Acting Through Its Authorised ... vs Delex Cargo India Pvt. Ltd on 21 January, 2023

IN THE COURT OF SH GURVINDER PAL SINGH,
DISTRICT JUDGE (COMMERCIAL COURT)-02,
PATIALA HOUSE COURT, NEW DELHI

CS (Comm.) No. 48/2019

M/s. Aviaxpert Pvt. Ltd.,
Having its registered office at;
E-178, East of Kailash,
New Delhi-110065

And also at:
A-253/2, Road No. 5,
Mahipalpur Extension,
New Delhi-110037

Acting through its Authorised Signatory
Mr. Deepak Kumar Gupta ...Plaintiff

versus

1. Delex Cargo India Pvt. Ltd.,
Having its branch office at:

Khasra No - 433,
Westend Greens Farm House Road,
Near Shiv Murti,
Rangpuri,
New Delhi-110037

Also at:

Y-56, Phase - II,
Okhla Industrial Area,
New Delhi-110020.

And also at:
Khasra No - 1115,
Nearby Hansraj School,
Village-Bhalswa,
Delhi-110033

And also at:

B - 401, Pramukh Plaza,
Opposite P & G, Chakala,
Andheri (East) Mumbai-400099.

And also at:
F - 5, 5th Floor
Pinnacle Business Park, Mahakali Caves Road,
Andheri (East),
Mumbai - 400093.

And

Having its registered office at:
NDR Estates, 110, GMT,
Kanakkachatram Madhavaram,
Chennai - 600 110.

2. Go Airlines (India) Ltd.
C-1, Wadia International Centre (WIC),
Pandurang Budhkar Marg, Worli,
Mumbai-400025,
India

Also at:

C/o Britannia Industries Limited,
A-33, Lawrence Road Industrial Area,
New Delhi-110035,
India ...Defendants

Date of Institution : 27/02/2019
Arguments concluded on : 29/11/2022
Decided on : 21/01/2023

Appearances : Sh. Sumit Shukla, Ld. Counsel for plaintiff.
Sh. Gautam Swaroop, Ld. Counsel for defendant no. 1.
Sh. Meenesh Dubey, Ld. Counsel for defendant no. 2.

JUDGMENT

1. Plaintiff had filed the present suit as a commercial dispute of a specified value, seeking recovery of Rs. 46,34,698/- with interest and cost from defendant no. 1 on the premise of having entered into Tripartite Letter of Intent (in short Tripartite LoI) with the defendants on 14/01/2016, in terms of which defendant no. 2 had availed services of plaintiff for providing Loaders and Supervisors for ground handling services at Indira Gandhi International Airport (in short IGI Airport) and said agreement had validity for a period of three years from 01/02/2016 to 31/01/2019. Prior to that defendant no. 1 had issued Letter of Intent dated 26/09/2015 (in short 2015LoI) for providing equipment at IGI Airport.

2. Shorn of unnecessary details, following are the relevant brief material facts of the case of plaintiff. Manpower for operating the Ramp Equipments was provided by plaintiff, whereas as per terms agreed, the bills were to be raised by plaintiff and to be paid by defendant no. 1. In terms of Tripartite LoI, all the Ramp Equipments were provided by plaintiff to defendant no. 1 but were used by defendant no. 1 very carelessly and recklessly, therefore it required frequent overhauling and

repairs so as to be able to function. Realizing that the scope of work had changed, plaintiff had brought to the knowledge of defendant no. 1 by emails and in meeting dated 03/12/2015 it was agreed between plaintiff and defendant no.1 that the cost towards overhauling and repairs would be borne by defendant no.1 but defendant no.1 never made payments towards repairs of the Ramp Equipments and did not make payments towards bills raised by plaintiff on time. Vide email dated 25/04/2016 plaintiff issued notice to terminate the 2015 LoI and sought return of its Ramp Equipments along with settlement of accounts. Plaintiff sent various reminders but defendant no. 1 paid no heed towards the same and it was only vide email dated 19/05/2016 defendant no. 1 denied its liability to pay for the amounts due towards repairs and in view of the same, plaintiff terminated the 2015 LoI vide email dated 20/05/2016 and sought return of its Ramp Equipments and settlement of accounts. Since plaintiff had to commence its operations from 01/02/2016 as per Tripartite LoI, plaintiff had made all the necessary arrangements with respect to the loaders and the staff and issuance/renewal of their respective Airport Entry Permits and had mobilized its resources at IGI Airport. It was informed to plaintiff by defendant no. 1 that the LoI previously executed between defendant no. 2 and LION Manpower (the previous service provider of defendant no. 2), was subsisting as on that day and in view of the same, plaintiff must start its operations from 01/04/2016 onwards, during which time, said LoI between LION Manpower and defendant no. 2 shall be terminated by defendant no. 2. Defendant no. 1 had deliberately and wrongly sent the termination notice to LION Manpower, though the termination notice was to be sent by defendant no. 2 in terms of LoI with LION, which was informed to plaintiff by defendant no. 1 only on 25/03/2016 i.e., five days before the date of commencement of work by plaintiff. Vide email dated 25/03/2016 defendant no. 1 admitted that LoI with LION could not be terminated because the termination notice was wrongly sent by defendant no. 1 and LION Manpower had refused to accept the notice of termination served upon it by defendant no. 1 and fresh termination notice shall have to be issued by defendant no. 2 in order to effectuate the termination of LoI of LION. Plaintiff responded by email dated 27/03/2016, apprised defendant no. 1 about having already incurred sufficient expenses and made all necessary arrangements. Defendant no. 1 sent email dated 30/03/2016 informing plaintiff that LION's LoI was still subsisting and defendant no. 2 wants to first terminate the LoI of LION by sending a month's notice and so defendant no. 1 directed plaintiff to be on standby at IGI Airport and deploy its resources only when there is a disruption created by LION Manpower during the one month period. Plaintiff replied vide email dated 30/03/2016 and informed that as directed by defendant no. 1, plaintiff shall mobilize its resources at IGI Airport on 31/03/2016 at 11:59 pm and the resources shall be on standby, however, the billing will start accordingly from 01/04/2016 as per the terms of the Tripartite LoI. Defendant no. 1 did not object to it and admitted that the manpower would be deployed by plaintiff at IGI Airport. Bills/invoices were raised by plaintiff and for the unpaid sums, plaintiff has filed the present suit.

