

i.7

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Order : 05.11.2008*

+ **RFA 185/2008**

RAJESH SAIGAL Appellant
Through: Mr. Samdarshi Sanjay, Advocate

versus

VIMAL MEHRA Respondent
Through: Ms. Jyoti Singh, Advocate with
Mr. Ankur Chhibber and Mr. Aditya
Chhibber, Advocates

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?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.(Oral)

1. Heard learned counsel for the parties.
2. The appellant who was the defendant has suffered a decree in sum of Rs.5,00,000/- together with interest @ 8% per annum from the date of filing of the suit till realization.
3. Respondent's suit has been decreed. Counter claim filed by the appellant has been dismissed.

4. The suit of the respondent sought recovery of Rs.5,00,000/- on the plea that the appellant approached the respondent stating that he had export orders but could not execute the same due to paucity of funds and told the respondent that if the respondent paid some money to him to manufacture the goods, the same could be exported through the firm of the respondent and that in this manner both parties would gain, for the reason, the respondent would not only make some profits on the export but even earn duty draw back under a duty draw back scheme of the Government. That accordingly on said assurance, the respondent advanced a sum of Rs.5,00,000/- to the appellant on 7.6.2004. It was stated in the plaint that the appellant did not manufacture the goods but stated that he had another export order for which he required Rs.2,00,000/-. It is pleaded that the respondent thought that if some more money could be given to the appellant he would execute both export orders and hence on 17.11.2004 gave another 2,00,000/- by means of cheque to the appellant. That the appellant supplied the goods pertaining to the second order and hence Rs.2,00,000/- got adjusted. Rs.4,00,000/- was advanced by means of two cheques each in sum of Rs.2,00,000/- on 23.11.2004 and 2.12.2004 which amount was stated to be returned. It was further pleaded that without executing the first order the appellant desired further money

and the respondent advanced more money hoping that with additional funds the appellant would be able to execute the first order and therefore the respondent advanced a further sum of Rs.3,50,000/- on 11.1.2005. Pleading that the export order was not executed the suit was filed, but for unexplainable reasons prayer made in the suit was to pass a decree in sum of Rs.5,00,000/-.

5. In the written statement the appellant did not dispute having received Rs.5,00,000/-, Rs.2,00,000/-, Rs.4,00,000/- (by means of two cheques each in sum of Rs.2,00,000/-) and Rs.3,50,000/- from the respondent. He also did not deny having supplied the goods pursuant to the cheque received on 17.11.2004. He also admitted having returned Rs.4,00,000/- received by means of two cheques on 23.11.2004 and 2.12.2004.

6. The defence taken was that the appellant had manufactured the requisite goods which were not lifted by the respondent. Thus, right of the respondent to sue for recovery was denied. For the stated loss caused to him on account of the respondent not lifting the consignment the counter claim was filed in sum of Rs.3,75,200/-.

7. Needless to state on the pleadings of the parties the material issue as far as the plaint was concerned was whether the plaintiff is entitled to the amount claimed. Pertaining to the

counter claim the only material issue was whether the appellant is entitled to the amount claimed in the counter claim.

8. Obviously, the claim and the counter claim had to be decided hand in hand.

9. We note that the appellant has not filed any appeal pertaining to the findings against him which has resulted in the dismissal of the counter claim. We note that reasons for decreeing the suit and dismissing the counter claim are same.

10. If that be so, on said ground alone the instant appeal would require to be dismissed as barred by res-judicata.

11. But we intend to deal with the merits of the matter as well.

12. From the defence raised by the appellant it is apparent that to non-suit the plaintiff and to succeed in the counter claim the defence had to be established i.e. that the appellant manufactured the good which had to be exported and that the respondent did not lift the consignment.

13. The appellant had led some evidence to establish having procured raw material. But what has been fatal to the case of the appellant is the fact, as held by the learned Trial Judge, that there is no evidence on record to show that the appellant ever intimated the respondent having fabricated the export consignment requiring the respondent to take possession thereof.

14. We have gone through the evidence recorded before the learned Trial Judge as certified copies thereof have been filed along with the appeal.

15. The only material on record is the testimony of the appellant wherein he stated as under:-

“17. I had got ready the entire consignment as per the instructions of the plaintiff. The plaintiff had also been informed accordingly to lift the consignment. However, the plaintiff did not come forward to lift the consignment.”

16. Suffice would it be to state that the learned Trial Judge has held that the oral statement by the appellant that he had got ready the entire consignment and had informed the respondent to lift the same is unsupported by any contemporaneous conduct. No document, no notice or a communication has been proved.

17. We concur with the reasoning of the learned Trial Judge. A bald statement by the appellant in the witness box that he had got ready the entire consignment and had informed the respondent to lift the same is neither here nor there. No particulars of the date, the more by which the communication was sent, the time and place thereof; none have been stated.

18. We note that the respondent denied having received any intimation from the appellant that the consignment was ready and hence should be lifted.

19. We find no infirmity with the view taken by the

learned Trial Judge.

20. We find no merits in the appeal.

21. The appeal is dismissed.

22. Cost shall follow in favour of the respondent and against the appellant.

23. Learned counsel for the respondent states that a sum of Rs.5,00,000/- has been deposited by the appellant when RFA No.108/2007 was disposed of on 22.9.2007 when a conditional leave to defend was granted to the appellant. Since the suit filed by the respondent has been decreed and the appeal has been dismissed,. we direct the Registry to pay over the said amount lying in deposit in RFA No.185/2008 with accrued interest thereon to the respondent by tendering the cheque drawn in favour of the respondent to the counsel on record for the respondent.

PRADEEP NANDRAJOG, J.

J.R.MIDHA, J.

NOVEMBER 05, 2008
mm