

(2008) 11 CAL CK 0071
In the Calcutta High Court
Case No : C.S. No. 717 of 1987

Pig Iron Supplying Syndicate Pvt. Ltd.	APPELLANT
Vs	
Steel Authority of India Ltd.	RESPONDENT

Date of Decision : 28-11-2008

Acts Referred:

Arbitration Act, 1940 — Section 20
Limitation Act, 1963 — Section 10, 18

Citation : (2008) 11 CAL CK 0071

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : D.K. Shome, Swarnendu Ghosh and P.N. Mallick, for the Appellant; Soumen Sen and Rupak Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.

The Judgment of the Court was as follows:

1. The Court: - This suit was instituted on July 20th, 1987 seeking a decree against the defendant for Rs. 17,64,908.96 with interest at the rate of 18% per annum.
2. The plaintiff has alleged that the defendant failed and neglected to pay a sum of Rs. 8,22,808.17 handling agency commission claiming which twenty-two bills bearing dates falling between November 15th, 1980 and September 7th, 1981 were submitted by it to the defendant. Its case is that having handled and stored materials on behalf of the defendant during the period from November, 1980 to September, 1981, it became entitled to get the commission. It has been claimed that the contents of the defendant's letters dated September 26th, 1980, March 31st, 1982 and August 14th, 1985 amounted to due acknowledgment of liability made in writing by the defendant in respect of the plaintiff's right to get the claimed amount, and hence no part of the claim is barred by limitation.

3. The defendant entered appearance and filed its written statement on June 13th, 1988. Its advocate-on-record made the endorsements that it was not making any claim by way of a set-off or a counter claim.

4. The defendant has alleged that after adjusting the amount that was due to the plaintiff against its liability to pay the legally recoverable shortage value, it found that the plaintiff that was not entitled to get any amount was rather liable to pay a large balance of the recoverable shortage value. It has denied that it made in writing any acknowledgement of its any liability in respect of the amount claimed by the plaintiff. It has contended that, in any case, the plaintiff's claim, if any, is barred by limitation.

5. In 2004 the plaintiff took out an application for amendment of the plaint. By order dated January 10th, 2005 the application was allowed, and accordingly the plaint was amended inserting therein paras.11A, 11B and 11C.

6. In para.11A it has been stated that in a letter dated March 31st, 1982 the defendant admitted that pending completion of calculation of the recoverable shortage value, it was holding Rs. 8,22,808.17 due to the plaintiff; that since no final calculation was made, the plaintiff was not liable to pay any amount for shortage value; that the defendant was holding the amount in trust for the benefit of the plaintiff. In para.11B it has been stated that under the three agreements and in view of the course of dealings by and between the parties, the accounts were running, continuous and mutual; that the defendant never submitted the accounts. In para.11C it has been contended that in view of the facts stated in paras.11A and 11B, no part of the plaintiff's claim is barred by limitation. The amended plaint was re-verified on February 1st, 2005.

7. In view of amendment of the plaint, the defendant filed its additional written statement dated February 17th, 2005. It has disputed the correctness of the facts stated and contentions raised by way of amendment, and has denied that the accounts concerned were running, or continuous, or mutual as alleged, or at all.

8. The parties submitted their respective suggested issues, and by order dated August 1st, 2006 the following issues were framed:

1.Has the plaintiff any cause of action to institute the present suit? 2. Is the suit barred by limitation? 3. Did the defendant acknowledge its liability in writing? 4. Was the contractual agreement dated September 25, 1980, continuing beyond the period of one year, as alleged? 5. Is the defendant entitled to adjust the amount of Rs. 2,33,968.56, as alleged? 6. Is the plaintiff entitled to get a decree, as prayed for? 7. To what relief, if any, the plaintiff is entitled?

9. To prove its case the plaintiff has examined one Murarilal Gupta. The three agreements dated May 6th, 1976, February 23rd, 1979, and September 25th, 1980, whereby the defendant's units appointed the plaintiff to work as handling and storage contractor, have been marked Exs A, B and C respectively. The

twenty-two bills relied on by the plaintiff in two sets, 18 and 4, have been marked Exs D and E respectively. A statement prepared by the plaintiff showing payment of Rs. 2,33,968.56 for shortage value has been marked Ex G. The defendant's letters dated September 26th, 1980, March 31st, 1982, and August 14th, 1985 have been marked Exs M, BB, and HH respectively. On the other hand, the defendant has examined on commission one Ramesh Chakraborty, its former employee, and its letter dated October 21st, 1982 has been marked Ex 1.

