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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 5th March, 2018

\+ **RFA 145/2007 & CM APPL. 419/2008**

GOA OPTOLAB P.LTD. ..... Appellant

Through: Mr. Sushant Kumar and Mr. Aditya Singh, Advocates. (M:8953712999)

versus

NARESH GUPTA ..... Respondent

Through: Mr. R. M. Gupta, Advocate (M:9891363447) with Respondent in person.

CORAM:
JUSTICE PRATHIBA M. SINGH

PRATHIBA M. SINGH, J. (Oral)

1. Present appeal arises out of the impugned judgment and order dated 22nd December, 2006 by which the suit filed by the Respondent/Plaintiff (*hereinafter 'Plaintiff'*) has been decreed for the sum of Rs.20,00,000/- along with *pendente lite* and future interest @ 9% per annum.

Plaintiff's Case

2. Plaintiff is in the business of optical goods under the name of M/s. Naresh Optics at 214/2, Kandlekashan Street, Fatehpuri, Delhi. Shri Naresh Gupta is the proprietor of the firm M/s. Naresh Optics. It is the Plaintiff's case that the supplies were made by the Plaintiff to the Appellant/Defendant (*hereinafter 'Defendant'*). The Plaintiff claimed that the total amount due from the Defendant is Rs.39,16,534/-, i.e., vide Bill No. 3565 dated 23rd September, 2004 for a sum of Rs.4,88,034/- and Bill No. 003 dated 28th

June, 2005 for a sum of Rs.34,28,500/-. It is an admitted position that out of the total amount due, the Defendant made payment of Rs.22,67,552/- and the balance amount payable was Rs.16,48,982/-. Accordingly the Plaintiff claimed a total sum of Rs.22,52,103/- calculated as under:

> "*a. Rs.16,48,982/- being the balance amount of the bills*
> *b. Rs.5,64,078/- as interest upto 31.01.2006 and*
> *c. Rs.39,043/- as Sales Tax.*"

The above amount was on the basis of interest calculated at 24%. However, the Plaintiff, giving up the claim for Rs.2,52,103/- on account of interest, filed a suit for recovery of Rs.20,00,000/- from the Defendant and prayed for the following reliefs:

> "*It is, therefore prayed that a decree for Rs.20,00,000/- with pendente lite and future interest @ 24% per annum with monthly rest may be passedd in favour of the plaintiff and against the defendant with cost of the suit.*"

Defendant's Case

3. In the written statement, the Defendant has challenged the jurisdiction of the Delhi Courts on the ground that the order was telephonically placed, supply was made in Goa and hence the Courts in Delhi do not have jurisdiction. On merits, it is the case of the Defendant that the Defendant had been making timely payments of the supplies and even of the final bill for Rs.34,28,500/-. The invoice was originally issued on 16th April, 2005 whereas another fresh bill was issued on 28th June, 2005. The primary contention being that in the original invoice for Rs.34,28,500/- being Ex.DW-1/1, the address of Defendant was shown as Goa, whereas in the

new bill dated 28th June, 2005 (Ex.PW-1/1), the address of the Defendant was shown as Delhi. Be that as it may, the amount of invoice i.e. Rs.34,28,500/- remained the same.

4. The case of the Defendant is that some of the goods sent were, in fact, not ordered by the Defendant and that the Defendant had returned the said goods to its Delhi office and despite intimation, the Plaintiff did not collect the said goods. It is further stated that the Plaintiff could not force the Defendant to purchase the goods which were not required by it. It is further submitted that the Plaintiff had visited the Defendant's factory in Goa and after discussions, the Defendant had fairly offered to the Plaintiff a sum of Rs.13,28,500/- and cheques for the said amount were also prepared. Relevant portion of the written statement is set out below:

