
(2007) 01 DEL CK 0151

In the Delhi High Court

Case No : Regular First Appeal No. 33 of 2007

Shri Bijinder Singh

APPELLANT

Vs

Simplex Concrete and Piles (India) Ltd. and Others

RESPONDENT

Date of Decision : 25-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 10, Order 6 Rule 15

Citation : (2007) 01 DEL CK 0151

Hon'ble Judges : Swatanter Kumar, J;H.R. Malhotra, J

Bench : Division Bench

Advocate : M.K. Jha, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—Vide judgment and decree dated 21.7.2006, learned Additional District Judge, Delhi partially decreed the suit of the plaintiff Sh. Bijinder Singh against the defendants. The plaintiff being dis-satisfied from passing of the partial decree, has filed the present regular first appeal before this Court.

2. The necessary facts are that Sh. Bijinder Singh, Sole Proprietor had filed the suit for recovery of Rs. 3,19,590/- against the defendants on the ground that they had been approached by defendant Nos. 2 and 3 in the suit for providing total station survey instruments, surveyor, assistant surveyor and wireless radio (walkie talkie). As agreed on 11.5.2000, the services @ Rs. 60,000/- for total station survey instruments, Rs. 7,000/- for surveyor, Rs. 3,500/- for assistant surveyor and Rs. 2,000/- for wireless radio on monthly basis were to be provided to the defendants. The parties did not sign any written document. The sum of Rs. 10,000/- was paid as advance money. The work was commenced on 12.5.2000. It was the case of the plaintiff/appellant that the respondents had paid a meagre sum of Rs. 47,183/- @ Rs. 25,000/- per month on all counts instead of Rs. 67,000/- per month as agreed. It was also averred by the plaintiff that the agreed rate of Rs. 67,000/- per month was never varied and as such, the plaintiff

was entitled to the claimed amount with interest @ 2% per month w.e.f. 10.11.2000 till actual payment.

3. The suit was contested by the defendants-respondents who had taken up various legal objections as to maintainability of the suit as well as on merits contending that the agreed sum to be paid to the plaintiff was @ Rs. 25,000/- per month in terms of the detailed work order dated 8.7.2000. The plaintiff had raised the bills on that rates which were never agreed and the defendants had also asked the plaintiff to withdraw the work if he was not satisfied with the rate offered vide their letter dated 30.06.2000. The learned trial court vide its order dated 20.8.2002 framed the following issues:

1. Whether defendant company requested plaintiff to provide services mentioned in para No. 2 of the plaint?
2. Whether contractual service started from 12.05.2000? If so, its effect?OPP
3. Whether plaintiff suit is barred under provision of Order 30 Rule 10 CPC?
4. Whether plaint has not been properly verified Under Order 6 Rule 15 CPC? If so, its effect? OPD
5. Whether suit is bad for mis-joinder of the parties?OPD
6. Whether plaintiff was liable to pay ideal charges and compensate defendant No. 1 in case work is not completed in time?OPD
7. Whether plaintiff agreed to do requisite work at a lumpsum payment of Rs. 25,000/-per month?OPD
8. Whether plaintiff delayed the work for more than ten days and defendant suffered loss of Rs. 1,80,490/-?OPD
9. Whether plaintiff is entitled for the relief claimed?OPP
10. Whether defendant is entitled for counter claim?OPD

4. As is evident from the above narrated facts and issues framed thereupon, the material controversy between the parties related to the charges payable for rendering the said help. According to the plaintiff, it was @ Rs. 67,000/- per month while according to the defendants, it was @ Rs. 25,000/- per month. The period for which the services were rendered was not in dispute. The contention raised on behalf of the appellant is that the learned trial court has recorded an erroneous finding that the agreed rate of payment was Rs. 25,000/- per month for the services and not Rs. 67,000/- per month as claimed by the plaintiff. In support of its claim, the plaintiff had filed the copy of the letter dated 11.5.2000 as Ex.PW1/2 and the bills dated 30.6.2000 and 11.7.2000 as Ex.PW1/3 and Ex.PW1/4 respectively. The same were relied upon by the plaintiff in support of the submissions made.

