

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

+ **RFA No. 537/2003**

% **2nd January, 2012**

M/S. HINDUSTAN ROLLER SUPPLY CO. APPELLANT
Through: Mr. K.K. Kaul, Advocate.

versus

STATE OF UTTAR PRADESH & ANR. RESPONDENTS
Through: Mr. Amritansh Batheja,
Advocate for Mr. Anil Mittal,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. This Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial Court dated 13.1.2003 and as modified by the subsequent judgment dated 18.5.2010. By the original judgment dated 13.1.2003, the suit of the appellant/plaintiff for recovery of an amount of ₹ 4,94,824/- (₹ 3,20,600 being the principal amount and ₹ 1,73,124 as the interest @ 18% per annum) being the claim for hire charges towards supply of road rollers to the respondent No.1/Government of U.P. was dismissed on two counts. The first count was of limitation and the second count of merits of the claim having not been proved. By an order of a Division Bench of this Court dated 12.5.2005 in RFA No.537/2003, which

RFA No. 537/2003 *Page 1 of 9*

challenged the original judgment dated 13.1.2003 the matter was remanded to the trial Court on the issue of limitation with an entitlement to the appellant/plaintiff to lead additional evidence, and for the trial Court thereafter to give its findings and return the evidence with its findings to this Court on the point of limitation. By the subsequent judgment dated 18.5.2010, passed pursuant to the remand order, the trial Court has held the suit to be within limitation.

2. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of monies with respect to seven bills detailed in Annexure-A to the plaint and which are as under:-

“ ANNEXURE ‘A’

The Details of Bills of Road Roller No.M.R.103:-

Sl. No.	Bill No.	Date	Period	Amount ₹ P
1.	2902	30.4.1997	11.10.96 to 31.12.96	45,600/-
2.	2905	30.4.1997	1.1.1997 to 31.3.1997	57,000/-
3.	2904	30.4.1997	1.1.97 to 21.4.97	15,400/-
4.	2907	24.8.1997	22.4.1997 to 31.5.1997	30,100/-
5.	2908	24.10.97	1.6.97 to 30.9.97	98,500/-

The debit of Bill of Road Roller No.M.R.703

Sl. No.	Bill No.	Date	Period	Amount
1.	2877	31.12.96	20.3.96 to 14.4.96	16,800/-
2.	2909	24.10.97	26.7.97 to 30.7.97	57,200/-

3. The defence/contention of the respondents/defendants was that the appellant/plaintiff never submitted these bills and therefore there does not arise any question of payments with respect to these bills.

4. Learned counsel for the appellant/plaintiff firstly argued before this Court that once there is a subsequent judgment of the trial Court dated 18.5.2010 holding the suit to be within limitation, the appeal must automatically succeed. It was secondly argued that in any case the appeal is liable to succeed because the appellant in fact had given the bills stated in Annexure-A to the plaint to the respondents/defendants and which is proved from the letter dated 28.10.1997, Ex.PW1/12 sent by the appellant/plaintiff to the respondents/defendants.

5. In my opinion, the original judgment dated 13.1.2003 is correct and the suit was rightly dismissed by the trial Court.

The subsequent judgment dated 18.5.2010 holds the suit to be within limitation on the ground of there existing a part payment being an amount of Rs. 75,448/- by a bank draft dated 28.10.1997 and thus it was held that the suit was within limitation which was filed on 24.10.2000 i.e within three years from the part payment by bank draft of ₹ 75,448/- and which extended limitation for three years from that date. In my opinion, the trial Court has fallen into an error in passing the judgment dated 18.5.2010 holding the suit to be within limitation except for two bills as stated hereinafter. As

per the facts which have emerged it is not in issue that there were various contracts which were placed upon the appellant/plaintiff for supply of road rollers and which contracts were for different periods from 25.3.1996 to 8.4.1997. The last contract dated 8.4.1997 was for supply of road rollers from 1.4.1997 to 30.9.1997. It is not the case of the appellant/plaintiff as per the plaint filed that the subject suit is for recovery of monies on account of a running account which is maintained between the parties and which would be governed by Article 1 of the Limitation Act, 1963. The subject suit is for recovery with respect to seven bills which are stated in Annexure-A to the plaint and details of which are given above. Since as per the contracts between the parties, no period is provided from payment of the bills, the claim with respect to the bills will commence either from the period for which the road rollers were supplied or at the very best when subsequently the bills were raised. The last two bills, as per the plaint, have been submitted on 24.10.1997 and therefore except with respect to these two bills, i.e. for other five bills, the suit will be beyond limitation. With respect to bill Nos.2908 and 2909 dated 24.10.1997, since the suit was filed within a period of three years i.e. on 24.10.2000, (the date on which limitation commenced has to be excluded by virtue of Section 12(1) of the Limitation Act, 1963) the suit with respect to two bill numbers 2908 and 2909 for ₹ 98,500/- and ₹ 57,200/- respectively will only be within limitation. Qua the claim for the other five

bills, it is held that the suit was time-barred.

