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

RESERVED ON : 25th NOVEMBER, 2014

DECIDED ON : 12th DECEMBER, 2014

+ **CS(OS) 1532/2011 & CRL.M.A.No.16770/2012**

M/S UNITEL TECHNOLOGY (INDIA) PVT LTD. & ANR.

..... Plaintiffs

Through : Mr.Manu K.Giri, Advocate.

VERSUS

SMP INTERNATIONAL & ORS. Defendants

Through : Mr.Ashok K.Juneja, Advocate.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P. GARG, J.

1. The plaintiffs – M/s. Unitel Technology (India) Pvt. Ltd. & anr. have filed the instant suit for recovery of ₹ 41 lacs.

2. Plaintiffs' case is that a production unit at SDF No.E-17, Noida Export Processing Zone to repair and refurbish telephones was set up. The plaintiff company was 100% export oriented unit. However, it got special permission and licence to sell products in India. Defendants No.1 & 2 used to sell products i.e. telephones on behalf of the plaintiffs' company in India. Defendant No.3 used to receive goods on behalf of the defendant No.2.

These facts have been admitted in the cross-examination dated 29.05.2008 in Civil Suit No.185/2008, pending between the same parties. The said suit was dismissed by the learned Civil Judge, Tis Hazari Courts, Delhi. The findings in the said suit have attained finality.

3. Further case of the plaintiffs is that the company supplied telephones to defendants No.1 & 2 at cost price after paying duty. The sale was without profits. It was mutually agreed that the telephones will be sold at mutually agreed price in the local market and 80% profits from the sales would go to the plaintiffs' company. The defendant No.2 admitted in the cross-examination dated 29.05.2008 in Civil Suit No.185/2008 that when goods were supplied through NEPZ, these were duty paid. He further admitted that on the invoices (Ex.PW-1/D1 to Ex.PW-1/D6) by which goods were supplied, name of his firm was mentioned and delivery was taken by his mother – Smt. Parkashwati. The defendants were thus liable to pay ₹ 41,99,957/- to the plaintiffs as detailed in para No.7 of the plaint after deducting ₹ 50,000/- given in advance.

4. The defendants failed to file written statement within the prescribed period despite service. Finally, their right to file written statement was closed. Counter affidavit filed by the defendants was not taken on record by

an order dated 31.01.2012. The plaintiff No.2 examined himself as PW-1.

5. I have heard the learned counsel for the parties and have examined the file. I have also gone through the written arguments placed on record on behalf of the plaintiffs on 16.05.2014 and 01.12.2014.

6. In the plaint, the plaintiffs did not described in detail as to when the goods were supplied to the defendants. It is unclear as to whom the goods were supplied, and if so, at which place. It is not revealed if there was any contract in writing to supply the goods to the defendants or on what terms and conditions these goods were made available to the defendants. It is also not clear as to when the defendants were to make the payment of the goods supplied to them. All these vital facts are missing in the plaint.

7. Case of the plaintiffs primarily is based upon 'admission' of defendant No.2 in the cross-examination on 29.05.2008 in Civil Suit No.185/2008 wherein he admitted that when goods were supplied through NEPZ, these were duty paid. He further admitted to be correct that on the invoices (Ex.PW-1/D1 to Ex.PW-1/D6), by which the goods were supplied, the name of his firm was mentioned and delivery was taken by his mother – Smt. Parkashwati. The affidavit (Ex.PW-A/2) filed by Joginder Singh Sukhija as PW-1 before Local Commissioner is in consonance only with the

averments in the plaint.

8. Admitted position is that all these transactions took place in the years 2001- 2002. PW-1 (Joginder Singh Sukhija) admitted in the cross-examination that the present suit was filed by him in the year 2011 within three years from 29.05.2008 i.e. recording of the cross-examination in Civil Suit No.185/2008 when factum of invoices was admitted by the defendants. He admitted that he had not raised any demand in writing against the defendants since the year 2001 – 2002 till 2011. Admittedly, no suit for recovery of the price of the goods vide invoices (Ex.PW-1/D1 to Ex.PW-1/D6) was filed prior to 2011. It is not the case that the plaintiff was not aware of his right to institute the suit for recovery. He had agitated this plea even in the Civil Suit No.185/2008. No plausible explanation has been given by the plaintiffs as to why the suit for recovery of the outstanding amount was not preferred within the period of limitation. Institution of the suit after expiry of about more than nine years for recovery of the outstanding amount is apparently barred by limitation. The plaintiffs have not produced any document to show how the suit filed by them is within limitation. Under Sections 18 / 19 of Limitation Act, the statement on which a plea of acknowledgment is based must relate to a present subsisting liability, though

