

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

% Date of judgment: 09.5.2011

+ **R.S.A.No.243/2007**

OM PRAKASH Appellants
Through: Mr.Daljinder Singh, Advocate.

Versus

M/S NARAYAN ELECTRICAL & MECHANICAL WORKS
.....Respondent
Through: Mr.R.P.S.Sirohi, Advocate.

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.

1. This appeal has impugned the judgment and decree dated 14.2.2007 which had reserved the finding of the trial judge dated 28.4.2005 whereby the suit filed by the plaintiff Om Prakash seeking recovery of money had been decreed for a sum of Rs.41,680.68 along with interest at 9% per annum. Impugned judgment had reversed this finding. Suit of the plaintiff stood

dismissed.

2. Plaintiff is the proprietor of M/s Pawan Iron & Steel Store; he had supplied steel pipes to the defendant. Payments were being made by the defendant. A running account was maintained. It had been agreed that the defendant would make payment against each bill within seven days from the receipt of the goods otherwise interest would be chargeable at the rate of 24 % per month. Despite demands this amount was not paid. Suit was filed claiming a sum of Rs.41,680.68 for which Rs.36561.88 comprised of the principal and the balance was the interest @ 24% per annum w.e.f. 01.5.1999 to 30.11.1999; interest quotient was Rs.5119/-.

3. Defendant contested the suit. It was denied that any amount of payable by the defendant much less than the interest amount.

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

“1. Whether the suit of the plaintiff is not maintainable in the present form? OPD

2. Whether the plaintiff is entitled to the decree of amount claimed in the suit? OPP

3. Whether the plaintiff is entitled to any interest on the amount so claimed and if yes at what rate and for what period? OPP

4. Relief.”

5. Oral and documentary evidence was led. The invoices/bills were proved as Ex.PW-1/1 to Ex.PW-1/18; statement of account was proved as Ex.PW-1/23. The trial judge on the basis of the oral and documentary evidence held that the plaintiff is entitled to the decree of the aforementioned amount. Suit was accordingly decreed.

6. Impugned judgment had reserved this finding. The first appellate court had held that the statement of account was by itself was not sufficient to establish the claim of the plaintiff; no sales tax receipt, balance sheet, ledger book or account books have been proved by the plaintiff; the extraction from the account books does not fulfill the requirement of law. Section 34 of the Evidence Act had been adverted to. It was noted that the document Ex.PW-1/20 to Ex.PW-1/23 are loose sheets of paper and do not fall within the definition of books of account. Suit of the plaintiff was accordingly dismissed.

7. This is a second appeal. It has been admitted and on 03.8.2010 the following substantial question of law was formulated:

“Whether the first Appellate court has illegally ignored the documentary evidence adduced by the plaintiff, if so, its effect? “

8. On behalf of the appellant, it has been urged that the judgment of the trial court is illegal and perverse; it had not appreciated the fact that the original record of the Ex.PW-1/1 to Ex.PW-1/18 and Ex.PW-1/23 had been brought to the Court and this is evident from the testimony of PW-1. A notice (Ex.PW-1/20) under Order 12 Rule 8 of the Code of Civil Procedure had also been issued to the defendant asking him to produce the original documents but no reply had been furnished to the said notice. Attention has been drawn to the testimony of DW-1 wherein in his cross-examination he had admitted that he had given a reply to Ex.PW-1/20 but the same is not on record. It is pointed out that the impugned judgment dismissing the suit of the plaintiff is an illegality; it is liable to be set aside.

9. Arguments have been countered. It is pointed out that the findings of fact have been correctly appreciated by the court below and the impugned judgment calls for no interference.

10. Perusal of the record shows that the suit had been dismissed primarily on two counts. The impugned judgment had noted that Ex.PW-1/23 which is the statement of account are mere loose sheets of paper and under Section 34 of the Indian Evidence Act entries on the books of account unless properly proved cannot be a piece of evidence. It was noted that these entries in the books

of account were not regularly kept in the course of the business of the plaintiff. This finding suffers from a perversity. PW-1 had stepped into the witness box and in his affidavit by way of evidence (Ex.P) he had proved Ex.PW-1/23. He had deposed that the parties were maintaining a running account and the statement of account maintained by the plaintiff regularly in the ordinary course of business which is correct in terms of the cash book and ledger of the company is Ex.PW-1/23. He had brought the original ledger and cash book and this is evident from his testimony dated 21.9.2004; the original invoices had also been brought on that date. Trial judge had noted that the invoices Ex.PW-1/1 to Ex.PW-1/18 are only photocopies of the carbon copies maintained by the plaintiff; originals have not been produced. The case of the plaintiff is that the originals of these documents were lying with the defendant and notice under Order 12 Rule 8 of the Code (Ex.PW-1/20) had been served upon the defendant asking him to produce these originals. As per the court record no reply had been furnished to this notice. DW-1 in his cross-examination had however admitted that he had sent a reply to the notice Ex.PW-1/19 (u/O 12 Rule 2 of the Code) and Ex.PW-1/20 (u/O 12 Rule 8 of the Code); these replies are not on the court file as the same had not been filed. This is a clear and categorical admission of

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the defendant. DW-1 had further in his cross-examination admitted :

"All the bills through which I had purchased the goods from the plaintiff firm are also in my power and possession till today."

11. This admission of the defendant clearly establishes that the impugned judgment rejecting the bills Ex.PW-1/1 to Ex.PW-1/18 for the reason that the originals have not been produced is clearly a perversity; it is liable to be set aside. This finding is accordingly set aside.

12. Ex.PW-1/23 the statement of account was maintained by the plaintiff in his regular course of business; as per testimony of PW1 the original cash book and ledger account on the basis of which this statement account had been prepared had been tendered in the court. Not a single suggestion has been given to the PW-1 that this document is forged or fabricated. Finding of the trial judge rejecting Ex.PW-1/23 for the reason that they are loose sheets of paper and original had not been produced is again a perversity. This judgment is also set aside.

13. Result is that the plaintiff has been able to prove that he had through the aforementioned bills (Ex.PW-1/1 to Ex.PW-1/18) supplied goods to the defendant; defendant had not denied his business transactions with the plaintiff. The discussion noted supra

establishes and proves the case of the plaintiff. The appellate court had illegally ignored the evidence. Substantial question of law is answered in favour of the appellant and against the respondent. Appeal is allowed. Suit of the plaintiff is decreed.

INDERMEET KAUR, J.

MAY 9, 2011
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