



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 03rd August, 2023
Pronounced on: 24th August, 2023

+ RFA(COMM) 76/2023 & CM APPL. 20581/2023

MODERN CONSTRUCTION COMPANY DELHI Appellant
Through: Mr. Aman Bhalla & Mr. Aman
Tehlan, Advocates.

versus

HITECH ENTERPRISES Respondent
Through: Mr. Parveen Kumar Aggarwal &
Mr. Piyush Biswas, Advocates.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The present appeal under Section 13 of the Commercial Courts Act, 2013 read with Order XLI Rule 1 and Section 96 of the Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC"*) has been filed against the judgement and decree dated 14.02.2023 vide which the suit of the respondent/plaintiff has been decreed under Order XXXVII of CPC for a sum of Rs.53,69,918.70/- along with the interest @18% per annum.
2. The **facts in brief** are that the plaintiff (*hereinafter referred to as 'respondent'*) filed the Suit under Order XXXVII Rule 3(5) of CPC seeking recovery of Rs. 53,69,918.70/- along with the interest @18% per annum. The plaintiff is a registered Partnership Firm engaged in the



business of trading and supply of construction material including aggregates. The defendant (*herein after referred to as 'appellant'*) engaged in the business of engineering and construction, pursuant to an Agreement was supplied the requisite material from 03.08.2017 to 14.01.2019 under various sale Invoices (280 in number), which were duly acknowledged and accepted by the appellant. Goods worth of Rs. 72,19,425.50/- were supplied during this period. As per terms and conditions of sale, the defendant was also liable to pay 18% per annum interest on delayed payments. A part payment of Rs.48,78,736/- was made till 29.08.2020 by the defendant but thereafter he failed to make payment of the remaining principal amount of Rs.23,40,689.50/- and also interest which comes to Rs. 30,29,229.20/- as on 30.09.2021. Despite service of Legal Notice dated 20.03.2021, the appellant failed to pay the amount; hence the suit for recovery of 53,69,918.70/- was filed.

3. **The appellant** after putting in his appearance, filed his “*Leave to Defend*” application wherein it was claimed that there is misrepresentation and concealment of facts by the respondent. The basis of the suit was not any written contract but the balance due at the foot of the Ledger Account. The suit was not covered under Order XXXVII of CPC and was liable to be dismissed.

4. It was further claimed that the Court had no “*territorial jurisdiction*” since all the transactions happened in Uttar Pradesh. The goods were dispatched from U.P., supply was also made at U.P. Further, objection was taken that there was no compliance of Section 12A of the Commercial Courts Act, 2015 “*providing for pre-litigation mediation*”. The **calculation of interest at the rate of 18% per annum** was also



challenged as being against the terms and conditions.

5. It was further claimed that the material supplied by the respondent was not of satisfactory quality, however was defective and sub-standard. Consequently, owners of the Project where goods were supplied withheld the money of the appellant. The appellant had already communicated to the respondent about the goods being defective.

6. **The respondent had repelled the grounds** agitated in the Leave to Defend of the appellant and asserted that this Court has territorial jurisdiction. It is explained that the Head Office of the defendant/appellant is in Barakhamba Road, Delhi. The Order for supply of goods as well as the payments towards the goods, was made by the defendant/appellant from the Barakhamba Road office. Moreover, it was stipulated in the Invoices that in case of dispute, the jurisdiction would be at Delhi. The claim of the appellant that this court has no jurisdiction is not maintainable.

7. It was claimed that the rate of interest as 18% per annum was mentioned on the Invoices which was signed on behalf of the appellant and thus, the respondent is entitled to recovery of interest at the rate of 18% per annum.

8. It was further explained that the application under Order XXXVIII Rule 5 of CPC seeking urgent relief was filed and thus, the compliance of Section 12A of the Commercial Courts Act, 2015 for pre-litigation mediation, was not required.

