

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

% **Date of decision: 4th October, 2018.**

+ **RFA 817/2005 & CM No.16289/2005 (for stay)**

CHANDIGARH CLINICAL LABORATORIES Appellant
Through: Mr. Irfan Ahmed, Adv.

Versus

DR. LAL'S PATH LABS P. LTD. Respondent
Through: Mr. Abhishek Swaroop, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 13th July, 2005 in Suit No.213/2004 of the Court of Additional District Judge (ADJ), Delhi] allowing the suit filed by the respondent / plaintiff for recovery of Rs.5,51,979.26 paise with *pendente lite* and future interest at the rate of 18% per annum jointly and severally from the appellant / defendant and its Director Mr. Ravi Khanna, in the sum of Rs.4,83,500/- with *pendente lite* and future interest at the rate of 9% per annum against the appellant / defendant and not against its Director Mr. Ravi Khanna.

2. The appeal came up first before this Court on 21st November, 2005 when, while issuing notice thereof, the operation of the impugned judgment and decree was stayed subject to the appellant / defendant depositing the decretal amount in this Court. Vide order dated 22nd March, 2006, the respondent / plaintiff was permitted to withdraw the decretal amount deposited by the appellant / defendant subject to furnishing surety bond and

the trial court record was requisitioned. On 7th August, 2006, the appeal was admitted for hearing. The respondent / plaintiff / decree-holder has withdrawn the decretal amount by furnishing a surety bond in the form of an FDR qua which intimation was ordered to be given to the Centurion Bank of Punjab Ltd. and by furnishing an undertaking not to encash the said FDR. On 23rd November, 2009, the appeal was dismissed in default. However, vide subsequent order dated 30th November, 2009, the appeal was restored to its original position. The counsel for the appellant / defendant / judgment-debtor and the counsel for the respondent / plaintiff / decree-holder have been heard and the requisitioned record perused.

3. The respondent / plaintiff / decree-holder instituted the suit, from which this appeal arises, pleading that (i) on request of the appellant / defendant, the respondent / plaintiff, engaged in conducting pathological examinations, agreed to open a sample collection centre at the premises of the appellant / defendant at Chandigarh; (ii) the appellant / defendant used to collect the samples for pathological examinations at Chandigarh and forward the same to the respondent / plaintiff at Delhi and the respondent / plaintiff at Delhi used to conduct the pathological examination and forward the reports to the appellant / defendant at Chandigarh for onward delivery to the patients; (iii) the respondent / plaintiff used to charge a discounted rate to the appellant / defendant; (iv) the respondent / plaintiff, from time to time issued invoices to the appellant / defendant; (v) though the appellant / defendant initially was regular in remitting payments of the said invoices but started delaying the payments inspite of repeated requests and reminders of the respondent / plaintiff; (vi) though the appellant / defendant in part discharge of its liability to the respondent / plaintiff issued cheque dated 10th April,

2002 in the sum of Rs.10,000/- to the respondent / plaintiff but the said cheque was dishonoured on presentation; (vii) as per the statement of account maintained by the respondent / plaintiff in the normal course of business on the basis of invoices raised on the appellant / defendant from time to time, a sum of Rs.4,15,022/- was due from the appellant / defendant as on 31st August, 2003; and, (viii) the appellant / defendant is also liable to pay interest thereon at the rate of 18% per annum.

4. The appellant / defendant along with its Director, who was then also a defendant, contested the suit by filing a written statement, pleading on merits that (a) the dealings commenced in the year 1995 between the respondent / plaintiff and the Chandigarh Clinical Laboratories Pvt. Ltd.; (b) as on 1st April, 1999, an amount of Rs.48,714.50 paise was due from the Chandigarh Clinical Laboratories Pvt. Ltd. to the respondent / plaintiff; (c) the appellant / defendant took over the said amount from Chandigarh Clinical Laboratories Pvt. Ltd. on taking over the assets and liabilities of Chandigarh Clinical Laboratories Pvt. Ltd.; (d) during the course of business, the respondent / plaintiff raised many bills, on Chandigarh Clinical Laboratories Pvt. Ltd. and the appellant / defendant, for which no samples for pathological examination were ever sent to the respondent / plaintiff; (e) on 6th August, 2002, accounts were reconciled between the appellant / defendant and the respondent / plaintiff and it was found that bills / invoices in the amount of Rs.2,20,165/- had been raised by the respondent / plaintiff in excess; (f) a debit note dated 6th August, 2002 was sent by the appellant / defendant to the respondent / plaintiff which was accepted by the respondent / plaintiff; (g) again between October, 2002 and June, 2003, some wrong claims were found to have been made by the respondent / plaintiff and on re-conciliation, it was found that

the respondent / plaintiff owed Rs.1,389.50 paise to the appellant / defendant and which amount was written off by the appellant / defendant.

