IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

OSA No.23 of 1999
Date of decision: 30.3.2007

M/S Domebell Investments Pvt. Ltd. … Appellant/Plaintiff.

Versus

M/S Thakur Enterprises & other ….. Respondents/defendants

Coram:

The Hon'ble Mr.Justice Deepak Gupta,J.

The Hon'ble Mr Justice Surinder Singh.J.

Whether approved for reporting ?[1]

For the appellant : Mr Ashwani K Sharma, Advocate.

For the Respondent : Mr R K Gautam, Senior Advocate, with Mr Anup Rattan, Advocate.

Surinder Singh, J. (Oral):

1. The appellant has filed this Original Side Appeal, against the judgment and decree passed in Civil Suit No.14 of 1997, by the learned Single Judge, whereby the suit of the appellant was dismissed.

2. The facts in brief are that the appellant-Company, hereinafter to be called as the "plaintiff", is a body corporate having its registered office in Ahmednagar. It has branches all over India, out of which they have one branch at Parwanoo, District Solan (HP). The plaintiff

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ?***

deals in electronic goods, like television sets, washing machines, V.C.Rs etc. etc.

3. The respondents, hereinafter to be called as the ”defendants”, is a sole partnership firm of defendant Rajeev Thakur, who is engaged in sale and purchase of electronic items.

4. The case of the plaintiff has been that the defendant firm had approached the plaintiff in the year 1991 for the supply of electronic goods on credit, to which the plaintiff had agreed and opened an account. The electronic items were supplied to the defendants on credit and whatever payments were received, from time to time, were shown against the account of the defendants. It is the case of the plaintiff that the defendants adjusted the account of 8.2.1994 and the amount of Rs.4,17,215 remained due from them. Since the balance was not paid, they filed the suit for its recovery with interest at the rate of 18% w.e.f. 9.2.1994. The amount became Rs.6,42,511/- on the date of filing of the suit. Hence, prayed for a decree with future interest at the same rate.

5. The learned single judge, on the pleadings of the parties, had framed the following issues on 30.3.1994:

1. ***Whether the plaintiff is guilty of suppression of material facts, if so to what effect? OPD***
2. ***Whether the suit is barred by limitation? OPD***

3. Whether the defendants have made over payments as alleged? OPD

4. To what amount if any is the plaintiff entitled to recover from the defendants? OPP

5. Relief.

6. The parties led their evidence and upon hearing the parties, the learned Single Judge had returned the findings on issue No.3 against the defendants but on account of the findings on issue No.2 it was held that the claim, was barred by limitation and the plaintiff could not prove the actual delivery of goods to the defendants, therefore, dismissed the suit.

7. The plaintiff-Company, having felt aggrieved by the judgment and decree impugned, filed the present appeal, on the grounds that the learned Single judge did not appreciate the pleadings and evidence led before him, in the right perspective and also that the defendant had never denied the last payment of Rs.70,000/- made on 8.2.1994 to the plaintiff. Thus the suit was within limitation. The plaintiff did not put any reliance on Article (1) of the Limitation Act (now called as ‘the Act’) as it was not applicable in the present case. The reasoning given by the learned Single Judge is incorrect, therefore, the findings on issues against the plaintiff are based upon conjectures and surmises, hence the judgment

and decree deserves to be set aside and the suit of the plaintiff be decreed with costs.

8. We have heard the learned counsel for the parties and have examined the evidence on record in all its meticulous details.

9. Mr Ashwani K Sharma, learned counsel for the plaintiff has strenuously argued that on opening the account in the books of the plaintiff-Company, the credit for the goods supplied and payments received from the defendants were duly reflected therein. The defendant-firm had defaulted the payments and their last payment of Rs.70,000/- was received on 8.2.1994, after such payment there was a balance of Rs.4,17,215/-. Since these facts were not specifically denied in the reply filed by the defendants, therefore, it is presumed to have been admitted. The application of Article I of the Act (in fact it is item No.1 of First Division in Part I of the Schedule attached to the Act) was never, pleaded nor argued, it is only item No.14 of the schedule, which is applicable, therefore, the findings given are incorrect.

