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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 5th August, 2019
Pronounced on: 18th October, 2019

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CS(OS) 2244/2010

RADICO KHAITAN LIMITED

..... Plaintiff

Through: Mr. K. K. Bhuchar with Mr.B. L.
Wali, Advs.

versus

M/S J D WINES AND OTHERS

..... Defendants

Through: Mr. Abhay Mani Tripathi, Adv. for
D-1 to 4 and 6 to 17.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. Plaintiff who is engaged, inter-alia, in the business of manufacturing beverages i.e. Indian Made Foreign Liquor (IMFL), wine, spirit and liquor products including their by-products has filed the present suit for recovery of Rs. 2,50,96,591.44/- along with *pendente lite* and future interest and costs against the Defendants. Defendant No. 1 is a Partnership Firm constituted by Defendants 2 to 17 as its partners and is involved in stocking and retail sale of alcoholic beverages from its outlets at Gurgaon.

Case of the Plaintiff

2. In the year 2009, Defendant No.1, representing itself to be an L1 license holder, approached the Plaintiff with a request to supply liquor for its business with assurance and promise to make payments regularly on receipt

of goods. Plaintiff in good faith agreed to Defendants' request and commenced supplies. Against each supply, it raised invoices in the name of Defendant No.1, setting out description of the goods, rate and the sale price. The goods were supplied in accordance with the prerequisite documents for vending liquor viz Form L-32 issued to Defendant No. 1, and transport permit L-34 issued by the Excise Department. However, contrary to the assurances extended by Defendant No.1, except for making some part-payments, it failed and neglected to make complete payment of the invoices. As a result, over a period of time, huge amounts became outstanding and due towards the Plaintiff. Requests for liquidation were ignored. On Plaintiff's persistence, Defendant No.1 issued a balance confirmation letter dated 19th April, 2010 and acknowledged principal outstanding amount of Rs 2,04,71,000/- (Rupees two crore four lakhs seventy one thousand only). Plaintiff asserts that it regularly maintains books of accounts of its dealings with Defendant No.1 and the same is categorized as running account. In terms thereof, a principal sum of Rs. 2,11,92,940 (Rupees Two Crores Eleven Lacs Ninety Two Thousand Nine Hundred Forty Only) along with sum of Rs. 39,03,651.44/- (Rupees Thirty-Nine Lacs Three Thousand Six Hundred Fifty-One and paise Forty Four Only) towards interest calculated from the date of expiry of 90 days of credit on each invoice till the institution of the present suit, is due and outstanding.

3. Plaintiff issued legal notice dated 30th June 2010 calling upon the Defendants to pay and liquidate the outstanding balance along with interest thereon. In response thereto, Defendant No.1 issued a cheque bearing No. 019365 dated 07th July 2010 for Rs. 10 lacs drawn on Bank of Baroda in favor of the Plaintiff. The said cheque on its presentation was dishonored on account of 'Funds insufficient' as specified on the cheque return memo

dated 27th August 2010. Consequently, the Plaintiff, through its Advocate, issued and got served another legal notice dated 14th September 2010 under Section 138 of the Negotiable Instruments Act, 1881. The notice did not yield the desired result and criminal proceedings were initiated. Pursuant thereto, Defendant No. 1 made payment of Rs. 10 lacs to the Plaintiff in the court of Metropolitan Magistrate and the criminal complaint filed by the Plaintiff was disposed of in terms thereof.

Case of the Defendants:

4. Defendants have contested the suit by way of a joint written statement. Although Defendant No. 1 admits that it had business relationship with the Plaintiff, however it is contended that as per the agreement between the parties, the payment for the supplies was to be made on the sale of the goods and there was no credit period. As per the agreement between the parties, Defendant No. 1 was entitled to 20% rebate on the invoice value. Plaintiff had also agreed to pay Rs. 40 lacs for displaying advertisement material on the premium outlets of the Defendants. Plaintiff has not filed any document exhibiting the actual supply of goods to Defendant No. 1. Form L-32, relied upon by the Plaintiff does not evidence the actual supply of goods. It only manifests that permission was granted by the Excise Department allowing purchase of liquor to the extent specified in the permit. Similarly, Form L-34 also does not prove actual supply of material, it only means that the quantity specified therein was dispatched from the premises of the Plaintiff. Plaintiff has produced forged and fabricated documents; in particular, the balance confirmation letter dated 19th April 2010. Defendants have no outstanding liability, as claimed in the suit.

5. On the basis of the pleadings of the parties, vide order dated 18th July 2012, the following issues were framed:

i. Whether Mr. Satish Chandra Pandey is duly authorised to sign, file and institute the present suit on behalf of the plaintiff company? OPP

ii. Whether the Plaintiff is entitled to recover the amount of Rs. 2,50,96,591.44 from the Defendants? OPP

iii. Whether the Plaintiff is entitled to the award of pendente lite and future interest @24% per annum and if not at the same rate, then at what rate and for what period? OPP

iv. Whether the Plaintiff did not supply the quantity of beverages in accordance with the invoices in question? OPD

v. Relief.

Evidence in the Case-

6. Plaintiff has examined 2 witnesses namely Mr. Satish Chandra Pandey (PW-1), Assistant Company Secretary of the Plaintiff company and Shri Ram Vohra (PW-2). Defendants examined Shri Rajeev Garg, Defendant No. 4, (DW-1) to depose for them.

Issue 1: Whether Mr. Satish Chandra Pandey is duly authorised to sign, file and institute the present suit on behalf of the plaintiff company.

