

*

HIGH COURT OF DELHI : NEW DELHI

Reserved on : January 24, 2012

Pronounced on : February 15, 2012

+

**RFA No.396/2009
& C.M. No. 984/2011**

M/S. NARANG DISTILLERY LTD. Appellant
Through: Mr.Sanat Kumar, Advocates

versus

SH.RAMESH JAISWAL Respondent
Through: Mr.J.M.Kalia, Advocate

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR
%

ORDER
15.02.2012

1. Impugned judgment/decreed of 25th August, 2009 mandates the Appellant to pay an amount of ₹18,64,000/- alongwith interest @ 9% per annum to the Respondent, who was the Selling Agent of the Appellant Company by virtue of Agreement of 22nd May, 2007.
2. In terms of the aforesaid Agreement (Ex.P-1), Respondent had made a security deposit of ₹5 lac, which was to earn interest @ 9% per annum and Respondent was to get commission @ ₹80/- per case/box of country liquor and against prior payment, consignments of the liquor was supplied by the Appellant to the Respondent vide Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/13). In addition, the Respondent is said to have deposited a sum of ₹4,50,000/- in cash and another amount of ₹2,16,000/- by way of a Pay Order (Ex.PW-1/14) with the Appellant on

7th June, 2007 and again on 6th July, 2007, Respondent claims to have paid ₹1 lac by cheque to the Appellant.

3. According to the Respondent, aforesaid payments were made in terms of the afore-referred Agreement but the Appellant had failed to supply the liquor against the payments made and thus, the Agreement between the parties stood frustrated and cancelled. As per the Respondent, Appellant despite notice of 4th September, 2007 (Ex.PW-1/18) had failed to supply the *Statement of Account* reflecting the aforesaid transaction between the parties.

4. Respondent on the strength of *Statement of Account* (Ex.PW-1/19) had instituted a suit for recovery of ₹18,64,000/- against the appellant, who in the written statement had admitted the relationship between the parties which were governed by the Agreement of 22nd May, 2007 (Ex.P-1). However, the stand taken by the Appellant before the trial Court was that on account of breach of the terms of the aforesaid Agreement, the Respondent was liable to pay damages to the tune of ₹50 lacs and to institute such suit, Appellant/Defendant had reserved its right.

5. Though Issue regarding lack of cause of action and of Respondent/Plaintiff being guilty of committing breach of Agreement in question were framed, but the Issue regarding the entitlement of the Respondent/Plaintiff to recover the suit amount was the one on which both the sides had addressed arguments in this appeal.

6. Impugned judgment/decreed of 25th August, 2009 decreeing the suit of the Appellant on the strength of Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/13) is assailed by learned counsel for the Appellant by contending that the *Statement of Account* (Ex.PW-1/19) which is the basis of the Respondent's suit is a denied document and is inadmissible

in evidence as the entries therein have not been certified as per *Banker's Books Evidence Act, 1891*. It is pointed out by appellant's counsel that no books of accounts were ever produced in evidence and thus the very basis of the Respondent's suit gets knock down. Reliance was placed by Appellant's counsel upon decisions in *Sudir Engineering Company vs. Nitco Roadways Ltd.*, 1995 (34) DRJ 86; *Ishwar Dass Jain (dead) through legal heirs vs. Sohan Lal (dead) by LRs*, AIR 2000 SC 426; *L.K.Advani & Ors vs. Central Bureau of Investigation*, 66(1997) DLT 618; and *Harish Mansukhani vs. Ashok Jain*, 2009 II AD (Del) 30, to contend that the extract of some accounts (Ex.PW-1/19) is inadmissible in evidence.

7. To controvert the aforesaid stand of the Appellant, learned counsel for the Respondent drew the attention of this Court to the Challans/Invoices (Ex.PW-1/2 to Ex.PW-1/9) to point out that aforesaid documents are the admitted documents, which clearly establish that the supply in respect of these challans/invoices were made by the Appellant to the Respondent and so, even if *Statement of Account* (Ex.PW-1/19) is ignored, still, on the basis of aforesaid undisputed documentary evidence, Appellant is liable to refund the security amount as well as to pay the commission upon the aforesaid Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/9).