9. Furthermore, the claim of the respondent was based on the “*Written Contract*” as contained in the Invoices on the basis of which the suit has been filed under Order XXXVII of CPC, which is maintainable. It is



denied that the suit is based on the Ledger account; it is claimed that it is based on the unpaid invoices, copies of which have been placed on record. The Invoices are a valid contract and the suit has been rightly filed under Order XXXVII of CPC. The payments have been made by the appellant as per his claim in respect of six invoices vide cheque bearing No. 357829 dated 15.10.2019 in the sum of Rs. 1,43,796/- which has been appropriated by the respondent against the previous Invoices and due credit has been given in the Ledger Account. It is claimed that the suit is maintainable and the leave to defend has been rightly rejected.

10. **The learned Commercial Judge considered** the rival contentions of the parties and held that the claim of the respondent was based on the written contract as evidenced by the Invoices and thereby decreed the suit in the sum of Rs.53,69,918.70/- along with the interest at the rate of 18% per annum. Aggrieved, the appellant has filed the present appeal.

11. **Submissions heard.**

12. **The first fundamental question** for consideration is the maintainability of the suit under Order XXXVII of CPC as to determine whether the claims of the respondent were based on the “*Invoices*” or on the “*Ledger Account*”.

13. The term ‘*Invoice*’ has been defined in Black Laws; Dictionary 55th Edn as-

“A written account, or itemized statement of merchandise shipped or sent to a purchaser, consignee, factor, etc. with the quantity, value or prices and charges annexed, and may be as appropriate to a consignment or a memorandum shipment as it is to a sale. Joseph B. Cooper & Son, Inc v. Finlay Depts., Inc., 11 Misc. 2d 382, 174 N.Y.S.2d 265, 269.



Document showing details of a sale or purchase transaction.

A list sent to a purchaser, factor, consignee, etc., containing the items, together with the prices and charges of merchandise sent or to be sent to him. A writing made on behalf of an importer, specifying the merchandise imported, and its true cost or value.”

14. Thus, Blacks Law Dictionary defines any writing specifying the goods and its true price is an Invoice which is akin to a Written Contract.

15. A Co-ordinate Bench of this Court in the case of M/s KglSystel Ltd. vs M/s Fujitsu Icim Ltd. 2001 SCC OnLine Del 440 held that Invoice is a Written Contract. It was further observed that since Invoices/Bills are written contracts within the contemplation of Order XXXVII of CPC, the suit should be tried under the summary procedure as envisaged under this Order.

16. Likewise, in the case of Indian Iron & Steel Company Ltd. vs Nada Brothers and Others 2004 SCC OnLine del 518, this Court referred to the decision in M/s KglSystel Ltd.(supra) and echoed the same view.

17. The question as to whether Invoices/bills are ‘written contracts’ within the contemplation of Order 37 CPC, is thus settled.

18. The Court in KK Healthcare Pvt. Ltd. Vs. M/s Pehachan Advertising, 2012 SCC Online Del 426 and GE Capital Services India Vs. May Flower Healthcare Pvt. Ltd. &Ors, dated 31.08.2012 in CS (OS) 2859/2011 observed that merely because the plaintiff has also filed Ledger Accounts in support of the payments made vis-a-vis the Invoice, it would not make the case as based on Ledger Accounts since the recovery was claimed on the basis of the Invoices which tantamount to a written



contract. In such cases, a suit under Order XXXVII of CPC is maintainable. It therefore becomes pertinent to understand what is a Ledger Account and when can the suit be termed as based on “*Ledger Account*”.

19. A “*Ledger Account*” has been defined in Blacks Law; Dictionary 55th Edn as-

“A book of accounts, often referred to as a general ledger, in which a business records transactions; there being two parallel columns in each account, one for the debit entries, the other for the credits. Into this book are posted the items from the books of original entry or journals. The principal book of accounts of a business establishment in which all the transactions of each day are entered under appropriate heads so as to show at a glance the debits and credits of each account. Foothill Ditch Co. v. Wallace Ranch Water Co., 25 Cal. App.2d 555, 78 P.2d 215, 220.”