3. Following are the brief relevant material facts averred by defendant no. 1 and premise laid for defence in filed written statement. There is no cause of action against defendant no. 1 and the suit is replete with false statements and plaintiff had approached this Court with uncleaned hands. The suit is barred by res-judicata. Issues raised in the plaint were already finally determined and adjudicated upon by Ld. Adjudicating Authority, National Company Law Tribunal (in short NCLT), Chennai where no liberty was granted nor any liberty was sought by plaintiff and it was clearly determined therein that the payments for services allegedly provided in the month of April, 2016 was mistakenly

made. It is also averred that in email of defendant no.

1 of 30/03/2016 also was mentioned to plaintiff to "...deploy staff only in case if existing service provider create....during the notice period...". It was acceptable to plaintiff, as was evident from its email dated 30/03/2016, wherein plaintiff had clearly stated that "As suggested by you, we shall be on standby while you address the issue with Go Air...". It was, therefore, clear that the understanding between the parties that plaintiff would be required to deploy only if LION was creating any problems during the notice period. No request for deployment was made by defendant no.1, consequently plaintiff cannot raise any invoice towards the same. Plaintiff had also confirmed vide email dated 23/04/2016 that they would provide services only from 01/05/2016, however, plaintiff has knowingly withheld said email dated 23/04/2016 and other email communications which shed light on the facts and issues of the present dispute. Plaintiff itself sought for return of its equipment vide its email of 25/04/2016, so plaintiff cannot claim dues for the entire month of April, 2016. It is evident from the record and more particularly from emails dated 29/09/2016 and 04/11/2016 that defendant no. 1 had at all times disputed that any services were provided for the month of April, 2016. Vide email dated 03/11/2016 sent by defendant no. 1 it was mentioned inter alia that "...will not pay for the repair of the BFL as maintenance is in your scope and also for the Loaders bill of April which was charged without providing the loaders. The payment released to you is the full and final." Plaintiff accepted that the payment received was full and final and that there was no further payment outstanding. Defendant no. 1 averred that no payment for the month of April, 2016 has been made as alleged and defendant no. 1 always disputed the invoice for the month of April, 2016 whereas the tabulation and computation of payments provided by plaintiff in suit is erroneous and misleading to the extent that it indicates complete payment of the invoice dated 02/05/2016 i.e., for the month of April. 'First In First Out' (FIFO) method of adjustment of payments was being adopted by plaintiff i.e., a payment, irrespective of when it was made, would be adjusted against the oldest raised invoice. As such, payments made by defendant no. 1 towards invoices for subsequent months were adjusted against the incorrectly raised invoice for the month of April. In view of the same, the entire case made out by plaintiff i.e., as to failure to make payments for the months of June, July, etc. is completely baseless. It is also averred that LOI dated 26/09/2015 incorporates that plaintiff was requested to sign a copy of LoI in acceptance in terms and conditions of contract. However, LoI placed on record by plaintiff is unsigned, therefore, does not and cannot constitute a binding contract agreement. Also that the rates mentioned in the LoI are all inclusive viz., maintenance/ servicing/repairs, fuel etc; so any claim for repair on the basis of LoI was completely untenable. Tripartite LoI dated 14/01/2016 clearly specified inter alia that "5. We will be entering into a formal agreement with you in due course of time." No formal agreement has been placed on record and consequently, any claim based on the Tripartite LoI is untenable. No services were rendered by plaintiff for the month of April, 2016 as during that period and as communicated to plaintiff, LION was rendering services to defendant no. 2 and for which defendant no. 1 was to make the payments, and which payments were admittedly made to LION, therefore, plaintiff cannot raise any invoice towards the same. Plaintiff and defendant no. 1 clearly agreed that services were supplied by plaintiff to defendant no. 1 only commencing from 01/05/2016, which was communicated between the parties vide email dated 23/04/2016, which plaintiff had deliberately and intentionally withheld and suppressed. Defendant no. 1 in sent first email dated 23/04/2016 inquired as to the readiness of plaintiff's staff and passes to start operations from 1st May. In

response, plaintiff replied vide email dated 23/04/2016 stating that they were ready with the required staff and the airport entry passes to takeover operations from 30th April 2016 midnight. It was thus unmistakably clear that the agreement between the parties was for rendering of services by plaintiff with effect from 01/05/2016 only. Also plaintiff has not placed on record work order issued by defendant no. 1 in respect of the claimed amounts. The claim raised in the suit is the same claim which was raised in Co.P. No. (IB)/618/CB/2018, which was of principal amount of INR 34,14,589/- and was based only on the LoI dated 26/09/2015. Also no claim of interest was made in aforesaid Co.P. No. (IB)/618/CB/2018 and consequently raising of a claim towards interest is now clearly barred by res judicata. The averments made in the plaint had been categorically denied by defendant no. 1.

