(2008) 08 DEL CK 0221

In the Delhi High Court

Case No : CS (OS) No. 2389 of 1992

HB Leasing and Finance Co. Ltd. APPELLANT

Vs

Mahavir Spinning Mills Ltd. RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:
Limitation Act, 1963 — Article 37

Citation : (2008) 4 BC 398 : (2008) 153 DLT 293 : (2008) 106 DRJ 566 : (2009) 2 ILR Delhi 487

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : Pratap K. Mittal, Praveen K. Mittal and Kamal, for the Appellant; None, for the Respondent

Judgement

Hima Kohli, J.—The present suit has been instituted by the plaintiff against the defendant claiming a decree for possession in respect of a machinery known as ? Hydraulic Bricketting Press?, in possession of the defendant and for a decree of recovery of Rs. 23,04,199/- against the defendant along with interest @ 18% per annum. Apart from the above, relief has also been sought by the plaintiff against the defendant for grant of a decree for recovery of mesne profits for use and occupation of the machine @ Rs. 700/- per month for the period w.e.f. 1.5.1992, till the date of putting the plaintiff in actual physical possession of the machine.

2. At the very outset, counsel for the plaintiff submits that the plaintiff does not wish to press for the relief in respect of possession of the machine or recovery of mesne profits as prayed for in prayers (b) & (c) of the plaint. He submits that the present suit be confined to the reliefs sought for a decree of recovery with interest as prayed for in prayers (a) & (e) of the plaint.

3. The brief facts of the case are that the plaintiff is a company registered under the Companies Act and having its registered office at Delhi. One Shri Anil Goyal is the duly constituted attorney appointed by the plaintiff Company?s Board of Directors in their meeting held on 10.3.1992. A copy of the Board Resolution

passed by the plaintiff company in favour of Shri Anil Goyal, its Managing Director, is marked as Ex.PW-1/1. The power of attorney dated 11.5.1992 executed in favour of Shri Anil Goyal is marked as Ex.-PW.1/2. The certificate of incorporation of the plaintiff company dated 30.3.1982 is marked as Ex.PW-1/3. The said documents establish that Shri Anil Goyal is authorized by the Board of Directors of the plaintiff company to sign, verify and institute the present suit against the defendant.

4. The defendant is a company having its registered office at Ludhiana, Punjab and is engaged in the manufacture of Cotton and Acrylic yarns. The plaintiff is engaged in leasing and other financial services. On 23.5.1984, the plaintiff received a request letter from M/s. Mohta Industries Ltd., the predecessor-in-interest of the defendant, for taking on lease, a Hydraulic Bricketting Press costing Rs. 12.00 lacs, to be purchased from M/S Punjab Machinery Manufacturers Corporation, Ludhiana. Hence, a leasing facility was sought by M/s. Mohta Industries Ltd. from the plaintiff.

5. It is the case of the plaintiff that after discussions with the plaintiff, the predecessor-in-interest of the defendant, M/s. Mohta Industries Ltd. entered into a lease agreement dated 31.5.1984 with the plaintiff (Ex.PW-1/6) in respect of the machinery.

6. Article 2 of the lease agreement refers to the terms of lease. As per Article 2.1, it was recorded that the equipment was leased by the lessor to the lessee for a period of 96 months. Article 2.2 stipulated that arrears of lease rental would carry interest @ 1.5% per month on compounding basis with monthly rests. Article 6 of the lease agreement dealt with the lessee?s confirmation. Counsel for the plaintiff draws the attention of this Court to Article 6.1 which stated that the lessee acknowledged and confirmed that the equipment was of the required size, design, capacity and manufacture, suitable for its purpose and was selected by the lessee relying on its own judgment and not on the statement made by the lessor or its agents. Article 10.8 recorded that the parties agreed that civil courts in Delhi shall have the exclusive jurisdiction in respect of any matter, claim or dispute arising out of/or in relation to the lease.

7. Counsel for the plaintiff submits that the equipment in question was duly installed at the premises of M/s. Mohta Industries Ltd. In this regard, he refers to Ex.PW-1/5 which is the invoice raised by the manufacturer of the equipment, namely, M/S Punjab Machinery Manufacturers Corporation, Ludhiana. The said invoice dated 25.5.1984 was raised on plaintiff. The invoice reflects the amount of Rs. 13,20,000/- payable for the equipment. Ex.PW-1/9 is a letter dated 18.10.1986 whereby M/s. Mohta Industries Ltd. continued to pay the lease rental to the plaintiff regularly till 30.9.1986 and thereafter stopped paying the same.

