

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

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Date of decision: 3rd July, 2013

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RFA No.29/2005

PRAMOD KUMAR OBEROI

.... Appellant/plaintiff

Through: Mr. Shantanu Rastogi, Adv.

versus

**INDIAN SUGAR & GENERAL ENGINEERING
CORPORATION & ORS.**

..... Respondents

Through: Mr. Sudhanshu Batra, Sr. Adv. with
Mr. Bhuvan Gugnani, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal under Section 96 of the CPC impugns the judgment and decree dated 20th December, 2003 of the learned Addl. District Judge dismissing the Suit No.337/1995 filed by the appellant/plaintiff for recovery of a principal sum of Rs.2,77,019/- and a sum of Rs.2,20,826/- towards interest @ 24% per annum thereon w.e.f. 1st April, 1991, 1st April, 1992 and 16th August, 1992 and till the date of institution of the suit i.e. for a total sum of Rs.4,97,845/- jointly and severally from the three defendants/respondents. Notice of the appeal was issued and the Trial Court records requisitioned. Vide subsequent order dated 17th March, 2006 the delay of 35 days in preferring the appeal was condoned. The appeal was admitted for hearing on 28th July, 2006. The counsels have been heard yesterday and today.

2. The appellant/plaintiff filed the suit pleading:-

- (a). that the appellant/plaintiff owned a number of REP Import Licences (Replenishable Import Licences) which were issued originally in the name of the respective Exporters and sale/purchase whereof was permitted in the Import Policy of the year 1990-92;
- (b). that the respondent no.1/defendant no.1 The Indian Sugar & General Engineering Corporation and the respondent no.2/defendant no.2 Uttar Pradesh Steels are the proprietary concerns of the defendant/respondent no.3 The Saraswati Industrial Syndicate Ltd.; the appellant/plaintiff was between the years June/ July, 1989 and till 1991 selling such REP Import Licences (licence) to the defendants/respondents and the appellant/plaintiff had opened two separate accounts in the names of the respondents no.1&2 in its Books of Accounts in which the payments due from the respondents no.1&2 to the appellant/plaintiff and the payments received from the respondents no.1&2 were debited and credited respectively;
- (c). that the appellant/plaintiff transferred value of Rs.2,50,000/- in licence dated 16th November, 1990 in the name of M/s Shivalika International for a total sum of Rs.8,26,300/- CIF and the respondent no.1 agreed to pay consideration @ 37% of the said transferred value of Rs.2,50,000/- i.e Rs.92,500/- as consideration to the appellant/plaintiff therefor;

- (d). that after transfer of the value of Rs.2,50,000/-, the balance value of Rs.5,76,300/- remained in the said licence;
- (e). that in pursuance to the aforesaid one copy of the licence in question was delivered by the appellant/plaintiff to the respondent no.1;
- (f). that on 6th December, 1990 and 30th April, 1991 the respondent no.1 got opened a Letter of Credit (LC) in favour of the foreign supplier for Rs.2,45,347/ and Rs.4,737/- respectively totaling Rs.2,50,084/- against the transferred value of Rs.2,50,000/-;
- (g). that in fact at the time of delivery of the licence to the respondent no.1 out of the total value of Rs.826300/-of the said licence, certain value had already been exhausted for some other clients of the appellant/plaintiff and the same had a value of Rs.5,46,933/- only and after utilization of the value of Rs.2,50,000/- by the respondent no.1 the balance value of Rs.2,96,933/- remained on the said licence;
- (h). that the copy of the licence known as the Customs Purposes copy was to be returned by the respondent no.1 to the appellant/plaintiff latest by 31st August, 1991 to enable the appellant/plaintiff to avail of the balance value of Rs.2,96,933/- on the said licence; however the respondents no.1&3 failed to do so preventing the appellant/plaintiff from realizing the

balance value available on the said licence and thereby causing financial and business loss to the appellant/plaintiff;

