

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

+ **RFA No. 778/2018**

% **14th September, 2018**

M/S S P P FOODS PRODUCTS PVT LTD

..... Appellant

Through: Mr. Bharat Arora and Mr.
Pradeep Gahalot, Advocates
(Mobile No. 9811628929).

versus

M/S HANNU MARKETING

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 37554/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 37556/2018 (for delay)

2. For the reasons stated in the application the delay of 6 days in re-filing the appeal stand condoned, subject to all just exceptions.

C.M. stands disposed of.

RFA 778/2018 and C.M. Appl. Nos. 37553/2018 (for stay), 37555/2018 (for taking on record additional documents)

3. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 10.04.2018 by which the trial court has dismissed the suit for recovery of Rs.6,60,327/- along with interest filed by the appellant/plaintiff, and who pleads to be a seller of non-woven fabric for packing material to the respondent/defendant.

4. The facts of the case are that the appellant/plaintiff pleaded that there existed business relations between the parties under which the appellant/plaintiff sold to the respondent/defendant non-woven fabric for packing material. In paras 1 to 6 of the plaint, no details have been given as to when the business relations commenced or what were the total supplies made under which separate invoices. Thereafter, abruptly in para 7 of the plaint, the appellant/plaintiff

states that the respondent/defendant issued a cheque no. 751836 drawn on Punjab and Sind Bank dated 03.09.2014 for the amount due of Rs.6,60,327/-, and the subsequent para 12 says that since this cheque was dishonoured hence and that the subject suit was filed for recovery of moneys.

5. The respondent/defendant contested the suit by pleading that all dues for the supplies made by the appellant/plaintiff to the respondent/defendant stood duly paid and the dishonoured cheque which the appellant/plaintiff claims to have given for the balance dues, was in fact only a security cheque given at the commencement of business dealings between the parties and the same has been misused by the appellant/plaintiff for claiming the amount due. The suit was therefore prayed to be dismissed.

6. After the pleadings were complete, the trial court framed issues and the parties led evidence. These aspects are recorded in paras 5 to 7 of the impugned judgment, and these paras read as under:-

“5. On the basis of the pleadings, following issues were settled on 28.09.2016:-

1. Whether the plaintiff is entitled for recovery of Rs.6,60,327/- as prayed for ? OPP

2. Whether the plaintiff is entitled for any interest? If so, at what rate and for what period? OPP
3. Whether the plaintiff has not approached the court with clean hands and has suppressed material facts? OPD
4. Whether this court has no territorial jurisdiction to try the present suit? OPD
5. Whether the suit is without cause of action? OPD
6. Whether the suit is barred by the provisions of Order Rule 17 CPC? OPD
7. Whether the suit is not maintainable as the plaintiff company is not registered under Companies Act? OPD
8. Relief.

PLAINTIFF EVIDENCE

6. In order to prove its case, plaintiff has examined Sh. Pramod Kumar as PW1. He has tendered his evidence by way of affidavit Ex.PW1/A and relied upon the following documents:-

1. The Copy of Incorporation as Ex.PW1/1.
2. The Copy of resolution as Ex.PW1/2.
3. The copy of Tax invoices as Ex.PW1/3 (colly).
4. The copies of transport as Ex.PW1/4.
5. The certified copy of cheque bearing No.751836 dated 03.09.2014 for a sum of Rs.6,60,327/- as Ex.PW1/5.
6. Cheque returning memo dated 04.09.2014 as Ex.PW1/6.
7. Copy of legal demand notice dated 10.09.2014 and copy of the legal demand notice under section 138 of Negotiable Instrument Act, 1881 dated 10.01.2014 alongwith postal and courier receipts as Ex.PW1/7 (colly) and Ex.PW1/8 (colly).
8. Copy of the ledger account as Ex.PW1/9.

DEFENDANT EVIDENCE

7. In order to prove its case, defendant has examined Sh. Vijay Singhal as DW1. He tendered his evidence by way of affidavit Ex.DW1/A and relied upon the photocopy of complaint dated 11.12.2005 is marked as Mark A.”

