

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:17.04.2018	Delivered on: 10.07.2018
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CORAM
THE HONOURABLE Mr.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

O.S.A.No.31 of 2018
and
CMP.No.1852 of 2018

Renganathan

.. Appellant

Vs.

M/s.Saravana Store,
Rep.by its Partner T.Ellappan,
No.112A, Acharappan Street,
Chennai 600 001.

...Respondent

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of the O.S.Rules read with Clause 15 of the Letters Patent, to set aside the judgment and decree made in C.S.No.162 of 2010 dated 17.02.2017 and allow the above appeal.

For appellant : Mr. M.S.Krishnan,
Senior Counsel and
Mrs.V.J.Latha
for Mr.Yogesh Kannadasan

For Respondent : Mr. K.Azhaguraman

JUDGMENT

[Judgment of the Court made by P.RAJAMANICKAM,J.,]

This appeal has been filed by the defendant against the judgment and decree passed by the learned Single Judge of this court in C.S.No.162 of 2010 dated 17.02.2017.

2. The respondent herein has filed a suit in C.S.No.162 of 2010 for recovery of Rs.28,15,390/- with interest at the rate of 24% per annum, from the date of plaint till the date of realisation of the said amount and for cost. The learned Single Judge by the judgment and decree dated 17.02.2017 has decreed the suit directing the defendant to pay a sum of Rs.28,15,390/-

with interest at the rate of 24% per annum from the date of the plaint till the date of the decree and thereafter at 6% per annum till the date of realisation with costs. Feeling aggrieved, the defendant has filed the present appeal.

3. For the sake of convenience, the parties are referred to as described in C.S.No.162 of 2010.

4. The averments made in the plaint are, in brief, as follows:-

The plaintiff is a registered Partnership Firm and it is carrying on business as provisions and General Merchants. The defendant is doing business in the line of catering and the defendant is having running account with the plaintiff for the purchase of provisions and general items for his business. During the course of business, the defendant had purchased provision items from the plaintiff for supplying the same to the canteen at Chennai Petroleum Corporation Limited on various dates and in respect of which, a sum of Rs.17,16,702/- is due and payable by the defendant to the plaintiff as per the bills and the accounts maintained by the plaintiff. The last sale was made on 31.05.2007 for a sum of Rs.4880/-. In spite of repeated requests and demand made by the plaintiff, the defendant has failed and neglected to make payments. Hence, on 10.07.2008, the plaintiff has sent a legal notice demanding payment. The defendant has received the said notice and sent a reply through his counsel on 27.07.2008 with false averments. The defendant is liable to pay the aforesaid amount of Rs.17,16,702/- with interest at the rate of 24% per annum from 31.05.2007. So, on the date of filing of the suit, the principal with interest would come to Rs.28,15,390/-. Therefore, the defendant is liable to pay the said amount of Rs.28,15,390/- with interest at the rate of 24% per annum till the date of realization with costs.

5. The averments made in the written statement are in brief as follows:-

The suit has been filed for recovery of money alleged to be due in respect of the provisions continuously supplied to the defendant. It does not say the date on which such supply commenced. In fact, the defendant was clearing the bill as and when it was supplied either by way of cash or cheque and had never had a running account. As per the statement of account filed by the plaintiff, the transaction had commenced from 01.04.2006. But there is no explanation from the plaintiff for making claim after a period of 4 years and there was no demand at all. Since the plaintiff was receiving the amount regularly, it did not make any demand. The defendant states that the canteen which was run in Chennai Petroleum Corporation has been closed in may 2007 and at the time of closing itself, the

amounts which were pending were settled. Since the defendant stopped buying for any of his branches from the plaintiff, the plaintiff has come with a fake claim. The defendant has sent a suitable reply on 27.07.2008 denying the allegations made in the notice which was sent by the plaintiff dated 10.7.2008. The defendant is not liable to pay interest at the rate of 24% per annum., since no such contract was entered into. Therefore, the defendant prayed to dismiss the above suit.

