

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

% *Judgment Reserved on: March 20, 2017*
Judgment Delivered on: March 28, 2017

+ **RSA 126/2016**

M/S DOLPHIN MART LIMITED & ANR. Appellants
Through: Mr.Birendra Mishra & Ms.Poonam
Atej, Advocates

versus

AMIT LAMBA Respondent
Through: Mr.Ankit Miglani, Advocate

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

RSA 126/2016

1. This Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 against the concurrent findings of the Courts below i.e. of the trial Court dated 3rd February, 2015 and of the First Appellate Court dated 5th November, 2015 by which the suit of the respondent/plaintiff has been decreed for a sum of ₹1,77,798/- along with simple interest @ 9% per annum with effect from 31st October, 2009 till recovery of decretal amount.

2. The respondent/plaintiff as proprietor of M/s Goodwill Plastic Sign filed the civil suit No.231/2012 for recovery of ₹2,88,436/- along with interest pleading that he deals in plastic cards, ID cards, embossing, visiting cards etc.

3. Defendant No.1/M/s Dolphin Mart Ltd. is a company incorporated under Companies Act, 1956 where as Sh.Praveen Rao, defendant No.2 is its Chief Executive Officer.

4. The case of the respondent/plaintiff is that the defendant No.1/company used to purchase goods like digital print for mall, stickers, catalogue etc. on credit basis from the plaintiff's firm. The plaintiff was maintaining a running account in respect of the goods supplied and the payments received from the defendant No.1.

5. As per the account statement in respect of running account of defendant No.1, a sum of ₹1,77,798/- was outstanding since 3rd February, 2010 which the defendants failed to clear despite repeated requests and demand as well service of legal notice dated 18th May, 2012. Since the legal notice dated 18th May, 2012 inadvertently mentioned the name of the proprietor of M/s Goodwill Plastic Sign as Yogesh Lamba instead of Amit Lamba (the plaintiff), a corrigendum was also sent vide notice dated 11th July, 2012 correcting the name of the proprietor of the firm M/s Goodwill Plastic Sign as Amit Lamba.

6. As the defendant No.1 failed to clear the outstanding dues and even no reply to the legal notices was received, the Civil Suit No.231/12 was filed claiming ₹1,77,798/- towards principal, ₹1,05,138/- towards interest @ 24% from 31.10.2009 to 31.03.2012 and ₹5500/- towards costs of legal notice.

7. The appellants/defendants failed to file the written statement within the stipulated time hence vide order dated 3rd July, 2013 the application under Order VIII Rule 10 CPC was disposed of by passing the following order:-

“There is no plausible reason to believe that the entire organization of the defendant was so busy with the internal investigation that the WS could not be filed even for 90 days despite specific directions of the Court. Further, the defendant could have very well stated the facts relating to the internal investigation in the WS itself.

The non filing of WS for more than four months due to an internal investigation does not give rise to any exceptional circumstance which calls for condonation of delay in filing the WS.

It is interesting to note that the defendants have filed a suit for recovery against the plaintiff in the year 2013 i.e. after institution of the present case. Thus, it is highly improbable to believe that despite the internal investigation the defendants had the time to file a suit against the plaintiff but could not file the WS in the present case which was filed much earlier.

Accordingly, the Written Statement of the defendants filed on 01.04.13 cannot be taken on record. The application of the defendant for condonation of delay filed on 01.07.13 stands dismissed.

However, under O.8 Rule 10 CPC, the Court is not bound to pass a decree in every case in which no WS is on record within the statutory time period. In the present case, the facts set out in the plaint are such which shall require the plaintiff to prove his case for entitlement to the recovery amount claimed by him.

Accordingly, the application of the plaintiff under O.8 Rule 10 CPC is allowed to the extent that the WS filed by the defendants is struck off record. No decree shall follow in favour of the plaintiff at this stage.

Now to come up for further proceedings on 01.08.2013.”

8. It was a case where the written statement was not filed within the prescribed time and the defence was struck off. Without there being any written statement, the learned Trial Court has settled the issues on 1st August,

2013. In the absence of any written statement, no issue could have arisen or settled by learned Trial Court.

9. Before the learned Trial Court, the opportunity was given to the appellants/defendants to cross-examine PW-1, the plaintiff and at the request of appellants/defendants, PW-1 was even directed to place on record the statement of his personal bank account which has been complied with.

10. The learned Trial Court passed the decree relying on the following facts:-

(i) It is not disputed by the appellants/defendants that the bills were raised at the time of supply of goods and consolidated payment for multiple invoices used to be made.

