

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Co.APP No.46/2006**

% **Date of decision : 4th March, 2008**

M/S.MAGMA LEASING LIMITED **.....APPELLANT**
Through:Mr.B.B.Sawhney, Sr.Advocate
with Mr.S.Singhani and
Mr.V.K.Mishra, Advocates

Versus

M/S. HCL INFOSYSTEMS LIMITED **.....RESPONDENT**
Through: Mr. V.N.Koura with
Ms.Divya Bahl, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MS. JUSTICE REVA KHETRAPAL

- 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

DR. MUKUNDAKAM SHARMA, CJ :

1. By filing this appeal the appellant challenges legality of the order dated 10th July, 2006 passed by the learned Company Judge in C.P. No.105/2005, holding that some of the claims of the appellant for payment of interest would be barred by limitation and some other claims would be within

limitation. The direction issued by the learned Company Judge to the parties to carry out fresh calculations and to file a chart calculating interest payable under Clause 4 of the Agreement dated 11/12th November, 1998 is also under challenge in this appeal.

2. In order to appreciate the contentions of the parties it is necessary to place on record a few facts leading to the filing of the present appeal.

3. The appellant herein filed a Company Petition under Section 433 read with Section 434 of the Companies Act, 1956 for winding up of the respondent company on the ground that the respondent had failed to make payment of lease rentals and also interest accrued thereon. On 25th September, 1998 the respondent entered into an Agreement for Rental and Maintenance Service with Bharat Heavy Electricals Limited (BHEL for short). In the said agreement it was also stipulated that the respondent agreed to supply, install and maintain various hardwares being computer accessories and peripherals, at various establishments of

BHEL, for which respondent had entered into a separate agreement with the BHEL for different locations. After entering into the aforesaid agreements, the respondent approached the appellant for financing the aforesaid transaction. The appellant agreed to provide finance to the respondent which was repayable in 20 quarterly instalments covering a period of five years from the date of installation of computers at each of the locations in respect whereof the respondent had entered into rental and maintenance agreements with BHEL. Agreement dated 11/12th November, 1998 entered into between the HCL Infosystems Limited, the respondent herein, and the appellant is placed on record. The said agreement relates to the Rental and Maintenance Service Agreement executed on 21st October, 1998 by and between the respondent and the BHEL. Clause 4 of the agreement dated 11/12th November, 1998 reads as follows:

“4. HCL hereby ensures payment of lease rentals as due and payable by BHEL to be paid to MLL directly which rental is due and payable every quarter and is due to commence from the date of installation of the equipments at BHEL's site payable within 30

days of the end of the particular quarter during which the equipment is installed at BHEL and MLL will be treated as “lessor” for the purpose of the same.

It is further clarified that HCL will pay interest for the delay in obtaining receipt of lease rentals from BHEL pursuant to the performance under the Lease Agreement @ 2% per month after 30 days from the respective due dates until payment thereof and further HCL will also make good to MLL the short fall if any, in the respective lease rental due and payable together with interest @ 2% per month till the date of payment.”

4. By the aforesaid clause, the respondent has given assurance of payment of lease rentals which was due and payable every quarter by BHEL to be paid to the appellant directly. There is no dispute with regard to the fact that there are other agreements also between the parties with an identical clause. In the aforesaid Company Petition the dispute arose with regard to liability of payment of interest by the respondent company to the appellant on the delayed payment of lease instalments by BHEL, as per clause 4 of the aforesaid agreement dated 11/12th November, 1998. In terms of the said clause there was a liability to pay interest

@ 2% per month to the appellant for any default/delay in payment of instalment by BHEL beyond 30 days from the due date. On behalf of the respondent company a stand was taken that the claim for payment of interest raised by the appellant for alleged defaults in payment of instalments was barred by limitation. The learned Company Judge considered the said aspect and by order dated 10th July, 2006 held that each default in payment of instalment would constitute a separate cause of action as in the case of payment of monthly rent and interest, each default has to be separately calculated and that interest is payable for each period of default and not after the entire instalment was paid. Accordingly, It was held by the learned Company Judge that some of the claims for payment of interest made by the appellant would therefore be barred by limitation whereas some other claims would be within the limitation. In the light of the aforesaid observations, a direction was issued to the appellant and the respondent to carry out fresh calculations as aforesaid with reference to the date on which the winding

up petition was filed i.e. 17th March, 2005. The aforesaid order of the learned Company Judge is under challenge in his appeal.

5. In support of the appeal, the appellant relied upon communication dated 17th April, 2001, annexed as Annexure A-4 and also letter dated 11th October, 2002 which is Annexure A-6. Relying on the said communications, it was submitted by the learned counsel appearing for the appellant that there was acknowledgment of default in the said letters and, therefore, it was not proper for the learned Company Judge to hold that some of the claims for payment of interest accruing for non-payment of some instalments were barred by limitation. It was also submitted by the counsel appearing for the appellant that clauses 1&2 of the agreement dated 12th March, 1998, which is a Buy Back Agreement, would make it clear that there was continuing cause of action and continuing obligation to pay rentals and the interest accrued thereon, which was required to be calculated only at the time of final payment made and, therefore, the findings arrived at

by the learned Company Judge are required to be set aside and quashed. The other submission of the counsel appearing for the appellant was that the liability to pay instalments and interest in lieu thereof could be said to have been extended in view of clauses 4&5 of the aforesaid agreement which read as follows:

“4. This agreement shall come into force immediately and shall remain in full force and effect and shall continue to be enforceable until all the dues of MLL are fully paid to the satisfaction of MLL and a certificate of satisfaction as and when issued by MLL shall be conclusive proof to that effect.

