

\$~19

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

Date of Decision: 24th April, 2018

+

RFA 376/2017

M/S SALGUTI INDUSTRIES & ANR.

..... Appellant

Through: Mr. Shashi Shankar, Ms. Ekta Raghav
and Mr. Subrat Tripathi, Advocates
(M-9810433650)

versus

M/S J.P TEXTILES

..... Respondent

Through: Mr. B.S. Verma, Advocate (M-
9971169041)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present appeal has been preferred against the judgment/order dated 30th November, 2016 by which the suit of the Respondent/Plaintiff was decreed in the following terms:-

“(15) In view of my findings on the various issues above, the plaintiff is held entitled to the principal amount of Rs.2,78,651/- with interest @ 10% per annum on the said amount from the date of filing of the suit till realization of the amount and costs of the suit.”

2. A suit for recovery was filed by the Plaintiff M/s J.P. Textiles (*hereinafter “Plaintiff”*) against two Defendants, namely, Salguti Industries Ltd. (*hereinafter “Defendant no.1”*) and Sh. Prabhu Dass, Manager, Marketing of Defendant no.1 (*hereinafter Defendant no. 2*). The transaction relates to supply of cotton yarn. According to the Plaintiff, the supplies were duly made but there is an outstanding payment of principal amount of

Rs. 2,78,651/- which was not made by the Defendants. Accordingly, a suit for recovery was filed for both the principal amount and interest thereon.

3. In the written statement, the case of the Defendants was that the material supplied by the Plaintiff was defective and accordingly a debit note was issued by them to the Plaintiff. Further, it is the case of Defendants that they incurred a loss of over Euros 20,537 as the exported goods were rejected by Valman SPA who was the buyer. The Defendants submit that they have also filed an FIR in respect of the transaction being FIR No. 115/2016, PS, Chikkadapally, Distt. Hyderabad City under Section 406, 420, 506, 120B IPC. Counsel for the Defendants submits that a suit has also filed against the Plaintiff. However, details of the same have not been disclosed.

4. The following issues were framed in the suit on 7th July, 2014:-

- “1. Whether the plaintiff is entitled for recovery of Rs. 4,74,454/-as prayed for ? (OPP)*
- 2. If so, whether the plaintiff is entitled for any interest, if yes,for what period and at what rate ? (OPP)*
- 3. Whether the plaintiff has not come to the court with clean hands and has suppressed material facts ? (OPD)*
- 4. Whether the present suit is without cause of action ? (OPD)*
- 5. Relief”*

5. After the issues were framed, the Plaintiff's evidence was led on 12th November, 2014. The Defendants' witness i.e. Mr. Prabhu Dass filed his affidavit initially on 4th September, 2015 and filed another affidavit on 18th April, 2016. Counsel for the Plaintiff submits that the second affidavit was actually filed on 7th October, 2016. The Court repeatedly notes on 4th September, 2015 that though the affidavit of DW-2 is filed, no affidavit of

DW-1 is filed. A perusal of the order sheet of the Trial Court reveals that the Trial Court failed to notice that the witness appearing on behalf of the Defendants was actually the Manager, Marketing of Defendant No. 1 Company who was also impleaded as Defendant no. 2. The Defendants made a statement on 18th March, 2016 itself that they only wished to examine DW-2 and no one else. Mediation was attempted, but the same failed. On 1st September, 2016 the following order was passed by the Trial Court:-

“There is no list of witnesses filed on behalf of the defendants. The affidavit-in-evidence of DW2, the defendant no. 2 is filed. But the affidavit-in-evidence of DW1 is not filed till date nor the DWs are present for examination on the pretext that the defendants are still in the process of negotiations.

On inquiries, it is revealed that the offers and counter offers of the parties are not acceptable to each other. The defendants are directed to appear in person to disclose about the viability of any negotiations.

The affidavit-in-evidence of DW1, be filed within 03 days by supplying advance copy to the opposite party/counsel at bar, before filing it in the court. Last opportunity is given to the defendants for DE.”

