IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.01.2020

PRONOUNCED ON : 27 .01.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Civil Suit No.491 of 2015

M/s.Devendra Autocom Private Limited,
No.35/B/2, Second Main Road,
Industrial Estate,
Ambattur,
Chennai – 600 058.
Rep. By its Executive Director,

(Amended as per order
dated 16.09.2019 in
A.No.6710 of 2019) ... Plaintiff

Vs

M/s.Traverse Infortechh Solutions Ltd.,
No.24/10, Western Apartments,
Welcome Colony,
Anna Nagar West,
Chennai – 600 101 ... Defendant

Prayer:- This Civil Suit is filed under Order IV Rule 1 of Original Side Rules read with order VII Rule 1 of C.P.C., *for recovery of a sum of Rs.1,38,24,205/- together with future interest at 18% per annum on Rs.95,00,000/- from the date of plaint till date of realisation and for costs of the suit."*

For Plaintiff :Mr.Sunder Mohan
For Defendant :Mr.U.Devasenathipathi

JUDGMENT

This is a suit for recovery of money advanced by the plaintiff to the defendant pursuant to an alleged Memorandum of Understanding (MoU). The case of the plaintiff is that, it is a company incorporated under the Indian Companies Act, engaged in manufacturing in export of Auto Parts. The defendant is a Public Limited Company engaged in development of Multimedia Solutions products specializing and technology and enterprise applications; software and application support services for business purposes. The plaintiff and the defendant had entered into MoU dated 15.10.2009 valid for a period of three years. A sum of Rs.1,02,00,000/- was paid by the plaintiff to the defendant through cheque or RTGS in the following manner:-

Date	***Particulars***	***Amount (Rs.)***
07.01.2009	By Clearing	4,00,000/-
17.02.2009	By Clearing	10,00,000/-
23.02.2009	By Clearing	10,00,000/-
03.12.2009	Nirmal	3,00,000/-
21.12.2009	Devendra Exports P.Ltd.,	10,00,000/-
31.12.2009	By Clearing	10,00,000/-
31.12.2009	By Clearing	25,00,000/-
04.01.2010	Devendra Exports P.Ltd.,	30,00,000/-
	Total	1,02,00,000/-

2.Out of Rs.1,02,00,000/-, the payments of Rs.4,00,000/- on 07.01.2009 and Rs.3,00,000/- on 03.12.2009 were not made from the plaintiff account but from the account of one Nirmal Kumar who was the then Managing Director of the plaintiff company. The defendant had admitted the receipt of Rs.1,02,00,000/- from the plaintiff. The MoU dated 15.10.2009 is in effect regarding certain past transactions and it was entered only after January 2010. Though money was paid by the plaintiff to the defendant as per MoU for the ostensible purpose for outsourcing products through the defendant, no work done by the defendant.

3.Nirmal Kumar, the then Managing Director of the plaintiff company resigned his post on 28.12.2013 and relinquished his share in the plaintiff company on 28.07.2014. Only then, the plaintiff came to know about the MoU as well as the fact that the payment made to the defendant aggregating to Rs.95,00,000/- from the company account. Realising that the defendant has not done any project for the plaintiff and the MoU has come to an end after expiry of three years period, hence, the defendant is liable to refund the amount received from the plaintiff as envisaged under the MoU dated 15.10.2009. The plaintiff sent an email on 27.11.2013 to the defendant. The defendant did not respond. Hence, legal noticed issued on 11.02.2015. Thereafter, the present suit is filed narrating the cause of action for recovery of Rs.1,38,24,205/- with interest @ 18% per annum from the date of suit till the date of realization.

