

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

Reserved on: 11.09.2018
Date of decision : 18.12.2018

+ **OMP (COMM) 176/2017 & I.A.No.6316 /2018**

M/S BPL LTD Petitioner

Through **Mr.Parag Tripathi, Sr. Adv.with
Mr.Dhananjay Joshi,
Mr.G.Umapathy, Ms.R.Mekhala
and Mr.Aditya Singh, Advs.**

Versus

M/S MORGAN SECURITIES & CREDITS PVT. LTD

... Respondent

Through **Mr.K.Dutta and Mr.Simran Mehta,
Advs.**

+ **O.M.P. (COMM) 190/2017 & I.A. No.6302/2018**

MORGAN SECURITIES & CREDITS PVT LTD. Petitioner

Through **Mr.K.Dutta and Mr.Simran Mehta,
Advs.**

versus

ELECTRONIC RESEARCH PVT.LTD. & ORS. Respondents

Through **Mr.Parag Tripathi, Sr. Adv.with
Mr.Dhananjay Joshi,
Mr.G.Umapathy, Ms.R.Mekhala
and Mr.Aditya Singh, Advs.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been

filed by the parties to the arbitration proceedings which has resulted in the Arbitral Award dated 14.12.2016 passed by the Sole Arbitrator. (M/s BPL Ltd. shall hereinafter be referred to as the petitioner, M/s Morgan Securities and Credits Pvt. Ltd. shall be referred to as the respondent and Electric Research Pvt. Ltd. shall be referred to as 'ERPL').

2. One M/s BPL Display Device Ltd. (hereinafter referred to as 'BDDL') had sold certain goods to the petitioner. The two companies requested the respondent for extending bill discounting facility to BDDL. The same was sanctioned by the respondent by way of its letter dated 27.12.2002 (to the extent of Rs.6 crores) and 11.06.2003 (to the extent of Rs.6.50 crores). The said Sanction Letters referred to BDDL as the Drawer and the petitioner as the Drawee. The bill discounting period was upto 150 days.

3. Clauses 3 and 4 of the Sanction Letter dated 27.12.2002 are relevant for the purposes of the present petitions and are reproduced hereinbelow:

"3. Bill of Exchange/Hundi shall be with recourse to Drawer. Therefore the liability to repay amount to Morgan Securities &Credits Private Limited (hereinafter referred to as "the Discounting Company") on the due date shall be of Drawer and-Drawee jointly and severally. In case the Drawee does not make payment on due date of any bill of exchange/hundi, the Drawer shall make the payment of all the amount due thereon to without any notice or demand or presentment from the payee or the holder in this behalf.

4. The Drawee/Drawer agrees that normal agreed rate for providing Bill Discounting facility is 36% p.a., however as a special case the Discounting Company is providing the Bill Discounting facility at concessional rate of 22.5% p.a. payable upfront. In case of delay or default in making payment of amount of the Bill of Exchange or overdue bill discounting charges/interest or any part thereof on it's due date, the concessional rate will be withdrawn and the normal rate of bill discounting charges of 36% p.a. monthly rests, shall be payable by the Drawee/Drawer from its due date. Margin @ 3% p.m. for 3 days shall be deducted at the time of discounting, to be adjusted against delays in repayment, if any."

4. In the Sanction Letter dated 11.06.2003, apart from the above terms, ERPL was added as a guarantor and was to provide Comfort Letter along with Post Dated Cheques guaranteeing repayment of the amount due to the respondent. ERPL had issued the Comfort Letter and also the Post Dated Cheques in accordance with the Sanction Letter dated 11.06.2003.

5. The Bills of Exchange were drawn by BDDL directing the petitioner to pay to the respondent the sum of money mentioned in each of these Bills of Exchange within the period mentioned therein.

6. The respondent, claiming that a sum of Rs.25,79,91,096/- had become due and payable by the petitioner and BDDL, invoked the Arbitration Agreement contained in the Sanction Letters. The arbitration was initially initiated by the respondent against the petitioner and BDDL. ERPL was subsequently impleaded as respondent no.3 in the said arbitration proceedings on an application being filed by the respondent.

During the arbitration proceedings, the respondent dropped its claims against BDDL as BDDL had proceeded towards liquidation.

