

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 5228 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

Sd/-

and

HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Sd/-

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 their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO
	CIRCULATE THIS JUDGMENT IN THE SUBORDINATE JUDICIARY	

JAY AMBE INDUSTRIES PROPRIETOR SHRI DINESHKUMAR

BAJRANGLAL SOMANI

Versus

GARNET SPECIALTY PAPER LTD.

Appearance:

MR. ZALAK B. PIPALIA, ADVOCATE for the Appellant(s) No. 1

RULE UNSERVED for the Defendant(s) No. 1

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 07/01/2022

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE NIRAL R. MEHTA)

1) This first appeal is at the instance of an unsuccessful plaintiff and is directed against the judgment and decree dated

18.07.2012 passed by the Principal Senior Civil Judge, Vapi, in the Special Civil Suit No.62 of 2016 (Old No.72 of 2014), whereby the suit for recovery of money came to be dismissed.

2) The facts emerging from the records are that the Special Civil Suit No.62 of 2016 (Old No.72 of 2014) was instituted by the plaintiff (a proprietary concern) for recovery of an amount of Rs.29,36,211/- (Rupees Twenty-Nine Lakh Thirty-Six Thousand Two Hundred Eleven Only) from the respondent-original defendant with 15% interest. The aforesaid suit was instituted by the plaintiff through his Power of Attorney Holder.

3) It is the case of the plaintiff that there was a commercial transaction of sale & purchase between the plaintiff and the respondent-defendant. The respondent-defendant purchased papers from the plaintiff to the tune of Rs.42,31,167/- (Rupees Forty-Two Lakh Thirty-One Thousand One Hundred Sixty-Seven Only), out of which only Rs.12,64,950/- (Rupees Twelve Lakh Sixty-Four Thousand Nine Hundred Fifty Only) was paid. Thus, for the recovery of the balance amount of Rs.29,36,211/- (Rupees Twenty-Nine Lakh Thirty-Six Thousand Two Hundred Eleven Only), the aforesaid suit was instituted before the court of the Principal Senior Civil Judge, Vapi.

3.1 Despite the service of summons, the respondent-defendant thought fit not to appear before the trial court. Therefore, the suit was ordered to be proceeded *ex-parte*.

3.2 Having regard to the pleadings in the plaint, the trial court framed the following issues :

- (1) Whether the plaintiff proves that, the defendants has purchased the Ambesize 15 of Rs.42,31,167/- from the plaintiff?
- (2) whether the plaintiff proves that, the Rs.29,36,211/- is legal and recoverable debt from the Defendants?
- (3) Whether the plaintiff is entitled to get interest? If yes,, at what rate?
- (4) Whether the plaintiff is entitled to get reliefs as prayed?
- (5) what order and decree?

3.3 The trial court answered all the aforesaid issues in the negative and dismissed the suit mainly on the following grounds :

(I) The plaintiff failed to prove service of a valid demand notice to the defendant before the institution of the suit. The cover containing the demand notice returned unserved with an endorsement 'Door Locked'.

(II) No independent witness has been examined so as to prove the contents and genuineness of the invoices and the delivery challans.

(III) Out of the total dues of Rs.42,31,167/- (Rupees Forty- Two Lakh Thirty-One Thousand One Hundred Sixty-Seven Only), the plaintiff failed to specify how Rs.12,64,950/- (Rupees Twelve Lakh Sixty-Four Thousand Nine Hundred Fifty Only) was paid to him and in connection with which particular invoice. No cogent evidence to establish and prove that Rs.29,36,211/- (Rupees Twenty-Nine Lakh Thirty-Six Thousand Two Hundred Eleven Only) is legally recoverable.

(IV) The suit was instituted through the Power of Attorney Holder and in the Examination-in-Chief, nothing has been said by the Power of Attorney Holder as to how he derived knowledge of the various transactions.

4) Therefore, being aggrieved by the aforesaid, the plaintiff has approached this Court by way of this Appeal under Section 96 of the Civil Procedure Code, 1908.

5) It appears that on 12.12.2019, this Court issued notice to the respondent-defendant, making it returnable on 23.01.2020. The appellant was permitted to serve the said notice directly to the respondent. The service of notice could not be effected despite the efforts put-forth by the appellant. It also appears that as the fresh address of the respondent-defendant could not be procured, the appellant sought for public notice to be published in the newspaper. On 12.03.2020, this Court permitted the appellant to issue public notice in the newspaper 'Sandesh', Surat Edition.