20. The question of maintainability of a suit claiming recovery of an amount based on multiple invoices, part-payments, and ledger accounts came up for consideration of this court in the case of Inventa Cleantec Pvt. Ltd. vs Amit Mudgal, 2016 SCC OnLine Del 5144. It was observed that where the plaintiff has sued for balance price as outstanding in the account of the defendant in the ledger of the plaintiff, such a suit is based on a “*Ledger Account*” and would not fall under Order XXXVII CPC and would not be maintainable thereunder.

21. Similarly, in the case of ITC Limited vs Mahavira Singla 2023 SCC OnLine Del 882, this Court observed that a suit based on books of accounts maintained based on multiple transactions, and not on documents mentioned in Rule 1(2)(a) of Order XXXVII of CPC or for



recovery of a debt or liquidated demand in money based on a written contract, would not be maintainable under the provisions of Order XXXVII of CPC.

22. In the present case, though the respondent has claimed in its plaint that the suit is based on 280 Invoices that were raised on the appellant from 03.08.2017 to 14.01.2019, it also maintained the Ledger Account of the appellant as an “**open, mutual, current and running account**” and all the sales via different Invoices formed a part of the same transaction. It is further stated in the plaint that the respondent followed a First In First Out (FIFO) system of accounting by way of which it apportioned the part payments made by the appellants towards the Invoices issued prior in time.

23. Based on the submissions of the respondent in its plaint, it is apposite to discern the consequences of the account maintained by the respondent and the appropriations made therein to determine the maintainability of a summary suit under Order XXXVII CPC.

24. Blacks Law Dictionary defines a “**running account**” as an open unsettled account, as distinguished from a stated and liquidated account. Running accounts mean ‘*mutual accounts*’ and ‘*reciprocal demands*’ between the parties, which accounts and demands remain open and unsettled.

25. The characteristics of a ‘*mutual account*’ were stated in the case of Hirada Basappa vs Gadigi Mudappa (1871) VI MHCR 142 thus:

“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.”

26. Further, in the case of Tea Financing Syndicate Ltd. vs Chandrakamal Bezbaruah (1930) 2nd 58 Calcutta 649 it was observed that the requirement of ‘*reciprocal demands*’ involves transactions on each side which creates independent obligations on the other.

27. The case of Tea Financing Syndicate (supra) has been referred by the Apex Court in the case of Hindustan Forest Co. v. Lal Chand and Ors. 1960 SCR (1) 563 and Kesharichand Jaisukhlal v. Shillong Banking Corporation Ltd. 1965 SCR (3) 110 wherein similar observations were made.

28. Thus, the law on what constitutes a ‘*mutual account*’ is well settled and it implies reciprocal and mutual obligations which keep getting adjusted against each other on receiving the payments from either party.

29. The term “*running and non-mutual account*” on the other hand, has been explained in the case of Ranganathan vs. Sarwana Store 2018 SCC OnLine Madras 5897 that in case of a “*running and non mutual account*” between the buyer and seller, when goods are delivered by the seller to the buyer, the value of the goods is debited in the debit column and when amounts are paid by the buyer to the seller, they are entered in the credit column. The difference is continuously struck in the column for balance. In such a case, when the buyer defaults to make balance payment, the seller's action is not for the price of goods sold and delivered, but for the balance due at the foot of an account. The account is running as the amounts received from time to time are credited and the amounts still due is reflected as debit. Essentially, it is “*non mutual*” because the amounts



being adjusted are those payable by one party. Its contradistinction, “*Mutual account*” implies that the credit – debit account is of both the parties.

30. Now coming to the facts of the present case, as per the averments made by the respondent it was a ledger account which was being maintained which only reflected the payments as were being made by the appellant from time to time. From the bare perusal of Ledger Account it is evident that the liabilities were only of the appellant and the amount as received by the respondent from the appellant from time to time were being reflected.

31. The accounts being maintained of the appellant being “*running and non-mutual*”, the manner of apportionment of money in running accounts has been explained in Section 59 of the Contract Act, 1872 which reads as under :

“Section 59: Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

32. In the event the debtor makes a payment without specifying the Invoice towards which the amount is paid, the apportionment of such a payment is made in accordance with the following provisions of the Indian Contracts Act, 1872:

“Section 60: Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate and there are no other circumstances



indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Section 61: *Application of payment where neither party appropriates.—Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally.”*

33. The underlying principles of apportionment as contained in above sections according to *Pollock & Mulla, Indian Contract Act, 12th Edition*, is that when several debts are due owing to one person, any payment made by the debtor either with an express intimation or under circumstances from which an intimation may be implied, must be applied to the discharge of debt in the manner intimated or which can be implied from the circumstances.