6. Based on the aforesaid pleadings, the learned Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, one of the partners, viz., Mr.T.Ellapan was examined as PW1 and Exs.P1 to P6 were marked. On the side of the defendant, the defendant's Manager viz., Mr.N.Padmaraj was examined as DW1 and Exs.D1 to D3 were marked.

7. The learned Judge, after considering the materials placed before him found that the suit is not barred by limitation. He further found that since the defendant has taken a stand that he has paid the amount to the plaintiff, then and there, the burden is upon him to prove the said fact, but he failed to do so. He further found that the documents produced by the plaintiff would clearly establish that the defendant is liable to pay the suit amount. He also found that since the defendant had made use of the provisions which were supplied by the plaintiff, and made a profit, he is liable to pay interest at the rate of 24% per annum. Accordingly, he decreed the suit directing the defendant to pay a sum of Rs.28,15,390/- with the interest at 24% per annum from the date of the plaint till the date of decree and thereafter, at the rate of 6% till the date of realization with cost. The learned Judge has granted three months time for payment. Aggrieved by the same, the defendant has preferred the present appeal.

8. Heard, Mr.M.S.Krishnan, learned Senior Counsel and Mrs.V.J.Latha for Mr.Yogesh Kannadasan, learned counsel for the appellant and Mr.K.Azhaguraman, learned counsel for the respondent.

9. The points for consideration are as follows:-
1) whether the suit is barred by limitation?
2) whether the defendant is liable to pay the suit amount?
3) whether this appeal has to be allowed?

10. Point No.1 The learned Senior Counsel appearing for the appellant contended that eventhough, the defendant has not specifically taken a plea that the suit is barred by limitation, in view of Section 3 of the Limitation Act, 1963, a duty is cast on the Court to see whether the suit has been filed within the

prescribed period of limitation. He further contended that Article 1 of the Schedule to the Limitation Act, 1963, provides that in the case of a suit filed for recovery of balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the limitation period runs from the close of the year in which the last item admitted to be supplied or proved is entered in the account, but in this case, there is no mutual dealings between the plaintiff and the defendant and as such Article 1 of the Schedule to the Limitation Act, 1963, will not apply. He further contended that since the plaintiff has filed the present suit for recovery of the amount for having delivered the goods, Article 14 of the Schedule to the Limitation Act, 1963 alone will apply. He further contended that as per the said Article, the suit should have been filed within a period of three years from the date of delivery of the goods. He further contended that in this case since the suit was filed on 03.02.2010, the amount allegedly due prior to 03.02.2010 is barred by limitation, but the said fact was not taken into consideration by the learned Judge.

11. In support of the aforesaid contentions, the learned Senior Counsel relied upon the following decisions:-

- (1). Narayana Pillai Vs. Narayanan Vanjakshi, AIR 1957 Kerala 93.
- (2). Hindustan Forest Company Vs. Lal Chand and others, AIR 1959 SC 1349.
- (3). S.Muhammed Sultan Rowther and Co., registered Firm by its Partner A.S.Khader Sahib Vs. Manickam, Chettiar, AIR 1961 Madras 388.
- (4). Kesharichand Jaisukhalal Vs. Shillong Banking Corporation Ltd., Shillong (in liquidation, AIR 1965 SC 1711.
- (5). Cherunni Vs. Purushothama Iyer, AIR 1973 Kerala 174.

12. The learned counsel for the respondent/plaintiff, on the contrary, has contended that the defendant has not raised the plea of limitation in the written statement and as such, it is not open to him to raise the question of limitation without pleading. He further contended that DW1 has admitted in his evidence that the defendant has not paid the amount for each and every delivery and he used to pay part wise and not on the basis of any specific bill and hence, the account was continuous and mutual one and therefore, the Article 1 of the Schedule to the Limitation Act, 1963, will apply. He further submitted that the last transaction took place on 31.08.2007 and as such, the suit which was filed on 03.02.2010 is within the period of limitation.

