Sharma Enterprises Vs Hotel Leelaventure Ltd.

CS (OS) No. 2254 of 1989

Court: Delhi High Court

Date of Decision: April 13, 2009

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 13 Rule 4, Order 18 Rule 4, Order 8 Rule 1A(3), 34#Contract Act, 1872 â€" Section 2(6), 54, 55#Sales of Goods Act, 1930 â€" Section 11

Citation: (2010) 7 RCR(Civil) 2812

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: Roxna S. Swamy, for the Appellant; Sanjay Jain and Jhuma Bose, for the Respondent

Judgement

Anil Kumar, J.
This judgment shall dispose of plaintiff''s suit for recovery of Rs. 20,35,101.88 filed against the defendant for recovery of

the amounts due from the defendant to the plaintiff.

2. Brief facts to appreciate the controversies between the parties are that the plaintiff is a partnership firm duly registered under the Partnership Act

and Shri Ramesh Sharma is one of its partners. It was contended by the plaintiff that Shri Ramesh Sharma was one of its registered partners who is

authorized and competent to sign, verify and institute the suit on behalf of plaintiff''s firm.

3. The defendant is a private limited company which was constructing a five star luxury hotel in Bombay. The plaintiff was contacted for supply and

fixing furniture in the luxury suites in the Leela Penta Hotel of the defendant. The plaintiff had shown their willingness to carryout the interior work

including supply and fixing of furniture at the same rate as were given to M/s. Damian, Bombay.

4. It was contended by the plaintiff that a work order No. HLV/MD/Suits/86 dated 12th December, 1986 was placed with the plaintiff, for a sum

of Rs. 18,27,635/-, for providing furniture for 24 suites. The terms and conditions were incorporated in the work order dated 12th December,

1986. An endorsement was made on the work order by the plaintiff on 17th December, 1986 accepting the terms and conditions. The work order

was accepted at Delhi on 17th December, 1986 and on the same date, plaintiff received from the defendant a draft of Rs. 2.94 lakh dated 13th

December, 1986. While accepting the work order, it was categorically stipulated that payment conditions were to be reviewed.

5. The copies of the work order placed with the plaintiff were accepted by him and were sent to M/s. Rajinder Kumar and Associates, New

Delhi, interior decorators of the defendant for this project and to M/s. Semac, New Delhi, authorized consultant of M/s. Rajinder Kumar and

Associates as the work had to be carried out as per their specifications and instructions. The bills of the plaintiff were also to be certified by them.

Before the formal agreement could be executed, for which the plaintiff had supplied a stamp paper of Rs. 10, by letter dated 29th December,

1986 the defendant altered the scope of work and restricted it to 12 suites only in place of 24 suites. Consequently, the total consideration was

also changed to Rs. 9,13,817/-. The letter dated 29th December, 1986 awarding the modified work was accepted by the plaintiff and thereafter,

plaintiff executed the work. On completion of 80% of the work, the plaintiff wrote to the defendant on 16th February, 1987 that despite

concluding 80% of the work, necessary drawings had not been received by the plaintiff and therefore, it was not possible to send all the furniture to

Bombay. By the said letter dated 16th February, 1987, the plaintiff also claimed release of another sum of Rs. 3.00 lakh on account of running

payment.

6. After the plaintiff had completed 80% of the work, the defendant, vide work order No. HLV/VPE/86/083 dated 25th February, 1987, further

ordered the plaintiff to complete work on 14 more suites by 31st March, 1987. The other terms and conditions for executing the work for

additional 14 suites remained the same.

7. The defendant, thereafter, made further payment of Rs. 2.94 lakh, by cheque No. 427495 and Rs. 98,000/- by D.D.No. 139732 on 26th

February, 1987. A further amount of Rs. 9,17,919/- was due to the plaintiff which as per terms of the agreement was payable by the defendant to

the plaintiff within seven days after receiving the certificate from the architect. This amount was, however, not paid and only a sum of Rs. 1.86 lakh

was paid by cheque No. 027555 on 10th March, 1987. Thereafter an amount of Rs. 28,000/- was paid in cash on 13th March, 1987 and an

amount of Rs. 73,500/- was paid by cheque No. 353 on 18th March,1987, however, the entire amount was not paid.

8. The plaintiff asserted that the defendant was satisfied with the work done in the 12 suites in the hotel of defendant and therefore, the defendant

had placed the order for the work in additional 14 suites. According to the plaintiff, the additional work of 14 suites was given only after defendant

was satisfied about the quality of the work executed by the plaintiff. According to the plaintiff the only complaint which the defendant had about the

work done by the plaintiff was about the rate of its progress. It was averred that since the delay was not due to any fault on the part of the plaintiff,

by communication dated 5th April, 1987, the plaintiff had intimated the defendant that the furniture for the executive suites was lying ready at the

site for many days and that despite a number of reminders by the plaintiff"s supervisor at the site regarding supply of upholstered material, the

material had not been supplied nor has the carpet laying work been completed and therefore it was not possible for the plaintiff to complete its

work.

9. The plaintiff contended that losses were suffered by plaintiff on account of its labour sitting idle and even the marble for the dining tables in the

suites had not been provided. The letter dated 5th April, 1987 was not replied to by the defendant. The plaintiff also complained about change of

fabric material 3/4 times as per the instructions of the Chairman of the defendant company and the Project Coordinator at that time Mrs. Neelam

Mukherjee, which had further contributed to delay. The plaintiff"s allegation is that only some minor polishing job and finishing works were left

which were, however, completed later on as and when suites were made available to the plaintiff after completion of the civil work. The plaintiff in

any case contended that he finished and completed the entire work by 3rd week of April, 1987 and these facts were also communicated to

defendant by letter dated 17th April, 1987.

10. By letter dated 17th April, 1987, the plaintiff had also pointed out about the making of 29 sets of sofa and chairs at the instance of the

defendant for the 7th floor of the hotel valued at Rs. 3.00 lakh (approximately). By the said letter, the plaintiff had also pointed out the additional

work done by him for which was payment was to be made as extra items, the value of which was estimated to be between Rs. 1.50 lakh to Rs.

