

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

+ **RFA No.16/2004**

% **16th February, 2012**

KUSUM KUND DURGA Appellants
Through: Mr. S.N. Shukla, Advocate.

versus

KALRA PAPERS (P.) LTD. Respondent
Through: Mr. G. Kabir, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. Arguments in this case were concluded yesterday and this case was listed for today for passing of the judgment.

2. 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 24.11.2003 decreeing the suit of the respondent/plaintiff for a sum of ₹ 4,76,310/- with pendente lite and future interest @ 12% per annum and costs. The suit has been decreed with respect to supply of papers and paper boards. The respondent/plaintiff filed the suit for recovery of money setting out a cause of action in the

plaint of non-payment of dues in terms of a running account maintained by the respondent/plaintiff in its books qua the appellant/defendant. In the plaint, except mentioning of the statement of account, of the balance due in terms thereof, and the service of legal notice dated 27.9.1999, no other details were mentioned as to which are the specific bills of which payments remained due and outstanding.

3. The appellant/defendant contested the suit and took up two principal defences. The first defence was that with respect to five bills, exhibited before the trial Court during the cross-examination of the witness of the appellant/defendant, as Ex.DW1/PX1 to Ex.DW1/PX5, no goods were supplied and in fact these were fake bills. These disputed bills are marked as Y1 to Y6 in the statement of account filed and exhibited on behalf of the respondent/plaintiff as Ex.PW1/3. The second defence raised by the appellant/defendant was that those goods which were supplied under the bills exhibited before the trial Court as Ex.DW1/PY1 to Ex.DW1/PY5 were defective and which fact was duly informed to the respondent/plaintiff. This fact of the defective goods was brought to the notice of the respondent/plaintiff after the defect in the goods was brought to the notice of the appellant/defendant by the buyers of those products from the appellant/defendant. These disputed bills which pertain to

defective goods are mentioned in the statement of account Ex.PW1/3 as entry Nos.X1 to X8.

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

- “1. Whether the plaintiff has no cause of action to file the present suit? OPD
2. Whether the plaintiff is entitled for the suit amount? OPP
3. Whether the plaintiff is entitled for interest, if so, at what rate and to what extent? OPP”

5. Before proceeding to discuss the merits of the case certain important aspects have to be noted. Firstly, the respondent/plaintiff filed no document whatsoever not only with the plaint but also when evidence was led on its behalf except the statement of account Ex.PW1/3. Further, the disputed bills, Ex.DW1/PX1 to DW1/PX5, were not filed and proved in the affirmative evidence led on behalf of the respondent/plaintiff, but were only filed and ‘exhibited’ in the cross-examination of the witness DW1, Smt. Kusum Kunj Durga. I am using the expression “documents were exhibited” as opposed to the “documents being proved and exhibited” with regard to documents, Ex.DW1/PX1 to Ex.DW1/PX5, inasmuch as these documents are not proved as required by law, and therefore, they will have to be treated as unproved or unexhibited documents. This I say so because not only these bills, Ex.DW1/PX1 to Ex.DW1/PX5, were not proved by

any affirmative evidence led by the respondent/plaintiff but also even in the cross-examination of the DW-1 when these bills were confronted to the witness they were not admitted, and in fact it was stated that these disputed bills do not bear the signatures or the initials of any of the employees of the respondent/plaintiff. Therefore, these documents cannot be said to have been proved and hence cannot be referred to. As regards the weight to be attached to these documents, Ex.DW1/PX1 to Ex.DW1/PX5, assuming the same are evidence in the case, is an issue which I will advert to in the later part of this judgment. Further, the respondent/plaintiff was put to notice of the complete case of the appellant/defendant alongwith the documentary evidence by the appellant/defendant by filing all the documents alongwith the written statement, however, the respondent/plaintiff did not choose in spite of knowledge of these documents of the appellant/defendant, to file various documents to prove what is the normal stamp of the respondent/plaintiff during the relevant period. Finally, no one from the postal department was summoned to prove the service of legal notice although the appellant/defendant had denied the receipt of the legal notice.