7. Plaintiff, contends that Mr. Satish Chandra Pandey (PW-1), Assistant Company Secretary, has been duly authorised to institute the present suit, sign and verify the pleadings on behalf of the Plaintiff by and under a resolution of the Board of directors passed on 27th July 2010, a certified copy whereof is marked as Exhibit PW-1/1. Defendants contend that the suit is not maintainable and is liable to be dismissed as Mr. Pandey is not

the authorized Assistant Company Secretary of the Plaintiff Company and does not have the authority to contest the suit on behalf of company.

8. Mr. Satish Chandra Pandey, Assistant Company Secretary of the Plaintiff Company, who signed and verified the suit, received the authorization on behalf of Plaintiff Company, vide resolution passed by the Board of Directors of the Plaintiff Company dated 27th July 2010 [Ex. PW 1/1]. The certified copy of the extract of the Minutes of Meeting of the Board was proved by producing the original Minutes Book. The relevant extract of the affidavit by way of evidence is reproduced hereunder:

“I say that by and under a resolution of Board of Directors of the Plaintiff passed on 27.07.2010, the deponent being the Assistant Company Secretary of the Plaintiff company is authorized and empowered to institute a suit for and on behalf of the Plaintiff and to appoint legal advisors and advocated for the said purpose. The deponent being the Assistant Company Secretary of the Plaintiff is well versed with the facts and circumstance of the present case and is otherwise empowered to institute the present suit, sign and verify the pleadings for and on behalf of the Plaintiff and to take such other steps for recovery of the amount due to the Plaintiff from the Defendants and to do all such acts, deeds and things as may be necessary for the prosecution of the case for and on behalf of the Plaintiff. The present suit is accordingly signed, verified and instituted by the deponent for the recovery of the suit amount against the Defendants. The resolution passed by the Board of Directors of the company on 27.7.2010 is Exhibit PW 1/1.

I say that I have signed, verified and instituted the present suit for recovery of Rs. 2,50,96,591.44 (Rupees two crores fifty lakhs ninety six thousand five hundred ninety and one paise forty four only) for and on behalf of Plaintiff and the same is tendered in evidence. The signatures of the deponent in the plaint are at place marked A and B.”

9. There is no effective cross-examination by the Defendants on this issue and they have sought to advance an argument that since the Minute Book

produced by Mr. Satish Chandra Pandey (PW-1) did not contain the seal of the company and was not signed by the other members of the Board, the filing of the suit is without proper authorization. The relevant portion of the cross examination of Mr. Satish Chandra Pandey to this effect is reproduced hereunder:

“I am working as an Assistant Company Secretary with the plaintiff. I am looking after legal compliances as well as legal matters of the plaintiff....

... I have been authorized by means of resolution dated 27.07.2010. (Vol.). I have brought the original minutes book today and a copy has already been on record as Ex PW-1/1. It is correct that the same do not bear the seal of the company. (Vol.). The seal was not required to be affixed and the documents It is correct that the same are signed by the Chair Person. (Vol.). As the signatures of others members of board are not required. It is incorrect to suggest that I have wrongfully claimed that the signatures of the other members are not required. I have seen the records placed...”

10. Plaintiff is a company incorporated under the Companies Act, 1956. Order 29 Rule 1, CPC deals with the filing of suits by or against corporations which provides that in a suit by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the Secretary or by any Director or other Principal Officer of the Corporation who is able to depose to the facts of the case. A company being a juristic entity can authorize any person to sign the plaint or the written statement on its behalf. The authorisation would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code. A person may be expressly authorised to sign the pleadings on behalf of the company by a resolution passed by the Board of Directors to that effect or by a power of attorney being executed in favour of any individual. A company can even ratify the actions of its officers in signing the pleadings by an express or

implied authorization. It will be a travesty of justice if the Plaintiff herein is to be non-suited for a technical reason that the authority was lacking and defective. Defendant's contention regarding the missing seal is wholly misconceived. No law has been shown to say that seal is necessary to authenticate the minute book. Since the resolution of the Board has been proved by producing the original minute book, mere absence of seal/signature over the same makes it immaterial. Significantly, pursuant to the specific authorization to Mr. Satish Chandra Pandey, the Plaintiff Company has consistently participated in the present proceedings and this leaves no room for doubt that the authorization was valid. The prosecution of the suit is itself ratification of the authorization given by the Board.

11. It would also be profitable to note the views expressed by this Court on this issue. The Division bench of this Court in the case of ***Shabnam Gulati vs. Religare Finvest Pvt. Ltd***, 2017 SCCOnLine Del 11656 while discussing the authority required to institute a suit on behalf of a company held as under:

"In similar circumstances, the Supreme Court in the case of United Bank of India v. Naresh Kumar, (1996) 6 SCC 660 had held that procedural defects, which do not go to the root of the matter, should not be permitted to defeat a just cause. There is sufficient power in the Courts, under Code of Civil Procedure, to ensure that injustice is not done to any party who has a just cause. We may herein quote from the said judgment:

9... Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

10.. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer.

12. Similarly, this Court in the case of *Merck Sharp & Dohme Corporation and Ors. vs Glenmark Pharmaceuticals Ltd, 2015 SCC OnLine Del 12580* relying on the judgment of *United Bank of India v. Naresh Kumar* (Supra), held as under:

“34. In this case, trial has continued almost for two years. Thus, it is difficult in these circumstances to presume that suit has not been filed and pursued without the authorization of plaintiff No. 2. Ex. PW5/2 is the letter of authority duly signed by the whole time Director of the plaintiff No. 2 authorizing Mr. Chetan Gupta to sign and verify the plaint. This shows that plaintiff No. 2 has ratified the action of Mr. Chetan Gupta of signing the plaint and, thereafter, continuing with the same.