7. The Sole Arbitrator by her Impugned Award has directed the petitioner to pay a sum of Rs.7,27,05,579/- and Rs.20,62,28,681/- with interest as applicable in the terms of Agreements/Sanction Letters from the date these amounts were due till the date of the Award, and at the rate of 10% per annum from the date of the Award till realization. As far as ERPL was concerned, the Arbitrator dismissed the claims against it as being barred by time and also under Section 64 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'NI Act').

8. Both parties being aggrieved by the said Award have challenged the same. OMP(Comm) No.176/2017 has been filed by the petitioner challenging the direction of the Sole Arbitrator to make payment to the respondent, while OMP(Comm.) No.190/2017 has been filed by the respondent challenging the dismissal of its claim against ERPL as also the rate of interest for the post Award period been confined to only 10% per annum by the Arbitrator.

9. Learned senior counsel for the petitioner submits that the rate of interest awarded by the Sole Arbitrator for the pre-reference and *pendent lite* period is contrary to Section 80 of the NI Act and therefore, cannot be sustained. He submits that the Bills of Exchange did not contain any provision for payment of interest, much less @ 36% per annum compounded monthly. In the absence of such stipulation in the Bills of Exchange, the respondent was entitled to claim interest only @18% per

annum as provided in Section 80 of the NI Act. In this regard, he places reliance on the following judgments:

a) *K.Rajagopal & Anr. vs. M.Thiagarajan & Ors.* (1999) 95 Comp Cas 286 Mad

b) *Shri Manjit Singh Mehta vs. Shri Prabhjot Singh* 2011 SCC OnLine Del 902

10. Learned senior counsel for the petitioner further submits that as the interest has been granted by the Arbitrator in contravention of Section 80 of the NI Act, the Award is liable to be set aside as being against the public policy of India. For this, he places reliance on the following judgments:-

a) *Tata Finance Ltd. vs. Viriyoga International Ltd. & Ors.* 1998 SCC OnLine Del 123

b) *Sri T. Ramachandra Reddy v. Sri Murthy Gowder*, MANU/KA/0103/2010.

11. On the other hand, learned counsel for the respondent submits that the petitioner had not relied on Section 80 of the NI Act before the Sole Arbitrator and therefore, cannot rely upon the same while challenging the Arbitral Award. In this regard, he places reliance on the judgment of the Supreme Court in *Union of India vs. Susaka (P) Ltd.*, (2018) 2 SCC 182 and of this Court in *KEI Industries Ltd. vs. D.V.B & Ors.* 2012 SCC OnLine Del 1523. He further submits that the claim of the respondent was not based on the Bills of Exchange but on the Sanction Letters and therefore, Section 80 of the NI Act will have no application. He submits

that Section 80 of the NI Act would be applicable to the ‘parties’ to the Negotiable Instruments; the respondent was not a party to the Negotiable Instruments in question and therefore, Section 80 of the NI Act would not be applicable.

12. Section 80 of NI Act is reproduced hereinbelow:

“80. Interest when no rate specified.—When no rate of interest is specified in the instrument, interest on the amount due thereon shall, [notwithstanding any agreement relating to interest between any parties to the instrument], be calculated at the rate of [eighteen per centum] per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

Explanation.—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonor.”

13. A reading of the above provision would show that where no rate of interest is specified in the Negotiable Instrument, interest @ 18% per annum shall be payable, notwithstanding any agreement relating to interest between any ‘parties’ to the instrument. The said provision is clearly for the benefit of the ‘Payee’ or ‘Holder in due course’ of the Negotiable Instrument to claim interest irrespective of any separate agreement relating to interest being executed between parties to such Negotiable Instrument.

14. Before adverting further, a few provisions of the NI Act need reference.

15. Section 5 of the NI Act defines a Bill of Exchange as under:-

*“5. **“Bill of exchange”**.—A “bill of exchange” is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.”*

16. Section 7 of the NI Act defines the ‘Drawer’, ‘Drawee’ and the ‘Payee’ as under:

*“7. **“Drawer”**, **“drawee”**.—The maker of a bill of exchange or cheque is called the “drawer”, the person thereby directed to pay is called the “drawee”.*

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*“**Payee**”.--The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the “payee”.*

17. Sections 8 and 9 of the NI Act define the ‘holder’ and ‘holder in due course’ as under:

*“8. **“Holder”**.—The “holder” of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.*

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

*9. **“Holder in due course”**.—“Holder in due course” means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order], before the amount mentioned in it became payable, and without having*

sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.”