4.The cause of action for the suit is narrated at paragraph No.8 of the plaint and the same is extracted below:-

> *"8.The cause of action for the suit arose at Chennai, within the jurisdiction of this Hon'ble Court, on 15.10.2009, when the plaintiff and the defendant entered into a Memorandum of Understanding on a case to case basis and paid the defendant on various dates from 07.01.2009 to 04.01.2010 various amounts aggregating to Rs.95.0 lakhs, but no work was outsourced to the defendant; on 14.10.2012 when the said MoU lapsed with efflux of time and no work was done pursuant or based on the MoU; on 27.11.2013 when the plaintiff sent an e-mail to the Accountant of the defendant demanding refund of the advances paid to the defendant aggregating Rs.95.0 lakhs, but in spite of having received the email, the defendant did not reply or comply with the demand in the said email; on various subsequent dates when the plaintiff made various oral requests to the defendant which were of no avail; on 11.02.2015 when the plaintiff caused a legal notice to be issued to the defendant and the same has been received in spite of which, the*

> *defendant has not made payment and de die in diem when the defendant is illegally withholding the money received from the plaintiff and has not repaid the said sum along with interest to the plaintiff."*

5.The sole defendant has filed the written statement denying the averments made in the plaint. According to the defendant, they were not engaged by the plaintiff for any business. The proposal made by the plaintiff to enter into a business transaction was accepted by the defendant and the MoU was prepared with the help of the plaintiff's Attorney. The defendant signed the draft MoU and handed over it to the plaintiff. Due to some reasons, the plaintiff did not sign the MoU and refused to execute the MoU. The MoU referred in the plaint is only an agreement to agree. Pursuant to this MoU, the parties did not enter into any agreement which can be made enforceable.

6.The averment made in the plaint that the defendant had received Rs.1,02,00,000/- is a cooked up fact. Neither the terms of MoU nor the annexure attached to the said MoU are enforceable. The suit is a vexatious one filed based on an unenforceable MoU. The defendant admits that certain payments were made by the plaintiff in view of business transactions entered into between them. For the money received, the defendant had completed the demanded service by the plaintiff and the said fact will be proved during the trial.

7.Based on the above pleadings, this Court framed the following issues:-

> *"1.Whether the MoU dated 15.10.2009 is valid, enforceable, and as in accordance to the prevailing law ?*
>
> *2.Whether the defendant received the sum of Rs.1,02,00,000/- as per MoU?*
>
> *3.Whether any money has been transferred from the plaintiff to the defendant on basis of MoU dated 15.10.2009.*
>
> *4.Whether the defendant provided the services demanded to the plaintiff as MoU for the payment ?*
>
> *5.Whether the plaintiff revised any terms of the MoU to make profit out of it ?*
>
> *6.Whether the payment made from individual account of a director shall be considered to be a payment on behalf of the plaintiff company ?*
>
> *7.Whether a delay of 5 years in preferring this plaint from the date of cause of action of this suit is fatal ? And if this suit is within the limitation prescribed ?*
>
> *8.Whether the plaintiff is entitled to decree for reliefs prayed in the plaint and other consequential reliefs ?"*

8.The plaintiff has examined two witnesses and marked 18 exhibits.

After cross examination of P.Ws.1 and 2, the defendant though got the leave of the Court to issue subpoena for one Nirmal Kumar, did not pay batta and opted not to examine any witness or mark exhibits on his behalf.

9.Issue Nos.1 and 2:-

The MoU relied by the plaintiff is marked as Ex.P.2. The defendant has denied the enforceability of this document (Ex.P.2) and had effectively cross examined P.W.1 to create doubt about the veracity of this document. The MoU though drafted as a bilateral agreement, only the authorized signatory of the defendant company has signed and the representative of the plaintiff has not signed this document. One K.L.Ramesh, residing at AP 1093, 69th Street, 11th Sector, West K.K.Nagar, Chennai has signed as witness but not examined. Ex.P.2 starts with the recital that this MoU made on this 15th October 2009. Whereas, at page No.8, which is also carry the seal and signatory of the defendant, we find few payments made after the date of MoU i.e, 15.10.2009. To the specific question put by the defendant counsel to P.W.1, he has asserted that Ex.P.2 was executed only on 15.10.2009. The details of payments mentioned in the last page of the MoU and date of the document does not synchronize. Further, nowhere in the MoU, the project or the cost of project find a place. In fact, at one place of the MoU it specifically say that, all purchase and implementation cost, schedules, resource, etc., will be borne out in separate account specific to projects. In the plaint, the plaintiff has averred that the MoU has been acted upon by the plaintiff and the defendant. Same is fortified by the fact that the payments were made based on the MoU and has been admitted in the MoU. The plaintiff say. It is evident that MoU has been entered into only after January 2010 which is apparent from the fact that the payments made from December 2009 to January 2010 reflect in the MoU which was executed on 15.10.2009.

