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

Date of Decision: 30th May, 2018

\+ **RFA 410/2016**

MOHAMMED RAIS ..... Appellant

Through: Mr. M. Tarique Siddiqqui, Mr. Mohammad Usman Siddiqui, Ms. Aisha Siddiqui and Ms. Sakeena Quidwai, Advocates. (M:9811391014)

versus

M/S ABHI PACKAGING ..... Respondent

Through: Mr. Rakesh K. Shukla and Mr. Amlesh Yadav, Advocates. (M:9899454835)
Mr. N. L. Sahai, Advocate (M:9899986943) for Applicant Ms. Zeenat Rais.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. A suit for recovery of Rs.11,21,975/- was filed by M/s. Abhi Packaging *(Respondent/Plaintiff)* against M/s. Zen International *(Appellant/Defendant)*. The brief case of the Plaintiff is that it used to supply the packaging material to the Defendant and regular accounts were being maintained to show the transactions between the Plaintiff and the Defendant. For the financial year 2010-11, an amount of Rs.7,28,555/- was outstanding but the Defendant failed to make the payment. The total amount of supplies made were to the tune of Rs.10,15,271/-, out of which some part payments were made and the outstanding amount was to the tune of

Rs.7,28,555/-. The details of the bills raised are contained in paragraph 6 of the plaint, which are as under:

"

Sr. No.	*Bill No.*	*Dated*	*Amount (in Rs.)*
1	*001*	*05.10.2010*	*1,36,716/-*
2	*003*	*15.10.2010*	*2,98,112/-*
3	*005*	*11.11.2010*	*4,60,327/-*
4	*010*	*06.12.2010*	*1,20,116/-*
		Total =	*10,15,271/-*

"

2. The details of the payments received are contained in paragraph 7 of the plaint, which are as under:

"

Sr. No.	*Cheque No.*	*Dated*	*Amount (in Rs.)*
1	*509718*	*19.11.2010*	*1,36,716/-*
2	*509728*	*17.01.2011*	*1,50,000/-*
		Total =	*2,86,716/-*

"

3. It is the Plaintiff's case that despite several reminders the amounts were not paid. According to the Plaintiff, the statement of account for the year 2010-11, in fact, is admitted by the Defendant by email dated 29th February, 2012. In respect of two amounts, the Defendant claimed that he had not received the bills/supplies. Out of the total payment to the tune of Rs.7,28,555/-, the Defendant admitted in the email dated 29th February, 2012, liability to the extent of Rs.4,53,555/-.

4. Finally, the Plaintiff got a legal notice issued and reminder notices, however, since no payment was received the Plaintiff filed the suit for principal amount of Rs.7,28,555/- along with the interest i.e. for total sum of

Rs.11,21,975/-.

5. The written statement claimed that M/s. Zen International is a proprietary concern and Mr. Mohammad Rais is not the proprietor of the same. Apart from this, there are no preliminary objections that have been taken by the Defendant and the entire written statement consists of bare denials.

6. The Plaintiff led evidence of Mr. Nagesh Tanwar as PW-1, who is the proprietor of the Plaintiff firm. Mr. Tanwar filed his evidence and exhibited the following documents.

- Ex.PW-1/A - Ledger account
- Ex.PW-1/B - Original invoices admitting acknowledgments of receipt of material
- Ex.PW-1/F to G - Documents including various cheques, which have been returned due to insufficient funds.
- Ex.PW-1/H to I - Original print out of email dated 29th February, 2012 along with the statement of account.
- Ex.PW-1/J - Legal notice dated 18th March, 2014.
- Ex.PW-1/M - email dated 11th April, 2014 which is a reminder legal notice

7. In his cross examination, PW-1 states that he had supplied the material to the Defendant at 59/5, Naraina Industrial Area, Phase-II. The email, according to him, was received from Mr. Mohammad Rais. He also states that he did not have any dealing with M/s. Global Trading Company. The Plaintiff states that in the email received, Mr. Mohammad Rais has represented himself as the proprietor of M/s. Zen International. He also

deposed that he had received part payments from M/s. Zen International.

8. PW-2 Mr. Sarvesh Kumar was another witness, who submitted that he used to supply plastic products to Mr. Mohammad Rais and there were disputes which were going on even in respect of supplies made by him. He confirmed that the signatures on the cheque Ex.PW-1/G are of Mr. Mohammad Rais.

9. PW-3, was an official from Allahabad Bank. He produced the attested current bank opening form of M/s. Zen International, which was marked as Ex.PW-3/1. He confirmed that M/s. Zen International was a customer of East Patel Nagar Branch. He also confirmed that this firm is the sole proprietary concern of Ms. Zeenat Rais and the introducer was Mr. Mohammad Rais, as per the bank account opening form.

10. PW-4 was an accountant of the Plaintiff Company, who stated that he cannot identify the signatures of Mr. Mohammad Rais. He confirmed that supply of goods was made by the Plaintiff. He relied upon the documents Ex.PW-1/A to Ex.PW-1/I which are invoices and the ledger account. He submitted that both M/s. Global Trading Company and M/s. Zen International have the same proprietor i.e. Mr. Mohammad.

