

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

+ **RFA No.1053/2017**

% **19th December, 2017**

WIMPY INTERNATIONAL LTD. Appellant

Through: Mr. Ravinder Kumar Yadav,
Advocate with Ms. Arti
Anupriya, Advocate and Ms.
Preeti Singh, Advocate.

versus

GULSHAN DHINGRA Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

C.M. No.46183/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**C.M. Nos.46182/2017 (for condonation of delay in filing) &
46185/2017 (for condonation of delay in re-filing)**

2. For the reasons stated in the applications, delay of one
day in filing and eight days in re-filing the appeal is condoned.

C.M.s stand disposed of.

RFA No.1053/2017 and C.M. No.46184/2017 (stay)

3. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the Trial Court dated 29.7.2017 by which the trial court has decreed the suit for recovery in favour of the respondent/plaintiff for an amount of Rs.15,74,272.50/- along with interest at 12% per annum simple till the filing of the suit and *pendente lite* and future interest at 9% per annum simple. I may note that admittedly in the present case the appellant/defendant has led no evidence at all and that the respondent/plaintiff has proved his case by leading evidence.

4. The facts of the case are that the respondent/plaintiff pleaded that the appellant/defendant purchased from the respondent/plaintiff cooking oils being Diamond Groundnut Refined Oil and Little Soya Refined Oil in 15 litre packets/tins. Respondent/plaintiff supplied the goods to the appellant/defendant under different invoices. The respondent/plaintiff claimed that in around early April, 1999, the appellant/defendant started delay in payments and on 1.4.1999 amount of Rs.9,12,572.50/- accumulated

against the appellant/defendant and which thereafter on account of payment made on 7.4.1999 was reduced to Rs.77,976.50/-. Again thereafter the appellant/defendant delayed payments and by June, 2001 the outstanding in favour of the respondent/plaintiff and against the appellant/defendant rose to Rs.15,74,272.50/-. Plaintiff thereafter talks of certain correspondence between the parties and ultimately of respondent/plaintiff issuing the legal notice dated 8.12.2001, which having failed to evoke the desired response, consequently the subject suit was filed.

5. The appellant/defendant filed its written statement and contested the suit. It was pleaded in the written statement that the suit was barred by limitation. It was also pleaded that the appellant/defendant was dealing with a partnership firm of M/s Super Traders and not the respondent/plaintiff who claimed to be the sole proprietor of M/s Super Traders. The appellant/defendant also pleaded that the respondent/plaintiff had raised invoices upon the appellant/defendant at higher prices than the prevailing maximum recommended retail prices. Suit was hence prayed to be dismissed.

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

- “1. Whether the suit is barred by limitation? OPP
2. Whether the plaintiff had any dealing with the defendant or made any supplies to the defendant as per the credit invoices/sales bills detailed in para 9 of the plaint? OPP
3. Whether the plaintiff is entitled to interest on the main claim? If so, on what amount, at what rate and from what date? OPP
4. Whether the plaintiff is entitled to issuance of the statutory sales tax forms including C forms and ST 35 for the financial year 2001-2002 or the amount of Rs.24,088/- towards the liability which may be incurred by the plaintiff on account of non furnishing of such sales tax forms? OPP
5. Relief.”

7. Respondent/plaintiff led evidence and proved his case by proving the various quotations of the appellant/defendant as Ex.PW1/2 to Ex.PW1/16, the invoices of supply as Ex.PW1/17 to Ex.PW1/64, dissolution deed of M/s Super Traders whereby the respondent/plaintiff took over the assets and liabilities of the partnership firm as Ex.PW1/1. Other documents were also proved and this is noted by the trial court in para 22 of its impugned judgment and which para 22 reads as under:-

“22. In order to prove his case, plaintiff has examined himself as PW-1. He tendered his evidence by way of affidavit Ex.PW1/A relying on various documents i.e Ex.PW1/1 to Ex.PW1/74. Ex.PW1/1 is the Dissolution Deed, Ex.PW1/2 to Ex.PW1/16 are the quotations/rates/prices for supplying the goods to the defendant company. Ex.PW1/17 to Ex.PW1/64 are credit invoices/sales bills through which goods were supplied by the plaintiff and duly acknowledged by the defendant. Letter dated 07.04.1999 written by the plaintiff to the defendant is Ex.PW1/65,

the ledger account of defendant maintained by M/s Super Traders during the period April 1999 till 31.03.2002 is Ex.PW1/66, letter dated 09.04.2001 issued by defendant to the plaintiff is Ex.PW1/67, letter dated 06.12.2001 issued by defendant whereby defendant demanded an amount of Rs.4,42,848/- is Ex.PW1/68, legal notice dated 08.12.2001 is Ex.PW1/69, letter dated 28.12.2001 issued by defendant whereby defendant demanded an amount of Rs.4,42,848/- is Ex.PW1/70, plaintiff replied to the letter dated 28.12.2001 vide his letter dated 01.01.2002 which is Ex.PW1/71. Another communication dated 03.01.2002 sent by the plaintiff to the defendant is Ex.PW1/72. Letter dated 17.07.2002 issued by defendant to plaintiff is Ex.PW1/73.”