35. For the foregoing reasons, this issue is decided in favour of the plaintiffs and against the defendant.”

13. In view of the above discussion, it is established that the suit was validly instituted by a competent person who has been authorized by the Plaintiff Company by way of a resolution by the Board of Directors. Accordingly, the issue is decided in favour of the Plaintiff and against the Defendants and it is held that Mr. Satish Chandra Pandey has

validly signed, filed and instituted the present suit on behalf of the Plaintiff Company.

Issue 2: Whether the Plaintiff is entitled to recover the amount of Rs. 2,50,96,591.44/- from the Defendants?

14. Plaintiff claims that the Defendants failed to make payments for the liquor supplied to them. Defendants on the other hand refuted the liability primarily taking the plea of non-delivery. They contend that no material was received against the invoices that are subject matter of the suit. Plaintiff has not filed any document showing the actual supply delivery of material to Defendant No 1. The payment towards the supplies have been duly made and this fact has been concealed by the Plaintiff. PW-1 has failed to state the exact figure of the supplies made to the Defendants. Document Ex. PW 1/73 cannot be relied upon as it is not the Statement of Account maintained in the regular course of business, rather it is an extract from the Statement of Account and the said document has not been proved as per Section 65-B of the Evidence Act, 1872. The invoices (Ex PW1/37 – Ex 1/71) are also not proved as per the law, since Plaintiff did not call any witness from the accounts department to prove the same. Plaintiff has failed to produce the monthly sales statement, the statutory document that evidences the actual supply and have therefore failed to prove that the quantity of liquor mentioned in the invoice was actually supplied. The balance confirmation letter dated 19th April 2010 is also denied.

15. On the basis of the aforementioned contentions, it emerges that Defendant No. 1 admits having business transactions with the Plaintiff. In fact, during the course of arguments, learned counsels informed the Court that till date, the parties are transacting with each other and the Plaintiff is making supply of goods to Defendant No. 1. Be that as it may, since the onus of this crucial

issue is on the Plaintiff, let us examine and scrutinize the evidence led by the parties to see if the Plaintiff has successfully proved the same. In order to establish the liability, Plaintiff has sought to rely upon a) Invoices along with Form L-32 and L-34. b) Balance confirmation letter issued by the Defendants and c) Statement of Accounts.

A. Invoices and Forms L-32 and L-34.

16. Plaintiff sought to prove the supply of liquor on the basis of the invoices, L-32 Forms and L-34 Forms. It is important to understand the framework of trade of Liquor. Liquor trade is fully controlled and regulated by the Excise department which issues permits/licenses that are necessary for sale and purchase of liquor. There are two major types of licenses viz L-32 and L-34. Form L-32 records the quantity that a purchaser wishes to purchase within a period of 30 days from the date of issuance. Form L-34 is a document that exhibits the actual supply of goods supplied to the purchaser, under the supervision of the Excise Department. The permit [L-32] carries the name of the vendor and the manufacturer and remains valid for the period mentioned therein. This Form signifies that the vendor specified has the requisite permission to purchase the maximum quantity of alcohol indicated therein. The vendor can nevertheless, if it chooses, purchase lesser quantity, but cannot exceed the limit. On the submission of Form L-32 by the vendor, the manufacturer becomes entitled for issuance of Form L-34 from the Excise Department which signifies that the quantity demanded by the vendor can be moved out of the warehouse of the manufacturer, as indicated on Form L-34 itself. Form L-34 is thus a permission by the Excise Department to move the liquor out of the premises of the manufacturer in accordance with Form L-32.

17. There is sufficient independent credible evidence on record to prove the liability. Plaintiff examined Mr. Satish Chandra Pandey, Assistant Company Secretary as PW-1. The statement of PW-1 in the affidavit by way of evidence is reproduced hereunder:

“I say that accordingly, the defendant No. 1 placed various purchase orders with the plaintiff, from time to time, for supply of various brands of liquor and on the said purchase orders of the defendant No. 1, the plaintiff supplied the requisite goods to the defendant No. 1 from time to time and for every such supply, the plaintiff raised and issued invoices to the defendant no. 1 for payment. The said goods (liquor) were supplied by the plaintiff to the defendant no. 1 in accordance with the Form L-32 issued to the defendant no. 1 for purchase of the liquor and transport permit L-34 issued to the plaintiff for sale of the same by the concerned authorities (Excise Department).”

PW-1 in his cross examination has maintained his stand to this effect. The relevant portion of the statement is reproduced hereunder:

“L-32 is an excise format /permit, granted to L1 License holders for the purpose of placing orders for purchasing of liquor/wine. It is in respect of Indian made foreign liquor. It is correct that the form L-32 is a permit for distributors, allowing them to purchase a particular quantity of liquor and it is not an actual purchase order. (Vol.). No purchase order can be placed in the absence of L-32.

Q. Please see the records and tell whether any purchase orders are placed on record?

A. Yes. (Vol.). As L-32 is the document which contains the requisite quantity of liquor to be supplied by the plaintiff to the defendants.

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I can tell from the record as to which invoice has been issued in respect of any particular purchase order/L-32/L-34. L-34 is issued by the Department in the name of the manufacturer. It is correct that L-34 is issue for the purpose of permission to the

manufacturer to sell the liquor (Vol.) subject to issuance of L-32 by the purchaser.

