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

Judgment Reserved on: August 13, 2015

%   *Judgment Delivered on : August 17, 2015*

\+   **RFA(OS) 65/2015**

M/S S & S TECHNOCRAFT (P) LTD ..... Appellant

Represented by: Mr.Pramod K.Seth, Advocate with Mr.Vineet Seth, Advocate

versus

RATHI STEEL LIMITED ..... Respondent

Represented by: Mr.Naresh Kaushik, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The appellant was the defendant and challenge in the appeal is to the order dated October 10, 2014, dismissing IA No.13981/2013 filed by the appellant under Order XXXVII Rule 3(5) of the Code of Civil Procedure. Declining to grant the appellant leave to defend the suit filed by the respondent, a decree has been passed against the appellant in sum of ₹28,93,421/- (Rupees Twenty Eight Lacs Ninety Three Thousand Four Hundred and Twenty One only) together with interest @ 16% per annum from August 04, 2009 till date of filing of the suit as also pendente lite and future interest till realization.

2. It is trite that to defend a suit filed under Order XXXVII of the Code of Civil Procedure, the defendant has to disclose such facts as would be deemed sufficient to entitle the defendant to defend the suit, i.e., such facts

have to be disclosed, which if proved would result in the suit being dismissed.

3. Has the appellant done so?

4. It takes us to the pleadings of the respondent in the suit.

5. Instituted on April 29, 2013, and claiming a sum of ₹28,93,421/- (Rupees Twenty Eight Lacs Ninety Three Thousand Four Hundred and Twenty One only) as the balance outstanding concerning an order dated July 15, 2009 placed by the appellant upon the respondent and pre-suit interest @ 24% per annum on sum of ₹31,93,421/- (Rupees Thirty One Lacs Ninety Three Thousand Four Hundred and Twenty One only) for 502 days and at the same rate for a period of 831 days on the sum of ₹28,93,421/-(Rupees Twenty Eight Lacs Ninety Three Thousand Four Hundred and Twenty One only), decree claimed was in sum of ₹55,28,508/- (Rupees Fifty Five Lacs Twenty Eight Thousand Five Hundred and Eight only) with pendente lite and future interest @ 24% per annum.

6. Pleading in the plaint that on July 15, 2009 the appellant placed a supply order upon the respondent for supply of steel, and mentioning the quantity and the rate it has been highlighted in the plaint that the quantity and the description of the goods as also the rate was mentioned in the supply order as under:-

Dia of steel	**Qty.**	**Rate**
8mm	20.00	₹33,500.00 Per M.T.
10mm	05.00	₹32,350.00 Per M.T.
12mm	10.00	₹31,500.00 Per M.T.
16mm	10.00	₹31,500.00 Per M.T.
20mm	10.00	₹31,500.00 Per M.T.
25mm	30.00	₹31,500.00 Per M.T.
32mm	15.00	₹33,000.00 Per M.T.

7. Further the case pleaded in the plaint is that the respondent effected the delivery as per the supply order at the notified place being the Saket District Centre where the respondent had been awarded the work to construct a Theatre Academy and Auditorium. It was pleaded that the steel bars were delivered at the site on July 16, 2009, July 17, 2009 and July 18, 2009. Four bills, one dated July 16, 2009, two dated July 17, 2009 and the fourth dated July 18, 2009 were raised in sum of ₹2,94,806/- (Rupees Two Lacs Ninety Four Thousand Eight Hundred and Six only) having due date of payment August 02, 2009, ₹9,53,258/- (Rupees Nine Lacs Fifty Three Thousand Two Hundred and Fifty Eight only) having due date August 03, 2009, ₹9,48,136/- (Rupees Nine Lacs Forty Eight Thousand One Hundred and Thirty Six only) having due date August 03, 2009 and ₹9,97,221/- (Rupees Nine Lacs Ninety Seven Thousand Two Hundred and Twenty One only) having due date August 04, 2009 respectively. It was pleaded that the quantity supplied as per the four bills was as per the supply order dated July 15, 2009 i.e. 99.280 MT and that the total sum payable under the four bills was ₹31,93,421/- (Rupees Thirty One Lacs Ninety Three Thousand Four Hundred and Twenty One only). It was pleaded that the appellant did not make the payment and thus the respondent was constrained to write a letter on November 16, 2009 in which after detailing the bill numbers, the bill date, the amount due and the due date of payment ₹31,93,421/- (Rupees Thirty One Lacs Ninety Three Thousand Four Hundred and Twenty One only) were claimed as outstanding payment since July, 2009 towards supply of MS bars to the appellant. It was pleaded that the appellant wrote on November 27, 2009 as under:-

> *"With reference to reminder 1, 2 dated 06.11.2009 and 16.11.2009, we would request that you kindly get your matter resolved regarding quality at site/Mr.Bharat Bhushan, Architect of INDESIGN. After settling the matter please contact us to enable us to take further action in the matter."*

