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IN THE HIGH COURT OF DELHI

Judgment reserved on : October 15, 2008

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Judgment delivered on : November 19, 2008

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RFA 4/2008

HARISH MANSUKHANI

..... Appellant

Through: Mr. Adarsh Ganesh, Advocate

VERSUS

ASHOK JAIN

..... Respondent

Through: Mr. K.C. Jain, Advocate

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

: PRADEEP NANDRAJOG, J.

1. The appellant i.e. the defendant is aggrieved by the judgment and decree dated 1.7.2007 passed by the learned Trial Court whereby the suit filed by the respondent has been decreed in sum of Rs.11,53,470.50 (Rupees Eleven Lacs Fifty Three Thousand Four Hundred and Seventy and Paisa Fifty)

together with pendente lite and future interest @ 6% per annum. The break up of the amount is Rs.9,61,941.05/- as the amount shown as outstanding in the statement of account, Ex.PW-1/1; Rs.1,92,816.68 towards sales tax due on account of ST-35 forms not being supplied; and Rs.2,200/- as the notice charges paid to the lawyer when the pre-suit notice of demand was raised vide Ex.PW-1/3.

2. For sake of convenience we shall be referring to the parties as the plaintiff and the defendant.

3. Case of the plaintiff was as pleaded in para 1 of the plaint as under:-

“That the plaintiff is the proprietor of M/s. Jain Plastic Works and is a manufacturer of various items of plastic goods and is having its regd. Office at 9090, Gali Zamir Wali, Nawab Ganj, Azad Market, Delhi – 110006 and the defendant had been purchasing plastic goods on credit basis from the plaintiff and the sale transactions and its part payments were duly maintained and reflected in the statement of account maintained by the plaintiff, copy of which is annexure A.”

4. The statement of account, Annexure A, reflects that as on 30.5.2005 a sum of Rs.9,61,941.05 is payable being a debit entry in said sum. It was further pleaded that despite assurances, the defendant did not issue any ST-35 form for which Rs.1,92,816.68 became payable towards sales tax.

5. The defendant disputed the liability to pay as reflected in the statement of account relied upon by the plaintiff.

6. At the trial, besides examining himself as PW-1, plaintiff examined his field officer, Sh. Rakesh, as PW-2.

7. The plaintiff proved the statement of account referred to in the plaint as Ex.PW-1/1. 128 bills drawn in the name of the defendant on various dates between 4.4.2004 till 2.5.2005 were collectively proved as Ex.PW-1/2. Lawyer's notice dated 1.9.2005 raising the demand before suit was filed was proved as Ex.PW-1/3. The notice served during trial under Order 12 Rule 8 was proved as Ex.PW-1/5. A notice of demand dated 4.7.2006 issued by the Sales Tax Authorities raising a demand on the plaintiff in sum of Rs.1,91,529/- for sales tax due for the assessment year 2004-05 was proved as Ex.PW-1/7. In respect of no proof being with the plaintiff by way of acknowledgment from the side of the defendant pertaining to receipt of the bills Ex.PW-1/2 or the goods there-under, in harmony with the pleadings in the plaint, PW-1 deposed that due to cordial relationship and there being goodwill between the parties, the precaution of obtaining signatures of the defendant or its representative on the bills or when goods were delivered was not observed. However, PW-2 Mr.Rakesh the field officer of the plaintiff, examined as PW-2, deposed to the effect:-

“That all the goods supplied to the defendant either to himself or at this instructions directly to his customers were sent from our factory at Narela, Delhi. The defendant used to call me at his residence cum office at CB/14C, Shalimar Bagh, Delhi – 110088 and he used to tender his bill (of the same goods as being sent by us) with the instructions to further deliver the said goods to his customers/parties such as M/s. Arbo Pharmaceuticals, Kirti Nagar, New Delhi, M/s. Kamal Pharmaceuticals, Zakhira, New Delhi. But whenever the goods were to be supplied to one of his party at Gurgaon namely M/s. Pect India, Gurgaon or M/s. Lark Laboratories, Bhiwari, he used to request me to book the goods through road transport M/s. S.K.Golden Transport Company, Zakhira..... The defendant rarely received the goods at his office as there was no sufficient space to store the goods which were too big in size..... Since the defendant was one of valued customer of the plaintiff he never insisted to obtain the signatures of defendant on the carbon copies of such bills, only to maintain cordial relations between us.”

8. The defendant examined himself as his witness and deposed that he had to make no payment to the plaintiff as per Ex.PW-1/1. In cross examination he admitted facing prosecution for dishonour of cheques issued by him to the plaintiff.