5. On the pleadings of the parties, the following issues were framed in the suit on 14th December, 2004:

- “1. Whether the plaint is signed and verified by a competent persons? OPP.
2. Whether this court has no jurisdiction to try and entertain the present suit as alleged in the preliminary objection No.2 in WS? OPP.
3. Whether various bills to the tune of Rs.2,20,165/- were raised by the plaintiff without any costs and some invoices were raised by plaintiff twice as alleged in para No.8 in the WS? If so to what effect? OPD.
4. To what principal amount, if any, is the plaintiff entitled from the defendant? OPP.
5. Whether the plaintiff is entitled to any interest, if so at what rate, for which period and to what amount? OPP.
6. Relief.”

6. The Suit Court, on the basis of evidence led has held that (i) the respondent / plaintiff had proved as Ex.PW1/1 the extract of the Board Resolution, authorizing institution of suit and signing and verification of the plaint; (ii) the contention of the appellant / defendant that the Board Resolution had not been proved in accordance with law could not be accepted as the appellant / defendant, at the time of proving of Ex.PW1/1 and admission of the extract of the Board Resolution into evidence did not raise any objection and did not challenge the same; (iii) in the matter of authority to institute a suit a technical view could not be taken; (iv) though the appellant / defendant was based in Chandigarh but admittedly the appellant / defendant used to send samples for pathological examinations,

collected at Chandigarh, to the respondent / plaintiff at Delhi and the respondent / plaintiff used to send the reports of pathological examinations from Delhi to Chandigarh; (v) cause of action for the suit thus accrued also at Delhi; (vi) the respondent / plaintiff, besides proving its statement of account, had also proved the invoices running into 500 pages, on the basis of which the said statement of account had been prepared; (vii) the said invoices as well as the statement of PW-1 corroborated the entries in the books of account; (viii) though the contention of the appellant / defendant was that the respondent / plaintiff had not produced the requisition slips sent by the appellant / defendant along with the samples to be examined / tested by the respondent / plaintiff but the witness of the respondent / plaintiff had explained that the respondent / plaintiff was not in possession of these requisition slips as they had been destroyed after 10 days of receipt; the witness had further explained that the respondent / plaintiff used to generate a large number of such requisition slips in a day and the same if preserved required a large amount of storage space; the witness yet further explained that after the invoice had been prepared on the basis of requisition slips and after the report of the test carried out had been forwarded to the appellant / defendant, the requisition slips were destroyed; reliance in this regard is placed on *Kaka Ram Sohan Lal Vs. Firm Thakar Das Mathra Das* AIR 1962 Punjab 27; (ix) the entries in the books of account of the respondent / plaintiff had thus been corroborated with other evidence in the form of invoices; (x) no adverse inference was thus required to be drawn against the respondent / plaintiff for not producing the requisition slips; the respondent / plaintiff had been able to prove outstanding of Rs.4,15,022/- from the appellant / defendant; (xi) the books of accounts and copies of income tax

returns proved by the appellant / defendant were not worthy of credit; (xii) the appellant / defendant, in the reply to the legal notice preceding the suit, had not stated that there was any double invoicing on the part of the respondent / plaintiff or that any wrong invoice had been issued; (xiii) though the witness of the appellant / defendant admitted that the respondent / plaintiff used to send two copies of the invoice, one for the record of the appellant / defendant and the other for the clients whose samples were forwarded for pathological examination but the appellant / defendant had not produced the invoices so received by it from the respondent / plaintiff; (xiv) the witness of the appellant / defendant also admitted that the appellant / defendant at no point of time sent any communication to the respondent / plaintiff regarding wrong billing / invoicing or double billing / invoicing; (xv) the witness of the appellant / defendant in cross-examination, admitted that at least one of the entries which the defendant was claiming to be faulty, was correct; (xvi) however the Director of the appellant / defendant could not be made personally liable for the dues of the appellant / defendant; (xvii) the respondent / plaintiff had also not proved any agreement for payment of interest at the rate of 18% per annum and in the circumstances interest at the rate of 9% per annum was justified; and, (xviii) the respondent / plaintiff was thus entitled to a sum of Rs.68,478/- only towards the rate of 9% per annum for the period prior to the institution of the suit. Hence, the decree for Rs.4,83,500/-.