> "*In fact when the Plaintiff had visited the Defendants at their Factory at Tivim, Goa, in October 2005, after discussions the Defendants had offered to the Plaintiff the total settlement figure of Rs.13,28,500/- vide their cheques bearing no.744179 dated 10.11.05 for Rs.2,00,000/-, No.744180 dated 20.11.05 for Rs.2,25,000/-, No.744181 dated 30.11.05 for Rs.2,25,00, No.744182 dated 10.12.05 for Rs.2,25,000/- and No.744184 dated 30.12.05 for Rs.2,28,500/-. The Plaintiff however for reasons best known did not accept this settlement figure.*"

Trial Court Judgment

5. The following issues were framed in the suit.

> "*1.Whether the court has no territorial jurisdiction to try the present suit? OPD*
> *2. Whether the Plaintiff is entitled for the recovery of suit amount, if so, for what sum? OPP*
> *3. Whether the Plaintiff is entitled for the interest,*

if so, at what rate & for what period? OPP
4. Relief."

6. Plaintiff led the evidence of the proprietor/Mr. Naresh Gupta - PW1 who exhibited the following documents:

- Ex.PW-1/1, original invoice dated 28th June, 2005 for the sum of Rs.34,28,500/-.
- Ex.PW-1/2 – office copy of invoice for Rs.4,88,034/- dated 23rd September, 2004.
- Ex.PW-1/3 – Legal notice dated 14th November, 2005.
- Ex.PW-1/D1 - copy of insurance policy of New India Assurance Company Limited.
- Ex.PW-1/6 - E-mail dated 25th May, 2005.

7. Defendant led the evidence of Mr. Pitambar Joshi as DW-1 and following documents were exhibited:

- Ex.DW-1/1 - Copy of the invoice dated 16th April, 2005 for the sum of Rs.34,28,500/-.
- Ex.DW-1/3 – Email dated 18th April, 2005 from the Plaintiff to the Defendant.
- Ex.DW-1/4 - Courier receipt of Blue Dart showing the dispatch of goods to the Defendant's Delhi office.
- Ex.DW-1/7 - Reply dated 8th December, 2005 issued by the Defendant to the legal notice of Plaintiff.

8. The Trial Court after examining the pleadings and evidence on record held that the Plaintiff is entitled to the decree for Rs.20,00,000/- and also

awarded interest @ 9% per annum.

Appeal Proceedings

9. In the present appeal, at the time of admission, the Defendant was directed to deposit a sum of Rs.15,00,000/- subject to which the execution proceedings were stayed. Thereafter, on 23rd November, 2007 an application was moved by the Plaintiff for release of amount and the admitted sum of Rs.13,28,500/- was directed to be released to the Plaintiff subject to furnishing of adequate security. Appeal stood admitted and has been heard.

10. The question of jurisdiction is not seriously pressed by Defendant. In any event, this Court is of the opinion that after so many years it would not be appropriate to reject a plaint on the ground of territorial jurisdiction at this stage. The Defendant was duly represented both in the Trial Court and in the present Appeal. Further, part of the cause of action has arisen in Delhi as the Defendant admittedly had a local office which was also dealing with the Plaintiff. The supplies were made from Delhi, the goods were returned by the Defendant to its Delhi office, thus a part of the cause of action arose in Delhi.

11. On merits, it is noticed that the consistent case of the Defendant is that some of the goods which were supplied, were not ordered by it. This is clear from a perusal of the written statement as also from the evidence of DW-1. The invoice filed by the Plaintiff i.e. Ex.PW-1/1 does not have a list of products or the material supplied. The list of material supplied has not been produced even during evidence. The Defendant, in reply to the legal notice, categorically stated as under:

> "*The Company has neither ordered nor received the goods vide bill no.3565 dated 23.09.2004, as*

regards the bill no.003 dated 28.06.2005 M/s. Naresh Optics has supplied 3653 pieces of 1.56 index CR 39 lenses of value of Rs.1,18,722/- which has not been ordered by the Company, this has been informed to M/s. Naresh Optics and the said sum is to be deducted from the bill.

