

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : 9th November, 2011

+ RFA(OS)73/2011

HINDUSTAN PHOTOFILMS MANUFACTURING CO. LTD.

....Appellant.

Through : Mr. Dileep Poolakkot, Advocate

versus

M/S ANU ENTERPRISE AND ORS. ...Respondents

Through: Mr.J.K. Bhola, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE S.P.GARG

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

S.P.GARG, J. (Oral)

1. Appellant Hindustan Photofilms Manufacturing Co. Ltd has preferred the present appeal against the judgment dated 2nd August, 2010 passed by the learned Single Judge whereby the suit filed by the appellant seeking decree for a sum of ₹2,39,47,194.27 against the respondents, was dismissed.

2. In the plaint, the appellant averred that it was carrying on a business of manufacture and sale of photo sensitized products including still photo products and graphics arts photo produces. On 30th July, 1984 and 1st August, 1984,

the appellant constituted respondent M/s Anu Enterprises as its stockiest in respect of two types of products and entered into an agreement which was initially for five years and later renewed in 1989 for a further period of five years. In terms of the agreement, dealings between the parties were on a principal-to-principal basis. M/s Anu Enterprises, as stockiest, was entitled to a credit period as well as a trade discount on the product value and additionally to an agreed commission. As stockiest, M/s Anu Enterprises has to furnish bank guarantees/revolving letter of credit/insurance guarantee to secure the overall credit facility. It is stated that consequently, the respondent initially issued some bank guarantees upon which the appellant started supplying the goods. During the course of dealings, respondent approached it for enhanced credit facilities against bills of exchange as they anticipated greater volume of business and that purchases would be made against hundies to be accepted for payment of supplying of goods.

3. As per the appellants, the City Bank was operating a bill discounting scheme under which hundies could be discounted forthwith by presentation before the date of maturity and the acceptors to such hundies would make payment to the bank on the date of maturity for the value along with interest charges etc. The appellants accepted the proposal of the respondents and started selling goods to it against hundies duly accepted by the latter for payment. The hundies would be presented to the City Bank which discounted them or paid or credited to the appellant's account. However,

the respondent did not honour the hundies accepted by them and consequently failed to pay the amount on the due dates, as a result, City Bank debited the appellant's account to the extent of such dishonored hundies. The respondents were informed about the dishonor of hundies as well as consequential embarrassment and loss.

4. Further case of the appellant is that the respondent promised to clear the entire amount outstanding but failed to do so despite repeated reminders. Under these circumstances, the appellant was constrained to invoke bank guarantees to the tune ₹6.5 lacs, ₹1,06,58,723/- including the bank charges levied by the City Bank became due and payable to it.

5. The appellant relied upon acknowledgment dated 24/05/1993 of debt of ₹1,06,58,723.43 stating that they were liable to pay a sum of ₹1,53,57,289.54. The appellant further claimed interest @ 21 per cent per annum from the date of payment till 31st March, 1996.

6. The respondents pleaded before the learned Single Judge that they never approached the appellant for credit facilities against hundies. Supplies to stockists for credit period ranging from 45 to 60 days were routine as the appellant was facing cash liquidity. Due to liquidity problem, it started practice of receiving bills of exchange. The blank hundy papers were signed at the behest of the appellant by respondent no.2 and that 30 stamp papers were sent on three occasions i.e., 24th June, 1989, 11th December, 1989 and 6th March, 1990. It was the appellant who was in arrangement for

bill discounting with City Bank and they were unaware whether hundies were prepared and whether amounts were paid under it.

7. The respondents further claimed that the appellant was in the habit of issuing bogus bills and debit notes even when no goods were supplied for the window dressing of its account. No acknowledgment dated 24th May, 1993 was ever issued by them. A sum of ₹195.90 lac was payable by the appellant to them.

8. Number of issues were framed during the trial. The appellant examined PW1 Sh.N.Shivan, its Manager to prove the issues. The respondent examined respondent no.2. After an appraisal of the evidence adduced on record and considering the contentions of the learned counsel for the parties, the learned Single Judge came to the conclusion that the appellant was entitled to a decree for ₹46,58,727.43 however having regard to the finding on issue No.2, regarding limitation, the appellant could not succeed as the suit was not filed within limitation and was time barred.

9. Aggrieved by the said orders, the appellant has come in appeal.

10. Short question which arises is, “whether the suit filed by the appellant before the learned Single Judge was within limitation or the prescribed period of limitation got extended due to alleged acknowledgment dated 24th May, 1993?”

11. In the plaint, the appellant in para no. 16, averred that the cause of action arose on all dates when the respondents acknowledged and promised to pay all the outstanding amounts, especially and more specifically on 24th May, 1993 when the respondent acknowledged an amount of ₹1,53,57,289.54 as being the amount outstanding and payable by them to the appellant.

