

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

% **Date of decision: 30th August, 2018.**

+ **RFA 18/2008**

MILLENNIUM DELUXE MOTORS P.LTD. Appellant

Through: Mr. D.J. Khera, Adv.

Versus

ARUN JAIN

.... Respondent

Through: Mr. Saurabh Dev Karan and Mr.
Uchit Bhandari, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 9th August, 2017 in Suit No.217/2006 of the Court of Additional District Judge, Delhi] of dismissal as barred by time of the suit filed by the appellant/plaintiff for recovery of Rs.4,12,250/- from the respondent/defendant.

2. The appeal came up first before this Court on 18th January, 2008 and vide order dated 19th November, 2008 notice thereof ordered to be issued. The respondent/defendant however was not served for several dates and finally appeared before this Court on 28th January, 2010. Vide order dated 17th March, 2010, the appeal was admitted for hearing and ordered to be listed in due course. On the appellant/plaintiff applying for early hearing, notice was issued to the respondent/defendant and vide order dated 20th September, 2011, the parties referred to mediation. Mediation remained unsuccessful and the appeal was again ordered to be listed in due course. The appellant/plaintiff filed application for urging additional grounds and

which was allowed on 25th May, 2012 albeit in the absence of the counsel for the respondent/defendant. The appeal thereafter came up for hearing on 17th April, 2013 but none appeared for the respondent/defendant and in the interest of justice, the appeal was adjourned from time to time. Vide order dated 21st May, 2018, the counsel for the appellant/plaintiff was directed to inform the counsel for the respondent/defendant of the next date and a copy of the order was ordered to be sent to the respondent/defendant. In response to the aforesaid, Mr. Saurabh Dev Karan, Advocate appears but only with the *Vakalatnama* and without any paper book and without any instructions and seeks adjournment. Adjournment has been refused, since notice was ordered to be issued to the respondent/defendant, though not required, as the respondent/defendant had defaulted in appearing and the respondent/defendant, after appearing in response to the notice, cannot again start the process of adjournments.

3. The counsel for the appellant/plaintiff has been heard and the Suit Court record requisitioned in this Court perused.

4. Since the suit of the appellant/plaintiff, even though the respondent/defendant had been proceeded *ex-parte* after filing the written statement, has been dismissed as barred by time, I will hereinafter enumerate the averments in the plaint from the aspect of limitation.

5. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading (i) that the appellant/plaintiff approached the respondent/defendant for giving to the appellant/plaintiff on lease the ground floor of property No.13/4, Mathura Road, Faridabad, Haryana which included a showroom and office measuring approximately 3000 sq.

ft. in the shape of a hall and a workshop measuring 9000 sq. ft.; (ii) that rent of Rs.1,25,000/- per month exclusive of electricity and water charges was agreed to be paid by the appellant/plaintiff to the respondent/defendant; (iii) that a Lease Agreement dated 9th June, 2000 was executed between the parties and wherein the respondent/defendant agreed to carry out certain works as desired by the appellant/plaintiff in the premises and to make the premises ready for use within 7 to 8 days; (iv) that the respondent/defendant was not having any money for carrying out the said works which he had undertaken in Clause 3 of the Agreement dated 9th June, 2000 and requested the appellant/plaintiff to pay Rs.2,50,000/- as advance money for completing the said jobs; (v) that since the appellant/plaintiff was interested in starting the work, the appellant/plaintiff, in good faith, advanced an amount of Rs.2,50,000/- as loan, to be adjusted in the future monthly rent; (vi) that the respondent/defendant did not utilize the said monies for carrying out the works as desired by the appellant/plaintiff and requested the appellant/plaintiff for further amounts which were paid by the appellant/plaintiff; (vii) that in addition to the Agreement dated 9th June, 2000, one more Agreement/Lease Deed dated 1st July, 2000 was executed between the appellant/plaintiff and the respondent/defendant, with both the Agreements/Lease Deeds to be read concurrently as provided in the Lease dated 1st July, 2000; (viii) that the appellant/plaintiff has paid a total sum of Rs.17,37,250/- to the respondent/defendant between the dates 8th June, 2000 and 23rd October, 2000 (supposedly incorrect for 23rd October, 2003); (ix) that the appellant/plaintiff, in payment of the initial amount of Rs.2,50,000/-, had issued two cheques of Rs.1,50,000/- and Rs.1 lakh respectively; that the respondent/defendant represented that the cheque for Rs.1 lakh had