10. Mr. Sen, counsel for the defendant, commencing the arguments, has said that, on the facts, there is no reason for him to press the first, fourth and fifth issues. His whole argument is confined to the issues of limitation and acknowledgement. By referring me to the terms and conditions of the agreements, depositions of the witnesses, the defendant's letters dated September 26th, 1980, March 31st, 1982, October 21st, 1982 and August 14th, 1985, and the Supreme Court decision in Major (Retd.) Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, , he has argued that there is no reason to decide the question of limitation by applying the provisions of s.10 of the Limitation Act, 1963; and that, even if it is held that the suit is one for the balance due on a mutual, open and current account, it, having not been instituted before expiration of the period prescribed by the Schedule, art.1, is liable to be dismissed. As to acknowledgement, his argument is that nothing in the letters relied on by the plaintiff amounts to an acknowledgement of its liability by the defendant in respect of the plaintiff's right to get the amount claimed or any part thereof, and hence there is no question of extending the benefit of s.18 of the Limitation Act, 1963.

11. According to Mr. Shome, counsel for the plaintiff, the question of limitation should be decided keeping in view only the provisions of art.1 of the Schedule to the Limitation Act, 1963, and not those of s.10 of the Act. His argument is that since the account concerned was a mutual, open and current account, where there had been reciprocal demands between the parties, and since the last item was never entered in the account that was never settled by the defendant, the suit instituted in July, 1987 is perfectly within the prescribed period. To show what is meant by the expression "a mutual, open and current account" he has relied on Ram Pershad & Anr. v. Harbans Singh & Ors., (1907) 6 CLJ 158; The Tea Financing Syndicate Ltd. Vs. Chandra Kamal Bez Barua, ; and The Hindustan Forest Company Vs. Lal Chand and Others, . In support of his contention that the starting point of limitation would have been the date of final settlement of the account, thus creating an occasion for entering the last item in the account and raising the final bill, he has relied on M.L. Dalmiya and Co. Vs. Union of India (UOI), ; and Union of India (UOI) and Another Vs. L.K. Ahuja and Co., . To show when even a conditional promise to pay a debt amounts to an acknowledgement within the meaning of the provisions of the Statute of Limitations, he has given me Maniram v. Seth Rupchand, (1906) L.R. 33 Ind. Ap.165.

12. I find that what I have to determine first is whether the period of limitation for filing the suit is the one prescribed by article 1 of the Schedule to the Limitation Act, 1963. The provisions of article 1 say that for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the period of limitation for instituting a suit is three years, and that the time from which the period begins to run is the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

13. The question therefore is whether the amount claimed by the plaintiff was the balance due to it on a mutual, open and current account. The answer to the question, in my opinion, can be had only by inspecting the account concerned. And only if it is found that the account was a mutual, open and current account, it will be possible to ascertain whether the amount claimed by the plaintiff was the balance due to it on such an account. The plaintiff has not produced any books of account. The defendant has categorically denied that the amount claimed by the plaintiff was the balance due to it on any mutual, open and current account. Mr. Shome has said that it was for the defendant to produce the account. I will deal with this aspect a little later. At the present moment, I propose to examine whether the nature of the account concerned can be ascertained.

14. Since the account in question has not been produced, there is no scope to inspect it for ascertaining its nature. None of the authorities relied on by Mr. Shome says that though an account is not produced for inspection, the nature thereof can, or rather should, be ascertained by the court from any other evidence given by the parties.

15. In *Ram Pershad & Anr. v. Harbans Singh & Ors.*, (1907)6 CLJ 158, the plaintiffs therein produced their books of account to show that their suit was for recovery of the balance due on a mutual, open and current account, since at a point of time the books showed credit balance in favour of the defendants, though, at all subsequent periods, the balance was invariably against them. The argument that this circumstance alone was sufficient to make the account between the parties a mutual, open and current account was turned down, and in such context their Lordships said:

Now it is well-settled that an open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between two or more parties, or, an account which contains items between the parties from which the balance due to one of them is, or, can be, ascertained, from which it follows that such an account comes under the term of an open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits.

16. In *The Tea Financing Syndicate Ltd. Vs. Chandra Kamal Bez Barua*, also the plaintiff therein produced the account concerned with the plaint in support of its case that the claimed amount was the balance due to it on a mutual, open and current account. In *The Hindustan Forest Company Vs. Lal Chand and Others*, their Lordships of the Supreme Court were examining whether the High Court was right in holding that the account between the parties was mutual. Noticing that there was no hint in the plaint that the account was mutual, their Lordships allowed the appeal.

