

Pk Gupta and anr Vs. Ess Aar Universal Pvt Ltd and anr

Pk Gupta and anr Vs. Ess Aar Universal Pvt Ltd and anr

SooperKanoon Citation : sooperkanoon.com/922614

Court : Delhi

Decided On : Nov-21-2011

Judge : Pradeep Nandrajog; S.P. Garg, Jj.

Acts : Code of Civil Procedure (CPC) - Order 38; [Companies Act 1956](#); Stamp Act - Section 31; Negotiable Instrument Act

Appeal No. : RFA(OS) 78 of 2011

Appellant : Pk Gupta and anr

Respondent : Ess Aar Universal Pvt Ltd and anr

Judgement :

1. A suit, under Order XXXVII of the Code of Civil Procedure, was filed by the respondent against M/s.Prestige H.M.Poly Containers Ltd. (respondent No.2) and its Managing Director and Director respectively i.e. appellants No.1 and 2. Decree prayed for was in sum of `20,40,023/- (Rupees Twenty Lakhs Forty Thousand and Twenty Three only). It had four elements:- (i) Principal Amount covered by 5 cheques exhibits P-5 to P-9 each in the sum of `2,90,495/- i.e. `14,52,475/-; (ii) service charges as per lease agreement Ex.P-1: `5,79,048/- (Rupees Five Lakhs Seventy Nine Thousand and Forty Eight only); (iii) expenses towards legal notice: `7,700/- (Rupees Seven Thousand and Seven Hundred only); and (iv) bank charges: `800/- (Rupees Eight Hundred only). Liability sought to be enforced was stated to be joint and several.

2. The suit was instituted on 28th June 1997 and after a protracted battle, leave to defend was granted to the appellants and respondent No.2 upon the condition that the appellants and respondent No.2 would deposit `25,00,000/- (Rupees Twenty Five Lakhs only) towards not only the sum claimed in the suit but even to secure the interest which may accrue if claim was decreed.

3. The sum of `25,00,000/- was deposited with the Registry of this Court on 21.11.2002. The amount was invested in a fixed deposit and ultimately the respondent No.1 withdrew the amount deposited along with accrued interest thereon on 12.3.2004 after furnishing security.

4. 6 issues were settled between the parties on the basis of the pleadings as under:-

"1. Whether the plaintiff is incorporated under Companies Act, 1956 and the plaint has been signed verified and filed by a duly authorized person? OPP.

2. Whether the agreement dated 10.9.1993 and the personal guarantees are not duly stamped and executed documents? If so, its effect. OPD.

3. Whether the plaintiff is entitled to recover any amount? If so, what amount and from which of the defendants. OPP.

4. Whether the defendant is entitled to claim adjustment of `30,31,250/- on account of margin money? OPD.

5. Whether the plaintiff is entitled to claim any service charges from the defendants? If so, at what rate, what amount and from which date? OPP.

6. Relief."

5. Reason why aforesaid issues were settled was that in the plaint it was asserted by the plaintiff that it was a company registered under the [Companies Act 1956](#) and had taken over the company M/s.Rustagi Engineering Udyog Pvt. Ltd. as per a scheme sanctioned, which company had executed a lease agreement dated 10.09.1993 with respondent No.2 and had leased out 1250 sets of M.S. Moulds on the covenants contained in the agreement, obliging respondent No.2 to pay lease

rental in sum of `2,90,495/- for each quarter of the year, and since the lease was for three years, for the twelve quarters, twelve cheques, each in sum of `2,90,495/- were issued by respondent No.2 and appellant No.1 and appellant No.2 executed personal guarantee(s) to secure any outstanding due and payable to the plaintiff by respondent No.2. The company, M/s.Rustagi Engineering Udyog Pvt. Ltd. had received `30,31,250/- (Rupees Thirty Lakhs Thirty One Thousand Two Hundred and Fifty only) towards margin money as per the agreement. It was pleaded that service charges, in case lease rentals went into arrears, were payable at 3% compounded quarterly as per the agreement. It was alleged that whereas seven cheques pertaining to seven quarters of the lease period were duly honoured, the respondent No.2 company defaulted qua two quarters as the cheques relatable thereto were returned dishonoured by the banker on whom the cheques were drawn. The three other cheques were not presented for encashment but the moulds were retained by the respondent No.2 for another one year and thus on expiry of three years after commencement of the lease, entire lease rental for the twelve quarters had to be paid and since it was paid only for seven quarters, amount due for the remaining five quarters was liable to be paid to the plaintiff.

