

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

+ **CS(OS) No.13/2009**

% **Date of Decision: 02.02.2009**

M/s.J.K.Lakshmi Cement Ltd Plaintiff

Through Mr.Naresh K.Daksh, Advocate.

Versus

M/s.Namit Plastic (P) Ltd & Ors Defendants

Through Nemo.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

ANIL KUMAR, J.

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1. This is a suit for recovery of Rs.31,42,825/- as due on 30th November, 2002 plus interest at 21% per annum filed by the plaintiff.

2. The plaintiff has contended that the plaintiff company had sold and delivered goods to M/s. Namit Plastics Pvt. Ltd, defendant No.1 through defendants No.2 & 3.

3. It is asserted that from time to time the plaintiff company as per the requirements of defendants No.2 & 3 sold and supplied to them

goods in the name of M/s Namit Plastics Pvt Ltd, defendant No.1 and raised the bills.

4. The plaintiff is seeking recovery of the price of goods sold by invoices as detailed in para 11 of the plaint which are from 15th December, 2001 till 24th September, 2002. According to the plaintiff he had been maintaining running accounts and as on 31st July, 2002 the balance in the name of the defendant was Rs.32,94,502/- whereas the balance in the name of defendant as per the account books of defendants was Rs.31,40,321/-. Therefore, the defendant had confirmed a balance of Rs.31,40,320/- as on 31st July, 2002.

5. According to the plaintiff an amount of Rs.31,42,825/- was due on 24th September, 2002 which is still due and consequently the suit has been filed on 19th November, 2008.

6. On filing the plaint certain objections were raised by the registry on 19th November, 2008 and the plaint was returned. However, the suit was refilled on 3rd January, 2009. On account of objection it was again returned and again it was refilled on 6th January, 2009 and came up before the Court on 7th January, 2009.

7. The suit has been filed along with an application under Section 5 of the Limitation Act. In the application under Section 5 of the Limitation Act, the plaintiff has sought condonation of delay in filing the suit. It is contended that the suit is filed as per order dated 3th December, 2007 in Company Petition No.389/2004. The plaintiff applicant has asserted that in case the delay in filing the suit is not condoned great harm shall be caused. It is further contended that the suit was handed over to the clerk for signature of the plaintiff and the draft was misplaced by the clerk of the counsel and only after the status was enquired by the plaintiff it was filed. The application is supported by the affidavit of the clerk.

8. According to the plaintiff the cause of action last arose on 30th November, 2002. Though the plaintiff has alleged in the other paras that an amount of Rs.31,42,825/- was due on 24th September, 2002 then how the cause of action arose on 30th November, 2002 has not been explained.

9. Order VII rule 6 of the Code of Civil Procedure contemplates that where the suit is instituted after the period of limitation prescribed by law, the plaint shall show the grounds upon which exemption from such law is claimed. No such averments have been made in the plaint.

10. The plaintiff is claiming price of goods sold and delivered to the defendants. Under Article 14 of the Limitation Act, 1963 for the price of goods sold and delivered where no fixed period of credit is agreed upon, the period of limitation is three years from the date of delivery of goods. Plaintiff has not averred any fixed period of credit. Though the plaintiff has alleged that he had a current account with the defendants, however, limitation for filing suit is not be computed under Article 1 of the Limitation Act, 1963 from the close of the year in which last item was entered in the account because a mutual open and current account contemplates reciprocal demands between the parties. There has not been any allegation of reciprocal demands by the defendants in the plaint, therefore, the limitation cannot be computed under Article 1 of the Act. The limitation has to be computed on the basis of Article 14 of the Act and the period of limitation starts from the date of delivery of goods. The plaintiff has not alleged any date of delivery but has given the date of invoices and in the circumstances, the date of delivery of goods will be date of invoices especially since no allegation has been made that the goods used to be supplied much after raising the invoices. So for purposes of limitation of the goods sold and delivered, the limitation will be three years from the date of invoice in the present case.

11. The plaintiff has asserted that the reminders dated 8th August, 2002, 7th November, 2002 and 25th November, 2002 were sent, however, that will not extend the limitation for filing the suit on the basis of the allegations made in the plaint in accordance with the provisions of Limitation Act, 1963. The period of limitation would have been extended only in case of acknowledgement in writing of the amount due to the plaintiff by the defendants or on account of part payment of the amount due from the defendants to the plaintiff. In the circumstances, the period of limitation shall be computed from the date of invoices by which the goods were sold and delivered by the plaintiff to the defendants. The last invoice for the goods sold and delivered by the plaintiff to the defendants is of 24th September, 2002. Therefore the suit for recovery of price of goods sold and delivered by the plaintiff to the defendants should have been filed by 24th September, 2005.

12. The application filed by the plaintiff is under Section 5 of the Limitation Act. However, the learned counsel for the plaintiff contends that the application be treated as an application under Section 14 of the Limitation Act for claiming exclusion of time taken in continuing other legal proceedings bonafide in a Court not having jurisdiction. It is contended that a legal notice dated 1st November, 2002 was issued under Section 433 of the Companies Act and thereafter winding up

petition was initiated against the defendant which was also dismissed as withdrawn on 3th December, 2007.

