
(2011) 02 DEL CK 0372
In the Delhi High Court
Case No : CS (OS) No. 1318 of 1997

Ess Aar Universal Pvt. Ltd.

APPELLANT

Vs

Prestige H.M. Polycontainers Ltd. and Others

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Companies Act, 1956 — Section 36, 394
Contract Act, 1872 — Section 74
Stamp Act, 1899 — Section 33, 35, 36

Citation : (2011) 3 AD 598 : (2011) 122 DRJ 524

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : P.R. Agrawal, Anju. B. Gupta and Anupama Srivastava, for the Appellant; S.K. Chachra and Gaganpreet Chawla, for the Respondent

Judgement

S. Ravindra Bhat, J.—In this suit - initially instituted as a summary suit under Order XXXVII CPC - the Plaintiff claims a decree for Rs. 20,40,023/- against the Defendants.

2. The Plaintiff is a Company and had taken-over M/s. Rustagi Engineering Udyog Private Limited in terms of the order of Court u/s 394 of the Companies Act. The first Defendant is also a Company; the second and third Defendants are its Managing Director and Director. It is stated that the latter stood as sureties for the repayment of the first Defendant company's dues arising out of its agreement with the Plaintiff. The second and third Defendants also allegedly executed personal guarantees in favor of the Plaintiffs. The suit submits that the Defendants entered into an arrangement with the erstwhile M/s. Rustagi Engineering Udyog Private Limited, succeeded to by the Plaintiff, for taking on lease huge quantities of M.S. Moulds of particular specifications. The Plaintiff agreed to offer and lease-out 1250 sets of such moulds. According to the Plaintiff, the value of each such mould was Rs. 4850/-. The Plaintiff relies upon a lease agreement entered into with the first Defendant company on 10.09.1993. It is further stated that in fulfillment of the terms set-out in that agreement, 12

Post-Dated Cheques of Rs. 2,90,495/- each were given to the Plaintiff towards lease rental payment per quarter. The Plaintiff states that the Defendants had also agreed with it to pay three percent per month service charges in the event of lease rental default and that such charges were to be compounded quarterly along with bank charges, conclusion charges etc. The Agreement of 10.09.1993 provides for its termination by efflux of time or otherwise.

3. The suit submits that the Defendants had duly acted upon the terms of agreement and made payment of Rs. 30,31,250/- towards margin money and also issued 12 post-dated cheques, drawn on State Bank of India, Noida, i.e. Nos. 126801 to 126812 towards 12 quarterly cheques. It is stated that 7 of these cheques when presented on due dates were encased. When the Plaintiff presented the cheque dated 09.11.1995 - for Rs. 2,90,495/-, it was returned dishonored with the remarks "Insufficient Funds/refer to drawer", which was towards the eighth quarterly installment. A similar cheque towards ninth quarterly installment dated 09.02.1996 for the same amount was returned dishonored with the same remarks. It is stated that in these circumstances, the subsequent three cheque Nos. 126810-126812 towards the tenth, eleventh and twelfth installments were not encased and presented. The Plaintiff relies upon a letter dated 30.04.1996 whereby it was requested not to present the cheque for the tenth installment, i.e. 10.05.1996 for Rs. 2,90,000/-. It is further stated that the Defendants closed the bank account No. 16615 with the assurance that they would issue fresh cheques in lieu of the cheques for the eighth to twelfth installments. The suit alleges that despite this assurance, the Defendants did not issue fresh cheques and that the closing of the accounts was calculated and malafide move.

4. The Plaintiff relies upon the following clauses of the lease agreement:

XXX XXX XXX 2.2. The Lessee shall pay to the Lesser the lease management fee including processing fee and documentation charges and deposit rental as specified in Schedule attached.

The Lessee shall pay to the Lesser all installments of rental regularly on due dates sanctioned in the schedule without any deduction or abatement irrespective of whether or not the Assets are in use by Lessee or is working for one or more shifts or is under maintenance or replacement for any period whatsoever. All lease rentals shall be paid to the Lesser by the Lessee at New Delhi by demand drafts payable at New Delhi or cheque payable at part at New Delhi or as otherwise directed by the Lesser in writing. All payments made by post shall be at the risk of the Lessee.