17. Assuming that though the account concerned has not been produced for inspection of the court, the nature thereof should be ascertained by me from the available evidence, let us see what evidence, if at all, is available. The agreements, Exs A, B and C, did not stipulate that the account between the parties would be mutual, open and current one. They rather stipulated that the plaintiff would remain responsible for maintaining the requisite books of account and handing them over, at the end of the year, to the defendant that would be entitled to keep them in its custody. PW.1 has said (q. No. 28) that the account between the parties was a running, continuous, and current one. He did not give any evidence that the plaintiff submitted the books of account to the defendant. Nor has he given any evidence that the books of account were not available. As a matter of fact, the books of account have been withheld without any valid reason.

18. Curiously and quite irrelevantly, PW.1, in his cross-examination, while answering to the suggestion that after December 31st, 1980 there was no written contract or agreement between the parties, said (q. No. 208) that it was a continuous account. No suggestion was put to DW.1 that the account concerned was a mutual, open and current one. Even though DW.1 did not give any evidence that the account was a mutual, open and current one, a suggestion was put to him (q. No. 132) that since he deposed that the account between the parties was running and continuous and no final reconciliation was made, the plaintiff's claim was a surviving one. He disagreed. In none of the letters, it has exhibited, the plaintiff ever said that the claimed amount was the balance due to it on a mutual, open and current account. This case was made out by the plaintiff only by amendment of the plaint in 2005, long after the suit was instituted in 1987, and the written statement, taking the plea of limitation, was filed in 1988.

19. This being the position, and especially when the plaintiff has deliberately withheld the requisite books of account, I find no reason to go by the cryptic and unfounded self serving oral evidence of PW.1 that the amount claimed in the suit was the balance due to the plaintiff on a mutual, open and current account. In my opinion, the plaintiff's case that the account concerned was a mutual, open and current account has not been proved.

20. I am unable to accept Mr. Shome's contention that it was for the defendant to show by producing its books of account that the parties were not maintaining a mutual, open and current account. He has put forward the proposition in view of the following observations made in *Ram Pershad & Anr. v. Harbans Singh &*

Ors., (1907) 6 CLJ 158 (p.161 of the report):

In the case of *Hajee Syud Mahomed v. Ashrufoonissa*, it was observed, however, by Mr. Justice Pontifex that if the balance was sometimes in favour of the defendant, but generally in favour of the plaintiff, the banker, the account between them would hardly be a mutual one. If during the currency of the accounts, each of the parties could occasionally say to the other, "I have an account against you," the accounts between them would be mutual. Where the accounts can be called mutual, they can at the latest be mutual down to the date when the defendant made his last payment to the plaintiff, the banker; but from the date when the balance was for the last time in favour of the plaintiff and since which the account continued to be against the defendant, it could not be said that there were reciprocal demands between the parties, and the words "the last item admitted or proved," in Article 85, mean such item on the defendant's side of the account.

21. The words "the defendant's side of the account" have encouraged Mr. Shome to put forward the proposition. In my opinion, when the plaintiff asserted that the account concerned was a mutual, open and current account, it was for it to produce the books of account in proof of existence of such an account.

22. Assuming that my opinion on the nature of the account is wrong, and that the claimed amount was the balance due to the plaintiff on a mutual, open and current account, I propose to examine whether the suit was instituted before the expiration of the prescribed period. For this what is to be ascertained is when the last item admitted or proved was entered in the account. According to Mr. Shome the last item has not been entered even today, because the defendant did not make the final calculation of the shortage value recoverable by it from the plaintiff. For this he has relied on *M.L. Dalmiya and Co. Vs. Union of India (UOI)*, , and *Union of India (UOI) and Another Vs. L.K. Ahuja and Co.*, .

23. I do not think *M.L. Dalmiya and Co. Vs. Union of India (UOI)*, , or *Union of India (UOI) and Another Vs. L.K. Ahuja and Co.*, can be considered any authority on the question I am examining. Here the question is when the last item was entered in the account. In *M.L. Dalmiya* the question was whether amounts recovered by the Government from the contractor's running bills could be recovered by the contractor as a part of his final bill; and in such context it was held that even if the causes of action to enforce payments of the running bills were barred by limitation, the contractor would be entitled to recover the amounts as part of his final bill. In *L.K. Ahuja*, the question was whether Ahuja's application under s.20 of the Arbitration Act, 1940 was barred by limitation. And in that context their Lordships of the Supreme Court said (in para.8):

It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable.