4. Following are the brief relevant material facts averred by defendant no. 2 and premise laid for defence in filed written statement. Suit is misconceived, false and the averments of suit are bundle of misrepresentation and frivolous. For unjust enrichment, ulterior motives, plaintiff had suppressed certain material facts and there is no cause of action against defendant no. 2, whereas defendant no. 2 has been unnecessarily impleaded as a party to present suit and no relief has been sought against defendant no. 2. The present suit is bad for mis-joinder of parties as defendant no. 2 is neither a necessary and proper party to the suit. Defendant no. 2 is not privy to any transactions, dealing and its terms and conditions of defendant no. 1 with third party. Defendant no. 2 in the normal course of business entered into a manpower supply agreement with defendant no. 1. Defendant no. 2 was never privy to the transaction between plaintiff and defendant no. 1 as the same was privileged and terms agreed thereon were between plaintiff and defendant no. 1. The relationship between defendant no. 2 and plaintiff was solely of a service provider and service recipient and defendant no. 2 had no role or say in the formulation, enactment etc. of internal business policy of defendant no. 1. Plaintiff issued invoices against defendant no. 1 and it was defendant no. 1 who had to receive and deal with such invoices, whereas defendant no. 2 had no dealing with defendant no. 1. Defendant no. 2 was not aware of the dispute in respect of the said transaction ongoing between plaintiff and defendant no. 1. Defendant no. 2 was not the part of the understanding arrived between plaintiff and defendant no. 1 in respect of transaction at, during or after raising of the invoices and as such defendant no. 2 is not liable to repay any amount to plaintiff. Defendant no. 2 made this fact clear to plaintiff to take any such grievance or claims with defendant no. 1 directly as was dealt earlier between them as defendant no. 2 was never a party and even the correspondence exchanged between plaintiff and defendant no. 1 will clarify that defendant no. 2 was never involved or made privy to said business transaction or any discussion thereto. Defendant no. 2 had only entered the Tripartite LoI in capacity of the airline and had nothing to do whatsoever with the service contract between plaintiff and defendant no. 1. Even the Tripartite LoI in its Liability clause clearly stipulates that in the event of "Any liability under this agreement arising out of the abovementioned services and any equipments will be sole responsibility of defendant no.1 only". Defendant no. 2 prayed for dismissal of the suit against it with cost.

5. In replications to written statements of defendants, plaintiff reiterated the averments of the plaint and denied the contentions put forth by defendants in their respective written statements. Following are the material averments in brief in filed replications. Signatory of written statement of defendant no. 1 is not duly authorized by defendant no. 1. Written statement of defendant no. 2 is liable to be

struck off as it is not properly verified in terms of Order VIII Rule 3A of The Code of Civil Procedure, 1908 (in short CPC). Written statements of defendants are bereft of the fact of which of the allegations of plaint are denied by defendants; so written statements be rejected. Defence raised by defendant no. 1 is entirely baseless and is on unsubstantiated averments. Also defendant no. 1 does not have any valid or plausible defence. Defendant no. 1 has not denied that the services for the period 01/06/2016 to 15/07/2016 were provided by plaintiff whereas for the first time defendant no. 1 pleaded that accounting statement of First In and First Out ('FIFO') was followed by defendant no. 1 in order to wrongly justify the payment made by it for the month of April, 2016.

Defendant no. 1 has neither placed on record the audited financial statements of defendant no. 1 company nor placed on record any certificate by a Chartered Accountant for the period 2016-2017 showing any system of FIFO is being followed by defendant no. 1 company. Execution of Tripatite LoI and services provided by plaintiff for the period from 01/06/2016 to 15/07/2016 were not denied by defendants in their respective written statements. Defendant no. 1 in written statement has tried to mislead this Court by phrasing few of the words from paragraph/pleadings or documents and quoted only the selective words at various places and the entire case and conduct of defendant no. 1 is fraudulent and based on falsehood. Plaintiff prayed for decree of suit.

6. Case management hearing was done on 16/12/2021. After hearing Ld. Counsel for parties and on the basis of pleadings of the parties; following issues were framed:-

ISSUES "1. Whether plaintiff is entitled for recovery of Rs.

46,34,698/- from defendant no. 1 as claimed?

OPP.

2. Whether plaintiff is entitled for any interest? If so at what rate; for which period and on what amount? OPP.

3. Relief."

7. Finding elements of settlement, the matter was referred to Mediation Centre, Patiala House Court, New Delhi. Schedule/ timeline was fixed on 16/12/2021 for speedy disposal of the case.

