
(2011) 01 DEL CK 0345

In the Delhi High Court

Case No : Regular First Appeal 444 of 2009

Ansar Crafts

APPELLANT

Vs

Ayushi Enterprises

RESPONDENT

Date of Decision : 24-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27(1), 107

Citation : (2011) 180 DLT 43

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Tarique Siddiqui and R. Ahmed, for the Appellant; Dushyant Sisodia, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Sistani, J.

CM No. 17697/2009:

1. This is an application filed by the Appellant under Order 41 Rules 27 and 28 of the CPC for producing additional evidence.
2. Heard Counsel for the parties. By present application, the Appellant seeks leave to adduce additional evidence in the form of certain e-mail on record and also seeks leave to exhibit and prove the same.
3. The only ground raised in the present application for not exhibiting the e-mails, copies of which were filed in the trial Court, is that the Counsel appearing on behalf of the Appellant in the trial Court did not exhibit the same.
4. Para 7 of the present application reads as under:
 7. That admittedly PW-2, Mr. Ajit Kumar, had himself written to the foreign buyer of the Appellant that Appellant is not at fault in delaying the delivery of the goods. Unfortunately, Counsel of the Appellant in trial Court could not exhibit

such communications and also could not put the same before the said Ajit Kumar at the time of his cross-examination in evidence.

5. learned Counsel for the Appellant submits that the case of the Petitioner would be covered under Order 41 Rule 27(b) of the CPC as there is no explanation either in the application or during the course of hearing as to why the aforesaid emails were not exhibited by the Appellant before the trial Court.

6. learned Counsel for the Appellant has drawn the attention of the Court to the aforesaid emails, which have been received by the Appellant from a foreign buyer from Portugese wherein the foreign buyer has called upon the Appellant to explain the delay in not sending the goods on time. The foreign buyer has also expressed concern and regret over the fact that on account of delay on the part of the Appellant he has suffered losses and his buyers have refused to lift the goods.

7. The law with regard to Order 41 Rule 27 is well settled that a party cannot be allowed to patch up the weak parts of his case or to fill up omissions in a Court of appeal by rendering any additional evidence.

8. Counsel for the Appellant has also relied upon North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs., , and more particularly paras 13,14, 15,18,19 and 20, which are as under:

13. Though the general rule is that ordinarily the appellate Court should not travel outside the record of the lower Court and additional evidence, whether oral or documentary is not admitted but Section 107, Code of Civil Procedure, which carves out an exception to the general rule, enables an appellate Court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27, Code of Civil Procedure. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist. The circumstances under which additional evidence can be adduced are--

(i) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted [Clause (a) of Sub-rule (1)], or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed [Clause (aa), inserted by Act 104 of 1976], or

(iii) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause [Clause (b) of Sub-rule (1)].

14. It is plain that under Clause (b) of Sub-rule (1) of Rule 27 Order 41, Code of

Civil Procedure, with which we are concerned in the instant case, evidence may be admitted by an appellate authority if it "requires" to enable it to pronounce judgment "or for any other substantial cause". The scope of the Rule, in particular of Clause (b) was examined way back in 1931 by the Privy Council in AIR 1931 143 (Privy Council) While observing that the provisions of Section 107 as elucidated by Order 41 Rule 27 are clearly not intended to allow litigant, who has been unsuccessful in the lower Court, to patch up the weak parts of his case and fill up omissions in the Court of appeal, it was observed as follows (AIR p. 148)--

... Under Clause (1)(b) it is only where the appellate Court "requires" it (i.e. finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands some inherent lacuna or defect becomes apparent".

15. Again in K. Venkataramiah Vs. A. Seetharama Reddy and Others, Constitution Bench of this Court while reiterating the aforementioned observations in Parsotim easel pointed out that the appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the Court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the Court at the time of hearing of the appeal on merits.

18. It is manifest that in the present case, the High Court did not examine the record of the case with the thoroughness which was expected at the time of disposal of the pending applications. On a perusal of the impugned decisions, it is clear that the High Court was not even aware of the pendency of the application under Order 41 Rule 27, CPC seeking leave to adduce additional evidence. A perusal of the documents, which came to light pursuant to the directions given by the High Court on 3.4.2002, prima facie, goes to show that these are likely to widely affect the decision of the Court in one way or the other.

