

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

+ **RFA No.887/2017**

% **25th October, 2017**

NATIONAL MARBLE & SANITARY STORE V.V. Appellant

Through: Mr. Rishi Manchanda,
Advocate.

versus

M/S. SHALIMAR PAINTS LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.37623/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**C.M. Nos.37622/2017 (for condonation of delay in filing) &
37624/2017 (for condonation of delay in re-filing)**

2. For the reasons stated in the applications, delay of 45 days in filing and 99 days in re-filing the appeal is condoned.

C.M.s stand disposed of.

RFA No.887/2017

3. This Regular First Appeal is filed under Section 96 of Code of Civil Procedure, 1908 (CPC) by the plaintiff in the suit impugning the judgment of the Trial Court dated 26.11.2016 by which the trial court has dismissed the suit for recovery of Rs.16,24,038.56/- filed by the appellant/plaintiff. The suit was filed by the appellant/plaintiff claiming that for the goods which it had purchased from the respondent/defendant, excess payment was made, and therefore repayment of such excess payment was being claimed by the suit.

4. The facts of the case are that the appellant/plaintiff pleads that it is dealing in paints and other allied items/goods. It was pleaded that the appellant/plaintiff had been purchasing paints from the respondent/defendant and as per the statement of accounts maintained by the appellant/plaintiff it was found that the respondent/defendant had received an excess payment of Rs.16,24,038.56/-. It was pleaded that in spite of there being a debit balance in favour of the appellant/plaintiff payable by the respondent/defendant, yet respondent/defendant forced the appellant/plaintiff to issue two

cheques of Rs.2,04,024/- to continue the dealings. It is further pleaded that a case has been filed against the appellant/plaintiff under Section 138 of the Negotiable Instruments Act, 1881. It was pleaded that the appellant/plaintiff requested the respondent/defendant many times to refund the excess amount paid by the appellant/plaintiff, but since there was no favourable result, the subject suit came to be filed.

5. The respondent/defendant contested the suit and pleaded that the suit plaint is completely vague as it is not pleaded as to what and how are the excess payments. The respondent/defendant pleaded that there is no specific reason why the appellant/plaintiff would have paid the excess amount over and above the actual price for paints and other products which were supplied by the respondent/defendant to the appellant/plaintiff. It was pleaded by the respondent/defendant that merely having debit entries in the statement of accounts of the appellant/plaintiff would not mean that there is a liability of the respondent/defendant to the appellant/plaintiff allegedly on account of excess payment. The suit was also pleaded to be barred by limitation because the last transaction between the parties was on 31.3.2007 and the accounts were finally settled on 21.4.2008 when the

appellant/plaintiff had issued a cheque of Rs.4 lacs in favour of the respondent/defendant which was dishonoured. It was pleaded that there is no acknowledgment by the respondent/defendant which enlarges the limitation. Suit was thus prayed to be dismissed.

6. After pleadings were complete, the trial court framed the following issues:-

- “(i) Whether the suit is barred by limitation? OPD
- (ii) Whether the plaintiff is entitled to recover the suit amount of Rs.16,24,038.56 from the defendant? OPP
- (iii) If so, whether the plaintiff is entitled to interest on suit amount as prayed? OPP
- (iv) Relief.”

7. Leading of evidence by the parties is recorded in paras 7 and 8 of the impugned judgment and which paras read as under:-

“7. Plaintiff in order to prove its case, led plaintiff evidence and got examined PW-1 Sh.Raman Khosla, PW-2 Sh. Shashikant, SWO-A, from Punjab National Bank and PW-3 Sh. Ram Charan, Officer from Canara Bank.

PW-1 has filed his evidence by way of affidavit wherein he reiterated and reaffirmed the contents of the plaint. PW-1 was cross-examined by proxy counsel for counsel for the defendant.

PW-1 in his testimony has relied upon the documents i.e., copy of Form A and B issued by Registrar of Firms and Societies and partnership deeds dated 25/04/2006 and 21/12/2006 Ex. PW-1/1(colly.), statements of account issued by Canara Bank and Punjab National Bank Ex.PW-1/2(colly.), bill dated 30/09/2008 and its receipt dated 08/10/2008 Ex.PW-1/3 (colly.) and legal notice dated 11/07/2011 and postal receipt Ex.PW-1/4 (colly.).

PW-2, who was summoned witness, during his testimony, has brought the summoned record i.e., statement of account of plaintiff pertaining to account no. 3086002100020178 for the period from 30/04/2006 to 20/12/2012 Ex.PW-2/1.

PW-3, who was also summoned witness, during his testimony, has brought the summoned record, i.e., details of realized cheques Ex.PW-3/1 from 04/01/2007 to 19/12/2008 issued by the plaintiff vide account no. 1387261010739 in favour of the defendant. PW-3 was cross-examined by counsel for the defendant.

8. Defendant has led defendant evidence and got examined Sh. Chanchal Singh Daul as DW-1, Sh.Rajinder Kumar as DW-2 and Sh.Madan Lal as DW-3.

