

* IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

* FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N.BALAYOGI

+ Appeal Suit No.63 of 2008

% Date: 20-6-2018

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1. M/s. Sri Gayatri Fertilisers & Chemicals, rep. by its Managing Partner, A Venkateswara Rao, 12-6-18/3, Eluru Road, Tadepalligudem, West Godavari District.
2. A. Venkateswara Rao, S/o. Bullaiah, Managing Partner, M/s. Sri Gayatri Fertilisers & Chemicals, 12-6-18/3, Eluru Road, Tadepalligudem, West Godavari District.

...Appellants/defendants

Vs.

M/s. Madras Fertilisers Ltd.,
Rep. by its Executive Director
Personnel Administration,
Mr. R.R. Pandalai,
At Manali, Madras – 68.

... Respondent/Plaintiff

! Counsel for the Appellants : Mr. Y. Ramatirtha

Counsel for Respondent : Mrs. I. Mammu Vani

< Gist:

> Head Note:

? Cases referred:

1. (1993) 2 SCC 130
2. (2015) 13 SSC 514
3. (2008) 2 SCC 444

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N. BALAYOGI

A.S.No.63 of 2008

JUDGMENT: (per V.Ramasubramanian, J.)

Challenging a money decree, the defendants have come up with the above appeal.

2. Heard Mr. Y. Ramatirtha, learned counsel for the appellant and Smt. I. Mammu Vani, learned counsel for the respondent.

3. The respondent filed a suit in O.S.No.95 of 1999 on the file of the II Additional District Court, Vijayawada for recovery of a sum of Rs.12,60,946=85 together with interest at 22% per annum, on the ground that the 1st defendant, which is a partnership firm dealing in fertilizers and chemicals, of which the 2nd defendant was the Managing Partner, purchased fertilizers and pesticides on credit basis from the plaintiff and that there was a mutual, open and current account, as per which a sum of Rs.10,53,607-38 became due and payable by 01.04.1996 and that after adjusting the deposits made by the defendants, a sum of Rs.12,60,946-85 (inclusive of interest) became due and payable.

4. The appellants/defendants filed a written statement contending *inter alia* that the suit was barred by limitation; that there was no territorial jurisdiction for the Court at Vijayawada to entertain the suit; that there was no agreement to pay interest much less interest at the rate of 22% per annum; and that the transactions did not relate to a open, mutual and current account.

5. On the basis of the pleadings, the trial Court framed the following issues:

1. Whether the person who signed the plaint is competent to file the suit and sign the material papers?
2. Whether this Court has no territorial jurisdiction to entertain the suit?
3. Whether the suit is barred by time?
4. Whether the account furnished by the plaintiff reflects true transactions, the plaintiff is entitled to a decree?
5. Whether the plaintiff is entitled to claim interest and if so, at what rate?
6. To what relief?

6. The respondent/plaintiff examined the Regional Manager of the Company as PW.1 and filed 11 documents as exhibits. The 2nd appellant/ 2nd defendant examined himself as DW.1 and filed a certificate issued by the Manager of the Andhra Bank, Tadepalligudem, as the only exhibit on his side.

7. On the basis of the evidence on record, the trial Court held that the Executive Director of the respondent/plaintiff was competent to sign the plaint and the material papers. On issue No.2, the trial Court held that all the transactions were carried out in the Regional office, though orders were obtained from the dealers and that since invoices were raised at Vijayawada and the cheques issued by the defendants were adjusted to the Bank account at Vijayawada, the Court had territorial jurisdiction to decide the lis.

8. On issue No.3, the Court below held that since the cheque issued by the defendant was adjusted in the account of the plaintiff on 23.07.1996, as per Ex.A.8, the suit filed on 23.07.1999 was within the period of limitation. On issue No.4, the Court below held that the suit claim was established by Ex.A.2, which is a computerized copy of the statement of account, maintained by the plaintiff. On issue No.5, the Court below held that in commercial transactions, the rate of interest ranged from 20% to 22% and that therefore, on an average 22% could

be awarded. Accordingly, the trial Court decreed the suit, answering issue No.6 in favour of the plaintiff, as prayed for.

