

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

% *Judgment reserved on :05.02.2015*
Judgment delivered on :09.02.2015

+ CS(OS) 2417/2009

MRS SAVINA SHARAN Plaintiff

Through Mr.Piyush Aggarwal, Advocate.

versus

M/S BABU HALEEM HANDICRAFTS Defendant

Through None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. Present suit is a suit for recovery. Plaintiff Savina Sharan has claimed a sum of Rs.28,79,302/- from the defendant.

2. The plaintiff is stated to be a proprietary concern having business dealings with the defendant since the year 2004. Plaintiff had been supplying material to the defendant (Boll Bottle Stoppers) and on account payments were being made. Purchase orders had been placed upon the defendant on 30.4.2007, 30.5.2007; the articles were to be delivered by 30.6.2007. It was agreed between the parties that in case

job work order was not complied with within the stipulated period , Re.1.00 per piece per day will be deducted from the bill amount payable by the plaintiff and this was so stated in the work order. Total amount calculated and deductible from the bills of the defendant is Rs.14,32,530/-.

3. The plaintiff had been making advance payments to the defendants on several occasions for supply of goods. Parties were maintaining statement of account in the regular course of the business. Balance payable by the defendant to the plaintiff was forwarded year to year. In the year 2006-07 a sum of Rs.19,956/- was due and payable; in the year 2007-08 balance amount payable by the defendant was Rs.21,64,889/-. Earlier also the defendant was not able to supply the goods to the plaintiff in time and the plaintiff was forced to send the goods by Air for which he incurred expenses of Rs.3,21,309/- which amount was debited vide debit note dated 18.9.2006. The defendant executed two receipts dated 18.9.2006 and 18.12.2006 in lieu of balance amount payable by him. In spite of various repeated letters and thereafter the legal notice dated 24.02.2009, the defendant failed to pay

the due amount. A total claim of sum of Rs.28,79,302/- has been made of which Rs.21,64,889/- is the balance outstanding as on 23.11.2007; interest @ 18% per annum has been claimed w.e.f. 23.11.2007 to 23.9.2009 thus totaling a sum of Rs.28,79,302/-.

4. Written statement was filed by the defendant. It was denied that any amount was recoverable from the defendant; the present suit is a clear abuse of the process of law. There is no cause of action. It is the defendant who had to recover a sum of Rs.14,32,530/- from the plaintiff. The plaintiff had put pressure upon him and took a writing from the defendant on 18.9.2006 that no amount was due and payable. The defendant is an illiterate person. Plaintiff had placed an order on 09.3.2007 which was to be executed by 30.6.2007. There was no agreement between the parties that Re.1 per piece would be deducted in case of delay. The defendant had completed the order and delivered it to the plaintiff on 09.7.2007. Plaintiff made only part payments. In spite of demands made by defendant payments were not made. A debit note was raised against the defendant on 04.10.2010 in the sum of Rs.14,32,530/-. Plaintiff agreed to withdraw this debit note and assured

to make the payment due to the defendant. The plaintiff made a payment of Rs.7,50,000/- to the defendant on 23.11.2007. The defendant has repeatedly been asking for the payment of Rs.14,32,530/-, Rs.7,50,000/- and Rs.2,00,000/- and to avoid payment this false suit has been filed. No amount is due and payable to the plaintiff. The suit is malafide.

5. Replication was filed reiterating the averments made in the plaint and denying the averments made in the replication.

6. On the pleadings of the parties the following issues were framed:

(i) Whether this court does not have the territorial jurisdiction to entertain and adjudicate on the subject matter of the suit? OPD

(ii) Whether the plaintiff is entitled to the recovery of Rs.2,79,302/- or any portion thereof? OPP

(iii) Whether the plaintiff is entitled to interest on the amount found due and payable by the defendant? IF so, on what amount, at what rate and for what period? OPD

(iv) Relief.

7. Plaintiff in support of his filed affidavit by way of evidence of PW-1 Savina Sharan. She was subjected to a cross-examination but before her cross-examination could be completed the defendant stopped

appearing and accordingly on 05.9.2013 the right to cross-examine PW-1 stood closed. Defendant did not lead any evidence. Defendant was in fact proceeded ex parte on 05.9.2013 itself.

8. Arguments have been heard. Record has been perused.

9. Issue wise finding read as under:

ISSUE No.i

10. Onus to discharge this issue was on the defendant. He has neither led any evidence nor addressed arguments. Although in the written statement an objection has been taken about the jurisdiction of this Court to entertain the present suit yet in view of the averment made in the plaint that the parties had their transactions and dealing in Delhi and the purchase orders have been placed for supply upon the defendant at Delhi, this Court does have the territorial jurisdiction to try and entertain the present suit. Issue no.1 is decided in favour of the plaintiff and against the defendant.