Mediation proceedings concluded as unsettled. Due to Covid pandemic conditions in office of Ld. Counsel for plaintiff, he could not take steps to adhere with the schedule/timeline fixed.

8. Plaintiff examined (i) Sh. Deepak Kumar Gupta Kotawala @ Deepak Gupta, its Authorized Representative as PW1; (ii) Sh. Mandeep Chauhan, its Accounts Executive as PW2; (iii) Sh. Sushil Raina, its Special Vice President-Commercial as PW3 and

(iv) Sh. Ajay Aggarwal, its Director as PW4 in led plaintiff evidence.

9. PW1 has relied upon the following documents:-

S.No	Documents	Exhibit
1.	Board of Resolution dated 06/02/2019	Ex PW1/1
2.	Board of Resolution dated 09/02/2022 authorizing PW1 to depose	Ex PW1/2
	26/11/2015 sent at 11:31 by PW1 to binay.jha@delex.in, hariomdahiya@delex.in	
	25/04/2016 19:26 sent by Deepak Gupta to 'SRIRAM' and others.	
	20/05/2016 11:52 sent by Deepak Gupta to 'SRIRAM' and others.	
6.	Copy of Legal Notice dated 12/10/2017 sent to defendants by Advocate of plaintiff	Ex PW1/6
7.	Copy of Demand Notice dated 06/12/2017 sent to defendant no. 1 by plaintiff	Ex PW1/7
8.	Copy of Demand Notice dated 19/03/2018 sent by plaintiff to defendant no. 1 demanding payment.	Ex PW1/8
9.	Certificate under Section 65B of The Indian Evidence Act,	Ex PW1/B

10. PW2 has relied upon the following documents:-

S.No	Documents	Exhibit
1.	Copy of letter dated 01/04/2015 of plaintiff for appointment of PW 2 as its Accounts	Ex PW2/1

	Executive.	
2.	Board Resolution dated 09/02/2019 of plaintiff authorizing PW2 to depose	Ex PW2/2

11. PW3 has relied upon the following documents:-

S.No	Documents	Exhibit
1.	Copy of the appointment letter dated 01/12/2014 issued in the name of PW3 by plaintiff	Ex PW3/1
2.	Board Resolution dated 09/02/2022 of plaintiff authorizing PW3 to depose	Ex PW3/2
	APL/ST/16-17/181 dated 16/07/2016 prepared by PW2 and signed by PW3.	
4.	Invoice No. APL/ST/16-17/172 dated 30/06/2016 prepared by PW2 and signed by PW3.	Ex PW3/4
5.	Invoice No. APL/ST/16-17/182 dated 16/07/2016 prepared by PW2 and signed by PW3.	Ex PW3/5
6.	Invoice No. APL/ST/16-17/056 dated 02/05/2016 for the month of April, 2016 for amount of Rs. 34,14,589/- prepared by PW2 and signed by PW3	Ex PW3/6

12. PW4 has relied upon the following documents:-

S.No	Documents	Exhibit
1.	Board Resolution dated 09/02/2022 of plaintiff	Ex PW4/1

	authorizing PW4 to depose 27/03/2016 09:36 am sent by PW4 to Sattiraju	
3.	Email dated 30/03/2016 10:20 pm sent by PW4 to Sattiraju	Ex PW4/3
4.	Certificate under Section 65-B of The Indian Evidence Act, 1872 of PW4	Ex PW4/B

13. Ld. Counsel for plaintiff closed the plaintiff evidence vide separate statement on 20/04/2022.

14. Defendant no. 1 examined (i) Sh. Binay Kumar Jha, its Deputy Manager-OPS as DW1; (ii) Sh. Manish Kejriwal, its Head Accounts/Financial Planning as DW2 in defendant evidence. No evidence was led by defendant no. 2.

15. DW1 has relied upon the following documents:-

S.No	Documents	Exhibit
1.	Letter of authority dated 19/05/2022 issued in favour of DW1 by defendant no. 1 23/04/2016 12:28 PM sent by SRIRAM to Sushil Raina 23/04/2016 12:57 PM sent by Sushil Raina to SRIRAM 23/04/2016 13:29 from Srinivas Sattiraju to Prasad Jogalekar	Ex DW1/1
5.	Affidavit under Section 65-B of the Indian Evidence Act of DW1	Ex DW1/B

16. DW2 has relied upon the following documents:-

S.No	Documents	Exhibit

1.	Letter of authority dated 19/05/2022 issued in favour of DW2 by defendant no. 1	Ex DW2/1

17. Ld. Counsel for defendant no. 1 and defendant no. 2 closed the defendants evidence vide separate statements on 31/05/2022.

18. Written arguments were filed by Ld. Counsel for the parties. Oral arguments were also addressed by Ld. Counsel for the parties. I have perused the record and have considered the rival contentions put forth by Ld. Counsel for the parties.