2.00 lakh. The defendant, however, by letter dated 24th April, 1987 brought to the notice of the plaintiff that no certified bills were pending with

him from Mr. Murthy of M/s. Semac by whom all the bills had to be scrutinized and certified. The defendant also pointed out in said letter that he

had carried out many works departmentally on behalf of plaintiff and that deductions would be made in that respect from the bills of the plaintiff,

however, no details of such works alleged to had been carried out were given.

11. Since the defendant had pointed out by letter dated 24th April, 1987 that no certified bills were pending, the plaintiff sent the Bill No.

RAC/01/87-08 dated 25th April, 1987 for a total amount of Rs. 19,96,607.60. The plaintiff also explained the allegation of slow progress of work

and contended that no payment had been made to the plaintiff although plaintiff had been carrying out work as usual and the defects and

rectification pointed out had been carried out and rectified by Shri Baldev Sharma who was available at the site on 29th April, 1987. On 2nd May,

1987, the defendant, however, paid an amount of Rs. 9,800/- by its Cheque No. 002440. The plaintiff, therefore, on 4th May, 1987 pointed out

to the defendant that out of their total liability of Rs. 27,37,842/- an amount of less than Rs. 10.00 lakh only has been paid and, therefore, plaintiff

further demanded ad hoc payments of about rupees nine lakh to rupees ten lakh at the earliest. The plaintiff also brought to the notice of the

defendant that the entire work had been completed except placing of furniture and upholstery work. The plaintiff also raised an extra item bill No.

05/87-88 for Rs. 4,74,235/-.

12. The plaintiff asserted that on 6th May, 1987, a meeting had taken place between the plaintiff and Mr.Vivek Nair and Mr.Dhavle on behalf of

Defendant Company who had assured the payment and that it was represented by them that an amount of Rs. 3.28 lakh shall be paid on 6th May,

1987 itself. However, later on when the plaintiff approached the Accounts Department of the defendant, he was told that only an amount of Rs.

1.00 lakh in place of Rs. 3.28 lakh could be paid. The plaintiff objected to the same in its letter dated 9th May, 1986 to the Chairman of the

defendant company and also reiterated the amounts which were due. By another communication dated 9th May, 1987, plaintiff also brought to the

notice of the defendant that the reason for the non- certification of his bill by the Accounts Department was the non- availability of Mr.Murthy who

has not been on the site for a long time and the bill could not be certified in the absence of Mr. Murthy. plaintiff also pointed out that no work is

pending and the changes which were sought by the defendant had also been carried out. The plaintiff also pointed out that 29 sets of sofa chairs

and dresser chairs were dispatched on 2nd May, 1987 and had reached the site by 7th May, 1987 and Bill No. 6/87-88 dated 9th May, 1987 for

an amount of Rs. 2,66,655/- had also been raised.

13. It is contended on behalf of plaintiff that on 18th May, 1987, the defendant wrote to him about the rejection of 29 sofa sets, on the ground that

the plaintiff has not accepted the rates quoted by defendant and has raised the bill No. 6/87-88 dated 9th May, 1987 and since the furniture were

not received by 2nd May, 1987, the defendant had a right to cancel the order. The defendant, therefore, asked the plaintiff to remove all the

furniture from the site. The defendant reiterated these facts by letter dated 11th June, 1987 and 28th July, 1987 and 29th August, 1987. By letter

dated 29th August, 1987 defendant is alleged to have communicated to the plaintiff that the management has to incur heavy expenses for safe

custody of 29 sofa sets and consequently from 9th May, 1986 onwards an amount of Rs. 2,000/- per day would be debited from the account of

the plaintiff towards storage charges.

14. Refuting the allegations of the defendant, plaintiff by its letter dated 28th June, 1987 had communicated that the bill could be amended on the

basis of rates quoted by M/s.Damian of Bombay and regarding the delay in the delivery, it was stated that while placing the order for 29 sofa sets,

the defendant had represented that amounts are being released as advance which were not released and the sofa sets were sent in good faith. The

plaintiff by letter dated 25th July, 1987 also communicated the balance amount due to the plaintiff amounting to Rs. 13,48,176/- and also rejected

the grounds for rejection of 29 sets of sofas and chairs. Regarding rejection of sofas because they had not reached by 2nd May, 1987, it was

contended that during the verbal discussions 35 days" time was given after giving the mobilization advance and since advance was not given nor the

time as agreed was given, therefore, on the ground that the sofas were not received by 2nd May, 1987 the same could not be rejected. According

to plaintiff, defendant also took another dishonest plea on 13th August, 1987 that the defendant has spent Rs. 5.00 lakhs on rectification of some

alleged defects in the sofa sets. The plaintiff pleaded that the defendant"s stand changed from time to time and the defendant was trying not to pay

the amounts due to the plaintiff. The plaintiff also tired to work out the differences through certain mutual friends. The plaintiff relied on a report

dated 8th October, 1987 worked out by M/s.Jayant Tipnis Consultants Pvt. Ltd. which also recommended that an amount of Rs. 13,46,176/-

plus interest at 18% was due from defendant to the plaintiff. On failure of the defendant to make any further payment the plaintiff sent a demand for

the amount due on 11th August, 1988 and the suit for recovery was filed on 5th August, 1989.

15. The suit was contested by the defendant who contended that the court at Delhi has no jurisdiction to try and dispose of the suit. It was

contended that the suit has been filed with a view to pressurize the defendants to submit to the unreasonable and illegal demands of the plaintiffs.

The defendant, however, admitted that the work order was placed on 12th December, 1986 for supplying furniture for 24 suites. It was admitted

that the defendant released the mobilization advance of Rs. 2,94,000/-. Though a bank guarantee was to be executed by the plaintiff, however, the

amount of Rs. 2,94,000/- was released on 17th December, 1986 without any bank guarantee being furnished by the plaintiff. The scope of work

was reduced from 24 suites to 12 suites on 29th December, 1986 and on 25th February, 1987 additional work for supplying and fixing furniture in

14 additional suites was entrusted to the plaintiff. Regarding the award of work of 14 additional suites, the defendant pleaded that it was not on

account of the satisfactory work of 12 suites but on account of the fact that the defendant was short of time to get the work done in the 14 suites

as the hotel opening was slated for 12th April, 1987 and the plaintiff had agreed to complete the work to meet the deadline.