13. The application and the plaint do not disclose the date on which the company petition under Section 433/434 of the Companies Act was filed. The company petition which was filed has been numbered as CP No. 389/2004 and this was dismissed as withdrawn on 3rd December, 2007. The notice under section 433 and 434 of the Companies Act was given on 1st November, 2004.

14. The petitioner is not entitled to seek exclusion of time as no details have been given in the application nor is the application supported by an affidavit of any authorized person on behalf of the plaintiff. Even if the time taken in filing the petition and the notice under Section 433/434 is taken the suit has not been filed within three years.

15. From 24th September, 2002 till 1st November, 2004 a period of two years, one month and seven days had already expired when the notice was given under Section 433 and 434 of the Companies Act. If the notice was given on 1st November, 2004 and the petition was dismissed as withdrawn on 3rd December, 2007, the plaintiff could file the suit within 10 months and 23 days from the date of dismissal of the

Company petition, the remaining period of limitation. The suit has been filed on 19th November, 2008 which is after a period of 11 months and 17 days. Consequently, even after excluding the period spent in prosecuting the company petition for winding up of the defendant no.1 filed by the plaintiff under Section 433/434 of the Limitation Act, 1963, the suit is not within time.

16. The learned counsel for the plaintiff has relied on Maharashtra State Farming Corporation Ltd v. Belapur Sugar and Allied Industries Ltd, 2004(3) Mah.L.J 414; Deshrath Singh v. Managing Director, M.P.State Co-operative Oil Seed Growers' Federation Ltd 2003(3) M.P.L.J 390; Union of India & Ors v. West Coast Paper Mills Ltd & Anr, AIR 2004 SC 3079; Rameshwarlal v. Municipal Council, Tonk & Ors, (1996) 6 SCC 100 and Chalisgaon Shri Laxmi Narayan Mills Co.Ltd v. Amritlal Kalidas Kanji, AIR 1964 Bombay 76 to seek exclusion of time spent in pursuing the company petition filed by the plaintiff under section 433 and 434 of the Companies Act.

17. The Supreme Court in Union of India and Ors v. West Coast Paper Mills Ltd (Supra) had held that if the period is spent bonafide in a writ petition seeking direction to refund the excess freight and if it could not be said to be actuated by malafide in filing the writ petition, then the time spent in filing the writ petition could be excluded as Section 14

is not limited only to the cases of defect of jurisdiction. It was held that Section 14 of the Limitation Act is wide in its application in as much as it is not confined in its applicability only to the cases of defect of jurisdiction but it is also applicable to cases where prior proceedings have failed on account of other cases of like nature.

18. The Supreme Court in *Rameshwarlal (Supra)* had allowed exclusion of time under Section 14 of the Limitation Act, 1963 spent by an employee of Municipal Corporation in a writ petition under Article 226 of the Constitution of India. In *Maharashtra State Farm Corporation Ltd (Supra)* a Division Bench of Bombay High Court had held that the right of equitable set off is recognized only if the claim arises out of the same transaction which is the foundation of plaintiff's claim and if the claim has not become time barred. The Division Bench had also held that in a winding up petition in respect of part of the claim if genuine disputes had arisen and the petitioner had pursued the winding up petition diligently and bonafidely then the time taken in winding up proceedings is to be excluded while directing the petitioner to pursue civil remedy available in law.

19. However, in the facts and circumstances, even if the time taken by the plaintiff for initiating winding up for the alleged non payment of the amounts due to the plaintiff on account of price of goods, is taken

into consideration, still the claim of the plaintiff for recovery of price of goods sold and delivered in the civil suit is barred by time. The application of the plaintiff is also under Section 5 of the Limitation Act and is not supported by the affidavit of any authorized person on behalf of plaintiff as it is supported by the affidavit of the clerk of the counsel. The plaintiff has also failed to disclose the ground on which extension of limitation is sought by the plaintiff in compliance with Order VII Rule 6 of the Code of Civil Procedure. In the circumstances, taking it from any legal point of view the suit of the plaintiff is barred by time.

20. Order VII Rule 11 of the Code of Civil Procedure contemplates that the plaint can be rejected where the suit appears from the statement in the plaint to be barred by any law. The suit of the plaintiff for recovery of price of goods sold and delivered on 24th September, 2002 is, therefore, barred by time and the plaint is liable to be rejected.

21. Therefore, in the totality of facts and circumstances considering the averment made in the plaint and the copies of the documents filed by the plaintiff and considering the application of the plaintiff for exclusion of time in taking the proceedings under Section 433/434 of the Companies Act for winding up of the defendant company, the plaint

for recovery of price of goods sold upto 24th September, 2002 is barred by time and, therefore, the plaint of the plaintiff is rejected.

February 2nd , 2009
Dev/k

ANIL KUMAR J.