In the month of October 2005 when a Mr. Naresh Gupta, Prop. of M/s. Naresh Optics visited the factory and met the Director of M/s. Goa Optolab Pvt. Ltd., Mr. Neeraj Gupta, he was informed that the Company is willing to pay all amounts due regarding the goods ordered, but the Company cannot be called upon to pay for goods not ordered by the Company.

The Cheques were drawn on that date and are still lying with the Company because Mr. Naresh Gupta refused to accept the lenses, which were not ordered by the Company and accept the Cheques as full and final settlement."

12. DW-1 also deposed in his affidavit as under:

"*That the defendant company received two notices dated 14.11.2005 issued by the plaintiff and in the said notices plaintiff intentionally and deliberately to create a confusion demanded amount of Rs.11,57,067.35 and Rs.21,86,143.23. On checking on records it was also found that bill No.3565 dated 23.9.2004 of Rs.4,88,034/- was settled by effecting the payment of an amount of Rs.2,67,552/- and the remaining goods were returned by the defendant company through Blue Dart Couriers vide Docket No.50018788315. ....*"

13. This stand of the Defendant has not been dealt with in the Plaintiff's evidence. What is, however, clear is that the goods which were returned, were returned to the Defendant's Delhi office and not to the Plaintiff

directly. But it does appear that the Defendant's case, that some of the products supplied were in fact not ordered by the company, has gone uncontroverted. The Plaintiff has not been able to adduce any evidence to show that the goods, of value of Rs.1,18,722/- consisting 3653 pieces of 1.56 index CR 39 lenses, were in fact ordered by the Defendant. In the face of the categorical assertion of the Defendant, since inception, that these products were not ordered by the Defendant, evidence of the Defendant, having been gone uncontroverted, it is to be held that the said products were not ordered by the Defendant. However, the products have also not been delivered back to the Plaintiff and remain in the Defendant's custody as Plaintiff has refused to take back the same.

14. Another dimension of this case is that admittedly, the Plaintiff visited the office of the Defendant in Goa in October, 2005 and at that time the Defendant admitted its liability to the sum of Rs.13,28,500/- and even cheques were prepared which were to be handed over to the Plaintiff. Plaintiff however refused to accept the said amount. Evidence of PW-1 does not give any reason as to why the amount of Rs.13,28,500/- was not accepted.

15. On balance it appears that there was a serious dispute in respect of the order placed for goods valued for Rs.1,18,722/-. The Defendant never disputed its liability to pay Rs.13,28,500/-. This dispute narrows down to the balance sum of Rs.3,20,482/-. A dispute has arisen in respect of Rs.1,18,722/- which could have been deducted from the sum payable. However, since the products were not returned to the Plaintiff, the said amount has to be payable to the Plaintiff by the Defendant.

16. In the facts and circumstances of the present case, the suit is decreed

for the sum of Rs.16,48,982/-. In view of the fact that the Defendant had offered the payment of Rs. 13,28,500/- at the inception in 2005, no interest would be payable on the same. Thus, the Plaintiff would be entitled to the following sums:

(i) Principal of Rs. 16,48,982/- out of which a sum of Rs. 13,28,500/- has already been released to the Plaintiff by this Court's order dated 23rd November, 2007;

(ii) Interest on the sum of Rs.3,20,482/-, @ 8% per annum from the date of invoice i.e., 28th June, 2005 till 13th March, 2007.

(iii) Sum of Rs.39,043/- towards sales tax.

(iv) Amount of Rs.33,261/-, as directed by the Trial Court, as costs.

The impugned judgment/decree is modified to the above extent.

17. The amount lying as on date in this Court is more than Rs. 5 lakhs. The total decretal amount as per paragraph 17 be computed as directed above. Upon computation, the amount found due and payable to the Plaintiff shall be released in favour of the Plaintiff. The remaining amount shall be refunded to the Defendant.

18. Appeal is disposed of in the above terms. All pending applications also stand disposed of.

PRATHIBA M. SINGH
Judge

MARCH 05, 2018/*dk*