

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

+ **RFA Nos. 815/2017 & 817/2017**

% **Reserved on: 27th September, 2017**
Pronounced on: 10th October, 2017

+ **RFA No. 815/2017 & CM APPLs. 35105-06/2017**

PRAKASH INDUSTRIES LIMITED Appellant

Through: Mr. Kalasi Rai, Advocate

versus

SARVE KIRTI KUMAR SHARMA Respondent

+ **RFA No. 817/2017 & CM APPLs. 35108-09/2017**

PRAKASH INDUSTRIES LIMITED Appellant

Through: Mr. Kalasi Rai, Advocate

versus

SARVE KIRTI KUMAR SHARMA Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. These Regular First Appeals under Section 96 of the Code of Civil Procedure, 1908 (CPC) are filed by the

appellant/defendant/counter-claimant impugning the judgment of the trial court dated 27.5.2017 by which the trial court has decreed the suit of the respondent/plaintiff for a sum of Rs.7,68,305/- with interest at the rate of 12% per annum on account of goods (being spare parts) supplied and the counter-claim of the appellant/defendant for a sum of Rs.6,10,593/- has been dismissed and which amount was claimed by the appellant/defendant being the loss allegedly suffered on account of the respondent/plaintiff giving spare parts late and also which were defective and resultantly the appellant/defendant/counter-claimant had to engage transport services from transporters at a cost which is the subject matter of the counter-claim.

2. The facts of the case are that admittedly the appellant/defendant/counter-claimant placed upon the respondent/plaintiff purchase orders for supply of spare parts of trucks. Respondent/plaintiff is the authorized distributor of the spare parts of M/s Ashoka Leyland Limited. Purchase orders were placed from 2.9.2008 to 28.10.2009. Respondent/plaintiff claimed that the entire supplies as per the purchase orders were completed by supplying spare parts to the appellant/defendant. Complete payment

was however not made as reflected in the books of account of the respondent/plaintiff which showed a debit balance of Rs.5,64,721/-. Respondent/plaintiff after serving legal notice dated 21.2.2011, and to which the appellant/defendant is said to have sent a frivolous reply on 23.3.2011, filed the subject suit for recovery of moneys.

3. Appellant/defendant contested the suit and pleaded that in terms of the purchase orders supplies were to be immediately made inasmuch as the purchase orders showed that the supplies had to be made immediately. It was pleaded by the appellant/defendant that there were delays ranging between 25 to 73 days in supply of the spare parts and due to which the trucks owned by the appellant/defendant were unutilized and the appellant/defendant had to take the service of other transport agencies and pay hire charges for such trucks. The charges paid to the other transporters were made the subject matter of the counter-claim being the sum of Rs.6,10,593/-.

4. After pleadings were complete the trial court framed issues and parties led evidence. These aspects are noted in paras 8 to 10 of the judgment of the trial court and which paras read as under:-

“ISSUES

8. After completion of pleadings, issues were framed on 29.11.2013

as under:-

- (i) *Whether the plaintiff is entitled to recover a sum of Rs. 7,68,305/- towards supply of spare parts to defendant no. 1 with pendentelite and future interest @ 24% per annum from January, 2011 till realization as prayed for? OPP*
- (ii) *Whether the suit of the plaintiff is bad for mis-joinder of necessary parties as defendant no. 1 & 2 are not the necessary party? OPD.*
- (iii) *Whether the defendant/plaintiff in counter claim is entitled to recover a sum of Rs. 6,10,593/- towards losses on account of engaging services of outside transport agencies as prayed for? OPD.*
- (iv) *Relief.*

9. In support of his case, plaintiff has appeared as PW1 and filed his affidavit by way of examination in chief Ex. PW1/A. He has also proved the purchase order dated 03.07.2008 as Ex. PW1/1; invoice dated 04.07.2008 with reply as Ex. PW1/2; Purchase order dated 30.07.2008 as Ex. PW1/3; Invoice dated 31.07.2008 & 04.08.2008 with reply as Ex. PW1/4 and Ex. PW1/5; P.O. dated 14.08.2008, 29.10.2008, 13.12.2008 and 03.02.2009 as Ex. PW1/6 to Ex. PW1/9; Bill dated 02.09.2008, 12.11.2008, 22.12.2008 and 03.02.2009 as Ex. PW1/10 to Ex. PW1/13; P.O. dated 23.04.2009, 19.05.2009, 17.09.2009, 30.09.2009 and 24.09.2009 as Ex. PW1/14 to Ex. PW1/18; Bill dated 25.04.2009, 07.07.2009, 17.09.2009 & reply dated 01.10.2009, 24.10.2009, 28.10.2009 as Ex. PW1/19 to Ex. PW1/24; Statement of account for the period 01.04.2008 to 31.03.2009 as Ex. PW1/25; statement of the account for the period 01.04.2009 to 31.03.2010 as Ex. PW1/26; letter dated 31.12.2010 as Ex. PW1/27; Legal notice dated 21.02.2011 as Ex. PW1/28; and Defendants' reply dated 23.03.2011 as Ex. PW1/29. Plaintiff has also examined Sh. Vinod Malhotra, Accountant as PW2 who filed his affidavit of evidence Ex. PW2/A.