8. It was further pleaded that on November 28, 2009 the respondent once again demanded the outstanding payment to which the appellant responded on December 08, 2009 simply stating that respondent's attention was drawn to the appellant's letter dated November 27, 2009. It was pleaded that on December 12, 2009 the respondent wrote a letter with reference to appellant's letter dated November 27, 2009, expressing shock that the so called quality problem was raised by the appellant for the first time in its letter dated November 27, 2009. It was pleaded that in the said letter the respondent highlighted that the issue raised by the appellant was a ruse to delay payment. It was pleaded that in response to the respondent's letter dated December 12, 2009 the appellant wrote on December 17, 2009 raising issue not only regarding the quality of the goods supplied but even regarding the price charged. It was thereafter pleaded by the respondent in the plaint that the respondent refuted the contents of the letter dated December 17, 2009 written by the appellant vide its reply dated December 29, 2009. It was pleaded that the respondent was constrained to serve a legal notice on the appellant on February 16, 2010 to which a reply was received on February 25, 2010 in which the counsel for the appellant reiterated that the material supplied was of poor quality and rates being inflated. It was pleaded that the respondent continued to make efforts to secure payment and succeeded partially when the appellant paid ₹3,00,000/- (Rupees Three Lacs only) on December 02, 2010 by a cheque. Pleading

that in this manner ₹28,93,421/- (Rupees Twenty Eight Lacs Ninety Three Thousand Four Hundred and Twenty One only) was outstanding, suit was filed claiming ₹28,93,421/- (Rupees Twenty Eight Lacs Ninety Three Thousand Four Hundred and Twenty One only) and interest for two different periods as noted in paragraph 1 above.

9. Now, if the appellant accepted having placed the supply order dated July 15, 2009 and further accepted delivery of the goods under the four bills dated July 16, 2009, July 17, 2009, July 17, 2009 and July 18, 2009, it had to plead facts entitling it to leave to defend being granted. Said facts could obviously be to plead that the bills were raised not in conformity with the supply order and/or that the goods supplied were defective and were rejected.

10. Seeking leave to defend the appellant pleaded that the suit was filed on forged and fabricated documents. It was pleaded that the invoices were raised by the respondent on the appellant at its project site and were never received by the appellant. It was pleaded that the material has been lifted by the representative company from the site. Admitting having paid ₹3,00,000/- (Rupees Three Lacs only) to the respondent by cheque it was pleaded that the same was to supply material at DAV Public School site at Gurgaon. It was pleaded that if ₹3,00,000/- (Rupees Three Lacs only) paid by the appellant to the respondent was not to be taken into account for the claim in the suit, the claim would be barred by limitation.

11. Vide impugned order dated October 10, 2014 the learned Single Judge has opined that the defence raised is a sham. The learned Single Judge has reasoned that by taking the plea that the goods were defective, the appellant has admitted delivery of goods. The learned Single Judge has

highlighted that the goods pursuant to the supply order dated July 15, 2009 were delivered after three days being July 16, 2009, July 17, 2009 and July 18, 2009 and the grievance concerning the goods delivered being defective was raised for the first time on November 27, 2009. The learned Single Judge has highlighted Section 42 of the Sale of Goods Act which requires intimation of rejection of goods to be within a reasonable time failing which the buyer would be deemed to have accepted the goods. The learned Single Judge has highlighted that it was only in the reply to the legal notice sent by the respondent that the appellant for the first time took the stand on February 25, 2010 that the representative of the respondent had taken back the goods. The learned Single Judge has highlighted the vagueness of the stand taken therein. On the subject of limitation, the learned Single Judge has highlighted that the appellant had admitted paying to the respondent ₹3,00,000/- (Rupees Three Lacs only) by a cheque as pleaded in the plaint. The learned Single Judge has noted that the vague pleadings in the application seeking leave to defend concerning supply of goods at the site of respondent at Gurgaon as also its vague stand taken in the reply to the legal notice sent on February 25, 2010 was sought to be made good by referring to a supply order dated December 02, 2010, reference whereto had not been made in the reply dated February 25, 2010 to the legal notice sent by the respondent.

12. Now, the reason why we have highlighted the pleadings in the plaint is to bring home the point that in the plaint a reference has been made to the correspondence between the parties and the effect thereof has been pleaded. To non-suit the respondent facts had to be disclosed, upon proof whereof, the respondent would have been non-suited.

13. The vague plea in the application seeking leave to defend that the respondent had filed fabricated documents is no plea in the eyes of law for the reason the appellant did not dispute having placed the supply order dated July 15, 2009 and having received the goods under the four bills dated July 16, 2009, July 17, 2009, July 17, 2009 and July 18, 2009. The pleadings in the plaint that the description of the goods and the price thereof indicated in the four bills was as per the supply order have not been denied. By taking the plea that the appellant did not make the payment because the goods supplied were defective, the appellant has admitted the receipt of the goods. The assertion in the plaint that for the first time the appellant raised an issue concerning the quality of the goods was as per its letter dated November 27, 2009 has not been denied and thus the said assertion in the plaint has rightly been treated by the learned Single Judge as a plea not traversed by the appellant.

