

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

% *Judgment Reserved on : November 30, 2012*
Judgment Pronounced on : December 10, 2012

+ **RFA(OS) 112/2012**

M/S. BELL POLYMERS & ORS. Appellants
Represented by: Mr.Sanjeev Sachdeva, Sr.Advocate
instructed by Mr.Rishi Maheshwari, Ms.Priyam
Mehta, and Mr.Abhimanyu Chopra, Advocates.

versus

PRADESHIYA INDUSTRIAL & INVESTMENT
CORPORATION OF U.P. LTD. Respondent
Represented by: Mr.Sandeep Agarwal, and
Mr.K.A.Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

RFA(OS) No.112/2012

1. The appellant No.1, M/s.Bell Polymers and its two partners and the legal heirs of the third partner i.e. all the appellants have suffered a decree against them requiring them to pay to the respondent ₹1.5 lakhs for a period of eight months commencing from April 1992, and thereafter ₹2 lakhs per month till when the suit was filed on April 06, 1996 after adjusting ₹3.4 lakhs paid by appellant No.1 to the respondent.

2. The facts are not in dispute between the parties and we proceed to note the same.

3. Vide Ex.PW-1/3 dated February 17, 1990, the respondent entered into a loan-cum-equipment refinance agreement with 'Binatone

Electronics Ltd.’, a company registered under the Companies Act. Simultaneously, vide Ex.PW-1/4, a deed of hypothecation was executed by Binatone Electronics Ltd. in favour of the respondent as per which it acknowledged having received ₹74.75 lakhs to purchase equipment as per Annexure ‘A’ to the deed of hypothecation and agreed to pay the money in installments as per schedule with interest @17% per annum.

4. Binatone Electronics Ltd. could not repay any sum to the respondent and without consent/permission of the respondent handed over the hypothecated equipment to appellant No.1 which wrote a letter on October 10, 1991 to Binatone Electronics Ltd. indicating its willingness to pay ₹1.5 lakhs as advance to the respondent and probably similar amount each month for use of the equipment.

5. Unfortunately, the said letter has not been proved at the trial, but its contents find a reflection in Ex.PW-1/5 dated October 14, 1991, written by Binatone Electronics Ltd. to the respondent in which it was informed as aforesaid.

6. Correspondence was thereafter exchanged between the appellant No.1, the respondent and Binatone Electronics Ltd. which evidences that the respondent did not pursue its remedy to enforce its rights under the deed of hypothecation and considered the proposal of appellant No.1 to use the equipment and pay for the same and since nothing much turns thereon we eschew reference to the various letters proved at the trial; save and except two.

7. On April 05, 1992, vide Ex.PW-2/1, appellant No.1 wrote to the respondent as under:-

*“M/s.Pic Up Limited,
LUCKNOW*

For kind attention Mr.Rakesh Goel.

Ref: Your last visit to Delhi on 31st of March 1992.

Dear Sir,

Please refer to the visit you had to Delhi on the 31st of March 92 and the subsequent talks we had with you on the same day. In the talks which figured, we made you aware of the latest developments which had taken place regarding our efforts to sell molded cabinets out of the molds which have been financed by you to M/s. B.E.L. Limited, Sahidabad.

We have approached M/s. Texla, E.C.I.L., & Crown TV and practically matured an order of about 2000 cabinets per month from these three parties. In the beginning for a month or two these parties would be lifting slightly less so as to overcome their teething production problems with this new model. We now feel that we can look upon to some good sales from this cabinet. Moreover because of competitiveness in the market from other molders we have not been able to achieve a very good sale price of these cabinets. As such we feel that we can offer Rs.1.5 lakhs to 2 lakhs per month from this sale. Moreover we would also like that as far now we feel that the market is going to steadily rise so you are requested to give us a time of six to eight months for achieving this targeted sale.

Thanking you,

Yours sincerely,

Sd/-

DIRECTOR”

8. To which vide Ex.DW-1/PX (also exhibited as Ex.PW-2/2), the respondent wrote back as under:-

*“Shri Sanjiv Kapoor
M/s. Bell Polymers
58, North Avenue,
Punjabi Bagh,
NEW DELHI-110026*

Dear Sir,

This has reference to the discussions we had with you and Binatone Electronics Ltd. regarding use of moulds of job work.

We are agreeable to the request of M/s.Binatone Electronics Ltd. You may use these moulds for carrying out outside job work. However the same is subject to the following:-

You will reimburse us directly Rs.1.50 lacs to Rs.2 lacs or more per month depending on business done by you. This amount should be remitted every month by the first week starting May' 92.

You will keep a record of the number of cabinets made from these moulds and give us monthly statement of the same. As a temporary custodian of these moulds you would be responsible for its security and maintenance.

This permission is being given for a period of 8 months.

You are requested to kindly confirm at the earliest.

Thanking you,

*Yours faithfully,
Sd/-
(RAKESH GOEL)
MANAGER (ELECTRONICS)''*

9. M/s. Bell Polymers i.e. appellant No.1 retained the moulds and put them to use. It paid only ₹3.4 lakhs, the last payment being made on April 06, 1993.

10. Within three years i.e. on April 06, 1996, the respondent filed a suit against M/s.Bell Polymers and its partners praying for a decree in sum of ₹92.60 lakhs pleading that in terms of Ex.PW-2/1 and Ex.PW-2/2, M/s.Bell Polymers and its partners were liable to pay ₹1.5

lakhs per month for use of the moulds for a period of eight months and thereafter @₹2 lakhs per month.

