

* IN THE HIGH COURT OF DELHI AT NEW DELHI
% Date of Decision: December 05, 2011
+ RFA(OS) 86/2011

BHARAT UDYOG ...Appellant
Through: Mr.T.S.Ahuja, Advocate

versus

VINAY CORPORATION & ORS. ...Respondents
Through: Mr.Pramod Ahuja, Advocate with
Mr.Pradeep Sharma and M.Zafar
Khan, Advocates for R-1 to R-3

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

PRADEEP NANDRAJOG, J. (Oral)

1. Appellant's suit has been decreed against defendant No.4, impleaded as respondent No.4 in the instant appeal. Said respondent has not been served. Since the grievance in the appeal relates to the suit being dismissed in respect to the claim against defendants No.1 to 3, impleaded as respondents No.1 to 3 in the appeal, vide order dated November 01, 2011, in spite of respondent No.4 not being served, it was directed that the appeal would be heard for final disposal today.
2. Accordingly, arguments have been heard in the appeal.
3. We shall hereinafter be referring to the parties by their nomenclature in the suit.

4. Bharat Udyog, claiming to be a division of CLC Global Ltd. filed a suit impleading M/s. Vinay Corporation as defendant No.1 and Mr.Pramod Gupta and Mrs.Deepika Gupta as defendants No.2 and 3, stating that the two were partners of defendant No.1, which was stated to be a partnership firm. Radhika Fibers (India) Ltd. a company registered under the Companies Act was impleaded as defendant No.4.

5. As per the plaint it was stated that Bharat Udyog used to award job work to defendant No.4 to manufacture yarn for Bharat Udyog and for which cotton was required. Bharat Udyog entered into a contract with defendant No.1 as per which upon advance payment made by Bharat Udyog to defendant No.1 cotton was to be supplied to defendant No.4. It was pleaded that pursuant to the contract only two orders were placed by Bharat Udyog upon defendant No.1 and pertaining to the first order, by means of a bankers' cheque in sum of ₹9 lakhs was paid to defendant No.1 on 05.02.2003 and thereafter pertaining to the second order vide three bankers' cheques dated 13.02.2003, 18.02.2003 and 20.02.2003 in sum of ₹7 lakhs, ₹3.25 lakhs and ₹10.25 lakhs i.e. totaling ₹20.50 lakhs payments were made in advance. Stating that defendant No.1 supplied cotton as per the contract worth ₹9 lakhs and thus executed the first work order, grievance laid was that defendant No.1 adjusted ₹20.50 lakhs against dues of defendant No.4 in respect of independent transactions between defendant No.1 and defendant No.4. Thus, decree in sum of ₹20.50 lakhs with interest was claimed against defendants No.1 to 3.

6. In a nut shell, case of the plaintiff was that there was a contract between the plaintiff and the defendant No.1 under which plaintiff made advance payment to defendant No.1. Goods as per the contract were to be delivered by defendant No.1 at the factory of defendant No.4.

7. Defendants No.1 to 3 filed a joint written statement denying any contract with the plaintiff. They pleaded that defendant No.4 had contacted defendant No.1 for supply of cotton and had indicated that its financial position being tight, it had an arrangement with the plaintiff to pay the money on behalf of defendant No.4 and that defendant No.1 received the four bankers' cheques referred to in the plaint through defendant No.4 and to the account of defendant No.4 in respect of said contract entered into between defendant No.1 and defendant No.4.

8. Suffice would it be to state that the defence of defendant No.1 to 3 is premised on the law in India that there must be privity of contract between the parties and there need not be any privity of consideration.

9. We highlight the definition of consideration as per clause (d) of Section 2 of the Indian Contract Act 1872. It reads as under:-

“2.(d) When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;”

10. It is apparent that the consideration for the promise may flow either from the promisee or any other person.

11. Defendant No.4 filed a written statement supporting the plaintiff by pleading that defendants No.1 to 3 had wrongly adjusted a sum of ₹20,50,000/- payable by defendant No.4 to defendant No.1 in the account of the plaintiff. After filing the written statement defendant No.4 stopped appearing in the suit and was proceeded against ex-parte.

12. We would simply highlight that as per the written statement filed by defendant No.4 it admitted that if the sum in question was not adjusted by defendant No.1 in the account of the plaintiff, the said defendant would be liable to pay said sum to defendant No.1.

