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

RESERVED ON : NOVEMBER 29, 2017
DECIDED ON : JANUARY 04, 2018

\+ **RSA 210/2016 & CM No.28333/2016 (Stay)**

CHINA GARDEN RESTAURANT ..... Appellant

Through : Ms.Sonam Anand, Advocate.

versus

M/S VENUS INDUSTRIES ..... Respondent

Through : None.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P GARG, J.

1. The present regular second appeal has been preferred by the appellant to challenge the legality and correctness of a judgment dated 10.05.2016 of learned Additional District Judge in RCA No.11/2015 whereby the findings recorded by the learned Senior Civil Judge in Suit No.128/2012 (*M/S Venus Industries vs. China Garden Restaurant*) were endorsed. The appeal is contested by the respondent.

2. I have heard the learned counsel for the appellant and have examined the file. Appellant's counsel urged that the impugned judgment cannot be sustained as the evidence adduced by the appellant before the Trial Court was not appreciated in its true perspective. The respondent miserably failed to produce on record books of accounts to

establish that the goods were ever delivered to the appellant. It was admitted by the respondent that advance payment of ₹50,000/- was given to him for the supply of goods which he failed to comply. Consequently, counter-claim for the recovery of ₹50,000/- was filed by the appellant before the trial court. There was no cogent document on record to show if the goods were ever received by the appellant or his representative. Ledger account of the appellant (Ex.DW-2/2) only showed payment against invoice dated 06.04.2010. There was no basis for the trial court to hold and conclude that the other three invoices which did not find mention in Ex.DW-2/2 stood admitted by the appellant and the goods were supplied against the said invoices. The respondent was unable to show if any of the invoices had signatures of the appellant's representative. The invoices relied upon by the respondent were self-created, false and fabricated documents.

3. Reliance has been placed by the appellant on *Kurian Chacko vs.Varkey Ouseph* AIR 1969 Kerala 316; *Vinod Kumar vs.Gangadhar* (2015) 1 SCC 391; *Shasidhar & Ors. vs.Ashwini Uma Mathad & Anr.* (2015) 11 SCC 269 and *Kusum Kund Durga vs.Kalra Papers (P) Ltd.* 2013 I AD (DELHI) 532.

4. Undisputedly, a suit for the recovery of ₹87,745/- was filed by the respondent. It was averred in the plaint that vide invoices No.R1-45 dated 06.04.2010 for ₹24,806/-; R1-135 dated 15.04.2010 for ₹29,632/-; R1-136 dated 15.04.2010 for ₹1,04,443/- and R1-154 dated 16.04.2010 for ₹3,654/- (for a total value of ₹1,62,535/-), goods were supplied to the present appellant. After adjusting ₹74,790/- paid by the appellant a sum of ₹87,745/- was outstanding which he failed to pay despite service

of legal notice dated 7.3.2012. The suit was contested by the present appellant. In the written statement, the appellant denied receipt of any goods. It was claimed that ₹50,000/- were advanced to the respondent to supply certain goods within fifteen days. Since the respondent failed to supply the goods, he was liable to pay ₹50,000/-. It was further averred that the invoices relied upon by the respondent were forged and fabricated documents.

5. To prove their respective case, the respondent examined PW-1 (Anil Sharma) and the appellant examined DW-1 (Raminder Singh) and DW-2 (Girish Chand Joshi). After considering the rival contentions of the parties and on appreciation of the evidence, the learned Senior Civil Judge by the judgment dated 14.05.2015 decreed the suit in the sum of ₹87,745/-. The respondent was also granted interest @ 18% p.a. from the date of filing of the suit till the date of passing of the order. Future interest @ 6% p.a. was also awarded. Challenge to the said judgment in RCA No.11/2015 did not yield any positive result. The appellate court rather granted costs to the respondent by a judgment dated 10.05.2016.

6. Needless to say, burden to prove its case was upon the respondent. The respondent examined Anil Sharma as PW-1, who filed his evidence by way of affidavit (Ex.PW-1/1). Anil Sharma proved the copy of accounts of statement Ex.PW-1/C and the copies of the bills Ex.PW-1/D (colly). He also deposed that a legal notice was served upon the appellant vide postal receipts Ex.PW1/E (colly); it remained unreplied. This witness was cross-examined at length. In the cross-examination the witness denied if ₹50,000/- were ever advanced by the appellant. He reiterated that the plaintiff firm had received the order for

supply of goods in April, 2010. The order was placed for supply of goods by the defendant at the time of his personal visit. The plaintiff firm had maintained invoices for purchase order for supply of goods and the same were Ex.PW-1/D (colly). The witness further reiterated that at points A, B & C on the Ex.PW-1/D (colly), the signatures of the appellant appeared to show that the articles were received. He denied that these were forged signatures of the respondent. Anil Sharma further disclosed that order for a sum of ₹1,63,000/- approximately for supply of the goods to the appellant were received; the respondent firm had supplied the goods to the tune of ₹1,62,535/- through local transport. The witness elaborated that at the time of supply of the goods, security staff of Ashoka Hotel used to be present but the consignment was stamped by the staff of appellant. The witness refuted that the bills/invoices Ex.PW-1/D (colly) were forged and fabricated. The witness further claimed that the document Ex.PW-1/D (colly) bore signatures of Merchandiser namely Ashmeet Kaur at points X1, X2 and X3. It also had the signatures of M.D., namely, Praveen Khurana at points Y1, Y2 and Y3.

