

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

**Reserved on: 28th November, 2019
Pronounced on: 03rd December, 2019**

+ RFA 942/2019, CM APPL Nos.47531/2019, 47533/2019

GINI & JONY LTD

..... Appellant

Through : Mr.Saket Sikri, Mr.Amit P
Deshpande, Mr.Ajay Pal,
Advocates.

versus

CREONS INFRASTRUCTURE PVT LTD

..... Respondent

Through : Mr.Naresh K.Daksh, Advocate

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant against the judgment and decree dated 10.05.2019 passed by the learned Additional District Judge-03/South-East District, Saket Courts, New Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.10261/2016 (old No.1945/2009) whereby the suit of the respondent for recovery of Rs.67,13,124/- was decreed against appellant to the extent of Rs.44,04,937/- with costs and simple interest @ 10% pa from date of filing of suit till realization.

2. The brief facts are:-

a) the appellant company is incorporated under the Companies Act, 1956 and having its Office in Mumbai and also at other places in India including in Delhi and is engaged in the business of manufacturing, marketing and selling kids wear through retail showrooms and outlets;

- b)* the respondent is engaged in the business of advertising, designing, architectural and interior decoration and developing projects, showrooms, outlets, exhibition events etc and is also providing the related services viz. interiors, ordered fixtures etc. to its various customers including various multi-national companies;
- c)* the appellant intended to hire services of the respondent for designing, fabrication, providing fittings and fixtures for different Outlets / Showrooms in different parts of India. During the course of discussion, the respondent quoted rate of Rs.1750/- per square feet for fabricating and carrying necessary work in the showrooms of the appellant;
- d)* vide its e-mail dated 11.3.2007, the appellant instructed the respondent to fabricate and install necessary interiors in showroom at Rave Moti Mall, Kanpur, Uttar Pradesh, which the respondent agreed and after having prepared the required designs and getting them approved from the respondent, started the work and provided fittings, fixtures etc. When only the glass work was left, the appellant insisted for payment as per work and not as per square feet;
- e)* the respondent almost completed the said showroom and affixed all the fittings including flooring by laying vitrified tiles, fixed full height wall partitions, modular wall units and also completed other works and all of a sudden vide e-mail/letter dated 23.04.2007, the appellant asked the respondent to halt the work on the site as the said Mall was to take some time to be operational;
- f)* thereafter, the appellant asked the respondent to remove the fittings and fixtures from the said showroom and shift it to other sites.

On the respondent asking as to who shall bear the cost of dismantling and transportation etc. for removing/transporting the material to other sites, no response was given by the appellant nor it disclosed any particular site for shifting the materials;

g) finally, the appellant disowned the said showroom/ shop and asked the respondent to vacate the said shop and remove all its material;

h) since the fittings, fixtures and interiors were to be dismantled and removed and most of the fittings were to be damaged, the respondent asked the appellant about costs of dismantling, place for sending the dismantled elements, valuation of current work position, cost of designing /hidden etc vide emails dated 03.08.2007 and 06.08.2007, but again no response came from the side of appellant; and

i) as per terms, practice and understanding the appellant was required to make the payment in advance, but in view of continuing business relations, the respondent did not demand the payment and carry out the work at Kanpur Mall in advance and consequently, raised invoice / bill No.06-07/03/0425 dated 01.08.2007 to the extent of Rs.44,04,937/-, but the appellant avoided its payment. As per terms of the bill, interest @ 24% per annum was payable. From time to time, various communications were sent, but the appellant refuted to discharge its liability. Thereafter, a legal notice dated 22.01.2008 was issued; followed by their suit.

3. The appellant filed its written statement wherein besides other objections alleged this Court has no territorial jurisdiction. However, the learned Trial Court after examining the emails, pleadings etc. came to the conclusion Delhi courts have jurisdiction to decide the suit. The

reasoning of the learned Trial Court is contained in following paragraphs of its impugned judgment:-

"10. From the memo of parties, it is seen that the Registered Office of the plaintiff is situated in Lajpat Nagar and its Corporate office is situated in Okhla Industrial Area and both the said addresses fall within the jurisdiction of this court. The address of the defendant is of Mumbai. Although the defendant has denied everything in the written statement but it is a settled position of law that simple and evasive denial should not be considered without any specific details/substance (Ref: Order 6 Rule 4 CPC). Moreover, the content of the written statement and the evidence led on record have to be considered as a whole and not in an isolated or distorted manner.

