
(2011) 02 DEL CK 0188

In the Delhi High Court

Case No : Regular First Appeal No. 643 of 2000

J. Kimatrai Co. and Others

APPELLANT

Vs

Geeta Monga Prop. and Geeta Textiles and Another

RESPONDENT

Date of Decision : 07-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 34
Limitation Act, 1963 — Article 1

Citation : (2011) 02 DEL CK 0188

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Ashok Kaushik, Proxy Counsel for R.N. Sharma, for the Appellant;
L.S. Monga and Dinesh Monga, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal u/s 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 29.9.2000 whereby the suit of the Respondent No. 1 was decreed against the Defendant for a sum of Rs. 4,60,606/- with proportionate costs and interest @ 18% per annum.

2. The facts of the case are that the Respondent No. 1/plaintiff had supplied material being fabric/cloth to the Appellant in the regular course of business. It was stated by the Respondent/plaintiff that goods were supplied to the Appellant up to 14.7.95 and Appellants made payment from time to time and the last payment was made on 2.2.96 leaving a balance of Rs. 4,60,606/- and for which amount the recovery suit was filed.

3. The Appellants entered appearance and contested the suit on the ground that the husband of the Respondent No. 1 was also acting as an attorney of the Appellant and he committed certain manipulations with one of the partners of the Appellant firm namely Mr. N.S. Kimat Rai, who was sued as Defendant No. 3 in

the suit. Subsequently the suit was withdrawn as against Defendant No. 3. It was alleged that the suit was barred by time because the suit was filed on 6.4.1999 whereas the last payment made in the open mutual and current account was 2.2.96 whereby the suit ought to have been filed as per Article 1 of the Limitation Act, 1963 by 31.3.1999. It was further alleged that since there was collusion between the Respondent No. 1 and one of the partners, Mr. N.S. Kimat Rai, the suit was bound to be dismissed.

4. The Trial Court after completion of the pleadings framed the following issues:

1. Whether a cause of action has arisen in favour of the plaintiff against the Defendant? OPP
2. Whether the plaintiff is entitled to recover a sum of Rs. 4,60,606/- if so, from whom? OPP
3. Whether the plaintiff is entitled to recover any interest on the amount due? If so, at what rate and for which period? OPP
4. Whether the suit is barred by time? OPD
5. What would be the effect of filing of suit without serving any demand notice? OPD
6. Whether there is an Arbitration Agreement between the parties? OPD
7. Whether suit is bad for non-joinder of necessary parties? OPD
8. Whether the suit is not maintainable as alleged by Defendant? OPD
9. Whether any writing was given by Defendant No. 2 in favour of plaintiff on being misled by the husband of the plaintiff, if so, what effect? OPD.
10. Relief.

5. Issue Nos. 1, 2 and 4 are the real issues which were argued before the Trial Court and have also been argued before me.

6. While dealing with issue Nos. 1, 2 and 4, the Trial Court after referring to the deposition of the witnesses of the parties, and also referring to the documentary evidence, has held that the Respondent No. 1 has established its claim against the Appellant. The Trial Court relied upon the letter dated 13.4.1996, Ex.PW1/3 issued by the Defendant No. 3/Mr.N.S. Kimat Rai to hold that the suit is within limitation. The Trial Court has also relied upon the certificate of the Chartered Accountant of the Appellant firm exhibited as Ex.PW1/4 which showed that the balance due by the Appellant firm to Respondent No. 1 as on 1.4.95 being Rs. 16,90,058/.

7. The following observations of the Trial Court while discussing the evidence and giving the findings and conclusions, are relevant:

14. In cross-examination he admitted that he is matriculate and is director of many companies and is partner of many firms. He showed his ignorance whether