7. The emphasis of the counsel for the appellant / defendant before me also has been qua the requisition slips aforesaid. It is argued that the requisition slips, admittedly forwarded by the appellant / defendant to the respondent / plaintiff, were the best proof of the volume of work done by the

respondent / plaintiff for the appellant / defendant. It is contended that the respondent / plaintiff failed to produce the same and on this ground only should have been non-suited.

8. I have enquired from the counsel for the appellant / defendant, whether the appellant / defendant issued any notice to the respondent / plaintiff, immediately after the framing of the issues or before the commencement of the evidence of the respondent / plaintiff, to produce the said requisition slips.

9. The answer is in the negative.

10. For a litigant to be entitled to urge that adverse inference should be drawn against the opposite party, it is incumbent upon the litigant to give notice to the opposite party to produce the document and to in evidence establish that such evidence exists and has relevance to the lis. Merely by putting a question in the cross-examination of the opposite party that the document exists, a surprise in the form of adverse inference cannot be sprung on the opposite party.

11. In the present case, the witness of the respondent / plaintiff when asked about the requisition slips, has given cogent reasons for non-production thereof and which has been rightly accepted by the Suit Court.

12. In fact, I have enquired from the counsel for the appellant / defendant, whether the appellant / defendant has produced its own copies of the requisition slips.

13. The counsel for the appellant / defendant states that no such copies were maintained.

14. I have further enquired from the counsel for the appellant / defendant, whether not the blank requisition slips were maintained in the form of a booklet and whether there were any counterfoils of the said booklet.

15. The counsel for the appellant / defendant states that nothing in this regard has come on record.

16. The explanation given by the witness of the respondent / plaintiff qua the requisition slip is a reasonable one and no error of fact or law can be said to have been committed by the Suit Court Judge in accepting the said explanation.

17. As far as the money claim is concerned, the argument of the counsel for the appellant / defendant is that certificate under Section 65B of the Indian Evidence Act, 1872 has not been filed by the respondent / plaintiff.

18. Though the appellant / defendant has similarly produced its accounts but the appellant / defendant also has not provided the said certificate. Section 65B was incorporated in the Evidence Act with effect from 17th October, 2000. The evidence in the suit was recorded in or about the year 2004-05. It appears that neither counsel at that time was aware of the requirement for proving information contained in electronic record through a certificate as aforesaid. Though the onus to prove the money claim was on the respondent / plaintiff but considering the nature of the defence of the appellant / defendant and on which issue no.3 was framed as aforesaid, all that can be said is that the onus was equally on both the parties. Both the parties are in the same boat and once it is so, I am of the opinion that no benefit can be drawn by the appellant / defendant in the facts and circumstances of the case. It cannot be lost sight of that the appellant /

defendant was disputing Rs.2,20,165/- out of the claim of Rs.4,15,022/- by contending that on reconciliation, a debit note was sent to the respondent/plaintiff with respect to the said amount. However, the appellant / defendant has failed to prove that there was any reconciliation or that any such debit note was sent. The plea of the appellant / defendant was that the representatives of the respondent / plaintiff had visited Chandigarh on 6th August, 2002 when the debit note was also prepared; however, the debit note was not personally delivered to the respondent / plaintiff and no acknowledgment of receipt of the same by the respondent / plaintiff thereon obtained. Only a courier receipt in proof of dispatch thereof has been proved and which does not inspire confidence. No statement of reconciliation was jointly prepared or signed. It is highly unlikely that if the appellant / defendant had noticed any overbilling on the part of the respondent / plaintiff, the appellant / defendant, upon the respondent / plaintiff agreeing to the same and reconciliation having been carried out, not insisting for a signature of the representatives of the respondent / plaintiff on the reconciled statement of account. It is also highly unlikely that the alleged reconciliation would not be preceded by even a single communication in writing. The Suit Court Judge has thus rightly rejected the said defence of the appellant / defendant and decided issue no.3 against the appellant / defendant.

