

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CS(OS) No. 888/1996

%

24th August, 2012

**PRADESHIYA INDUSTRIAL & INVESTMENT CORPORATION OF UP
LIMITED**

..... Plaintiff

Through: Mr. Sandeep Aggarwal, Advocate with Mr.
K.A. Singh, Advocate.

Versus

M/S. BELL POLYMERS & ORS.

..... Defendants

Through: Mr. Vikas Dhawan, Advocate with Mr.
Abhimanyu Mahajan, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit has been filed by the plaintiff-M/s. Pradeshiya Industrial & Investment Corporation of UP Limited (PICUP) against the defendants for recovery of ₹ 92.6 lacs alongwith interest. Defendant No.1 is the partnership firm of which defendant Nos.2 to 4 are partners.

2. The facts of the case are that the plaintiff-company gave a loan to one

company, namely, M/s. Binatone Electronics Limited for purchase of moulds. M/s. Binatone Electronics Limited was making televisions. The moulds were for the purpose of making TV Cabinets. The plaintiff sanctioned a loan of ₹ 74.75 lacs to M/s. Binatone Electronics Limited and out of which sanctioned amount, M/s. Binatone Electronics Limited availed an amount of ₹ 71.55 lacs. Due to recession in TV industry, M/s. Binatone Electronics Limited could not pay the loan amount and had in fact more or less ceased doing business. At this stage, defendants approached the plaintiff and by their letter dated 5.4.1992 (Ex.P1) made an offer to take the moulds from M/s. Binatone Electronics Limited, use the same, and pay the sum of ₹ 1.5 lacs to ₹ 2 lacs per month to the plaintiff. The plaintiff accepted this offer of the defendants by its letter dated 13.4.1992 (Ex.PW2/2 or Ex.DW1/PX). As per this letter, the permission was granted by the plaintiff specifically for a period of eight months. The plaintiff in the plaint avers that defendants only paid a total amount of ₹ 3.40 lacs and did not pay any amount thereafter. The last payment which is said to have been made is on 6.4.1993. The plaint then talks about sending of the legal notice for keeping on using of the moulds by the defendants without payment and asking for return of the moulds. The notice sent by the plaintiff to the defendants is dated 13.7.1993, Ex.PW2/3. The subject suit thereafter came to be filed claiming the monthly use and charges at ₹ 2 lacs per month w.e.f. April, 1992 till the date of filing of the suit. The total amount which

was due was stated to be ₹ 92.60 lacs towards the monthly instalments.

3. Defendants contested the suit and filed their written statement. It was not disputed that the defendants had written their letter Ex.P1 dated 5.4.1992 to the plaintiff and which offer of the defendants was accepted by the plaintiff vide its letter dated 13.4.1992, Ex.PW2/2 or DW1/PX.

4. Though there are various defences in the written statement, at the stage of final arguments four defences/arguments have been urged before me. First defence is with respect to suit being barred by limitation. Second is non-joinder of necessary party, namely M/s. Binatone Electronics Limited. Third argument is with respect to defendants not having any privity of contract with the plaintiff and fourthly/finally, it is argued that liability of the defendants would at best be only for a period of eight months as stated in Ex.PW2/2 or DW1/PX.

5. The following issues in this case were framed on 22.1.2001:-

“1. Whether plaint has been signed and verified and suit instituted by a duly authorised person on behalf of plaintiff-corporation?

2. Whether as per the letter dated 13th April, 1992, the defendants are liable to pay to the plaintiff ₹ 16 lacs for a period of 8 months, as alleged?

3. Whether plaintiff is entitled to claim any amount towards use of moulds by the defendants beyond the period of 8 months as stipulated in said letter dated 13th April, 1992? If so, at what rate and for which period?

