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Court : Chhattisgarh

Decided On : Apr-15-2011

Judge : N.K. Agarwal

Appeal No. : CIVIL REVISION NO 33 OF 2010

Appellant : Gomathi Wires and Another

Respondent : Diamond Wires Pvt Ltd.

Judgement :

(CIVIL REVISION UNDER SECTION 115 OF THE CODE OF CIVIL PROCEDURE)

1. Instant revision calls in question the legality and propriety of order dated 16.09.2009, passed by District Judge, Raipur, in Civil Suit No. 1-B/07, whereby the trial court has held, suit is governed by Article 1 of Schedule to the Limitation Act, 1963 (for short `the Act') and decided the preliminary issue framed in plaintiff's (respondent herein) favour.

2. Brief facts of the case are: money suit for recovery of Rs. 24,52,541.20 was filed by the plaintiff against the defendants (applicants herein). As per plaint averment, plaintiff supplied to the defendants GI wires, MS Wires and HB Wires etc. worth including taxes to Rs. 24,92,535/- on various dates commencing from 19.05.03 up to 21.01.04. Both the parties are maintaining books of account. An

amount of Rs. 14,31,368/- is outstanding against the defendants as on 31.03.2004 for which plaintiff is entitled with interest @ 24 percent per annum and thus amount due is Rs. 24,52,541.20 including interest. According to plaintiff, suit is governed by Article 1 of Schedule to the Limitation Act, and therefore, suit filed on 20.03.2007 is within limitation.

3. According to defendants suit is governed by Article 14 of Schedule to the Act and suit being not filed within a period of three years from the date of last transaction, is barred by limitation.

4. During hearing of Writ Petition W.P. (227) No. 5975/2008 filed by the defendants, counsel for both the parties have submitted that issue of limitation can be decided on the basis of plaint averment read with statement of account (Annexure A/6) as a preliminary issue, therefore, this court vide order dated 23.06.2009, remitted back the matter to the trial court for deciding the issue of limitation based on plaint averment read with statement of account (Annexure A/6) as a preliminary issue. However, the trial court misconstrued the order of this court, also recorded plaintiff's evidence and vide order impugned, decided the issue in plaintiff's favour. Hence this revision.

5. Shri Sunil Otwani, learned counsel appearing for the applicants would submit: plaint averment read with statement of account (Annexure A/6) on the face, makes it clear suit has been filed for balance of price of goods and the same would be governed by Article 14 and not by Article 1 of Schedule to the Act for the purpose of computing limitation, and the trial court has committed manifest jurisdictional error in holding suit is governed by Article 1 of Schedule to the Act.. As per Article 14 of Schedule to the Act, if no fixed period of credit is agreed upon then suit is required to be filed for recovery within three years from the date of its supply. In the instant case, last delivery of consignment was made by the plaintiff on 21.01.04, therefore, suit filed on 21.03.2007 is on the face barred by limitation and is not maintainable. In support of his contention, reliance has been placed upon the following judgments:

i. Hindustan Forest Company v. Lal Chand and others (para 10)

ii. Lakshman Prasad v. Ghasi Ram and others

iii. Anumukonda Anjaneyulu v. Agricultural Traders and

iv. Keshav Prasad v. Sunil Jauhar

6. On the other hand, Shri Prafull Bharat, learned counsel appearing for the plaintiff supported the order impugned and would submit: the trial court having found defendants were paying the amount as lump-sum and as per Annexure A/6 there is shifting of balance on both the sides evidencing reciprocal demand and obligation, account is mutual, open and current, and suit would be governed by Article 1 of Schedule to the Act and is well within limitation.

7. I have heard the counsel appearing for the parties and perused the order impugned.

8. The core question involved in the case is whether or not suit is governed by Article 1 of Schedule to the Act for the purpose of computation of period of limitation.

9. Article 1 and 14 of Schedule to the Limitation Act reads as under:

Description of Suit	Period of limitation	Time from which period begins to run
1. For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item, admitted or proved is entered in the account, such year to be computed as in the account.
14. For the price of goods sold and delivered no fixed period of credit is agreed upon.	Three years	The date of the delivery of the where goods.

10. An account is mutual, open and current when it is an account between two parties, having mutual dealings which is running or current, i.e., not closed, and open, i.e., not settled. There must, as such, be a mutual credit founded on a subsisting debt on the other side or an express or an implied agreement for a set off of mutual debts. In order that the account liability is mutual, there must be transactions on each side, creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligations.

In a mutual, open and current account one side payment is not sufficient. Mutual account involves a reciprocal demand and payment or promise. If independent dealings between parties giving rise to independent obligations are absent, the account cannot be said mutual, open and current.

There must be cross claims arising out of a course of dealing which evidences or is at least referable to an intention of set off, regarding the transactions of the parties creating independent obligations on each side.

