

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

+ C.S(OS) No. 952/2004

Date of Decision: 23.09.2013

M/S. VIMAL TELEKTRONIX PVT. LTD. Plaintiffs

Through: Ms. Amita Gupta, Adv.

Versus

M/S. TATA TELECOM LTD. Defendants

Through: Nemo.

**CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA**

M.L. MEHTA, J.

1. This is a suit for recovery of a sum of Rs. 31,44,080.00/- (Rupees Thirty One Lakhs, Forty Four Thousand and Eighty only) along with interest @ 15% per annum from the date of institution of the suit till the date of realisation. The case of the plaintiff is as follows.
2. The plaintiff is a company incorporated under the Indian Companies Act, 1956 and is engaged in the business of supply and installation of G. I. Pipes, supply of prefabricated RCC, concrete makers etc. The plaintiff submits that the Indian Oil Corporation Ltd. (hereinafter 'the IOCL'), gave the contract of laying Optical Fiber Cable (hereinafter 'OFC') to the defendant vide Contract No.

PL/E&C/T&I/KS-SnM/TC dated December 17, 1999. The said OFC-laying was to be done along the IOCL's Pil Pipelines in two sections viz. Auchandi (Delhi)-Sonapat-Meerut (hereinafter 'Section I') and Kurukshetra-Sharanpur (hereinafter 'Section II'). And that vide Contract No. 1/D/SC 990522 DTD, dated January 1, 2000, the defendant sub-contracted part of its work under its contract with IOCL in favour of the plaintiff. As per this contract, the plaintiff was required to perform of blowing/pulling off the OFC in HDPE Duct, OFC joining and loop testing of the laid OFC, amongst other works. Under the said contract, the plaintiff was required to lay a Duct for a distance of 15 km and insert OFC for the entire length of Sections I and II, comprising of 30 and 20 joints, respectively.

3. The plaintiff submits that in furtherance of its sub-contract, the defendant executed two Purchase Orders bearing P.O. No. 1/D/BO 99051, dated January 3, 2000 (hereinafter 'PO 21') and P.O. No. 1/D/SC 990522, dated January 3, 2000 (hereinafter 'PO 22'). And that, as per the sub-contract, the plaintiff carried out the entire work in accordance with the instructions of the defendant, along with other extra tasks required from time to time, over and above the stipulations under the agreements, which were subsequently approved by the defendants. The plaintiff submits that the defendant owes the plaintiff various outstanding dues, which are described as hereunder.
4. Due No. 1: The plaintiff submits that it received a reduced payment of only Rs. 8,10,295.00/- (Rupees Eight Lakh Ten Thousand Two

Hundred and Ninety Five only) on October 19, 2001. And that this sum was less by Rs. 49,485.00/- (Rupees Forty Nine Thousand Four Hundred and Eighty Five only) as against the bills raised by the plaintiff, which appeared to be a unilateral deduction on account of cash expenditure incurred by the site officers of the defendant in carrying out the work done by the ITL under its contract with IOCL in the Yamuna Nagar-Saharanpur Section. The plaintiff submits that it was neither required to perform operations under the contract, nor was requested to perform it by the defendant, in the Yamuna Nagar-Saharanpur Section. Further, the plaintiff also submits that it concluded its operations on July 7, 2000, whereas the expenses incurred by the officers of the defendant were in the period of September-October 2000, subsequent to the completion of the plaintiff's operations. The plaintiff claims the abovementioned deduction to be illegal and unwarranted.

5. Due No. 2: The plaintiff submits that in a meeting held on September 21, 2001 at the defendant's office in Gurgaon, the defendant admitted to pay the plaintiff a sum of Rs. 41,800.00/- (Rupees Forty One Thousand Eight Hundred only) in lieu of extra items supplied by the plaintiff at the Auchendi-Meerut Section at a later date. Whereas, the defendant purportedly failed to make the said payment on some pretext or the other.
6. Due No. 3: The plaintiff submits that it carried out extra work of removal of kinks from the ducts laid by another company, under specific instructions from the defendant. And that bills amounting

to Rs. 21,01,500.00/- (Rupees Twenty One Lakh One Thousand Five Hundred only) were raised against the defendant in furtherance of this extra work. The plaintiff also submits that it wrote various letters dated June 20, 2000; June 21, 2000; and April 4, 2002, requesting the defendant to make payment. However, the defendant allegedly did not pay this amount on the pretext that it did not receive payments from the IOCL. The plaintiff claims that since its dealings with the defendant were on a principal to principal basis, the defendant is bound to pay the dues irrespective of not receiving payments from IOCL.

