged the knowledge of PW1/4 and PW1/4A which were the cost of the surveyor. The learned senior counsel, Mr. Batra has contended that the rates which were given as abstract cost by Smt. Madhuri Shah of M/s. Inderjeet Maitra were not denied by the defendants in their response to the letter, Exhibit P6, which is exhibit P7. The learned counsel for the plaintiff has also relied on the deposition of plaintiff No.1 by way of affidavit dated 13th December, 2004 specifically stipulating the rates which according to her were agreed with the defendants. It is submitted on behalf of plaintiff that the rates which were disclosed in the deposition have not been categorically denied by the defendants in their depositions by way of affidavits. He contended that on perusal of the deposition of defendant No.2 Mr. Hardeep Singh on affidavit dated 27th January, 2005 and of defendant No.1 dated 27th January, 2005 it is apparent that the rates deposed by the plaintiffs have not been specifically denied by either of the defendants. He contends that even in the cross examination no suggestion has been given to the plaintiff No.1 that the rates given by her in deposition were incorrect or were not the rates which were agreed between the plaintiff and the defendants. The learned counsel in the circumstances contended that the rates deposed by the plaintiff no.1 in her affidavit, are the rates which tally with the rate list given by the defendants, a photocopy of which is produced by the plaintiffs which is Exhibit PW1/31. On behalf of the plaintiffs, reliance has also been placed on the deposition of Mrs. Veena Garella, PW3 who was the earlier architect of plaintiffs who had deposed that the rate list, a photocopy of which is PW1/31 is the rate list which was given to the plaintiff no.1, Dr. Bharagva in her presence by the defendants. Even no suggestion has been given to Mrs. Garella in the cross examination that the rate list exhibit PW1/31 was not given to the plaintiffs by the defendants in her presence.

43. The primary dispute on which all the issues will also depend is whether the parties had been in ad-idem in respect of the construction of the house, to be calculated on the rate wise basis or on the lump sum basis. The plaintiff has produced a photocopy of the rate list which was allegedly handed over to plaintiff No.1, Dr.(Ms.) V.L.Bhargava by Sh. Balwant Singh, DW2. Later on, that document was exhibited as Ex. PW1/31. PW2 has also deposed that Ex. PW1/31 was given by Sh. Balwant Singh to Dr. (Mrs.) V.L.Bhargava. Though Mr. Garella, who was examined as PW3 has also deposed that a photocopy of the rate list was given by Sh. Balwant Singh, DW2 to Dr. (Ms.) V.L.Bhargava, PW1 and the original of the rate list was not supplied, however, considering the testimonies of the various witnesses it cannot be inferred on the basis of even preponderance of probability that the photocopy of the rate list Ex. PW1/31 was given by Sh. Balwant Singh to plaintiff- Dr.(Ms.) V.L.Bhargava. This is more so because the parties have failed

to discharge their respective onus to prove or disprove the hand writing on the alleged photocopy of the rate list Ex. PW1/31. Learned counsel for the plaintiffs has also not been able to explain specifically as to why the measurements were carried out, if the work was awarded according to the builder/contractor on lump sum basis.

44. In the plaint which was filed by the owners, it was not disclosed that they were only given a photocopy of the rate list and the original was not given to them, rather what was stated was that they had been given the price list submitted by the builder/contractor. This is not in consonance with the various provision noted hereinabove. PW1, Dr.(Ms.) V.L.Bhargava rather deposed that she does know the differences between the quotation and the rate list. She also admitted that the alleged rate list Ex. PW1/31 does not bear the property number of the owner or their name.

45. The said witness had admitted that earlier they had planned to add a small basement and later on it was decided to extend the same, therefore, two plans were given to the builder/contractor. In her cross-examination the said witness had admitted that she was given a rough estimate which included the electricity, wood work, etc. which was around Rs.17/- lakhs for basement, Rs.20/- lakhs for ground floor and Rs.11/-lakhs for the first floor. She also agreed that the alleged rate list Ex.PW1/31 did not specify the rate for the wood work and sanitary and the alleged rate list is only for the basic structure including the door frames. Learned counsel for the builder/contractor has pointed out that this fact is also corroborated by the reply to the notice dated 10th December, 2002.

46. Though the alleged rate list, allegedly given by the builder/contractor to the plaintiff/owners is on a plain paper, however PW6, Sh. Khushroo Kalyawala had rather deposed in his cross-examination that the rate list which was given to the plaintiffs was on the letter head of the builder/contractor and was also signed by the builder/contractor. The plaintiffs witness has thus refuted their own plea that the rate list was given on a plain paper which is also the photocopy. The plaintiffs have not explained as to why the photocopy was accepted by them and they did not insist for rate list duly signed by the defendants. The plaintiffs have not even explained the circumstances under which they accepted only a photocopy of the rate list not duly signed by the defendants especially since no written agreement stipulating the terms of construction of the building was executed between the parties. It is unbelievable that for construction of a house involving lakhs of rupees, the plaintiffs would not insist for a proper rate list duly signed by the defendants.

47. In the circumstances, in order to prove whether the rate list produced by the plaintiffs which has been exhibited as Ex.PW1/31 incorporates the rates which were agreed between the parties, it was incumbent upon the owners to have proved the rates stipulated in the alleged rate list, as the whole basis for the transaction seems to be that the builder/contractor had carried out the construction in the hospital where the plaintiff Dr.(Ms.) V.L.Bhargava was

working. Though the record was summoned from Sita Ram Bhartia Institute and Mr. Anil Kumar, Account In-charge, had produced the documents, for contending that the signatures and the writing of the defendants which were exhibited as Ex.PW7/1 and PW7/5, which is alleged to be the same as the signature on Ex PW1/31, however, the said witness also deposed that he could not identify the handwriting of the defendants even on PW1/3, which is allegedly in the handwriting of the defendants. In the circumstances the plaintiffs should have got the expert opinion of a handwriting expert whether the signatures on PW 1/3 are of the same person who had signed the letters PW 7/1 and Pw 7/5. The plaintiffs have failed to discharge their onus properly in the facts and circumstances.