19. If the stand of the Appellant, which, according to them, is borne out from the documents now on record, is found to be correct, then obviously these will have material bearing on the core issue, namely, whether the decree dated 13.3.2001 is a nullity, having been allegedly obtained by concealing material facts and

playing fraud on the Court. It is trite that a judgment or decree by the first Court or by the highest Court--obtained by playing fraud on the Court is a nullity and non est in the eye of the law See S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.,

20. In any event, had the Court found the additional documents, sought to be admitted, necessary to pronounce the judgment in the appeal, in a more satisfactory manner, it would have allowed the application and, if not, the application would have been dismissed. Nonetheless, it was bound to consider the application before taking up the appeal. We say no more at this stage, as the aforementioned applications are yet to be considered by the High Court on merits in the light of the legal position, briefly set out hereinabove. In view of the aforementioned factual scenario, we are of the opinion that the impugned judgment and the orders are erroneous and cannot be sustained.

9. I have heard Counsel for the parties. Counsel for the Appellant has strongly urged before this Court that the copies of e-mails go to the root of the matter and in case the Appellant is permitted to adduce additional evidence the Court would be able to pronounce judgment in a more satisfactory manner.

10. learned Counsel for the Appellant has relied upon the case of K. Venkataramiah Vs. A. Seetharama Reddy and Others, and more particularly para 16, which reads as under:

16. In view of what the High Court has stated in this passage it is not possible to say that the High Court made the order for admission of additional evidence without applying its mind. It seems clear that the High Court thought, on a consideration of the evidence, in the light of the arguments that had been addressed already before it that it would assist them to arrive at the truth on the question of Seetharam Reddy's age if the entries in the admission registers of the school were made available. It was vehemently urged by the learned Counsel for the Appellant that there was such a volume of evidence before the High Court that it could not be seriously suggested that the Court required any additional evidence "to enable it to pronounce judgment". The requirement, it has to be remembered, was the requirement of the High Court, and it will not be right for us to examine the evidence to find out whether we would have required such additional evidence to enable "us" to pronounce judgment. Apart from this, it is well to remember that the appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the Court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "be enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule

27(1)(b) of the Code.

11. The judgments sought to be relied on by Counsel for the Appellant are not applicable to the facts of this case. In the case of K. Venkataramiah (supra), the Supreme Court was faced with the situation where it was noticed that two admission registers relating to the School for the relevant period were in fact summoned by learned Counsel for the Petitioner and were produced before the Tribunal but for some reason, which was not clear to the Court, these registers were not proved and were not marked as exhibits. Thus, invoking the provisions of Order 41 Rule 27(b), the Apex Court remanded the matter back. The aforesaid situation does not exist in the facts of this case where the emails, sought to be relied upon by the Appellant, have been placed on record and after examining the aforesaid emails this Court is of the view that the same do not come to the aid and rescue of the Appellant as none of the e-mails show that delay was caused by any act of the Respondent. Even otherwise there is no explanation as to why the emails were not exhibited. Similarly, the judgment rendered in the case of North Eastern Railway Administration, Gorakhpur (supra), is also not applicable to the facts of this case since the e-mails and letters do not support the case of the Appellant. Applying the settled law and in view of the above facts, I find no merit in the present application and the same is accordingly dismissed.

12. Brief facts necessary to be noticed for the disposal of the present appeal are that the Appellant and Respondent had entered into an agreement on 16.3.2005 for supply of cloth. The Respondent had agreed to sell four lakh meters of cloth 92x104 Zero-Zero Moisturised super dying quality in eight colours 50,000 mt. each @ Rs. 32/-, per month. The delivery of the cloth was to be made in 40 days. Since despite delivery of the cloth and service of legal demand notice dated 31.8.2005, the Appellant failed to make the payment, the Respondent was forced to file a suit for recovery in the sum of Rs. 8,62,448/-.

13. learned Counsel for the Appellant has strongly urged before this Court that Respondent had failed to supply the cloth within the stipulated time of forty days, which resulted in further loss to the Appellant as the goods could not be prepared on time and shipped to the foreign buyers. Counsel further submits that since the Appellant has suffered losses to the tune of over Rs. 52 lakh, Respondent could not have demanded any amount from the Appellant. The Counsel further states that the foreign buyers withheld the money of the Respondent to the tune of Rs. 10.00 lakh on account of the lapse and delay by the Respondent.

