* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RFA No. 892/2018**

% 30th October, 2018

M/S LAXMI NARAYAN BUILDERS & SUPPLIERS
..... Appellant
Through: Mr. Vijay Waghey, Advocate (9810244197)

versus

M/S GANPATI BUILDTECH PVT. LTD.
..... Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 45382/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No.45383/2018 (delay in re-filing)

For the reasons stated in the application, delay in re-filing is condoned.

CM stands disposed of.

RFA No. 892/2018

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 03.05.2018 by which the trial court has dismissed the suit for recovery of Rs. 25,42,823/- filed by the appellant/plaintiff against the respondent/defendant. The said suit amount was claimed on account of the appellant/plaintiff claiming to have supplied building construction material to the respondent/defendant.

2. As per the suit plaint, paras 5 to 13 illustrate the cause of action, and in order to show that the plaint was miserably lacking and failed to make the minimum averments as required to establish the existence of a cause of action in a suit for recovery of money for goods supplied. These paras 5 to 13 are reproduced as under:-

> "5. That at the time of making negotiations with the plaintiff, the defendant's directors Sh. Abhishek Gupta and his father Mr. Ajay Gupta asked the plaintiff to deposit the cash of Rs.7,00,000/- (Rupees Seven Lakhs Only) as security amount to be deposited

with them to ensure the continuous supply of quality material as per their desire.

6. That the plaintiff along with his father namely Sh. Bhopal Singh had paid a sum of Rs.7,00,000/- (Rs. Seven Lakhs Only) in cash as security amount to Sh. Abhishek Gupta on 10-02-2010 in the presence of Mr. Ajay Gupta and Mr. Bhopal Singh and one Mr. Jugendra Singh Solanki S/o Sh. G.R.Singh R/o D-115, Pocket-D, L.I.G. Flats, GTB Enclave, Delhi-110092.

7. That the directors of the defendant company namely Sh. Abhishek Gupta and Sh. Ajay Gupta had got signed and got thumb impression on some papers from the plaintiff as well as Sh. Bhopal Singh purportedly to be the contract papers relating to the supply of building material by the plaintiff. Those papers were including some blank letter heads of the defendant company.

8. That the defendant has placed orders for supply of building materials time to time and the plaintiff has supplied the same as and when required by the defendant and the defendant has never raised any objection in respect of the building material supplied to the defendant and the plaintiff was maintaining a regular account with the defendant.

9. That the plaintiff was raising the bills against the supply of the building material and the defendant was making the part payments in their account as maintained by the plaintiff in due course of business.

10. That the plaintiff has supplied the building material to the defendant upto September 2012. The defendant has assured the plaintiff to pay the complete price of each and every delivery of building material at the time of delivery but the defendant has failed to make the payment at the time of delivery.

11. That after many requests the defendant has issued three cheques to the plaintiff bearing No.- 955014 dated 10-3-2013 for Rs. 2,41,099/- and No.- 955016 dated 15-3-2013 for Rs. 5,00,000/- and No.- 955017 dated 21-3-2013 for Rs. 5,00,000/- all drawn on Punjab National Bank, Delhi but the all three cheques were dishonoured as such the plaintiff filed a criminal complaint under section 138 N.I. Act against the defendant.

12. That after that the defendant has made the payment of cheques amount and further failed to make the payment of balance due

amount even after the several requests has made by the plaintiff as well as his father.

13. That the defendant is also liable to pay principal amount i.e. Rs. 23,98,891/- and interest @ 18% per annum from 11-1-2014 to 10-5-2014 i.e. Rs. 1,43,932/- as such the defendant is liable to pay a total sum of Rs. 25,42,823/- till 10-5-2014."

3. When a suit is filed for recovery of money for material supplied, either the plaint will set out the exact invoices with their details with respect to which amounts are claimed, as also the payments made by the respondent/defendant in case only the balance amount is claimed. However, a reading of the aforesaid paras of the plaint shows that the requisite averments of the cause of action do not exist as to what were the invoices, what were the details of the invoices, when were the invoices raised, what were the amounts of the invoices, etc.