6) It appears that on 21.10.2020, this Court once again issued notice for final disposal of the Appeal by making it returnable on 07.12.2020, wherein, the appellant was directed to serve the notice of the order by publishing the same in the daily newspaper having wide circulation in the area. Accordingly, once again the public notice in the newspaper 'Sandesh', Surat Edition came to be published.

7) On 16.09.2021, this Court admitted the Appeal and further directed to notify the same on 11.10.2021 for final disposal. Lastly, this Appeal came up for final hearing on 19.10.2021. However, on that date also, the defendant failed to appear either in person and/or through any advocate.

8) In view of the aforesaid, this Court was left with no other option but to proceed with the matter on merits in absence of the respondent-original defendant.

9) We have heard Mr.Zalak Pipalia, the learned counsel appearing for the appellant.

9.1 Mr.Pipalia, the learned counsel appearing for the plaintiff submitted that the judgment and decree passed by the court below is erroneous and not sustainable in the eye of law. He submitted that the trial court committed a serious error in not looking into the oral as well as the documentary evidence produced on record.

9.2 Mr.Pipalia submitted that the trial court committed a serious error in applying the principles of law as laid down in the

case of Ajay Kiritkant Ghelani and others vs. Mathureshnagar Co-Operative, reported in 2008(1) GLR 213.

10) We have considered the oral evidence of the plaintiff led on oath by way of affidavit and have also looked into the relevant documents such as the Power of Attorney (Exh: 21), Examination-in-Chief on behalf of the plaintiff (Exh: 19), copy of the ledger account maintained by the plaintiff (Exh: 156) and copies of the different invoices along with its delivery chalan (Exh: 22 to 152).

ANALYSIS :

11) The short question that falls for our consideration is, whether the trial court was justified in dismissing the suit instituted by the plaintiff, despite there being no denial and/or no rebuttal evidence led by the respondent-original defendant.

12) So as to answer the aforesaid question, we should look into the provisions of Sections 34, 59, 61 and 62 respectively of the Indian Evidence Act, 1872 :

Section 34. [Entries in books of account including those maintained in an electronic form] when relevant.—

[Entries in books of accounts including those maintained in an electronic form], regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Section 59: Proof of facts by oral evidence.—All facts, except the [contents of documents or electronic records], may be proved by oral evidence.—All facts, except the [contents of documents or electronic records], may be proved by oral evidence.

Section 61: Proof of contents of documents.—The contents of documents may be proved either by primary or by secondary evidence.

Section 62: Primary evidence.—Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document;

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the

contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original. Illustration A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

13) It is also profitable to refer to the provisions of Order VIII Rules 1, 3, 4 and 5 as well as Order XII (2-A) of the CPC, which are reproduced as under:-

ORDER-VIII

(1) **WRITTEN STATEMENT** : *The defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.*

(3) **DENIAL TO BE SPECIFIC** : *It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*(4) **EVASIVE**

DENIAL : *Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance, Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how*

much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

(5) SPECIFIC DENIAL : Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.”

ORDER XII RULE- 2A. DOCUMENT TO BE DEEMED TO BE ADMITTED IF NOT DISPUTED AFTER SERVICE OF NOTICE TO ADMIT DOCUMENTS : (1) Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability:

Provided that the Court may, in its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.

(2) Where a party unreasonably neglects or refuses to admit a document after the service on him of the notice to admit

documents, the Court may direct him to pay costs to the other party by way of compensation.

14) At the outset we may take notice of the fact that the respondent-original defendant had not appeared before the trial court as well as before this Court so as to put-forth his defense. In other words, the pleadings of the plaintiff and evidence so adduced remained uncontroverted all throughout. Thus, the suit for recovery of dues based on documentary evidence such as invoices, duly signed and acknowledged delivery chalan and ledger account, has not been disputed by the respondent-defendant.

PRINCIPLES OF LAW APPLICABLE TO THE PRESENT CASE :

15) In *Chandi Ram vs. Jamind Kanta Deka*, reported in AIR 1952 Assam 92, the Assam High Court held that if a ledger is not supported by any Day-book or Roznama, it would not fulfill the requirement of Section 34 of the Evidence Act and cannot be regarded relevant under that section. In the opinion of the Assam High Court there is no daily opening or closing balance in the ledger accounts which is maintained in some other books and ledger can be prepared at any time. Therefore, it cannot be regarded as relevant.

16) In *Hira Meher vs. Birbal Prasad Agarwal*, reported in AIR 1958 Orissa 4, the Orissa High Court held that if the plaintiff relies on the entries in his credit ledger which he himself has scribed out, the plaintiff does not assert that the transaction on credit took place actually the credit register cannot be relied upon because there will be no corroboration of the entries made therein.