34. **Mulla** proceeds to observe that “*where several distinct debts are owed by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor*”.

35. The Rule of Appropriation of money was summed up by Mr. T.L.



Venkatarama Aiyar, J. (as he then was) in the Full Bench decision of the Madras High Court in Marimella Suryanarayana vs. Venkataraman Rao (AIR 1953 Madras 458). It was stated:

"The principles governing appropriation of payments made by a debtor are under the general law well settled. When a debtor makes a payment, he has a right to have it appropriated in such manner as he decides and if the creditor accepts the payment, he is bound to make the appropriation in accordance with the directions of the debtor. This is what is known in England as the rule in 'Clayton's case' (1861) 1 Mar.572: 35E.R. 781 and it is embodied in Section 59, Contract Act. But when the debtor has not himself made any appropriation, the right devolves on the creditor who can exercise it at any time, vide 'Cory Bros. & Co. vs. Owners of the Turkish Steamship 'Mecca', (1897) A.C. 286; and even at the time of the trial : Vide 'Symore vs. Picket', (1905) 1 K.B. 715. That is Section 60, Contract Act. It is only when there is no appropriation either by the debtor or the creditor that the Court appropriates the payments as provided in Section 61, Contract Act."

36. In the case of Anmol Steel Processors Private Limited vs Colour Roof (India) Limited (MANU/MH/0167/2022) the Bombay High Court analysed Section 60 and 61 of the Indian Contracts Act and observed:

"55. Under section 60 of the Indian Contract Act, where the debtor has omitted to intimate and there are no settled circumstances undertaking the debt to be applied, the creditor may apply at his discretion to any lawful debt actually due and payable to him from the creditor, whether is regular or is not barred by law in force for the time being as to the limits of the suit"

"56. At this stage, it would be apposite to refer to section 61 of the Indian Contract Act which provides that where neither party makes any appropriation, the payment shall



be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.”

37. Thus, to summarize where a debtor, owing several distinct debts to one person, makes a payment indicating that the payment is to be applied to the discharge of some particular debt, the payment must be applied accordingly in terms of Section 59 of the Contract Act. However, where the debtor omits to so intimate, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its *recovery is or is not barred by the law in force for the time being as to the limitation of suits*, according to Section 60 of the Contract Act. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by limitation in terms of Section 61 of the Contract Act.

38. The respondent as per its own averments in the plaint had been maintaining a running account recording the dues towards all the Invoices and appropriated the payments made by the appellant in a chronological manner towards the earliest dues, in accordance to Sections 60 and 61 of the Indian Contracts Act, 1972. Based on such appropriation, the remaining due that as reflected in the running account amounted to Rs. 23,40,689.50. Indubitably, it is this due amount derived from the running Ledger Account of the respondent along with interest at 18% per annum amounting to a cumulative sum of Rs. 49,66,429.87 that has been claimed vide Legal Notice dated 20.03.2021. From a reading of the Legal Notice dated 20.03.2021, it is manifest that the payment of the due was



demanded in its aggregate form and not based on specific invoices.

39. In this context, it would be significant to refer to the assertion of the appellant that he made payment of Rs.1,43,796/- on 14.09.2019 vide cheque dated 15.10.2019 against six invoices raised between 28.12.2018 to 14.01.2019. According to him, the payment had been made by him against specific Invoices and it was not an “on account” payment. Whether the payment was against specific Invoices or was on account payment, is a matter of evidence. This is significant as the present suit has been filed on 25.10.2021 and if the defence of the appellant is accepted, then some amounts due against the earlier Invoices may become barred by limitation.

