

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.11.2010

CS(OS) No. 132/1998

S.V. ELECTRICALS LTD

..... PLAINTIFF

Vs

SYLVANIA & LAXMAN LTD.

..... DEFENDANT

Advocates who appeared in this case:

For the Plaintiff : Mr. P.S. Bindra & Ms Shweta Priyadarshini, Advocates
For the Defendant: Mr Harish Malhotra, Sr. Advocate with Mr Rajender Aggarwal, Advocate

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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

RAJIV SHAKDHER, J

1. The captioned suit was originally filed under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') for recovery of sum of Rs 48,89,814/- alongwith interest at the rate of 21% per annum from the date of filing of the suit till its realization. This apart a prayer for cost is also made in the suit. It is not in dispute that this court by order dated 26.11.1999 came to the conclusion that the instant suit did not fall within the "categories and classes" contemplated by order XXXVII and, therefore, was not maintainable under the said provision. Accordingly, the court proceeded to grant unconditional leave to defend to the defendant herein.

2. In the plaint the case set up is as follows: It is averred that the plaintiff carried out the business of manufacturing and marketing of brass nickel plated and aluminum caps in different grades and filament from pure tungsten for use in fluorescent tubes and bulbs. It is averred that the defendant approached the plaintiff for supply of goods manufactured

by them which were used, in turn, by the defendant for manufacture of fluorescent tubes and bulbs. It is also the case of the plaintiff that the agreement obtaining between the plaintiff and the defendant was an oral agreement and in pursuance of which the plaintiff supplied goods to the defendant between 1993-94. It is further averred that against supplies made the plaintiff would issue challan/vouchers in the prescribed format against orders raised verbally and/or in writing or telephonically. It is the plaintiff's case that one of the conditions, which obtained in respect of the contract, was that the defendant was required to make payment within 45 days of the supply. In other words the period of credit granted was 45 days failing which the defendant was required to pay interest at the rate of 21% per annum.

3. The plaintiff has specifically averred in respect of its claim made in the suit that supplies worth Rs 25,21,285/- were made from one of its divisions which is categorized as Unit-I, while supplies worth Rs. 7,94,985/- were made from another division which is categorized as Unit-II. The claim made in the suit in the sum of Rs 48,89,814/- comprises of the both: the supplies referred to above as also interest on the said amount at the rate of 21% per annum from the date of bills raised till 31.10.1997. According to the plaintiff, the interest on 25,21,285/- for the period referred to above would add up to Rs 11,79,168/-, while interest on Rs 7,94,985/- would add up to Rs 3,94,376/-. Importantly, in the plaint, there is reference to the bills under which supplies have been made by each of the two units referred to above. Unit-I evidently has supplied goods worth Rs 25,21,285/-, as noticed above under ten (10) bills, spanning over a period 08.03.1995 to 09.08.1995. Similarly, supplies from unit no. 2, it is averred, were made under 21 bills; the period in respect of which spans from 23.03.1994 to 24.06.1995. It is the plaintiff's case, since the defendant failed to pay the said amount, a legal notice by way of registered post was issued on 26.10.1996. Since the defendant failed to make the payment, the instant suit was filed on 16.01.1998.

4. On the suit being moved in court, this court by order dated 22.01.1998 issued summons to the defendant for 20.04.1998. The summon was, at the relevant point in CS(OS) 132/1998

time, issued in the form prescribed under Order XXXVII of the CPC. On return of summon the defendant filed its application for leave to defend, and, as noticed above, it was granted unconditional leave vide order of this court dated 26.11.1999.

5. Consequently, a written statement was filed by the defendant. The defendant in the written statement averred that it was the plaintiff who had approached the defendant at Delhi for supplying raw materials which evidently the defendant used in manufacturing its products. The defendant denied that there was any such agreement which provided that if the payments were not made within the period of 45 days, the interest would run. The defendant categorically denied that the plaintiff had supplied goods worth Rs 25,21,285/- from Unit-I and/or goods worth Rs 7,94,985/- from Unit-II. Thus, in other words, the defence of the defendant is that since the goods in issue, contrary to what is contended by the plaintiff, were not supplied, no debt was owed by the defendant.

5.1 There is also an averment in the plaint with respect to payments made by the defendant, in respect of other supplies made by the plaintiff which are not the subject matter of the recovery in the instant suit. I need not therefore elaborate on the same, since, even as per the plaintiff, the claim in the instant suit is not in relation to those goods. The plaintiff seeks recovery of monies only in respect of goods supplied under the bills alluded to during the periods referred to in paragraph 3 hereinabove by me.