11. There are various assertions in the later part of the written statement as well as affidavit filed in evidence with regard to the subsequent e-mail communications between the parties and the defendant also heavily relied on its e-mail dated 23.04.2007 whereby the plaintiff was asked to remove all the resources from Kanpur Mall to Ranchi in Kolkata. From the said e-mail communications, it is clear that a contract was made between the parties for providing services by the plaintiff for the fabrication and decoration work at a showroom situated in a Kanpur Mall to the defendant and the said contract was given on certain terms.

12. It is a settled position of law (Ref. Sec. 20 CPC) that in order to decide the issue of territorial jurisdiction, this court is required to consider the place where the cause of action arose. The "Cause of action" is the bundle of facts and it starts from the initial place where a contract is finally made or where the acceptance of the contract is intimated.

13. The argument of the Ld. Counsel for the defendant to the effect that e-mail is stored in a server situated in USA, therefore, said place of communication is to be considered for email communication is apparently absurd since the said email comes to light/existence when it is actually viewed or read by someone on his computer. The place from where an email is opened and viewed is to be treated as the place of receiving of email communication and not its server. Both the offices of the plaintiff are situated in Delhi, therefore, the said place has to be taken into account from the side of the plaintiff and the place of defendant in Mumbai, from the side of the defendant.

14. xxx xxx

15. From the aforesaid case-laws, it is clear that the place of formation of contract means a place where communication of the acceptance is sent. In the instant case, the plaintiff initially sent a quotation vide email 10.03.2007 to the defendant providing the terms and conditions. Thereafter, vide e-mail dated 11.03.2007, the defendant directed the plaintiff to start the work for various sites which including the site of Kanpur Mall by indicating rate as Rs.1300 PSF. The first email of the plaintiff was only a proposal indicating certain rates which were modified and communicated to the plaintiff vide email dated 11.03.2007 and therefore, this intimation is the acceptance of contract, which was received by the defendant at its destination, which is situated in Delhi.

16. The Counsel for defendant also argued that in the first e-mail dated 10.03.2007 of the plaintiff, it was indicated that an agreement was required to be signed but since it was not signed, therefore, there was no contract in existence. It is a settled position of law that a contract can be formed orally or in writing or by conduct/steps of the parties. The e-mail dated 10.03.2007 is a proposal/quotation whereas the e-mail dated 11.03.2007 sent by the defendant is an acceptance of the said proposal and therefore, it was a complete contract in legal sense. The formation of contract is further established from the fact that the plaintiff had also carried out the works as per the contract which was given to it from time to time and there was no objection raised by the defendant.

17. The counsel for the plaintiff also argued that it is a settled position of law that "Debtor has to seek the Creditor" and in this regard he referred to Section 48 and 49 of the Indian Contract Act. I find substance in the aforesaid submissions."

4. Now before coming to the arguments of either sides, it would be appropriate to refer to the emails exchanged between the parties.

5. The first email is dated 10.03.2007 (Ex.PW1/4) written by the respondent to the appellant notes:-

"It will be great if you let me know the status of the agreement that we need to sign mutually, when we will be able to sign the same in order to eliminate the ambiguity for the upcoming projects and perform smoothly to achieve the common goal."

6. This email was replied by the appellant vide email dated 11.03.2007 (Ex.PW1/5) as under:-

'1. Kanpur - FF (Rs.1300 PSF) was besides the rate of other sites.'

7. The appellant then sent an email dated 23.04.2007(Ex.PW1/7) and its notes:-

*"Dear Mr Kamal,
As per Manish's visit to Kanpur the Mall will take another two months to be operational, we would like to halt the work for the Kanpur-site and all the resource there could be utilised for Ranchi and Kolkata.*

Labours from that particular site can be sent to Agra as for Agra we are paying Rentals.

*I hope my previous mails have cleared our scope of work f r Kolkata, Ranchi & Bhopal..I hope we would be able to meet the deadlines of 26th.
Anything reqm from my end..pls contact e.
Rgds
Animesh”*

8. The appellant’s email to the respondent on 02.08.2007 at 15:31:07 hrs (Ex.PW1/11) is to the following effect:-

*“Dear Kamal Sir,
Please vacate the shop at Rave @ Moti, Kanpur, ASAP. You are requested to remove all material from the said site.
Thanks
Manish Chandra”*

This mail was replied by the respondent on the same day at 06.10PM (Ex.PW1/12) to the following effect:-

