

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

% Order delivered on: 10th November, 2014

+ **I.A. Nos.17592/2011 & 17593/2011 in CS(OS) No.303/2011**

M/S FAR EAST MARKETING (P) LTD Plaintiff
Through Mr.J.S. Bakshi, Adv. with
Mr.A.S.Bakshi, Adv.

versus

M/S KHURANA ELECTRICALS & ORS Defendants
Through Mr.Sumit Kalra, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The plaintiff has filed the present suit for recovery under Order XXXVII CPC against the defendants.
2. Brief facts of the case are that the plaintiff-Company is engaged in the business of suppliers, dealers, stockists of Home Appliances etc. The defendant No.2 portrayed himself to be the proprietor of the defendant No.1's sole proprietorship firm. Pursuant to the agreement arrived at Delhi, the defendants had been appointed as the distributor in respect of the products/appliances supplied by the plaintiff.
3. It is the case of the plaintiff that as per the books of accounts of the plaintiff-Company, a principal amount of Rs.17,35,916/- was due and outstanding against the defendants as on 26th February, 2009 after taking into account all the payments received from the defendants. Thereafter the plaintiff made repeated requests and reminders and notice of demand dated 7th April, 2010 was served

upon the defendant. After the service of the legal notice dated 7th April, 2010, defendant No.2 approached the plaintiff at its office at Delhi and on 13th October, 2010 made a written balance confirmation of the amount of Rs.17,58,865/-. By way of an affidavit/undertaking dated 13th October, 2010 the defendant No.2 gave 5 cheques bearing Nos.440144, 440145, 440146, 440147, 440138 each for Rs.1,00,000/- and the balance amount of Rs.12,58,865/- was to be paid in the month of December, 2010 and January, 2011. The said affidavit/undertaking has been reproduced herein below:-

“I, Bharat Bhushan S/o Sh. Kessar Dass R/o H.No.360, Rajiv Poram, Gali No.2, Bhind, Sec-6 Karnal (Haryana) do hereby solemnly affirm and declare as under :-

1. That, I am owner of Khurana Electricals having office at 360, Rajiv Puram, Gali No.2, Phossgarh, Karnal.
2. That I was worked as Distributor of Far East Marketing (P) Ltd.
3. That I have to pay Rs.17,58,865/- (Seventeen Lacs Fifty Eight Thousand Eight Hundred Sixty Five) to Far East Marketing (P) Limited having its registered office at 1/7, West Patel Nagar, New Delhi-110008 against the supply of consumer durable goods.
4. That, I/We hereby undertake that I/We shall make the payment of aforesaid outstanding amount as per following:
 - Amount of Rs.500000/- will be paid in the month of October, 2010 vide cheque No.440144, 440145, 440146, 440147, 440138 vide dated 30/10/2010 of Rs.100000/- each respectively and balance amount of Rs.12,58,865/- will be paid in the month of December, 2010 and January, 2011.

5. That, I/We hereby undertake that I/We shall not dishonor the Cheque(s) issued to pay the said outstanding amount.
6. I hereby undertake that if I/We fail to make the payment of said outstanding amount within the period as mentioned above then said company shall free to take legal action in the courts of Delhi to recover the outstanding amount.

(Deponent)

Verification

I/We the above named deponent do hereby affirm and verify that I/We have voluntarily made the above affidavit and its contents are true to best of my knowledge. Verified at Delhi on this 13th day of October, 2010.

(Deponent)"

However, the aforesaid cheques were dishonoured on presentation due to insufficiency of funds.

4. It is stated that the defendants have not paid the valid dues of the plaintiff inspite of due service of the legal notice dated 7th April, 2010 as well as acknowledgment in writing and thus, are liable to pay the aforesaid dues along with interest at 18% per annum with effect from 15th January, 2009 till realization.

