**(2001) 11 SHI CK 0017**

**In the High Court Of Himachal Pradesh**

**Case No :** Civil Suit No. 1 of 2000

S. Butail and Company APPELLANT

Vs

H.P. State Forest Corpn. RESPONDENT

**Date of Decision :** 22-11-2001

**Acts Referred:**

Chartered Accountants Act, 1949 — Section 22, 30
Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1
Contract Act, 1872 — Section 7
Evidence Act, 1872 — Section 115
Interest Act, 1978 — Section 3

**Citation :** AIR 2002 HP 1 : (2002) 1 ShimLC 319

**Hon'ble Judges :** R.L. Khurana, J

**Bench :** Single Bench

**Advocate :** K.D. Sood, for the Appellant; Neel Kamal Sood, for the Respondent

## Judgement

R.L. Khurana, J.—The plaintiff, a registered Partnership Firm of Chartered Accountants, has filed the present suit for the recovery of Rs. 14.21,450/- (Rs. 10,93,425/- as principal and Rs. 3,28,025/- as interest at the rate of 18% per annum for the period 30-3-1998 to 30-11-1999).

2. The defendant is a Company duly constituted under the Companies Act, 1956. It is assessed to Income Tax and is also subjected to statutory audit. The plaintiff has been rendering professional services as Chartered Accountant to it by way of audit, finalisation of accounts, taxation and other allied matters since 1973. During the course of finalisation of the assessment of income for the purpose of Income Tax for the year 1992-93, it was found that the defendant had shown the assessable income as Rs. 1,30,000/- as against the actual assessable income of Rs. 4,88,58,590/-. The Income Tax authorities had, therefore, issued a notice dated 18-1-1996 u/s 148 of the Income Tax Act with regard to concealment of income. The total liability of the defendant for the particular year worked out at Rs. 12.93,42,479.33 paise as under :--

(i) Income Tax payable Rs. 2,19,86,365.50 (ii) Surcharge Rs. 32,97.954.83 (iii) Interest under Section 234A, 234B and 234C Rs. 5.40.54,725.33 (iv) Penalty for con- cealed income Rs. 6,40,05,834.00 ---------------- Total= Rs. 14,33,44,879.66 (v) Less amount already paid Rs. 1,40,02,400.00 ---------------- Balance liability Rs. 12,93,42,479.66

3. The services of the plaintiff were obtained by the defendant to deal with the case of concealment of income and also to advise/suggest a course of action.

4. The plaintiff vide letter dated 27-12- 1997 (Ex. PW1/A) suggested the defendant to go in for "Voluntary Disclosure Income Scheme, 1997" as under :

"Now the best course available with the Corporation is to go in VOLUNTARY DISCLOSURE INCOME SCHEME-1997. The case of the Corporation has also been discussed with the Commissioner of Income Tax, Shimla. Under this Scheme the tax liabilities of the Corporation would be as under :

Total assessable Rs. 4,88.58,590.00 profit Already assessed Rs. 1,30.00,000.00 ------------------ Rs. 3,58,58.590.00 Tax on above Rs. 1,25.50,510.00 In the light of the above, it is advised that the Corporation should deposit Rupees 1,25,50,510/- under VDIS - 1997. Thus, the liability of Rs. 12,93,42,479/-will be extinguished automatically. Our professional for the above would be 1% of the total liabilities. Kindly let us know the decision of the management of the Corporation at the earliest possible so that the benefit under the Scheme could be availed as the same is available upto 31st December, 1997."

5. According to the plaintiff, the advice rendered and the fee quoted were accepted by the defendant when the plaintiff was informed in this regard telephonically and was also asked to proceed in the matter. The plaintiff vide another communication dated 30-12-1997 (Ex. PW1/B) confirmed as under :

''This has reference to our telephonic discussion on the subject noted matters and our letter No. Nil dated 27-12-1997. It is already clarified that the professional charges as mentioned in the above-referred letter is 1% of the total liability extinguished i.e. Rs. 12,93,42,479/-. Further as desired declaration under VOLUNTARY DISCLOSURE SCHEME-1997 has been filed and the documents of the Corporation has been through in the initial scrutiny. We are in constant touch with the department of Income Tax for the issue of VDIS Certificate. The same will be sent to you as soon as it is issued."

