

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

+ **RFA No. 666/2017**

% **31st July, 2017**

HARJIT SINGH

..... Appellant

Through: Mr. Rajnish K. Gaiind, Mr.
Hemant Kaushik and Mr.
Maninder Kaur, Advocates.

versus

M/S BHARAT HOTELS LTD. AND ANR.

..... Respondents

Through: Ms. Purnima Maheshwari,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

CM No. 26877/2017 (Delay of 65 days in filing the appeal)

For the reasons stated in the application, delay in filing is
condoned.

CM stands disposed of.

CM No.26878/2017 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No. 666/2017 & CM No. 26876/2017 (U/o XLI R 27 CPC)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff impugning the judgment of the trial court dated 17.12.2016 dismissing the suit filed by the appellant/plaintiff for recovery of Rs. 3,50,000/-. The subject suit was filed by the appellant/plaintiff on account of services rendered by the appellant/plaintiff as consolidators, customs clearing and forwarding agents to the respondent/defendant.

2. The facts of the case are that the subject suit was filed by the appellant/plaintiff claiming that they provided services of consolidators, customs clearing and forwarding agents to the respondent/defendant and that as per the statement of account maintained in the regular course of business a sum of Rs.3,23,366/- remained due and which since was not paid in spite of service of legal notice dated 19.10.2004 the subject suit for recovery came to be filed.

3. The respondent/defendant filed its written statement and pleaded that whatever bills the appellant/plaintiff had raised were duly paid. Respondent/defendant also pleaded that appellant/plaintiff never submitted the bills with any cover note. It was further pleaded by

respondent/defendant that stamp and signatures on the cover note of the bills alleged to be delivered to the respondent/defendant and alleged to contain endorsement of receipt of the employee of the respondent/defendant are forged. The suit was also pleaded to be barred by limitation inasmuch as it was pleaded that Article 1 of the Limitation Act, 1963 will not apply but the suit will be governed by Article 14 of the Limitation Act.

4. After issues were framed and parties led evidence, the trial court passed the impugned judgment dismissing the suit by holding that appellant/plaintiff has not even filed its statement of account for proving that any amount was due from the respondent no.1/defendant no.1. Trial court also held that the suit is barred by limitation because suit is not governed by Article 1 of the Limitation Act but is governed by Article 14 of the Limitation Act i.e there is no open, mutual and current account and limitation arises on raising each individual bill by the appellant/plaintiff.

5. Before this Court counsel for the appellant/plaintiff has argued that because of negligence of the Advocate of the appellant/plaintiff, the statement of account was not filed, and

therefore, such statement of account be allowed to be now filed by allowing CM No. 26876/2017 filed by the appellant/plaintiff under Order XLI Rule 27 CPC. Appellant/plaintiff by this application also seeks to file copies of the income tax returns for the relevant year showing the amount due to the appellant/plaintiff from the respondent/defendant.

6. Though at this stage, an application under Order XLI Rule 27 CPC cannot be allowed once parties had gone to the trial and had complete opportunity to lead their evidences, however, in the interest of justice, I have examined the relevancy of the statement of account which is now sought to be filed in order to determine whether the suit would come under Article 1 of the Limitation Act. If the suit does not come under Article 1 of the Limitation Act then the only bill which would remain to be due and payable, if Article 14 of the Limitation Act applies, would be the bill dated 12.12.2001 for a sum of Rs.22,835/- inasmuch as the subject suit was filed on 8.12.2004 and hence any bill prior to 8.12.2001 would become barred by limitation on application of Article 14 of the Limitation Act. In the opinion of this Court in fact Article 14 of the Limitation Act does not apply and

what will actually apply is Article 113 of the Limitation Act being the residuary article which provides for commencement of limitation within three years of arising of cause of action.

7. The law with respect to the meaning of the expression “open mutual and current account” of Article 1 of the Limitation Act is now well settled. For Article 1 of the Limitation Act to apply the account must be open i.e account must not be closed, it must be for the current year and it should be mutual i.e there should be mutuality of transactions in the sense of shifting balances or counter obligations of each party against the other. That there has to be mutuality or shifting balances or there must exist counter obligations of one party against other is now clear in view of the judgments of the Supreme Court in the cases of *Hindustan Forest Company Vs. Lal Chand & Others*, AIR 1959 SC 1349 and *Kesharichand Jaisukhal Vs. Shillong Banking Corporation* AIR 1965 SC 1711. The relevant paras of these judgments read as under:-

Relevant paras of *Hindustan Forest Company (supra)*

“7. The question what is a mutual account, has been considered by the courts frequently and the test to determine it is well settled. The case of the *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*, may be referred to. There a company had been advancing monies by way of loans to the

proprietor of a tea estate and the proprietor had been sending tea to the company for sale and realisation of the price. In a suit brought by the company against the proprietor of the tea estate for recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by art. 85 of the Indian Limitation Act. Rankin, C.J., laid down at p. 668 the test to be applied for deciding the question in these words:

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

8. The observation of Rankin, C.J., has never been dissented from in our courts and we think it lays down the law correctly. The learned Judges of the appellate bench of the High Court also appear to have applied the same test as that laid down by Rankin, C.J. They however came to the conclusion that the account between the parties was mutual for the following reasons:

"The point then reduces itself to the fact that the defendant company had advanced a certain amounts of money to the plaintiffs for the supply of grains. This excludes the question of monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs. 13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had agreed to pay for them and had in part made the payment in advance. There can be no question that in so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries

made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments.