17) In *Sohan Lal vs. Gulab Chand*, reported in AIR 1966 Raj. 229, the Rajasthan High Court held that Bahi Khata is an account book if maintained in regular course of business and entries therein are not admissible if not supported by corresponding entries on Rokam or Nagal Behi.

18) In *Zehna Sorabji vs. Mirabella Hoter Col. (Pvt.) Ltd.*, reported in AIR 1981 Bom 446, the Bombay High Court held that a ledger by itself cannot be a book of account of the character contemplated by Section 34 of the Evidence Act unless it is corroborated by the entries in the cash-book.

19) In *Beni vs. Bisan Dayal*, reported in AIR 1925 Nag. 445, the Nagpur High Court held that, the entries in the books of

account by itself are not sufficient to charge any person with liability unless there is independent evidence of the transaction to which the entries relate.

20) The proposition laid down in the above referred authorities about the admissibility of ledger without the corroborative evidence being led in support of the entries in the ledger cannot be disputed. It is well settled that a ledger, though an account book, has no evidentiary value unless the entries made therein are proved by independent evidence which, in other words, would mean that there must be corroboration of entries which corroboration can be supplied by proving the transaction or by proving the entries in the Daily cash book or Roznama. Without corroboration, entries in the ledger cannot be brought within the purview of Section 34 of the Evidence Act. In the instant case, it is, therefore, to be seen, whether apart from the entries in the ledger, there was corroborative evidence in support of the entries in the ledger. This matter would largely depend on the facts of each case.

21) The plaintiff led oral evidence on oath by way of affidavit through his Power of Attorney. The Power of Attorney, in his oral evidence, has stated that the plaintiff-firm had supplied goods in

the form of papers to the defendant for an amount mentioned in the plaint; out of which, part payment was made by the defendant and part payment was due from him on account of supply of those goods. There is no rebuttal by the defendant with respect to the statement given by the plaintiff. This, in our opinion, would constitute sufficient corroboration within the meaning of law about the entries made in the ledger.

22) In *Balmukand vs. Jagan Nath*, reported in AIR 1963 Raj. 212, the Rajasthan High Court that Section 34 of the Evidence Act does not require any particular form of corroborative evidence. Even a witness, in support of entries made in the books of account, would be sufficient compliance with Section 34 of the Evidence Act. In *Balmukand (supra)*, the Rajasthan High Court relied on AIR 1938 All. 353 (*Narain Das and others vs. Firm Ghasi Ram Gojar Mal and others*), wherein the Allahabad High Court held that a single witness can corroborate the entries made in the books of account.

23) In *Gopasunder Sabathao vs. Chunilal*, reported in AIR 1955 Orissa 6, the Orissa High Court held that the evidence of a party himself was substantial compliance with the provisions of Section 34 of the Evidence Act in so far as corroboration of the

entries in the account book were concerned. These authorities do not dispute the proposition of law laid down by the authorities submitted by the learned counsel for the appellant.

24) After scrutinising the law on the point, it is to be held :

- i) that ledger by itself may not be the proof of transaction and no liability can be fastened on the basis of an entry in the ledger alone unless it is corroborated by some other evidence;
- ii) ledger can be taken into consideration and would become relevant u/s 34 of the Evidence Act only when there is corroborative evidence on record in support of the entries made therein or in support of the transaction between the parties;
- iii) that what form of evidence is to be led to corroborate the entries in the ledger would largely depend on the facts of each case. If the entries in the ledger are not denied by the defendant, it may not require any corroboration. Therefore the nature of proof would vary from case to case.

25) The Allahabad High Court decision in the case of Narain

Das (*supra*) should be considered closely by us. We quote the relevant observations made in paragraphs 4, 5 and 6 therein :

“4. The next question argued by learned Counsel for the appellants is that the plain, tiff entirely failed to prove the amount of damages suffered by him. It is contended that the plaintiff merely produced the ‘bahis’ of his firm and did not produce any corroborative evidence of the relevant entries proving the claim of the plaintiff. Under Section 34, Evidence Act entries in books of account regularly kept in the course of business are relevant but such statements shall not alone be sufficient evidence to charge any person with liability. It is obvious that it was the duty of the plaintiff to have produced corroborative evidence in support of the entries in his account books. Legislature however does not require any particular form of evidence in addition to entries in books of account and any relevant fact which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroborative evidence furnished by the entries in books of account if true. The question is whether in the present case there is any such corroboration. On behalf of the plaintiff, Kishan Gopal has been produced to corroborate the entries in the account books. This witness is employed as ‘munim’ of the plaintiff’s firm. He proved the entries in the account books and stated that the plaintiff had spent Rs. 1982-1-3 on account of the defendants in the purchase of Bejhar and shop rent, etc. Out of this amount, the witness stated that the defendants had paid only Rs.400. No cross-examination has been directed on behalf of the defendants to question the accuracy of this statement. It is perfectly true

