(2012) 05 DEL CK 0659

In the Delhi High Court

Case No : Regular First Appeal (OS) 26 of 2008

Beharilal Madanlal Jaipuria APPELLANT

Vs

Star Papers Mills Ltd. and Others RESPONDENT

Date of Decision : 28-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Evidence Act, 1872 — Section 101, 61, 62, 64

Citation : (2012) 05 DEL CK 0659

Hon'ble Judges : Siddharth Mridul, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : J.P. Sengh and Mr. Pradeep Dewan instructed by Mr. Sumeet Batra and Ms. Ankita Gupta, for the Appellant;

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—The present first appeal assails the decree and judgment dated March 20, 2007 whereby the learned Single Judge has decreed suit filed by respondent No. 1 in sum of Rs. 96,41,765.31 along with simple interest @15% per annum from the date of institution of the suit till the date of payment. The respondent No. 1 had filed a suit for recovery of money towards the price of goods allegedly sold by it to the appellant. It was the claim of respondent No. 1 that it was a manufacturer of various types of papers and that the appellant was a whole sale dealer of paper and as a dealer was purchasing paper from the respondent No. 1 and for which, respondent No. 2, the Managing Director of the appellant personally approached the respondent No. 1 in October, 1985 at the Saharanpur Mills for what was claimed to be a bulk order in the hands of the appellant for its customers. It was pleaded that respondent No. 2 assured the respondent No. 1 about prompt payment. It was further alleged that in the month of November and December, 1985 and January 1986 huge stocks were lifted by the appellant from the respondent No. 1. The total value of the goods supplied was stated to be worth Rs. 72,27,079/- vide 189 consignments against the terms of direct payment. It was alleged that goods under the 189 consignments were duly delivered from the Delhi office of the respondent No. 1.

2. The respondent No. 1 therefore alleged that a sum of Rs. 72,27,079/- is due and payable by the appellant. The statement of amount outstanding from the appellant was annexed to the plaint as Annexure-A. Statement of amount due for the goods supplied against hundi documents showing liability of Rs. 2,99,480/- was annexed to the plaint as Annexure-B. The statement of incidental charges claimed on bills was Annexure-C to the plaint. Annexure-D and D1 to the plaint respectively were the statement of interest against the outstanding bills upto July 1987 and from August 08, 1987 to September 15, 1987. Statement of interest on amount due for goods supplied against hundi upto July 31, 1987 was Annexure-E and thereafter up to September 15, 1987 was Ex.E-1 to the plaint. Annexure-F was statement of interest due for delayed payment. Annexure-G to the plaint was a statement of amount due with interest against oldest outstanding 12 bills after adjusting the on account payment of Rs. 2.27 lakhs. It was pleaded by the respondent No. 1 that the said respondent was retaining certain amount of trade discount to which the appellant was entitled. Annexure-H to the plaint was the statement of amount due after adjusting the trade discount portion against the interest debit notes. Annexure-I to the plaint was the statement of interest waived by the respondent No. 1. Annexure-J to the plaint was the summary of the amount due to the respondent No. 1 from the appellant.

3. The appellant contested the suit by taking various pleas of law and of fact. In sum and substance, it was pleaded by the appellant that the suit of the respondent No. 1 was based on fictitious and fraudulent transactions entered into between the parties. The appellant pleaded that the alleged bills in respect whereof suit had been filed were on the basis of fictitious transactions which were tainted with fraud, deceit and on circumvention of law. It was alleged that the transactions were against the public policy and void ab-initio. On facts it was stated that in reality no actual deliveries were made to the appellant against the bills which were the subject matter of the suit. The appellant stated that in or about 1972-73 Shri B.P. Bajoria, the then Managing Director of the respondent No. 1 approached Shri Nagarmal Jaipuria and suggested that the appellant and respondent No. 2 and 3 should receive certain bills drawn on them inasmuch as the respondent No. 1 intended to sell certain quantities of papers in the open market at prices higher than the mill rates. It was represented on behalf of the respondent No. 1 that unless and until the bills were accepted by a wholesaler, the goods could not be taken out of the mills. As per the scheme of the respondent No. 1, the goods were to be ostensibly sold to the appellant while factually they were sold by the respondent No. 1 in the open market at a premium. It was thus stated by the appellant that since the price of paper was commanding good premium in the market it was lucrative business for the respondent No. 1 to sell the goods in the open market by ostensibly showing them to be sold to the appellant as the respondent No. 1 would also save sales tax @ 4% on direct sales from Saharanpur Mill to the appellant, as a wholesaler, which saving could not be made in case of sale from Saharanpur Mill directly to

