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

+ **Date of Decision: 08.07.2015**

% **RSA 157/2015 and C.M. No.7634/2015**

M/S JOLLY VIDEOTRONICS Appellant

Through: Mr. Pankaj Chaudhary, Advocate.

versus

SATISH THAPAR & ANR Respondents

Through:

+ **RSA 177/2015 and C.M. Nos.8510-8512/2015**

M/S JOLLY VIDEOTRONICS Appellant

Through: Mr. Pankaj Chaudhary, Advocate.

versus

ANITA THAPAR & ANR Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeals preferred under Section 100 CPC are directed against the judgment dated 05.12.2014 passed by Sh.Raghubir Singh, ADJ-15 (Central), Tis Hazari Courts, Delhi in RCA No.14/14/12 and RCA No.15/14/12, whereby the said first appeals preferred by the appellant/defendant No.1 in the suit had been dismissed.

2. The plaintiffs, who are impleaded as respondent in the respective appeals are husband and wife. Both the plaintiffs preferred their respective suits for recoveries. Appellant herein was impleaded as defendant No.1 and M/s Vision India was impleaded as defendant No.2. The case of the plaintiffs was that they were engaged in the manufacture of Television (TV) components. At the instance of the appellant/ defendant No.1 – who gets Television sets manufactured through defendant No.2, and on its assurance of payment, TV components were supplied by the plaintiffs to respondent No.2 M/s Vision India on several occasions. The plaintiffs claimed that payments were being made by defendant No.2 to the plaintiffs. On one occasion, even defendant No.1/ appellant made payment to the plaintiffs for the components supplied to defendant No.2. The defendant No.2 acknowledged his liability in respect of the outstanding amounts for supplies made, but did not make payment. The plaintiffs sent repeated letters to the appellant/ defendant No.1, reminding the appellant/ defendant No.1 of his assurance to make payment for the supplies made at his instance to the defendant No.2, and demanding payment of the outstanding amount. These communications [Exhibits PW-1/9 (Colly.)] were sent on 10.05.2002, 10.08.2002, 25.09.2002 and 04.10.2002, but to no avail. There was no response by the appellant/ defendant No.1 to these communications. Consequently, the plaintiffs filed their respective suits for recovery.

3. Defendant No.1 filed its written statement stating that it had no privity of contract with the plaintiffs. Defendant No.1/ appellant stated that the plaintiffs had supplied the components to defendant No.2 at their own risk and responsibility, and only defendant No.2 was liable to make payment for

the same. Defendant No.2 filed its written statement claiming that the liability was that of defendant No.1, since the components were procured by defendant No.1 for manufacture of TV sets by defendant No.2. Thus, both the defendants sought to saddle the other with the liability. It appears that there was no dispute with regard to the quantification of the claim, and that the plaintiff was indeed entitled to recover the amounts for the supplies of TV components made by each of them.

4. The Trial Court framed the issues in respect of the plea of the appellant/ defendant No.1, that it had no privity of contract with the plaintiff and thus, the suit was bad for misjoinder of parties. The same were issues No.1 & 2. The parties led their respective evidence before the Trial Court. The Trial Court, after detailed consideration of the same, decreed both the suits against both the defendants. While dealing with the aforesaid issues, the Trial Court, *inter alia*, observed as follows:

“16. A perusal of Ex. PW1/7 to the letter dated 30.7.2002 reveals that the defendant no.1 had paid Rs.50,000/- to the plaintiff stating that the amount has been paid upon request and on behalf of defendant no.2. Merely stating so does not absolve the defendant no.1 from its liability towards the plaintiff moreso, in the event of defendant no.2 keeping a consistent and undisputed stand throughout that the defendant no.2 was doing job work for the defendant no.1 and the latter used to provide all the raw material for the defendant no.2. In light of the aforesaid discussion, it cannot be concluded that there was no privity of contract between the plaintiff and the defendant no.1.