14. It is the case of the Appellant that in lieu of the loss caused to the Appellant due to late delivery of cloth by the Respondent, the Appellant and the Respondent had mutually agreed to reduce Rs. 2/-, per metre, for 391887.15 metres of fabric in order to reduce the loss to the Appellant and accordingly a debit note dated 9.8.2005 was issued by Appellant to the Respondent. The Counsel for Appellant next submits that the trial Court had erred in holding that the debit note dated 9.8.2005 has been signed by the Respondent under

pressure from the Appellant. The Counsel submits that the Respondent got the two cheques dated 9.8.2005 and 18.8.2005 encashed and further submits that the statement of accounts relied upon by the Respondent has not been proved through ledger in the Court or through annual returns or by producing his accountant before the trial Court.

15. The Counsel for the Appellant has vehemently argued before this Court that the trial Court has grossly erred in not appreciating the fact that timely delivery of the entire cloth within forty days was the essence of the agreement dated 16.3.2005 and the Respondent supplied the entire cloth only in ninety days, thereby violating the basic terms of the said agreement.

16. It is further contended by learned Counsel for Appellant that the trial Court has failed to appreciate the fact that PW-2, Sh. Ajit Kumar, who is the ex-employee of the Appellant, had become dishonest and has deposed falsely against the Appellant since PW-2 has left the job of the Appellant and has started his own business with the help of the Respondent. The Counsel has drawn the attention of the Court to the deposition of PW-2, wherein PW-2, Sh. Ajit Kumar, has deposed that he takes good on credit from the Respondent, which is sufficient reason to depose against the Appellant and to favour the case of the Respondent.

17. learned Counsel for the Respondent submits that defence, sought to be raised by learned Counsel for the Appellant, is bogus and is not based on any evidence nor any documents have been placed on record in support of grounds raised by the Appellant. Counsel further submits that neither along with the written statement nor at any point of time the Appellant has placed on record a single document to show that the Appellant had called upon the Respondent or the Appellant made a grievance for non-supply of the cloth on time. Counsel also submits that cloth was not supplied on time as the Appellant had not made the payments on time. Counsel next submits that in the absence of any evidence on record the grounds taken in the present appeal cannot be considered.

18. It is further submitted by Counsel for the Respondent that the debit note dated 9.8.2005 was signed by the Respondent under pressure since the Appellant had refused to pay any outstanding amount unless the Respondent signed the debit note. The Counsel submits that the Respondent was in urgent need of money as his business was being adversely affected and his reputation in the market was at stake on account of funds not being released by the Appellant. It is also submitted that the Respondent had also lodged a complaint dated 9.8.2005 against the Appellant with Police Station Krishna Nagar, Delhi.

19. Counsel for Respondent submits that the delay in delivering the cloth occurred due to delayed and irregular payments by the Appellant and that the Appellant cannot draw any benefit from his own wrong by claiming compensation for the alleged loss suffered by him due to delayed dispatch of goods to the foreign buyer.

20. I have heard learned Counsel for the parties and also perused the entire evidence on record.

21. At the outset, it has been contended by learned Counsel for the Appellant that timely delivery of cloth was the essence of the agreement dated 16.3.2005 and the Respondent has failed to supply the cloth within the time stipulated consequent to which the Appellant has suffered a loss of Rs. 52.00 lakh and a further amount of Rs. 10.00 lakh has been withheld by the foreign buyers. In the case of M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, at page 470, the Apex Court has observed that:

27. Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the agreement ought to be noticed in their proper perspective so as to assess the intent of the parties. The agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties.

22. A similar view as expressed in the case of M.P. Housing Board Vs. Progressive Writers and Publishers, wherein the Apex Court observed that:

27.... Whether time is the essence of the contract would, therefore, be a question of fact to be determined in each case and merely expression of the stipulated time would not make time an essence of the contract.

23. It is further held in the case of General Manager Northern Railways and Another Vs. Sarvesh Chopra, , that if the party accepts the belated performance of a reciprocal obligation it cannot claim compensation for any loss occasioned by non-performance of the obligation at the time agreed unless at the time of such acceptance, the other party gives notice to the promisor of his intention to do so.