been misplaced and received cash of Rs.1 lakh from the appellant/plaintiff thereagainst; however, the respondent/defendant thereafter encashed the cheque dated 8th June, 2000 for Rs.1 lakh also; (x) that out of the aforesaid sum of Rs.17,37,250/-, a sum of Rs.1,80,000/- was paid directly by the appellant/plaintiff to the suppliers of the material and labour required for carrying out the works aforesaid in the premises; (xi) that on taking possession, the appellant/plaintiff found that the workshop was leaking from various places and since the respondent/defendant failed to rectify the same, the appellant/plaintiff got legal notice dated 4th August, 2000 issued to the respondent/defendant; (xii) that the respondent/defendant again assured the appellant/plaintiff that he will redress all the grievances; accordingly, further payments continued to be made by the appellant/plaintiff to the respondent/defendant; (xiii) that the amount of Rs.17,37,250/- also includes an amount of Rs.41,250/- on 7th October, 2000, Rs.13,750/- on 6th November, 2000 and Rs.13,750/- on 7th December, 2000, total being Rs.68,750/- which was directly paid to the Income Tax Department towards tax deducted at source; (xiv) that in addition to the above, a pay order for Rs.62,000/- was also handed over to the respondent/defendant by the appellant/plaintiff as final settlement for a case u/S 130 of the N.I. Act, 1881 on 23.10.2003; (xv) that the appellant/plaintiff occupied the tenanted premises upto 30th April, 2001; however the workshop continued to be in possession of the appellant/plaintiff upto 31st July, 2001; (xvi) that since there was no bifurcation of rent in Lease Deed dated 1st July, 2000 or Lease Deed dated 9th June, 2000 between showroom and workshop and since the appellant/plaintiff had vacated the showroom by 30th April, 2001, it was decided between the parties that the

appellant/plaintiff shall pay an amount of Rs.25,000/- per month as rent for the workshop till its vacation; (xvii) that for the period of occupation from 1st July, 2000 to 30th April, 2001 at a rent of Rs.1,25,000/-, the liability of the appellant/plaintiff is for Rs.12,50,000/-; (xviii) that for the period of occupation of the workshop from 1st May, 2001 to 31st July, 2001 @ Rs.25,000/- per month, the liability of the appellant/plaintiff to the respondent/defendant is of Rs.75,000/-; (xix) that the total liability of the appellant/plaintiff to the respondent/defendant is thus of Rs.13,25,000/- as against the sum of Rs.17,37,250/- received by the respondent/defendant from the appellant/plaintiff; and, (xx) that the respondent/defendant had filed a Civil Suit in the Courts at Faridabad, Haryana for recovery of Rs.8,26,000/- from the appellant/plaintiff and which suit was pending consideration. Hence, the suit for recovery of Rs.4,12,250/- with interest.

6. On the aspect of limitation, it is deemed appropriate to set out hereinbelow, paras 15 & 16 of the plaint as under:

“15. That the Plaintiff has requested the Defendant several times to pay the suit amount back to the Plaintiff. However, the Defendant adopted delaying tactics and finally on 5.4.2005 refused to make the payment of the suit amount to the Plaintiff and also refused to withdraw the suit filed by him in the Faridabad Court. The Defendant is withholding the legitimate amount of the Plaintiff without any justification, as such, the Plaintiff is entitled to claim interest on the said amount at the rate of 12% per annum from 5.4.2005. However, the Plaintiff is claiming the interest during the pendency of this suit @ 12% p.a. till the amount is realised. The Plaintiff undertakes to pay court fees on the amount of interest to be granted by this Hon’ble Court.

16. That the cause of action has arisen in favour of the Plaintiff and against the Defendant initially when the Defendant

filed a suit for recovery against the Plaintiff under Order XXXVII of CPC. The cause of action has further arisen on 9.9.2004, when the leave to defend was granted to the Plaintiff by the Hon'ble Court of Faridabad. The cause of action has further arisen in December, 2004, when the written statement was filed by the Plaintiff, detailing the excess payment made by the Plaintiff to the Defendant. The cause of action has finally arisen on 5.4.2005, when the Defendant refused to withdraw his suit and also refused to repay the suit amount to the Plaintiff in the open Court. The cause of action is continuing and subsisting one."

