

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 19.01.2011
Judgment Pronounced on: 31.1.2011

+ **CS(OS) No. 1443/1999**

M/s J.C. Enterprises (Regd.)

.....Plaintiff

- versus -

Ranganatha Enterprises

.....Defendant

Advocates who appeared in this case:

For the Plaintiff: Mr. S.C. Singhal and Mr. Sanjay
For the Defendant: Mr. R.N. Sharma

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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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 Digest? | Yes |

V.K. JAIN, J

1. This is a suit for recovery of Rs.43,82,473/-. It is alleged in the plaint that M/s J78.C. Enterprises, which was a partnership firm, was dissolved vide Dissolution Deed dated 1.4.1997 and thereafter, the plaintiff Rakesh Sharma

has been running this firm as his proprietorship concern. The defendant Suresh is running business under the name and style of M/s Ranganatha Enterprises. It is alleged in the plaint that under an oral agreement between the parties, the defendant was appointed as a stockiest of State lotteries including Daily Lotteries etc., on wholesale rate basis. As per the terms and conditions of the agreement, the plaintiff was required to dispatch lottery tickets to the defendant from Delhi as per the requirement of the defendant. The defendant was required to make payment to the plaintiff within a week from the date of the draw. In default of payment, the plaintiff was entitled to interest at the rate of 18% per annum for the period beyond 15 days from the date of draw. It is alleged that the defendant is liable to pay a sum of Rs.20,97,566/- to the plaintiff towards price of the lottery tickets, after adjustment of part payment of Rs.1 lakh made by him on 6th June, 1996. The plaintiff has also claimed interest on that amount at the rate of 18% per annum, which comes to Rs.22,84,907/-, thereby making a total sum of Rs.43,82,473/-.

2. The defendant has contested the suit. He has taken preliminary objections that this Court has no

territorial jurisdiction to try the suit and the suit is barred by limitation. It is further alleged that since the agreement was executed between the defendant and M/s J.C. Enterprises, the plaintiff has no cause of action and no right to sue the defendant.

3. On merits, it is alleged that the defendant was in the business of sale of lottery tickets till the year 1993 and had purchased some consignments of lotteries from M/s J.C. Enterprises, payments of which were promptly settled and nothing is due from him. The defendant has also denied the alleged oral agreement between him and M/s J.C. Enterprises, as also the agreement to pay interest. As regards the payment of Rs.1 lakh, it is alleged that this amount was paid to the plaintiff on 6th June, 1996 as a loan.

4. The following issues were framed on the pleadings of the parties:-

- (i) Whether there is no cause of action for the suit and whether the plaintiff does not have the right to sue? OPD
- (ii) Whether the suit is barred by law of limitation? OPD
- (iii) Whether this Court has no territorial jurisdiction to try and decide the

present suit? OPD

- (iv) Whether there is any oral agreement entered into between the plaintiff and the defendant in the month of December, 1991 and if so, what were the terms and conditions of the same? OPP
- (v) Whether the defendant was required to submit his accounts and make payments at New Delhi for the tickets alleged to have been received by him? OPP
- (vi) Whether the plaintiff is entitled for recovery of an amount of Rs.43,82,473/- from the defendant as claimed in the suit? OPP
- (vii) If the aforesaid issue is answered in favour of the plaintiff whether the plaintiff is also entitled for payment of any interest and if so, at what rate and for which period? OPP
- (viii) Relief.

Issue No.1

5. On this issue, the plaintiff Mr. Rakesh Sharma, in his affidavit by way of evidence, stated that M/s J.C. Enterprises, which was a partnership firm till 1st April, 1997, was dissolved, vide Dissolution Deed dated 1st April, 1997 and now he is its proprietor. During his cross-examination, he stated that after dissolution of the partnership firm, he took over all its assets and liabilities

being its proprietor. Though the original Dissolution Deed was not produced by the plaintiff and consequently its copy filed by him could not be exhibited and was marked as mark X-1 during his examination before the learned Joint Registrar, even if the document Mark X-1 is excluded from consideration, the unrebutted deposition of plaintiff is sufficient to prove that M/s J.C. Enterprises was dissolved with effect from 1st April, 1997 and all its assets and liabilities were taken over by the plaintiff as its proprietor. Another important factor to be noted in this behalf is that no other partner of M/s J.C. Enterprises has sued the defendant for recovery of the dues of the firm, which, in turn, supports the oral deposition of the plaintiff that he had taken over the assets and liabilities of the erstwhile partnership firm with effect from 1st April, 1997. The issue is decided against the defendant and in favour of the plaintiff.

