

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

+ **RFA No. 593/2007**

% **18th May, 2012**

M/S UPVAN STEEL TUBES PVT. LTD. & ANR.

..... Appellants

Through: Mr. Ajay Malhotra, Adv.

versus

M/S TUBE INVESTMENTS OF INDIA LTD. Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. 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 29.8.2007 decreeing the suit for recovery filed under Order 37 CPC of the respondent/plaintiff for a sum of ₹14,01,320/- alongwith pendente lite and future interest at 9% per annum simple.

2. The facts of the case are that the respondent/plaintiff was the seller and the appellant No. 1/defendant company was the buyer of tubes

and tubular goods made of steel and other metals. The respondent/plaintiff claimed that a sum of ₹11,99,209/- became payable as per invoices which were annexed with the plaint as annexure 3 to 16 and also because the appellant had acknowledged the debts in writing under the signatures of the Director of the appellant No. 1/defendant company, being a sum of ₹8,37,799/- with respect to the Delhi branch; and a sum of ₹4,65,366.25 with respect to the Noida branch. Since the dues were not paid the subject suit came to be filed.

3. On service for summons for judgment, the appellant/defendant filed its leave to defend application in which three principal defences were raised, and which are also the points argued before this Court:-

- i) The goods which were supplied by the respondent/plaintiff to the appellant were defective and therefore no amount can be claimed with respect to the subject invoices.
- ii) In fact there was a settlement between the parties on 7.8.2004 whereby the respondent/plaintiff agreed to give adjustment to the appellant/defendant with respect to the defective goods.
- iii) That payments were in fact made to one Mr. M.D.Bhasin who was an agent of the respondent/plaintiff-company, and therefore, no amount is due to the respondent/plaintiff.

4. Trial Court has dismissed leave to defend application by making the following observations:

“6. Order 37 CPC provides for summary procedure in respect of the suit for recovery of money. The essence of summary suit is that the defendant is not, as in an ordinary suit, entitled as a matter of right to defend the suit. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant, who has no defence. The arguments of Ld. Counsel for the defendant that the court has no territorial jurisdiction is devoid of any merits as it can be seen that the invoices were issued from Delhi and the defendant was carrying on its business, admittedly, till July, 2002 in Delhi. Therefore, firstly, if the plaintiff is supplying certain goods at Noida, no issue can be raised that the Delhi courts have no jurisdiction merely because the accounts are maintained separately. It cannot be said that no cause of action has arisen within the jurisdiction of this court, thus this argument is rejected. The next argument that the defendant has never dealt with the plaintiff company is also conceived as bare perusal of invoices show that the invoices are being issued by Tube investments, which is the plaintiff company. The defendant very well knew that they are dealing with which company. The invoices do not mention that the goods are being supplied through Mr. M.S.Bhasin herein. Therefore, these arguments are also devoid on merits.

7. The other arguments of Ld. Counsel for the defendant that the suit has not been properly instituted by a duly authorized person does not hold good as the defendant has failed to show as to how the person is not authorized. By merely making an averment that the person is not authorized is neither here nor there. It does not prove the contention of the defendant that the suit has not been filed by the authorized person, therefore, this contention is accordingly rejected.

8. It has been argued that the goods supplied by the plaintiff company to the defendant were of inferior quality. From the perusal of the record, it is clear that nothing has been pointed out by the defendant that when they had returned the goods back to the plaintiff company or when they had informed the plaintiff company about the inferior quality. It is a common business practice that as soon as the goods are received, they are checked and if they are found to be of inferior quality, the buyer informs the supplier about the inferior quality of goods received. However, in the present case, the defendant continued to accept the goods without any objection and at this stage once the present suit has been instituted, he cannot be permitted to raise the defence that the goods were of inferior quality without there being any earlier objection on record. This view is supported by the judgment of Hon'ble High Court of Delhi in M/s. Lohmann Rausher Gmbg, Vs. M/s. Medispere Marketing Pvt. Ltd. 2005 II AD (Delhi) 604 wherein it has been held that "As per the mandate of Section 41 of the Sale of Goods Act, the defendant not having inspected the goods in question prior to delivery, had a right to inspect the case on delivery and report defects within a reasonable time of delivery. If not rejected within reasonable time, mandate of Section 42 stipulates that he defendant would be deemed to have accepted the goods."

9. In any case, the conformation letter dated 30.4.2003, which is admitted by the defendant leaves is no room for doubt that the plaintiff company is entitled to the amount as claimed. The defendant in their application for leave to defend have tried to explain this confirmation letter by saying that these letters were issued to the plaintiff under a mis-representation since the same were required by the plaintiff company for submitting it before the Income Tax Authority. This explanation does not appears to be convincing as the perusal of the document shows that there is no such indication as to for what purpose they were issued. It is only after he suit has been filed the explanation has been given qua all these letters. The confirmation offends an sufficient enough to prove

that the defendant company owned the plaintiff company.” (underlining added)

5. The principles with respect to grant of leave to defend are now well settled and are contained in the celebrated decision of the Supreme Court in the case of *M/s Mechelec Engineers & Manufacturers v. M/s Basic Equipment Corporation, 1976 (4) SCC 687*. Para 8 of the said judgment lays down the tests in this regard and which paragraph reads as under:-

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :

(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the

action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.”