10. Defendant in support of its case examined following five witnesses:-

- (A). DW1 Sanjay Jain, AR of defendant company has filed his affidavit of evidence Ex. DW-1/A and he has relied upon the documents Ex. PW1/1, Ex. PW1/3, Ex. PW1/6 to Ex. PW1/9 and Ex. PW1/14 to Ex. PW1/16.
- (B). DW2 Sh. Birendra Thakur has filed his examination in chief by way of affidavit Ex. DW2/A and relied upon the documents i.e. bilty invoices Ex. DW4/1 to Ex. DW4/55 and bilty invoices Ex. DW5/1 to Ex. DW5/53.
- (C). DW3 Parvesh Kumar Chaturvedi has filed his examination in chief by way of affidavit as Ex. DW3/A and has testified that defendant company owns 157 trucks and the management placed orders for immediate delivery of spare parts on the plaintiff and he had informed the management vide memo dated 20/08/2008 and 22/10/2008 that consignment received from the plaintiff had low durability and parts supplied was spurious and of inferior

quality and there was lot of delay due to which company was not able to utilize its trucks.

(D). DW4 Sharad Kumhar is an employee of Aggarwal Transport Company and has testified that the defendant approached Aggarwal Transport Company and hired trucks from August, 2008 till October, 2008. He has proved the bilty invoices for the period 15/08/2008 to 13/10/2008 as Ex. DW4/1 to Ex. DW4/55 as the trucks of the defendant company were not running due to want of spare parts.

(E). DW5 Mr. Awdhendra Pandey is an employee of Shree Bajrang Roadways and he has filed his examination in chief by way of affidavit Ex. DW5/A and has deposed on the lines of DW4 and has proved the bilty invoices as Ex. DW5/1 to Ex. DW5/53. Some of the invoices were de-exhibited being photocopies and were marked as Mark A-1 to A-14. Thereafter DE was closed”.

5. As regards the main issue nos. 1 and 3, as to whether there was any delay in supply of the spare parts and whether the goods supplied were defective, trial court has held these aspects in favour of the respondent/plaintiff. Trial court has held that before the suit was filed after serving of the legal notice, the appellant/defendant/counter-claimant never wrote any letter to the respondent/plaintiff that there were delays, and such defence was taken up only for the first time to reply to the legal notice and in the pleadings in the suit and the counter-claim. Trial court has held that if the supplies were delayed then the appellant/defendant could have rejected the supplies but admittedly the supplies were not rejected on account of delay. Trial court therefore has held that time was not the essence of the contract.

The relevant observations in this regard are contained in paras 16, 17 and 19 of the impugned judgment and these paras read as under:-

“16. Ld. Counsel for the plaintiff on the other hand argued that the plaintiff had supplied the goods to the defendant as per the purchase orders placed by the defendant. The defendant never disputed or raised any objections regarding the delayed supply of the goods or inferior quality of the goods to the plaintiff. It was argued that the defendant has failed to establish that the goods supplied by the plaintiff were spurious or of inferior quality. It was argued that the defendant has also failed to place on record its books of accounts to show that the defendant has made the payment for the goods received by it.

17. From the perusal of the record it is clear that the defendant had received the goods supplied by the plaintiff and there is no dispute raised by the defendant with regard to the supply of the goods. If the defendant had made the entire payment to the plaintiff, it was for the defendant to show as to how and when the outstanding dues were paid to the plaintiff. The defendant has not placed on record any books of accounts showing the payments to the plaintiff. Even the witnesses examined by the defendant have not been able to prove that the entire dues of the plaintiff have been cleared. DW2 Sh. Birendra Thakur who is the Accountant of the defendant company has not produced any books of accounts to contradict the statement of accounts produced by the plaintiff. Even in the cross examination of PW1 and PW2, the defendant has failed to point out any discrepancy or false entries in the statement of accounts filed by the plaintiff. The statement of accounts filed by the plaintiff are computer generated print out supported by the affidavit under Section 65 B of Indian Evidence Act and hence, the same are admissible in evidence and Order 7 Rule 17 CPC is not applicable as every print out of the computerized record is admissible when supported by the affidavit under Section 65 B of the Evidence Act.