7. Due No. 4: The plaintiff submits that certain other extra works were carried out under specific instructions from the defendant, for which it raised bills amounting to Rs. 1,14,790.00/- (Rupees One Lakh Fourteen Thousand Seven Hundred and Ninety only) against the defendant. However, the defendant purportedly did not pay this amount.
8. The plaintiff submits that after adjusting various part payments made from time to time in the mutual running account maintained by the parties, the summation of Dues 1 to 4 amounts to a total of Rs. 23,07,575.00/- (Rupees Twenty Three Lakhs Seven Thousand Five Hundred and Seventy Five only), which is still due to the plaintiff from the defendant. And that since the afore said Dues have become over due, as such the defendant rendered themselves to pay interest @ 15% per annum from the date of each pending bill till the date of payment/realisation, which is also purportedly the

usage in the trade of the plaintiff. And that accordingly, a sum of Rs. 8,36,505.00/- (Rupees Eight Lakh Thirty Six Thousand Five Hundred and Five Rupees only) has become due by way of interest from July 31,2000 till December 31, 2002. And that a total sum of Rs. 31,44,080.00/- (Rupees Thirty One Lakh Forty Four Thousand and Eighty only) has become due from the defendant to the plaintiff.

9. The plaintiff submits that it served a Legal Notice dated June 17, 2002 upon the defendant, to which it received a reply dated July 16, 2002 stating that the defendant shall reply to the claims made in the Legal Notice at the earliest. However, the plaintiff submits that it has received no such reply and that it was forced to approach this Court with the instant suit. The plaintiff submits that the cause of action arose within the territorial jurisdiction of this Court, since the defendant contracted with the plaintiff in New Delhi, where the defendant has one of its offices. And that the cause of action arose when the contractual works and additional/extra works were carried out by the plaintiff and when the defendant denied payment for the same. And that the cause of action arose lastly on June 17, 2002 when the plaintiff served the Legal Notice upon the defendant and on July 16, 2002 when it received a reply from the defendant.
10. In its written statement, the defendant has raised the preliminary objection that the claims of the plaintiff are grossly barred by limitation and that the suit has not been properly instituted for want of proper authorisation. With regards to its material contentions, the

defendant submits that as per its contract with IOCL, it was required to lay Ducts in Section I for a distance of 15 kms and insert OFC for the entire length of Section I, and also the entire length of Section II. And that the OFC was required to be inserted by using 'blowing technique' with the help of appropriate machines having the industrial standard capacity of pushing upto 2 kms. The defendant submits that the total number of joints in the OFC was stipulated to be 30 for Section I and 20 for Section II. And that the number of joints were to be strictly adhered because the efficiency of the OFC decreased with increasing number of cuts and joints. Moreover, adhering to the number of joints stipulated was imperative because the OFC was provided in drums containing 4 km long cables, which meant that a joint of almost every 3 kms. And that this also implied that the machines required for blowing the OFC into the ducts to have a minimum capacity of blowing for at least 1.5 kms (since the cables are blown from either end of the Duct), which is well within the industrial standard of 2 kms.

11. The defendant submits that the plaintiff had sub-contracted the entire works under its contract with IOCL qua Sections I and II under PO 21 and 22 respectively. The scope of work under the said PO's is as under. And that the plaintiff was required to adopt the best technology and methodology to deploy the machinery after fully understanding the actual site conditions. And that as per PO 22, the plaintiff was required to undertake a pedometric route survey of Sections I and II and upon satisfying itself of the ground

conditions, was required to identify in advance all the buried overlaps, physical hindrances, abrupt changes and blockages in the duct to enable the defendants to take necessary action on it and coordinate with the IOCL and its vendor L&T.