13. In this case, the defendant has not taken a plea in the written statement that the suit is barred by limitation. However, according to the learned Senior Counsel for the appellant/defendant, as per Section 3(1) of the Limitation Act, 1963, a duty is cast upon the Court to see whether the suit is in time even, if the defendant has not taken a defence that it is barred by limitation. Section 3(1) of the Limitation Act, 1963 reads thus:-

" 3. Bar of Limitation. (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence."

14. A plain reading of the aforesaid provision would clearly show that the suit, appeal and application which were filed after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Therefore, the defendant is entitled to raise a question of limitation even without pleading.

15. Now, let us see whether the suit is barred by limitation. With regard to this point the observations made in the decisions cited by the learned senior counsel for the appellant/defendant are extracted hereunder.

1) In Narayana Pillai Vs. Narayanan Vanajakshi, (supra) a Single Judge of the Kerala High Court in Paragraph Nos.3 and 4 has observed as follows:-

"3. This question came before a Division Bench of the Bombay High Court in Atmaram Vinayak v. Lalji Lakhamshi, AIR 1940 Bom 158 (C). Beaumont, C. J., who wrote the leading judgment considered the decision referred to above and dissented therefrom. It was observed by the learned Chief Justice that the principle that limitation does not destroy the right but bars only the remedy was not noticed by Sir Mulla in the earlier case. The learned Chief Justice pointed out instances in which it is possible to have one cause of action which is enforceable in part and unenforceable in part, such as a claim for mesne profits part of which may be barred by limitation.

It was also pointed out that according to Article 52, the starting point of limitation was not the accrual of the cause of action but the date of delivery of the goods. Even though the cause of

action in a case, like the present one may be one for all the items delivered to the defendant, the starting point of limitation must be taken to be the date of delivery of the goods. These goods were delivered on various dates and the date of the last delivery cannot be taken to be the date of delivery of goods on earlier occasions. I may here extract the following passage from the judgment of Beaumont, C. J.:

"These goods were not delivered on the date of the last delivery; they were delivered on various dates during the preceding year, and one cannot alter that fact, nor can one read Article 52 as if the starting point of time was the accrual of the cause of action. The starting point of time is the date of the delivery of the goods, and it seems to me that, although the cause of action is one for the price of all the goods delivered, the Court is bound to check the various items which go to constitute that cause of action and to apply Article 52 to deliveries which took place more than three years before the filing of the suit."

4. If I may say so with respect this is the correct view, and applying this principle, the suit must be held to be barred by limitation except as regards the last item in the accounts, namely a sum of Rs. 6-8-0 which represents the price of goods delivered on 11th February 1953. The suit was filed on 10th February 1956 and this item alone can escape the bar of limitation, as the rest of the amount represents the value of goods delivered before 1953. The suit is therefore barred except in respect of a sum of Rs. 6-8-0.

2) In Hindustan Forest Company Vs. Lal Chand and others, (supra) the Hon'ble Supreme Court in Paragraph No.10 has observed as follows:-

"10.66 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.

3) In S.Muhammad Sultan Rowther and Co., registered Firm by its Partner A.S.Khader Sahib Vs. V.Manickam Chettiar, (supra) a Single Judge of this Court in Paragraph Nos.5 and 6 has observed as follows:-

"5. The plaintiff claimed that since the defendant had not intimated to him as to which of the supplies of goods the payments made by him from time to time should be adjusted, he as, creditor, has enforced his right given in the above sections of adjusting the payments to the value of the goods supplied in order of time, irrespective of whether such claims are barred or not. The decisions cited before me by the learned counsel for the defendant Atmaram Vinayak v. Lalji Lakhamshi, ILK 1940 Bom 127 : (AIR 1940 Bom 158) and Firm Gulabrai Narain Das v. Firm Illahi Bux Mohammad Ayub, AIR 1945 All 185 lay down the view that in cases of supply of goods by a tradesman to a buyer, where goods are supplied from time to time and payments are made from time to, time, the relevant article of the Limitation Act is Article 52 and that each delivery of goods

gives rise to an independent cause of action to recover the price thereof under Article 52 and that the claim in respect of deliveries which took place more than three years before the filing of the suit was barred by limitation.