8. In this regard, counsel for the plaintiff refers to Ex.PW-2/1 which is the receipt issued by the manufacturer for Rs. 12.00 lacs towards the amount paid by the plaintiff for the equipment purchased. Ex.-PW-2/2 is the copy of the ledger

account of the plaintiff maintained in normal course of business which reflects the entry of the payment of Rs. 12.00 lacs by the plaintiff. Ex.PW-2/3 is the copy of the ledger of the plant and machinery maintained by the plaintiff which shows payment of Rs. 12.00 lacs made by the plaintiff. Ex.PW-2/4 is the copy of the general lease rental brouchure issued by the plaintiff in respect of the installment received from M/s. Mohta Industries Ltd. towards lease rental. Ex.-PW2/5 is the copy of the ledger maintained by the plaintiff with regard to lease income received from different parties. The amount received from M/s. Mohta Industries Ltd. has been reflected in the entries in the ledger dated 12.9.1984, 13,10.1984, 12.11.1984, 4.12.1984, 23.1.1985, 2.3.1985, 6.4.1985 and 11.5.1985.

9. In the meantime, M/s. Mohta Industries Ltd. was declared as a sick unit and was taken over by the defendant company w.e.f. 1.1.1987, which fact was not disputed by the defendant. The scheme of amalgamation issued by the Board of Industrial Financial Reconstruction in respect of M/s. Mohta Industries Ltd. is marked as Ex.PW-1/10. As per para 3(a) of the said Scheme, all the assets and liabilities of M/s. Mohta Industries Ltd. were transferred in favour of the defendant herein.

10. It is the case of the plaintiff that as a consequence of the aforesaid taking over of liabilities by the defendant, the defendant stepped into the shoes of M/s. Mohta Industries Ltd. and was liable to pay lease rental to the plaintiff in terms of the lease agreement dated 31.5.1984. However, as the defendant failed to make any payments to the plaintiff despite assurances and correspondence exchanged between the parties as also legal notices issued to the defendant, the plaintiff was compelled to institute the present suit.

11. The plaintiff claims a sum of Rs. 10,46,760/- toward lease rental payable by the defendant for the period w.e.f. 1.10.1986 to 30.4.1992 along with penal interest in respect of the overdue lease rental in accordance with the lease agreement @ 18% per annum upto 29.5.1992 which amounts to Rs. 12,57,439/-. The plaintiff also claims future interest @ 1.5% per month on the amount found due and payable by the defendant.

12. The present suit was instituted on 29.5.1992. The plaint was registered and summons were issued to the defendant on 15.7.1992. The defendant entered appearance on 5.1.1993 and filed its written statement. After the pleadings were completed, the following issues came to be framed vide order dated 25.2.1997:

(i) Whether the suit is barred by limitation?

(ii) Whether this Court has territorial jurisdiction to try and decide the suit?

(iii) Whether the plaint discloses any cause of action?

(iv) Whether the plaintiff entered into a lease agreement dated 30.5.1984 with Mohta Industries Ltd., in pursuance of a request raised by the plaintiff under letter dated 23.5.1984 for leasing out one Hydraulic Bricketting Press?

(v) Whether the ?Hydraulic Bricketting Press? was delivered and supplied to the defendant company by the plaintiff?

(vi) Whether the plaintiff is entitled to a decree for Rs. 23,04,199/- from the defendant and also for recovery of possession of Hydraulic Bricketting Press, as claimed in the suit?

(vii) Whether the plaintiff is entitled to interest and if so, at what rate?

(vii) Relief.

13. Thereafter, parties were directed to lead their evidence. The plaintiff produced Shri Anil Goyal, Managing Director of the plaintiff company as PW-1 and Shri Vijay Grover, Manager (Accounts) of the plaintiff company as PW-2. The defendant produced Shri O.P. Sharma, Vice-President of the defendant company as DW-1.

