

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

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Date of decision: 23rd October, 2013

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RFA 167/2004

M/S ASHBEE SYSTEMS P.LTD.

.... Appellant

Through: Mr. Sanjay Kumar Mishra, Adv.

Versus

M/S AGAUTA SUGAR & CHEMICALS & ANR. ... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

CM No.11379/2013 (of appellant for restoration of appeal dismissed in default on 20th May, 2013).

1. Notice of the application sent to both the respondents has been served.
2. None appears for either of the respondents inspite of the matter having been passedover.
3. Considering that the respondents had not appeared on 20th May, 2013 also when the appeal was dismissed in default, need is not felt to await the respondents any further.
4. For the reasons stated, the application is allowed and the appeal is restored to its original position.

RFA 167/2004.

5. None appears for the respondents.

6. As per the cause list of this Court, regular appeals of the years 2005-2006 are being heard. Need is thus not felt to await the respondents who earlier also were very irregular in their appearance. The counsel for the appellant/plaintiff has been heard and the Trial Court record perused.

7. The appeal impugns the judgment and decree dated 3rd December, 2003 of the Court of the Addl. District Judge, Delhi of dismissal of Suit No.402/1998 filed by the appellant/plaintiff for recovery of Rs.4,89,217.20p.

8. Notice of the appeal was issued and vide order dated 26th July, 2005 the appeal admitted for hearing. The appeal was on 13th March, 2012 dismissed in default of appearance of the appellant/plaintiff. An application for restoration was filed by the appellant/plaintiff. None appeared for the respondents/defendants inspite of service of notice of the said application and vide order dated 6th December, 2012 the appeal was restored to its original position. The counsel for the respondents/defendants appeared on 1st February, 2013 and stated that the respondent/defendant no.1 had since been

closed down. Thereafter, as aforesaid, the appeal was dismissed on 20th May, 2013 and on application of the appellant/plaintiff has been restored today.

9. The appellant/plaintiff instituted the suit from which this appeal arises pleading:-

- (a). that it is engaged in the business of manufacture, sale and maintenance of weighbridges and allied items;
- (b). that the respondent/defendant no.1 (A division of Willard India Ltd.) against whom only the suit was originally instituted had been maintaining a running account with the appellant/plaintiff and had been purchasing various items from time to time and making payments therefor;
- (c). that the respondent/defendant no.1 placed an order dated 28th January, 1993 for supply of electronic weighbridges and other material and which were supplied by the appellant/plaintiff vide invoices dated 26th June, 1993, 4th September, 1993, 17th December, 1993, 12th February, 1994, 28th March, 1994 (two), 30th March, 1994 and 26th June, 1993 and a debit note dated 4th September, 1993 was also issued;

- (d). that the appellant/plaintiff again received an order for further supplies which were delivered vide invoices dated 30th March, 1994;
- (e). that the respondent/defendant no.1 also signed and executed Annual Maintenance Contract (AMC) for the period 15th September, 1995 to 14th September, 1996 in the sum of Rs.1,40,000/- with the appellant/plaintiff;
- (f). that yet another order dated 26th August, 1995 was placed by the respondent/defendant no.1 on the appellant/plaintiff and against which supplies were made vide invoices dated 12th October, 1995;
- (g). another order dated 20th September, 1995 was placed by the respondent/defendant no.1 on the appellant/plaintiff and against which supplies were made vide invoices dated 19th October, 1995, 11th January, 1996 and 2nd February, 1996;
- (h). that the respondent/defendant no.1 used to make the payments on account from time to time and as per books of accounts maintained by the appellant/plaintiff in the ordinary course of

business, a sum of Rs.3,94,530/- was outstanding from the respondent/defendant no.1 and which the respondent/defendant no.1 had failed to pay; and,

- (i). that last payment was made by the respondent/defendant no.1 vide cheque dated 17th October, 1995 for Rs.1,11,600/-.

accordingly, the suit for recovery of principal amount of Rs.3,94,530/- and interest of Rs.94,687.20p till the date of institution of the suit i.e. total Rs.4,89,217.20p was filed.