But these decisions do not deal with the question of the right of the plaintiff to appropriate the payments to the outstandings under successive deliveries of goods in order of time, irrespective of the question whether the claim for the value of such deliveries is barred by limitation or not. Reference is made to the decision of the Allahabad High Court in *Puttural v. Jagannath*, AIR 1935 All 53, which I find has been referred to and followed in AIR 1945 AH 185, which lays down that where payments are made by the customer from time to time without specifying the items of goods to which they are to be credited, the supplier is entitled to credit them to the earlier of the items sold, and will, for the purposes of limitation be taken to have done so and he is not entitled to credit them to the entire balance due on the dealings in the sense of saving limitation for each and every item. I am of the opinion that the principle thus enumerated is the appropriate one to be applied to the case on hand.

6. The further question is, how this principle has to be applied to an account of the present kind. The amounts credited from time to time will go to wipe off the debits against the goods supplied from time to time until we reach a particular delivery of goods on a particular date which remains unadjusted either in whole or in part by the above procedure. If the date corresponding to the delivery which remains thus unadjusted, in whole or in part, is beyond three years from the date of the suit, the claim in respect of that amount will remain barred under Article 52 of the Limitation Act. But if the date corresponding to that delivery and the dates of subsequent deliveries which remain unadjusted, fall within the three-year period of limitation, the claim for the corresponding amounts will be in time. Applying the aforesaid principle to the plaintiff's statement of account (which the learned District Munsif has found to be correct and acceptable) I find that the payments on the credit column are sufficient to

wipe off all outstandings on account of the deliveries made prior to 4-12-1954.

Therefore, there is no question of the value of any of the deliveries made in this case being barred by time. The suit claim is in effect for the balance due after the plaintiff has exercised his right of appropriating the payments made from time to time against deliveries made from time to time in the order of time of the deliveries, according to the right given to the plaintiff to make such appropriation under Sections 60 and 61 of the Indian Contract Act. The suit claim is laid for the balance remaining outstanding and I hold that it is in time. The suit is decreed with costs and this revision petition is allowed with costs."

4) In Kesharichand Jaisukhalal Vs. Shillong Banking Corporation Ltd., Shillong (in Liquidation), (supra), the Hon'ble Supreme Court, in Paragraph No.11, has observed as follows:-

"11. 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".

5) In Cherunni Vs. Purushothama Iyer, (supra), a Single Judge of the Kerala High Court in Paragraph No.2 has observed as follows:-

"2. I see no reason to interfere with the judgment of the learned appellate Judge. It is admitted that the last purchase on credit by the defendant was on 14-3-1960. After that date also there were purchases, but they were all cash purchases. The plaintiff would put forward the case that after the balance was struck on the 14th of March, 1960 there was an agreement by the defendant to pay in instalments and some payments by cheque were also made. He wants the Court to construe these payments as amounting to acknowledgement of the debt under Section 19 of the Limitation Act. This is not possible. The article of the Limitation Act applicable to the transaction is Article 14 (Article 52 of the old Act).

Under this Article even though goods were delivered to the defendant from time to time on account, the cause of action will be one for all the items delivered, and the starting point of limitation in respect of each item of account must be taken to be the date of delivery of the goods under that item of account. The last date of delivery cannot be taken to be the date of delivery of goods on earlier occasions. (See Naravana Pillai v. Narayanan, AIR 1957 Ker 93) Atmaram Vinayak v. Lalit Lakhamsi, AIR 1940 Bom 158 and Firm Gulabrai v. Firm Ilahi Bux. (AIR 1945 All 185). In the present case as already indicated, the last purchase, and the delivery of the goods was on the 14th of March, 1960. The payment by cheque cannot save limitation of the goods already sold and delivered.

The plaintiff has no case that there was a settlement on 14th March 1960 and that thereafter the defendant agreed to pay in instalments. There is nothing in support of this, either in the plaintiffs notice Ext. A7 or

in his plaint. There are also no materials to support it. Therefore, the article of the Limitation Act to be applied is. Article 14 and when that is applied, all purchases earlier to 14th March, 1960, are barred. The alleged settlement must be ruled out for the further reason that no accounts were signed by the defendant or his agent."