that this witness does not say in so many words that he has personal knowledge of what he states but it appears that the parties were satisfied with the statement made by this witness and the defendants did not consider it necessary to pursue the matter further and cross-examine this witness with respect to his personal knowledge of the facts he was stating.

5. In Dwarka Das v. Sant Baksh, (1895) 18 All 92, the facts were very much similar. In this case the plaintiff sued for the recovery of money due on a running account and produced his account books, which were found to be books regularly kept in the course of business in support of his claim. One of the plaintiffs gave evidence as to the entries in the account books but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own hand-writing, or simply as one describing the state of affairs that was shown by the books. He was cross, examined but no questions were asked him to show that he was not speaking as to his personal knowledge. On these facts it was held that:

The evidence given as above should be interpreted in the manner most favourable to the plaintiff and might be accepted in support of the entries in the plaintiffs' account books which by themselves would not have been sufficient to charge the defendants with liability. [Head note of 18 All 98.]

6. It may be noted that in the present case also, the defendants did not choose to cross-examine the plaintiff. The fact that he was the 'munim' of the plaintiff's firm was not questioned nor was his knowledge of the facts tested in cross-examination. Under these circumstances, I see no reason to differ from the learned Civil Judge in holding that the plaintiff has succeeded in establishing his claim with regard to the amount of money invested by him on behalf of the defendants. Learned Counsel for the appellants has relied on *Khunni Mal Narain vs. Dwarka Das Baijnath*, (1930) 17 AIR All. 710. The facts of this case appear to be entirely distinguishable. In this case the oral evidence produced by the plaintiff consisted mainly of his own statement and that of his 'munim'. The Court below had reasons for rejecting the statements of these witnesses. The learned Judges in deciding this case did not examine the evidence but accepted the view expressed by the lower Appellate Court. Eliminating the oral evidence, there was nothing left but the bare entries in the account books in support of the plaintiff's case which under Section 34, Evidence Act, were considered insufficient to base a decree upon it. There is nothing in this case which runs counter to the opinion expressed in the case reported in *Dwarka Das vs. Sant Baksh*, (1895) 18 All 92, mentioned above. Having regard to all the circumstances in my judgment there is sufficient evidence on the record to corroborate the entries in the account books."

26) One more infirmity we have noticed in the impugned judgment of the trial court is with regard to the notice issued by

the plaintiff demanding the requisite amount prior to the institution of the suit. The trial court has taken the view that such demand notice issued by the plaintiff has not been proved in accordance with law. The question is, is it mandatory for a plaintiff to first issue a demand notice and only thereafter file a suit for recovery of money ? We may clarify that there is no such law which obliges the plaintiff to first issue a demand notice and only thereafter institute a suit for recovery of money. Ordinarily, such notice is issued only for the purpose of limitation. If the plaintiff is apprehensive about the issue of limitation that may be raised by the defendant before the trial court, in the facts and circumstances of the case, only with a view to meet with such contingencies, the plaintiff would first issue a notice and then institute the suit. Demand notice is mandatory only under Sections 12(3)(a) and 12(3)(b) respectively of the Bombay Rent Act, or if it is a suit against the State, in such circumstances, notice under Section 80 of the CPC is required.

27) It appears that the trial court proceeded on the footing that since the plaintiff has not examined any independent witness so as to prove the demand notice served upon the defendant and the delivery chalang, the respondent could not be said to have

received the goods, and accordingly is not entitled to recover the amount towards the sale transaction with the defendant.