4. It is pertinent to note that the plaint is not also based on a statement that the appellant/plaintiff maintains an open, mutual and current account and what is stated is that the appellant/plaintiff has maintained a regular account. The expression 'maintaining a regular account' is not an expression under Article 1 of the Limitation Act, 1963 because Article 1 of the

Limitation Act requires maintaining of an open, mutual and current account.

5. Assuming that the plaint contains the cause of action of the details of the invoices, the issue is that whether the appellant/plaintiff has proved the claim of Rs. 23,98,891/- which is said to be the principal amount as per para 13 of the plaint. It is further required to be noted at this stage that with respect to three cheques which were dishonoured, as stated in para 11 of the plaint, admittedly, the proceedings under Section 138 of the Negotiable Instrument Act, 1881 have been compromised, and the appellant/plaintiff has received the amounts with respect to the three cheques. We would therefore be concerned with whether the appellant/plaintiff has proved the claim of Rs. 23,98,891/- less sum of Rs. 12,41,099/- (stated in para 11 of the plaint) already received by the appellant/plaintiff in the proceedings under Section 138 of the Negotiable Instruments Act.

6. A reading of the impugned judgment passed by the trial court, as also the affidavit by way of evidence filed by the appellant/plaintiff, shows that so far as the statement of account is

concerned, which is proved as Ex.PW1/A, this statement of account is not a statement of account as is known in the business because the statement of account is not a statement of account entry-wise for the transactions but the statement of account is nothing but total amount claimed at the end of each month as per the case of the appellant/plaintiff. This is commented upon by the trial court in paras 7.1 of the impugned judgment and this para 7.1 reads as under:-

> "7.1 As per deposition of PW1 at para no. 11, the three cheques bounced which were received by the plaintiff were settled in proceedings under Section 138 of N.I. Act. Once the said sum was received by the plaintiff in the said proceedings and so settled therefore, liabilities as to such cheques was already stood discharged by the defendant. Therefore, the said cheques are not under issue in the present case which cannot found basis of claim against the defendants in having been issued in discharge of liability so existed against the invoices. However, plaintiff has not pleaded that against which of the invoices the said cheques were issued in the month of March 2013. The statement of account filed by the plaintiff is from 01.04.2012 to 10.01.2014 vide Ex.PW1/A. If the same is settled upto March 2013 in view of the said cheques issued by the defendant and settled in separate proceedings under Section 138 NI Act consequently the liability of defendant must reduce. Plaintiff has not explained that how he has reduced such liability of the defendant on receipt of such cheque in the month of March 2013. In fact, in the statement of account the payment of the said amount of Rs. 12,50,000/- is shown by the plaintiff as paid amount against the total sum due for a sum of Rs. 36,48,891/-. After deduction of said amount, the balance is shown as Rs. 23,98,891/-. The statement of account, it is not prepared date-wise but it is prepared as month-wise without showing any of the invoices or amount specifically mentioned in the invoices.

> <u>The invoices are filed from 11.07.2011 but the statement of account is filed only from 01.04.2012. hence, the statement of account is not filed co-relating with the invoices filed. Hence invoices cannot be co-related with the statement of account for the period prior to 01.04.2012.</u>"
>
> (Underlining Added)

Therefore, the statement of account, as is required in law for claiming amount due, does not stand proved.

7. In any case, in law, the statement of account must be supported with the necessary documents of the transactions and the trial court in this regard notes that even the invoices filed and the statement of account do not tally because invoices are filed from 11.07.2011 and the so called statement of account is filed from 01.04.2012. There is also a mismatch between the total sum claimed of the invoices of Rs. 13,63,000/- and credit being shown in favour of the respondent/defendant is Rs. 3,95,000/- for the balance to come to Rs. 9,68,000/- and whereas the opening balance shown to be in favour of the appellant/plaintiff in April 2012 is Rs. 30,31,308/- and which goes up to Rs. 39,98,891/- by September 2012 for the balance due claimed of Rs. 9,67,583/- in September 2012. If the balance in September 2012 is Rs. 9,67,583/- then thereafter the respondent/defendant is shown to have received a

sum of Rs. 12,50,000/- on account of bouncing of cheques in Section 138, Negotiable Instrument Act proceedings, and thus, no amount is due.