the customers. It was stated by the appellant that the respondent No. 1 in addition to make the profit by sale in open market also wanted to pocket the sales tax. It was stated by the appellant that on behalf of the respondent No. 1 it was threatened that if the said arrangement was not accepted, the wholesale distributorship agreement with the appellant would be terminated. The appellant states that under the said pressure and threat it succumbed to the illegal demands of the respondent No. 1 and agreed to the arrangement in which goods would directly be sold in the open market and the appellant would be used as a conduit for the said illegal transaction. It is further stated by the appellant that the respondent No. 1 compelled them to allow the bills to be raised in its name and to undergo formalities in its name so that the fraudulent scheme and device could not be caught by the authorities. It was pleaded by the appellant that the respondent No. 1 had no godown or sales depot at Delhi from which the alleged supplies were made and that the challans, etc. were forged and fabricated documents. In this manner the appellant claims that no liability against fictitious bills can be foisted upon it.

4. In a nutshell, the case of the appellant was that Shri Nagarmal Jaipuria just lent a helping hand to the respondent at the asking of its Director Shri B.P. Bajoria and to bring home the point urged that the gain to the respondent No. 1 was to remove the goods from Saharanpur and show the same to have been brought to its godown at Delhi and thereby avoid going Central Sales Tax since respondent No. 1 was moving the goods from Saharanpur to Delhi i.e. inter-city without there being a sale and then effecting sales, intra-city, in Delhi, but which required respondent No. 1 to be registered as a dealer with the Sales Tax Authorities in Delhi, a fact which did not exist i.e. respondent No. 1 was not registered as a dealer with the Sales Tax Authorities at Delhi.

5. On the pleadings of the parties the following preliminary issues were settled:-

A) Whether the plaintiff has paid proper court fees on the plaint?

B) Whether there is a counter claim raised in written statement?

C) Whether the defendant is liable to pay Court Fees thereon?

D) Whether the suit is not maintainable and is liable to be dismissed as barred under Order 2 Rule 2 of the Code of Civil Procedure?

E) Whether the plaint is liable to be rejected/amended in terms of the judgment in IA No. 3250/89 where the plaintiffs have undertaken not to rely upon and claim any relief against the defendants on the basis of averments of the dishonest intention, manipulation and fraud etc. made in para 18 of the plaint?

7. On facts, following issues were settled:-

1) Whether the plaint has been signed, verified and instituted by a person competent to do so?

2) Whether the defendant nos. 2 & 3 are personally liable for the claims against

the defendant no. 1?

3) Whether the alleged bills forming the claim in the suits have been raised on the basis of the fictitious and fraudulent transactions?

4) Whether the defendant no.1 accepted the bills without actual delivery of goods to it?

5) Whether there was any sales office or sales depot of the plaintiff at Delhi, from which the plaintiff has made alleged sales to the defendant no. 1?

6) Whether the defendant no.1 was purchasing paper from the Delhi Office of the plaintiff?

7) Whether on a representation made by the defendant no.2 in the month of October, 1985, personally at Saharanpur Mills, the defendant no.1 lifted huge stock of paper in the months of November, December, 1985 and January, 1986 from the plaintiffs?