16. According to the defendant, plaintiff had agreed to complete the work in respect of all the suites by March 31, 1987. Though defendant paid

to the plaintiff an aggregate sum of Rs. 13,50,000/- including Rs. 9,00,000/- as mobilization advance, however, the plaintiff did not complete the

work nor was the progress of the work satisfactory. plaintiff failed to adhere to the time schedule and the work was substandard and unsuitable for

the required standards of a five-star hotel. These facts were communicated to the plaintiff by letter dated 24th April, 1987. The plea of the

defendant is that he had incurred an expenditure of Rs. 3,05,000/- to rectify the defects in the plaintiff''s work and the said amount has been

debited from the amount which are due from defendant to the plaintiff.

17. Regarding the 29 sofa sets, defendant alleged that the sofa sets were rejected as they were not according to specifications and had inferior

quality of workmanship. The plaintiff was also allegedly intimated about the rejection by letter dated 18th May, 1987 that all the 29 sofa sets had

been rejected and the Bill No. 06/87-88 dated 9th May, 1987 for Rs. 2,66,655/- was also returned. It is alleged that since the plaintiff failed to

take back the sofa sets despite various communications, the defendant by letter dated 29th August, 1987 communicated to the plaintiff that the

defendant would charge a sum of Rs. 2,000/- per day towards the storage charges till removal of the sofa sets. Thereafter defendant by inviting

public tenders sold the 29 sofa sets for a sum of Rs. 12,325/-. In the circumstances, the defendant have also claimed a sum of Rs. 14,77,675/- as

storage charges for the 29 sofa sets at the rate of Rs. 2,000/- per day. The defendant contended that no amount is due from defendant to the

plaintiff and on the contrary the defendant have to recover an aggregate sum of Rs. 16,18,062.40 from the plaintiff.

18. The plaintiff filed a replication to the written statement of defendant categorically contending that Shri Vinod Agnari is not the Manager of the

defendant and that he was not competent to sign, verify the pleadings on behalf of the defendant company. The plaintiff denied the allegations made

by the defendant that were contrary to the pleas and contentions of the plaintiff and reiterated his pleas.

19. On the basis of the pleadings and the documents of the parties, the following issues were framed on 15th November, 1991:

1. Whether this Court has no territorial jurisdiction? OPD

2. Whether the plaintiff is a registered partnership firm? OPP

3. Whether Mr.Ramesh Kumar Sharma is one of the registered partners of the plaintiff firm and whether the plaint has been signed and verified and

the suit has been instituted by a duly authorized person? OPP

4. Whether the plaintiff failed to adhere to the time schedule for completing the work. If so to what effect?

5. Whether the plaintiff''s work was sub-standard and unsuitable for the required standard of a five star hotel as alleged in the written statement. If

so to what effect? OPD

6. Whether the plaintiff is entitled to the payments against their bills dated 25th April, 1987, 4th May, 1987 and 9th May, 1987? OPP

7. Whether the written statement has been signed and verified by a duly authorized person? OPD

8. To what amount, if any, the plaintiff is entitled towards principal and interest?

9. Relief.

20. On behalf of plaintiff, Shri Ramesh Sharma, PW-1; Shri Baldev Sharm, PW-2; Shri Joginder Singh Chhabra, PW-3; Shri Resham Singh, PW-

4 and Shri Vishwanath Sharma, PW-5, were examined. The depositions of these witnesses were filed on affidavits and they were cross-examined.

21. The defendant filed the deposition of Sh.Arvind Waman Degwekar, Deputy General Manager by an affidavit dated 12th August, 2005 who

was cross examined by the plaintiff. During the course of the arguments an application under Order XVIII Rule 4 and Order XVII and Order VIII

Rule 1-A(3), being IA No. 4656/2006, was filed seeking to examine Sh.Vinod Agnani the signatory of the written statement and to place on

record his appointment letter. The application was allowed and an additional deposition of the witness of the defendant, Sh.Vinod Agnani, was

taken on record and the affidavit was exhibited as exhibit DW.2/A. The letter dated 25th February, 1985 by the Managing Director of Leela

Scottish Lace Pvt. Ltd. was also taken on record and was exhibited as DW.2/B. The said witness deposed on 24th May, 2006 but he was not

cross examined despite an opportunity given on that date.

22. The learned Counsel for the parties were heard at length and the pleadings and the documents and the evidence have also been perused. By

order dated 7th October, 1998 all the exhibit marks other than those admitted by defendants (exhibit P1 to P32) and those proved in the trial

(exhibit PW.1/1 to PW.1/3 and mark PW 1/B) were deleted. Therefore, it appears exhibit marks PW.2/1 to PW.2/3; PW.5/1 to PW.5/5;

PW.1/5, PW.1/6, PW.3/1 to PW.3/3 and others were deleted. Though the exhibit marks were deleted on these documents by said order, later on

evidence has been led on these documents by the parties, however, these documents have not been exhibited again. The learned Counsel for the

plaintiffs and the defendant have relied on some of these documents which do not have exhibit marks as exhibit marks on those documents were

deleted by order dated 7th October, 1998. Therefore, the question which arises is whether these documents are to be considered or not.

23. The learned Counsel for the plaintiff has contended that even though the exhibit marks were deleted pursuant to order dated 7th October,

1998. However, in view of the testimonies of various witnesses regarding these documents, they can be considered. The learned Counsel has

relied on Shiv Ram Vs. Thakar Dutt, Ram Rattan (Dead) by Lrs. Vs. Bajrang Lal and Others, Santosh Kumar Gupta and Others Vs. Jay Prakash

Agarwal, to contend that if a party fails to make an endorsement on a document of an exhibit mark under Order XIII Rule 4 of the Code of Civil

Procedure, it does not preclude the consideration of the document, if the evidence has already been led about that document and it has been

proved.

24. The learned Counsel for the plaintiff has referred to the testimonies of the partner of the petitioner and of various witnesses on behalf of

petitioner who have deposed about these documents. She has contended that in view of the testimonies recorded about these documents whose

exhibit marks were deleted, they have been proved and consequently they should be considered even though the exhibit marks were not put on

those documents.