13. For the reasons which we would be recording hereinafter, it is apparent that defendant No.4 took a stand at the behest of the plaintiff. The two were acting in concert. It appears that defendant No.4 had lost its creditworthiness and thus it hardly mattered to it whether its creditor is the plaintiff or defendant No.1.

14. Since the bankers' cheques were drawn from out of the account of the plaintiff, it would be better if we consider the defence evidence first, for the reason defendants No.1 to 3 having admitted receipt of the payment, but pleaded facts which were a plea of avoidance, onus would be on defendants No.1 to 3 to prove the defence.

15. Only one witness Mr.Rajiv Kumar Jain DW-1, was examined by defendants No.1 to 3 and of the various documents proved by him only two need to be highlighted.

16. The first is Ex.DW-1/1, a letter dated 19.12.2002, addressed by defendant No.4 to defendant No.1. It reads as under:-

"M/s.Vinay Corporation
Ahmedabad
Kind Attn. : Sh.H.P.Gupta ji / Sh.Parmod Gupta ji
Sub: :Payment against our purchase of cotton

Respected Sir,

With reference to the above, as informed by our management, we are very much pleased to inform you that looking to our tight position of funds. Our Co. has made some arrangement with M/s.Bharat Udyog to solve the problem of payment. According to that M/s.Bharat Udyog will make payment on our behalf against our purchase of cotton and also we shall export the yarn through them for that we shall require the good quality cotton either 27.5+ MM or 28 MM Shankar Cotton with good Grade on regular basis. Therefore you are requested to kindly arrange to send samples of good quality cotton to our plant for testing purchase. Because we are going to decide in this regard very shortly. So please remain in touch regarding market position and availability of cotton, with us.

Further to inform you that in future we shall purchase the cotton on cash and carry basis. Purchase and selection will be made by our representative on spot as per our earlier system and the same will be despatch at our works at Hansi.

Regarding your outstanding payment we are trying to send payment as soon as possible.

We hope that you shall find our above arrangement in order and we once again assure you that in future you shall not face any kind of

problem regarding delay in payment. Now we may go ahead very smoothly.

Thanking You,

Yours truly,

For Radhika Fibres (India) Ltd.

Sd/-

Manager (Raw Material)" (*Emphasis underlined*)

17. The third sentence of the letter is extremely important. It reads: '*According to that M/s.Bharat Udyog will make payment on our behalf against our purchase of cotton*'.

18. A perusal of Ex.DW-1/1 would reveal that defendant No.4 wrote to defendant No.1 that in respect of business to be done between the two, due to its tight legal position, payments would be made by M/s.Bharat Udyog on behalf of Radhika Fibers (India) Ltd.

19. This shows that the privity of contract was between defendant No.1 and defendant No.4 but consideration for the contract from defendant No.4 was to flow from the plaintiff.

20. The second letter which is also important to be noted is Ex.DW-1/2. It is dated 6.2.2003. It reads as under:

"M/s.Vinay Corporation

Ahmedabad

Kind Attn.: Sh.H.P.Gupta ji / Sh.Parmod Gupta ji

Dear Sir,

We refer to our letter Dt.19.12.02 please find enclosed herewith one draft No.103025 dt.05.02.03 for ₹900000/- (Rs. Nine Lacs only) kindly receive the same in order and credit the same in the name of M/s.Bharat Udyog Hansi and

arrange to despatch the material in the name of M/s.Bharat Udyog Hansi and ensure that material will be delivered at our premise i.e. Radhika Fibres/Radhika Spg.

Our transporter is Chetak Roadways India so please do not despatch material through any other transporter. Balance due if any in a/c of Bharat Udyog Hansi we shall be responsible.

Thanking You,

Yours Truly,

For Radhika Fibres (India) Ltd.

Sd/-

Manager (Raw Material)" (*Emphasis underlined*)

21. Relevant would it be to note that under cover of said letter draft No.103025 dated 5.2.2003 in sum of ₹9 lacs was tendered by defendant No.4 to defendant No.1, expressly making it known that the source of the draft was the funds of the plaintiff.

22. Having highlighted the relevance of the first document in paras 18 and 19 above, relevance of the second document may now be highlighted.