12. The defendant submits that contrary to the contention of the plaintiff, it was never satisfied with the execution of work under PO 21 and PO 22. The defendant alleges that the plaintiff used machinery much below the industrial standards, and that the defendant had raised various issues relating to the works carried out by the plaintiff in a shoddy and unprofessional manner. The defendant submits that the plaintiff's obligations under PO 21 and 22 were clearly defined and there was no scope for additional /extra work. And that the plaintiff's failure to deploy proper machinery led to the use of extra resources. And that the plaintiff allegedly failed to follow specific instructions of the defendant on various fronts including the following

- a) Pull box/joints boxes were left open resulting in mud, dust, dirt and water seeping in the Duct and thereby creating problems while OFC laying and also damaging the OFC;
- b) Upon instructions issued by the defendant to clean the mud in the Duct using a compressor, the plaintiff failed to carry it out;
- c) The machinery deployed by the plaintiff was of inadequate capacity of blowing only 600 meters instead of the industrial standard of 2 kms, leading to additional/extra work. The said

machines also broke down and were not replaced for 26 days thereby adding to the idling costs.

13. The defendant denies the correctness of each of the Dues claimed by the plaintiff. The defendant's reply to each of the Dues claimed by the plaintiff is as hereunder -

14. Due No. 1: Regarding the claim of Rs. 49,484.00/- the defendant submits that in view of the agreement reached between the parties as recorded in the minutes of the meeting dated August 2, 2000, the said amount was adjusted towards the expenses incurred by the defendant for rectification of defects in splicing and also the damage caused to the OFC while laying it.

15. Due No. 2: Regarding the claim of Rs. 41,800.00/- the defendant submits that due to faulty and defective services offered by the plaintiff, the defendant was forced to hire the services of another service provider being M/s. Tulsian Earth Movers, who was paid the said amount of Rs. 41,800.00/- and a copy of PO No. I/D/SC 900 539 dated April 13, 2000 was issued to it.

16. Due No. 3: Regarding the claim of Rs. 21,01,500.00/- the defendant submits that there was a meeting held between the plaintiff and the defendant on September 21, 2001, wherein the said claim was discussed in detail and the parties arrived at a settlement. The defendant further submits that it was clearly indicated to the plaintiff that the cause for additional cost was due to the plaintiff's faulty operations and intermittent cutting of the Duct and the use of a blowing machine with inadequate strength. And that the plaintiff

agreed and acknowledged this understanding and raised a revised invoice dated September 24, 2001, which was settled in full. Therefore the defendant submits that by raising the revised bill, and accepting full and final payments made thereunder, all issues relating to pending payments were settled and no further bills can be raised against the defendant.

17.Due No. 4: Regarding the claim of Rs. 1,14,790.00/- the defendant submits that the plaintiff did not even raise this figure during the settlement meeting dated September 21, 2001 and further did not even include this sum in their final bill dated September 24, 2001. Therefore, the defendant submits that the plaintiff is precluded from claiming the said due at a later stage as an afterthought.

18.In its reply to the written statement, the plaintiff has denied that the suit is barred by limitation, and has reiterated that the suit has been properly instituted by the Director of the plaintiff company Sh. Vimal Gupta, who is authorised by the Board of Directors vide Resolution dated June 2, 2002. The plaintiff also denies all allegations regarding faulty operations, use of inadequate machinery and delays in completing its operations. The plaintiff also reiterates that the additional/extra works were carried out only under specific demand/instruction of the defendant and has denied that they were caused due to the delays/faults. The plaintiff further submits that all deductions and adjustments claimed in the written statement were all unilateral and arbitrary in nature and that the plaintiff did not consent to any such arrangement. And that there

was no settlement dated September 21, 2001 and that the payments made under the bills raised on September 24, 2001 were merely part payments of the amounts due to the plaintiff from the defendant.

19. Vide Order dated March 21, 2006, this Court framed the following Issues for consideration.

- 1) Whether the plaint is signed and verified and the suit instituted by a properly authorized person? OPP
- 2) Whether the plaintiff is entitled to any balance amount towards work done for the defendant? OPP
- 3) Whether any of the bills raised by the plaintiff forming subject matter to the present suit are barred by limitation? OPD
- 4) Whether the plaintiff is entitled to any interest? If so, on what amount, at what rate and for which period? OPP

20. Vide Order dated January 17, 2012 the evidence of the defendant was closed, and vide Order dated April 10, 2012, the defendant was proceeded ex parte. I have heard the counsel for the plaintiff, and also perused through the evidence on record. Issue wise findings are as under:

Issue No. 1:

21. Onus to prove this issue was cast upon the plaintiff. There is no dispute that the plaintiff is an incorporated company. However, the objection taken by the defendant is that the plaint has not been signed, verified and filed by a duly authorised person.