11. Shifting of balance by itself may not be enough to bring the case within the purview of Article 1.

The account showing articles and payment of the prices thereof by the buyer to the seller on different dates do not constitute mutual, open and current account so as to bring the case under Article 1. The case falls under Article 14.

12. The account showing articles and payment of the prices thereof by the buyer to the seller on different dates do not constitute mutual, open and current account so as to bring the case under Article 1. The case falls under Article 14.

13. The Supreme Court in case of Hindustan Forest Company (Supra) holding: the requirement of reciprocal demands involves transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations, observed in paras 7,9, 10,11 and 12 as under:

"7. The question what is a mutual account, has been considered by the courts frequently and the test to determine it is well settled. The case of the Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah may be referred to. There a company had been advancing monies by way of loans to the proprietor of a tea estate and the proprietor had been sending tea to the company for sale and realisation of the price. In a suit brought by the company against the proprietor of the tea estate for recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by Article 85 of the Indian Limitation Act. Rankin, C.J., laid down at p. 668 the test to be applied for deciding the question in these words:

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had agreed to pay for them and had in part made the payment in advance. There can be no question that insofar as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer.

The learned Judges do not appear to have taken a contrary view of the result of these payments.

10. The learned Judges however held that the payment of Rs 13,000 by the buyer in advance before delivery had started, made the sellers the debtor of the buyer and had created an obligation on the sellers in favour of the buyer. This apparently was the reason which led them to the view that there were reciprocal demands and that the transactions had created independent obligations on each of the parties. This view is unfounded. The sum of Rs 13,000 had been paid as and by way of advance payment of price of goods to be delivered. It was paid in discharge of obligations to arise under the contract. It was paid under the terms of the contract which was to buy goods and pay for them. It did not itself create any obligation on the sellers in favour of the buyer; it was not intended to be and did not amount to an independent transaction detached from the rest of the contract. The sellers were under an obligation to deliver the goods but that obligation arose from the contract and not from the payment of the advance alone. If the sellers had failed to deliver goods, they would have been liable to refund the monies advanced on account of the price and might also have been liable in damages, but such liability would then have arisen from the contract and not from the fact of the advances having been made. Apart from such failure, the buyer could not recover the monies paid in advance. No question has, however, been raised as to any default on the part of the sellers to deliver goods. This case therefore involved no reciprocity of demands. Article 115 of the Jammu and Kashmir Limitation Act cannot be applied to the suit.

11. The learned Judges appear also to have taken the view that since the goods were not delivered at the times fixed in the contract, and the prices due were not paid at the end of the months, the parties clearly indicated their intention not to abide by the contract. We are unable to agree with this view. Such conduct only indicated that the parties had extended the time fixed under the contract for delivery of the goods and payment of price, leaving the contract otherwise unaffected.

12. The learned Judges also observed that the contract did not provide how the amount advanced was to be adjusted. But it seems clear that when the contract provided that the advance was towards the price to become due, as the learned Judges themselves held, it followed by necessary implication that the advance had to be adjusted against the price when it became due. So there was a provision in the contract for adjusting the advance."

14. The Supreme Court in case of Kesharichand Jaisukhlal v. Shillong Banking Corporation Ltd. Shillong5 has held in para 9 and 10 of its judgment as under:

"9. There is no substance in the further contention of the appellant that by preferring a claim as creditor in respect of the draft in the liquidation of the Bharati Central Bank, the respondent accepted the draft in satisfaction of its dues from the appellant. The respondent owed a duty to the appellant to take steps in the liquidation proceedings for the realisation of the amount of the draft. By preferring the claim the respondent preserved all rights in respect of the draft and acted in the best interests of the appellant. In the circumstances, the courts below rightly gave appropriate directions on the respondent for giving credit to the appellant for all sums which may be realised by the respondent from the Official Liquidator of the Bharati Central Bank. The courts below rightly answered Issue 4 in the negative."

10. The next point in issue is whether the proceedings are governed by Article 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under Section 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under Section 45(D). Now, Article 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the

parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

15. The High Court of Allahabad in case of Lakshman Prasad (Supra) has held in para 7 and 11 of its judgment as under:

"7. The next question arising for decision is if the learned lower court erred in holding that article 85 of the Limitation Act was not applicable to the case. While the learned court held that there were mutual dealings between the parties it did not apply Art. 85 of the Limitation Act as during the course of the mutual dealings, the plaintiff was always the creditor and the defendants were always debtors. The balance, according to the learned court was not a shifted one and, as such, Art. 85 referred to above was not attracted. The correctness of the aforesaid view has been challenged on behalf of the appellant petitioner and, as will presently appear, there is considerable force in the contention advanced. It may, at the outset, be mentioned that in the Art. 85 itself it has not been specifically provided that during the course of dealings the balance should actually have shifted from one side to the other. What the article requires is that the transactions must be both on the debit and credit sides creating independent obligations. The essence of a mutual account is the creation of independent obligations. An account is not mutual if the obligation is one-sided only and the transaction on the debit side evidence discharge of the obligation. Each party should be in a position to say that it has an account with the other and if it is so minded it can enforce the obligation by a suit. Where there are independent obligations on both sides the balance generally keeps on shifting. In other words, while there is a possibility of the shifting of balance from one side to the other the shifting of balance is not sine qua non and the absence of a shifting balance is not a conclusive test for deciding as to whether there was a mutual, open and current account between the parties or not.

