

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

+ **RFA No.921/2017 & C.M. Appln. No. 39612/2017 (stay)**

% **16th November, 2017**

SUNIL GOEL Appellant

Through: Ms. Runjita Das, Advocate.

versus

RAJESH GUPTA Respondent

Through: Mr. Satish Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. This First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the defendant in the suit impugning the judgment of the trial court dated 2.8.2017 by which the trial court has decreed the suit filed by the respondent/plaintiff for recovery of Rs.8,08,374/- alongwith interest at 6% per annum.

2. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that the appellant/defendant was liable to make payment to the respondent/plaintiff with respect to the job work

of knitting fabrics etc in terms of the four invoices dated 12.12.2007, 22.12.2007, 28.12.2007 and 2.3.2008. It was further pleaded in the plaint by the respondent/plaintiff that as per the books of account maintained by the respondent/plaintiff there was a debit balance as against the appellant/defendant of a sum of Rs.8,08,374/- as on 29.2.2012 and which amount should be decreed in favour of the respondent/plaintiff and against the appellant/defendant.

3. The appellant/defendant appeared and contested the suit. It was pleaded that the suit is barred by time because invoices are of the year 2007-2008 and the suit has already been filed in April 2012. It is denied that the account maintained by the respondent/plaintiff is an open, mutual and current account. It was also pleaded that the invoices in question have been forged and fabricated by the respondent/plaintiff in connivance with Ms. Kusum who left the appellant/defendant and joined the respondent/plaintiff.

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

- i) Whether the suit of the plaintiff is barred by Section 5 of Limitation Act? OPP
- ii) Whether the work done by the plaintiff for the defendant was defective? OPD

- iii) Whether this fact of being defect in the work, was ever not admitted by the defendant in time to the plaintiff? OPD
- iv) Whether the plaintiff is entitled to the amount claimed? OPP
- v) Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP
- vi) Relief.”

5. Evidence was led by the parties and this aspect is recorded in paras 9 and 10 of the impugned judgment and these paras read as under:-

“9. In order to prove its case, plaintiff Sh. Rajesh Gupta examined himself as PW-1 and led evidence by way of affidavit Ex. PW-1/A. He relied upon the following documents:

- i) Ex. PW-1/1 is the invoice dated 12.12.2007.
- ii) Ex. PW-1/2 is the invoice dated 22.12.2007.
- iii) Ex. PW-1/3 is the invoice dated 28.12.2007.
- iv) Ex. PW-1/4 is the invoice dated 24.03.2008.
- v) Ex. PW-1/5 (colly) are delivery challans of invoices.
- vi) Ex. PW-1/6 (colly) are the delivery challans of invoices.
- vii) Ex. PW-1/7 (colly) and Ex. PW-1/8 are delivery challans of invoices.
- viii) Ex. PW-1/9 is the true copy of statement of Account.
- ix) Ex. PW-1/10, Ex. PW-1/11 and Ex. PW-1/12 are the receipts dated 14.07.2010, 06.12.2009 and 15.06.2009.
- x) Ex. PW-1/13 is the notice dated 22.06.2011.
- xi) Ex. PW-1/14 are postal receipts.

10. On the other hand, defendant himself stepped into the witness box as DW-1 and deposed by way of affidavit Ex. DW-1/A. He relied upon the documents Ex. PW-1/1 to Ex. PW-1/12 which documents were filed by plaintiff himself.”

6.(i) The issue argued on behalf of the appellant/defendant before this Court is that suit is barred by limitation. It is argued that the suit filed cannot be treated to be one on the basis of a mutual, open

and current account because the account in question maintained by the respondent/plaintiff in its books of account is not an open, mutual and current account inasmuch as neither there are shifting balances nor independent obligations which arise because of any other relationship except that of a buyer and seller with respect to job work of knitting. Reliance is placed by the appellant/defendant on 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 to argue that unless there are shifting balances and/or mutual independent obligations, the account as maintained by the respondent/plaintiff cannot be an open, mutual and current account as per Article 1 of the Limitation Act, 1963.

(ii) It is also argued on behalf of the appellant/defendant that the receipts which are relied upon by the respondent/plaintiff and which have been allegedly proved by the respondent/plaintiff as Ex.PW1/10 to Ex.PW1/12, are forged and fabricated documents, and therefore, such documents cannot extend the limitation period. It is also argued that the factum with respect to the receipts having been executed in

favour of the respondent/plaintiff by an employee Mr. Shekhar of the appellant/defendant was never taken up in the pleadings of the respondent/plaintiff i.e either in the plaint or the replication and that these receipts only materialized suddenly during the course of evidence being led by the respondent/plaintiff and such evidence therefore being beyond pleadings cannot be looked into because no amount of evidence beyond pleadings can be looked into.

(iii) It is further argued that assuming the receipts are genuine and respondent/plaintiff was allegedly paid a sum of Rs.20,000/- each on 15.6.2009, 6.12.2009 and 14.7.2010 by the appellant/defendant, but, admittedly since the payments are cash payment receipts and only alleged to be signed by an employee of the appellant/defendant who was not a duly authorized agent as per Section 20 of the Limitation Act, such payments cannot extend the limitation period which commenced from the original dates of the invoices in December 2007 and March 2008.

