

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

% *Judgment Reserved on : 04.12.2017*  
*Date of Judgment: 09.02.2018*

+ **R.F.A. 386/2017**

NARESH KUMAR BANSAL ..... Appellant/plaintiff.  
Through: Mr. Rajeev Aggarwal and  
Mr. Ankit Gupta, Advocates.

versus

TRIMURTHI HIGHTECH CO PVT LTD & ANR.  
.. Respondents/defendants.  
Through: None.

**CORAM:**  
**HON'BLE MR. JUSTICE VINOD GOEL**

**VINOD GOEL, J.**

1. The appellant/plaintiff has challenged the impugned judgment and decree dated 06.12.2016 passed by the court of Additional District Judge-II, North West, District Rohini Courts, Delhi (in short 'learned ADJ') by which his Civil Suit No.76092/2016 against the respondents/defendants was dismissed leaving the parties to bear their own costs.
2. The brief facts of the case are that the appellant/plaintiff filed the suit for recovery of Rs.12,13,200/- against the respondents/defendants on account of arrears of outstanding amount for supply of material i.e. Ready Mix Concrete (in short 'RMC'). It is claimed that the appellant/plaintiff is one of the

partners of the firm M/s Enpeecon which is engaged in the business of supply of RMC. The appellant/plaintiff is authorised by the other partners to sign, verify and file the suit against the respondents/defendants and depose before the Court on behalf of the Firm by Authority Letter dated 25.05.2012. It is further alleged by the appellant/plaintiff in the plaint that the respondents/defendants were having business dealings with them and they used to supply RMC to the respondents/defendants on cash/credit basis from time to time as and when the order was placed upon them. The respondents/defendants have been making payment on the basis of the running account being maintained by the appellant/plaintiff in due course of its business.

3. It is further alleged by the appellant/plaintiff that they had supplied RMC to the respondents/defendants vide different invoices from time to time to the satisfaction of the respondents/defendants. The respondents/defendants lastly made the payment on 15.12.2009 and thereafter they stopped making payment to the appellant/plaintiff. It is claimed that as per the Customer Ledger Account for the period from 1.04.2010 to 16.07.2010, a sum of Rs.12,13,200/- has been outstanding and due against the respondents/defendants. They have prepared the statement of account in regular course of their business. It is claimed that the respondents/defendants are liable to pay interest @ 24% per annum on the outstanding amount till the date of payment. The appellant/plaintiff through their counsel

also served the respondents/defendants with a legal notice dated 18.04.2012 by speed post/registered AD.

4. In its written statement, it is *inter alia* pleaded by the respondents/defendants that the appellant/plaintiff has not disclosed the name and address of the partners in the firm M/s Enpeecon and the plaint has not been signed and verified as per the requirement of law. The appellant/plaintiff being a partner of the firm has no locus standi to file the suit on behalf of the firm in his individual capacity. It is pleaded that the appellant/plaintiff has not alleged if their firm is registered one as they have not filed the registration certificate of the partnership firm on record. It is pleaded that the respondents/defendants used to reside and work for gain at Chennai and they have no office in Delhi and no cause of action or part of cause of action arose in Delhi. It is further pleaded that the respondents/defendants were making the payment to the appellant/plaintiff immediately after receipt of the goods at the spot through their representatives.
5. In its para-wise reply, the respondents/defendants have admitted the contents of para No.2 of the plaint wherein the appellant/plaintiff has alleged that the respondents/defendants were having business dealings with them and they used to supply RMC to the respondents/defendants on cash/credit basis from time to time as and when the order was placed upon them by the respondents/defendants. It is pleaded that the respondents/defendants were making payment of the bills at the

spot immediately after the receipt of the goods. The respondents/defendants have also admitted the contents of para No.4 of the plaint wherein it is pleaded by the appellant/plaintiff that the goods were supplied to the entire satisfaction of the respondents/defendants at their project at Sarita Vihar, Delhi being associated with Delhi Metro. The respondents/defendants repeatedly pleaded that the payment of the goods was made at the spot immediately after the receipt of the goods by their representative. However, it is denied that a sum of Rs.12,13,200/- was outstanding against them. It is pleaded that they are not liable to pay interest @ 24% per annum for want of any contract. Regarding the legal notice, it is pleaded by the respondents/defendants that the notice is illegal and without any basis.

6. The appellant/plaintiff filed replication to the written statement of the respondents/defendants denying the allegations of the respondents/defendants and reaffirming the averments made in the plaint.
7. On the pleadings of the parties, the learned ADJ framed the following issues on 23.07.2013:-
  1. Whether the plaintiff is entitled for recovery of Rs.12,13,000/- as prayed for? OPP.
  2. Whether the plaintiff is entitled for the interest @ 24% p.a. as prayed for? OPP.
  3. Whether the suit of the plaintiff is barred as per provisions of Order VI Rule 2 CPC and is defective and liable to be rejected? OPD.
  4. Whether the suit of the plaintiff is not signed and verified as per requirement of law and is

not maintainable in its present form and is liable to be rejected? OPD.

