

(2006) 10 DEL CK 0130

In the Delhi High Court

Case No : Regular First Appeal No. 275 of 2004

Rabindra Education Society (Regd.) and Another

APPELLANT

Vs

M.L. Anand and Company

RESPONDENT

Date of Decision : 10-10-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10(2)

Citation : (2006) 10 DEL CK 0130

Hon'ble Judges : T.S. Thakur, J;S.L. Bhayana, J

Bench : Division Bench

Advocate : Valmiki Mehta and Rakesh Malhotra, for the Appellant; R.S. Bhalla and M.J. Nasir, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J

1.This appeal arises out of a suit for recovery of Rs. 4,89,614/- filed by the plaintiff-respondent against the defendant-appellant herein and decreed by the court below for a sum of Rs. 4,22,849.85 with costs and interest @ 12% per annum from 1.1.1988 on reducing balance payable to the plaintiff.

2. The plaintiff is a registered partnership engaged in execution of building contracts. According to the averments made in the plaint, it was hired by the defendant for building a temporary structure on a portion of land allotted in favor of the latter by the Delhi Development Authority in Mayapuri, Delhi. Negotiations regarding the rates at which the work will be paid for, were held between the parties and the agreed rates for different items of work stipulated in a document signed by the parties on 28th April, 1986.

3. The plaintiff soon thereafter commenced the work and constructed different structures as set out in the plaint and completed the work assigned to it by 1st April, 1987. The plaintiff's further case was that in the course of the progress of the work, the defendant had paid to it from time to time a total sum of Rs.

3,90,070/- leaving a sum of Rs. 4,34,369.40 outstanding against the defendant after adjustment of the payments received till 25th July, 1987. The plaintiff alleged that although the defendant had assured payment of the outstanding amount and allotment of the construction work of the main school building to the plaintiff, neither the construction work of the main school building was allotted to the plaintiff nor the balance amount due under the second running bill cleared. It was further alleged that the second running bill submitted by the plaintiff had been prepared on the basis of the measurements recorded by M/s. Gogate and Associates who were working as consulting engineers and architects for the job. On receipt of the said bill, the defendant had referred the same to Gogate and Associates for verification, who had by their letter dated 19th October, 1985 advised the defendant that on a preliminary scrutiny of the second running bill, the plaintiff was entitled to an on account payment of Rs. 1.5 lakhs pending final scrutiny. That amount was also not paid by the defendant.

4. Around November, 1987, the plaintiff is alleged to have found that some of its material lying at site was being utilized by the defendant unauthorizedly. When the plaintiff objected to the same, it was told that the plaintiff could add the cost of the material to the final bill. A supplementary bill was accordingly submitted by the plaintiff by letter dated 16th November, 1987 for a further sum of Rs. 5,980/- towards the cost of the material used by the defendant. A decree for a sum of Rs. 4,89,614/- inclusive of interest @ 18% per annum was in the above backdrop claimed by the plaintiff in the suit filed by him in the court below.

5. In the written statement filed by the defendant, it was alleged that it had paid a sum of Rs. 4,35,000/- to the plaintiff on different dates as against a sum of Rs. 3,90,000/- admitted by the plaintiff. It was also alleged that there was no concluded contract regarding the rates of construction between the parties and that the work done by the plaintiff was sub-standard in nature apart from the fact that the completion of the work had been delayed resulting in heavy financial loss of Rs. 3 lakhs to the defendant.

6. On the pleadings of the parties, the following issues were framed by a single Bench of this Court hearing the suit on the original side before its transfer to the Additional District Judge, Delhi for trial.

1. Whether the plaint discloses any cause of action?
2. Whether the suit is maintainable in its present form?
3. Whether the plaint has been signed, verified and filed by a competent person?
4. Whether the contract of construction work awarded by defendant No. 1 to plaintiff was carried out in accordance with the specification and terms and conditions of the contract?
5. Whether the plaintiff is entitled to a decree for recovery and if so, to what amount?

6. Whether the plaintiff is entitled to any interest and if so, at what rate and for which period ?

7. Relief.

7. In support of its case, the plaintiff examined Shri V.K. Anand, one of its partners. The defendant remained content with the deposition of Shri Tagore Kharbanda, Joint Secretary of the defendant.