8. After having heard learned counsel for the parties, and upon scrutiny of the evidence on record, and after going through the decisions cited, I do find that the solitary issue which falls for consideration in this appeal is whether the Respondent is entitled to recover the suit amount on the basis of the evidence led, i.e., Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/13) and to refund of the security deposit with interest etc.

9. It is true that the *Statement of Account* (Ex.PW-1/19) is not admissible in evidence and has to be excluded from consideration, but when the Agreement of 22nd May, 2007 (Ex.P-1) and the Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/9) remain undisputed, then, in terms of the aforesaid Agreement, the Respondent is entitled to claim the commission in respect of the supplies made in reference to the aforesaid Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/9).

10. Not only this, the factum of Respondent paying ₹4,50,000/- in cash and ₹2,16,000/- by Pay Order to the Appellant on 7th June, 2007 and another sum of ₹1 lac vide cheque on 6th July, 2007 is not in dispute, but Appellant has tried to wriggle out of the responsibility to pay the aforesaid amount by taking a stand that the same is liable to be set off against the damages, in respect of which a separate suit is stated to be pending. Perhaps, for this reason, trial Court has not returned any specific finding on the second issue of Plaintiff/Respondent being guilty of committing breach of Agreement in question as the same would be appropriately considered in the pending suit for damages instituted by the Appellant.

11. Regarding the Challan/Invoices (Ex.PW-1/10 to Ex.PW-1/13), it emerges from the evidence that though these documents are neither admitted nor denied, but the factum of supplies being made against these invoices is not in dispute. In this regard the relevant cross-examination of the Respondent needs to be noted. It is as under:-

“Q. Is it correct that invoices (No. in 12) being Ex.PW-1/2 to 13 shows the total quantity of cases lifted during the subsistence of the said Agreement?”

A. Yes”

12. The pertinent finding returned in the Impugned judgment/decreed of 25th August, 2009 is as under:-

“It is admitted case that the targets were not achieved and in which case, it was agreed between the parties that a commission of ₹10/- was to be deducted by the Defendant. The Defendant was at liberty to cancel the Agreement. The Plaintiff vide letter dated 4.9.2007 asked the Defendant for the complete monthly statement of the accounts which was not supplied by the Defendant.”

13. Once it has been held in the impugned judgment that the Respondent was not entitled to the commission as claimed, then Respondent's suit could not have been decreed on the basis of the commission claimed @ ₹80/- per case.

14. The apt observations of a Division Bench of this Court in **Harish Mansukhani vs. Ashok Jain**, 2009 II AD (Del) 30, which are instantly attracted to the facts of this case, are as follows:-

“A Plaintiff has to prove his case and stand on his own legs. No doubt, the Defendant did not produce his books of account but that does not mean that the Plaintiff must succeed on said account.”

15. In the instant case, on the strength of the Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/13) and the evidence led regarding Respondent making payments to the Appellant in cash/cheque/pay order, it is held that the Respondent is entitled to recover the security deposit with interest and the afore-noted payments alongwith commission due but not @ ₹80/- per case. Infact the entitlement of the Respondent to the

commission is @ ₹70/- per case, which upon calculation would come to ₹42,000/- against Challan/Invoices (Ex.PW-1/2 to Ex.PW-1/13) instead of ₹48,000/- per Invoice/Challan. To this extent, the impugned judgment is modified and thus, the suit amount stands reduced from ₹18,64,000 to ₹17,92,000 alongwith interest granted by the trial Court.

16. Accordingly, this appeal is partly allowed to the extent of decreeing Respondent's suit with costs against the Appellant for a sum of ₹17,92,000/- alongwith interest @ 9%per annum from the date of institution of the suit till realization.

17. This appeal is disposed of while making it clear that anything observed herein shall have no bearing on the merits of the suit for damages filed by the Appellant against the Respondent as the same is stated to be still pending before the trial Court. Pending application also stands disposed of as infructuous.

(SUNIL GAUR)
JUDGE

February 15, 2012
pkb