6. In the written statement filed, the signing of the agreement was not denied. It was not denied that the moulds were received by respondent No.2 and that the said respondent paid margin money in sum of `30,31,250/-. But it was pleaded, in para 3 of the preliminary objections as under:- "That the suit is liable to be dismissed inasmuch as the lease agreement and the personal guarantees annexed with the plaint are neither duly executed in accordance with law nor properly stamped and, therefore, the same cannot become the basis for the claim made by the plaintiff in the case."

7. It was not denied that lease rental in sum of `2,90,495/- per quarter was payable. It was not denied that lease rental pertaining to five quarters was not paid. It was pleaded that the margin money paid by appellant No.1 in sum of `30,31,250/- was retained by the plaintiff which came to much more than the unpaid lease rental. Admitting the default clause liability to pay service charges @3% compounded quarterly if lease rentals went into arrears, it was pleaded that the amount was by way of penalty and being excessive was unconscionable and

hence not enforceable.

8. We would like to speak a word here with respect to issue No.2.

9. It is apparent that issue No.2 was settled in view of preliminary objection No.3 i.e. that the agreement and the personal guarantee(s) were not duly stamped and executed documents. On what plea was it alleged that they were not duly stamped? And why were they not duly executed? Nothing was pleaded. As would be evident hereinafter the only argument predicated qua them was that the stamp paper(s) on which they were scribed were purchased from a stamp vendor in the State of Uttar Pradesh but the documents were executed at Delhi and hence it was urged that the stamp duty exigible had to be paid at Delhi i.e. the stamp papers had to be purchased from a stamp vendor at Delhi.

10. Now, the plea as laid in paragraph 3 of the preliminary objection (contents noted in para 6 above) would show that pertaining to the documents not being properly stamped, any prudent person of even ordinary intelligence would think that the challenge is on the inadequacy of the stamp duty paid and not that it was paid in a wrong State.

11. We need to highlight that the fundamental principles, essential to the purpose of a pleading is to place before a Court the case of a party with a warranty of truth to bind the party and inform the other party of the case it has to meet. It means that the necessary facts to support a particular cause of action or a defence should be clearly delineated with a clear articulation of the relief sought. It is the duty of a party presenting a pleading to place all material facts and make reference to the material documents, relevant for purposes of fair adjudication, to enable the Court to conveniently adjudicate the matter. The duty of candour approximates 'uberrima fides' when a pleading, duly verified, is presented to a Court. In this context it may be highlighted that deception may arise equally from silence as to a material fact, akin to a direct lies. Placing all relevant facts in a civil litigation cannot be reduced to a game of hide and seek. In the decision reported as 2011 (6) SCALE 677 Rameshwari Devi Vs. Nirmala Devi the Supreme Court highlighted that pleadings are the foundation of a claim of the parties and where the civil litigation is largely based on documents, it is the bounden duty and obligation of the Trial Judge to

carefully scrutinize, check and verify the pleadings and the documents filed by the parties.

12. Highlighting that pleadings must be sufficient and consequence of laconic pleadings, which cannot be permitted, and the failure to plead sufficient details amounting to an insufficient plea, in the decision reported as AIR 1999 SC 1464 D.M.Deshpande Vs. Janardhan Kashinath Kadam, the Supreme Court observed qua a claim for tenancy that in the absence of a concise statement of material facts relating to the tenancy, the mere raising of a plea of tenancy is not enough for the purpose of raising an issue on the question. The Court cautioned against a pedantic approach to the problem and directed that the Courts must ascertain the substance of the pleading and not the form, in order to determine the same. It was observed that pertaining to a claim of tenancy, the exact nature of the right which is claimed has to be set-forth and no issue pertaining to existence of tenancy could be framed on a vague plea.

13. Thus, we are of the opinion that issue No.2 ought not to have been even settled, inasmuch as it was not pleaded as to in what manner the documents were not properly stamped and that in what manner they were not properly executed.

14. On the issue of execution qua the three documents, we simply note that as regards the two personal bonds, they bear on their face the signature(s) of the executant thereof, and as regards the agreement, we find that it bears the signatures of the authorized signatory of the respondent No.2, with the stamp of the company embossed thereunder. If signature(s) of an executant appears on a document, in what manner it is alleged that the document has not been properly executed needs to be pleaded.

15. Holding that on the existing pleadings, issue No.2 ought not to have even been settled, we shall be discussing on the subject as was debated before the learned Single Judge while dealing with the submissions urged during hearing of the appeal.

16. Issue No.1 decided against the appellants and respondent No.2 was not pressed before us. Only submissions urged were to the admissibility of the lease

agreement and the personal guarantee(s) and qua the sum decreed, we shall be noting hereinafter such facts as are relevant to deal with the same.