DW-1 has filed his evidence by way of affidavit wherein he reiterated and reaffirmed the contents of the written statement. It is pertinent to mention here that in the present case, DW-1 was examined and partly cross-examined by counsel for the plaintiff and on 11/10/2013, it was submitted on behalf of the defendant that DW-1 has left the employment of the defendant. Thereafter, DW-1 has not turned up for his further cross-examination. Hence, his testimony cannot be read in evidence.

DW-2 and DW-3 have filed their evidence by way of affidavits wherein they reiterated and reaffirmed the contents of the written statement. DW-2 and DW-3 were cross-examined by counsel for the plaintiff.

DW-3, in his testimony, has relied upon the documents i.e., copy of letter dated 28/04/2006 Mark-A, copy of document dated 21/04/2008 Mark-B and copy of cheque bearing no. 290988 dated 30/09/2008 Mark-C.

Defendant has also relied upon document i.e., copy of resolution Ex.DW-1/A, statements of account Ex.DW-1/B and Ex.PW-1/D1 and copy of cheques Ex.PW-1/D2 and Ex.PW-1/D3.”

8. Trial court has decided the issue no.1 of limitation against the appellant/plaintiff by holding that the suit is not governed by Article 1 of the Limitation Act, 1963 as there is no mutual, open and current account and the suit is governed by the residuary Article 113 of the Limitation Act i.e when right to sue arises limitation arises and the suit had to be filed within three years of arising of cause of action. The suit was filed on 2.12.2011 and the last bill issued by the respondent/defendant was on 30.9.2008 with it being received on

8.10.2008. Therefore the suit filed beyond three years of 8.10.2008 i.e filed on 2.12.2011 was held to be barred by limitation as per Article 113 of the Limitation Act.

9.(i) Learned counsel for the appellant/plaintiff argues that the suit was governed by Article 1 of the Limitation Act because the account maintained by the appellant/plaintiff was an open, mutual and current account. It was argued therefore that the suit is within limitation as it was governed by Article 1 of the Limitation Act.

(ii) The argument urged on behalf of the appellant/plaintiff that the suit is governed by Article 1 of the Limitation Act is a misconceived argument because the pre-condition for applicability of Article 1 of the Limitation Act is that either there must be shifting balances or there must be reciprocal obligations. This has been held by the Supreme Court in the judgments in the cases of *Hindustan Forest Company Vs. Lal Chand & Ors. AIR 1959 SC 1349* and *Kesharichand Jaisukhal Vs. The Shillong Banking Corporation AIR 1965 SC 1711*. These judgments were followed by this Court in the case of *M/s Videocon International Ltd. Vs. M/s City Palace Electronics Pvt. Ltd.* in RSA No.286/2004 decided on 21.3.2012 and the relevant paras

of this judgment in the case of *M/s Videocon International Ltd (surpa)* have been referred to by the trial court at internal pages 15 to 17 of the impugned judgment. Counsel for the appellant/plaintiff has failed to show me that there are shifting balances in the statement of accounts maintained by the appellant/plaintiff with respect to the respondent/defendant because it is not shown from the statement of accounts that at some points of time there is a credit balance in favour of the appellant/plaintiff and at other points of time there are credit balances in favour of the respondent/defendant. Also there are no mutual obligations because parties only have one relationship of seller and buyer and not that there are various other relationships also between the parties which are governed by a single account for the account to become a mutual, open and current account. Accordingly, I reject the argument that account between the parties was a mutual, current and open account. In fact, in my opinion, this argument of the account between the parties being open, current and mutual under Article 1 of the Limitation Act is not even available to the appellant/plaintiff because the appellant/plaintiff has failed to prove its statement of accounts before the trial court, and so held by the trial

court, because, the statement of accounts filed by the appellant/plaintiff was a copy of the electronic record but it was not certified in terms of the requisite certificate under Section 65-B of the Indian Evidence Act, 1872. Therefore the argument urged with respect to Article 1 of the Limitation Act is not available in favour of the appellant/plaintiff who has not proved its statement of accounts.

10.(i) It was then argued by the appellant/plaintiff that the suit is within limitation even under Article 113 of the Limitation Act because it is argued that the appellant/plaintiff had made last payment of Rs.50,000/- on 18/19.12.2008 and the suit filed on 2.12.2011 was within limitation as it is filed within three years of the last date of payment on 18/19.12.2008.

(ii) The argument of the appellant/plaintiff that the suit is within limitation as it is filed before expiry of three years from 18/19.12.2008 is a misconceived argument because the plea of extension of limitation because of Sections 18 and 19 of the Limitation Act is available to a creditor on account of payment being made by the debtor towards the debt. Provisions of Sections 18 and 19 of the Limitation Act will not apply as regards the appellant/plaintiff in the present case because the

payment which is said to have been made is not by the debtor/respondent/defendant but the payment relied upon is by the appellant/plaintiff who is a creditor. It is the payment by a debtor which extends the limitation period for the creditor to file a suit because of Sections 18 and 19 of the Limitation Act, and it is not the law that payment by the creditor extends the limitation period for the benefit of the creditor and who is the appellant/plaintiff in the present case. Accordingly this argument of the appellant/plaintiff is rejected.