19. The defence of delayed supplies or inferior quality of the goods raised by the defendant also appears to be only an after thought. There are no letters or e-mails or communication of any other kind on record to show that defendant had raised the issue of delayed supplies with the plaintiff at any point of time prior to the issuance of legal notice by the plaintiff. The defendant had the right to reject the goods supplied by the plaintiff if the same were of inferior quality or spurious in nature or if the same were supplied belatedly. But defendant had neither rejected the goods nor raised any objections in this regard. Rather the conduct of the defendant shows that the defendant placed orders for further supply of the goods to the plaintiff even when the plaintiff supplied the goods belatedly. This shows

that the time was not the essence of the contract as claimed by the defendant. Had it been so, the defendant could have rejected the goods supplied by the plaintiff belatedly and could have intimated the plaintiff that the defendant had rejected the goods due to non adherence to the time schedule as required under Section 43 of the Sales of Goods Act, 1930. Once the defendant has consumed the goods supplied by the plaintiff, the defendant is bound to pay the price of the same." (underlining added)

6. I completely agree with the reasoning and conclusions of the trial court inasmuch as the appellant/defendant never disputed or raised any objections, prior to service upon it of the legal notice, with respect to the delayed supply of goods or to the alleged inferior quality of the goods. No evidence was led by the appellant/defendant as to how the goods were allegedly spurious and of inferior quality. Trial court has rightly observed that since no dispute as regards the delay of the supply of the goods being inferior or spurious was ever raised at any point of time till the legal notice was served upon the appellant/defendant, therefore, such defence could not be believed. Trial court has also held that the amount was due to the respondent/plaintiff because appellant/defendant admitted to have been received the goods and failed to prove paying of the balance amount claimed by the respondent/plaintiff.

7. In addition to the reasoning of the trial court, I would also seek to refer to Section 42 of the Sales of Goods Act, 1930 and as per this Section if the goods are consumed by the buyer and not returned back to the seller within a reasonable time then the buyer is deemed to have accepted the goods. As per Section 42 of the Sale of Goods Act, only within a reasonable time the buyer should inform the seller that he has rejected the goods otherwise the goods have to be taken to be accepted. In the present case, it is noted that no objection ever was raised by the appellant/defendant of the goods being defective prior to the serving of the legal notice by the respondent/plaintiff upon the appellant/defendant. Section 42 of the Sales 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. No doubt, the appellant/defendant has led evidence of DW-4 and DW-5 Mr. Sharad Kumhar and Mr. Awdhendra Pandey that the appellant/defendant had used the services of two transport companies M/s Aggarwal Transport Company and Bajrang Roadways,

and the necessary invoices have been proved and exhibited, however, at best such evidence will show that the appellant/defendant had hired trucks for transportation, but this itself is not enough because it had to be proved by the appellant/defendant that which were its trucks, out of its owned 157 trucks, which could not run allegedly on account of delayed supply of spare parts, but admittedly no documentary evidence whatsoever has been led by the appellant/defendant that which and how any of its trucks remained idle. Also, the appellant/defendant had to prove that it was never using third party transporters for transportation of its goods for any time prior to using the services of M/s Aggarwal Transport Company and Bajrang Roadways and whose services were necessitated only on account of delays in supply of the spare parts or the spare parts being inferior/spurious, however, no documentary evidence whatsoever has been filed which should be believed by the courts that the appellant/defendant never used to engage third party transporters otherwise for its business. In any case, and as stated above, even assuming that third party transporters were engaged by the appellant/defendant, yet the appellant/defendant cannot succeed unless

it proves that time was the essence of the contract and it had otherwise given notice under Section 55 of the Indian Contract Act, 1872 that on account of delay losses had been caused to it by the respondent/plaintiff. Admittedly, no notices have been proved to have been served by the appellant/defendant upon the respondent/plaintiff with respect to the alleged losses caused on account of delays. Therefore, the trial court has rightly decreed the suit for recovery of moneys and dismissed the counter-claim of the appellant/defendant.

9. There is no merit in the appeals. Dismissed.

OCTOBER 10, 2017

VALMIKI J. MEHTA, J