

(2018) 05 DEL CK 0176
In the Delhi High Court
Case No : RFA 515 OF 2015

M/S UTILITY POWERTECH LIMITED

APPELLANT

Vs

M/S AMIT TRADERS

RESPONDENT

Date of Decision : 15-05-2018

Acts Referred:

Indian Electricity Rules, 1956 — Rule 63, 69
Indian Evidence Act, 1872 — Section 25

Citation : (2018) 05 DEL CK 0176

Hon'ble Judges : PRATHIBA M. SINGH

Bench : Single Bench

Advocate : Tarkeshwar Nath, Onkar Nath, Deepak K. Sharma, Ashish Sharma, Gauri Kaushik

Final Decision : Dismissed

Judgement

Prathiba M. Singh, J.

1.The present appeal arises out of the judgment and decree dated 29th April, 2015 by which the Plaintiff/Respondent's (hereafter "Plaintiff") suit

has been decreed in the following terms: "In view of my findings on issues no.1 to 4, the suit of the plaintiff is decreed in favour of the plaintiff and

against the defendant for sum of Rs.17,14,128/- along with interest @ 12% per annum from the date of filing of present suit till its realization. Cost of

the suit is also allowed in favour of plaintiff and against the defendant."

2.The Plaintiff was an electrical contractor engaged in the business of providing supply of electrical goods and services thereof. It was a sole

proprietary concern of Shri Darshan Lal. Work order dated 23rd September, 2004 was placed by the Appellant/Defendant (hereinafter

"Defendant") for erection of complete equipment for implementation of High

Voltage Distribution System [HVDS] and Testing & Commissioning

of HVDS as per scope of work in Delhi Distribution Area. The said work order was awarded to the Plaintiff for the Blocks- I-1, I-2, and M-1, M-2 of

Sangam Vihar area, situated at South Delhi. The Plaintiff was required to do the transportation, erection, installation, testing, commissioning of

H.V.D.S, excavation and fencing related works etc. The payments were staggered with 70% payment on monthly basis, 20% on mechanical

completion of erection and balance 10% after 6 months from the date of handing over of all the equipment in the said colony.

3.The Plaintiff claims that the work order was completed in 2006. However, as against the total invoice of Rs.77,58,011/- actual payment of only

Rs.60,44,883/- was made to the Plaintiff. The overdue amount was to the tune of Rs.17,14,128/-. Despite repeated personal meetings and requests,

the outstanding dues were not cleared. Legal notice was issued by the Plaintiff on 4th May, 2009. Since the outstanding was not paid, the suit for

recovery came to be filed.

4.In the written statement, the only defence raised by the Defendant was that the Joint Venture Partner of the Defendant i.e. Reliance Energy

Limited (hereinafter 'REL') did not certify the payments to the Plaintiff. Until and unless the REL certified the payment to be made to the

Plaintiff, no payment can be released to the Plaintiff, by the Defendant. It was further pleaded that since the approval of the Electrical Inspector was

not obtained, the payment was not liable to be made. The Defendant relied upon the work order which stipulates that 'the payment shall be made

as per the actual executed quantities duly certified by REL and Unit Rates enclosed at Annexure II.' The Defendant raised a counter claim for a

sum of Rs.63,52,193/-. According to the Defendant, the total sum payable to the Plaintiff is only Rs.62,32,159/- out of which amounts of TDS of

Rs.1,74,239/- and Work Contract Tax of Rs.2,01,890/- are adjustable. Apart from these, Rs.2,62,492/- towards Watch and Ward amount and

Rs.23,706/- towards material shortage recovery were retained. Thus, the Defendant claims that the total amount, which has either been paid or

deducted/adjusted towards the aforesaid heads is Rs.63,52,193/- In light of this, it is the Defendant who is entitled for a refund from the Plaintiff as

excess payments of Rs.1,20,034/- have been made.

5.The following issues were framed in the suit on 7th December, 2010.

1. Whether the plaintiff is entitled to a decree for recovery as prayed for? OPP

2.Whether the defendant is entitled to a decree for counter claim as prayed for?
OPD

3.Whether the plaintiff is entitled to any interest as prayed for? OPP

4.Whether the plaintiff has no cause of action to file the present suit? OPP

5.Relief.??

6.PW-1 Shri Darshan Lal deposed on behalf of the Plaintiff and Shri S. S. Jain, Shri Gaurav Bhatnagar and Shri D. K. Singh deposed on behalf of the Defendant company. The Trial Court, thereafter, decreed the suit vide the impugned judgment dated 29th April, 2013.

7.In the present appeal, the operation of the impugned judgment and decree was stayed subject to the deposit of the entire decretal amount vide order dated 5th August, 2015. On 8th January, 2018 an early hearing application was allowed in view of the severe medical problems being suffered by sole proprietor of the Plaintiff and his wife. The matter was thereafter heard.