8. The trial court also notes that the appellant/plaintiff has claimed a deposit of a sum of Rs.7 lakhs as security with the respondent/defendant but how this amount of Rs. 7 lakhs is deposited as security is not at all proved and in fact such an entry was not found to exist in the so-called account proved by the appellant/plaintiff.

9. The trial court has also noted that if the cheques were dishonored in March 2013 then why would the appellant/plaintiff continued to supply goods on credit basis much later till 10.01.2014. All these aspects do show the lack of credibility and merit in the case of the appellant/plaintiff and the same is stated in paras 7.2 to 7.8 of the impugned judgment, which read as under:-

> "7.2 After the period 01.04.2012 invoice is filed for 22.09.2012 for a sum of Rs. 3,61,076/-. Another invoice for 28.09.2012 is for a sum of Rs. 500277/-. Another invoice for 28.09.2012 is for a sum of Rs. 5,01,230/-. Hence the total sum in the said invoice comes to approximately Rs. 13,63,000/-. The credit shown to the defendant in the said period is for a sum of Rs. 3,95,000/-. Hence, balance amount comes approximately for a sum of Rs. 9,68,000/-. The opening balance shown by the

plaintiff is Rs. 30,31,308/- on April 2012 and by September 2012 the balance is shown after necessary credit as Rs. 39,98,891/-. Hence, the balance due shown by plaintiff is Rs. 9,67,583/- on September 2012. Hence by payment of said amount in the proceedings compounded under Section 138 NI Act the matter has been so compounded between the parties on such payment. The balance amount to be paid by the defendant under such proceedings under Section 138 NI Act and so paid thereunder does not match with the cheque amount with the dues claimed by the plaint in his statement of account Ex. PW1/A. As per own statement of account the balance due against the defendant on September 2012 was for a sum of Rs. 9,67,583/- though, the plaintiff has received a sum of Rs. 12,50,000/- from the plaintiff on bouncing of such cheques. Therefore, claim of the plaintiff is not matching with the issuance of cheque by the defendant as to such liability as per invoices filed for the period April 2012 till September 2012 which are Ex. PW1/B33, Ex. PW1/B34, Ex. PW1/B35. Other invoices for the remaining period are not filed by the plaintiff. The invoices filed by the plaintiff does not match with the statement of account filed by the plaintiff. In such view of the matter it cannot be stated that the statement of account is correctly prepared. Further, the statement of account does not mention date-wise raising of amount supplied, therefore, specific pleading is absent as to supply of material for any particular amount. In fact the invoices mentions date of consignment to the trucks but they were subsequently prepared on 28.09.2012 without proving necessary receipts on the basis of which the same were prepared. Hence, the invoices are not primary evidence of their preparation and therefore they cannot be relied upon.

7.3 Since the account statement of the plaintiff is only prepared month-wise thereby it does not prove the date on which supply was made. However, the account statement Ex. PW1/A reflects two similar statement for the period 01.04.2012 to 31.03.2013 at page no. 4 & 5. However reading both the two statements jointly shows that the amount credited and debited is same and hence there is no dispute as to the said two statements. The statement at para 5 from 01.04.2012 to 22.02.2013 is more specific and date-wise.