7. The learned Additional District Judge has held the suit to be barred by time, reasoning (a) that it was the plea of the appellant/plaintiff that the cause of action to file the suit arose initially when the respondent/defendant filed a suit against the appellant/plaintiff and further on 9th September, 2004, when leave to defend in that suit was granted to the appellant/plaintiff and also in December, 2004, when written statement was filed by appellant/plaintiff in that suit; (b) that it was further the plea of the appellant/plaintiff in the plaint that the cause of action further arose on 5th April, 2005, when the respondent/defendant refused to withdraw the suit or to refund the amount of Rs.4,12,250/-; (c) that the counsel for the appellant/plaintiff relied on Article 113 of the Schedule to the Limitation Act, 1963 and contended that the cause of action under Article 113 of three years accrued on 5th April, 2005; (d) that the said submission was untenable as cause of action admittedly initially arose when the respondent/defendant filed the suit in the Courts at Faridabad on 19th January, 2002 for recovery of Rs.8,26,000/-; (e) that thus the subject suit filed on 3rd July, 2006 was barred by limitation; (f) that per Section 9 of the Limitation Act, once time

had begun to run, no subsequent disability or inability stops it; (g) that the counsel for the appellant/plaintiff was wrongly invoking Article 113 of the Schedule to the Limitation Act as the period of limitation for a suit for recovery of excess amount was governed by Articles 9 & 26 of the Schedule to the Limitation Act and Article 113 can be invoked only when there is no other specific Article governing the limitation for the suit; (h) that as per the appellant/plaintiff himself, he had vacated the tenancy premises on 30th April, 2001 and was liable to pay only Rs.25,000/- for the workshop till the date of vacation; (i) that the appellant/plaintiff, on 30th April, 2001, must have been aware of the excess payment which had been made and under Article 9 of the Schedule to the Limitation Act, the period of limitation of three years commenced to run therefrom; however the suit was filed only on 3rd July, 2006; and, (j) that the plea of the appellant/plaintiff, that the appellant/plaintiff was not aware of excess amount paid till the suit was filed by the respondent/defendant in Faridabad Court, was unbelievable.

8. The counsel for the appellant/plaintiff today also, on enquiry as to which Article of the Schedule to the Limitation Act governs the suit, has drawn attention to Article 113 which provides limitation of three years commencing from the date when the right to sue accrues, for any suit for which no period of limitation is provided elsewhere in the Schedule.

9. Attention of the counsel for the appellant/plaintiff has been drawn to para 4 of the plaint at page 25 of the paper book, where it is the plea of the appellant/plaintiff that the amount of Rs.2,50,000/- was advanced as loan, to be adjusted in future monthly rental. Attention of the counsel for the

appellant/plaintiff has further been invited to (i) Article 19 of the Schedule to the Limitation Act which provides limitation of three years commencing from the date when the loan is made, for a suit for money payable for money lent; and to, (ii) Article 21, which provides limitation of three years, also commencing from the date when the loan is made, for money lent under an agreement that it shall be payable on demand. The plea in para 4 of the plaint is, of advancing Rs.2,50,000/- as loan to be adjusted in future monthly rent. The appellant/plaintiff has not specified the month towards rent of which the payment was agreed to be adjusted. The only inference is that when the payment was made on 8th June, 2000 i.e. before occupying the premises on 1st July, 2000, the same was adjusted in the rent for the earliest month. If the loan was not so adjusted, the limitation commenced to run towards the end of the month of July, 2000 and August, 2000 and the suit for recovery of the loan amount, filed on 3rd May, 2006, was thus clearly beyond the said period of three years.

10. As aforesaid, a large number of other payments have been pleaded by the appellant/plaintiff, to have been made on behalf of the respondent/defendant, either to the supplier of materials used for carrying out the works to be carried out in the premises or to the Income Tax Authorities, on behalf of the respondent/defendant. The limitation for recovery of such monies is governed by Article 23 of the Schedule to the Limitation Act, which provides limitation of three years commencing from the date when the money is paid, for a suit for money payable to the plaintiff for money paid for the defendant. The said payments also are all of

the year 2000 and the suit filed on 3rd May, 2006 for recovery thereof is barred by time.

