

(1994) 08 DEL CK 0081
In the Delhi High Court
Case No : Suit No. 694 of 1975

Greaves Cotton and Co. Ltd.

APPELLANT

Vs

Anand Machinery Stores and Others

RESPONDENT

Date of Decision : 10-08-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8

Citation : (1994) 3 AD 1241 : (1994) 56 DLT 117

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : T.L. Garg, for the Appellant; Sumit Bansal, for the Respondent

Final Decision : Allowed

Judgement

P.K. Bahri, J.—This is a suit for recovery of Rs. 1,36,257/90P. The case of the plaintiff is that defendant No. 1 is a partnership-firm comprising of defendants 2 & 3 as its partners and the plaintiff, which holds sole distributorship rights of different kinds of machines and engines, had entered into a dealership agreement with defendant No. 1 in respect of territory of Meerut District and on the basis of the said dealership agreement dated February 1, 1967. The sales were made to the defendants from time to time and the defendant has been making payments and all the sales were made subject to terms printed on the face of the invoices, namely, interest @ 12% per annum will be charged on all accounts remaining unpaid one month after the delivery and the defendants were also liable to pay sales-tax but were liable to pay full rate of tax if the defendants had failed to supply C forms (i.e. Central Sales Tax Forms). In para 6 of the plaint the plaintiff gave details of various supplies made in between the period February 23, 1973 to September 18, 1974, in respect of which bills were duly issued but payment had not been received and even C forms were not furnished by the defendants. So, it was pleaded that the defendants are liable to pay a sum of Rs. 93,055/87P on account of price of the goods so supplied and Rs. 10/318/52P on account of sales-tax as C forms were not supplied and Rs.

8,824/51P again on account of sales-tax in respect of C forms having been not supplied in respect of some old bills and Rs. 24,059/- as interest on the overdue payments.

2. Defendants contested the suit and in their first written statement filed on July 12, 1976, they raised the objections that suit has not been instituted and plaint signed and verified by a duly authorised person on behalf of the plaintiff and that payments made by the defendants to the tune of Rs. 1,09,190/84P as shown in Annexure A to the written statement have not been adjusted by the plaintiff and that interest amount calculated in disregard of the payment shown in Schedule A and if such payments are taken note of then only a very nominal amount would be due as interest. The defendants categorically admitted that the goods vide the bills mentioned in para 6 of the plaint have been supplied to the defendants. Another plea taken was that defendants had not agreed to the terms mentioned in the invoices with regard to the payment of interest and lastly it was averred that defendant No. 3, in fact, was not the partner of defendant No. 1 and thus, not liable for any amount. It was admitted that Delhi Courts have jurisdiction to try the suit.

3. In replication the plaintiff categorically stated that the payments mentioned in Annexure A to the written statement have been adjusted for payment of old bills details of which were given at page 6 of the replication and it was clarified that two cheques mentioned in annexure to the written statement were dishonoured and there were certain mistakes regarding some amounts which were also detailed out and it was admitted that Rs. 99,181/50P had been adjusted which amount was comprised of the payments received by cheques, bank drafts, cash and by way of credit notes.

4. The defendants had with the permission of the Court sought amendment of the written statement with a view to take the plea that in fact, Delhi Courts have no jurisdiction as the agreement between the parties contemplated that only Bombay Courts would have territorial jurisdiction. It is pertinent to mention at this stage that defendants did not care to controvert the facts coming out in the replication with regard to the amount already paid by the defendant being adjusted towards the payment of old bills details of which appear in the replication. Following issues were framed:

1. Whether the suit has been instituted by a person duly authorised to do so on behalf of the plaintiff, and the plaint has been signed and verified by a person competent to do so?

2. Whether the payments mentioned in Annexure "A" to the written statement were in respect of the bills respecting which claims are made in the suit?

3. Whether the plaintiff is entitled to interest? If so, at what rate and for which period?

4. Whether the plaintiff is not entitled to sales tax at a higher rate in respect of

the transactions for which the defendants did not furnish declarations in form "C"?

5. To what amount, if any, is the plaintiff entitled?

6. Relief.

The following additional issue was also framed:

Additional Issue: Whether defendant No. 3 is a partner with defendant No. 2 in defendant No. 1? If so to what effect?

5. The plea taken in the additional written statement that Delhi Courts have no jurisdiction to try the suit was not pressed at the stage of even framing of issues and even at the stage of framing additional issue and rightly so because the agency agreement, copy of which is Ex.DW1/1, produced by the defendants themselves clearly indicated in Clause 11 that only Delhi Courts would have territorial jurisdiction to try the suits arising out of this agreement and defendants were having their dealings with the plaintiff's office at Delhi.