11. So far as merits of the matter are concerned, in my opinion, trial court has rightly held that appellant/plaintiff has failed in proving that any excess payment was made. This conclusion of the trial court is correct because firstly the appellant/plaintiff has failed to prove the statement of accounts and as already noted above. Further, if there was any excess payment then the appellant/plaintiff was duty bound as per the entry in the statement of accounts to establish/prove/show as to how this so-called excess payment was made by the appellant/plaintiff to respondent/defendant. A general statement does not prove as to how excess payment was made. Trial court also further rightly concludes that if there was an excess

payment then what was the need for the appellant/plaintiff even thereafter to issue cheques in favour of the respondent/defendant for the sum of Rs.2,04,024/-. In fact, the respondent/defendant has contended that cheques were of Rs.4 lacs and which were dishonoured and result of which proceedings under Section 138 of the Negotiable Instruments Act, 1881 were filed. I may note that the appellant/plaintiff has not stated before the trial court or even before this Court as to what is the fate of the proceedings under Section 138 of the Negotiable Instruments Act. In any case once cheques were issued in favour of the respondent/defendant, then, the case of the appellant/plaintiff falls to the ground that in fact there were dues payable by the respondent/defendant to the appellant/plaintiff inasmuch as there does not arise an issue of the appellant/plaintiff who claims to be a creditor to make further payment by cheque to the respondent/defendant because this would have only added to any excess payment allegedly made by the appellant/plaintiff to the respondent/defendant. Trial court has rightly discussed this aspect under issue no.2 and this relevant discussion reads as under:-

“ISSUE NO.(ii):- Whether the plaintiff is entitled to recover the suit amount of Rs.16,24,038.56 from the defendant?”

The onus of proving this issue was on the plaintiff. It has already been held in issue no.(i) that present suit of the plaintiff is barred by limitation. Even otherwise, the present suit of the plaintiff is not maintainable. It is the contention of the plaintiff that the plaintiff has made the excess payment to the defendant and plaintiff is entitled to recover the excess amount from the defendant. According to section 101 of the Indian Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts, which he asserts, must prove that those facts exist and the burden of proof lies on that person. According to section 102 of the Indian Evidence Act, the burden of proof in a suit or proceedings lies on that person, who would fail if no evidence at all were given on either side. According to section 103 of the Indian Evidence Act, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

According to section 72 of the Indian Contract Act, 1872, a person to whom money has been paid or anything delivered, by mistake or under coercion, must repay or return it. For the purpose of proving its case, the plaintiff has to prove that suit amount was paid to the defendant due to mistake. A person who seeks refund has a duty to disclose or account for what he has received in the transaction. Plaintiff has to prove as to how much goods were received by the plaintiff and how much payment was made by the plaintiff to the defendant. In the present case, the plaintiff has filed the statement of account on record in support of its claim. Each and every invoice/bill is an independent transaction between the parties. The plaintiff has not filed documentary evidence in respect of each and every transaction took place between the parties. No reasonable explanation has been adduced on record by the plaintiff for the same. Mere filing of statement of account by the plaintiff is not sufficient to prove the case. No reasonable explanation has been adduced on record by the plaintiff as to why excess payment was made by the plaintiff to the defendant.

The present suit of the plaintiff is based on statement of account. Statement of account Ex.PW-1/2 (colly.) relied upon by the plaintiff in the present case are computer generated printouts and as such same have to be proved as per provision of section 65B of the Indian Evidence Act. In the present case, no certificate u/s 65B of the Indian Evidence Act has been proved on record by the plaintiff. In the absence of certificate u/s 65B of the Indian Evidence Act, statement of account Ex.PW-1/2 (colly.) of the plaintiff are inadmissible in evidence and cannot be read in evidence.

On the one hand, it is contended by the plaintiff that plaintiff has made excess payment to the defendant. On the other hand, the plaintiff has issued two cheques Ex.PW-1/D2 and Ex.PW-1/D3 in favour of the defendant. No reasonable explanation has been adduced on record by the plaintiff for the same.

PW-1, who is the partner of the plaintiff firm, in para-14 of his evidence by way of affidavit has deposed that the plaintiff has filed false and frivolous statement of account. PW-1 in his testimony himself stated that plaintiff has filed the false and frivolous statement of account. No reasonable explanation has been adduced on record by the plaintiff for the same. In view of the aforesaid discussion and findings of this court on issue no.1, this Court is held that present suit of the plaintiff is not maintainable and plaintiff is not entitled for the recovery of the suit amount from the defendant. The plaintiff has failed to discharge the onus on this issue. Accordingly, this issue is decided against the plaintiff and in favour of the defendant.”

12. In view of the above, I do not find any merit in the appeal. Dismissed.

OCTOBER 25, 2017
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VALMIKI J. MEHTA, J