*“Dear Manish,
Further to your below the work has been put on hold on site since the last two months as per Mail received from Gini & Jony, the matter cannot be closed on the mail itself we need to take a call on below points:*

- 1. Who is going to bear the cost of dismantling;*
- 2. Do we need to dismantle the complete outlet;*
- 3. Where do we need to send the dismantled elements;*
- 4. Who will evaluate the current work position as on date & Certification of the same & clearance of payment on that a/c*
- 5. Who will bear the designing/hidden expenses*
- 6. Transportation cost approval for to and fro*
- 7. Authorised person from Gini & Jony need to be present at the time of the outlet.*
- 8. Packaging need to be done or not?*

Kindly provide the needful inputs on above... to move further on this.

*Thanks,
Sanjeev”*

9. The email dated 03.08.2007 at 11.42AM of the appellant notes:-

*“Dear Sanjeev,
Please send with me the details of the material (Civil and fixtures) lying at the site along with the quantity. Plz send in excel format.
Plz facilitate the needful ASAP.
Rds
Manish.*

The above mail was replied by the respondent on 06.08.2007 at 05.15PM to the following effect:-

"Hi Manish

As per the below mentioned mail please find status report of the civil and the fixture work at the Kanpur site stating the work which has been fully done and the nes which are at virtual completion stage. The finishing work will get over within this week.

Let us know how to proceed further.

In case of any query please feel free to revert back.

Thanks and regards.

Nikhil Bathla".

10. On 23.10.2007 at 17:59:59 hours the appellant mailed (Ex.PW1/6) as follows:-

"Dear Mr.Kamal,

As discussed today at our J.B. Nagar Office regarding Rave Mall, Kanpur.

Creons would dismantle the entire outlet and reuse the same at a new outlet.

Out of the 25 lacs, Mr.Kamal has assured he can use the entire material except the following:

- 1. Skirting worth Rs.12,506.00*
- 2. Suspended False Ceiling Rs.1,65,360.00*
- 3. Punning Rs.60,528.00 and*
- 4. Flooring Rs.2,21,00.00 (the amount which can be reused would only be known once the dismantling for the same is done. The same would be confirmed by Mr.Kamal)*

Rgds

Animesh."

This email is relied upon by the appellant.

11. The email dated 04.12.2007 at 8:41PM (Ex.PW1/8) notes:-

"Regarding Kanpur Site as per our discussion with Mr.Lakhani the new site details were to be given within 15 days on our last letter of understanding between both the companies which has not being maintained. Kindly understand the seriousness of the situation as this has been long delayed from your end without any constructive solution for the same."

12. The appellant replied on 06.12.2007 at 01.06PM (Ex.PW1/19) to the following effect:-

"Regarding Kanpur site, please speak to Mr.Prakash Lakhani and get the same resolved immediately."

13. It is the case of the appellant *a)* since there were variation in rates, hence the email dated 11.03.2007 be considered as a *counter offer* given by the appellant and its acceptance was communicated to appellant at Kanpur, hence Delhi Courts shall have no jurisdiction; and *b)* per email dated 23.10.2007 the respondent suffered loss only to an extent of Rs.4,65,000/- hence could claim only such amount.

14. Qua contention *a)* I may say the issue *viz the counter offer was made by the appellant* was never urged before the learned Trial Court. The plea of territorial jurisdiction, as raised before the learned Trial Court has been aptly dealt with by the learned Trial Court in paras No.10 to 16 (*supra*) of its judgment, impugned herein and it does not need any interference.

15. Even otherwise, the Bill Ex.DW1/10, as raised by the respondent, bear clause No.2 *viz All dispute will subject to Delhi jurisdictions only*. It is urged by the appellant that it never signed such bill and hence did not accept its terms. However, the appellant's witness DW1 deposed nothing about it *as had not seen any document pertaining to the transaction and had no personal knowledge of facts of case*, per his deposition.

16. Lastly there was no contract, *written or oral* as to where the payments were to be made, hence if there was no contract to the contrary, it was the *debtor* who had to chase the *creditor*.

17. In *Satyapal vs Slick Auto Accessories Pvt Limited and others* 2014 AIR (Delhi) 115 the Court held:-

"6. I completely agree with the conclusion of the trial court because it is settled law that the debtor has to seek the creditor and since no place of payment was agreed upon, payment would have been made to the seller/appellant who is residing and working for gain at New Delhi. Trial court has also rightly relied upon Section 49 of the Indian Contract Act, 1872 that it was upon the respondent no.1/defendant no.1 to fix the place of payment and which has not been done, and therefore payment would have been made by the debtor to the creditor at the place of the creditor/plaintiff/appellant. As already stated the first appellate court has not even bothered to refer to the analysis and reasoning of the trial court for holding that the courts at Delhi have jurisdiction. Accordingly, the findings of the first appellate court are set aside and it is held that the courts at Delhi have territorial jurisdiction."

