

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

+ **RFA No.740/2017 & CM Nos. 29966-67/2017**

% **25th August, 2017**

M/S KHANNA MALLEABLE & ORS. Appellants

Through: Mr. Sandeep Khatri and Ms.
Anu, Advocates.

versus

M/S PARAS PETRO PLAST INDIA (P) LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugning the judgment of the trial court dated 16.5.2017 by which the trial court has decreed the suit of the respondent/plaintiff for a sum of Rs.3,73,105/- along with interest at 12% per annum. The suit has been decreed for goods being oil supplied by the respondent/plaintiff to the appellants/defendants.

2. The facts of the case are that the respondent/plaintiff filed the subject suit stating that it was in the business of oil distribution and

that the appellants/defendants had placed orders for supply of oil at Delhi and the ordered oil was supplied by the respondent/plaintiff to the appellants/defendants. The appellant no.1/defendant no.1 is a partnership firm of which appellant nos. 2 and 3/defendants nos. 2 and 3 are/were partners. It was pleaded in the plaint that two cheques bearing nos. 775904 dated 28.2.2012 and 775905 dated 28.3.2012 drawn on UCO Bank, SME Industrial Area, Jalandhar were given to the respondent/plaintiff but the same were dishonored on presentation. Respondent/plaintiff after serving the legal notice dated 19.3.2012, which failed to yield the desired results, filed the subject suit for Rs.2,61,570/- being the principal amount and Rs.1,11,535/- as the interest due from 30.11.2011 to 3.6.2012.

3. Appellants/defendants contested the suit by filing their written statement. It was pleaded that courts at Delhi had no territorial jurisdiction because appellants/defendants were situated at Jalandhar in Punjab and even the oil was supplied outside Delhi. It was pleaded by the appellants/defendants that the respondent/plaintiff misled the appellants in that the oil which was supplied was of Indian Oil Corporation whereas oil which was supplied was of inferior quality

being manufactured by Haldia Patro Chemicals Ltd. That the oil was supplied by the respondent/plaintiff, and received by the appellants/defendants, was however admitted by the appellants/defendants. The basic objection of the appellants/defendants was that the oil was not of good quality.

4. After pleadings were complete, trial court framed issues and parties led evidence, and these aspects are noted in paras 5 to 7 of the impugned judgment, and which paras read as under:-

“5. No replication is filed by plaintiff. From the pleadings, following issues were framed vide order dated 13.08.2015.

- I) **Whether the goods supplied by the plaintiff were of spurious quality and failed chemical test as alleged by the defendant? OPD.**
- II) **Whether this court does not have territorial jurisdiction to try and entertain the present suit? OPP**
- III) **Whether the plaintiff is entitled for recovery of the suit amount as prayed for? OPP.**
- IV) **Whether the plaintiff is entitled for pendent lite and future interest, if yes, at what rate and for what period? OPP.**
- V) **Relief.**

6. In order to prove its case, plaintiff examined Sh. Sanjay Jain as PW-1. PW-1 has filed his affidavit in evidence as Ex.PW-1/A wherein he has reiterated and reasserted the contents of the plaint on oath. PW-1 has relied upon copy of Statement of Account which is Ex.PW-1/3 and Copy of the notice dated 19.03.12 which is Ex.PW-1/8. All other documents mentioned in the affidavit Ex.PW-1/A were de-exhibited vide statement dated 11.07.16. PW-1 was cross examined on behalf of all the defendants and then discharged. No other witness was examined by the plaintiff. Thereafter, PE was closed vide order dated 8.9.2016.

7. Defendants examined DW-1, Sh. Amit Khanna who filed his evidence by way of affidavit Ex.DW-1/1. DW-1 relied upon the documents Ex.DW-1/2 which is Test certificate dated 07.12.2010, Ex.DW-1/3 which is Computation of Loss report, Ex.DW-1/4 is the Letter dated 14.05.2011

which was handed over by the defendants to the plaintiff. DW-1 was cross examined on behalf of the plaintiff and then discharged. No other witness was examined by the defendants. Thereafter, DE was closed.”

5. On the aspect of territorial jurisdiction, the trial court has held that as per the evidence led it is found that the orders were placed upon the respondent/plaintiff at Delhi and hence courts at Delhi had territorial jurisdiction. Trial court has relied upon the deposition of PW-1 in his affidavit that the orders were placed at Delhi and this aspect was not challenged by cross examining PW-1. Trial court also held that if the case of the appellants/defendants was that the orders were placed upon the respondent/plaintiff to Mr. Gulshan, who was the agent of the respondent/plaintiff at Jalandhar then appellants/defendants had to prove this fact and which they failed to do. Trial court has further held that once no place of payment is specified then a debtor must seek the creditor and therefore payment was to be made at Delhi, and hence Delhi courts had territorial jurisdiction. This relevant discussion is contained in paras 13 to 15 of the impugned judgment and which paras read as under:-