4. Whether plaintiff is entitled to interest? If so, at what rate, for which period and on what amount?

5. Whether defendants did not return the moulds, as alleged in para No.20 of the plaint? If so, to what effect?

6. Whether suit is bad for non-joinder of Binatone Electronics Ltd.?
7. Whether in view of the order dated 2nd November, 1992 passed in C.P. No.93/92, liability for the suit amount cannot be enforced against the defendants as alleged in para A of the preliminary objections of written statement?
8. Whether suit is barred by res-judicata as alleged in para C of the preliminary objections of written statement?
9. Whether amounts paid by the defendants to the plaintiff-corporation were towards full and final settlement of the claim as alleged in para E of the preliminary objections of written statement?
10. Whether the moulds have been lying unused since May 1993 and the defendants are not liable to pay licence charges as alleged in para F of the preliminary objections of written statement?
11. Relief.”

6. No defence/plea is taken in the written statement of the suit being barred by limitation and therefore no issue was prayed to be framed by the defendants on limitation at the time of framing of issues. Counsel for the defendants however refers to Section 3 of the Limitation Act, 1963 and urges that even if an issue of limitation is not pressed Courts have to *suo moto* consider the issue as to whether the suit is within limitation.

In my opinion, the argument raised on behalf of the defendants that the suit is barred by limitation is misconceived and liable to be rejected for reasons given hereinafter. No doubt Courts have to *suo moto* look into the issue of limitation, however, where there are averments in the plaint which *prima facie* show the suit to be within limitation, and the issue becomes a mixed question of law and fact, it is necessary that an issue has to be framed in this regard, because, if

the issue had been raised, the plaintiff would have been put to notice of that issue and the plaintiff would have led evidence to show as to how the suit is within limitation. This I am saying so because the suit is filed on 6.4.1996 and the last payment as per the plaint which is said to have been made by the defendants is dated 6.4.1993. Plaintiff has made this averment of payment by defendants in paras 16 and 23 of the plaint. As per Section 12(1) of the Limitation Act, 1963, the date from which limitation has to be calculated is to be excluded and therefore limitation, if the payment of 6.4.1993 is taken for extending limitation, would have commenced from 7.4.1993 and therefore the suit could have been filed by 6.4.1996. Suit has been filed on 6.4.1996. If the defendants would have been pleaded and got an issue framed of limitation, plaintiff would have shown as to how the last payment alleged by it of 6.4.1993 would have complied with the requirements of either Section 18 or Section 19 of the Limitation Act, 1963. It is not permissible for the defendants to spring a surprise on the plaintiff on a factual issue on which evidence is required to be led before the same is decided. I therefore hold that in the absence of any objection/defence taken of limitation, and that no issue of limitation was got framed, the defendants cannot simply stand up at the stage of final arguments and urge on the basis of Section 3 of the Limitation Act, 1963 that suit should be held to be barred by time. After all, it would in fact be amounting to deceiving the plaintiff into believing that the objection of

CS(OS) 888/1996 *Page 5 of 13*

limitation is not taken up and because of which the plaintiff has not led evidence on this aspect. Thus the suit cannot now be got dismissed on the ground of limitation.

I therefore reject the argument and hold that the defendants are not entitled to urge the plea of limitation at this stage of final arguments in the absence of any such pleading or any issue having been got framed by them to this effect.

7. Let me now take up for decision the issues which have been framed in this case.

Issue No.1

8. Issue No.1 having not been pressed is decided in favour of the plaintiff and against the defendants. In any case, the Supreme Court has in the case of *United Bank of India Vs. Naresh Kumar & Ors. AIR 1997 SC 3* held that once the legal proceedings are contested to the hilt, they should not be thrown out on account of technical issues.

Issue No.8

9. Issue No.8 is also dismissed as not pressed and is therefore decided in favour of the plaintiff.

Issue Nos.2,3,5,9 and 10

10. Issue Nos.2,3,5, 9 and 10 can be and are being taken up together for disposal inasmuch as these issues will cover the aspects as to what is the
CS(OS) 888/1996

amount which is due to the plaintiff, whether the defendants are liable only for a period of eight months as per the letter dated 13.4.1992 Ex.PW2/2 or DW1/PX and also as to till when the defendants continue to be liable to make the payment of the monthly charges and at what rate.

