

Delhi Development Authority Vs. A.S.Sachdeva and Sons Pvt. Ltd.

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Court : Delhi

Decided On : Dec-08-2011

Judge : Pradeep Nandrajog; S.P. Garg, Jj.

Appeal No. : RFA(OS) 18/2010

Appellant : Delhi Development Authority

Respondent : A.S.Sachdeva and Sons Pvt. Ltd.

Advocate for Def. : Mr.Raman Kapur; Mr.Aviral Tiwari, Advs.

Advocate for Pet/Ap. : Ms.Anusuya Salwan; Ms.Renuka Arora; Mr.Kunal Kohli, Advs.

Judgement :

1. The respondent had made an offer when notice inviting tender was floated by DDA to construct the listed works in the notice inviting tender and upon acceptance of the bid a contract bond Ex.P-21 was executed. The respondent was to bring its own material, save and except those which was listed in the tender documents, to erect the constructions; and in respect of the material to be issued (listed in the tender documents), it was the obligation of DDA to supply the said material at the fixed cost recorded in the notice inviting tender. The general conditions of the contract had the usual clause 10CC which stipulates that increase in the price of labour and material based upon applicable indices issued by the Ministry of Commerce would be paid to the respondent as per formula

prescribed in the clause, but not including the material which had to be issued by DDA. The reason is obvious; DDA was to supply the material at the fixed price.

2. It is not in dispute between the parties that the completion was delayed and the final completion certificate was issued on 01.12.1997 and the respondent was paid labour and material escalation as per clause 10CC.

3. Claim in the suit filed by the respondent has been summarized by the learned Single Judge in para 7 of the impugned judgment and decree dated August 07, 2009; and we reproduce the same as under:-

Towards amount illegally withheld `45,000/- on account of alleged repair

Towards amount withheld without `2,00,000/- any reasons

Towards penal recovery for steel `25,518.80 reinforcement

Towards penal recovery for cement `1,286.56

Towards unlawful reductions and `2,20,827/- deductions and less rate paid for extra items

Towards non-payment against Item `5,85,480/- No.6.4(d)-B/F steel glazed doors for quantity of 546.20 Sqm

Towards watch and ward from `2,40,000/- 1.12.1997 to June 2000

Towards compensation on account `5,20,000/- of idle establishment, idle T&P due to contract being delayed by 12 months

4. Total amount claimed as per plaint is `18,38,112/- and pre-suit interest @12% per annum was claimed at `14,15,346/-. Decree prayed for as per the plaint is in sum of `32,53,458/-.

5. Vide judgment and decree impugned, the last claim towards compensation on account of idle establishment, T&P on account of the contract being prolonged has been declined. The preceding seven claims have been allowed. Principal sum decreed is `13,16,825.80, on which, as per para 36 of the impugned judgment,

only pendente-lite and future interest have been directed to be paid @12% per annum.

6. The respondent has neither filed a cross appeal nor cross objections pertaining to claim in sum of `5,20,000/- being denied and thus we do not note the facts applicable thereto.

7. We propose to deal with the relevant facts pertaining to the claims which have been allowed at seriatim and deal with the same simultaneously because we feel this would render our decision easy to comprehend.

8. Though not pleaded anywhere in the plaint or in the written statement, from the letter of intent it is apparent that the works had to commence on 25.06.1993 and the stipulated date of completion was 24.10.1995. But the work was completed on 01.12.1997. During this period, as noted herein above and independent thereof with respect to the running bills certified for payment; and as per the final bill Ex.DW-1/1 submitted, it is clear, a fact not in dispute between the parties, that the respondent was paid material and labour escalation from time to time.

9. To be brief, we must note that the contract bond Ex.P-21 which consists of various documents, includes the letter of acceptance dated 15.06.1993 as per which the tendered cost is `4,94,64,633/- i.e. Rupees Four Crores Ninety Four Lakhs Sixty Four Thousand Six Hundred and Thirty Three only. The final bill Ex.DW-1/1 submitted by the contractor shows that including escalation, the final price came to `6,27,96,201/- i.e. Rupees Six Crores Twenty Seven Lakhs Ninety Six Thousand Two Hundred and One only i.e. the escalation was in sum of `1,33,31,598/- (Rupees One Crore Thirty Three Lakhs Thirty One Thousand Five Hundred and Ninety Eight only). Thus, with respect to the tendered price, the escalation was 25%.

10. We have noted as aforesaid, not for the reason there is any dispute on the escalation to be paid, but for the reason the data would be relevant with respect to deductions effected by DDA for steel reinforcement and cement supplied to the respondent.

11. It needs to be highlighted that the objection taken by DDA to the claims being barred by limitation has been negated by the learned Single Judge with reference to the final bill Ex.DW-1/1 being settled by DDA only on February 26, 2002 and holding that this was the date when the dispute finally crystallized. Noting that the suit was instituted on May 31, 2004, finding returned is that the claims are not barred by limitation, a finding though challenged in the memorandum of appeal, but given up by learned counsel for the appellant for the reason there is just no scope to urge to the contrary. Thus, the finding returned by the learned Single Judge on the claims being maintainable is upheld.