5.2 The defendant's stand is thus that both the instant suit, as well as the winding up petition being Co. P. No. 335/1996, were filed to coerce the defendant into paying the amounts which were never due. I must point out at this stage that, in respect of a specific averment in the plaint to the effect that the amount claimed was payable, there is a reference to the C-Forms issued by the defendant, which, according to the plaintiff, acknowledged the receipt of goods supplied by them to the defendant. In respect of this specific plea, the defendant took the stand that the C-forms had been manipulated by the plaintiff in collusion with its employees, who were on strike and/or in litigation with the defendant. The defendant elaborated upon this defence by stating in its written statement that since the goods in question had to be delivered through the bank, only upon the

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hundi being accepted, the manipulation in the same C-form was quite evident on a bare perusal. In other words, according to the defendant, both the accepted hundis and the C-Forms had to be handed over to the bank together.

6. The plaintiff in the replication has rebutted the stand of the defendant and reiterated its stand in the plaint.

7. Based on the pleadings by order dated 01.02.2001 following issues were framed:

- (i) *Whether the suit has been filed by a duly authorized person? OPP*
- (ii) *Whether the plaintiff has supplied the material to the defendant vide bills mentioned in part 6 of the plaint and whether the goods under bills were duly received by the defendant? OPP*
- (iii) *Whether the defendant has made payments towards all the bills raised by the plaintiff? OPD*
- (iv) *Whether any defective goods were supplied by the plaintiff to the defendant and the said defective goods were returned by the defendant to the plaintiff? IF so, its effect? OPD.*
- (v) *Whether the C-Forms covering the bills as mentioned in para 6 of the plaint were not issued by the defendant to the plaintiff? OPD*
- (vi) *Whether the plaintiff is entitled to the suit amount? OPP*
- (vii) *Whether the defendants are liable to pay the interest to the plaintiff on the outstanding bills? If so, at what rate? OPP*
- (viii) *Relief.*

8. In support of its case plaintiff examined two witnesses, while the defendant examined only one witness. Let me briefly allude to the evidence led by the parties.

8.1 Mr Girish Nair (PW1) in his examination-in-chief replicated the stand taken in the plaint. The said witness proved the set of documents for each of the supplies alleged to have been made to the defendant, which comprises of a covering letter addressed to its banker State Bank of Indore, Amana Branch, Dewas, Madhya Pradesh (hereinafter referred to as 'SBI'). The said set of documents is collectively marked as Exhibit P/1. PW1 further asserted that the goods had been supplied to the defendant by transporter M/s Jet Roadlines Corporation (hereinafter referred to as 'Jet Roadlines'). In this regard PW1 deposed that in respect of the goods dispatched to the defendant through Jet Roadlines, the freight invoices raised by the said Jet Roadlines, was paid by the

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defendant. It was further stated by PW1 that payments to Jet Roadlines was evidenced from the statement of account of the said transporter, i.e., Jet Roadlines. The copies of the receipts issued by Jet Roadlines in support of the statement of account were filed with the affidavit of evidence of PW1.

8.2 In his cross-examination, PW1 alluded to the fact that he was authorized to file the instant suit, and that a certified copy of the resolution in that regard had been filed by him at the time of instituting the suit. The original in that regard was also brought to court by him. As regards the supplies made to the defendant, PW1 adverted to the effect that supplies were made to the defendant based on “verbal orders”. PW1, however, refuted the fact that the defendant issued material receipt-note against goods supplied. He further adverted to the effect that hundis, which were issued by the plaintiff, were accepted by the defendant “on their own will”. He, however, accepted that the hundies, with the defendant’s acceptance, had not been filed on record. The suggestion made to PW1 that C-Forms had not been issued by the defendant was refuted by PW1. PW1 further refuted the suggestion that C-Forms had been obtained by the plaintiff by manipulating the employees of the defendant, who were not authorized to issue C-Forms. PW1 accepted the fact that the defendant had not issued any cheques to the plaintiff after 1995. PW1, however, asserted that the defendant was in existence. The PW1 asserted that the understanding with the defendant was that the payments will be made within a period of 45 days from the date of supply. PW1 further accepted that even though the plaintiff did prepare balance sheet and list of debtors the same had not been filed on record. It was accepted that the said documents, i.e., the balance sheet and the list of debtors had been filed by plaintiff with the Income Tax Department. The suggestion, that, in the said records, filed with the Income Tax Department by the plaintiff, the defendant had not been shown as the debtor, was refuted by the PW1. PW1 accepted the fact that plaintiff was amenable to a special audit under the Income Tax Act as its turnover was more than Rs 40 lacs. It was also accepted that even though the defendant had not made payments within the stipulated credit period of 45 days, the plaintiff

continued to supply goods to the defendant. The PW1 also accepted the fact that the plaintiff had not filed its statement of account, pertaining to the defendant, on record. The PW1 accepted the fact that the defendant's business had not been operational since 1996. He, however, denied any knowledge of the defendant having disputes with its labourers.

