

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

+ **RFA No.1048/2017**

% **18th December, 2017**

PICCADILY HOTEL PVT. LTD. Appellant
Through: Mr. Abhishek Kumar,
Mr. Navin Kumar, Advocates

versus

ORANGE INTERNATIONAL PVT. LTD. Respondent
Through: None

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No.45998/2017

Allowed, subject to all just exceptions.

CM stands disposed of.

RFA No.1048/2017 & CM No.45997/2017 (stay)

1. This Regular First Appeal under Section 96 of the Civil Procedure Code, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the trial court dated 17.08.2017 by which the trial court has decreed the suit for recovery filed by the respondent/plaintiff for an amount of Rs.15,23,488/- along with interest

at 10% per annum. Suit has been decreed for recovery on account of goods/marble slabs received by the appellant/defendant from the respondent/plaintiff.

2. The facts of the case are that the respondent/plaintiff pleaded in the plaint that it supplied various goods/marble slabs by giving acknowledgement of the bills. Total amount of the bills was Rs.20,20,680.25 and the appellant/defendant only made payment of Rs.9,00,468/- and, therefore, the balance amount since was not paid, after serving the legal notice dated 15.01.2011, the subject suit was filed.

3. Appellant/defendant had contested the suit and pleaded that the respondent/plaintiff only supplied goods worth Rs.8,51,074.95 and for which appellant/defendant had already paid Rs.9,00,468/- and, therefore, in fact respondent/plaintiff had received an excess amount of Rs.49,393.05. Appellant/defendant also claimed that respondent/plaintiff was liable to be imposed penalty at 10% of the value of the goods on account of delayed supply of goods. The basic grievance of the appellant/defendant was that whereas with respect to the marble slabs called “**Bottochino**”, the appellant/defendant received

such marble slabs but the marble slabs of the type known as “**Serpe Jente**” was never received by the appellant/defendant and that for such marble slabs even no order was placed. Suit therefore was prayed to be dismissed.

4. After pleadings were complete, trial court framed the issues and parties led evidence, and these aspects are noted in paras 4 to 6 of the impugned judgment, which read as under:-

“4. After completion of pleadings, the following issues were framed on 21.08.2013 by Ld Predecessor of this Court:-

1. Whether the plaintiff is entitled to recover a sum of Rs.15,23,448/- (Rupees Fifteen Lakhs Twenty Three Thousand Four Hundred Forty Eight only) as prayed for? OPP
2. Relief.

Thereafter the parties were directed to lead their evidence.

5. In support of its case, the plaintiff has examined Sh.Vijay Kumar, AR of plaintiff company as PW-1 who tendered his evidence by way of affidavit Ex.PW-1/A and proved the Certificate of registration, memorandum, and article of the plaintiff as Ex.PW-1/1; Certified copy of the Board Resolution dated 03.08.2011 as Ex.PW-1/2; the purchase Order dated 08.08.2008 of the defendant no.-1 as Ex.PW-1/3; Bills/tax invoices as PW-1/4 to Ex.PW-1/8; running account of the defendant no.-1 as Ex.PW-1/9; letter dated 13.08.2010 as Ex.PW-1/10; Courier Receipts as Ex.PW-1/11; legal notice dated 15.01.2011 as Ex.PW-1/12 and postal receipts dated 17.01.2011 and courier receipts dated 18.01.2011 as Ex.PW-1/13 to Ex.PW-1/14. Thereafter, P.E. was closed.

6. Defendants to prove their defence have examined its director Sh. Narender Kumar as DW-1 who tendered his evidence by way of affidavit as Ex.DW-1/A and proved on record Resolution dated 11.08.2016 as Ex.DW-1/1. Thereafter, D.E. was closed.”

5. Trial court has decreed the suit by observing that respondent/plaintiff proved the fact that the marble slabs of Serpe Jente

were received in terms of Bill nos. 39, 42 and 43 issued by the respondent/plaintiff to the appellant/defendant and which were proved as Ex.PW-1/5, PW-1/7 and PW-1/8 respectively. Trial court also notes that the witness of the appellant/defendant DW-1 in his cross-examination admitted that the aforesaid bills Ex.PW-1/5, PW-1/7 and PW-1/8 were received in the office of the appellant/defendant. Accordingly, trial court held that the respondent/plaintiff had been successful in proving the supply of marble slabs under Bill nos.39, 42 and 43 to the appellant/defendant and, therefore, appellant/defendant was liable to pay for the same. The relevant observations of the trial court in this regard are contained in paras 9 to 13 of the impugned judgment and these paras are as under:-

“9. Counsel for the defendant no.-1 has argued that defendant no.-1 had placed orders on the plaintiff as per the purchase order dated 08.08.2008 for supply of 4000 sq.ft. of Bottochino marble. It was further argued that as per the purchase order, the quantity could vary upto 5% and delivery was to be given in seven days and after 10 days, penalty @10% was payable by the plaintiff to defendant no.-1. It was also submitted that as per clause 14, payment of excess quantity and partial delivery will not be entertained without any specific approval/sanction authority. It was argued that the plaintiff had supplied the goods vide its invoice no.38 and 41 and defendant no.-1 had paid Rs.9,00,468/-. It was further argued that the bills no.39, 42 and 43 were received by the defendant no.-1 as the same were submitted at Srinivas Puri Office of defendant no.-1 whereas no goods were supplied at the site against these bills. It was also argued that there was no question of further supply of Bottochino Marbles measuring 2000 sq ft vide bill no.42 and 43 and there was no purchase order regarding supply of “Serpe Jente” marble slabs and the plaintiff had failed to prove

the actual delivery of the goods pertaining to these bills and the plaintiff is bound to refund the excess amount of Rs.49,393.05 to defendant no.-1.