6. The assessment for the year 1992-93 as well as declaration under VDIS-1997 was completed on 2-3-1998. The plaintiff on 30- 3-1998 vide Ex. PW1/C while sending the bill for its professional charges Informed the defendant as under:

"I have great pleasure in informing you that the case of the Corporation filed under VDIS-97 for the assessment year 1992-93 in respect of the profit of the Corporation to the tune of Rs. 3,58,58,590/- ((Rupees three crores fifty eight lacs fifty eight thousand five hundred ninety) only has gone in favour of the Corporation. The certificate of VDIS-97 has also been obtained from the

 

Commissioner of Income Tax. With the completion of this case tax liability of the Corporation of more than 13 crores has been extinguished and also unavoidable litigation have been avoided.

Please find enclosed herewith our bill of professional charges of Rs. 12,93,425/- in terms of our letter No. Nil dated 27-12-1997 with the request that the same may be kindly remitted at the earliest possible."

7. The defendant, as against the bill submitted by it towards the professional charges, paid a sum of Rs. 2,00,000/- to the plaintiff as under :

(1) Amount paid by Rs. 1,90,000/- cheque dated 25-5-1998 (ii) Income Tax de- Rs. 10,000/- ducted at source vide T.D.S. certificate issued by defendant. ---------------- Total Rs. 2,00,000/-. ----------------

8. The balance amount of professional fee was not paid by the defendant in spite of repeated demands and registered notice. Hence the present suit.

9. The defendant, while resisting the suit, did not deny the hiring of services of the plaintiff. It was pleaded that the defendant never agreed to pay professional fee to the plaintiff at 1% of the total liability extinguished. A lump-sum fee of Rs. 2.00,000/-was agreed to be paid to the plaintiff, which fee stands paid. It was further pleaded that charging of fee by the plaintiff on percentage basis was prohibited under the provisions of Chartered Accountants Act, 1949 and the regulations framed thereunder. The defendant denied its liability and stated that nothing was due to be paid. The fee of Rs. 2,00,000/- was accepted by the plaintiff without any reservation or protest and as such the plaintiff is estopped from filing the suits and claiming the suit amount. Interest was also denied. Legal objections as to limitation, absence of cause of action and maintainability of the suit were also raised.

10. On the pleadings of the parties, following issues were framed on 3-10-2000 :

1. Whether the plaintiff is a registered partnership concern and the suit has been filed by a competent person?..,. OPP

2. Whether M/s. Suresh Butall & Company was appointed as a legal advisor to rendering professional services to the defendant Corporation; and the terms and conditions suggested by the plaintiff concern were accepted by the defendant Corporation and services of the concern were availed by the defendant-Corporation, if so, its effect? O.P. Parties.

3. To what extent of amount and interest the plaintiff concern is entitled to? .. OPP

4. Whether the suit is not maintainable as alleged? ..OPD

5. Whether the plaint is liable to be rejected under Order 7, Rule 11-D, CPC as alleged? ....OPD

6. Whether the plaintiff has no cause of action to file the suit as alleged? ...OPD

 

7. Whether the suit of the plaintiff is barred by limitation as alleged? .....OPD

8. Whether the plaintiff is estopped from filing the suit by his own acts, deeds, conduct and acquiescence as alleged? ... OPD

9. Relief.

11. I have heard the learned counsel for the parties and have also gone through the record of the case. My findings on the above Issues are as under :

Issue No. 1.

12. Ex. PW3/A is the copy of the certificate of registration of the plaintiffs firm while Ex. PW3/B is the copy of the statement in "Form-A" containing the names of the partners of the plaintiffs firm. A perusal of the same shows that the plaintiffs firm is a registered partnership firm having been so registered under the provisions of Partnership Act, 1932 on 17-11-1999 and the name of Rajesh Kumar, through whom the present suit has been filed, is shown as one of the partners of the plaintiffs firm. The other partner being Shri Rajeev Sood. In view of such documentary evidence, to which there is no rebuttal by the defendant, it is held that the plaintiff is a registered partnership firm and that the suit has been filed through a competent person. The issue is decided in favour of the plaintiff.