16. From the observations made in the aforesaid decisions, it can be deduced that for the creation of an open, current and mutual account, there must be an intention between the parties, either express or implied, which may be deducible from the course of dealings to have mutual dealings, creating reciprocal obligations, independent of each other. In this case, there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the seller (plaintiff) had under taken to make delivery of goods and the buyer (defendant) had agreed to pay for them. Payments were made in discharge of the obligation created in the buyer by the deliveries made to him to pay the price of the goods delivered and did not create any obligation on the seller in favour of the buyer. The dealings between the parties disclose a single contractual relationship i.e. of buyer and seller between them, the account between them cannot be termed as a mutual account. Therefore, Article 1 of the Schedule to the Limitation Act, 1963, has no application in the present case.

17. Now, let us see whether Article 14 of the Schedule to the Limitation Act, will apply to the facts of this case. In the instant case, according to the plaintiff, it has continuously supplied the goods to the defendant from the year 2006. It's further case is that the defendant has not paid the amount then and there and whatever amount he paid has been given credit to and hence, a continuous account has been maintained. Though the defendant in his written statement has taken a plea that there was no continuous account, DW1 has admitted in his cross examination that for the goods supplied, they used to pay part-wise and not on the basis of any specific bills. He also admitted that from 2005, it was a running account. So, it is clear that the defendant has not made payment on each and every items of the goods delivered and not settled the accounts then and there. The evidence adduced by both sides would show that the plaintiff has been continuously supplying the goods to the defendant and the defendant has been making payments intermittently and both of them have been maintaining continuous account. The account between the parties are open, running, but non-mutual account. Therefore, Article 14 of the Schedule to the Limitation Act, 1963, will not apply to the facts of this case.

18. At this juncture, it would be relevant to refer the decision in Bharath Skins Corporation Vs. Taneja Skins Company Pvt. Ltd., (2012) DLT 290, wherein, in the similar set of facts, a Division Bench of the Delhi High Court, after referring to the various decisions including Hindustan Forest Company Vs. Lal Chand and others (supra), Kesharichand Jaisukhalal Vs. Shillong Banking Corporation Ltd., (supra) and elaborate discussions has held that when there was no mutual account, Article 1 of the Schedule to the Limitation Act, 1963, has no application. It was also held that, it was a case of open running and non mutual account between the buyer and seller and as such Article 14 also does not apply. Finally, the Hon'ble Division Bench held that there being no Article in the Schedule to the Limitation Act, 1963, dealing with suits for recovery for money due on running and current but a non-mutual account, the residual Article viz., Article 113 applies to such suit.

19. For proper appreciation, the relevant portions of the Judgment of the aforesaid Division Bench is extracted hereunder:-

15. In view of the above discussion, since the dealings between the parties disclose a single contractual relationship i.e. of buyer and seller between them, the account between them cannot be termed as a „mutual“ account. As a necessary corollary, Article 1 of the Schedule to the Limitation Act, 1963 has no application in the present case.

16. Having held that Article 1 of the Schedule to the Limitation Act, 1963 does not apply in the present case, the further question which arises for consideration is, which Article in the Schedule to the Limitation Act, 1963 applies in the present case.

17. It has been submitted by the learned counsel appearing for the appellant that Article 14 of the Schedule to the Limitation Act, 1963 applies in the present case and that on applying the said article the suit would be barred by limitation. Learned counsel for the respondent conceded that if Article 14 of the Schedule to the Limitation Act 1963 would apply, the claim would be barred by limitation. But had urged that Article 1 of the Schedule to the Limitation Act, 1963 would be attracted, a plea which we have already rejected. Thus, we consider whether Article 14 of the Schedule to the Limitation Act is attracted.

18. Article 14 of the Schedule to the Limitation Act, 1963 reads as under:-

No	Description of suit	Period of Limitation	Time from which period begins to run
14.	For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years	The date of the delivery of the goods.