9. Mr Pradeep Agarwal, PW2, in his examination-in-chief, which was carried out orally, deposed that he was a partner in Jet Roadlines. He further deposed that the goods procured from the plaintiff were delivered to the defendant against a copy of the goods received (GR), based on which payments were received by way of cheques from Jet Roadlines.

9.1 During the course of examination, PW2 produced office copies of the consignment note/GR copies dated 08.03.1995, 31.03.1995, bearing no. 2477 again 31.03.1995 bearing no. 2478, 09.08.1995 bearing no. 2710, 09.07.1991 bearing no. 2711, 09.08.1991 bearing no. 2713, 19.06.1995, 04.07.1995 bearing no. 2617 and 04.07.1997 bearing no. 2618. These were marked as Exhibits PW2/1 to PW2/10. PW2 also adverted to the effect that the cheques received during the relevant period were encashed by Jet Roadlines, as reflected in its: bank account statement Ex. PW2/11; the receipts issued in that regard to the defendant dated 07.07.1995 (Ex. PW2/12); receipt dated 26.09.1995 (Ex. PW2/13); carbon copy of receipt (Ex. PW2/14) and photocopy of the receipt dated 29.05.1995 (Ex. PW2/15). PW2 deposed that an identical process was followed in delivery of every such consignment; and similar documents were generated between Jet Roadlines and the defendant. In his cross-examination PW2 accepted the fact that cheques were issued to Jet Roadlines against material received. PW2 volunteered that cheques received by Jet Roadlines were only for cartage, and that no amounts were received in respect of the goods. PW2 went on to say that since the amount due to Jet Roadlines was paid by the defendant there was no outstanding liability of the defendant qua Jet Roadlines.

10. As indicated above, defendant examined only one witness, i.e., Mr Sunder Lal (DW1), their Manager (Administration). DW1 in his examination-in-chief (which was carried out by filing affidavit of evidence) reiterated the stand taken in the written statement. More specifically the DW1 adverted to the effect that the plaintiff had instituted a company petition, during the pendency of which, the plaintiff was paid a sum of Rs 2.80 lacs without prejudice to its rights and contention. The details of payment were also alluded to in the said affidavit of the DW1. The DW1 specifically denied that the goods, in respect of which claim had been lodged by the plaintiff, had been supplied to it. The DW1 also alluded to the fact that since the defendant's worker had struck work, the defendant was unable to take delivery of the goods; a fact which was in the knowledge of the plaintiff; and which is why, the title documents were neither accepted nor were the goods in issue received by the defendant.

10.1 The DW1 also stated that since the premises of the defendant was sealed, it resulted in a situation that even the directors of the defendant were unable to enter the premises as, their ingress was impeded by the workers, who were instigated by various suppliers of the defendant.

10.2 In so far as the C-Forms were concerned, DW1 stated that they were got issued by the plaintiff by manipulating the staff of the defendant, who had struck work. Since the goods had to be delivered only on acceptance of hundis by the defendant, the goods were returned and hence, the claim of the plaintiff for recovery would not lie. The DW1, however, accepted the fact that apart from the goods in issue in the present suit, some goods had been supplied between May, 1995 to September, 1995 worth Rs 8,82,296/-, in respect of which payments had been made by the defendant. As regards the suggestion made to DW1 as to whether the goods have been supplied against invoice nos. 47, 70, 71, 59, 60, 79, 80, 81 and 82, the witness refuted the suggestion that goods had been supplied by the plaintiff through Jet Roadlines. In response to a question with regard to alleged payments received in respect of delivery of consignments by Jet Roadlines, DW1 deposed as follows: *"I cannot admit or deny whether defendant had made the payment to*