Issue No.2

6. It is an admitted case that the defendant made payment of Rs.1 lakh to the plaintiff, by way of demand draft, on 6th June, 1996. Though, the case of the plaintiff is that, in fact, the payment was received by him on 10th June,

1996, that would make no difference since the High Court was closed in June, 1999 and the suit was filed during vacation on 23rd June, 1999.

7. Section 19 of the Limitation Act, to the extent it is relevant, provides that where payment on account of a debt or of interest is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the date when the payment was made. In case, part payment by way of a demand draft was made by the defendant to the plaintiff on 6th June, 1996, this being a payment in writing, a fresh period of limitation commenced from that date and since the High Court was closed in the month of June, 1999, the suit having been filed during the same vacation on 23rd June, 1999 would be within the prescribed period of limitation. The dispute between the parties, however, is as to whether the amount of Rs.1 lakh was paid as part payment towards the dues outstanding against the defendant on the date of payment as claimed by the plaintiff or it was paid as a friendly loan by the defendant to the plaintiff, as alleged by the defendant.

8. In his affidavit by way of evidence, the plaintiff

Rakesh Sharma has stated that part payment on account was made by the defendant on 6th June, 1996 vide letter Exhibit P/2 and receipt issued by the plaintiff in this regard on 10th June, 1996 is Exhibit P/3. PW-2 Shri Manjit Singh, who is working with the plaintiff, has corroborated the deposition of the plaintiff in this regard and has stated that last payment was received from the defendant vide Memo No.181 dated 6th June, 1996 for Rs.1 lakh vide demand draft, which was duly realized by the plaintiff. The original Memo dated 6th June, 1996 is Exhibit PW-2/1. I see no reason to disbelieve the oral testimony of plaintiff and his employee Shri Manjit Singh as regards the nature of the payment made by the defendant on 6th June, 1996. During his cross-examination of PW-2 Shri Manjit Singh also no suggestion was given to him that the document Exhibit PW-1/1 was not issued by the defendant. When a witness deposes a particular fact and no suggestion to the contrary is given during his cross-examination, the party against whom the deposition is made is deemed to have admitted that part of the deposition, which thereby remains unchallenged. Therefore, by not suggesting to PW-2 Shri Manjit Singh that the document Exhibit PW-1/1 was not

issued by him, the defendant is deemed to have admitted the issue of this document by him. Even otherwise, Exhibit PW-1/1 on which the name as well as address and telephone number of Ranganatha Enterprises, of which the defendant admittedly is the proprietor, is correctly printed does not appear to be a forged document. The memo Ex.PW-2/1 shows that the payment of Rs.1 Lac was made in account, which implies part payment. The receipt Exhibit P-3, which is a computer generated receipt, as stated by PW-2 Shri Manjit Singh, also shows that the payment of Rs.1 lakh vide demand draft No.777626 dated 25th May, 1996 was received in the account of the defendant maintained with M/s J.C. Enterprises. The letter Exhibit P-2, which is written on the letterhead of the defendant, is the forwarding letter whereby the aforesaid demand draft for Rs.1 lakh was sent to M/s J.C. Enterprises. Though the case of the defendant is that Exhibit P/2 is a forged document, the fact and circumstance of the case indicate that this is a genuine document whereby demand draft for Rs.1 lakh was sent by the defendant to the plaintiff on 6th June, 1996. Another material circumstance in this regard is that though the defendant claims that the amount of Rs.1

lakh was given as a friendly loan to the plaintiff, no notice was ever issued by him demanding the aforesaid amount from the plaintiff. No suit admittedly has been filed by the defendant for recovery of this amount from the plaintiff. Had the amount of Rs.1 lakh being given as a friendly loan, the defendant would at least have demanded this amount from the plaintiff and would also have filed a suit for recovering it from the plaintiff. Therefore, I am satisfied that the payment of Rs.1 lakh vide demand draft No.777626 dated 29th May, 1996 was made towards payment of the amount, which was due from the defendant at that time. In view of the provisions contained in Section 19 of the Limitation Act, the suit, to the extent it pertains to the amount, which had not become time barred on 6th June, 1996, when the part payment was made, will not be barred by limitation.

