(2010) 08 DEL CK 0083

In the Delhi High Court

Case No : CS (OS) 1606 of 1996 and I.A. No''s. 6374 of 1996 and 11377 of 2009

Hindustan Photofilms Manufacturing Co. Ltd. APPELLANT

Vs

Anu Enterprises and Others RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:
Evidence Act, 1872 — Section 63, 65, 65(C)

Citation : (2010) 174 DLT 171

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Dileep Poolakkot, for the Appellant; M.S. Dewan, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The plaintiff seeks a decree for the sum of Rs. 2,39,47,194.27 against the defendants. The first defendant is a registered partnership firm of which the other two defendants are partners (defendants hereafter are collectively referred as ''M/s Anu Enterprises'').

2. The suit averments are that the plaintiff carries on business of manufacture and sale of photo Sensitised Products including still photo products and graphics arts photo products. On 30.07.1984 and 01.08.1984, the plaintiff constituted Anu Enterprises as its stockiest in respect of two types of products and entered into agreement which were initially for five years and later renewed in 1989 for a further period of five years. In terms of the agreements, the dealings between the plaintiff and Anu Enterprises on a principal-to-principal basis. Anu Enterprises as stockiest entitled to a credit period as well as a trade discount on the product value and additionally to an agreed commission. As stockiest Anu Enterprises has to furnish bank guarantees/revolving letter of credit/insurance guarantee to secure the over all credit facility it is stated that consequently Anu Enterprises initially issued some bank guarantees upon which the plaintiff started supplying the goods. The plaintiff mentions that during the course of dealings Anu Enterprises approached it for enhanced credit facilities against bills of exchange

as they anticipated greater volume of business and that purchases would be made against hundies to be accepted for payment of supplying of the goods.

3. The plaintiff mentions that the City Bank was operating a bill discounting scheme under which hundies could be discounted forthwith by presentation before date of maturity and acceptors to such hundies would make payment to the bank on the date of maturity for the value along with interest charges etc. The plaintiff accepted the Anu Enterprises proposal and selling goods to it against hundies duly accepted by the latter for payment. The hundies would be presented to the Citi Bank which discounted them or paid or credited to the plaintiff''s account. However, Anu Enterprises did not honour the hundies accepted by them and consequently failed to pay the amounts on the due dates as a result Citi Bank debited the plaintiff''s account to the extent of such dishonoured hundies. The plaintiff mentions having informed Anu Enterprises about the dishonouring of hundies as well as consequent embarrassment and loss. It is submitted that initially the defendant was apologetic and promised to clear the entire amounts outstanding but failed to do so despite repeated reminders. It is further submitted that the plaintiff was under the circumstances constrained to invoke bank guarantees to the tune of Rs. 65 lakhs. Apparently only Indian Overseas, Kanpur honoured a bank guarantee to the tune of Rs. 5 lakhs and the other banks refused to honour resulting in cases being filed against them (such banks).

4. The plaintiff in the above circumstances, alleges that the principal amount of Rs. 1,06,58,723.43 including bank charges leveled by the Citi Bank is due and payable to it. The plaintiff also relies upon an acknowledgement of debt by Rs. 1,06,58,723.43 Dated 24.05.1993 stating that they were liable to pay a sum of Rs. 1,53,57,289.54. It is stated that on the said principal amount of Rs. 1,06,58,723.43. The plaintiff is further entitled to interest for 21% from the date of payment till 31st March, 1996. Thus a decree for Rs. 2,39,47,194.27 is sought.

5. Anu Enterprises does not deny having been appointed as stockiest and having been entitled to a credit period, trade discount on the product value and commission. It, however, alleges never having been approached the plaintiff for credit facilities against hundies and further states that supplies to stockiest for credit period ranging from 45-60 days were routine as the plaintiff was facing cash liquidity. The defendant alleges that due to the liquidity problem it started the practice of receiving bills of exchange. Anu Enterprises alleges that blank hundi papers were signed at the behest of the plaintiff by the second defendant and that 30 stamp papers were sent on three occasions i.e. 24.06.1989, 11.12.1989 and 06.03.1990. Anu Enterprises alleges that it was the plaintiff who was in arrangement for bill discounting with Citi Bank and further states that it was unaware when the hundies were prepared and whether amounts were paid under it.

6. Anu Enterprises alleges that the plaintiff was in the habit of issuing bogus bills and debit notes even when no goods were supplied for the window dressing of its

account. It denies having issued any acknowledgement on 24.05.1993 and further states that a sum of Rs. 1,95.90 lakhs is payable by the plaintiff to it. It is submitted that the plaintiff has filed the suit with a view to avoid reconciliation of the accounts. Anu Enterprises lastly alleges that invocation of the bank guarantee was unjustified and on false premises.

7. In view of the pleadings in this case and the documents placed on record the Court framed the following issues:

ISSUES

1. Whether the suit has been signed and instituted by a duly authorized by the company?

2. Whether the suit has been filed within the period of limitation?

3. Whether plaintiff obtained signatures of D2 on various blank hundi papers as alleged by defendant in the written statement and later converted the same into bills of exchange and the same (discounted) from the bankers i.e. Citi Bank?