7. On perusal of the evidence adduced on record by the respondent, it stands established that the goods were delivered to the appellant vide invoices Ex.PW-1/D (colly).

8. The appellant examined DW-1 (Raminder Singh) who adduced his evidence by way of affidavit (Ex.DW-1/A) and proved the documents Ex.DW-1 to Ex.DW-2 (colly). The witness reiterated the averments in the written statement. When cross-examined, the witness was unable to answer the queries raised by the respondent's counsel.

He was unable to disclose as to how much payment has been given to the respondent till date. He volunteered to add that besides ₹50,000/-, they had made payment of ₹8,016/- and ₹16,790/- as per ledger account Ex.DW-2 (colly). He was unable to inform whether the material was supplied against the said payment of ₹8,016/- and ₹16,790/-. The witness had no knowledge as to who had released the said payments. The witness was unable to disclose about the entry mark at point A to A-1 and B to B-1 in the ledger account statement page no.11 (Ex.DW-2) (colly). He did not deny categorically if the material was not supplied to the appellant in April, 2010 through four invoices. He merely expressed his ignorance if the respondent had supplied the material through four invoices in April, 2010. The witness informed that he had no knowledge if the respondent supplied the material worth ₹1,62,535/- in April, 2010. When asked if any material against invoice R1-136 dated 15.04.2010 was received, the witness expressed his ignorance.

9. On scrutinizing the entire statement of this crucial witness, it reveals that material facts proved by the respondent by way of affidavit of PW-1 (Anil Sharma) have remain unchallenged and unrebutted. In the written statement the appellant's case was that no articles, whatsoever, were ever delivered by the respondent any time and the invoices relied upon were forged and fabricated. However, in the cross-examination DW-1 (Raminder Singh) took conflicting stand and admitted that there were previous transactions between the parties and the running account was in existence. The answers given in cross-examination reveal that the appellant used to get supply of the

articles/goods from the respondent and had made certain payments as reflected in its own ledger account (Ex.DW-2) (colly). All these facts were not pleaded or asserted by the appellant in the written statement or in the evidence by way of affidavit Ex.DW-1/A. The appellant apparently concealed the material facts and falsely denied that there was no delivery of the goods from the respondent.

10. DW-2 (Girish Chand Joshi), who used to look after the accounts department, in the cross-examination disclosed that a cheque for the sum of ₹2,54,367/- was issued in the name of the respondent. He volunteered to add that it was subsequently cancelled due to non-supply of goods by the respondent. He admitted that they used to receive the material at Ashoka Hotel from other parties. When specifically asked whether any material was received from the respondent vide invoices R1-45 dated 06.04.2010/-; 135 and 136 (both dated 15.04.2010) and 154 dated 16.04.2010, the witness responded that he had received the material only against one invoice, that was around ₹24,000/- or ₹25,000/-. As far as he remembered the goods received were worth around ₹8,000/- against the aforesaid invoice which were regarding cutlery items. He further disclosed that an assurance was given to issue a 'credit note' of remaining amount of ₹16,000/- in the document exhibited as DW-2/2 (colly). The witness was unable to tell as to whose signatures appeared at point 'A' on Ex.PW-1/D (colly on 1st page) and at point 'B' on Ex.PW-1/D (colly on 2nd page). He did not remember whether the phone number mentioned at point 'B' belonged to the appellant's hotel or not. He did not know whether signatures at point 'C' on Ex.PW-1/D (colly on 3rd page) was of appellant's

employee. He was unable to disclose if legal notice dated 07.03.2012 was received by the appellant. He, however, admitted that it was not responded to.

11. Again, the testimony of DW-2 does not support the stand taken by the appellant in the written statement. There is variance between the pleadings and the proof adduced by the appellant before the trial court.

12. In civil cases, standard of proof is preponderance of probabilities and not beyond reasonable doubt. When both the parties have led their evidence, burden to prove pales into insignificance. In the present case, the respondent was able to discharge the initial burden placed upon him to prove that the articles were supplied to the appellant by virtue of invoices No.R1-45 dated 06.04.2010 for ₹24,806/-; R1-135 dated 15.04.2010 for ₹29,632/-; R1-136 dated 15.04.2010 for ₹1,04,443/- and R1-154 dated 16.04.2010 for ₹3,654/- (for a total value of ₹1,62,535/-). PW-1 had categorically given the names of the individuals whose signatures appeared on these invoices to show that the goods were received. The appellant did not produce any individual to deny the signatures over the invoices. It was not claimed that no such individual was appellant's employee at any point of time. Some transactions relied upon by the respondent find reflection in the accounts maintained by the appellant for which no explanation has been offered for its denial in the written statement.

13. Both the courts below have dealt with all the relevant contentions minutely. The concurrent findings of the courts below on facts based upon fair appreciation of the evidence deserve no intervention.

14. The appeal lacks merits and is dismissed. All pending applications(s) also stand disposed of.

15. Trial court record along with the copy of the order be sent back forthwith.

S.P.GARG
(JUDGE)

JANUARY 04, 2018/sa