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3.The payment shall be made after production of ISI certificate confirming to 18-269-1976, within 3 day on receipt of material.

.....

5.The first 30% quantity of cement shall be supplied within three days and the balance within 45 days of the issue of the supply order otherwise a penalty of Rs.500/- per day will be affected from the respective next day of the supplies.”

Contention of the plaintiff was that of a total supply worth Rs.4,39,200/- of cement was made; only Rs.3,84,300/- was paid by the defendant; balance of Rs.54,9000/- was illegally retained by the defendant. Suit was accordingly filed.

3. In the written statement, it was contended that the plaintiff has no cause of action; he had not adhered to condition no.3 and 4 of the tender agreement (Ex.DW-1/1); he was not entitled to any payment.

4. From the pleadings of the parties the following seven issues were framed:

- i. Whether the suit has been signed, verified and authorized by a duly authorized person?
- ii. Whether there is no cause of action against the deft.?
- iii. Whether the defdts are entitled to forfeit the amount in view of clause 3 and 5 of the agreement?
- iv. Whether the plea raised with regard to ISI certificate is after thought?
- v. Whether the defdts are stopped from raising the plea of quality of cement after using the same?
- vi. Whether the plttf is entitled for the relief claimed? OPP
- vii. Relief.

5. On the basis of oral and documentary evidence all the issues were decided in favour of the plaintiff. It was held that the suit has

been signed and verified by a duly authorized person; power of attorney Ex.PW-1/1 had been proved through PW-1 G.M.Lal, in whose favour the power of attorney had been executed authorizing him to institute the present suit; document Ex.PW-1/1 was examined and scrutinized. It was held that supply of ISI certificate was not the essence of the contract; cement bags which had been supplied by the plaintiff to the defendant had the ISI mark and this had been admitted by DW-1 in his cross-examination. There was no assurance given by the plaintiff that only on the supply of the ISI certificate would balance payment be made. This finding was arrived at after examining the correspondences exchanged between the parties.

6. This finding of the trial judge was affirmed in appeal.

7. This is a second appeal. It has been admitted and on 09.5.2007 the following two substantial questions of law were formulated:

1. Whether it was proper for the courts below to ignore the above said terms and conditions, if so, what is their effect?

2. Whether the suit instituted by the respondent herein before the court below, was instituted by an duly authorized person?

8. On behalf of the appellant, it has been urged that the judgments of the two the courts below are perverse for the reason that they have not construed the terms and conditions of Ex.DW-1/1 in its true and correct perspective. Clause 3 specifically postulated that only after the supply of ISI certificate would the payment be made by the defendant; admittedly in this case the plaintiff has not furnished the ISI certificate. On the second substantial question of law, it has been urged that the provisions of Order 29 Rule 1 of the Code are mandatory; they cannot be given a

go by. Ex.PW-1/1 which was the power of attorney purported to have been executed in favour of PW-1 has two different dates; the date of its execution is 14.1.1991 whereas date of attestation is 15.1.1991 thereby destroying the authenticity of this document; it cannot be said that this document had been attested by the notary public on the date it was executed. Learned counsel for the appellant has placed reliance upon 1990(3) Delhi Lawyer 356 Syndicate Bank Vs. M/s S.A.Trading Corpn. & Ors. 1999 AD (Delhi) 739 Birla Dlw Ltd. Vs. Prem Engineering Works and another judgment of this court reported in 78(1999) DLT 123 Shrijee Synthetics (Bombay) Pvt. Ltd. Vs. M/s Manju Falls to support his submission that a suit which has not been instituted by a duly authorized person is liable to be dismissed; such a proceeding is nonest.

9. Arguments have been countered. It is pointed out that the concurrent judgments of the two courts below do not call for any interference. Both these contentions now raised have been dealt with by the courts below.

10. Record has been perused.

11. On the first substantial question of law, the finding returned in the impugned judgment endorsing the finding of the trial judge is as follows:

“4.1 On analysis and scrutiny of record in the light of pleadings, evidence of the parties, grounds of appeal and their contentions, broadly speaking the appeal is basically based on Clause 3 and Clause 5 of agreement/letter dated 01.03.1990 (Ex. P.W.1/4 and Ex D.W.1.1). According, to the appellants/defendants, the respondents/plaintiffs were required to furnish ISI certificate within three days from the receipt of material and appellants/defendants were required to make payment after production of such ISI Certificate confirming IS-269-1976 and secondly the

respondents/plaintiffs were required to supply 30% quantity of cement within three days and the balance within 45 days of the supply order, otherwise a penalty of Rs. 500/- per day will be imposed, however, both the conditions were not complied by the respondents/plaintiffs; letter/documents Ex.DW1/4 and Ex.PW 1/4 are the admitted documents of the parties. On the other hand, the respondents/plaintiffs opposed this contention of the appellants/defendants that it is an after thought plea of appellants/defendants as the other correspondence exchanged/proved never talked about violation of Clause 3 of agreement/letter dated 01.03.1990. Had there been requirement of Clause 3 as essence of the contract the appellants/defendants would have pointed out in the written correspondence or otherwise orally but it was never pointed out. Otherwise, the respondents had already placed on record Certificate of ISI. The appellant/defendant witness S.S. Gaur, DW.1 in his examination and appellants' letter dated 12.04.1990 Ex. DW1/3 letter dated 16.04.1990 Ex.DW1/ 5, letter dated 04.05.1990. Ex DW1/7, letter dated 30.05.1990 Ex.DW1/ 9, letter dated 15.06.1990 Ex.DW1/10, letter dated 21.06.1990 Ex.DW1/12 and letter dated 06.12.1990 Ex.DW 1/18 do not refer for supply of ISI certificate by the respondents/plaintiffs to the appellants/defendants, therefore, according to the respondents/appellants, supply of ISI Certificate was not essence of the contract.

