

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

+ **RFA No. 252/2006**

% **19th September, 2018**

PANASONIC INDIA PVT. LTD.

..... Appellant

Through: Ms. Namita Sharma and Mr.
D.R.Bhatia, Advocates.

versus

NATIONAL RADIO ELECTRONICS & ORS.

..... Respondents

Through: None.

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 Civil Procedure, 1908 (CPC), is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 24.08.2005 by which the trial court has decreed the suit for recovery, filed by the appellant/plaintiff seeking recovery of a sum of Rs.3,24,655/-, only for an amount of Rs. 34,419.95/-, and which is the amount of the last

invoice dated 30.10.2001 which was within limitation of three years of the suit having been filed by the appellant/plaintiff on 27.10.2004.

2. The facts of the case are that the appellant/plaintiff appointed the respondents/defendants as its dealers of electronic goods. The respondent no.1/defendant no.1 is a partnership firm of which respondent nos.2 and 3/defendant nos.2 and 3 are the partners. The case of the appellant/plaintiff was that as per its books of account, various amounts were due and the respondents/defendants on their request were given a credit note for a sum of Rs.2,86,251/- towards Local Advertisement Support and after such an amount was credited in favour of the respondent/defendant on 14.08.2003, there remained a balance of a sum of Rs.1,88,753/-, and this amount is claimed by the appellant/plaintiff as principal amount, with interest at 24% being claimed on the amount of Rs.1,35,902/-, and thereby totalling the suit claim amount to Rs.3,24,655/-.

3. The respondents/defendants did not appear in the suit and were proceeded *ex parte*.

4. The appellant/plaintiff led evidence to prove its case by proving the invoices exhibited as Ex.PW1/6 and Ex.PW1/7. As

already stated above the last invoice Ex.PW1/7 is dated 30.10.2001. The statement of account was proved as Ex.PW1/8. Trial court however has held that the statement of account is not an open mutual and current account under Article 1 of the Limitation Act, 1963 and therefore limitation will have to be seen bill wise. Since the suit was filed on 27.10.2004 and only one invoice being Ex.PW1/7 dated 30.10.2001 was within three years of filing of the suit, therefore suit was dismissed as barred by limitation for invoices prior to Ex.PW1/7 dated 30.10.2001 and decreed only for the invoice amount in Ex.PW1/7. The relevant paras of the impugned judgment in this regard are paras 3 to 5 and these paras read as under:-

“3. In ex-parte evidence, plaintiff has filed affidavit of Sh. Roopesh Kumar Sharma, Asstt. Manager (Legal) of the plaintiff company. He has proved in his affidavit authorization in his favour as Ex.PW1/1, certificate of incorporation of the plaintiff company as Ex.PW1/2, authorization in favour of Sh. Vinit Aggarwal, who had instituted the present suit as Ex.PW1/3. Defendant No.1 is deposed to be a partnership firm and defendant Nos. 2 and 3 are its partners who approached the plaintiff in New Delhi and represented that they were dealing in sale of electronic goods and were interested in dealership of plaintiff's products for Kannur District, Kerala, therefore, plaintiff appointed defendant No.1 as one of its dealer for Kannur District, Kerala. Defendant No.1 is deposed to have been purchasing the products from the plaintiff from time to time against bills Ex.PW1/4 to Ex.PW1/6 and payment made by the defendant were shown in statement of account. It is deposed that last purchase was made by defendants

on 30.10.01 vide invoice Ex.PW1/7. However, it is deposed that defendants had defaulted in making payment as per terms agreed which they did not pay despite several requests. It is deposed that plaintiff called upon the defendants to pay the outstanding amount on receipt of which defendants approached the plaintiff for settlement of outstanding amounts subject to issuance of credit note in favour of defendants in the sum of Rs.2,86,251 towards local Advertisement Support and same was duly credited by the plaintiff on 14.8.03. It is deposed that as per books of account maintained by the plaintiff a sum of Rs.1,88,753.20 is due and payable by the defendants towards principal amount. Copy of statement of account has been proved as Ex.PW1/8. It is deposed that plaintiff is also entitled to interest @24% per annum (Rs.1,35,902.30 from October 2001 till filing of the suit) inasmuch as defendant failed and neglected to make payment of outstanding amount. In all plaintiff has claimed Rs.3,24,655.50.