19. In the instant case, the account between the parties was an open, running and non-mutual account.

20. In case of a running and non-mutual account between the buyer and seller, when goods are delivered by the seller to the buyer, the value of the goods is debited in the debit column and when amounts are paid by the buyer to the seller, they are entered in the credit column. The difference is continuously struck in the column for balance. In such a case, when the buyer defaults to make balance payment, the seller's action is not for the price of goods sold and delivered but for the balance due at the foot of an account. Thus, Article 14 would have no application in suits of recovery of money due on a running and a non-mutual current account between the buyer and seller.

21. In this regards, it is important to note the following observations made in the decision reported as (1849) 7 C. 3. 106 Dood v. Wigley when it was observed:-

"Where goods are ordered of a tradesman on the 1st of January and distinct orders for other goods are given on the 2nd, 3rd, 4th, 5th, etc., if from the previous dealings between the parties, or from general usage, or otherwise, it is to be inferred that it was contemplated by the parties, that, in the event of the dealing continuing, the several items should be included in the monthly, quarterly, or yearly bills, the result of such an arrangement, and the legal position of the parties, seems to be this,-upon the delivery and acceptance of the first parcel of goods, delivered on the 1st of January, an entire contract is created, and a complete cause of action accrues, the tradesman, being) under no engagement to sell other goods, or to give credit

beyond the price of the articles then delivered : when, on a subsequent day, other goods are delivered and accepted, a new contract arises, not simply a contract to pay for the goods then delivered, but a new entire contract by which the tradesman waives his existing right to payment off the goods delivered on the 1st of January, and the purchaser agrees to pay for both parcels as upon one entire sale... After the successive waiver and extinguishment of each preceding contract, the only subsisting contract and cause of action ex contract will be the last."

22. The observations in the decision reported as (1856) 18 C.B. 325 Bonsey v Woodsworth are also worthy of being noted; and are as under:-

"where a tradesman has a bill against a party for any amount, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

23. The upshot of the above discussion is that Article 14 of the Schedule to the Limitation Act, 1963 does not apply to suits for recovery of money due on a running and current but a non-mutual account between the buyer and seller i.e. an account of the kind with which we are dealing.

24. There being no Article in the Schedule to the Limitation Act, 1963 dealing with suits for recovery of money due on running and current but non-mutual accounts, in such circumstances, the residual article viz. Article 113 applies to such suits.

25. Under Article 113, the period for limitation for filing a suit is three years and the same begins to run when the right to sue would accrue when claim was denied in response to the legal notice dated 26.06.1985 on 13.07.1985 but since `7,000/- was paid on 13.07.1985 and 24.07.1985 (`2,000/- on the former date and `5,000/- on the latter date), limitation would commence from 24.07.1985. The suit being filed on 02.09.1985, governed for purposes of limitation by Article 113 the suit would be within limitation."

20. The aforesaid decision will squarely apply to the facts of the present case. In this case also, the account between the parties are running and current but non-mutual. Therefore, Article 14 of the Schedule to the Limitation Act, 1963, also has no application to the facts of this case. In view of the aforesaid decision, the residual Article viz., Article 113 of the Schedule to the Limitation Act, 1963, would apply to the present case.

21. In this case, the last sale was made on 31.05.2007. The plaintiff had issued legal notice claiming amount on 10.07.2008, the defendant had denied the plaintiff's claim by the reply notice dated 27.07.2008. So, in view of the Article 113 of the Schedule to the Limitation Act, 1963, the right to sue arose on the date of denial i.e., on 27.07.2008. From that date, the suit has to be filed within three years. In this case, the suit was filed on 03.02.2010. So, the suit is within limitation. Accordingly, this point is answered in favour of the plaintiff.

22. Point No.2:

The learned Senior Counsel for the appellant has contended that the plaintiff has produced only extract of the account statements, but they failed to produce the original accounts and hence, the suit is not maintainable. He further contended that as per Section 34 of the Indian Evidence Act, the statement of accounts alone is not sufficient to charge any person with liability. He further contended that the plaintiff has not examined the author of the accounts and hence no reliance can be placed upon the account statement filed by the plaintiff.