14. After pleadings were completed and evidence recorded vide order dated 19.10.2005, the case was listed in the category of ?finals? for disposal. This case has remained in the list of ?final matters? for the past few months. However, none has been appearing for the defendant. Same is the position even today. Be that as it may, in view of the pleadings of the parties and the evidence placed on the record as also the documents filed by the respective parties, this Court proposes to decide the issues as follows.

15. Issue No. 1. Whether the suit is barred by limitation ?

This objection has been taken by the defendant in its written statement as preliminary objection No. 1. Counsel for the plaintiff submits that the onus to prove the aforesaid issue lies on the defendant. However, as none is present on behalf of the defendant, it is necessary to peruse the records. A perusal of the affidavit dated 31.8.2005 filed by the defendant (Ex.D-1) shows that apart from making a bald averment in para 11 to the effect that the suit of the plaintiff is time barred and without any cause of action, there is no elaboration or substantiation of the said objection taken by the defendant.

16. Counsel for the plaintiff, however, submits that the lease agreement was executed on 31.5.1984, the lease rental was payable by the predecessor-in-interest of the defendant spread over a period of 96 months w.e.f. 1.6.1984 to 30.4.1992. It is stated that as the lessee continued to default in paying the installments right till the end of April, 1992, the plaintiff instituted the present suit on 29.5.1992, by virtue of Article 37 of the Limitation Act. He submits that Article 37 deals with a promissory note or bond payable by installments, which provides that, if default be made in payment of one or more installments, the whole amount shall be due and the period of limitation for making recoveries is 3 years from the date when default is made, unless where the payee or obligee waives the benefits of the provision and then, when fresh default is made in respect of which there is no waiver. It is further stated by the counsel for the plaintiff that had the plaintiff determined the lease agreement with the

predecessor-in-interest of the defendant, in that eventuality, the period of limitation for instituting the suit would be calculated immediately after such a determination. However, in the present case, the lease agreement was not determined by the plaintiff and thus, he submits that the suit has been instituted well within the period of limitation. In support of his submission that the suit filed by the plaintiff is within the period of limitation, learned Counsel for the plaintiff relies on the following judgments:

(1) Arjun Sahai Vs. Pitamber Das and Others,

(2) Bangwantrao v. Moh Khan AIR 1977 MP 276;

(3) In Re: Punjab Finance (P) Ltd. v. Mohan Lal and Anr. 1978 (48) Comp Cas 271,

(4) National Research Development Corporation Vs. Pulver Ash Project Limited ; and

(5) C. Dhanam Vs. A.M. Srinivasan and Others,

17. In the case of National Research Development Corporation (supra) after examining the issue of limitation in respect of a case where installments on royalty were payable on six-monthly basis and payments were not being made, the court disagreed with the contention of the counsel for the respondent therein that the cause of action arose in favour of petitioner on each such default and that the period of 3 years shall have to be calculated for each default from the date of such default. Instead, the court held that if the agreement was not determined, such a right to sue would arise on the expiry of the period of the agreement, and once the claim is filed within 3 years of such period, the same could not be held to be barred by limitation and that apart, Part I of the Schedule to the Limitation Act would come to the aid of the parties.

18. Counsel for the plaintiff is justified in drawing strength from the aforesaid judgment. In the present case, the last installment paid by the predecessor-in-interest of the defendant was upto 30.9.1986 and in terms of the lease agreement, the 96th installment was payable on or before 30.4.1992. In these circumstances, the plaintiff was entitled to institute the present suit within a period of 3 years from 1.5.1992. Hence, issue No. 1 is decided in favour of the plaintiff and against the defendant.

19. Issue No. 2 - Whether this Court has territorial jurisdiction to try and decide the suit.

The onus to prove issue No. 2 lies with the defendant who took such an objection in the written statement. However, a perusal of the affidavit sworn by the defendant, (Ex.D-1) shows that there is no mention of the said objection. Furthermore, no evidence has been led by the defendant in this regard. Matter should rest here. However, this Court proceeds to examine the pleadings and the documents placed on the record to decide this issue. The lease agreement dated

31.5.1994 shows that the same was executed at Delhi. Article 10.8 of the lease agreement stipulates that civil courts at Delhi shall have the exclusive jurisdiction. Counsel for the plaintiff states that all cheques towards lease rentals were tendered at Delhi and deposited by the plaintiff at Delhi. Similar averments have been made in para 29 of the plaint, to which there is a bald denial in the corresponding para of the written statement. In view of the unrebutted evidence on the record, it is held that this Court has the territorial jurisdiction to try and decide the case. Accordingly, issue No. 2 is decided in favour of the plaintiff and against the defendant.