9. Assailing the judgment and decree of the trial Court, it is contended by Mr. Y. Ramatirtha, learned counsel for the appellants – (1) that when the entire cause of action arose in Tadepalligudem and the defendants reside and carried on business in Tadepalligudem, it was not correct on the part of the trial Court to uphold the territorial jurisdiction of the Court in Vijayawada, merely on the basis of the pleadings without proof that invoices were raised at Vijayawada; (2) that even the last cheque that was encashed by the plaintiffs, was actually on 18.07.1996 as revealed by the letter of the Andhra Bank, filed as Ex.B.1 and that the date on which the plaintiff made a credit entry in their account, cannot save the limitation; (3) that when the case of the plaintiff during the trial was completely different from their case in the plaint, the suit ought to have been thrown out; and (4) that in any case, the awarding of interest at 22% is without any basis and contrary to law.

10. In response to the above submissions, it is contended by Smt. I. Mammu Vani, learned counsel for the respondent that a part of the cause of action arose at Vijayawada where the plaintiff had a branch office, wherefrom invoices were raised and wherein the cheques issued by the defendants were encashed; that the credit advise about the encashment of the last cheque was issued only on 23.07.1996; that in any case, even as per the letters admittedly written by the defendants on 04.01.1996 and 14.03.1996 filed as Exs.A.9 and A.10, the security deposit of Rs.1,50,000/- came to be encashed against the dues on 30.09.1996 and hence the last date for filing the suit was only 29.09.1999; that as per the oral evidence, there was a contract for payment of interest at 22%

per annum; and that the computer printout of the accounts filed as Ex.A.2 clearly showed that there was a open, mutual and current account.

11. We have carefully considered the rival contentions. From the rival contentions we are of the view that the following points arise for determination in the above appeal.

1. Whether the Court in Vijayawada had territorial jurisdiction to entertain the suit?
2. Whether the suit was barred by limitation?
3. Whether the plaintiff had established the suit transactions on the basis of a mutual, open and current account showing the liability of the defendants? And
4. Whether the award of interest at 22% per annum was correct?

POINT No.1:

12. The first point arising for determination is as to the territorial jurisdiction of the Court in Vijayawada to entertain the suit.

13. Unfortunately for the respondent, there was no whisper in any paragraph of the plaint as to where a part or the whole of the cause of action arose. The plaint comprises of 10 paragraphs. Paragraphs 7 to 10 respectively contain details with regard to cause of action, particulars of suit claim, valuation for the purpose of Court fees and jurisdiction and the reliefs prayed for. The first and second paragraphs contain the long cause title. That leaves us with paragraph Nos.3 to 6.

14. In paragraphs 3 to 6, there is no whisper as to where the invoices were raised, where supplies were made, where cheques were issued, where cheques were encashed and where any part of the cause of action arose.

15. But in the written statement, the defendants raised a specific plea in paragraph 5 contending that the registered office of the plaintiff was at Madras and the stocks were kept by the plaintiff at

Tadepalligudem; that the contract for the purchase of goods was accepted at Tadepalligudem; that the plaintiff's representative used to collect empty cheques from the defendants as well as other people from Tadepalligudem and that there was not even a contract for conferring jurisdiction upon the Courts in Vijayawada.

16. At least after such a clear cut stand taken by the defendants in the written statement, the plaintiff ought to have woken up and come up with additional particulars. The plaintiff did not do so complicating matters for themselves. Even PW.1, the only witness examined on the part of the plaintiff did not come up with any particulars regarding the place where invoices were raised, the place where supplies were made, the place where contract was entered into and the place where payments were made. In the affidavit filed by PW.1 in lieu of chief-examination, he merely repeated the averments contained in the plaint and did not even advert to the details that are necessary to confer jurisdiction upon the Court in Vijayawada.

17. During corss-examination, PW.1 admitted (1) that there is an appointment letter whereby the 1st defendant was appointed as a dealer; (2) that such appointment was limited to the town of Tadepalligudem; (3) that whatever stocks were supplied to the defendants, they were supplied at Tadepalligudem; (4) that the marketing officer at Tadepalligudem obtained orders from dealers, particularly, the defendants for supply of stocks; (5) that all the orders for supply of stocks were obtained from the defendants by the marketing officer at Tadepalligudem; (6) that the stocks were supplied to Tadepalligudem; and (7) that the collection of cheques/Demand Drafts was at Tadepalligudem.