23. In support of the aforesaid contentions, the learned Senior Counsel has relied upon the following decisions:-

1) Chandradhar Goswami and others, Vs. Gauhati Bank Ltd., AIR 1967 SC 1058.

2) P.Sood & Co., (Manufacturing), represented by its Partner, Krishna Kumar Sood, Vs. Peerchand Misrimalji Bhansali, 2005 (3) CTC 12.

3) S.Babu Vs. J.K.Industries Limited, 2008-3-L.W.609.

24. The learned counsel for the respondent/plaintiff, on the contrary, contended that in the written statement, the defendant has admitted the transactions between the plaintiff and himself. He further contended that according to the defendant, he has paid the amount then and there and hence, there is no amount due to the plaintiff and in such a case, the burden is upon the defendant to prove that he has paid the entire amount, but he failed to do so. He further contended that the plaintiff has not solely depends upon the accounts

statement, but it has also produced bills in support of its claim and as such the plaintiff has fulfilled the conditions stipulated under Section 34 of the Indian Evidence Act.

25. In the instant case, the defendant has not denied the transaction. The case of the defendant is that he has settled the amount whenever the goods were delivered. So, the burden is upon the defendant to prove that he has paid the amount. In support of his contention, the defendant relied upon the statement of accounts maintained by him (Ex.D3). The said statement contains so many corrections. So, the learned Judge has rightly rejected the said statement.

26. According to the plaintiff, the defendant used to make payment only through cheques. PW1 has specifically stated in his evidence that the defendant never paid any cash, but, DW1 has stated that they used to make payments either by way of cash or cheque. If the defendant has paid the amount by cash, he would have produced the voucher to evident the same. But the defendant has not produced any voucher. Therefore, the contention of the defendant that he has paid the entire amount due to the plaintiff is not acceptable.

27. From the decisions cited by the learned senior counsel for the appellant/defendant, it is clear that when a plaintiff filed a suit for recovery of money based on the account, he should produce the original account book before the Court and prove the entries made therein are true. But in this case, the defendant has not disputed the entries made in the account statement produced by the plaintiff with regard to the supply of goods. His only defence is that he has paid the amount whenever, the goods were delivered. But, he failed to prove the same. Further, the plaintiff not only relied upon the statement of accounts, but also relied upon the bills. The plaintiff has produced the bills in support of the entries made in the statement of accounts and marked as Ex.P4 series. The defendant also produced the bills which were issued by the plaintiff and marked as Ex.D1 series. So, the plaintiff has satisfied the conditions stipulated under Section 34 of the Indian Evidence Act. Further, since the defendant has not discharged the burden that he has paid the amount due to the plaintiff, non-examination of the author of the accounts will not have any bearing in this case.

28. It is to be pointed out that in the written statement, the defendant has taken a plea of total discharge of the amount due to the plaintiff. But, DW1 has stated in his evidence that as per their account, the defendant is liable to pay a sum of Rs.4,93,922.30/- as on 31.05.2007. As already stated that no reliance can be placed upon the statement of accounts produced by the defendant (Ex.D3) as it contains so many

corrections. Apart from Ex.D3, the defendant has not produced any other document to show that he has paid all the amount due to the plaintiff. The oral evidence of PW1 Ex.P2 to Ex.P4 series and Ex.D1 series would clearly establish that a sum of Rs.17,16,702/- was due as on 31.05.2007.

29. In so far as payment of interest is concerned, the learned Senior Counsel for the appellant/defendant has contended that since there is no contract for payment of interest, the plaintiff is not entitled to claim interest. He further contended that the learned Single Judge did not consider the plea of the defendant that the interest charged by the plaintiff is usurious. He further contended that the plaintiff is not entitled to claim interest at the rate of 24% per annum. He further contended that the plaintiff is not entitled to capitalize the interest and ask for interest for the said amount.