Issue no.(ii) and (iii)

11. These issues will be decided by a common discussion. The affidavit by way of evidence (proved as Ex.PW-1/A) PW-1 has reiterated the averments made on oath. It has been reiterated that the

parties had business dealing with one another since 2004. Plaintiff had placed purchase orders for 105250 pieces upon the defendant of which only 50,000 pieces were to be delivered by 30.4.2007, 30,000 pieces were to be delivered by 30.5.2007 and remaining 25,250 pieces were to be delivered by 30.6.2007. It has been reiterated that there was a delay in the delivery of goods. Re.1 per piece was agreed to be deducted from the amounts payable by the plaintiff. Purchase order AM/PI-345/06-07 dated 09.3.2007 has been proved as Ex.PW-1/A. The same has been perused. This is a document duly signed by both the parties i.e. the plaintiff and the defendant and the note at serial no.3 and 4 stipulates that the materials were to be delivered at B-5, Mayapuri, New Delhi; if the materials were not delivered at the given time then Re.1 per day per piece would be deducted. Further averments on oath are that the defendant had violated the terms and conditions of the purchase order and the delivery of the goods was not made in time. The challans (25 in number) have been proved as Ex.PW-1/B. These documents have not been signed by the defendant and nor has this been averred or stated in this affidavit. The statement of the account of the plaintiff has been proved as Ex.PW-1/C which is from the period 01.02.2003 to 31.3.2008.

This statement of account reflects that a sum of Rs.14,32,530/- was the amount deductible from the bills of the defendant and was the payment due to the plaintiff. This statement of account has not been certified under Section 34 of the Bankers' Books Evidence Act; it has also not been certified by the Chartered Accountant of the plaintiff company. It is a computer print-out, signed by the plaintiff. The further averments of the defendant that there was a debit note dated 18.12.2006 which had been executed by the defendant and has been proved as Ex.PW-1/E. This document is in the sum of Rs.3,21,309/-. In the column of signature there is a black ink mark. There are no signatures of the defendant as has been averred by the plaintiff. There is no second debit note of 18.9.2006 as has been averred in the plaint and in spite of query to the learned counsel for the plaintiff on this count he has been unable to show this document to the Court. In fact Ex.PW-1/F is a document dated 18.9.2006 purported to have been signed by Babu Haleem (defendant) wherein it has been clearly stated that no amount is due and payable to the plaintiff. The remaining documents which have been proved by the plaintiff are the legal notices.

12. The cross-examination of PW-1 has also been perused. PW 1
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stated that she had filed challans and purchase orders to show that she is the proprietor of the plaintiff firm. She has admitted that all transactions are in the name of the plaintiff firm. She has admitted that Ex.PW-1/B (challans) have neither been prepared by her nor signed by her; she has admitted that she had filed leaves of the papers and the complete challan book containing the challans had not been filed by her. She admitted that when the defendant was paid the money he used to sign the receipts and take a photocopy; account books were being maintained in the course of business. She admitted that she can produce the statement of account in respect of defendant. It was however not produced. It was at this stage that the defendant was proceeded ex parte and his right to cross-examine this witness was closed.

13. The law is well settled; for the plaintiff to make out a case the plaintiff has to prove it. There is no doubt that in a civil proceeding it is the balance of probabilities which has to weigh in the mind of the Court. The documentary evidence (Ex.PW-1/A) which has been proved on record shows that if there was a delay in making the supply of goods Re.1 per piece per day would be deducted by the plaintiff from the bills of the defendant. The debit note and challans are however not reliable.

Admittedly, they are just loose sheets of paper unsigned by the defendant; there is no explanation as to why the challan book had not been produced; this was in spite of a specific query put to the learned counsel for the plaintiff. These challans are carbon copies; even as per PW-1 receipts were signed by the defendant but no such signatures of the defendant appear on any of the documents proved by the plaintiff. Thus this Court finds it difficult to rely on these challans. The further admission of PW-1, that as and when payments were received by the defendant he used to sign the receipts and photocopies were maintained and no such document having been proved again throws doubt on the veracity of the version of the plaintiff. The statement of account (Ex.PW-1/C) is also not certified as required under the Bankers' Books Evidence Act. It has also not been certified by the Chartered Accountant of the plaintiff firm. This statement of account is an electronic record; it has been generated from the computer system of the plaintiff under the control of the plaintiff herself. It is a photocopy of the computer generated print-out signed by the plaintiff. A Bench of this Court in Punjab National Bank Ltd. Delhi Vs. Vinod Kumar and Others MANU/PH/0093/1957 had considered the scope of Section 4 of CS(OS) 2417/2009

the Banker's Books Evidence Act. It was reiterated that a statement of account which has been certified in accordance with Section 2(8) of the said Act is a prima facie evidence which would thereafter not compel the bank to produce the original entry; this is completely missing in this case. In view of the ratio of the said judgment this Court is not inclined to act on the basis of this evidence. Thus the conscience of the Court is not satisfied with this document either.

Plaintiff is not entitled to any amount; if the principal amount is not payable the question of interest does not arise. Issue no.(ii) and (iii) are decided against the plaintiff.

ISSUE NO.iv - RELIEF:

14. Suit is dismissed. Parties to bear their own costs.

INDERMEET KAUR, J

FEBRUARY 9, 2015

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