IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 102 of 2016

North Eastern Carrying Corporation Ltd.,
Having its Head Office at 9062/47,
Rambag Road, Azad Market,
Delhi
Represented by
Shri Gordhan Singh Shekhawat,
Son of Shri Anop Singh Shekhwat,
Aged 39 years,
Married, Branch Manager,
North Eastern Carrying Corporation Ltd.,
Diamond Apartments,
Shop no. B, Jaycee Nagar,
Ponda-Goa. … Appellant

V e r s u s

M/s. Marico Industries Ltd.,
Survey No.71 and 72/1,
Khandepar, Ponda-Goa.
403406. ….. Respondent

(All the above are the Registered Address of the parties)

Shri Gaurish Agni, Advocate for the Appellant.

Shri S. M. Singbal, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.
DATE:11th January, 2018.

ORAL ORDER :

The challenge in this appeal is to the concurrent finding of the Courts below dismissing the suit of the appellant for recovery of an amount of Rs.4,26,304/- along with interest.

2. The brief facts are that the appellants were the Carrying and Forwarding agents (C and F Agents) engaged by the respondent. There is a C and F Agreement between the parties entered into on 1/9/2000. Indisputably, the appellant had carried various consignments of the products of the respondent from 6/10/2010 to 31/3/2011 in respect of which the freight amount of Rs.2,44,900/- was due and payable to the appellant by the respondent. It so happened that one of the consignments of the respondent which was carried by the appellant went missing during the period from 24/9/2000 to 23/10/2000 in respect of which an F.I.R was lodged with the police. The appellants filed a suit for recovery of an amount of Rs.4,26,304/- (comprising of the freight charges & interest) against the respondent.

3. The suit claim was resisted on behalf of the respondent inter alia on the ground that the claim was barred by limitation as the suit was not brought within a period of three years. The respondent also raised contentions on merits stating that insurance claim in respect of the consignment, which went missing, could not be fully recovered, on account of the failure of the appellants, to furnish a closure report. [There is a letter issued by the respondent on 12/4/2004 which reads as under:

Monday, April 12, 2004.

To
The Branch Manager,
North Eastern Carrying Corporation Ltd.,
HO at 9062/47, Rambagh Road,
Azad Market, Delhi.

Dear Sir,

Sub: Outstanding amount as on 31/3/2004.

From our records we hereby confirm that an amount of Rs.21446/- towards freight charges is due from us & payable to you as on 31st March 2004.

The above amount is net payable to you after making necessary deductions including TDS at the prevailing rate.

The above amount would be reimbursed to you once our insurance claim has been settled that is pending with National Insurance Company- Panjim. The claim is pending from Dec 2000, due to non-submission of police closure report from your office.].

4. The learned trial court framed issues, including that of limitation. The parties led evidence and produced documents. The learned trial court by a judgment and decree dated 12/8/2014 dismissed the suit inter alia on the ground that the suit was barred by limitation. The learned trial court also found that there is no case made out on merits as the amount towards the consignment which went missing was liable to be adjusted. The

said judgment and decree has been confirmed in appeal by the learned District Judge.

5. I have heard Shri Agni, the learned counsel for the appellant and Shri Singbal, the learned counsel for the respondent. With the assistance of the learned counsel for the parties I have gone through the record and the evidence led.

6. It would be first necessary to deal with the issue of limitation as it goes to the root of the matter. It is submitted by Shri Agni, the learned counsel for the appellant that the letter (Exhibit 49/C) would amount to an acknowledgment coupled with a promise to pay which would be governed by Section 25(3) of the Indian Contract Act, 1872 (Act, for short). It is submitted that in the plaint the appellant had rightly shown the cause of action to have accrued on 12/4/2004 and the suit having been filed in March 2006 was well within limitation. The learned counsel was at pains to point out that none of the courts below have adverted to the provisions of Section 25(3) of the Contract Act in order to examine whether the suit was filed within limitation. Shri Agni, however, in all fairness did not dispute that the ground based on Section 25(3) of the Act was neither raised before the trial court nor before the first appellate court. He also concedes that no specific ground based on

section 25(3) of the Act is raised in the second appeal memo. In this regard reliance is placed on the decision of the Supreme Court in the case of **State of U.P and others Vs. Dr. Anupam Gupta etc. 1992 0 AIR 932**, in order to submit that if a pure question of law arises in the case, it can be allowed to be raised for the first time before this Court. The learned counsel has referred to Clause VII pertaining to "Shortages" and Clause VIII " Delay/Detention". It is pointed out that in Clause VII entitled "Shortages", the respondent was not entitled to deduct any amount while there is a specific clause which permits the respondent to deduct the amount towards delay in transportation or delivery of the consignment beyond stipulated time. The submission is that the letter (Exhibit 49/C) has to be read in the context of the terms of the contract and not bereft of it. It is thus submitted that the respondent was not entitled to make a conditional promise to pay, the amount of freight charges making it contingent on insurance claim being realized in full.