30. The learned Counsel for the respondent/plaintiff on the contrary, contended that eventhough there is no contract for payment of interest, as per the mercantile usage, the plaintiff is entitled to claim interest. He further contended that as per Section 34 of CPC., the plaintiff is entitled to claim further interest for the principal sum adjudged. He further submitted that the principal sum adjudged would be the sum actually loaned plus the amount of interest on periodical rests and therefore, the plaintiff is entitled to capitalise the interest. In support of the said contentions, he relied upon the decision in Central Bank of India Vs. Ravindra and others, (2002) 1 SCC 367.

31. In this case, admittedly, there is no contract for payment of interest. In the said circumstances, it would be relevant to refer Section 61 of the Sale of Goods Act, 1930, which reads as follows:-

"61. Interest by way of damages and special damages.-

(1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case whereby law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price--

(a) to the seller in a suit by him for the amount of the price-from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller- from the date on which the payment was made."

32. From the reading of Sub Section (2) of Section 61 of the Sale of Goods Act, it is clear that in the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price to the seller in a suit filed by him for the amount of the price, from the date of the tender of the goods or from the date on which the price was payable. In H.S.Ahmed Hussain and another Vs. Ifrah Ahmed and another, (2002) 6 SCC 52, the Hon'ble Supreme Court, in the case of motor accident claim, has held that the claimants are entitled to get interest at the rate of 9% p.a. In Clariant International Ltd., and another Vs. Securities & Exchange Board of India, (2004) 8 SCC 524, the Hon'ble Supreme Court has held that in the absence of any agreement or statutory provision or mercantile usage, interest payable can be only at the market rate and such interest is payable upon establishment of totality of circumstances justifying exercise of such equitable jurisdiction. It was also held that in this regard, the Courts of law can take judicial notice of both inflation as also fall in bank rate of interest. So, we can take judicial notice about the rate of interest charged by the nationalised banks. Now, the nationalised banks are charging interest from 8% to 10% per annum for the loans advanced by them for commercial transactions. Therefore, this Court is of the view that awarding of 9% interest per annum from the date of the amount due would meet the ends of justice.

33. The next question which arises for consideration is whether the plaintiff is entitled to capitalize the interest. For capitalization of the interest, the plaintiff relied upon the decision in Central Bank of India Vs. Ravindra and others, (supra) wherein, the Hon'ble Supreme Court in paragraph No.41 has held that "the principal sum adjudged would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties or the established banking practice has stood capitalised". In this case as already pointed out that there is no contract for payment of interest. As per the aforesaid decision where there is a contract between the parties for payment of interest on periodical rests, then, the interest can be capitalised. But in this case, there was no contract at all for payment of interest. Therefore, the plaintiff is not entitled to capitalise the interest. The plaintiff is entitled to ask for interest only for the principal amount i.e., Rs.17,16,702/- at the rate of 9% per annum.

34. For the aforesaid reasons, we hold that the plaintiff is entitled to claim interest at the rate of 9% p.a., for the principal amount of Rs.17,16,702/- from 31.05.2007 till the date of decree. Since it is a commercial transaction, we are of the view that the plaintiff is entitled to get further interest on the same rate for the period from the date of decree till the date of realisation. Accordingly, this point is answered.

35. Point No.3:

In the result, this appeal is partly allowed. We modified the decree passed by the learned Judge in C.S.No.160 of 2010 dated 07.02.2017 as follows:-

i) that the defendant is directed to pay a sum of Rs.17,16,702/- with interest at the rate of 9% p.a., from 31.05.2007 till the date of realization and;

ii) that the defendant is directed to pay the proportionate cost of the suit and Appeal to the plaintiff.

Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VII)

//True copy//

Sub Assistant Registrar

dna/gv

TO

1. The Sub Assistant Registrar,
High Court, Madras.

+1cc to Mr.V.J.Latha, Advocate SR.No.45171

+1cc to Mr.K.Azhagu Raman, Advocate SR.No.45284

OSA.No.31 of 2018
and

CMP.No.1852 of 2018

VD(CO)
GN(07/08/2018)

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