24. In this case the final bill claiming the amount was submitted by the plaintiff in September, 1981; and the defendant denied its liability on October 21st, 1982. According to Mr. Sen when the cause of action entitling the plaintiff to sue arose in September, 1981, there was no scope to postpone the accrual of the cause of action by not entering the last item in the plaintiff's account. In this context he has relied on Major (Retd.) Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, in which the application filed by the contractor, Inder Singh, under s.20 of the Arbitration Act, 1940 was dismissed by the High Court holding that it was barred by limitation, because it was filed in January, 1986, while the cause of action arose in 1980 when the work was completed. Allowing the appeal their Lordships of the Supreme Court said (in para. 4):

It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28th Feb. 1983 and there was non-payment, the cause of action arose from that date, that is to say, 28th of Feb. 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim.

25. The defendant has not admitted that the last item in the account concerned was entered at any particular date. The plaintiff has not given any evidence in proof of the fact that the last item in the account concerned was entered at any particular date. Mr. Shome has rather contended that since the defendant did not settle the plaintiff's claim, an occasion could not arise to enter the last item in the account. This is a misconceived contention. The words "the last item admitted or proved," in art.1, mean such item on the defendant's side of the plaintiff's account, if it was a mutual, open and current account. Hence there was no question of not entering the last item in the account on the basis whereof the plaintiff claimed that the amount was the balance due to it on the account; and which means that according to the plaintiff's account nothing was due to the defendant.

26. Since the account has not been produced for inspection of the court, there is no easy way to ascertain the date at which the last item was entered in the account. Admittedly both the parties were maintaining their respective accounts. From Ex AA, the plaintiff's letter to the defendant dated February 24th, 1982, it appears that the defendant stopped dispatching materials to the plaintiff's stockyard in April, 1981; that stock with the plaintiff became nil on September 2nd, 1981; that the plaintiff was maintaining its books of account. From Ex 1, the defendant's letter to the plaintiff's solicitors dated October 21st, 1982, it appears that according to the defendant's final account, even after adjustment of the whole of the amount due to the plaintiff against its liability to the defendant for recoverable shortage value, the plaintiff remained liable to pay a

sum of Rs. 21,60,112.32.

27. These facts lead to the conclusion that the last item in the plaintiff's account could not be entered after September 2nd, 1981 after which there was no transaction between the parties. This is apparent from Ex E, the challan dated September 2nd, 1981. According to the plaintiff its right to claim the amount arose by September 7th, 1981, which is the date of the final bill. It submitted this final bill to the defendant. Thereafter no bill was raised by the plaintiff. In the absence of the last item entered into its account it could not submit a final bill. This being the position, I am unable to see how it can be said that the suit instituted in 1987 was instituted within three years from the close of the year in which the last item was entered in the plaintiff's account. Nor was it instituted within three years from the close of the year in which the last item was entered in the defendant's account, on the basis whereof the defendant wrote Ex 1 informing the plaintiff that nothing was due to it and asking it to pay Rs. 21,60,112.32.

28. Mr. Shome's last argument is that irrespective of whether the applicable period of limitation is the one prescribed by the Schedule, art.1, or art.18, or art.113, which all prescribe the same period of three years, the suit cannot be said to be barred by limitation, because it was instituted before expiration of three years from the date the defendant made in writing an acknowledgement of its liability in respect of the plaintiff's right to get the amount claimed in the suit. For this he has relied on Exs BB and HH, the defendant's letters dated March 31st, 1982 and August 14th, 1985 respectively, and *Maniram v. Seth Rupchand*, (1906) L.R.33 Ind. Ap.165. According to Mr. Sen, who has relied on Ex 1, the defendant's letter dated October 21st, 1982, nothing in Exs BB and HH ever amounted to the defendant's making an acknowledgement within the meaning of s.18 of the Limitation Act, 1963, because, even if there was an acknowledgement of the liability, it was evidently a conditional one.

29. I am unable to see how *Maniram v. Seth Rupchand*, (1906) L.R.33 Ind. Ap.165 is of any assistance to the plaintiff. There *Maniram* (the adopted son of one *Motiram*) brought the suit on September 5th, 1901 to recover certain amounts from *Rupchand*, the defendant in the suit. Both *Motiram* and *Rupchand* were mahajans or money dealers, and they had regular dealings with one another from July 21st, 1895 to May 12th, 1898, and at the close of these dealings *Rupchand* owed *Motiram* the amounts correctness whereof was not questioned. *Rupchand* took the plea of limitation, and hence the question arose whether a statement made by him in a reply dated September 20th, 1899, filed to a petition of objections submitted by certain persons to the probate application he filed as one of the trustees appointed by *Motiram* who died on October 6th, 1898 leaving a will, amounted to an acknowledgement of his liability to *Motiram*.

30. The statement made by *Rupchand* in the reply was as follows:

The applicant Rupchand Nanabhai is a big Mahajan of Burhanpur paying Rs. 106 as income tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate.

