

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **IA No. 6769/2008 in CS(OS) No. 844/2008**

Date of Decision : 02.02.2010

Schenker India Pvt. Ltd.

..... Plaintiff

Through: Mr. V. K. Gupta,
Advocate.

Versus

Sirpur Paper Mills Ltd.

..... Defendant

Through: Mr. Anil Gera, Advocate.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 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 the judgment should be reported in the Digest ? | Yes |

V.K. SHALI, J.

1. This order shall dispose of the application filed by the plaintiff bearing no. 6769/2008 under Section 151 CPC of the Limitation Act for condoning the delay of 204 days in refiling the suit.
2. Briefly stated the facts of the case are that the plaintiff filed a suit against the defendant for damages of Rs.5,00,00,000/- and for permanent injunction. It was alleged, in the suit that the plaintiff is a wholly owned subsidiary of Schenker AG, Germany and is engaged in the business of logistics. The plaintiff was alleged to have been carrying on business at international and domestic freight

transporters as air cargo, shipping, chartering, consolidation, forwarding, customs clearing and travel agents etc. It is alleged that the plaintiff came and talked to the defendant at its office in Delhi on 09.09.2005. The defendant vide an e-mail on the same date sought to engage the services of the plaintiff for providing such logistic facilities. The defendant accepted shipment made in respect of the following goods

- a. Material-Second Hand paper machine
- b. Container requirement etc.

3. The sum and substance of the transaction between the plaintiff and the defendant was that the defendant is running a paper mill at Sirpur (Hyderabad) and in the course of its business it had purchased heavy duty machine from Germany and the same was to be transported by the plaintiff from Germany to India finally at Sirpur. During the course of this transaction there were allegations and counter allegations of breach of various obligations on the part of respective sides. The case of the defendant was that the plaintiff had not released some containers which necessitated filing of a suit for injunction against the plaintiff as a consequence of which though the machinery was released by the plaintiff to the defendant, however, the plaintiff claimed that in the process they were defamed on account of various e-mail and other acts of commission and omission on the part of the defendant. It

is also alleged by the plaintiff that the defendant had with a view to pressurize and blackmail the plaintiff filed a criminal complaint under Section 200 Cr.P.C. for registration of an FIR under various provisions of the IPC against the plaintiff and its Managing Director, Delhi. The Plaintiff alleges that the said complaint was dismissed vide order dated 24th March, 2007 as a consequence of which the plaintiff claimed a sum of Rs.76,03,821/- along with the interest @12% from the defendant which was allegedly not at all paid by the defendant to the plaintiff. On the conspectus of these broad facts, the plaintiff chose to file the present suit for recovery of damages of Rs.5,00,00,000/- against the defendant. It also sought decree of mandatory injunction for restraining the defendant from causing any damage or harming the goodwill of the plaintiff. The suit in paragraph 96 contained the cause of action clause as under:

“96. That the cause of action arose on 09.09.2005 when the defendant first wrote to the plaintiff for the shipment from Neustadt of Sirpur. The cause of action arose on every date that the plaintiff subsequently communicated to the defendant in connection with the shipments. The cause of action again arose on every occasion when the demand for a sum of Rs.76,03,821/- was made on the defendant and the defendant instead of paying the due sum, started to level and impute false allegations on the plaintiff with an intent to disrepute the plaintiff in the market so that it suffers in its business. The cause of action again arose when the defendant did not return bare containers to the plaintiff on time and

forced the plaintiff to agree to their demands for returning containers. The cause of action further arose on 27.03.2006 when the plaintiff filed a false criminal case, devoid of merits, against the plaintiff filed a false criminal case, devoid of merits, against the plaintiff to coerce, blackmail and take undue advantage of plaintiff. The cause of action further arose on 24.03.2006 when the false and baseless complaint filed by the defendant was dismissed by the learned ACMM. The cause of action is continuous one and subsists as the defendant is continuing with its malafide intent of ill-reputing and harming image and goodwill of the plaintiff and causing loss in business.”

4. The matter was listed for the first time on 6th May, 2008 when the Court asked the learned counsel for the plaintiff to examine the position regarding the maintainability of the suit in the light of the provisions of Limitation Act. The matter was adjourned to 28th May, 2008 on which date further time was sought by the learned counsel for the plaintiff and the matter was adjourned to 03.09.2008 thereafter adjournments were sought by the learned counsel for the plaintiff. On 22.09.2008 the IA bearing no. 6769/2009 under section 151 CPC seeking condonation of delay in refileing the plaint but it was renotified for 10.11.2008. On 10.11.2008 notice was issued to the defendant whereupon the pleadings of the said IA have been completed and the matter has been listed today for consideration of the said IA to see as to whether the present suit is maintainable in the light of the provisions of the Limitation Act.