22. In the instant suit, the plaint was filed by one Sh. Vimal Gupta, PW1 purporting to be the Director/authorised representative of the plaintiff company. In his Evidence by way of Affidavit, placed on record as Ex. PX, he has deposed that he has been authorised by the Board of Directors, to sign and verify the plaint and also institute the instant suit on behalf of the plaintiff company, vide a Resolution dated June 2, 2002. And that the said Resolution is placed on record as Ex. PW1/2. The said Resolution states as follows:

"In the General Meeting of the Board of Directors of M/s. Vimal Telektronix (P) Ltd., having its Registered office at B-161, Basement, Sector 26, NOIDA - 201 301 on 2nd June 2002, it has been decided and resolved to:

**File the suit against TATA TELECOM LTD. As they are not paying the company*

**Mr. Vimal Gupta, Director is authorised to sign all documents and delegate the same power to anybody to settle-down ad interaction in the above case."*

23. The defendant has taken specific objection to the said Resolution contending that it does not specifically authorise Sh. Vimal Gupta to institute the instant suit. The plaintiff has contended that this is merely a technical lapse, and that it must be ignored. The plaintiff has sought to rely upon the decision of this Court in the case of

Mahanagar Telephone Nigam Ltd. v. Smt. Suman Sharma, 2011 AD (Del.) 331, wherein this Court observed:

"Reading Order VI Rule 14, together with Order 21 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order XXIX can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation."

24.I find that the reliance is misapplied. The ***MTNL Case*** (supra) is regarding the authority of a principal officer of a company to sign and verify the plaint on behalf of the company. However, it must be borne in mind that it is completely different from the authorisation required to institute a legal proceedings on behalf of the company. The position of law is well settled in this regard. In the case of ***M/s. Nibra Ltd. v. National Insurance Co., AIR 1991 Delhi 25***, it was held by this Court:

"[U]nder Chapter IV of the Delhi High Court (Original Side) Rules, 1967, a suit can be presented by a duly authorised agent or by an advocate duly authorised by him for the purpose. The authorisation, in the case of a company can be given only after a decision to institute suit is taken by the Board of Directors of the company. the

Board of Directors, may in turn authorise a particular Director, principal officer or the secretary to institute a suit."

25. It is seen from the Resolution, that Sh. Vimal Gupta was not specifically authorised to institute the instant suit. As per Order XXIX Rule 1 of CPC, he could, at best, be said to be authorised to sign and verify the plaint on behalf of the plaintiff. In the case of ***M/s. Weston Tubes Pvt. Ltd. v. National Insurance Company Ltd. & Ors.***, CS (OS) No. 1309/2002, this Court observed

"It is well-settled that under Section 291 of the Companies Act, except where the express provision is made that the powers of the Board in respect of the particular matter are to be exercised by the company in general meeting; in all other places, the Board of Directors are entitled to exercise all its powers. The individual Directors have only such powers, which are vested in them by the Memorandum of Articles. There is no doubt that courts ordinarily do not non-suit anyone on account of technicalities. However, it is trite that the question of authority to institute a suit on behalf of the company is not a technical matter as it has far-reaching effects. Thus, unless the power to institute a suit is specifically conferred on a particular Director by the company, he has no authority to institute a suit on its behalf. Needless to

say that such a power can be conferred on the Directors by the Board of Directors only by passing a resolution in that regard."

26. In view of the above, there being no evidence on record to indicate that Sh. Vimal Gupta had authority to institute this suit, it has to be held that the plaintiff has not proved that the plaint was instituted/filed by a duly authorised person. The issue is accordingly decided against the plaintiff. In fact, the suit could be dismissed on this count alone. I shall however proceed to decide the other preliminary objection taken by the defendant on the ground of limitation.