11. Mr. Mohammad Rais filed his affidavit by way of evidence but did not appear for cross-examination. The suit was decreed by the Trial Court. The operative portion of the trial court judgment is as under:

> "***17. Issue no. 5 : Relief.***
> *Accordingly, in view of the foregoing reasons and discussion as well as the facts and circumstances of the case, plaintiff is entitled for decree of his suit, a money decree of Rs.11,21,975/- along with pendent lite and future interest @9%per annum from the filing*

of the suit till the realization is hereby passed in favour of the plaintiff and against the defendant. Cost of the suit is awarded in favour of the plaintiff. Decree sheet be accordingly prepared. File be consigned to the record room."

12. In the present appeal preferred by Mohammad Rais, the main contention of Mr. Tarique Siddiqui, learned counsel for the Appellant/Defendant is that Mr. Mohammad Rais is not the proprietor of M/s. Zen International, and therefore, the decree is faulty. He submits that the Plaintiff was well aware of Ms. Zeenat Rais being the proprietor and it ought to have been impleaded the correct person. This Court on 23rd February, 2018 passed the following order.

"***CM APPL.2616/2018 in RFA 410/2016***

This is an application filed by the Appellant seeking stay of execution proceedings on the ground that the proprietor of M/s Zen International is not Mr. Mohammed Rais but Ms. Zeenat Rais. The documents placed on record show that Mr. Mohammed Rais and Ms. Zeenat Rais are husband and wife. Mr. Mohammed Rais is the introducer for the bank account of the firm. He appeared before the Trial Court but did not led the evidence to show that he is not running affairs of the firm. The present application is accompanied by an affidavit of Mr. Mohammed Rais. The submission of Mr. Siddiqui, Ld. Counsel for the Appellant is that since Ms. Zeenat Rais was not impleaded in the suit, the impugned order is unsustainable. However, the counsel for the respondent submits that Zen International had issued the cheque and all the transactions were *being conducted by Mr. Mohammed Rais. The Respondent had supplied packaging material to the Appellant and a cheque for Rs.10 lakhs had been given towards the cost of such packaging material which remained unpaid.*

Let Mr. Mohammed Rais and Ms. Zeenat Rais be present in Court.

Relist on 12th March, 2018."

13. Thereafter, notice was issued by the Court to Ms. Zeenat Rais. She entered appearance on 18th May, 2018. Mr. N. L. Sahai, Advocate appeared on behalf of Ms. Zeenat Rais. Since this is a money decree, both the counsels for Mr. Mohammad Rais and Ms. Zeenat Rais were directed to seek instructions as to which of them would be depositing the decretal amount in order to proceed further with the appeal. However, today both the parties have refused to deposit any part of the decretal amount. It is the contention of Mr. Mohammad Rais that the suit itself was wrongly filed and he is not the proprietor so he is not liable to pay any money. It is the contention on behalf of Ms. Zeenat Rais that since the suit was not filed against her, she is not liable to pay any money.

14. A perusal of the documents on record and the evidence clearly shows that Mr. Mohammad Rais has been dealing with the Plaintiff regularly. Insofar as the dealings of M/s. Zen International is concerned, the original cheque is on record which also shows that he has signed on behalf of M/s. Zen International as a proprietor and it was a cheque for Rs.1 lakh. The return memo of the bank does not state that the signatures did not match but merely states that the amount `Exceeds arrangement'. This itself shows that Mohammad Rais was, in fact, carrying out his business on behalf of M/s. Zen International. Moreover, in the account opening form, he has introduced

Ms. Zeenat Rais and his signatures appear in the said form as well. The manner in which the husband and wife have been conducting the business from the same premises makes it clear that the Plaintiff, who is an outsider, could not have known as to who is the proprietor of the Defendant firm. In any event, both the parties are present today in the Court. However, both of them do not take any responsibility for the payments due to the Plaintiff.

15. The outstanding nature of the payment is clear from the various documents placed on record including ledger account, original invoices and the part payments. The email along with the statement of account, which admits a substantial part of the outstanding amount, is not disputed. Mr. Mohammad Rais has, in fact, failed to even appear in the witness box in support of the defence put forward by him. Thus, adverse inference has to be drawn against him. In his affidavit, a specific statement was made that he was not the Proprietor the following is extracted below:

> *"4. The deponent states that he never approached to the Plaintiff at any point of time and deponent is not the Proprietor of M/s Zen International and he has nothing to do with the alleged transaction between the Plaintiff and M/s Zen International."*

He ought to have appeared to support this statement. Without having subjected himself to cross examination, the statement in the affidavit ought to be taken as not being proved. The memo of parties has been structured in such a manner that it has been filed against M/s. Zen International. It could not have been within the knowledge of the Plaintiff as to whether Mr. Mohammad Rais and Ms. Zeenat Rais was the proprietors when, in fact, Mr. Mohammad Rais was dealing with them. The fact, that Mr.Mohammad Rais has contested the suit on behalf of M/s. Zen International, is itself clear evidence of the fact that he was responsible for the transactions.

16. Under these circumstances, the trial court judgment does not warrant any interference and the same is not perverse or illegal. The decree is, however, modified in the following manner.

17. The suit is decreed for a sum of Rs.7,28,555/- along with the *pendent lite* and future interest @ 8% per annum from the date of filing of the suit till the date of payment. The present decree being passed shall be read as decree against M/s. Zen International through its proprietor irrespective of whether Mr. Mohammad Rias or Ms. Zeenat Rais is the proprietor. Both the parties are present in Court and are bound by the decree passed.

18. Appeal is, accordingly, dismissed.

PRATHIBA M. SINGH
JUDGE

MAY 30, 2018/*dk*