19. Ld. Counsel for plaintiff argued that suit has been filed by plaintiff seeking recovery of principal amount of Rs. 34,95,687/- and interest @ 12% per annum from the respective due dates aggregating to Rs. 11,39,011/- with pendente-lite interest and future interest from defendant no. 1. Following are the main arguments of Ld. Counsel for plaintiff. The suit arises out of invoice Ex PW3/3 dated 16/07/2016 of Rs. 1,59,563/-; (ii) balance amount of Rs. 14,20,415/- out of invoice Ex PW3/4 dated 30/06/2016 of Rs.38,82,629/- and (iii) invoice Ex PW3/5 dated 16/07/2016 of Rs. 19,15,709/-; which were issued by plaintiff. Aforesaid invoices were issued in terms of 2015LoI and Tripartite LoI. It was clear from the pleadings; documents on record, evidences led by parties that the undisputed understanding between the parties was that the manpower of the plaintiff would be deployed but shall be on 'standby' (only for the exclusive use of the defendant no. 1) for the month of April, 2016 and the plaintiff shall be paid for such deployment. This understanding was not disputed till 15/07/2016 (the date of termination of the Tripartite LoI dated 14/01/2016) and also till 16/08/2016 when email dated 16/08/2016 was issued by defendant no. 1 admitting its liability against all the invoices raised by the plaintiff. Only on 29/09/2016, defendant no. 1 suddenly unilaterally started disputing its liability for the month of April, 2016; even after making payment of the invoice raised for such period. Defendant no. 1 did not adjust such amount paid for the month of April, 2016 in any of the invoices raised subsequently by the plaintiff. It was only after the termination of the Tripartite LoI, defendant no. 1 is malafidely taking a plea that the payment made for the month of April, 2016 be adjusted against the said invoices which were raised subsequently on 30/06/2016 and 16/07/2016. Following documents of plaintiff were admitted by defendant no. 1 in affidavit of admission/denial of documents of plaintiff:-

Sl. No. Particulars

1. Copy of Letter of Intent dated 26/09/2015 (in short 2015LoI) for providing equipment

2. Copy of Tripartite LoI (in short Tripartite LoI) dated 14/01/2016 for providing manpower

3. Copy of email dated 25/03/2016 sent at 04:24 P.M.

4. Copy of email dated 30/03/2016 sent at 07:21 P.M.

5. Copy of email dated 19/05/2016 sent at 10:48 P.M.

6. Copy of email dated 16/08/2016 sent at 10:00 A.M In view of the above unequivocal admission of the above documents by defendant no. 1 it is clear that 2015LoI and Tripartite LoI were admitted by defendant no. 1 in terms of which the services were provided by plaintiff and said invoices were issued by plaintiff and no other contractual relationship existed between the plaintiff and defendant no. 1. In terms of admitted email dated 16/08/2016 sent at 10:00AM by defendant no. 1, the total outstanding dues of the plaintiff tallying with the invoice numbers and invoice date have been admitted by defendant no. 1. The execution, existence, validity and receipt of the invoices above said were proved by plaintiff through PW3, who signed the invoices and PW2 who prepared the invoices. All the three invoices forming part of the said invoices and the invoice dated 02/05/2016 find place in the admitted email dated 16/08/2016 issued by Mr. Clement Fernandez, Senior Manager in Accounts Department of defendant no. 1. Mr. Clement Fernandez is also currently working with defendant no. 1 as admitted by DW1 and DW2 in their cross examination but Mr. Clement Fernandez was not examined by defendant no.1 for the reasons best known to it. The TDS against the said invoices had been accounted and deposited by defendant no. 1. In terms of admitted email dated 30/03/2016, above said, sent by CEO of defendant no. 1 viz. Mr. Srinivas Sattiraju, the plaintiff was asked to be on 'standby' and deploy staff in case the then existing service provider created any disruption meaning thereby that the manpower of the plaintiff was to be ready at the airport and even if hypothetically, the services were stopped at any moment, plaintiff was to commence work immediately. This meant that plaintiff was always to be ready with its manpower. This objective could not be achieved if the manpower was not always deployed at the airport at the end of the plaintiff. Therefore, the cost towards such deployment above said, was to be paid by the defendant no. 1. This understanding was arrived in terms of email dated 30/03/2016 sent by PW4 at 10.20 PM. Defendant no. 1 did not dispute this email dated 30/03/2016 sent by PW4 at 10.20 PM. No document had been placed on record by defendant no. 1 disputing the email dated 30/03/2016 sent at 10:20 PM by PW4. Also defendant no. 1 has not examined Mr. Srinivas Sattiraju, CEO of defendant no. 1 disputing the email dated 30/03/2016 sent at 10:20 pm by PW4. Also, as per the understanding between the parties, the invoice raised for the period of April, 2016 viz. invoice dated 02/05/2016 was also cleared by defendant no. 1 without any demur or protest. DW1 had deposed that he was not aware whether any email was issued by the defendant no. 1 informing the plaintiff that no payment for the month of April, 2016 would be made. DW1 also deposed that no document was signed or executed between the plaintiff and defendant no.1 towards full and final settlement of accounts of the plaintiff. DW2 has also made the similar deposition that no document was signed or executed between the plaintiff and defendant no. 1 towards full and final settlement of accounts of the plaintiff. DW2 further deposed that no email was sent to

> the plaintiff specifying that the payment for the month of April, 2016 was mistakenly made to the plaintiff. Even though, DW2 deposed that the payment for the month of April, 2016 was adjusted against invoices raised in May, 2016 and June, 2016 in the books of accounts of defendant no. 1; no such documents were produced by defendant no. 1. DW2 was not in employment of defendant no. 1 in period from 01/04/2016 to 15/07/2016 in terms of his own deposition. DW2 further deposed that no email/ letter was issued to the plaintiff informing that the TDS was mistakenly deducted. DW2 also deposed that rectified TDS returns were filed by defendant no. 1 but the same were not produced before this Court. In terms of deposition of DW1; Mr. Daljit was the then Vice President of defendant no. 1 but Mr. Daljit was not examined by defendant no. 1. Email dated 29/09/2016 was issued way after the Tripartite LoI was terminated on 15/07/2016 and email dated 16/08/2016 was issued by Mr. Clement Fernandez, Senior Manager in the Accounts Department of defendant no. 1 admitted the liability.