17. Before issues were settled, admission/denial was completed and it needs to be highlighted that during admission/denial, the agreement was admitted as Ex.P-1 and the personal guarantee bond(s) were admitted as Ex.P-3 and Ex.P-4. The five cheques were admitted as Ex.P-5 to Ex.P-9.

18. One witness each was examined by the parties and Mr.Sudhir Rustagi PW-1 tendered by way of affidavit his examination-in-chief and once again referred to the aforementioned documents as having been duly executed and suffice would it be to highlight that at no stage was the admissibility of the documents questioned.

19. On the issue of admissibility, with reference to Sections 33 and 35 of the Stamp Act and Section 36 thereof, the learned Single Judge has held that the rigors of Sections 33 and 35 of the Stamp Act were whittled down by Section 36 thereof which prohibited the questioning of any instrument which was admitted in evidence, except to the extent provided in Section 61 thereof. The learned Single Judge has held that when the documents were tendered in evidence and proved, no contemporaneous objection qua their admissibility being raised, it was too late in the day for the appellants to have argued with reference to the admissibility thereof.

20. We find sufficient force in the contention urged by learned counsel for the appellants that they had raised an issue pertaining to the admissibility of the said documents in the written statement filed and it was not a case where question of admissibility was not predicated at the earliest. Counsel urged that the mere formality of not repeating the objection qua admissibility, when evidence was led would not mean that no objection qua admissibility with reference to stamp duty was not raised.

21. But, we hold against the appellants for the reason, we have already held, that on the vague pleading no issue was required to be settled qua the adequacy or inadequacy of the three documents inasmuch as we find that adequate stamp duty was paid and the objection being raised was, as finally argued, that the stamp duty

was paid in the State of Uttar Pradesh. If this was the precise objection raised, the opposite party could have taken recourse to corrective measure as per Section 31 of the Stamp Act.

22. Besides, we find that there is no evidence that the documents were not executed in the State of Uttar Pradesh, but were executed at Delhi.

23. In the teeth of the agreement Ex.P-1 and admission of the fact that five cheques in sum of `2,90,495/- pertaining to five quarters remained unpaid, the learned Single Judge has held that the sum of `14,52,475/- was payable, for the reason it was not disputed by the appellants and respondent No.2 that the leased moulds had not only been retained by respondent No.2 but even used all throughout.

24. The argument advanced before us by learned counsel for the appellants was that once the cheque for the eighth lease quarter was dishonoured, the plaintiff ought to have returned the margin money and taken back the moulds.

25. The argument has no legs to stand on, for the reason, a perusal of the lease agreement Ex.P-1 would reveal that the value of the leased moulds, called the asset, as per the Annexure to the lease was `60,62,500/- (Rupees Sixty Lakhs Sixty Two Thousand and Five Hundred only) and half of which i.e `30,31,250/- was the margin money. The term of the lease was 36 months and vide serial number eight of the Schedule to the Agreement, after 36 months the lease could be renewed at a lease rental of only 1%. We now note a few important clauses of the lease. They are as under:-

"2.3 Without affecting the Lessor's right or the Lessee's obligations to pay the lease rentals of the fixed period specified herein, in the event of Lessee being in arrears of such rentals, such arrears of lease rentals shall carry service charges at the rate of three percent (3%) per month compounded quarterly of each instalment of lease rent or part thereof that remain unpaid. The Lessor will be entitled to Bank charges, collection charges or any other expenses borne by the Lessor. The Lessor will immediately claim a service charge @ `150.00 for every dishonoured cheque, plus legal expenses for trial, if any, under the Negotiable Instrument Act

which the Lessee shall pay to the Lessor on demand.

2.4 Upon termination of this lease by efflux of time or otherwise the Lessee shall, at its own cost and expenses forthwith deliver or cause to be delivered to the Lessor the Assets, at such time and place as may be directed by the Lessor, in good repair, order and condition (subject to normal and tear).

XXXXXX

4.16 On demand pay to the lessor all costs, charges and expenses incurred by the lessor in connection with the Assets (including inspection thereof as mentioned in Clause 4.10 above) or for the preservation, protection or enforcement of the lessor's right or for retaking or repossession of the Assets with service charges thereon at the rate of three per cent (3%) per month, from the date of the incurring such costs, charges and expenses by the lessor, till payment.

XXXXXX

7.3 If the lessee fails to pay the moneys referred to in 7.1 and 7.2 above, the lessor may pay the same and the lessee shall reimburse all sums so paid together with service charges thereon at the rate of three per cent (3%) per month from the date of payment till such reimbursement.