- (i). that the appellant/plaintiff vide its letter dated 14th September, 1991 thus filed a claim on the respondents no.1&3 for Rs.1,09,865.21p being 37% of the balance value of Rs.2,96,933/- on the said licence;
- (j). that the respondents acknowledged their such liability to the appellant/plaintiff in their various letters dated 7th March, 1992, 2nd April, 1992, 4th May, 1992, 8th August, 1992 and 5th October, 1992;
- (k). however subsequently the respondents no.1&3 turned turtle and vide their letters dated 7th March, 1992 and 7th September, 1992 totally denied their liability in the said amount of Rs.1,09,865.21p to the appellant/plaintiff;
- (l). that the appellant/plaintiff realizing the *mala fide* intent of the respondents no.1&3, vide their letter dated 23rd September, 1991 reminded the respondents for return of other 44 REP Import Licences (of which 38 had been transferred to the respondent no.1 and 06 to the respondent no.2) and on which licences also balance value was available;
- (j). that the appellant/plaintiff vide letter dated 1st November, 1991 reminded the respondent no.2 that in one of the six licences the validity had expired whilst it was in the custody of the

respondent no.2 causing financial loss of Rs.6,162/- to the appellant/plaintiff;

- (k). that the appellant/plaintiff vide its letter dated 28th December, 1991 further demanded from the respondents no.1&2 an amount of Rs.4,266/- with respect to three other licences validity whereof was expiring on 31st December, 1991 whilst in the custody of the respondent no.2;
- (l). that the appellant/plaintiff vide its letter dated 13th January, 1992 demanded Rs.18,910/- being the total consideration due to the appellant/plaintiff;
- (m). that the appellant/plaintiff vide its letter dated 13th January, 1992 demanded Rs.22,424/- being consideration @ 20% of the balance value of Rs.1,12,122/- in eight out of the 38 licences aforesaid;
- (n). that the appellant/plaintiff vide its letter dated 24th / 27th January, 1992 demanded Rs.1,45,089/- from the respondents being the consideration @ 20% of the balance value of Rs.7,25,445/- in 30 other licences;
- (o). that the respondents no.1&2 belatedly under the cover of their letter dated 19th February, 1992 returned 23 licences including four out of six licences which were transferred to the respondent no.2;

- (p). that however the same could not be utilized by the appellant/plaintiff for the reason of the validity thereof having expired; and,
- (q). that earlier the respondents had been returning such licences having balance value to the appellant/plaintiff.

The appellant/plaintiff thus on 26th September, 1995 instituted the suit for recovery of:-

- (i). Rs.1,09,865.21p towards licence dated 16th November, 1990.
- (ii). Recovery of Rs.1,67,513/-, Rs.18,910/-, Rs.407.10p & Rs.1,650/- towards other licences having balance value and which were illegally withheld by the respondents.

3. The respondents contested the suit by filing a written statement but in view of what is stated herein below, need is not felt to discuss the contents thereof at this stage. Suffice, it is to state that on the pleadings of the parties, the following issues were framed in the suit:-

- “1. Whether the plaintiff is entitled to the suit amount? OPP
- 2. If so, the rate of interest which the plaintiff is entitled? OPP
- 3. Whether the suit is within limitation? OPP
- 4. Whether the suit is bad for misjoinder of causes of action? OPP
- 5. Relief.”

It may be mentioned that in the impugned judgment there appears to be an error in reproducing the issues framed in the suit.

4. The Trial Court in the impugned judgment took up the issue No.3 pertaining to limitation first and held the claim in suit to be barred by time observing:-

- (A). that as per the plaint the Licence dated 16th November, 1990 and qua which a sum of Rs.1,09,865/- was claimed was returnable by the respondent no.1 to the plaintiff on 31st August, 1991 and thus the cause of action for filing the suit arose on the said date and the suit should have been filed by 31st August, 1994;
- (B). that the licences for late return/withholding of which Rs.1,67,513/- was claimed were admittedly given by the appellant/plaintiff to the respondents in the year 1990-91 and should have been returned soon thereafter;
- (C). that as per the plaint all these licences were demanded by the plaintiff from the respondents in the year 1991-92 and 23 licences were returned on 6th March, 1992;
- (D). thus the cause of action to file the suit in respect of this claim arose prior to 6th March, 1992 and the suit should have been filed on or before 6th March, 1995;
- (E). the same was the position with respect to the claim for Rs.18,910/-;

- (F). though the plaintiff had pleaded acknowledgment by the defendant of their liability vide letters dated 7th March, 1992, 2nd April, 1992, 4th May, 1992, 8th August, 1992 and 5th August, 1992 but the same even though not proved extended the limitation for three years only and the suit was not filed within the said period of three years but only on 26th September, 1995;
- (G). that the letter dated 5th October, 1992 purportedly also of acknowledgment of liability had also not been proved and thus could not be taken into consideration; however even if it were to be taken into consideration it did not contain any acknowledgment of liability and in fact did not even pertain to the claims for Rs.1,09,865/-, Rs.1,67,513/- & Rs.18,910/- and pertained only to the claims for Rs.407.10p and Rs.1,650/- which the counsel for the plaintiff during the course of arguments before the Trial Court had given up;
- (H). that the judgments relied upon by the counsel for the plaintiff on the aspect of acknowledgment of liability did not apply to the present case.

