

**(2014) 10 DEL CK 0245****Delhi High Court****Case No:** I.A. No. 13981/2013 in C.S. (OS) No. 1009 of 2013

Rathi Steel Limited

APPELLANT

Vs

S &amp; S Technocrats (P) Ltd.

RESPONDENT

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**Date of Decision:** Oct. 10, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 17 Rule 17, Order 37 Rule 3(5), Order 37 Rule 37, 151, 34
- Sales of Goods Act, 1930 - Section 41, 42, 43

**Citation:** (2015) 215 DLT 420**Hon'ble Judges:** G.P. Mittal, J**Bench:** Single Bench**Advocate:** Amita Singh Kalkal, Advocates for the Appellant; Man Mohan Goel and Lalit Sharma, Advocates for the Respondent

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**Judgement**

G.P. Mittal, J.

This is a summary suit for recovery of Rs. 55,28,508/- under Order 37 of the Code of Civil Procedure, 1908 (CPC). The Plaintiff's averments are that the Defendant by a written request dated 15.7.2009 (through fax) placed an order for supply of 99.280 MT TMT bars, as detailed in para 4 of the plaint. The amount payable by the Defendant in respect of 99.280 MT TMT bars was Rs. 31,93,421/-. It is averred that the Plaintiff had been orally and in writing requesting the Defendant to make payment of the goods supplied. The Plaintiff again wrote a letter dated 16.11.2009, requesting the Defendant to clear the outstanding payment of Rs. 31,93,421/-. For the sake of convenience and proper appreciation of the case, it would be appropriate to extract the letter herein:

"Sub: Outstanding Payment

Dear Sir,

We refer to the long outstanding payment worth Rs. 31,93,421/- outstanding since, July, 2009 towards supply of MS Bars to your Saket, New Delhi site. In follow up to the payment, we have been in touch with you telephonically as well as on various occasions apart from personal meeting with you in the month of August 2009, September 2009 and October 2009, but regret to inform you that neither the payment has been made to us nor you honour your word of commitment, given in personal meetings.

The details of outstanding are reproduced below:

We, whereas, again request you to start making the payment against supplies as aforesaid. Any letter of acknowledgement from your side would comfort us of any business hardship which you may facing."

2. It is averred that the Defendant wrote a letter dated 27.11.2009 (Document 5) asking the Plaintiff to resolve the matter regarding quality at sight with one Mr. Bharat Bhusan. The letter is extracted hereunder:

"With reference to reminder 1,2 dated 6.11.2009 and 16.11.2009, we would request that you kindly get your matter resolved regarding quality at site/Mr. Bharat Bhusan, Architect of INDESIGN. After setting the matter, please contact us to enable us to take further action in this matter."

3. According to the Plaintiff on 2.12.2010, the Defendant issued a cheque for Rs. 3,00,000/- drawn on State Bank of Indore against the outstanding amount of Rs. 31,93,421/- leaving the balance amount of Rs. 28,93,421/-.

4. It is the case of the Plaintiff that the Plaintiff did not receive any response from the architect and, therefore, it sent a reminder dated 28.11.2009 (Document 6) to the Defendant again asking for outstanding payment. The Defendant again required the Plaintiff to act in accordance with its letter dated 27.11.2009. The Plaintiff wrote several letters thereafter and ultimately served a legal notice dated 16.2.2010 upon the Defendant.

5. The Defendant in reply dated 25.2.2010 to the legal notice took up a plea that the Plaintiff had already lifted the material from the premises of the Defendant on 16.1.2010 but the bill was not cancelled. Thus, at this time, the Defendant completely denied its liability.

6. The Defendant filed an application being IA No. 13981/2013 under Order 37 Rule 3(5) read with Section 151, CPC seeking unconditional leave of the Court to defend the suit. The sum and substance of the defence raised by the Defendant is that the plaint filed by the Plaintiff is supported by forged and fabricated documents and is based on false and concocted facts. It is further the case of the Defendant that the suit based on invoice No. 14/658 dated 16.7.2009, invoice No. 14/667 dated 17.7.2009, invoice No. 14/668 dated 17.7.2009 and invoice No. 14/672 dated 18.7.2009 has been filed beyond the period of limitation and thus, is liable to be

dismissed.

7. Further, it is the case of the Defendant that the cheque dated 2.12.2010 for Rs. 3,00,000/- was given by the Defendant to the Plaintiff for supply of material at DAV Public School site at Gurgaon. The Plaintiff failed to supply the goods and also failed to return the earlier stated amount of Rs. 3,00,000/-. In fact, a counter claim for recovery of Rs. 4,98,000/- along with interest @ 24% per annum was also filed by the Defendant against the Plaintiff which was not pressed at the time of hearing the application seeking leave to defend the suit.