Issue No. 1:6. Plaint has been signed, verified and instituted by Shri M.P. Jain, a duly constituted Power of Attorney holder of the plaintiff-company. Sh. M.P. Jain appeared as PW 1 and proved on record the resolutions passed by the Board of Directors of the plaintiff-company Exs. P4 & P5 which show that Board of Directors had authorised a sub-committee of the Board of Directors vide resolution, copy of which is Ex.P3 dated April 8, 1975, had decided to execute the Power of Attorney in favor of Sh. M.P. Jain for dealing with all legal matters on behalf of the plaintiff-company and they have proved the Power of Attorney, copy of which is Ex. P1, which has been executed by the Director and Secretary of the plaintiff-company who had been so authorised to execute the power of attorney on behalf of the company vide resolution already proved in this case. So, this power of attorney, copy of which is Ex. P1, authorises Sh. M.P. Jain, sign and verify the plaint as well as institute the suit on behalf of the plaintiff-company.

7. The Counsel for the defendants has urged that there is no specific power in this power of attorney to Sh. M.P. Jain to institute the present suit and thus, it should be held that the suit has not been instituted by a duly authorised person on behalf of the plaintiff-company. This contention is devoid of all force because the contents of the power of attorney, copy of which is Ex. P1, make it evident that Sh. M.P. Jain had been given the power to institute all suits on behalf of the company. In view of the vastness of the power given in the power of attorney it cannot be said that present suit had not been instituted by any duly authorised person on behalf of the plaintiff-company. So, this issue is decided in favor of the plaintiff.

Issue No. 2 :8. It was for the defendants to prove that in fact, the payments which have been mentioned in Annexure-A to the written statement have been made in respect of the bills in question. It is admitted case of the parties that

defendants have received supply of the goods in respect of which the bills have been issued, copies of which are Exs. P9 to P20. M.P. Jain had deposed that before filing of the suit a legal notice was also given to the defendants, copy of which is Ex. P6 (duplicate exhibit) and he had verified from the documents, account books regarding the amount due mentioned in the plaint and he stated that the claim of the plaintiff is correct. Nothing came out from his cross-examination to indicate that the payments which had been alleged to have been made were pertaining to the bills in question.

9. PW3 is the Accounts Officer of the plaintiff-company since 1970 and he deposed that the plaintiff-company has been maintaining regular books of accounts which are audited every year and defendant No. 1-firm was having a running account with the plaintiff and supplies were as per each bill and the payments were also adjusted as per each bill and that no payments have been received from the defendants in respect of the supplied made to the defendants in respect of the bills, copies of which are Exs. P9 to P20 and no "C" forms have been received in respect of these bills despite repeated reminders to the defendants and defendants are liable to pay 9% additional sales tax in respect of the amounts due in respect of the bills and also liable to pay 12% per annum interest as per the terms quoted in the invoices which were accepted by the defendants. He proved on the record Ex. P21, a copy of the entries pertaining to the defendants' account and also proved on record two cheques which were dishonoured which had been mentioned in the replication as well and he also proved on record Exs. P22 to P39, copies of the bills, which stand referred in the replication and against which the amounts claimed to have been paid vide Annexure-A to the written statement have been adjusted. He proved that a letter Along with the statement of account was sent to the defendants, copy of which is Ex. 40, another letter was sent to the defendants, copy of which is Ex. P41 and Exs. P42, P59, P63 & P64 are the letters received from the defendants showing that at no point of time any dispute was raised by the defendants regarding non-supply of any goods in respect of the bills Exs. P22 to P39.

10. I may mention here that in cross-examination of this witness a categorical suggestion was given that defendants have not received the goods purported to have been supplied as per bills, copies of which are Exs. P22 to P39. As already indicated above by me that it is in the replication that the plaintiff had given out the facts as to how the amount claimed by the defendants to have been paid had been adjusted towards the payment due from the defendants in respect of the old bills, the details of which were given in the replication itself. Defendants at no point of time had cared to take any plea either by way of amendment of the written statement although they had got permission of the Court to amend the written statement on another point or they have not even cared to file any sub-rejoinder to take any plea that the goods in respect of the bills Exs. P22 to P39 had not been supplied to the defendants.

11. This witness also proved on record the dishonoured cheques Exs. P43 to P46,

bank memos Exs. P47 to P50 and also proved some Hundis Exs. P51 to P57 which were dishonoured, and also proved the various letters and the telegram issued to the defendants which are Exs. P60 to P62, P65 and P67 and P58 (telegram).

12. The falseness of the pleas taken by the defendants is self-evident because the defendants have no gumption in coming out with a plea as culled out from the contents of cross-examination of PW3 that in fact, defendants have not received the goods in respect of the bills Exs. P22 to P39 at all. But in cross-examination when the witness stated that the plaintiff had received the "C" forms from the defendants in respect of the bills Exs. P22, P23, P25, P31 & P35, the defendants tried to take a different stand when defendant No. 2 came in witness box as DW1. He took up the plea that, in fact, defendants have received the goods in respect of the bills Exs. P22, P23, P25, P31 & P35 but had not received the goods in respect of the other bills. It was a somersault on the part of the defendants to come up with this new plea for the first time in testimony of defendant No. 2.