48. Though, the learned counsel for the plaintiffs had emphatically emphasized that if Ex.PW1/3 is read with PW1/31 it would be evident that the builder/contractor had agreed to carry out the work on the basis of the rate list, which is the photocopy, Ex.PW1/31. However, it is apparent that Ex.PW1/3 has not been proved. The Account Official of the Sita Ram Bhartia Institute has not proved Ex.PW1/3, nor has the plaintiffs taken any steps to take a specimen of the signatures of the defendant and got them compared with the disputed signatures of the defendant on Ex.PW1/3.

49. The learned counsel for the plaintiff has tried to draw inferences on the basis of the other documents i.e. the valuation report prepared by the plaintiffs' valuer, however, that will not establish the fact that Ex.PW1/31, the photocopy of the rate list which is not signed, and which does not bear the name of the plaintiff, or any address, was given by the builder/contractor and that these rates were agreed to by the defendants.

50. The learned counsel for the defendants had argued that there was no written agreement between the parties for the construction by builder/contractor. However, it is not necessary to have a written agreement on which the parties should have put their signatures to the documents, which embodied the terms of the agreement. What is to be seen and inferred is as to on what term the parties were ad-idem in respect of the terms of the construction which was to be carried out by the defendants at the plot of the plaintiffs. Primary dispute, therefore, remains whether the rate list Ex.PW1/31 was given by the builder/contractor to plaintiffs or not and the construction had to be carried out on the basis of those rates? On perusal of the entire evidence and on the basis of the preponderance of probability, it cannot be inferred that the rate list Ex.PW1/31 was given by the defendants to the plaintiffs and the parties had agreed to construction of the building of the plaintiffs on those rates.

51. On the basis of the evidence led by the parties even the builder/contractor has failed to establish by reliable evidence that he is entitled for Rs.2,67,150/- and he had agreed to construct the building of the owners on lump sum basis.

52. The onus of issue No.2 was on both the parties to prove respectively that

agreement for construction of building was on rate basis or on lump sum basis. On the basis of preponderance of probability, it cannot be inferred that the parties have been able to establish whether agreed rates were on ratewise basis or on lump sum basis. Consequently, the issue is decided against the owners and the builder/contractor.

Issue No.3.

53. On the basis of the evidence led by the parties and as has been discussed in issue No.2, both the parties have failed to establish as to which rate lists had been exchanged between the parties on the basis of which the construction was carried out by the builder/contractor. The onus of the said issue was on both the parties and consequently, the said issue is also decided against both the parties.

Issue No.4

54. The onus of this issue was on the plaintiff. The plaintiffs could have established that the excess payments have been made by the plaintiffs to the defendants. Had the plaintiffs established that the agreement between the parties was on ratewise basis? Since the plaintiffs have failed to establish that the agreement was on the ratewise basis, which is the basis of the plaintiffs to claim that the excess payments have been made by the plaintiffs to the defendants. Therefore, this has not been established that the plaintiffs made excess payments to the defendants for the work done by them. Issue, therefore, is decided against the plaintiffs.

Issue No.5

55. Since the defendant-Balwant Singh also failed to establish that the agreement was on the lump sum basis and therefore, on the said basis he is entitled for Rs.2,67,150/-. The defendant therefore, is also not entitled for Rs.2,67,150/- in the facts and circumstances, and issue is decided against the defendant accordingly.

Issue No.6

56. On the basis of the evidence led by the parties and as has been discussed in detail while deciding the issue No.2, it is apparent that the plaintiffs have failed to establish that the defendant had given the bill for Rs.10,59,798/- for the work done. The issue is accordingly decided against the plaintiff.

Issue No.7

57. The onus of this issue was on the contractor/builder that they had completed 98% of the work. What was exact term for the construction of the building has not been established by both the parties. Consequently, it has also not been established that the defendant had completed 98% of the contracted work because the terms and conditions and the extent of work which was to be carried out by the defendants has not been established. The issue is therefore, decided against the defendant.

Issue No.8

58. The Onus of this issue was on the defendant. From the evidence led by the parties, the defendant-Balwant Singh has failed to lead cogent evidence on the basis of which the inferences can be drawn that the plaintiff had agreed to pay Sh. Balwant Singh his alleged bill dated 19th October, 2002. The said issue is therefore, also decided against the defendant - Sh. Balwant Singh.

Additional Issue and Relief

59. In the circumstances, neither the owners are entitled for a decree for a sum of Rs.22,69,894.50/- and interest 80% per annum on the said amount in suit CS(OS) No.1530/2003 against the defendants/builder/contractor, nor the builder/contractor Sh. Balwant Singh is entitled for Rs.2,67,150/- claimed by the builder/contractor in suit CS(OS) No.1173/2004 against the owner of the building. Consequently, the suit CS(OS) No.1530/2003 of the plaintiffs - Dr. (Mrs.) V.L. Bhargava & Anr. v. Balwant Singh & Anr. is dismissed. The suit CS(OS) No.1173/2004 of the defendant, Sh. Balwant Singh v. Dr.(Ms.) V.L.Bhargava and Anr. is also dismissed. The parties are, however, left to bear their own costs in the facts and circumstances.