18. A reading of the above provisions would clearly show that the Agreement being referred to in Section 80 of the NI Act is one between the ‘Drawer’ and ‘Drawee’ of the Bill of Exchange, as they are the parties to such Bill of Exchange.

19. Learned senior counsel for the petitioner has placed reliance on the judgment of the Andhra Pradesh High Court in ***Commissioner of Income Tax vs. Dexan Pharmaceuticals Pvt. Ltd. & Anr.*** 1995 SCC Online AP 903 to contend that the Bill of Exchange would have three parties, that is the Drawer, Drawee and the Payee. In my opinion, the said judgment would have no application to the facts of the present case. In the said judgment, the Court was not considering Section 80 of the NI Act and was only considering whether the document in question therein was a ‘Hundi’. The Court found that as in the document in question, the Drawer himself was the Drawee, the said document could not be called a Hundi.

20. In the present case, as a matter of fact, the respondent was not a party to the Bills of Exchange. Further, the claim of the respondent was not on the basis of the Bills of Exchange but on the basis of two Sanction Letters to which the petitioner was admittedly a party.

21. In my view, therefore, reliance of the petitioner on Section 80 of the NI Act is totally ill-founded.

22. Judgment of the Madras High Court in *K.Rajagopal v. M.Thiagarajan* (supra) would have no application to the facts of the present case as it was a case where there was no Agreement or written deed regarding the payment of interest. Therefore, the question of effect of such an agreement did not arise.

23. In *Shri Manjit S.Mehta vs. Shri Prabhjot Singh* (supra), the Court again found that there was no agreement between the parties in relation to the interest. The said judgment again would have no application to the facts of the present case.

24. In view of the above discussion and as Section 80 of the NI Act is held inapplicable to the facts of the present case, the reliance of the petitioner on the judgment of this Court in *Tata Finance Ltd.* (supra) and that of Karnataka High Court in *Sri T.Ramchandra Reddy* (supra) cannot be accepted.

25. I may only note that the learned counsel for the respondent has pointed out that the judgment of this Court in *Tata Finance Ltd.*(supra) has been set aside by the Division Bench of this Court in an appeal.

26. Learned senior counsel for the petitioner has further placed reliance on the provisions of the Usurious Loans Act, 1918 as amended by the Punjab Relief of Indebtedness Act, 1934 to contend that a rate of interest in excess of 12½% per annum should be deemed to be excessive and cannot be granted by the Arbitrator. He submits that the Arbitrator has erred in holding that the Bills of Exchange transactions were not loans but were trade transactions making the provisions of the Usurious

Loans Act inapplicable. For this, he places reliance on the following judgments:

i. Smt. Dayawati and Anr. vs. Inderjit & Ors. AIR 1966 SC 1423

ii. FMI Investment P. Ltd. vs. Montari Industries Ltd. & Anr. 2012 SCC OnLine Del 5354

iii. M/s. Monnet Finance Ltd. vs. Rattan Lal Garera & Anr., 2012 SCC OnLine Del 5450

27. I am unable to agree with the submission made by the learned senior counsel for the petitioner.

28. Grant of interest in an Arbitral Award is governed by Section 31 (7) of the Act, (as it stood prior to its amendment as the arbitration proceedings had commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015), which is reproduced hereinbelow:

“31.(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of award to the date of payment.”

29. A reading of Section 31(7)(a) of the Act would show that the Arbitral Tribunal is empowered to grant interest for the pre-reference

and *pendente lite* period at such rate as it may deem reasonable, unless otherwise agreed by the parties. In the present case, the parties have clearly stipulated the rate of interest that is payable by the petitioner to the respondent and therefore, the award of such rate of interest by the Arbitrator cannot be faulted.

30. Even Section 31(7) (b), as it stood prior to amendment, empowered the Arbitrator to grant post-Award interest at such rate as it found to be reasonable and, in case, the award was silent on the post-Award interest, in fact, interest at the rate of 18% was payable from the date of the award to the date of payment.