Issue No. 3:

27. The defendant has contended that the bills raised by the plaintiff are barred by limitation. The defendant has averred that in accordance with Section 18 of the Limitation Act, 1963 read with Article 1 of Schedule I, the instant suit is well within the prescribed limitation period. At this juncture, it is clear to me that the plaintiff raised various bills against the defendant in lieu of operations performed by it from time to time. There appears to have been outstanding dues inter se the parties. However, on September 21, 2001, the parties met and arrived at a settlement regarding pending payments. The Minutes of the said meeting are placed on record as Ex. PW 1/14. It is apparent from the said document, that the parties have

arrived at an arrangement regarding pending payments. Without delving into the material particulars regarding the said settlement, it is clear to me that the parties negotiated the settlement of pending dues as late as September 21, 2001.

28. Article I of Schedule I under the Limitation Act, 1963 prescribes a statutory limitation period of three years commencing from the close of the year in which the last item admitted or proved is entered into the account. In the case of ***Bharath Skins Corporation v. Taneja Skins Company Pvt. Ltd.***, 186 (2012) DLT 29, a Division Bench of this Court considered an issue similar to the instant one. In that case, the defendant had contended that bills based on which the plaintiff had sought recovery had been barred by limitation. The Ld. Single Judge concurred with the defendant. However, on appeal, the Division Bench setting aside the judgment of the Ld. Single Judge, examined the legislative intent behind Article 1 of Schedule 1 under the limitation Act. The Court observed:

“The object of Article 1 is thus in effect, to apply the old English Common Law of acknowledgement (which is different from the acknowledgements and payments referred to in Sections 18 and 19 of the Limitation Act, 1963) to a certain type of cases for the purpose of exempting the plaintiff from the principle that limitation runs against each item from its date, and to provide that if the last item is within time, it will draw the previous items after it, however old they may be, although there has been no

acknowledgement or payment sufficient to comply with the conditions imposed by Sections 18 and 19 of the Limitation Act, 1963.”

29. Therefore, in order for this proposition to be applicable to the transactions in the instant case, it must be seen if the parties had a running account or a mutual/reciprocal account. This court in the case of **Ashok Parshad v. M/s. Mahalakshmi Sugar Mills Co. Ltd., CS (OS) No. 2542/1997**, has considered a catena of precedents regarding what qualifies a transaction into a mutual/reciprocal account.

“The question what is Mutual or Reciprocal Account has been considered by the courts frequently and the test to be determined is well-settled. Article 85 of the Indian Limitation Act, 1908, which is in the same term as Article 1 of the Indian Limitation Act except as to the period of limitation, was interpreted by Rankin C.J. in Tea Financing Syndicate Ltd. vs. Chandrakamal, AIR 1931 Cal 359. The observations of Rankin C.J. have never been dissented from in our courts and the same has been endorsed by the Supreme Court in various cases. Reference can be made to Hindustan Forest Company vs. Lal Chand and Others, AIR 1959 SC 1349. The test that was laid by Rankin C.J. for determining whether an account is mutual and reciprocal or not, was reiterated by the Supreme Court in the aforesaid case of Hindustan Forest Co., observing that “the requirement of reciprocal demands involves transactions on

each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations.

*The Supreme Court in the case of **Kesharichand Jaisukhlal Vs. Shillong Banking Corporation Ltd.**, (1965) 3 SCR 110, after referring to the lead case on Mutual Account titled **Hirada Basappa Vs. Gadigi Muddappa**, (1871) VI MHCR 142 observed as under:*

“To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations”.” (emphasis supplied).

30. In the instant case, it is evident that the arrangement between the parties was in the nature of a mutual, open and current account, since both parties were maintaining running accounts of costs incurred by them qua each other. That being the case, Settlement Meeting which took place on September 21, 2001 amounts to an implied acknowledgement of the pending dues between the parties. In such a circumstance, the period of limitation shall be computed from the end of the financial year in which the Settlement Meeting took place. Keeping in mind the settlement meeting which took place on September 21, 2001, the prescribed period of limitation expires on the completion of three years commencing from the end

of the financial year i.e. March 31, 2002. Therefore, the suit will only be barred by limitation, if it was instituted after March 31, 2005. Since the instant suit has been filed on May 19, 2004 as per Registry entry, it is well within the prescribed limitation period. This issue is decided accordingly in favour of the plaintiff. I shall now proceed to decide the issues on merits.

Issue no. 2:

31. Based on the evidence on record, I shall now proceed to examine the whether the defendant is liable to make payments towards the work done by plaintiff in accordance with each of the outstanding dues as claimed hereinbefore.