L-34 also bears the details of the purchaser.

It is incorrect to suggest that L-34 is merely a permission in favour of the manufacturer to sell. It is incorrect to suggest that the same is not purchaser/party specific. It is incorrect to suggest that once L-34 is available with the manufacturer the same be used by the manufacturer for any of its client / purchaser. It is incorrect to suggest that L-34 does not bear any details of the purchaser/party and the manufacturer can fill it as per its own choice or sweet will. It is incorrect to suggest that I have wrongfully or falsely stated that L-34 is issued pursuant to L-32 or that the same has no bearing whatsoever with any purchaser/proposed purchaser”

18. Plaintiff has also examined one Sh. Yatinder Yadav (PW-4), Excise Inspector, who produced the summoned record pertaining to Form (s) No. 34 issued to Defendant No. 1. On the basis of the records produced by him, he confirmed that all the exhibits- copies of the Form L-34 (Ex PW-1/2 to Ex PW 1/36) filed on record were issued by the Excise Department under the respective licenses. During the cross-examination, the said witness also stated that the liquor from the godown of the Plaintiff is transported in the presence of an Excise Officer. The relevant extract of the Statement of Mr. Yatinder Yadav (PW-4) is reproduced hereunder:

“I have brought the summoned record pertaining to Form NO. L-34 issued to J.D. Wines. Copy of L-34 issued to the licensee dated 20.08.2009 is already on record as Ex. PW 1/2.(Office copy seen and returned)...

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Form NO. L-32 is issued to the licensee for authorize possession and transportation of liquor. Licensee cannot remove liquor issued against the permit without Form NO.

L-34. Form NO. L-34 authorizes the licensee to remove the liquor against the valid permit i.e. L-32. There are various types of licensee. In this case, J.D. Wines was holding L-1 license which authorizes J.D. Wines to store and supply liquor to various retail licensee (L-2) in the region of Gurgaon. I have knowledge that J.D. wines also have L-2 license. It is correct that the holder of L-32 form cannot buy liquor more than one mentioned in L-32 but can buy lesser quantity to the one mentioned in L-32. If the licensee purchases less quantity viz-a-viz that mentioned in L-32, the only document maintained in this regard is L-34. All the licensees are required to submit their monthly sales statement to the department. Plaintiff also submits monthly sales statement to the department. I have not brought the record pertaining to monthly sales statement. (Volunteered. Since the same was not summoned). The quantity of liquor mentioned in L-32 may vary sometimes from L-34. It is correct that vehicle number is compulsorily required to be noted on L-34.

Question: Is it correct that L-34 and sales invoice are required to be drawn simultaneously?

Answer: The department has nothing to do with sales invoice. It is correct that sales invoice is never submitted to the department. I cannot say if the sale invoice should also bear the vehicle number. (Volunteered, since the department has nothing to do with sales invoice). The record of transportation of the liquor to the godown of licensee is maintained by the licensee under the supervision of department. Plaintiff also maintains this record. (Volunteered, it is compulsory). The record of bilty of the transport is not maintained by the Excise Department. The liquor from the godown of the plaintiff is transported in the presence of an Excise Officer. The working hours of Excise Inspector are not specified. The office hours are 9AM to 5PM. (Volunteered. But we are on duty 24 hours). It is not practically possible to be physically present at the Godown of the licences for 24 hours continuously. It is correct that every Godown has one specified Excise Inspector. The availability of the Excise Inspector at specified Godown is as per the convenience of the licensee. (Volunteered. Depending upon the departure of the vehicle)....."

19. It would also be useful to note the stand of Defendants on these documents. The relevant extract from the evidence by way of affidavit of Mr. Rajeev Garg(DW-1) on the above Form(s) is reproduced hereunder:

“I say that the issuance of Form L-32 and permit L-34 by the authority merely shows that concerned parties have requisite permission for sale, Purchase and Transport of Alcoholic breweries and nothing more than that. I say that the said licenses and permits do not reflect the actual sale, purchase or transport of intended material.”

Mr. Rajeev Garg in his cross stated as under:

“The permission is granted by the Excise Authority on our application in writing. It is correct that this permission is called as Form L-32. It is correct that order is placed on the Plaintiff within the limits of quantity mentioned on form L-32. After placing the order on the plaintiff, we received the material through transporter with proper bilty and we do not send our person to collect the material. I do not know that it is mandatory to sign the register maintained by the Excise Department called L-34 before dispatching the delivery from plaintiffs premises. (Volunteered. Though, it may be mandatory as per Excise Rules).

20. On a careful perusal of the aforementioned testimony of Mr. Yatinder Yadav (PW-4), it is thus established that the Form L-34 relied upon by the Plaintiff match with the records of the Excise Department. These documents prove the dispatch of the goods from the godown of the Plaintiff in the presence of the Excise Department. The L-32 and L-34 Forms are concededly in the name of Defendant No. 1 and the goods were dispatched for supply to the address mentioned therein. Defendants have tried to demonstrate that Form L-34 is not a conclusive proof of sale of goods and should be disregarded and Plaintiff should have instead produced the Monthly sales statement.

