(2022) 11 DEL CK 0047

In the Delhi High Court

Case No : Regular First Appeal (COMM) No. 8 Of 2022, Civil Miscellaneous Application No. 8073, 8074, 8075, 45780 Of 2022

M/S Rakman Industries Limited APPELLANT

Vs

M/S Sumaja Electro Infra Private Ltd RESPONDENT

Date of Decision : 09-11-2022

Acts Referred:

Limitation Act, 1963 — Article 13, 113
Code Of Civil Procedure, 1908 — Order 11 Rule 1, Order 11 Rule 1(3), Order 11 Rule 1(5), Order 41 Rule 27

Citation : (2022) 11 DEL CK 0047

Hon'ble Judges : Vibhu Bakhru, J;Amit Mahajan, J

Bench : Division Bench

Advocate : V. N. Sharma, Nitish Kumar Singh, Abhishek Raj, Amit Kumar Thakur, Alok Ranjan Singh

Final Decision : Allowed

Judgement

Amit Mahajan, J

1. The present appeal is filed challenging the judgment and decree dated 30.01.2021 (hereafter 'impugned judgment and decree') passed by learned Commercial Court, Shahdara in Civil Suit (Comm) No. 206/2019 titled as M/s Sumaja Electro Infra Private Limited v/s M/s Rakman Industries Limited.

2. The learned Commercial Court, by way of impugned judgment and decree dated 30.01.2021 decreed the suit in favour of plaintiff (respondent herein) for an amount of Rs. 22,46,172/- along with pendente-lite and future interest at the rate of 18% per annum from the date of filing of the case till the realisation of the amount along with costs of Rs. 55,000/- and Rs. 26,306/-.

3. The suit was filed by the plaintiff claiming that a sum of Rs. 98,87,013.71/- was paid to the defendant as advance between the period 01.05.2014 to 16.12.2015 for supply of electric conductors. The defendant, however, supplied

goods for a value of Rs. 76,40,841/- and illegally withheld the sum of Rs. 22,46,171/-; it had neither supplied goods against the said amount nor refunded the same.

4. In the suit, defendant was proceeded ex parte on 11.02.2020. The ex parte evidence was, thereafter, led by the plaintiff and the plaintiff tendered the affidavit by way of evidence of one Mr. Raghav Agrawal.

5. The learned Commercial Court accepted the statements affirmed in the affidavit for the reason that the same remain uncontroverted and held as under:

"15. The testimony of PW-1 remains uncontroverted, unrebutted and unchallenged as the defendant, which are ex parte, failed to appear before the Court and cross examine the witness. There is no reason to disbelieve the testimony of PW-1 who has reiterated, reasserted and reaffirmed all the facts, as elaborated in the plaint. All the relevant documents and relevant averments have been proved in the evidence and affidavit of Mr. Raghav Agrawal, Authorised Representative of plaintiff (PW-1).

16. Therefore, in view of the foregoing discussion, it appears the the plaintiff has been able to successfully prove that the defendant is liable to pay the amount sought in the plaint. Accordingly, the suit of the plaintiff is hereby decreed in favour of the plaintiff and against the defendant. The plaintiff is entitled to recover an amount of Rupees Twenty Two Lakhs, forty Six thousand One Hundred Seventy Two Rupees Only (Rs.22,46,172/-) only along with pendent-lite and future interest @ 18% p.a. till realization of the amount.

17. Further, towards the costs and expenses, as the counsel for the plaintiff has filed the memo of fees (Rs.50,000/- + Rs.5,000/- = Rs.55,000/-), the defendant is also liable to pay the same i.e. Rupees Fifty Five Thousand only (Rs.55,000/- only). Also as the counsel for the plaintiff has filed the memo of expenses memo of expenses (Rs.24,306/- + Rs.2,000/-), the defendant is also liable to pay the other expenses i.e. Twenty Six Thousand Three Hundred and Six only (Rs.26,306/- only).

18. Accordingly, the case is hereby decreed in favour of the plaintiff and against the defendant for an amount of Rupees Twenty Two Lakhs, Forty Six Thousand, One Hundred and Seventy Two Rupees Only (Rs.22,46,172/-) only along with pendent-lite and future interest @ 18% p.a. from the date of filing of the case till realization of the amount; along with costs of Rupees Fifty Five Thousand only (Rs.55,000/- only) and Rupees Twenty Six Thousand Three Hundred and Six only. (Rs.26,306/- only).

