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Court : Delhi

Decided On : Aug-07-2009

Reported in : 164(2009)DLT162

Judge : S. Muralidhar, J.

Acts : Code of Civil Procedure (CPC)

Appeal No. : CS (OS) 882 of 2004

Appellant : A.S. Sachdeva and Sons (P) Ltd.

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Bhupesh Narula, Adv.

Advocate for Pet/Ap. : Raman Kapur and; Dhiraj Sachdeva, Advs

Judgement :

S. Muralidhar, J.

1. This is a suit for recovery of Rs. 32,53,458/- along with pendente lite and future interest at 12 % per annum in favour of the plaintiff together with costs.

2. Defendant No. 2, the Executive Engineer of Delhi Development Authority (DDA), invited tenders for the construction of 59 Category-III, and 118 Category-II SFS Houses, 148 MIG flats, 36 shops and a community hall including stilted

parking space and internal development (Nagin Lake Apartment) near Village Peera Garhi, Pashim Vihar. The tender of the plaintiff was accepted and the work was awarded to it by the Defendant No. 1 DDA. The date of the completion as per the agreement was 1st December 1997. The maintenance warranty period was to expire on the completion of six months thereafter, i.e., on 30th May 1998. According to the plaintiff it completed the entire work to the satisfaction of the defendants DDA on 1st December 1997 and a completion certificate was also issued by the DDA. The final bill was prepared on 26th July 2002. According to the plaintiffs DDA arbitrarily withheld from the amount due to the plaintiff a sum of Rs. 45,000/- on account of the alleged repairs and Rs. 2,00,000/- without assigning any reason. The plaintiff therefore first claims that it is entitled to the refund of Rs. 2,45,000/- wrongly withheld by the DDA.

3. It is stated that although the flats were constructed by 1st December 1997, the possession thereof was given to individual flat owners over a period of time between December 1997 and June 2000. According to the plaintiff, the DDA also recovered a sum of Rs. 25,518.80 as penal recovery for steel enforcement and a sum of Rs. 1286/- towards penal recovery of cement. The plaintiff claims that the balance unconsumed quantity of steel and cement was returned to the DDA. No notice was issued by the DDA under Clause 42 of the agreement to the plaintiff about any alleged loss suffered by the DDA or on account of the excess use of these materials. It is accordingly contended that the recovery of Rs. 26,705.36 on account of the excess use of steel or cement was unjustified. A refund is claimed of the said amount.

4. According to the plaintiff, DDA also arbitrarily recovered various amounts from the final bill. The total amount on this account worked out to Rs. 2,20,827/- and the break-up of the individual items forming part of this amount has been set out in para 7of the plaint.

5. It is further claimed that the plaintiff had provided a steel glazed door of 546.20 sq. m. amounting to Rs. 5,85,480/-, which the plaintiff was entitled to in terms of Clause 6.4 (d) of the agreement.

6. In terms of the agreement, the work was to be completed on 23rd September 1995 but was ultimately completed only on 1st October 1997. The extension of time for completion of the work up to 1st December 1997 was granted by the DDA without levy of any compensation. It is claimed by the plaintiff that due to the prolongation of the contract period, the establishment comprising engineers, supervisors, chowkidars and other staff remained idle at the site. The machinery deployed by the plaintiff also remained idle. The plaintiff claims that it suffered losses on account of the prolongation of the contract by twenty-six months. Accordingly, the plaintiff claims compensation at the rate of Rs. 20,000/- per month for the delayed period of twenty-six months amounting to Rs. 5,20,000/-.

7. The plaintiff had a lawyer's notice dated 28th July 2003 issued to the DDA asking it to pay Rs. 19,77,284/- together with interest at 18 % per annum. DDA sent a reply which according to the plaintiff was frivolous. Therefore the plaintiff was compelled to file the present suit. The summary of the total claims made by the plaintiff is set out in para 14 of the plaint as under:

i) Towards amounts illegallyand uncontractually withheldon account of alleged repair. Rs. 45,000.00ii) Towards amount withheld without any reasons. Rs. 2,00,000.00iii) Towards unjustified penal recoveryfor steel reinforcement. Rs. 25,518.80iv) Towards unjustified penalrecovery for cement. Rs. 1,286.56v) Towards unlawful reductionsand deductions and less ratespaid for extra items. Rs. 2,20,827.00vi) Towards non paymentagainst item No. 6.4(d) - P/F. steelglazed doors for quantity of546.20 Sqm. Rs. 5,85,480.00vii) Towards watch and ward from1-12-97 to June-2000. Rs. 2,40,000.00viii) Towards compensation onaccount of loss suffered on idling of establishment,T&P;, and machinery due to prolongationof the contract periodby 26 more months. Rs. 5,20,000.00------------------Total Rs. 18,38,112.00------------------