7. Learned counsel for the appellant/plaintiff has drawn the attention of this Court to pages 76, 77 and 81 of the paper book of this appeal, which is the statement of account of the appellant/plaintiff filed and proved in the trial court as Ex.PW1/9, and in this statement of account two Invoices dated 11.01.2013 are shown as being the invoices for which payment was not made and therefore the appellant/plaintiff filed the subject suit.

8. The trial court has held that the entries in the statement of account being the two Invoices dated 11.01.2013 have not been substantiated because admittedly there is no proof of delivery of goods under these two Invoices dated 11.01.2013 inasmuch as the goods receipts relied upon by the appellant/plaintiff and proved as Ex. PW1/4 (Colly) do not bear any signatures of the defendant towards the receipt of the goods. The trial court has noted the contention of the respondent/defendant that the Transport Receipts Ex.PW1/4 (Colly) as per the respondent/defendant is a forged and fabricated document. The trial court thereafter in para 13 of the impugned judgment has referred to the fact that PW1 in his evidence admits that on the

documents Ex.PW1/4 (Colly) there are no signatures of receipt of goods. This para 13 of the impugned judgment reads as under:-

“13. Further, when PW-1 was shown the invoices Ex.PW1/3 (colly), he after looking at the said invoices admitted that there is no receiving on the said invoices, but deposed that receiving was on transport receipts. When he was shown the transport receipts Ex.PW1/4 (colly), he after looking at the same admitted that there is no receiving of goods on Ex.PW1/4 (colly). Plaintiff has neither examined the person/ transporter who has transported the material from Rudrapur to Bawana nor has filed the C forms as stated in the plaint.”

9. In my opinion, therefore, the trial court was justified in arriving at the finding that the appellant/plaintiff is not entitled to the suit amount inasmuch as appellant/plaintiff has failed to prove that the goods in question stood delivered to the respondent/defendant which form the subject matter of the two Invoices dated 11.01.2013. This is so because the transport receipts do not show any receiving of goods by the respondent/defendant and the same was admitted by the witnesses of the appellant/plaintiff.

10. The trial court has further given exhaustive and detailed observations as to how the cheque which is relied upon by the appellant/plaintiff, which is the sole cause of action pleaded in the

plaint for amount being due to the appellant/plaintiff, including for the suit to be within limitation, was not a cheque given by the respondent/defendant for clearing of any amount due under any unpaid invoices, but that this cheque was in fact only a security cheque which was with the appellant/plaintiff from the commencement of the business dealings. For arriving at this conclusion, the trial court has referred to this cheque no. 751836 which was proved as Ex.PW1/5 and the counter-foils of the cheque which showed that this cheque no. 751836 appears in the series of cheques pertaining to the year 2012 whereas the subject cheque as per the appellant/plaintiff bears the date of 03.09.2014 i.e. the cheque in question could not have been dated September, 2014 when the cheque is in the series of cheques which have been banked in the year 2012. This relevant para of the trial court is para 16, and which reads as under:-

“16. Now coming to the other document i.e. the cheque Ex.PW1/5. The defence of defendant is that the said cheque was the blank signed security cheque handed over to the representative of plaintiff. DW-1 during his cross-examination deposed that cheque was given as security against ordered invoice in January 2013. During arguments, Ld. Counsel for the defendant has drawn attention to the entry dated 12.12.2012 in the statement of account Ex.PW1/9, where there is balance of Rs.6,60,327 which is also the amount of cheque in question.

PW-1 during his cross-examination admitted that in the account statement, there is no detail of the cheque Ex.PW1/6. He further deposed that he does not remember when the cheque Ex.PW1/6 was handed over by the defendant. I have seen the cheque Ex.PW1/5 bearing no.751836 which is of the same series as the cheque shown at entry dated 10.12.2012 in Ex.PW1/9. The cheques shown at entry dated 09.09.2013 and 23.10.2013 are of completely different series bearing no.581149 and 581174. The entry dated 10.12.2012 is the entry just above the entry dated 12.12.2012 for the amount of Rs.660327/-. The bills/ invoices Ex.PW1/3 are subsequent to the said entry and are dated 11.01.2013. As discussed above, plaintiff has failed to prove invoices Ex.PW1/3 (Colly). On the contrary, DW-1 has stood the test of cross-examination and proved that cheque Ex.PW1/5 was the security cheque. Accordingly, both these issues are decided against plaintiff and in favour of defendant."

