

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

+ **RFA No. 67/2015**

% 15th November, 2018

VIPIN BANSAL SOLE PROPRIETOR
OM PRAKASH FATEHCHAND & CO. Appellant

Through: Mr. Jagjit Singh, Advocate.
(9810152774)

versus

EXQUISITE DECOR PVT. LTD Respondent

Through: Mr. Pradeep Dhingra, Ms.
Shalini Dhingra and Ms.
Hitendha, Advocates
(9667939822)

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of the Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of the trial court dated 09.01.2015 by which the trial court has rejected the plaint Under Order VII Rule 11 CPC by holding that the suit is barred by limitation. In fact, when a suit is dismissed on admitted facts as being barred by time, the suit is

dismissed actually under Order XII Rule 6 CPC. Dismissal of a suit on limitation is if the court has jurisdiction and thereafter because of having jurisdiction it decides the issue on merits, and as held by the Supreme Court in the case of *Prem Lata Nahata and Another Vs. Chandi Prasad Sikaria (2007) 2 SCC 551*. Therefore, the impugned judgment will be treated as a judgment dismissing the suit under Order XII Rule 6 CPC as barred by limitation.

2. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of Rs. 20,00,000/- by pleading that the appellant/plaintiff was the seller and the respondent/defendant was the buyer of goods being timber and timber products. As per para 5 of the plaint, dealings between the parties are said to have commenced even much earlier than 01.04.2000, and that as on 01.04.2000 the debit balance brought forward against the respondent/defendant was a sum of Rs. 4,13,933/-. The chart in para 5 of the plaint thereafter proceeds till the debit entries upto 03.05.2005, and which is the last bill being Bill No.078 dated 03.05.2005 which was raised by the appellant/plaintiff upon the respondent/defendant. As per the chart given in para 5, the last entry is the entry dated 15.03.2007 which

shows that by a cheque, the payment of Rs. 50,000/- was made by the respondent/defendant to the appellant/plaintiff and the debit balance against the respondent/defendant and in favour of the appellant/plaintiff came to be a sum of Rs. 13,70,035.26/-. The subject suit has been filed on 24.05.2011.

3. In a suit for recovery of money, the period of limitation is three years. The issue with respect to limitation can be looked into from two points of view in the present case. One is as to whether there was an open, mutual and current account maintained between the parties as a result of which the suit can be said to be a suit under Article 1 of the Limitation Act, 1963, whereby limitation will commence from the last date of the financial year in which a particular transaction is admitted or proved. The second point of view with respect to limitation would be the date of the last bill or the date of the last payment and these factors will be an acknowledgment to extend the limitation under Section 19 of the Limitation Act or as per Sections 18 and 19 of the Limitation Act. As regards the second aspect, it is to be noted that an acknowledgment if is one which falls under Sections 18 and 19 of the Limitation Act, such an

acknowledgment must necessarily be falling within the limitation period for filing of the suit, i.e. an acknowledgment of debt/payment after the period of limitation does not extend the limitation.

4. On the aspect of there being an open, mutual and current account, admittedly there is not even a single averment in the plaint that the appellant/plaintiff is suing for the balance due on the open, mutual and current account. Even if this Court overlooks the fact that there is no such averment and examines as to whether there was an open, mutual and current account, it is found that in fact there is no open, mutual and current account because an open, mutual and current account requires either shifting balances or reciprocal obligations vide *Hindustan Forest Company v. Lal Chand & Others*, AIR 1959 SC 1349 and *Kesharichand Jaisukhal v. Shillong Banking Corporation*, AIR 1965 SC 1711. In the present case, there is only one obligation and one contract between the parties of the appellant/plaintiff being the seller and the respondent/defendant being the buyer, and consequently the issue to be examined is as to whether there are shifting balances. A reference to para 5 of the plaint wherein the chart is given of the amount due in the form of an account, shows that there

is always a debit balance against the respondent/defendant and in favour of the appellant/plaintiff. Therefore, once there are no shifting balances the account in question is not an open, mutual and current account and Article 1 of the Limitation Act will not apply. Even if we take Article 1 of the Limitation Act to apply, the last entry which is said to be in the account is dated 15.03.2007 and if limitation therefore commences from 01.04.2007, the limitation period of three years will expire on 31.03.2010, whereas the subject suit has been filed on 24.05.2011. The subject suit is therefore clearly time barred.

