

***IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of Judgment : 25.10.2010*

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R.S.A.No.185/2010

SHRI MUKHTIAR SINGH Appellant
Through: Mr.Sanjay Verma, Advocate.

Versus

SHRI SANT RAM Respondent
Through: Nemo.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.(Oral)

CM No.18589/2010(for exemption)

Allowed subject to just exceptions.

R.S.A.No.185/2010

1. This second appeal has impugned the judgment and decree dated 15.7.2010 which had affirmed the finding of the Trial Judge dated 5.9.2009 whereby the suit filed by the plaintiff/appellant Mukhtiar Singh for recovery of Rs.1,17,406.62 had been dismissed. The appellant/plaintiff had been non-suited on the ground of limitation by the Trial Judge. This has been affirmed in the impugned judgment.
2. The plaintiff was carrying on business of building material in the name and style of M/s Ajit Timber. The defendant was in the business of construction of buildings; he used to take construction material on hire basis i.e. steel plates of different sizes. Last business dealings between the parties

took place on 14.12.2003 on which date the final bill was submitted as per which the defendant owed a sum of Rs.86328.40 to the plaintiff. Defendant did not pay up the amount; the suit was accordingly filed.

3. Defendant in his written statement had denied the liability. It was stated that the plaintiff used to collect the steel plates from the site after completion of the work and some times the defendant returned the steel plates. The defendant has no liability towards the plaintiff.
4. Trial Judge had framed seven issues. The oral and the documentary evidence led by the parties was examined. The statement of account, bill book, challan book proved by the plaintiff was relied upon. Although no specific issue on limitation has been recorded yet the court in view of the mandate of Section 3 of Limitation Act relying upon a judgment of the Supreme Court had addressed itself on the said issue. Article 26 of the Schedule-I of the Limitation Act 1963 was held applicable, as per which limitation for a suit of such a nature would be three years commencing from the date when the accounts are stated in writing signed by the defendant or by his duly authorized agent. Ex.PW-1/17 dated 1.10.2002 was the last bill signed by the defendant. Other bills relied upon by the plaintiff Ex.PW-1/18 to Ex.PW-1/32 were not acknowledged by the defendant. In Ex.PW-1/4, Ex.PW-1/14, Ex.PW-1/15 and Ex.PW-1/17 no date had been appended on the signatures. As such Ex.PW-1/17 dated 1.10.2002 was relied upon as the last acknowledgment by the

defendant; the present suit filed on 21.1.2006 was held to be time barred. The Trial Judge in the alternate had also examined the contention and the argument raised by the defendant that this was a hire purchase agreement. In this context it had relied upon Ex.PW-1/12 i.e. the challan dated 4.9.2002 which again would make the suit of the plaintiff time barred having been filed on 21.1.2006. It was held that the plaintiff had failed to prove his claim in respect of the supply of articles for the period after 5.9.2002.

5. The findings of the Trial Judge were upheld in the impugned judgment. An indepth analysis of the oral and documentary has been gone into again by the first Appeal Court. This was the second fact finding Court.
6. The relevant extract of the impugned judgment dealing with this contention is reproduced herein as under:

“12. Section 3 of Limitation Act deals with Bar of Limitation. In **V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao and another, AIR 2005 SC 4138**, it was held by their lordship that mandate of section 3 of Limitation Act says that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex- facie barred by law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation.

13. Under order 8 rule 2 CPC the defendant must raise by his pleadings all matters which show that suit is not maintainable and such ground of defence as if not raise would be likely to take the opposite party by surprise or would raise issue of fact not arising out of the plaint for the instance fraud, limitation, release, payment, performance or facts showing illegality. This however is not consistent with the rule laid down by limitation act that a suit instituted after the prescribed period of limitation shall be dismissed although limitation has not set up as a defence as held by their lordship in **Udhav Singh v. Madhav Rao Sindia, AIR 1976 SC 744**.

14. It is clear that court is bound to consider the plea of limitation and given effect to it, even though the same is not set up as a defence or raised by the defendant in his pleadings. The court can go into the question of limitation.