24. A careful perusal of the agreement dated 16.3.2005 shows that though the time stipulated for supply of entire 4.00 lakh metres of cloth was forty days, but there was no stipulation for any penalty or rebate in case the supply was not within the time stipulated. The Appellant has not placed on record any document to show that he had objected to the delayed supply of the cloth or the Appellant protested against the late supply of goods. The Appellant has failed to place a single document or prove on record that the Respondent was cautioned regarding late supply of goods or time was made essence of the contract. No legal notice was issued to the Respondent in this regard that any compensation or rebate shall be claimed from the Respondent for delay in delivery of the cloth. Applying the settled position of law, I am of the view that time was not the essence of the agreement dated 16.3.2005. No clause of the Agreement or the Agreement as a whole leads to any such inference. There is no evidence on record to prove that Appellant has suffered a loss of Rs. 52.00 lakhs or that an amount of Rs. 10.00 lakh has been withheld by the foreign buyer of the

Appellant on account of delay attributed to any act of the Respondent. The Appellant has not initiated any proceeding against the Respondent for recovery of the said loss since 2005. The trial Court had also posed a question to this effect to the Counsel for Appellant to which the Counsel rendered no plausible reply.

25. The Counsel for Respondent contends that the delay in delivery of cloth was due to irregular and delayed payments made by the Appellant since the Respondent is a small trader and the payment made by the Appellant was used by the Respondent to arrange for the next lot of cloth. The Counsel for Appellant contended that the payments have been made timely and the cloth supplied by the Respondent was defective. There is no evidence led nor Appellant has made any averment with regard to the poor quality of cloth supplied by the Respondent. No communication between the Respondent and the Appellant has been placed on record wherein he Appellant had intimated the Respondent of the poor quality of cloth. The said Agreement had also fixed a payment schedule and the statement of account produced by the Respondent make it evident that the Appellant was not regular in making the payments of material supplied in lots and it is the Appellant who initially violated the terms of the contract which led to a consequent delay in delivery of cloth.

26. It is the case of the Appellant that the debit note dated 9.8.2005 has been duly acknowledged by the Respondent and was executed after due negotiations. No undue pressure was exerted upon the Respondent. The Counsel for Appellant has also submitted that PW-2, Sh. Ajit Kumar, has deposed falsely against the Appellant due to the business relations of PW-2 to the Respondent. The Respondent has not disputed the signatures on the said debit note though he submits that the signatures were obtained by coercion since the Respondent was under threat of losing out the entire payment. Admittedly, the entire four lakh metres of cloth was supplied within ninety days i.e. by 15.6.2005, while the debit note was prepared on 9.8.2005, which make it clear that despite delivery of the entire cloth in June, 2005, the Appellant failed to make the payments to the Respondent till August, 2005, and the debit note was prepared about two months after the delivery of the last lot of cloth. This fact lends support to the evidence placed on record that the payment of the Respondent was withheld by the Appellant for around two months after the delivery of the entire cloth. PW-1, Sh. Manoj Kumar Jain, has deposed in his cross-examination that the debit note was prepared by PW-2, Sh. Ajit Kumar, in his presence in the business premises of the Appellant. PW-2, Sh. Ajit, Kumar deposed, that said debit note was prepared by him on instructions from DW-1, Sh. Zaheeruddin Ansari who is the proprietor of the Appellant company. he further, deposed that DW-1 Sh. Zaheeruddin Ansari forced PW-1 to sign debit note, blackmailing him that the outstanding payments shall not be made unless PW-1 signs the said debit note. In his cross-examination, PW-2 has further deposed that the rejection of cloth by the foreign buyer was due to delay in factory production of the Appellant.

27. Admittedly, PW-2, Sh. Ajit Kumar, was an employee of the Appellant at the

relevant time. It has also been admitted that PW-2 left the job of the Appellant and started his own business. Merely because PW-2, takes goods from the Respondent on credit does not make his evidence unworthy of credit. Nothing has been placed on record by the Appellant to impeach the credit worthiness of PW-2, Sh. Ajit Kumar. The deposition of PW-2 that the rate difference details were prepared by him a day prior to the said debit note is corroborated from the document of rate difference details which bears the date of 8.8.2005 and the debit note dated 9.8.2005. Accordingly, I find no merit in the contention of the Appellant that PW-2, Sh. Ajit Kumar, has deposed falsely. I concur with the view of the trial Court that since the entire cloth had been delivered to the Appellant and Appellant was withholding the payment of the Respondent, Appellant had an upper hand and was in a position to exercise undue influence on the Respondent. It is impossible to believe that when the Appellant suffered an alleged loss of Rs. 62.00 lakh, he would settle for a meager adjustment of Rs. 7.83 lakh.

28. Accordingly, no grounds are made out to entertain the present appeal and the same is accordingly dismissed.

CM No. 22885/2010.

29. In view of the fact that appeal stands dismissed, Registry is directed to release the amount, deposited by the Appellant with the Registrar General of this Court, in favour of the Respondent.

30. Application stands disposed of.