4. From perusal of the evidence as discussed above, it is clear that earlier name of the plaintiff was M/s National Panasonic India Pvt. Ltd. which has subsequently been changed to M/s Panasonic India Pvt. Ltd vide certificate of incorporation Ex.PW1/2. It also stands proved on record that Sh. Vinit Aggarwal was competent to file the present suit as is clear from Ex.PW1/3. It also stands prove on record that defendant No.1 is a partnership firm and defendant Nos. 2 and 3 are its partners. It also stands proved on record that defendants purchased goods from the plaintiff vide invoices Ex.PW1/4 to 1/7. Ex.PW1/4 and Ex.PW1/5 are dated 30.9.01, Ex.PW1/6 is date 24.10.01. According to the plaintiff, last purchase was made on 30.10.01 vide Ex.PW1/7. It also stands proved on record that defendants failed to pay the amount due towards them. According to the plaintiff, it served a notice of demand on the defendants on receipt of which defendants approached the plaintiff for settlement subject to issuance of credit note in favour of defendants for a sum of Rs.2,86,251/- which the plaintiff did. It is deposed that according to books of accounts maintained by the plaintiff a sum of Rs.1,88,753.20 is due and payable towards principal. Plaintiff has also claimed interest @ 24% per annum from the date of filing of suit. In all plaintiff has claimed a sum of Rs.3,24,655.50.

5. Present suit has been filed on 27.10.04. It is not the case of the plaintiff that account maintained by the plaintiff is mutual or running account so as to enable the application of different rule of calculating of period of limitation. In the present case, goods have been supplied on invoice basis. First two invoices are dated 30.9.01. Third invoice is dated 24.10.01. Since suit has been filed on 27.10.04, therefore, claims against invoices Ex.PW1/4 to Ex.PW1/6 are time barred and only invoice which is within the period of limitation is Ex.PW1/7 because goods were supplied on 30.10.01. Invoice Ex.PW1/7 is for a sum of Rs.34,419.95. Plaintiff has also claimed interest @ 24% per annum. In my considered opinion, rate of interest as claimed by the plaintiff is quite exorbitant. However, it should taken note of that transaction between the parties is commercial one and plaintiff is entitled to a reasonable interest from the defendants. In my view award of interest @ 10% per annum will meet the ends of justice. I am of the view that plaintiff is entitled to recover interest @ 10% per annum on the amount of Rs.34,419.95 from the date of invoice till date of realisation.”

5. Counsel for the appellant/plaintiff argues that the trial court has erred in holding that the account was not an open mutual and current account inasmuch as, the appellant/plaintiff in its plaint had pleaded in paras 8 and 9 that the account maintained by the appellant/plaintiff of the respondents/defendants was an open mutual and current account. I however cannot agree with this because in paras 8 and 9 of the plaint, there is no averment that the account maintained between the parties is an open mutual and current account.

Paras 8 and 9 of the plaint which are relied upon on behalf of the appellant/plaintiff read as under:-

“8. The last purchase made by the Defendants from the Plaintiff was vide Invoice dated 30.10.2001 and the last ‘on account’ payment made by the Defendants was on 10th September, 2001.

9. That the Plaintiff has been maintaining books of accounts in regular course of their business with respect to the bills raised upon the Defendants and the ‘on account’ payment received from them.”

6. In my opinion, even if there was an averment in the plaint that the account maintained by the appellant/plaintiff of the respondents/defendants was an open mutual and current account, it has still to be seen that whether in fact the account which is maintained by the appellant/plaintiff of the respondents/defendants Ex.PW1/8 is an open mutual and current account. In law, an account can be an open mutual and current account under Article 1 of the Limitation Act only if there are shifting balances or independent obligations. The aspect of there existing shifting balances or independent obligations is *sine qua non* in view of the judgments of the Supreme Court in the cases of ***Hindustan Forest Company Vs. Lal Chand & Others, AIR 1959 SC 1349*** and ***Kesharichand Jaisukhal Vs. Shillong Banking Corporation AIR 1965 SC 1711***. I have applied the ratios of both

these judgments in the recent judgment dated 25.7.2017 in **RSA No.85/2016** titled as **ICICI Bank Ltd. Vs. Mohd. Zaheen** and the relevant paras of this judgment are paras 7 to 11 and these paras read as under:-

“7. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of Rs.2,57,601.67/- against the respondent/defendant on account of the respondent/defendant having availed the overdraft facility in the current account maintained by the respondent/defendant with the appellant/plaintiff/bank. Admittedly, the last entry in the overdraft account whereby overdraft facility was availed was on 22.2.2011. Suit was filed on 29.8.2014 and hence the suit was held to be time barred having been filed three years after 22.2.2011.

