

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

+ **RFA No. 99/2018**

% **1st February, 2018**

NORTHERN TIMBERS & ORS. Appellants

Through: Ms. Shimpy Arman Sharma,
Advocate.

versus

RAJ KIRPAL LUMBERS LTD. 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. 3764/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 3765/2018 (for delay)

2. For the reasons stated in the application, the delay of 68 days in re-filing the appeal stands condoned.

C.M. stands disposed of.

RFA No. 99/2018

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit

impugning the judgment of the trial court dated 11.7.2017 by which the trial court has decreed the suit filed by the respondent/plaintiff for Rs.5,00,000/- along with *pendente lite* interest at 10% and future interest at 12%. The suit was filed for Rs.12,17,233/- but the same was decreed only for Rs.5,00,000/-.

4. The facts of the case are that the respondent/plaintiff pleaded that it was in the business of timber ply and allied products and therefore had requested the appellants/defendants to supply Waterproof Broad Classic Gold Ply and for which an advance of Rs.5,00,000/- was given by a cheque no. 620924 dated 12.4.2007. It was pleaded that the appellants/defendants encashed the cheque but did not supply any material and hence the subject suit was filed after serving the legal notice dated 22.9.2009.

5. Appellants/defendants contested the suit by filing the written statement. Appellant no. 1/defendant no.1 is a partnership firm of which appellant nos. 2 and 3/defendant nos.2 and 3 are partners. It was pleaded in the written statement that the suit was liable to be dismissed because goods were duly supplied to the respondent/plaintiff on 30.4.2009 vide bill no. 21. It was also prayed

that the suit is liable to be dismissed because Courts at Delhi did not have territorial jurisdiction. Suit was also pleaded not to be maintainable against appellant nos. 2 and 3/defendant nos.2 and 3 who were pleaded not to be partners of the appellant no. 1/defendant no.1.

6. After the pleadings were complete, the trial court framed the following issues:-

- “1. Whether the plaintiff is entitled to the decree of recovery as prayed for? OPP
2. Whether the plaintiff is entitled to interest, if so at what rate? OPP
3. Whether the present suit is barred due to the mis-joinder and non-joinder of the necessary parties? OPD
4. Whether the court has no territorial jurisdiction to try the present suit? OPD
5. Whether the present suit is not maintainable? OPD
6. Relief.”

7. Parties led evidence and these aspects are recorded in paras 6 to 8 of the impugned judgment and which paras read as under:-

“6. Matter was then listed for plaintiff's evidence. In order to prove its case, the plaintiff has examined PW1 Sh. Sunil Garg, its Director as one and the only witness.

7. PW-1 tendered his evidence by way of an affidavit PW1/A, in which he reiterated the contents of plaint and relied on following documents:

- Copy of Certificate of incorporation is Ex.PW1/1.
- Copy of Resolution dated 03.04.2010 Ex.PW1/2.
- The Statement of Account of plaintiff company is Ex.PW1/3.
- Legal notice dated 22.09.2009 is Ex.PW1/4.
- Registry Slip and UPC receipt dated 22.09.2009 as Ex.PW1/5 & Ex.PW1/6 respectively.

- Award bearing no.02/DC(W0/2008-09 regarding acquisition of the said land is Ex.PW1/7.
- Letter dated 21.02.2008 written by plaintiff addressed to Lt. Governor for allotment of land is Ex.PW1/8.
- A letter issued dated 22.02.2008 is Ex.PW1/9.

8. Matter was then listed for defendant's evidence. In order to prove its case, the Defendants have examined DW-1 Sh. Dharmender Kumar Tiwari, its Sale Executive, as one and the only witness. DW-1 tendered his evidence by way of an affidavit DW1/A.”