25. Perusal of the testimony of the partner of the plaintiff and other witnesses reveal that there is ample evidence regarding the proof of these

documents on which the exhibit marks were given earlier but later on before the evidence was recorded, the exhibit marks were deleted. In Shiv

Ram (supra) it was held that omission to make the endorsement required under Order XIII Rule 4 of the CPC does not preclude the consideration

of the document. The said provision contemplates that a document which has been admitted in evidence should bear an endorsement by the judge

as to the number and title of the suit, the name of the person producing the document, the date on which it was produced and a statement of its

having been so admitted. Admission of the document is not on account of endorsement made by the judge but on account of evidence already led

in respect of the document. For this reason, the converse is also true that mere marking or endorsement of a document is not the proof of the

document unless there is cogent evidence in regard to the document. In Ram Rattan (supra) the Supreme Court had held that when a document is

tendered in evidence and an objection is raised by the opposite party that the document is not admissible, it is obligatory upon the judge to decide

the objection. However, endorsing an exhibit mark with a stipulation that the objections shall be decided later on, is not proof of the document

unless the objection is decided. Therefore, merely putting an exhibit mark is not the proof of the document. Conversely the absence of an exhibit

mark on a document will not preclude the Court from considering the said document if evidence in respect of the proof of the document has been

led.

26. Consequently, all the exhibit marks which were deleted should be treated as the exhibit marks of those documents for purpose of identification

as ample evidence has been led by the plaintiff''s partner and other witnesses later on about these documents. Exhibit PW.1/8 dated 25th July,

1987 will be one of the relevant document as the defendant has claimed that the plaintiff had agreed to give credit for the amounts claimed in that

letter. By the said debit note exhibit PW.1/8 a sum of Rs. 1,01,561/- has been claimed.

27. On behalf of learned Counsel for the defendant an undated written submission was filed wherein it was contended that since the authorization

of Sh.Vinod Agnani to sign and verify the written statement has been established, in the circumstances the defendant has given up issue Nos. 1 to 3

& 5. It has further been contended that there is no liability of defendant and even if plea and contentions of the plaintiff are admitted to have been

proved, the liability of the defendant cannot be more than Rs. 12,98,261/- towards the principal sum. It was also contended that there is no liability

of pay the interest and in any case it cannot be more than 6% per annum simple interest. Though the defendant had given up issue Nos. 1 to 3 & 5,

however, in view of the detailed evidence already led by the plaintiff, they are dealt with.

28. Issues Nos. 2 & 3 are whether the plaintiff is a registered firm and Sh. Ramesh Kumar Sharma is one of the registered partners of the plaintiff

firm and whether the plaint has been signed, verified and instituted by a duly authorized person. To prove these issues the plaintiff has produced the

partnership deed dated 1st August, 1997, a copy of which is exhibit PW.1/1. PW.1 Sh.Ramesh Sharma has identified his signature and the

signatures of Sh.Baldev Sharma, the other partner of the firm on the partnership deed. The plaintiff has also proved the supplementary deed of

partnership dated 1st April, 1983, a copy of which has been proved as PW.1/2. The plaintiff has also produced Form B of the registration of the

firm which is exhibited as exhibit PW.1/3. These documents, partnership deeds and the document pertaining to the registration of the firm have

been duly proved and have not been refuted by the defendant. It has also been proved that the plaint has been signed and verified by one of the

registered partners who has also instituted the plaint. In these circumstances these issues have been established by the plaintiff and it is held that the

plaintiff is a registered firm and Sh. Ramesh Kumar is one of the registered partners who has signed and verified the plaint and instituted the suit on

behalf of the plaintiff firm. Consequently issues No. 2 & 3 are decided in favor of plaintiff.

29. The onus of issue No. 1 was on the defendant who had contended that the Court at Delhi does not have jurisdiction to try the suit. From the

perusal of the testimony of Sh.Arvind Waman Degwekar, Deputy General Manager of the defendant, it is apparent that no such facts have been

established which will entail an inference that the Courts at Delhi does not have jurisdiction. In contradistinction the plaintiff has deposed

categorically that Capt. Nair, Chairman of the defendant company had stayed at Maurya Sheraton Hotel, New Delhi where he had met him and

where the contract was negotiated and finalized. It was also deposed that prior to the meeting with Capt. Nair there had been discussion with Mr.

Rajinder Kumar of M/s. Rajinder Kumar & Associates, Architects of the defendant company at Delhi. The categorical deposition of Mr. Sharma

is that the acceptance of the rates on behalf of the plaintiff firm was given to Capt. Nair when he was in Delhi. The bank draft for Rs. 2,94,000/-

was given by Mr.Rajinder Kumar from his office at B-6/17, Shopping Centre, Safdarjung Enclave, New Delhi. In the cross examination of PW.1,

Sh.Ramesh Sharma, these facts that the offer to make the furniture was accepted at Delhi and part payment was also made later on by Mr.

Rajinder Kumar of M/s. Rajinder Kumar & Associates, Architects at Delhi, have not been denied nor any suggestions to the contrary were given

to the witnesses of the plaintiff. From the consideration of the deposition of Sh.Ramesh Kumar, PW.1, therefore, it has been established that part

of the cause of action had arisen at Delhi also and nothing has been produced by the defendant to show that the institution of the suit, on account of

any exclusion Clause between the parties, was restricted to a place other than Delhi. In any case the learned Counsel for the defendant in his

written submissions filed by M/s. K.J.John and Company Advocate had also given up the issue No. 1. Therefore, it is held that the Court at Delhi

has jurisdiction and, therefore, the issue whether the Court does not have territorial jurisdiction, is decided against the defendant.