8. In its written statement, DDA contended that the delay in the completion of the project was due to insufficient labour and materials and lack of supervision on the part of the plaintiff. It is submitted that although the completion certificate was issued on 1st December 1997, nearly twenty defects were pointed out, and this was agreed to by the plaintiff by countersigning the documents. However, till date,

some of the defects remain to be attended to and therefore it is contended that Rs. 2,45,000/- was rightly withheld. It is submitted that since the plaintiff accepted the bills and the measurements on 29th December 2000, the plaintiff was estopped from raising false claims. Since the suit was filed only on 29th May 2004 whereas the bill has been accepted on 29th December 2000, the suit was barred by limitation. The defects pointed out in the completion certificate had not been removed even during the subsistence of the maintenance period, i.e., 30th May 1998. The sum of Rs. 45,000/- had been withheld for not providing slide door bolt door stopper etc. in nine vacant flats. The plaintiff had been provided these and therefore could not claim refund of this sum of Rs. 45,000/-. Similarly, the sum of Rs. 2,00,000/- withheld for not repairing the plaster or providing whitewashing and final coat of water proofing cement paint disentitled the plaintiff to recover this amount. It is submitted that inasmuch as the measurement book was signed also by the removed. It is submitted that the flats were in fact handed over to the individual allottees by the plaintiff itself and that in order to safeguard the property it had to employ watch and ward personnel, the rates of which were strictly in accordance with the circular already issued by the DDA. The claim in terms of Clause 6.4(d) is also reiterated.

10. After admission and denial of documents, the following issues were framed on 6th February 2006:

1. Whether the plaint has not been signed and verified by the authorized representative of the Company? OPD

2. Whether the plaint is liable to be rejected inasmuch as it is not supported by an affidavit as required under the CPC? OPD

3. Whether the suit is barred by limitation? OPD

4. Whether the plaintiff has removed the defects pointed out to them at the time of recording of completion certificate? OPP

5. Whether the defendant is justified in withholding the amounts as claimed in para 3 of the plaint? OPD

6. Whether the plaintiff is entitled to the amounts as claimed in para 14 of the plaint? OPP

7. Whether the plaintiff is entitled to interest on the aforesaid amount and if so at what rate and for what period? OPP

8. Relief.

11. The submission of Mr. Raman Kapoor, the learned Counsel for the plaintiff and Mr. Bhupesh Narula, the learned Counsel for the DDA have been heard.

Issue Nos. 1 and 2:

12. It is seen that the plaint has both been signed and verified by the plaintiff and is supported by the affidavit of the Managing Director of the plaintiff. Therefore, these two issues are decided in favour of the plaintiff and against the defendant DDA.

Issue No. 3:

13. Whether the suit is barred by limitation?

It is seen that the suit was filed on 31st May 2004. The final bill admittedly was prepared and paid only on 26th February 2002. The cause of action for the plaintiff to claim the balance amount arose only then. The suit having been filed within two years thereafter cannot be said to be barred by limitation. In Pandit Construction Co. v. Delhi Development Authority : 2007(3) Arb. LR 205 (Delhi), a similar contention was rejected by this court. This issue is decided in favour of the plaintiff and against the defendant.

Issue No. 4:

Whether the plaintiff has removed the defects pointed out to them at the time of recording of completion certificate?

14. The completion certificate was sent on 13th February 1998 by the Executive Engineer, DDA to the Superintending Engineer. It was stated therein that the date

of the actual completion was 1st December 1997 and that the completion was 'however subject to measurements being recorded, quality being checked by a competent authority and defects to be removed AE, EE...during Site Inspection.' A list of twenty items has been appended indicating the works that required to be still completed. However, the completion certificate itself was signed on 1st December 1997.

15. The plaintiff had been asking for extension of time for completion. What is significant is that on 4th January 2001 the measurement was taken and the final bill was also prepared as on that date. The first two sheets of the final bill signed by the AE and the EE has been endorsed by the plaintiff stating that 'measurement and bill accepted'. However, in page 3 which gives the break-up of the amounts including the amount withheld there is receipt by the plaintiff for receipt of the amount of Rs. 1,52,440/- in which it endorsed 'received under protest'. It is the case of the plaintiff that if in fact no work remained incomplete, there was no question of the final bill being prepared on 4th January 2001 and ultimately being paid on 27th March 2002.

