*   IN THE HIGH COURT OF DELHI AT NEW DELHI

+   RFA No. 187/2018

%   16th April, 2018

M/S PENTAX ENGINEERING PVT. LTD.   ..... Appellant

Through: Mr. Kishore M. Gajaria and Ms. Namrata Chadha, Advocates.

versus

M/S TECHNO FAB ENGINEERING LTD.   ..... Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 6391/2018 (delay of 190 days in re-filing)

For the reasons stated in the application delay in re-filing is condoned.

CM stands disposed of.

CM No.6392/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No. 187/2018 and CM No. 14263/2018 (U/o XLI Rule 27 CPC filed by the appellant)

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 18.4.2017 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of Rs. 3,37,120/- against the respondent/defendant. Suit has been dismissed on the ground that it is barred by limitation.

2. The facts of the case are that the appellant/plaintiff is said to have dispatched certain items pertaining to Gas Detection Systems to the respondent/defendant and with respect to which a bill dated 27.1.1999 for a sum of Rs.2,90,518/- was raised. As per the case in the plaint the respondent/defendant after various reminders released an amount of Rs.50,000/- *vide* cheque no. 811313 dated 16.6.1999 and thereafter another sum of the respondent/defendant was received by the appellant/plaintiff from M/s BSES Ltd. on 1.3.2001 of an amount of Rs.48,900/- and therefore, for the balance amount of Rs.1,90,518/-, after serving a legal notice dated 6.12.2003, the subject suit was filed on 9.7.2004.

3. Trial court has dismissed the suit by deciding issue no.1 of limitation against the appellant/plaintiff by holding that the last admitted payment was made by the respondent/defendant on 1.3.2001 and therefore, the suit filed on 9.7.2004/12.7.2004 would be well

beyond the period of limitation of three years. The relevant discussion of the trial court in this regard reads as under:-

> "8. I have heard the Ld. Counsels for the plaintiff and the defendant and perused the record carefully. My issues wise findings are as under :
> **ISSUE No. 1** : Whether the suit is barred by limitation ? OPD.
> The burden to prove this issue is on the defendant. It is vehemently contended by counsel for defendant that the present suit is barred by limitation. It is also contended that the representative of the defendant had made a payment of Rs.48,900/¬ on 01.03.2001 after deduction of TDS to the plaintiff on behalf of defendant by way of demand draft and the present suit being filed on 12.07.2004 is beyond the period of limitation.
> On the other hand, Ld. Counsel for the plaintiff has contended that the defendant has filed a list of its creditors before SEBI and in para no. 8 of that declaration he has admitted that a sum of Rs.3.37 lakhs is due towards the plaintiff. There is no date on this declaration and as per para no. 8, the defendant has only mentioned that the plaintiff has filed summary suit before the Additional District Judge for recovery of an amount of Rs.3.37 Lakhs including interest @24% p.a. It is also claimed by the plaintiff that it had supplied gas detectors for a naptha plant for which only part payment had been made by our company. Our company is disputing the claim made by the plaintiff and has also filed its written statement before the court. Hence, there is no acknowledgment before the SEBI that the plaintiff owes a sum of Rs.3.37 lakhs. It is also contended by the counsel for plaintiff that the defendant has sent a letters dated 21.03.2002 and 05.04.2002 wherein it is mentioned that they want to settle the matter.
> 9. I have perused the letters. In both the letters, the defendant has not admitted the liability of the suit amount. In the declaration to the SEBI, the defendant has not admitted that plaintiff owes a sum of Rs.3.37 lakhs. It is only mentioned that plaintiff company has filed a suit for recovery and the defendant company is disputing the claim. Thus, there is no admission on the part of the defendant
> 10. Section 18 of the Limitation Act reads as under :
>
> > *1). "Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*

> *2). Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received."*

The defendant has nowhere admitted before the expiration of the period of limitation as it owes a suit amount against the plaintiff. The counsel for the plaintiff has placed reliance on the judgments 185 (2011) DLT 428 in case titled Bhajan Singh Samra Vs. Wimpy International Ltd., Rishi Pal Gupta Vs. S. J. Knitting And Finishing Mills P. Ltd., 202 (2013) Delhi Law Times 735 in case titled Shahi Exports P. Ltd. & Anr. Vs. CMD Buildtech Pvt. Ltd. I have perused these judgments but none of the judgments is applicable to the facts of the present case in hand. As the defendant in the balance sheet has not acknowledged the debt of the plaintiff. The counsel for the defendant has also placed reliance on the judgment in case titled Moidu Vs. Kerala State Electricity Board.