*the transporter specially M/s Jet Roadline Corporation at the time of taking the delivery of consignment". To a specific question whether payments have been made to Jet Roadlines at the time of taking delivery of the consignment the DW1 deposed as follows: "It is correct that the defendant had issued cheques with the documents mark Ex. 1 to M/s Jet Road Line Corporation while taking the delivery of consignment. The cheques number are now encircled at point A". The DW1, however, stood firm in his cross-examination as regards the stand taken in the examination-in-chief that the C-Forms have been issued by the employees of the defendant, who had struck work. The DW1 accepted the fact that no action had been taken against the employees who had issued the C-Forms, though he denied the suggestion that C-Forms were issued after supplies of goods had been received by the defendant. The DW1 deposed that he became aware of the issuance of C-Forms only after the instant suit was filed. **The DW1 also denied the suggestion that the plaintiff had supplied filaments (i.e., goods in issue) to the defendant vide invoice nos. 205, 100, 150, 36, 1, 5, 14, 16, 26, 27, 38, 50, 62, 63, 64, 65, 68, 69, 70, 72 and 78.** Suggestion to the effect that filaments were sent through courier against the aforesaid invoices was also denied.*

11. In the background of the pleadings filed by parties and the evidence placed on record; submissions on behalf of the parties have been made by Mr Bindra and Mr Malhotra. Mr Bindra appeared for the plaintiff and Mr Malhotra, appeared for the defendant. The brief submission of Mr Bindra is that the defendant has been supplied with the goods under 31 bills referred to in the plaint. On account of goods delivered by the plaintiff (the details with respect to which have been culled out in paragraph 6 of the plaint) money is owed by the defendant to the plaintiff. Since the defendant refused to make the payment a company petition no. 335/1996, to which reference is made above, was filed in this court. During the pendency of the said company petition, the plaintiff has received a sum of Rs 2.80 lacs. Mr Bindra further submitted that the fact that goods were supplied to the defendant is proved by virtue of the fact that the transportation charges in connection with delivery of goods against lorry receipts vis-à-vis all

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consignments sent, had been admittedly paid by the defendant. In this regard, Mr Bindra submitted that the payment by the defendant of the transportation charges to Jet Roadlines is not disputed. As noticed above, reliance was placed on the testimony of DW1 with regard to this aspect of the matter. Mr Bindra submitted, therefore, that the plaintiff's claim, as raised in the suit, ought to be decreed. During the course of the submissions Mr Bindra, however, did not dispute the fact that they had neither filed the statement of accounts of the defendant, appearing in its books, nor had they filed their balance sheet for the relevant period or the list of sundry debtors as appearing in their books. It was also not disputed by Mr Bindra that the documents of title with respect to the goods in issue were routed through their bankers, i.e., SBI, which included hundis equivalent to the value of the goods. It was not disputed by Mr Bindra that these hundis were not accepted. Mr Bindra, however, in order to support his submissions that goods had been delivered to the defendant, laid stress on the fact that the same stood established by virtue of the fact that C-Forms in respect of the supplies made had been issued by the defendant.

12. Mr Malhotra, learned senior counsel, who appeared for the defendant, refuted the claim of the plaintiff. He submitted that the onus of proof with respect to the alleged supplies of goods in issue was on the plaintiff. He submitted that the plaintiff has miserably failed to discharge its onus. In this regard he drew my attention to the set of documents filed by the plaintiff in respect of each of the consignments allegedly said to have been delivered to the defendant. In this regard Mr Malhotra drew my attention to the covering letters issued by the plaintiff to its banker, SBI dated 08.03.1995, 31.03.1995, 17.06.1995, 04.07.1995 and 04.07.1995. It was contended that a perusal of the aforementioned covering letters would show that the documents of title included the following: (i) an Invoice; (ii) a Hundi; and (iii) a Lorry receipt. Mr Malhotra submitted that each of the covering letters carried the following instructions: *“Note: in case party does not retire the documents on due date, please instruct to your Connaught Circus Branch, N. Delhi to hold the documents for further advice from*

us”. Based on the above, Mr Malhotra argued that it was quite clear that the goods could not have been released to the defendant unless hundies were accepted. As regards C-Forms Mr Malhotra submitted that the same were manipulated. He drew my attention to the fact that the stamped date on the C-forms in issue, i.e., exhibits P5(1), P5(2) and P5(3), would show that the employees had ante-dated the C-Forms. This point he drew home by adverting to the fact that while on Ex. P5(1) the stamped date of the department was 27.08.1997 at the foot of the C-Form on behalf of the defendant, where signatures were appended, the date affixed was 15.12.1995. Similarly, for Ex. P5(2) the stamped date was 18.09.1997, while the purported date of issuance by the defendant was 28.05.1996. The last C-Form Ex. P5(3) filed bore a stamped date of 18.09.1997, whilst the date on which it was allegedly issued by the defendant was 28.05.1996. According to Mr Malhotra the manipulation was evident on the face of the documents, i.e., the C-Forms.