9. On the basis of the evidence on record the learned Trial Judge has decreed the suit. Four pronged reasoning can be culled out from the decision of the learned Trial Judge. From the fact that the defendant admitted having issued cheques to the plaintiff and in respect whereof he was being prosecuted the conclusion drawn is that the said evidence evidences

commercial transactions between the parties and led assurance to the truthfulness of the case pleaded in the plaint more particularly for the reason the defendant did not produce his account books. Secondly the reason that the defendant did not refute the notice of demand served by the plaintiff on 1.9.2005, proved as Ex.PW-1/3. Thirdly that the defendant did not produce the original of the 128 bills when called upon to do so vide Ex.PW-1/5 i.e. the notice served by the plaintiff upon the defendant during trial under Order 12 Rule 8 CPC. An adverse inference has been drawn against the defendant for non-production of the original bills. Lastly, the notice of demand dated 4.7.2006, Ex.PW-1/7, has been held as proof of sales effected by the plaintiff under the bills in question since the sales tax authorities had raised a demand for payment of sales tax qua said bills.

10. At the hearing held on 15.10.2008, learned counsel for the appellant urged that the learned Trial Judge failed to appreciate that the principle of law was that there can not be a variance between pleading and proof and thus erred in ignoring the fact that whereas case pleaded in the plaint was of goods being delivered to the defendant, the evidence brought on record was that most of the goods were supplied to third parties allegedly at the instance of the defendant. Counsel urged that the plaintiff did not even bifurcate the alleged delivery to the

defendant and the alleged delivery to the third parties stated to be at the instance of the defendant. Counsel further urged that the whole theory of receipt of bill(s) and the goods not being obtained from the defendant due to the stated cordial relations between the parties gets demolished by the fact that the goods covered by most of the bills, as deposed to by PW-2, was made to third parties, with whom, the plaintiff obviously had no dealings, as per the version of the plaintiff, and thus it remained unexplained as to why delivery of the goods to said third parties as and when the same was effected was not got acknowledged. Counsel further urged that the plaintiff ought to have examined S.K.Golden Transport Company, Zakhira to establish that goods were supplied through the said transporter to the parties named in the statement of PW-2. Pertaining to Ex.PW-1/7 counsel urged that the same was a notice of demand and not an assessment order and the plaintiff failed to link the same to the bills in question. On the issue of not producing the originals of the 128 bills resulting in an adverse inference being drawn against the defendant, learned counsel urged that an adverse inference can be drawn against a party for not producing the original documents only if it is established that the party concerned was in possession of the documents. Non response to the legal notice Ex.PW-1/3 resulting in an adverse inference being drawn against the defendant was sought to be watered

down by learned counsel for the defendant who urged that non response to a legal notice is a mere presumptive evidence and the totality of the evidence has to be considered by the Court.

11. Before discussing the evidence on the record and the pleadings of the parties, certain features of the 128 bills collectively proved as Ex.PW-1/2 may be noted for the reason they are important and relevant to appreciate the rival versions keeping in view the circumstance that there is no evidence on record to show that the defendant acknowledged the bills as also the fact that there is no evidence of delivery of goods to the defendant as per the particulars of the goods set out in the bills. The first and the foremost feature is that at the rear of as many as 88 bills the names of various parties have been written. We have made a statement of the said 88 bills in a tabular form. The same is as under:-

	Name of Company	No.
1.	RADICURE PHARMA ,B-117 OKHLA INDUSTRIAL AREA,PHASE-I	3 BILLS
2	A.K. LABORATORY ,BHIWARI (RAJASTHAN)	2 BILLS
3	LARK LABORATORIES ,BHIWARI (RAJASTHAN)	9 BILLS
4	GURGAON	1 BILL

5	ARBO PHARMACY ,6/14 KIRTI NAGAR ,DELHI 15	6 BILLS
6	K.P. BOTLA ,14- SHIVAJI ROAD ,ZAKHIRA	1 BILL
8	KAMAL PHARMA ,ZAHIRA,NEW DELHI	13 BILLS
9	ABYSS PHARMA ,B-121 PHASE I, MAYAPURI INDUSTRIAL AREA	6 BILLS
10	BIOTECH DRUG ,A-212, 215 CHAWLA COMPLEX ,OKHLA INDUSTRIAL AREA	4 BILLS
11	SUPER MAR ,F 90/25 OKHLA INDUSTRIAL AREA,PHASE I	3 BILLS
12	KUMAN PHARMA ,GURGAON	5 BILLS
13	KUNDALI ,AMRO PHARMA,175-176 HSIDC	1 BILL
14	PET PHARMA	1 BILL
15	MR. SURESH ,0-64 ,LAJPAT NAGAR ,DELHI - 19	1 BILL
16	PECT INDIA , GURGAON INDUSTRIAL AREA	2 BILLS
17	SALEX PHARMA ,NARELA	8 BILLS
18	MAX PHARMACEUTICALS	2 BILLS
19	B-6 BADLI INDUSTRIAL AREA	1 BILL
20	KARNAL ASHOK GILAY, PRILAK BAZAR	1 BILL
21	COS MAS PHARMACEUTICALS	1 BILL