31. The petitioner itself has placed reliance on Section 80 of the NI Act which, in absence of any stipulation in the Bills of Exchange, provides for payment of interest at the rate of 18% per annum. Clearly therefore, Usurious Loans Act would have no application to the transaction in question, which was of discounting of Bill of Exchange.

32. The Arbitrator has also considered the nature of transaction in question and has held as under:

“26. The Usurious Loan Act, 1918 was followed by the Punjab Relief of Indebtedness Act, 1934 (hereinafter called "1934 Act") The said 1934 Act is applicable to the Union Territory of Delhi. Section 2(3) of the 1934 Act defines "loan" to mean "loan whether of money or kind". The question for consideration is whether the present transaction can be called a "loan". To call a transaction a loan it means lending money by one party to the other with condition to repay along with interest. In this case the claimant had not simply lend money to the respondent No.1. It was paid on behalf of respondent No.2 because of the business transaction

entered into between respondent No.1 and 2. The respondents had a business dealing. It can also be called "commercial transaction" pursuance to which both the respondents approached the claimant to pay the price of the goods upfront to respondent No.1 on behalf of respondent No.2 on the terms and conditions stipulated in the sanction letters. Such a transaction which is a business transaction or a trade transaction by no stretch of imagination can be construed as "loan" as defined in sub section 3 of section 2 of 1934 Act or section 2 of Usurious Loan Act, 1918. This being a commercial transaction or a trade transaction which happened between the two business entities on whose request claimant made payment, hence cannot be said to be a "loan". Respondent No.1 and respondent No.2 transacted business and since respondent No.2 was not in a financial position to pay to respondent No. 1 therefore respondents approached the claimant to pay to the seller the amounts of the transaction with a stipulation that the same would be repaid to the claimant along with the interest as per the terms of the sanction letters. Therefore, this tribunal is of the view that such transaction cannot be called a "loan".

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30. To arrive at the conclusion that the present transaction is neither a debt nor a loan, help can also be taken from the Punjab Debtors Protection Act, 1936 in short "Act 1936". Section 2 sub section (6) of the Act 1936 defines "loans" to mean an advance whether of money or in kind at agreed interest and shall include any transaction which the Court finds to be in substance a loan, but does not include

.....

(iv) a loan advanced by a bank, co-operative society or a company whose accounts are subject to audit by a certified auditor under the Indian Companies Act) 1913;

(v) a loan advanced to a trader;

(vi) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881 (XXVI of 1881), other than a promissory note;

31. Sub section (8) of section 2 of Act 1936 also defines the expression "trader" as used in section 2(vi), to mean a person who in the regular course of business buys and sells the goods or other property, whether moveable or immoveable and shall include six categories (i) a wholesale or retail merchant, commission agent, a broker, a manufacturer, a contractor, a factory owner but shall not include a person who sells his own agriculture produce or cattle or buys agriculture produce or cattle for his own use. In the present case the respondent No.1 and 2 are in the business where one bought the goods of the other. Therefore, respondents are traders.

32. For the reasons stated above, I am of the considered view that the transaction in question was neither a loan nor debt. It was a simple commercial transaction in which one respondent sold its goods and the other respondent bought it. They jointly approached the claimant to pay on behalf of respondent No.2 and provide bill discounting facility."

33. I am in agreement with the findings of the Arbitrator. The provisions of the Act, especially Section 31(7) and the provisions of NI Act would clearly show that the transaction in question would not fall within the ambit of the Usurious Loans Act.

34. In **Dayawati** (supra), the claim was based on a mortgage and therefore, the Supreme Court held that the provisions of Usurious Loans Act would apply even at the stage of appeal. Once it is held that the Usurious Loans Act is not applicable, the said judgment would have no application to the facts of the present case.

35. In **FMI Investment P. Ltd.** (supra), this Court was dealing with the claim of Inter-Corporate Deposit/loan, while in case of **Monnet Finance** (supra), it was a case of loan for purchase of equipment. These were

considered as loan transactions and therefore, provisions of Usurious Loans Act were held to be applicable.