5. The Trial Court under issue No.1 aforesaid held:-

- (I). a perusal of the transfer letters annexed to various licences sold by the plaintiff to the defendants showed that the licence became the property of the transferee after the transfer and the

licence could have been transferred further by the transferee as it was not disputed that the licences were freely transferable;

- (II). once the licence became the property of the defendants and it could have been transferred further by the defendants without any permission from the plaintiff;
- (III). the irresistible conclusion from the above is that the licences were not required to be returned to the plaintiff after making import only to the extent of the value transferred to the defendants;
- (IV). that the licences were thus not returnable by the defendants to the plaintiff;
- (V). that the plaintiff while transferring the licences to the defendants did not stipulate that the same were required to be returned by the defendants to the plaintiff;
- (IV). had there been any agreement for return of the licences by the defendants to the plaintiff, some specific date would have been fixed for return as the licences were valid for a particular period only and could not have been utilized after expiry thereof;
- (VII). on the other hand the transfer letters executed by the plaintiff in favour of the defendants specifically stipulated that the plaintiff had received full and final compensation for re-transferring the licences in favour of the defendants and had no right or claim of whatsoever nature in the licences;

- (VIII).though a specific transfer value was written in the transfer letters and the value of goods which could be imported against those licences were more than the said transfer value but that would be immaterial when the plaintiff knew very well that the defendants could have further transferred these licences and given custody thereof to some other persons and no prohibition thereagainst was placed on the defendants in the transfer letters;
- (IX). as far as the plea and evidence of the plaintiff of the defendants having actually returned some of the licences was concerned, such return would not show an agreement for return in as much as it was the defence of the defendants that such licences were returned as a gesture of goodwill and being of no use to the defendants; and,
- (X). in the absence of any stipulation of return in the transfer letters, no such agreement between the parties could be deciphered from such conduct.

6. The Trial Court in the impugned judgment has further held that the plaintiff had failed to prove the actual loss if any sustained by him on account of non-return of the licences; that thus the appellant/plaintiff could not be held entitled to any amount towards unutilized value on withheld/non-returned licences.

7. In view of the aforesaid findings, the suit was dismissed.

8. The counsel for the appellant/plaintiff did not controvert the dates aforesaid recorded in the impugned judgment on which the cause of action is recorded to have accrued to the appellant/plaintiff for recovery. He rather pegged his case, in so far as the aspect of limitation is concerned, on the respondents having acknowledged their liability. Attention in this regard was first drawn to page 655 of the Trial Court record being the letter dated 5th October, 1992 on the letterhead of the respondent no.1 and addressed to the appellant/plaintiff and which the Trial Court as aforesaid has held to have been not proved by the appellant/plaintiff. The respondents, during admission/denial of documents had denied the said letter. By the said letter, subject whereof is “confirmation of balance as on 31st March, 1992”, the respondent no.1 purports to call upon the appellant/plaintiff to send to the respondent no.1 a complete statement of accounts showing the last balance as on 31st March, 1992, to enable the respondent no.1 to reconcile the account of the appellant/plaintiff. Upon it being enquired from the counsel for the appellant/plaintiff as to how the same can be said to be an acknowledgment of liability, reliance is placed on ***Hansa (P) Limited Vs. MMTC Ltd.*** 113 (2004) DLT 474 laying down that an acknowledgment of liability need not be accompanied by a promise to pay either expressly or even by implication though the words used in the acknowledgment must indicate the existence of a jural relationship of debtor and creditor between the parties and with an intent to admit such jural relationship and that such intention can also be inferred by implication. The contention of the counsel for the appellant/plaintiff is that the respondent no.1 by seeking confirmation of account from the appellant/plaintiff admitted a jural relationship of

accounts with the appellant/plaintiff and the same should be treated as an acknowledgment of liability and the suit is within three years therefrom.