14. Section 42 of the Sale of Goods Act reads as under:-

> *"42.**Acceptance***
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> *The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."*

15. The only issue which would arise would be as to what would be the reasonable time to intimate rejection of the goods. The goods, as to be noted from the supply order and the bills raised pursuant thereto, are MS bars of different diameters. The inspection of the said goods would at best

require a week's time and since it is not the case of either party that the appellant had previously examined the goods and thus giving the appellant the right under Section 41 of the Sale of Goods Act, to a reasonable opportunity to examine the goods, the time for the reasonable opportunity would be at best a week. If within said reasonable time the appellant did not intimate rejection of the goods, as per the mandate of Section 42 of the Sale of Goods Act, the goods would be deemed to be accepted. The rejection of the goods on the allegation of the same not being of good quality on November 27, 2009 is sans any particulars of how the goods were not of good quality. The rejection has thus to be treated as a sham and a pleading relating thereto has to be treated as a moonshine.

16. As regards the plea of the appellant, in respect of which for the first time a stand was taken when the appellant replied on February 25, 2010 to the legal notice sent by the respondent, that the goods have been taken back by the representative of the respondent, it would be sufficient if we simply note that the goods were delivered on July 16, 2009, July 17, 2009 and July 18, 2009. The vague plea of the goods being not of the requisite quality was taken for the first time on November 27, 2009 and in respect of which we have already held that the rejection of the goods not being conveyed within reasonable time, the goods would be deemed to have been accepted and thus the question of any defence being predicated that after the goods were rejected they were taken back by the representative of the respondent does not arise. Besides, we find that the goods being taken back was a stand taken by the appellant in its reply dated February 16, 2010 to the legal notice sent by the respondent in which it was stated that one Mr.Sanjay Maheshwari a representative of the respondent had taken back the goods

from the site on January 16, 2010. In the application seeking leave to defend there is no reference to the appellant having sent a letter under certificate of posting on January 18, 2010 informing the respondent that Sanjay Maheshwari had taken back the goods. A letter dated January 18, 2010 has been filed by the appellant along with a certificate of posting, and in respect of which the learned Single Judge has held that fabrication of the letter and the certificate of posting is writ large because no reference therefore was made in the reply sent by the appellant on February 16, 2010 to the legal notice sent by the respondent.

17. On merits, therefore, we concur with the view taken by the learned Single Judge that the defence raised is sham. Besides, we would also add that the insufficient pleas in the application seeking leave to defend had not even attempted to confront the pleadings in the plaint made good with reference to the documents of the appellant and the vague plea that the documents relied upon in the plaint are fabricated, without disclosing the particulars of the facts as to how the documents are fabricated is a plea which has to be ignored in law, for the reason a plea which is vague and without material particulars is treated in law as no plea in the eyes of law.

18. On the subject of the suit being instituted within limitation, we note that the plaint was filed in this Court on April 29, 2013. The goods were delivered on July 16, 2009, July 17, 2009 and July 18, 2009. A payment in sum of ₹3,00,000/- (Rupees Three Lacs only) has admittedly been made by the appellant to the respondent on December 02, 2010 i.e. within the period of 3 years when the cause of action accrued to sue, treating the cause of action as accruing when the goods were delivered. It is settled law that any payment of an outstanding amount made within the period of limitation

extends the period of limitation. If the payment of ₹3,00,000/- (Rupees Three Lacs only) is towards the bills in question, the plaint would obviously be instituted within the period of limitation because the limitation would then expire on December 02, 2013.

19. The appellant pleaded that ₹3,00,000/- (Rupees Three Lacs only) paid by it was towards another supply order for goods to be delivered at DAV Public School in Gurgaon where the appellant was executing a construction work.

20. The learned Single Judge has held the said plea to be a sham, and we concur. This stand was taken by the appellant for the first time when it replied to the legal notice sent by the respondent on February 16, 2010, and is to be found in the appellant's reply dated February 25, 2010. The appellant has not traversed said plea of the respondent in the plaint in the application seeking leave to defend. We highlight that every plea constituting cause of action pleaded in the plaint requires to be met and explained in an application seeking leave to defend and such pleas constituting the cause of action if not controverted or explained in the application seeking leave to defend would require said plea in the plaint to be treated as having been admitted and with respect to whatever has been controverted or explained in the application seeking leave to defend the matter has to be considered further, whether the plea taken in the application seeking leave to defend is a sham plea. Even in the application seeking leave to defend it has not been disclosed as to by what mode the alleged purchase order was sent to the appellant. The reasons given by the learned Single Judge in paragraph 28 of the impugned decision are sound.

21. There is thus no merit in the appeal which is dismissed with costs

against the appellant and in favour of the respondent.

22. Pursuant to the order dated February 10, 2015 operation of the impugned order was stayed on the conditions that the appellant shall furnish a bank guarantee in sum of ₹45,00,000/- (Rupees Forty Five Lacs only) in favour of the Registrar General of this Court. The bank guarantee has been furnished.

23. The Registrar General of this Court shall encash the bank guarantee and pay the sum realized to the respondent and said payment received by the respondent would be treated as the amount received pursuant to the decree passed by the learned Single Judge, and if an issue arises whether after adjusting said sum any other amount as per the decree is payable by the appellant to the respondent, the Executing Court shall decide the same.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

AUGUST 17, 2015
skb/mamta