13. I have heard the counsels for the parties and perused the pleadings as well as the evidence on record. What emerges upon examination of evidence on record is that the plaintiff admittedly has not placed on record any evidence which is decidedly in its possession in the form of its books of accounts, balance sheet, vouchers etc. Therefore, whether any amounts are due and payable by the defendant to the plaintiff in the plaintiff's books of accounts remains a question-mark. These documents are admittedly in possession of the plaintiff, and as a matter of fact, these documents have been filed by the plaintiff with the Income Tax Department despite which the plaintiff has chosen not to place the said evidence on record; as a result an adverse inference has to be drawn against the plaintiff. The plaintiff, however, has pivoted its claim only on the fact that it had made supplies. The defendant, on the other hand, has refuted that it had received goods in issue which are referred to in paragraph 6 of the plaint. In order to establish that the goods had been supplied, the plaintiff has based its entire case on the monies paid by the defendant towards transportation against lorry receipts generated qua consignment of goods in issue. In the testimony of DW1, the relevant portion of which is extracted

hereinabove, it appears that payments have been made by the defendant to Jet Roadlines. The DW1, however, categorically denies the receipt of goods from the plaintiff. DW1 has also asserted that the C-Forms, which were generated, were issued by disgruntled employees of the defendant. In so far as the C-Forms are concerned, as submitted by Mr Malhotra, I am in agreement with him that the C-forms on their face appear to be ante-dated. While the date of issuance of the C-Forms by the Sales Tax Department is 27.08.1997 for Ex. PW5(1), and 18.09.1997 for Ex. P5(2) and Ex. P5(3), the first C-Form has been shown to have been issued on 15.12.1995, while the other two have been apparently issued on 28.05.1996. These C-forms are quite clearly ante-dated. Therefore, an attempt by the plaintiff to establish delivery of goods in issue, based on the C-Forms, is clearly untenable.

14. PW1 in his testimony has accepted the fact that the operations of the defendant remained closed during 1996-97. DW1, on the other hand, has adverted to the effect that since they were having labour problems and the factory premises were sealed the directors of the defendant had difficulty in gaining access to the factory premises. Taking into account the totality of circumstances, the mere fact that there are cheques issued for transportation, in my view, would not relieve the plaintiff of its burden to establish delivery of goods especially in the circumstances that the documents of title clearly indicated that the defendant could have obtained possession and title to the goods in issue only on acceptance of hundies. This fact is not refuted by the plaintiff. Furthermore, as noticed above, curiously the plaintiff has not filed the documents clearly in its possession such as the books of accounts, the balance sheet, vouchers etc. In these circumstances, I am of the opinion that the plaintiff has not been able to discharge its onus completely on this aspect of the matter. Therefore, the only conclusion which I can arrive at, is that, the goods in issue were not supplied to the defendant by the plaintiff.

15. In these circumstances, my answers (not necessarily in seriatim) to the issues raised in the suit are as follows:

Issue No. 2:

As noticed above, since the plaintiff has not been able to discharge its onus, the said issue is decided against the plaintiff and in favour of the defendant.

Issue No. 3:

In view of my answer to issue no. 2, there is no question, of the defendant making any payment with regard to the bills in issue, as the plaintiff has not been able to establish that the goods in issue had been supplied to the defendant.

Issue No. 4:

As regards this issue, this is not an issue which arises from the pleadings as conceded by the counsel for the parties.

Issue No. 5:

The said issue is decided in favour of the defendant and against the plaintiff. As noticed hereinabove, the C-Forms in issue were clearly ante-dated.

Issue No. 6:

In view of my findings in respect of the issues above, the plaintiff is not entitled to the amount claimed in the suit. The said issue is decided against the plaintiff.

Issue No. 7:

This issue would suffer the same fate. The plaintiff is not entitled to interest as it is not able to establish its claim. Consequently, the said issue is also decided against the plaintiff.

Issue No. 1:

In so far as this issue is concerned, the learned counsel for the defendant conceded that he does not wish to contest the said issue. The issue is accordingly decided in favour of the plaintiff. The suit has been instituted by a duly authorized person.

16. In aforesaid circumstances, the suit is dismissed with cost of Rs 75,000/-.

RAJIV SHAKDHER, J

NOVEMBER 30, 2010

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