Analysis and Findings

8.A perusal of the pleadings and evidence in the present case reveals that the only defence of the Defendant is that REL, which is a Joint Venture

Partner of the Defendant, had not certified the payments of the invoices. There is actually no dispute as to any of the documents which have been

filed on record. Most of the documents are admitted. It also clearly appears that the Defendant had deducted TDS on the entire invoice amounts of

Rs.77,58,011/- and not on the amount of Rs.62,32,159/- as claimed by the Defendant to have been certified by REL. Despite this, the Defendant did

not make the payment of the complete invoice amount.

9.A perusal of the cross examination of PW-1 shows that the approval of the electrical inspector was to be obtained by the Defendant. PW-1 also

admitted that the REL would visit the site for inspection and give certification to the work being conducted. PW-1 categorically stated that it was not

his obligation to obtain the approval from the electrical inspector. In his evidence, PW-1 had clearly stated that during his visits to the office of the

Defendant, it was revealed to him that the Defendant had deposited the electrical inspection fees for the different blocks of Sangam Vihar namely

Block-I-1, I-2 and M-1, M-2 on 15th February, 2005, and 9th January, 2006, respectively. This clearly showed that there was no fault in the goods

supplied or the services provided by the Plaintiff. Interestingly, on this aspect there was no cross examination by the Defendant. It is, therefore, clear

that the Defendant had no grievance in the Plaintiff's execution of the work order and had in fact deposited the fees for inspection by the

electrical inspector. If the project was not completed, inspection by the electrical inspector could not have been asked for. Inspection is done only prior

to commencement of the distribution through the installed systems.

10.DW-1 admitted that TDS was deducted on the running bills and the TDS certificates were given. He admitted that the total billed amount on which

TDS was deducted was Rs.77,58,011/-. His admissions are significant and are extracted hereinbelow: "I do not know if the electric is

installed by the plaintiff is in working order or not. It is correct that defendant had deposited the money for inspection by electrical inspector....."

11.DW-2 who was the Chief Manager (HR) admitted that the Plaintiff was not a party to the agreement between Defendant and REL, however,

Plaintiff was aware of the terms and conditions of the said agreement. He also admitted that he was not aware of any letter written by the Defendant

Company to the Plaintiff regarding the quality of the work done. He did not even have knowledge if the electricity had started flowing in the

distribution system set up by the Plaintiff. He, too, admitted that TDS as well as Work Contract Tax (WCT) was deducted on the total billed amount.

He further admitted that there are no documents pertaining to shortage in delivery or any documents relating to Watch and Ward retention.

12.DW-3 the Additional Manager of the Defendant Company admitted that a sum of Rs.17,14,128/- was not paid to the Plaintiff "because

according the terms of sub letting contract this amount was not approved by REL, i.e. Principal Contractor. It is correct that the bills certified by the

Reliance of the plaintiff work was not placed on record".

13.An appreciation of the evidence recorded reveals that the Plaintiff was never informed about the relationship between Defendant and REL. The

Defendant admittedly was a Joint Venture of REL and NTPC. All the witnesses of the Defendant accepted that the TDS and WCT were deducted

on the entire invoice amount. They also admitted that there was no document

showing that there was a shortcoming in the execution of the work by the Plaintiff. Work order did contain a condition that "payments shall be made as per the actual executed quantities duly certified by the REL and Unit Rates enclosed as annexure 2. However, as per the Plaintiff's witness, these inspections were to be arranged by the Defendant. REL representatives used to come for inspection and certify the work done, however, it was not the obligation of the Plaintiff to take approval of the Electrical Inspector, REL. The plaintiff relies upon Rule 63 of the Electricity Rules, 1956 (hereinafter, "Electricity Rules") which reads as under:

"Approval by inspector" Before making an application to the inspector for permission (to commence or recommence supply) after an installation has been disconnected for 1 year or above at high or extra high voltage to any person. The supplier shall ensure that the high or extra voltage electric supply-lines or apparatus belonging to him are placed in position, properly joined and duly completed and examined. The supply of energy shall not be commenced by the supplier unless and until the inspector is satisfied that the provisions of Rule 65 to 69 both inclusive have been complied with and the approval in writing of the inspector has been obtained by him."

14. Thus, it was the case of the Plaintiff that it is only after complete satisfaction of the work carried out is done under Rules 65 to 69 of the Electricity Rules, that the fees for inspection by the electrical inspector is paid. Thus, the fact that the Defendant had deposited the fee for the electrical inspector to conduct inspection showed that there was no shortcoming in the work executed by the Plaintiff.

15. The Defendant cannot rely on a mere non-certification by the REL at its own whims and fancies to deprive the amount due to the Plaintiff. There has to be some justification for the Defendant to withhold the payment. Till the suit was filed by the Defendant, there was no grievance raised by the Defendant whatsoever as to the work which was executed. None of the three witnesses of the Defendant had any technical knowledge of the work executed, and also did not point out any shortcomings in the same. All the three witnesses were either related to accounts, finance or HR department, and none of them had any justification or plausible explanation for the nonpayment. REL is a third party. The work order was placed by the Defendant and the primary responsibility of the payments vests on the Defendant. If the

Defendant had a grievance with the work, the same ought to have been raised with the Plaintiff, which was not done.