16. It is submitted that the extension for completion of the work was granted from time to time with reasons being furnished. Reference is made to the letter dated 18th August 1998 issued by the Executive Engineer requesting that extension of time up to the date of completion of work, i.e., 1st December 1997 should be accorded 'without levy of compensation'. In the said letter, the EE noted:

It is also certified that due to the delayed completion of work, the department has not suffered any financial loss. The contractor; on the performa Petitioner-I has also given the undertaking that due to the hindrances he has not suffered any financial loss and his labour and T & P never remained idle. He has also undertaken that he will not claim any liquidated damages on this account.

A reference is also made to the Plaintiff's letters dated 10th April 1998 and 12th October 2001 informing the DDA that the defects pointed out in the letter dated 30th March 1998 had already been removed.

17. On behalf of the defendant DDA Shri S.P. Singh, the Executive Engineer, DDA was examined as DW1. In his cross-examination on 6th July 2007, he admitted that no notice was issued under Clause 42 of the agreement for levying penalty on the plaintiff. When he was asked as to who was responsible for delay in execution of the work, he stated that the delay was 'on account of defaults on part of both the sides, i.e., contractor as well as of the department'. It was suggested to him by the Counsel for the plaintiff that the defects pointed out in the completion certificate were required to be rectified only at the time of the allottee being granted possession of the flat. Although he denied the suggestion, he was unable to give details on the actual handing over the possession to the allottee of the flat.

18. In his cross-examination on 22nd August 2007, DW1 again did not have records to indicate whether the defects pointed out were cured when the flat was handed over to the allottee. He, however, admitted that there was no complaint by any allottee after taking over the possession that he had found the fittings either incomplete or missing altogether. He was also unable to produce any document to show what was the amount spent by the DDA to complete the deficiencies in the flats.

19. This court concludes that DDA has been unable to bring on record any document to show that there was any defect in any of the flats at the time of handing over possession to the allottee. The reply given by DW1 in this regard is significant:

I have brought today the Allotment/Possession to allottes (sic allottees) Register. The first flat on the suit side delivered possession to the allottee was on 27.11.1998 as per this register. That possession to the allottee was given by DDA official i.e. by JE/AE. It is not recorded in the register brought by me whether the flat was complete in all respects when its possession was given to the allottee. I cannot say whether the items mentioned as deficient in the flats as per the completion certificate Ex PW1/D-18 had been provided when the possession of the flat was given to the allottee. Fittings like brass fittings, CP Fittings as mentioned in the completion certificate, to my opinion, were to be provided by the Contractor but it were not provided and I am not aware if those fittings were there

with the JE/AE DDA and were fixed by the Contractor when the possession of flats were given to the allottees (sic allottees). I will have to check up the record if contractor did deliver those fitting meant for all the flats and deposited with the JE and then those fittings were released to the Contractor and he fixed those fittings while giving possession of the flat to the allottee. I am not aware if any allottee of the flat made any complaint that after taking possession of the flat he had found fittings either incomplete or missing. Whatever work was recorded incomplete in the completion certificate it was got carried out by DDA either through 'impressed' or through department labour but not by engaging any outside agency. I cannot say if there is any document of the fact that any amount was spent by DDA to complete those deficiencies. It is wrong to suggest that DDA had not spent any amount to complete deficiencies in the flats in question. It is wrong to suggest that all the works had been completed by the Contractor or that no deficiency or incomplete work as recorded in the completion certificate Ex PW1/D-18, was left unattended by the Contractor.

20. On the next date 28th September 2007, DW1 brought the allotment register pertaining to the allotment of flats. He explained:.after inspection of the flat, when the allottee is satisfied after inspection, the allottee puts signature on the register. At the time of appending signature on the register, all the work in the flat was complete. Vol. In case, the contractor leaves the work incomplete, then the department completes the work. In the present case, the contractor had left the work incomplete. The remaining work was done by the department. The said work was completed by the department only by department labour and no outside agency was engaged for the work....

DW1, however, admitted that 'no letter or notice was issued to the plaintiff informing him that the work would be completed at the risk and cost of the plaintiff'. Also he admitted that there was no document in the form bills with regard to the purchase of materials for completion of the flat by the DDA.

