* **IN THE HIGH COURT OF DELHI**

Judgment reserved on : September 26, 2008

% Judgment delivered on : September 29, 2008

\+ **RFA 374/2001**

NEW RAMA SEED CORPORATION ..... Appellant

Through: Mr.Manish Batra, Advocate

VERSUS

DARSHAN LAL JAIN ..... Respondent

Through: Mr. Rajiv Aneja, Advocate

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog
Hon'ble Mr.Justice J.R. Midha

1. Whether reporters of local papers may be allowed to see the judgment? Yes.

2. To be referred to the Reporter or not? Yes.

3. Whether judgment should be reported in Digest? Yes.

: **PRADEEP NANDRAJOG, J.**

1. The appellant who was the defendant has suffered a decree in sum of Rs.1,89,000/- together with interest @ 18% per annum from the date of the suit till realization as also cost.

2. Briefly stated, case of the respondent was that he was in the business of manufacturing tin boxes and appellant has placed 2 orders for manufacture and supply of tin boxes.

The first order was for 6000 tin boxes @ Rs.6.25 per box. The second order was for 600 boxes @ Rs.8/- per box. On the boxes relatable to the first order, the words “Gurdaspur Ki Shaan” had to be printed and on the boxes relatable to the second order “New Rama Seed Corporation” had to be printed. It was stated that in addition to the aforesaid prices it was agreed that the appellant shall pay Rs.21,000/- as cost of scanning, planning and proofing and art work in connection with the 2 orders.

3. Pleading that the appellant lifted only 3,200 boxes pertaining to the first order and 385 boxes pertaining to the second order and that the respondent had executed the entire works; further pleading that even in respect of the boxes which were taken delivery of, Rs.13,580/- was the outstanding payment, suit was filed claiming Rs.1,89,100/- detailed as under:

i)	Outstanding payment	Rs.13,580.00
ii)	Cost of Boxes. (Gurdaspur-ki-shaan) 6000 – 3200 = 2800 x 6.25	= 17,500.00
	(New Rama Seeds Corpn.) 6000 – 385 = 5615 x 8.00	= 44,920.00
iii)	Cost of Scanning/Planning Proofing & art-work	Rs.21,000.00
iv)	Damages for restoration of goods lying in the	

	godown from 9.6.97 to 8.3.1999.	Rs.63,000.00
v)	Interest on Rs.97,000/- from 1.7.97 to 28.2.99 @18% p.a.	Rs.29,100.00
	Total:	Rs.1,89,100.00

4. The stand taken in the written statement was that the suit was barred by limitation. It was admitted that the 2 orders as stated in the plaint were placed but in respect of the second order it was disputed that the agreed price was Rs.8/- per box. It was stated that the price agreed was Rs.6.25 per box. It was denied that any amount was agreed to be paid towards printing and scanning charges. It was admitted that 3,200 boxes pertaining to the first order were received and 385 boxes pertaining to the second order were received. It was pleaded that the remaining boxes were not lifted because the same were not up to the specification.

5. Since the learned Trial Judge has found a variance between pleading and proof pertaining to the defence raised in the written statement and evidence led it would be relevant to note the pleadings in the written statement pertaining to the plea that the boxes were not taken delivery of on account of not being up to the specification. The pleading is as under:-

> "The first lot of boxes both with the inscription "Gurdaspur Ki Shan", numbering 3200 and "New

> Rama Seed Corporation", numbering 385 was lifted by the defendant since the same being as per specification of the defendant's order while the remaining boxes of both the inscription that of "Gurdaspur Ki Shan" and "New Rama Seed Corporation" were of Sub-standard stuff, using low quality material like thin sheet of tin, sub-standard colour/paint etc. and as such the defendant refused to accept the same. The boxes were not as per specification. The defendant time and again requested the plaintiff to provide the material as per specification while the plaintiff failed to do so. The plaintiff instead of extending the co-operation started threatening the defendant."

6. Since learned counsel for the parties, in appeal, have restricted their submissions pertaining to the suit being decreed on merits we need not note any fact relatable to the plea of limitation.

7. The defendant examined Narender Kumar Vij as DW-1. Narender Kumar Vij stated in his testimony that he did not receive the remaining boxes because the same were not as per the specifications. In relation to the goods not being up to specifications, he stated:-

> *"I had not lifted certain number of boxes which were not of the standard because of moisture. The printing was not good."*

8. Learned Trial Judge has held that the defendant/appellant has attempted to prove a deficiency in the goods not as per the pleadings and hence has rejected the defence.

9. In respect of the dispute whether there was an agreement that the appellant shall pay Rs.21,000/- towards printing charges the learned Trial Judge has noted that in the statement of account maintained by the respondent in the name of the appellant, Ex.PW-3/33, an entry was made on 22.3.1996 debiting Rs.17,296/- when bill No.3154 was raised.

10. Learned Judge has noted that the said bill was raised on account of supply of 385 boxes @ Rs.8/- per box i.e. Rs.3,080/-. Local sales tax @ 7% was charged being Rs.215.60/-. Rs.14,000/- was charged towards designing scanning, printing and proofing. Rounding of the figure, total amount came to Rs.17,296/-.

11. Two conclusions have been drawn from the said bill. First, on the admission by the appellant that it had received delivery of 385 boxes under the 2nd order and this being the only bill, it has been opined that it concludes the issue of the price pertaining to the second lot. Since the bill was raised @ Rs.8/- per box and there was no evidence that the appellant refuted the bill, the learned Trial Judge has held that the respondent has successfully established that the price payable per box for the 2nd lot was Rs.8/-.