30. On the pleadings of the parties issue No. 7 was framed about the written statement of the defendant, as the plaintiff had contended that the

written statement has not been signed, verified by a duly authorized person on behalf of defendant and the onus to prove this issue was on the

defendant. Sh. Arvind Waman Degwekar, Deputy General Manager of the defendant did not depose anything about his authorization to sign,

verify the written statement on behalf of the defendant company. In fact his affidavit does not disclose any fact as to who has signed, verified the

written statement and how the person who has signed and verified the written statement was authorized on behalf of the defendant company. In his

cross examination recorded on 17th November, 2005 he rather accepted that he joined the defendant company in March, 1999 and except

identifying the signatures of Mr. Dhawle he has no personal knowledge of any of the facts as deposed by him in his deposition on affidavit dated

12th August, 2005. He also categorically deposed that he had no knowledge about the documents. The other witness examined on behalf of

defendant is Mr.Vinod Agnani, DW.2. In his deposition on affidavit dated 24th April, 2006 he stated that he has seen the written statement filed on

behalf of defendant which is signed and verified by him. It is further deposed by him that in the year 1989 when the suit was filed he was involved

in day to day activities of finance related matters as he was employed as a Finance Manager with the holding company of the defendant. He also

produced a letter dated 25th February, 1985 on the letter head of Leela Scottish Lace Pvt. Ltd. which document is exhibited as exhibit DW.2/B.

By virtue of the said letter the Managing Director of Leela Scottish Lace Pvt Ltd, had appointed Mr.Vinod Agnani, DW.2 as a finance manager in

Leela Scottish Lace Pvt Ltd. Appointment letter of of DW.2 does not stipulate that Leela Scottish Lace Pvt. Ltd. is the holding company of

defendant and Sh.Vinod Agnani, DW.2 shall be liable to look after day to day finances of the defendant company. In his deposition DW.2 has

admitted that he does not recollect as to how much share holding Leela Scottish Lace Pvt. Ltd. had in defendant company. He, however, also

stated that it was about 40%. It has not been established that Leela Scottish Lace Pvt. Ltd. is the holding company of defendant. From the

appointment letter of the said witness in Leela Scottish Lace Pvt. Ltd. it is not established that he was liable to look after day to day finances of

defendant company. The defendant seems to be a company incorporated under the Company Law. Neither the memorandum of Association or

Articles of Association has been produced to show that the Director of a holding company was authorized to appoint any person to sign and verify

the pleadings on behalf of the defendant company nor any other authorization has been proved to show as to who are the persons who were

authorized to appoint a duly authorized person on behalf of defendant company. Director of an holding company also becomes authorized pursuant

to a resolution passed in his favor. No resolution has been produced and proved to show that Mr.Vinod Agnani was authorized to sign and verify

the written statement on behalf of M/s. Hotel Leela Venture Limited. The verification of the written statement dated 14th February, 1990 also is by

Sh.Vinod Agnani of Bombay Indian Inhabitants and manager of the defendant. The written statement, except in the verification, does not give any

description of Sh.Vinod Agnani as to what was his designation or authorization as far as the defendant company is concerned. It has also not been

averred and established that an employee of M/s Bombay Indian Inhabitants could sign and verify the pleadings on behalf of M/s Hotel Leela

Venture Limited.

31. In the circumstances it has not been proved as to what was the status of Bombay India Inhabitants and that Mr.Vinod Agnani was the manager

of Bombay India Inhabitants. There is no plea that Leela Scottish Lace Pvt. Ltd. is a holding company of the defendant. The plea of the defendant

therefore, that Sh.Vinod Agnani was the finance manager of Leela Scottish Lace Pvt. Ltd. a holding company of the defendant, is contrary to the

pleas raised in the written statement which describes Sh.Vinod Agnani as a manager of Bombay India Inhabitants. In these circumstances, the

defendant has not been able to establish that the written statement filed on behalf of defendant is signed, verified by a duly authorized person.

Consequently, the issue is decided against the defendant holding that the written statement has not been signed and verified by a duly authorized

person. Therefore, natural corollary of this finding is that whatsoever pleas have been taken in the written statement cannot be considered as the

pleas of the defendant company. Therefore the pleas and contentions raised on behalf of the defendant cannot be accepted.

32. The issue Nos. 4, 5 & 6 are considered together though the learned Senior counsel for the defendant, Mr. Jain has not pressed issue No. 5.

The learned Counsel for the defendant had contended that plaintiff has failed to prove that any amount is due from the defendant to the plaintiff. In

the alternative it is contended that even if, it is assumed that the plaintiff has proved his case, the liability of the defendant could not be more than

the amount stipulated in the calculation sheet filed on behalf of the defendant. According to the defendant the amount of three bills allegedly due

from the defendant to the plaintiff are of Rs. 27,37,497/-. According to the learned Counsel Mr. Jain, an amount of Rs. 13,50,000/- has been

received by the plaintiff in accordance with para 4(h) of the written statement at page 101 of the pleadings. In the circumstances, it is contended

that the alleged liability after adjusting the amount already paid will be Rs. 13,87,497/-. From the said liability the learned Counsel for the

defendant has further subtracted an amount of Rs. 1,01,561/- on account of debit note exhibit PW.1/8 leaving an alleged liability of Rs.

12,85,936/-. The defendant had allegedly sold the defective sofas for Rs. 12,235/-. The bill for the sofas was for Rs. 2,66,655/-. Therefore an

amount of Rs. 2,54,330/- is further deducted by the defendant. According to him there is no cross examination on this aspect by the plaintiff of the

defendant''s witnesses and thus after deducting a further sum of Rs. 2,54,330/- the liability of the defendant cannot be of more than Rs.

10,31,606/-. According to the learned Counsel, Mr.Jain maximum deductible amount for delayed delivery as per Clause 14 of the agreement

dated 2nd January, 1986 is Rs. 25,000/- and, therefore, the plaintiff is also be liable for a sum of Rs. 25,000/-. In the circumstances it is

contended that the defendant is also entitled for this amount and therefore, the principal amount due from the defendant to the plaintiff cannot be

more than Rs. 10,06,606/- after deducting this amount of Rs. 25,000/- , which can be rounded off to Rs,10,00,000/- and on this amount the

learned Counsel has calculated the interest @ 6%, in case the defendant is held liable to pay interest. The interest from 1st July, 1989 to 30th

April, 2007 on an amount of Rs. 10,06,606 comes to Rs. 10,70,000/- and, therefore, it is contended that the maximum liability of the defendant

cannot be more than Rs. 20,70,000/-. The learned Counsel for the plaintiff has denied these calculations and has not admitted the same.