Neither the books of accounts nor the rectified TDS returns nor any emails before 15/07/2016 and 16/08/2016 were produced by defendant no. 1 disputing the liability for the month of April, 2016; so adverse inference may be taken against defendant no. 1 in terms of Illustration (g) of Section 114 of The Indian Evidence Act, 1872. Defence set up by defendant no. 1 is moonshine and baseless. The four emails dated 23/04/2016 were either authored by or addressed to Mr. Srinivas Sattiraju and Mr. Sriram of defendant no. 1 and DW1 testified that he had no access to the email addresses ss@delex.in and sriram@delex.in nor had sent nor was he marked in any of the said emails marked Ex DW1/2, Ex DW1/3 and Ex DW1/4. DW1 further deposed that Ex DW1/2, Ex DW1/3 and Ex DW1/4 were also not printed from his printer/computer of. None of the documents relied upon by defendant no. 1 in support of its defence have been proved so as to negate the claim of plaintiff. Mr. KTS Moorthy, Chief Financial Officer of defendant no. 1 had signed the written statement of defendant no. 1 but was not examined by defendant no. 1 in its evidence. Defendant no. 2 had not filed statement of truth with written statement, so its his written statement is liable to be struck off. The understanding to be on 'standby' was arrived between plaintiff and defendant no. 1 in terms of email dated 30/03/2016 sent at 19:21 hrs. by CEO of defendant no. 1 wherein it was agreed between plaintiff and defendant no. 1 that the manpower of the plaintiff should be ready for immediate deployment. In response of said email dated 30/03/2016 sent at 19:21 hrs. by CEO of defendant no. 1, plaintiff had also on same date issued email Ex PW 4/3 to the effect in terms of the email dated 30/03/2016 sent at 19:21 hrs. by CEO of defendant no. 1 and the Tripartite LoI, the manpower of the plaintiff shall be ready to be deployed and the billing for the same shall start with effect from 00:01 hours on 01/04/2016. The aspect of billing was also based on the email dated 27/03/2016 Ex PW 4/2 sent at 09:36 hrs. on behalf of PW4 in terms of which PW4 had informed the defendant no. 1 that considerable expenses were sustained by the plaintiff towards the manpower to be deployed in terms of the Tripartite LoI. In cross examination of PW4 no email/document was put before him to counter aforesaid understanding between plaintiff and defendant no. 1. Ld. Counsel for plaintiff prayed for decree of the suit as claimed, relying upon the following precedents:-

> 1. Narayan Bhagwantrao Gosavi Balajiwale vs Gopal Gosavi & Ors., (1960) 1 SCR 773: AIR 1960 SC 100;

2. Vice-Chairman, Kendriya Vidyalaya Sangathan & Anr. vs Girdharilal Yadav, (2004) 6 SCC 325;

3. Narbada Devi Gupta vs Birendra Kumar Jaiswal & Anr., (2003) 8 SCC 745;

4. P. C. Purushothama Reddiar vs S. Perumal, 1972 (1) SCC 9;

5. Bal Kishan vs State & M.C.D, ILR (1976) II Delhi 235;

6. Muddasani Venkata Narsaiah (Dead) though Legal Representatives vs Muddasani Sarojana, (2016) 12 SCC 288;

7. Iqbal Basith & Ors. vs N. Subbalakshmi & Ors., (2021) 2 SCC 718;

8. Tulsi & Ors. vs Chandrika Prasad & Ors., (2006) 8 SCC 322;

9. Vidhyadhar vs Manikrao & Anr., (1999) 3 SCC 573;

10. Adivekka & Ors. vs Hanamavva Kom Venkatesh (Dead) by LRS. & Anr., (2007) 7 SCC 91;

11. Binapani Paul vs Pratima Ghosh & Ors., (2007) 6 SCC 100;

12. Jay Ambe Industries vs Garnet Specialty Paper Ltd., MANU/GJ/0466/2022;

13. State Bank of India vs Kanahiya Lal & Ors., MANU/ DE/1058/2016 and

14. Sudarshan Cargo Pvt. Ltd. vs M/s. Techvac Engineering Pvt. Ltd., ILR 2013 KARNATAKA 3941.

20. Following are the main arguments of Ld. Counsel for defendant no. 1. Due to the on-going obligations of defendant no. 2 with third party, the services of the plaintiff under Tripartite LoI were only required from May 2016 and defendant no. 1 vide emails dated 25/03/2016, 30/03/2016 and 23/04/2016, duly informed the plaintiff about the same and further stated that its services would only be required prior to May 2016, if there was any disruption of the services caused by third party. The same was also acceptable to plaintiff as evidenced vide emails dated 30/03/2016 and 23/04/2016. Tripartite LoI and 2015LoI were eventually terminated by plaintiff and the services of the plaintiff were only provided from 01/05/2016 till 15/07/2016. Yet plaintiff raised frivolous and incorrect invoice dated 02/05/2016 Ex PW3/6 and invoice dated 16/07/2016 Ex PW3/3. Said invoices were issued towards the alleged services provided by plaintiff during the month of April 2016 and towards the maintenance and fuel cost of the Baggage Freight Loaders (in short BFLs). Plaintiff had failed to prove that the 2015 LoI and Tripartite LoI were concluded contracts. Clause 5 of the terms and conditions of Tripartite LoI stipulated that "we will be entering into a formal agreement with you in due course of time". No such formal LoI was ever executed nor was ever