9. Per contra, the senior counsel for the respondents has contended that the said letter dated 5th October, 1992 is in reference to the earlier letters both dated 10th August, 1992 at pages 621 and 623 of the Trial Court record and the perusal whereof shows that the same pertained to the claims for Rs.1,650/- and 407.10p which being petty claims were given up by the appellant/plaintiff before the Trial Court. He has thus contended that the said letter dated 5th October, 1992, even if the contention of the appellant/plaintiff of being of acknowledgment of liability is accepted, is at best an acknowledgment of liability in the sum of Rs.1,650/- and Rs.407.10p, the claim wherefor has been given up.

10. No response to the aforesaid contention is forthcoming.

11. I may even otherwise add that mere seeking of confirmation of account without mentioning any amount as due cannot by any stretch of imagination be treated as an admission of liability to pay any amount. The Division Bench in ***Sha Manmall Misrimall Vs. K. Radhakrishnan*** AIR 1972 Madras 108 held that letters merely calling for statement of accounts would not be an acknowledgment of liability. Earlier also another Division Bench in ***Andiappa Chetti Vs. Alasinga Naidu*** MANU/TN/0268/1911 had held that asking for an account in response to a creditors demand may be a very different thing from acknowledging the necessity of settling accounts when a creditor basis his right upon accounts. Similarly, a Full Bench of Calcutta High Court in ***Jogeshwar Roy Vs. Raj Narain Mitter***

MANU/WB/0026/1903 held that stating “I will see if anything is due” cannot be an acknowledgment of liability that anything is due. Though a Division Bench of the Bombay High Court in *Shreeram Durgaprasad Vs. Sial Soap Stone Factory* MANU/MH/0391/380 did hold that where a debtor asked for a copy of the account upon a notice issued to him demanding the account, he thereby acknowledged his liability to pay but the account in that case was a mutual open and running account with reciprocal demands. The judgment impugned in this appeal expressly holds the account between the parties in the present case to be not such and as aforesaid there is no challenge to that part. A Division Bench of the High Court of Oudh also in *Shah Muhammad Khan Vs. Ahmad Ali Khan* AIR 1934 Oudh 170 held that a request for account is sufficient acknowledgment from which a promise to pay the amount found due may be inferred, but in that case also after accounts were sent the only response was that the same were insufficient and detailed accounts were demanded. On the contrary in the present case the appellant/plaintiff vide its letter dated 10th August, 1992 to the respondent no.1 at page 621 of the Trial Court record had informed the respondent no.1 that its books were showing a debit balance of Rs.407.10p in its accounts for the period ending 31st March, 1990 and demanded the said amount from the respondent no.1. Similar letter also dated 10th August, 1992 at page 623 of the Trial Court was sent with respect to the amount of Rs.1,650/-. The respondent no.1 in response to the said letters, vide its letter dated 18th August, 1992 instead of admitting or denying the liability in the amounts of Rs.407.10p and Rs.1,650/- asked the appellant/plaintiff to send the statements of accounts in support of its claim. The letter dated 5th

October, 1992 was merely a reminder to the appellant/plaintiff to send the statements of accounts. I cannot from the said correspondence infer any acknowledgment of liability by the respondent no.1.

12. Once there is no acknowledgment of liability within three years from the date when the cause of action as recorded in the impugned judgment had accrued (and which as aforesaid is not controverted) and within three years prior to the institution of the suit, no error can be found in the finding of the Trial Court of the suit claim being barred by time.

13. As far as the issue No.1 is concerned, though in the light of above the decision thereon would be irrelevant but the counsel for the appellant/plaintiff has from a reading of the written statement of the respondents purported to show that the respondents therein did not set-up a defence of the licences being not returnable by the respondents to the appellant/plaintiff. It is further argued that there were two copies of each licence i.e. Exchange Control copy and a Customs copy; only the Customs copy was handed over to the respondents; that had the intent been to transfer all rights in the licence even the Exchange Control copy of the licence would have been handed over to the respondents but which was retained by the appellant/plaintiff; that the respondents or any transferee from the respondents could not in the absence of the Exchange Control copy open a Letter of Credit for import of any goods under the licence. He has in this regard also drawn attention to pages 415, 417, 457, 459, 517, 519, 535, 537, 539, 543, 573, 655 and 693 of the Trial Court record.