33. The amounts of three bills are as follows. Bill No. RAC/01/87-88 dated 25th April, 1987 for Rs. 19,96,607/- which is exhibit PW.1/17; bill

No. RAC/05/87-88 dated 4th May, 1987 for Rs. 4,74,235/- which is exhibit PW.2/6 and bill No. RAC/06/87-88 dated 9th May, 1987 for Rs.

2,66,655/- which is exhibit PW.1/12. These bills had been raised on the defendant and they cannot be denied. The first two bills relate to the

works which were carried out in the suites of Hotel Leela Venture, Bombay and third bill relates to supply of 29 sofa sets.

34. The plea of the defendant is that in respect of the work executed under the first two bills there was delay in execution of work beyond the

specified deadline. Regarding the delay and unsatisfactory execution the defendant has relied on letter dated 2nd February, 1987 which was

exhibited as CW.1/1; letter dated 14th March, 1987 exhibit CW.1/3; letter dated 26th March, 1987 which was exhibited as P-5; letter dated 28th

March, 19987 which is exhibited as P-6; letter dated 4th April, 1987 which is exhibit CW.1/5; letter dated 4th April, 1987 which is exhibit

CW.1/6 and letter dated 27th April, 1987 which is exhibited as CW.1/8.

35. The copy of letter dated 2nd February, 1987 which is exhibited as CW.1/1 is by Vice President (Engineering & Projects) to the plaintiff. This

letter was denied by the plaintiff. This letter of 2nd February, 1987 demands from the plaintiff that till the date of the letter, the work had not been

completed and plaintiff was asked to work out the time schedule and quality of workmanship with Mrs. Neelam, Chief Interior Coordinator. By

letter dated 14th March, 1987 the Vice President (Engineering & Projects) again demanded plaintiff to complete the work with urgency and in

case the plaintiff was not able to do so, the defendant would award part quantity of work to another agency to complete the suites at the risk and

cost of the plaintiff. By letter dated 28th March, 1987, exhibit CW.1/4, the plaintiff was asked to complete the work in all respects by 1st April,

1987 failing which 25% of the contract value was to be deducted as liquidated damages from the amounts payable to the plaintiff. Exhibit CW.1/5

is again a memorandum stipulating that the defendant shall be constrained to withdraw part of the work and hand over to some other contractor

and debit the cost to the account of the plaintiff. Exhibit CW.1/5 was denied by the plaintiff and it is dated 4th April, 1987.

36. The defense of the defendant is that the plaintiff failed to adhere to the time schedule for completing the work. From the evidence led by the

plaintiff it is apparent that the work order for Rs. 18,29,635/- was entered on 12th December, 1986 for providing furniture for 24 hotel suites. The

hotel was scheduled to be opened on 12th April, 1987 and the work was to be completed by 15th February, 1987. This has also emerged that on

19th December, 1986 the scope of the work was reduced to 12 suites and the amount was also reduced from Rs. 18,27,635/- to Rs. 9,13,817/-.

The scope of work was again changed from 12 suites to 26 suites on 25th February, 1987 on the same terms and conditions. The work order

dated 12th December, 1986 incorporated a liquidated damage Clause to the effect that if the work will not be completed within the stipulated time,

the defendant would have the right to recover damages at Rs. 5000/- per week subject to a maximum of 10% of the work value. While modifying

the order reducing the work to 12 suites by communication dated 29th December, 1986 the complete schedule was revised incorporating that 4

suites will be completed by 30th January, 1987 and the balance 8 suites will be completed by 15th February, 1987. While awarding 14 suites

more by communication 25th February, 1987 it was communicated that the opening of the hotel is on 12th April, 1987 and the work is to be

completed by 31st March, 1987. The question that arises is whether time in these circumstances was the essence of the contract or not? Section

11 of the Sale of Goods Act contemplates that unless a different intention appears from the terms of the contract, stipulation as to time of payment

is not deemed to be the essence of a contract of sale. This Section also contemplates that whether the time is the essence of the contract depends

on the terms of the contract. Section 54 of the Indian Contract Act also contemplates that when a party to a contract promises to do a certain thing

on or before a specified time and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed

becomes voidable at the option of the promise, if the intention of the parties was that the time should be of the essence of the contract. If it was not

the intention of the parties that the time should be of the essence of the contract, the contract does not become voidable by the failure to do such

thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

It is equally true that if, in case of a contract voidable on account of the promisors" failure to perform his promise within the time agreed, the

promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss

occasioned by the non performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his

intention to do so.

37. This also cannot be disputed that mere fixation of a period of delivery or a time in regard thereto does not by itself make the time an essence of

the contract. The agreement has to be considered in its entirety and on proper appreciation of the intent and purport of the Clauses incorporated

therein. The state of facts and the relevant terms of the agreement ought to be noticed in its proper perspective so as to assess the intent of the

parties. The agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In

M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, the Apex Court had held that it is well settled that when the contract itself provides

for extension of time, the same cannot be termed to be the essence of the contract and default in such a case does not make the contract voidable.

It becomes voidable provided the matter in issue can be brought within the ambit of the first paragraph of Section 55 of the Contract Act and it is

only in that event that the claimant would be entitled to claim damages and not otherwise. This has been established that on 12th December, 1986

the order was for providing furniture for 24 suites which was altered and restricted to providing furniture for 12 suites comprising of 6 executive

suites, 3 junior suites and 3 deluxe suites before 15th February, 1987. There was further alteration on 25th February, 1987 for providing furniture

in 14 more suites comprising of 4 deluxe suites, 4 junior suites and 6 executive suites. The work for 12 suites awarded pursuant to order dated

29th December, 1986 was not completed by 15th February, 1987. Still work for 14 new suites was awarded on 25th February, 1987. This is not

the case of the defendant that the contract for 12 suites which was to be completed by 15th February, 1987 was independent of the contract for

the 14 additional suites which was to be completed by 31st March, 1987. The evidence led on behalf of the plaintiff has not been refuted, as the

witness who has appeared on behalf of defendant has deposed only on the basis of record, not having personal knowledge of the facts or of the

defendant''s documents. The defendant has not contended that these were separate agreements. The inevitable inference is that there were

alterations in the terms of the agreement in respect of the scope and consequently the time was also extended from 15th February, 1987 to 31st

March, 1987. The time was extended on account of awarding more work and because the defendant had also failed to carry out his obligations.