10. The respondent/defendant No.1 not only contested the suit by filing a written statement but also filed a counter claim, *inter alia* pleading:-

- (i). that the suit of the appellant/plaintiff was barred by time;
- (ii). denying that there was any running account between the parties;
- (iii). admitting the order dated 28th January, 1993, last supply whereunder was effected on 26th June, 1993; however stating that the goods supplied by the appellant/plaintiff thereunder did not work despite efforts by the appellant/plaintiff and the weighbridges supplied accordingly remained non-functional; that the respondent/defendant had itself spent Rs.8.5 lacs in

making the weighbridges workable and the appellant/plaintiff was liable to indemnify/compensate the respondent/defendant with Rs.4,70,000/- therefor;

- (iv). admitting the supplies vide invoice dated 30th March, 1994;
- (v). admitting the AMC, but stating that the appellant/plaintiff failed to deliver thereunder also and which was thus cancelled midway and payment of Rs.70,000/- out of Rs.1,40,000/- was made wherefor;
- (vi). admitting the order dated 26th August, 1995 and the supplies vide two invoices dated 12th October, 1995 but again stating that the said goods failed to function and thus nothing is due to the appellant/plaintiff therefor;
- (vii). admitting the order dated 20th September, 1995 and the supplies thereunder vide invoice dated 19th October, 1995 but denying any liability therefor as the said goods remained non-functional and claiming refund of Rs.1,57,000/- therefor; and,
- (viii). denying that payments were made on account from time to time; stating that the payments were made bill-wise and nothing

is due to the appellant/plaintiff; further denying that anything was due to the appellant/plaintiff and making a counter claim for Rs.4,57,000/- against the appellant/plaintiff.

11. Needless to state that the appellant/plaintiff controverted the counter claim.

12. The appellant/plaintiff subsequently sought to implead the respondent/defendant no.2 M/s. Willard India Ltd. as defendant no.2 in the suit and which was allowed on 28th July, 2003.

13. In the aforesaid state of pleadings, the following issues and additional issues were framed in the suit on 30th September, 2002 and 1st October, 2003:-

- “1. Whether the present suit of the plaintiff has not been filed, verified and signed by duly authorized person? OPD*
- 2. Whether the suit of the plaintiff is barred by limitation? OPD*
- 3. Whether the suit of the plaintiff is bad for no cause of action? OPD*
- 4. Whether the counter claim has not been signed, verified and filed by duly authorized persons? OPP*
- 5. Whether the counter claim of the defendant is barred by time? OPP*
- 6. Whether the defendant is entitled for the decree of counter claim with interest or not? OPD*

7. *Whether the plaintiff is entitled for the decree of the suit amount, if so, what amount? OPP*
 8. *Whether the plaintiff is entitled for the interest on the suit amount, if so, at what rate and for which period? OPP*
 9. *Relief.*
- Additional issues:-***
1. *Whether the present suit is barred by time against defendant no.2? OPD*
 2. *Whether there is any cause of action against defendant no.2 in the present case? OPP*
 3. *Relief.”*

14. The appellant/plaintiff examined three witness and the respondents/defendants examined four witnesses.

15. The learned Addl. District Judge, in the impugned judgment, has found/observed/held:-

- (A). that the suit was filed by a duly authorized person on behalf of the appellant/plaintiff;
- (B). that it was the contention of the respondents/defendants that the respondent/defendant no.2 had been added as a defendant vide order dated 28th July, 2003 and the limitation against the respondent/defendant no.2 would be counted from that date only and not from the date of 24th September, 1998 when the suit was instituted;

- (C). that as per the evidence of the appellant/plaintiff itself, out of the principal amount of Rs.3,94,530/- due, a sum of Rs.1,35,000/- was due since March, 1994 and Rs.2,46,000/- was due since October, 1995;
- (D). that the witnesses of the appellant/plaintiff had admitted that each and every order of supply was a separate contract;
- (E). it thus follows that payment was also to be made against each individual order;
- (F). that the appellant/plaintiff had not proved as to against which order the last payment of Rs.1,11,600/- on 17th October, 1995 was made; since each order was treated as a separate contract for the purposes of compliance and payment, there would be separate periods of limitation for each and every contract and the payment of Rs.1,11,600/- would extend the period of limitation only for the order against which that payment was made;