2.3 Without affecting the Lesson's right or the Lessee obligations to pay the lease rentals of the fixed parts specified herein, in the event of Lessee being in arrears of such rentals, such arrears of lease rentals shall carry service charges at the rate of three percent (3%) per month compounded quarterly of each installment of lease rent or part thereof that remain unpaid. The Lesser will be

entitled to Bank charges, collection charges or any other expenses borne by the Lesser. The Lesser will immediately claim a service charge @ Rs. 150.00 for every dishonored cheque plus legal expenses for trial, if any, under the Negotiable Instrument Act which the Lessee shall pay to the Lesser on demand.

2.4 Upon termination of this lease by efflux of time or otherwise the Lessee shall, at its own cost and expenses forthwith deliver or cause to be delivered to the Lesser the Assets, at such time and place as may be directed by the Lesser, on good repair, order and condition (subject to normal and tear).

XXX XXX XXX 9.1 On the occurrence of any of the events specified below, the lesser shall be entitled, without prejudice to any other rights or remedies which the lesser may have under this lease or otherwise in law and notwithstanding any subsequent acceptance of rentals, to terminate this lease, without any notice except as specified hereof and at any time after the occurrence of such events.

9.2 If the lessee fails to pay the rentals on the dates and in the manner stipulated in the Schedule or other sums payable hereunder within 10 days of their becoming due, whether demanded or not.

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5. It is stated that the sum of Rs. 5,79,048/- had accrued to the Plaintiff as payable by the Defendants towards service charges in terms of the agreement in addition to the principal amounts of overdue quarterly installments. The Plaintiff relies upon the demand made by it through legal notice dated 06.01.1997, despite which the Defendants did not honor their commitment. On these allegations, it is stated that the Plaintiff is entitled to a decree for Rs. 20,40,023/- (Rs. 14,52,475/- as claimed towards the outstanding installment dues; Rs. 5,79,048/- towards service charges; Rs. 7,700/- towards legal notice expenses and Rs. 800/- towards bank charges).

6. After summons were issued in the prescribed format, applicable for summary suits, the Defendants entered appearance and sought to contest the proceedings by seeking leave to defend through an application, being I.A. No. 10745/1997. The orders of this Court dated 09.08.2002 and 10.09.2002 revealed that the Defendants were granted leave conditionally upon payment of Rs. 14,52,475/-, being the principal amount, which was subsequently done. After complying with the directions, the Defendants filed their written statement.

7. The Defendants' common written statement firstly submits that the suit itself is not maintainable in view of Clause 10.8 of the agreement dated 10.09.1993, which requires resolution of inter se disputes and differences through arbitration. The Defendants submit that while the second and third Defendants were the Managing Director and Director, subsequently, they ceased to hold such office. The written statement admits that 1250 sets of M.S. Moulds were leased to the first Defendant. They further deny that the lease equipments were given from a supplier of their choice. The Defendants state that the lease agreement dated

10.09.1993 is neither enforceable nor valid, as it is improperly stamped and not duly executed. The terms of the agreement are, however, not denied. The written statement alleges that the service charges at 3% per month compounded quarterly are unlawful and unenforceable. It admits that in terms of the agreement, the margin money of Rs. 30,31,250/- was paid but claims that the Plaintiff is unlawfully withholding it after expiry of the period of agreement. On these allegations, the Defendants deny any liability.

8. On 12.01.2005, the following issues were framed by the Court on the basis of the pleadings and documents on record:

XXX XXX XXX 1. Whether the Plaintiff is incorporated under Companies Act, 1956 and the plaint has been signed, verified and filed by a duly authorized person? OPP.

2. Whether the agreement dated 10.9.1993 and the personal guarantees are not duly stamped and executed documents? If so, its effect. OPD.

3. Whether the Plaintiff is entitled to recover any amount? If so, what amount and from which of the Defendants. OPP.

4. Whether the Defendant is entitled to claim adjustment of Rs. 30,31,250/- on account of margin money? OPD.

5. Whether the Plaintiff is entitled to claim any service charges from the Defendants? If so, at what rate, what amount and from which date? OPP.