9. During the course of arguments, it was submitted by learned counsel for the plaintiff that since, the parties were maintaining a mutual open and current account in which last entry was made on receipt of payment from the defendant on 6th June, 1996, the suit having been filed on 23rd June, 1999, during summer vacation of the High Court

is well within limitation.

Article 1 of the Limitation Act, 1963, to the extent it is relevant, provides that in a suit for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the period of limitation is three years from the close of the year in which the last item admitted or proved is entered in the account. In order to an account to be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligation. This proposition of law was upheld by the Supreme Court in ***Hindustan Forest Co. v. Lalchand, AIR 1959 SC 1349.*** In the case before the Supreme Court, the parties entered into an agreement for the supply of 5000 maunds of maize, 500 maunds of wheat and 1000 maunds of dal at the rates and time, specified. A sum of Rs.13,000/- has been paid as advance. The goods were delivered and the buyer was also making payments. The last delivery of the goods was made on 23rd June, 1947, and the suit was brought on 10th October, 1950, for the balance of the price due. The

Supreme Court pointed out that what had happened was that the sellers had undertaken to make delivery of the goods and the buyer had agreed to pay for them and had in part made payments in advance and held that there could be no question in such a case that the payments had been made towards the price due and there were no independent obligations on the sellers in favour of the buyer. This proposition of law was again applied by the Supreme Court in ***Keshari Chand v. Shilong Banking Corporation Ltd.***, ***AIR 1965 SC 1711***. The real question to be seen by the Court in such a case is to ascertain whether the transactions between the parties gave rise to independent obligations or they were merely a mode of liquidation of the obligation already undertaken by one party. Even in a case for price of goods sold and delivered, there may be obligation on the part of the seller towards the buyer in case some advance has been paid and has not been returned or the payment made by the purchaser is more than the price of the goods which he had to pay to the seller of the goods.

However, I find that there is no allegation in the plaint that the parties were having a mutual, open and current account in which there have been reciprocal

demands between the parties. There is no allegation in the plaint that the plaintiff owed any amount to the defendant at any point of time whether on account of excess payment or otherwise. The case as set up in the plaint is based only on the part payment of Rs.1 lakh sent by the defendant on 6th June, 1996. In para 10 of the plaint it has been specifically alleged that the suit has been filed within the period of limitation since on account part payment last made by the defendant to the plaintiff at New Delhi on 6th June, 1996 was received on 10th June, 1996. No plea of the parties maintaining a mutual, open and current account with reciprocal obligations on the part of both the parties was set up even in the replication to the written statement. Hence, the period of limitation in this case cannot be calculated under Article I of Limitation Act. The issue is decided accordingly.

Issue No.4

10. In his affidavit by way of evidence, the plaintiff has stated that there was an oral agreement between the parties in December, 1991 and the terms and conditions of that agreement were accepted at New Delhi. He further stated that as per the terms and conditions of the agreement, the

plaintiff was required to dispatch lottery tickets to the defendant from Delhi and the plaintiff had accordingly been dispatching lottery tickets to the defendant from time to time, the last consignment having been dispatched on 22nd July, 1993. He further stated that the defendant was required to make payment to the plaintiff at Delhi for the lottery tickets received by him. PW-2 Shri Manjit Singh also has stated that tickets to the defendant used to be dispatched at Delhi and the payment used to be received at Delhi.

In his affidavit by way of evidence, the defendant has stated that in the year, 1990 Mr. J.C. Sharma one of the partners of M/s J.C. Enterprises had approached him in his office at Bangalore and had started supplying the lottery tickets to him. He further stated that he never came to Delhi in or around December, 1991 and did not enter into any oral or written agreement with the plaintiff. He further stated that most of the consignments were handed over to him in person either by the partner or the representatives of the plaintiff firm.

The plaintiff has filed a large number of bills issued by M/s R. South Courier, Ram Nagar, New Delhi in respect

of the lottery tickets dispatched to the defendant from M/s J.C. Enterprises. Some of these bills are Bill Nos.087019 dated 17th December, 1992, 093076 dated 8th February, 1993, 093082 dated 12th February, 1993, 006705 dated 10th May, 1993, 019705 dated 8th June, 1993, 018986 dated 10th July, 1993 and 015610 dated 12th July, 1993. This documentary evidence clearly shows that the tickets used to be dispatched by the plaintiff to the defendant from Delhi and used to be delivered through M/s R. South Courier, which used to receive the lottery tickets from the plaintiff at Delhi and deliver the same to the defendant at Bangalore.