This statement, it was held by their Lordships, was sufficient acknowledgement to give a new period of limitation from September 28th, 1899, and hence the suit commenced on September 5th, 1901 was within the period of limitation; and this conclusion their Lordships reached for the following reasons:

There can be no doubt that the five years spoken of are the five years before the death of Motiram, i.e., before October 6, 1898. On that date the whole of the indebtedness other than interest had been incurred, there having been no dealings since May 12, 1898. There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that whoever on the account should be shown to be the debtor to the other was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative if the balance should be ascertained to be against him.

31. Their Lordships then examined the question whether an acknowledgement of liability, if balance on investigation should turn out to be against the person making the acknowledgement, was sufficient, and held as follows:

In a case of very great weight, the authority of which has never been called in question, Mellish L.J. laid it down that an acknowledgement to take the case out of the Statute of Limitations must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed: *In re River Steamer Co., Mitchell's Claim*. An unconditional acknowledgement has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgement that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by their ascertainment of a balance in favour of the claimant. It is a case of the third proposition of Mellish L.J., a conditional promise to pay and the condition performed.

32. Here, in this case, by Ex BB, the letter dated March 31st, 1982, the defendant informed the plaintiff that it was holding Rs. 8.15 lakh (approx.) from the plaintiff's service charge for adjustment against the recoverable shortage value, the final calculation whereof was under process. It was a conditional acknowledgement. Ex 1 is the letter of the defendant dated October 21st, 1982

stating that in view of the position emerging on due and proper accounting that the total recoverable shortage value was Rs. 33,51,356.92, the withheld sum of Rs. 8,16,467.27, already adjusted against the recoverable amount, was no longer due to the plaintiff that, on the contrary, was liable to pay Rs. 21,60,112.32. The condition was performed by calculating the recoverable shortage value and completing the account that revealed that the plaintiff that was not entitled to get any payment was rather liable to pay a large balance recoverable shortage value. By Ex 1 while the defendant called upon the plaintiff to pay the balance recoverable shortage value, it clearly said that it was no longer liable to pay any amount to the defendant. It is to be noted that in terms of the contract the defendant was entitled to recover a legally recoverable shortage value from the service charges payable to the plaintiff.

33. Ex HH is a letter of the Senior Executive (M) of the defendant dated August 14th, 1985 to the plaintiff stating as follows:

Kindly refer to your letter No. PISS/SNM/85-86 dated 24th, July, 1985 addressed to the Hon"ble Minister of State for Steel regarding your outstanding dues for handling Pig Iron at Howrah which has been forwarded to this office. The matter has been examined and it has been found that SAIL also had some counter claims on you under the same contract. We would, therefore, suggest that you get in touch with our General Marketing Manager, Eastern Region at Calcutta who has been requested to deal with the matter.

34. I do not see how it can be said that anything said in Ex HH amounted to making an acknowledgement in writing by the defendant of its liability in respect of the plaintiff's right to get the amount claimed in the suit. In the letter the defendant did not say that it was liable to pay any amount to the plaintiff. The defendant did not say that stand taken by it in its letter dated October 21st, 1982, Ex 1, was wrong. In Ex 1 the defendant categorically stated that it was no longer liable to pay any amount to the plaintiff that, rather, was liable to pay a large sum to the defendant. In my opinion, in view of what the defendant stated in its letter dated October 21st, 1982, Ex 1, there is no scope to say that the acknowledgement of its liability in respect of the plaintiff's right to get Rs. 8.15 lakh for service it gave to the defendant as handling and storage contractor, made by writing the letter dated March 31st, 1982, Ex BB, could remain alive after October 21st, 1982. Ex 1, specifically mentioning why and under what circumstances Ex BB was written, brought a state of flux to an end, and no previous acknowledgement in writing could prevail over what was stated in it. As a matter of fact, the defendant's stand stated in Ex 1 gave rise to a cause of action entitling the plaintiff to sue. A suit instituted by it before expiration of three years from October 21st, 1982 would have been perfectly within the prescribed period. This suit was, however, instituted only in 1987, i.e. after expiration of the prescribed period.

35. Hence I answer the issues framed and recorded in the suit in the following manner. The first issue is answered in the affirmative. The second issue is also

answered in the affirmative, that is, the suit is barred by limitation. The third, fourth, fifth and sixth issues are answered in the negative. The answer to the seventh issue is that the plaintiff is not entitled to any relief.

For these reasons, the suit is dismissed with costs in favour of the defendant to be assessed according to rules. The department concerned is directed to draw up, prepare and complete the decree within a fortnight from the date the records are sent down from the court. Suit dismissed with cost