12. The learned Single Judge has allowed `45,000/- and `2,00,000/- i.e. the first and the second sum claimed holding that DDA had not justified withholding `2,45,000/-.

13. Though in the appeal filed by DDA it has been prayed that the decree passed be set aside in its entirety, but in the grounds urged we do not find any challenge to the said finding recorded by the learned Single Judge and thus we had not permitted learned counsel for DDA to make any submissions in relation thereto. Accordingly, impugned judgment insofar said two claims were allowed is affirmed.

14. As noted hereinabove, DDA had to supply the items listed in the tender documents at the fixed price, which included cement and steel. The contract provides that after the works are completed, considering the structural reinforcement drawings and working drawings, the cement and steel consumed would be worked out on a theoretical basis to which would be added a fixed 3% towards wastage and 2% towards variation and if still it is found that cement and steel has been issued in excess, if not returned, price thereof would be recovered at twice the issue rate. While settling the final bill, DDA recovered `25,518.80 towards excess steel reinforcement got issued and `1,286.56 towards excess cement got issued; the excess quantities not being returned.

15. The pleadings in the plaint qua said two items of work, in para 6 of the plaint, are as under:-

"6. That the defendants also recovered a sum of `25,518.80 towards Penal rate recovery for steel reinforcement and a sum of `1286.56 towards penal recovery for cement. It is submitted that during the execution of work there was no allegation of any wastage or pilferage of these materials by the defendants and excess consumption, if any, has been bona-fidely used in the work. Balance materials, if any, which remained un-consumed were also returned to the defendants under clause-42 of the agreement nor the defendants intimated the plaintiff company about any loss, if at all suffered by the defendants on account of excess use of these materials. Therefore penal recovery made by the defendants for steel reinforcement and cement was totally unjustified and unlawful plaintiff company is entitled to refund of the said sum of `26,705.36."

16. Suffice would it be to highlight that the respondent questioned the recovery on the plea that during execution of work, wastage or pilferage was never alleged; secondly, excess consumption if any was bona-fide; thirdly balance material unconsumed were returned and lastly no notice contemplated by clause 42 of the agreement was issued. The respondent never pleaded that the rate at which recovery was effected was by way of penalty and in the absence of proof of loss caused, no amount could be recovered.

17. The learned Single Judge has held that in the absence of damages proved, the recovery clause being penal in nature, DDA could not effect any recovery and secondly that notice contemplated by clause 42 of the general conditions of the contract had not been issued. The learned Single Judge has also been influenced by the fact that neither was any wastage or pilferage alleged.

18. The first reasoning of the learned Single Judge ignores the well known principle that there can be no variance between pleading and proof. If a particular subject matter is challenged on a plea „A’ the same cannot be made good upon proof relatable to plea „B’. The respondent did not challenge the excess recovery on the ground that the clause in question was a penal clause.

19. Respondent's witness i.e. its Managing Director who appeared as PW-1, on the issue of recoveries admitted during cross-examination that it was true that 3% wastage and 2% variation in the theoretical quantities as per the applicable clause of the agreement was factored when quantity of steel and cement to be consumed was worked out.

20. Thus, the pleading of the respondent that there was no allegation of wastage or pilferage against it is neither here nor there.

21. Works contracts, pertaining to buildings, have to be understood in the context of business efficacy. It is not possible to keep an account of the minutest quantities consumed. These contracts therefore envisage theoretical quantities to be worked out and give allowance towards probable variations and wastage, recognizing that these are inevitable lay down an agreed formula to work out quantities of material consumed. If parties agree to a mode to determine the quantities consumed in execution of a contract, they cannot be permitted to plead that they have acted bona fide in consuming excess quantities or that there is no proof of pilferage. The contractors are paid to execute works efficiently and based on the structure drawings as also working drawings, are obliged to ensure that neither deficient nor excess raw material is consumed.

22. The view taken by the learned Single Judge, which we note is based upon two decisions of learned Single Judges is thus incorrect in law and is overruled. We reiterate that where a contract stipulates a formula to calculate quantities consumed, it would be impermissible to calculate quantities consumed on any other basis and if the contract contemplates determination of excess material issued by the owner of the worked to be calculated with reference to the actual quantities issued and theoretical quantities consumed, the same is binding between the parties and admits of no exceptions.

23. It is no doubt true that a penalty clause, masquerading as a recompense clause, cannot be enforced in the absence of proof of actual damages, but to obtain relief on said principle of law, there must be adequate pleadings by he who raises the objection for the reason, whether a clause in a contract is by way of penalty or is by way of a reasonable pre- estimate of the loss is a mixed question

of law and fact. The respondent having not pleaded as aforesaid, relief based thereon cannot flow.

