

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

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Date of decision: 2nd August, 2013

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RFA 319/2001

NORTHERN CONTRACTORS (P) LTD. Appellant

Through: Mr. Vishwa Bhushan Arya, Adv.

Versus

M/S.KAPUR TIMBER STORES Respondent

Through: Mr. Manish Kohli & Mr. Pradeep
Shukla, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This first appeal impugns the *ex parte* judgment and decree (dated 16th January, 2001 of the Court of the Additional District Judge, Delhi in Suit No.629/1993 (Old No.3000/1992)) against the appellant for recovery of Rs.4,40,419.25p along with costs and interest at the rate of 18% per annum from the date of institution of the suit till realization of the decretal amount. Notice of the appeal was issued and the delay of 20 days in filing the appeal condoned. The appeal was admitted for hearing on 05.05.2003 and the appellant / defendant directed to deposit the decretal amount and the respondent / plaintiff was permitted to withdraw the same by furnishing security. In compliance therewith, a sum of Rs.4,40,419/- is informed to have been deposited. The counsels have been heard.

2. The respondent / plaintiff had instituted the suit from which this appeal arises, for recovery of the principal outstanding balance of Rs.2,85,986.55p towards the price of goods sold by the respondent/plaintiff to the appellant/defendant. Summons of the suit were served on the appellant / defendant was contested the same by filing a written statement on 13.08.1996. Thereafter, the suit was adjourned from time to time for filing of replication by the respondent / plaintiff and for admission / denial of documents. However, the appellant / defendant stopped appearing in the suit with effect from 10.09.1997 and was vide order dated 26.11.1998 proceeded against *ex parte* and *ex parte* evidence led by the respondent / plaintiff. When the suit was listed for hearing *ex parte* arguments of the respondent / plaintiff, an application under Order 9 Rule 7 of the CPC for setting aside of the order dated 26.11.1998 proceeding *ex parte* against the appellant / defendant was moved and which was dismissed vide order dated 05.09.2000. The counsel for the appellant / defendant states that the said order was not challenged. The appellant / defendant did not appear before the Trial Court thereafter also. Though the appellant / defendant was *ex parte* but the learned Additional District Judge at the stage of final arguments, finding that written statement had earlier been filed by the appellant / defendant, framed the following issues on 09.10.2000 and vide impugned judgment decreed the suit as aforesaid:

“1. *Whether the present suit has been signed, verified and filed by a competent person duly authorized under law? OPP*

2. *Whether the suit of the plaintiff is well-within the period of limitation? OPP*
3. *Whether the plaintiff is entitled to recover the suit amount claimed in the suit? OPP*
4. *Whether the plaintiff is entitled to recover the interest? If so, at what rate, at what amount and for what period? OPP*
5. *Whether the plaintiff had never supplied the goods to the defendant as claimed in respect of the bills as mentioned in para 5 of the WS? OPD*
6. *Relief.”*

3. The counsel for the appellant / defendant has mainly addressed on the aspect of the claim in suit being barred by time, by contending that the aspect of limitation under Section 3 of the Limitation Act, 1963 was to be looked into by the Court even if the appellant / defendant was *ex parte*. In this regard it is firstly contended, (a) that the suit as filed on 20.07.1992 was by M/s Kapur Timber Stores, a partnership firm through its partner Mr. Devender Kumar Kapur (it is not in dispute that the said firm was a registered firm under the Partnership Act and Sh. Devender Kumar Kapur was its registered partner); (b) that as per the respondent / plaintiff itself, the said firm was dissolved on 31.03.1993 but no intimation thereof was given to the Trial Court for a period of nearly five years till the application in this regard was filed in the year 1998 and when the plaint was permitted to be amended vide order dated 26.11.1998