8. By the Judgment impugned in this appeal, the Court below has decided issues No. 1 and 2 in favor of the plaintiff and against the defendant. It found that the plaintiff had received a payment of Rs. 1,50,000/- on 12.5.1988 and a further sum of Rs. 1,30,000/- on 18th January, 1990. The Court, Therefore, was of the view that if the defendant had itself made such a substantial payment, it could not be heard to say that the plaintiff had no cause of action to maintain the suit. So also, the court found Issue No. 3 in favor of the plaintiff and against the defendant. Issues No. 4 and 5 were also discussed by the trial court at length in the context of the material placed on record and held in favor of the plaintiff. The Court found that the plaintiff was entitled to a sum of Rs. 1,00,094.92 representing the difference between the amount claimed by the plaintiff as per the agreed rates and the amount which the architect had calculated by reducing the said rates unilaterally. It also found the plaintiff entitled to a further sum of Rs. 42,754.93 on account of the extra items of work done by him in his running bill marked Ex.PW1/5 including an amount of Rs. 8692.15 on account of claims No. 31/1 and 36/6 omitted by the architect from his report Ex.PW1/14. The court, however, disallowed the claim made by the plaintiff for Rs. 5980/- and Rs. 54,575/- covered by bills marked Ex.PW1/7 and Ex.PW1/20 on account of the alleged misappropriation by the defendant of the unused material lying at the site. The plaintiff was in that view held entitled to receive a further sum of Rs. 1,42,849.85 only with interest @ 12% per annum on a sum of Rs. 4,22,849.85 from 1.1.1988 to 12.5.1988 and on the balance amount of Rs. 2,72,849.85 payable as on 13th May, 1988 till 17th January, 1990, where after interest @ 12% to be paid to the plaintiff was only on an amount of Rs. 1,42,849.85 till the date of realization. The present appeal calls in question the correctness of the above Judgment and decree, as already noticed earlier.

9. Appearing for the appellant, Mr. Mehta made a two-fold submission. Firstly, he submitted that Mr. Gogate employed by the defendant-appellant was appointed a Commissioner to evaluate the work executed by the plaintiff-respondent. Shri Gogate had submitted a report according to which the plaintiff was entitled to a sum of Rs. 1,00,094.92 less than what was claimed by it in the suit towards the agreed items of work. In addition, there were certain items regarding which there was no such agreement between the parties on the question of rates. There was, according to Mr. Mehta, a difference In the amount claimed by the plaintiff and that certified to be due by the Court Commissioner to the extent of Rs. 42,754.93 in regard to the said items. The difference arising on both these counts had been, according to the learned Counsel, ignored by the trial court and

the suit decreed against the defendant. Since the report submitted by the Commissioner appointed by the Court was not disputed by the plaintiff, the Court was, according to Mr. Mehta, not justified in doing so.

10. Alternatively, he submitted that the court below had ignored the fact that the appellant had paid to the plaintiff a sum of Rs. 45,000/- in cash in terms of receipts marked Ex.PW1/DX2 and Ex.PW1/DX3. He urged that the plaintiff's version that the said amount had been returned to the defendant was unsupported by any evidence. The court below had thus fallen in error in ignoring the said aspect and decreeing the suit against the defendant.

11. On behalf of the plaintiff, it was, on the other hand, argued that the appointment of Shri Gogate was not with a view to getting in the work undertaken by the appellant evaluated. The said appointment had been made only with a view to placing on record the nature and the extent of the work undertaken by the plaintiff. Shri Gogate had actually overstepped his authority by undertaking an exercise determining the amount payable to the plaintiff which determination was without any basis and wholly arbitrary in nature having regard to the fact that most of the items of work which the plaintiff had executed had to be paid for at the rates agreed between the parties which rates the learned Commissioner had without any reason or justification reduced.

12. It was further argued that the plaintiff had raised running bills for payment in regard to certain items of work for which no rates had been settled between the parties. The defendant-appellant had at no stage questioned the reasonableness of the rate at which the plaintiff had claimed the payment. The rates claimed by the plaintiff in any case were compatible with the rates fixed by the CPWD for similar items of work. Disallowance of the said rates by the Commissioner were, according to the learned Counsel, unjustified and rightly ignored by the trial court.

13. In so far as the alleged payment of Rs. 45,000/- to the plaintiff is concerned, learned Counsel for the respondent argued that since the said payment was made by Shri P.L. Kharbanda from his personal account, the same was returned to the school who had insisted that all its payments shall be made by cheques only. A cheque for Rs. 50,000/- was instead issued by the school which has been duly accounted for and adjusted while making the claim for the balance amount. There was in that view no error in the impugned Judgment and decree to warrant interference.