16. The Trial Court was right in holding that none of the Defendant's witnesses challenged the bills raised by the Plaintiff as being incorrect or

invalid. The Trial Court further rightly observed that no suggestion was put to the Plaintiff's witness that the electrical inspector had declined to

give the approval. The analysis by the Trial Court, of the evidence given by the Defendant's witnesses, cannot be faulted with. In fact, the Trial

Court observed that there is no document on record to show that REL had refused to approve the amount of Rs.17,14,128/- or that any grievance was

raised by REL in respect of the works executed by the Plaintiff.

17. Almost at the conclusion of the evidence of the Defendant, a veiled attempt was made to produce a witness from REL, which was refused as the

Defendant had failed to produce the said witness, despite repeated opportunities. The said order dated 31st May, 2013 was not challenged and has

attained finality. Thereafter arguments were heard by the Trial Court and judgment was pronounced on 29th April, 2015.

18. Trial Court has analysed that no document has been filed in respect of shortage of delivery and W&W retention, and thus, the Defendant had no

right to withhold the sums of Rs.2,62,491/- and Rs.23,706. The Trial Court finally found that the deduction of TDS by itself constitutes the admission

that the amount was payable.

19. On the issue of TDS deduction, the Trial Court may have erred as the settled position is that deduction of TDS does not constitute an admission of

liability. The Trial Court may be wrong in holding that the TDS certificate by itself constitutes an admission of liability. This is not so, inasmuch as the

TDS can be deducted even on the expectation of estimated liability. Independently of the TDS certificate, the liability of the Defendant is quite clear.

The Supreme Court in Commissioner of Income Tax v. Gujarat Fluoro Chemicals (2012) 13 SCC 731 categorically held that "both advance tax as

well as TDS are based on estimation of income by the assessee." The Bombay High Court as well, in S.P. Brothers v. Biren Ramesh Kadakla

(2009) 1 Bom CR 453 has held that "the issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of

Section 25 of the Indian Evidence Act". The TDS certificate is primarily to

acknowledge the deduction of tax at source.â? The judgement dated 27th November, 2012 in Bigdot Advertising & Communications Pvt. Ltd. v. Union of India [CS(OS) No.226/2000] was dealing with the question of the person who is liable once the TDS certificate is issued. It is not a precedent on the proposition that if a TDS certificate is issued, it amounts to admission of liability. In light of this, though the deduction of TDS by itself cannot be sufficient to impose liability, but on a totality of facts it is clear that the defendant is liable.

20.A perusal of the evidence and the pleadings on record clearly shows that the only justification being raised to withhold the payment was noncertification by REL, the obligation of which was not upon the Plaintiff. In the absence of any deficiencies being pointed out in the work executed by the Plaintiff, there can be no justification in withholding payments. The arrangement between the Defendant and its own Joint Venture Partner i.e. REL is an internal arrangement between them, and the Plaintiff cannot be saddled with outstanding amounts in this manner owing to their own internal issues. The Defendant having not led any evidence whatsoever to justify the withholding of the payment and having not pointed out any deficiencies in the work executed and further having deducted the TDS and deposit of the said tax with the government for the entire bill amount, there can be no justification in withholding the outstanding payments.

21.The Plaintiff was very reluctant at the initial stage to sue the Defendant and the plaint and evidence reveals that he made repeated attempts both in writing and in the form of meetings with officials of the Defendant requesting them to clear the outstanding payments. However, the Defendantâ??s conduct in this case has been far from bona fide, and displays a complete lack of conduct as is required in commercial dealings. The Plaintiff, which is a sole proprietary concern, has been made to unnecessarily litigate for the recovery of its admitted dues.

22.Clause 1.1 (h) relied upon by the Defendant is a clause which exists in agreement between the Defendant and REL. The witness of the Defendant categorically admits that this contract was not a part of the work order between the Plaintiff and the Defendant. Though the electrical inspectorâ??s approval is required for all installations, Clause 1.1 (h) does not fix the burden of obtaining the inspectorâ??s approval upon the Plaintiff/Contractor.

As stated by the Plaintiff's witness, it was the Defendant's responsibility and in fact the Defendant had paid the fee required for obtaining the electrical inspector's approval. It is clear that it was the Defendant's responsibility to get the approval of the electrical inspector. Thus, this cannot be a ground to refuse the payments for the work executed. In the facts and circumstances of the case, the Trial Court's judgment/decree is upheld. The amount lying deposited in this Court to the tune of Rs.29,81,593/- along with the accrued interest thereon (minus TDS to be deducted on the interest component) is directed to be released to the Plaintiff within 2 weeks, by the Registry.

23.The Appeal is accordingly dismissed. No order as to costs.