11. In ***A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem, (1989) 2 SCC 163***, the Supreme Court while dealing with the issue of territorial jurisdiction of the Court observed that the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors. It was further observed that a cause of action is a bundle of facts, which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant and comprise every fact necessary for the plaintiff to prove to enable him to obtain a decree, though it has no relation

whatever to the defence which may be set up by the defendant. It was also held that the performance of a contract being part of cause of action, a suit in respect of its breach can always be filed at the place where the contract should have been performed or its performance completed. It was further held that part of cause of action arises where money is expressly or impliedly payable under the contract.

12. In a suit for price of the goods sold and delivered which in effect is also the suit for breach of contract on the part of the defendant by not paying the price of the goods in terms of the agreement between the parties, the cause of action, within the meaning of Section 20(c) of the Code of Civil Procedure arises at the following places:-

- (i) The place where the contract was made.
- (ii) The place where the contract was to be performed which in such a contract would mean the place where the goods were delivered to the purchaser and
- (iii) The place where money in performance of the contract was payable, expressly or impliedly.

The plaintiff, may in his choice, sue the defendant at any of these three places unless the parties by agreement

have restricted the jurisdiction to a particular place, by agreeing that in the event of a dispute arise between them, the Court at a particular place alone would have jurisdiction to resolve the same.

As per illustration (a) to Section 20 of the Code of Civil Procedure, if A, a tradesman in Calcutta sells goods to B who is carrying on business in Delhi and on the request of B, A delivers the goods to Railway in Calcutta, A may sue B for price of goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business. This illustration clearly shows that cause of action does arise at the place where the goods are delivered by the seller to the purchaser.

13. If the goods are handed over to the carrier for delivery directly to the consignee, the property in the goods passes to the consignee, the moment they are delivered to the carrier/courier for the purpose of delivering them to the consignee, since the consignee thereafter has no control in those goods and the carrier/courier is bound to deliver them only to the consignee. Section 23(1) of the Sale of Goods Act, 1930 provides that where there is a contract for the sale of unascertained or future goods by description and

goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. Sub-Section 2 of this Section, to the extent it is relevant, provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Since the goods handed over to the courier at Delhi were deliverable to the defendant and not to the order of the plaintiff or his agent, the plaintiff did not reserve any right of disposal of those goods, while handing them over to the courier. Therefore, the property in the lottery tickets handed over by the plaintiff to the courier at New Delhi passed to the defendant, the moment the goods were handed over to the courier for delivery to him and, therefore, the tickets shall be deemed to have been delivered to the defendant at New Delhi. Section 39(1) of the Sale of Goods

Act, to the extent it is relevant, provides that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer. Since the lottery tickets for price of which the present suit has been filed were delivered to the defendant at Delhi through R. South Couriers, the part of cause of action arose in the jurisdiction of this Court and, therefore, in view of the provisions contained in Section 20(c) of the Code of Civil Procedure, Delhi Court has jurisdiction to try the suit.

14. Exhibit PW-2/1 to which I have earlier adverted indicates that the payment of Rs.1 lakh to the plaintiff was sent from Bangalore to Delhi. The letter Exhibit P/2 clearly shows that the draft of Rs.1 lakh was sent from Bangalore to Delhi. The computer generated receipt Exhibit P/3 is the most important document in this regard and this document, which could not have been issued at Bangalore, leaves no reasonable doubt that the payment of Rs.1 lakh was received by the plaintiff at Delhi vide demand draft No.

777626 dated 25th May, 1996. Therefore, besides oral evidence in the form of deposition of plaintiff and PW-2 Shri Manjit Singh, there is ample documentary evidence produced by the plaintiff to prove that the payment of lottery tickets used to be received by M/s J.C. Enterprises at Delhi. In fact, a large number of documents have been filed by the plaintiff which show that payment of lottery tickets used to be sent by the defendant to M/s J.C. Enterprises from Bangalore. These documents have been collectively exhibited as Exhibit PW-2/2. These documents include a large number of letters whereby payment was sent by the defendant to M/s J.C. Enterprises from Bangalore on various dates. One such letters bears Sr. No.10272 and is dated 8th April, 1993. Another such letter bearing No.10299 is dated 15th April, 1993 and contains reference to payment of Rs.1,22,510/- vide demand draft No.903061 dated 24th April, 1993. Document bearing No.10300 dated 15th April, 1993, document bearing No.10405 dated 28th April, 1993, document bearing No.10451 dated 7th May, 1993, document bearing No.10452 dated 7th May, 1993, document bearing No.10406 dated 28th April, 1993, document bearing No.10492 dated 13th May, 1993, document bearing