On assessment of record, letter dated 01.03.1990 Ex.DW1/1 (Ex.PW1/4) provides terms and conditions of contract between the parties and Clause 3 stipulates that payment shall be made after production of ISI Certificate and clause 5 Schedules quantity and time for supply of cement. Witness DW 1 admits in his cross examination that there was no dispute of quality of cement that each bag of cement was bearing mark/impression "ISI". Further, the letters Exhibits DW1/3, DW1/5, DW1/7, DW1/9, DW1/10, DW1/12 and DW1/18 are the correspondence exchanged by the appellants/defendants with the respondents/plaintiffs and none of the letters suggest seeking ISI Certificate from the respondents/plaintiffs. Secondly, I have an occasion to go through letter dated 26.06.1990 Ex.DW1/11 in the light of cross examination of witness DW 1 and letter dated 25.07.1991 Ex.DW1/23 and on consolidated reading of such letters in the light of statement of DW1, the appellants/defendants itself suggest that a sum of

Rs.54,000/- was withheld towards security. In letter Ex. DW 1/23 it was supplemented that such amount is withheld till the time the relevant ISI Certificate was produced, which was never claimed in the earlier correspondence. Now, the picture emerged is that appellants/defendants released the payment of 90% amount to the respondents/plaintiffs and requirement or requisition of ISI Certificate was never made in the correspondence exchanged earlier to July, 1991 and it is apparent that either the appellants/defendants was satisfied with the requirement of ISI Certification or its need was not felt while releasing the amount, either as a waiving off the requirement or as a concession or otherwise. Therefore, when the appellants/defendants released 90% payment to the respondents/plaintiffs, there was no reason to withheld remaining 10% payment as letter/agreement dated 01.03.1990 Ex.PW1/4 (or Ex.DW1/1) does not bifurcate the amount. Accordingly, there was no reason for the appellants/defendants to forfeit the amount withheld by it. Hence, the trial court has appreciated the plea of both sides. Keeping in view the record and evidence led by the parties and I do not find any infirmity, illegality or flaw on the opinion formed in respect of the issues 2 to 7 or to disturb the opinion formed by trial court. Neither there is violation of principles of law or principle of natural justice, by the trial court."

There is no perversity in this finding. It calls for no interference.

12. The impugned judgment had relied upon the correspondences exchanged between the parties. Ex. DW-1/2 is the letter dated 22.3.1990 of the plaintiff wherein it has been specifically stated that the balance amount of Rs.54,900/- is still due and payable; it has been mentioned that there is no clause in the purchase order which permits a deduction; the balance be remitted. In reply to this letter the defendant vide communication dated 02.4.1990 (mark A /admitted document) has stated that the matter regarding the refund of the balance is under consideration; meanwhile the balance supply may be made. There is no mention

in this correspondence that the balance amount has been retained for the reason that the ISI certificate has not been furnished by the plaintiff. Both the courts below had noted that it was not the essence of the contract that only after furnishing of the ISI certificate by the plaintiff would the balance payment be made. This is an admitted fact that the defendant had made 90% of the payment; only 10% payment had been retained. The correspondences exchanged between the parties nowhere gave any assurance qua the plaintiff that he would furnish the ISI certificate to the plaintiff. DW-1 had also admitted that each cement bag which has been received bore the ISI stamp.

13. The finding on this substantial question of law calls for no interference. Substantial question no.1 is answered in favour of respondent and against the appellant.

14. On substantial question no.2 issue no.1 had been framed. The finding on issue no.1 by the trial court was returned as under:

“Issue No.1:- The plaint is signed and filed by one Mr.G.M.Lal, who is stated to be the Asst. Manager of the pltf com. During his evidence, he deposed that he is the Sr.Manager and holds a power of attorney, which is proved as Ex.PW-1/1. There is no C.E. of this power of attorney. This issue is, therefore, decided in favour of the pltf.”