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18. It is further contended by the defendant no.2 that the defendant no.1 had never stated that the said letters have been wrongly sent to defendant no.1 and no dispute has been raised

by the defendant no.1 with respect to the said letters. Even Ex. PW1/8 i.e. letter dated 03.10.2002 was addressed to defendant no.1 and not to defendant no.2.

19. It is the case of the defendant no.2 that the said defendant was obliged to keep an account of all the material received on behalf of defendant no.1 as a trustee of defendant no.1. It is contended by defendant no.2 that as evident from Ex. PW1/7, the letter written by the defendant no.1 to the plaintiff, the defendant no.2 was paying whatever was available with them and if funds are not available with them, it was the defendant no.1 who used to pay the outstanding amounts to the plaintiff and accordingly, the ultimate liability to pay any amount found outstanding against the plaintiff is with the defendant no.1. The defendant no.2 further contended that the purported letter dated 30.8.2002 (EX DW1/P1) wherein allegedly the defendant no.2 had confirmed the outstanding of Rs.1,65,459/- to the plaintiff is a forged and fabricated document and it is not signed by defendant no.2.

20. The defendant no.2 had relied on the cross examination of PW 1 wherein the said PW 1 had stated, "I have demanded the money from defendant no.1 because the defendant no.1 had told us to supply the material to defendant no.2" in support of its contention that there is no privity of contract between the defendant no.2 and the plaintiff. The defendant no.2 further contended that the testimony of DW1 cannot be relied upon as the said witness has shown no confidence during his testimony but he has gone to the extent of saying that I cannot say what is written in the written statement and it is correct that there is no Special Power of Attorney authorizing me to appear before this court on behalf of the defendant.

21. Per contra, the plaintiff has contested the case of the defendant no.2 on the ground that the defendant no.2 is also liable to pay the amount as claimed in the suit as it is his own witness i.e. DW2 who in his evidence by way of affidavit had stated that defendant no.2 have requested Jolly Videotronics i.e. defendant no.1 to pay the amount of Rs.76,574/- vide Ex. PW1/8 to the plaintiff and the aforesaid payment was to be

made by Jolly Videotronics and the defendant no.2 has authorized the defendant no.1 to make the aforesaid payment to the plaintiff by debit to defendant no.2's account. In the light of this letter, whereby the defendant no.2 is acknowledging its liability towards the plaintiff, it cannot be said there is no privity of contract between the plaintiff and the DW2. Accordingly, the present issues stand decided in favour of the plaintiff and against the defendants. ”

5. Also relevant to the said issues is the observation made in paragraphs 23 & 24 of the judgment of the Trial Court, which reads as follows:

“23. Per contra, the defendant no.1 denied their liability to pay any amount. The said defendant also submitted that the payment made by them to the plaintiff was made as per the instructions of defendant no.2 and there was no privity of contract between the plaintiff and the defendant no.1. However, considering the pleadings of the parties and the evidence in total, it can be said that the defendant no.1 has failed to raise any substantial defence to the suit of the plaintiff as he has even failed to file a proper written statement on its behalf. The written statement filed by the defendant no.1 is signed by one Sh. Mukul Jolly who has not disclosed any authority that he is exercising on behalf of defendant no.1 while casually he has mentioned himself as partner of M/s. Jolly Videotronics without there producing any partnership deed on record. Moreover, there is no authority letter authorizing said Sh. Mukul Jolly to file a written statement on behalf of defendant no.1. In addition thereto, the DW1 i.e. the sole witness appearing on behalf of defendant no.1 has deposed in a manner which does not create any dent in the case of the plaintiff as the said witness has failed to prove that he had any authority to appear before this court and depose on behalf of the defendant. The said witness has gone to the extent of deposing that he cannot say who has signed the written statement on behalf of the defendant.