6. With this small preface, let me turn to the issues on merits. The first issue is with respect to whether the respondent/plaintiff supplied goods to the appellant/defendant which are covered under the bills,

Ex.DW1/PX1 to DW1/PX5. I have already noted above that these bills are not proved at all and therefore the exhibit marks on these documents are of no effect. The documents were exhibited in cross-examination of DW-1 when the answer was recorded in the cross-examination of DW-1 as “the documents Ex.DW1/PX1 to DW1/PX5 do not bear the signatures or initials of any employee of my firm”. Surely, this was, by no stretch of imagination, an admission of the disputed five bills, and therefore there was no question of treating these documents as proved and being given exhibit numbers. Further mere proving of the bills would not mean that there is proof of actual delivery of goods under these disputed five bills. Delivery is an aspect which had to be specifically proved by the respondent/plaintiff once the receipt of goods under these bills was disputed. Even assuming the delivery challans were not required to be filed, surely there can be other evidences such as dispatch registers, gate passes and so on. Also when I compare the disputed bills, Ex.DW1/PX1 to DW1/PX5, to the admitted bills on record, which are the second set of bills under which defective goods were received, the comparison shows that in those bills where goods were received by the appellant/defendant, and which bills are Ex.DW1/PY1 to Ex.DW1/PY5 there is found in each of the bill the following endorsement:

Endorsement No.	Date
559470	22.8.98
559468	23.8.98
559459	27.6.98
636878	13.9.98
559472	6.8.98

These endorsements, which are in all probability of receipt/delivery of goods, are however conspicuous by their absence in the disputed bills, Ex.DW1/PX1 to DW1/PX5. Obviously, these aforesaid endorsements must be either of the challan numbers under which the goods were supplied or they were of a dispatch register entry numbers of the respondent/plaintiff or gate-passes or some other such evidence to show actual delivery of the goods to the appellant/defendant by the respondent/plaintiff. The very fact that these endorsements do not exist on the disputed bills, Ex.DW1/PX1 to Ex.DW1/PX5, shows that there was no supply made to the appellant/defendant under these five disputed bills. Surely, a person who sells the goods, such as the respondent/plaintiff, will definitely in addition to the alleged bills showing supply, would have its own dispatch registers, books of account and various other documents to show actual dispatch of goods. This becomes all the more relevant as the respondent is a company under the Companies Act, 1956 and its accounts would in fact have been audited. The respondent/plaintiff however chose

not to file any copies of any books of account, goods registers or copies of its dispatch register etc to show the dispatch/delivery of goods under the disputed bills to the appellant/defendant. Further, other important fact to determine whether goods were in fact supplied to the appellant/defendant would be by means of sales tax ST I forms. It is not disputed that with respect to the sales which were made by the respondent/plaintiff to the appellant/defendant, ST I forms were in fact supplied by the appellant/defendant to the respondent/plaintiff. The doubt with respect to delivery of goods under these disputed bills can very well have been got cleared by the respondent/plaintiff by filing the ST I forms with respect to these disputed bills. Not only the respondent/plaintiff failed to file the ST I forms showing the receipt of the goods under the disputed bills by the appellant/defendant, on the contrary the appellant/defendant filed the photocopy of the ST I form for the year 1998-99 before the trial Court which showed that the disputed goods were never supplied. The trial Court has given a mark being Mark A to this document, however, in my opinion, the document is not to be marked but can be taken as proved and exhibited inasmuch as the original of this document was bound to be in power and possession of the respondent/plaintiff, and the respondent/plaintiff therefore in accordance with Section 65(a) read with Section 66(2) of the

Indian Evidence Act, 1872 ought to have filed the original of this form, however, as already stated above, except filing a bare bone statement of account, the respondent/plaintiff filed no other document.

In view of the above, I hold that the appellant/defendant had proved its case that no goods were supplied under the disputed bills, Ex.DW1/PX1 to Ex.DW1/PX5.