Issue No. 7

13. The professional services of the plaintiff was engaged by the defendant on 27-12-1997. The present suit was filed on 10-12-1999 within the stipulated period of three years. Therefore, the suit is within time. The issue is decided in favour of the plaintiff.

Issue No. 2.

14. It is not disputed that the professional services of the plaintiff were hired by the defendant in connection with the finalisation of the assessment of the Income Tax for the year 1992-93. The only dispute between the parties is as to the extent of professional charges payable to the plaintiff in connection with the professional services rendered.

15. According to the plaintiff, it had quoted professional fee to be charged vide Exs. PW1/A and PW1/B at 1% of the total liability extinguished, that is, Rs. 12,93,42,479/-. The defendant vide its written statement vide Para 3 of the reply on merits has denied the receipt of the letters Ex. PW1/A and Ex. PW1/B. However, during the course of admission/denial of documents on 14-9-2000 under Rule 3A, Order 12. Code of Civil Procedure, admitted the letter Ex. PW1/A, though letter Ex. PW1/B was again denied.

16. DW1 Shri Y. S. Thakur, Financial Advisor to the defendant-Corporation, has categorically admitted that letter Ex. PW1/A was received from the plaintiff whereby the plaintiff had indicated that fee of 1% of the total extinguished

 

liability would be charged. He has also admitted the receipt of the professional fee bill Ex. PW1/D from the plaintiff as well as the letters Exs. PW1/G and PW1/H demanding the professional fee. It is also in the statement of DW1 that no reply was sent to the plaintiff in respect of letters Exs. PW1/G and PW1/H.

17. DW2 Shri G. C. Chaudhary was the Managing Director of the defendant at the relevant time. He has admitted that the plaintiff had demanded professional fee at the rate of 1% of the total liability vide letter Ex. PW1/A. He has nowhere stated that such fee was not accepted by the defendant. He has gone to state that he was not competent to sanction the fee as demanded by the plaintiff and that such fee was to be sanctioned by the Board of Directors.

18. The case put forth by the defendant during the course of evidence is entirely in variance to the case put forth in the written statement. In such written statement vide Para 3 of the reply on merits, the specific case put forth by the defendant is that the defendant had agreed to pay lump-sum of Rs. 2,00,000/- to the plaintiff in view of the services rendered by it. On the other hand, the evidence coming on record on behalf of the defendant is that the professional fee of Rs. 2,00,000/- was paid to the plaintiff as sanctioned by the Board of Directors.

19. It was contended on behalf of the defendant that charging of professional fee on percentage basis is prohibited by the Chartered Accountants Act. 1949 and the regulations framed thereunder. In support of his contention the learned counsel for the defendant has placed reliance on Sections 21 and 22 of the Chartered Accountants Act, 1949 (for short ''the Act'') and Clause 10 of the Regulations framed under the Act.

20. Sections 21 and 22 of the Act do not prohibit the charging of the professional fee by a Chartered Accountant on percentage basis. Section 21 of the Act deals with the procedure in inquiries relating to misconduct of members of the Institute of Chartered Accountants of India constituted under the Act. Section 22 of the Act defines "professional misconduct" as to include any act or omission specified in any of the Schedules to the Act. Clause 10 of the first Schedule provides that a Chartered Accountant in practice shall be deemed to be guilty of professional misconduct, if he charges or offers to charge, accepts or offers to accept in respect of any professional employment fees which are based on percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act.

21. Assuming that Section 22 of the Act read with Clause 10 of the First Schedule prohibits the charging of fee on percentage basis, such prohibition is only when the fee is proposed to be charged on percentage basis only when it is based on -

(a) profits, or

(b) it is contingent upon the findings or result of the case.