6. Relief.

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9. In support of the respective cases, the Plaintiff and the Defendants had filed documents. The order of 15.10.2003 indicates that the Defendants admitted 12 documents filed by the Plaintiff, which were exhibited as Ex. P-1 to P-12.

10. Issue No. 1: This issue was framed at the behest of the Defendant. The written statement does not seriously dispute that the Plaintiff is an incorporated company under the Companies Act. So far as the question of proper authorization to sign, verify and institute the present suit is concerned, the Plaintiffs' witnesses have deposed in that regard and have not been cross-examined. In the circumstances, it is held that the suit was competently filed and is maintainable.

11. Issue No. 2: The Defendants argue that the agreement dated 10.09.1993 and the two personal bonds furnished by the second and third Defendants are improperly stamped and, therefore, inadmissible. During the arguments, the Defendants sought to support this submission by reference to several decisions - Hariom Agrawal Vs. Prakash Chand Malviya, as well as AIR 1971 1070 (SC) .

12. It is submitted that the above decisions, as well as Sections 33 and 35 of the Stamp Act clarify that inadequately stamped documents cannot be looked into by the Court. It is submitted by the Plaintiff that the Defendants' objections as to

the admissibility on ground of stamping of the documents cannot be called into question once they have been marked as Exhibits. Reliance is placed, for this purpose, on Section 36 of the Companies Act.

13. This Court notes that the Defendants have not indicated as to what is the proper stamp that ought to be affixed by the Plaintiff upon the lease agreement of 10.09.1993. So far as the two personal bonds and guarantee are concerned, they have been stamped. In the first instance, the Defendant ought to have stated what was the relevant provision as well as the shortfall in the value of stamps. At the relevant stage, i.e. when the documents were being admitted or denied, the Defendants ought to have challenged the Plaintiff and indicated their objection appropriately so that the document was not marked. However, such steps were not taken. Section 36 of the Indian Stamp Act provides for such contingencies and states as follows:

XXX XXX XXX 36. ADMISSION OF INSTRUMENT WHERE NOT TO BE QUESTIONED.

Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped

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14. It is evident that the Defendants having not raised the relevant objections at the appropriate time, are now precluded at the stage of hearing of the suit, from objecting to the admissibility of the documents, which have already been marked. In the circumstances, Issue No. 2 is to be answered against the Defendants and in favor of the Plaintiff.

15. Issue No. 3: The Plaintiff bases its claim upon the non-payment of four quarterly installment charges. It has placed on record the five cheques issued by the Defendants, i.e. 126808, 126809, 126810, 126811 and 126812. The Defendants do not deny the agreement or the fact that the M.S. Moulds were delivered to them and remained in their custody. They do not further deny that such Moulds were being used by them in terms of the agreement. The tenor of the written statement nowhere reflects a complete denial of the transaction. The anxiety of the Defendants appears to be towards the margin money deposited by them and the service charges at 3% per month. The material on the record - apart from the pleadings and the documents includes deposition of PW-1, Sh. Sudhir Rustagi. He clearly submits that the cheques, Ex. P-6 and P-7 were presented for encashment but were dishonored and other cheques Ex. P-5, 8 and 9 were not presented because the earlier two cheques were dishonored. He also stated in cross-examination that the Defendants intimated that the accounts had been closed. The cross-examination of the Defendant was mostly centered around the practice pertaining to deposit of margin money and service charges.

16. DW-1, Sh. P.K. Gupta was the Managing Director; in his cross-examination on behalf of the Defendants, he admitted to the signing of the agreement and

also stated that he was duly authorized to do so. He also admitted that the personal guarantees, Ex. P-3 and P-4 were furnished by him and by the other Defendant. It was further conceded that 1250 sets of Moulds were handed-over to the Defendant company and that they continued to be in the custody of the first Defendant even as on the date of cross-examination, i.e. 02.12.2008. Most crucially, the said witness admitted that the company failed to pay lease rental installments which was the crux of the agreement.

17. In view of the above material, the Court is of the opinion that the Plaintiff has proved its claim for the principal amount, i.e. Rs. 14,52,475/-. This issue is answered in favor of the Plaintiff and against the Defendants. Since personal guarantees for repayment of amounts stood proved by the Plaintiff and were also admitted by the sole witness on behalf of the Defendants, the Defendants are jointly liable.