19. I may in this regard also notice that the invoices raised of Rs.2,20,165/- claimed to have been overbilled were not billed overnight. If it was so, it is inexplicable as to why the appellant / defendant, in April, 2002, would forward a cheque for Rs.10,000/- to the respondent / plaintiff which was returned dishonoured.

20. Else, the respondent / plaintiff is found to have proved outstanding of Rs.4,15,022/- from the appellant / defendant and proved the statement of account and the invoices raised from time to time.

21. Though the counsel for the appellant / defendant before me has not argued that the plaint was not signed and verified by duly authorized person and the Courts at Delhi had no jurisdiction, I may however record that the reasoning given in the Suit Court judgment for deciding issues no.1 and 2 in favour of the respondent / plaintiff is in accordance with law. I may in this regard record that on the issue of authority to sue, the suit in any case could not have been defeated. It has been held in ***Haldiram (India) Pvt. Ltd. VS. Haldiram Bhujawala*** 2009 (109) DRJ 647, ***Canara Bank Vs. K.L. Rajgarhia*** 2009 SCC OnLine Del 310 and ***Union of India Vs. Shanti Gurung*** 2014 SCC OnLine Del 989 that even if the Court finds any such deficiency, opportunity has to be given to the concerned party to rectify the same. In any case, what has transpired during the pendency of this appeal i.e. of the money having been released to the respondent / plaintiff, by cheque drawn by this Court in the name of the respondent / plaintiff and the respondent / plaintiff furnishing security for restitution also would show that the monies claimed in the suit have gone to the coffers of the respondent / plaintiff only and not in the pocket of anyone else. Similarly, qua territorial jurisdiction also, considering the nature of the contractual relationship between the parties, it cannot be said that the Courts at Delhi, where admittedly part of the contract was being performed, did not have jurisdiction to entertain the suit. Courts at Delhi would also have jurisdiction on the principle of debtor must seek the creditor.

22. At this stage, the counsel for the appellant / defendant states (i) that it was not the case of the appellant / defendant that before the first reconciliation nothing was due from the appellant / defendant to the respondent / plaintiff; thus the cheque for Rs.10,000/- was sent in discharge of liability; (ii) that the witness examined by the respondent / plaintiff was not competent to prove the case of the respondent / plaintiff under Section 34 of the Evidence Act; he came in employment of the respondent / plaintiff subsequent to the transactions subject matter of the suit and has deposed on contractual terms on the basis of hearsay.

23. I have considered the aforesaid arguments. The cheque for Rs.10,000/- was sent about three and a half months prior to 6th August, 2002. I have asked the counsel for the appellant / defendant as to what was the amount due according to the appellant / defendant to the respondent / plaintiff as on that date.

24. The counsel for the appellant / defendant states that since the account was a running account, it is difficult to say how much money was due from one party to another on 10th April, 2002 when the cheque was sent.

25. Without the appellant / defendant showing the status of the account as on 10th April, 2002, the sending of the cheque remains a factor belying the plea of reconciliation dated 6th August, 2002 claimed by the appellant / defendant.

26. As far as the objection with respect to Section 34 of the Evidence Act is concerned, the witness of the respondent / plaintiff, though not in the employment of the respondent / plaintiff at the time of transaction subject matter of the suit, has deposed that the said statement of account was

maintained in the regular course of business. The same satisfies the requirement of Section 34 of the Evidence Act.

27. No merit is thus found in this appeal.

28. Dismissed with costs of Rs.20,000/- on the respondent / plaintiff.

29. The security furnished by the respondent / plaintiff is discharged and the FDR if any deposited by the respondent / plaintiff in this Court be also returned to the respondent / plaintiff duly discharged. A certificate be also issued to the respondent / plaintiff for onward submission to the bank which had issued the FDR, confirming that the FDR is free from the security furnished.

30. At this stage, the counsel for the appellant / defendant states that since decretal amount has already been paid, cost be waived.

31. The counsel for the respondent / plaintiff fairly gives no objection to the same.

32. Allowed. The costs imposed on the appellant / defendant is waived.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

OCTOBER 04, 2018

‘gsr’