7.4 The DW-1 has deposed that he has also claimed recovery of Rs. 7 lakhs in the present suit which was initially given as security to the defendant before entering into first contract. It is noted that the account statement Ex. PW1/A begins from April 2012 showing closing balance of Rs. 30,31,308/-. At the end of the statement on 10.01.2014 after giving credit of Rs. 12,50,000/- paid in criminal complaint case u/sec. 138 of N.I. Act the balance amount is shown as Rs. 23,98,891/-. The account statement is regarding trade transaction between the parties and giving of security for advance is not a trade transaction unless specifically reflected in the account statement. The account statement of the plaintiff does not reflect so. Since the complete account statement is not filed therefore it cannot be found that whether the account statement has by default included the security amount. The burden is on the plaintiff to prove the complete account statement which is not filed. In the account statement security amount is not specifically mentioned at the end of each financial year which shows that the account statement is not inclusive of security amount of Rs.7 lakhs. The security amount is not adjusted usually under the regular account and it has to be refunded to the party when contracts between parties ends. In the present case the transaction is in the nature of running account and goods were admittedly supplied to the defendant on credit basis. When goods were supplied on credit basis then there was no need to give advance security amount to the defendant as there is nothing with the defendant which needs to be secured. In fact the defendant has to make payment for such supply of material by the plaintiff. Thereby the plea of the plaintiff that the account statement included security amount cannot be believed and in absence of complete account statement it is found that plaintiff has failed to prove complete transaction between the parties and nature of such transaction. Therefore, effective right is not available with the defendant to put question on each and every entry of account statement. It is noted that the specific entries are not mentioned in the entire account statement. Therefore defendant could not cross examination on each and every entry. Hence the account statement is incomplete not only in period but also by its nature by not mentioning specific entries which thereby cannot be relied upon for the purpose of claim of the plaintiff for recovery.

7.5 The invoices are filed by the plaintiff vide Ex.PW1/B1 dated 11.07.2011 to Ex.PW1/B35 dated 28.09.2012. It is already held that said invoices are not prepared on date specific basis on such supply but it is a consolidated statement in each of such invoice. The material was supplied on different dates. Hence the basis on which the said invoices were prepared are not produced in original before the Court and therefore the above invoices cannot be relied upon which is not a primary evidence. It is duty of the plaintiff to prove its case by primary evidence and there is no explanation from the plaintiff that why he has not produced the primary evidence in his case. Without such primary evidence the invoices Ex.PW1/B1 dated 11.07.2011 to Ex.PW1/B35 dated 28.09.2012 could not be prepared.

7.6 The plaintiff has never asked for any receipt from the defendant for giving of security amount of Rs.7 lakhs. The giving of receipt was delayed by the defendant and thereafter not supplied to the plaintiff despite asking several times by the plaintiff. No such date is pleaded of asking of such receipt by the plaintiff nor any action is taken against the defendant for non supply of receipt. Thereby it cannot be believed that any amount of Rs. 7 lakhs was given by the plaintiff to the defendant as security amount.

7.7 The signature of recipient of the goods which are allegedly received by the supervisor namely Sh. Dinesh and Sh. Rahul could not be identified by the plaintiff nor any general receipt of supply of goods through transport is proved by the plaintiff. PW-1 cannot tell the exact price of the material supplied by the plaintiff to the defendant nor he can tell the exact amount paid by the defendant to the plaintiff against such supply. It is admitted that the statement of account Ex. PW1/A does not reflect total amount of transaction between the parties for a sum of approximately Rs. 1 Crore. This is admitted by the PW-1. It is also admitted that PW-1 has not filed complete statement of account. Hence, the case of the plaintiff cannot be believed.

7.8 It is noted that the cheque no. 955014 dated 10.03.2013 for a sum of Rs. 2,41,099/-, cheque no. 955016 dated 15.03.2013 for a sum of Rs. 5 lakhs and cheque no. 955017 dated 21.03.2013 for a sum of Rs. 5 lakhs, all drawn on Punjab National Bank were issued by the defendant which were bounced on presentation. When the cheques were bounced then it is difficult to understand that the plaintiff continued to supply goods to the defendant on credit basis till 10.01.2014. In view of the fact that the invoices are filed only till 28.09.2012. In such circumstances of the case and when the account statement is not proved it cannot be said that the plaintiff has supplied the goods to the defendant."

10. In my opinion, therefore, the trial court has committed no illegality in dismissing the suit for recovery of monies as the appellant/plaintiff has miserably failed to prove his case. As already stated above, in fact even the plaint is completely bereft of the requisite averments of a cause of action. The statement of account relied upon by the appellant/plaintiff is not an open, mutual and current account and is not an account at all as is known in law. Clearly, there are unexplained discrepancies with respect to the invoices, their dates, the balance claimed as per the so called statement of account and so on. The trial court was hence justified in holding that the appellant/plaintiff failed to prove as to how the suit amount became due towards the appellant/plaintiff.

11. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed.

OCTOBER 30, 2018/ib **VALMIKI J. MEHTA, J**