24. Independent of this reasoning, it assumes importance that the fixed price at which DDA was issuing cement and steel was notified in the notice inviting tender and sufficient would it be for us to note that the said price is the one at which DDA would have procured cement and steel in bulk from suppliers as of said date, but actually, DDA procures the materials as and when needed at the prices then in vogue. The contract envisaged the works to be executed over a period of time. The contract envisaged escalation. Just as the respondent got the benefit of escalation in the price of raw material consumed as per formula prescribed under clause 10CC of the contract, DDA would equally be entitled to a recompense, as per a formula prescribed in the relevant clause of the contract. Thus, it can be safely said that the clause in the contract that recovery of excess material got issued and not consumed would be at twice the issue rate was a reasonable pre-estimate of the loss inasmuch it was well within the contemplation of the parties that prices would rise. Thus, even on facts, DDA was not obliged to prove any loss caused to it. Besides, there is intrinsic evidence of price rise, which we have noted herein above, pertaining to the original contract price rising by 25% over a period of time and suffice would it be to state that this is proof of the reasonable pre-estimate being the basis of the clause in question, with respect to the damages suffered by DDA if excess material got issued was not returned. Lest it strike jarring to the reader that in the instant case proof of price rise is only 25% and thus upon the premise that DDA had to procure cement and steel at the increased price when the works progressed, it would be entitled to recompense only at 25% of the issue price, we would only respond by saying that the concept of loss being a reasonable pre-estimate being incorporated in a contract is not to be seen and evaluated with reference to what had actually happened, but with reference to whether it was a reasonable pre-estimate. To hold otherwise would mean that in every case where the clause contemplates a loss to be recompense as a reasonable pre-estimate of the damage suffered, it would require proof of the actual damage suffered and this would negate the very concept of a reasonable pre-estimate of loss being agreed to be paid as per a formula prescribed in the contract. The view taken by the learned Single Judge, which is premised on two

decisions of two learned Single Judges is overruled.

25. That leaves us to consider whether clause 42 of the General Conditions of the Contract was or was not complied with. The clause reads as under:-

"CLAUSE 42:

(i) The contractor shall see that only the required quantities of materials are got issued. Any such material remaining unused and in perfectly good condition at the time of completion or termination of the contract shall be returned to the Engineer-in-Charge at a place where directed by him, by a notice in writing under his hand, if he shall so require. Credit for such materials will be given at the prevailing market rate not exceeding the amount charged from him excluding the element of storage charges levied at the time of issue of materials to him. The contractor shall also not be entitled to cartage and incidental charges for returning the surplus materials from and to the stores where from they were issued.

(ii) After completion of the work, the theoretical, quantity of cement to be used in work shall be calculated on the basis of statement showing quantity of cement to be used in different items of work provided in Delhi Schedule of Rate, 1989 with up to date correction slips No.1 to 16 printed by the CPWD upto the date of receipt of tender. In case any item is executed for which the standard constants statement for the consumption of cement are not available in the above mentioned statement or cannot be derived from this statement, the same shall be calculated on the basis of standard formula to be laid down by the Superintending Engineer of the circle concerned. Over this theoretical quantity of cement, shall be allowed a variation upto 3% plus/minus for works estimated cost of which as put to tender is not more than Rs.5 Lakhs and upto 2% plus/minus for works, the estimated cost of which put to tender is more than Rs.5

Lakhs. The difference in the quantity of cement actually issued to the contractor and the theoretical quantity including authorised variation, if not returned by the contractor, shall be recovered at twice the issue rate, without prejudice to the provision of the relevant conditions regarding return of materials governing the contract. In the event of it being discovered that the quantity of cement used is less than the quantity ascertained as herein before provided (allowing variation on the minus side as stipulated above), the cost of quantity of cement not so used, shall be recovered from the contractor on the basis of stipulated issue rates and cartage to site.

(iii) The provision of fore-going sub-clause shall apply Mutatis-Mutandis in the case of steel reinforcement or structural steel sections (each diameters/section or category shall be considered separately) except that the theoretical quantity of the steel shall be taken as the quantity required as per design or as authorized by Engineer-in-Charge including authorized lappages plus 3% wastage due to cutting into pieces. Over this theoretical quantity 2% plus/minus shall be allowed as variation due to wastage being more or less.

(iv) After the completion of the work the actual quantity of wire, conduit/G.I./C.I./S.C.I. pipes, used in the various items of work shall be calculated on the basis of measurements recorded in the measurement books for purposes of payment and for assessing the consumption of material used on works. Over this quantity a variation of 5% plus shall be allowed for wastage of materials during execution in case of cables other than underground cables) Wires, conduit pipes/G.I./C.I./S.C.I. Pipes. The difference in quantity of materials issued to the contractor and the quantity recorded in the measurement book including authorized variation as stated above, if not returned by the contractor shall be recovered at twice the issue rates plus cartage to site, without prejudice to the provisions of the

relevant condition regarding return of materials governing the contract.

(v) After the completion of the work, the theoretical quantity of bitumen to be used on works shall be calculated on the basis of CPWD statement showing quantities of bitumen to be used in different items of work provided in the Delhi Schedule of Rates 1989 with upto date correction slips or in respect of agreements which do not provide for or authorize application of Delhi Schedule of Rates 1989 with upto date correction slips theoretical quantity of bitumen to be used in works shall be calculated on the basis of standard formula as laid down by Superintending Engineer of the concerned circle. Over the said theoretical quantity of bitumen, a variation upto plus (excess) 2-1/2% shall be allowed.