18. All the above admissions made by PW.1 clearly demonstrate that no part of the cause of action arose at Vijayawada. Admittedly, the orders for supply of goods was taken by the marketing officer of the plaintiff-company from the consumers like the defendants at Tadepalligudem, the stocks were supplied at Tadepalligudem and cheques and Demand Drafts were also collected from Tadepalligudem. Merely because the cheques were encashed at the Branch of the plaintiff's Bank in Vijayawada, the Courts in Vijayawada cannot be clothed with jurisdiction. Hence, the trial Court was wrong in holding that the Court in Vijayawada had jurisdiction to entertain the suit.

19. However, relying upon the judgments of the Supreme Court in (1) R.S.D.V Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd.,¹; and (2) K.P. Ranga Rao v. K.V. Venkatesham & ors.,², it is contended by Smt. I. Mammu Vani, learned counsel for the respondent/plaintiff that unless the appellants established "consequential failure of justice", they are not entitled to invoke Section 21 C.P.C.

20. We have carefully considered the above submissions. It is true that as held by the Supreme Court in the aforesaid two cases, objection, as to the place of issuing, may be entertained by an appellate or revisional Court, only if the following three conditions are satisfied – (1) that such objection was taken in the Court of first instance at the earliest possible opportunity; (2) that such objection was taken either at or before the settlement of issues, where issues are settled; and (3) that there has been a consequent failure of justice.

21. The appellants/defendants have not shown how failure of justice resulted from the suit being instituted in the Court at Vijayawada.

¹ (1993) 2 SCC 130

² (2015) 13 SSC 514

In the grounds of appeal, the appellants/defendants have not even raised a ground that there was a failure of justice consequent upon a wrong Court assuming jurisdiction. If the appellants had at least taken a ground that they were handicapped from summoning some witnesses or producing some records or engaging a counsel to defendants themselves, the appellants could argue that there was a failure of justice, consequent upon the suit being instituted at Vijayawada. In the absence of any ground about the failure of justice, we have no alternative except to answer Point No.1 against the appellants, despite our finding that the Court in Vijayawada did not have territorial jurisdiction to decide the lis.

POINT No.2:

22. The second point revolves around limitation.

23. As per the plaint, the plaintiff started supplying fertilizers from 05.01.1996. According to the plaintiff there was an open, mutual and current account as per which a sum of Rs.10,53,807-38 became due and payable by 01.04.1996. The last of the cheques issued by the 1st defendant was said to have been encashed on 23.07.1996. Apart from this, the security deposit of Rs.1,50,000/- made by the defendants at the time of commencement of the business transactions was encashed on 30.09.1996, in accordance with Exs.A.9 and A.10-letters, dated 04.01.1996 and 14.03.1996. Therefore, it is contended that the plaint presented on 23.07.1999, was within the period of limitation of 3 years.

24. In other words, the plaintiff attempted to save limitation on the basis of two things, namely, (1) the realization of a cheque for Rs.75,000/- on 23.07.1996; and (2) the encashment of the security deposits on 30.09.1996.

25. The plaintiff filed (i) the Certificate of Incorporation of the Company as Ex.A-1, (ii) the computer printout of the Statement of Accounts of the plaintiff-company, in respect the account of the 1st appellant/1st defendant as Ex.A-2, (iii) the Demand Notice issued on 15-4-1999 as Ex.A-3, (iv) the office copy of the Notice as Ex.A-4, (v) the copy of the reply as Ex.A-5, (vi) the true copy of the fax message given to P.W.1 authorising him to adduce evidence as Ex.A-6, (vii) the copy of the Memorandum and Articles of Association of the plaintiff as Ex.A-7, (viii) the copy of the cheque realization advice dated 23-7-1996 as Ex.A-8, (ix) the letters given by the defendant to the plaintiff on 04-01-1996 and 14-3-1996 as Exs.A-9 and A-10 and (x) the attested copy of the claim form for the subsidiary grant issued by the Government as Ex.A-11.

26. According to the plaintiff, an open, mutual and current account was maintained. This is how the starting point for the period of limitation is taken by the plaintiff to be the last entry in such an open, mutual and current account.

27. It is needless to point out that if several transactions between two parties had taken place on a one-on-one basis, independent of each other, limitation will start running from each of the transactions separately. But if there is an open, mutual and current account, limitation will start running from the last of the transactions.