28) To hold that a particular document is not admissible for proof of its contents unless the writer is called, is to denude the documentary evidence of all its value and is clearly contrary to certain express statutory provisions to be found in the Evidence Act, more particularly, Section 59 of the Evidence Act. In our opinion, the documentary evidence becomes meaningless if to prove it in every case by way of oral evidence of its contents. If that is the position, it would mean that, in the ultimate, the analysis of the evidence must be oral and that the oral evidence would virtually be the only kind of evidence recognized by law, however, that is not the position under the Evidence Act. The definition of the term 'evidence' in Section 3 of the Evidence Act lays down that evidence means and includes statements made by the witnesses, which are called oral evidence, and documents produced before the court, which are called documentary evidence. A bare perusal of Section 59 of the Evidence Act states that all facts, except the 'contents' of documents, may be proved by oral evidence. Needless to say, that once the documents is proved in the manner provided under the provisions of the Evidence Act, the contents of that documents are also proved. It

is for that reason that the Evidence Act advisedly lays down that the contents of a document can be proved by proving the document in the usual manner, a proposition that emerges unequivocally from a combined reading of Sections 59, 61 and 62 of that Act. Thus, according to us, the trial court should have believed the documents of invoices, such as invoices of the delivery chalan and ledger account, in absence of any dispute or rebuttal evidence submitted by the respondent-original defendant. Once the document has been exhibited, the initial burden of proof could be said to have been discharged by the original plaintiff. The original defendant was expected to deny the same with cogent rebuttal evidence, but having failed in submitting the rebuttal evidence, the trial court could not have ignored the exhibited evidence/undisputed evidence merely because there was no oral evidence in the form of examination of any evidence by the witness in support of the documentary evidence.

29) In our view, when the appellant-original plaintiff has produced the copies of the invoices and the delivery chalans duly stamped and signed by the respondent-defendant, more particularly, when there is no denial whatsoever on behalf of the respondent-original defendant, in view of Section 59 of the Act,

1872, the trial court should not have held that no oral evidence in the form of examining any evidence about the delivery of goods should have been made. When the initial burden of proof has been discharged by the plaintiff, it is for the respondent-defendant to rebut such evidence.

30) The trial court only kept one thing in mind, i.e. the provisions of 34 of the Act, 1872, which says that, the statement made during the course of business shall not alone be sufficient evidence to charge the person with any liability. This means that the production of only a ledger account would not be sufficient to establish the case. Some corroborative material should be adduced in support of such documents. The trial court should not have been oblivious of the evidence, such as, the statement at Exhibit 156 read with the documents produced at Exhibits 22 to 152, i.e. the invoices and the delivery chalans, which are undisputed.

31) In view of the aforesaid facts and circumstances of the case, in our considered opinion and even as per Section 34 of the Act, 1872, the plaintiff could be said to have complied with the requirements of producing the other evidence to substantiate the

ledger account. The trial court has committed serious error in holding that the plaintiff has failed to establish that a sum of Rs.29,36,211/- (Rupees Twenty-Nine Lakh Thirty-Six Thousand Two Hundred Eleven Only) is due and recoverable from the defendant out of the total dues of Rs.42,31,167/- (Rupees Forty-Two Lakh Thirty-One Thousand One Hundred Sixty Seven Only).

32) According to us, the trial court ought not have ignored the evidence led by the plaintiff through his Power of Attorney. In our view, the Power of Attorney Holder certainly can depose in the proceedings to the extent of his personal knowledge about the transactions. In the instant case, the date of the Power of Attorney is 15.07.2011 and this Power of Attorney was executed for a special reason to institute legal proceedings on behalf of the firm. The Power of Attorney Holder appears to have been acting on behalf of the firm since long and thereby it would not be appropriate to presume that the Power of Attorney Holder has no personal knowledge as regards the transactions in question, more so, when there was no cross examination of the Power of Attorney Holder disputing, *inter-alia*, his personal knowledge of the transaction in question. Thus, in our considered opinion, the view taken by the trial court as regards not having personal knowledge is erroneous. We say so because there cannot be any

general presumption that the Power of Attorney Holder would not possess any personal knowledge. The defendant has to confront the Power of Attorney as regards his personal knowledge. However, in the instant case, as noted above, the Power of Attorney Holder was not cross-examined. Thus, there is no dispute about his personal knowledge.

33) In the result, this Appeal succeeds and is hereby allowed. The impugned judgment and decree passed by the Principal Senior Civil Judge, Vapi, dated 18.07.2012, in the Special Civil Suit No.62 of 2016 (Old No.72 of 2014) is hereby quashed and set-aside. The Special Civil Suit No.62 of 2016 (Old No.72 of 2014) is hereby allowed. The defendant is directed to pay an amount of Rs.29,36,211/- (Rupees Twenty-Nine Lakh Thirty-Six Thousand Two Hundred Eleven Only) with running interest @ 6% per annum from the date of the institution of the suit.

34) Registry to draw the decree accordingly.

(J. B. PARDIWALA, J.)

(NIRAL R. MEHTA, J.)

/MOINUDDIN