19. The decree sheet be prepared accordingly."

6. The present appeal has been filed on a limited ground that the claim filed by the plaintiff was barred by limitation.

7. It is contended by the learned counsel for the appellant / defendant that even

assuming the facts as stated in the plaint to be correct, the claim would still be barred by limitation and the learned Commercial Court erred in passing a decree in such time-barred claim.

8. It is further contended that the facts, which remained uncontroverted, do not indicate that the suit was filed within the period of limitation.

9. It is further argued that admittedly the orders were placed for supply of electric conductors up to December, 2015 and even as per the plaint, the legal notice was issued for the first time on 01.07.2019. It is, thus, contended that the cause of action, if at all arose in December, 2015 and therefore, any suit for recovery of money could have been filed within a period of three years from December, 2015.

10. The learned counsel appearing for the respondent, on the other hand, argued that the cause of action to file a suit, in the present case, does not start from the date of last payment.

11. It is contended that the defendant in an Email communication dated 06.11.2017 has admitted the liability towards the plaintiff and therefore, the period of limitation was required to be reckoned from the said date and not from the last date of payment.

12. The email communication dated 06.11.2017 was admittedly not filed along with the plaint and the respondent has filed an application under Order 41 Rule 27 for placing on record the said Email dated 06.11.2017 and handing over memo dated 22.09.2019 of 33/11kv Substation at Dhanghata Sant Kabir District Uttar Pradesh. The application is filed for treating these documents as additional evidence. It is stated that since a number of communications were exchanged between the parties over a period of time, the present communication could not be traced at the time of filing of the suit even after exercise of due diligence.

REASONING

13. In the plaint, it was specifically pleaded that the plaintiff had paid a sum of Rs. 98,87,013.71/- for supply of electric conductors between the period 01.05.2014 to 16.12.2015. It was averred as under:

6. That since 01.05.2014 to 16.12.2015 plaintiff has paid defendant Rs.98,87,013.71/-for supply of electric conductors. But defendant have supplied goods of rupees Rs.76,40,841/-only till date. Meaning thereby defendant is illegally holding the goods of Rs.22,46,171/-.That it is pertinent to mention that defendant had always received the payment in advance. In this way defendant has received Rs:22,46,172/-(Twenty two lakh, forty six thousand one hundred seventy two rupees only) in advance and the goods i.e ACSR conductor were not supplied by them. The proof the payment along by way of bank statement and detail of ledger account are Annexed herewith Annexure- P5(colly) and Annexure- P6.

7. Plaintiff requested defendant to supply the goods on time but they failed to supply it on time. Ultimately my defendant had to purchase the goods at higher rate from market and project of plaintiff got delayed due defendant unprofessional conduct.

8. That thereafter the Plaintiff sent a legal demand notices dated 10.07. 20 19 through his counsel at the above said given address of the Defendant by way of speed post. In the said notice, the Plaintiff has requested the Defendant to make the payment of above said advance payment made by them within a period of 07(seven) days from the receipt of the legal notice. The said notices were duly served to the defendant. That on receipt of legal notice defendant kept quiet and even do not bother to reply the same or refund the advance money given to them. The copy of legal notice, speed post receipts and tracking report are Annexed herewith as Annexure-P7 (Colly.), Annexure-P8 and Annexure-P9 respectively.

9. That however on 05.08.2019 defendant company representative called plaintiff through his mobile and admitted the claim of the plaintiff and assure them to repay the amount. But lapse of more than a month defendant failed to make recoverable amount, plaintiff requested the defendant telephonically to repay the advance money given to them for supply of ACSR conductor the representative of the defendant company not only flatly refused to pay the same but also threatened the plaintiff for dire consequences.

14. In paragraph 15 of the plaint, in relation to cause of action, it averred as under:

15. That the cause of action for filing the present suit arose in favour of the plaintiff when the defendant admitted the claimed amount on number of occasions and. It further arose when the when defendant fail to supply the goods on the time. further arose on various dates when the Plaintiff requested the Defendant to repay his entire amount of Rs.22,46,172/-(Twenty two lakh, forty six thousand one hundred seventy rupees only) but to no avail. It further arose when the Plaintiff sent a legal notice to the Defendant to repay the amount of the amount. It further arose when defendant called the plaintiff in July 2019 and admitted the pending amount. It further arose when plaintiff called the defendant for pending the amount on august 2019 and defendant flatly refuse the refund and threatened the dire consequences. The cause of action is still continuing and subsisting one as the defendant did not pay the recoverable amount till date.