21. They rely on the cross examination of the Excise Officer (PW-4) who has stated that the Plaintiff is required to submit monthly sales statement to the Excise Department. Defendants argue that the said document alone can conclusively prove delivery of the goods and since the same has not been brought on record, Plaintiff has not proved supply of goods. This contention of the Defendant is misconceived. Plaintiff has produced sufficient oral and documentary evidence on record whereby it can be inferred that the goods have indeed been delivered. The Defendants have admitted Form(s) L-32 [Ex. P-1 to Ex. P-35]. The admission of the said documents exhibits the intention of the Defendant to purchase from the Plaintiff, the quantity of liquor specified therein. This intention is translated into actual sale purchase by virtue Form(s) L-34.

22. It is also a vital fact that all the three documents i.e. L-32, L-34 and the invoices have correlation with each other. Each L-34 contains the particulars of the goods, the relevant L-32 and the name of the beneficiary. The invoice contains all the above particulars, the price, CST and VAT. All the above entries contain the particulars of the beneficiary i.e. Defendant No. 1. The Defendants' plea of non-delivery also appears sham and without substance. Mr. Rajeev Garg (DW-1) during his cross examination deposed to the following effect:

“Q. Whenever the quantity or quality of goods mentioned in L-34 do not tally with the actual supplies received by you, what do you do?”

A. Whenever the goods actually are supplied to us alongwith invoice, L-34 and bilty and if it does not tally with L-34 we inform the supplying company.

Q. Whether you asked them to issue afresh invoice in such case?

A. Yes.

Q. Do you have in your possession any such communication where you wrote to the plaintiff to issue fresh amended invoice?
A. No.

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It is correct that whatever supplies we actually received from the plaintiff were in accordance with L-34 and the invoice accompanying the same. It is correct that for that reason we did not have to write to the plaintiff about any shortage in actual supply. We started making entries in the ledger maintained by us copy of which is Ex. DW-I/1 from the very day when we started receiving supplies. The entries in the ledger account were in accordance with the invoices received by us."

23. Thus, in my considered opinion, failure to produce the monthly statements does not in any way discredit the version of the Plaintiff. It cannot be said that failure to produce the monthly sales statements is fatal to the case of the Plaintiff. There is sufficient independent credible evidence on record to prove the liability. The aforementioned witness from the Excise Department has also stated that the vehicle number is not compulsorily required to be noted on L-34 and that the Excise Department is not involved with the issuance of sale invoices in the transportation of the liquor and also does not maintain any record of the bill of the transport. The transporter cannot move liquor from the godown of the manufacturer without Form L-34 which is essential for the movement of goods. Mr. Rajiv Garg, (DW-1) during his cross examination admits that the transporter while delivering the liquor gives a copy of L-34 to them. He also confirmed that they received copies of L-34 for each and every delivery made by the transporter of the liquor supplied by the transporter. He could however not confirm if the transporters bill of for the liquor supplied by the Plaintiff were in their possession. The ostensible reason for his inability to do so was the Income

Tax scrutiny, which is not convincing and requires the Court to draw inference against the Defendants that vital evidence has been withheld from Court. The relevant extract of the statement is reproduced hereunder:

“It is correct that Transporter cannot move liquor without L-34. (Volunteered. However, it is not mandatory that the material has actually been supplied as L-34 is mere permission obtained to transport the liquor). It is correct that the Transporter while delivering the liquor gives the copy of L-34 to us. It is correct that we received the copy of L-34 for each and every delivery made by the Transporter of the liquor supplied by the plaintiff. I cannot say if all the transporters bilty are in our possession of the liquor supplied from the plaintiff. (Volunteered-Because of income tax scrutiny). I do not remember if we made all the entries in our books of account of all the bilties received from the Transporters. I do not remember if the entries of the bilties thereafter are entered to the computer.”

24. In the instant case, Form L-34 does mention the truck number that was used for transportation of the goods. No doubt, the goods receipt (GRs) have not been filed along with the suit, however, there is a valid explanation given by the Plaintiff for not doing so. Plaintiff has contended that the transportation was arranged by the Defendants. Sh. Ram Vohra (PW-2) has very categorically deposed that transportation was not provided by the Plaintiff. He has further stated that if the Plaintiff had arranged for the transportation, the copy of the GR would be attached with Form L-32, L-34 and invoices. In such circumstances where the transport is not provided by the Plaintiff, there would not be any GR. Since L-34 have been proved, the only logical conclusion is that the goods left the premises of the Plaintiff for delivery to the Defendants. The statement of Mr. Ram Vohra (PW-2) is reproduced hereunder:

“Question: Can you tell as to in which deliveries to the defendant, transportation was provided by the plaintiff?”

Answer: As per documents on record, in none of the case transportation was provided by the plaintiff. If we provide transport, the copy of the GR Number will be attached with Form L-32 & L-34 and invoice and if we will not provide there will no GR Number.

We did not keep any record of the transactions where the transportation was provided by the defendant firm. (Volunteered. It was done on good faith but now we are maintaining this record). It is wrong to suggest that no transportation shall leave our Go-down with liquor without proper documentation like bilty. It is wrong to suggest that the copy of the bilty is also provided to plaintiff even in cases where the transportation is provided by the wholesaler."

