

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

+ **RFA Nos. 144/2004 and 145/2004**

% **12th March, 2012**

1. RFA 144/2004

M/S NARAINGARH SUGER MILLS LTD. Appellant
Through: Mr. O.P. Verma, Advocate.

versus

KRISHNA MALHOTRA Respondent
Through: Mr. J.K. Chopra, Advocate.

AND

2. RFA 145/2004

M/S.NARAINGARH SUGER MILLS LTD Appellant
Through: Mr. O. P. Verma, Advocate.

versus

TILAK RAJ MALHOTRA Respondent
Through: Mr. J.K. Chopra, Advocate.

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

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J. (ORAL)

RFA 144/2004

1. The challenge by means of this Regular First Appeal (RFA) filed

under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 27.9.2003 decreeing the suit of the respondent/plaintiff/seller against the appellant/defendant/buyer. The appellant/defendant bought various electrical and machinery goods from the respondent/plaintiff, and for the balance due on which supplies, the subject suit was decreed along with the claim towards sales tax.

2. The facts of the case are that during the years 1997-99, the appellant/defendant purchased various electrical and machinery goods from the respondent/plaintiff and made various part payments on account. The last payment which was made was of ₹1,99,600/- by cheque No. 461486 dated 1.3.1999 and whereafter there was the balance due of ₹2,12,142.64/-, for recovery of which the subject suit came to be filed along with the claim of interest and the claim of sales tax, totaling to ₹5,78,111.22/-.

3. The suit was contested by the appellant on various grounds including of the suit being barred by limitation and the moneys not being payable as the goods which were supplied were defective.

4. The trial Court after completion of pleadings, framed the following issues:-

“1. Whether the plaintiff was maintaining a running account of the defendant in his books of account or not?
OPP.

2. Whether the suit is barred by limitation?
3. Whether the plaintiff has not supplied the goods to the defendant as per specifications? OPD.
4. Whether the plaintiff is entitled to recover the suit amount? OPP.
5. Whether the plaintiff is entitled to recover the future pendente lite interest? If yes at what rate? OPP.
6. Relief.”

5. On the issue of limitation, the trial Court has held as under:-

“ISSUE NO.2

11. The counsel for the defendant in his written arguments has contended that as per the admission of the plaintiff, the last payment was made by the defendant amounting to Rs.2 Lakhs through an account payee cheque on 6.2.1999 and the suit has been filed by the plaintiff on 21.2.2002 thus suit of the plaintiff is barred by time. The counsel for the defendant in support of his contention has referred to case of **Attadi Venketi Vs. M/s Bharatam Ramuly and Sons, AIR 1984 Orissa 226, The Hindustan Forest Company Vs. Lal Chand and others**. This authority cited by the learned counsel for the defendant is not applicable for the simple reason the counsel for the defendant has failed to show as to where the plaintiff has made this admission that last payment was made by the defendant of Rs.2 lakhs through an account payee cheque on 6.2.1999./ The case of the plaintiff in the plaint is that after the encashment of the last cheque no.461486 for Rs.1,99,600 on 1.3.99, balance amount of Rs.2,12,142.64 still remained unpaid. In reply, the defendant has denied that after encashment of cheque no.461486 for Rs.1,99,600/- a balance amount of Rs.2,12,142.64 remained unpaid by the defendant. Meaning thereby that the issuance of the cheque no.461486 for Rs.1,99,600/- is admitted. PW-1 and PW-2 in evidence by way of affidavit have both stated in one voice that after the last payment of Rs.1,99,600/- vide cheque no.461486 dated 1.3.99, balance amount of Rs.,12,142.64 remained unpaid by the defendant. There is no cross examination on this point that cheque no.461486 dated 1.3.99 was never issued nor there is any suggestion to this effect. Even otherwise,

V.K.Puri DW-1 in evidence by way of affidavit has no where deposed that cheque dated 1.3.99 was never issued by them. It is well settled that in a recovery suit, period of limitation for filing a suit is three years from the last payment. In the present case, the defendant has admittedly issued cheque no.461486 dated 1.3.99 for sum of Rs.1,99,600/-, the present suit has been filed on 21.2.2002, thus the present suit is well within the period of three years from the date of the cheque dated 1.3.99. In view of my findings above, this issue is also decided in favour of the plaintiff and against the defendant.”

(emphasis supplied)

6. Learned counsel for the appellant argues that the suit was barred by limitation, inasmuch as, the case of the respondent/plaintiff as put in the cross-examination of the witness, DW1 of the appellant/defendant was that the cheque was issued towards nine specific bills as found at internal page no.three of the cross-examination. It is argued that once the payments have been made towards a particular bunch of bills, the suit would be governed by Article 14 of the Schedule of the Limitation Act, 1963, i.e. the limitation period commenced from the date of each bill. It is argued that the bills in this case are all prior to three years of the filing of the suit on 21.2.2002 and, therefore, the subject suit will be barred by time.