8. The Plaintiff filed a reply to the application seeking leave to contest. The Plaintiff stated that the story of supplying any material at DAV Public School site at Gurgaon and an advance of Rs. 3,00,000/- by a cheque dated 2.12.2010 in that account has been weaved by the Defendant in order to put a sham defence to the suit. It is stated that the letter dated 18.1.2010 was strangely and allegedly sent to the Plaintiff only by Under Certificate of Posting (UPC) although, other communications were always sent to it by registered post. It has been stated that the Defendant has not placed on record any document like Site Gate Entry proof to enter and exit of the vehicle of the Plaintiff at the Defendant's site. It is the case of the Plaintiff that the Defendant has not been able to put up a plausible or probable defence so as to entitle him to the grant of leave to defend the suit.

9. Although the counter claim filed by the Defendant was not pressed at the time of hearing of the application seeking leave to defend the suit, it is no longer *res integra* that a counter claim cannot be permitted to be raised in a suit under Order 37, CPC.

10. In *Union of India & Ors. v. Raj Kumar Sawheny*, 1995 III AD (Delhi) 881, a learned Single Judge of this Court held as under:

"16. It has already been observed above, that a defendant in a suit under Order 37 is not entitled to defend the claim of the plaintiff unless he raised certain triable issues by way of defence in his application for leave to defend. Thus the counter-claims are beyond the scope of Order 37 of the Code and cannot be entertained thereunder. The same view was also given vent to by a Single Judge of this Court as reported in *Bramec Suri (P) Ltd. v. Shri Smith Chem*, 1981 R.L.R. 60...." It is the defence with regard to course of dealings and cause of action set up in the plaint which has to be taken into account while granting such permission. Extraneous controversies and different causes of action cannot justify enlargement of the scope and purpose of the summary action brought under Order 37."

11. Referring to [Kiranmoyee Dassi and another Vs. Dr. J. Chatterjee](#) in [Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation](#), the Supreme Court reiterated the principles as to where leave to contest the suit should be granted. In para 8, the Supreme Court held as under:

"8. In [Kiranmoyee Dassi and another Vs. Dr. J. Chatterjee](#) Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17, CPC in the form of the following propositions (at p. 253)-

"(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence setup is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

12. Thus, if the Defendant raises triable issues that he has a fair, bona fide and reasonable defence even if not positively a good defence, the Defendant is entitled to unconditional leave to defend the suit. At the same time, if the Defendant discloses such facts which may be deemed sufficient to entitle him to defend the suit although, the Affidavit does not positively and immediately make it clear that he has a defence, the Defendant would be entitled to leave to defend the suit, but in such cases, the Court may in its discretion impose condition as to the time or mode of trial or furnishing a security. If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine, normally the Defendant is not entitled to leave to defend the suit.

13. In the backdrop of the above stated legal principles, it has to be seen whether the application seeking leave to defend the suit filed by the Defendant discloses a bona fide defence to the suit.

14. It is not in dispute that 99.280 MT TMT bars worth Rs. 31,93,421/- were supplied by the Plaintiff to the Defendant on the basis of the Defendant's written order.

15. The defence raised by the Defendant is that the goods i.e. 99.280 MT TMT bars supplied by the Plaintiff to him were not of the quality as asked for, that the goods supplied were of inferior quality and that the goods were also removed by the Plaintiff from the site of the Defendant and thus, there is no question of any liability of making payment in respect of the goods which had been returned by the Defendant. There is a plea with regard to the part payment of Rs. 3,00,000/- in respect of the supply of goods to the Defendant. To this, the Defendant's answer is that this payment was in respect of another supply which was expected to be made by the Plaintiff to the Defendant at another site, i.e., DAV Public School site at Gurgaon.

16. At this juncture, I would like to refer to the provisions of Section 41 to Section 43 of the Sale of Goods Act, 1930. The same reads as under:

"41. Buyer's right of examining the goods--

(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

42. Acceptance--

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

43. Buyer not bound to return rejected goods--

Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

17. As per Section 41 of the Sale of Goods Act, 1930, if the goods delivered to the buyer have not been previously examined, he cannot be said to have accepted the same, unless he had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

18. As per Section 42 of the Sale of Goods Act, 1930, if the buyer after a lapse of reasonable time retains the goods without intimating to the seller that he has rejected them, he is deemed to have accepted the goods.

19. As per Section 43 of the Sale of Goods Act, 1930, buyer is not expected to return the rejected goods and it is always sufficient if he intimates the seller that he refuses to accept the same.

20. In [Lohmann Rausher Gmbh Vs. Medisphere Marketing Pvt. Ltd.,](#) it was held that if Defendant did not reject the goods within a reasonable time, he would be deemed to have accepted the goods.