8. Trial court has held that the suit is within limitation by relying upon the fact that the last invoice raised by the respondent/plaintiff upon the appellant/defendant was dated 11.6.2001 and the suit was filed on the re-opening day after expiry of summer vacations of June, 2004 on 5.7.2004, and consequently the suit filed on re-opening date after end of summer vacations was within limitation.

9. Counsel for the appellant/defendant argued that the suit was barred by limitation inasmuch as the statement of account which was filed and proved by the respondent/plaintiff as Ex.PW1/66 shows that the last payment made by the appellant/defendant to respondent/plaintiff was on 1.6.2001, and therefore, the suit had to be filed prior to 1.6.2004 but the suit having been filed on 5.7.2004 would be barred by limitation with respect to the bills which are prior

to 1.6.2001 when the last payment of Rs.50,000/- was made by the appellant/defendant to the respondent/plaintiff. It is argued that the last bill raised upon the appellant/defendant by the respondent/plaintiff was dated 5.11.2000, and this was raised three years prior to filing of the suit and consequently since payment was made by the appellant/defendant bill-wise, the bill dated 5.11.2000 and all bills prior to 5.11.2000 would be barred by limitation and payments of which could not have been claimed through the subject suit which was filed on 5.7.2004. It is also argued that the payment made by the appellant/defendant on 1.6.2001 of Rs.50,000/- since was only against one bill of 5.11.2000, earlier bills were barred by limitation and so also later bills which were three years prior to filing of the suit and which essentially covered all the bills as shown in the statement of accounts for which the suit is filed, except two last bills for a sum of Rs.25,800/- which is dated 4.6.2001 and for Rs. 17,200/- dated 11.6.2001.

10. Though the arguments urged on behalf of the appellant/defendant appear to be correct with respect to payments with respect to bills prior to 4.6.2001 being barred by limitation, however

in my opinion for the additional reasoning which this Court is giving, and which this Court is entitled to give in view of Order XLI Rule 24 CPC, the suit has to be held within limitation. This additional reasoning is that the statement of account which is proved by the respondent/plaintiff as Ex.PW1/66 is an open, mutual and current account and therefore suit could have been filed by the respondent/plaintiff three years from the end of financial year in which the last entry is proved or admitted. Since the last entry proved or admitted is of 1.6.2001, the period of limitation of three years will commence as per Article 1 of the Limitation Act, 1963 on 1.4.2002. Suit therefore filed on 5.7.2004 i.e within three years from 1.4.2002 will be within limitation. I am holding that the subject statement of account proved as Ex.PW1/66 is an mutual, open and current account because when we see this statement of account, it is seen that there are shifting balances or reciprocal demands/obligations or independent obligations. Shifting balances are shown when the statement of account is taken as a whole and including with respect to the entries dated 7.6.2000 and 5.11.2000 when there is found to exist a credit balance in favour of the appellant/defendant in the books of account of

the respondent/plaintiff and other dates there are debit balances against the appellant/defendant. Similar was the position also on earlier dates of the statement of account entries being dated 11.2.2000 and 3.5.2000 when there is credit balances shown in favor of the appellant/defendant.

11. Shifting balances result in open, mutual and current account in view of the judgments of the ratios of the Supreme Court judgments 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.”

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)

12. In my opinion therefore once there existed shifting balances i.e independent obligations or reciprocal demands/obligations and the fact that the appellant/defendant has led no evidence in my opinion, therefore the suit can be treated as within limitation on account of Article 1 of the Limitation Act. The argument urged on behalf of the appellant/defendant of the suit being barred by limitation is therefore rejected.

13.(i) Learned counsel for the appellant/defendant then sought to argue that the respondent/plaintiff/partnership firm was not

registered and therefore the suit was not maintainable on account of the suit being barred by Section 69 of the Partnership Act, 1932.

(ii) This argument in my opinion is also misconceived for two reasons. Firstly, it is seen that no such issue was got framed by the appellant/defendant with respect to the suit being barred by Section 69 of the Partnership Act. The second reason for rejecting the argument is that the respondent/plaintiff had proved the dissolution deed as Ex.PW1/1 and as per which dissolution deed the respondent/plaintiff took over all the assets and liabilities of the partnership firm and continued the business of M/s Super Traders as a sole proprietor. Therefore for this reason also the argument that the suit is filed by the partnership firm is rejected.

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

DECEMBER 19, 2017
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VALMIKI J. MEHTA, J