The agreement which provide for supply of bitumen at a fixed rate, the value or price of the difference in the quantity of bitumen actually issued to the contractor and the theoretical quantity including the above mentioned authorized variation, if not returned by the contractor, shall be recovered at twice the issue rate of bitumen, without prejudice to the relevant conditions in the agreement regarding return of materials governing the contract. In the event of it being discovered that the quantity of bitumen used by the contractor is less than the quantity calculated in the manner aforesaid (no variation) on the lower side shall, be allowed the cost of quantity of bitumen not so used shall be recovered from the contractor on the basis of stipulated issue rate plus cartage thereof upto site.

(vi) The provisions made above are without prejudice to the right of the Delhi Development Authority to take action against the contractor under the conditions of the contract for not doing the work according to the prescribed specifications.

(vii) The materials shall be issued to the contractors, at the place of delivery as mentioned in the schedule. If these are delivered at any other site the difference due to cartage will be adjusted accordingly. The contractor shall have to cart at his cost the materials to the site of the work as soon as these are issued. The materials shall be issued between the working hours and as per rules of the Delhi Development Authority's Godown as framed from time to time.

(viii) The contractor shall bear all incidental charges for cartage, storage and safe custody of materials.

(ix) M.S. Bars and for steel etc shall be issued if stipulated in lengths as available in the stores. No claim on this account shall be entertained.

(x) The contractor shall construct suitable godowns at the site of work for storing the materials safe against damages of sun, rain dampness, fire, theft etc. He shall also employ necessary watch and ward establishment for the purpose.

(xi) Cements bags shall be stored in separate godowns as per typical godowns sketch attached with pucca floor and weather proof roofs and walls. Each godown shall be provided with a single door with two locks. The keys of one lock shall remain with Delhi Development Authority's Junior Engineer-in-Charge of work and that of the other lock with the authorized agent of the contractor at the site of the work, so that the cement is removed from the godown according to the daily requirement with the knowledge of both the parties.

The cement bags shall be stacked on proper floors consisting of two layers of dry bricks laid on well consolidated earth at a level of at least one foot above ground level. These stacks shall be in rows of 2 and 10 high with a minimum 2'9" clear space around the bags should be placed horizontally continuous in each line as shown in the

accompanying sketch.

The day to day receipt and issue accounts of cement shall be maintained by the Junior Engineer-in-Charge and signed daily by the contractor or his authorised agent (as per specimen of register attached)."

26. Now, the clause does not contemplate any notice, as is conventionally understood, to be issued calling upon the contractor to respond thereto. But principles of natural justice would require a party to be informed that a decision contemplated by a contract was being taken, which we find in the form of Ex.DW-1/13 being the letter dated 30.03.1998 written by the Executive Engineer, Western Division-VIII, DDA calling upon the contractor to firstly rectify the defective works pertaining to GI Pipes and shuttering and additionally to return the surplus material to the store and ensure that the ledger is reconciled. In this connection, admissions by PW-1 during cross-examination may be noted. He deposed during cross- examination as under:-

"It is true that Clause 42 in the agreement stipulated that unused material shall be returned to the defendant-department and that in case of any default in return of that material, department would be entitled to recover its value. It is true that defendant department recovered Rupees Twenty six thousand seven hundred and five and thirty six paise (`26,705.36) on account of non- return of the unused material which was in accordance with the clause in the agreement but (vol. I would say that reinforcement material in the form of small iron bar pieces which remained unused, I tried to return that material but department refused unjustly to take it back on the ground that it were pieces.)"

27. In any case, we find that vide Ex.DW-1/2, on 23.05.1998, the Assistant Engineer-II, Western Division-VII DDA, wrote a letter requiring the contractor to return 2 MT of 100 mm dia steel as this was the quantity to be returned after giving benefit of wastage and variation.

28. Thus, insofar the learned Single Judge has decreed the claim in sum of `25,518.80 and `1,286.56, we set aside the impugned decree.

29. Claim in sum of `2,20,826/- finds corresponding pleading in paragraph 7 of the plaint where-under it is pleaded as follows:-

"That even though the works were executed under the supervision and control of the defendants throughout and whatever defects were notified by the defendants were duly rectified by the plaintiff company and possession of all the flats were handed over to the allottees after removal of all the defects and discrepancies. The defendants arbitrarily recovered various amounts from the final bill, besides the defendants also made less payment due to lesser rate paid then agreed during execution of work, in respect of extra items. Total amount recovered/less paid from the final bill is `2,20,827/- as detailed below:-

a) `1,075.08: Defendants unlawfully recovered the said amount vide item No.2 of Reduction Item Statement No.1 vide page-11 of the final bill without any reason.

b) `6,952.40: Defendants unlawfully recovered the said amount vide item No.3 of Reduction Item Statement No.1 vide page-11 of the final bill, on account of alleged results of chemical analysis of concrete, whereas cement was supplied by the defendants.

c) `19,005/-: Defendants unlawfully recovered the said amount vide item No.1 of Reduction Item Statement No.2 vide page-12 of the final bill on account of alleged stone chipping and using chips of smaller sizes.