10.No doubt, the plaintiff has marked Exs.P.3 and P.4 which relate to entry 2 (Rs.10,00,000/- and 8 (Rs.30,00,000/-) in page 8 of Ex.P.2. This lend support to the case of the plaintiff that money was paid to the defendant by the plaintiff. But whether those money was paid pursuant to MoU or for some other purpose, could not be ascertained from the terms of MoU. More particularly, page 8 of MoU (Ex.P.2) is a stand alone document appended to MoU which was not signed by both the parties but only by the defendant. At the most this entry can be considered as a receipt. The plaintiff contends that though MoU is not signed by both the parties, having admitted the signature and execution of the document, it should be construed as an admission under section 21 of the Indian Evidence Act.

Pointing out that the defendant in his written statement has stated that he will prove that for the money received, he has completed the demanded service by examining Nirmal Kumar has not come through and having failed to prove that he has completed the demanded service for the money received from the plaintiff, adverse inference should be drawn.

11.Section 21 of the Indian Evidence Act reads as under:-

> *"21. Proof of admissions against persons making them, and by or on their behalf.—Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—*
>
> *(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.*
>
> *(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.*

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. Illustrations

(a) The question between A and B is, whether a certain deed is or is not forged, A affirms that it is genuine, B that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the Captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements,

though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that the person did examine it and told him it was genuine. A may prove these facts for the reasons stated in the last preceding illustration. Comments Submission of a letter not containing anything either in favour or against but simply a statement of original defendant, then such letter cannot be taken as that of a substituted defendant, confronting with admissions; Salil Kumar Roy v. Badu Den Bhansali, AIR 1999 Cal 270."

12.This Section deals with a general rule of admissions which are relevant and may be proved against the person who makes the said admission. Section 21 of the Indian Evidence Act shifts the burden and at the most can be taken as a waiver of proof on the part of the plaintiff. In fact, the defendant has also not seriously disputing the receipt of the money as listed at page No.8 of Ex.P.2. But it is disputed by the defendant that the said money was not received pursuant to the MoU but for the service rendered to the plaintiff in the course of the business transaction.

13.The terms of MoU as found in Ex.P.2 disclose only a broad understanding between the plaintiff and the defendant and the decision to work jointly arise of their common interest. It is specifically stated that this MoU is to establish a written basis under which parties may have collaboration and enter into further agreements from time to time during the term of this MoU to perform development of products as well as market, implement and support the same.

14.Except Ex.P.2, there is no other document to show that pursuant to this MoU, parties have entered into further agreement from time to time during the term of the MoU. Clause 9 of the MoU says that the MoU shall be valid for a period of three years from the date of signing of MoU. This recital provides answer to the Issue No.1. Clause 9 of the MoU reads as below:-

> *"9.Validity*
>
> *The MoU shall be valid for a period of three years from the date of signing of the MoU subject to annual review. The validity of this MoU may be extended by mutually agreed terms and conditions."*

15.The said MoU (Ex.P.2) can be taken as a valid document only if both sides have affixed their signatures. Since, only the defendant has signed and there is no evidence to show that the said MoU was acted upon dehors of plaintiff representative not signing. This MoU cannot be taken as a valid document and there is no clause in the said document have enforceability. Accordingly, Issue nos.1 and 2 answered in negative. The plaintiff relies upon this document more to save limitation. Whether it will save the limitation or not, will be discussed while considering the Issue No.7.