12. The second inference drawn was on account of the fact that the amount of Rs.14,000/- was claimed on account of printing, scanning and processing charges and if it was not so

payable, the appellant would have protested against the same being raised in the bill. Having not so done, learned Judge has opined that it shows that printing and scanning charges were payable extra.

13. At the hearing held on 26.9.2008 the learned counsel for the appellant very fairly conceded that the principle of variance between pleadings and proof requires the Court to reject all evidence which seeks to prove a fact contrary to the pleadings of the parties or in a manner which is at variance with the pleadings of the parties. Thus, learned counsel very fairly conceded that the ground for rejecting the goods has not been established by the appellant as required by law.

14. There being no dispute that the first lot of 6,000 boxes had to be paid for @ Rs.6.25 per box the issue of price related to the second order also was conceded as flowing out of bill No.3154 dated 22.3.1996.

15. For record we may note that the said bill has not been exhibited or proved at the trial but is at page No.219 of the Trial Court record. As noted above, reference to the said bill is in the ledger account Ex.PW-3/33 where an entry has been made on 22.3.1996 debiting the account of the appellant in sum of Rs.17,296/- relating the entry to a bill No.3154.

16. Learned counsel for the appellant urged only 3

submissions. Firstly that the learned Trial Judge erred in awarding Rs.63,000/- as damages for storage of the goods in the godown of the respondent from 9.6.1997 to 8.3.1999 as also awarding interest @ 18% per annum on the outstanding amount which include damages for storage of the goods. Lastly, there was no evidence that Rs.21,000/- was agreed to be paid for printing and scanning charges.

17. Learned counsel for the respondent stated that his client had to store the boxes till they were destroyed from 9.6.1997 to 8.3.1999. When questioned whether the respondent had taken the godown on hire, learned counsel answered in the negative and stated that the godown belonged to the respondent.

18. Under the proviso to Section 73 of the Contract Act it is the duty of every party to a contract to mitigate the loss if there is a breach of contract.

19. The appellant had refused to lift the boxes in the year 1997 itself and thus we see no reason why the respondent continued to hold on to the boxes which were not being accepted by the appellant. Further, since the respondent was not paying any rent for the godown in question and there being no evidence that the respondent could not store other goods in the godown due to lack of space, we hold that no case is made out to award damages

towards storage charges.

20. With respect to the cost of scanning, planning and proofing of the art work, it would be relevant to note that the respondent has raised only one bill No.3154 dated 22.3.1996. The bill raises a demand of Rs.14,000/- for said work. It does not record that part amount was being claimed. No other bill was admittedly raised for the alleged balance amount. The boxes were manufactured much before the suit was filed. If the bill in question probablizes that it was agreed between the parties that extra money would be paid for planning, scanning and proofing of the art work, in the absence of any further demand, the bill also probablizes that the agreed amount for said work was only Rs.14,000/-.

21. Learned counsel for the appellant conceded that an outstanding payment of Rs.13,580/- was payable for the goods which were received.

22. Thus, the amount which would be payable for the manufacture and supply of boxes would be Rs.13,580/- + Rs.17,500/- + Rs.44,920/- = Rs.76,000/-. Rs.14,000/- would be payable for scanning, planning and proofing. Total amount payable comes to Rs.90,000/-.

23. The bills raised show a demand of interest @ 18% per annum, being a printed clause.

25. But to succeed, the respondent has to prove that

the said rate of interest was an agreed rate of interest or was the rate of interest payable as per market practice and usage.

26. No evidence on market practice or usage has been led.

27. It is true that a printed condition of a bill can evidence a contract between the parties but the said principle has to be applied with care. If, as noted in the instant case, a contract is pleaded as an executory contract and bills are raised when supply is effected, the bills cannot be read as a contractual document for the reason the contract had preceded the supply and the bill being raised. In such a situation, the bill has to be treated as evidencing a demand for payment and no more.

28. The respondent had served a notice on 9.6.1997 claiming interest @ 18% per annum. The said notice can be treated as a notice of demand under the Interest Act 1978. Thus, the respondent would be entitled to interest at the rate offered by Scheduled Banks on fixed deposits which we note was 12% per annum as on 9.6.1997.

29. The respondent would thus be entitled to interest @ 12% per annum w.e.f. 9.6.1997, in view of the notice dated 9.6.1997 Ex.PW-3/31.

30. The appeal is partially allowed. Impugned judgment and decree is modified to the extent that the suit

filed by the respondent is decreed in sum of Rs.90,000/- with interest @ 12% per annum w.e.f. 9.6.1997 till the date of payment and proportionate cost.

31. We note that pursuant to interim orders passed by this Court the appellant has deposited a sum of Rs.1,20,000/- and a further sum of Rs.1,52,034.80. The said amount had been released in favour of the respondent.

32. Thus, the respondent has received in all a sum of Rs.2,72,034.80.

33. The respondent has apparently received an amount in excess than what would be payable to the respondent as per decree modified today.

34. We thus grant a right of restitution to the appellant who would be permitted to seek restitution by filing an appropriate application as per law after calculating the amount payable to the respondent as per our decision rendered today.

35. There shall be no order as to costs in the appeal.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

September 29, 2008
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