produced. Also 2015 LoI finds mention that "you are requested to sign copy of this letter in acceptance of the above terms and conditions of this contract." No signatures of the plaintiff were affixed on the 2015 LoI nor any 2015 LoI signed by plaintiff was ever produced. The claim of the plaintiff for April 2016 and for maintenance and fuel charges is entirely misconceived. Plaintiff is also aware that it has not provided any services during the April 2016 and plaintiff has also accepted to the aforesaid and had agreed to prove its services only from May 2016 vide emails dated 30/03/2016 and 23/04/2016, which were admitted by plaintiff without any contest/demur whatsoever. Plaintiff has not placed on record any document which establishes that defendant no. 1 had requested the plaintiff to "deploy staff" as stated in its email dated 30/03/2016. No document has been filed nor proved that defendant no. 1 was ever informed of staff deployment by the plaintiff. Therefore, if at all the plaintiff had deployed staff, it had done so without any intimation to defendant no. 1. The Domestic Airport is a security sensitive area and all workers require permit to enter the airport premises; additionally, the service recipient is always informed in advance of the manpower and plant and machinery which would be deployed. Above said version of DW1 in his affidavit Ex DW1/A was unrebutted and unchallenged as no cross examination was done by plaintiff/Ld. Counsel on this point. No airport permits, licenses, airport entry permits etc. showing deployment of staff by the plaintiff had been produced. Plaintiff is not entitled to seek payment qua the maintenance and fuel charges under the 2015 LoI which under the explicit terms make clear that the rates agreed between plaintiff and defendant no. 1 would be all inclusive viz maintenance/servicing/repairs, fuel etc. Plaintiff was also made aware by (i) email dated 19/05/2016 (at page 38 of documents of plaintiff); (ii) email dated 29/09/2016 (at page 48 of documents of plaintiff); (iii) email dated 30/09/2016 (at page 99 of documents of plaintiff) and (iv) email dated 04/11/2016 (at page 94 of documents of plaintiff); that it will only be releasing payments qua the months where services have actually been provided and would also deduct the amount pertaining to repairs of the equipment. Plaintiff has failed to satisfy the burden of proof in relation to the services provided/cost incurred as alleged burden lies upon the plaintiff to prove its claim of recovery. Plaintiff has failed to discharge its burden of proof for the claim of recovery. Claim of plaintiff for the month of April, 2016 and for the maintenance and fuel charges is completely misconceived. Plaintiff has already received its dues by way of an undisputed full and final settlement. On 29/09/2016 by email (page 48 of documents of plaintiff) plaintiff was informed that no services were provided for April 2016 and no payment would be made for this month and plaintiff did not dispute this position. On 03/11/2016 by email (at page 95 of documents of plaintiff), defendant no. 1 conveyed to the plaintiff that the payment already released would be 'full and final". Plaintiff did not dispute this position in cross examination of PW2. Defendant no. 1 had cleared all correct invoices raised by plaintiff. Defendant no. 1 followed an accounting system termed "FIFO" i.e., 'First In First Out' under which the payment is adjusted against the earliest invoice raised, irrespective of when the payment is made. Therefore, the payments released by defendant no. 1 have been incorrectly adjusted for the month of April 2016 by the plaintiff. Same is also supported by the statement of DW2 during the cross examination wherein he had stated that "The payment for the month of April, 2016 was adjusted against May 2016 and June 2016 in the books of the defendant no. 1" and no cross examination of DW2 was done in this facet. Plaintiff has incorrectly adjusted the payment towards the month of April 2016, when no such services were provided by the plaintiff during the month of April 2016 and present plaint is just an attempt to seek additional payment from defendant no.1, without providing any services. Even otherwise, plaintiff has failed to prove

that it provided any services viz. either manpower or equipment to defendant no. 1 or that it had mobilized resources at IGI Airport or that it had incurred cost towards maintenance and fuel charges of the equipment. It is so borne out in the evidence of PW3. Plaintiff has failed to prove of having suffered damages or loss. Payment of tax deduction at source does not amount to admission. The said stand of plaintiff taken was earlier rejected vide order dated 26/11/2021 on application of plaintiff under Order XIIIA of CPC. Plaintiff has miserably failed to demonstrate its case and discharge its onus on issues framed and suit is liable to be dismissed with cost. Ld. Counsel for defendant no. 1 relied on following precedents:-