5. Whether the suit of the plaintiff is defective as per provisions of Sec. 69 of Indian Partnership Act, 1932 and is liable to be dismissed? OPD.
6. Whether the suit of the plaintiff is not maintainable as no cause of action has arisen for filing the present suit and is not maintainable and liable to be dismissed u/o 7 Rule 11 CPC? OPD.
7. Whether this Court has no jurisdiction to try the suit and suit is liable to be rejected on this ground, as alleged? OPD.
8. Whether the plaintiff has concealed and suppressed the material facts at the time of filing the suit and is liable to be dismissed? OPD.
9. Relief.

8. In support of its case, the appellant/plaintiff has examined himself as PW1. However, despite opportunity, the respondents/defendants did not adduce any evidence. In fact the evidence of the appellant/plaintiff was closed on 03.03.2016 and matter was listed for the respondent/defendants' evidence on 12.07.2016 but the respondents/defendants stopped appearing from 12.07.2016. The respondents/defendants also did not turn up to address arguments.
9. After hearing the learned counsel for the appellant/plaintiff, the learned ADJ decided issues No.1 and 2 against the appellant/plaintiff and issues No.3 to 8 against the respondents/defendants and consequently under issue No.9, the

suit of the appellant/plaintiff was dismissed with no order as to costs.

10. Despite service of the notice in the appeal, the respondents/defendants did not appear. It is argued by learned counsel for the appellant/plaintiff that the respondents/defendants have admitted the business dealings and transactions, delivery and supply of the RMC to them by the appellant/plaintiff but they failed to adduce any evidence of alleged payment. He argued that respondents/defendants did not challenge the correctness of any entries in the copies of statement of account Ex.PW1/3 collectively. He argued that the learned ADJ has passed the impugned judgment and decree on the basis of conjectures and surmises. He argued that burden of proof was upon the respondents/defendants to prove alleged payment which they failed to prove miserably.
11. I have heard the learned counsel for the appellant/plaintiff and perused the record carefully.
12. Without discussing the pleadings and evidence on record, the learned ADJ decided issues No.3 to 5 and 7 against the respondents/defendants. It is felt necessary to adjudicate these issues as per evidence on record.

**ISSUE No. 3 to 5.**

13. It is pleaded by respondents/defendants in their written statement, that the appellant/plaintiff has not alleged in the plaint that the said partnership firm is a registered one at the time of institution of the suit and the registration certificate of

the partnership firm has not been filed and therefore, the suit is barred under Section 69 of the Indian Partnership Act, 1932. It is also pleaded that the appellant/plaintiff being a partner of the firm has no locus standi to file the suit on behalf of the firm in his individual capacity without disclosing the name and address of all the partners of firm M/s Enpeecon.

14. Here it would be profitable to refer to sub sections (1) & (2) of Section 69 of the Indian Partnership Act, 1932 which read as under:-

**“Section 69**

**Effect of non-registration.-**

- (1) **No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.**
- (2) **No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.**
15. The only requisite under Section 69 (2) of the Act is that a suit by or on behalf of a firm can only be instituted against a third party when the firm is registered and the person suing has been recorded in the register of the firm as partner in the firm.

16. The appellant/plaintiff Naresh Kumar Bansal had filed the suit for recovery not in his individual capacity but as partner of M/s Enpeecon on its behalf against the respondents/defendants. Ex.PW1/D2 is the copy of the Form-B dated 03.02.2003 issued by the Registrar of the Firm, Government of NCT, Delhi by which the firm M/s Enpeecon has been registered at Sr. No.231 of 2003 under Rule 8 of Delhi Partnership (Registration of Firm) Rules, 1972. Ex.PW1/D1 is the copy of Form-A issued by the Registrar of the Firm in respect of firm M/s Enpeecon bearing registration No.231 dated 03.02.2003. This Form-A reflect that the firm M/s Enpeecon has four partners therein namely Naresh Gupta, Naresh Kumar Bansal, Pawan Kumar Gupta and Manoj Gupta. Therefore, it cannot be said that the suit is defective for non-compliance of Section 69 of Indian Partnership Act, 1932. Ex.PW1/1 is Authority Letter dated 25.05.2012 by which other three partners namely Pawan Kumar Gupta, Naresh Gupta and Manoj Gupta have authorized Mr. Naresh Kumar Bansal, the 4<sup>th</sup> partner to sign, verify and file suit for recovery against the respondents/defendants and its Director and to depose in the Court. Accordingly, the plaint has been signed, verified and instituted by Sh. Naresh Kumar Bansal as authorized partner on behalf of M/s Enpeecon against the respondents/defendants. Letter Ex.PW1/1 is not disputed in cross-examination of PW1. As such, these issues No.3,4 and 5 are decided against the respondents/defendants and in favour of the appellant/plaintiff.