11. So far as the aspect that moulds were taken by the defendants from M/s. Binatone Electronics Limited and the moulds were used by the defendants, is not a disputed fact. What is argued is that the liability of the defendants at best is for a period of eight months only. In my opinion, once it is proved and established that defendants were in possession of the moulds till the date of filing of the suit, it is not open to the defendants to urge that their liability is only for a period of eight months as stated in the letter dated 13.4.1992, Ex.PW2/2 or DW1/PX. Let us take an example that a tenant or a licensee overstays in a tenanted or licenced premises even after the expiry of the original term. Can it be said that the tenant is liable to pay the charges of use for original term only although such tenant or licensee has kept on using the tenanted or licenced premises. The obvious answer is that the tenant or licensee must continue to pay charges till he uses the tenanted or licenced premises. Here, the moulds in question were taken by the defendants from M/s. Binatone Electronics Limited and which moulds were financed by the plaintiff and were taken by the defendants subject to and only as per an understanding to pay monthly charges for these moulds. It is otherwise established on record that the

CS(OS) 888/1996

moulds were not returned by the defendants to the plaintiff till the filing of the suit and in fact were returned during the pendency of the suit to the official liquidator in the winding up proceedings against M/s. Binatone Electronics Limited. Therefore, merely because the letter Ex.PW2/2 or DW1/PX mentions that the permission to use the moulds is given for eight months, the defendants cannot continue to use the moulds even beyond eight months and seek to only pay for a period of eight months. I may also add that as per Section 70 of the Contract Act, 1872 if something is done for a person without intending to do the same gratuitously, then, the person who receives the benefit must make payment for the benefit received. The defendants have used the moulds and there was no intent of the plaintiff to give the moulds gratuitously, admittedly because monthly charges were payable, and therefore, the provision of Section 70 being directly applicable and thus is a self-contained reason to reject the argument urged on behalf of the defendants that their liability is only for a period of eight months and not more.

12. On the issue as to whether the charges which are payable are ₹ 1.5 lacs per month or ₹ 2 lacs per month as claimed by the plaintiff, it will be necessary to refer to the letter dated 5.4.1992 (Ex.P1) written by the defendants to the plaintiff as this aspect is dealt with in this letter. This letter is reproduced as under:-

“To
CS(OS) 888/1996

5th April, 1992

Page 8 of 13

M/s. Pic Up Limited,
LUCKNOW.

For kind attention Mr. Rakesh Goel.

Ref: Your last visit to Delhi on 31st of March 1992.

Dear Sir,

Please refer to the visit you had to Delhi on the 31st of March 92 and the subsequent talks we had with you on the same day. In the talks which figured, we made you aware of the latest developments which had taken place regarding our efforts to sell molded cabinets out of the molds which have been financed by you to M/s. B.E.L. Limited, Sahidabad.

We have approached M/s. Texla, E.C.I.L., & Crown TV and practically matured an order of about 2000 cabinets per month from these three parties. In the beginning for a month or two these parties would be lifting slightly less so as to overcome their teething production problems with this new model. We now feel that we can look upon to some good sales from this cabinets. Moreover because of competitiveness in the market from other molders we have not been able to achieve a very good sale price of this cabinets. As such we feel that we can offer ₹ 1.5 lakhs to 2 lakhs per month from this sale. Moreover we would also like that as far now we feel that the market is going to steadily rise so you are requested to give us a time of six to eight months for achieving this targeted sale.

Thanking you,

Yours sincerely,

DIRECTOR” (underlining

added)

The last few lines of this letter show that the minimum amount payable was ₹ 1.5 lacs per month and which would stand increased to ₹ 2 lacs per month after about six to eight months period of taking of the moulds, and by which

time the targeted sale would be achieved. Therefore, in my opinion, the amount which would be payable by the defendants would be a sum of ₹ 1.5 lacs for every month upto eight months from April, 1992. Thereafter, the defendants would be liable to pay a sum of ₹ 2 lacs per month till the date of filing of the suit inasmuch as the defendants had moulds with them till then. Surely, it was not difficult, and if the defendants were bonafide, they should have simply returned the moulds to the plaintiff or even to M/s. Binatone Electronics Limited if they were not using the same. Defendants however did neither, and therefore, the conclusion is that they continued to use the moulds and hence became liable to pay the user charges.