21. To this court, it appears that the DDA did not evolve any clear procedure for actual handing over the flats to the allottees. There is force in the contention of the learned Counsel for the plaintiff that very often the handing over the flats is done

by the builder/contractor and not the DDA. If indeed any of the flats remained with defects as pointed out in the completion certificate, there is no reason why the DDA should have agreed to extension of time for completion without charging any penalty. The letter extending the time for completion was issued much after the completion certificate prepared. It could have been possible for the DDA to deny extension of time without compensation if indeed the defects remained to be attended to. The explanation given by the witness for the DDA about the plaintiff not being authorized to hand over possession really does not throw much light on what was the procedure followed. It is also plain that at the time of taking over possession, the allottee would normally point out what the defects in the flat are. With there being not a single complaint by any allottee about any flat handed over being incomplete, the DDA has not been able to establish that the plaintiff did not carry out the defects as pointed out in the completion certificate.

22. Mr. Narula sought to refer to the photographs taken by the DDA sometime in 2006 about the status of the building. Photographs taken in 2006 may not really reflect what the position was when the individual flats were handed over to the allottees. That is what needs to be looked at in order to examine whether there is justification in the DDA withholding a sum of Rs. 2,45,000/-.

23. In his evidence, the witness for the plaintiff explained in detail in what manner the defects were rectified. Further with the final bill having been paid in 2002, it is not open to the DDA to still maintain that the defects remained to be removed.

24. On a consideration of the evidence, it is clear that the plaintiff has been able to prove that it was able to remove the defects pointed out at the time of recording of the completion certificate. Issue No. 4 is accordingly answered in favour of the plaintiff and against the defendants.

Issue No. 5:

Whether the defendant is justified in withholding the amounts as claimed in para 3 of the plaint?

25. In view of the findings recorded hereinabove, the defendants were not justified in withholding the sum of Rs. 2,45,000/- from the final bill paid on 26th February 2002. The issue is accordingly answered against the defendants and in favour of the plaintiff.

Issue No. 6:

Whether the plaintiff is entitled to the amounts as claimed in para 14 of the plaint?

26. As regards withholding of Rs. 2,45,000/- this Court has already concluded that this was not justified. Next is the question of justification for the penal recovery for steel enforcement and cement. In the cross- examination of DW1, he has admitted that no show cause notice was issued in terms of Clause 42 of the agreement to the plaintiff seeking to recover penal interest on account of non-return of unused steel and cement. In K.R. Builders Pvt. Ltd. v. DDA 144 (2007) DLT 408, this Court referred to the decision of the Supreme Court in Maula Bux v. Union of India : AIR 1970 SC 1955 which emphasized the importance of actually proving the loss suffered by the DDA. In other words, there could not be any automatic double rate recovery under Clause 42(2) without the defendant actually proving what was the loss suffered by it.

27. As regards the withholding of the sum of Rs. 2,20,827/-, the reference may again be made to the admission by DW1 in his cross-examination that the work was complete in all respects when flats were handed over to the allottees.

28. As regards the sum of Rs. 5,85,480/- being the claim made by the plaintiff for fixing steel glazed door for a quantity of 546.20 sq. mts., it is sought to be contended by Mr. Narula, the learned Counsel for the DDA that this is actually a double payment which is already included in the main portion of 6.4 and therefore does not have to be again paid in Clause 6.4(d).

29. A careful perusal of the Clause 6.4 shows that the main portion does not in fact indicate any quantity or sum. It merely states 'providing and fixing steel glazed door, windows and ventilators of standard rolled steel sections....' Then from Sub-clause (a) to (e) the individual items are specified. Sub-clause (a) talks of 'over all

portion treated as fixed' and a certain sum is provided for. Clauses (b) (c) and (e) use the adjective 'extra' whereas Clause (d) simply states 'door'. Against this item, the quantity and rate are indicated, and the total sum payable calculated on that rate and quantity is indicated. It is not possible to agree therefore with the contention of the Mr. Narula that this is an extra payment. The payment for the door is specified only in Clause 6.4 (d) and nowhere else. The absence of the word 'extra' to qualify the word 'door' shows that the claim by the plaintiff is justified.

Watch and Ward:

30. The evidence of the plaintiff shows that it did deploy watch and ward in the premises. This became necessary since the DDA had in fact not taken over the site from the plaintiff formally and the entire site with the built up flats obviously could not be left unprotected. The question posed and the answer given by the witness DW1 in this regard are significant:

Q Did DDA take over the site from the plaintiff after completion of the work?

A There is no such procedure to take over the site from the plaintiff. Vol. The plaintiff left the site.