making M/s Kapur Timber Stores through its sole proprietor Mr. Subhash Kapur as the plaintiff. (On enquiry, it is informed that Mr. Subhash Kapur was also earlier a registered partner of the partnership firm M/s Kapur Timber Stores); (c) that M/s Kapur Timber Stores through its sole proprietor Mr. Subhash Kapur in whose favour the decree has been passed, became the plaintiff only on 26.11.1998 and thus the suit as far as by the said sole proprietary, ought to have been deemed to have been instituted on 26.11.1998 or at best on 11.02.1998 when the application for amendment in this regard was filed; (d) that the suit for recovery of monies by the said sole proprietary firm as on 11.02.1998 or 26.11.1998 was barred by time. Attention in this regard is invited to Section 21(1) of the Limitation Act and it is contended that the respondent / plaintiff has not brought its case within the meaning of sub-Section (2) thereof. Reliance is placed on the judgment of the Division Bench of the Calcutta High Court in *Usha Beltron Ltd. Vs. Nand Kishore Parasramka* AIR 2001 Calcutta 137 and in which case also the suit was filed by a firm and by amendment the sole surviving partner was substituted as sole proprietor and it was held that the suit would be deemed to be instituted on the date when the amendment was allowed and on which date, it was held to be barred by time. Reliance is also placed on *Ramalingam Chettiar Vs. P.K. Pattabiraman* 2001 (2) Supreme 133 (SC) laying down that where the substitution / impleadment order does not specify that the impleadment would take effect from the date of institution of the suit, the suit is deemed to have been instituted on the date of the filing of the impleadment application. It is contended that the order dated 26.11.1998

allowing the amendment in the present case also does not specify that the suit by M/s Kapur Timber Stores sole proprietary would be deemed to be instituted as on 20.07.1992 when the partnership firm had instituted the suit and thus the institution of the suit by the sole proprietary has to be deemed to be on 26.11.1998 or on 11.02.1998. Reference is yet further made to ***Sha Babulal & Co. Vs. B. Nagappa*** AIR 1983 Karnataka 217 where the suit describing the plaintiff as a joint family firm was allowed to be amended to describe the plaintiff as a registered partnership firm and which was held to be a case of substituting a new party and finding the mistake to be not *bona fide*, Section 21 was held to apply and the suit held to be barred by time.

4. Without expressing any opinion on the judgment of the Division Bench of the Calcutta High Court, even if it were to be good law, the same is distinguishable in the facts of the present case. In the suit before the Calcutta High Court, the first amendment to bring on record the factum of retirement of the other partners during the pendency of the suit and the sole surviving partner becoming the sole proprietor was filed and which was allowed and thereafter a second application was filed to make the sole proprietary the plaintiff and the partnership firm which had originally instituted the suit, the plaintiff no.2 in the suit. While allowing the said application, the question of limitation was expressly kept open. The reasoning which prevailed with the Division Bench in that case to hold as it did, is to be found in para 52 of the judgment where it is observed that the plaintiff in that case had not made out any case of assignment and no evidence was led to prove any assignment. On the

contrary, the amendment application in the present case was on account of dissolution of the firm and Mr. Subhash Kapur acquiring rights of the firm. The respondent / plaintiff in its *ex parte* evidence proved the Dissolution Deed as Ex.E2 which is found to expressly record that the assets and liabilities of the partnership business had been taken over by the said Mr. Subhash Kapur and the said Mr. Subhash Kapoor being exclusively entitled to the debts of the firm from the persons to whom the erstwhile firm had supplied the goods during the course of business and who owed monies to the firm, and the other partners of the erstwhile firm having no such rights. The present is but a case of substitution or devolution of interest during the pendency of the suit, within the meaning of Section 21(2) of the Limitation Act and the argument that every time the firm is reconstituted, a new suit is deemed to have been filed is to say the least found to be preposterous.

5. The counsel for the appellant has also contended that there was an inordinate delay of nearly five years in applying for substitution. He has however not been able to demonstrate the effect thereof. In my opinion, the said delay is immaterial. The suit admittedly during the said time was being pursued and the question of a suit filed by a partnership firm abating, as is sought to be suggested, does not arise.

