

\$~7

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

Date of Decision: 23rd April, 2018

+ **RFA 635/2016 & CM APPL. 31482/2016**

M/S SIKKA KWICK HANDLING SERVICES (P)

LTD

..... Appellant

Through: Mr. Jatin Sapra, Advocate (M-9312223395).

versus

M/S UNISTYLE IMAGES PVT LTD

..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is an appeal filed by the Appellant/Plaintiff (*hereinafter*, 'Plaintiff') challenging the order dated 31st March, 2016. The Plaintiff had instituted a suit for recovery against the Defendant/Respondent (*hereinafter*, 'Defendant') claiming a sum of Rs.3,57,550/-. After summons was issued in this suit, the Defendant did not appear and accordingly on 13th May, 2015, the Defendant was proceeded ex-parte. The Trial Court, thereafter, recorded ex-parte evidence on behalf of the Plaintiff.

2. The Plaintiff's witness Mr. Harvinder Singh, Assistant Manager, apart from his authorization produced the following documents:

- i) Original Board Resolution dated 29th September, 2014 as Ex. PW-1/A;
- ii) Board Resolution dated 7th July, 2015 as Ex. PW-1/IA;

- iii) Invoice No.39 as Ex. PW-1/B;
- iv) Ledger account as Ex. PW-1/C, and
- v) Affidavit alongwith 65B Certificate as Ex. PW-1/D.

3. The Trial Court recorded that there were three invoices which ought to have been produced by the Plaintiff i.e., invoice dated 16th May, 2013 for Rs.5,26,607/-, and invoices dated 31st May, 2013 for Rs.25,711/- and Rs.13,15,761/-. Out of these three invoices, only one invoice was produced i.e., invoice dated 16th May, 2013. Both the invoices dated 31st May, 2013 were not produced by the Plaintiff. As per the ledger account, PW-1/C, the outstanding amount claimed in respect of the Defendant was Rs.2,84,820/-. However, without producing the said invoices, the liability of the Defendant could not be established by the Plaintiff. The Trial Court therefore, dismissed the suit for non-prosecution of the invoices.

4. Notice was issued in the appeal on 30th August, 2016. However, none has appeared for the Defendant. The Defendant was proceeded ex-parte in the appeal on 20th December, 2017. The Plaintiff has filed an application under Order XLI Rule 27 seeking permission to bring on record additional documents i.e., the other two invoices not produced before the Trial Court. It is his submission that the ledger account was already on record before the Trial Court. The suit could not have been dismissed.

5. This Court has heard arguments on behalf of the Plaintiff. There is no doubt that the Plaintiff failed to produce two invoices which form the basis of his claim. A mere ledger account, without support from the background documents, cannot be taken to be true and correct, especially, when the Plaintiff's witness has not been cross examined. The Plaintiff ought to have

produced the two material invoices before the Trial Court and having failed to do so, the Trial Court was right in dismissing the suit.

6. Counsel for the Plaintiff submits that both the invoices were available but it was never advised that the non filing of invoices could lead to dismissal of the suit. Both the invoices were traced in its records and have been filed with the application. As held in ***Mahavir Singh & Ors. v. Naresh Chandra (2001) 1 SCC 309*** additional evidence may be permitted by the Appellate Court for various reasons and one such reason would be the inability of the Court to pronounce judgment owing to a lacuna or defect in the evidence as it stands. The Supreme Court observed as under:

*“5. Before we proceed further we would like to refer to the scope of an application under Order XLI, Rule 27 CPC. Section 107 CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order XLI, Rule 27 CPC. Principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, Section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly. The scope of Order XLI, Rule 27 CPC was examined by the Privy Council in *Kesowji Issur v. G.I.P. Railway* AIR 1931 PC 143, in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the court has no*

jurisdiction to admit such evidence in cases where this rule does not apply. Order XLI Rule 27 CPC envisages certain circumstances when additional evidence can be adduced:

- (i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
- (ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or*
- (iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.*

In the present case, it is not the case of either party that the first situation is attracted. So far as the second circumstance noticed above is concerned, question of exercise of due diligence would not arise because the concerned scientific laboratory from which examination is sought to be made itself was not in existence at the time of trial and so that clause is also not attracted. In the third circumstance the appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The expression "to enable it to pronounce judgment" has been subject of several decisions including Syed Abdul Khader v. Rumi Reddy and Ors. [1979]2SCR424 wherein it was held that when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of court delivering it. It is only a lacuna in the evidence that

*will empower the court to admit additional evidence.
[See: The Municipal Corporation of Greater Bombay
v. Lala Pancham and Ors. [1965]1SCR542].”*

7. The Court has seen the records and it appears that the claim of the Plaintiff is not dubious. Considering that the invoices are available with the Plaintiff and the Defendant has not appeared either before the Trial Court or before this Court, no prejudice would be caused if the Plaintiff is permitted to file the said two invoices and prove its case.

8. In view of the above facts and circumstances, the Plaintiff is permitted to lead supplementary evidence for production of two invoices dated 31st May, 2013 in support of its claim and prove the same in accordance with law. The said permission is being granted, subject to payment of Rs.10,000/- as costs to be paid to the Delhi High Court Legal Service Committee. The appeal is allowed in the above terms. The costs shall be deposited within a period of two weeks.

9. The Trial Court record be sent back to the Trial court and the matter be listed for further proceedings on 15th May, 2018, on which date, the Trial Court shall confirm that the costs have been deposited and thereafter proceed further in the matter. Appeal is accordingly allowed in the above terms.

**PRATHIBA M. SINGH
JUDGE**

APRIL 23, 2018
Rahul