11. I may at this stage also notice that neither of the two Lease Deeds dated 9th June, 2000 or 1st July, 2000 are registered, though bilateral documents, and no proper stamp duty has been affixed thereon. For this reason also, the said Lease Deeds cannot be looked at for any purpose, though the counsel for the appellant/plaintiff also, in support of his arguments, has not relied upon the said Lease Deeds and the same would have relevance only for the purpose of merits, if the suit were to be found to be within time.

12. The emphasis of the counsel for the appellant/plaintiff has also been on payment of Rs.62,000/- by pay order, pleaded in the plaint in para 6, to have been made on 23rd October, 2000. The counsel for the appellant/plaintiff, by contending that the said date was incorrectly pleaded and in fact is 23rd October, 2003 as noted in the impugned judgment and decree also, has sought to contend that the suit was filed within three years therefrom.

13. The appellant/plaintiff, with respect to the said payment of Rs.62,000/-, has in para 11 of the plaint pleaded as under:

“11....“In addition to the above, a pay order for Rs.62,000/- was also handed over to the Defendant by the Plaintiff as final settlement for a case U/s 130 of the N.I. Act on 23.10.2003.”

14. The counsel for the appellant/plaintiff is unable to answer, whether the settlement aforesaid has been proved. A perusal of the Suit Court

record does not show the appellant/plaintiff to have proved the said settlement.

15. I have enquired from the counsel for the appellant/plaintiff, as to how an amount paid by way of settlement in one legal proceeding, can furnish a cause of action for another legal proceeding, without the appellant/plaintiff proving that the settlement in the first legal proceeding was subject to the right of the appellant/plaintiff to institute proceedings for recovery of the amount paid in settlement.

16. The counsel for the appellant/plaintiff, at this stage, draws attention to pages 125 and 126 of the appeal paper book, which contain a photocopy of an illegible statement, purportedly made by the respondent/defendant in some Court, of receipt of Cheque No.668036 dated 23rd October, 2003 of Rs.62,000/- and the order dated 30th October, 2003 of Judicial Magistrate, Faridabad, of dismissal of some plaint as withdrawn. Though the counsel for the appellant/plaintiff admits that the said documents were not before the Suit Court (for which reason they cannot be considered in appeal) but even if the same were to be seen, it is not understandable, as to how the same can furnish a cause of action to the appellant/plaintiff for institution of the suit from which this appeal arises.

17. The counsel for the appellant/plaintiff however draws attention to Article 26 of the Schedule to the Limitation Act which provides limitation of three years commencing from the date when the accounts are stated in writing, signed by the defendant, for a suit for recovery of money payable to the plaintiff, found to be due from the defendant to the plaintiff, on accounts being stated between them.

18. The appellant/plaintiff has neither pleaded any accounting relationship with the respondent/defendant nor proved any accounting relationship. Ordinarily, there is no accounting relationship between landlord and tenant. The counsel for appellant/plaintiff contends that because Rs.62,000/- aforesaid were paid in settlement, Article 26 is attracted. As aforesaid, the settlement has not even been proved. Even otherwise, a settlement before a Court, cannot be equated with a settlement of account *inter se* the parties. The invocation of Article 26 is equally misconceived.

19. On enquiry, while the counsel for the respondent/defendant states that Faridabad proceedings aforesaid which were pending on the date of institution of the suit, have been decided in favour of the respondent/defendant, the counsel for the appellant/plaintiff states that the same were decided in favour of the respondent/defendant but in appeal have been decided in favour of the appellant/plaintiff. However, neither counsel has copies of orders of the said Faridabad proceedings.

20. The appellant/plaintiff has been unable to show any error in the judgment of the Suit Court dismissing the suit as barred by time. The appellant/plaintiff is indeed found to have slept over its rights, if any.

Accordingly, the appeal is dismissed. Since the respondent/defendant is also found lacking, no costs.

Decree sheet be prepared.

Trial Court record requisitioned be sent back.

RAJIV SAHAI ENDLAW, J.

AUGUST 30, 2018/bs