

\$~32

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

%

Judgment delivered on: 16.02.2018

+

RFA 10/2017 & CM APPL.245/2017

HAVELLS INDIA LTD

..... Appellant

Through: Mr. R.S. Kela and Mr. Sanjeev
Bindal, Adv. (Mob. 9810241752).

Versus

DILIP RATHI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This appeal impugns a judgment and decree dated 03.09.2016 passed by the Additional District Judge-16 (Central), Tis Hazari Court, Delhi, dismissing the appellant's suit, *inter alia*, on the grounds that the suit was not properly instituted and that no case was made out apropos the facts pleaded. The question of law raised by the appellant is whether the suit was properly instituted i.e. whether it was signed by a person duly authorised to do so. The suit had been signed by one Mr. S.R. Arora, a functionary of the appellant company. Its resolution allegedly authorising him was recorded in the Minutes' Book of the company. This book, although in possession of the appellant, was never produced and no explanation for the default was furnished. A mere extract of the resolution, authenticated by the Company

Secretary, was filed; however, for the document to be admissible the primary evidence i.e. the Minutes' Book should have been produced. Furthermore, the evidence to prove the ledger account was not supported by an affidavit as required under Section 65(b)(ii) of the Indian Evidence Act, 1972. The applications for bringing on record the requisite affidavit and necessary documents were dismissed on 05.09.2016 and 27.07.2016 respectively. The impugned order held as under:

“..... 18. While taking such evidence into consideration, the first authorization in favour of S.R.Arora is dt 24.08.05 which is Ex. PW1/2. Perusal of this document shows that same is true copy of extract of Resolution passed by finance committee in the meeting of Board of Directors of plaintiff company held on 24.08.2005. admittedly, by then M/s. Crabtree India Ltd. had not merged into plaintiff company. It is also admitted fact that suit is in respect of transaction between Crabtree India Ltd. and defendant. As such in respect of transaction in question plaintiff company had no legal claim by 24.08.05, but this is not explained as to how Havells India Ltd. was passing any Resolution in favour of Sh. S.R.Arora for prosecuting the legal proceedings on behalf of that company whereas by then M/s. Crabtree India Ltd have not merged into it.

19. In order to remove such difficulty, apparently PW-1 has also referred in his evidence another authorization dt 06.10.2008, which is Ex.PW1/2A. Obvious objection regarding this document can be that such document is not pleaded in the plaint and thus is liable to be ignored. Even if such document Ex. PW1/2A is taken into consideration, I find that any Resolution of Board of Directors either Ex.PW1/2 or Ex.PW1/2A do not satisfy the legal requirement so far as proving the due authorization on behalf of plaintiff company in favour of said S.R.Arora because at the time when these documents were exhibited admittedly witness has not brought the minutes book regarding the extract of resolution which were exhibited as Ex.PW1/2 and Ex.PW1/2A.

20. Law is well settled that mere exhibition of documents does not dispense with the proof of that documents as per law. As per the requirement of order 29 Rule 1 CPC in case suit filed by or against the corporation , pleadings on behalf of corporation / company may be signed and verified on its behalf by Secretary, Director or other Principal Officer of the company who is able to depose on behalf of plaintiff company. It has been held by Delhi High Court in "Escorts Ltd. Vs. Sai Autos and Ors," 42(1990) DLT 446 that only way to prove that a particular resolution at a meeting of Board of Directors of Company is that the minutes book in which said Resolution was recorded as having been so passed, should be produced in the court as that can form evidence of the fact that such a Resolution was passed. In that judgment Hon'ble High Court while referring to the provisions of Section 194 of Companies Act and also relying upon earlier judgment has held that Resolution of Board of Directors can be proved only by bringing minutes book of the Board of Directors Meeting. In the present case, such procedure has not been adopted.

