IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.33 OF 2010

Shri Sudhir Janardhan Desai,
son of Janardhan Desai, major,
having his office at 15, Shankar Niwas,
117, Shivaji Park Road No.3,
Mumbai – Maharashtra. …. Appellant

Versus

Royal Inks Private Limited,
a Company formed and registered
under the Indian Companies Act,
with its office at 322,
Kundaim Industrial Estate,
Kundaim Goa. …. Respondent

Mr. Virendra Parsekar, Advocate for the Appellant.
Respondent absent though served.

Coram: M. S. SONAK, J
Date: 15th April 2021

ORAL JUDGMENT

Heard Mr. Parsekar, learned counsel for the Appellant.

2. The Respondent is duly served. However, there is no appearance on behalf of the Respondent.

3. The Appellant is the original plaintiff and the Respondent is the original defendant in Regular Civil Suit No.61/2004/A instituted by the Appellant in the Court of the Civil Judge Senior Division, Ponda. The Appellant, by instituting the aforesaid suit had sought for the following reliefs.

> *"(A) The Defendant be order to pay to the Plaintiff a sum of Rs.40,495.75/- (Rupees Forty Thousand, Four Hundred and Ninety-Five And Paise Seventy five Only).*
>
> *(B) The Defendant be ordered to pay pendent-lite and post-decreetal interest on the sum of Rs.40,495.75/- (Rupees Forty Thousand, Four Hundred and Ninety-Five And Paise Seventy five Only) calculated at the rate of 18% per annum."*

4. The Respondent filed a written statement denying the claim in the suit.

5. Based on the pleadings, the learned Trial Judge framed and answered the following issues.

	POINTS		**FINDINGS**
1	Whether the plaintiff proves that he has sold a total quantity of 280 kilograms of Rubine Toner to the defendant?		In the affirmative
2	Whether the defendant proves that the suit is barred by Law of Limitation?		In the negative

3	What Order? What Relief?		As per Order.

6. By judgment and decree dated 30.06.2009, the learned Trial Judge decreed the suit in the following terms.

> " *ORDER*
>
> *(a) The suit is decreed.*
>
> *(b) The defendant is hereby ordered and directed to pay to the plaintiff a sum of Rs.40,495.75 (Rupees forty thousand four hundred ninety five and paise seventy five only) alongwith interest @ 18% per annum from 1/9/2004 till full and final payment.*
>
> *(c) Cost by the defendant.*
> *Decree shall be drawn up accordingly."*

7. The Respondent appealed to the Adhoc District Judge-1, FTC, Mapusa (First Appellate Court) vide Regular Civil Appeal No.78/2009. Vide judgment and decree dated 19.11.2009, the First Appellate Court allowed the appeal and set aside the judgment and decree dated 30.06.2009 made by the Trial Court. Hence, the present appeal.

8. This appeal was admitted on 22.11.2010 on the following substantial questions of law:

> “(i) Whether Regular Civil Suit No.61/2004/A is barred by limitation?
>
> (ii) Whether adverse inference has to be drawn against the respondent for not stepping into the box and a presumption can be drawn that the case set up by him is not correct?”

9. On the aspect of limitation, the Trial Court, after considering the pleadings and the evidence on record had held that the suit instituted by the Appellant was within the prescribed period of limitation. The First Appellate Court however has reversed the Trial Court based only on the following discussion:

> “*As regards point of limitation if it is presume that order was placed on 23.7.2001 than limitation period expires on 23.7.2004. The present suit was filed on 30.8.2004. As per the Article 58 of the limitation Act 1963 the suit for recovery of money has to be filed within a period of 3 years from the date of the agreement. The Lower Court was wrong in holding that there was part payment and extending the period of limitation.*”

10. Now according to me, though the order for the supply of material was placed by the Respondent on the Appellant on 23.07.2001, such a date cannot be a starting point for computing the period of limitation. Therefore, the reasoning of the First Appellate Court that the date on which the Respondent placed the order for the supply of material on the Appellant is the starting point of limitation, is quite perverse and untenable.

11. Instead reference is necessary to both the pleadings in the plaint as well as the documents produced on record by the Appellant in this matter. In the plaint, the Appellant has pleaded in paragraph 9 that the bills/invoices which were raised on the Respondent had to be settled by the Respondent within 90 days from the date of which the same was raised. Again, in paragraph 10, it was pleaded that in case the amount was not paid within 90 days, the Respondent will be obliged to pay the interest at the rate of 18% per annum. In paragraph 11, it was pleaded that the Respondent failed to settle the bills/invoices within 90 days. Further, in paragraph 24, it was pleaded that the cause of action for filing the suit arose on 30.11.2001 when 90 days allowed by the plaintiff to the defendant to pay the bills/invoices expired. In paragraph 28, it was pleaded that the suit has been instituted within a prescribed period of limitation.