32. From the Minutes of the Meeting dated September 21, 2001, Ex. PW 1/14, it seen the parties discussed and arrived at a Settlement. A brief summary of the terms of the said Settlement are as follows:

- a) Paragraph 1 stipulates that the balance amount payable by the defendant to the plaintiff for the supply of items against PO 21 was Rs. 9,01,676.00/-
- b) Paragraph 2 stipulates that the extra items supplied by VTPL at the Auchandi-Merrut Section amounting to Rs. 41,800.00/- will be paid by the defendants only after verification by their site engineer.
- c) Paragraph 3 stipulates that the plaintiff will supply the necessary bills in furtherance of the Paragraph 1 and 2

d) Paragraph 4 stipulates that the plaintiff's claim of Rs. 22,30,318/- towards removing kinks and damages found in ducts, as submitted through bills 3, 8, and 9 cannot be paid by the defendant since the IOCL has not agreed to pay for the same.

33. It is seen from the bottom of the page of the Minutes of the Meeting that the representative of the defendant has affixed his signature with the note stating

“Agreed subject to reconsideration of Paragraph 4”

34. Thus, it can be said that the terms of Settlement were only binding upon the parties qua Paragraphs 1 to 3. Since the plaintiff did not consent to the stipulation in Paragraph 4, it cannot be held to be binding on either of the parties. From the terms which were mutually agreed by the parties at the settlement, the following claims come to the fore.

35. The plaintiff has contended that from the monies payable to it by the defendant as agreed under Paragraph 1 of the Settlement i.e. Rs. Rs. 9,01,676.00/-, the defendant deducted a sum of Rs. 49,485.00/- from the payment dated October 19, 2001 (viz. Due No. 1). The defendant has averred in its written statement that this amount was adjusted towards the expenses incurred by it towards rectification of defects in splicing as well as damage caused to the OFC while laying it. The defendant has also averred that the said adjustment has been noted in its Minutes of the Meeting dated August 2, 2000.

I find this argument of the defendant untenable for the following two reasons.

36. Firstly, the defendant has not placed anything on record to prove that the parties agreed to adjust the amount of Rs. 49,485.00/- against the cost of splicing and damage caused to the OFC. Neither has the defendant exhibited the copy of the said Minutes of the Meeting dated August 2, 2000. Secondly, there is no plausible reason as to why the defendant did not mention the said adjustment in the meeting dated September 21, 2001, when the terms of Settlement were agreed upon between the parties, and deduct the said amount from the amount payable to the plaintiff as agreed under Paragraph 1 of the Settlement.
37. Similarly, regarding the claim of Rs. 41,800.00/- (viz. Due No. 2), the defendant has agreed under Paragraph 2 of the Settlement that it will make the payment after its site engineers verified it. However, in its written statement, the defendant has averred that it paid the said amount to one M/s. Tulisian Earth Movers (TEM), which rectified faulty and defective operations performed by the plaintiff. The defendant has averred that the said amount was paid through a Pay Order dated April 13, 2000 issued to TEM. Once again, I find it inconceivable that the defendant did not make the mention of the payment of Rs. 41,800.00/- to TEM in August 2000 during the Settlement Meeting held on September 21, 2001. Instead, the defendant has agreed to make payment of the said amount after its site engineers evaluated it.

38.It is apparent to me that the alleged adjustments and payments as claimed by the defendant are sham. Therefore, in view of the Settlement arrived at between the parties on September 21, 2001, it must be held that the plaintiff is entitled to the claim made under Dues No and 2, i.e. Rs. 49,485.00/- and Rs. 41,800.00/- respectively.

39.I shall now proceed to decide the remaining two claims i.e. Dues No. 3 and 4 i.e. Rs. 21,01,500.00/- and Rs. 1,14,790.00/- respectively. It is the contention of the the plaintiff that Due No. 3 became payable in lieu of removal of kinks and damages from the ducts against; and Due No. 4 became payable in lieu of certain other additional works carried out under specific insrtuctions from the defendant.