By letter dated 28th March, 1987 which has been proved as exhibit P6 which was admitted by the defendant, the time was again extended till 1st

April, 1987. It was also communicated to the defendant that no further extension of time will be granted. However, on the same day the plaintiff

had written a letter to the Vice President of the defendant pointing out that the plaintiff was instructed to carry out the upholstery work by 31st

March, 1987 but the upholstery cloth for Junior suits and Executive suits has not been decided. The plaintiff further revealed that he had done

upholstery on 12 dinning chairs and 4 pelmets of junior suites. It was also pointed out that due to change in decision, the plaintiff had been asked to

remove the upholstery already done. The plaintiff also complained that even the tapestry had not been finalized, therefore, how he can be asked to

complete the work within time. The said letter dated 28th March, 1987 had been exhibited as Exhibit Pw 5/2 and cogent evidence has been led

regarding this letter. The letter has not been refuted in the cross examination nor the witnesses of the defendant deposed that the letter was not

received by the defendant. Till 7th April, 1987 various material which had to be provided by the defendant had not been delivered to the plaintiff,

which is apparent from the letter dated 7th April, 1987 addressed to Vice President of the defendant which letter was proved and exhibited as Ex.

Pw5/3. By said letter the plaintiff had asked for material e.g Marble for dinning Table Top in all Deluxe suites; Marble for all fridge cabinet in all

suites; Marble for side board (Cardenza) in Deluxe and Junior suites; upholstery cloth for lounge chair, dinning chairs and head board in deluxe

suites. It was pointed out by the plaintiffs that unless this material is supplied, the plaintiff shall not be in a position to complete the work of the

suites. From these facts it is apparent that the time to finish the work was extended by the defendant on account of enlargement of scope of work

and also because of defendant''s failure to carry out his obligation.

38. The Apex Court in R.N. Kumar v. R.K. Solan (198) 2 SCC 508 had held that whether in any particular case there was a complete novation

of a contract in the sense that a new contract replaced or substituted the old contract, would depend upon the facts and circumstances of the case.

The work order dated 12th December, 1986 incorporated the liquidated damage Clause of Rs. 5000/- per week subject to the maximum of 10%

of the contract value which was not changed while altering the contract and changing the scope of work from 24 suites to 12 suites on 29th

December, 1986. The scope of work was again modified and 14 more suites were added on 25th February, 1987. Again the liquidated damage

Clause was not modified and remained the same. From the totality of the facts and circumstances it is apparent that there was alteration in the

terms of the contract but it was not the novation of the contract.

39. From the evidence led by the parties, it is also inferable that plaintiff''s plea that the delay was on account of acts on the part of the defendant

and imputable to the defendant, has not been refuted successfully by the defendant. The plaintiff and his witnesses have deposed that the delay was

on account of many acts on the part of the defendant such as that the designs for the furniture was not finalized till mid February, 1987; materials

were not made available on time; the suites in which the furniture was to be installed were not made available as civil work was not completed and

the carpets etc. not laid; the security personnel of the defendant did not allow the workers of the plaintiff to work round the clock; the part of the

work which was completed was asked to be redone. There is no reliable evidence on behalf of the defendant to counter the cogent evidence led

on behalf of the plaintiff. The learned Counsel for the plaintiff has also relied on letter dated 16th February, 1987 from plaintiff to the Chairman of

the defendant stating that the drawings had been received on 10th February, 1987 only and it would take 10 to 15 days time to get the furniture

manufactured. This letter dated 16th February, 1987 has been proved as exhibit PW.2/1. The reliance has also been placed on letter dated 25th

March, 1987 exhibited as PW.5/1 complaining to the defendant that work cannot be completed within the time as the security personnel of the

defendant had not been allowing the workers of the plaintiff to work day and night. The plaintiff had also written a letter dated 28th March, 1987

complaining about the change in decision and to remove the upholstery already done. The letter was exhibited as PW.5/2. Therefore, it cannot be

held that delay was on the part of the plaintiff only and was on account of lapses on the part of the plaintiff.

40. Though in the pleadings the defendant have raised a counter claim for money spend for the rectification of the alleged defective work of the

plaintiff. However, no evidence has been led on this plea. The defendant had claimed cartage of furniture of two suites, administrative cost of

coordination, non supply of items and damages to hotel carpets to the extent of Rs. 2,52,000/-, however none of these pleas have been proved.

Even the learned Counsel for the defendant during the arguments restricted the claim of damages on account of the work not having been

completed within the stipulated time to Rs. 25,000/- only. On the consideration of the depositions of the plaintiffs and the defendant and the terms

of the contract, therefore, it cannot be held that the time was the essence of the agreement and the delay was solely attributable to the acts on the

part of the plaintiff and imputable to the plaintiff. In the circumstances, the defendant cannot be allowed Rs. 25,000/- towards the damages as has

been claimed by the defendant and consequently the issue No. 4 is decided against the defendant.

41. The learned Counsel for the defendant had also not pressed the issue No. 5 regarding plaintiff"s work being sub-standard and unsatisfactory

for the required standard of a five star hotel. From the evidence adduced on behalf of the defendant, it has not been established that the work of

the plaintiff was sub-standard and unsatisfactory for a five star hotel and was not according to specification and was of inferior quality.

Consequently, the issue is decided against the defendant. Therefore, the defendant is not entitled to deduct any amount from the amounts due to

the plaintiff on account of alleged sub standard and unsatisfactory work of the plaintiff.

