

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

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Date of decision: 3rd December, 2015

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RFA 331/2004

EXQUISITE DECORS P. LTD.

..... Appellant

Through: Mr. Ripin Sood, Adv.

Versus

BAKELITE HYLAM LTD.

..... Respondent

Through: Mr. P.S. Bindra, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 23rd September, 2003 of the Court of Smt. Sunita Gupta, Additional District Judge (ADJ), Delhi decreeing Suit No.351/1998 filed by the respondent for recovery of Rs.4,97,532/- comprising of principal amount of Rs.1,51,537/- towards the price of goods sold and delivered and Rs.1,07,537.22 on account of sales tax not re-imbursed and balance towards interest together with future interest @ 9% per annum from the date of filing of the suit till realisation.
2. Notice of the appeal was issued and vide *ex-parte* ad-interim order dated 2nd June, 2004, subject to the appellant depositing the decretal amount

in this Court, the execution of the impugned judgment and decree was stayed. The appellant on 21st July, 2004 stated that the decretal amount had been deposited in the Trial Court. The same was ordered to be kept in a fixed deposit. The appeal, on 19th July, 2006 was admitted for hearing and was dismissed in default of appearance of the appellant on 10th April, 2012. On application of the appellant, the appeal was restored to its original position. The counsels have been heard.

3. Though in the suit, the following issues were framed on 8th April, 1999:

*“(i) Whether the plaintiff is a duly incorporated and the plaint has been signed and verified by a duly authorised person?
OPP*

(ii) Whether the suit is within limitation? OPP

(iii) Whether the price settled between the parties was inclusive of Central Sales Tax? OPD

(iv) To what amount, if any, is the plaintiff entitled? OPP

(v) Whether the plaintiff is entitled to claim any interest? If so, at what rate and to what amount? OPP

(vi) Relief.”

but the counsel for the appellant has raised the following three contentions only; (A) that the learned ADJ has erred in deciding Issue No.(i) in favour of the respondent/plaintiff; the respondent/plaintiff failed to prove

that the plaint in the suit had been signed and verified and the suit had been filed by a duly authorised person on behalf of the respondent/plaintiff; (B) that though the sole witness of the respondent/plaintiff in his cross-examination stated that he could not tell which of the invoices claimed to have been raised by the respondent/plaintiff on the appellant/defendant had remained unpaid and the learned ADJ erred in decreeing the suit on the basis of the statement of account and which is not permissible under Section 34 of the Indian Evidence Act, 1872; and, (C) that the learned ADJ has wrongly drawn adverse inference against the appellant/defendant.

4. In view of the aforesaid limited nature of the controversy, it is not deemed appropriate to set out the facts in detail and / or the evidence thereon and the findings of the learned ADJ with respect thereto in detail and which all is exhaustively dealt with in the judgment of the learned ADJ.

5. The counsel for the appellant/defendant on the first of the aforesaid contentions has invited attention to the Power of Attorney executed by the respondent/plaintiff in favour of the signatory to the plaint and has contended that the same authorised only signing of the plaint and not the institution of the suit and thus the suit was not proved to have been instituted by a duly authorized person on behalf of the respondent/plaintiff.

6. I am unable to agree. Clauses 1 to 4 of the said Power of Attorney are as under:

- “1. To sign complaints, affidavits, vakalat and other papers for filing suits.*
- 2. To appear and plead on behalf of the Company.*
- 3. To give evidence and to obtain monies from the Courts.*
- 4. To file Execution Petition/ Applications and Recovery Proceedings and to give receipt for monies recovered.”*

In my view, the words, “to sign complaints...for filing suits” is wide enough to encompass a power to institute the suit as well. Not only so, the same is reiterated in Clause 4 supra with respect to filing not only of execution petition but also of recovery proceedings. Similarly, the recital to the said Power of Attorney also provides that the Attorney was being appointed to do all “acts, deeds, matters in respect of filing suits including criminal complaints (suits) against M/s. Le-Exquisite (P) Ltd.”. It thus cannot be said that the suit on behalf of the respondent/plaintiff was not instituted by a duly authorised person. Not only so, if one minutely looks at Issue No.(i) framed in the suit, the same is also with respect to signing and verification of the plaint and not with respect to the institution of the suit.

7. On the second of the aforesaid contentions, the counsel for the appellant/defendant has again invited attention to the cross-examination of the sole witness of the respondent/plaintiff where he has stated that the suit is based on statement of account; that the appellant/defendant was maintaining a running account with the respondent/plaintiff; that he could not say which particular invoices raised by the respondent/plaintiff were unpaid.

8. I however find the respondent/plaintiff to have also, besides statement of account, proved all the invoices reflected therein. Thus, though the witness of the respondent/plaintiff stated that the suit was based on statement of account but it cannot be said that the respondent/plaintiff had failed to prove its claim by primary evidence i.e. of invoices. What the witness of the respondent/plaintiff meant, if one sees the cross-examination in entirety, is that the outstanding claimed was on the basis of statement of account. I have in this regard also perused the examination-in-chief as well as cross-examination of the sole witness of the appellant/defendant and do not find the said witness to have contradicted any of the invoices or any of the entries and particulars in the statement of account proved by the respondent/plaintiff. Rather, the witness of the appellant/defendant admitted

that “the material ordered was delivered by the plaintiff in batches depending upon availability with them. The material was delivered against challan. Later on, invoices were sent to our office through their delivery boys. On our behalf, we made ‘on account’ payment from time to time”. All that the said witness deposed with respect to the error, if any in the invoices and / or the statement of account was that the respondent/plaintiff had subsequently started sending invoices reflecting rates much higher than those agreed on, however without specifying the invoices in which the rate higher than as agreed on was charged and without deposing that any protest at the contemporaneous time was lodged with respect thereto.

9. There is thus no merit in the second contention also of the counsel for the appellant/defendant.

10. As far as the third contention is concerned, the counsel for the appellant/defendant has contended that the learned ADJ in the impugned judgment has also drawn adverse inference against the appellant/defendant for not replying to the legal notice got sent by the respondent/plaintiff prior to the institution of the suit, when the appellant/defendant had replied to the legal notice.

11. The counsel for the appellant/defendant is however unable to tell as to how the same affects the outcome of the suit. As aforesaid, the respondent/plaintiff is found to have proved the monies, for recovery of which the suit was filed, to be due from the appellant/defendant *de hors* the said adverse inference also by proving the invoices and the statement of account and the appellant/defendant has failed to prove any error therein.

12. Else, I have examined the judgment of the learned ADJ vis-a-vis the Trial Court record requisitioned in this Court and agree *in toto* therewith.

13. There is thus no merit in the appeal which is dismissed with costs. The counsel's fee assessed at Rs.15,000/-.

14. Decree sheet be drawn up.

15. The decretal amount lying deposited in the Trial Court together with interest, if any accrued thereon be now released to the respondent/plaintiff.

RAJIV SAHAI ENDLAW, J

DECEMBER 3, 2015

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