20. Issue No. 3 - Whether the plaint discloses any cause of action?

Issue No. 4 ? Whether the plaintiff entered into a lease agreement dated 30.5.1984 with M/s. Mohta Industries Ltd., in pursuance of a request raised by the plaintiff under letter dated 23.5.1984 for leasing out one Hydraulic Bricketting Press? and

Issue No. 5 ? Whether the ?Hydraulic Bricketting Press? was delivered and supplied to the defendant company by the plaintiff?

All the aforesaid issues are interlinked and therefore taken up together for consideration.

21. In so far as the cause of action for instituting the plaint is concerned, it is stated by the plaintiff in para 23 of the plaint that the cause of action for institution of the suit occurred when the lease rental fell due on 1.10.1986 and continued to accrue thereafter and lastly accrued when the plaintiff sent a legal notice dated 20.6.1991 through their counsel to the defendant. The defendant has stated in para 3 of the preliminary objections in the written statement that no cause of action arises against it. It is further elaborated that the machinery in question never came to the defendant, but is stated to have been delivered by the plaintiff under an alleged agreement dated 31.5.1984 to M/s Mohta Industries Ltd., who was held responsible by the plaintiff for its safety.

22. Counsel for the plaintiff submits that in view of the fact that the defendant took over all the assets liabilities of M/s Mohta Industries Ltd. in terms of the order of BIFR (Ex.-PW 1/10), it does not lie in its mouth to allege that there is no cause of action for institution of the present suit against the defendant. He further refers to the affidavit of DW-1 (Ex.D-1) wherein in para 3 thereof, the defendant admits taking over the assets and liabilities of M/s Mohta Industries Ltd. However, it was disputed that the machinery in question came in the possession of the defendant company and instead, it was averred that no entry of such machines was entered in the records of M/s Mohta Industries Ltd.

23. In this regard, reference to the cross-examination of the DW-1 is relevant. DW-1 in his cross-examination, admitted purchasing the management of M/s Mohta Industries Ltd. in early 1987. However, he denied personal knowledge of the lease agreement. He also stated that he was unaware of the date when the

plant and machinery of M/s Mohta Industries Ltd. was taken over by the defendant company. He admitted that he had not attached the list of plant and machinery along with his affidavit. It was admitted that the extract of the register of assets/plant and machinery in support of the claim of the defendant that the possession of the equipment in question was not with the defendant, was not filed with the affidavit. The witness also admitted that he had not seen the register of assets/plants and machinery of M/s Mohta Industries Ltd. for the years 1984, 1985 and 1986.

24. It was further admitted in the affidavit by DW-1 that the defendant had not written any letter to the earlier management regarding leasing of the equipment in question or making any enquiries thereof. It was admitted that books of accounts, records and documents of M/s Mohta Industries Ltd. for the period 1984-1986 were not seen by the witness and he was unaware as to which plant and machinery had been disposed of by the previous management and whether any plant and machinery had ever been disposed of by the said management for the years 1987, 1988 and 1989. The witness also admitted not having brought with him, the register of plant and machinery of M/s Mohta Industries Ltd. for the years 1984-86 or the books of accounts, invoices, documents and papers of the said company.

25. In view of the aforesaid cross examination of the DW-1, his deposition in the affidavit that no equipment had been leased out by the plaintiff, that no machinery was in the possession of the defendant company, and that there was no entry of such a machine in the material register of M/s Mohta Industries Ltd., is unacceptable and liable to be rejected as the same has not been substantiated by any of the relevant documents in this regard.