42. The plaintiff had also provided 29 sofa sets which are alleged to be not conforming to the contracts and according to the defendant the plaintiff

was directed to remove them on 18th May, 1987 and thereafter the defendant stored them for two years for which an amount of Rs. 14 lakhs has

been claimed as warehouse charges and thereafter the 29 sofa sets were alleged to have been sold for Rs. 12,325/-. The written statement on

behalf of the defendant has not been filed by a duly authorized person and therefore, the pleas of the defendant cannot be accepted. The defendant

has failed to establish that the sofa sets were not according to the specifications and were of inferior quality. The defendant has failed to give the

alleged specifications. The defendant has also failed to establish that any samples were given and the sofa sets ought to have been manufactured

according to the samples allegedly given by the defendant. The plea of the defendant that the sofa sets were sold for Rs. 12,325/-and the plaintiff is

only entitled for the said amount, cannot be accepted in the facts and circumstances. The learned Counsel for the plaintiff had referred to a

magazine and has contended that the photographs show that the sofa sets, in fact, are used by the defendant in his hotel. On the basis of the alleged

magazine, it cannot be inferred that the sofa set had not been sold by the defendant by they are used in the hotel. However, this cannot be disputed

that the sofa sets were received by the defendant and unless the defendant had established that they were of inferior quality and were not according

to the specifications, the defendant shall be liable for the price of goods received by the defendant. The issue is thus decided in favour of plaintiff

and against the defendant holding that the defendant shall be liable for the price of 29 sofa sets.

43. Issue No. 8 pertains to as to what amount plaintiff is entitled towards principal and interest. The plaintiff is entitled for a principal sum of Rs.

12,85,936.00. This amount comprises of amount of three bills of Rs. 19,96,607.00; Rs. 4,74,235 and Rs. 2,66,655, a total amount to Rs.

27,37,497 and after deducting the amount already received, Rs. 13,50,000 and an amount of Rs. 1,01,561, the debit note Ex Pw 1/8 admitted by

the plaintiff.

44. To what amount of interest the plaintiff is entitled and from which date the amount became due. From the perusal of the plaint, it is apparent

that the plaintiff has not claimed any interest from the date the amounts became due to the plaintiff from the defendants. Neither the amount of

interest due till the institution of the plaint is calculated nor it has been pleaded specifically nor any court fees has been paid on the amount of

interest which allegedly had become due to plaintiff from the defendants till the institution of the suit. The amount had become due to the plaintiff

from the date of the raising of the bills as no credit period is provided. Part payment had also been made by the defendant to the plaintiff. To claim

interest the learned Counsel for the plaintiff has relied on a number of precedents regarding award of interest. The reliance has been placed on

Satish Solvant Extractions Private Limited Vs. The New India Assurance Company Ltd., Yogesh Kant Bhageria Vs. Deepak Jain, Aditya Mass

Communications (P) Ltd. Vs. A.P.S.R.T.C., , Aditya Mass Communication Pvt. Ltd. v. A.P.S.R.T.C. and D.D.A. and Others Vs. Joginder S.

Monga and Others,

45. Perusal of the precedents relied on by the plaintiff reflect that they pertain to grant of pendente lite and future interest u/s 34 of the Code of

Civil Procedure. None of the judgments, however, has held that even if the plaintiff has not claimed interest till the date of filing/institution of the suit,

the same be awarded to him. For claiming the interest till the date of filing of the suit, the plaintiff was to state the amount of interest in plaint and

ought to have paid court fees on the amount of interest claimed till the date of filing. In absence of any claim for interest prior to the date of

institution and without paying court fees on the same, it is not appropriate to award any amount of interest till the date of filing of the suit.

46. This cannot be disputed that u/s 34 of CPC the courts have discretion both in the matter of the grant of interest and rate of interest. The power

to grant pendente lite and future interest is not dependent upon a specific claim being made by the plaintiff. Ordinarily, the interest pendente lite is

granted u/s 34 of the CPC unless there are cogent reasons for depriving the plaintiff of interest during trial.

47. In Satish Solvant Extraction Pvt. Ltd. (supra), a Division Bench of the High Court had held that ordinarily pendente lite interest can be granted

u/s 34 of the Code of Civil Procedure, unless there are cogent reasons for depriving the plaintiffs of the interest during trial. However, the

discretion in the matter of future interest is restricted to 6% per annum except in commercial transactions where under the proviso it may be

allowed at the contractual rate or bank rate in relation to the said transaction. A Division Bench of this Court in Yogesh Kanth Bagheria (supra)

had held that in a suit for recovery of loan despite no contract being there regarding payment of interest, the plaintiff can still be awarded interest at

the current rate as defined u/s 2(6) of the Act. The precedent relied on by the plaintiff, however, has not held that even if the interest till the time of

the institution is not claimed, the same can be awarded u/s 2(6) of the Act or any other provisions. The precedent, Ghaziabad Development

Authority (supra) relied on by the plaintiff is regarding awarding of 18% interest at uniform rate by the National Commissioner, which was held to

be unsustainable.

48. In K.T. Venkatagiri (supra) relied on by the plaintiff, the Apex Court had held applying the doctrine of unjust enrichment that the appellants in

that case could not retain the amounts received directly or indirectly by them on account of MSIL by taking advantage of conditional interim order

and they were directed to pay the amount back with interest at 18% per annum and thereafter interest @ 9% per annum. The case of the plaintiff is

apparently distinguishable. The judgment was passed by the Apex Court in appeals which were filed challenging the orders passed in a batch of

writ petitions and is apparently distinguishable from the case of the plaintiff which is a suit for recovery where no interest has been claimed till the

date of institution of the suit. Similarly in Aditya Mass Communication (P) Ltd. interest was awarded in a writ petition and the order was challenged

before the Apex Court where it was held that the award of interest @ 12% by the Trial Court was reasonable.

49. Considering the precedent relied and the facts and circumstances, therefore, the plaintiff is not entitled for interest prior to the institution of the

suit, however, as far as the pendente lite and future interests is concerned which is awarded u/s 34 of the Code of Civil Procedure, the plaintiff is

entitled for the same. Considering the evidence led by the parties and other facts and in totality of circumstances, the plaintiff is awarded simple

interest @ 9% per annum from the date of institution till the recovery of the amount from the plaintiff. The issue is decided accordingly.

50. In the circumstances, the suit of the plaintiff is decreed for recovery of a sum of Rs. 12,85,936.00 (Rupees twelve lakhs eighty five thousand

nine hundred and thirty six) along with pendent lite and future simple interest at the rate of 9% per annum from the date of institution of the suit till

the realization of the decreetal amount. The plaintiff is also awarded cost of Rs. 20,000/- in the facts and circumstances. Decree sheet be drawn.