(ii) From the admitted position of the parties regarding payment for multiple invoices, the only mode to ascertain balance payment from either side, is the statement of account maintained by the parties.

(iii) The business relationship between the parties is admitted, reciprocal demands were raised during the course of business and as such it was not necessary for the respondent/plaintiff to prove delivery of goods against each and every invoice when the case is based on running statement of account and not on individual bills.

(iv) The appellant No.2/defendant No.2, the Chief Executive Officer was not liable in his individual capacity and liability was held to be only of defendant No.1, the company which is a legal entity.

11. The First Appellate Court dismissed the appeal bearing RCA No.07/15 observing that there was no evidence/cogent material to prove that the statement of account relied upon by the respondent/plaintiff to seek recovery, was not correct. It was held that there was no material discrepancy

or inconsistency in the testimony of PW-1, the plaintiff. The testimony of PW-1 was held to be duly corroborated by the necessary documentary evidence.

12. Learned counsel for the appellants/defendants has questioned the legality of the concurrent judgments of the Court below by highlighting the testimony of PW-1 wherein he had admitted that sometime payments used to be made in his personal account and some payments were received as advance also. But this was not pleaded in the plaint. Learned counsel for the respondent has further contended that the statement of account in respect of personal account of Amit Lamba reflected payment of ₹37,056/- in that account of which no credit was given. This also shows that the statement of running account maintained in respect of appellant No.1/Company was not correctly maintained which the respondent/plaintiff has admitted that he was receiving certain payments in his personal account then no decree could have been passed on the basis of running statement of account maintained by the proprietorship concerned of the respondent/plaintiff.

13. I have considered the submissions made by learned counsel for the appellant and perused the LCR.

14. This being the second appeal, interference under Section 100 CPC by this Court can only be made when it is found that conclusions drawn by the Courts below were erroneous or based on no evidence or inadmissible evidence or by ignoring material evidence. Learned Trial Court has dealt with all the contentions raised before this Court in detail giving reasons for rejecting the contentions not only in respect of payments made but also in respect of proof of delivery for the reasons recorded while passing a decree

based on the running statement of account maintained by the plaintiff in his ordinary course of business.

15. It is required to be noted at the cost of repetition that the appellants/defendants neither filed the written statement nor could lead any defence evidence before the learned Trial Court. Even the two legal notices sent by respondent/plaintiff were not replied by the appellants/defendants. The limited right availed by him to demolish the case of the respondent/plaintiff was by way of cross-examination of PW-1. There is concurrent findings by both the Courts below that the testimony of PW-1 was duly corroborated by the necessary documentary evidence.

16. In my opinion in a case such as the present one, wherein the appellants/defendants had not led any evidence, the respondent/plaintiff has proved the case by proving the statement of account and the invoices. The statement of account showing regular dealings between the parties and failure on the part of the appellants/defendants to put the entries in their own statement of account to PW-1 during his cross-examination by specifically pointing out those payment entries which though existed in the statement of account of appellant/defendant No.1 but were missing in the account statement of respondent/plaintiff. The courts below were justified in decreeing the suit for recovery of money for the goods supplied to the appellants/defendants and the balance outstanding in respect of such supply made and reflected in the statement of account maintained by the respondent/plaintiff.

17. It is relevant to note here that though the learned Trial Court passed a judgment and decree only against defendant No.1/appellant No.1, the legal entity, the first appeal as well second appeal have been filed by both the

defendants. The Chief Executive Officer who was impleaded as defendant No.2 could not have been aggrieved by the judgment and decree of both the Courts below as no decree was passed against him in his individual capacity.

18. Since appreciation of evidence is within the jurisdiction of the original Court and the First Appellate Court and while exercising jurisdiction under Section 100 of the Code of Civil Procedure, 1908 the appellant cannot seek re-appreciation of evidence by this Court.

19. The concurrent findings of the fact by both the Courts below cannot be lightly interfered with by this Court when the instant appeal does not raise any substantial question of law.

20. Since no question of law much less any substantial question of law arises in this appeal so as to require interference by the High Court in exercise of jurisdiction under Section 100 of CPC the instant Regular Second Appeal is dismissed.

21. No costs.

22. LCR be sent back alongwith copy of this order.

CM No.16780/2016 (Stay)

Dismissed as infructuous.

PRATIBHA RANI
(JUDGE)

MARCH 28, 2017/ 'pg'