5. HCL undertakes to pay MLL the amount due under this agreement immediately on demand notwithstanding any dispute of disputes raised by and between itself and BHEL and also any suit or proceeding pending before Court or Tribunal and the liability of HCL under these presents is absolute and unequivocal.”

6. Strong reliance was placed by the appellant on clause-4 of the aforesaid agreement. Reliance was also placed by the appellant on the decision of the Supreme Court in the case of ***Food Corporation of India v. Assam State Cooperative Marketing & Consumer Federation Ltd and Others***

reported in (2004) 12 SCC 360.

7. Mr.V.N.Koura, the learned counsel appearing for the respondent, however, refuted the aforesaid submissions contending inter alia that there was no acknowledgment as sought to be made out by the appellant and, therefore, the order passed by the learned Company Judge is legal and valid. He also submitted that on a proper interpretation of clauses 4 & 5, it would be established that there was no continuing cause of action as sought to be pleaded and argued by the appellant and what was enforceable was only the agreement between the parties which could be only enforced till all the dues were fully paid to the satisfaction of the appellant, and the same never contemplated and stipulated that the cause of action for payment of each rental and interest thereon also stood extended which could be paid at the end of the contract. Counsel appearing for the respondent also relied upon the Division Bench decisions of this Court in the case of **National Small Industrial Corporation Limited v. Takdir Singh** reported in

120(2005) DLT 397 and in the case of **Globe Motors Limited v. Mehta Teja Singh & Co** reported in 24 (1993) DLT 214 and also a decision of the Madras High Court in the case of **Union of India v. Seyadu Beedi Co. & Another** reported in AIR 1970 Madras 108. The aforesaid decision of the Madras High Court was also a Division Bench decision wherein it was held that even if letter is written by the Railway authorities to the effect that the claim of the plaintiff was under investigation and he would be advised definitely on the finalisation of the claim, the same cannot be construed as even an implied admission of liability.

8. In light of the aforesaid submissions of the counsel appearing for the parties, we have looked into the various clauses of the agreement for Rental and Maintenance Service executed on 25th September, 1998 between the respondent and BHEL. We have also perused the agreement executed on 11/12th November, 1998 as also the agreement entered on 30th November, 1998 between BHEL, the respondent and the appellant and also the Buy Back Agreement dated 12th March,

1998 between the respondent and the appellant. There is an irrevocable power of attorney executed on 12/13th November, 1998 by the respondent in favour of the appellant and a supplemental agreement executed on 23th June, 1999 between BHEL, the respondent and the appellant, Clause 2 of which is relevant which we have perused.

9. A perusal of the aforesaid documents makes it clear that the fixed lease rentals were payable in 20 quarterly instalments covering a period of five years. There is also a stipulation that in the event of a default in the payment of the instalment, either by short payment or delayed payment, the appellant was entitled to recover from the respondent interest at 2% per month after 30 days from the respective due date of payment until payment and short fall in the lease rental with interest @ 2% per month till the date of payment. On going through the records we also find that the finding of the learned Company Judge that the cause of action for default of each instalment arose separately is justified. The period of limitation for any recovery is three years

commencing from the date on which the instalment becomes due. The learned Company Judge was therefore justified in holding that since the appellant has filed the Company Petition only on 17th March, 2005 therefore the parties would go back three years from the said date with reference to the date when the instalment was belatedly paid by BHEL. So far as acknowledgments pointed out by the appellant in the letters dated 17th April, 2001 and 11th October, 2002 are concerned, in our considered opinion, the same could not be interpreted and construed to be any acknowledgment in any manner. The aforesaid letters only indicate that what was communicated was only a statement that the claim of the appellant would be looked into. Madras High Court under similar circumstances in the case of ***Seyadu Beedi Co.*** (supra) has clearly held that such correspondence cannot be interpreted as any form of acknowledgment. In our considered opinion, the interpretation that is sought to be given to the aforesaid letters by the appellant is fallacious and cannot be accepted. ***Food Corporation of India***

(supra) was the decision of the Supreme Court which is relied upon by the counsel appearing for the appellant. A close look at the facts of the said case would prove and establish that the facts in the said decision are distinctly different and distinguishable from the facts of the present case. In the said decision, the Supreme Court has found that the two letters dated 29th March, 1977 and 30th July 1977 clearly acknowledged the amount of Rs.2 crores, whether by way of advance or by way of deposit against paddy procurement, which was accepted as an admission of jural relationship of buyer and seller, which stood converted into relation of creditor and debtor on the failure of the principal transaction. In the lease under reference in the present case, we have already held that there is no acknowledgment of liability in any of the aforesaid letters as sought to be made out and, therefore, the said decision has no application to the facts of the present case. The Division Bench decision of this Court in **National Small Industries Corporation Limited** (supra) that cause of action would accrue separately with regard to

each instalment when that particular instalment became due, and that period of limitation for that particular instalment is three years commencing from the date that particular instalment become payable, and also the other decision of the Division Bench in ***Globe Motors Limited (supra)*** that limitation would start from the date of default, would be applicable to the facts of the present case.

10. In this view of the matter we find no merit in this appeal which is dismissed. The parties shall appear before the learned Company Judge on 17th March, 2008, for directions and further orders in this regard.

CHIEF JUSTICE

REVA KHETRAPAL
JUDGE

March 4th, 2008
“V”