- (G). that thus the claim for Rs.1,35,000/- due since March, 1994 made in the suit instituted on 24th September, 1998 was barred by time;
- (H). that the suit against the respondent/defendant no.2 is to be deemed to have been instituted only on 28th July, 2003 when the respondent/defendant no.2 was impleaded as a party and thus the claim for the balance amount of Rs.2,46,000/- also was barred by time;
- (I). that though the respondent/defendant no.2 M/s. Willard India Ltd. was carrying on business in the name and style of respondent/defendant no.1 and Order 30 Rule 10 of the CPC permits suing in such names or style but only where such a course is permissible; that the appellant/plaintiff was not misled in any way and was always aware that the respondent/defendant no.2 was carrying on business in the name and style of respondent/defendant no.1 and thus the suit filed by the appellant/plaintiff initially against respondent/defendant no.1 only was not maintainable as a suit against a Limited Company in its business name is not maintainable;

- (J). that the respondent/defendant no.1 being only an assumed name, the suit against the respondent/defendant no.1 was not maintainable; issue no.3 and additional issue no.2 were thus decided in favour of the respondents/defendants and against the appellant/plaintiff;
- (K). that the counter claim of the respondents/defendants was filed by a duly authorized person;
- (L). the appellant/plaintiff had not disclosed as to why the counter claim was barred by time; accordingly issue no.5 was decided in favour of the respondents/defendants;
- (M). that the claim of the appellant/plaintiff of Rs.1,35,000/- was barred by limitation;
- (N). that the claim of the appellant/plaintiff for the balance sum of Rs.2,46,000/- was not seriously disputed by the respondent/defendant no.1; therefore it stood proved that in October, 1995 the sum of Rs.2,46,000/- was due from the respondents/defendants to the appellant/plaintiff;

- (O). deducting the sum of Rs.1,35,000/- from the total claim of the appellant/plaintiff of Rs.3,94,530/-, a sum of Rs.2,59,530/- was due and payable by the respondents/defendants to the appellant/plaintiff inclusive of balance maintenance charges;
- (P). that the respondents/defendants had vide statement dated 27th February, 2002 given up counter claim of Rs.1,70,000/-;
- (Q). that the appellant/plaintiff was thus entitled to recover Rs.2,59,530/- from the respondents/defendants;
- (R). that the respondents/defendants had been unable to prove that there was any fault on the part of the appellant/defendant either in supplying the machines or in attending thereto; and,
- (S). thus there was no merit in the counter claim of the respondents/defendants.

thus, though finding the appellant/plaintiff to be entitled to recovery of Rs.2,59,530/- from the respondents/defendants, the suit for recovery of the said amount was also dismissed.

16. The counsel for the appellant/plaintiff has contended that the learned Addl. District Judge erred in, after holding the appellant/plaintiff to be

entitled to recover Rs.2,59,530/- from the respondents/defendants, not decreeing the suit for the said amount also. Reliance is placed on ***Wockhardt Limited Vs. Chemetac Pharmaceuticals*** 2004 (77) DRJ 435 and ***Inderchand Mulchand Vs. Manoj Premchand Sharma*** 2001 AIHC 1234 (Bombay High Court). On enquiry, the counsel for the appellant/plaintiff states that the appellant/plaintiff is not pressing this appeal for recovery for the balance amount.

17. The respondents/defendants have not filed any cross objections to any of the findings. On enquiry it is also informed that the respondents/defendants have not preferred any appeal against the dismissal of their counter claim.