6. The basic aspect of the tests is that the defence must not be a moonshine and there must be a triable issue for grant of leave to defend.

7. So far as the first argument on behalf of the appellant of goods being defective is concerned, I may note that the invoices with respect to which suit has been filed are for the period from 9.7.2002 to 8.10.2003, however, for this period, and much less for all the invoices, has any letter been written by the appellant/defendant to the respondent/plaintiff of the goods being defective. As per Section 42 of the Sale of Goods Act, 1930,

and which provision has also been quoted by the trial Court while referring to the judgment in the case of *M/s. Lohmann Rausher Gmbg. Vs. M/s. Medispere Marketing Pvt. Ltd. 2005 II AD (Delhi) 604*, once no objections to the goods are raised within a reasonable period of time, any objection with respect to the goods is deemed to have been waived and goods are deemed to be accepted. Since there is no contemporaneous correspondence for alleged defective goods with respect to the invoices which are subject matter of the suit, I hold that the defence which was raised in the leave to defend application of the goods being defective was only a moonshine and no triable issue arose in this regard. Though, counsel for the appellant has sought to refer to certain correspondence alleging the goods being defective I note that such correspondence is either prior to the subject invoices, and so far as the letters of the period much later than the invoices are concerned, the same are only letters allegedly of the appellant/defendant without any acknowledgment thereof from the respondent/plaintiff. In any case, as already stated above in terms of Section 42 of the Sale of Goods Act, 1930, the goods having been once accepted there can arise no scope for contending much later that the goods were defective.

8. The second argument on behalf of the appellant of there being a settlement between the parties on 7.8.2004 is only to be stated to be rejected straightaway inasmuch as admittedly the so-called settlement as pleaded is only an oral settlement, and admittedly there is no writing signed between the parties evidencing such settlement. In any case the theory of the settlement falls to the ground once we look at the subsequent acknowledgments dated 30.4.2005 signed by the Director of the appellant No. 1/defendant company whereby the amount due to the respondent/plaintiff has been acknowledged as Rs. 8,37,799/- qua the Delhi branch and ₹4,65,366.25 qua the Noida branch. I may further add that the Supreme Court in the case of *Syndicate Bank vs. R. Veeranna and Ors., 2003 (2) SCC 15* has held that once there is acknowledgment of debt then a fresh cause of action arises and fresh limitation period begins for filing of the suit. The Supreme Court in the said judgment has relied upon its earlier judgment in the case of *Hiralal and Ors. vs. Badkulal and Ors. AIR 1953 SC 225*. The relevant observations of the Supreme Court in *Syndicate Bank's* case (supra) are contained in the para 8 of the said judgment and the same reads as under:

“8. We may add that in the light of the acknowledgement of their liability by the defendants in 1978, it is not open to them now to deny to make payment of the amount due

to the Bank on the ground that higher rate of interest could not be charged. It is clear from the judgment of this Court in *Hiralal and Ors. v. Badkulal and Ors.* AIR 1953 SC 225 : [1953]4SCR758 , that an unqualified acknowledgement of liability as in the present case by a party not only saves the period of limitation but also gives a cause of action to the plaintiff to base its claim.”

9. The final argument which was urged on behalf of the appellant was that no amounts were due inasmuch as payments were made to one Mr. M.D.Bhasin, an agent of the respondent/plaintiff. Qua this argument it needs to be stated that for the alleged cash payments, admittedly, the appellant/defendant has no receipts, and even with respect to the alleged cheque payments, no details have been stated or proof filed. Liability of a huge amount cannot be avoided on a defence of having made payments to an agent when there is nothing to evidence the payments made to the agent. Counsel for the appellant sought to urge that in the reply to leave to defend application there are admissions that the amounts have admittedly been paid to one Mr. M.D.Bhasin and this is sufficient to grant leave to defend, however it has already been noted that the alleged payments to Mr. M.D.Bhasin have not been supported by any documentary evidence showing that the suit amount is not to be paid and that the suit amount is payable becomes clear from the acknowledgment of debts dated 30.4.2005 and which is a written contract containing a liquidated amount. I do not

find any categorical admission in the reply to the leave to defend application that the suit amount stands paid on account of the payments made to Mr. M.D. Bhasin, much less after the acknowledgement in writing dated 30.4.2005.

10. In view of the above, trial Court has rightly dismissed application for leave to defend as containing only moonshine defences. No triable issue arose. In view of the above there is no merit in the appeal which is accordingly dismissed leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

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