36. In fact, this Court in ***Morgan Securities and Credit Pvt. Ltd. vs. Morepen Laboratories Ltd. & Anr.*** (2006) 132 DLT 588, has held as under:

“It may also be mentioned that the passing of an order on interest at the time of making the award is clearly contemplated by the provisions of the Arbitration and Conciliation Act, 1996. Sections 31 (7) (a) and 31(7)(b) may be referred to for this purpose. Clause (a) of Section 31(7) of the Act permits the Arbitral Tribunal to award interest in cases where the award is for the payment of money at such rate as it deems reasonable. Clause (b) provides that where a sum is directed to be paid by an arbitral award, unless the award otherwise directs, such sum shall carry interest at the rate of 18% per annum from the date of the award to the date of payment. Assuming for the sake of argument, that an arbitral award had been made only for the return of the principal amount then by virtue of Section 31(7)(b), it would carry interest at the rate of 18% per annum from the date of the award to the date of payment. Would this provision be considered to be hit by Section 3 of the Usurious Loans Act, 1918? The obvious answer is, No. It would not because the Arbitration and Conciliation Act is also a statute and it permits the Arbitral Tribunal to award interest from the date of the cause of action till the making of the award as well as from the date of the award till the making of payment and even stipulates that where the award does not otherwise direct, the rate of interest upon the award would be 18% per annum which is much higher than the rate of interest contemplated under the Usurious Loans Act, 1918. It may be noted that Section 3 of the Usurious Loans Act, 1918 contains a non obstante clause but it is with regard to the Usury Laws Repeal Act, 1855 and not any other Act. The Arbitration and Conciliation Act, 1996 is also later in time and, therefore, even if there is a conflict the latter would apply. Leges posteriores priores contrarias abrogant.”

37. In view of the above, I find no merit in the objection raised by the petitioner on the application of the Usurious Loans Act.

38. Learned senior counsel for the petitioner has further submitted that the claim of interest even otherwise is highly exorbitant and cannot be sustained. He has produced a chart to contend that the amount payable with interest as awarded would become multiple times that of the principal and is therefore, unjustified.

39. I am unable to agree with the submission made by the learned senior counsel for the petitioner. In ***PEL Industries Ltd. & Ors. vs. SE Investment Ltd.*** 2018 SCC OnLine Del 8746, this Court had considered the issue of award of interest and held that where party to the transaction, being a business entity, was well aware of the rate of interest payable under the transaction, it would be beyond the jurisdiction of this Court to go into the reasonableness or otherwise of the rate of interest agreed upon between the parties. Relying upon the judgment of this Court in ***Syndicate Bank vs. West Bengal Cements Ltd. & Ors.*** AIR 1989 Del 107, it was held that grant of interest at less than contractual rate as a matter of rule, will amount to giving a premium to those who trade upon the money of others; defaulting borrowers cannot be given the benefit by reducing the rate of interest.

40. In the present case also, the reasonableness of the rate of interest has gained in magnitude only because of persistent defaults on the part of

the petitioner to honour its side of the bargain. The petitioner certainly cannot be allowed to take advantage of its own defaults.

41. In any case, the Arbitrator having granted interest in accordance with the terms of the contract between the parties, such Award cannot be set aside by invoking the general principles of fairness or equity.

42. The learned senior counsel for the petitioner has further contended that the claim of the respondent was barred by limitation. He submits that in terms of Article 31 of the Schedule to the Limitation Act, 1963, the period of limitation for a claim on basis of a Bill of Exchange is three years from when the bill falls due. The arbitration having commenced under Section 21 of the Act by issuance of notice dated 28.06.2007, all amounts that fell due prior to 28.06.2004 were barred by limitation. He further submits that the letter dated 02.02.2007, relied upon by the Arbitrator as an acknowledgment of liability, even assuming it to be so, would also operate only in respect of debts that were not barred as on the date of the said letter; therefore, bills of exchange falling due prior to 02.02.2004 would be barred by limitation.

43. On the other hand, the learned counsel for the respondent has submitted that except for one of the Bill of Exchange, being OMR 35, for all other Bills of Exchange part payments had been received by the respondent within the period of limitation and therefore, in terms of Section 19 of the Limitation Act, fresh period of limitation started from the date of such payment. The letter dated 02.02.2007, being acknowledgment of debt, a fresh period of limitation started from the date of such letter and therefore, on the date of invocation of the

arbitration on 28.06.2007, claims against all the Bills of Exchange would be within limitation, except in case of OMR 35.