11. The defence of the appellants was not that the moulds were not in their possession but was that the company Binatone Electronics Ltd., the owner of the moulds was in liquidation and that the respondent could not claim any money from it with respect to the use of the moulds. It was pleaded in the alternative that money had to be paid depending upon the business done and not a fixed amount. It was pleaded that there was no privity of contract between the respondent and appellant No.1.

12. Vide impugned decision dated August 24, 2012, the learned Single Judge has decreed the suit as per claim and has noted that a plea of bar of limitation was sought to be urged; rejecting the same reason given is that no defence predicated on the bar of limitation was pleaded and thus no issue thereto was settled and thus the appellant could not be permitted to urge any plea with respect to the bar of limitation.

13. Pithily stated, the reasoning of the learned Single Judge is that appellant No.1's letter Ex.PW-2/1 dated April 05, 1992, was a categorical assurance that for use of the moulds it would be paying at least ₹1.5 lakhs and probably a maximum of ₹2 lakhs per month which offer, as per Ex.PW-2/2, was accepted by the respondent.

14. As regards the issue of limitation, the learned Single Judge has held that in the written statement filed, averment in the plaint that last payment was made on April 06, 1993, not being rebutted, the plaint instituted on April 06, 1996 could not be said to be barred by limitation and even otherwise said debate could not be raised unless an issue was settled on the pleading, for the reason evidence may have to be required to be led depending upon the defence raised. A finding with which we agree.

15. Even otherwise, claim in the suit is for charges commencing from the month of April 1992 and as noted above the plea that appellant had made a payment on April 06, 1993 would require it to be held that with respect to the previous dues, on account of part payment made within the period of limitation, the period of limitation would get a fresh lease of life with effect from April 06, 1993. The suit instituted on April 06, 1996 would thus be within limitation for the previous dues and in any case would be within limitation for the subsequent dues.

16. With respect to the plea urged by the appellant that if Ex.PW-2/1 and Ex.DW-1/PX (Ex.PW-2/2) was to be treated as a contract and thus sum mentioned therein as payable would only be for a period of eight months, the view taken by the learned Single Judge is that Section 70 of the Contract Act would come to the aid of the respondent inasmuch as the hypothecated equipment remained in the custody of the appellant.

17. We need to note the fact that after the suit was filed, Binatone Electronics Ltd. went into liquidation and on a date not known, the official liquidator took possession of the hypothecated equipment. But that fact would be irrelevant inasmuch as the claim in the suit was restricted to the date when the suit was filed and no future payments were sought till the hypothecated equipment remained in the custody of appellant No.1.

18. In our opinion, the core issue which needed to be decided was : Whether the principle of liability to pay under forbearance to sue is attracted on the facts of the instant case.

19. It is settled law that forbearance to sue can form valid consideration for a promise, provided a liability exists. Even some degree of forbearance is sufficient. In the decision reported as AIR 1941 Peshawar 6 Karam Din Nawab Din v. Anant Ram Lala Hukam Chand Dhall & Anr., the principle of forbearance to sue as a consideration was

held applicable when a third party agreed to do an act for the second party not to exercise its right with respect to a first party. The facts were that Anant Ram and Tara Chand had instituted a suit on a pronote executed by one Abdul Rashid and had obtained an order of attachment before judgment and when put into execution the bailiff went to attach the properties of Abdul Rashid, Karam Din gave a cheque to the plaintiffs to satisfy their claim against Abdul Rashid. Anant Ram and Tara Chand did not pursue the attachment. The cheque bounced. They sought execution of the attachment against Karam Din alleging him to be a surety, but gave up said claim realizing that Karam Din was not a surety as understood in law. Suit was thus instituted against Karam Din; and was decreed. First Appeal failed and the matter reached the Division Bench of the High Court in a Second Appeal. Karam Din argued that he had no contract with the plaintiffs. The view taken in the Second Appeal was that by the act of Karam Din to pay ₹4,000/- to the plaintiffs, they gave up their rights against Abdul Rashid i.e. it was a situation akin to a forbearance to sue. Decree passed against Karam Din was upheld.

20. Now, the respondent did not proceed to repossess the hypothecated equipment when Binatone Electronics Ltd. was not in liquidation and this was on account of the reason that appellant No.1 undertook to pay at least ₹1.5 lakhs per month for a period of eight months and promised to pay at least ₹2 lakhs per month after eight months, but if sales increased. It is thus a case of forbearance to sue at the promise of the appellant No.1. Thus, the appellant No.1 and its partners cannot deny liability to pay at least ₹1.5 lakhs per month for the reason this was the minimum consideration assured.

21. Thus, the route to the destination, in our opinion has not to be the application of Section 70 of the Contract Act but the principle of liability when a party forbears to exercise its contractual rights against a

party to a contract at the promise made even by a third party, making enforceable the promise in question.

22. The original partners would be liable for the dues of the partnership firm and the heirs of the deceased partners would be liable with respect to the estate they have inherited from the deceased partner, and resolution of which issue i.e. the amount payable would have to await an execution petition. If defence raised by the legal heirs is that they have not inherited anything or what they have inherited from the estate of the deceased partner is less than the liability of the deceased partner, the issue would have to be decided.

23. The appeal is partially allowed. The suit filed by the respondent is decreed against the defendants passing a decree (jointly and severally) to pay to the respondent a sum of ₹1.5 lakhs per month from April 1992 till when the suit was instituted after adjusting ₹3.4 lakhs paid. Interest on the decretal amount would be as awarded by the learned Single Judge. Costs would be in proportion.

24. As regards the appeal the parties shall bear their own costs.

CM No.19299/2012 (Stay)

Since the appeal stands disposed of, instant application seeking stay of the impugned order till disposal of the appeal is disposed of as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

DECEMBER 10, 2012
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