40.It is the case of the plaintiff that on June 21, 2000, it wrote to the defendant regarding the faulty ducts in the Kurukshetra-Yamuna crossing leading to the idling of plaintiff's machines along with bills for idling charges (Bills No. 3,8 and 9). The plaintiff has also contended that vide its reply to the said letter, which strangely is said to be dated 20 June, 2000, the defendant purportedly stated that it is continuously putting pressure on IOCL to get the payment. However, the plaintiff has failed to prove these documents by exhibiting them. In the absence of the above mentioned evidence, I am left to solely rely upon the Terms of Settlement arrived at on the meeting dated September 21, 2001. However, at this juncture it must be noted that Paragraph 4, which pertains to the amount

payable in lieu of work done in removing kinks and damages from ducts, is not binding on either of the parties as noted hereinbefore. Moreover, it is also pertinent to note, that plaintiff witness, Sh. Vimal Gupta, PW 1, has deposed that he did not attend the meeting dated September 21, 2001. In his Cross-Examination, which is recorded vide Order dated November 16, 2010, Sh. Vimal Gupta, PW 1 has stated the following -

"I was not present at the meeting held between the plaintiff and the defendant company at the office of the defendant on 21.09.2001. Volunteered: Another Director was present namely Mr. S. N. Gupta . Minutes of that meeting i.e. on 21.09.2001, I have seen document PW 1/14 and I states (sic) that signatures at point X now being encircled in red are those of Mr. S.N.Gupta. Same is my reply w.r.t. the signatures at point X on document already exhibited as Ex.PW1/2.

I was still working as a Director i nthe palintiff company as on 24.09.2001. Mr. S. N. Gupta is stil continuing as a Director in the plaintiff company."

41.It is also pertinent to note that the said Mr. S. N. Gupta has not been produced as a witness for proving the said Document. In the absence of evidence tendered by him with regards to the claim made in furtherance of Paragraph 4 of the Settlement, there is no other evidence in favour of the plaintiff to show that the defendant was liable to pay the sum claimed as Due No. 3.

42.Similarly, with respect to Due No. 4 i.e. Rs. 1,14,790.00/-, the

plaintiff has sought to rely upon Ex. PW 1/12 viz. Letter dated April 4, 2002, wherein the plaintiff wrote to the defendant claiming as under

"Final Bill Dt. 24.09.2001 for extra work (services) not claimed by TTL from IOCL but carried out on site by VTPL under instructions of TTL/IOC engineers amounting to Rs. 1,14,790/- is still pending payment. We have been including these items in our regular running bills as and when carried out. Not billing these items on IOCL thereby not getting the payment is not our fault. We have done the work and spent far more money than claimed, have to be paid by TTL (sic)"

43. It is also seen from the Ex. PW 1/15A, that the plaintiff has raised a consolidated Bill dated September 24, 2001 for a sum of Rs. 1,14,790.00/- as claimed above. However, it is strange to note that there is another letter dated September 24, 2001, which is placed on record as Ex. PW 1/12, wherein the plaintiff has sent another list of 'Final Bills' amounting to a total of Rs. 27,87,037.00/-. Upon careful examination, it is clear to me that Ex. PW 1/12 was sent to the defendant in furtherance of Paragraph 3 of the settlement which stipulated that the plaintiff must furnish fresh bills for the settlements arrived at Paragraphs 1 and 2. Meanwhile, it is also seen that at no point in the settlement, have the parties made any mention of payment to be made in lieu of extra work amounting to Rs. 1,14,790.00/-. Therefore, it is evident that the plaintiff did not discuss this amount with the defendant during the Settlement

Meeting on September 21, 2001. Therefore, I am inclined to agree with the submission of the defendant that the claim of Due No. 4 amounting to Rs. 1,14,790.00/- is merely an afterthought.

44. In light of the abovementioned findings, it must be decided that the plaintiff is not entitled to the sums claimed under Dues No. 3 and 4 i.e. Rs. 21,01,500.00/- and Rs. 1,14,790.00/- respectively.

Issue 4:

45. The plaintiff has not led any evidence to establish that it is entitled to get interest at the rate of 15% per annum in accordance with the usage and business practice as followed in the line of plaintiff's business. In any event, the payment of interest was to be subject to the relief granted.

Relief:

46. In view of the finding in Issue No. 1, the plaintiff is not entitled to any relief. The suit is consequently dismissed.

M.L. MEHTA, J.

SEPTEMBER 23, 2013

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