44. The letter dated 02.02.2007 from the Chairman and the Managing Director of the petitioner to the respondent is reproduced hereinbelow:

“This is with reference to the discussions we had today at our Office with your representative, Mr. Madhukar Dodrajka regarding outstanding dues pertaining to BDDL account.

At the outset, I would like to thank you for your patience and understanding during the really trying phase of BPL Limited.

As you may be aware, BPL Limited has restructured its businesses and has formed a joint venture company for its Colour Television business with our JV partners, SANYO. After the formation of the JV, BPL has been striving hard to get back to normalcy and is in touch with various financial institutions for sanction of required funds for our working capital requirements and settlement of all outstanding dues. I am constantly monitoring the situation and rest assured we will settle your outstandings within the next 6 months.

Looking forward to your support, as always and thank you once again for your patience and understanding.”

45. In my view, the same is clearly an acknowledgment of liability in terms of Section 18 of the Limitation Act. The Arbitrator has also considered the said issue as under and arrived at the same conclusion:

“Reading of this letter it can safely be concluded that it is a clear case of acknowledgement of liability of the outstanding amounts against hundies pertaining to BDDL account on the part of the respondent No.2. Reading of this letter, nowhere indicate that the respondent was talking about acknowledging of liability of any particular or specific hundi. Moreover, in view of the fact that

there was a part payment made by respondent No.2 within the period of limitation i.e. August 2005 as admitted by the respondent' and the acknowledgement made vide letter dated 2/2/2007 within time, by no stretch of imagination it can be said that claims of claimant are barred by time. Within six months of 2/2/2007 when payments was made of outstanding dues, claimant invoked arbitration. Further,

55. Mr. Joshi further contended that letter dated 2/2/2007 cannot be construed as an acknowledgement of liability by respondents as the said letter has been signed by Mr.Ajit Nambiar in his personal capacity as Chairman and Managing Director. It cannot be construed as an acknowledgement of liability by respondent No.2 even though letter is written on the letter head of respondent No.2; Mr. Nambiar was not representing Respondent No.2 nor was authorized to represent respondents No.1 or respondent No.3. Tribunal find no merits in this submission of Mr. Joshi because if Mr.Ajit Nambiar was not authorized to represent respondent No.2 he ought to have stepped into the witness box to say so. But he choose not to do so. Mr. Ajit Nambiar, CMD of Respondent No.2 in no uncertain words admitted the liability vide letter dated 2/2/2007 and promised to pay outstanding dues within six months. The issue is, therefore, decided against the respondent No.2."

46. As far as the part payments are concerned, though the Arbitrator holds that such payment having not been made by the petitioner against particular Bills of Exchange, has to be considered as a part payment and admission of liability towards the entire claim of the respondent, I am unable to agree with the same. In the affidavit of Evidence filed by the respondent, the respondent had clearly shown the adjustment of the part payments against each particular Bill of Exchange. The respondent having itself adjusted such payments against particular Bills of Exchange, cannot claim benefit of extension of limitation even for those Bills of Exchange for which it did not receive any payment. Therefore, the claim

of the respondent for Bill of Exchange bearing OMR No.35 has to be held as being barred by limitation. However, the claims against other Bills of Exchange were within the period of limitation and the objection of the petitioner qua those is rejected.

47. Learned senior counsel for the petitioner, placing reliance on Section 37 of the NI Act submits that as the Sanction Letters mentioned that recourse shall be taken to Drawer, the same amounted to a contract to the contrary under Section 37 of the NI Act and it is only the Drawer of Bills of Exchange, that is BDDL, that would be liable under the same.

48. I am unable to agree with the submission of the learned senior counsel for the petitioner. Section 37 of the NI Act is reproduced hereinbelow:

“37. Maker, drawer and acceptor principals.—The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be.”

49. Clause 3 in the Sanction Letter dated 27.12.2002 sought to be relied upon by the learned senior counsel for the petitioner is reproduced hereinbelow:

“3. Bill of Exchange /Hundi shall be with recourse to Drawer. Therefore the liability to repay amount to Morgan Securities & Credits Private Limited (hereinafter referred to as "the Discounting Company") on the due date shall be of Drawer and Drawee jointly and severally. In case the Drawee does not make

payment on due date of any bill of exchange/hundi, the Drawer shall make the payment of all the amount due thereon to without any notice or demand or presentment from the payee or the holder in this behalf.”