14. The appointment of Shri Gogate was made in terms of an order passed by the single Judge of this Court on 12th May, 1988, which was in the following terms:

learned Counsel for parties submit that there has been part settlement of the disputes between the parties. The settlement is that defendants shall make the payment of Rs. 1,50,000/- on or before 25th July, 1988. It is further agreed that Mr. Gogate, who is an Architect, shall verify the nature and extent of the

construction already done within one week. Till that verification is done by Mr. Gogate, no further construction shall be done. After verification by Mr. Gogte, defendants are at liberty to proceed with the construction, addition, in accordance with law.

15. A plain reading of the above would show that the Commissioner had simply to verify the "nature and extent" of the construction raised by the plaintiff. The Commissioner was not required in terms of the above order, to evaluate the work or determine the amount which was payable to the plaintiff for the same. In as much as the local commissioner took upon himself the job of evaluating the work and determining the amount payable for the same, he went beyond his brief. In any case, the rates at which the work undertaken by the plaintiff had to be paid having been agreed between the parties, there was no question of Shri Gogate reducing the same while evaluating the work. That is precisely what had been done by the Commissioner without disclosing the basis on which he did so. The Commissioner was not examined by the parties as could be done under Order XXVI Rule 10(2) of CPC. Matters that could be clarified from him had thus remained unexplained.

16. Mr. Mehta's argument that the work undertaken was not up to the mark has not impressed us. The nature of the defects in terms of quality of the workmanship or otherwise has not been explained by the defendant either in the written statement or in the evidence adduced at the trial court. In the absence of any cogent material to show that there was any deficiency in the work undertaken by the plaintiff, the plea that the work was sub-standard must fail.

17. That is true even in regard to the items of work regarding which no rates had been agreed to between the parties. There is no real basis for holding that the said items of work suffered from any deficiency or that the amount claimed by the plaintiff for the same was in any manner excessive. This is particularly so when the plaintiff had raised running bills claiming payment at the rates mentioned by him in the same to which the defendant had not raised any objection at any stage. The reduction proposed by the Commissioner in the amount claimed by the plaintiff by Rs. 1,00,094.92 in the case of agreed items and a sum of Rs. 42,754.93 in the case of extra items was, Therefore, unjustified hence liable to be ignored. In as much as the trial court decreed the suit for the said amount, it did not, in our opinion, commit any mistake. The view taken by the trial court is accordingly affirmed.

18. That brings us to the question whether any payment made to the plaintiff remains to be adjusted towards the amount payable to it. The plaintiff has no doubt admitted in his statement that a sum of Rs. 45,000/- was received by him in terms of two receipts referred to earlier. At the same time, the plaintiff has asserted that the said amount was returned to the defendant-school and a cheque of Rs. 50,000/- received from it in consideration thereof. This was done because the school wanted to make all payments only by cheque. In substance, the defendant's plea appears to be that the amount of Rs. 45,000 paid in cash to

the plaintiff has not been accounted for by the plaintiff. The defendant has not, however, let in the best evidence that was available with it on that aspect. It has not produced before the court the account books maintained in regard to the payments made to the plaintiff from time to time. If a sum of Rs. 45,000/- had been paid over and above the amount of Rs. 50,000/- paid through cheque, the account books would speak about the same. The withholding of the account books by the defendant must, Therefore, give rise to an adverse inference to the effect that in case, the books were produced, the same would have gone against the defendant.

19. Reference may in this connection be made to the decision of the Supreme Court in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, , where the Apex Court declared that if a party, in possession of evidence which could throw light on a controversy, withholds the same, the Court must draw an adverse inference against him even if the onus of proof did not lie on him. The Court observed:

Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

20. It is also useful to refer to the observations made by the Privy Council in AIR 1917 6 (Privy Council) in this regard. The court observed:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough? they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

21. To the same effect are the decisions of this Court in Messrs Bansidhar Ganga Pershad Agency v. Chanan Lal and Anr. (1975) I Delhi 445 and Hari Kumar Vs. Sat Narain Mehra, .

22. The Explanation offered by the plaintiff is, in our view, logical and accordingly accepted.

23. In the result, this appeal fails and is hereby dismissed but in the circumstances, without any orders as to costs.