5. It may be noticed at the very outset that the learned trial court has recorded

in the impugned judgment that these documents are photocopies and the plaintiff had sought permission time from the court to lead secondary evidence which request was declined by the court vide its order dated 6.7.2004. Particularly Ex.PW1/2 to Ex.PW1/4 were also not referred to by the plaintiff in the plaint. Once a document is neither pleaded nor referred to in the documents relied upon, the plaintiff could have hardly relied upon that document particularly in face of the order of the trial court dated 6.7.2004. From the record, it appears that the appellant did not question the correctness of that order and in fact has not even challenged the order rejecting permission to lead secondary evidence even in the present appeal. The onus to prove that the rates quoted in Ex.PW1/2 were accepted by the defendants was upon the appellant which he failed to discharge. Even in his examination, the appellant while appearing as PW-1 did not state on oath that the terms of the said letter were duly accepted and acted upon between the parties. According to the plaintiff, the bills were duly certified by the officers of the defendants but as recorded by the trial court, Ex.PW1/3 reflected only certification of the working days and not the rates. On the other hand, the defendants had written letter to the appellant regarding payment @ Rs. 25,000/- per month for the services rendered. Vide letter dated DW1/6, the appellant was also informed by the respondents regarding the loss suffered by the respondents on account of inadequate workmanship from the plaintiff and claiming a sum of Rs. 1,80,490/-. They also suffered losses on account of ten days' delay in terms of Ex.DW1/6. However, all these counter claims of the defendants were decided in favor of the appellant and against the respondents which were relating to issue Nos. 6, 8 and 10. Upon cumulative appreciation of oral and documentary evidence, the learned trial court came to the conclusion that the monthly rate for services rendered was agreed between the parties @ 25,000/- per month. The payment of Rs. 57,183/- on two different occasions was admitted by the plaintiff and resultantly the learned trial court decreed suit of the plaintiff at the said rate for the period from 12.5.2000 to 31.10.2000 along with interest @ 9% per annum. The findings recorded by the learned trial court are based upon proper appreciation of evidence. The findings cannot be said to be perverse or based on no evidence. Though, this Court would be a court of fact and law both while entertaining a regular first appeal but that per se would not give indefeasible right to the appellant for admission of the appeal.

6. Reference can also be made in this regard to a Division Bench judgment of this Court in the case of *Municipal Corporation of Delhi v. Ganesh Dass Ram Lubhaya* RFA 233/1986, decided on 09th March, 2006, where the court held as under:

6...This court in exercise of its appellate jurisdiction is the Court of fact and law, both. The court would interfere whenever there is an error of law or complete misappreciation of evidence or that the finding of the court is based upon no evidence. Reference can be made to the judgment of the Supreme Court in the case of *Bhanu Kumar Jain Vs. Archana Kumar and Another*, , where the Court held that a right to question the correctness of a decree in a First Appeal is a

statutory right. Such a right shall not be curtailed, nor shall any embargo be fixed thereupon unless the Statute expressly or by necessary implication says so. This wide interpretation is subject to all these limitations of law and the errors in the judgments of the Trial Court have to be of substantial and apparent nature. The errors of law or errors in appreciation of evidence should be of such a nature which would have substantial impact on the rights of the parties. For instance, non-examination of a material witness is a matter which would be looked into as a substantial question by the First Appellate Court (Refer : Rattan Dev Vs. Pasam Devi,). Wherever the errors are so apparent, there the appellate court can interfere on fact and law both. The right of appeal is not an inherent right or a common law right, but as already indicated, is a statutory right. The appellant court would not interfere in findings of fact, unless such findings were recorded merely on inference. It would be undesirable for the appellate court to interfere with the findings of fact of trial Judge, who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit, which is attached to one or the other of conflicting witnesses. And besides that, the burden is always on the appellant to show that the judgment appealed against is erroneous, legally, and is not supported by any evidence. It is possible to take another view on the basis of the same evidence, would be no ground for this Court to interfere in a well-considered judgment.

7. The findings recorded by the trial court are in conformity with law. They do not suffer from any legal or factual infirmity. There is no merit in the contention raised on behalf of the appellant.

8. The present appeal is dismissed in liming, however, with no order as to costs.