8. The issue argued on behalf of the appellant before this Court, and as reflected from the order dated 22.3.2016 passed by the learned Single Judge of this Court while issuing notice in this RSA was that Article 1 of the Limitation Act, 1963 applies and limitation will be counted from the close of the year in which the last item of transaction is admitted or proved. It was accordingly argued that the courts below have wrongly dismissed the suit as time barred by applying Articles 19 and 21 of the Schedule of the Limitation Act.

9. In my opinion to a simple overdraft account Article 1 of the Limitation Act does not apply because in an overdraft account there is no mutuality of transactions i.e there are transactions which only create obligations on one side with the other entries being only towards complete or partial discharge of such obligations. For Article 1 of the Limitation Act to apply there has to be mutuality of obligations and not one sided obligations. This has been held by the Supreme Court in the judgment in the case of **Hindustan Forest Company Vs. Lal Chand & Others, AIR 1959 SC 1349**, and relevant paras 7 to 10 of which judgment read as under:-

“7. The question what is a mutual account, has been considered by the courts frequently and the test to determine it is well settled. The case of the *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*, may be referred to. There a company had been advancing monies by way of loans to the proprietor of a tea estate and the proprietor had been sending tea to the company for sale and

realisation of the price. In a suit brought by the company against the proprietor of the tea estate for recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by art. 85 of the Indian Limitation Act. Rankin, C.J., laid down at p. 668 the test to be applied for deciding the question in these words:

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

8. The observation of Rankin, C.J., has never been dissented from in our courts and we think it lays down the law correctly. The learned Judges of the appellate bench of the High Court also appear to have applied the same test as that laid down by Rankin, C.J. They however came to the conclusion that the account between the parties was mutual for the following reasons:

"The point then reduces itself to the fact that the defendant company had advanced a certain amounts of money to the plaintiffs for the supply of grains. This excludes the question of monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs. 13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had

agreed to pay for them and had in part made the payment in advance. There can be no question that in so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments.

10. 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.” (emphasis added)

10. Similar was the view of the Supreme Court in the case of *Kesharichand Jaisukhal Vs. Shillong Banking Corporation AIR 1965 SC 1711*, where however in the facts of the case Article 1 of the Limitation Act was held to apply on account of reciprocal obligations existing because in the overdraft account there were also deposits which were made by the customer and which thus created independent obligations to repay the amount of cash deposits and also on account of the cheques, hundis and drafts deposited for collection. The ratio in the case of *Hindustan Forest Company (supra)* was however reiterated in

Shillong Banking Corporation's case (*supra*) that there is required existence of mutual dealings between the parties. The relevant paras of the judgment in the case of *Shillong Banking Corporation (supra)* are paras 10 to 12, and these paras read as under:-

"10. The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

11. Now in the leading case of *Hirada Basappa v. Gadigi Muddappa*, Holloway, Acting C.J. observed:

"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

These observations were followed and applied in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* and *Monotosh K. Chatterjee v. Central Calcutta Bank Ltd.*, and the first mentioned Calcutta case was approved by this Court in *Hindustan Forest Company v. Lal Chand*, Holloway, Acting C.J. laid down the test of mutuality on a construction of s. 8 of Act XIV of 1859, though that section did not contain the words "where there have been reciprocal demands, between the parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasizes the test of mutuality laid down in the Madras case.

12. 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.”
(underlining added)

11. In the present case, it is seen that there is no mutuality of obligations and transactions are one sided only being in the nature of grant of overdraft by the appellant/plaintiff/bank to the respondent/defendant and therefore any payment by the respondent/defendant is only towards discharge of the obligation created in favour of the appellant/plaintiff/bank. There are no transactions on each side creating independent obligations because there is no obligation of the appellant/bank towards the respondent/defendant. Therefore, Article 1 of the Limitation Act cannot come to aid of the appellant/bank. Suit, therefore, filed on 29.8.2014 was barred by limitation on account of the last overdraft facility being availed on 22.2.2011 and on which date will arise the balance due in the overdraft account in favour of the appellant/bank and against the respondent/defendant.”

7. On examination of the statement of account Ex.PW1/8, it is seen that there is only one relationship between the parties, i.e. the appellant/plaintiff as seller and the respondents/defendants as suppliers/dealers, and there are therefore no independent obligations because there is only one relationship. Statement of account Ex.PW1/8 also does not show shifting balances of any existing credits in favour of the appellant/plaintiff and sometimes debits against the appellant/plaintiff on account of excess payments having been made by the respondents/defendants to the appellant/plaintiff. Therefore, once there are no shifting balances, the statement of accounts Ex.PW1/8 cannot be said to be an open mutual and current account.

8. There is therefore no merit in the appeal. Dismissed.

SEPTEMBER 19, 2018/ib

VALMIKI J. MEHTA, J