I am unable to agree with the contentions as raised on behalf of the appellant, inasmuch as, Section 19 of the Limitation Act, 1963 has rightly been relied upon by the trial Court to hold that a fresh period of limitation commences once payment is made on account of the debt due. In this case, the debt which was due to the respondent/plaintiff was the total debt due including the nine bills which have been referred to in the cross-examination of DW1 and, therefore, the payment of cheque is towards part of the total debt due. Once the payment is made towards part of the total debt due, Section 19 of the Limitation Act, 1963 comes into play whereby a fresh period of limitation starts on payment having been made in writing

and under the signatures viz. by a cheque towards the part of debt due. A suggestion by the appellant cannot change the fact that the cheque for ₹ 1,99,600/- was not towards any specific bills, but was towards all dues/debt generally. What is material is the aspect as to the giving of the cheque of ₹1,99,600/- by the appellant generally towards the total debt due and not how the respondent/defendant acted or appropriated the payment. The extension of limitation arises from the factum of payment by the appellant under Section 19 towards the debt due and not how the creditor appropriates. After all when the payment by cheque was made, there was a total figure of debt due at the foot of the statement of account and the cheque issued was towards the total of the debt mentioned at the foot in the statement of account. I, therefore, hold that the payment by means of cheque dated 1.3.1999 was towards the debt due at the foot of the statement of account and, therefore, the same extended the period of limitation for a period of three years. The suit, therefore, could have been filed till 28.2.2002, and since the same was filed on 21.2.2002 the same is within limitation.

7. So far as the issues pertaining to the liability of the appellant/defendant, the same was covered under issue Nos. 3 and 4. With regard to these issues Nos. 3 and 4, the trial Court has held as under:-

“ISSUE No. 3.

12. The onus of proving this issue was on the defendant. The case of the defendant is that the plaintiff is guilty of supplying sub-standard quality of goods besides defective goods and as such most of the goods were rejected and returned back to the plaintiff which have not been accounted for. In reply Ex.PW1/123 the defendant has stated that the plaintiff from the very beginning till the last business dealing with the plaintiff remained most irregular, inefficient, unfair, non-cooperative besides being deficient and having no respect of time. This reply is dated 1.7.2000. The statement of account of the defendant maintained by the plaintiff is

Ex.PW1/118 which shows that the transaction between the parties commenced from 6.9.1997 vide bill no. 19835 for sum of Rs.23,776/-. PW-1 Prem Chand in evidence by way of affidavit has deposed that the orders for the supply of goods were never made in writing, it was either personal or telephonic orders and the name of the person who gave orders is indicated on each bill Ex.PW1/2 to Ex.PW1/117. PW-2 in his evidence by way of affidavit has stated that Dharamveer was working on commission basis and was never authorised to deal directly with the outside parties. However, the defence of the defendant is that the orders placed by the defendant for the purchase of the goods have always been in writing. The plaintiff sent legal notice dated 8.6.2000 which is Ex.PW1/120 to the defendant which was replied by the defendant vide reply dated 1.7.2000 Ex.PW1/123. The written statement was filed by the defendant on 3.6.2002 i.e. almost after two years. The defendant, for the first time has taken the plea that orders were placed by the defendant for purchase of goods in writing and the plaintiff had been supplying sub standard quality of goods besides being defective. It has nowhere been suggested to this witness that orders were placed by the defendant for purchase of goods in writing. Firstly, the defendant has not placed any document on the record to show that the dealings between the parties for purchase of goods was in writing. Furthermore, the defendant has not placed any material on the record to show that it had issued a notice or had written any letter to the plaintiff that the goods supplied by it were of sub-standard quality. This plea has been taken by the defendant for the first time in the written statement. The defendant kept silent for period of two years and during this period of two years he never raised any objection to the effect that the goods supplied by the plaintiff were of sub-standard quality or defective. Even otherwise, the defendant has not placed any document on the record to show that the rejection of the goods were ever communicated to the plaintiff. The defendant kept on sleeping over his rights for period of two years. Even in his reply he never raised this plea. It is only when the plaintiff filed the present suit for recovery, that the defendant has come up with this plea. DW-1 V.K.Puri who is employed as Company Secretary with the defendant has nowhere deposed that the orders purchased for supply of goods were always in writing. Thus it can safely be presumed that the defendant has miserably failed to prove that the orders for purchase of the goods were in writing. The defendant has also failed to prove that the plaintiff had not supplied the goods to the defendant as per the specifications. The defendant has miserably failed to discharge the onus of proof of this issue. Thus this issue is decided in favour of the plaintiff and against the defendant.