4. Whether the plaintiff is entitled to recover from the defendants jointly and severely the amount of Rs. 2,39,47,149.27 along with interest at the rate of 21% pendency and further interest as claimed in the plaint?

5. Whether defendants have filed proper Court fee on the set of claim?

6. Whether the claim for set of is within limitation?

7. Whether plaintiff is entitled to suit amount. If so at what rate of interest?

Issue No. 1

8. This issue was framed at the behest of the defendant. In order to prove that the suit was validly filed, PW-1 Shri N. Sivan, Manager of the plaintiff company deposed and relied upon the extract of the resolution of Board of Directors dated 30.06.1995 in its 202 meeting entitling him to sign, verify and institute the suit. A copy of the resolution was produced as Ex.PW-1/2. The defendant did not chose the cross-examine the witness on this aspect. This issue is accordingly answered in favour of the plaintiff.

Issue No. 2

9. In this case the suit was filed on 8th April, 1996. The evidence placed on record would reveal that the first set of agreements Ex. PW-1/2 to PW 1/4 were entered into 30.07.1984 and 01.08.1984, Ex. PW-1/5 and PW-1/6 are letters of 3 & 4th March 1989 by the plaintiff to Anu Enterprises accepting the proposal for continuing the stockiest agreement in respect of Indu Products. The plaintiff relies upon a series of invoices issued on 23 different dates to support its claim for having supplied the goods. The relevant dates are between 30.07.1990 and 28.01.1991. The invoices have been produced as PW-1/24 to PW-1/107 which apparently also issued correspondingly debit notes to the defendants which are

marked as Ex. PW-1/133 to Ex. PW-1/193 and Ex. PW-1/236 to PW 239. This cover the period from 17.01.1991 to 10.08.1991. The copies of hundies relied upon are between the period from 03.08.1990 to 27.01.1991 covering these invoices are produced as Ex. PW-1/7 to Ex. PW-1/23. The plaintiff has however, not produced extract of its ledgers or relevant or account books reflecting the entries of debit and credit made on account of the goods supplied and received amounts from time to time or the amounts shown to the tune and payable by the defendant Anu Enterprises.

10. The plaintiff is aware that the suit covers a period, in respect of which the last payment was made (or became due from the defendant) in mid 1992. Furthermore the tenure of the second stockiest is said to have been extended in 1980. If it was renewed for five year term the tenure would be ended in 1994. The plaintiff therefore placed reliance on Ex. PW1/245, the photocopy of letter written by Anu Enterprises stating that according to its ledger balance as shown on 28.02.1993 a sum of Rs. 97,94,181.46 was payable on account of "GA" (graphic art product); and Rs. 55,63,108.08 on account of "Still" (Still Photo). The original of this document was not produced what is however, produced is the photocopy of an attested copy and attestation appears on the face of the documents to have been made on 24.01.1994.

11. The defendant had objected to the maintainability of this document on the ground of admissibility relevance and mode of proof. The record would also reveal that PW-1 Shri N.Sivan had deposed as to the correctness of documents marked as Ex. PW-1/7 to PW-1/44. He only mentioned in para 19 of his affidavit that the photocopy of the letter of acknowledge dated 24.05.1993 was exhibited as Ex. PW-1/245 without mentioning the circumstances under which such letter was received. Why only a photocopy in spite of the original was being brought on record. Furthermore the Court notes that no attempt was made by the plaintiff at any stage of the suit to adduce secondary evidence in terms of Sections 63 and 65 of the Evidence Act, 1872 after explaining the circumstances under which the original of defendant''s letter dated 24.05.1993 could not be produced.

12. Section 65 of the Evidence Act enacts 8 distinct situations where a party is relieved from the obligation of placing on record primary evidence. Section 65(c) states that when the original is destroyed or lost or where the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time; he can produce any form of secondary evidence. While this provision is an enabling one yet it must be remembered that in the secondary evidence, ordinary document is admissible only if the party proves that he is not in possession or control of it and further that what can be done to procure a production of it. He also has to account for non-production of the primary document in one or the other ways indicated....

13. In this case, the plaintiff contends that about having received the letter dated 24.05.1993 confirming the balance payable by the defendant Anu Enterprises. However, the circumstances under which that original documents has gone

missing or cannot be produced by the plaintiff has been neither pleaded nor proved at any stage. The plaintiff has blandly sought to introduce secondary evidence at the stage of examination of its witness, which was objected to by the defendant. That the plaintiff at least had possession of the original in January 1994 when an attested copy was secured. Even the original copy of the attested has not been produced and what is placed on record is a photocopy. Under these circumstances, the Court is constrained to hold that the Ex. PW-1/245 cannot be taken on record and considered as it was not adduced in evidence in the manner prescribed. Without the document the suit claim is clearly time barred as the last transaction between the parties was sometime in mid 1992. The suit, is therefore, barred in law as having been filed within the 3 year limitation period prescribed for money claims.