10. Defendant no.-1 has pleaded in the written statement that bills no.39 (Ex.PW-1/5), Bill no.42 (Ex.PW-1/7) and Bill No.43 (Ex.PW-1/8) were forged by the plaintiff to extract money from the defendant no.-1 but there is no evidence on record to suggest that these bills were forged. Counsel for the defendant no.-1 has argued that these bills were supplied in the office of the defendant no.-1 but goods were not supplied against them. This argument raised by Counsel for the defendant no.-1 is contrary to the statement of DW-1 who has testified in his cross-examination “it is correct that the bills Ex.PW-1/4 to Ex.PW-1/8 have been received by the defendant no.-1 company in their office. The bills were received in the office after the material and challan received at the site were checked and accepted for their quantity and quality.” It was further stated by DW-1 that defendant no.-1 has not received the material in respect of all the 5 bills Ex.PW-1/4 to Ex.PW-1/8. However, it is surprising that defendant no.-1 did not write any letter/complaint to the plaintiff regarding non-receipt of the goods nor the bills no.39, 42 and 43 were returned to the plaintiff at any point of time. Defendant no.-1 has not even produced the materials register maintained at the site which would have easily proved the non-delivery of the goods to it. All the bills Ex.PW-1/4 to Ex.PW-1/8 have been duly received on behalf of the defendant no.-1 by the same person. Hence, there is no reason to believe that goods were not supplied against the bills no.39, 42 and 43 when defendant no.-1 has admitted the receipt of the goods against the bills no.38 and 41.

Defendant no. 1 has not placed on record any documentary evidence to show that it had received lesser quantity of the goods or that the goods supplied were of different quality than stipulated in the purchase order. Once the goods have been supplied by the plaintiff and the same have been duly accepted by defendant no.-1 without any protest, the defendant no.-1 is liable to pay the price of the same.

11. Section 42 of the Sales of the Goods Act provides that if the buyer retains the goods beyond reasonable time without rejecting the goods, he has deemed to have accepted the same.

12. Section 43 of the Sales of the Goods Act casts a duty upon the buyer to intimate the seller if he wants to reject the goods.

13. In the present case, neither defendant no.-1 has rejected the goods for short supply nor for inferior quality. It has not even intimated the plaintiff that the goods supplied to it were short in quantity or were not of the nature as agreed between the parties. Therefore, in such a situation, defendant no.-1 is deemed to have accepted the goods supplied by the plaintiff and defendant no.-1 is liable to pay the price of the same.

Although in the written statement and arguments, defendant no.-1 has taken a defence that the goods were not supplied within the stipulated period but the conduct of defendant no.-1 in accepting the goods without any protest

raises a presumption that time was not essence of the contract and therefore, delay if any, in supply of the goods will not amount to breach of the terms of the contract.” (underlining added)

6. I completely agree with the aforesaid findings and conclusions given by the trial court because the trial court has not only referred to the fact that the bills are duly received by the appellant/defendant but also that the witness of the appellant/defendant admitted in his cross-examination of receipt of the Bill nos.39, 42 and 43. Trial court also rightly notes that appellant/defendant could have proved non-receipt of material by filing copies of material register at site, but that was not done.

7. In my opinion, there is one another reason which can be given for decreeing the suit inasmuch as if the appellant/defendant had not received the goods/marble slabs under Bill nos.39, 42 and 43 and which were of the year 2008, then why till filing of the suit on 18.08.2011, appellant/defendant did not in any manner object to the respondent/plaintiff as to why these bills have been issued although appellant/defendant has never received goods under these three invoices. Since the appellant/defendant raised no objection on receipt of the aforesaid three invoices, the appellant/defendant cannot argue

that appellant/defendant has not received goods under the subject invoices.

8. Learned counsel for the appellant/defendant argued that proof of giving of bills is not proof of delivery of goods and since in the bills the endorsement is only of receipt of the bills, consequently trial court has erred in decreeing the suit. In my opinion, this argument urged on behalf of the appellant/defendant is misconceived because even with respect to the undisputed bills, the only endorsement appearing in those bills/invoices are of receipt of the bills. Therefore, once the contract between the parties is only to show receipt of the goods by showing receipt of the bills, then the appellant/defendant cannot argue that for one set of undisputed bills, there need not be delivery challans whereas for other set of disputed bills there ought to have existed delivery challans.

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

DECEMBER 18, 2017
pk

VALMIKI J. MEHTA, J