50. In the Sanction Letter dated 11.06.2003, the term sought to be relied upon by the learned senior counsel for the petitioner is as under:

“Bill of Exchange /Hundi shall be with recourse to Drawer. Therefore the liability to repay amount to the lender on the due date shall be of Drawer and Drawee jointly and severally, which hereinafter shall be collectively referred to as the "Borrower.”

51. A reading of the above terms of the Sanction Letters would clearly show that it makes the Drawer and the Drawee of the Bill of Exchange jointly and severally liable. This is also the mandate of Section 37 of the NI Act. Merely because the terms of the Sanction Letters state for reference to the Drawer, cannot absolve the Drawee of such liability.

52. The learned senior counsel for the petitioner, relying upon Clause 3 of Sanction Letter dated 27.12.2002, further submits that the later part of the said clause also provides that if on the due date the Drawee, that is the petitioner, does not make the payment, it would be the liability of the Drawer, that is BDDL, to make the payment to the respondent. He submits that on failure of the petitioner to make the payment on the due dates of the Bills of Exchange, the respondent could have laid the claim only against BDDL and not against the petitioner.

53. I am unable to agree with the submission of the learned senior counsel for the petitioner. Clause 3 clearly records that the liability of the Drawer(BDDL) and the petitioner is joint and several. Same is the provision in the Sanction Letter dated 11.06.2003. The Arbitrator has also considered this issue and has held as under:

“51. Mr. Joshi while relying on clause 3 of the sanction letter contended that since respondent No.2 has failed to repay the amount then as per clause 3 the responsibility to repay shift to respondent No.1. This argument has also no force in view of the fact that the agreement provides that the liability to repay is joint and several of drawer and drawee. Once the liability of parties as per the agreement is joint the respondent No.2 will remain liable even though later part of clause 3 of the sanction letter does mention that in case the drawee does not make payment on due date the drawer shall make the payment. This does not absolve the liability of drawee. One cannot ignore the first part of clause 3 which specifically make both the respondents jointly liable. The second part of clause 3 protects the claimant because it ensures that even though liability is joint but in case for any reason drawee fail the drawer shall remain liable. It does not mean joint liability comes to an end. In fact second part of clause protect the creditor by ensuring that creditor may not become remediless. Having accepted the bills of exchange and agreeing to repay the price of the goods respondent No.2 cannot shirk its responsibility of repaying to the claimant. Second part of clause 3 dispenses with the notice required to be issued as contemplated under section 30 of the Negotiable Instruments Act. Moreover, the second part of clause 3 will not in anyway dent the first part. Both parts of clause 3 have to be read harmoniously, then the real intention of the parties can be inferred. It means the drawer and drawee will remain liable jointly. Second part of clause 3 is a safeguard provided for the benefit of the creditor. The intention of the clause is to secure repayment. Hence it can be concluded that liability to repay is also that of respondent No.2.”

54. I am in agreement with the finding of the Arbitrator on this issue.

55. Learned senior counsel for the petitioner, lastly relying upon Section 64 of the NI Act, submits that the petitioner had also furnished Post Dated Cheques to the respondent towards payment of its dues under the Bill of Exchange. The respondent, however, failed to present these cheques and therefore, in terms of Section 64 of the NI Act, the petitioner stood discharged from its liability.

56. I am unable to agree with the said submission of the learned senior counsel for the petitioner. The Arbitrator has considered this issue at some length and has held as under:

“60. The admitted facts on record are that post-dated cheques given by respondents were not presented by claimant. What was the reason for that has been explained by. Mr. P.K. Gupta CW1 in his additional affidavit wherein it has clearly been stated that CMD of Respondent No.2 assured him personally with regard to the out-standings amounts and that claimant to have patience and understand the position of respondent. This expression also find mention in the letter dated 2/2/2007. This fact has also been pleaded in para 1.10 and 1.17 of the statement of claim as well as in paras 24 and 29 of the evidence affidavit of CW1. This position was reiterated by CW1 in paras 2 and 3 of his additional affidavit wherein he specifically stated the dates on which Mr.Madhukar Dodrajka visited Bangalore to pursue the matter of outstanding amounts with Respondent No.2 and that the CMD of Respondent No.2 talked to CW1 personally that the outstanding amounts would be paid. Moreover, if the post-dated cheques were given towards discharge of liabilities of hundies, then what was the necessity for the respondent No.2 to make part payments in the year 2004, 2005 and subsequent thereto. No letter has been produced on record to show that the respondent informed the claimant that since post-dated cheques have already been given, therefore its liability under the hundies stood discharged on account of non-presentment of the