I am of the view as the limitation expired on 01.03.2004 and before the expiration of the period of limitation, the defendant had not acknowledged the amount. Thus, the limitation is not extended as per section 18 of the Limitation Act. Moreover, the counsel for the defendant has drawn my attention towards explanation of section 18 and he also contended that this explanation is not applicable as the defendant has nowhere acknowledged the amount. I am of the view that as the defendant has no where acknowledged the debt of the plaintiff. I am of the view, the present suit being filed on 12.07.2004 is beyond the period of limitation and this issue is decided in favour of the defendant and against the plaintiff."

4.(i) In my opinion, no fault can be found in the aforesaid reasoning and conclusion of the trial court that the suit is barred by limitation.

(ii) Counsel for the appellant/plaintiff however has drawn the attention of this Court to an order dated 22.12.2016 passed by the trial court whereby an application filed by the appellant/plaintiff under Order XI Rule 14 CPC was allowed and an application filed by the respondent/defendant before SEBI which is dated 13.1.2010 was allowed to be taken on record, and this document as per the appellant/plaintiff will extend the period of limitation for filing of the suit.

(iii) In my opinion, this argument urged by the appellant/plaintiff is misconceived for two reasons. Firstly, the extension of limitation has to be by means of acknowledgment of debt as per Sections 18 and 19 of the Limitation Act, 1963 within the prescribed period of limitation. The period of limitation in this case was upto 1.3.2004, and the document Ex.PW1/A which is sought to be relied upon is much later dated 13.1.2010 i.e beyond the period of limitation. Therefore, this document will not help the appellant/plaintiff to extend the period of limitation.

(iv) The second reason for rejecting this argument is that by this document Ex. PW1/A there is no acknowledgment of debt by the respondent/defendant in favour of the appellant/plaintiff because in Para 8 of this document Ex.PW1/A which is filed by the respondent/defendant there is no acknowledgement but denial of liability by writing as under:-

> "8. Pentax Engineering Limited has filed a summary suit (200 of 2004) before the Addl. District Judge, Delhi, against our Company for recovering an amount of Rs.3.37 Lakhs including interest at the rate of 24% p.a. The Plaintiff has claimed that it had supplied gas detectors for a napha plant for which only part payment had been made by our Company. <u>Our Company is disputing the claim made by the Plaintiff and has also filed it written statement before the Court</u>. The matter is scheduled for hearing on March 3,2010." (underlining added)

(v) Merely because in the next para the appellant/plaintiff is shown as a creditor does not mean that the same has to be taken out of context from the just preceding Para 8 wherein the liability of the respondent/defendant towards the appellant/plaintiff has been denied. Therefore, in my opinion, there cannot be extension of limitation on the basis of this document Ex.PW1/A.

5. On behalf of the appellant/plaintiff an application has been filed under Order XLI Rule 27 CPC for leading additional evidence, however once a case has been contested to the hilt and the appellant/plaintiff had otherwise complete opportunities to lead evidence, now the appellant/plaintiff cannot seek further opportunity to lead additional evidence to fill up lacunae in the appellant/plaintiff's case, and for which reason the powers under Order XLI Rule 27 CPC cannot be exercised. I may note that by the application appellant/plaintiff seeks to bring on record the books of accounts,

balance sheets etc of the respondent/defendant from the year 2001-2002 till date and especially till the year 2010, however such position was very much available to the appellant/plaintiff during the course of trial, more so because appellant/plaintiff filed and was allowed to place reliance upon Ex.PW1/A, and therefore, the powers under Order XLI Rule 27 CPC cannot be exercised for the appellant/plaintiff to lead additional evidence at this stage. CM No. 14263/2018 is therefore dismissed.

6. There is no merit in the appeal. Dismissed.

7. The next date i.e 24.5.2018 stands cancelled.

APRIL 16, 2018/ib **VALMIKI J. MEHTA, J**