(underlining added)

11. Learned counsel for the appellant/plaintiff sought to argue that the cheque which given was not towards security, however, I completely agree with the detailed reasoning and conclusion of the trial court in para 16 of the impugned judgment, and more so because the appellant/plaintiff has completely failed to prove that it supplied goods under the two Invoices dated 11.01.2013.

12. In my opinion, in fact, the suit is liable to be dismissed on the ground of limitation as well because the suit cannot be said to be based on an open, mutual and current account as envisaged under Article 1 of the Limitation Act, 1963. The relevant pages of the statement of account which have been filed at pages 76, 77 and 81 of

this appeal paper book do not show any shifting balances. In law, shifting balances are a *sine qua non* once there is relationship between the parties of a seller and buyer, and since there are no shifting balances, the claim of the appellant/plaintiff will be only with respect to the two Invoices dated 11.01.2013 (with no further date fixed for payment) and since the suit was filed on 01.03.2016 i.e. three years after the supply of goods in terms of the invoices dated 11.01.2013, therefore, the suit was barred by limitation. The statement of account in question is not of an open, mutual and current account and requires the existence of shifting balances. The same has been arrived it on account of the ratios of the judgments of the Supreme Court in the cases of *Hindustan Forest Company v. Lal Chand & Others*, AIR 1959 SC 1349 and *Kesharichand Jaisukhal v. Shillong Banking Corporation* AIR 1965 SC 1711. I have considered the aforesaid two judgments of the Supreme Court in the judgment delivered in the case of *ICICI Bank Limited v. Mohd. Zaheen* RSA No. 85/2016 decided on 25.07.2017 and held that a suit cannot fall under Article 1 of the Limitation Act, 1963 unless either there are mutuality of obligations or existence of shifting balances. The relevant paragraphs of the

judgment in the case of *ICIC Bank Limited (supra)* are paras 7 to 11

and these paragraphs read as under:-

7. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of Rs.2,57,601.67/- against the respondent/defendant on account of the respondent/defendant having availed the overdraft facility in the current account maintained by the respondent/defendant with the appellant/plaintiff/bank. Admittedly, the last entry in the overdraft account whereby overdraft facility was availed was on 22.2.2011. Suit was filed on 29.8.2014 and hence the suit was held to be time barred having been filed three years after 22.2.2011.

8. The issue argued on behalf of the appellant before this Court, and as reflected from the order dated 22.3.2016 passed by the learned Single Judge of this Court while issuing notice in this RSA was that Article 1 of the Limitation Act, 1963 applies and limitation will be counted from the close of the year in which the last item of transaction is admitted or proved. It was accordingly argued that the courts below have wrongly dismissed the suit as time barred by applying Articles 19 and 21 of the Schedule of the Limitation Act.

9. In my opinion to a simple overdraft account Article 1 of the Limitation Act does not apply because in an overdraft account there is no mutuality of transactions i.e there are transactions which only create obligations on one side with the other entries being only towards complete or partial discharge of such obligations. For Article 1 of the Limitation Act to apply there has to be mutuality of obligations and not one sided obligations. This has been held by the Supreme Court in the judgment in the case of *Hindustan Forest Company v. Lal Chand & Others*, AIR 1959 SC 1349, and relevant paras 7 to 10 of which judgment read as under:-

“7. The question what is a mutual account, has been considered by the courts frequently and the test to determine it is well settled. The case of the *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*, may be referred to. There a company had been advancing monies by way of loans to the proprietor of a tea estate and the proprietor had been sending tea to the company for sale and realisation of the price. In a suit brought by the company against the proprietor of the tea estate for

recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by art. 85 of the Indian Limitation Act. Rankin, C.J., laid down at p. 668 the test to be applied for deciding the question in these words:

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Hallway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

8. The observation of Rankin, C.J., has never been dissented from in our courts and we think it lays down the law correctly. The learned Judges of the appellate bench of the High Court also appear to have applied the same test as that laid down by Rankin, C.J. They however came to the conclusion that the account between the parties was mutual for the following reasons:

"The point then reduces itself to the fact that the defendant company had advanced a certain amounts of money to the plaintiffs for the supply of grains. This excludes the question of monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs. 13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened

was that the sellers had undertaken to make delivery of goods and the buyer had agreed to pay for them and had in part made the payment in advance. There can be no question that in so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments.