8) Whether the defendants no. 2 and 3 gave assurances to the plaintiff and acting on them the plaintiff supplied goods to the defendant no. 1?

9) Whether the defendant no. 1 is under undue influence, coercion and threats as detailed in written statement?

10) Whether the defendant no.1 accepted the hundi as detailed in Annexure ''B'' of the plaint?

11) Whether the plaintiff is entitled to recover any incidental charges as detailed in Annexure ''C'' of the plaint?

12) Whether the plaintiff could not have adjusted the credit due to the defendant against the outstanding amounts as alleged in the plaint?

13) Whether the suit for interest alone is not maintainable as principal amount has been received and accepted by the plaintiff unconditionally?

14) Whether the plaintiff is entitled to and can claim interest at the rates claimed in the suit?

15) Whether the interest claimed is hit by the provisions of Usurious Loans Act?

16) Whether the claim of the plaintiff in respect of certain bills allegedly accepted by the defendant is barred by time?

17) Whether the plaintiff has not given due and proper credit to the amounts paid by the defendant amounting to Rs. 2,72,08,308.29/- from May, 1985 till the date of filing of the written statement?

18) Whether the plaintiff is liable to render true and proper accounts to the defendants from the inception of the wholesale dealership up to date between the parties?

19) To what amount, interest and relief the plaintiff and/or the defendant are entitled to claim from each other?

7. The respondent No. 1 examined Shri A.S. Bhargava as its only witness. The appellant examined its Director Shri R.C. Jaipuria as its witness.

8. Vide the impugned judgment and decree dated March 20, 2007 the learned Single Judge passed a decree as aforesaid.

9. On behalf of the appellant the following submissions were urged before the learned Single Judge :-(i) That the suit had not been validly instituted.(ii) The suit transactions have not been proved. (iii) The delivery of the subject goods was not proved. (iv) The Respondent did not have any godown at Delhi. (v) Key witness not produced on behalf of the respondent No. 1. (vi) The best evidence was not produced. (vii) The books of accounts were not produced. (viii) The appropriation of trade discount buttresses the defence of fictitious transaction. (xi) None of the hundis of the alleged nine hundi transactions signed by the appellant. (x) The parties were in pari delicto potior est conditio. (xi) Rate of interest not proved. No other issue was urged before us by the appellant.

10. The learned Single Judge has held against the appellant in view of the 189 consignments as per bills raised in the name of the appellant, holding that on the same being established, the liability to pay must follow.

11. The same 11 submissions which were urged before the learned Single Judge were urged at the hearing of the appeal and suffice would it be to state that from the aforesaid arguments raised on behalf of the appellant only the following questions arise for consideration in the present appeal:-

1. Whether the suit has been validly instituted?

2. Whether the alleged bills forming the claim in the suit have been raised on the basis of the fictitious and fraudulent transactions?

3. Whether the appellant accepted the bills without actual delivery of goods to it?

4. Whether there was any sales office or sales depot of the respondent No. 1 at Delhi, from which the respondent No. 1 has made alleged sales to the appellant?

5. Whether the respondent No. 1 could have adjusted the credit due to the appellant against the outstanding amounts as alleged?

6. Whether the appellant accepted the hundis as detailed in Annexure ''B'' of the plaint?

12. The questions aforesaid as well as the submissions and contentions made on behalf of counsel for the appellant and the judicial decisions relied upon by them are discussed herein below in seriatim.

13. The respondent No. 1 had produced a copy of the Board Resolution dated September 10, 1987 (Ex.P-909) authorizing Shri L.K. Poddar to institute the suit.