23. Whereas DW-1 categorically deposed that it had no contract, understanding or agreement with the plaintiff and that the jural relationship was inter-se defendant No.1 and defendant No.4 and that the payments received by it were through defendant No.4, the plaintiff took a stand to the contrary, which is contrary to Ex.DW-1/2.

24. Affidavit by way of evidence of 3 witnesses; Sh.Sandeep Phookan PW-1, Mr.Sanjay Mittal PW-2 and

Mr.Sanjay Chaudhary PW-3 (not examined) were filed. The first two were tendered in cross-examination. Thus, the third affidavit by way of evidence has to be ignored.

25. During cross-examination, Sandeep Phookan PW-1 admitted the following:-

“(a) There was no written contract executed for supply of cotton to the plaintiff company by defendants 1 to 3 (vol. but it was a verbal agreement and that is how mostly the trade goes). Negotiations for this verbal agreement between the plaintiff and defendants 1 to 3 had taken place, Management on behalf of the plaintiff company means the Directors and as on behalf of defendants I may not say exactly since I had not participated in those negotiations.

(b) The verbal negotiations for the agreement had taken place on telephone as I understand and not face to face at a particular place. As regards details of those negotiations I may say that Rupees Nine Lakhs was sent to the defendants at Ahmedabad. I cannot say if the raw cotton was to be supplied by defendants from Ahmedabad as supply could be from any place in Gujrat. I do not know if at no point of time none of the defendant came to Delhi in this verbal negotiated agreement.

(c) I do not remember if at any point of time defendant company was asked by writing to provide a particular quality or an quantity of cotton. It is wrong to suggest that the plaintiff company had never placed any order for supply of raw cotton on the defendants. (vol.defendants 1 to 3 had raised two invoices for supply of cotton and the amount to be adjusted against advance Rupees Nine Lakhs).

(d) I am not aware if there was any written instructions from the plaintiff company to defendants for supply of cotton subsequent to the above referred two invoices (vol. Plaintiff company however sent Rupees Twenty Lakhs Fifty thousand around

25th /26th February 2003 for supply of the cotton). Plaintiff company does not have any document to show any such order placed or any correspondence on the issue of supply of cotton, all it was verbal through telephone.

(e) It is true the plaintiff company has filed only one letter Ex.PW1/4 and it is true that defendants 1 to 3 sent a reply and I identify that reply Ex.PW1/5(vol. disputing its contents). It is true there is no other letter or correspondence between plaintiff company and defendants 1 to 3 in this transaction besides documents Ex.PW1/4 and Ex.PW1/5. It is a fact that Ex.PW1/4 was written after eight months of the payment of Rupees Twenty lakhs fifty thousand (vol.we had been following up supply of material on telephone).

(f) I could bring from my office only the Statement of Account which I place it on record (learned defendant's counsel wants the document to be read in evidence and hence document is put exhibit mark Ex.PX). I could not bring any other documents as it is not available. Other documents referred to in my cross-examination that I would try to find out and produce if available. It is wrong to suggest that there was no direct contract between defendant and the plaintiff firm."

26. During cross-examination Mr.Sanjay Mittal admitted the following:-

"(a) I do not know any details about any contract executed between the plaintiff and defendant company or that on behalf of defendant company who entered into that contract. Rupees Nine Lakhs amount deposited with the defendant company was for supply of material by the defendant company and then two bills were received against that amount along with some debit notes. I do not know who got defendant company introduced to the plaintiff.

(b) It is not to my knowledge if any forwarding letter was sent along with the payment of Rupees Nine lacs given to the defendant company. That payment of Rupees Nine lacs was made by cheque or by draft, but I do not by what made the cheque or draft was sent to the defendant. I am not in knowledge of any such fact if payment of Rupees Nine Lacs was made to defendant M/s. Vinay Corporation on the instructions of defendant No.4 Radhika Fibers India Ltd. given to the plaintiff by debiting the account of Radhika Fibers. I do not remember if plaintiff company had written any letter or other communication as to what produce or article defendant company was supposed to send against that payment of Rupees Nine lacs.

(c) If the amount of Rupees Nine lacs was sent either by cheque or by pay order was it sent just by putting the instrument in the envelope without there being any forwarding letter?