15. Therefore, the plaintiff for the purpose of cause of action and limitation, pleaded that it arose, firstly, when the defendant failed to supply the goods on time. It is pleaded that it further arose on various dates when the plaintiff requested the defendant to repay the entire amount and further arose when plaintiff sent a legal notice for repayment of the amount. It is claimed that it further arose when defendant called the plaintiff in July, 2019 and admitted the

pending amount and in August, 2019 when defendant flatly refused to refund and threatened the dire consequences.

16. In terms of the order placed by the plaintiff on the defendant, dated 23.04.2014, marked as “Mark P1/2” it was mentioned in Clause 2.6 that the material was to be delivered within four weeks of manufacturing clearances. The plaintiff in the entire plaint has not pleaded as to the specific dates or months of a year when goods were required to be delivered. The limitation in respect of suits for recovery of balance amount paid in advance for goods to be delivered is governed by Article 13 of the Limitation Act, 1963. In terms of the said Article, the period of limitation is three years from the date when the goods ought to have been delivered. In the absence of any pleadings, it can thus be presumed that in terms of the order placed by the plaintiff, the goods were to be delivered within four weeks of manufacturing clearance. It is significant to note that the plaintiff in the entire plaint has not pleaded anything about the date when the goods were required to be delivered, so as to calculate the period of limitation but only mentions that the defendant failed to supply it on time and the plaintiff had to purchase the same from market at a higher rate. Again, no date or period has been mentioned about such purchase at a higher price from market has been mentioned in the plaint.

17. It is settled law that mere demand for the repayment of does not extend the period of limitation. It is also equally well settled that merely sending a legal notice to repay the amount does not assist the plaintiff for the purpose of calculation of the period of limitation. Even if it is to be presumed that a statement made in the plaint is correct as a matter of evidence, the same would still be beyond the period of limitation. The plaintiff pleaded that he had communicated with the defendant in July, 2019, and the defendant had admitted the pending amount. The said month of July, 2019, is after five years of placing the order for supply which is, 23.04.2014. The last invoice placed by the plaintiff on record is dated 18.11.2015. Thus, even if we take the averment that the defendant had called the plaintiff in July, 2019, and had admitted its liability to pay the pending amount, the same would not extend the period of limitation for claiming the outstanding amount as the said acknowledgement, if any, is beyond the period of three years from the cause of action which, in the present case, would be the date when the goods ought to have been delivered. The plaintiff has also pleaded that cause of action also arose on various dates when the plaintiff requested the defendant to repay the entire amount. The said averment, however, will not extend the period of limitation since making a demand does not extend the period of limitation, which commence on a date in terms of the provisions of Limitation Act. Further, it is not the case of the plaintiff that the goods were to be supplied over the period of next few years and, therefore, the cause of action would start after the expiry of the said period.

18. Thus, apart from contending that some correspondences were exchanged between the parties in relation to refund of money, nothing else has been

pleaded. It is settled law that the correspondence exchanged between the parties cannot extend the limitation period for institution of a suit. Once the right to sue had accrued, the limitation to file cannot be extended by sending reminders or other communications. If the said proposition is accepted, then the limitation to file a suit will never end and will be extended by sending repeated demand notices. The law requires a litigant to be vigilant of its rights and avail remedies before expiry of the stipulated period of limitation within the four corners of Civil Procedure Code and other applicable laws.

CM APPL. 45780/2022 (under Order XLI, Rule 27, Code of Civil Procedure (CPC), 1908 -for production of additional evidence)

19. Order 41 Rule 27 permits a party to produce additional evidence in Appellate Court in case he is able to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the impugned judgment and decree appealed against was passed.

20. The plaintiff, in the supporting application, has only reproduced the language of Rule 27 which in our opinion does not establish why such evidence was not filed along with the suit.

21. The plaintiff contends, on the strength of the emails exchanged on 06.11.2017, that the defendant has accepted that the payments were to be made to the plaintiff and, therefore, the period of limitation would start running from the said date. This contention is erroneous.

22. We have also perused Emails which are now sought to be produced in support of the contention that the cause of action arose on 06.11.2017. For the ease of reference, the Emails are reproduced as under:

S. No.

Date & Time

From

To

Body

1.

06.11.2017

12:46 PM

Sumaja Electroinfra

Rakman

Sub.: Pending payment Dear Sir,

As discussed many times regarding our pending payment Rs 10 Lac approx.. against conductor supply. Pls return the above amount by RTGS/DD at the earliest.

Regards,

Sumaja Electroinfra Pvt. Ltd.

2.

06.11.2017

03:52 PM

Rakman

Sumaja Electroinfra

Dear Sir,

In reference to your mail, we shall bring to your kind attention that the PO was placed by you for the supply of material and the material was not lifted in time by you despite our repeated reminders and requests.