he had shown himself as an employee of many company or firms. He admitted that J. Kimatrai & Co filed its balance sheet of the year 1994-95 alongwith the income tax return but he has stated that it was filed by his brother N. Kimatrai, Defendant No. 3. He also admitted that he must have received some profit in the year 1994-95. He showed his ignorance that if any amount is to be paid to Geeta Textiles in the balance sheet of 1994-95 of the Bombay Unit of J. Kimatrai & co. He showed his inability to produce the balance sheet for the year 1994-95 and 1995-96 as according to his the same are in possession of Defendant No. 3. He denied that the balance sheet of the year 1994- 95 and 1995-96 have been seen by him which bears the signature of Ashwani Shah, C.A. of the Bombay Unit. He showed his ignorance about the dealing of plaintiff firm with the Defendant company. He has admitted that FOR No. 100/98 was registered at P.S. Chandni Chowk against him and others but the police has moved for its cancellation. He admitted that no notice was given to the plaintiff for appointment of Arbitrator. He showed his inability to furnish the details of misappropriation by the husband of the plaintiff. He also showed his inability to say orally whether goods were purchased by Defendant No. 1 from the plaintiff vide invoice No. 1380 dated 5.8.1994. He showed his inability to bring the record in the court as according to him the same was taken away by his brother Defendant No. 3 N.S. Kimatrai with whom he is not keeping good terms. He also showed his inability to produce the balance sheet from Ashwani Shah saying that he is not keeping any personal account nor he can bring copies of the income tax return of the year 1994-95, 1995-96 nor he can produce the account books of these years as the same are in the possession of Defendant No. 3. He further stated that he has no document to show with regard to any transaction between Geeta Textile and J. Kimatrai & Co. He further stated that Ashwani Shah remained CA of Bombay Unit till 1994-95. He expressed his ignorance that he has served a notice to Sh. Ashwani Shah through Mr. R.N. Sharma, Adv. He further admitted that he did not make any complaint to the police about the taking away of accounts book by his brother. He denied that a sum of Rs. 4,60,606/- is due to be paid by them to the plaintiff.

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Section 34 of the Indian Evidence Act, 1972 says that the entries in the books of accounts regularly kept in the course of business are relevant whenever they referred to a matter into which a court has to inquire. Section 34 further says that these entries are not alone sufficient. In the present case, besides the ledger proved by the attorney of the plaintiff, he has also relied upon a letter ex.PW1/3 vide which one of the partners of the Defendant has admitted that further payment of Rs. five lacs is still due to M/s. Geeta Textiles. Though plaintiff has withdrawn its suit against Defendant No. 3, even than the existence of this letter cannot be denied rather this letter has been admitted by the counsel for the Defendant No. 3. It has also been admitted by Defendant No. 1, 2, 4 & 5 that Defendant No. 3 is also a partner of the Defendant company hence ex.PW1/3 cannot be brushed aside. So far as certificate ex.PW1/4 is concerned, I am not agree with the contention of Ld. Counsel for the Defendants No. 1, 2, 4 & 5 that

this certificate is procured. Defendant No. 1 has not denied that Sh.A Shwani Shah who has issued this certificate, was not the chartered accountant of their firm. It is admitted by DW1 that Ashwani Shah was the chartered accountant of Bombay Unit hence it cannot be said that certificate ex.PW1/4 is procured from Ashwani Shah. Over and above this certificate and letter, plaintiff has also produced one invoice ex.PW1/5 dated 14.7.1995 which clearly explains about the transaction of Geeta Textiles, plaintiff with the Defendant company. Considering all these facts and circumstances I am convinced that cause of action has arisen in favour of plaintiff and against the Defendants. Hence, this issue is decided in favour of plaintiff and against the Defendants.

Issue No. 2

plaintiff has adduced orally as well as documentary evidence showing that Rs. 16,90,058.00 was the closing balance as on 31st March, 1995 in the account books in which the transaction of M/s. Geeta Textiles and Defendants were incorporated. Ex.PW1/2 also shows the same balance carried forward on 1.4.1995 in the running account of plaintiff and the Defendants company. This document also disclose that as on 2.2.1996 the balance was Rs. 4,60,606/-. The documents on record also goes to show that the transaction were continuously going on between the plaintiff and the Defendants for which the accounts were maintained regularly. On the other hand DW1 has admitted that Defendant No. 1 is a company and Defendant Nos. 2, 3, 4 & 5 are its partner. He has also admitted that plaintiff and Defendant company re members of Delhi Hindustani Mercantile Association and Sh Kailash Monga, husband of the plaintiff was the Manager of M/s.J. Kimatrai & Co upto 1996. He has not denied whether any amount has been shown to be paid to M/s Geeta Textiles whose Proprietor was Ms. Geeta Monga, in their balance sheet of the year 1994-95. He has simply stated that he cannot produce the balance sheet since the same has been taken away by Defendant No. 3. He also admitted that he had lodged no complaint regarding the taking away of the accounts books against the Defendant No. 3. He has shown his inability to tell how much amount is to be given or is to be received from any person. He has specifically deposed in his cross-examination that he cannot say whether J. Kimatrai & Co. Has to pay a sum of Rs. 4,60,606.00 to the plaintiff. Hence it comes out that he is unaware of the transactions. Considering the evidence on record, I am convinced that the plaintiff has established that plaintiff company is entitled to recover a sum of Rs. 4,60,606.00. The question from whom this amount is to be recovered. It is to be recovered from the company or its partner. So this issue is also decided accordingly in favour of plaintiff.

Issue No. 4.