28. A careful look at Ex.A-2 will show that the last of the debit entries was made on 31-3-1996. Thereafter, a credit entry is made on 23-7-1996, in respect of an amount collected through a cheque bearing No.648287. But this cheque was obviously issued in March, 1996, as seen from the number 481024 appearing in the 2nd column under the heading

“MO-WROPA”, in Ex.A-2, both as against the date 31-3-1996 and the date 23-7-1996.

29. Interestingly, five cheques which dishonoured on 05-7-1996 and 08-7-1996 are included in the Statement of Account Ex.A-2 after the entry relating to 23-7-1996. Thereafter, there is another entry with the caption “SDD ADJ.CREDIT NOTE” which is dated 30-9-1996, relating to the encashment of a sum of Rs.1,57,940=53 ps from the deposits.

30. The limitation could not have started from 30-9-1996, merely on the basis of a unilateral entry made by the respondent/plaintiff in their books of account, encashing the security deposits given under Exs.A-9 and A-10. Exs.A-9 and A-10 are respectively dated 04-01-1996 and 14-3-1996. As per the terms and conditions contained in Exs.A-9 and A-10, the deposits made thereunder were to be with the plaintiff for a minimum period of one year. Merely because they can encash the deposit at any time, the same will not tantamount to an acknowledgement of liability on the part of the appellants/defendants. If a unilateral adjustment of a security deposit will not constitute acknowledgement of liability, the same cannot extend the period of limitation.

31. As we have indicated earlier, the last of the transactions even as per Ex.A-2, had taken place on 31-3-1996. Therefore, limitation in the normal course would have started running from 01-4-1996 and the same would have expired on 31-3-1999. But the plaint was presented on 23-7-1999. Such a presentation would have been within the period of limitation only if either some payment or an acknowledgement of liability had taken place after 1-4-1996. The plaintiff pleaded -- (i) a payment on 23-7-1996 and (ii) a payment/acknowledgement of liability on 30-9-1996.

32. What was done on 30-9-1996, cannot be taken as a payment, as it was only an encashment of a security deposit made in January and March, 1996. If the encashment made on 30-9-1996 cannot be taken to be a payment by the defendant, it should at least constitute acknowledgement of liability. To constitute acknowledgement of liability, under Section 18 of the Limitation Act, 1963, such acknowledgement should have been made in writing, before the expiration of the period prescribed for the institution of a suit. Though the admission or acknowledgement need not be in regard to any precise amount or by expressed words, it must emanate from the party under liability. A useful reference may be made in this regard to the decision of a 3-member Bench of the Supreme Court in *J.C. Budhraj v. Chairman, Orissa Mining Corporation Ltd*³.

33. In the case on hand, what happened on 30-9-1996 was the encashment of the security deposit made by the defendants in January and March, 1996. Therefore, such a unilateral act on the part of the plaintiff cannot be construed either as payment or as acknowledgement of liability capable of saving the limitation.

34. That takes us to the question whether the last payment was on 23-7-1996. As we have indicated earlier, the realization of an amount of Rs.75,000/- on 23-7-1996 was in respect of a cheque bearing No.648287. The date of issue of this cheque is not mentioned anywhere in the pleadings.

35. But in Ex.A-5, dated 08-10-1996, Reply Notice given by the defendants to the counsel for the plaintiff, in response to the pre-suit notice, the defendants claimed that a blank cheque bearing No.648287

³ (2008) 2 SCC 444

lying with the plaintiff, was filled up and encashed on 18-7-1996. The relevant portion of the reply notice dated 08-10-1996 filed by the plaintiff themselves as Ex.A-5 is extracted as follows:

“(vi) It is apparent that in business usage, more particularly Fertiliser business the factory concern used to demand for post dated cheques or empty cheques towards abundant caution for bulk transactions in between the factory vs dealers and accordingly as per the demand my clients handed over certain empty cheques with ardent hope to continue smooth business with your client. Evidently on 13-3-1996 the empty cheque bearing No.648294 which was filled by your client an amount of Rs.83,200/- was honoured by my client. Likewise on 18-7-1996 a cheque bearing No.648287 which was filled by your client as Rs.75,000/- was honoured by my client which clearly shows that your clients are habituated for procuring empty cheques from various persons including my clients. It is also apparent that the alleged cheque bearing No.648295 dated 13-3-1996 which is said to be dishonoured but the cheque bearing No.648287 was honoured on 18-7-1996 which is clear enough that my clients are *bona fide* persons for honouring the cheques for the debts due.”