post-dated cheques. Rather vide letter dated 2/2/2007 the respondent No.2 through its MD acknowledged the liability and asked the claimant to have patience and understanding. Patience and understanding has been explained by the claimant through its witness Mr. P.K. Gupta CW1 who categorically stated that non-presentation of cheques was on the request of Mr. Ajit Nambiar, hence vide letter dated 2/2/2007 he appreciated the patience and understanding of the claimant.

61. It was for the respondent No.2 to rebut this averment of the claimant by adducing the evidence of Mr.Ajit Nambiar. Mr.Ajit Nambiar never stepped into the witness box to explain as to why he asked claimant to have patience and understanding or that he never told claimant not to present the cheques. Testimony of Mr. P.K. Gupta CW1 cannot be discarded nor can be called hearsay. In fact from the above discussions, it can safely be concluded that cheques given by respondent No.2 were not presented because of the understanding between the Respondent No.2 and claimant.”

57. The above being a finding of fact arrived at by the Arbitrator upon appreciation of the evidence led before her, this Court cannot sit as a Court of appeal to re-appreciate the same. In fact, the learned senior counsel for the petitioner has been unable to show how the above findings of the Arbitrator can be said to be incorrect. In view of such findings, Section 64 of the NI Act would have no application.

58. As noted above, the respondent has also challenged the Arbitral Award on the limited grounds of ERPL being discharged of its liability and the post-award interest being granted at the rate of 10% per annum only.

59. As far as discharge of ERPL is concerned, the Arbitrator has held as under:

*“62. So far as respondent No.3 is concerned, Respondent No.3. stood guarantor for the repayment of amounts due pursuant to which "Comfort letter" was issued. Reading of the comfort letter indicate that the amount of Rs.64,332,301 was furnished as security in case the drawer and drawee fail to discharge their obligation. It is the case of the claimant that the drawer and drawee failed to discharge their obligation under the agreement dated 11/6/2003, the claimant ought to have encashed the-security amount furnished by the respondent No.3. Respondent No.3 is not the principal debtor hence decision of **Harish Chandra** (supra) would not apply to its case. Respondent No.3 was only a guarantor. Having not encashed its post-dated cheques nor having given any reason for not doing so, I find force in the argument of Mr.Joshi that so far as respondent No.3 is concerned, its liability came to an end and it stood discharged on the failure of the claimant to present the post-dated cheques issued by the respondent No.3. Against respondent No.3 claim is also barred by time. The said respondent never issued any acknowledgement letter acknowledging the debt. Therefore, the claim against respondent No.3 fails and is dismissed.”*

60. I may further note that initially the respondent had invoked arbitration only against the petitioner and BDDL. It got ERPL impleaded only later by moving an application before the Arbitrator. Clearly, there was no acknowledgment of liability by ERPL that could have extended the period of limitation against it. Further no reason for non-presentation of the Post Dated Cheques issued by ERPL was presented by the respondent before the Arbitrator or before this Court.

61. In view of the above, the finding of the Arbitrator on discharge of ERPL from the liability cannot be faulted and is sustained.

62. As far as the post award interest is concerned, the same being a matter of discretion of the Arbitrator, again cannot be faulted. The

Award cannot be set aside merely because the Court could have exercised its discretion in another manner.

63. In view of the above, the Award on the principal sum of Bill of Exchange bearing No.OMR-35 of an amount of Rs.75,39,304/- is set aside. The Award inasmuch as it directs the petitioner to make payments to the respondent except for the above Bill of Exchange and proportionate interest thereon, is upheld.

64. OMP(Comm) No.176/2017 is therefore, partly allowed, while OMP (Comm) No.190/2017 shall stand dismissed. There shall be no order as to costs.

DECEMBER 18, 2018
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NAVIN CHAWLA, J

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