5. The plaintiff has prayed for a decree of recovery of Rs.23,88,865/- against the defendants along with the pendent lite and future interest @ 18% per annum from the date of filing of the suit till its realization. The details of the same are given as under:

<u>S.No.</u>	<u>Particulars</u>	<u>Amount</u>
1.	Amount due as principal per balance confirmation	Rs.17,58,865/-

2. Interest @ 18% p.a w.e.f 15th January, 2009 till date Rs.6,30,000/-

Total Rs.23,88,865/-

6. The matter was placed before this Court by the Joint Registrar and the suit was registered under Order XXXVII CPC. The defendants were served with the summons under Order XXXVII CPC to enter appearance on 26th March, 2011. However an application being I.A.No.7176/2011 under Order XXXVII Rule 3(4) CPC was filed by the plaintiff for issuance of summons for judgment to the defendants. Notice of that application was issued on 4th May, 2011 in the prescribed Form No.4A in Appendix-B of CPC for 23rd May, 2011. The defendants were served with summons for judgment on 18th October, 2011. In response thereto, the defendants have sought leave to defend in the present application being I.A.No.17592/2011 raising the following grounds of triable issues:-

- (i) It is stated in the application that the plaintiff has filed one document, which it claims to be the Affidavit/Undertaking dated 13th October, 2010, duly signed by the defendants, which is purported to be acknowledgement of debt by the defendants and the whole suit of the plaintiff is also based on this fabricated document only. It is contended that the plaintiff through its employees, obtained the signature of the defendants on various documents which includes the blank stamp paper used for fabricating the abovementioned affidavit/undertaking, on the pretext that the plaintiff requires the same for executing the

written agreement between the parties as the same was not executed earlier.

- (ii) All goods were supplied by the plaintiff from Haryana Freight Carrier, Vidhyawati Building, Main G.T. Karnal Road, Kundli, Distt. Sonipat (Haryana) and were received by the defendants at Karnal (Haryana) and all the payment were also made in Karnal. Hence, no cause of action arises within the jurisdiction of this Court.
- (iii) Except for the first few months, the goods supplied by the plaintiff was not up to the standards and most of the goods were either defective or in damaged condition and the goods worth Rs.12,00,000/- were returned to the plaintiff in the month of March, 2009. The defective/damaged goods worth Rs.10,00,000/- are still lying with the defendants for which the defendants had already made the payment to the plaintiff and despite several requests and reminders the plaintiff had neither replaced the goods nor adjusted the amount of those goods. The defendants received various written complaints with regard to the quality of goods supplied by the plaintiff from various customers/dealers and the same were forwarded to the plaintiff also but the plaintiff failed to look into that. The plaintiff supplied goods, on the contrary plaintiff never received those goods mentioned in the debit notes and even no bills were issued by the plaintiff for those goods.

During the Diwali festival in year 2008 the defendants were directed to book a stall in Trade Fair to be held in Karnal (Haryana) and all the expenses with regard to that fair was to be

borne by the plaintiff. Despite several reminders the amount spend by the defendants for participating in the fair which amounts to Rs.50,000/- approx was not paid to the defendants and the same can be substantiated by the account statement filed by the plaintiff.

During the business transactions, the plaintiff announced various incentive schemes for the distributors, however, despite the several requests, the defendants were not given credit for the same and that fact also can be substantiated by the account statement filed by the plaintiff.

- (iv) The invoices raised by the plaintiff contained the terms and conditions with regard to the sale made by the plaintiff and as per those terms and conditions printed on each and every invoices, all disputes are subject to Arbitration at Delhi and hence this Court has no jurisdiction to try and entertain the suit, as the same is the subject of Arbitration.
- (v) The account statement filed by the plaintiff along with the suit is contrary to what the plaintiff has stated in his suit and does not corroborate statement filed by the plaintiff is also not complete as there are few payments made by the defendants and credit notes issued by the plaintiff himself had not been taken into account and the account statement filed does not depict the accurate amount.

7. As far as the grounds raised by the defendant in the application for territorial jurisdiction is concerned, there is a specific statement made in the para 13 of the plaint which has been reproduced herein below:-

“That the agreement interse the parties was arrived at Patel Nagar New Delhi and the amounts were also payable at Delhi. The part payments were made at Delhi. The defendants made balance confirmation of its debt at Delhi and also revalidated the cheques at Delhi. The agreed place of jurisdiction is Delhi. The plaintiffs reside and work for gain at Delhi. The cause of action in favour of the plaintiff and against the defendants arose at Delhi. Hence, this Honourable Court has the territorial jurisdiction to entertain and try the present suit.”