d) `2,937.50: Defendants unlawfully recovered the said amount vide item No.1 of Reduction Item Statement No.3 vide page-12 of the final bill on account of alleged improper derusting in steel work.

e) `9,730.50: Defendants unlawfully recovered the said amount vide Reduction Item Statement No.5 vide page-13 of the final bill on account of joints of glazed tiles dado alleged to be sounding hollow at few places.

f) `11,177.91: Defendants unlawfully recovered the said amount vide page 13 of the final bill on account of providing wooden battens alleged to be not as per specification.

g) `93,131.76: Defendants unlawfully recovered the said amount vide item No.1 of Deduction Item Statement No.1 vide page 14 of the final bill on account of alleged not providing hinges.

h) `9,526.14: Defendants unlawfully recovered the said amount vide item No.4 of Deduction Item Statement No.1 of the final bill on account of providing 10 Lt. Capacity flushing cistern instead of 12.50 Lt. Capacity when 12.5 Lt. Capacity cistern were not being manufactured and not available in the market.

i) `17,964.32: Defendants unlawfully recovered the said amount vide item No.5 of Deduction Item Statement vide page-17 of the final bill on account of using 10 Lt. Capacity instead of 12.5 Lt. Capacity.

j) `6,772.02: Defendants unlawfully recovered the said amount vide item No.6 of Deduction Item Statement No.1 vide page-17 of the final bill for providing fly proof wire guage shutters instead of glass panes.

k) `27,222.60: Defendants unlawfully recovered the said amount vide item No.1 of Deduction Item Statement No.4 vide page-18 of the final bill.

l) `15,331.74: Defendants unlawfully recovered the said amount vide item No.2 of Deduction Item Statement No.4 vide page-18 of the final bill.

Thus the defendants unlawfully and uncontractually recovered the total sum of `2,20,826.97 from the final bill without any notice of any defects or discrepancy as required under clause-14 and 17 of the agreement. Thus the plaintiff is entitled to refund of the said sum of `2,20,826.97."

30. Response of DDA is as under:-

"7. That para 7 of the plaint is wrong and denied. It is submitted that as per clause 15 of Agreement the contractor is bound to carry the order's from quality control/C.T.E. and during Inspection the quality control point out certain defects and some of the defects mentioned above were never been attended to till date. All the Quality inspections were carried out during the progress of the work and was conducted in the presence of the officer of plaintiff company on 7-2-1995, 19-8-1994 as per letter dated 1-11- 1994, 31-10-1994, 12-7-1995 as per letter dated 17-8-1995, 15-9-1997 as per letter dated 15-12- 1997 and the same were intimated to the plaintiff time and again but no action has been taken to remove all the defects as some are still remaining to be attended to till date. The Deduction, Reduction of item statement for defective, improper workmanship were prepared and got approved by S.E. on -3-6-1997, 20-5- 1999, 10-8-1999, 23-4-1998, 6-2-1997, 22-3- 2000, and the same was duly accepted by the agency during each R/A bill as well as the measurement Book and the final bill prepared on 29-12-2000. The raising of objection after lapse of so many year's is not justified and hence denied. No amount is payable to the plaintiff as mentioned para wise in the plaint from a to I. That in spite of having the knowledge of deductions on 29-12-2000 the plaintiff has not raised any dispute within a period of three years.

a) That in reply to para a it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and

conditions and measurements of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing and fixing hinges of lessor thickness of 99.36 meter as mentioned at page 88 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

b) That in reply to para b it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements of the Agreement of each item mentioned therein. The deductions on this item has been made on account of obtaining results of chemical analysis of concrete 1:2:5:13.4 instead of 1:1:5:3 of 20 Cubic Meter as mentioned at page 89 of the measurement book and final bill which was duly accepted by the plaintiff where the 1 is cement. 1.5 is coarse sand and 3 is graded stone aggregate .20mm nominal size which has not been provided by the plaintiff. No amount is payable to the plaintiff.

c) That in reply to para c it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specifications of the Agreement of each item mentioned therein. The deductions on this item has been made on account for not steving stone chipping and using chips of smaller size of 25 Sq.Mtrs. as mentioned at page 90 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable to the plaintiff.

d) That in reply to para d it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of not doing proper derusting in steel work in i) Agreement item No.6.4 composite units and ii) item 11.6 M.S.Holder Bat clamps, iii) item 6.2 pressed steel door frame measuring 1175 sq.