the exact nature or the specific character of the said liability may not be indicated in words. However, the words must indicate the existence of jural relationship between the parties such as that of debtor and creditor and it must appear that the statement is made with the intention to admit such jural relationship. There must be a conscious affirmation of an intention of continuing such relationship in regarding to an existing liability. In the instant case, the period of limitation had already expired to institute the recovery suit before the alleged admission / acknowledgement made by defendant No.2 in the proceedings in Civil Suit No.185/2008. Sections 18 and 19 of the Limitation Act are thus not attracted in the present suit.

9. Under Section 25(3) of Contract Act, following conditions must be satisfied in order to invoke the provisions : i) it must refer to a debt which the creditor but for the period of limitation, might have enforced; ii) there must be a distinct promise to pay wholly or in part such debt; and, iii) the promise must be in writing signed by the person or by his duly appointed agent.

10. Under Section 25 (3), a debtor can enter into an agreement in writing to pay the whole or part of a debt, which the creditor might have enforced but for the law of limitation. Such a promise constitutes novation and can

form a basis of a suit independently of the original debt. A promise to pay the time barred debt is a valid contract. For application of Section 25 (3) of Contract Act, the promise must be express and unequivocal. In the instant case, no such promise to pay the time barred debt was made by any of the defendants.

11. Civil Suit No.185/2008 was decided by a judgment dated 04.06.2010. It was a suit filed by defendant No.2 – Yashjit Basrar against the present plaintiff for recovery of ₹ 58,655/-. These documents (Ex.PW-1/D1 to Ex.PW-1/D6) were put in the cross-examination. The plaintiff therein objected to the filing of those documents. The relevant findings of the Civil Court are :

“First of all, it has to be seen that Ld. counsel for the plaintiff has taken an objection with respect to the documents Ex.PW 1/D-1 to PW 1/D-6. It is true that PW 1 in the cross examination has admitted it to be correct that on the invoices which are Ex.PW 1/D-1 to PW 1/D-6 by which the goods were supplied, the name of his firm is mentioned and the delivery was taken by his mother Smt. Parkash Wati. But I am of the opinion that Ld. counsel for the plaintiff has rightly pointed out that the aforesaid documents which are merely the photocopies, have not been proved as per the provisions of Indian Evidence Act. Further more, it has to be seen that the Ld. counsel for the plaintiff has rightly pointed out

that in the said challans it has been specifically mentioned that until and unless the complete payment is made, the property / goods shall be the property of the defendant and so far as the challan Ex.PW 1/D-2 is concerned, the same was issued against full payment.

Otherwise also, going by the evidence of the parties on record, I have no hesitation to hold that the said documents have not been proved in accordance with the provisions of Indian Evidence Act. In the cross examination as well DW 1 categorically stated that these documents Ex. PW 1/ D-1 to PW 1/D-6 were prepared by accounts department but he does not remember the name of the person concerned who had prepared and signed the invoices.”

12. It reveals that even the execution of these documents was not admitted by the Trial Court dealing with the said Civil Suit. The defendants had denied their liability to pay any such amount ₹ 10 lacs agitated by the plaintiff in the said proceedings.

13. Reliance was placed on Appeal (Civil) No.3484/1997 decided on 05.01.2004 by the Hon’ble Supreme Court in ‘*Food Corporation of India and ors. vs. M/s. Babulal Agrawal*’. This judgment, however, is not applicable to the facts and circumstances of the case. In the said proceedings, objection regarding limitation was taken for the first time in the Apex Court. Moreover, the limitation aspect was a mixed question of fact

and law and for that reason, the parties were not be permitted to raise it later on. In the present case, the suit is barred by limitation beyond doubt and it is not a mixed question of law and fact.

14. In the light of above discussion, the suit of the plaintiffs is dismissed being barred by limitation. No order as to costs. Decree-sheet be prepared accordingly. Pending application also stands disposed of.

S.P.GARG, J

DECEMBER 12, 2014 / tr