7. The learned counsel for the appellant has placed reliance on the decision of this Court in the case of **Dinesh B. Chokshi & Others Vs. Rahul Vasudeo Bhatt & Others 2012 0 ALLMR (Cri) 3656**, where the issuance of a cheque in respect of a time barred debt was held to constitute a valid and enforceable promise within the meaning of sub section (3) of Section 25 of the Contract Act.

8. On the contrary, it is submitted by Shri Singbal, the learned counsel for the respondent that the ground based on Section 25(3) of the Act not having been raised in the Courts below cannot be raised for the first time in the Second Appeal. It is submitted that even otherwise the letter Exhibit 49/C cannot be said to be an acknowledgment coupled with a promise to pay. The learned counsel has referred to Clause 6 of the Contract namely "Damages and protection", in which the transport carriers i.e the appellant was responsible for the safety of the goods from time of collection of the stocks till the delivery at the destination. It is pointed out that in the event of any loss or damage arising in the course of transportation of the goods, it was the sole liability of the respondent, for making good the value of such loss or damage to the respondent. It is submitted that if so read, the letter (Exhibit 49/C) cannot be said to be at variance with the terms of the contract. The learned counsel points out that only 75% of the insurance claim has been realized and the remaining 25% could not be realized on account of the failure of the appellant to furnish closure report. He, therefore, submits that the second appeal does not raise any substantial question of law.

8. I have given my anxious consideration to the rival circumstances and the submissions made. At the outset it may be mentioned that the learned

counsel for the appellant has given up the case based on sections 18 and 19 of the Limitation Act. In other words, it was not disputed that the last of the consignment in respect of which the recovery of the freight charges is sought having been issued on 31/3/2001 the letter (Exhibit 49/C) was not within three years thereof. It is not disputed that for an acknowledgment simplicitor governed by section 19 of the Limitation Act, (which has the effect of extension of the period of limitation) has to be within the period of limitation and not beyond it. Thus the sole reliance at this stage is on section 25(3) of the Contract Act in order to submit that the letter (Exhibit 49/C) amounts to an acknowledgment coupled with a promise to pay.

9. Before dealing with the said contention it may not be out of place to mention that a specific contention based on section 25(3) of the Act was not raised before any of the Courts below and not even in the appeal memo before this Court. This ground is raised for the first time during the course of the arguments at bar. However, assuming that this is a question of law which can be examined on the basis of the facts which have already come on record, I proceed to deal with the same briefly. Section 25 (3) of the Contract Act is an exception to the rule that a contract without consideration is void. Under section 25 (3) of the Act if there is a promise, made in writing to pay wholly or in part a debt of which the creditors might have entered payment, but for

the law of limitation, such an agreement can be enforced as a contract. It is well settled that under section 25(3) of the Act there has to be a clear and unequivocal promise to pay a debt which may be otherwise barred by limitation. A bare perusal of the letter Exhibit 49/C shows that while confirming the payment of an amount of Rs.2,14,446/- as due and payable (after making necessary deductions including for TDS) it is stipulated on behalf of the respondents that the amount would be reimbursed once the insurance claim which was pending with the National Insurance Company is settled. The letter further makes it clear that the appellant was put on notice that the claim is pending from December 2000 due to non submission of the police closure report. It can thus be seen that the letter as it stands does not bear out any clear or unequivocal promise to pay the amount. On the contrary the promise is conditional and contingent on the insurance claim being realized which has not materialized. In that view of the matter, it is not possible to accept the contention based on section 25(3) of the Contract Act.

10. The decision in the case of **Dinesh B. Chokshi (supra)** cannot take the case of the appellant any further. In that case the question was whether a cheque issued towards repayment of a time barred debt would constitute a valid and enforceable promise. This Court found that on plain reading of section 13 of the Negotiable Instrument Act 1881, (N.I. Act, for

short) a negotiable instrument does contain a promise to pay the amount mentioned therein and such a promise is given by the drawer under section 6 of the N.I. Act. It can thus clearly be seen that the question was answered in the affirmative in view of the fact that the cheque is a document which is governed by the provisions of the Negotiable Instruments where there is an inherent promise to pay unlike the letter Exhibit 49/C. In my considered view the decision in the case of **Dinesh B. Chokshi** turned on its own facts.

11. Once having held that the suit was barred by limitation, it would not be necessary to go into the merits of the claim. However, the fact remains that under Clause VI of the contract as transporters and carriers it was the responsibility of the appellant to ensure the safety of the goods and in the event of any loss or damage, the appellant was liable to make good the value of such loss or damage to the respondent. I have carefully gone through the judgment of the trial court and that of the first appellate court and I do not find that the appeal raises any substantial question of law. In the circumstances, the second appeal is hereby dismissed.

C. V. BHADANG, J.

Ap/