ISSUE No. 4.

13. Before filing the present suit, the plaintiff had issued a legal notice dated 8.06.2000 which is Ex.PW1/29. The Defendant had sent reply dated 01.07.2000 which is Ex.PW1/32. In para 11 of the plaint, the plaintiff has stated that it had sent reminders/notice on 11.6.99, 26.06.99 and 08.06.2000. The Defendant in the written statement in reply to this para has stated that the Defendant replied all the letters of the plaintiff which were received by it and undertakes to file the reply sent by the Defendant to the plaintiff. It is, therefore, to be presumed that the Defendant has not specifically denied the receipt of these letters. In Ex.PW1/29 the plaintiff had stated that, as the payments were overdue which were also entered in the books of accounts maintained by the plaintiff which amounted to Rs.2,18,222. The defendant in his reply has nowhere disputed its liability towards the plaintiff. Rather the defendant is totally silent as far as this aspect of the matter is concerned. The plaintiff in the notice Ex.PW1/29 had made serious assertions to the defendant but the defendant remained silent. Since the defendant has not at all disputed its liability, in adverse inference has to be drawn against the defendant.

14. The defendant in cross-examination of plaintiff witnesses has laid emphasis on the fact that Dharamvir had been working with the plaintiff and he was dealing exclusively with the defendant. PW1 in his cross-examination has denied that entire dealings with Narain Dutt Sugar Mill was through Dharamveer. Therefore, the onus of proving this fact that the entire dealings with the defendant was through Dharamveer, was on the defendant. The defendant has not filed any document on the record to show that it had intimated the plaintiff that it had dealings also through Dharamveer. It sound really very strange that the defendant has been purchasing the goods from the plaintiff since September, 1997 and during the whole period, the name of Dharamveer never came in the picture. However, all of a sudden the defendant in the evidence has come up with the plea that it had started dealing through Dharamveer. He has also stated in his cross-examination that no written communication was sent to the plaintiff regarding supply of defective goods by the plaintiff. DW-1 V.K. Puri in his cross-examination has admitted that all the corrections in the bills were not communicated to plaintiff in writing but same were intimated to Dharamvir. This witness in his cross-examination has further admitted that payment has been made only against bill no. 3345 but he cannot state that payment has been made only against one bill, it may be either 3302 or 3345. He deposed that clause of interest on Ex.PW1/D2 was never accepted by the defendant and this fact was never communicated to

plaintiff in writing but same was told to Dharamvir. He has also stated in his cross-examination that the defendant never gave intimation in writing of changes in the material receipt but same were used to be told to Dharamvir.

15. DW-2 Dharmambir has deposed that defendant used to place verbal order, written and telephonic orders for supply of goods and he does not remove the terms settled between the plaintiff and defendants. He has further deposed that goods were returned by the defendant to the plaintiff and some were returned to him. In cross-examination, he has specifically admitted that reconciliation on behalf of the plaintiff was not done by him because of no payment made by the plaintiff to him on account of commission. He has also admitted that he has got no proof to show the delivery of purchase orders of the goods having being returned by the defendant to the plaintiff. Under these circumstances, the evidence of DW-2 otherwise also is of no help to the defendant. Furthermore, the whole cross-examination of the witness of the plaintiff has been confined to Dharambir.

16. In view of my findings above, I hold that the plaintiff has been able to show that he is entitled to recover the amount claimed in the suit. I also hold that the defendant has failed to prove that the plaintiff is not entitled to the balance unpaid C.S.T @ 6% on the purchases for not giving the required C forms. Therefore, this issue is decided in favour of the plaintiff and against the defendant.”

(emphasis added)

8. A reference to the aforesaid findings show that it is not disputed that goods were in fact received by the appellant/defendant. Once the goods were received, the onus of proof was upon the appellant/defendant to show that the goods were defective. It was also required to show that the defective goods were in fact returned to the respondent/plaintiff or the respondent/plaintiff was told to take away these defective goods. The trial Court has noted that the case of the appellant/defendant was that the defect in the goods was brought to the notice of one Sh. Dharambir who was said

to be an agent of the respondent/plaintiff. The trial Court in this regard held that the name of Sh. Dharambir has cropped up for the first time during the evidence, and the appellant/defendant never pleaded this case in the written statement or in any correspondence entered into prior to the suit. Further, there is no admission in the cross-examination of the witness of the respondent/plaintiff, PW3-Sh. Tilak Raj Malhotra, the husband of the respondent/plaintiff that Sh. Dharambir was an agent of the respondent/plaintiff. When a person is talked of as an agent or a commercial agent, such person is an agent as is normally understood in the Chapter of agency under the Indian Contract Act, 1872. Such agent, therefore, has to be a commercial agent. It has come in the evidence of the respondent/plaintiff that Sh. Dharambir was only a commission agent and a commission agent is normally not a commercial agent whose actions can bind the principal. Being a commission agent, some of the bills have been prepared by the said Sh. Dharambir, however, admittedly the other bills have been prepared by Sh. Tilak Raj Malhotra or by other persons. Therefore, merely because the said Sh. Dharambir prepared bills, he cannot be held to be a commercial agent as is known in commercial parlance, so as to bind the respondent/plaintiff. Admittedly, not a single letter has ever been written by the appellant/defendant to the respondent/plaintiff of the