10. The learned Judges however held that the payment of Rs. 13,000 by the buyer in advance before delivery had started, made the sellers the debtor of the buyer and had created an obligation on the sellers in favour of the buyer. This apparently was the reason which led them to the view that there were reciprocal demands and that the transactions had created independent obligations on each of the parties. This view is unfounded. The sum of Rs. 13,000 had been paid as and by way of advance payment of price of goods to be delivered. **It was paid in discharge of obligations to arise under the contract. It was paid under the terms of the contract which was to buy goods and pay for them. It did not itself create any obligation on the sellers in favour of the buyer; it was not intended to be and did not amount to an independent transaction detached from the rest of the contract.** The sellers were under an obligation to deliver the goods but that obligation arose from the contract and not from the payment of the advance alone. If the sellers had failed to deliver goods, they would have been liable to refund the monies advanced on account of the price and might also have been liable in damages but such liability would then have arisen from the contract and not from the fact of the advances having been made. Apart from such failure, the buyer could not recover the monies paid in advance. No question has, however been raised as to any default on the part of the sellers to deliver goods. This case therefore involved no reciprocity of demands. Article 115 of the Jammu and Kashmir Limitation Act cannot be applied to the suit.”

(emphasis supplied)

10. The Supreme Court took a similar view in the case of *Kesharichand Jaisukhal v. Shillong Banking Corporation AIR 1965 SC 1711*, where however in the facts of the case Article 1 of the Limitation Act was held to apply on account of reciprocal

obligations existing because in the overdraft account there were also deposits which were made by the customer and which thus created independent obligations to repay the amount of cash deposits and also on account of the cheques, hundis and drafts deposited for collection. The ratio in the case of *Hindustan Forest Company (supra)* was however reiterated in *Shillong Banking Corporation's* case (*supra*) that there is required existence of mutual dealings between the parties. The relevant paras of the judgment in the case of *Shillong Banking Corporation (supra)* are paras 10 to 12, and these paras read as under:-

"10. The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

11. Now in the leading case of *Hirada Basappa v. Gadigi Muddappa*, Holloway, Acting C.J. observed:

"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

These observations were followed and applied in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* and *Monotosh K. Chatterjee v. Central Calcutta Bank Ltd.*, and the first mentioned Calcutta case was approved by this Court in *Hindustan Forest Company v. Lal Chand*, Holloway, Acting C.J. laid down the test of mutuality on a construction of s. 8 of Act XIV of 1859, though that section did not contain the words "where there have been reciprocal demands, between the

parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasizes the test of mutuality laid down in the Madras case.

12. In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to s. 45(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative."

(underlining added)

13. In the present case, it is seen that there is no mutuality of obligations and transactions are one sided only being in the nature of grant of overdraft by the appellant/plaintiff/bank to the respondent/defendant and therefore any payment by the respondent/defendant is only towards discharge of the obligation created in favour of the appellant/plaintiff/bank. There are no transactions on each side creating independent obligations because

there is no obligation of the appellant/bank towards the respondent/defendant. Therefore, Article 1 of the Limitation Act cannot come to aid of the appellant/bank. Suit, therefore, filed on 29.08.2014 was barred by limitation on account of the last overdraft facility being availed on 22.02.2011 and on which date will arise the balance due in the overdraft account in favour of the appellant/bank and against the respondent/defendant.”

14. In view of the aforesaid discussion, I do not find any merit in the appeal, and the same is hereby dismissed.

SEPTEMBER 14, 2018

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VALMIKI J. MEHTA, J