16.As discussed above, page 8 of Ex.P.2, provides the details of payments. Exs.P.3 and P.4 are bank documents which show that a sum of Rs.10,00,000/- and Rs.30,00,000/- respectively was paid to the defendant company on the respective dates. But, just because statement of payments is appended to MoU dated 15.10.2009, in the absence of evidence, it cannot be taken as a payment made as per MoU. The plaintiff has not placed any documents to show that the payments made by the defendant on the respective dates were pursuant to any written agreement between them for performing development of products and projects which is essential requirement even as per MoU terms.

17.In fact, from the reading of the plaint, it is clear that the plaintiff's Director, Nirmal Kumar resigned and relinquished his share from the plaintiff company. The plaintiff was not even aware of this MoU or the payment made to the defendant. Relying upon email communication marked as Ex.P.9, the plaintiff contends that the defendant was informed on 27.11.2013, about the expiry of MoU and retention of Rs.95,00,000/- by the defendant paid in advance by the plaintiff. This electronic evidence not supported by an affidavit as required under section 65B of the Indian Evidence Act or any other corroboratory evidence to show hard copy of the mail was served to the defendant or his representative. Therefore, a document (Ex.P.2) not signed by all the parties concerned and without evidence to show that it the acted upon has to be held as invalid and unenforceable document.

18.The explanation given by the plaintiff regarding the date of execution of this document (Ex.P.2) also not convincing. If the contention of the plaintiff to be accepted that though the date of MoU as found in the document is 15.10.2009, but was executed subsequently after the month of January 2010 then, all the more reason to accept the contention of the defendant that the MoU signed by him was only a draft but not given effect to due to some reasons one or the other attributable to the strained relationship between the Directors of the plaintiff company.

19.This Court holds that MoU dated 15.10.2009 not valid and enforceable. The alleged receipt of Rs.1,02,00,000/- as found in Ex.P.2 is not pursuant to the MoU. As discussed earlier, the plaintiff who has asserted the fact ought to have placed evidence to show that the MoU though signed only by the defendant was acted upon and based on the said MoU there were subsequent agreement for projects and programmes for which, money was transferred. When the payment of money accepted by the defendant but denied that it was not pursuant to MoU, the plaintiff ought to have placed proof that the payment based on MoU (Ex.P.2).

20.Page 8 of Ex.P.2; Ex.P.3 photocopy of the cheque and Ex.P.4 statement of the bank, prove money was paid by the plaintiff to the defendant on the respective dates. These three documents are not sufficient to conclude that the money was transferred by the plaintiff to the defendant only pursuant to the MoU (Ex.P.2).

21.MoU is dated 15.10.2009. The plaintiff himself is not sure about the date of its execution. But try to fix the date of execution after January 2010. So that, the payment details found in the last page of Ex.P.2 - MoU can be taken as a part of MoU (Ex.P.2). The payment details as found in Ex.P.2 starts from 07.01.2009 and ends on 04.01.2010. Nearly 8 payments spanning within a period of 12 months. The first three payments were made prior to the date of MoU and the remaining five payments made subsequent to the date of MoU. None of these payments are reflected in the MoU (Ex.P.2).

22.Issue No.3

The learned counsel for the defendant has specifically elucidated through the plaintiff witness about this during the cross examination. The witness admitted about the non reference of the payment in the MoU. While so, the alleged money transferred from the plaintiff to the defendant cannot be construed as the payment based on MoU (Ex.P.2). Issue No.3 answered accordingly.

23.Issue Nos.4 and 5:-

The defendant though in the written statement has stated that the payment received as per the service demanded and discharged through the evidence of Nirmal Kumar, the defendant has not examined the said Nirmal Kumar. However, this will not be fatal to the case of the defendant since, whether or not, the defendant received the money and whether or not, he has rendered service demanded by the plaintiff, the belated claim after the period of limitation repels the defendants claim and therefore, Issue Nos.4

and 5 will have no impact on the outcome of the suit.