14. Though the senior counsel for the respondents had controverted that there is any such admission in the written statement but on a reading of the entire written statement I must say that the stand of the respondents is not unequivocal. Even otherwise it belies logic as to why the balance value in a licence, of which only part value had been transferred to the respondents, should be allowed to go waste. It cannot be lost sight of that the transaction is of the time when imports were highly restricted and sought after. However inspite of observing so I am unable to on the basis thereof reverse the finding of the Trial Court on issue No.1. What has been argued today by the counsel for the appellant/plaintiff is in response to the queries raised during the hearing yesterday. Though the explanations offered by the appellant/plaintiff today appear plausible but the fact remains that the appellant/plaintiff has not built up its case on the said lines. I have perused the testimonies of the sole witnesses examined by the appellant/plaintiff and the respondents. No foundation for such case has been laid in the evidence also; rather the appellant/plaintiff appearing as PW1 in his cross examination recorded on 1st August, 2002 stated “there was no agreement between me and the defendants that the defendants shall return the copy of the licence after use”. Not only so there is nothing to show that the appellant/plaintiff at any time after the stipulated date demanded the return of the licences. The claim for return of other 44 licences besides the licence dated 16th November, 1990 was made for the first time only after the dispute with respect to the licence dated 16th November, 1990 arose even though the same were to be returned earlier. Not only so the demand for return of the licence dated 16th November, 1990 handed over to the respondents was made only

after the respondents claiming loss thereof started making a demand on the appellant/plaintiff for the duplicate copy thereof.

15. There is yet another factor. The transfer document executed by the appellant/plaintiff in favour of the respondents were as under:-

*“M/S INDIAN SUGAR AND GENERAL ENGINEERING CORPN.,
6, COMMUNITY CENTRE, NEW FRIENDS COLONY,
NEW DELHI – 110 065.*

Dear Sirs,

*Sub: Re/Transfer of REP Licence No. P/K/3343895
Dated 16/11/90 for Rs.8,26,300/= of M/s. Shivalika
International, Panipat for import of Transfer Value :
Rs.2,50,000/=*

By enclosing herewith both copies of the above licence, we do hereby re-transfer in your favour in terms of para 183 (1) (2) of Import Policy for the year AM 88-91. The licence will be valid for import as mentioned above.

In the event of any penalty damages/or loss on account of mis-utilisation, if any, made by you or your transferee, you will be fully responsible for the same and we do not owe any responsibility and liability for the same.

We confirm having received full and final compensation for re-transferring the above Licence in your favour. We shall have no right or claim or whatsoever nature on the above licence hence forth.

You may operate upon the said licence and goods thus imported in accordance with the import policy in force for your sole benefit and for this purpose, we confirm that you will not require any separate authority from us.”

16. A reading thereof does not show any agreement whatsoever between the parties pleading which the claim in suit has been made. Once, the agreement between the parties has been reduced into writing, Sections 91 & 92 of the Evidence Act bar any evidence in contravention/variation thereof.

17. The counsel for the appellant/plaintiff has also drawn attention to the legal notice got issued by the appellant/plaintiff prior to the institution of the suit and the reply got sent by the respondents thereto and has contended that the respondents in the reply did not specifically deny the liability to return the licences to the appellant/plaintiff as was specifically notified. He has contended that by such non-reply the respondents should be deemed to have acknowledged their liability.

18. I am unable to agree. The principles enshrined in Order VI of the CPC relating to pleadings cannot be extended to legal notices. The counsel for the appellant/plaintiff has been unable to show any duty on a person to reply to a legal notice as a pleading or imputing any admission or acknowledgment from non-reply. Of course the senior counsel for the respondents controverts and contends that there was a categorical denial in the reply to the legal notice. I may add that though the non reply to the notice or non denial of a material averment in reply to the notice may be a relevant consideration in adjudication of *inter se* rights of the parties but the same cannot be deemed to be acknowledgment of liability or an admission without anything more. Reference in this regard may be made to ***Union of India Vs. Watkins & Mayor Co.*** AIR 1966 SC 275 holding that silence of the defendant to the

claim preceding the suit cannot be deemed to be an implied undertaking of the defendant to comply with the claim.

19. I am also in agreement with the reasoning given by the Trial Court that the validity of the licences being limited, the agreement of transfer in writing between the parties ought to have provided for a fixed date for return of the copy of the licence delivered by the appellant/plaintiff to the respondents and non-mentioning thereof leads to an inference of there being no such agreement between the parties.

20. No merit is therefore found in the appeal which is dismissed; however, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 3, 2013

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