13. Defendant No. 2 admitted that defendant No. 1 has been maintaining proper books of accounts and stock register but neither copies of the same were filed in the case nor the defendants had cared to bring them in Court while giving the testimony. It is not out of place to mention that the plaintiff had after going through the written statement of the defendants served two notices on counsel for the defendants, one is dated September 20, 1976, by which defendants were required to furnish "C" forms in respect of the bills for which "C" forms have not been given so that the plaintiff could give adjustment in the sales-tax but no response was given by the defendants to this notice. Another notice was served under Order XII Rule 8 CPC requiring the defendants to produce their own account books and the other books in respect of the supplies made to the defendants for the relevant years and also the original bills received by the defendants for the relevant period. There has been no response by the defendants to this notice as well. The account books maintained by the plaintiff-company have been duly proved. There is not the slightest suspicion thrown on the correctness of the entries maintained in the account books of the plaintiff in the regular course of business. In view of the conflicting pleas being taken by the defendants as noticed above, I have no hesitation in coming to the conclusion that the plaintiff has been able to establish categorically that the defendants have not made payments in respect of the bills, copies of which are Exs. P9 to P20. The adverse inference has to be drawn against the defendants for non-production of the account books and other documents which are in possession of the defendants that if the defendants had produced their account books the claim of the plaintiff would have been well made out even from the entries existing in the account books of the defendants. There is no Explanation given even in arguments as to why despite a notice being served on the counsel for the defendants for production of the account books by the defendants, the defendants had failed to produce the said account books. So, I hold that

defendants have failed to prove that the payments made by them as enumerated in Annexure-A to the written statement have been made in respect of the bills in question, copies of which are Exs. P9 to P20. So, this issue is decided against the defendants.

Issue No. 3 : 14, The defendants in the written statement in preliminary objection in para 3 themselves admitted that interest is liable to be paid but took the plea that it would be nominal interest if the payments allegedly to have been made by the defendants are given due adjustments. If that is the position, there is no reason for holding that defendants are not liable to pay interest @ 12% per annum on the overdue payments as mentioned in the bills on the basis of which the supplies were made to the defendants and the bills were also supplied to the defendants and at no point of time the defendants raised any objection to the said term existing in the bills.

15. The learned Counsel for the defendants has vehemently argued that in the agency agreement Ex. DW1/1, there is no clause agreed upon between the parties that the defendants shall pay the interest. It is not necessary that such a clause should have been incorporated in that agency agreement when the agency agreement contemplates supply of the goods and the payments to be made by the defendants against the bills and the bills do contain a clause for payment of interest @ 12% per annum if the amounts are not paid in respect of the particular bills for one month. So, I hold that the plaintiff is entitled to have interest @ 12% per annum and the calculations made by the plaintiff in respect of the amount due as interest have not been disputed. So, I hold that the plaintiff is entitled to have interest amount of Rs. 24,059/-. This issue is decided accordingly in favor of the plaintiff.

Issue No. 4:16. The defendants even do not claim that they have supplied "C" forms in respect of the bills in question and also in respect of the old bills details of which were furnished to the defendants as annexures B to the notice sent to the defendants, copy of which is Ex.P6. So, the plaintiff is entitled to recover Rs. 10318/52P as sales tax in respect of the goods supplied as per bills, copies of which are Exs. P9 to P20 and Rs. 8,824/51P as the sales tax in respect of "C" forms not supplied in respect of old bills, as discussed above. This issue is decided accordingly in favor of the plaintiff and against the defendants.

Issue No. 5 : 17. In view of the findings given in the above issues, I hold that the plaintiff is entitled to recover in all Rs. 1,36,257/90P from the defendants. Issue is decided accordingly in favor of the plaintiff.

Additional Issue : 18. The plea taken by the defendants is that, in fact, the partnership deed executed between defendants 2 & 3 for becoming partners of defendant No. 1 was not acted upon. In the written statement it is admitted fact that the defendants had got the partnership registered with the Sales Tax Department. This is also admitted by defendants 2 & 3 that they had opened a bank account in the name of partnership firm-defendant No. 1. PW2 had proved

on record an account opening form which was duly signed by defendants 2 & 3 for opening the bank account, copy of which is Ex.P7 and copy of the partnership letter signed by both defendants 2 & 3 is Ex. P8. Defendant No, 3 appearing as DW2 admitted her signatures on these documents but she took the plea again that this partnership was not acted upon and in fact, she never became a partner. But it has come out in the testimony of defendant No. 2 as DW1 that in fact, on the basis of the account opened as partnership firm the Hindustan Commercial Bank, Meerut Cantt. Branch, had advanced even loan to the partnership firm. There is no evidence produced to show that at any time the sales tax registration which was obtained in the name of defendant No. 1 as partnership firm of defendants 2 & 3 was revoked. So, it is not possible to give any credence to the statements of defendants 2 & 3 that the partnership was not acted upon when even bank had advanced the loan to defendant No. 1 treating it as partnership firm of defendants 2 & 3. So, I hold that defendant No. 3 is also the partner of defendant No. 1 Along with defendant No. 2 and thus, is liable for the amount in suit. Issue to decided against the defendants and in favor of the plaintiff.

Relief: Suit is liable to be decreed for recovery of a sum of Rs. 1,36,257/90P with costs and pendents lite interest and future interest against the defendants jointly and severally.

I decree the suit for recovery of a sum of Rs. 1,36,257-90P with costs and grant pendente lite interest and future interest @ 12% per annum from the date of the suit till realisation.