18. Also in *Yash Chhabra vs Maya Jain* 2015(11) DRJ 316 it was held:-

"7. Considering the plea of territorial jurisdiction the learned Single Judge has held that the principle of: 'the debtor has to find the creditor' was sufficient to confer territorial jurisdiction in the Courts at Delhi because the respondent was undisputedly a resident of Delhi, and for which the learned Single Judge has referred to three decisions in paragraphs 6 and 7 of the impugned decision.

8. Apart from the reasoning, on the principle of law, of the learned Single Judge, in our opinion the additional reason to hold that Courts at Delhi would have territorial jurisdiction is the fact that in the plaint the respondent has pleaded in unambiguous language, and for which paragraph 14 of the plaint may be referred to, that the money was paid to the defendant at Delhi and the receipt in question was also executed at Delhi. Seeking leave to defend there is no negative pleading that the receipt was not executed at Delhi. There is no pleading that the receipt was executed elsewhere."

19. Qua contention **b)** that the respondent could claim only Rs.4,65,000/- viz. alleged the actual loss, I disagree, as the respondent had completed its work per contract, except some glass work was left. Further, though the appellant had asked the respondent to dismantle each fitting and use it either at Ranchi or Kolkata, but did not give clear instructions where to shift and who shall bear the cost of dismantling etc.

and kept quite even when repeated requests were made to give instructions. Thus it was a total loss for the respondent. Qua completion of work to an extent of 70%, the learned Trial Court has rightly held as follows:-

"24. The Ld. Counsel for the defendant claimed that vide email dated 23.10.2007, the defendant clearly mentioned the amount and other things but the plaintiff did not comply its direction/instruction and, as such, the plaintiff was at fault.

25. No doubt, the plaintiff was carrying on work at different sites for interior and decoration installation of various showrooms of the defendant but it cannot be said that there was a joint contract for such projects. In the instant case, a contract was initially formed between the parties through email dated 10.02.2007 and 11.03.2007 which provides the details of construction of fittings and decoration of the showroom at Kanpur Mall but there was no condition of dismantling of the articles and it was not the part of the initial contract. As per the provision of Indian Contract Act, any party can modify or change the terms of the contract and it is called notation of contract but for that purpose, mutual consent of the parties is essential.

26. From the specific emails of the parties, it is evident that only unilateral instructions were given by the defendant to the plaintiff, which were not accepted by the latter. Therefore, the same are not binding upon the plaintiff. When the defendant directed the plaintiff to dismantling the entire articles and use them to another location, the plaintiff was within its right to ask for cost of dismantling and other necessary issues of payment, transportation and other things but it seen that defendant did not consider the said issues. Therefore, this court holds that the plaintiff cannot be faulted for not following the said instructions. When the plaintiff had performed his part of contract, he is entitled for recovery of amount.

27. The plaintiff has placed on record an invoice Ex.PW1/8 providing the details of each and every articles and work performed and showing the total due amount of Rs. 44,04,937. The said invoice has been disputed by the defendant but the defendant did not place on record any evidence or any counter invoice or statement of account to dispute the said invoice by providing its own details of work. However, the counsel for the defendant has pointed out that the plaintiff has performed only 70% of the work, which is reflected in the last column of the retail invoice Ex. PW1/15.

28. From the perusal of the said column, it is seen that the plaintiff has claimed certain amount by indicating the status of work in the form of 'completed', '70% finished' etc. in respect of specific entries but it is no where mentioned that the amount claimed is for unperformed work. In his cross-examination the DW also admitted that he does not know the facts/transaction of the present case and no other evidence has been led by the defendant. Therefore, in the light aforesaid circumstances, this

court holds that the plaintiff is entitled for recovery of amount of Rs.44,04,937."

20. There is no reason to differ from the view taken by the learned Trial Court. There is no illegality in the impugned judgment passed by the learned Trial Court and appeal is therefore dismissed. The pending application, if any, also stands dismissed. No order as to costs.

YOGESH KHANNA, J.

DECEMBER 03, 2019

M