The onus on proving issue was on the Defendant. This suit as filed on the basis of running account between the plaintiff and the Defendant. plaintiff has produced on record the running account books and has shown that the payment of Rs. 4,60,606.00 was due as on 2.2.1996. He has also proved on record a

letter Ex.PW1/3 dated 13.4.1996 written by one of the partners of the company M/sJ. Kimatrai & Co. Which was addressed to Union Bank of India in which an acknowledgment of payment of Rs. Five lacs has been admitted by one of the partners namely Sh.N.S. Kimatrai. This suit was filed on 6.4.1999. Hence, this suit is filed within limitation. Accordingly this issue is decided in favour of plaintiff and against the Defendants.

(Emphasis added)

8. I do not find any illegality or perversity in the approach or the findings or the conclusions of the Trial Court by which it decreed the suit of recovery of the Respondent No. 1. The Respondent No. 1/plaintiff proved the certificate of the Chartered Accountant of the Appellant firm as Ex.PW1/4 which showed the opening balance for financial year 1995-96 as Rs. 16,90,058/-. The Respondent No. 1/plaintiff also filed its statement of account which was proved as Ex.PW1/2 and which is a statement maintained in the regular course of business containing all the debit and credit entries. When this statement of account is exhibited, there was no suggestion put to the witness of the Respondent No. 1 that this statement of account was forged and fabricated. In fact during the course of the arguments, I put a specific question to the counsel for the Appellant whether such a suggestion was put, and the learned Counsel for the Appellant conceded that no such suggestion had been put. I may further note that even taking the case of the Appellant at its best that the statement of account of the Appellant in the books of account of the Respondent No. 1 is not correct, then, the Appellant was bound to file its own statement of account to dispute the correctness of the statement of account exhibited as Ex.PW1/2, and which admittedly was not done. Once there is found to be an amount due to the Respondent No. 1 as per Ex.PW1/2 (statement of account) and Ex.PW1/4 (certificate of the Chartered Accountant of the Appellant), the Respondent No. 1 clearly should succeed for price of the material which she had supplied to the Appellant. It is in this context, that the letter exhibited as Ex.PW1/3 dated 13.4.1996 of one of the partners of the Appellant firm must have been seen. Of course, this partner, Defendant No. 3/ Respondent No. 2 was supporting the Respondent No. 1, however, every support is not to be taken as misconceived and that the same should be taken as collusion inasmuch as the Trial Court has relied upon an independent document being the certificate of the Chartered Accountant of the Appellant firm, Ex.PW1/4, which proved the opening balance as on 1.4.95. Also, as noted above by me, the Appellant failed to file its statement of account and which would have really brought out the correct position, but the Appellant failed to do the same and whereby an adverse inference is to be drawn against the Appellant.

9. Learned Counsel for the Appellant argued that the Respondent No. 1 did not step into the witness box and only her husband as attorney stepped into the witness box and therefore such deposition could not be relied upon. Whether deposition of an attorney has to be relied upon depends upon the facts and circumstances of each individual case. In the present case, the Trial Court has in

fact relied not so much on the oral deposition on behalf of the Respondent No. 1, but on the documents being Ex.PW1/2, Ex.PW1/3 and Ex.PW1/4 to decree the recovery suit. Further, as the attorney of the Respondent No. 1, the husband had personal knowledge of the facts and hence he was thus competent to depose. The contention of the learned Counsel for the Appellant must therefore fail.

10. In my opinion, however, the Trial Court has granted a high rate of interest being 18% per annum. Though, counsel for the Appellant has not argued this point, I note that the Supreme Court in its recent chain of judgments reported as *Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others*, , *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, , *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., & Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another*, and *State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd* (2009) 3 ALR 140 (SC) has held that on account of the consistent fall in the rates of interest in the changed economic scenario, the Courts must reduce the high rates of interest which are awarded, more so when litigation is pending for a long period of time. In this case the suit was filed on 6.4.1995 i.e. around 16 years from today. Accordingly, in the facts and circumstances of this case, I reduce the rate of interest granted by the Trial Court which was 18% per annum to 12% per annum simple pendente lite and future till the date of deposit of the 50% decretal amount in this Court by the Appellant. The rate of interest of 12% per annum thereafter will be payable not on the entire decretal amount but only on the balance decretal amount not deposited in this Court and till realization of this balance decretal amount with interest by the Respondent No. 1.

11. Accordingly, the Appeal is allowed to a limited extent of reducing the rate of interest from 18% per annum to 12% per annum simple, as stated above. Decree sheet be prepared. The appeal is therefore disposed of as dismissed qua the decreed suit amount but partly allowed to the extent of the reduction of the pendente lite and future rate of interest. The parties are left to bear their own costs. Trial Court Record be sent back.