6. The counsel for the appellant has also argued that the impugned judgment does not discuss the said aspect.

7. All that needs to be observed to meet such arguments is that even if the Judge has committed any error in writing the judgment, so long as the

findings arrived can be supported by material on record, as is the case over here, the same cannot be a ground for interfering with the judgment. The appellate Court can always give additional reasons.

8. The counsel for the appellant has next contended that the claim in suit, even on the date of original institution on 20.07.1992, was barred by time. It is contended that the supplies of goods qua which the balance was stated to be outstanding, was not only to the appellant / defendant but also to M/s Sona Steering System Ltd. and the last supply to M/s Sona Steering System Ltd. was on 15th October, 1987 and the suit for recovery of the balance price of the said supplies instituted on 20th July, 1992 was barred by time. In fact, first the counsel for the appellant / defendant had sought to argue that there were no averments in the plaint of the supplies to M/s Sona Steering System Ltd. and which fact was brought for the first time in *ex parte* evidence only and being beyond pleadings could not have been seen. However, upon the counsel for the respondent / plaintiff drawing attention to para 5 of the reply on merits of the written statement filed by the appellant / defendant specifically referring to M/s Sona Steering System Ltd. as 'S.S. Syet' the counsel states that the same was on the basis of the statement of account filed along with the plaint. It is also argued that the suit as filed was not in accordance with Order 7 Rule 11 of the CPC as no books of accounts were produced.

9. However in this regard, I find that though the appellant / defendant was served with the summons of the suit and appeared on 27.04.1994 but had taken a similar objection and for which reason no written statement

was filed for over one year. The said objection of the appellant / defendant was finally disposed of vide order dated 02.05.1995 finding that all the details required to be submitted had been submitted with the plaint and thereafter a direction for filing of the written statement was issued.

10. The respondent / plaintiff in its *ex parte* evidence has deposed that the appellant / defendant was a civil contractor and was buying timber from the respondent / plaintiff for its various projects and one of which was at the construction site of the said M/s Sona Steering System Ltd. and though the appellant / defendant had asked the respondent / plaintiff to make the bills for the said supplies in the name of M/s Sona Steering System Ltd. but had agreed to make the payment thereof itself and had so been making payments. As far as the aspect of limitation is concerned, it was deposed that the suit claim was within time as the appellant / defendant had been making on account payment by cheques on 12.09.1988, 28.12.1988, 05.04.1989, 03.06.1989 and 19.07.1989 of Rs.20,000/-, Rs.50,000/-, Rs.30,000/-, Rs.20,000/- and Rs.20,000/- respectively. The said on account payments are not controverted by the counsel for the appellant also. It thus cannot be said that on the basis of *ex parte* evidence on record, the finding of the learned Additional District Judge is erroneous.

11. The counsel for appellant contends that a separate statement of account was being maintained by the respondent/plaintiff in the name of M/s Sona Steering System Ltd. and the respondent/plaintiff could not

have merged the statement of account in the name of the appellant / defendant with the statement of account in the name of M/s. Sona Steering System Ltd. It is contended that there is no transaction in the statement of account of appellant/defendant in the three years preceding the suit.

12. The appellant / defendant as aforesaid was *ex parte* before the Trial Court. It has been enquired from the counsel for the appellant whether the appellant has in the memorandum of appeal denied that it had not accepted any contracts or works for M/s Sona Steering System Ltd. and that it had no relationship with the said party. The counsel has fairly stated that there is no plea in the memorandum of appeal. In the absence thereof, the version of the respondent / plaintiff is not such which is unbelievable. Judicial notice can be taken of the trade practice of contractors procuring goods themselves and making themselves liable for price thereof to the suppliers, though obtaining the bills in the name of the client directly for whom the work is being executed. Mere separate statement of account will not make any difference, as long as liability is of the same person.

13. The counsel for the appellant / defendant has again contended that the impugned judgment and decree does not discuss all these aspects. Again, an error in writing the judgment if otherwise found to be in consonance with the facts and material on record, cannot be a ground for interference therewith.