18. The issue thus to be adjudicated is, whether the finding of the learned Addl. District Judge, of the claim for Rs.2,59,530/- though due from the respondents/defendants to the appellant/plaintiff being barred by time, is correct or not. The learned Addl. District Judge has held, that the said amount fell due in October, 1995; though the suit was instituted within three years on 24th September, 1998 but against the respondent/defendant no.1 only which is not a juristic person and merely the name and style in which the respondent/defendant no.2 was carrying on business; thus the suit against

the respondent/defendant no.1 was not maintainable; that the respondent/defendant no.2 M/s. Willard India Ltd. was impleaded only on 28th July, 2003 and the suit against it was to be deemed to be instituted on the said day only and on which date it was barred by time.

19. The sole defendant in the suit, as originally filed, was described as “M/s. Agauta Sugar & Chemicals (A division of Willard India Ltd.), Plot No.2, Sikandarabad Industrial Estate, Sikandarabad (U.P.) also at Luxmi Bhawan, 72, Nehru Place, New Delhi – 110 019” and was referred to in the plaint as the “defendant Company”.

20. The said defendant, in the written statement-cum-counter claim verified by “T.V. Ganeshan, Company Secretary”, did not take any objection that the suit was not properly instituted in the name of M/s. Agauta Sugar & Chemicals as defendant and on the contrary, as aforesaid, made a counter claim and which could have been made, extending the logic on the impugned judgment, not by M/s. Agauta Sugar & Chemicals but only by M/s. Willard India Ltd.

21. The suit and the counter claim proceeded for adjudication and issues were framed and trial commenced. The defendant thereafter made an

application to amend the written statement to take a plea that the suit was contrary to the provisions of Order 29 of the CPC and the provisions of Order 30 Rule 10 did not apply in the case of Limited Companies. The said amendment was allowed on 7th February, 2003. It was thereafter that the appellant/plaintiff filed an application for amendment to implead the respondent/defendant no.2 M/s. Willard India Ltd. as defendant no.2. The respondents/defendants contested the said application but the same was allowed vide order dated 28th July, 2003 supra.

22. Section 21 of the Limitation Act, 1963 undoubtedly provides that where, after the institution of a suit a new defendant is added, the suit as regards him shall be deemed to have been instituted when he was so made party. However, the proviso thereto enables the Court, when satisfied that the omission to include a new defendant was due to mistake made in good faith, to direct that the suit as regards such defendant shall be deemed to have been instituted on an earlier date.

23. The question which arises for consideration is, whether the impleadment of the respondent/defendant no.2 M/s. Willard India Ltd. in the present case amounts to impleadment of a 'new defendant', and even if so, whether the non-impleadment of the respondent/defendant no.2 was due to a

mistake made in good faith and whether the suit against the respondent/defendant no.2 should be deemed to have been instituted on an earlier date i.e. on the date of initial institution of the suit, on which date it has been held to be within time for recovery of Rs.2,59,530/-.

24. As would be apparent from the aforesaid, the written statement originally filed to the plaint in which “M/s. Agauta Sugar & Chemicals (A division of M/s. Willard India Ltd.)” alone was the defendant was filed by T.V. Ganeshan, Company Secretary of M/s. Willard India Ltd. and no objection was taken therein of the suit being not properly constituted or being not against a juristic person. Not only was the claim of the appellant/plaintiff contested on merits but a counter claim was also filed. Such counter claim, following the logic of the learned Addl. District Judge, could not have been by M/s. Agauta Sugar & Chemicals and in fact was made by M/s. Willard India Ltd. and not by M/s. Agauta Sugar & Chemicals which was not a juristic person. It is thus sufficiently established that M/s. Willard India Ltd. took the suit as instituted, as against it and contested the same and also made a claim against the appellant/plaintiff.

25. In these circumstances, in my view, impleadment of M/s. Willard India Ltd. on 28th July, 2003 as a respondent/defendant no.2 though on an

application of the appellant/plaintiff can at best be by way of abundant caution and cannot be said to be impleadment of a 'new defendant'. As aforesaid, M/s. Willard India Ltd. was very much before the Court even prior thereto.

