
(2006) 08 DEL CK 0206

In the Delhi High Court

Case No : Regular First Appeal No. 419 of 2002

Sh. Vikas Arora

APPELLANT

Vs

Shakti Aluminium Products P. Ltd.

RESPONDENT

Date of Decision : 28-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, Order 37 Rule 4

Citation : (2007) 2 BC 131

Hon'ble Judges : T.S. Thakur, J;S.L. Bhayana, J

Bench : Division Bench

Advocate : Rajiv Talwar and Manish Kohli, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

T.S. Thakur, J.—An application filed by the appellant under Order xxxvII Rules 3 & 4 CPC for grant of leave to defend the suit filed by the plaintiff-respondent having been dismissed, the Court below has decreed the plaintiff's claim for a sum of Rs. 4,99,000/- with interest pendente lite and till realisation with interest at the rate of 12% p.a. The present appeal calls in question the correctness of the said judgment and decree.

2. The plaintiff company carries on business in the supply of Aluminum sheets and coil. The defendant was, it appears, purchasing goods from the plaintiff from time to time and making on account payments against the same. The statement of account, filed by the plaintiff, however, revealed a debit balance of Rs. 2,96,686/- against the defendant-appellant as on 9th August, 1996. This amount, the defendant failed to pay despite a legal notice, culminating in the institution of a suit by the plaintiff under Order xxxvII for a total sum of Rs. 4,99,000/- representing the principal and the interest due thereon.

3. The defendant appeared in response to the summons issued against it and sought leave to defend the suit, inter alia, on the ground that the suit was barred

by limitation and that the court had no pecuniary jurisdiction to adjudicate upon the dispute. Repelling the contention that the suit was barred by limitation, the trial court held that the suit having been filed on 8th December, 1999 was within limitation which stood extended by three years by reason of a part-payment of a sum of Rs. 50,000/- on 9th December, 1996. The court held that since the part-payment was made within three years of institution of the suit, the same was within time.

4. Similarly, the court repelled the contention that it had no pecuniary jurisdiction to entertain and try the suit. It also held that just because the concern in which the defendant was a partner had been closed, did not dis-entitle the plaintiff to claim the recovery of the amount or raise a triable issue in the suit. The defendant's application for grant of leave to defend was accordingly rejected and the suit decreed, as already noticed above. The present appeal calls in the correctness of the said judgment and decree.

5. Appearing for the appellant, Mr. Rajiv Talwar, strenuously argued that the court below was in error in holding that the suit had been filed within the period of limitation prescribed for the same and that no triable issue arose on the question of limitation raised by the defendant. Relying upon the decision of the Supreme Court in *Jiwanlal Acharya Vs. Rameshwarlal Agarwalla*, *Arjunlal Dhanji Rathod Vs. Dayaram Premji Padhiar*, and *Ashok K. Khurana v. Steelman Industries and Anr.* 2000 3 AD (Delhi) 551, Mr. Talwar argued that the suit filed against the appellant was barred by limitation and the court below had fallen in a palpable error holding the same to be within time. He urged that in a case where a cheque had been accepted unconditionally, the date on which the cheque was issued would be construed as the date of payment of the amount covered by the same no matter the actual payment of the amount was credited into the account of the payee on a subsequent date. While determining whether the suit was or was not within time, the court had to see the date the cheque was issued and not the date on which the same was credited. He urged that the cheque, in the instant case, was issued on 5th December, 1996 even when the amount covered by the same was credited in the account of the plaintiff on 9th December, 1996. The period of three years when counted from the date the cheque was issued expired on 5th December, 1996 and not on 9th December, 1996 when the amount was actually transferred to the account of the plaintiff-respondent. So reckoned, the present suit filed on 8th December, 1999 was, according to the learned Counsel, clearly beyond the period of three years prescribed for the same and should, Therefore, have been dismissed as barred by limitation.

6. On behalf of the plaintiff-respondent, it was, on the other hand, contended that the plea of limitation now urged by the appellant had never been properly raised before the trial court and could not, Therefore, be urged for the first time in appeal. It was alternatively submitted that even if the plea was allowed to be urged and the same raised a triable issue, all that could be done was to grant leave to defend the suit and to remit the matter back to the trial court for a fresh

adjudication instead of dismissing the suit straightway in the present appeal. It was argued that the date on which the cheque was issued was a question of fact and ought to be proved by evidence before the question of limitation is decided by reference to the said date.

7. The trial court has clearly noticed the bar of limitation urged by the plaintiff before it. It has, as a matter of fact, gone into that issue and held that the suit was indeed within time reckoned from the date part-payment was credited into the account of the plaintiff. There is, Therefore, no basis for the argument that the defendant had not urged the plea of limitation at the proper stage. The judgment under appeal itself belies that contention.

8. The question then is whether the plea of limitation was in the peculiar fact and circumstances of the case sufficient to raise a triable issue so as to entitle the defendant to the grant of leave prayed by him. Our answer is in the affirmative. The bar of limitation urged on behalf of the defendant was a defense that could not be ignored or wished away so long as the same was not wholly frivolous in nature. A plea of limitation seriously raised would certainly constitute a triable issue entitling the defendant to the grant of leave to defend.

9. The part-payment of the amount outstanding against the defendant was, in the present case, admitted by the plaintiff. It was also admitted that the amount was credited in the plaintiff's account only on 9th December, 1996. The question, however, was whether limitation would necessarily get extended for a further period of three years from the said date. That was a moot proposition which the court ought to answer only after proper evidence was adduced as to the circumstances in which the cheque was issued and whether the same had been accepted as an unconditional payment as also the date of issue of the cheque which had to be proved as questions of fact. The decision of the Supreme Court in Jiwanlal Achariya's case relied upon by the appellant would bear relevance to the determination of this aspect. While we do not wish to express any opinion as to the true purport of the said decision, we are of the view that the facts and circumstances of the case as also the legal position stated in the said decision and the other decisions relied upon by the appellant did make out a case for the grant of leave to defend to the appellant.

10. In the result, this appeal succeeds and is hereby allowed. The judgment and decree passed by the trial court is set aside; the application filed by the defendant-appellant under Order xxxvII Rules 3 & 4 CPC granted and the defendant allowed to defend the suit. The suit shall consequently stand remitted back to the trial court for an expeditious hearing and disposal in accordance with law. Parties are directed to appear before the trial court on 09.10.2006.