12. Now the aforesaid pleadings were simply denied by the Respondent without an offering any explanation of whatsoever nature. There is documentary evidence on record that establishes that in respect of these very invoices the part payments were made by the Respondent in an amount approximately of ₹35,000/- or thereabouts. The Respondent has failed to even step into the witness box in this matter. Thus, by a preponderance of probability, the Appellant had established that the payments in terms of the invoices/bills raised by the Appellant were to be

paid within 90 days from the date of such invoices. The invoices are also placed on record. The 90 days period expired only on 30.11.2001. The suit which was instituted on 30.08.2004 was therefore well within the period of limitation. The First Appellate Court based upon the aforesaid cryptic reasoning should, therefore, not have reversed the Trial Court on the issue of limitation.

13. In this case, it is not necessary to go into the issue as to whether the part payment made amounts to an acknowledgment of liability and results in an extension of the period of limitation. Though there is evidence of part payments, there is no clear evidence as to whether this was accompanied by any express or implied acknowledgment of debt. However, based on the pleadings and both the documentary as well as the oral evidence on record, it does appear that 90 days was available to the Respondent to clear the amount referred to in the bills/invoices raised by the Appellant. The reasoning of the First Appellate Court is *ex facie* perverse. The suit was indeed instituted within the prescribed period of limitation. The first substantial question of law is therefore required to be answered in favor of the Appellant and against the Respondent.

14. In so far as the second substantial question of law is concerned, the Trial Court on consideration of both oral as well as documentary evidence on record has concluded that the material was

indeed delivered by the Appellant to the Respondent. The finding to the contrary recorded by the First Appellate Court again suffers from perversity. The relevant and vital material, in the form of invoices as well as documents submitted through the Goa Urban Co-operative Bank, have been ignored or in any case, totally misinterpreted by the First Appellate Court. The First Appellate Court has given no cognizance whatsoever to the most significant circumstance that the Respondent even made part payment in this matter. If there were no deliveries, then the minimum that was expected of the Respondent was some defense evidence to explain such payments. There were delivery notes produced on record evidencing deliveries. There were bank documents in support of deliveries. Even in the written statement except for a bare denial, there is no explanation whatsoever offered by the Respondent about why some part payment was made if indeed there was no delivery of material. By ignoring all these relevant aspects, the First Appellate Court has reversed the Trial Court. In reversing the Trial Court, the First Appellate Court has failed to take into account the principles set out by the Hon'ble Supreme Court in the case of ***Santosh Hazari Vs Purushottam Tiwari (Dead) by Lrs***[1] which requires the First Appellate Court to come into close quarters with the reasoning of the Trial Court.

15. Further, in this case, the First Appellate Court completely

1 (2001) 3 SCC 179

failed to appreciate that the Respondent did not lead any evidence in the matter. The Respondent, in this case, had to explain the documents produced on record by the Appellant. The Respondent also had to explain the oral testimony on behalf of the Appellant. The Respondent had to explain the circumstances in which the payments were made by them to the Appellant. Failure to lead any evidence called for an adverse inference against the Respondent.

16. In ***Vidhyadhar Vs Manikrao and Another***[2]**,** it is held that where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. This aspect of the matter has not at all been considered by the First Appellate Court while reversing the Trial Court.

17. Accordingly, even the second substantial question of law is required to be answered against the Respondent.

18. As a result of the aforesaid discussions, the judgment and order made by the First Appellate Court is required to be set aside and the judgment and decree made by the Trial Court is required to be restored. However, on perusal of the records, I find that there is no justification for

2 AIR 1999 SC 1441

the award of interest at the rate of 18% per annum on the amount claimed. The invoices produced do not refer to this amount of 18% interest. In one of the invoices, there is a reference of interest at the rate of 12% per annum. In any case, there is no evidence on record to justify the claim of interest at the rate of 18% per annum. Besides this is a case where a partial payment was already made by the Respondent. Taking into consideration the nature of the transaction, according to me, the interest at the rate of 9% per annum will be appropriate.

19. Accordingly, the judgment and decree made by the First Appellate Court is set aside and the judgment and decree made by the Trial Court is restored with the modification that the interest rate shall be 9% instead of 18% per annum from 01.09.2004 till full and final payment.

20. This Second Appeal is partly allowed. There shall be no order as to costs.

M. S. SONAK, J.

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