26. I am unable to agree with the reasoning of the learned Addl. District Judge, of the appellant/plaintiff being not entitled to the benefit of the proviso of Section 21 supra (though not mentioned in the impugned judgment) for the reason of being always aware that M/s. Agauta Sugar & Chemicals was a division of M/s. Willard India Ltd. The learned Addl. District Judge has in this regard relied on various documents, losing sight of the fact that the appellant/plaintiff in the plaint itself had described the defendant as "M/s. Agauta Sugar & Chemicals (a division of M/s. Willard India Ltd.)". The test to be applied under the proviso to Section 21 of the Limitation Act is not of the appellant/plaintiff having been misled but of whether the omission was due to a mistake made in good faith. The good faith of the appellant/plaintiff is established from the fact that no such objection was taken in the written statement also and rather a counter claim was filed by M/s. Willard India Ltd. treating itself to be the defendant, against the appellant/plaintiff. Reference in this regard may be made to

Gastech Process Engineering (India) Pvt. Ltd. Vs. Saipem

MANU/DE/1326/2009 holding that such counter claim can be made by a defendant only and not by a third party. The reliance by the counsel for the appellant/plaintiff in this regard on ***Inderchand Mulchand Banwal*** supra is also apposite.

27. That brings us to the aspect of the conflict if any between Order 29 and Order 30 Rule 10. Order 29, dealing with suits by or against a corporation, in Rule 1 provides for signing and verification of pleadings by Secretary or Director or other principal officer of the corporation and in Rule 2 thereof provides for service of summons on the corporation. It nowhere provides that a corporation has to be sued in the name of the corporation only and/or that it cannot be sued in any other name. Order 30 deals with suits by or against firms and persons carrying on business in names other than their own. Rules 1 to 9 thereof deal with ‘firms’ and Rule 10 thereof provides that “any person” carrying on business in a name and style other than his own may be sued in such name or style as if it were a firm name. I fail to see why the expression “any person” in Order 30 would not include a Company. My research however shows the Calcutta High Court to, in ***Modi Vanaspati Manufacturing Co. Vs. Katihar Jute Mills Pvt. Ltd.*** AIR 1969 Calcutta 496

have held so and the Full Bench of the Allahabad High Court in ***Rajendra Prasad Oil Mills, Kanpur Vs. Smt. Chunni Devi*** AIR 1969 Allahabad 1 and the Rajasthan High Court in ***M.K.M. Moosa Bhai Amin, Kota Vs. Rajasthan Textile Mills, Bhawanimandi*** AIR 1974 Rajasthan 194 to have held to the contrary. This court has already in ***Wockhardt Limited*** supra relied upon by the counsel for the appellant/plaintiff, concurred with the Allahabad view and I see no reason to take a different view.

28. Thus, whichever way one looks at, I am unable to concur with the reasoning given by the learned Addl. District Judge for holding the claim of Rs.2,59,530/- found to be admittedly due to the appellant/plaintiff from the respondents/defendants which are in fact the same person, to be barred by time.

29. Since the counsels for the respondents/defendants have not appeared I have independently also perused the records to satisfy myself that the finding of the learned Addl. District Judge, of Rs.2,59,530/- being due to the appellant/plaintiff is in accordance with the evidence led and I am satisfied in this regard.

30. As far as the claim of the appellant/plaintiff for interest is concerned, the transaction between the parties being a commercial one, though claim for interest for the period prior to the institution of the suit at the rate of 12% per annum, which is also found to be in accordance with the contract between the parties, cannot be interfered with but the appellant/plaintiff is awarded interest *pendete lite* and for three months after the decree at 6% per annum only. However if the decree remains unsatisfied after three months, the appellant/plaintiff shall be entitled to interest at 10% per annum.

31. The appeal is accordingly partly allowed and a decree is passed in favour of the appellant/plaintiff and against the respondents/defendants for recovery of. Rs.2,59,530/- together with interest at 12% per annum thereon from two years prior to the institution of the suit and at the rate of 6% per annum from the date of institution of the suit and till expiry of three months from the date of decree and at 10% per annum after three months from the date of the decree and till realization. The appellant/plaintiff shall also be entitled to proportionate costs of the suit and this appeal.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

OCTOBER 23, 2013/pp