14. The counsel for the appellant / defendant has next contended that the learned Additional District Judge had on 05.09.2000 erred in dismissing the application of the appellant / defendant for setting aside of the order proceeding *ex parte* against the appellant/defendant.

15. Though the counsel for the respondent / plaintiff has contended that the appellant/defendant having not challenged that order, it is not permissible for the appellant / defendant to in this appeal urge so, but Order 43 Rule 1A of the CPC permits challenge to non-appealable orders in appeal against the final judgment and an order under Order 9 Rule 7 of the CPC is not appealable under Order 43 Rule 1 of the CPC and the appellant / defendant though has in the prayer clause in the appeal not sought setting aside of the order dated 05.09.2000 but in the grounds of appeal is found to have challenged the same. Thus the said aspect has also been considered.

16. The ground taken by the appellant / defendant in its application for setting aside of the proceedings held *ex parte* against it was that the diary and the file of the advocate for the appellant / defendant had got lost and the advocate for the appellant / defendant thus remained oblivious of the case and only when the appellant / defendant contacted the advocate, an inquiry was made and application for setting aside of the *ex parte* filed. The learned Additional District Judge, in the order dated 05.09.2000 has observed that in fact on the date when advocate for the appellant / defendant claimed to have appeared in the court and on which date the file and the diary were stated to have been lost, he had not even appeared

before the Court. It was further noticed that the application was filed after nearly one and a half years and there was no reason or explanation given for non appearance for such a long time.

17. The counsel for the respondent / plaintiff by referring to *M/s Condor Power Products Pvt. Vs. Sandeep Rohtagi* 111 (2004) DLT 121 has also contended that the appellant / defendant even after 5th September, 2000 did not appear for addressing final arguments as could have done. It is contended that all the arguments which are being made now on the aspect of limitation could have been urged by the appellant / defendant at the stage of final arguments after 05.09.2000 before the Additional District Judge and which was not done.

18. Merit is found in the said contention of the counsel for the respondent / plaintiff. The non appearance of the appellant / defendant before the Trial Court even after knowledge of the suit, is clearly indicative of the lackadaisical attitude of the appellant / defendant in contesting the suit. Not only so, I also find the action of the appellant / defendant of not contacting the advocate for one and a half years to be such which justified the order dated 05.09.2000. It cannot be lost sight of that the proceeding was a suit which entails adjudication of questions of fact and for which the presence of the litigant is necessary and the litigants are aware/ought to be aware of the suits being put to trial and they being required to appear as witnesses. There was / is no explanation as to why the appellant / defendant did not contact its advocate for one and a half years. I thus do not find any error in the order dated

05.09.2000 dismissing the application of the appellant / defendant under Order 9 Rule 7 of the CPC or requiring interference at this stage after 13 years. I am further of the view that an order of dismissal of an application under Order 9 Rule 7 of the CPC even though may be technically appealable under Order 43 Rule 1A but a defendant who does not immediately challenge such an order and takes the risk of challenging the same in the appeal against the decree ultimately passed against him and which appeal remains pending for long, runs the risk of a more stringent test being applied to its default of appearance leading to being proceeded against *ex-parte*.

19. The counsel for the appellant / defendant has also urged that no notice of the application filed by the respondent / plaintiff for amendment of the plaint in pursuance to the dissolution of the respondent / plaintiff firm and its debts and liabilities being taken over by Sh. Subhash Kapur aforesaid was issued to the appellant / defendant. From the order sheet on the Trial Court record, it is found that though notice of the said application for amendment was ordered to be issued and had remained unserved but the amendment was nevertheless allowed.

20. However no error is found in the aforesaid. Notice of the application for amendment was issued without realizing the fact that the appellant / defendant had not been appearing in the suit; on the subsequent date when it was realized that the defendant had not been appearing in the suit since prior to the filing of the application for

amendment, the appellant / defendant was proceeded against *ex parte* and the application for amendment allowed.