14. The issue is therefore answered against the plaintiff and in favour of the defendant.

Issue No. 3

15. The onus proving that the blank hundi papers signed by them (defendant) were done without the authority - with the object of causing loss to them, lay upon them. In this connection the defendants rely upon Ex. PW-1/DA 24.06.1989 Ex. PW-1/DB 20.10.1989 and PW-1/DC 19.10.1990. All letters written by the plaintiff to Anu Enterprises requesting that a total of 90 sheets of blank stamp paper were to be signed and returned, these were apparently stamp papers. To support that the defendants had complieds with this request the replies dated 26.06.1989 PW-1/DK 20.10.1989 PW-1/DL, 14.12.1989 PW-1/DM, 06.03.1990 PW-1/DN have been produced. Besides this the only other material is in the form of DW depositions in para 7 alleging that blank hundi papers were got signed from him and had been fabricated under the bills for exchange for various amounts.

16. Now there can be no doubt that certain blank papers were signed by the defendants, however, the allegation that such blank papers were misused by the plaintiff who "credited" bills of exchange of hundies has to be clearly established. The defendants do not point to any complaint or proceeding where they allege forgery or fabrication of documents. In these circumstances, issue No. 3 is answered against the defendant and in favour of the plaintiff.

Issue No. 4

17. The plaintiffs in addition to the invoices PW-1/24 to PW-1/107 Constituting the period between 30.07.1990 and 28.02.1991 have placed reliance on debit notes PW-1/133, PW1/193 and PW1/236 to PW-1/239 and PW1/210 have also been relied upon. The two judgments of this Court in CS(OS) No. 1043/1996 - a suit filed against Vysya Bank and suit being CS(OS) No. 1044/1996 - filed against State Bank of Mysore. These were in respect of bank guarantees furnished in its favour and invoked by the plaintiff for the total amount of Rs. 60 lakhs. Both the sits were decreed - (CS (OS) No. 1043/1996 being decreed

02.08.2007 for Rs. 50 lakhs with pendent lite and future interest @ 12% p.a. and CS(OS) No. 1044/1996 being decreed on 21.04.1998 for Rs. 10 lakhs with interest from 01.10.1993 including future interest.

18. The defendant with these materials, it is evident that the goods covered by the invoices were supplied and debit notes were raised from time to time. In accordance with the arrangement hundies were also issued that were later dishonoured by the defendants. The defendants as in the written statement gone to the extent of denying issuance of bank guarantees; later in the course of evidence DW-1 admitted that such guarantees were issued. Additionally this Court as two suits filed against Vysya Bank and State Bank of Mysore found that the plaintiff had validly invoked the guarantees. Having regard to these conspectus and circumstances the onus lay upon the defendant to show that the goods were never received by it and that they at any stage protested that they were never liable to pay any amounts. Having not done so and have fallen back upon vague and general allegations. Reliance placed by the defendant on a letter dated 14.09.1993 is of no consequence because the plaintiffs Chairman clearly states that the defendant owed money to it. Similarly the defendants reliance on a letter of 13.06.1991 by the plaintiff that goods would be sold henceforth on cash and carry basis does not imply that Anu Enterprises and the other defendants were not liable for the previous supplies made.

19. In view of the discussions held that the plaintiff has proved that defendants were liable to pay it a sum of Rs. 1,06,58,723.43 principal amount as claimed.

20. The plaintiff is, however, required to adjust the amounts of Rs. 60 lakhs from the said payable amount. During the hearing, it was submitted that the Vysya bank had, as against its liability of Rs. 50 lakhs with 18% interest paid the sum of Rs. 1,22,26,893/- on 10.11.2008 and 14.11.2008 and further an amount of Rs. 14,38,805/- was paid in satisfaction of the decree in CS(OS) No. 1044/1996. Thus the plaintiff would be entitled to the reduced principal value of Rs. 46,58,723.43. The plaintiff has not produced any material or pointed out to any condition in the agreement between the parties requiring payments of 21% interest on outstanding sums. In these circumstances, it is held that the plaintiff is not entitled to 21% interest resultantly Issue is answered in favour of the plaintiff and against the defendant; the defendant is liable to the extent of Rs. 46,58,723.43 being the principal amount.

Issues 5 and 6

21. These issues were framed at the behest of the defendant who had shown claim in paras 10 and 18 of the written statement that a sum of Rs. 1,95.90 lakhs was payable by the plaintiff and they were entitled to a set of claim on that account. The defendants have not adduced even a single document in support of such claim nor was it seriously urged by DW-1. In these circumstances, issues are held against the defendants. Issue No. 7

22. In view of the findings recorded in respect of issue No. 4, the plaintiff is

entitled to a decree for Rs. 46,58,723.43.

23. Having regard to the fact that the amounts were payable, however having regard to the finding in issue No. 2 i.e. that the suit was not filed within a period of limitation and is time barred, it cannot succeed, the suit is therefore dismissed.

24. In these circumstances, there shall be no orders as to costs.