8. The main issue was issue no. 1 as to entitlement of the respondent/plaintiff to the suit amount and with respect to which trial court has held that there is no dispute that the cheque of Rs.5,00,000/- was indeed credited to the account of the appellant no. 1/defendant no.1 and as conceded in the written statement, and the defence of the appellants/defendants was only that they had supplied the material to the respondent/plaintiff on 30.4.2009 in terms of the bill no. 21 for Rs.5,53,257/-, however, trial court has found that on the bill no. 21 under which appellants/defendants are said to have supplied the material to the respondent/plaintiff there exist no signatures of the respondent/plaintiff of having received the goods, inasmuch as there is no signature above the printed expression “customers signature” appearing on this bill. Trial court has further held that the goods could not have been supplied because goods are said to be supplied to the Mundka office in the year 2009 whereas the Mundka office of the

respondent/plaintiff was closed by the respondent/plaintiff in April, 2007 after the same was acquired by the Delhi Metro Rail Corporation (DMRC) and which was proved in terms of the acquisition of land as shown from the Award under the Land Acquisition Act proved as Ex.PW1/7. Trial court also has further rightly observed that there is no explanation why with respect to an order placed in April, 2007 and which was covered under the subject cheque dated 12.4.2007, goods would be supplied by the appellants/defendants as late as on 30.4.2009.

9. I completely agree with the aforesaid reasoning and conclusions of the trial court which are found in paras 11 to 13 of the impugned judgment and which paras read as under:-

“11. The onus to prove this issue was upon the plaintiff. Plaintiff has submitted that the plaintiff had orally requisitioned 12 mm film face ply 30 Kg. Waterproof Branch Classic Gold to the defendant and while placing requisition to the defendant the plaintiff had advanced Rs.5.00 Lac vide cheque No. 620924 dated 12.04.2007 for the said purpose. Plaintiff has further submitted that in spite of said advance the defendant did not supply the materials to the plaintiff and plaintiff had suffered loss of goodwill and reputation as based on the representation of the defendants the goods were to be supplied to the clients of the plaintiff immediately, but the committed requisition was not supplied to the plaintiff by the defendant at all and therefore the plaintiff could not meet its commitments vis a vis their own client and therefore the plaintiff has suffered loss of goodwill and reputation apart from opportunity loss in terms of business. The plaintiff has further submitted that the said cheque as narrated above was encashed by the defendant on 13.04.2007 as is reflected from the bank statement Bank of India maintained by the plaintiff at New Delhi. However, in spite

of the encashment the materials were not supplied even for close to three years.

12. The plaintiff has further submitted that despite assurance of the defendant that they would supply the material or return the payment with interest, the defendants neither supplied the material nor returned the sum of Rs.5 Lakhs and the plaintiff because of paying advance money did not place the order of the same to any other supplier. The plaintiff has submitted that since the goods were never supplied by the defendants, the defendants are liable to return Rs. 5 Lakhs alongwith interest as well as Rs.5 Lakhs for business loss and loss of reputation due to non supply of material amounting to Rs.12,17,233/- to the plaintiff. The plaintiff had already issued legal notice dated 22.09.2009, Ex. PW 1 /4 to the defendants for payment of amount of Rs.12,17,233/-.

The defendants on the other hand have submitted that they have supplied the material in the year 2009 although they have denied to have made any representation to plaintiff at his office situated at Kotla Mubarakpur, New Delhi. The Defendants have denied that they did not supply the material to the plaintiff and have further submitted that therefore the plaintiff has not suffered any loss of goodwill and reputation. The defendants have admitted that they have received Rs.5 Lakhs from the plaintiff but they have submitted that they have supplied the material on 30.04.2009 vide bill no.21 of Rs.5,53,257/- to the plaintiff's office which was received by the plaintiff.

The case of the plaintiff of having made the payment of Rs.5 Lakhs to the defendants in the year 2007 stands proved by the admission of the defendant as well as by bank statement of plaintiff of Bank of India i.e. Ex.PW1/3. The defendants have placed on record the invoice dated 30.04.2009 in support of supplying of the material in the year 2009. A perusal of said invoice reveals that it does not bear signature of customer at the space where it is written "customer's signature". Further the plaintiff has submitted that he had placed order for 12 mm film face ply 30 Kg. Waterproof Branch Classic Gold whereas the invoice filed by the defendant described the material supplied is Devdar Cuts Size and Bundal which, even if taken to be true, does not meet the requirements of the plaintiff as the plaintiff did not place order for supply of these materials. Further the defendant has nowhere explained as to why the order placed as early as in April 2007 was supplied by the defendant on 30.04.2009. The plaintiff has placed on record the copy of the documents that its office situated at Mundka was acquired under the Land Acquisition Act as well as the documents in support of the compensation granted to the plaintiff in view of taking over possession of its office of Mundka vide order dated 01.01.2009. These documents clearly establish that the office of plaintiff situated at Mundka was demolished by DMRC on 18.01.2008 and thus the defendant could not have possibly

supplied material reflected in Bill no. 21 to the plaintiff at office of plaintiff situated at Mundka on 30.04.2009.