15. A bare perusal of the plaint shows that respondent used to hire the steel plates from the appellant. The appellant used to raise the bill. The respondent used to sign the bills as an acknowledgement for delivery of steel plates. A part from bills, there was monthly computation of the accounts between them whereby duration of the hire of steel plates and further calculations were settled so that there remained no dispute between them as to the final computation of the monthly account. The bills/invoices used to be acknowledged by the respondent by signing. The appellant prepared the statement of account on the basis of bills etc. from 27.11.01 till 14.12.03.

16. The appellant has examined himself as PW1 whereas respondent has examined himself as DW1. The affidavit of PW1 shows that statement of account Ex.PW1/1 is based upon the record namely ledger, stock register, bill book and challan books duly verified by the respondent on monthly basis. It shows that the appellant has prepared the statement of account on the basis of the acknowledgement done by the respondent on the bills, vouchers and monthly statements prepared by them.

17. The question arises whether the bills and vouchers were duly acknowledged either by the respondent or his authorized representative not. Ex.PW-1/4,1/14,1/15,1/16,1/17,1/18 to 1/32 are the bills raised by the appellant in the name of respondent. Bills Ex.PW-1/4 dated 01.5.02, 1/14 dated 01.06.02, 1/15 dated 01.07.02 and 1/17 dated 01.09.02 bear the signatures under date of the respondent. Ex.PW-1/7 to 1/12 are the challans/delivery reports issued by appellant in the name of respondent. The latest is Ex.PW-1/12 dated 04.09.02. These bills and challans/delivery reports except Ex.PW-1/11 were duly acknowledged by the respondent by putting his signatures. There is nothing in the cross examination of DW1 that bills and challan/delivery reports were not acknowledged by him or they don't bear his signature meaning thereby that the bills and delivery reports/challans were not acknowledged by the respondent. Bills Ex.PW1/16 dated 01.08.02 and delivery/challan report Ex.PW-1/1 bear the signature of one Ram Dayal and Dagar. No question or suggestion is put to DW1 during the course of cross examination that Ram Dayal and Dagar are duly authorized by him to receive the steel plates and put their signatures after receiving the steel plates. There is nothing that bill and delivery/challan report are acknowledged by the respondent. Ex. PW1/17 is the latest bill acknowledged by the respondent which is dated 01.09.02 but received by him 01.10.02. The challan/delivery reports Ex.PW1/7 to 1/12 bear the words that "person taking the goods on rent will be responsible for loss or damage." These words implies that steel plates were not given on hire basis but there were given on rent. There is no other documentary

evidence to show that steel plates were given on hire basis. Challan/delivery reports show that these were given on rent so there cannot be the question of continuous cause of action as alleged by the appellant. The period of limitation for the recovery of rent charges is three years. The latest bill Ex.PW1/7 is dated 01.10.02 and challan/delivery reports Ex.PW1/12 is dated 04.09.02 as acknowledged by the respondent. The suit should have been filed to recover the amount against these bills and challan/delivery report was within three years from the date reflected on them. The appellant has filed the suit on 21.01.06 which is beyond the period of limitation. The claim with respect to these bills and delivery reports/challans has become time barred.

18. The bills Ex.PW1/18 to 1/32 are with respect to the period from 01.09.02 to 14.12.03. The affidavit of PW1 shows that he continued to raise the bills against the respondent till 14.12.03 as material was under the use of the respondent. The copies of the bills are Ex.PW1/18 to 1/32. The cross examination shows that his labour used to obtain the signatures of the persons to whom the goods were supplied by him. He used to obtain signatures of the respondent only on the receipt with respect to the goods supplied from the shop. He never noted down the name of the person to whom he delivered the material at the instance of the respondent. DW1 in his affidavit has corroborated the version of written statement. In the cross-examination he stated that he never informed the appellant directly about the requirement of steel plates at a particular site. He used to suggest the name of the appellant to the owners to hire the required articles. It is correct the construction material supplied by the appellant used to reach at the site along with challan thereof. The labour used to count the received articles. He asked the concerned owner to make the payment of shuttering directly to the appellant after deducting the same from contractual amount as and when he got on contract basis. The record pertaining to the quantity of material supplied by the appellant used to be maintained by the owner of the site and in the absence of the owner he used to count the material. There is no liability towards the appellant so suggestion is denied that he used to acknowledge the bills, invoices and challans raised by the appellant at the site and used to make the payment after verification of accounts.