(d) Accounts department prepares cheque/bank draft as per the requirement of the marketing division of the company and then accounts department is not aware as to in what manner such cheque/bank draft is sent to the party."

27. Suffice would it be to note that the assertion of Sandeep Phookan in his examination-in-chief that payments were sent by the plaintiff to defendant No.1 directly through its office at Delhi stand completely falsified from Ex.DW-1/2. The written document clearly shows that the bank draft in sum of ₹9 lacs was sent by defendant No.4 to defendant No.1.

28. That apart, the answers of Sh.Sandeep Phookan and Sh.Sanjay Mittal show the hollowness of their claim. The former who claimed that the oral contract between the plaintiff and defendant No.1 was concluded at Delhi failed to even name the persons who took part in the discussions. Where

and when the discussions were held? He could throw no light. In fact, at one stage he stated that the verbal negotiations took place on the telephone but as he understood the same to be.

29. Sanjay Mittal who claimed to the Deputy Manager (Finance) could also throw no light on the manner and the mode by which the plaintiff sent the payments to defendant No.1.

30. In view of the documentary evidence and the evasive testimony of the witnesses of the plaintiff it is apparent that the defence has succeeded on the strength of the documentary evidence coupled with the vagueness, hollowness and shallowness of the credit of the witnesses of the plaintiff.

31. The nail is hammered in the coffin of the plaintiff, when we peruse the cross-examination of Rajesh Kumar Jain DW-1, the sole witness examined by defendants 1 to 3. It reads as under:-

“I am working in the defendant company as Chief Account Officer for the last fifteen years. The defendant company executed Power of Attorney in my favour five years ago whereby I was authorized to pursue the legal matters. The Power of Attorney executed in my favour is at page No.48 of the documents filed on 15.10.2004. My Lawyer has prepared my affidavit Ex.DW 1/A and I signed the same at Delhi in the office of my Advocate. I have been visiting Delhi often.

Our company is dealing with Radhika Fibres i.e. defendant No.4 for the last ten years. Our company never have any dealing with Bharat Udyog, plaintiff. Only in two dealings/lot of cotton we supplied to Bharat Udyog but the sale was dispatched to the

premises of Radhika Fibres as per directions of Radhika Fibres. The payment for the said two supplies were made by the Camp Office of Radhika Fibers at Ahmdabad. The payment was made after the supply of the material to Radhika Fibers. It was a matter of practice that payment was made by third party on behalf of Radhika Fibers accounts its customers. Radhika Fibers has to pay approximately to Rupees Twenty three lakhs to twenty four lakhs to defendant No.1.

In the year February 2003 we received three cheques from the representative of Radhika Fibers. I do not know if the said three cheques were issued from the accounts of Radhika Fibers. I do not know that the said three cheques were sent by the plaintiff from its Delhi account. As per the instruction issued by Radhika Fibers we used to deposit the cheques in our account. It is correct that we received a notice from the plaintiff whereby we were told to pay ₹20,50,000/- to the plaintiff as the material for the said payment was not supplied to the plaintiff. We did not pay the amount of ₹20,50,000/- nor we supplied the material but we replied the notice. The said payment was made to us on the old outstanding amount towards Radhika Fibres. There was no outstanding amount towards Radhika Fibres accounts Bharat Udyog. It is wrong to suggest that I am deposing falsely. It is wrong to suggest that I have filed a false affidavit."

32. It would be sufficient for us to highlight that save and except a suggestion at the end, which he denied, that he was deposing falsely, the plaintiff did not even make an attempt to discredit the creditworthiness of the examination-in-chief of the witness, in which he deposed facts in sync with the written statement.

33. The learned Single Judge has thus correctly opined that the plaintiff has failed to prove any contract with

defendant No.1, much less at Delhi and thus qua defendants No.1 to 3, no cause of action had accrued, much less at Delhi, requiring the suit to be dismissed qua defendants 1 to 3. The suit has been rightly decreed against defendant No.4 in view of Ex.DW-1/1 and Ex.DW-1/2, both being written communications by and under the authority of defendant No.4.

34. We find no merit in the appeal which is dismissed with costs in favour of defendants No.1 to 3; to be paid by the plaintiff.

35. Counsel fee quantified in sum of ₹22,000/-.

PRADEEP NANDRAJOG, J.

S.P.GARG, J.

DECEMBER 05, 2011
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