22	LEAGUE PHARMA	1 BILL
23	SHAKTI BOTTLE ,B4-556, TILAK BAZAR	7 BILLS
24	VARDMAN PACKAGING	1 BILL
27	YASHPAL & SONS, LUDHIANA	1 BILL
28	VARDHMAN PHARMA ,KARNAL	1 BILL
29	NATIONAL BOTTLE, TILAK BAZAR	1 BILL
30	ASHOKA BOTTLE , SHAHDRA	4BILLS
31	MAIDEN PHARMA, KUNDALI	1 BILL

12. The second feature of the bills is that the first bill commences at serial No.2854 and the number continues till serial No.3065. We clarify that between said serial nos. i.e. 2854 to 3065, 125 bills have been issued in the name of the defendant. The bills till serial No.2950 have two telephone numbers printed thereon being telephone number 3534267 and 3525263. On the bills from serial No.2951 onwards three telephone numbers being 23525263, 23545700 and 27785600 have been printed. The last three bills have serial numbers 1, 2 and 3 thereon with telephone numbers as per the bills from serial No.2951 onwards.

13. As held in the decision reported as AIR 1968 SC 1083 Om Prabha Vs. Abinash Chand it is now settled that a decision cannot be based on facts not pleaded and no evidence would be permissible to be led with regard to a fact which has not been pleaded in its pleading by a party.

14. There is considerable merit in the contention urged by learned counsel for the appellant that having embarked on the journey by pleading in the plaint that goods were supplied to the defendant the plaintiff could not prove that the goods were supplied to third parties, but at the asking of the defendant. That the goods were delivered to the defendant is a fact distinct from the fact that goods were delivered to a third party, but at the asking of the defendant. In this connection it assumes importance that there is no evidence acknowledging receipt of the bills by the defendant as also that there is no evidence to establish that the goods covered by the bills were at all delivered to the defendant or any third party to whom the defendant allegedly directed delivery to be made. The justification by the plaintiff of not having obtained any acknowledgment due to cordial relationship between the parties holds no water, when, as per the evidence of PW-2 most of the goods were delivered to third parties. Obviously as per the case attempted to be proved (without being pleaded) the plaintiff had no commercial dealings with said third parties and obviously

maintained no cordial relations with them. Thus, normal prudent business conduct of acknowledging delivery of goods ought to have been followed and there being no evidence of the same, the probability would be that no goods were supplied to any third party at the asking of the defendant. As per the testimony of PW-2 the services of a transporter was engaged to deliver the goods to third parties outside Delhi. The said transporter to whom freight must have been paid has not been examined. The evidence of the witness of the plaintiff i.e. PW-2 as also of the plaintiff becomes shaky when we browse through the 128 bills, 88 whereof have been noted in a tabular form hereinabove. The names of 31 parties are written at the rear of 128 bills. The witness of the plaintiff only spoke about 4 out of said 31 parties.

15. Mere raising of a bill and reflecting the same in a statement of account is not good evidence without establishing delivery of the goods under the bills. We may hasten to add that in the instant case there is no evidence to even establish that the bills were raised upon the defendant, in that, were ever delivered to the defendant. There is no contemporaneous letter proved on record in which the plaintiff made a grievance upon the defendant that a huge outstanding amount was due from the defendant to the plaintiff.

16. Pertaining to the fact that the defendant had issued certain cheques to the plaintiff and was facing proceedings under Section 138 of the NI Act 1881 we may note that there is no evidence as to what were the number of the said cheques nor is there any evidence of the value of the cheques. The only evidence is a statement of PW-1 that certain cheques were issued to him by the defendant and on being returned dishonoured he had initiated criminal proceedings against the defendant and the admission of the defendant of being so prosecuted. Unfortunately, this Court is unable to appreciate the dispute relatable to the cheques as neither party has cared to state about the value of the cheques or their number. But, there is some significant intrinsic evidence, unfortunately against the plaintiff, which shows that only one cheque which was bounced could form the subject matter of the dispute relatable to Ex.PW-1/1. We note that as and when a cheque, issued by the defendant to the plaintiff, was presented for encashment, the same has been credited in the account Ex.PW-1/1 and if a cheque was dishonoured the entry was reversed by debiting the account in the same amount. Each and every cheque, save and except one, which was dishonoured was represented for repayment and cleared evidenced by the fact that the second credit entry in Ex.PW-1/1 pertaining to the cheque has not resulted in a reversal of the entry. From the

statement of account we find that only one cheque bearing No.974238 dated 23.9.2004 credit entry whereof stands recorded on said date, on being returned on 25.9.2004, has remained outstanding with the entry being reversed in sum of Rs.35,000/- on 25.9.2004. It was for the plaintiff to have led cogent and clear evidence pertaining to the alleged dishonoured cheques. We repeat, save and except stating that some of the cheques issued by the defendant have bounced the plaintiff has not bothered to speak a little more.

