

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

+ FAO No. 393/2007

% Judgment Reserved On: 19th October, 2010
Judgment Delivered On: 21st October, 2010

M/s HINDUSTAN EVEREST TOOLS LTD. Appellant
Through Mr.S.S.Saluja, Advocate

Versus

VIJAY LUNIA Respondent
Through Nemo

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J

1. This appeal has been filed by the appellant under Order 43(1)(a) of the Code of Civil Procedure against the order dated 25.05.2007 passed by the Additional District Judge in Civil Suit No.50/2006, whereby the learned Additional District Judge was pleased to direct return of the plaint to the plaintiff for filing of the same in an appropriate court inasmuch as, the learned Additional District Judge has come to a finding that nothing has been shown by the appellant as to how the suit filed by him in Delhi cannot be tried by a court in Delhi, particularly, when the defendant is a resident of Kolkata.

2. The appellant filed a suit for recovery of ₹3,87,379/- against the respondent by making an averment that the order for supply of goods was placed by the respondent at Delhi and part payments were also made in Delhi. The relevant averments made by the appellant in this regard in the plaint are contained in paragraph 13 of the plaint, the

same reads as under:-

“13. That the cause of action for the suit arose to the plaintiff company against the Defendant at Delhi and the orders for supply of hand tools were made at Delhi and the part payments were made at Delhi, hence this Hon’ble Court has got the territorial as well as pecuniary jurisdiction to entertain, try and dispose of the present suit in accordance with law.”

3. The suit was contested by the respondent by filing a written statement by taking the preliminary objections that the suit is hopelessly barred by time; that the appellant wrote a letter to respondent on 9/9/2005 for recovery of ₹3,78,665/- which was alleged to be due and outstanding from respondent since November 2002; that the suit is not maintainable on the ground of territorial jurisdiction as the respondent is residing at Kolkata (West Bengal). On merits, respondent denied about appellant’s supplying the goods to the respondent on credit basis from time to time as per demands and orders placed by the respondent. Respondent specifically denied that there were any specific orders for supply of goods; that appellant has not placed even a single bill to substantiate its allegations. Respondent further denied that the running account of the appellant was maintained as per the procedure established under law; respondent denied about any outstanding due, however, receipt of notice was admitted by the respondent. Rest of the allegations leveled by the appellant were also denied by the respondent.

4. The appellant filed a replication, wherein he denied the averments made by the respondent in the written statement. However, the appellant has not placed on record any document which may go to show that the order was placed in Delhi by the respondent or that the payments were made in part in Delhi as pleaded by the appellant in paragraph 13 of the written statement.

5. On the pleadings of the parties, the Additional District Judge framed the following issues:-

- “1. Whether the suit is barred by limitation? OPD
2. Whether this Court has no territorial jurisdiction to try the matter? OPD
3. Whether the plaintiff is guilty of concealment of material facts?

4. Whether the plaintiff is entitled to the claim of the suit? OPD
5. To what rate of interest and the for what period is plaintiff entitled to recover from the defendant? OPD
6. Relief.”

6. Since issue No.1 and 2 were preliminary in nature, arguments were heard by the Additional District Judge. While dealing with issue No.2, the Additional District Judge after taking note of various judgments, which have been referred in the order in question, and after taking note of the provisions contained in Section 20 of the Code of Civil Procedure held as under:-

“15. The catena of decisions make it explicitly clear that a Civil Suit will lie in a Court within whose local limits the substantial cause of action has arisen or the defendant resides or works for gain. The plaintiff, has filed the present case because according to plaintiff a part of cause of action arose within the territory of Delhi because order for supply of goods was placed at Delhi, also the payments were made by defendant at Delhi. The plaintiff has not placed on record any documents to prima facie substantiate the fact despite opportunity. Nor it has been shown that payments were received by plaintiff at Delhi. The cursory look at the contents of the plaint shows that no substantial cause of action ever arose within the Union Territory of Delhi. Thus if there is no cause of action or part thereof has arisen here the suit should have been filed where the defendant at the time of commencement of suit actually and voluntarily resided or carried on business or personally worked for gain. The Memo of Parties indicates that defendant Shri Vijay Lunia as proprietor of defendant firm was carrying on business at Kolkatta. According to Section 20 CPC the plaintiff should have sued the defendant at Kolkatta, where defendant is said to be carrying on business.

16. Thus, keeping in view the above discussion, I am of the considered opinion, that since no cause of action arose at Delhi nor defendant worked for gain at Delhi or resided at Delhi, this Court has no territorial jurisdiction to try the present suit.”

7. During the course of argument, the appellant was not able to show any document which may establish that the orders were placed at Delhi or that the payments were made at Delhi. In fact, no such document was filed by the appellant along with the suit/plaint. Even though all those documents on which the cause of action arises ought to have been filed along with the suit.

8. Learned counsel for the appellant further submits that the issue

of jurisdiction was required to be decided only on the basis of plaint and without even looking at the written statement.