26. Further, apart from the aforesaid deposition of DW-1, the plaintiff has placed on record Ex.PW-1/4, which was a letter issued by M/s Mohta Industries Ltd. requesting for lease of the equipment in question. Ex.-PW-1/5 is the invoice of the manufacturer in the name of the plaintiff in respect of the machinery in question. Ex.-PW-1/6 is the lease agreement dated 31.5.1984 between the plaintiff and the predecessor-in-interest of the defendant. Ex.PW-1/7 is the agreement entered into between the plaintiff and the M/s Mohta Industries Pvt. Ltd. Ex.PW-1/8 is the letter dated 10.10.1986 issued by the defendant confirming installation of the machinery on 29.5.1984. Ex.-2/1 is issued by the manufacturer confirming receipt of Rs. 12.00 lacs from the plaintiff, being the cost of machinery. Ex.-PW2/2 is the ledger of the plaintiff showing payment of Rs. 12.00 lacs by the plaintiff to the manufacturer. Ex.-PW2/3 is the copy of the ledger of the plaintiff showing purchase of the plant and machinery. Ex.PW-2/4 are the copies of vouchers maintained by the Accounts Department of the plaintiff showing receipts of installments paid by the defendant towards lease rental in respect of the equipment leased to it. Ex.-PW-2/5 are the copies of the ledger showing receipt of lease rental recoverable from the defendant.

27. In the light of all the aforementioned documents, it is clearly established that

pursuant to a request received by the plaintiff from M/s. Mohta Industries Ltd. dated 23.5.1984 for leasing out one ?Hydraulic Bricketting Press? the plaintiff entered into a lease agreement dated 31.5.1984 with M/s Mohta Industries Ltd. It is also established from the aforesaid documents that the ?Hydraulic Bricketting Press? was delivered and installed at the premises of M/s Mohta Industries Ltd. Once the defendant company took over assets and liabilities of M/s Mohta Industries Ltd. in terms of the order of Board of Industrial Financial Reconstruction, the defendant cannot dispute the lease agreement entered into with M/s Mohta Industries Ltd or the installment of the machinery at the premises of the M/s Industries Ltd. In these circumstances, issues No. 3, 4 and 5 are decided in favour of the plaintiff and against the defendant.

28. Issue No. 6 ? Whether the plaintiff is entitled to a decree for Rs. 23,04,199/- from the defendant and also for recovery of possession of ?Hydraulic Bricketting Press?, as claimed in the suit?

29. As already recorded at the outset, counsel for the plaintiff does not press for the relief of recovery of possession of the equipment and confines the present suit to its claim for entitlement to Rs. 23,04,199/-.

30. Insofar as the claim of the plaintiff for Rs. 23,04,199/- is concerned, the plaintiff admits having received all the installments payable by M/s Mohta Industries Ltd. from the date of execution of the lease agreement to 30th September, 1986. The same is also borne out from a perusal of Ex. PW-2/4, referred to in para 9 hereinabove. He further states that the plaintiff is entitled to claim lease rental for the period from 1.10.1986 to 30.4.1992, totalling to Rs. 10,46,760/-. On the aforesaid amount, the plaintiff has calculated penal interest @ 18% per annum, in terms of Article 2.2 of the lease agreement which amount is calculated as Rs. 12,57,439/- upto 29.5.1992. In reply to the aforesaid tabulation of the plaintiff, the defendant has only made a bald denial that the machine was not delivered by the plaintiff and there was no lease agreement and hence the defendant was not liable to pay any amount to the plaintiff.

31. The aforesaid defence taken by the defendant stands demolished in the light of the evidence led by the plaintiff and the documents placed on the record. Issues No. 3,4 & 5 have already been decided against the defendant and in favour of the plaintiff. In view of the unrebutted evidence placed on the record, it is held that the plaintiff is entitled to a decree for Rs. 23,04,199/- against the defendant as claimed in the suit. Issue No. 6 is answered in the favour of the plaintiff to the aforesaid extent.

32. Issue No. 7 whether the plaintiff is entitled to interest and if so, at what rate?

33. This leaves the issue with regard to the claim of interest. The plaintiff has claimed interest on Rs. 23,04,199/- @ 18% per annum. Taking into consideration the fact that the plaintiff has been held entitled to receive from the defendant a sum of Rs. 23,04,199/- which includes penal interest calculated @ 18% per annum coming to Rs. 12,57,239/-, it is deemed appropriate to grant the plaintiff

pendente lite interest @ 12% per annum from the date of institution of the suit till the date of passing of the decree and future interest @ 9% till realization.

34. Suit is decreed on the aforesaid terms. Decree sheet be drawn up accordingly.