10. The learned Judges however held that the payment of Rs. 13,000 by the buyer in advance before delivery had started, made the sellers the debtor of the buyer and had created an obligation on the sellers in favour of the buyer. This apparently was the reason which led them to the view that there were reciprocal demands and that the transactions had created independent obligations on each of the parties. This view is unfounded. The sum of Rs. 13,000 had been paid as and by way of advance payment of price of goods to be delivered. **It was paid in discharge of obligations to arise under the contract. It was paid under the terms of the contract which was to buy goods and pay for them. It did not itself create any obligation on the sellers in favour of the buyer; it was not intended to be and did not amount to an independent transaction detached from the rest of the contract.** The sellers were under an obligation to deliver the goods but that obligation arose from the contract and not from the payment of the advance alone. If the sellers had failed to deliver goods, they would have been liable to refund the monies advanced on account of the price and might also have been liable in damages but such liability would then have arisen from the contract and not from the fact of the advances having been made. Apart from such failure, the buyer could not recover the monies paid in advance. No question has, however been raised as to any default on the part of the sellers to deliver goods. This case therefore involved no reciprocity of demands. Article 115 of the Jammu and Kashmir Limitation Act cannot be applied to the suit.” (emphasis added)

Relevant paras of *Shillong Banking Corporation (supra)*

“10. The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

11. Now in the leading case of *Hirada Basappa v. Gadigi Muddappa*, Holloway, Acting C.J. observed:

"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

These observations were followed and applied in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* and *Monotosh K. Chatterjee v. Central Calcutta Bank Ltd.*, and the first mentioned Calcutta case was approved by this Court in *Hindustan Forest Company v. Lal Chand*, Holloway, Acting C.J. laid down the test of mutuality on a construction of s. 8 of Act XIV of 1859, though that section did not contain the words "where there have been reciprocal demands, between the parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasizes the test of mutuality laid down in the Madras case.

12. In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to s. 45(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative." (underlining added)

8. This Court has to examine therefore from the statement of account now sought to be relied upon and filed by the appellant/plaintiff that whether there was mutuality during the relevant

and last current year 2001-2002. Along with the counsel for the appellant/plaintiff, this Court has examined the statement of account and it is found that there are no shifting balances or mutuality in the accounting year 2001-2002, and that at all points of time the statement of account relied upon by the appellant/plaintiff and now filed in this Court only shows debit balance as against the respondent/defendant. Therefore, since there are no shifting balances, and admittedly there are no counter obligations in the sense that there was anything which was sold and/or supplied by the respondent/defendant to the appellant/plaintiff, then, Article 1 of the Limitation Act will not apply because there is no mutuality in terms of the ratios of the judgments of the Supreme Court in the cases of *Hindustan Forest Company (supra)* and *Shillong Banking Corporation (supra)*.

9. As already stated above, the account which is sought to be relied has to be a current account, i.e it must have currency i.e it must be of the relevant year on the basis of which amounts are claimed from the defendant in the suit. Putting it in other words, historical shifting of balances of prior years and which is not the current year for which balances claimed are due, the historical years or

earlier years of dealing is not a current year and would not make the account as mutual current account. Therefore, taking the fact that CM No. 26876/2017 filed under Order XLI Rule 27 is allowed, even then the account for the year 2001-2002 is not shown to be an open mutual current account inasmuch as there are no shifting balances during the last and relevant accounting year 2001-2002. Therefore, once Article 1 of the Limitation Act does not apply, the suit filed on 8.12.2014 is clearly barred by limitation because the statement of account relied upon for the year 2001-2002 is not an open, mutual and current account.

10. That leaves us with a solitary bill dated 12.12.2001 for an amount of Rs.22,835/-. This is Bill No. 3106. In view of the fact that respondent/defendant has denied receiving of this bill, therefore the appellant/plaintiff had to prove that this bill was actually delivered to the respondent/defendant. Learned counsel for the appellant/plaintiff except showing that this bill has been exhibited in the affidavit of evidence, filed by the appellant/plaintiff could not show that the affidavit of evidence refers to delivering of this bill by identifying of signatures of any employee of the respondent/defendant on this bill,

and therefore it is not shown that this bill dated 12.12.2001 was ever delivered to the respondent/defendant. Once that is so, even with respect to this solitary bill the appellant/plaintiff cannot claim any amount from the respondent/defendant.

11. In view of the above discussion, I do not find any merit in the appeal, and the same is therefore dismissed, leaving the parties to bear their own costs.

JULY 31, 2017/ib

VALMIKI J. MEHTA, J



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