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

+ **Date of Decision: 23.11.2015**

% **RSA 32/2015**

BK AGGARWAL Appellant

Through: Mr. Abhishek Kumar, Advocate

versus

GYASUDDIN AHMED Respondent

Through: Mr. Sitab Ali Chaudhary, Advocate

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment and decree dated 15.09.2014 passed by the learned ADJ (East), Karkardooma Courts, Delhi in RCA No.37/2012, whereby the first appeal preferred by the appellant/plaintiff has been dismissed and the judgment and decree dated 17.10.2011 - dismissing the suit of the appellant/plaintiff being Suit No.128/2009 passed by the learned Senior Civil Judge, has been affirmed.
2. The admitted position is that the parties had business transactions. The plaintiff supplied goods to the defendant. Payments were being made

by the defendant from time to time in respect of the supplies made by the plaintiff. The case of the plaintiff was that the last supplies were made to the defendant on 19.08.2002 vide bill no.317 for Rs.3,063/-. The plaintiff claimed that the defendant made payment of Rs.10,000/- by cash on 22.07.2005 and further payment of Rs.8,000/- was made on 17.10.2007. The plaintiff claimed that the outstanding balance was Rs.72,646/-. Since the said amount was not paid despite legal notices, the suit was filed by the plaintiff to seek recovery of amount along with interest.

3. The defendant contested the suit by raising several issues, including the issue of limitation as the suit was instituted on 13.05.2009. The Trial Court framed the issues including the issue whether the suit of the plaintiff is barred by limitation. While findings were returned by the Trial Court on all the issues in favour of the plaintiff, on issue no.3 i.e. the issue of limitation, the Trial Court returned the findings in favour of the defendant and against the plaintiff and, consequently, dismissed the suit. The First Appellate Court has concurred with the said findings. Thus, the only issue that arises for consideration before this court is whether the suit of the plaintiff is barred by limitation.

4. The submission of counsel for the appellant is that the appellant had led in evidence the statement of account (Ex. PW-1/2). The said statement of account Ex. PW-1/2 shows that the defendant had made payment in cash on 22.07.2005 and 17.10.2007 of Rs.10,000/- and Rs.8,000/- respectively. He submits that each of these payments extended the period of limitation. The submission is that the bills were payable within one month of the same being raised. Consequently, the bill dated 19.08.2002 bearing no.317 (Ex.

PW-1/27) was payable by 19.09.2002. The payment of Rs.10,000/- was made during the currency of limitation on 22.07.2005, thereby extending the period of limitation by three years. Once again, the payment of Rs.8,000/- was made on 17.10.2007 during the currency of the limitation period. The suit itself was filed in the year 2009, i.e. before the expiry of three years from the last payment made on 17.10.2007. It is submitted that the findings returned by the Trial Court and the First Appellate Court is patently erroneous.

5. Learned counsel submits that the payment of Rs.8,000/- had been made by the defendant as a consequence of issuance of legal notice to the defendant on 21.09.2006 (Ex. PW-1/28).

6. Learned counsel for the appellant submits that while the defendant was under cross examination, he stated that he used to maintain a manual record of the transactions and that he could make an attempt to produce the same, if so available. Learned counsel submits that the court directed the witness to produce the said record, if available, on the next date of hearing and the further cross examination was deferred. However, the defendant thereafter did not appear for his cross examination. Consequently, an adverse inference should be drawn against the defendant that, had he produced the said manual record/accounts, the same would have established the payment of two instalments in cash of Rs.10,000/- and Rs.8,000/- respectively, as aforesaid.

7. On the other hand, the submission of learned counsel for the respondent is that the suit was barred by limitation. The last transaction between the parties, even according to the statement of account (Ex. PW-

1/2), had taken place way back on 19.08.2002, when bill no.317 (Ex. PW-1/27) was raised. Learned counsel submits that the defendant had stated in his cross examination that he had never made any payment in cash either during, or after the close of the transaction, and payments during the transaction and thereafter were always made in cheque only.

8. He further submits that in his written statement, the defendant had stated that he does not have any surviving record. Even the Trial Court had merely directed that the defendant may produce the record, if available. Since none was available, the same was not produced. The non-production of the record by the defendant could not be the basis for raising any adverse inference against the defendant, that the defendant had made payment in cash of Rs.10,000/- and Rs.8,000/- as alleged. Learned counsel submits that the plaintiff had to stand on his own feet. The plaintiff had not been able to establish the payment of two instalments, as aforesaid, in cash on 22.07.2005 and 17.10.2007.

9. Having heard learned counsels, I am of the view that there is no merit in the present second appeal and it does not raise any substantial question of law for consideration by this Court. The findings returned by the two courts below are concurrent on the aspect of limitation, and the appellant has not been able to satisfy this Court that there is any justification calling for interference with those concurrent findings of fact. Pertinently, in the cross examination of the defendant, the plaintiff did not put to the defendant the statement of account (Ex. PW-1/2). The defendant was not even specifically put to the so-called cash payments made on 22.07.2005 and 17.10.2007. It is also pertinent to note that though the plaintiff claimed that the said cash

payment of Rs.8,000/- had made in response to the legal notice issued to the defendant vide Ex.PW-1/28, the said legal notice, and the two other notices Ex. PW-1/32 and Ex. PW-1/36 were sent to M/s Shah Exports through its proprietor, Mr. Kale Khan, even though the suit was filed against the respondent/defendant Sh. Gyasuddin Ahmed, who was described as the proprietor of Shah Exports. It, therefore, appears that the notices were not even sent to the defendant and, consequently, the question of making cash payments would not arise.

10. Counsel for the appellant has placed reliance on ***Gopal Krishanji Ketkar v. Mohamed Haji Latif & Ors.***, (1968) 3 SCR 862. However, the same is of no avail. In particular, the following extract has been relied upon by the appellant:

“Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In Murugesam Pillai v. Manichavasaka Pandara(1) Lord Shaw observed as follows:

“A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to, the, Courts the best material for its decision.. With regard to (1) 44 I. A. 98, at P. 103. 867 third parties, this may be right enough-they have no responsibility for the

conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.””

11. The aforesaid proposition cannot be invoked in the aforesaid factual background of the present case. The defendant did not admit that he was possessed of the record/accounts. On the contrary, in the written statement, he denied that the said record survived. Even in his cross examination, he did not admit that the said record existed. Thus, no adverse inference could have been drawn against him. The plaintiff had to establish his case by leading of evidence and had to stand on his own feet. In the present case, the plaintiff failed to establish that the suit was filed within limitation by establishing the said two payment of Rs.10,000/- and Rs.8,000/- respectively in cash by the defendant. Pertinently, all other payments, even according to the plaintiffs statement of account Ex. PW-1/2 had been made through cheque in terms of the contracts contained in the bills including Ex. PW-1/27.

12. For all the aforesaid reasons, I find no merit in the present second appeal and the same is, accordingly, dismissed. The parties are left to bear their respective costs.

VIPIN SANGHI, J

NOVEMBER 23, 2015

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