22. In the present case the plaintiff agreed to charge professional fee on

 

percentage basis neither on the profits of the defendant nor it was contingent upon the result of the case. Such fee was agreed to be charged on Rs. 12,93,42,479/- which the defendant was likely to save towards its tax liability irrespective of the result of the assessment which was ultimately to be made by the concerned authorities. Therefore, the present case would not fall within the ambit of Section 22 read with Clause 10 of the first Schedule of the Act.

23. It was next contended on behalf of the defendant that the offer of the plaintiff to charge professional fee on percentage basis was never accepted by the defendant, therefore, there is no concluded contract and the defendant is not liable to pay the suit amount to the plaintiff.

24. There is no merit in the contention of the learned counsel for the defendant. Under the law, an offer may be accepted either by express words or positive conduct. In the present case, the defendant by asking the plaintiff to proceed with the case without any reservation even after the receipt of the letter Ex. PW1/A containing the terms of professional fee would amount to acceptance of the offer by conduct. Therefore, there has been a concluded contract between the parties. As a result, the plaintiff is entitled to the professional fee as claimed by it. The balance of such professional fee comes to Rs. 10,93,425/-. The issue is decided in favour of the plaintiff.

Issue No. 3.

25. In view of the findings recorded under Issue No. 2 above, the plaintiff is entitled to the principal outstanding amount of Rs. 10,93,425/-.

26. The plaintiff has claimed interest amount to Rs. 3,28,025/- on the above outstanding amount at the rate of 18% per annum for the period 30-3-1998 to 30-11-1999. The defendant has disputed the rate of interest as well as its liability to pay interest.

27. Section 3 of the Interest Act, 1978 provides that in any proceedings for recovery of any debt, the Court may, if it thinks fit, allow interest to the person entitled to the debt at a rate not exceeding the current rate of interest on the whole or part of the period. "Current rate of interest" has been defined u/s 2 (b) as meaning the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained by charitable or religious institutions) by different clauses of scheduled banks in accordance with the directions given or issued to the banking companies generally by the Reserve Bank of India under Banking Regulation Act, 1949.

28. No evidence has come on the record to show as to what was the current rate of interest at the relevant time. In the absence of such evidence, the plaintiff would be entitled to interest on the outstanding amount on a reasonable rate. In the present case it would be reasonable to award interest at the rate of 9% per annum for the period claimed by the plaintiff. Calculating at such rate, the plaintiff is entitled to interest amounting to Rs 1,64,012/-. The issue is

 

accordingly decided in favour of the plaintiff.

Issue No. 4.

29. The defendant has contended that the suit is not maintainable in view of Sections 21 and 22 of the Act and the regulations framed thereunder. In view of the findings recorded under Issue No. 2 above, the suit is maintainable. The issue is decided against the defendant.

Issue No. 5.

30. It has been held under Issue No. 2 above that the provisions of Sections 21 and 22 of the Act are not attracted to the present case. Therefore, the plaint is not liable to be rejected under Order 7, Rule 11 (d), Code of Civil Procedure. The issue is decided against the defendant.

Issue No. 6.

31. In view of the findings recorded under Issue No. 2 above, the plaintiff has the cause of action. The case is decided against the defendant.

Issue No. 8

32. The case of the defendant is that since payment of Rs. 2,00,000/- as professional fee was accepted by the plaintiff without any reservation and protest, it is estopped from filing the present suit.

33. It may be stated that a sum of Rs. 1,90,000/- was paid to the plaintiff by cheque dated 25-5-1998. This cheque was forwarded/sent to the plaintiff by the defendant vide letter dated 27-5-1998 (Ex. PW1/F). A sum of Rs. 10,000/- was deducted/retained by the defendant as advance Income Tax. There is nothing in the letter that the amount of Rs. 1,90,000/- after deducting Income Tax was being paid in full and final settlement of the bill dated 30-3-1998 (Ex. PW1/D). The plaintiff vide letter Ex. PW1/G while acknowledging the receipt of Rs. 1,90,000/- reiterated that the professional charges were Rs. 12,93,425/-. The defendant was, therefore, called upon to pay the balance amount of Rupees 10,93,425/-. This was followed by the reminder Ex. PW1 /H and registered notice Exs. PW1/J and PW1/K. No reply was, admittedly, sent by the defendant to the communications Exs. PW1/G and PW1/H.