13. Issue Nos.2,3,5,9 and 10 are therefore decided in favour of the plaintiff and against the defendants by holding that the defendants will be liable to pay charges of ₹ 1.5 lacs per month for eight months from April, 1992 and thereafter at ₹ 2 lacs per month till the date of filing of the suit.

Issue Nos.6 and 7

14. Issue Nos.6 and 7 can be dealt with together and are therefore being disposed of together. The defence in this regard is that it is the M/s. Binatone Electronics Limited which was the owner of the moulds and therefore M/s. Binatone Electronics Limited is a necessary party and non-joinder of which makes the suit liable to be dismissed. It is also urged that there is no privity of contract of the defendants with the plaintiff inasmuch as it was M/s. Binatone Electronics

CS(OS) 888/1996

Limited which was the owner of the moulds and therefore no payment is liable to be made to the plaintiff.

In my opinion, once again these arguments urged on behalf of the defendants carry no weight at all. The moulds in question were financed by the plaintiff. Plaintiff had rights in the same to take possession thereof from M/s. Binatone Electronics Limited. It is in terms of the agreement between the plaintiff and the defendants that the moulds could be and were taken over by the defendants from M/s. Binatone Electronics Limited. Once moulds are taken over by the defendants in terms of an agreement, and which is shown by the letters Ex.P1 and Ex.PW2/2 or DW1/PX, I fail to understand how at all can the defendants urge any lack of privity of contract with the plaintiff or that in the absence of M/s. Binatone Electronics Limited the suit is bad for non-joinder of a necessary party. The contract between the plaintiff and the defendants was completed by means of the letters Ex.P1 and Ex.PW2/2 or DW1/PX, and but for the consent of the plaintiff, the defendants could not have been taken the moulds from M/s. Binatone Electronics Limited and therefore the contract for payment of user charges of the moulds was only between the plaintiff and defendants and therefore neither M/s. Binatone Electronics Limited is a necessary party and nor is the suit bad for lack of privity of contract of the defendants with the plaintiff.

15. These issues are therefore decided in favour of the plaintiff and
CS(OS) 888/1996 *Page 11 of 13*

against the defendants.

Issue No.4

16. That leaves us with issue No.4 with respect to entitlement of the plaintiff to interest. Considering that present is a commercial transaction, the plaintiff would surely be entitled to interest on the decretal amount, however, considering the present interest regime of the commercial banks (and which is now prevalent for the past many years), and also considering the recent trend of the judgments of the Supreme Court not to grant high rates of interest, I decline to grant interest @ 24% per annum as claimed by the plaintiff and grant the plaintiff pendente lite and future interest @ 9% per annum simple till payment of the decretal amount. Plaintiff will also be entitled to costs of the suit.

Relief

17. Suit of the plaintiff is therefore decreed against the defendants for user charges of the moulds @ ₹ 1.5 lacs for a period of eight months from April, 1992. With effect from December, 1992 defendants will be liable to pay charges of ₹ 2 lacs per month till the date of filing of the suit. Plaintiff will also be liable to give adjustment of the payment received by it from the defendants as stated in the plaint being the amount of ₹ 3.40 lacs. Plaintiff is also entitled to interest on the amount due as on the date of the suit and till payment of the decretal amount @ 9% per annum simple. Plaintiff will also be entitled to costs of the suit in terms of the CS(OS) 888/1996

rules of this Court. Decree sheet be prepared. Suit is decreed and disposed of accordingly.

AUGUST 24, 2012
Ne

VALMIKI J. MEHTA, J.