5. The learned proxy counsel for the plaintiff has submitted that Mr. Aman Vachher is busy in Supreme Court in some long cause matter, and therefore, requests for an adjournment.
6. A perusal of the order sheet shows that notice on the main suit has still not been issued and almost two years have elapsed and the question of maintainability of the suit itself on the anvil limitation is still to be dealt with. I find myself unable to accede to the request of the learned counsel for the plaintiff for adjournment of the matters.
7. I have heard the learned counsel for the defendant as well as the learned proxy counsel for the plaintiff and proceeded ahead to decide the matter.
8. The issue which needs to be considered is two fold. First, whether the suit which was filed on 09.10.2007 on the basis of averments purported to have been made in the plaint with regard to cause of action was within limitation and if not whether the period of 204 days which the plaintiff has taken in re-filing the suit can be condoned by this Court in exercise of the inherent powers under Section 151 CPC.
9. A perusal of the entire suit and the prayer of the plaintiff essentially shows that the said suit is for the recovery of damages of Rs.5,00,00,000/- for which the period of limitation which has been prescribed under Article 74 or 79 is one year from the date of libel or one year from the date

of distress. The plaintiff himself in his cause of action para states that the said cause of action accrues to the plaintiff for the first time on 26.03.2006. If the period of limitation is to be reckoned from 27.03.2006 the said period of limitation of one year would come to end on 26.06.2007 while as admittedly the plaint has been filed by the plaintiff on 09.10.2007, and therefore, on the face of it the suit of the plaintiff with regard to its main relief of claiming damages under tort law is barred by limitation.

10. It may be further pertinent to mention here that although the delay which a party may cause in filing an appeal or an application can be condoned under Section 5 of the Limitation Act but Section 3 clearly bars the filing of a suit or entertaining a suit which is hit by limitation. Section 5 of the Limitation Act does not apply to the suit as the word “**suit**” is omitted by the legislature in the language of the said section. Therefore, delay in filing the suit cannot be condoned by invoking Section 5 of the Limitation Act, much less the same can be done by resorting to Section 151 of the CPC.
11. In addition to this, it may be pertinent here to mention that a suit is said to be instituted in terms of the Section 3 (2) of the Limitation Act only when it is instituted in an ordinary case where the plaint is presented to a proper officer. A plaint is presented to a proper officer only if it is having appropriate ad-valorem court fees paid on the same or in

case the appropriate Court fees on the suit is not paid, there is an application under Section 149 CPC seeking enlargement of time to pay deficient court fees.

12. In the instant case, the contention of the learned counsel for the plaintiff is that the suit was presented originally on 09.10.2007. Objections were raised regarding the maintainability of the suit because proper ad valorem court fees was not paid. The learned counsel for the defendant in his reply to the application filed by the plaintiff under Section 151 CPC has raised a ground of non-payment of ad valorem court fees so as to urge that originally filing of the suit on 09.10.2007 itself could not be treated as valid filing, therefore, suit was barred by limitation. The plaintiff has sought to give an explanation that the court fees was actually paid to the clerk for purchase of court fees who on account of inadvertent mistake has forgotten to purchase the same. This explanation does not help the plaintiff to bring the suit within limitation. Further, the refiling has been done after 204 days which clearly shows that there was a complete negligence on the part of the plaintiff by not filing the suit in time but even the refiling which is normally to be done within a period of one week, according to the High Court Practice and Direction, it has been done after 204 days, which is again exceeding the stipulated period of one week, the entire period will be counted towards original delay, if the filing is done after more than

one week or so that the initial filing is assumed to have been done on the day when the refilling is done. If this format is followed then the filing in this case is not assumed to have been done on 09.10.2007 but 204 days latter and this delay of 204 days cannot be condoned. The explanation which has been furnished by the plaintiff is totally unbelievable.

13. I am of the considered opinion that since the suit is for recovery of Rs. 5,00,00,000/- it should have been filed within a period of one year from the date of accrual of cause of action and if calculated the same on the basis of the averments made by the plaintiff in the plaint then the said period of limitation have would come to an end on 26.03.2007. Since the suit itself has not been filed within the period of limitation, subsequent period of 204 days cannot be condoned and the suit is dismissed as barred by limitation. All the pending IAs are also dismissed.

V.K. SHALI, J.

February 02, 2010
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