5(i). On the next aspect as to whether the limitation is extended by acknowledgment either under Section 18 or Section 19 of the Limitation Act, let us examine each of these aspects of Sections 18 and 19 of the Limitation Act in the facts of the present case.

(ii). So far as Section 18 of the Limitation Act is concerned, the same requires that there need not be a specific acknowledgment of a specific amount but there can be acknowledgment of debt once there is otherwise an admission of a jural relationship of a debtor and creditor. This is held by the Supreme Court in the case of *J.C. Budhraj v. Chairman, Orissa Mining Corporation Ltd. and Anr.*

(2008)2 SCC 444. In order to prove the filing of the suit within limitation under Section 18, the learned counsel for the appellant/plaintiff has placed reliance upon the Reply dated 18.03.2009 given on behalf of the respondent/defendant, and para 4 thereof to argue that limitation is extended and the suit is within limitation. This para 4 of the para-wise reply given by the respondent/defendant in its Reply dated 18.03.2009 reads as under:

“4. It is accepted that total amount outstanding as on 1.04.2004 was for the sum of Rs.2,51,799/-. It is accepted that bills were made on 1.04.2004, 2.04.2004, 3.04.2004, 21.03.2005 & 3.05.2005, the value amount payable against bills and terms of payment of such invoices are disputed. It is denied that the value of goods purchased and duly invoiced in the account of our client was Rs.17,70,035.26. It is further denied that any such amount of Rs.17,70,035.26 became payable.

The payments made were always according to terms mentioned in para 2 of statement of facts as explained above. It is denied that they were part payments or running payments. It is further denied that they were the only payments. It is denied that the payments alleged above were credited and appropriated. It is denied that after appropriation of amount, the balance sum payable by our client was Rs.13,70,035.26 towards Principle amount. On the other hand, rather our client has to recover the amount from your client and your client in order to wriggle out of the above liabilities have misrepresented and made you issue this notice on false and misleading facts.”

(iii). I cannot agree with the argument urged on behalf of the appellant/plaintiff that the aforesaid para 4 will help in extending the limitation because the acknowledgment of debt must be within the

period of limitation. The date which is talked of in para 4 of the Reply dated 18.03.2009 sent by the respondent/defendant is for various bills with the last bill being dated 03.05.2005, and the acknowledgement is of a sum of Rs. 2,51,799/- as on 01.04.2004. If what is acknowledged is the debt as on 01.04.2004 or for that matter even on 03.05.2005, then the acknowledgment had to be before 01.04.2007 or 03.05.2008 whereas the Reply is dated 18.03.2009 i.e. beyond the limitation period of three years. Once therefore, the so called acknowledgment of debt in terms of the Reply dated 18.03.2009 is beyond the period of limitation, the same cannot help in extending limitation in view of the categorical language of Section 18 of the Limitation Act which requires acknowledgment to extend limitation has to be given within the prescribed period of limitation. Therefore, it is held that the suit cannot be held to be within limitation in view of the acknowledgment of debt by the respondent/defendant in its Reply dated 18.03.2009.

6. So far as the aspect of payment extending the period of limitation is concerned, and therefore, Section 19 of the Limitation Act applying, it is seen that the last payment which is made, and as stated in para 5 of the plaint, is of 15.03.2007. Limitation therefore

would expire on 15.03.2010. Suit however has been admittedly filed on 24.05.2011. Therefore, even on the basis of Section 19 of the Limitation Act, the suit will not be within limitation.

7. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed.

NOVEMBER 15, 2018/ib

VALMIKI J. MEHTA, J