Shri L.K. Poddar is stated to have left the employment of the respondent No. 1 prior to the commencement of evidence and his whereabouts were not known. It was submitted on behalf of the appellant that PW-1 Shri A.S. Bhargava has in his cross-examination admitted that to his knowledge, the respondent No. 1 Company did not pass any resolution before filing the suit and that he had no knowledge of this aspect. Also that DW-1 Shri R.C. Jaipuria has stated in his affidavit that even Shri Lalit Poddar has no personal knowledge of the alleged suit transaction as the latter had joined the respondent No. 1 only after the alleged suit transactions were over. In this behalf the appellant referred to the following judgments: Nibro Ltd. Vs. National Insurance Co. Ltd., and State of Haryana Vs. Bharat Steel Tubes Ltd., . According to the appellant these judgments emphasize that the respondent No. 1 could not succeed in the suit unless authorization in favour of person instituting the suit is proved. It was thus urged on behalf of the appellant that PW-1 had been unable to prove that any resolution or authority in accordance with law was accepted by the respondent No. 1 Company in favour of Shri L.K.Poddar who had allegedly signed and verified the plaint and instituted the suit since PW-1 had in his cross-examination stated that to his knowledge the respondent No. 1 Company did not pass any resolution. However, it is seen that the PW-1 actually proved the said resolution and being familiar with the signature of Shri L.K.Poddar were able to identify the same. This said question is thus decided against the appellant.

14. With respect to question No. 2 aforesaid, the claim of the respondent No. 1 was that the suit transactions were bona-fide and genuine and that it has actually delivered and sold the goods to the appellant at Delhi in the month of November, 1985 and thereafter. In support of their claim the respondent No. 1 relied on ST-I forms issued by the Sales Tax Department in lieu of the invoices raised by it on the appellant. Per contra, the appellant claims that there was no actual delivery of goods or their sale in favour of the appellant and the said transactions were fictitious, tainted with fraud and are against the public policy. The appellant buttressed his claim with following reasons:- (i) Documents of alleged transactions were not proved by the respondent No. 1 by leading evidence admissible u/s 62 of the Indian Evidence Act. (ii) The burden to prove that the transactions were bonafide was on the respondent No. 1 u/s 101 of Indian Evidence Act. (iii) The best available evidence was not produced in as much as the persons who dealt with the terms of sale settled by the Directors were not produced and the books of accounts were also not produced. (iv) No witness from the sales department or the transporter was produced.

15. In this behalf it is urged on behalf of the appellant that various documents (Ex.P-1 to Ex. P-976) relating to the alleged transactions cannot be held to be proved merely by way of the affidavit of PW-1. The respondent No. 1 was required to produce the person who had allegedly drawn/written the documents or in whose presence they had been executed. The appellant stated that the testimony of PW-1 was of no avail since the said witness had admitted that he was posted at Saharanpur till the year 2004 while the alleged transactions took

place in Delhi. The appellant has thus claimed that the burden of proving the transaction to be bonafide and genuine was on the respondent No. 1 u/s 101 of the Evidence Act, 1872 and that it was only after the respondent No. 1 had discharged the onus would the appellant be required to dislodge the proof that the appellant would be required to establish that the transaction was sham and fictitious. In this behalf the appellant relies on Subhra Mukherjee and Another Vs. Bharat Coking Coal Ltd. and Others, Sait Tarajee Khimchand and Ors. v. Yelamarti Satyam alias Satteyya and Ors., AIR 1991 SC 1865; and Sudir Engineering Company v. Nitco Roadways Ltd., 1995 II AD (Delhi) 189.

16. In Subhra Mukherjee(Supra) the Supreme Court observed:-

13. There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But a plain reading of question No. 1 discloses that it is in two parts; the first part says, ''whether the transaction, in question, is bona fide and genuine one'' which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham fictitious transaction. When circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious.

17. From the above it is apparent that before the appellant was required to dislodge the onus of establishing that the entire transaction was sham and fraudulent it would be incumbent on the respondent No. 1 to prove that the transaction in question did take place and was a bona-fide and genuine one. In this respect it is, therefore, noted that the learned Single Judge fell into error in requiring the appellant to discharge the onus of proving that the claim in the suit had been raised on the basis of fictitious and fraudulent transactions.

