

IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA No. 863/2005 & CM No. 13841/2010

Judgment delivered on: 10.11.2010

M/s. Sterling Holiday Resorts (India) Ltd. Appellant

Through: Mr.Ankit Gupta, Adv.

Versus

Mr.Manohar Nirody Respondent

Through: Ms. Nikita Sharma and
Mr. Asit Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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

KAILASH GAMBHIR, J. Oral:

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1. By this appeal filed under Section 96 read with Order 41 Rule 2 and Section 151 of the Code of Civil Procedure, 1908,

the appellant seeks to set aside the judgment and decree dated 1.9.2005 passed by the Court of the learned ADJ, Delhi whereby the suit was decreed in favour of the respondent and against the appellant.

2. The background of facts necessary to decide the present appeal is that the respondent was employed in the appellant company as General Manager Operation (North) since 15.10.94. The respondent while in service opted for the scheme of "own your car scheme" offered by the appellant company under which the appellant deducted an amount of Rs.1000/- every month from the salary of the respondent and after adjusting the entire price of the car failed to transfer the registration in the name of the respondent. Thereafter, the appellant stopped paying the salary to the respondent since January, 1998 and the respondent resigned on 10.8.98 and the car was also repossessed by the finance company. Feeling aggrieved with the actions of the appellant company the respondent filed a recovery suit which vide judgment and decree dated 1.9.2005 was decreed in favour of the respondent for a sum of Rs. 4,94,888/- alongwith interest at 12% p.a from the date of filing of the suit till its realization. Feeling aggrieved

with the abovesaid judgment, the appellant has preferred the present appeal.

3. Counsel for the appellant has mainly raised two contentions in support of his appeal. The first argument is that the acknowledgment letter dated 7.6.2000 alleged to have been issued by the appellant company was not proved by the respondent in accordance with law. The second argument of the counsel for the appellant is that the appellant was not given sufficient opportunity to cross examine the respondent.

4. Assailing the impugned order, counsel for the appellant submits that the respondent failed to prove the letter dated 7th June, 2000 through which the respondent has claimed acknowledgment of the said dues. The contention of counsel for the appellant is that the second page of the said letter is a photocopy and, therefore, clearly signatures of Mr. Steve Borgia on the second page are not original. Counsel thus states that mere exhibition of the said document cannot be taken to imply that the respondent has proved the said document. Counsel also submits that the appellant has raised objections to all the documents, which were exhibited by the respondent in his evidence filed by him by way of affidavit including the said

letter dated 7th June, 2000. Counsel also submits that sufficient opportunity was not granted to the appellant to cross-examine the respondent who entered the witness box as PW- 1. Counsel also submits that nowhere the respondent has taken a stand as to the whereabouts of the original of the second page of the letter. Counsel for the appellant further submits that the said letter dated 7th June, 2000 was forged by the respondent so as to claim the benefit of the limitation period.

5. Counsel for the appellant also submits that the suit filed by the respondent was clearly barred by limitation as the same was filed by the respondent on 3rd July, 2003 while limitation came to an end somewhere in the year 2001. Counsel also submits that even based on the said acknowledgment letter dated 7th June, 2000, the limitation came to an end on 6th June, 2003 while the suit was filed by the respondent on 3rd July, 2003.

6. Counsel for the respondent on the other hand refutes the submissions of the counsel for the appellant and submits that the suit was instituted by the respondent on 31st May, 2003 and therefore the same was clearly within the limitation period. Counsel for the respondent further placed reliance on paras

No. 12 and 13 of the impugned judgment whereby the Trial Court has dealt with the said issue of limitation and decided the same in favour of the respondent.

7. I have heard learned counsel for the parties.

8. On perusal of the trial court record it is quite evident that the suit was filed by the respondent on 31st May, 2003 and on the assignment of the same, it was taken by the concerned Court on 3rd July, 2003. If the period of limitation is taken from the date of the said acknowledgment letter dated 7th June, 2000 then clearly the suit filed by the respondent is within the prescribed period of limitation.