goods being defective. In fact, as a sequitur I did put to learned counsel for the appellant/defendant as to what proof the appellant/defendant has of the alleged defective goods being returned to the respondent/plaintiff, but the counsel for the appellant/defendant, however, candidly admits that there is no proof of the goods, stated to be defective, having been returned to the respondent/plaintiff. Further, the learned counsel for the appellant/defendant also admits that there is no letter written to the respondent/plaintiff that the goods should be lifted because the goods were defective.

9. In this view of the matter, there is no reason to interfere with the findings of fact of the trial Court that the goods were not defective, that Sh. Dharambir was not a commercial agent as known in commercial parlance, no letter was ever written to show the defective nature of the goods and that the alleged defective goods were, in fact, never returned to the respondent/plaintiff by the appellant/defendant.

10. A civil case is decided on balance of probabilities. The balance of probabilities in this case shows that the appellant/defendant who has received the goods must pay for the goods instead of creating excuses for non-payment.

11. An appellate Court would not interfere with the findings of the trial

Court with respect to one possible and plausible view taken by the trial Court unless the view taken by the trial Court is illegal or perverse. In view of the aforesaid, I do not find any illegality or perversity in the impugned judgment which calls for interference by this Court in appeal.

12. Before concluding the matter, I may note that counsel for the appellant/defendant has stated that the appellant/defendant will furnish the relevant/requisite Central Sales Tax Forms to the respondent/plaintiff. If these CST Forms are supplied, then, there would be no decree for an amount of ₹1,04,965.58/- as decreed by the trial Court. No other issue was pressed or urged before this Court.

13. In view of the above, the present appeal being RFA No.144/04 is dismissed, leaving the parties to bear their own costs. The amount deposited in this Court, along with accrued interest, if any, be released to the respondent/plaintiff in appropriate satisfaction of the impugned judgment and decree. Trial Court record be sent back.

RFA 145/2004

1. The facts of the present case are similar to the facts of RFA No.144/04 and are not being stated in detail herein. The only issue which is to be examined in this case is the issue as to whether the suit was barred by time, and which is the only issue argued before me on behalf of the

appellant/defendant.

2. The admitted facts are that the payment which has been made towards the debt due by the appellant/defendant to the respondent/plaintiff is of a sum of ₹2,00,000/- vide cheque No.115736 dated 6.2.1999. As per Section 19 of Limitation Act, 1963, fresh period of limitation of three years will begin from this last cheque dated 6.2.1999, however, the suit has been filed on 21.2.2002 i.e. after a period of three years of the payment of ₹2,00,000/- vide cheque No.115736 dated 6.2.1999. The suit will therefore be barred by limitation.

3. Learned counsel for the respondent/plaintiff sought to argue that the suit was governed under Article 1 of the Limitation Act, 1963 as there was an open, mutual and current account. The argument raised on behalf of the respondent/plaintiff is misconceived inasmuch as the law is well settled by the judgment of the Supreme Court in the case of ***Hindustan Forest Company v. Lal Chand & Ors., AIR 1959 SC 1349*** and as per the ratio of which case unless there are reciprocal demands or shifting balances, the account cannot be a mutual, open and current account. In the present case, learned counsel for the respondent/plaintiff admits that there has always been a balance due from the appellant/defendant to the respondent/plaintiff i.e. there are no shifting balances. There is also no other relationship

between the parties except the relationship of a buyer and seller i.e. of the appellant/defendant as buyer and the respondent/plaintiff as a seller with respect to the electrical goods, and consequently, there are no reciprocal demands as per the ratio of the judgment of the Supreme Court in the case of *Hindustan Forest* (supra). A reading of the impugned judgment of the trial Court and para 11 thereof shows that the trial Court has erred in glossing over the fact that the suit filed on 21.2.2002 i.e. after three years of the cheque dated 6.2.1999 and was thus clearly barred by limitation.

4. In view of the above, appeal RFA No.145/04 is accepted. Impugned judgment and decree dated 27.9.2003 passed in suit No.37/02 titled as *Tilak Raj Malhotra Vs. M/s. Naraingarh Sugar Mills Ltd.* is set aside. The suit of the respondent/plaintiff will stand dismissed. Parties are left to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

MARCH 12, 2012

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