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

% **Date of decision: 9th July, 2015**

\+ **RFA No.368/2004**

MUNICIPAL CORPORATION OF DELHI .... Appellant
Through: Ms. Biji Rajesh, Adv. for Mr. Gaurang Kanth, Adv.

Versus

BHARAT OVERSEAS P. LTD. & ANR. ..... Respondents
Through: None.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 impugns the judgment and decree dated 23rd March, 2003 of the Additional District Judge (ADJ), Delhi, of dismissal of Suit No.273/03/80 filed by the appellant for recovery of a sum of Rs.9,25,000/- jointly and severally from the respondent No.1 Bharat Overseas Pvt. Ltd. (BOPL) and from the respondent No.2 Jaipur Udyog Limited (JUL).

2. Notice of the appeal was issued. Only the respondent No.2 JUL appeared in pursuance thereto. The appeal was admitted for hearing on 2nd March, 2005. The respondent No.1 BOPL could not be served in the

ordinary way and on the application of the appellant Municipal Corporation of Delhi (MCD), was permitted to be served by publication, which was effected. None however appeared for the respondent No.1 BOPL. There is till date no formal order proceeding *ex-parte* against the respondent No.1 BOPL. The respondent No.1 BOPL is now ordered to be proceeded against *ex-parte*. The appeal came up for hearing on 30th July, 2014, when none appeared for the appellant MCD or for the respondent No.2 JUL and the appeal was dismissed in default. The appellant MCD thereafter applied for restoration and which was allowed on 26th August, 2014, without issuing notice to the respondent No.2 JUL, which had been appearing and who was absent on 26th August, 2014. After restoration, the appeal was again ordered to be listed in the category of 'Regular Matters' and being an old matter, was directed to be taken up today. None has appeared for the respondent No.1 BOPL or respondent no.2 JUL today. The respondent No.2 JUL is also proceeded against *ex-parte*.

3. The counsel for the appellant on enquiry, states that North Delhi Municipal Corporation (NrDMC) is the successor of appellant MCD and she is now appearing for NrDMC.

4. Though the Trial Court record was requisitioned in this Court and received, but is informed to have been returned, on the dismissal of the appeal in default on 30th July, 2014 and was not re-requisitioned while restoring the appeal and as such is not available today. However, in the light of what is recorded herein below, need therefor is not felt.

5. It may, at the outset be noticed that the respondent No.1 BOPL had failed to appear before the Trial Court also and had been proceeded against *ex-parte*. The respondent No.2 JUL though initially appeared before the Trial Court and filed written statement but also stopped appearing thereafter and was also proceeded against *ex-parte*. In the circumstances, the appellant MCD had led *ex-parte* evidence before the Trial Court and the judgment of dismissal of the suit of the appellant MCD is an *ex-parte* judgment.

6. The respondent No.2 in its written statement having taken a plea of the suit claim being barred by time, the learned ADJ, in the *ex-parte* judgment, examined the aspect of limitation and has dismissed the suit of the appellant MCD holding the claim therein to be barred by time. Additionally, it has also been held that the appellant MCD, in the *ex-parte* evidence, had failed to prove that the suit had been instituted and the plaint filed by a duly authorized person on its behalf.

7. The counsel for the appellant MCD, on the aspect of limitation, has argued:

(i) that the appellant MCD on 26th February, 1974 deposited a sum of Rs.8,90,240/- with the respondent No.1 BOPL who was the agent of the respondent No.2 JUL as advance price for supply of cement;

(ii) that the respondent No.1 BOPL on 20th March, 1974, 21st March, 1974, 17th May, 1974 and 6th March, 1975 supplied to the appellant MCD cement of the value of Rs.1,31,932.29 paise, Rs.56,674.51 paise, Rs.22,041.61 paise and Rs.34,437.18 paise respectively i.e. for a total amount of Rs.2,45,085.59 only, leaving a balance of Rs.6,51,602.95 paise out of the advance price paid and against which no cement was supplied; and,

(iii) accordingly, on 19th May, 1980, the suit from which this appeal arises was filed for recovery of the said principal amount together with interest till the date of institution i.e. for a total sum of Rs.9,25,000/-.

8. The learned Trial Court has proceeded on the premise of the period of limitation applicable to the appellant MCD being of three years and the

counsel for the appellant MCD has not controverted the same. The suit was admittedly filed beyond the prescribed period of limitation. The counsel for the appellant MCD, before the Trial Court as well as today, relies on an acknowledgement of liability dated 9th May, 1977. The Trial Court has held it to be not an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, 1963. It is the said finding of the Trial Court which is under challenge in this appeal.

9. I have at the outset enquired from the counsel for the appellant MCD that even if the aforesaid contention of the appellant MCD were to be accepted, the suit having been instituted on 19th May, 1980, would be beyond the period of three years from the alleged acknowledgement dated 9th May, 1977.

10. The counsel for the appellant MCD states that the suit in fact was instituted on 7th May, 1980 i.e. well within three years of the acknowledgement dated 9th May, 1977.

11. The endorsement on the impugned judgment as well as the decree sheet, is of the suit having been instituted on 19th May, 1980. It may be mentioned that the appellant MCD in the memorandum of appeal has not

controverted the said part of the judgment and decree showing the suit to have been instituted on 19th May, 1980. The basis of the claim of the counsel for the appellant MCD, of the suit having been instituted on 7th May, 1980, has been enquired.

12. The counsel for the appellant MCD states that her contention, of the suit having been instituted on 7th May, 1980, is based on the copy of the plaint which bears the said date.