XXXXXX

9.2.2 Without prejudice to and in addition to the lessor's rights provided in Clause 9.2.1 hereinabove, the lessor shall also be entitled to recover from the lessee and the lessee shall be bound to pay to the lessor the following amounts, viz.:

a) the entire amount of the rentals for the Fixed Period of the lease computed in the manner set out in the Schedule attached as if the lease had not been terminated to the end and intend that the lessee shall pay to the lessor not only arrears of rentals upto the date of termination of the lease but also such further amount for the then unexpired residue of the term which the lessee would have been bound to pay to the lessor had the lease continued, and

b) the cost of all repairs and maintenance of the Assets to render and maintain it on good working order and condition and all costs, charges and expenses incurred by the lessor in repossessing the Assets and in enforcing its remedies howsoever occasioned. The parties hereto agree and record that the amounts to be paid by the lessee to the lessor or aforesaid have been bonafide and satisfactorily estimated to be the proper and reasonable amount that may be suffered by the lessor as and by way of liquidated damages.

25. The annexure to the lease reads as under:-

ANNEXURE/SCHEDULE TO LEASE AGREEMENT

FORMING PART OF THE LEASE AGREEMENT DATED

10/09/1994

0.1. LESSOR RUSTAGI ENGINEERING UDYOG (P) LIMITED 201/3, PANKAJ

CHAMBERS

COMMERCIAL COMPLEX

PREET VIHAR, DELHI-110 092

0.2. LESSEE PRESTIGE HM - POLYCONTAINERS LIMITED

8, SHREYAS

OPP. AIR INDIA, NARIMAN POINT

BOMBAY-400 020 & DELHI

OFFICE AT

A-7, MAHARANI BAGH,

NEW DELHI-110 065

0.3. DESCRIPTION OF ASSETS 1250 SETS OF M.S. MOULDS @ RS.4850/- EACH (AS PER DRAWING ATTACHED AND FORMING PART OF THE LEASE AGREEMENT)

0.4. SUPPLIER M/S.SHASHANK POLY-PLAST LIMITED

B-90 & B-107, SECTOR 6, NOIDA, DISTT. GHAZIABAD, U.P. - 201 301.

0.5. VALUE OF ASSETS Rs.60,62,500/-

0.6. LEASE TENOR 36 Months

0.7. LEASE RENTAL Rs.2,90,495/- per quarter STRUCTURE continuously for 12 quarters payable in advance, at par at Deli commencing from the date of disbursal.

0.8. RENEWAL OPTION @ 1%

0.9. REPAIR, MAINTENANCE & To be undertaken by the lessee INSURANCE at the lessee's cost. The lessee providing the appropriate insurance of the leased asset throughout the period of lease designating the lessor and/or its nominees as loss payees.

0.10. MARGIN MONEY Rs.30,31,250.00

0.11 DEPRECIATION The moulds will be eligible for ELIGIBILITY 100% write off in the financial year ending 31.3.1994 under First Proviso to Sub Clause (ii) of Clause (1) of Section 32 of the Income Tax Act, 1961

The lease rental structure as detailed above has been arrived at on the express assumption that the asset on lease as detailed above will be subject to depreciation at a rate of 100% i.e. in the accounting year ended 31.03.1994. It is also hereby agreed that all mention of assets as detailed above in the new singular shall mean to include the plural and vice versa."

26. Suffice would it be to note that vide clause 9.1 and its various sub-clauses, upon default by the lessee, the lease could be determined and vide clause 9.2.2, contents whereof have been noted hereinabove, notwithstanding the lease being

determined, the entire lease rentals were payable. Thus, it is apparent that the plaintiff was entitled to a lease rental for the full twelve quarters.

27. It is not the case of the appellants that they ever returned or even offered to return the moulds. They continued to use the same.

28. The lease in question has to be understood with business efficacy. Moulds are perishable industrial tools and with passage of time a mould becomes scrap. The lease agreement recognizes this fact by reducing its value to virtually nil after three years, evidenced by the fact that after three years the lease rental agreed to was only 1%. The last part of the schedule reads: The lease rental structure as detailed above has been arrived at on the express assumption that the asset on lease as detailed above will be subject to depreciation at a rate of 100% i.e. in the accounting year ended 31.03.1994. It is also hereby agreed that all mention of assets as detailed above in the new singular shall mean to include the plural and vice versa. It is apparent that the moulds were subject to depreciation as recognized under the tax laws and after three years full depreciation of 100% was claimed. So understood, it is apparent that the so-called margin money was half the price of the moulds and the remainder half was agreed to be paid as a lease rental and in this connection we simply highlight that the twelve quarterly lease rentals @ `2,90,495/- per quarter multiplied by 12 comes to `34,85,940/- and this explains that on the remainder half investment, in sum of `30,31,250/-, an inbuilt interest element had been factored; being `4,54,690/-.

