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

% *Date of decision:* 01.11.2017

+ CS(OS) 114/2014

TOP FORTY SUSPENSION PVT. LTD. Plaintiff
Through Mr. Amit Sanduja, Advocate

versus

TOP AUTO PVT. LTD. Defendant
Through None.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. The present suit is filed by the plaintiff seeking recovery of a sum of Rs.1,54,48,680.60 from the defendant.
2. In the plaint, it has been stated that the plaintiff has been supplying auto parts to defendant No.1 since 2000. It is claimed that as on 01.04.2010 an amount of Rs.1,25,81,610.60 is due from defendant No.1 in respect of the goods so supplied by the plaintiff to the defendant No.1. It is stated that the parties are maintaining a mutual open and current account. Various payments have been received from the defendant No.1. Last payment was made by the defendant on 05.01.2011 for a sum of Rs.1,00,000/- vide cheque No.384271 drawn on ICICI Bank, Model Town Branch, Delhi. Hence, it is pleaded that the suit is within time.
3. It is also pointed out that a notice was served on 24.12.2013 on the defendant thereby asking the defendant to make necessary payment. Despite delivery of notice, the defendant have neither sent a reply nor made

payment.

4. I may note that in the present case the plaintiff has impleaded the defendants No.2 to 4 who are the Directors of defendant No.1 as parties. There is no averment in the entire plaint as to how defendants No.2 to 4 can be said to be personally liable for the acts and deeds of defendant No.1. In my opinion defendants No.2 to 4 are neither necessary nor proper party. I accordingly delete them from the array of parties.

5. I may note that this matter was listed as item '1A' in the category of regular list and has been called out on several dates. On earlier dates, none had appeared for the defendant. Today, the learned counsel for the plaintiff has appeared. None has appeared for the defendant.

6. The defendants have filed a written statement. In the written statement, it is pleaded that the plaintiff approached the defendant for appointing them as their exclusive wholesale distributor (for all India) for their automobile products under the brand "ORVEL". It is urged that directors of the plaintiff used the experience and acumen of Mr.Rajesh Thukral who invested enormous resources in building reputation and goodwill of Orvel brand goods of the plaintiff. It is pointed out that return of defective goods and reimbursement is normal trade practice of the automobile part industry. Similarly, cash discount coupons are issued as incentives by the manufacturer and they are encashed at the Dealer's end. It is urged that the defendant incurred massive expenses and issued credit notes to the people who returned defective Orvel goods and routinely reimbursed people qua the coupons. It is stated that the plaintiff is well aware of the huge stock of defective Orvel brand goods lying with the defendant which were returned each year. Credit notes of Rs.1,09,47,638 is

said to have been issued to the buyers for the goods of the plaintiff. Further Orvel brand goods worth Rs.28,47,592/- are lying with the defendant till date. Further it is pleaded that cash discount coupons of the buyers worth Rs.43,38,797/- are also pending. Further the defendant claimed to have spent a sum of Rs.39,19,183/- towards expenses for travelling and sundry charges for the employees of the plaintiff. Hence, it is pleaded that as per records, no amount is due from the defendant. It is also conceded that the directors of the plaintiff had instituted a suit for recovery of Rs.10 lacs against the defendant. In 2012, the suit was decreed and the defendant paid the said sum alongwith interest.

7. Based on the above pleadings, this court framed issues on 29.09.2014, which are as follows:

- (1) To what amount the plaintiff is entitled to recover from the defendant?
OPP
- (2) Whether the defendant is liable to pay any interest to the plaintiff?
OPP
- (3) Whether the goods supplied by the plaintiff to the defendants were defective? OPD
- (4) Whether the plaintiff is liable to pay any amount to the defendant as alleged in the written statement? OPD
- (5) Whether the instant suit is barred under Order II Rule 2 CPC? OPD
- (6) Relief

8. The plaintiff led the evidence of Sh.Ravinder Singh, PW1 who exhibited three documents, namely, resolution dated 23.12.2013 as Ex.PW1/1, certified copies of ledger accounts of the plaintiff as Ex.PW1/2

(colly.) and certified copies of ledger accounts of the defendants as Ex.PW1/3 (colly.). The defendants have led the evidence of one witness Sh.Rajesh Thukral as DW1. He had tried to exhibit thirteen documents as Ex.DW1/1 to DW1/13. However, at the time of tendering of the documents, an objection was taken by the learned counsel for the plaintiff that the documents which are marked as exhibits in the affidavit by way of evidence are photocopies and not the original. It was also pleaded that earlier in the admission and denial there are no original documents on record. Mode of proof was objected to then also.

9. The plea of the learned counsel for the defendants was noted that the defendants have brought the original documents. However, there is no recording by the Joint Registrar who was recording the evidence that the original documents have been seen and returned while exhibiting the documents.