18. Issue No. 4: It has come on the record that the sum of Rs. 30,31,250/- had been deposited by the Defendants on account of the margin money. As discussed previously, the Defendants have admitted both in the written statement as also in the evidence. The value of the moulds, according to the terms of the agreement - dated 10.09.1993, was Rs. 60,62,500/-. The arrangement agreed upon by the parties for this included payment of quarterly rent charges, the tenure of the lease was 36 months and the Defendants were to pay Rs. 2,90,495/- per quarter. The margin money deposited with the Plaintiff was Rs. 30,31,250/-.

19. The Defendants have sought to argue that they were absolved of liability of paying any amount since the margin money, i.e. Rs. 30,31,250/- continues to be with the Plaintiff. In support of this contention, the Defendants urged that a custom or practice exists in their relevant trade or market that such margin money is adjustable. The Defendants had sought to cross-examine the Plaintiff's witness on this score; the latter deposed that the amount was to be adjusted/returned upon return of the laser's assets. The Defendants examined DW-1, who in this regard deposed that the amount of margin money was given to the Plaintiff as per required custom in trade. Upon being asked about his previous knowledge, he asserted that there were plenty of instances but was unable to point-out to anyone in the regard. He admitted, further that all the terms and conditions were mentioned in the agreement dated 10.09.1993.

20. The Defendants' attempt, in the opinion of the Court, to seek adjustment of the margin money, towards lease rental liability or at least a part of it, is untenable. No custom or trade usage of the amount pledged by it has been established. Furthermore, the Defendants have concededly kept the moulds with them and sought to offer their return only through the cross-examination of DW-1, i.e. in 2008. No circumstance of such previous offer appears to have been made by them - at least it has not been pointed-out from the record. The Defendants had the possession and use of the moulds long after the termination of the agreement for about 11-12 years. They also defaulted in the payment of

lease rentals to the extent of Rs. 14,52,475/-. Had the Defendants claimed for such amounts or the return of such amounts, it was incumbent upon them to state the same clearly and prove the entitlement in accordance with law. Furthermore, the Court has already noticed that the margin money was towards securing the moulds and reflected 50% of their value. Now, when the moulds were never returned or offered to be returned, the question of adjusting the margin money towards lease rentals cannot arise unless clear usage understanding or contract to that effect is proved to the Court. In the present case, no such circumstances has been proved. For these reasons, the fourth issue is found against the Defendants and in favor of the Plaintiff.

21. Issue No. 5: The Plaintiff, in order to prove the present issue relies upon Clause 2.3 of the agreement which has been extracted above. The effect of the said stipulation is that arrears of lease rentals would carry service charge at 3% per month compounded quarterly. The Plaintiff claims Rs. 5,79,048/- towards service charges on application of Clause 2.3.

22. Though the Plaintiff has been able to prove that the parties agreed to 3% monthly service charges towards constituted overdue quarterly installments arrears, this Court is of the view that in the absence of any service, the stipulation amounts to a penal interest though not termed as such. In term of Section 74 of the Contract Act, such a penal clause is clearly unenforceable and the Plaintiff would be entitled only to damages or any amounts towards compensation not exceeding such agreed amount, upon proof of damage. In the present case, the Plaintiff has been able to establish that the Defendants withheld the amount of Rs. 14,52,475/-. It is also established that the Defendants did not return the 1250 moulds all these years. In these circumstances, it can be safely inferred that the Plaintiff has proved that it suffered damage; yet it is not yet proved that the damage is of an extent and magnitude so as to warrant a decree for 3% per month compounded quarterly upon the overdue payments. It is held that the claim for Rs. 5,79,048/- is inadmissible; however, the Plaintiff is entitled to reasonable compensation through interest @ 10% compound interest from the date of institution of the suit till payment.

23. Issue No. 6: Relief

24. In view of the above findings, the Plaintiff is entitled to decree for Rs. 14,52,475/- with interest at 10% compounded annually from the date of institution of the suit till payment. The amount deposited by the Defendants in Court is directed to be adjusted towards appropriation of such liability. In addition, the Plaintiff shall be entitled to costs; the counsel's fee is quantified at Rs. 55,000/-. The suit is decreed in these terms.