17. It remains a mystery as to why have the names of 31 parties been written at the rear of the carbon copies of 88 bills out of 128 bills filed by the plaintiff before the learned Trial Judge.

18. The totality of the evidence leans against the plaintiff, but what is most fatal is the variance between what was pleaded in the plaint and what was sought to be proved. No doubt, the defendant did not produce his statement of account but still, the plaintiff has to stand on his own legs to prove his case.

19. It would not be out of place to record here that the statement of account, Ex.PW-1/1, commences with a debit opening balance of Rs.5,73,399/- as of 1.7.2004. The bills prior to 1.7.2004 forming part of Ex.PW-1/2, total 28 in number.

Thus, the statement of account does not even detail the said 28 bills. Indeed, the feature of the bills as noted hereinabove being that the bills till serial number 2950 have a 7 digit telephone number printed thereon makes them susceptible inasmuch as the said bills, being 59 in number, have ostensibly been issued in the year 2004. It is a matter of common knowledge that with effect from the year 2002 all telephone numbers in India were prefixed with the digit '2' and in Delhi all telephone numbers became 8 digit telephone numbers. The possible argument that bills are got printed in bulk and the existing telephone number as on date of the printing of the bills would be reflected in the bills and thus the date on which the bill is issued becomes irrelevant with relation to the telephone number printed thereon cannot even be urged by the plaintiff for the reason as noted above, there is continuity in the bill number as the immediate next bill after 2950 is bill number 2951 and so on till the number 3065. Evidenced by the fact that the last 3 bills recommence with the number 1 and bear further numbers 2 and 3 it is apparent that the plaintiff would get printed fresh serial numbers in one lot of the bills as and when proforma thereof was got printed. Thus bills from serial No.2900 till 3100 ought to have been printed together.

20. Ex.PW-1/7 is a writ of demand and not an assessment order, as was correctly urged by the learned counsel for the

appellant. It does not refer to any bill, much less the bills in question. It is relevant to note that the demand raised therein pertains to the assessment year 2004-05 i.e. the financial year 1.4.2003 – 31.3.2004. The plaintiff forgot that the bills on which he was relying are drawn on dates between 4.4.2004 till 2.5.2005. Obviously, the bills do not relate to the assessment year 2004-05. Further, the bills span not one but two financial years and hence would span not one but two assessment years. Thus, Ex.PW-1/7 is no evidence of goods being supplied by the defendant to the plaintiff as per the disputed bills.

21. An adverse presumption can be drawn against a party who does not produce a document in his possession. Thus, before a presumption can be drawn against a party called upon to produce a document, it has to be proved that the document production whereof was sought was in the possession of the party concerned. The defendant had denied that any bill was raised on him. Thus, without proving that the plaintiff had raised the bills on the defendant, in that, without establishing that physical custody of the bills was with the defendant, no adverse inference could be drawn against the defendant.

22. No doubt, not responding to a legal notice is a piece of evidence wherefrom an adverse inference can be drawn against the noticee. But, the said adverse inference is no more

than presumptive evidence which by its very nature is weak evidence. Where the totality of the evidence weighs in favour of the person issuing the notice, non response to a notice by the noticee can be put in the scales to reassure the Court that contemporaneously the noticee kept silent evidencing a kind of acquiescence. But, the quality of evidence led to prove the case positively and its probative value has always to be kept in mind and given primacy.

23. A plaintiff has to prove his case and stand on his own legs. No doubt, the defendant did not produce his books of account but that does not mean that the plaintiff must succeed on said account.

24. The evidence led by the plaintiff is shaky. The variance between what the plaintiff pleaded and attempted to prove is a serious infirmity in the case of the plaintiff. Unfortunately, the learned Trial Judge has eschewed reference to the quality of the evidence led; the variance between pleading and proof; as also has ignored certain essential features of the evidence to which we have referred to in our decision, thereby rendering the impugned judgment and decree liable to be reversed.

25. The appeal is allowed. Impugned judgment and decree dated 1.10.2007 is set aside. The suit filed by the

plaintiff is dismissed. We leave the parties to bear their own costs all throughout.

26. If any money has been deposited by the appellant pursuant to the order dated 9.1.2008 we direct the Registry to return the same to the appellant together with accrued interest if any.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

November 19, 2008
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