8. No arguments were addressed by the defendants while arguing the application for leave to defend. Thus, the contention of the defendants on this ground is rejected. Even otherwise, nothing contrary is available on record to show that the statement made in para 13 of the plaint is false and incorrect.

9. As far as merit of the suit is concerned, the Supreme Court in ***M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation***, reported in 1977 SC 577 has evolved following principles after comprehensive review of the authorities on the subject:-

- a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defence.
- b) If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
- c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet,

shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

- d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
- e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.

10. In view of the above settled proposition of law, let me deal with the application filed by the defendant for leave to defend.

11. Learned counsel for the defendants, during the course of arguments, has neither denied the fact that the defendants have given the undertaking to the plaintiff dated 13th October, 2010, nor has he denied the signatures of defendant No.2 where the said defendant has acknowledged the debt. The only submission made by the defendants is that the signatures were obtained by the plaintiff on various documents including the stamp paper, therefore, the plaintiff has misused/manipulated the stamp paper.

12. Learned counsel for the defendants has also not denied the fact that for the outstanding amount, five cheques were issued by the defendants which were dishonoured on presentation, due to insufficient funds. In view of the said position, there is a presumption in favour of the plaintiff and against the defendants under Sections 91 and 92 of the Indian Evidence Act, 1872.

13. No evidence of any oral agreement or statement can be admitted when the terms of any such contract have been reduced in the form of a document. Thus, the grounds mentioned in the application for leave to defend as defence, it is merely a moonshine defence. The said grounds have no application in law. The present case is clearly covered in guiding principles of (d) and (e) of the judgment of **M/s Mechalec Engineers & Manufacturers** (supra). The defendants have no defence who are not entitled for leave to defend.

14. Lastly the defendants' counsel has referred to an application being I.A. No.17593/2011 under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") which has been filed by the defendants wherein it is stated that as per terms and conditions settled between the parties, all disputes are subject to Arbitration only. The settled terms and conditions agreed between the parties are printed on every invoice raised by the plaintiff and accepted by the defendants.

15. It is stated that as per Section 5 of the Act, no Court shall have jurisdiction to intervene where there is an arbitration clause/ agreement. Further as per Section 8 of the Act, it is clear that a judicial authority before which, an action is brought in a matter, which

is the subject matter of an Arbitration Agreement shall be referred to the Arbitration.

Thus, there is an existence of arbitration clause as per the settled law and conditions between the parties and the dispute raised in the suit relates to the subject matter of the Arbitration and the dispute be referred to arbitration.

16. The plaintiff in replies to the aforesaid applications has denied the contentions of the defendants.

17. With regard to the arbitration clause appearing on the invoice, the learned counsel for the defendants argued that this Court has no jurisdiction to try and entertain the suit in view of the existing Arbitration clause.

18. Having considered the undertaking/affidavit executed by the defendant No.2 as well as the dishonouring of the cheques issued by the said defendant, since the presumption is that the defendants have admitted their liability of the outstanding amount of the plaintiff, thus there is no dispute between the parties whereby the defendants have to pay the amount to the plaintiff. The question of referring the dispute, under these circumstances, to the Arbitration does not arise.

19. In the present case, since there are written documents raising presumption against the defendants with regard to the undertaking and dishonouring of the cheques, no ground has been made out by the defendants to grant the leave to defend in the present case. The application for leave to defend as well as the application under Sections 5 and 8 of the Act are accordingly dismissed.

CS(OS) No.303/2011

20. In view of the order passed in the applications being I.A. Nos.17592/2011 & 17593/2011, the suit of the plaintiff is accordingly decreed for recovery of Rs.23,88,865/- along with pendent lite and future interest @ 18% per annum from the date of filing of the suit till its realization. The plaintiff is also awarded cost of the suit. A decree be drawn accordingly.

**(MANMOHAN SINGH)
JUDGE**

NOVEMBER 10, 2014