24. Moreover, DW1 had stated that he was not present at the

time of drafting of the written statement on behalf of defendant no.1. The DW1 has further stated that he cannot say what is written in the written statement and he does not know who were the other partners of the defendant no.1 firm and who has signed the vakalatnama in favour of the counsel. The said DW1 has gone to the extent in his deposition, of saying that he cannot say whether any written statement has been filed by defendant no.1 or whether other partner of defendant no.1 has authorized Sh. Mukul Jolly to file the written statement and to appoint counsel on behalf of the defendant no.1. The said witness also affirmed the fact that no document has been filed in this court regarding any authorization by other partners in favour of Sh. Mukul Jolly to file the written statement and to appoint the counsel on behalf of defendant no.1.”

6. The aforesaid extracts have been taken from the judgment rendered in Civil Suit preferred by Satish Thapar being Suit No.185/2006. Similar observations are found in the judgment rendered in the suit preferred by his wife Anita Thapar.

7. The first appeal preferred by the appellant has been dismissed. The First Appellate Court has affirmed the judgment & decree passed by the Trial Court and all findings of fact with regard to the liability of defendant No.1/ appellant are also affirmed by the First Appellate Court.

8. The submission of learned counsel for the appellant is that even if it were to be accepted that the supplies were made by the plaintiff to defendant No.2 on the request of appellant/ defendant No.1, the same would not legally oblige the appellant/ defendant No.1 to make payment in respect of the components for which defendant No.2 has not made payment.

9. In support of this submission, he has placed reliance on ***Indian***

Overseas Bank Vs. S.N.G. Castorete Private Limited & Others, 2002 (62) DRJ 32, wherein this Court held that the person who merely recommended the case of the defendant for grant of loan does not become legally liable in respect of the loan, unless there is proper documentation executed, making him liable as a guarantor. In this case, the Court held that merely because defendant No.6 had issued a letter dated 08.08.1977 giving an assurance to pay the amount, he was not liable. The Court held that the letter could not be construed as a guarantee deed. It was nothing more than a recommendation made to the plaintiff Bank by defendant No.6, in favour of defendant No.1, to advance loan to defendant No.1. The Court held that defendant No.6 would have been be legally liable, if proper documentation had been executed, as had been by defendants No.2 to 5. They had executed the deeds of guarantee.

10. Reliance is also placed on ***Chanana Steel Tubes Private Limited Vs. M/s Jaitu Steel Tubes Private Limited & Another***, AIR 2000 HP 48. The Himachal Pradesh High Court held that where a party introduces another party as a customer to a certain businessman, the party so introducing does not become liable as a guarantor, in case the customer were not to make payment for the goods received.

11. While dealing with a second appeal under Section 100 CPC, this Court would not interfere with consistent findings of fact rendered by the Trial Court and the First Appellate Court on the basis of appreciation of evidence. If there is cogent evidence to support the findings so returned, and the view taken by the Trial Court and affirmed by the First Appellate Court is a plausible view – though it may not be the only plausible view, this Court

would not interfere with the same, merely because there may be another plausible view.

12. At this stage, I may also take note of another decision relied upon by learned counsel for the appellant. He has placed reliance on *Union of India Vs. Ibrahim Uddin & Another*, (2012) 8 SCC 148, wherein the Supreme Court has held that there is no prohibition to a second appeal being entertained on findings of fact, provided the Court is satisfied that the findings of the Court below were vitiated by non-consideration of relevant evidence, or exhibited an erroneous approach to the matter, or if the findings recorded by the Court below are perverse. Thus, it would require examination whether the concurrent findings of fact returned by the Courts below are vitiated within the above referred parameters.

13. In the present case, the plaintiff had led in evidence his communications [Exhibits PW-1/9 (Colly.)] sent on 10.05.2002, 10.08.2002, 25.09.2002 and 04.10.2002, to defendant No.1, thereby repeatedly reminding defendant No.1/ appellant of the fact that the goods had been supplied to defendant No.2 on behalf of defendant No.1, and on its assurance of payment for the goods so supplied, and in all these communications, the plaintiffs demanded the outstanding amounts from defendant No.1. Pertinently, defendant No.1 did not respond to any of these communications to deny, or challenge his liability, as claimed by the plaintiff, or to deny the specific allegation that the goods had been supplied by the plaintiff, on behalf of defendant No.1, to defendant No.2, or that the defendant No.1 had not given an assurance of payment of the outstanding amount.