34. Ex. PW1/L is the reply to the registered notices Exs. PW1/J and PW1/K. The stand taken by the defendant in such reply is that the plaintiff was informed that it would be paid professional charges of Rs. 2,00,000/- to which the plaintiff had agreed and in furtherance thereof the work was undertaken by the plaintiff. In its written statement also, the defendant has averred that it had agreed to pay lump-sum amount of Rs. 2,00,000/- to the plaintiff in view of services rendered by the plaintiff.

35. As pointed out above, while dealing with Issue No. 2, the evidence coming on record is absolutely in variance of the pleadings. PW2 Shri Anil Chauhan. Office

 

Manager of the defendant has deposed :

"The plaintiff company had claimed its legal fee on the basis of 1% of the extinguished liability and had furnished a bill accordingly to the forest corporation. The plaintiff company while giving its advice vide Ex. PW17A had proposed to charge a legal fee at the rate of 1% of the extinguished liability. The bill copy of which is Ex. PW17D was received from the plaintiff company towards the legal fee. As against the fee of Rs. 12,93,425/-, a sum of Rs. 2,00,000/-only was paid to the plaintiff company by the Forest Corporation. Reminders were being received from the plaintiff company demanding the balance amount of the fee. As per the record, no reply to such remind- ers was sent to the plaintiff company."

36. This witness was never cross-examined by the defendant on the above aspect. Only a suggestion was given that there has been no agreement between the parties with regard to the fee to be charged. This witness in reply to the suggestion stated-

"I cannot say whether there has been no agreement between the parties with regard to the fee to be charged."

37. The above suggestion coming from the defendant itself falsifies the stand of the defendant that the defendant agreed to pay and the plaintiff agreed to accept professional charges of Rs. 2,00,000/-.

38. DW1 Y. S. Thakur, Financial Advisor of the defendant has also belied the stand of the defendant that the plaintiff agreed to charge Rs. 2,00,000/- as professional charges. He has stated -

"The bills submitted by the plaintiff came up for discussion between the representatives of the plaintiff and the Managing Director and thereafter I was asked to prepare the agenda for the Board Meeting. The meeting of the Board of Directors took place on 17th January. 1998. In the meeting with the Managing Director, the representatives of the plaintiff had agreed to charge Rs. 3.76 lacs as professional fee representing 3% of the amount paid as taxes. The Managing Director had no authority to approve the payment of the amount of Rs. 3.76 lacs. The Board of Directors had approved a fee of Rs. 2 lacs to be paid to the plaintiff."

39. As against the above version of DW1, the then Managing Director of the defendant while appearing as DW2 has deposed-

''The plaintiffs were Chartered Accountant for the defendant Corporation. Since the plaintiffs were the standing counsel for the defendant Corporation in tax matters, the case of VDIS was also dealt with by them. The plaintiffs had demanded professional fee at the rate of 1% of the total liability vide letter Ex. PW1/A. 1 was not competent to sanction the fee demanded by the plaintiffs. Such fee was to be sanctioned by the Board of Directors. The matter was accordingly placed before the Board of Directors."

 

40. The fact that the plaintiff has been repeatedly demanding the balance amount after receipt of Rs. 2,00,000/- from the defendant goes to show that the payment was not received by the plaintiff in full and final settlement of its bill for the professional services rendered. The defendant has failed to make out a case of estoppel against the plaintiff. The issue is as such decided against the defendant.

Relief.

41. As a result of the findings recorded under the above issues, a decree for a sum of Rs. 12,57,437/- (Rs. 10,93,425/- as the principal outstanding amount and Rupees 1,64,012/- as interest) with proportionate costs is passed in favour of the plaintiff and against the defendant. The plaintiff shall further be entitled to interest at the rate of 9% per annum on the principal amount of Rs. 10,93,425/- from 10-12-1999 (the date of the suit) till the date of payment/realisation of the amount.

 