25. The abovementioned statement of PW-2 shows that a consistent stand was maintained throughout the course of the proceedings and Defendants have not been able to show anything to the contrary. Plaintiff has also proved the copies of the invoices placed on record. Plaintiff claimed that the original invoices are in the possession of the Defendants. Defendants, on the other hand, took a plea that the invoices had been taken away by the Income Tax Authorities for the purpose of carrying out a scrutiny into the affairs of the Defendant No. 1. The statement of Mr. Rajiv Garg, (DW-1) is reproduced hereunder:

"The accounts were maintained for the purchases by us as per bills and for the payments received as per the bank statement and the rebates/discounts on the basis of our dealing with the customers and all the entries of the materials actually received by us. I have to check my records to ascertain if we are in possession of all the bills of the material purchased and supplied by us as some must have been submitted with Income Tax Department at the time of scrutiny. We were not given any receipt by the income tax office of the document submitted with them during scrutiny. The Income Tax Department gave a notice to us for scrutiny. That notice is available with us. The documents submitted by us to Income Tax during scrutiny

were checked and verified by us before submitting. I do not know if any list was prepared by us of the documents submitted with Income Tax Authorities. We were receiving invoices from the Plaintiff. We made respective entries as per invoices as and when received in our account books. Most of the books of accounts of us are still with income tax authorities as the scrutiny is still pending. Scrutiny started most probably in the financial year 2011-12. The invoice is kept in a file after making the entries in the books. (Volunteered. Copy of the invoice is provided to the client after endorsing receiving on it). I do not know if the invoices were in our possession when the notice of this suit was served in 2010. It is correct that the invoices were in our possession when the written statement was filed in September, 2011.

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“ Q. Is there any invoice sent by the plaintiff in your possession which would show that cartage has been paid by the plaintiff?

Ans. As I have already stated before that due to some income tax-raid/survey all the documents and files were taken by Income Tax Authority, therefore we are not in a possession of any such invoice.”

26. Be that as it may, since the Defendants have not produced the original invoices, the copies of the invoices produced by the Plaintiff have to be admitted as evidence. Defendants' contention that the Plaintiff did not bring any person from the accounts department to prove the invoices is misconceived. PW-1, was looking after the legal compliances and has proved the same in accordance with law on the basis of the records produced by the Plaintiff company.

27. Thus, on a conjoint reading of all the documents produced on record i.e. Form L-32, L-34 and invoices, it can be firmly inferred that the Plaintiff has successfully proved the supply of goods under the aforesaid forms and the

invoices. It is also significant to note that Defendants have led no evidence to the contrary. Undoubtedly, the burden of proof for this issue lay upon the Plaintiff, as it had to prove the liability. However, shifting of onus of proof is a continuous process in the evaluation of evidence. In the present case, during trial the Plaintiff had been able to produce sufficient material in the nature of documentary and oral evidence that suggests the high degree of probability of the liability of the Defendants, the onus thus shifted on the Defendants. Confronted with the statement, Defendants conveniently took the plea that the documents are with the Income Tax Authority and did not produce any material on record that would corroborate its defense. Since Defendants admitted business relationship and the other documents, especially Form(s) L-32 & L-34 it was obligatory for them to produce evidence to show that liability arising therefrom, to the extent they admitted, stood settled and nothing was outstanding. Defendants have failed to discharge the onus and in the absence thereof, the burden of proof, never shifted back and thus on the basis of high degree of probability established by the Plaintiff it can be said that Plaintiff has discharged the onus. On the basis of the documents and the evidence led, it emerges that the defense of the Defendants was only with the intent to avoid liability, without any substance and that Plaintiff's case is proved through preponderance of probability.

28. Thus, considering the overall circumstances in the case, I am unable to accept the plea of the Defendants that the goods in question had not been supplied by the Plaintiff.

B. Balance confirmation letter.

29. Defendants' liability is also proved by way of written acknowledgement of debt of Rs. 2,04,71,000/- vide letter dated 19th April 2010 [Balance

Confirmation Letter- Ex. Pw 1/72]. It is submitted by the Plaintiff that the said letter is on the letter head of Defendant No. 1 firm and is signed by Mr. Mahesh Kumar. Defendants have taken a completely contradictory plea and have contended that the balance confirmation letter is a forged document, it does not bear the signature of any of the Partners of Defendant No.1 firm and neither does it bear the stamp of the Defendant No.1 firm nor is it printed on the letter head of the firm. Their stand as it emerges from the cross examination of PW-2 is that they have not disputed the signatures of Mr. Mahesh Kumar but have sought to deny his authority to give such a confirmation. The statement of Mr. Rajeev Garg in the evidence by way of affidavit is reproduced below:

“I say that the Defendant No. 1 did not issue any letter dated 19.04.2010 acknowledging and confirming the alleged principal outstanding balance of Rs 2,04,71,000/- (Rupees Two Crores Four Lakhs Seventy one thousand only) a due and payable by Defendant no.1 to the Plaintiff as on 31.3.2010. I say that the letter is forged, and created document. I say that it does not bear the signature of any of the partners or employees and also it does not bear stamp of the company. I say that the Plaintiff has forged the letter in attempt to substantiate its nonexistent claim.”

30. Sh. Ram Vohra (PW-2) in his evidence by way of affidavit in paragraph 9 has stated that Mr. Mahesh Kumar signed Ex. PW 1/72 in his presence and he identified his signatures. The extract of the statement in the evidence by way of affidavit is reproduced below:

“ I say that Shri Mahesh Kumar, Accountant of the Defendant Firm issued balance confirmation vide letter dated 19.04.2010 and the said letter is signed by him and I identify his signatures as he has signed the said letter in my presence. The balance confirmation letter dated 19.04.2010 issued by the defendant is Exhibit PW 1/72.”