Mtr. As mentioned at page 90 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

e) That in reply to para e it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of the joints of glazed tiles dado sounding hollow at corners at places measuring 325 sq. Mtr. As mentioned at page 91 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

f) That in reply to para f it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing width of wooden battens as 100 mm as against the requirement of 150 mm as per the specification measuring 582.79 sq. Mtr. as mentioned at page 91 of the measurement book and final bill which was duly accepted by hte plaintiff. No amount is payable on this.

g) That in reply to para g it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of not providing hinges measuring 1246.41 sq. Mtr. as mentioned at page 92 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

h) That in reply to para h it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and

conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing high level CI flushing cistern of 10 ltr capacity instead of 12.50 ltr capacity all against item No.1 totaling 177 numbers as mentioned at page 96 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

i) That in reply to para i it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing low lever cistern vister china cistern 10 ltr capacity instead of 12.5 ltr capacity against item No.11.5 totaling 236 nos. as mentioned at page 97 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

j) That in reply to para j it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing and fixing fly proof galvanised m.s. wire gauge to steel window instead of glass panes measuring 177 sq mtrs as mentioned at page 98 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

k) That in reply to para k it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing CP brass straps and CP brass union 32 mm dia totalling 354 numbers as mentioned at page 98 of the measurement book and final bill which was duly accepted by the plaintiff. No

amount is payable on this.

l) That in reply to para l it is submitted that the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing cp brass union and cp brass trap totalling 177 nos. as mentioned at page 99 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

It is denied that the defendant unlawfully and uncontractually recovered the amount. It is the plaintiff before not complying with the terms and specification of the contract has to take an approval prior from the Engineer In Charge which the plaintiff has never even applied for."

31. The learned Single Judge has held that onus was on the DDA to prove that the works were executed by not adhering to the specifications in the contract since execution of the works was not in dispute.

32. The learned Single Judge has held that there is no evidence led by DDA to establish the same.

33. Unfortunately, attention of the learned Single Judge was not drawn to the examination-in-chief through the medium of affidavit by way of evidence filed by DDA. S.P.Singh, Executive Engineer, Division-VII of DDA had deposed on the subject by way of examination-in-chief as under:-

"7. That as per clause 15 of Agreement the contractor is bound to carry order's from quality control/C.T.E. and during Inspection the quality control pointed out certain defects and some of the defects mentioned above were never been attended to till date. All the Quality inspections were carried out during the progress of the work and was

conducted in the presence of the officer of plaintiff company on 7-2-1995 ExDW1/5, 19-8-1994 as per letter dated 1-11-1994/31-10-1994 Ex DW1/6, 12-7-1995 as per letter dated 17-8-1995 Ex DW1/7, 15-9-1997 as per letter dated 15-12-1997 ExDW1/8 and the same were intimated to the plaintiff time and again but no action has been taken to remove all the defects as some are still remaining to be attended to till date.

The Deduction, Reduction of item statement for defective, improper workmanship were prepared and got approved by S.E. on 1-6-1997 EX PW1/D-16 AND EX PW1/D-17, 20-5-1999 EX PW1/D-18 and EX PW1/D19, EXPW1/D20, 10-8-1999 EX PW1/D21, PW1/D22, PW1/D23, 23-4-1998 EX PW1/D24 AND PW1/D25, 6-2-1997 EXPW1/D26, EXPW1/D27, 22-3-2000 EXPW1/D28 AND PW1/D29, and the same was duly accepted by the agency during each R/A bill as well as the measurement Book and the final bill prepared on 29-12-2000. The raising of objection after lapse of so many year's is not justified. No amount is payable to the plaintiff as Claimed by the plaintiff. That inspite of having the knowledge of deductions on 29-12-2000 the plaintiff has not raised any dispute within a period of three years.

a) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing and fixing hinges of lessor thickness of 99.36 meter as mentioned at page 88 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

b) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements of the Agreement of each item mentioned therein. The deductions on this item has been made on account of obtaining results of chemical

analysis of concrete 1:2:5:13.4 instead of 1:1:5:3 of 20 Cubic Meter as mentioned at page 89 of the measurement book and final bill which was duly accepted by the plaintiff where the 1 is cement. 1.5 is coarse sand and 3 is graded stone aggregate .20mm nominal size which has not been provided by the plaintiff. No amount is payable to the plaintiff.

c) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specifications of the Agreement of each item mentioned therein. The deductions on this item has been made on account for not steving stone chipping and using chips of smaller size of 25 Sq.Mtrs. as mentioned at page 90 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable to the plaintiff.

d) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of not doing proper derusting in steel work in i) Agreement item No.6.4 composite units and ii) item 11.6 M.S.Holder Bat clamps, iii) item 6.2 pressed steel door frame measuring 1175 sq. Mtr. As mentioned at page 90 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

e) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of the joints of glazed tiles dado sounding hollow at corners at places measuring 325 sq. Mtr. As mentioned at page 91 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

f) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing width of wooden battens as 100 mm as against the requirement of 150 mm as per the specification measuring 582.79 sq. Mtr. as mentioned at page 91 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

g) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of not providing hinges measuring 1246.41 sq. Mtr. as mentioned at page 92 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

h) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing high level CI flushing cistern of 10 ltr capacity instead of 12.50 ltr capacity all against item No.1 totaling 177 numbers as mentioned at page 96 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

i) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing low lever cistern instead of high lever cistern 10 ltr capacity instead of 12.5 ltr capacity against item No.11.5 totaling 236 nos. as mentioned at page 97 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

j) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing and fixing fly proof galvanised m.s. wire gauge to steel window instead of glass panes measuring 177 sq mtrs as mentioned at page 98 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

k) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing CP brass straps and CP brass union 32 mm dia totalling 354 numbers as mentioned at page 98 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

l) That the deductions have been made due to the plaintiff not adhering to the terms and conditions and measurements and specification of the Agreement of each item mentioned therein. The deductions on this item has been made on account of providing cp brass union and cp brass trap totalling 177 nos. as mentioned at page 99 of the measurement book and final bill which was duly accepted by the plaintiff. No amount is payable on this.