9. Learned counsel for the appellant has relied upon the judgments of this Court delivered in the case of Caterpillar Inc. Vs. Mr.Kailash Nichani and Ors., 2002 II AD (Delhi) 894, wherein on the basis of specific averments made by the plaintiff that the defendants were selling the infringed goods in Delhi, the Court held that this Court had jurisdiction even though no document filed in support of such submission was placed on record.

10. The other judgment relied upon by the appellant is the judgment delivered in the case of Boston Scientific International B.V.(M/S) Vs. Metro Hospital, 2007 I AD (Delhi) 719, wherein on an application filed on behalf of the defendant under Order VII Rule 10 CPC for return of the plaint on the ground that this Court does not have territorial jurisdiction to entertain the same, this Court was pleased to make the following observations:-

“5. Having obtained unconditional leave to defend the suit, the defendant has filed the present application under Order 7 Rule 10 for return of the plaint on the ground of lack of territorial jurisdiction. Now, on the one hand we have an order of this court granting unconditional leave to defend on the ground that a 'triable issue' arises qua the plea of territorial jurisdiction and, on the other, we have the present application wherein the defendant seeks return of plaint without the issue being tried. This, to me, seems a somewhat incongruous situation. A 'triable issue' means that the same requires to be decided after leading of evidence. Whereas, the parameters of disposing of an application under Order 7 Rule 10 CPC, at the initial stage without going into evidence, requires the court to only look at the averments contained in the plaint.

8. Of course, arguments were advanced on the question of place of 'residence' of the defendant and various decisions including Patel Roadways Limited, Bombay v Prasad Trading Company : AIR 1992 SC 1514, New Moga Transport Co v United India Insurance Co Ltd and Others : (2004) 4 SCC 677 and Pramod Kumar Gupta v M/s Skylink Chemicals : 93 (2001) DLT 143 were cited in this context. But, in my view it is not necessary to examine the issue of place of residence as the plea taken in the plaint is also that the cause of action, or at least a part of it, arose in Delhi. Two averments were made with regard to this in paragraph 17 of the plaint. The first being that the equipment was supplied by the plaintiff to the defendant from Delhi. Even if this averment is taken at face value, it, in my view may not confer jurisdiction on this court. However, the second statement that the payments were received in Delhi by the plaintiff stands on a different

footing. Receipt of payments does constitute a part of cause of action. As per the plaint, the plaintiff, in the course of dealings with the defendant, used to receive payments at Delhi. This is controverted by the defendant in the written statement by stating that the payments were also made at NOIDA and not in Delhi. But, the written statement and defence of the defendant is not to be looked into. That would also be a matter of evidence. So, going by the plaint alone it is clear that the business dealings between the plaintiff and the defendant were conducted, not on the basis of any written contract, but on the basis of orders placed over the telephone. Hence, even if it assumed that Delhi was not the expressly contracted place of payment, Delhi would still be the presumed place of payment because of the general rule that, in the absence of a contract to the contrary, a debtor is bound to find the creditor for making the payment. In other words, the place of payment is the place where the creditor resides. In this context, the learned counsel for the plaintiff's reliance on *Bangali Mal v (Firm) GangaRam Ashrafi Lal* : AIR 1923 All 465 (1), *Soniram Jeetmull v R.D. Tata and Company Ltd* : AIR 1927 PC 156 and *H.S. Shobasingh and Sons v Saurashtra Iron Foundry and Steel Works (Pvt) Ltd* : AIR 1968 Guj 276 is quite appropriate. The learned counsel for the defendant raised a plea that *Soniram Jeetmull* (supra) was not applicable in the present case as in that case the debts were not disputed whereas in the present case they are. But, this is not a distinguishing feature at this stage because the plaint alone is to be seen and not the defence of the defendant. Similar is the fate of the his submission that the said privy council decision would apply in a case where no place of payment is specified but, here the payments were despatched at NOIDA. This again is the averment of the defendant."

11. Having gone through both the above judgments, I am of the considered view that in the facts of this case, the two judgments referred to by the appellant does not come to his rescue for the reasons that the first judgment has been delivered in a case where specific allegations were made with regard to violation of trade mark rights and a specific plea was taken that the sale was being effected in Delhi of the infringed goods. In the second case, it has been observed, "that the statement of the plaintiff that payments were received in Delhi stands on a different footing. Receipt of payment does constitute a part of cause of action. As per the plaint, the plaintiff, in the course of dealings with the defendant, used to receive payments at Delhi. This is controverted by the defendant in the written statement by stating that the payments were also made at NOIDA and not in Delhi." However, in the present case, there is specific denial with regard to making of payment in Delhi by the

respondent. Despite opportunity granted, the appellant has not placed even a single document which may substantiate his case that the payment was either made in Delhi or that the orders were placed in Delhi.

12. In view of the above, I do not find any merit in the case of the appellant. The appeal is, therefore, dismissed with no order as to costs. The impugned order is upheld. Trial court record, if any, be sent back.

MOOL CHAND GARG, J

OCTOBER 21, 2010

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