31. Plaintiff Company had no reason to disbelieve or suspect that Mr. Mahesh Kumar, with whom they were dealing, did not have the authority to sign Ex. PW 1/27. There is no effective cross-examination of PW -2 on this aspect. The relevant extract of the cross examination is reproduced hereunder:

“Question: Do you seek instructions only from the wholesalers themselves or seek instructions from their employees as well?”

Answer: It depends and sometimes the wholesaler authorizes the Go-down Incharge to place order. We do not ask for any written authorization. We get the amount settled from the accountant and do not ask for any authorization of the accountant. (Volunteered. As the transaction is for the entire year). We did not ask Mr. Mahesh Kumar of his authority when he signed the confirmation letter Ex. PW1/72. (Volunteered. We were dealing with him for the entire year and as such there was no requirement for asking for the authority letter). It is wrong to suggest that Mr. Mahesh Kumar was never authorized to sign any confirmation letter and he has colluded with us for signing this letter Ex. PW1/72. Our invoices are computer generated copies. It is wrong to suggest that Ex. PW1/72 is not on the letter head of defendant no.1 and is only a computer generated copy. It is wrong to suggest that the presence of Excise Inspector is must at the time vehicle leave our Go-down/depot. It is wrong to suggest that all the documents filed by the plaintiff are forged and fabricated. It is wrong to suggest that plaintiff has received the amount of all the supplies made to the defendants. One Excise Inspector is deputed for every Go-down but in case of some urgency with Excise Inspector, he may ask his colleague to attend his particular Go-down. The said deputation is neither official nor in writing. It is correct that L-34 on record does not bear the stamp of the Excise Inspector. It is wrong to suggest that I am deposing falsely.”

32. A bare perusal of the aforementioned statements shows that PW-2 has resolutely maintained his stand and nothing adverse could be proved by the Defendants. Significantly, Defendants do not deny that Mr. Mahesh Kumar

was their employee or that the document was signed by him. The onus lay on the Defendants to prove that he did not have the authority to sign the same. Defendant's sole witness Rajiv Garg (DW-1), did not complete his cross examination and Mr. Mahesh Kumar was also not called to depose before the Court about the truthfulness of the said authority. Defendants have also failed to produce the employees register/ muster roll or any other document to refute the claim of the Petitioner in this regard. The statement of Mr. Rajeev Garg (DW-1) to this effect is reproduced hereunder:

"I do not remember if employees register is maintained by the defendant. I do not remember the number of employees working with the defendant in 2009 till this suit was filed. I cannot even provide the approximate figures of employees. I do not remember if the defendant maintains the salary register of its employees."

33. Thus Defendants' denial that Mr. Mahesh Kumar did not have the authority to sign the same, has not been decisively rebutted. Defendants have also not produced any evidence to suggest that Mr. Mahesh Kumar had been induced or defrauded into signing the said document or any material to suggest that any action was taken against Mr. Mahesh Kumar for the alleged transgression of the limits of his authority or if any legal action was taken against him in respect of Ex. PW 1/72. Heavy duty lies upon the party who seeks to avoid the balance confirmation. It was for the Defendants to prove their stand and nothing has been done in this regard. Defendants have not placed on record any charter of duties or powers which were vested on Mr. Mukesh Kumar. This information was solely within the knowledge of the Defendants and since they have chosen not to place the same on record, an adverse inference ought to be drawn against the Defendants to hold that Mr. Mukesh Kumar was competent to sign the said document. In the totality of the above facts, I have no doubt that Ex. PW-1/72 was legally valid and binding upon the Defendants.

C. Statement of accounts.

34. Plaintiff has also proved the Statement of Account [Ex. PW 1/73] that records sale transactions with the Defendants. This document has been refuted on the ground that the same is not maintained in the regular course of business and is just an extract of the Statement of Account. On this aspect, the Defendants have sought to place reliance on the statement of the Plaintiff to the effect that it maintains the Statement of Account in SAP Software and Ex. PW 1/73 is printout from the software in excel format. Defendants have also contended that the document has not been proved as per the mandate of Section 65-B of Evidence Act.

35. Plaintiff has sought to prove the aforementioned Statement of Account [Ex. PW 1/73] by a certificate under Section 65-B, marked as Ex. PW1/126. The aforesaid books of account are maintained in electronic form and a copy thereof has been proved by way of a certificate under Section 65B of the Evidence Act. The extract of statement of Mr. Satish Chandra Pandey from evidence by way of affidavit is reproduced hereunder:

“ I say that the Plaintiff maintains, in its ordinary and regular course of business, a running account of the Defendant No. 1. As per the accounts of the Plaintiff, a principal sum of Rs. 2,11,92,940 (Rupees Two Crores Eleven Lakhs Ninety two Thousand nine Hundred Forty Only) is due and outstanding from the Defendant No. 1 towards the Plaintiff on account of the above said goods supplied by the Plaintiff to the Defendant no. 1.

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The certificate by the authorized signatory of the Plaintiff is respect of statement of account/ email/ computer print outs in the suit is Exhibit PW 1/126.”

36. Section 34 of the Indian Evidence Act 1872 deals with the relevance of entries in the books of account including those maintained in an electronic

form. Under the said provision, entries into the books of account including those maintained in the electronic form, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to enquire. However, such statements alone do not qualify as sufficient evidence to charge any person with liability. Though there is no specific method of proving the books of account, however, oral and documentary corroborative evidence relating to the entries in the books of account is regarded as sufficient proof of the entries made therein.