No.10494 dated 13th May, 1993, document bearing No.10583 dated 20th May, 1993, document bearing No.10584 dated 20th May, 1993, document bearing No.10604 dated 25th April, 1993 and document bearing No.10605 dated 25th May, 1993 are amongst numerous such documents filed by the plaintiff. The authenticity of these documents was not disputed by the defendant during cross-examination of PW-2. All these documents start with the words “We are herewith sending payments as follows”, which clearly show that payments used to be sent by the defendant from Bangalore to M/s J.C. Enterprises at Delhi. Thus, it can hardly be disputed that payments used to be sent by the defendant from Bangalore to Delhi and used to be received by M/s J.C. Enterprises at Delhi. The receipt of payment at Delhi proves the case of the plaintiff that the agreement between the parties envisaged payment of price of the tickets at Delhi. The payment of price of the goods is an integral and important part of an agreement for sale of goods and if the payment was to be made and used to be made in the jurisdiction of this Court, it cannot be disputed that for this reason alone part of the cause of action arose at Delhi. Consequently, Delhi Court has jurisdiction to try the

present suit.

Issue Nos. 4 to 6

15. In his affidavit by way of evidence, the plaintiff has stated that a sum of Rs.20,97,566/- is payable by the defendant towards the price of lottery tickets sold to him. He has also proved the copies of his ledgers, which are Exhibit P-4 (Colly). PW-2 Shri Manjit Singh, in his affidavit corroborated the deposition of the plaintiff in this regard and stated that the defendant is liable to pay Rs.43,82,473/- inclusive of interest. In rebuttal, the defendant has stated that every penny of dues of M/s J.C. Enterprises had been cleared and settled.

16. I see no reason to disbelieve the entries made in the ledger book of the plaintiff. According to the plaintiff, he has been maintaining regular books of accounts in respect of his business transactions. According to PW-2 Shri Manjit Singh, he used to maintain the account books being accountant of the plaintiff company. Copies of the ledger book filed by the plaintiff shows that the principal amount claimed by him is payable by the defendant to M/s J.C. Enterprises.

In view of the provisions contained in Section 34 of Evidence Act, once it is shown that an entry has been made in a book of accounts and that book of accounts has been regularly kept in the course of business, the requirement contained in the first part of the Section is fulfilled and the entry becomes admissible as relevant evidence. However, the statement made in the entry will not alone be sufficient to charge any person with liability. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness. Since, however, an element of self-interest and partisanship of the entrant to make a person – behind whose back and without whose knowledge the entry is made – liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words “such statements shall not alone be sufficient to charge any person with liability”.

17. In **M/s. Gannon Dunkerlay & co. Ltd. vs. Their Workmen** 1972 3 SCC 443 it was found that the register in

which entries had been made in the regular course of business was admitted in evidence by the Tribunal without any objection from the Union of India. Supreme Court was of the view that it was for the union to challenge the authenticity of the register by cross-examining the person, who proved the register on the points which could throw doubts on its authenticity.

18. In **R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple and another** AIR 2003 SC 4548, the appellant was found to be maintaining books of account. During cross-examination, he was not questioned regarding authenticity of the books or the entries made thereunder. Some of the entries in the books had been made by the deceased-father of the appellant, who was not available to depose incorporation of the entry. The subordinate Court felt no need of any further corroboration before acting upon the entries in the ledge book made by the deceased-father of the appellant. As regards the entries made by the appellant, he had deposed to making of those entries and had corroborated the same in his own statement. The appellant was believed by the trial Court as also by the appellate Court and his statement was found to

be enough corroboration of the entries made by him. However, the finding of the trial Court and the first appellate Court was reversed by the High Court. Supreme Court found no justification for the High Court reversing the findings and was of the view that the High Court had erred in ruling out the books in consideration, on the ground that the same were not duly maintained or were not proved in the absence of the maker having stepped in the witness box.

In **Kulamani Mohanty vs. Industrial Development Corporation of Orissa Ltd.** *AIR 2002 Orissa 38* it was held that if the books of accounts are produced as primary evidence and oral evidence is led as corroborative evidence relating to the entries in the books of accounts maintained in the regular course of business, unless the contrary is proved or any doubt is raised through evidence regarding genuineness of such books of account or any of the entries, then such books should be regarded as proved.

