* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RFA No.319/2017**

% **24th August, 2018**

M/S FRESH & HEALTHY ENTERPRISES LTD.
..... Appellant
Through: Mr. M.M.Kalra, Advocate (9810135477)

versus

M/S R.K.BROTHERS ..... Respondent
Through: Mr. V.K.Diwan, Advocate and Mr. Lalit Kumar, Advocate (9811237371)

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 20.10.2016 by which the trial court has dismissed the suit as barred by time. I may note that the suit has been dismissed at the initial stage even before filing of the written statement by the respondent/defendant. The suit was

dismissed because the respondent/defendant had filed an application under Section 3 of the Limitation Act, 1963 for dismissing the suit as time-barred.

2. The subject suit was a suit for recovery of monies filed by the appellant/plaintiff. Appellant/plaintiff by the suit has claimed an amount of Rs.26,63,856/-. Monies were claimed on account of supply/sale and purchase of Apples by the appellant/plaintiff to the respondent/defendant.

3. A reading of the suit plaint shows that in para 2 of the suit plaint various invoices are mentioned totalling to a sum of Rs.2,80,32,224/-. In para 3 of the plaint, the details of payments made have been mentioned. Then in para 4 of the suit plaint, the amount due in the suit has been arrived at, and this is with reference to the ledger account of the appellant/plaintiff. This para 4 of the suit plaint reads as under:-

> "4. That the Defendant had only made part payment of Rs.2,35,20,000/- towards the outstanding amount. As such, the following amount came to be due and outstanding as on July 2013:

Total Sales	Rs.2,80,32,224/-
Less: Discount Given	Rs.4,07,555/-

Less: Discount Given	Rs.4,02,863/-
Less: Credit Note issued	Rs.10,29,950/-
Less: Amount received	Rs.2,35,20,000/-
Less: Credit for Penalty Income	Rs.8,000/-
Balance Amount Due from the Party	Rs.26,63,856/-

(True copy of the ledger account maintained by Plaintiff for Defendant for the period 2013-2015 duly reflected the sale-purchase of applies is Annexure-**P 3 colly**. True copy of bank statement of account of Plaintiff (relevant parts) is attached at Annexure **P-4 Colly**) (underlining added)

4. The plaint thereafter makes reference to a cheque dated 19.7.2013 issued by the respondent/defendant which was dishonoured as also to various reminders which were given by the appellant/plaintiff as stated in para 10 of the plaint. Since the respondent/defendant failed to pay the suit amount, therefore, the subject suit was filed for claiming the amount which is the balance due at the foot of the running account which has been annexed at Annexure P-3 to the plaint.

5. The impugned order dismissing the suit as time barred reads as under:-

"20.10.2016

Present: Counsel for parties.

Vakalatnama filed alongwith an application U/s 3 of Limitation Act on behalf of defendant. Copy supplied to plaintiff. The counsel for defendant has drawn the attention of the Court to para No.13 of plaint and argued that suit is not within limitation. It is settled law that as per Section 3 of Limitation Act even if limitation point has not been raised by any of the parties, the Court itself has to see whether the suit is within limitation or not and this is dictate of Section 3 of the Limitation Act. In the present matter as per plaintiff himself cause of action has arosen on 14.05.2013 and cheque discharging the liability issued by defendant allegedly was dishonoured on 19.07.2013. So even if three years period is taken from this date then suit should have been filed upto 18.07.2016. The present suit has been filed on 25.07.016 which is clearly time barred. There cannot be any condonation of delay in filing the suit. The counsel for plaintiff has nothing to rebut the same.

Accordingly, this court has no option except to dismiss the suit and file be consigned to record room."

6. In my opinion, the trial court has committed a gross illegality in dismissing the suit as time barred without even adverting to the fact that the suit is based on a statement of account. A suit plaint does not have to contain a statement of law that the ledger account was an open,mutual and current account under Article 1 of the Limitation Act because that is an inference or a finding of fact which has to be arrived at from the statement of account which is filed. When we see the statement of account which is filed with respect to transactions entered into, Annexure P-3 to the plaint at page 223 of the

trial court record, it is seen that within the first few transactions itself there are shifting balances. Once there are shifting balances clearly therefore the suit will be on the basis of an open, mutual and current account.

7. As per Article 1 of the Limitation Act, a suit filed on the basis of an open,mutual and current account, limitation commences at the end of the financial year for which the transactions are entered into. The transactions entered into show that the last invoice entered into the ledger account maintained by the appellant/plaintiff of the respondent/defendant is dated 14.5.2013. Limitation therefore will commence as per Article 1 of the Limitation Act on 1.4.2014. The suit has been filed on 26.7.2016 i.e within three years of commencing of limitation on 1.4.2014, and therefore, the suit was clearly within limitation. Trial court has committed a gross illegality in dismissing the suit as time barred without reference to the statement of account and without reference to the law under Article 1 of the Limitation Act and which states that once a suit is filed on the basis of an open, mutual and current account, then limitation commences from the end of the financial year and which last transaction is proved or admitted,

with the last transaction as stated above being dated 14.5.2013 when Invoice no.8130 for an amount of Rs.1,73,040/- was raised by the appellant/plaintiff upon the respondent/defendant.

8. Learned counsel for the respondent/defendant wanted to cite various judgments, however, no judgments need to be cited on the proposition of law which is not disputed, and the undisputed position of law is that the account relied upon by the appellant/plaintiff must be an open, mutual and current account. The meaning of an open,mutual and current account has been dealt with by the Supreme Court in the judgments in the cases of ***Hindustan Forest Company Vs. Lal Chand & Others, AIR 1959 SC 1349*** and ***Kesharichand Jaisukhlal Vs. Shillong Banking Corporation AIR 1965 SC 1711,*** and the law is that shifting balances will create an open,mutual and current account.

9. In view of the aforesaid discussion, the defence taken by the respondent/defendant of the suit being barred by time was a completely frivolous defence, and that too without filing of a written statement. Trial court has committed a complete illegality in allowing the application under Section 3 of the Limitation Act filed by the respondent/defendant as discussed above.

10. The impugned order/judgment of the Trial Court dated 20.10.2016 is therefore set aside with costs of Rs.25,000/- payable by the respondent/defendant to the appellant/plaintiff, and which payment of costs shall be a condition precedent for the respondent/defendant to contest the suit in the trial court.

11. Parties to appear before the District and Sessions Judge, North, Rohini Courts, Delhi on 24.9.2018 and the District and Sessions Judge will now mark the suit for disposal to a competent authority in accordance with law. Trial court record be sent back.

AUGUST 24, 2018/ib **VALMIKI J. MEHTA, J**