

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **RFA No. 13/2000 & CM No.58/2000(u/ O 41 Rule 23 and 27 CPC)**

Date of decision : 13.10.2009

IN THE MATTER OF :

M/S THIRANI CHEMICALS LTD.

..... Appellant

Through Mr.Sunil Goyal, Mr.D.P.Kaushik and
Ms.Kavitha K.T. Advocates

versus

M/S SHREE RAM PLAST & ANR.

..... Respondents

Through Nemo

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may be allowed to see the Judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

HIMA KOHLI, J. (ORAL)

1. By way of the present appeal, the appellant assails an ex-parte judgment dated 4.12.1999 whereunder a suit instituted by the appellant (plaintiff in the court below) for recovery of a sum of Rs.2,28,736/- against the respondents (defendants in the court below) was dismissed on the ground that the appellant/plaintiff had failed to lead any evidence in support of its case or to prove that the goods had been sold and supplied to the respondents/defendants.

2. In a nutshell, the facts of the case are that the appellant/plaintiff was engaged in the business of manufacture and trading of various grades of Calcium Carbonate. The respondent No 2., partner of the respondent No.1 firm approached the appellant/plaintiff for purchase of Calcium Carbonate, which as per the appellant/plaintiff, was duly supplied to them from time to time. It is the case of the appellant/plaintiff that an open, current, mutual and reciprocal account was maintained by the respondents/defendants with the appellant/plaintiff and that as per the books of account maintained by the latter as on 26.4.1995, a sum of Rs. 1,62,760/- was due and payable by the respondents to the appellant. It was averred in the plaint that despite repeated reminders, the respondents/defendants failed to clear the outstanding dues and further, a cheque dated 9.9.1993, for a sum of Rs.30,000/- issued by the respondents/defendants in favour of the appellant/plaintiff when presented for realization, got dishonoured. On 26.4.1995, the appellant/plaintiff issued a legal notice to the respondents/defendants. It is the case of the appellant/plaintiff that pursuant thereto, the respondents/defendants agreed to pay a sum of Rs.10,000/- per month to liquidate the outstanding dues and out of Rs.1,62,760/-, the appellant/plaintiff even received Rs.45,000/- from the respondents/defendants thereafter from time to time. As the respondents failed to clear the entire outstanding dues, the appellant sent yet another legal notice dated 19.11.1998, calling the respondents/defendants to clear the balance outstanding amount of Rs.1,25,960/-. The respondents however failed to clear the outstanding amount. As a result, the appellant was compelled to institute the aforesaid

suit on 24.3.1999, for recovery of the outstanding amount, along with interest claimed @ 21% p.a.

3. Summons in the suit were issued by the Trial Court to the respondents/defendants, who did not appear despite service and were proceeded against ex-parte on 11.5.1999 and 29.10.1999. Thereafter, the case was posted for recording of the appellant/plaintiff's ex-parte evidence. The sole witness produced by the appellant/plaintiff was Mr. Anil Kumar Aggarwal, the authorized representative of the appellant/plaintiff (PW-1). The Trial Court examined the deposition of the aforesaid witness and the documents placed on the record and arrived at the conclusion that there was nothing placed on record by the appellant/plaintiff to show that the goods mentioned by it, were actually delivered to the respondents/defendants. Hence it was concluded that the sale and delivery of the goods to the respondents/defendants having not been proved on record and the statement of accounts of the appellant/plaintiff not being sufficient, the suit could not be decreed against the respondents/defendants. Aggrieved by the aforesaid judgment dated 04.12.1999, the appellant has preferred the present appeal. The appeal was admitted vide order dated 14.3.2000 and notices were issued to the respondents. As per the order 18.7.2000, though service was complete, none appeared for the respondents. Same is the position even today.

4. Counsel for the appellant submits that along with the present appeal, an application, registered as CM No.58/2000 has been filed under

Order 41 Rule 23 & 27 of the Code of Civil Procedure, praying *inter alia* for remanding the matter to the Trial Court for permission to lead additional evidence to establish the fact that the goods in question were actually sold and delivered to the respondents/defendants. In this regard, he draws the attention of this Court to certain original documents, filed in the Trial Court under an index dated 24.3.1999, which include certain invoices and delivery challans for the period 1993-94. It is stated by the counsel for the appellant/plaintiff that though the aforesaid original documents were duly filed along with the list of documents, the same were not got exhibited inadvertently and hence were not taken note of by the learned ADJ while passing the impugned judgment. This Court has examined the Trial Court records. Perusal of the documents filed by the appellant in the suit proceedings bears out the submission made on behalf of the appellant that certain documents including invoices and delivery challans bearing the truck numbers filed in original under index dated 24.03.1999, were not adverted to by PW-1, in the course of his deposition, as recorded on 05.11.1999 and hence, escaped being exhibited.

5. Having regard to the facts and circumstances of the present case and keeping in view the fact that the relevant original documents are already on the record of the Trial Court, though the same were not pointed out by the witness of the appellant/plaintiff in the course of his deposition, it is deemed appropriate to allow the application of the appellant/plaintiff for permission to remand the matter to the Trial Court to enable it to lead additional evidence on the basis of the pleadings and documents already on

the record.

6. The appeal is accordingly allowed. The impugned judgment dated 4.12.1999 is set aside. The appellant is directed to appear before the District Judge on 12.11.2009 for fixing an actual date of hearing before the concerned court. The Registry is directed to remit the Trial Court records to the District Court forthwith, for further proceedings.

OCTOBER 13, 2009
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(HIMA KOHLI)
JUDGE