12. In the written statement, the respondents categorically denied this assertion of the appellant and stated that the suit was barred by limitation. No acknowledgment was made on 24th May, 1993.

13. The burden to prove that the suit was within limitation or that there was valid acknowledgment dated 24th May, 1993 by the respondents or that the prescribed period of limitation got extended due to that acknowledgment was heavily upon the appellant. Scanning the evidence adduced on record, it stands established that the appellant miserably failed to prove before the court if there was any acknowledgment made by the respondents vide letter dated 24th May, 1993 Ex.PW1/245.

14. In the affidavit Ex.P-1 tendered in evidence, PW1 Mr.N.Shivan himself put exhibit mark to this acknowledgment letter as Ex.PW1/245. Learned counsel for the respondents at that time objected to the documents being exhibited on the ground of admissibility, relevance and mode of proof. It was specifically pointed out by the learned counsel for the respondents at that time that the documents were

photocopies of the original ones. At that time, the appellant did not bother to place on record the original document, the photocopy of which had been marked as Ex.PW1/245. The appellant did not give any plausible explanation at that time for not filing the original document to be exhibited in evidence before the Court. PW1 Mr.N.Shivan was cross-examined. In the cross examination, he admitted that Ex.PW1/245 was not signed or executed in his presence. It was signed at the office of the respondent. Specific suggestion was put to this witness in the cross examination that document PW1/245 was later on fabricated to bring the claim within limitation.

15. The respondents examined Sh.Ram Khanna respondent no.2 who filed his evidence by way of affidavit Ex.DW1/A. In the affidavit it was specifically pleaded that the suit was barred by limitation and the alleged acknowledgment dated 24th May, 1993 is a crude forgery and does not bear the signature of the deponent. The acknowledgment appeared to have been manufactured to bring the suit within limitation. In the cross examination, no suggestion was put to the witness if Ex.PW1/245 was a genuine document or that it was executed by the respondents and contained the signatures of respondent no.2. The plea taken by the respondents in the affidavit remained unchallenged and uncontroverted in the cross-examination.

16. During the long pendency of the suit before the learned trial court, at no stage, the appellant produced on record the original acknowledgment dated 24th May, 1993. No explanation was offered by the appellant about the

whereabouts of the original of Ex.PW1/245. The appellant put exhibit mark suo motu on the document at the time of tendering evidence by way of affidavit. No permission was obtained to lead secondary evidence.

17. Perusal of the document Ex.PW1/245 reveals that it is a photocopy of the attested notarized copy of the original one. Even the original of Ex.PW1/245 i.e., the document attested by the Notary Public has not been produced before the Court. No efforts were made by the appellant to summon Mr.K.C.Sharma, Notary Public who had allegedly attested the original of Ex.PW1/245 to throw light as to how and under what circumstances, he had attested the document. The acknowledgment is alleged to be dated 24th May, 1993. Ex.PW1/245 a photocopy of attested document is dated 24th January, 1994. The appellant has not explained as to how and under what circumstances the original of Ex.PW1/245 was got attested from Notary Public at a belated stage after about 7-8 months. There is nothing on record to show if Notary Public had seen the original acknowledgment at the time of attesting the photocopy of Ex.PW1/245.

18. From the document Ex.PW1/245 nothing is manifest as to under what circumstances this alleged acknowledgment came into existence. It is also not clear as to by which mode this alleged original acknowledgment was sent by the respondents to the appellant or who had received it in their office. The appellant did not produce on record any register showing receipt of original of Ex.PW1/245.

19. The learned Single Judge specifically dealt with this contention of the appellant and observed that the appellant blandly sought to introduce secondary evidence at the stage of examination of its witnesses. Even the original copy of the attested one was not produced and what was placed on record was a photocopy. The learned Single Judge was justified that Ex.PW1/245 could not be taken on record as it was not adduced in evidence in the manner prescribed to prove the document. The onus lies on the creditor to prove that the acknowledge relied on to save limitation was made within time.

20. At the fag end of his arguments, learned counsel for the appellant brought our attention towards one application moved under Section 151 CPC to file and place on record the documents annexed thereto as Annexure-1. In our view, this application which was never brought on judicial record, does not change the fate of the case. Learned counsel for the appellant fairly admitted that original acknowledgment was never brought on record before the learned Single Judge. Since the entire case of the appellant was based upon the acknowledgment dated 24th May, 1993 to bring the suit within limitation, it was legal duty cast upon the appellant to prove the alleged acknowledgment dated 24th May, 1993 for extension of prescribed period of limitation which the appellant, for the reasons stated above, miserably failed. Learned Single Judge was completely justified in dismissing the claim of the appellant being barred by limitation. The legislature has cast a duty upon the court to examine on the

touchstone of the case put forth by the parties and to decide whether the suit is within limitation or not.

21. We find no merits in the appeal and the same is dismissed. No order as to costs.

(S.P.GARG)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

November 09, 2011
'raj'