11. In the instant case, it has already been observed that the defendants purchased cloth from the plaintiff and that the defendants supplied readymade garments to the plaintiff for sale on commission basis. The dealings between the parties thus created independent obligations. It was just a coincidence that

during the course of dealings the amount due to the plaintiff was always more than the amount due to the defendants from the plaintiff, but that circumstance, of itself, would not take the dealings out of a mutual, open and current account. I am, therefore, of the opinion that the Article of the Limitation Act applicable to the case was 85 and the whole of the amount claimed was within three years of the last entry made in the accounts. The learned lower appellate court was thus not right in applying to the case article 52 of the Limitation Act and rejecting a part of the claim as statute barred."

16. The High Court of Andhra Pradesh in case of Anumukonda Anjaneyulu (Supra) has held in para 20 of its judgment as under:

"20. The position in this case is exactly the same as was in the case before the Supreme Court. There is no evidence on record. On the basis of which I could give an finding that the defendant had advanced money to the plaintiff independent of the fertiliser transactions. There are no instances of repayment of moneys in cash by the plaintiff to the defendant. The course of conduct as exhibited by the entries in the account books abundantly proves that all these transactions were in respect of the transactions of fertilizers. Either the moneys were advanced just sometime before the supplies were made or moneys were paid a few days after the purchases were made. Both the payments, anterior and subsequent to the actual deliveries of fertilizers were thus intimately connected with the deliveries of fertilisers. There were no independent transactions creating independent obligations. Merely because on one or two occasions the balance shifted from one side to the other and remained un-discharged for a few days. It cannot be said that the account was a mutual, open and current account. Following the decision of the Supreme Court, which is in all fours with the facts of the present case. I must hold that the account is not a mutual, open and current account."

17. The High Court of Calcutta in case of State Trading Corporation of India Ltd. v. The Jay Shree Chemicals and Fertilisers and another6 has held in para 11 of its judgment as under:

"11. The case also does not help the plaintiff. The account in the present suit, does not reveal that there were independent dealings between the parties or there were independent obligations arising out of the independent dealings and transactions. What it reveals is that in terms of the transaction between the parties, there is a possibility of having a shifted balance in favour of one party or the other at times. The ingredients to make an account mutual, open and current are independent dealings giving rise to independent obligations which are totally absent in the present case. I am unable to accept the submissions on behalf of the plaintiff that the account in the present case is mutual, open and current or current and continuous. The defendant's counsel, submits that each transaction being separate and distinct transaction, they would give rise to independent causes of action in respect of each case. There being no mutual, open and current account between the parties the plaintiff's claims are barred by limitation. The Article 1 of the Limitation Act of 1963 (old Article 85) will have no application on the facts of this case. I agree with the defendant on this point."

18. In the light of ratio of law laid down by the Supreme Court and High Courts of Andhra Pradesh, Allahabad and Calcutta in the cases referred hereinabove, the distinguishable characteristics of mutual account can be summarized as follows : (1) that there should be two sets of independent transactions between the parties in one of which one of the parties should hold the position of debtor and the other that a creditor, and in the other, the reverse position, (2) that the dealings should disclose independent obligations on both sides, and not merely obligations on the one side, the acts done by the other being merely discharges of such obligations, (3) that each party must be able to say to the other "I have an account against you". A shifting balance is not per se a conclusive test of mutuality and (4) One or two stray transactions, which normally persons engaged in business have to carry out for the sake of good friendly business relations with the other party, cannot be termed as reciprocal or mutual obligations but are merely isolated transactions and do not fall within the compass of their normal business dealings.

19. Now, reverting to the facts of the case, the account in the present suit does not reveal that there were independent dealings between the parties or there

were independent obligations arising out of the independent dealings and transactions. What it reveals is that on 3 or 4 occasions there is excess payment by the defendants forming credit entry in plaintiff's account books. Two or three stray transactions, which normally persons engaged in business have to carry out for the sake of good friendly business relations with the other party, cannot be termed as reciprocal or mutual obligations but are merely isolated transactions and do not fall within the compass of their normal business dealings as held hereinabove. The ingredients to make an account mutual, open and current are independent dealings giving rise to independent obligations which are totally absent in the present case. The account showing articles and payment of the prices by the buyer to the seller on different dates do not constitute mutual, open and current account so as to bring the case under Article 1. The case squarely falls under Article 14; therefore, the plaintiff's suit is barred by limitation.

20. For the reasons mentioned hereinabove, the revision is allowed. Impugned order dated 16.09.2009 is set aside and it is held that suit is barred by law of limitation. No order asto costs.

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