10. Contra, Mr R K Gautam, learned Senior Advocate has supported the issue-wise findings arrived at by the learned Single Judge and urged that by whatever angle the suit filed by the plaintiff-Company is seen it is clearly barred by limitation and no such goods were supplied as

alleged, therefore, the appeal merits dismissal with costs.

11. We have thoughtfully considered the rival contentions of the parties. To appreciate the points raised, we have reappraised the evidence on record.

12. As a matter of fact, the plaintiff had never raised any plea in his plaint that the suit was being filed for the recovery of the balance amount due on a mutual, open and current account and that it was governed by item No.1 of the Schedule attached to the Act, for which the limitation is three years from the date of the close of account in which the last transaction took place. This fact is also reiterated in appeal. It is the case of the plaintiff in appeal that it is only item No.14 of the schedule attached to the Act, which applies to this case.

13. We have perused the Schedule appended to the Limitation Act, which prescribes the limitation. This schedule contains three Divisions. First Division, applies to the suits, second to appeals and third to the applications. The 'First Division' is sub divided into X (ten) parts. Part I deals with "Suits relating to Accounts" its item No.1 was applied by the learned Single Judge to arrive at the findings on issue No.2 above. The contention raised by the plaintiff need to be appreciated in the light of the pleadings and the evidence put forth.

14. We have gone through the statement of defendant Rajeev Thakur (DW-1) recorded on 27.10.1998 He has specifically stated that there was no transaction with the plaintiff-Company after 6.12.1993. His case was of excess payment, to the plaintiff, which according to him, was not adjusted towards his account, despite notice Ex.DW-1/A. In the cross-examination he has denied having received Two coloured T.V's. on 8.6.1993, three coloured T.V's and three black and white T.V's on 7.2.1994, from the plaintiff company. However, he has admitted that there was no specific denial in the written statement to this effect.

15. The plaintiff did not prove the actual delivery of the above items by leading a direct and cogent evidence despite knowing fully well regarding the denial of such delivery of goods. Unfortunately, the plaintiff's sole witness Sh. Ravinder Bhan (PW-1) though examined on April 7,1999 i.e. after the statement of DW-1 aforesaid has proved the original invoices Ex.PW-1/\D to Ex.PW-1/H and copies of Goods receipt Ex.PW-1/J to EX.PW-1/M but still he did not prove the important fact of actual delivery of goods, more specifically shown in the invoices Ex.PW-1/G and Ex.PW-1/H dated 7.2.1994 for RS.55,770/- (Rs.45970 + Rs.9800) which were alleged to have been carried through Truck No. HYW 5860 vide G.R. Ex.PW-1/M showing the value of goods to the tune

of Rs.53,855/-, that also does not match with the invoices aforesaid. Further the evidence of actual delivery of the aforesaid goods is missing. Therefore, in our considered opinion due to the lack of primary evidence with regard to delivery of goods to and receipt thereof by defendants, the case of the plaintiff cannot succeed and item No.14 of the Schedule of the Act is also of no avail to the plaintiff.

16. Further by showing the receipt of payment of Rs.70,000/- in the account books by the plaintiff cannot improve the case of the plaintiff in any way unless some official from the bank would have been produced and examined. Thus, it is a classical case of non-production and non-examination of primary evidence regarding actual delivery of goods as aforesaid, in absence of which the suit of the plaintiff company must fail and was thus, rightly dismissed by the learned Single Judge.

17. Viewed from all the angles, we do not find anything worth interference in the judgment and decree passed by the learned Single Judge.

18. Hence, the appeal merits dismissal and is accordingly dismissed with costs.

(Deepak Gupta),J.

March 30, 2007 (Surinder Singh),J.
(D)