## **ISSUE NO.7**

17. The respondents/defendants in preliminary objection No.5 of their written statement pleaded that they used to reside and work for gain at Chennai and do not have any office in Delhi and no cause of action or part thereof has arisen in Delhi and therefore, the Courts in Delhi have no jurisdiction to try the suit. However, on merits, contents of para No.4 of the plaint where the appellant/plaintiff has alleged that goods were supplied to the entire satisfaction of the respondents/defendants at their project at Sarita Vihar, Delhi being associated with Delhi Metro has been admitted to be correct. In the circumstances, the respondents/defendants have admitted that part of the cause of action has accrued in Delhi. Moreover, it is not disputed by the respondents/defendants in cross-examination of PW1 that respondent company is engaged in construction of Delhi Metro Project and deal took place with the respondents/defendants at the office of appellant/plaintiff in Delhi. Since the contract to supply the material had taken place in Delhi and RMC was also supplied to the respondents/defendants in Delhi, the respondents/defendants cannot be allowed to say that Delhi Court has no jurisdiction to try the suit. As such, this issue is decided against the respondents/defendants.

## **ISSUES NO.1 & 2**

18. The point for consideration before this Court is whether the appellant/plaintiff is entitled for recovery of Rs.12,13,200/- with interest from the respondents/defendants.

19. It is the case of the appellant/plaintiff that they have supplied RMC to the respondents/defendants and as per the customer ledger account for the period from 01.04.2010 to 16.07.2010, a sum of Rs.12,13,200/- has been outstanding against the respondents/defendants. In their written statement, the respondents/defendants have admitted that there were business dealings between the parties and the appellant/plaintiff used to supply them RMC on credit cash basis from time to time and as and when the order was placed upon the appellant/plaintiff by them. It is important to note that it is pleaded by the respondents/defendants that they were making the payment of the bills at the spot immediately after the receipt of the goods. They have also admitted the contents of para No.4 of the plaint wherein it is pleaded by the appellant/plaintiff that the goods were supplied to the entire satisfaction of the respondents/defendants at their project at Sarita Vihar, Delhi. The respondents/defendants have repeatedly pleaded in their written statement that the payment of the goods was made by them at the spot immediately after the receipt of the goods by their representatives. When the respondents/defendants have taken the defence of making the payment of all material/RMC supplied to them the burden of proof was on the respondents/defendants to prove and establish that they have made the payment of the material supplied to them.
20. In this regard, it would be relevant to refer to Section 102 of the Indian Evidence Act, 1872 which reads as under:-

**“Section 102**

**On whom burden of proof lies.-** The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

**Illustrations:**

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B’s father.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

**The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.**

**If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.**

**Therefore the burden of proof is on B.”**

21. Since the supply of the material i.e. RMC by appellant/plaintiff to the respondents/defendants is not disputed and the respondents/defendants have only claimed that they have made the payment for the material supplied to them by the appellant/plaintiff and if no evidence is produced by either side, it is the appellant/plaintiff who would succeed as the supply of the material is not disputed and the payment is not proved. Under Section 102 of the Evidence Act, therefore the burden to prove alleged payment is on the respondents/defendants.
22. In his evidence, the appellant/plaintiff has tendered copies of 66 Tax Invoices issued on several dates during the period from 31.08.2009 to 19.05.2010 along with copies of Delivery Notes

by which RMC M-15 of various quantities was supplied to the respondents/defendants. These documents were exhibited as Ex.PW1/2 (collectively). At the time of tendering these documents by PW1 in evidence in examination-in-chief, the respondents/defendants have not objected to the mode of proof. However, in the cross-examination it was suggested to PW1 by the respondents/defendants that the invoices and delivery challans did not bear the signatures of the respondents/defendants. PW1 testified that these bear signatures of the staff of the respondents/defendants at the site. PW1 stated that the bills/vouchers and challans are signed by his employees Mr. Harish Garg and Mr. Sandeep and one Mr. Nagar, who had expired. Since the mode of proof was not objected to at the time of exhibiting the documents the respondents/defendants cannot be allowed to raise the same at any stage subsequent to the marking of the documents as an exhibit. This has been so held by the **Hon'ble Supreme Court in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple (2003) 8 SCC 752**. This view was reiterated by Apex Court in **Dayamathi Bai (Smt) Vs. K.M. Shaffi (2004) 7 Supreme Court Cases 107**, in **Nandkishore Lalbhai Mehta Vs. New Era Fabrics Private Limited and Others (2015) 9 Supreme Court Cases 755** and **Sonu @ Amar Vs. State of Haryana (2017) 8 Supreme Court Cases 570**.

