

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

+ **RFA No.938 /2003**

% **8th February, 2012**

NIKHIL FOOTWEARS LTD. Appellant
Through: Nemo

VERSUS

VICTORY ENTERPRISES & ANR. Respondents
Through: Nemo

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This case is on the Regular Board of this Court since 02.02.2012.
No one appears for the parties though it is 1.00 pm. I have therefore,
perused the record and am proceeding to dispose of the appeal.

2. The challenge by means of this Regular First Appeal filed under
Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned

judgment of the Trial Court dated 10.11.2003, dismissing the suit of the appellant/plaintiff filed for recovery of ₹ 3,05,000/- on account of footwear supplied to the respondents/defendants.

3. The case of the appellant/plaintiff was that it was an Action Group company which supplied footwear to the defendant No. 1/respondent No. 1, a partnership firm, of which respondent no. 2/defendant no. 2 was the managing partner. It was pleaded in the plaint that as per the running account maintained by the appellant/plaintiff as on 31.3.2002, the respondents were liable to pay to the appellant/plaintiff a sum of ₹ 2,48,223/-. In part discharge of this liability, a cheque No. 949559 for ₹ 1 lakh dated 30.10.2000 drawn on Canara Bank was given by the respondents/defendants to the appellant/plaintiff. This cheque, however, was not presented because the respondents/defendants requested that the cheque be not presented. Since the respondents/defendants did not pay the amount due therefore, a legal notice dated 8.11.2002 was served claiming the amount of ₹ 2,48,223/- along with interest. The subject suit thereafter came to be filed.

4. The defendants refused to accept the service of the summons of the suit and were therefore proceeded *ex parte* by this trial Court vide order dated 5.5.2003. Even before this Court, no one appears for the respondents in spite of service.

5. Before the trial Court, the appellant filed the board's resolution for institution of the suit as Ex. PW 1/1. The legal notice was proved as Ex. PW1/2. The postal receipt, AD card and the UPC were proved as Ex. PW1/3 to Ex. PW1/5. The original cheque of ₹ 1 lakh given by the respondents/defendants, was also filed in the Court. The bills of supply were filed and proved as Ex. PW1/6 and Ex. PW1/7.

6. The trial Court has dismissed the suit by holding that the said cannot be said to have been properly instituted and also because only photocopies of the bills were filed. It was also held that the statement of account filed by the appellant/plaintiff cannot be believed as it contained loose sheets. Following are the observations of the trial Court for dismissal of the suit:-

4. ...

“Thus from the evidence it is clear that although the plaintiff is a limited company but it is not maintaining records in a systematic manner. The minute book also contains the loose

sheets without page Nos. which can be changed. The ledger also contains loose sheets which are not numbered and can be changed and similar is bill book. Although the witness deposed that pages are not changed as they are audited by Chartered Accountant Shri N.K. Jain but it is admitted that these are neither certified by him nor signed by him in token of having checked/audited the same. Thus no reliance can be placed on these documents. A perusal of the resolution will also show that it is not a resolution Mark A by the company but infact it seems to be an authority letter i.e one director authorizing the document. Though it is mentioned at the head of this that it is an extract of the minute of the meeting of the board of directors held on 20.1.2003 but it is admitted by the witness that it is not signed by any of the directors who have attended the meeting not the minute book having any page nos. and it also consisted of loose sheets which could be replaced. None of the director has come in the witness box and the authority to sign and verify the pleadings by the accountant is not proved on record as per law. Ex.PW1/6 & 1/7 are the photocopies of the bills and the witness has admitted that carbon copies are not prepared. The order is stated to have been placed by the defendant on telephone but it is also admitted that it is not reduced into writing. Thus the evidence on record cannot be relied on. The plaintiff has also produced the original cheque dated 30.10.2000 purportedly to be signed by the mananging partner of the defendant but as per the plaintiff, it was not presented on the instructions of the defendant. This itself is not sufficient to hold that the goods were supplied by the plaintiff to the defendant as per their orders and the defendant did not make the payments. Although, PW1 has deposed that books of account are regularly maintained but he admitted that they are in loose

sheets and the pages are not numbered , and it can be replaced. Thus no credence could be given to this also. I, therefore, find that the plaintiff has relied to prove its case and the suit of plaintiff deserves to be dismissed and is accordingly dismissed. Decree-sheet be prepared accordingly and file be consigned to Record Room.”

7. In my opinion, the Trial Court has clearly fallen into an error in discarding the bills being photocopies inasmuch as the original bills cannot be with the appellant/plaintiff and the same had to be with the respondents/defendants who were *ex-parte*. It is pursuant to these bills that the goods/footwear were supplied to the defendants and since the originals would be with the respondents/defendants, as per Section 65(a) of the Indian Evidence Act, 1872, the secondary evidence in the form of photocopies of the bills can always be led because the respondents/defendants were bound to file the originals, but since in this case the defendants/respondents were not appearing, therefore, the issue of filing of the original bills by the defendants/respondents did not arise.

8. The trial Court was also not justified in dismissing the suit on the ground that the suit was not properly instituted because the resolution to file the suit was filed and exhibited as Ex. PW 1/1. It was not necessary for any director to come in the witness box for proving the authority to sign and

verify the pleadings as has been wrongly held by the trial Court. The Trial Court has ignored the binding judgment of the Supreme Court reported as ***United Bank of India vs. Naresh Kumar, 1996(6) SCC 660; AIR 1997 SC 3***, in which judgment the Supreme Court has held that cases filed by companies should not be dismissed on technical ground with respect to validity of institution. The Supreme Court went on further to hold that as long as the suit is contested to the hilt, it ought to be held that the suit was validly instituted and filed. In the present case besides the suit being contested to the hilt, the resolution for filing the suit was proved as Ex. PW 1/1 and there was no cross-examination on this aspect because the defendants/respondents were *ex-parte*. Once there is no cross-examination, the resolution is proved in view of the judgement of the Supreme Court reported as ***R.V.E.Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P.Temple 2003 (8) SCC 752***.

9. In view of the above, I hold that the appellant/plaintiff has proved its case for recovery of money. The impugned judgment and decree dated 10th November, 2003 is therefore, set aside. Suit of the appellant/plaintiff is decreed for a sum of ₹ 2,48,223/- along with pendente lite and future

interest @ 9% per annum simple. Appellant will also be entitled to costs of this appeal. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J

FEBRUARY 08, 2012
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