14. The submission of learned counsel for the appellant that while making some payment to the plaintiff of the outstanding amount, the appellant/defendant No.1 had clearly stated that the said payment had been made on account of defendant No.1, and that the plaintiff should credit the payment so made in the account of defendant No.2, in my view, does not absolve the appellant of its liability. So also the fact that in the documents relating to the transaction, there is no mention of defendant No.1 and that the billing was done by the plaintiff directly in the name of defendant No.2, is of no consequence. It is clear that the Trial Court as well as the First Appellate Court have concluded that the defendant No.1/ appellant was acting as an indenter, and on the instructions of defendant No.1, TV components were supplied by the plaintiff to defendant No.2, which was manufacturing TV sets for defendant No.1.

15. So far as the reliance placed on the decision in *S.N.G. Castorete* (supra) is concerned, that was a case where the loan had been advanced by a bank to its customer, i.e. defendant No.1. Defendants No.2 to 5 had executed the documents of guarantee. No such document had been executed by defendant No.6. He had only informally sent a communication, assuring that he shall stand guarantee. However, no formal document of guarantee was executed by defendant No.6. Since the claim pertained to a bank loan, and the bank enters into the loan transaction on the basis of formal documents prepared by it, and defendant No.6 had not executed any such document, the Court, in that background, held that defendant No.6 could not be held liable merely because he had earlier issued a communication giving an assurance to make payment of the loan amount in case the borrower did

not do so. This judgment does not come to the aid of the appellant for the simple reason, that in the facts of the present case, it has emerged that the goods were supplied as instructed by appellant/ defendant No.1 to the defendant No.2/ its manufacturer, and the involvement of the appellant in the transactions between plaintiff and defendant No.2 was also evidenced by the fact that part-payment was made by defendant No.1 to the plaintiff. Moreover, defendant No.1 did not respond to even a single communication of the plaintiff directly attributing responsibility and liability on the appellant to make the outstanding payment, and demanding payment of the outstanding amount from the appellant/ defendant No.1. The decision in *Chanana Steel Tubes* (supra) is also of no avail for the same reason.

16. Another submission made by learned counsel for the appellant is that defendant No.2 was manufacturing TV sets for other vendors as well, and not only for the appellant. It is submitted that the components were being supplied by plaintiff to defendant No.2 for manufacture of TV sets to other vendors as well.

17. Firstly, I do not find any such plea having been raised before the Trial Court. Secondly, the appellant did not take any such stand in response to the communications aforesaid issued by the plaintiff. The appellant had not repudiated its liability owed to the plaintiff. The conduct of the plaintiff in repeatedly and openly demanding the amount due from the appellant, and even claiming that the appellant had assured that payment would be made by it for supplies made to defendant No.2 at the instance of the appellant, and of the appellant/ defendant No.1 in not even once, denying the communications of the plaintiff and also making part-payment to the

plaintiff, on preponderance of probabilities leads to the conclusion that defendant No.1 was equally liable, along with defendant No.2 to make payment for all the outstanding amounts to the plaintiffs. It cannot be said that the view taken by the learned Trial Court and the First Appellate Court is not a plausible view premised on appreciation of evidence brought on record.

18. I am of the view that the decision in *Ibrahim Uddin* (supra) does not come to the aid of the appellant, as it cannot be said that the findings of the Court below are vitiated by non-consideration of relevant evidence; by an erroneous legal approach to the matter or; that the findings recorded by the Courts below are perverse.

19. For all the aforesaid reasons, I find no merit in these appeals and dismiss the same, as no substantial question of law arises for consideration of this Court.

VIPIN SANGHI, J

JULY 08, 2015

B.S. Rohella