18. In Sait Tarajee Khimchand(Supra) it was held that mere marking of an exhibit does not dispense with the proof of documents and that the proof of documents is distinct from the marking of documents as exhibit.

19. In Sudir Engineering Company(Supra) it has been held that mere admission of a document in evidence does not amount to its proof.

20. It is urged by the appellant and in our opinion justifiably that the best available evidence was not produced by the respondent No. 1. The persons who were in direct dealing with respect to the alleged transactions were not examined. The gate passes, stock registers, day book ledgers, balance sheet, proof of registration of godown with Excise Department and Sales Tax authorities were not produced. Further the respondent No. 1 by not producing the original books of accounts failed to prove their case. Annexure-A to J appended to the plaint were only statements and excerpts of the entries allegedly contained in the books of accounts and not the reproduction of the relevant pages of the books of accounts themselves.

21. In Rajappa Hanamantha Ranoji Vs. Sri Mahadev Channabasappa and Others, , the Court observed that an adverse inference was rightly drawn on account of non-examination of a key witness by the appellant. On the facts and circumstances of the case it was vital for the concerned witness to be examined and was rather the heart of the entire matter going to the root of the whole case. There was no explanation for non-examination of the witness. The Court therefore held that the decree of the First Appellate Court is based on no evidence and is perverse.

22. In Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs., the Supreme Court observed as follows:-

It will be noticed that sanctity is attached in the law of evidence to books of account if the books are indeed "account books i.e. in original and if they show, on their face, that they are kept in the "regular course of business", Such sanctity, in our opinion, cannot attach to private extracts of alleged account books where the original accounts are not filed into Court. This is because, from the extracts, it cannot be discovered whether the accounts are kept in the regular course of business or if there are any interpolations or whether the interpolations are in a different ink or whether the accounts are in the form of a book with continuous page-numbering. Hence, if the original books have not been produced, it is not possible to know whether the entries relating to payment of rent are entries made in the regular course of business.

23. In Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, the Court has reiterated the rule of best evidence.

24. From the above, our opinion is that the respondent No. 1 failed to produce the best available evidence and further failed to examine key witnesses to prove their case. This would result in our drawing an adverse inference against the respondent No. 1.

25. Coming to the issue of ST-I forms relied upon by the learned Single Judge to conclude that the occasion of issuance of these sales tax forms would only arise if goods had been supplied, it is observed that the mere exhibiting of these documents does not dispense with the onus of proof. In our view it was incumbent upon the respondent No. 1 to have led direct evidence required u/s 61 and 64 of the Evidence Act to prove the alleged 976 documents. Failure to produce the documents itself would enure to the benefit of the appellant. In fact in this behalf it is also noticed that PW-1 in his deposition feigned ignorance with respect to the place where the sales tax returns were filed.

26. With respect to question No. 3 above, the appellant submitted that no delivery of goods was made to it by the respondent No. 1 from Delhi. In this behalf it is observed that PW1 has in his cross-examination admitted that none of the invoices cum challans filed by the respondent No. 1 bears the acknowledgement receipt of goods even though they were obtained in the usual course of business. PW-1 further admitted that the respondent No. 1 did not file

any "Goods Receipt" issued by the transport company and that no gate passes were prepared while delivering the goods from the Delhi godown to the appellant. This casts a serious doubt on the genuineness of the alleged transaction. The respondents have not advanced sufficient evidence that can be relied upon to prove the delivery of goods in the instant case.

27. With respect to question No. 4 it is observed that the respondent No. 1 failed to prove the existence of any of its godowns at Delhi. PW-1 in his deposition stated that the respondent No. 1 had a godown in Delhi. However he did not remember the locality where it is situated and he had never visited it. PW-1 also admitted that the goods were of such a nature which could be taken only through transport and that he had never seen the godown from where suit transactions allegedly took place. Furthermore, the respondent No. 1 failed to produce any registration certificate for the said godown as required under the Excise Law or the Sales Tax Act. In view of the fact that the respondents statedly supplied goods from Delhi, failure to produce registration certificate has fortified appellant''s claim of fictitious nature of the transactions.