9. Now to examine the contention of the counsel for the appellant that the letter dated 7.6.2000 was forged, on perusal of para No. 28 of the plaint it is quite evident that the respondent/plaintiff pleaded limitation period based on the said acknowledgement letter dated 7th June, 2000 and in reply to the said para the appellant/defendant has not taken a stand that the said letter dated 7th June, 2000 was forged by the respondent/plaintiff. Copy of the said letter was placed on record by the respondent/plaintiff and, therefore, the appellant could have taken a clear stand that the said letter filed by the

respondent was a forged document. No such plea was raised by the appellant before the learned Trial Court also. Hence, so far the question as to whether the said letter dated 7th June, 2000 was properly proved by the respondent on record or not or whether the said letter is a forged document or not, this Court does not find any perversity or illegality in the findings arrived at by the learned Trial Court. In paras 12 and 13 of the impugned judgment, the learned Trial Court came to the conclusion that no evidence was led by the appellant/defendant to prove that the said document i.e. letter dated 7th June, 2000 was a forged one. The learned Trial Court also observed that the entire evidence led by the appellant appears to be hearsay evidence. It would be useful to reproduce the said paras of the impugned judgment here:

"12. Although the defendant has stated that the document is forged but in the entire evidence led by the defendant not even a single statement has been made by the witness how he can say that the document is forged one and the defendant has not led even single evidence to prove that document Ex.PW 1/19 is forged document or the manner in which the defendant can say that document is forged one. The entire evidence led by the DW1 appears to be hear say evidence.

13. Onus to prove this issue was on the plaintiff. The plaintiff has proved this issue by placing on record and proving the letter dated 7.6.2000 of the defendant company wherein the defendant admitted liability of

making payment as per Section 18 of the Limitation Act. Cause of action for filing present suit arose on 10.08.98 when the plaintiff left the services of the defendant and hence letter dated 7.6.00 is within three years limitation period and has further extended limitation for filing suit for recovery up till 6.6.03, suit is filed on 3.6.03. Therefore I am of the opinion that onus has been rightly discharged by the plaintiff. The suit of the plaintiff is within period of limitation. This issue is decided in favour of the plaintiff and against the defendant."

10. Although in the impugned judgment reproduced above, there is a wrong observation made by the Trial Court that the suit was filed by the respondent on 3rd June, 2003, which in fact should have been 31st May, 2003, but except the said mistake this Court does not find any illegality in the said findings arrived at by the learned Trial Court on issue No. 1.

11. The other issue raised by the counsel for the appellant is that sufficient opportunity was not given to cross examine the respondent, PW 1. The learned trial court has clearly observed in para 16 of the impugned judgment as under:

"16. The plaintiff has given the detailed facts in the evidence, despite giving opportunity to the defendant for cross examination on this account plaintiff witness was not cross examined and hence the opportunity was closed. Therefore the testimony of the plaintiff is uncontroverted and unchallenged."

12. Also a perusal of the order sheet dated 21.7.04 where it is clearly observed by the learned trial court that PW 1 is present for cross examination and opportunities for cross examination have not been utilized by the defendant, hence the cross examination is accordingly closed. Therefore, it is clear that the appellant did not choose to cross-examine PW1 who proved the case of the respondent. The plea of the appellant that sufficient opportunity was not granted to the appellant to cross-examine the said witness is totally untenable as evidently no steps were taken by the appellant to seek such an opportunity to cross examine the said witness. Neither did the appellant in its own evidence take any stand to contradict the said letter dated 7th June, 2000 nor did the appellant anywhere take a stand that the letter was a forged document. It is a settled legal proposition that where the party fails to avail the right of cross examination of a witness despite there being sufficient opportunity and the testimony of such a witness remains unrebutted and unimpeached then in such circumstances such a testimony has to be given due credence. Once the appellant itself has chosen not to dispute the correctness of the said document by taking any specific plea in the written statement

and has also not chosen to cross-examine the witness of the respondent besides not even taking any such stand in his own deposition, then, now he cannot be heard to say that the said document was a forged document or the same was not proved in accordance with the law.

13. In the light of the above, there is no merit in the present appeal and the same is hereby dismissed.

November 10, 2010

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KAILASH GAMBHIR, J