That the defendant had recovered the amount legally and contractually recovered the amount. It is the plaintiff before not complying with the terms and specification of the contract has to take an approval prior from the Engineer In Charge which the plaintiff has never even applied for."

34. He was cross-examined and in respect of the issue at hand, the cross-examination reads as under:-

"I have brought today the Allotment/Possession of 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. 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."

35. The attention of the learned Single Judge appears also not to have been drawn to Ex.DW-1/2, Ex.DW-1/3, Ex.D- 1/6, Ex.D-1/7, Ex.D-1/12, Ex.DW-1/13, Ex.DW-1/16, Ex.DW- 1/18, Ex.DW-1/19 and Ex.DW-1/20 and most important to

the measurement book Ex.DW-1/4.

36. Vide Ex.DW-1/3 dated 25.03.1998, defective items pertaining to GI pipes in Block No.52, 53 and 54 have been identified, but there is no proof that the said letter was sent to the respondent. Ex.DW-1/6 is a completion certificate duly signed by the respondent on 01.12.1997 where in 20 items of deficient, defective or unexecuted works have been listed. Ex.DW-1/7 is the photocopy of the completion certificate recorded in the measurement book. Ex.DW-1/12 is a letter dated 23.05.1998 highlighting that defects in GI and SCI pipes continued to exist. Same is the grievance pertaining to GI pipes in Ex.DW-1/13 dated 30.03.1998. Ex.DW-1/16 dated 23.08.1997 lists the unexecuted works as of said date. Ex.DW-1/18 lists defects detected as of 13.11.1997. Ex.DW-1/19 records defects as of 03.01.1998 and Ex.DW-1/20 records defects as of 06.03.1998.

37. Suffice would it be to highlight that defects noted from time to time appear to have been rectified, evidenced by the fact that the latest in point of time of the aforesaid documents is Ex.DW-1/12 which is dated 23.05.1998 and therefrom it can be gathered that the contractor had rectified the defects other than those which find a mention in the said letter dated 23.05.1998 and suffice would it be to state that the only defects listed therein pertain to GI and SCI pipes.

38. Learned counsel for the respondent had heavily relied upon the cross-examination of DW-1 as extracted in para 34 above to highlight that he admitted that he was not aware that the allottees of the flats had made any complaints pertaining to the fittings and fixtures when possession was handed over. Therefrom, learned counsel sought to infer that it is apparent that there were no defects in the flats, for had there been any, the allottees would have raised a grievance.

39. We find substantial force in the argument advanced for two reasons. Firstly, the various letters relied upon by DDA would show that as time passed by, less and less number of defective/non-rectified works were listed and in the last communication dated 23.05.1998 i.e. Ex.DW-1/12 the only defects listed pertain to GI and SCI pipes. This shows that there were no other defects which continued to exist nor any unexecuted works remained for the reason the allottees would have

pointed out the same.

40. An argument can be advanced that if defective work pertaining to GI and SCI pipes existed and yet the allottees took possession of the flats without demur, it would be apparent that the allottees remained casual and if they remained casual, it would not mean that the contractor should make an illegal gain. Though this argument was never advanced, but being within the realm of a possibility, we answer the same. The answer is short and neat. GI pipes and SCI pipes are outside the flats. The latter are meant to discharge the noxious gases from the sewer line into the atmosphere and are the black coloured pipes which we all see at the rear of buildings, terminating two to three feet above the parapet with a top covering having slits wherefrom noxious gases from the sewer line are discharged in the air. These pipes, if defectively placed, can never be detected by a lay person. Similarly, as regards GI pipes from which household affluent flows to the sewer lines, defective joinery work is evidenced with the passage of time to the user, but an expert can detect the same.

41. But from the various sub-heads of the claim as per para 7 of the plaint it is apparent that DDA did not effect any recovery on account of defective execution of work pertaining to GI and SCI pipes as there is no claim under said head and therefrom we can infer that after 23.05.1998 even said defective work was completed. The various sub-heads as can be noted from the various sub-paras of para 7 of the plaint would reveal that deductions were sought to be effected for such works, which though mentioned initially in the initial documents as defectively/deficiently executed, but with passage of time got reduced in number and finally got reduced to only two items pertaining to GI and SCI pipes as per Ex.DW- 1/12 and since for these works payments were released it can safely be inferred that these works were executed and qua the remainder we hold that the learned Single Judge has correctly opined that payments ought to have been made.

42. We owe an apology for a prolix reasoning inasmuch as we were compelled to do so on account of the fact that the learned Single Judge has arrived at a cryptic finding by simply recording that onus was on the DDA to prove that the works were

either incomplete or defective and DDA had not discharged the onus. Why was the onus not discharged?