21. At this juncture, it will become necessary to refer to the documents which are not in dispute.

22. 99.280 MT TMT bars were supplied on various dates to the Defendant, as stated in para 5 of the Plaint, i.e. on 16.7.2009, 17.7.2009 and 18.7.2009. The Defendant has not placed any document before the letter dated 27.11.2009 whereby the Defendant had ever complained about the quality of goods supplied to it by the Plaintiff. The Plaintiff before that date had already written two letters dated 6.11.2009 and 16.11.2009 making a grievance that the Defendant was not making payment in spite of personal meeting in the month of August, September and October, 2009. What the Defendant for the first time did, as can be gathered from the letter dated 27.11.2009 is that the Plaintiff was requested to contact Architect, Mr. Bharat Bhusan at the site for resolving the dispute regarding quality of the goods. Admittedly, this letter was written much after four months of the supply of the goods. The goods supplied are such (99.280 MT TMT bars), which are kept in open ground, which are visible to the persons visiting the site and also its quality can easily be ascertained either by the party concerned or by any agent appointed by the party. Thus, in view of Section 42 of the Sale of Goods Act, in the absence of any grievance or intimation about the quality of goods within a reasonable time, which time in the instance case cannot be more than a couple of weeks, the goods are deemed to have been accepted by the Defendant. Even in the letter dated 27.11.2009, the Defendant has not specifically raised any issue with regard to the quality of the goods supplied to him. The Defendant simply informed the Plaintiff to contact an Architect at site and to resolve the matter regarding quality.

23. There are a few more letters with regard to the claim for outstanding payment, which may not be very relevant except that the Plaintiff insisted for payment by letter dated 29.12.2009, 31.12.2009 and then sent a legal notice dated 16.2.2010 to the Defendant. It was only in reply to the legal notice that a vague defence was

raised by the Defendant that one Mr. Sanjay Maheshavari, representative of the Plaintiff had lifted the TMT bars on 16.01.2010 from the site. Along with the application seeking leave to defend, the Defendant also placed a letter dated 18.1.2010 whereby the Plaintiff was allegedly informed that Mr. Sanjay Maheshavari, representative of the Plaintiff had lifted the goods from the site at night time without any prior information. Curiously, this is the only letter alleged to have been written by the Defendant to the Plaintiff and sent under UPC. However, the receipt of this letter has been denied by the Plaintiff. According to the Plaintiff, this letter is forged and fabricated. There is another letter dated 7.1.2010, which for the first time talked about the quotation being inflated and the test report not from any authorised laboratory. These questions too were raised by the Defendant almost after six months of the supply of the goods to it for the first time.

24. The question for consideration is, can a letter dated 18.1.2010 that the goods were lifted by the Plaintiff's representative be believed. In this connection, it is important to note that the goods in question are 99.280 MT TMT bars. The goods cannot be removed just in a flick of time. A person is required to engage a large amount of labour and trucks to load the goods. It is difficult to comprehend that such a huge quantity of goods would be permitted to be lifted from the site of the Defendant by the persons available at the site without any receipt and without even seeking permission from the owner. Apart from this, when the parties were exchanging letters by registered post, it is not palatable that one isolated letter, through which a plea of removal of the goods by the Plaintiff from the site of the Defendant is raised, is sent only through UPC. In this connection, it would be apposite to refer to a three Judge Bench decision of the Supreme Court in [Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil and Others](#), wherein it was held that a Certificate of Posting is easy to procure and does not inspire confidence. In para 60 of the report, the Supreme Court stated as under:

"60. Gadakh's version that he sent the letter dated May 16,1991 (Ex. Q) under certificate of posting is unbelievable. A certificate of posting is easy to procure and does not inspire confidence. Moreover, the circumstances belie his version. With his considerable means and past experience of elections, he would have sent such a letter by registered post to ensure its delivery and create cogent evidence of its despatch. Moreover, he would not merely send such a letter but have his denial published in newspapers because of its significance during elections. We have no doubt that Gadakh's conduct belies his belated denial at the trial."

25. Similarly, in [State of Maharashtra Vs. Rashid Babubhai Mulani](#), it was held that a Certificate of Posting will be of very little assistance as no record is maintained about any letter sent under the Certificate of Posting.

26. Turning to the facts of the instant case, where all the letters are exchanged between the parties by registered post, it is difficult to comprehend that a vital letter such as removal of goods was merrily written by the Defendant to the Plaintiff and

sent only under Certificate of Posting.