13. However, the date of institution would not be the date which the plaint bears but the date on which the plaint, though prepared earlier, was ultimately filed in the Court and which as per the judgment and decree is 19th May, 1980. Accordingly, even if the contention of the appellant MCD of there being an acknowledgement of liability dated 9th May, 1977 were to be accepted, the suit would still be barred by limitation.

14. However, for the sake of completeness, it is deemed appropriate to deal with the argument of the acknowledgement also.

15. The alleged acknowledgement is in a letter dated 9th May, 1977 purported to have been written by the respondent No.2 JUL "to all stockists of M/s Bharat Overseas Pvt. Ltd. and their sub-agents M/s Mukul Trading

Pvt. Limited and M/s Rajiv Trading Co. Pvt. Ltd.". I say "purported" because it is a finding of the learned Trial Court that the appellant MCD in its *ex-parte* evidence has not even proved the said letter. What has been filed as Annexure A-9 to the memorandum of appeal also, is only a typed copy of the said letter, showing the same to have been signed by the Secretary of the respondent No.2 JUL by order of Board and alleged to have been authenticated by the Chairman of the respondent No.2 JUL. It is not the case of the appellant MCD that the original signed letter is the same as the typed copy of the same. In any case, the Trial Court has held the same, even if were to be believed, to be not an acknowledgement.

16. In the typed copy of the said letter, the respondent No.2 JUL is purported to have stated as under:

> *"Dear Sirs,*
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> *This has reference to the discussions which your representatives namely Shri O.P. Lamba and others had with the members of our Board of Directors today. The view of the Board was conveyed to you that it would take a couple of months to take a decisions by the Company for taking over the liability of the advances obtained by the erstwhile Sale Selling Agents of the Company M/s. Bharat Overseas Private Limited and their sub-agents for supply of cement by the Company's cement works at Sawai Madopur.*

You however insisted that a decisions must be taken today and the liabilities be adopted by the Company. The Board reconsidered the issue. The undersigned has now to revise you that the Board has decided that the Jaipur Udyog Ltd. accept in principle the liability of the Advances received by Messrs Bharat Overseas (Private) Limited and/or their sub-agents M/s. Rajiv Trading Co. Pvt. Ltd. and M/s. Mukal Trading Pvt. Ltd. for supply of cement from the Company's cement works at Sawaimadhopur."

17. In my view, all that the respondent No.2 JUL stated in the said letter is that it has taken over the liability of the advances received by the respondent No.1 BOPL, either itself or through its sub-agents. There is no acknowledgement therein, of any liability to the appellant MCD.

18. The counsel for the appellant MCD in this regard relies on paras 20 & 21 of ***J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd.*** (2008) 2 SCC 444, where it has been laid down that acknowledgement may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay or is coupled with a claim to set off or is addressed to a person other than a person entitled to the right.

19. There can be no dispute about the said proposition. However, the fact of the matter remains that the purported acknowledgement aforesaid, is not at all with respect to the amount owed to the appellant MCD. The same is only an acknowledgement of liability to refund the advances received by the agents of the respondent No.2 JUL.

20. Even as per ***J.C. Budhraja*** supra, words used in the acknowledgment 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 and of continuing such relationship in regard to an existing liability. However, the document on which the appellant MCD relies as an acknowledgment within the meaning of Section 18 of the Limitation Act, 1963, is neither addressed to the appellant MCD nor has any reference, of / to the appellant or of any jural relationship with the appellant MCD or to any rights claimed by the appellant MCD. The same thus, fails to satisfy the essential requirements of an acknowledgment. Merely because the respondent No.2 JUL acknowledged liability for the advances received by its agents does not amount to acknowledgment of any liability to MCD or acknowledgment of any jural relationship with appellant MCD.

21. The counsel for the appellant MCD of course argues that the need for issuance of such letter arose only because it was the appellant MCD which was pursuing the matter of refund and alternatively for supply of cement in lieu thereof. However, the counsel for the appellant MCD on enquiry fairly states that there is no evidence to the said effect and only an averment in the plaint. Without any evidence and proof, no such contention can be raised.

22. There is thus no error in the finding returned by the learned ADJ on the aspect of limitation.

23. I may at this stage record that the appellant MCD has neither pleaded nor proved, as to on which date cement against the advance, alleged to have been given, was to be supplied and from which date the period of three years was to start running and has proceeded in the matter on the premise of the limitation of three years having started running from 6th March, 1975, when the last instalment of cement was supplied. Else, it may be noted that the relevant article would be Article 13, providing limitation of three years for institution of a suit for the balance of money advanced in payment of goods to be delivered, commencing from the date when the goods ought to have been delivered. It is however not the case of the appellant MCD that the

goods were to be delivered at any time within three years prior to the institution of the suit. On the contrary, annexures to the petition suggest that the goods i.e. cement was to be supplied immediately after the date of payment of advance. The suit claim, was barred by time on this account also.

24. In view of the findings aforesaid on the aspect of limitation, need is not felt to address the other issue, of the appellant MCD having not proved that the plaint was signed, filed and verified by a duly authorized person, which was also decided against the appellant MCD. Suffice it is to state that were the suit claim to be within time, as per ***United Bank of India Vs. Naresh Kumar*** (1996) 6 SCC 660 the said aspect would not have come in the way of decreeing the suit.

25. There is thus no merit in the appeal, which is dismissed.

Decree sheet be drawn up. No costs.

RAJIV SAHAI ENDLAW, J

JULY 09, 2015
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(Corrected and released on 24th July, 2015).