7. So far as the aspect as to whether the goods which were supplied under the bills marked as entries X1 to X8 in the statement of accounts, Ex.PW1/3, in my opinion, the appellant/defendant has discharged onus of proof that the goods supplied under these bills were in fact defective and sub standard. To prove that the goods under these bills were sub standard and defective, the appellant/defendant filed before the trial Court her letters sent to the respondent/plaintiff dated 19.10.1998 (Ex.DW1/10), 21.9.1998 (Ex.DW1/6), 14.11.1998 (Ex.DW1/11), 19.11.1998 (Ex.DW1/12), and an undated letter Ex.DW1/13, besides the debit note Ex.DW1/12A. Each of these aforesaid documents as mentioned contained a stamp of the respondent/plaintiff which reads as under:-

“Kalra Papers Pvt. Ltd.
20, Raja Garden, New Delhi-110015”

There are identical stamps in each of the aforesaid letters and the debit note. Above each of the stamps there is a signature of one or the

other persons who signed on behalf of the respondent/plaintiff-M/s. Kalra Papers (P.) Ltd. These documents were filed by the appellant/defendant alongwith its written statement. In spite of such documents having been filed right since initial stage, and therefore they were put to notice of the respondent/plaintiff, however, the respondent/plaintiff did not file even a single document to show as to if the aforesaid stamps were not of the respondent/plaintiff then what were the stamps of the respondent/plaintiff during the relevant period. The respondent/plaintiff had personal knowledge of what would be its correct stamp and therefore by virtue of Section 106 of the Evidence Act, 1872 onus of proof was upon the respondent/plaintiff to file the stamp of the contemporary period. The very fact that the respondent/plaintiff has not filed what was its stamp of the relevant/contemporaneous period clearly shows that the stamps on the aforesaid documents, as also the endorsements of receipts are of no one else but the respondent/plaintiff. Merely because these documents are denied by the respondent/plaintiff, cannot mean that these documents are not proved documents. These documents were duly proved in the affidavit by way of evidence which was filed on behalf of the appellant/defendant. The trial Court has therefore erred in de-exhibiting all these documents and giving to them different marks. I therefore hold that these documents were

validly proved and exhibited by the appellant/defendant, and which documents show that the appellant/defendant had on different occasions informed to the respondent/plaintiff by means of writing of the goods being defective.

8. There remains no doubt of the goods being defective inasmuch as the appellant/defendant filed and exhibited letters of its customers duly supported by the purchase orders of the buyer of those products M/s. Growell Agriproducts Pvt. Ltd. to show the complaints about the defective goods. The purchase orders were filed and exhibited by the appellant/defendant before the trial Court as Ex.DW1/1, Ex.DW1/2 and Ex.DW1/3. Not only the appellant/defendant filed the purchase orders, but it also filed, proved and exhibited the letters from the customer M/s. Growell Agriproducts Pvt. Ltd. with respect to defective/sub standard nature of the goods. These letters of M/s. Growell Agriproducts Pvt. Ltd. have been proved and exhibited as Ex.DW1/9 (dated 21.9.1998), Ex. DW1/7 (dated 8.11.1998) and Ex.DW1/8 (dated 12.11.1998).

In view of the aforesaid I have no doubt in my mind that the appellant/defendant has clearly discharged the onus of proof with respect to the goods which are covered under the entries X1 to X8 in the statement of account Ex.PW1/3 were defective goods.

9. The conclusion of the above is that with respect to the bills covered under the entries Y1 to Y6 in the statement of account Ex.PW1/3 there was in fact no delivery of any paper or paper products to the appellant/defendant, and with respect to entries X1 to X8 in the statement of account Ex.PW1/3, the respondent/plaintiff was not entitled to payment as goods which were supplied under these bills were defective. A reading of the impugned judgment of the trial Court shows that none of the reasons, which have been adverted to by me above, have been taken note of by the trial Court. The impugned judgment therefore deserves to be set aside.

10. In view of the above, appeal is accepted. Impugned judgment and decree is set aside. Suit of the respondent/plaintiff will stand dismissed. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

The amount deposited in this Court by the appellant/defendant alongwith accrued interest, if any, be released back to the appellant/defendant. The bank guarantee furnished by the appellant/defendant also stands discharged.

VALMIKI J. MEHTA, J

FEBRUARY 16, 2012

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