“13. In the present suit plaintiff has averred in para 3 of the plaint that defendant no.2 and 3 used to place orders at the office of the plaintiff situated in Delhi and the payment was received by the plaintiff at Delhi. This fact has been reasserted on oath by PW-1 in this affidavit Ex.PW-1/A. PW-1 has deposed that defendant no.2 and 3 used to place orders at the

office of the plaintiff situated at Delhi. PW-1 has further deposed that running account was maintained by the plaintiff at their office at Delhi, However, defendants have stated in their written statement that purchase order was never placed in Delhi. As per the provisions of the Evidence Act when defendants have pleaded that purchase order was not placed at Delhi then onus was upon defendants to prove the said fact. However, no evidence has been adduced by defendants in this regard. Infact PW-1 has not been cross examined with respect to deposition made in his affidavit Ex. PW-1, it is established that orders were placed by defendants at Delhi Hence, from testimony of PW-1, it is established that orders were placed at Delhi. There is no evidence on record to controvert the testimony PW-1 in this regard. There is no evidence on record to show that orders were not placed by defendants in Delhi. It has been argued that orders were placed through one Sh. Gulshan who was the agent of the plaintiff. However, plaintiff has categorically denied that Sh. Gulshan was working as agent of the plaintiff. PW-1 in his cross examination has stated that Sh.Gulshan was only looking after day to day affairs of the plaintiff and he was not authorized to take any orders by himself. As discussed above now the onus was upon the defendant to prove that orders were place through Sh.Gulshan. Hence, it was incumbent upon defendants to either examine Sh.Gulshan or to plae on record any document to show that order was placed with the plaintiff company through Sh. Gulshan who was agent of the plaintiff. Hence, in these circumstances, when there is no documentary evidence on behalf of either of the parties, then oral testimony has to be considered. As already discussed, PW-1 has deposed in his affidavit that order was placed in Delhi. He has not been cross examined on the said aspect neither any other evidence has been placed on record by defendants to controvert the said stand of plaintiff. Hence, it is established that part cause of action had arisen in Delhi.

14. Further, it is a settled law that in case no place of payment has been fixed then debtor must seek the creditor. Reference in this regard be made to the judgment of the Hon'ble High Court passed in the case titled as **M/s Lohmann Rausher Gmgh. Vs. M/s Medisphere Marketing Pvt Ltd. 2005 II AD (Delhi) 604** and the another judgment in case titled as, **Satyapal vs Slick Auto Accessories Pvt Ltd & ors, 2014 AIR (Del) 115.**

15. It was further held by the Hon'ble Court in the case of **Satyapal vs Slick Auto Accessories Pvt Ltd & Ors., 2014 AIR (Del) 115** that in case notice to the creditor for fixing the place of payment. In the present case also admittedly no place of payment was determined between parties. Hence, in view of the law laid down by the Hon'ble High Court, the court within whose jurisdiction plaintiff is residing or having its workplace will be having territorial jurisdiction to try the present suit. Admittedly plaintiff's office is situated at Delhi. The said fact is clear by the documents filed by the defendants. Therefore, in view of the above discussion I am of the firm

view that this court has the jurisdiction to try the present suit. This issue is decided in favour of the plaintiff and against the defendants.”

(underlining added)

6. In my opinion, no fault can be found with the aforesaid reasoning because a civil suit is decided on balance of probabilities. As per the balance of probabilities, and as per the evidence led, trial court was entitled to arrive at one possible and plausible view that orders were placed at Delhi inasmuch as nothing contrary in terms of documentary evidence was led and proved by the appellants/defendants that orders were not placed at Delhi. In any case, Delhi would have territorial jurisdiction because part of cause of action would have arisen at Delhi as payments were to be made at Delhi on the principle of debtor having to seek the creditor and which aspect has been rightly decided by the trial court in paras 14 and 15 of the impugned judgment. The argument of the appellants/defendants therefore is rejected that courts at Delhi did not have territorial jurisdiction.

7.(i) The next issue and aspect was that as to whether respondent/plaintiff was entitled to the suit amount on account of oil supplied. There is no dispute that oil was supplied and received by the

appellants/defendants. The only issue was that whether oil supplied was not of proper quality. Counsel for the appellants/defendants sought to argue that the case of the appellants/defendants was that the oil supplied as per the last bill dated 29.11.2010/Ex.PW1/11 was defective and therefore no payment had to be made to the respondent/plaintiff as the bill Ex.PW1/11 was for a sum of Rs.3,76,110/-. It is argued by the appellants/defendants that oil was of poor quality as proved in terms of the test report dated 6.12.2010 which is filed and proved as Ex.DW1/2.

(ii) I cannot agree with the arguments urged on behalf of the appellants/defendants inasmuch as if the oil was defective in terms of the bill dated 13.11.2010 then there was no reason why appellants/defendants would have issued the cheques bearing nos. 775904 dated 28.2.2012 and 775905 dated 28.3.2012 and which were dishonored. More importantly trial court has rightly applied the provision of Section 42 of the Sale of Goods Act, 1930 that if a buyer does not return the goods but uses the goods then it cannot be argued by the buyer that the buyer is not liable to make payment for the goods received. Section 42 of the Sale of Goods Act reads as under:-

“42. Acceptance- 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.”

8. Learned counsel for the appellants/defendants argued that the statement of account filed and proved by the respondent/plaintiff as Ex.PW1/3 cannot be looked at because the same is not with regard to Section 65B of the Indian Evidence Act, 1872 however it is seen that before cross-examination commenced by the appellants/defendants the exhibition of the statement of the account Ex.PW1/3 was not objected to on the basis of Section 65B of the Indian Evidence Act. Once no objection is taken to the mode of proof of the document then such objection is waived in view of the ratio of the judgment of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Another, (2003) 8 SCC 752.***

9. It is not disputed in the facts of the present case that appellants/defendants did not return the so called defective oil to the respondent/plaintiff. Also, there is no evidence led by the appellants/defendants that they have not used the oil i.e sold the oil

further and once that is so Section 42 of the Sales of Goods Act clearly bars the appellants/defendants from denying their liability for payment with respect to the oil received by the appellants/defendants.

10. There is no merit in the appeal. Dismissed.

AUGUST 25, 2017/ib

VALMIKI J. MEHTA, J