21. In the evidence of PW-1, two Resolutions Ex.PW1/2 and Ex.PW1/2A have been simply referred to without proof of their base by bringing the minutes book. Moreover, these extract of Resolution do not bear signatures of any of the directors of the plaintiff company. Ld. Counsel for the defendant has relied upon judgment of Delhi High Court in "M/s. Nibro Ltd. vs. National Insurance Co. Ltd." decided on 06.03.1990, judgment in "M/s, Anant Raj Agency Pvt. Ltd. vs. M/s. National Insurance Co." decided on 14.05.2009 in CS OS No. 1413/90. In both these judgments also Hon'ble High Court had taken the view that due signing and verification of plaint is distinct from institution. Order 29 CPC does not cover the institution of the suit. A suit on behalf of corporation is required to be proved to have been validly instituted. Such valid institution can only be under the authority of the company. Such authority can flow only from Board of Directors of the Company. Thus, it is to be establish that suit has been instituted under the authority of

Board of Directors of the company or under the authority of some person duly empowered by the Board of Directors of the company to institute suit and legal proceedings for claims of company. Thus Order 29 Rule 1 CPC does not authorize persons mention therein to institute the suit on behalf of the corporation. Authority to institute the suit must be proved lawfully by primary evidence of Resolution of Board of Directors of Company, passed in this regard.

22. In the present case, PW-1 in cross examination has admitted that he had not brought the minutes book regarding Resolution dt 24.08.05 of Board of Directors passed in his favour. PW-1 further admits that minutes book are in power and possession of plaintiff company. Despite such evidence of PW1, minutes book regarding Ex.PW1/2 and Ex.PW1/2A were not brought on record. As such I find that authority in favour of Sh. S.R. Arora / PW1 has not been lawfully proved. Here it is also important to refer that PW-1 in his cross examination further admits that he do not have any personal knowledge regarding the transaction between Crabtree India Ltd. and defendant and that his knowledge is only based on the record available with him. Thus from such evidence, I find that plaintiff company has failed to prove due authority in favour of Sh. S.R.Arora who had signed and verified the plaint on behalf of plaintiff company. Issue accordingly decided against the plaintiff and in favour of defendant.

2. Apropos the case on merits, which was to be heard as issue no. 5, the Court held as under:-

“33. Another important aspect, which clearly creates doubt regarding plaintiff’s case, two witnesses were examined on behalf of plaintiff company but none of the witness had any first hand information about the transaction in question. PW-1 in his cross examination admits that he has no personal knowledge regarding the transaction entered into with defendant. He says that his knowledge relates to record available with him. Entire cross examination of PW-1 clearly indicate that his evidence remained evasive and vague.

Similarly, PW-2 who though in his evidence in his examination in chief tried to prove raising of invoices in question Ex.PW1/3 to Ex.PW1/7 and delivery of goods thereunder, but even in cross examination of PW-2, he has admitted that he has no personal knowledge about the case. Regarding delivery of goods under invoice Ex.PW1/5 also he has testified that fact regarding delivery of goods was told to him by delivery man but that delivery man was never examined. Thus, some of the evidence of PW-2 is rather based on hearsay evidence. Fact remains that reading the evidence of PW1 & PW2, together does not establish the case of the plaintiff even by preponderance of probabilities. Their evidence clearly indicates inherent weakness on certain material aspects of the plaintiffs case. I might have concluded that certain facets of defendant's case may not have been proved but, even plaintiff has also failed to establish its claim, therefore, this issue stands decided against the plaintiff and in favour of defendant.”

3. The application for bringing on record the evidence under Section 65B of the Evidence Act was dismissed on 05.09.2014 for the following reasons:-

“4. I have heard Ld. Counsel for the parties and perused the averment made in the application. The plaintiff has filed application under Order 41 Rule 27 seeking permission to lead additional evidence. The application should have been filed under Order 18 Rule 17 CPC and not under 41 Rule 27 CPC. Vide this application, plaintiff is seeking permission for leading additional evidence qua statement of account filed by it on record. As per the plaintiff, it filed the statement of account along with the replication but inadvertently same could not be proved by the plaintiff while examining PW-1.