In **Kalipada Sinha vs. Mahaluxmi Bank Ltd.** *AIR 1961 Calcutta 191* the entries made in the statement of accounts coupled with the oral deposition were found to be sufficient to prove the case of the respondent. Similar view was taken by a Division Bench of Punjab High Court in

Kaka Ram Sohanlal and others vs. Firm Thakar Das Mathra Das and another *AIR 1962 PUNJAB 27*. In taking this view, the High Court relied upon the decision of Lahore High Court in **Firm Jodha Mal Budhu Mal vs. Ditta** *AIR 1925 Lah 242 (1)* and the decision of the Allahabad High Court in **Suraj Prasad vs. Mt. Makhna Devi** *AIR 1946 All 127*.

19. In the case before this Court, PW-2 Manjeet Singh, who has been maintaining the books of accounts of the plaintiff, has duly proved the entries made in account books. The authenticity of the books of accounts of the plaintiff was not impeached during his cross-examination. According to the plaintiff, whatever was due to him was reflected in the ledger and was also shown in his income-tax returns. The oral deposition of the plaintiff, therefore, is sufficient corroboration of the entries made in the account books. This is more so when the defendant has failed to produce his account books despite admitting that he had been maintain such books.

20. In his cross-examination, the defendant has admitted that he had been maintaining account books and income tax return has been filed by him on the basis of

account books. He has also admitted that all credits, debits and dues are mentioned in his account books. However, the account books have not been produced by the defendant. He claimed, during his cross examination, that in the year 1996-97, there was a problem in the lottery business and the police had seized much of his record. He, however, could not give the case number or FIR number in which his documents were seized. He stated that though the case had been closed and he had applied for return of account books, the same had not been returned to him. In case, the account books of the defendant were seized by the police, as claimed by him, nothing prevented him from summoning the account books from the Court where they have been filed. This is more so when the defendant claims that he had already applied for return of those account books. Since the defendant had an opportunity to rebut the account books of the plaintiff by producing his own account books and he did not avail that opportunity, I see no reason to disbelieve the account books maintained by the plaintiff, who has also produced the author of the account books in the witness box. In fact, an adverse inference needs to be drawn against the defendant for not producing the account

books, which he could easily have produced. Section 114 (g) of the Indian Evidence Act, 1872 provides that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. Therefore, an adverse inference can be drawn that had the defendant produced the account books in the Court, the entries showing the amount claimed by the plaintiff would have been found shown outstanding in those account books.

21. However, the plaintiff can recover only that much amount, which has not become barred by limitation. Since the payment made by the defendant on 6th June 1996 would save, from limitation, only amount which had not become time barred as on 6th June, 1996, when payment was made by way of a demand draft, only the amount which was legally recoverable on 6th June 1996 can be recovered by the plaintiff as principal sum. The issues are decided accordingly.

Issue No.7

22. A perusal of the delivery challans raised by M/s J.C. Enterprises whereby goods were dispatched to the defendant shows that the term regarding interest has been

specifically printed in the challans. Interest was payable at the rate of 18% per annum on payment received beyond 15 days from the date of dispatch. Hence the plaintiff is entitled to recover interest at the rate of 18% per annum on the unpaid principal amount. The issue is decided accordingly.

Issue No.8

23. Vide order dated 19th January, 2011, the plaintiff was directed to file an affidavit stating therein the amount which was due to him from the defendant on 6th June, 1993. The affidavit filed by the plaintiff shows that Rs.12,78,478/- was due to the plaintiff on 6th June, 1993. The plaintiff has claimed a sum of Rs.22,84,907/- as interest on the principal sum of Rs.20,97,566/- at the rate of 18% per annum. Calculated on proportionate basis, the amount of interest on Rs.12,78,478/-, being the principal amount, comes to Rs.13,92,262/- at the rate of 18% per annum. In view of my findings on the other issues, the plaintiff is entitled to a sum of Rs.12,78,478/- as principal amount and a sum of Rs.13,92,262/- as interest making a total sum of Rs.26,70,740/-.

ORDER

For the reasons given in the preceding paragraphs, a decree for recovery of Rs.26,70,740/- with proportionate costs and proportionate pendente lite and future interest at the rate of 12% per annum is passed in favour of the plaintiff and against the defendant.

Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

JANUARY 31, 2011
Vk/Ag