15. Perusal of the plaint shows that G.M.Lal is the person who has instituted the present suit. He has been described in the plaint as one of the principal officers of the plaintiff company and duly authorized to file the present suit on behalf of the company. Power of attorney has been proved as Ex.PW-1/1. The said document has been perused. It states that the company namely M/s J.K.Synthetics Ltd. has appointed Mr.G.M.Lal as their attorney to file suits/ application for and on behalf of the company. This is

contained in clause 3 of the Ex.PW-1/1. This document was executed on 14.1.1991. It further recites that this power of attorney has been executed pursuant to the resolution passed by the Board of Directors in the meeting held on 21.12.1991. The date of attestation of the document is 15.1.1991. PW-1 has not been cross-examined at all. Not a single question or suggestion has been given to this witness that this document is not in fact a duly authenticated document or PW-1 G.M.Lal had not been authorized by the company in terms of Ex.PW-1/1 to institute the present suit. This testimony of PW-1 having remained unchallenged it is clear that it has to be accepted.

16. This finding on issue no.1 had also been endorsed in appeal.

Finding returned is as follows:

4.2 It is apparent from preceding paragraph 4.1 above that there is no discussion on issue No. 1. In fact, the appellant had not referred or contested issue No. 1 in the appeal but objections have been raised at the time arguments in appeal, on the finding of trial court on issue no. 1.

The appellants submit that there are catena of law on the point that in case plaint is instituted by a company, there ought to have been Resolution of Board, otherwise no person shall be competent to sign and verify the plaint. Sh. G.M. Mal, Senior Manager of the respondents/plaintiffs had filed and verified the plaint and he also appeared in the witness box on the basis of power of attorney Ex. PW-1/1 and no Resolution of Board of company was filed, therefore, Mr. G.M. Mal was not he competent person to sign or verify the plaint. The appellants have relied upon M/s Nibro Ltd. Vs. National Insurance Co. Ltd. 1990 DLT 633 wherein it was held that power of attorney vest with the Board of Directors and individual Director cannot, without specific resolution of the board, institute a suit; M/s Shreeji Synethics Pvt. Ltd. V. Manju Falls 78 1999 DLT 123 that unauthenticated power of attorney cannot be accepted as a basis of any suit stated to be instituted by a competent person and Birla DLw Ltd. Vs. Prem Engineering Works 1999 AD (DELHI) 739 wherein it was discussed that execution before notary public cannot be proved unless twin requirement of execution before and authenticated by

notary public are proved and unless such requirements are proved, presumption of Section 85 of Indian Evidence Act cannot be termed, therefore, power of attorney Ex. DW-1/1 is, in fact, no document in the eyes of law. The suit ought to have been dismissed on this plea.

Whereas, the respondents/plaintiffs opposed the request while relying upon the law declared by Division Bench of Hon'ble Supreme Court of India in Union of India Vs. Naresh Kumar AIR 1997 SC 3 wherein it was held that the suit shall not be dismissed on technical reasons like the plaint was not signed and verified by a competent person and accordingly, the appellants/defendants cannot derive any benefit.

As discussed, the appellant/defendant had not taken the plea in the written appeal but in written submissions, therefore, it requires to adjudicate it since the question on the point of law has been raised before this first appellate court. If we read the evidence of both the parties consolidatedly, we can assess, at glance, that Sh. G.M. Mal, PW-1 deposed specifically that he has been authorized to file the suit supplemented with power of attorney Ex. PW-1/1 in his favour by the respondent/plaintiff. The PW-1/1 was never cross examined on the point of authorizing him to file the suit nor he was questioned about general power of attorney in his favour or its authenticity or execution, therefore, in the absence of cross-examination on this score, and in the light of law declared in Union of India (supra), I am of the opinion that trial court opined and declared the issue no. 1 properly and I do not find any merit in the appeal qua issue no. 1 also.

17. This finding also calls for no interference. The judgments relied upon by the learned counsel for the appellant are clearly distinct. In Syndicate Bank (supra) a Bench of this court had held that the provisions of Section 4 of the Power of Attorney Act 1882 are far stronger than the provisions of Section 85 of the Evidence Act which deals with "presumption" as to power of attorney. Section 4 of the Power of Attorney Act states that no further proof of contents of the instrument shall be required if the same has been proved in accordance with Section 4 of the said Act. The judgment of Birla Dlw Ltd. (supra) is also distinct. In that case the

power of attorney in favour of Mr.Poddar was proved through Mr.Saraogi. Mr.Poddar had himself not come into witness box. Mr.Saraogi did not depose anything about either being familiar with the signatures of Mr.Poddar or that the said power of attorney was executed in favour of Mr.Poddar in his presence. In these circumstances, presumption under Section 85 of the Evidence Act had not been adverted to. The third judgment of *Shrijee Syhthetics* (supra) is also distinct and not applicable. Court had noted that there was prima facie lack of authority on behalf of the directors to institute the suit.

18. In this case Ex.PW-1/1 has been proved qua PW-1 to institute and file the present suit; Ex.PW-1/1 had remained un-assailed and unchallenged. In a judgment reported in 1996 6 SCC 660 *United Bank of India Bank of India Vs. Naresh Kumar*, the Supreme Court had held that procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause; there is sufficient power in the Courts under the Code, to ensure that injustice is not done to any party who has a just case; as far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

19. Substantial question of law no.2 is also answered in favour of the respondent and against the appellant.

20. There is not merit in the appeal. Appeal as also pending application is dismissed.

INDERMEET KAUR, J.

APRIL 04, 2011
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