5. In this case, the trial was concluded on 25.05.2012 and thereafter matter was posted for final argument. Counsel for the defendant advanced final argument on 27.08.2012 and since then the case has been listed for advancing argument

by counsel for the plaintiff. Instead of advancing final argument, the plaintiff has filed present application on 17.10.2013.

6. The claim of the plaintiff is that they filed statement of account along with the replication which was on record but due to some inadvertance same could not be proved by PW-1 at the appropriate stage. Perusal of the record shows that the plaintiff filed uncertified computer generated statement of account along with replication. The certificate under Section 65(B)(II) of evidence Act, which is mandatory qua electronic evidence has not been filed by the plaintiff along with the said computer generated statement, therefore, said statement of account filed by the plaintiff cannot be received in evidence.

7. It is also relevant that plaintiff has filed a certified copy of the statement of account along with present application but even along with the certified copy of the statement of account, plaintiff has not filed certificate in compliance of Section 65(B)(II) of Indian Evidence Act, therefore, certified copy of the statement of account filed along with the present application also cannot be taken into consideration as same cannot be treated as document.

8. In view of the above facts and circumstances, I am of the considered view that the statement of account sought to be proved by way of additional evidence by the plaintiff by way of present application is not a document in the eyes of law in the absence of certificate as contemplated under Section 65(B)(11) of Indian Evidence Act. The application filed by the plaintiff at this belated stage is thus not maintainable, same is accordingly dismissed”.

4. The learned counsel for the appellant relies upon the judgment of the Supreme Court in SLP(Crl.)No.2302 of 2017, titled as ‘**Shafhi Mohammad vs. The State of Himachal Pradesh**’, decided on 30.01.2018, which held that the applicability of requirement of a certificate under section 65 B of the

Evidence Act, being procedural, can be relaxed by the Court whenever the interest of justice so justifies. However, the Court would note that the said observation was in the context that: if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, then, the requirement of such certificate could not be mandatory. It held as under:-

“(2) In Order dated 25th April, 2017 statement of Mr. A.N.S. Nadkarni, learned Additional Solicitor General is recorded to the effect that videography will help the investigation and was being successfully used in other countries. He referred to the perceived benefits of “Body-Worn Cameras” in the United States of America and the United Kingdom. Body-worn cameras 2 act as deterrent against anti-social behaviour and is also a tool to collect the evidence. It was submitted that new technological device for collection of evidence are order of the day. He also referred to the Field Officers' Handbook by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India. Reference was also made to Section 54-A of the Cr.P.C. providing for videography of the identification process and proviso to Section 164(1) Cr.P.C. providing for audio video recording of confession or statement under the said provision.

xxxx

xxxx

xxxx

(12) Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.”

5. In the present case, however, both the primary evidence: (i) the

Minutes Book and (ii) the computer from which the ledger account statement was generated, were in custody of the appellant. It could have easily produced the former and filed the requisite affidavit for admissibility of the account statement as evidence, but they chose not to do so. After the closure of recording of evidence, it waited for an unexplained 17 months' before it moved an application for admission of the evidence ledger statement, which had been electronically stored. The appellant/plaintiff had filed the suit in 2008. It had all the time and opportunity to produce the requisite documents, evidence and certificates. It could have done so even at leisure. But it chose not to do so. In the absence of admissible evidence, its suit failed. The impugned order cannot be faulted for so concluding. Reference to hearsay evidence of the two plaintiffs' witnesses hardly makes a case for preponderance of probabilities. Their testimony was held to be neither persuasive nor convincing in favour of the appellant/ plaintiff to prove that the monies claimed i.e. Rs.3,40,861.88/- by it, was due from the respondent.

6. In the circumstances, there is no occasion to interfere with the reasoning of and the conclusion arrived at in the impugned order. The appeal is without merit. Accordingly, it, alongwith pending application, is dismissed.

NAJMI WAZIRI, J.

FEBRUARY 16, 2018

RW