6. The next issue thereafter to be looked into as to whether the bills which are the subject matter of Annexure-A; including two bills Nos.2908 and 2909; were ever raised upon/delivered to the respondents. The trial Court, in this regard, has held as under:-

“14. In order to prove the claim for these two bills the plaintiff has to serve the bills upon the defendants for the payment, and in his examination-in-chief though he has deposed in his affidavit filed in lieu of examination-in-chief that he has submitted the bills; but on cross-examination he had specifically stated that he had not taken the receipt of the bills which he had submitted in the department and that he had sent the bills Ex.PW1/5 to Ex.PW1/11 to the department through post and he has further deposed that he has not filed the postal receipts of the same in the Court file. Therefore, in view of this statement made by the PW-1 on cross-examination, it appears that the bills have been sent to the defendant by post but no document has been placed on record to prove the service of such bill upon the defendant. The document Ex.PW-1/12 has been relied by the plaintiff to prove that the bills has been submitted to the defendant no.2, and on argument it is submitted that the said document Ex.PW1/12 was bearing the receipt of the said bill. Once the witness has specifically admitted that he had taken no receipt regarding the submission of the bills form the department and that he has sent these bills by post but no postal receipt in that regard has been proved for sending the said bills to the defendant and receipt thereof through the postal authorities, I find that the said document Ex.PW-1/12 relied by the plaintiff cannot be relied as a conclusive proof to submit the bills with the defendant. Therefore, I find that in absence of receipt of the said letter duly executed by a competent person on behalf of the defendant No.1 or 2 either on the said letter and in the absence of any postal receipt produced and proved on record to prove the transmission of that letter and receipt thereto by the defendant, I find that the plaintiff bitterly failed to prove the service of these bills upon the defendant. Therefore, I find that the plaintiff cannot be held entitled to recover the amount of Ex.PW1/9 and Ex.PW-

1/11 unless he proves by reliable evidence the service of these bills upon the defendants which he bitterly failed, as found above, and, therefore, I find that the plaintiff cannot be held entitled to claim that amount from the defendant unless the bill has been duly served upon the defendant with the log book of the driver concerned. So the claim of the plaintiff for that amount remains pre-mature, and, therefore he cannot be held entitled to recover ₹ 1,55,700/-. So this issue stands decided in favour of the defendants and against the plaintiff.” (emphasis added)

I agree with the aforesaid findings and conclusions of the trial Court inasmuch as once the appellant/plaintiff takes up a case that bills were sent by post and he fails to file and prove any postal receipts for service of these bills, it is rightly held that these bills were never submitted to the respondent No.1/State of U.P. In the examination in chief, it was submitted on behalf of the appellant/plaintiff that no receipts were taken with respect to the bills submitted inasmuch as the bills were sent by post. Once the appellant/plaintiff therefore failed to prove that the bills, Ex.PW1/5 to Ex.PW1/11, the subject matter of Annexure-A to the plaint were ever served on the respondents, obviously it must be held that they would not be genuine bills for which payment had to be made by the respondent No.1/State of U.P. This aspect of the bills not having been supplied is strengthened by the fact that if really work under these bills was done, then, surely the appellant/plaintiff would have filed and proved on record the log books containing the signatures of the driver and possibly the counter-signatures on behalf of the respondents/defendants showing that road rollers in fact were

supplied for the period which are the subject matter of the bills stated in Annexure-A to the plaint. After all, a substantial monetary liability of ₹ 3,20,600/- as the principal amount alongwith interest thereon @ 18% per annum as claimed by the appellant/plaintiff cannot be fastened on the respondents/defendants unless it is proved quite clearly that road rollers were in fact supplied for the periods which are the subject matter of the seven bills stated in Annexure-A to the plaint, and for which the bills were raised upon/served on the respondents.

7. Learned counsel for the appellant/plaintiff sought to place reliance upon the letter dated 28.10.1997 Ex.PW1/12 to show that the disputed bills were in fact served on the respondents/defendants. Firstly, I do not find any statement in the examination-in-chief made on behalf of the appellant/plaintiff that this letter dated 28.10.1997 Ex.PW1/12 bears the signatures of any officer/person of the respondents/defendants. Admittedly, this letter dated 28.10.1997 was not sent by registered post or through any other recorded post. Therefore, on the basis of such fragile evidence, it cannot be said on preponderance of probabilities that this letter dated 28.10.1997, Ex.PW1/12 was ever served on the respondents/defendants.

8. It was then argued on behalf of the appellant/plaintiff that there is no cross-examination on behalf of the respondents/defendants when this letter was exhibited in the affidavit by way of evidence filed on behalf of the

appellant/plaintiff and therefore it was argued that it should be held that Ex. PW1/12 stands proved to have been received by the respondents/defendants. Unfortunately however, I cannot accede to this argument also inasmuch as firstly a mere lack of cross-examination on this aspect is only one of the aspects which has to be seen alongwith facts of the case in order to determine how the conclusion has to be arrived at, in the facts of the case when we are talking of a substantial monetary liability. I do not think that lack of cross-examination in itself should in any manner enable the appellant/plaintiff to discharge the onus of proof which was on the appellant/plaintiff that disputed bills were in fact served on the respondents/defendants. Further, I have perused the cross-examination conducted of PW-1, Sh. Chanchal Singh and in this cross-examination dated 16.9.2002 there is a specific suggestion which is put on behalf of the respondents/defendants that the bills in question were never received by the respondents and to which the witness-Sh. Chanchal Singh stated that "it is wrong to suggest that bills were never received in the department". Therefore, it cannot be said that there is no cross-examination that the disputed bills were not received by the department.

9. I thus do not find any reason to interfere with the impugned judgment dismissing the suit of the appellant/plaintiff inasmuch as the appellant/plaintiff failed to prove that disputed bills were in fact served upon the respondents/defendants. As already stated above, the appellant/plaintiff

also failed to file and prove the log book to show if really road rollers were in fact supplied for the periods which are the subject matter of the disputed bills.

10. In view of the above, there is no merit in this appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

JANUARY 02 , 2012

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