23. Even in his cross-examination, PW1 has testified that no cash payment was made on the spot. He stated that all the payments

were made through RTGS or by cheque. In further cross-examination, PW-1 has denied the suggestion of the respondents/defendants that entire payment has been received by him against the delivery of the goods. The respondents/defendants have not adduced any evidence regarding the payment of the material received by them from the appellant/plaintiff. In fact, after closing of appellant's evidence on 03.03.2016, the matter was listed for evidence of the respondents/defendants for 12.07.2016 but the respondents/defendants chose not to appear and their evidence was closed by learned ADJ. Since the respondents/defendants have failed to discharge their burden of proof to prove the alleged payment of the material supplied to them by the appellant/plaintiff, an adverse inference is to be drawn against the respondents/defendants under Section 114 (g) of the Evidence Act which reads as under:-

**“Section 114. Court may presume existence of certain facts-** The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

**The Court may presume-**

.....  
(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;  
.....

24. In **Nagar Palika, Raisinghnagar v. Rameshwar Lal & Another (2017) Supreme Court Cases 618** the respondents/plaintiffs filed a suit for permanent injunction restraining the defendant from dispossessing him from the suit land. He claimed to be the holder and in possession of the suit land on the strength of the patta issued in favour of his grandfather by the appellant/defendant. The appellant/defendant in its written statement, *inter alia*, alleged that the grandfather of appellant/plaintiff was given some other land; that the grant so made in relation to the said land was cancelled; and the money received was also refunded to him. **The Hon'ble Supreme Court** has held that the stand taken by the appellant/defendant was required to be proved by them as burden to prove these facts was on them but they failed to prove any of the issues though raised and the appeal filed by the appellant-defendant was dismissed.
25. The respondents/defendants have failed to place on record the copies of their ledger or the details of the cheques by which the alleged payment was made. They have also not adduced any oral evidence. Though, the appellant/plaintiff have placed on record the copies of the ledger accounts of the respondent company for the period from 01.04.2009 to 31.03.2010 and 01.04.2010 to 16.07.2010 showing a debit balance of Rs.12,13,200/- which were exhibited as Ex.PW1/3 (collectively) without any objection from the respondents. However, these copies of the ledger accounts do not bear the

certificate under Section 65B of the Evidence Act. These are also not signed by anyone on behalf of the appellant/plaintiff. Though, objections about the exhibiting of the documents were not taken by the respondents/defendants at the time when the exhibited mark was put on these documents, yet these documents are not admissible in evidence and objection is open even at a later stage as held by Apex Court in **Dayamathi Bai (Smt) Vs. K.M. Shaffi (2004) 7 Supreme Court Cases 107, Nand Kishore Lal Bhai Mehta Vs. New Era Fabrics Private Limited and Others (2015) 9 Supreme Court Cases 755 and Sonu @ Amar Vs. State of Haryana (2017) 8 Supreme Court Cases 570**. These ledger accounts cannot be considered 'evidence' and looked into. However, this does not affect the case of the appellant/plaintiff as the burden to prove the payment as claimed/alleged by the respondents/defendants in their written statement and as per their line of cross-examination of PW1 was on the respondents/defendants, which they have failed to discharge. In fact no evidence has been adduced by the respondents/defendants before the Learned ADJ and they chose not to appear and their evidence was closed. As such, the appellant/plaintiff has made out a case for recovery of Rs.12,13,200/- against respondent No.1. However, the appellant/plaintiff is not entitled to judgment and decree against the respondent No.2/defendant No.2, who is the Director of respondent No.1 and impleaded in his personal capacity, since there is no allegation of fraud against respondent No.2.

26. The appellant/plaintiff has claimed interest @ 24% p.a. against the respondents/defendants. In his cross-examination, PW1 has admitted that there is no written contract between the parties with respect to the payment of interest against the outstanding amount. He has denied the suggestions that they are not entitled to interest @ 24% p.a. or any other rate against the outstanding amount. The copies of the tax invoices Ex.PW1/2 collectively did not contain any terms and conditions of payment of interest on the outstanding amount. Since the respondent No.1 is enjoying the fruits of the outstanding amount of Rs. 12,13,200/-, it would meet the interest of justice if the respondent No.1 is directed to pay decretal amount of Rs. 12,13,200/- with interest @ 9% p.a. from the date of filing the suit till realization of the decretal amount.
27. In view of my above discussions, the appeal is accepted and the suit of the appellant/plaintiff for recovery of Rs.12,13,200/- is decreed against respondent No.1/defendant No.1 with cost throughout and interest @ 9% p.a., from the date of filing the suit till realization. Decree sheet be prepared accordingly.
28. Trial court record be sent back forthwith.

**(VINOD GOEL)**  
**JUDGE**

**FEBRUARY 9<sup>th</sup>, 2018**  
"sandeep"