Further, we had also informed you to lift the balance material after paying the differential increase in prices of material till date, as considerable time has passed since the placement of PO.

Awaiting your reply. Thanks and Regards,

Rakman Industries Limited

3.

06.11.2017

06:07 PM

Sumaja Electroinfra

Rakman

Dear Sir,

Pls provide materials as per on going order already given advance to you.

If you feel any problem to provide materials so please return our balance amount.

Regards,

Sumaja Electroinfra Pvt. Ltd.

4.

06.11.2017

Sumaja

Rakman

Sub.: Re: Pending Payment

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4 attachments:

[SUMAJA REPLY NOVEMBER

2016.pdf]

[CCMAI CIRCULARS.pdf]

[PRICE VARIATION OF ACSR

DOG. pdf]

[Rakman.pdf]

5.

07.11.2017

Rakman

Sumaja

Dear Sir,

With reference to your mail, it is brought to your kind notice that you had placed the order in September, 2015 and as per Clause 2.6 of your Purchase Order (copy enclosed), the complete material was to be lifted by

you with in 06 weeks and we had always insisted on delivery of material but it was your goodself who failed to lift the material from time to time, which is also evident in the previous orders placed on us and subsequent deliveries.

We had requested you to lift material from us numerous times but of no avail whereas we have come to know that you had lifted the material from other suppliers in the mean time and not from us despite our reminders and requests, for reasons best known to you only.

We are enclosing copy of mail of mail of November 2016 in which we had already informed you that since you have failed to lift the material with in the delivery period, we cannot bear the price increase in the basic cost of raw materials.

As you have mentioned that you want to lift the balance material. We hereby encloses the copy of worksheet for the prices applicable as on today along with the copy of CCMAI circulars applicable for the price variation applicable.

You are requested to kindly take note of the same and do the needful accordingly at the earliest possible.

Thanks and Regards,

Rakman Industries Limited

6.

07.11.2017

02:23 PM

Sumaja Electroinfra

Rakman

Dear Sir,

We have given order on fixed price. No any variation in price.

Pls resolve this matter. Regards,

Sumaja Electroinfra Pvt. Ltd.

7.

07.11.2017

02:44 PM

Rakman

Sumaja Electroinfra

Dear Sir,

Kindly note that the prices were fixed till the expiry of delivery period mentioned in the PO i.e. for 6 weeks only and not for more than TWO YEARS.

Further, it is brought to your kind attention that in the previous order you had reduced the prices substantially, at the time of delivery,

even though the prices were fixed till the expiry of contract, on account of reduction in prices of raw material citing that we won't be able to pay the contract value as we are getting the material at lower prices. Its very strange that when there is reduction in the prices of raw material, then you shall pay the current prices but when the prices have increased then you will opt for the PO prices, even after the time lapse of TWO years.

Kindly take note and do the needful. Thanks and Regards,

Rakman Industries Limited

8.

15.12.2017

Sumaja

Rakman

Dear Sir,

Pls provide the following documents for IT case. Details are given below:-

1.Bank Statement year- 2014-2015

2.Confirmation of a/c

3.ITR copy 2014-2015 & 2013-2014

4.Payment received details for2014-2015

Kindly confirm,

Thanks & Regards

Sumaja Electroinfra Pvt. Ltd.

9.

26.12.2017

07:29 PM

Rakman

Raghav Agrawal (Sumaja Electroinfra)

Dear Sir,

As discussed, PFA Thanks and Regards,

Rakman Industries Limited

Attachment:

[SUBMITTED DOCUMENTS.pdf]

23. The defendant, in the Emails referred above, admits that the money was received between the period 01.05.2014 to 16.12.2015, but it is apparent that it does not acknowledge the liability to refund the said amount. As discussed above, the limitation in any case is not extended by sending emails and notices.

24. Even if we allow the application filed for taking the additional evidence, in our opinion, the same would be of no assistance to the plaintiff. It neither extends the period of limitation nor shows that the cause of action to file the suit arose on the date when these Emails were exchanged.

25. As stated above, any such application for production of additional evidence has to satisfy the requirements of Order 41 Rule 27. The production and leading evidence before the Appellate Court is not a matter of right and can be produced only when the conditions laid down are satisfied. Apart from reproducing the

language of Order 41 Rule 27, the only reason given is "since number of communications between the applicant and appellant took place over a period of time and this e-mail communication could not be traced out at the time of filing of suit for recovery even after the exercise of due diligence and it was short communication of e-mail and could not be traced out". The same, in our opinion, does not satisfy the requirement of Order 41 Rule 27. The plaintiff has mentioned that the said e-mail could not be traced out because of number of communications exchanged between the parties, however, no other communication has been filed along with the plaint.