29. Thus we agree with the learned Single Judge that the plaintiff was entitled to receive `14,52,475/- from respondent No.2 and since its Managing Director and Director i.e. the appellants had stood personal guarantee(s), the two were jointly and severally liable to the plaintiff.

30. An argument was advanced that the plaintiff was obliged in law to mitigate the loss as per the explanation to Section 73 of the Contract Act. It was urged that upon default being committed by the respondent No.2 the plaintiff was obliged to seize the moulds and sell them in the market at the best price and adjust the same from the balance outstanding.

31. The learned Single Judge has correctly held that the margin money, reflecting 50% of the value of the moulds, was to secure the moulds and there was thus no question of adjusting the margin money towards lease rentals.

32. Pot calling a kettle black! The appellants retained the moulds and never offered to return the same. Till the moulds came into possession of the plaintiff it could not sell the same. Having not offered to return the moulds, which the plaintiff could not seize forcefully as law did not permit it to do so, it does not lie in the mouth of the appellants to so urge.

33. The claim for `5,79,048/-, being 3% of the outstanding lease rental compounded quarterly, payable as per clause 2.3 and 4.16 of the lease agreement has rightfully being denied by the learned Single Judge holding the same to be penal interest under the garb of service charges. The learned Single Judge has rightly observed that the plaintiff was not to provide any service under the agreement. The learned Single Judge has rightly opined the same to be a penal provision akin to a penal clause pertaining to damages and has rightly held that for money outstanding a reasonable rate of interest is to be paid to recompense the plaintiff.

34. Thus, the learned Single Judge has passed a decree in sum of `14,52,475/- (Rupees Fourteen Lakhs Fifty Two Thousand Four Hundred and Seventy Five only) with interest @10% compounded annually till date of payment. Costs and lawyer's fee quantified at `55,000/- has also been decreed.

35. On the interest being compounded per annum, suffice would it be to state that as held in the decision reported as 2010 SC 1511 State of Haryana & Ors. Vs. M/s.S.L.Arora & Co., unless a statute or a contract so specifies, Courts do not generally, award interest by compounding the same.

36. As noted hereinabove, the plaintiff incurred a capital expenditure of `60,62,500/- to purchase the moulds and leased the same to respondent No.2. Receiving `30,31,250/- i.e half the capital towards margin money, balance capital expenditure incurred in sum of `30,31,250/- was to be recovered by way of lease rentals in sum of `2,90,495/- per quarter. As noted above, the lease being for a

period of three years, having twelve quarters, the lease rental recoverable was `34,85,940/-. The difference between the balance capital expenditure incurred and what was recoverable was `4,54,690/- (`34,85,940/- - `30,31,250/-). In other words, the plaintiff was to get a return of `4,54,690/- on the balance capital of `30,31,250/- which gives a return of about 5% per annum on the balance investment of `30,31,250/-. Under the circumstances, a reasonable rate of interest on the sum of `14,52,475/- (which already has an inbuilt element of about 5% interest per annum) would be 8% simple interest per annum.

37. The appeal is partially allowed. Suit filed by the plaintiff is decreed against the defendants i.e. the appellants and respondent No.2, whose liability shall be joint and several, in sum of `14,52,475/- with interest @8% per annum from date of suit till realization. We maintain the cost imposed by the learned Single Judge, and as regards the appeal, would leave the parties to bear their own costs.

38. Noting that the appellants and respondent No.2 had jointly deposited `25,00,000/- vide demand draft dated 18.11.2002 with the Registry of this Court which was invested in a fixed deposit and along with the accrued interest was paid to the plaintiff on 12.3.2004, we clarify that the interest awarded by us on sum of `14,52,475/- @8% per annum would reckon from the date when suit was filed till 12.3.2004 and the benefit of the interest which accrued on the FDR on the deposit of `25,00,000/- would be to the credit of the appellants and respondent No.2. We note that as per decree passed by us, money would be refundable to the appellants and respondent No.2 and for which the appellants would be entitled to seek restitution by filing an appropriate application before the learned Single Judge. Till restitution is effected, security furnished by the plaintiff when it withdrew the sum of `25,00,000/- deposited by the appellants and respondent No.2 together with accrued interest thereon shall be retained and upon restitution effected, the learned Single Judge would pass necessary directions.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com