28. The appellant, with regard to the question No. 5, has vehemently urged that the fictitious nature of the suit transactions was demonstrated from the fact that the respondent No. 1 had appropriated the trade discount entitled to the appellant. The respondent No. 1 has submitted that since the payment of interest debit notes as well as bills were not received in time, the respondent No. 2 kept a portion of the trade discount in deposit and raised the debit notes for such amounts along with the bills with an understanding that the same would be adjusted against the overdue interest debit notes. It is stated that both parties were in agreement of this arrangement. PW-1 has deposed that the reason why a debit note for the trade account was raised was that it could be shown against the outstanding of the appellant as receivables. The appellant vehemently denies any such arrangement and contends that since the respondent No. 2 has sold the goods in the open market the same was routed in the name of the appellant and the bills were prepared after discounting the trade discount. Thereafter, the respondent has subsequently raised the alleged debit notes for trade discount. It is admitted by the respondents that the appellant being a wholesaler was entitled to trade discount. The appellants have denied any arrangement to this effect. It is observed that in the absence of evidence to prove the existence of such arrangement the respondents were not justified in adjusting the credit due to the appellant against the outstanding amounts.

29. With regard to question No. 6 above the respondent No. 1 had urged that apart from the 189 consignments, goods worth Rs. 2,99,480/- vide nine consignments had been supplied through hundi documents and that these hundis were dishonoured due to non payment. In this behalf the appellant has urged that PW-1 in his deposition was unable to name or identify the person who allegedly accepted the hundis on behalf of the appellant and that in the normal course of business if hundi documents were to be accepted the same would have

been signed and accepted by named persons. As a consequence the appellant submits that the argument in favour of the documents being forged stands fortified.

30. We may summarize. The respondent No. 1 has failed to prove that it was registered as a dealer with the Sales Tax Authorities in Delhi. It failed to prove having any godown at Delhi. As per the laws applicable to Sales Tax, unless respondent No. 1 proved being a dealer registered at Delhi, it could not effect any sale of paper at Delhi without paying Central Sales Tax. It is obvious that respondent No. 1 surreptitiously removed its goods from its mill at Saharanpur not under the cover of the invoices raised in favour of the appellant, for the reason these invoices show an intra-city sale and not an inter-city sale. The respondent No. 1 has not led any evidence with respect to goods receipts pertaining to movement of goods from its mill at Saharanpur to Delhi and much less shown delivery by any transporter to the appellant. The aforesaid has been totally ignored by the learned Single Judge and therefrom it is apparent that the sales were fictitious i.e. appellant was shown as a name-lender. Respondent No. 1 managed to cheat the revenue.

31. From the aforesaid discussion it emerges that the respondent No. 1 had been unable to prove its case and consequently the suit filed by the respondent No. 1 deserves to be dismissed. In the circumstances we allow the present appeal and set aside the impugned judgment and decree dated March 20, 2007 passed by the learned Single Judge in CS(OS) No. 2248/1987 entitled Star Paper Mills Ltd. v. Beharilal Madanlal Jaipuria Ltd. and Ors.

32. The Registry is directed to refund the amounts deposited by the appellant along with interest thereon, if any, but after four months from today. The security furnished by the appellant with regard to the deposit of interest stands discharged.

33. A copy of this decision is directed to be sent by the Registry to the Commissioner of Sales Tax, Delhi, who is directed to look into the issue with respect to evasion of sales tax by the respondent No. 1 and what action needs to be taken even against the Director of the appellant to have connived. This is our reason for directing refund to be made after four months, for the reason if the Registry were to receive any communication from the Commissioner of Sales Tax within said time attaching the amount deposited by the appellant, the Registry would act in compliance therewith. No costs.