6. Unfortunately, the Trial Court adjourned the matter for filing of affidavit of Defendant no.1 despite the statement made by the Defendants that Mr. Prabhu Dass would be the only witness and further despite the fact that the affidavit of Mr. Prabhu Dass was on record. Since the court repeatedly directed an affidavit to be filed on behalf of Defendant no.1, a second affidavit of Mr. Prabhu Dass itself was filed in October 2016. The following was thereafter passed on 7th October, 2016:-

“No list of witnesses filed by the defendants.

*Only one affidavit of evidence has been filed on behalf of defendant no. 2. No affidavit of evidence filed on behalf of the defendant no. 1 despite specific directions. **The evidence of the defendants is hereby closed.** Be listed for final arguments and filing of written memorandum of arguments with advance copies to each other and soft copy to the court on 10.11.2016. Meanwhile, in case if there is any settlement, this court may be informed.”*

7. Since the evidence of Defendants was closed on 7th October, 2016, arguments were heard and judgment was pronounced on 30th November, 2016. Since there was no evidence on behalf of the Defendants, the Plaintiff's evidence was considered and the suit was decreed.

8. The Trial Court appears to have proceeded in an erroneous manner in this matter. The suit which was initially filed was against the Defendant no.1 and 2, the second defendant being the Manager-Marketing of Defendant no. 1. Even the transaction with the Plaintiff appears to have been carried out through Defendant no. 2. Thus, the Defendants chose to produce only Defendant no.2 as the witness on behalf of both the Defendants. The Trial Court, without appreciating this repeatedly adjourned the matter for filing of the evidence on behalf of Defendant no.1. This led to the erroneous order being passed of closure of the Defendants' evidence. This order of closure of evidence of Defendants was passed despite the affidavit of the Defendant No. 2 being on record. The closing of the Defendants evidence is unsustainable and the subsequent decree passed is also unsustainable as the evidence of the Defendants was not considered. There was no order directing the witness of the Defendants to be present. Repeatedly orders have been passed only directing DW-1 to be present.

9. Further the suit was initially filed as a suit under Order XXXVII CPC, however, leave to defend was granted on 24th February, 2014 on terms. In compliance of the order granting leave to defend, the Defendants deposited a sum of FDR of Rs. 1,25,000/- with a maturity amount of Rs. 1,62,063/-. Subsequently, in this appeal pursuant to the order of this Court, Appellant have also deposited further sum of Rs.2,17,650/-. The same is lying in a Fixed Deposit in this court.

10. Considering that there is a dispute raised by the Defendants which is liable to be adjudicated after considering the Defendants' evidence, it is deemed appropriate that an opportunity is granted to the Defendants to adduce their evidence in this matter. The affidavit of the Defendant's witness was on record when the impugned judgement and decree was passed, without considering the same. Accordingly, impugned judgment/decreed dated 30th November, 2016 is set aside. The following directions are accordingly issued:

- i) The sole witness of the Defendants, Sh. Prabhu Dass shall appear before the Trial Court on the dated fixed and his statement shall be recorded. Opportunity to cross examine him shall be given to the Plaintiff;
- ii) The final arguments shall be heard after the statement of the Defendants' witness is recorded and Defendants close their evidence;
- iii) The original FDR lying in the Trial Court record with a maturity date of 19th May, 2017 shall be returned to the Defendants with an undertaking that a fresh FDR for the sum of Rs.1,62,063/- shall be submitted within the time prescribed by the Trial Court.
- iv) The sum of Rs.2,17,650/- lying deposited in this court shall continue to lie in fixed deposit and shall abide by the final judgment of the Trial

Court.

11. The appeal is allowed in the above terms.

12. The matter is listed before Trial Court for further proceedings on 17th May, 2018. Trial Court record be sent back.

PRATHIBA M. SINGH
JUDGE

APRIL 24, 2018

Rahul/nk