19. I have gone through the testimony of PW1, DW1 and bills Ex.PW1/18 to 1/32 placed on record. The bills Ex.PW1/4, 1/14, 1/15 & 1/17 coupled with delivery receipts/challans Ex.PW1/7, 1/8, 1/9, 1/10 & 1/12 were acknowledged by the respondent. The bills Ex.PW1/18 to 1/32 don't bear the signature either of respondent or any of his authorized agent or representative. No question or suggestion is put to DW1 in the cross examination that these bills were not deliberately signed by him when they were given to him. The appellant has failed to explain why these bills don't bear the signatures of the respondent when the other bills and challan/delivery reports bear the signatures of the respondent. There is no acknowledgment on the bills by the respondent or in any other manner by

the respondent in order to extend the period of limitation. Mere preparation of statement of account Ex.PW1/1 on the basis of bills, challan/delivery reports and entries in the ledger book Ex.PW1/2, 1/3, 1/5 & 1/6 doesn't amount to an acknowledgment as said statement of account was never acknowledged by the respondent. The monthly statement of account allegedly verified between appellant and respondent is not placed on record by the appellant though he has alleged the same in his plaint as well as in the affidavit. This was the best possible evidence available with the appellant showing acknowledgment of debt on the part of respondent and in the absence of the same an adverse inference has to be drawn against him so mere raising of bills or preparation of statement of account doesn't extend the period of limitation unless acknowledged by the respondent.

20. The entries evidence on the file shows that the claim of the appellant on the basis of bills Ex.PW1/4, 1/14, 1/15, 1/16, 1/17 as well on the basis of challans/delivery reports Ex.PW1/17 to 1/12 is time barred. There can be no claim on the basis of bills Ex.PW1/18 to 1/32 as they were not acknowledged in writing by the respondent. From all angles, I am of the view that appellant is not entitled for the recovery of amount as claimed by him.

21.Ld.Trial Court has properly appreciated the facts as well as evidence on record. I do not find any infirmity in the judgment and decree 05.9.2009 passed by Ld. Trial Court and accordingly the appeal filed by the appellant is dismissed with no order as to the cost."

7. There is no perversity in this finding. This Court sitting as a second Appeal Court is not a third fact finding Court. It cannot re-appreciate facts. The substantial question of law had been formulated in the body of the appeal on page 7. They all border on the finding of the two Courts below on the question of limitation. The first Appeal Court had made a detailed scrutiny of the evidence before it. Question of limitation in some situations may raise a question of law under which category a substantial question of law may arise. In the instant case, the arguments urged before this Court and in terms of the substantial question of law as formulated in the body of the appeal, the queries raise a mix question of fact and law. The facts have been scrutinized in

detail by the two Courts below which cannot be re-agitated again before this Court. Hands of this Court are tied; it cannot interfere in the finding in the impugned judgment unless there is a perversity or a substantial question of law has arisen. Courts below had rightly relied upon Ex.PW-1/12 dated 14.12.2002 which was the last transaction acknowledged and signed by the defendant. Suit having been filed by the plaintiff on 21.2.2006 was beyond the period of three years which is the period for a transaction of this nature which was a suit falling under “Part II – Suits Relating to Contracts” of Schedule- I of Indian Limitation Act, 1963.

8. Article 26 is the relevant provision and reads as follows:

26.	For money payable to the plaintiff found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debit is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
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9. Suit was time barred. It was not maintainable. No question of law much less any substantial question of law has arisen.

10. There is no merit in the appeal. It is dismissed in limine.

INDERMEET KAUR, J.

OCTOBER 25, 2010
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