13. It is further noticed that in the written statement the defendant has submitted that receiving of Rs.5 Lakhs was an advance payment made by the plaintiff for invoice/Bill no. 21, dated 30.04.2009 whereas in the cross examination of PW-1 conducted on 14.12.2012, the defendant put a suggestion to PW-1 that the cheque dated 12.04.2007 was given by the plaintiff company to the defendants towards the price of goods received from the defendants earlier and not for supplying of goods thereafter by the defendants. The said contradiction in the stand taken by the defendants in their written statement and in the cross examination of PW-1 conducted on 14.12.2012 throws doubts on the veracity of the defence taken by the defendants.

It is further noticed that the defendants have relied on bill no.21 for Rs.5,53,257/- for alleging supply of material to the plaintiff but DW-1, the sole witness of the defendants, did not tender the said document in support of his examination in chief. Further the defendants have nowhere specified as to by which mode the order was placed by the plaintiff on the defendants in respect of which the defendant has relied on invoice dated 30.04.2009. PW 1 in his cross-examination conducted on 10.10.2012 has reiterated that the oral order referred to in his affidavit of evidence was placed by him personally on 12.04.2007 and on 14.12.2012, PW1 in his cross examination again stated that it was only a verbal order.

In view of these observations, the plaintiff has been able to establish his case with preponderance of probabilities and the defendant has failed to establish that they supplied the goods on 30.04.2009 vide bill no.21 to the plaintiff. Thus issue no.1 is decided in favour of the plaintiff and against the defendants. However, the plaintiff has not placed any document on record to show that it suffered loss of goodwill or reputation and therefore no amount can be awarded in favour of the plaintiff for the loss of business and loss of reputation in view of section 73 of Contract Act.”

10. Learned counsel for the appellants/defendants sought to argue that the appellants/defendants have supplied the material, however there is no answer forthcoming to the reasoning given by the trial court in its impugned judgment including of there being no signatures of the respondent/plaintiff on the alleged bill no. 21 under

which supply was made, with the fact that the office of the respondent/plaintiff did not exist at the place which is mentioned in the bill as that land was already acquired under the Land Acquisition Act in terms of the Award Ex.PW1/7. Also, there is no argument urged by the appellants/defendants to counter the reasoning given by the trial court that why for an order placed in April, 2007 material would be supplied two years later in the year 2009.

11. Accordingly, in my opinion, there is no substance in the argument urged on behalf of the appellants/defendants that the appellants/defendants supplied the material and hence were not liable to pay the amount decreed.

12. Counsel for the appellants/defendants then contended that appellant nos. 2 and 3/defendant nos.2 and 3 are not the partners of appellant no. 1/defendant no.1 and therefore are not liable, and to which argument it is seen that not only no partnership deed was filed for the relevant period from April, 2007 to August, 2007, even the partnership deed which was filed dated 1.4.2004 by the appellants/defendants on 7.7.2015 was after the evidence of the appellants/defendants was closed on 29.5.2013. In spite of respondent/plaintiff serving a notice under Order

XII Rule 8 CPC for production of partnership deed, the partnership deed was not filed during the course of the evidence of the appellants/defendants. Therefore a partnership deed filed by the appellants/defendants much after closing of evidence has been rightly rejected by the trial court as it is not a proved document.

13. Learned counsel for the appellants/defendants then sought to argue that the Courts at Delhi did not have territorial jurisdiction, however there is no merit to this argument because of the fact that the cheque of Rs.5,00,000/- was given by the respondent/plaintiff at New Delhi and was encashed at New Delhi and also that even as per the appellants/defendants goods were to be supplied at New Delhi and therefore Courts at Delhi had territorial jurisdiction on account of performance of contract being at Delhi and payment having been made and repayable at Delhi in view of the ratio of the judgment of the Supreme Court in the case of *A.B.C. Laminart (P) Ltd. and Another Vs. A.P. Agencies, Salem (1989) 2 SCC 163*.

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

FEBRUARY 1, 2018/AK

VALMIKI J. MEHTA, J