There is no discussion. We were thus compelled to discuss the relevant evidence. We reach the same conclusion, but with a reasoning and would terminate our discussion by impressing upon the fact that a judgment, post trial written while deciding a suit, must discuss the evidence which the parties rely upon and then the conclusions be penned and not that conclusions are written without a discussion on the evidence.

43. The impugned decision is accordingly upheld insofar `2,20,827/- has been allowed for the claims pleaded in para 7 of the plaint.

44. Claim in sum of `5,85,480/- on account of non- payment against Item No.6.4(d)-B/F Steel Glaze Doors for quantity of 546.20 square meters has been allowed by the learned Single Judge on the reasoning that defence of DDA that this was actually a double payment and had been included in the main portion of the works listed in clause 6.4 was not acceptable for the reasoning:-

"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 Mr.Narula that this is an extra payment. The payment for ht edoor is specified only in clause 6.4(d) and nowhere else. The absence of the word "extra" to qualify the word "door" shows that he claim by the plaintiff is justified."

45. Challenging the said finding it was urged by Ms. Anusuya Salwan learned counsel for DDA that what is provided in sub-clause (d) of Clause 6.4 of the contract is actually subsumed in sub-clause (a) of the Clause 6.4 of the contract. Thus, it becomes relevant and essential to note clause 6.4 of the Item descriptions. It reads as under:-

Providing & fixing steel glazed door, windows & ventilators of standard rolled steel sections, joints mitred (illegible) and welded with 15 x 3 mm lugs, 10 cm long with steel lugs embedded in cement concrete block, 15x10x10 cm of 1:3:6 (1 cement : 3 coarse sand : 6 graded stone agg. 20 mm nominal size) or with wooden plugs and screws or rawl plugs and screws or with fixing clips or with bolts and nuts as required including providing and fixing of glass panes with glazing clips and special metal sash putty of approved make complete including applying a priming coat of approved steel primer excluding the cost of metal beading and other fitting except necessary hinges or pivots as required.

a) Over all portion treated 2064.52 `311.75 as fixed. sq.m.

b) Extra for window side 1548.39 `97.75 hung sq.m.

c) Extra for ventilators (Top 516.13 `97.75 hung) sq.m.

d) Door 724.81 `546.20 sq.m.

e) Extra of side hung portion 724.81 `233.45 (doors) sq.m.

46. A perusal of clause 6.4 and its various sub-clauses would show that the complete work is described in the main body of the clause i.e. 6.4 and thereafter, five segments of the whole have been segregated against which rate at which payment would be made for each segregated work has been noted. The absurdity of the argument of DDA that the work in sub-clause (d) is subsumed in the work of sub-clause (a) is evident from the fact that the price payable for the element of work envisaged by sub-clause (a) is `311.75 square meters and the price for the element of work envisaged by sub-clause (d) is `546.20 per square meter. It is just not possible that for a listed work having higher value it would be a mistake to so list on account of the reason the work is actually subsumed in another listed item

of work of a lesser value.

47. We thus hold that the reasoning of the learned Single Judge is correct and additionally for the reason the witness of DDA simply deposed in sync with the defence of DDA, but in spite of being an Engineer, threw no light as to how come there was a duplication in an item of work.

48. Impugned decision insofar it has decreed the claim in sum of `5,85,480/- is accordingly upheld.

49. The learned Single Judge has decreed claim in sum of `2,40,000/- for watch and ward deputed by the contractor till possession of the flats was taken over by DDA in June 2000 notwithstanding the same being completed on 1.12.1997. Recompense has been awarded by accepting that, as pleaded in the plaint that expenditure in said sum was incurred for a period of 2 years and 6 months.

50. Learned Single Judge has noted a question and its answer given by DW-1 to opine that claim of DDA that it had deputed its watch and ward staff was not correct. The same is as under:-

"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 `25,518/- from the plaintiff towards panel rate recovery for steel and a sum of `1,286/- 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."

51. Learned counsel for DDA drew our attention to the letter dated 7.12.1998 written by the contractor informing that it would withdraw the watch and ward staff and therefrom learned counsel urged that it is apparent that the contractor withdrew the watch and ward staff and hence counsel urged that the contractor would not be entitled to any recompense on said count.

52. It is true that the contractor wrote the letter but its justification of not having abandoned the site in spite of the letter being written is reasonable; the justification has emerged in the cross-examination of PW-1 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 (vol. 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."

53. We concur with the reasoning of the learned Single Judge. The decision pertaining to expenses incurred to keep watch and ward at the site is accordingly

upheld.

54. Summarizing our decision, the impugned judgment and decree is upheld save and except in sum of `25,518.80 + `1,286.56 = `26,805.36. Thus, the appeal is partially allowed. Impugned judgment and decree is modified and the suit filed by the respondent is decreed in sum of `12,90,020.44 (Rupees Twelve Lacs Ninety Thousand Twenty and Paise Forty Four Only). The interest as awarded by the learned Single Judge is maintained.

55. Parties shall bear their own costs in the appeal.

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