36. Thus, it is clear that the defendant had taken a positive stand at the earliest point of time viz., under Ex.A-5 dated 08-10-1996 that the cheque bearing No.648287 was honoured on 18-7-1996. This was also corroborated by Ex.B-1, dated 27-6-2006, filed by the defendant. This Ex.B-1 is a letter of the Andhra Bank dated 27-6-2006 addressed to the plaintiff informing them that the amount representing the cheque was debited to the account of the defendant on 18-7-1996.

37. In such circumstances, Ex.A-8 and the entry in Ex.A-2 as though the amount of Rs.75,000/- was realized only on 23-7-1996 cannot be taken to be correct. In fact, there is no rebuttal by the plaintiff, to the claim made by the defendant that a blank cheque was encashed on 18-7-1996. The date of encashment is seen to be 18-7-1996 from Ex.B-1.

Merely because the intimation about such encashment reached the plaintiff after five days on 23-7-1996, the said date cannot be taken to be the starting date for counting the period of limitation.

38. Therefore, we are of the considered view that at the most, the date 18-7-1996 can be taken to be the date of commencement of the period of limitation. Hence, the suit ought to have been filed on or before 18-7-1999. But it was filed on 23-7-1999. Hence, the suit was clearly barred by limitation.

POINT No.3:

39. The 3rd point arising for determination is as to whether the plaintiff was able to establish the suit transactions on the basis of an open, mutual and current account.

40. Ex.A-2 is a computer printout of the accounts statement of the plaintiff-company. Interestingly, this statement is confined only to the 1st defendant. The plaintiff is not a banker to whom the provisions of the Bankers' Books Evidence Act, 1891 would apply. Therefore, the plaintiff ought to have proved the entries made in Ex.A-2. Unfortunately, P.W.1 merely marked Ex.A-2 and did not speak about any purchase orders or invoices or delivery challans. At the most, Ex.A-2 established that there was a mutual, open and current account. It did not establish the number of invoices raised, the quantity of supplies made, the payments realized and the balance due. We do not know what prevented the plaintiff from filing the purchase orders or invoices or delivery challans.

41. But in the light of the finding that we have recorded on the question of limitation, it is not necessary for us to go into this question. We are answered the question of limitation, assuming that these

transactions had actually taken place. Therefore, we would answer point No.3 in favour of the respondent/plaintiff.

POINT No.4:

42. Point No.4 arising for determination is about the rate of interest awarded by the Court. The Court awarded 22% merely on presumptions and surmises, as seen from paragraph-33 of the judgment. The plaintiff laid a claim for interest at 22%, without any basis. In paragraph-4 of the plaint, the plaintiff claimed entitlement to interest at 22%. But the plaintiff did not indicate the basis on which the interest was so claimed. The plaintiff did not even plead any trade practice for claiming interest at 22% per annum.

43. But in the course of evidence, P.W.1 claimed that there was an agreement entered into by the 1st defendant on 05-01-1996 and that under the said agreement, interest was payable at 22% per annum. However, the agreement was never produced. A claim for interest can be based either upon an agreement in writing or upon a trade practice in a commercial transaction. The plaintiff did not claim any trade practice. But P.W.1 claimed that it was based upon on an agreement. Such an agreement never saw the light of the day.

44. But unfortunately, the Court below presumed in paragraph-33 of its judgment that in commercial transactions, the rate of interest was between 20% and 25% and that the Court would take the average of 22%. This is completely baseless.

45. Therefore, we hold on point No.4 that the award of interest at 22% per annum was wholly illegal. Point No.4 is answered accordingly.

46. In the result, we are of the considered view that the judgment and decree of the Court below are unsustainable and are liable to be set

aside. Hence, the appeal is allowed and the judgment and decree of the Court below are set aside and the suit filed by the respondent/plaintiff will stand dismissed. However, we refuse to award costs in favour of the appellants, as they have succeeded on a technicality. Therefore, the appeal is allowed but the parties are directed to bear their respective costs throughout. The interlocutory applications, if any, pending in this appeal suit shall stand closed.

V.RAMASUBRAMANIAN, J.

N.BALAYOGI, J.

20th June, 2018.
Js/Ak



HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N.BALAYOGI

Appeal Suit No.63 of 2008
(per VRS, J.)



20th June, 2018.
(Ak)