There was no question of taking over site from the plaintiff as the site belongs to the DDA. We did not deploy and security for watch and ward. However, DDA staff used to remain there. It is wrong to suggest that no DDA staff was present at the site. No payment was made to the said staff vide bills as the said staff was regular staff of the DDA. I do not remember how many staff members were present at the site. It is wrong to suggest that defendant is liable to pay watch and ward charges to the plaintiff. It is correct that the department has recovered Rs. 25,518/- from the plaintiff towards panel rate recovery for steel and a sum of Rs. 1286/- towards panel recovery for cement. It is correct that the rate of panel rate recoveries is double amount of agreed rate. There was no complaint regarding theft or pilferage from the site.

31. Counsel for the plaintiff has pointed out in the circular issued by the DDA regarding provision of watch and ward. The letter dated 7th December 1998 written by the plaintiff to the EE DDA requested it to deploy watch and ward from the side of the department so that no problem may arise in future. In the said letter it was pointed out that the plaintiff had already withdrawn chowkidars from the entry gate. PW1 further explicated on this aspect as under:

There was no Clause in the Agreement for me to keep a watch and ward on the site (Vol. But since DDA did not take action for four years in the allotment of flats, I had to take care of the site by maintaining watch and ward). The watch and ward was needed even when internal fittings in the flats were not fixed till flat was occupied, protection of other material like doors, window panes, wash basin, system, grills etc. were there. It is true that I had written myself to DDA that I would not be responsible for watch and ward of the site but DDA declined my request verbally and not in writing (vol. DDA had initiated a proposal to execute Agreement for this watch and ward but Higher Authorities dismissed that proposal). I identify my letter Ex P-16 & 17 which I had written to DDA on this subject of watch and ward saying that it was the responsibility of DDA to provide watch and ward and that I was withdrawing my Watchman (vo. That was in the year 1998 and when DDA did not take any steps I had to keep a watchman for twenty four hours till allotment/possession continued). It is wrong to suggest that there was never a proposal to execute an Agreement for providing a Watchman on the site.

32. To this court, it appears that the provision of watch and ward by the plaintiff became inevitable as otherwise the property would have remained unprotected. In a similar context in K.R. Builders Pvt.Ltd., the claim of the contractor for watch and ward charges was upheld by this Court. In light of the above position, it appears to this court that the claim made by the plaintiff for providing watch and ward from 1st December 1997 up to June 2007 is reasonable and should be upheld.

Idle Labour and Establishment: claim at the rate of Rs. 20,000/- for a period of 26 months:

33. According to the plaintiff, the completion of the work was delayed for reasons not attributable to the plaintiff. Further the extensions were also granted by DDA

without charging any penalty. During the extended period, the machinery deployed by the plaintiff and the staff, remained idle.

34. It is seen that the plaintiff has really not produced any evidence to justify the claim for Rs. 20,000/- per month for a period of twenty-six months. In the letter written by the DDA on 18th August 1998 granting extension up to 1st December 1997 it has been indicated that the contractor had given an undertaking that due to the hindrances 'he has not suffered any financial loss and his labour and TMP never remained idle. He has also undertaken that he will not claim any liquidated damages on this account'. This is a document marked by the plaintiff itself. It has been issued by the defendant. The giving up of this claim by the plaintiff has been adequately explained by the DDA. In the above circumstances, it appears to this court that this claim by the plaintiff is not sustainable.

35. Issue No. 6 accordingly stands answered.

Issue No. 7:

Whether the plaintiff is entitled to interest on the aforesaid amount and if so at what rate and for what period

36. As regards the claim for interest, it is seen that the plaintiff has claimed the interest @ 12 % per annum from 1st December 1997 up to the date of filing of the suit and also future interest at 12 % per annum. This claim seems to be reasonable. Accordingly, the plaintiff is granted interest on the above sum at 12 % per annum simple interest pendente lite and future till the date of recovery on the claims found due and recoverable by the plaintiff.

Relief

37. In view of the findings as aforesaid, the plaintiff is held entitled to the following amounts:

Claim of the plaintiff Amount(a) The amounts withheld from the final bill Rs. 2,45,000/-.for which no adequate justification hasbeen provided by the defendant(b) Towards penal recovery for steel and cement Rs. 25,518.80 +Rs.

1,286.00(c) Reduction, deduction and less rates paidfor extra items Rs. 2,20,827/-(d) Non-payment against item 6.4(d) for steelGlazed door for quantity of 546 sq. mts. Rs. 5,85,480/-(e) Watch and ward charges. Rs. 2,40,000/----------------------Total Rs. 13,16,825.80---------------------

38. A decree is passed in favour of the plaintiff and against the defendant No. 1 DDA for the sum of Rs. 13,16,825.80p. along with simple interest at 12 % per annum from the date of filing of the suit till the date of recovery. The suit stands disposed of. The decree sheet be drawn up accordingly.

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