27. Another plea taken by the Defendant seeking leave to defend the suit is that the suit is barred by limitation and that a sum of Rs. 3,00,000/- was paid as an advance in respect of goods to be delivered at another site at DAV Public School Gurgaon for which the goods were not supplied, is also false and an afterthought. This defence in fact destroys the earlier defence of lifting of the goods by the representative of the Plaintiff as well for several reasons. In the letter dated 7.1.2010, the Defendant made grievance about the inflated quotation and inferior quality of the goods. Admittedly, the Defendant had not made payment in respect of the goods as per the letter dated 7.1.2010, although the goods were supplied in July, 2009, i.e., for a long period of six months. Can it be believed that in spite of being dissatisfied with the quality of goods supplied by the Plaintiff, the Defendant will give an advance of Rs. 3,00,000/- towards supply of goods at another site? All the more, the defence of payment of Rs. 3,00,000/- by cheque for supply of other goods came for the first time in reply dated 25.2.2010 to the legal notice dated 16.2.2010 and was sent by registered post to the Plaintiff only on 8.3.2010 (as per the registered AD receipt). Moreover, even the details of the goods which were sought to be supplied to the Defendant have not been mentioned in reply dated 25.2.2010. The Defendant for the first time produced a supply order dated 2.12.2010 for supply of certain quantity of TMT bars and also produced a voucher dated 2.12.2010. These documents are only sham documents. These documents have been denied and it is difficult to rely on the same for several reasons in addition to the one that the TMT bars weighing 99.280 MT were never lifted by the Plaintiff's representative from the site. As per the Defendant, the order was placed on 2.12.2010 and the amount of Rs. 3,00,000/- was also received through a cheque, which according to the Plaintiff was towards the part payment of the dues in respect of this suit. The Defendant never approached the Plaintiff for supply of the goods in respect of the alleged order dated 2.12.2010 before 15.4.2011. The construction of institutional buildings goes on at a very fast pace and the contractor cannot wait for supply of goods, particularly, TMT bars, which are required for piling, columns, beams and laying RCC roof for 4/5 months.

28. In view of the law laid down in *Mechelec Engineers & Manufacturers*, the defence raised by the Defendant (applicant) is sham and moonshine and is palpably false. The Defendant, therefore, is not entitled to leave to defend the suit. The same is accordingly rejected.

29. The Plaintiff has claimed interest @ 24% per annum on the basis of the contract. In *Varun Gauba v. Punjab & Sind Bank & Ors.*, KFA No. 264/2012, decided on 9.7.2012, while dealing with an appeal in respect of a suit under Order 37, CPC, this Court did not interfere with the grant of interest @ 22.5% per annum which was the agreed rate of interest as per the contract till the date of filing of the suit.

30. In *Sanjay Kumar v. Suresh Chand Gupta*, ILR (2010) Supp. (3) Delhi 806, (RFA 733/2010, decided on 29.11.2010) this Court dismissed an appeal against the



judgment declining the leave to contest and interest @ 15% per annum, which was the agreed rate of interest.

31. In [Bush Boake Allen \(India\) Ltd. Vs. Mehtajee and Company and Others,](#) an interest of 24% per annum was claimed without any agreement with regard to payment of interest between the parties. A learned Single Judge of this Court while declining leave to contest, allowed interest @ 6% per annum as there was no agreement to pay interest @ 24% per annum.

32. In the instant case, all the invoices clearly stipulate payment of interest @ 36% per annum, if the payments are not made on presentation of bill. The question for consideration is whether the Plaintiff should be allowed interest @ 36% per annum as per this contract contained in the invoice.

33. Normally, interest as per the contract is allowed in suits under Order 37, CPC in relation to the commercial transactions. The Plaintiff has claimed interest @ 24% per annum as against the stipulation interest @ 36% per annum in the invoices.

34. Section 34, CPC deals with grant of interest during pendency of the suit and after decision of the suit in addition to the interest awarded up to the date of filing of the suit. Section 34, CPC is extracted hereunder:

"34. Interest--

(1) Where and insofar as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, 2[with further interest at such rate not exceeding six percent, per annum as the Court deems reasonable on such principal sum from] the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

[Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six percent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I.--In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 (5 of 1970).

Explanation II.--For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.]

(2) Where such a decree is silent with respect to the payment of further interest 3[on such principal sum] from the date of the decree to the date of payment or other

earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie."

35. As per proviso appended to Sub-section (1) of Section 34, CPC, interest can be awarded beyond 6% per annum but should not exceed the contractual rate of interest and where there is no contractual rate of interest, the interest can be awarded at the rate at which money is lend or advanced by Nationalised Banks in relation to the commercial transactions. The claim of interest @ 24% per annum appears to be on the higher side. Considering the fact that the payment of the bills was withheld by the Defendant without any cause although the interest was agreed at the rate of 36% per annum, I am inclined to award interest only @ 16% per annum on the amount of Rs. 28,93,421/- from 4.8.2009 till the date of filing of the suit. I also grant interest at the same rate from the date of institution of the suit till the date of the decree and from the date of the decree till the realisation of the amount.

36. The Plaintiff shall also be entitled to the cost of the suit.

37. The suit is decreed in above terms. A decree sheet be drawn accordingly.

38. Suit stands disposed of. Pending applications also stand disposed of.