24.Issue No.6:-

The plaintiff himself has given up his claim regarding Rs.8,00,000/- paid to the individual account of the Director and it has restricted the said claim only to Rs.95,00,000/- out of alleged payment of Rs.1,02,00,000/-. Therefore, this issue does not arise for consideration.

25.Issue No.7:-

The plaint is presented before this Court on 01.06.2015 for the alleged payment made by the plaintiff to the defendant between 07.01.2009 and 04.01.2010. The plaintiff attempt to save the limitation based on the MoU marked as Ex.P.2 and clause 9 which say that MoU is valid for a period of three years from the date of signature. At the risk of repetition, this Court wish to point out that the MoU is dated 15.10.2009. Though is a bilateral agreement, only one party has signed this document. Even according to its recital, the MoU will get validity only after both the parties sign. It will stand valid for a period of three years from the date of signing. For want of consent by one of the party, this document itself has been held as invalid therefore, the period of three years as mentioned in the document Ex.P.2 will no way save the limitation. The plaintiff has to stand on his own legs to sustain the claim. The contention of the plaintiff that, as per Clause 9, the MoU is valid for a period of three years from the date of signing. When both parties not signed, no term in MoU can be taken advantage.

26.First of all, the plaintiff has failed to establish the validity of MoU. Secondly, he has failed to establish the alleged payment reflected in page No.8 of Ex.P.2 and Exs.P.3 and P.4 are pursuant to the terms of MoU. Having failed to correlate payment *vis a vis* the terms of MoU, the payment has to be taken independently and limitation should be reckoned from the date of payment. If so considered, the suit is hopelessly barred by limitation. As a result, the suit is liable to be dismissed accordingly, dismissed with costs.

27**.01.2020**

jbm

Index: Yes
Speaking order/non speaking order

List of witnesses examined on the side of the plaintiff :-

P.W.1 – A.Vinod Shankar
P.W.2 –P.K.Muraleedharan

List of witness examined on the side of the defendant :-

Nil

List of exhibits marked on the side of the plaintiff :-

S.No	*Date*	*Description*	*Remarks*
1	11.03.2015	Board Resolution of the plaintiff company	Original
2	15.10.2009	Memorandum of Understanding entered between the plaintiff and the defendant.	Original
3	16.02.2009	Cheque issued by the plaintiff to the defendant	Photo Copy
4	04.01.2010	Letter issued by the plaintiff to ICICI bank regarding RTGS	Photo Copy
5	27.11.2013	E-mail sent by the plaintiff to the Accountant of the defendant	Office Copy
6	11.02.2015	Legal Notice issued by the plaintiff to the defendant along with the postal receipt	Office copy
7	04.07.2018	Notice issued by the plaintiff to produce the list of documents set out in the notice.	Office copy
8		Certified copy of the Memorandum of Association of the defendant's company	Xerox
9		Certified copy of the Articles of Association of the defendant's company	Xerox
10		ROC Certified copy of schedule V Annual returns of the defendant's company for the year 2001 to 2002	Xerox
11		ROC Certified copy of the auduted Balance sheet & P and	Xerox

S.No	Date	Description	Remarks
		L Account of the Defendant's company for the year 2001 to 2002.	
12	03.02.1999	ROC Certified copy of the certificate of incorporation of the defendant's company	Xerox
13		ROC Certified copy of the Form No.8 of the defendant's company	Xerox
14	12.04.2004	ROC certified copy fo the Form No.32 of the defendant's company	Xerox
15		Company Master Data of the defendant's company	Xerox
16		Company Master Data of Saikon Biotechnologies Pvt. Ltd., where the applicant's Ex. Managing Director interested as a Director	Xerox
17	07.08.2019	Board Resolution	Original
18	17.01.2017	The Certificate of Incorporation Certificate issued the Registrar of Companies	Printed copy

List of exhibits marked on the side of the defendant:-

Nil

G.JAYACHANDRAN.J.,

jbm

Pre – Delivery Judgment made in
C.S.No.491 of 2015

27.01.2020