21. I am also of the view that once the appellant / defendant is proceeded *ex parte*, it is not necessary for the Court to issue notice of the applications subsequently moved by the respondent / plaintiff in the suit. A defendant who is negligent in defending the suit and who allows itself to be proceeded against *ex parte*, cannot make any grievance of non-service of application subsequently moved by the plaintiff and is deemed to have knowledge that in its absence, orders as are permissible in law in the suit, may be passed. There is no law mandating service of notice of applications filed by the plaintiff, on a defendant who has been proceeded against *ex parte*; else proceeding *ex parte* against the defendant would lose any meaning.

22. The counsel for the appellant / defendant has lastly argued that interest at the rate of 18% per annum on the principal amount allowed by the learned Additional District Judge for the period prior to the institution of the suit and from the date of institution of the suit till realization is exorbitant.

23. Per contra, the counsel for the respondent / plaintiff has argued that the transaction between the parties was a commercial one and in which grant of interest at such rate which represents the market rate of interest is justified. Reliance in this regard is placed on ***Space Enterprises Vs. M/s Srivivasa Enterprises Ltd.*** 72 (1998) DLT 666 where interest *pendente lite* and future at the rate of 24% per annum was awarded and on

Syndicate Bank Vs. M/s West Bengal Cements Ltd. AIR 1989 Delhi 107 where interest at the rate of 16½% per annum was awarded holding that in commercial transactions grant of interest for the period after passing of decree at contractual rate ought to be the rule and the grant of interest at reduced rate a rare exception. Reliance is yet further placed on ***Canara Bank Vs. Marshall Cycle*** 72 (1998) DLT 295 where also interest at 19.5% per annum with quarterly rests was awarded.

24. The counsel for the appellant / defendant has in rejoinder referred to ***Rubi (Chandra) Dutta Vs. United India Insurance Company Ltd.*** (2011) 11 SCC 269 where interest at the rate of 9% per annum was awarded.

25. I have considered the rival contentions. The judgments cited by the counsel for the respondent / plaintiff either relate to dues owed to the banks or where there was agreement as to the rate of interest payable. The impugned judgment does not find any agreement between the parties for payment of interest at 18% per annum and under issue No.4 only records that the respondent / plaintiff had claimed interest at the rate of 18% per annum. I have perused the plaint which is also not found to have pleaded any such agreement. However the affidavit by way of examination-in-chief of the witness of the respondent / plaintiff proves the bills raised by the respondent / plaintiff on the appellant / defendant for supply of goods and which contain a Clause for payment of interest at 18% per annum if the bill remains unpaid for 15 days. However, a perusal of the bills show that while some of them contain a Clause for payment of

interest at 18% per annum, the Clause in others is for payment of interest at 15% per annum. There is however no evidence of interest at the said rates having at any time in the past being paid by the appellant / defendant to the respondent / plaintiff.

26. In the entirety of the facts and circumstances of the present case, though I am not inclined to interfere with the decree for award of interest at 18% per annum in accordance with the agreement between the parties for the period prior to the institution of the suit but I am of the opinion that interest *pendente lite* the suit and this appeal and for three months hereafter should not be in excess of 9% per annum being the average of the rate of interest paid by nationalized banks on fixed deposits in the said years. However if the appellant does not comply with the decree within three months hereof, there is no reason for not making it liable for interest thereafter at the rate of 18% per annum.

27. No other argument has been urged.

28. The appeal is accordingly partly allowed. The impugned judgment and decree is modified as aforesaid to the extent of the rate of interest. It is further clarified that interest at the rate of 9% per annum from the date of institution of the suit and till three months from the date of disposal of this appeal and interest at the rate of 18% per annum after the said period of three months shall run only on the principal amount of Rs.2,85,986.55p only and not on the entire amount of Rs.4,40,419.25p. It is further clarified that the respondent / plaintiff shall also be entitled to the costs of the suit as decreed and to proportionate costs of this appeal.

Decree sheet be drawn up.

AUGUST 02, 2013
'gsr'..

RAJIV SAHAI ENDLAW, J