

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

+ **RFA No. 237/2018**

% **9th March, 2018**

PHOENIX UDYOG PVT. LTD. Appellant

Through: Mr. Pankaj Bhagat Mr. Sadre
Alam and Mr. Amitabh
Bachchan, Advocates.

versus

MAXPURE WATER SYSTEM PVT. LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 8967/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No. 237/2018

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the defendant in the suit impugning the *ex-parte* judgment and decree of the trial court dated 22.12.2017 by which the trial court has decreed the suit filed by the respondent/plaintiff for an amount of Rs.10,71,686/- along with

interest at 9% per annum being the value of the unpaid goods/water purifiers sold by the respondent/plaintiff to the appellant/defendant.

2. At the outset it is required to be noted that the appellant/defendant after initially appearing and filing written statement, did not appear from the stage of cross-examination of the witness of the respondent/plaintiff on 25.10.2017, and therefore, in terms of the evidence led by the respondent/plaintiff, the subject suit has been decreed.

3. The facts of the case are that the subject suit was filed by the respondent/plaintiff for recovery of balance due of Rs.10,71,686/- pleading that there was a relationship of buyer and seller between the parties whereby the respondent/plaintiff supplied to the appellant/defendant water purifiers, its parts and accessories on credit from time to time by raising invoices. It was pleaded in the plaint that goods were lastly supplied of a sum of Rs.3,27,548/- on 1.3.2011 and with respect to which last payment was received on 13.3.2011. The subject suit was filed on the last date of limitation on 13.3.2014.

4. The appellant/defendant had filed the written statement

and contested the suit denying the territorial jurisdiction of this Court as also the suit being barred by time. Appellant/defendant has also pleaded that there was no liability of the appellant/defendant who had returned the goods which were sent by the respondent/plaintiff without placing of any orders. Therefore, by pleading that appellant/defendant had no liability the suit was prayed to be dismissed.

5. After pleadings were complete the trial court framed the following issues:-

- “(i) Whether this Court has no jurisdiction to try and entertain the present suit? OPD
- (ii) Whether the suit of the plaintiff is barred by limitation? OPD
- (iii) Whether the plaintiff is entitled for a decree in the sum of Rs.10,71,686 as prayed in prayer no.(a) of the plaint? OPP
- (iv) Whether the plaintiff is entitled to pentende lite and future interest, if so, then at what rate and for which period? OPP
- (v) Relief.”

6. After issues were framed respondent/plaintiff led evidence of Sh. Alpesh Gokhru as PW-1 who has proved various documents Ex.PW1/1 to Ex.PW1/5. The invoices were proved as Ex.PW1/3 (colly) and the statement of account was proved as Ex.PW1/4. Appellant/defendant failed to appear from 25.10.2017 which was a date fixed for cross-examination of PW-1. Appellant/defendant was therefore proceeded *ex-parte* and right of the

appellant/defendant to cross-examine PW-1 was closed by treating it as nil. The impugned judgment has been passed thereafter by decreeing the suit. I may note that once a defendant in a suit is *ex-parte*, on the issues which have been framed really since there is no contest on behalf of the defendant by leading evidence, there would be no formal issues in the suit. This is being stated because whatever are the defences of the appellant/defendant in the written statement cannot be looked into because there is no evidence which is led by the appellant/defendant with the fact that even the witness PW-1 of the respondent/plaintiff has not been cross-examined. Therefore, there was no reason for the trial court not to believe the unrebutted testimony of the PW-1 for decreeing the subject suit in terms of the impugned judgment.

7. Counsel for the appellant/defendant argued that the suit was barred by limitation and therefore the suit had to be dismissed, however this argument is without merit because the respondent/plaintiff has proved that last payment which was made was on 13.3.2011 and consequently, the suit filed on 13.3.2014 i.e on the last date of limitation would be within limitation. The statement of account proved as Ex.PW1/4 shows the last payment, which is dated 13.3.2011, and therefore the argument of the appellant/defendant has no substance that

the suit was barred by time. Even if the payment made is of a specific amount of the last invoice yet this payment will be taken towards the balance due at the foot of the document which has been proved as Ex. PW1/4 and therefore the suit was not barred by limitation.

8. There was also an issue framed by the trial court with respect to territorial jurisdiction, but it is noted that onus of this issue was on the appellant/defendant who has not led any evidence. Therefore, there is no substance in the argument urged on behalf of the appellant/defendant that the court below has no jurisdiction. It was for the appellant/defendant to prove its case of lack of territorial jurisdiction that once the appellant/defendant has led no evidence it cannot be argued by the appellant/defendant that there was no territorial jurisdiction of the courts at Delhi.

9. Finally, counsel for the appellant/defendant argued that the appellant/defendant was wrongly proceeded *ex-parte* on 25.10.2017 and in this regard attention of this Court is drawn to grounds (g) and (h) of the grounds of appeal that merely because appellant/defendant did not appear on one date would not mean that the trial court should have proceeded *ex-parte* against the appellant/defendant. These grounds (g)

and (h) read as under:-

- “(g) For that even the memo of parties of suit as preferred by the respondent clearly establishes that the place of business of the appellant company is at Himachal Pradesh and not at Delhi.
- (h) Further, in the evidence of PW1, at para 2 it has been admitted that the both the office and factory of appellant is situated at Himachal Pradesh.”

10. In my opinion, grounds (g) and (h) are not the grounds which are required in law to be pleaded to show good cause for non-appearance before the trial court on 25.10.2017. If on the date fixed a defendant does not appear then surely court is entitled to proceed *ex-parte* and it cannot be argued by the appellant/defendant that just because of non-appearance on one date the court could not have proceeded *ex-parte* against the appellant/defendant. The appellant/defendant could only have succeeded in setting aside *ex-parte* proceedings if it showed a valid reason for non-appearance on 25.10.2017 and thereafter till the application was filed under Order IX Rule 13 CPC, however there are no such averments which are found in grounds (g) and (h). Therefore, there is no reason for setting aside the *ex-parte* order dated 25.10.2017 against the appellant/defendant.

11. There is no merit in the appeal. Dismissed.

MARCH 09, 2018/ib

VALMIKI J. MEHTA, J