26. It is relevant to refer to Order XI Rule 1 of the CPC as applicable to commercial courts. In terms of the said Rule, it is mandatory for the plaintiff to file a list of all the documents and photocopies of all the documents in its "power, possession, control or custody" pertaining to the suit along with the plaint.

27. Sub-rule (3) to Rule 1 of Order XI reads as under:

"(3) The plaint shall contain a declaration on oath from the plaintiff that all documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody.

Explanation. ––A declaration on oath under this sub-rule shall be contained in the Statement of Truth as set out in the Appendix."

28. In addition, the plaint is also required to be accompanied by a Statement of Truth, inter alia, affirming as under:

"5. I say that all documents in my power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated by me have been disclosed and copies thereof annexed with the plaint, and that I do not have any other documents in my power, possession, control or custody."

29. In terms of Sub-rule 5 of Rule 1 Order XI of the CPC, a plaintiff is not allowed to rely on documents, which were in the plaintiff's power, possession, control or custody but were not disclosed along with the plaint, except by leave of court. It is also specified that such leave would be granted only upon the plaintiff establishing "reasonable cause for non-disclosure".

30. In the facts of the present case, the plaintiff has been unable to establish any reasonable cause for not disclosing the communications sought to be relied upon along with plaint. The plaintiff is unable to show that the evidence which is now sought to be placed could not have been obtained with reasonable diligence at the time of trial and neither the evidence is of such nature which could have influenced the trial even if it remains uncontroverted.

31. Learned Counsel for the respondent has relied upon the judgement passed by the Apex Court in the case of Shakti Bhog Food Industries Pvt. Ltd. v. Central

Bank of India: (2020) 17 SCC 260, in order to contend that in a continuing breach, a fresh period of limitation begins to run at every moment of the time as long as the breach continues. The judgement, in our opinion, is not applicable to the facts of the present case. The Hon'ble Apex Court, in the said case, was dealing with the aspect of limitation in relation to suit for a decree of rendition of true and correct accounts in respect of interest charged by the defendant Bank relating to Current Account of the plaintiff for the period 01.04.97 to 31.12.2000. It was held by the High Court that a suit was barred by law of limitation. It was held to be beyond the period of three years prescribed in Article 113 of the Limitation Act, since the suit was filed in February, 2005. In the facts of the said case, it was noted by the Hon'ble Apex Court that the plaintiff had specifically pleaded in the plaint that the cause of action arose on various dates. It was noted that the plaint had specifically mentioned as under:

33. Again, in Para 28, it is stated as follows:

"28. That the cause of action to file the suit accrued in favour of the plaintiff and against the defendants when the illegal recoveries were noticed and letter dated 21-7-2000 was sent to the defendants to clarify as to how the interest was being calculated and recovered and on various other dates when the letters were sent to the defendants with request for refund of the excess amounts charged and on 9-7-2001 when assurance for proper calculation and refund was conveyed to the plaintiff and on 8-5-2002, 12-7-2002 and 22-9-2002 when requests were again made to settle the matter on 19-9-2002, 3-6-2003 and their cause of action arose on 28-12-2003 where the legal notice was served upon the defendant and on 23-12-2003 when the reply to the notice was received and finally on 8-1-2005 when the legal notice for rendition of accounts was served upon the defendants and the cause of action still subsists as the accounts have not been rendered so far nor the excess amount charged has been refunded by the defendants."

32. The Hon'ble Apex Court in the facts of the said case held that the trial court had failed to advert to and analyse the averments in the plaint but had selectively taken notice of the assertion in the plaint in question that the appellant had become aware about the discrepancies in July, 2000 and had proceeded to hold that the plaint was time barred as it was filed in February, 2005.

33. Learned Counsel has further relied upon the judgement in order to buttress the argument that the limitation is a mixed question of law and facts and cannot be decided as a preliminary issue. He relies upon Saranpal Kaur Anand v. Praduman Singh Chandhok & Ors.: (2022) 8 SCC 401. In our opinion, this issue decided by the Hon'ble Apex Court is not the subject matter of consideration in the present appeal.

34. For the reasons stated above, we have no hesitation to hold that the suit is barred by limitation.

35. The present appeal is, therefore, allowed and the impugned judgment and decree is set aside.

36. The registry is directed to release the amount, deposited by the appellant pursuant to the order dated 14.02.2022.