37. Plaintiff has produced the invoices, Form(s) L-32 & L-34 to corroborate the entries. The said documents have been proved in accordance with law. The items/entries reflected in the statement of account have thus been proved by independent evidence to prove the genuineness of the transactions shown therein. This evidence is sufficient corroboration of the statement of account maintained in the regular course of business. Defendants' attempt to discredit PW-1 on the ground that he is not competent to prove the statements is misplaced. A person who has knowledge of the document is competent to depose before the court to prove the same. The statement of account was proved by the authorized staff (PW-1) of the Plaintiff Company, who is the Assistant Company Secretary of the Plaintiff Company. No evidence was brought to raise doubt over the correctness of the accounts. Hence, the contention of the Defendants that, PW-1 is not competent to prove the said statement of accounts cannot be accepted. Coupled with the fact that Defendants have not led any evidence to raise any doubt regarding the genuineness of statement of account, merely because the writer of the account is not examined, the Plaintiff cannot be non suited.

38. Defendants have also not taken any objection with respect to the proof of the aforesaid document. There is no effective cross examination of the

witness who proved the statement of account with respect to the entries reflected therein. Defendants were not able to discredit the witness. The relevant extract of the cross examination is reproduced hereunder:

“I do not recollect the exact figure of which the material was supplied to the defendant and the payment made by the defendant. (Vol. it is since 2009 and the statement of account Ex.PW/73 is already on record). It is correct that as per the invoice filed by the plaintiff the last transaction with the defendant was vide invoice dated 27.2.2010 Ex.PW-1/71. (Vol. pertaining to this suit amount).”

39. Defendants have not been able to produce any testimony to contradict the stand taken by PW-1, either by way of evidence or examination/cross examination of witnesses. On the contrary, the evidence in the form of invoices which were in their possession have been kept back by the Defendants and accordingly adverse inference ought to be drawn against the Defendants on this aspect. Thus, having regard to the fact that Defendants have not been able to elicit anything adverse with respect to the entries reflected in the said document, it can be safely inferred that statement of accounts along with corroborating independent evidence has been led in the present case so as to render the statement of account as reliable evidence within the meaning of Section 34.

40. Accordingly, the aforesaid issue is decided in favour of the Plaintiff and against the Defendants.

Issue 3: Whether the Plaintiff is entitled to the award of pendente lite and future interest @24% per annum and if not at the same rate, then at what rate and for what period?

41. Plaintiff contends that Defendants are jointly and severally liable to pay the principal sum of Rs. Rs. 2,11,92,940/- (Rupees Two Crores Eleven Lakhs Ninety Two Thousand Nine Hundred Forty Only) and a sum of Rs. 39,03,651.44/- (Rupees Thirty Nine Lakhs Three Thousand Six Hundred Fifty One and paise Forty Four Only) towards interest on the said principal amount calculated at the rate of 24 % per annum from the date of expiry of 90 days of credit on each invoice till the date of filing of the suit. The Defendants are also liable to pay *pendente-lite* and future interest @ 24 % per annum on the said total amount from the date of filing of this suit till the actual date of payment.

42. Plaintiff relies upon the invoices [Exhibit PW-1/37 to Exhibit PW-1/71], which stipulate that if the payment is not made within the due date, interest would be charged at 24% per annum till the date of payment. Plaintiff has placed on record the calculation of interest accrued and payable in accordance with the stipulation mentioned in the invoices and are marked as PW-1/74. Defendants on the contrary contend that there is no agreement/ understanding between the parties with respect to the 90 day credit period as alleged by the Petitioner. They also deny that there was any understanding between the parties with respect to the interest on the delayed payments.

43. Defendants have not been able to place anything on record to disprove the documents relied upon by the Plaintiff and therefore it is clear that there was an agreement between the parties to pay interest on the outstanding amount and hence Defendants are liable to pay interest on the outstanding amount. However, the rate of interest claimed is found to be on the higher side and accordingly the *pendente lite* and future interest is awarded in favour of the Plaintiff at the rate of 12% per annum.

44. Accordingly, Issue No. 3 is decided in favour of the Plaintiff and against the Defendants in the above terms.

Issue 4: Whether the Plaintiff did not supply the quantity of beverages in accordance with the invoices in question?

45. The onus to prove this issue was on the Defendants. It is contended by the Defendants that the Plaintiff did not supply the quantity of the alcohol as stated in the invoices. Forms 32 and 34 as relied upon by the Plaintiff do not reflect the actual sale; purchase or transport of the goods. The sole witness who has appeared on behalf of the Defendants did not complete his cross examination and has not been able to discharge the onus of proof to show that the Plaintiff did not supply the quantities of alcohol in accordance with the invoices in question. No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross examination. Therefore any such statement made by DW-1 favouring the Defendants cannot be relied upon. On the contrary, in view of the findings given in respect of Issue No.2, the Plaintiff has duly proved the documents and the transactions between the parties and proved that Defendants have an outstanding liability towards the Plaintiff. Even otherwise the testimony of the Defendants' witnesses, examination in chief and the cross examination does not prove that there was any shortage of supply.

46. Accordingly, the issue is decided against the Defendant and against the Plaintiff.

Issue 5: Relief.

47. In view of the foregoing discussion, a decree is passed in favor of the Plaintiff and against the Defendants for a sum of Rs. 2,50,96,591.44/- alongwith *pendente lite* and future interest at the rate of 12% per annum from the date of filing of the present suit, till the date of realization. Plaintiff is also entitled to the cost of the suit on furnishing the certificate of cost within a period of three weeks.

48. The decree sheet be drawn up.

OCTOBER 18, 2019

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SANJEEV NARULA, J.