10. I have heard the learned counsel for the plaintiff.

11. I may first deal with issue No.1, namely as to what amount the plaintiff is entitled to recover from the defendant. A perusal of the evidence by way of affidavit of PW1 would show that he has proved certified copies of ledger accounts of the plaintiff and ledger accounts of the defendants. He has also proved notice as Ex.PW1/4, postal receipts as Ex.PW1/5, AD cards as Ex.PW1/6 and courier receipts as Ex.PW1/7. The documents PW1/2 and PW1/3 confirm that a sum of Rs.1,00,31,610.60 is due and payable by the defendants. Further, a perusal of the Ex.PW1/3 would show that the defendant has accepted the liability for Rs.1,00,31,610.60/-. Hence, in view of the above documents which have not been rebutted by the defendant, it is manifest that an amount of Rs.1,00,31,610.60/- due and payable by the

defendant.

12. I will now deal with issue No.3, namely as to whether the goods supplied by the plaintiff to the defendant were defective and issue No.4, namely as to whether the plaintiff is liable to pay any amount to the defendant as alleged in the written statement. The onus of these two issues was on the defendant. I may look at the evidence that has been placed on record by the defendant.

13. I may note that despite specific objection raised by the plaintiff, the defendants failed to file original documents. Hence, none of the documents of the defendants can be said to have been tendered in evidence properly.

14. In this context, a reference may be had to the judgment of the Supreme Court in the case of *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Anr.*, JT 2004 (6) SC 442, where exhibition of documents stated as follows:

“20. The learned counsel for the defendant-respondent has relied on The Roman Catholic Mission Vs. The State of Madras & Anr. AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an

objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.”

15. In the present case, the documents were photocopies and hence could not be tendered in evidence. The documents of the defendant were inadmissible in evidence in the absence of appropriate steps taken in this regard.

16. The basic defence of the defendant is of adjustment of the claim on account of the credit notes to the people who have returned the defective goods. Various amounts are said to be pending on account of defective goods so supplied by the plaintiffs and on account of the reimbursement of cash discount coupons. In his cross-examination, DW1 on 07.08.2015 to one of the questions replied as follows:

“Q. Was the accounting yearwise or else?

Ans. The accounting was not yearwise rather it was a continuing account as there used to be replacements and adjustments were also made against coupons.

Cash coupons were attached on the product.

The goods were defective right from the very beginning. I do not orally remember the total amount of the goods supplied by the plaintiff and received by me. **Vol.:** It will be reflected in the books. I maintain books of account. I maintain cash book and ledger. In respect of the defective goods a debit entry must have been made in my accounts. I am an Income Tax payee. The defendant No.1 company has filed regular returns of income tax. I do not remember whether the account statement of the defendant No.1 company had been filed in the present proceedings on the court record or not. Similar is my reply to income tax returns. Defendant No.1 company maintain a balance sheet. The accounts of the defendant No.1 company are audited.

Q. Can You tell the details of the alleged defective goods supplied by the plaintiff from year 1999 onwards?

Ans. The goods which were supplied by the plaintiff were sent by us to different dealers located in different States. Those dealers used to send back the defective goods/items. I am in possession of the debit notes sent by such dealers and on receipt of debit notes I used to issue credit notes to those dealers.

Q. Did you issue debit note to the plaintiff or supplied a copy of debit note allegedly sent to you by your dealers?

Ans. No. As the plaintiff was not maintaining any excise register or scrap register.”

17. In view of the cross-examination of DW1, it is manifest that DW1 has clearly stated that no credit note was issued to the plaintiff for the defective goods or items. He is also not clear as to whether in respect of the defective goods a debit entry was made in his books of accounts. He is also not clear as to whether any account statement of the defendant company has been filed. Clearly, the defendant has failed to prove issues No.3 and 4, the onus of which was on them.

18. So far as issue No.5 is concerned, namely, as to whether the suit is barred under Order II Rule 2 CPC, the onus of which was on the defendant. No submission has been made in this behalf by the defendant. A perusal of the record shows that the director of the plaintiff had in an individual capacity filed a suit against the defendant which was decreed in 2012. It is manifest that the said suit pertains to completely different transactions and different parties. The order II Rule 2 CPC would have no application.

19. Accordingly, I accept the version of the plaintiff and a decree is passed in favour of the plaintiff and against the defendants for a sum of Rs.1,54,48,680/-. The plaintiff is also entitled to *pendente lite* simple interest @ 8% p.a. from the date of institution of the suit till recovery. The plaintiff shall also be entitled to costs.

20. The suit is disposed of as above. All pending applications, if any, also stand disposed of.

JAYANT NATH, J.

NOVEMBER 01, 2017/v