40. At this juncture, it is imperative to give attention to the judgement passed by this court in the Dura-Line India Pvt. Ltd. vs BPL Broadband Network Pvt. Ltd., 2003 SCC OnLine Del 1160 wherein the court had shed light on the maintainability of cases under Order XXXVII CPC when the plaintiff has placed the Invoices and a Running Account on record, while making claims for recovery. It was observed by this court that mere averment or a mention of a Running Account in the plaint does not disentitle the plaintiff to avail any relief under Order XXXVII, CPC so long as the claims are based on Invoices that are admitted by the defaulter. Thus, when a suit is based on amounts due in a written contract comprising the offer, its acceptance by issuance of Purchase Orders and raising of Invoices in execution thereof which have been acknowledged by the debtor, such a suit cannot be dismissed even if a Running Account is maintained for the same.

41. In the present case as the respondent has claimed the amount purely



based on the balance due as reflected in the Running Account as there is no mention against which specific Invoices, the amounts are due. The respondent claims to have issued 280 Invoices to the appellant. There is not a scintilla of clarity on the number of Invoices that have been settled as there is mention of details of Invoices in the plaint. This indicates that the respondent has raised its claims in the suit by merely adhering to the accounting principle as explained in Section 60 and 61 of the Indian Contract Act for apportioning the money received from the defendant against the total recoverable amount in its statement of Ledger and claiming the balance amount. To the contrary, the appellant asserted that payment was against the specific Invoices, which becomes a matter of evidence. The recovery is apparently not based on Invoices; rather the reference to Invoices is nothing but an attempt to bring the claim within the scope of Order XXXVII CPC.

42. The respondent himself has asserted that during the course of business he had supplied goods amounting to Rs.6703928 in the F.Y.2017-18 and Rs.515497.50 in the F.Y. 2018-19. The goods worth Rs.72,19,425.50/- were supplied in all which were accepted by the appellant without any dispute in regard to the quality, quantity or specification. On account part payment was made from time to time in acceptance thereof, Rs.4878736/- had been paid till 29.08.2020 which **has been adjusted in the running account of the appellant**, but there is still a part payment which remained to be paid. From the submissions of the respondent itself in the plaint it is evident that the claim of the respondent is based on the ledger account and not on the specific Invoices.

43. A specific instance to elucidate the same would be the respondent's



own admission that the payment made by the appellant vide cheque bearing No. 357289 dated 15.10.2019 in the sum of Rs.1,43,796/- has been apportioned to the earlier Invoices. It is evident from these averments in the plaint that the payments have not been made corresponding to any particular Invoice, but have been made on account, which has been apportioned as per Ledger Account.

44. This court thus finds that the claim of the respondent is not based on individual Invoice but essentially on the ledger account. So being the case, it cannot be said that the suit of the respondent is based on Invoices as claimed by him. Therefore, the appellants are entitled to leave to defend.

45. A **second** objection had been taken on behalf of the appellant that this court has no territorial jurisdiction as the supply of the goods was made by the plaintiff from Uttar Pradesh to Uttar Pradesh and the Project was also based in Uttar Pradesh. However, the respondent has explained that the appellant has its Head Office at Barakhamba Road, Delhi and the demand for supply of material and payments were all made from the said Head office of the appellant. Therefore, part cause of action arose in Delhi conferring the courts in Delhi within territorial jurisdiction. This is more so when it was stated in the Invoices as well that the Delhi Courts have jurisdiction in case of any dispute.

46. We hereby, conclude that the triable issues have been raised by the appellant in regard to the payments by the appellant against specific Invoices or on account and also whether all the payment claimed through various Invoices are within limitation. A jurisdictional issue has also been raised in addition to rate of interest. The Leave to Defend of the appellant



has to be therefore, allowed.

47. Accordingly, we hereby allow the appeal and set aside the impugned judgment and decree dated 14.02.2023 and grant Leave to Defend the suit, to the appellant. The parties to appear before the learned Commercial Court on 04.09.2023 for its adjudication after taking written statement and evidence, in accordance with the provisions of C.P.C.

48. The present appeal and the pending application stand disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

AUGUST 24, 2023
S.Sharma/Ek/Nk