7. The law with respect to what is an open, mutual and current account is well settled in view of the aforesaid two judgments of the Supreme Court in the cases of *Hindustan Forest Company*

(*supra*) and *Kesharichand Jaisukhal (supra)*. I have applied the ratios of these judgments in a recent judgment delivered on 31.7.2017 in RFA No. 666/2017 titled as *Harjit Singh Vs. M/s Bharat Hotels Ltd. & Anr.* Paras 7 and 8 of the judgment in the case of *Harjit Singh (supra)* reads as under:-

“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)*.”

8.(i) Admittedly, in the present case, there are no shifting balances in that sometimes there is a credit balance in favour of the respondent/plaintiff in its books of account and sometimes there is a credit balance in favour of the appellant/defendant as per the books of account of the respondent/plaintiff. Putting it differently, the statement of account relied upon by the respondent/plaintiff do not show credit balance sometimes in favour of the respondent/plaintiff and sometimes in favour of the appellant/defendant. Therefore, there are no shifting balances for the account to become an open, mutual and current account as per Article 1 of the Limitation Act.

(ii) Also there are no independent counter obligations inasmuch as parties have only one relationship with respect to job knitting work whereby appellant/defendant was the buyer and the respondent/plaintiff was the seller. Therefore, for this reason also the statement of account is not an open, mutual and current account.

(iii) Once the account is not an open, mutual and current account limitation will run from the date of each of the invoices on

12.12.2007, 22.12.2007, 28.12.2007 and 2.3.2008. Admittedly, the suit has only been filed in April 2012, and therefore, if we do not have to see anything else the subject suit would be clearly barred by limitation because cause of action runs independently for each invoices as against the appellant/defendant and in favour of the respondent/plaintiff.

9.(i) In this case, the respondent/plaintiff for seeking to extend the limitation has relied upon three payments of Rs.20,000/- each on 15.6.2009, 6.12.2009 and 14.7.2010. The issue is that whether such receipts will extend the limitation as per Section 19 of the Limitation Act with respect to all the four invoices which are dated 12.12.2007, 22.12.2007, 28.12.2007 and 2.3.2008?

(ii) The answer to this has to be negative because the total payment under the receipts is a sum of Rs.60,000/-. This amount of Rs.60,000/- will wipe off only part of first/one bill dated 12.12.2007 and which was for an amount of Rs.8,32,788/-. The payments of Rs.60,000/- in view of Sections 60 and 61 of the Indian Contract Act, 1872 therefore cannot be taken as towards the next three bills, and therefore, once there are no payments towards the next three bills dated 22.12.2007,

28.12.2007 and 2.3.2008, the amount claimed for these bills by filing of a suit in April 2012 is clearly beyond three years and hence barred by limitation. I may note that when the amount of Rs.60,000/- is taken only towards the first bill dated 12.12.2007 of a sum of Rs.8,32,788/-, the same is in view of the provisions of Sections 60 and 61 of the Indian Contract Act and as per which the respondent/plaintiff had a right to appropriate payments in a particular manner, but when that is not done payment allegedly made by the appellant/defendant will have to be taken serially and chronologically i.e payments have to be taken towards earlier bills first and then later bills.

10. The next issue which arises is as to whether the respondent/plaintiff can take benefit of the receipts dated 15.6.2009, 6.12.2009 and 14.7.2010 of Rs.20,000/- each whether for the first invoice of 12.12.2007 or for that matter for any of the next three invoices dated 22.12.2007, 28.12.2007 and 2.3.2008 assuming that Sections 60 and 61 of the Indian Contract Act do not apply in this regard. The answer is found in Sections 19 and 20 of the Limitation Act, and more particularly Section 20 of the Limitation Act which states that payment to extend limitation can only be when the receipt is

signed by a duly authorized agent. Section 20 of the Limitation Act deliberately uses the expression “duly authorized agent” as compared to an employee because every employee is not to be taken as a duly authorized agent of an employer. Admittedly, in the present case, respondent/plaintiff has filed no document whatsoever on record showing that Mr. Shekhar who was an employee of the appellant/defendant was in any manner a duly authorized agent as required by Section 20 of the Limitation Act. Therefore, none of the receipts which are relied upon by the respondent/plaintiff, Ex.PW1/10 to Ex.PW1/12, assuming that they are not forged and fabricated as contended by the appellant/defendant, yet, such receipts are not receipts which will extend limitation because the same are not signed by a duly authorized agent and which is so required by Section 20 of the Limitation Act.

11. In view of the aforesaid discussion, it is seen that the subject suit was clearly time barred because the account in question is not an open, mutual and current account and the receipts Ex.PW1/10 to Ex.PW1/12 are not the receipts which are signed by a duly authorized agent as required by Section 20 of the Limitation Act.

12. In view of the above, this appeal is allowed. The impugned judgment of the trial court dated 2.8.2017 is set aside. Suit of the respondent/plaintiff will stand dismissed. Parties are left to bear their own costs.

NOVEMBER 16, 2017/ib

VALMIKI J. MEHTA, J