1. State of Madhya Pradesh vs Nomi Singh & Anr., (2015) 14 SCC 450;

2. Rajinder Pershad (Dead) by LRs. vs Darshana Devi, (2001) 7 SCC 69;

3. Jasdeep Singh Kalsi vs The State & Ors., 2018 SCC OnLine Del 12977 : (2019) 256 DLT 443 (DB);

4. Man Kaur (Dead) by LRS. vs Hartar Singh Sangha, (2010) 10 SCC 512;

5. Traders Syndicate vs Union of India, 1982 SCC OnLine Cal 149 : AIR 1983Cal 337;

6. Kailash Nath Associates vs Delhi Development Authority & Anr., (2015) 4 SCC 136;

7. Oil and Natural Gas Corporation Ltd. vs Essar Oil Ltd., 2016 SCC OnLine Bom 28;

8. Continental Transport Organization Private Limited, Mumbai vs Oil and Natural Gas Corporation Limited, Mumbai, Arbitration Petition No. 372 of 2013 decided by Bombay High Court on 21/04/2015;

9. Dhampur Sugar Mills Ltd. vs Bharat Petroleum Corporation Ltd., 2019 SCC OnLine Del 7982 ;

10. M/s. Utility Powertech Limited vs M/s. Amit Traders, 2018 SCC OnLine Del 9096;

11. S.P Brothers vs Biren Ramesh Kadakia, 2008 SCC OnLine Bom 1599;

12. South Eastern Coalfields Ltd. & Ors. vs M/s. S. Kumar's Associates AKM (JV), (2021) 9 SCC 166 and

13. Ram Sharan Das Batra vs Reliance Webstore Limited, 2015 SCC OnLine Del 9471.

21. Following are the main arguments of Ld. Counsel for defendant no. 2. No cause of action had ever arisen in favour of plaintiff and against defendant no. 2 and in evidence no plaintiff witnesses had raised any grievances against defendant no. 2, whereas PW2 in cross examination admitted that there was no claim against defendant no. 2. Defendant no. 2 had only entered Tripartite LoI in capacity of the airline and had nothing to do whatsoever with the service contract between plaintiff

and defendant no. 1 whereas Tripartite LoI had liability clause embodying that in the event of "Any liability under this agreement arising out of the abovementioned services and any equipments will be sole responsibility of defendant no. 1". Defendant no. 2 is not privy to any transactions, dealing with its terms and conditions between plaintiff and defendant no. 1. The relationship between defendant no. 2 and plaintiff was solely of a service provider and service recipient and defendant no. 2 had no role or say in the formulation, enactment, etc. of internal business policy of defendant no. 1 in respect of anyone. Invoices were raised against defendant no. 1 who had to deal with said invoices. Defendant no. 2 was not aware of the dispute in respect of the said transaction ongoing between plaintiff and defendant no. 1 at any moment of time. Defendant no. 2 had no liability to pay to plaintiff for any amount nor the claim of the plaintiff is against defendant no. 2. Ld. Counsel for defendant no. 2 prayed for dismissal of suit qua defendant no. 2.

22. My issue-wise findings are as under:-

Finding on issue no. 1

1. Whether plaintiff is entitled for recovery of Rs.

46,34,698/- from defendant no. 1 as claimed? OPP.

23. Defendant no. 1 had issued 2015 LoI dated 26/09/2015. Said 2015 LoI is one of the documents admitted by defendant no 1 in the affidavit of admission/denial of documents of plaintiff. Said 2015 LoI was for providing Ramp Equipment by plaintiff to defendant no. 1at IGI Airport and such equipment was Baggage Trolleys and Baggage Freight Loader (in short 'BFL'). Terms of 2015 LoI inter alia stipulated that rates specified therein were all inclusive viz. maintenance/servicing/repairs/fuel etc.

24. Parties to the lis entered into Tripartite LoI dated 14/01/2016. Said Tripartite LoI is admitted by defendant no. 1 in the affidavit of admission/ denial of documents. Said Tripartite LoI envisaged that plaintiff was required to provide Loaders and Supervisors at IGI Airport, New Delhi for the period for three years i.e., 01/02/2016 to 31/01/2019 in terms thereof. As per Tripartite LoI obligation of plaintiff was to deploy manpower at Airport who had valid ADP cards and had successfully completed the training conducted by airport operator whereas such manpower was to be so deployed under intimation to defendants. Beside that plaintiff was to arrange mandated trainings from time to time as required by the competent authority for such manpower at its own cost from authorized trainers and was to also provide summary and certification of training imparted to their staff on time to time basis to defendants. Plaintiff was also to ensure that their staff shall wear all their safety protection gear while on duty whereas those not having appropriate safety equipments were not to be allowed by defendants to be on duty. Tripartite LoI was terminable by any party giving 30 days prior notice to other party. Plaintiff was to raise every month rental bills to defendant no. 1 which were payable within 30 days after submission in INR directly by defendant no. 1 to plaintiff. It was the responsibility/liability of defendant no. 1 to provide those equipments required to carry out above mentioned services and the charges, if any, for the same were to be made directly by defendant no. 1 to plaintiff. Any liability under the Tripartite LoI arising out of the

mentioned services and any equipment's was the sole responsibility of defendant no. 1. Tripartite LoI also stipulated that formal agreement will be entered in due course of time. It is the admitted case of the parties and the witnesses of the plaintiff namely PW1, PW2 and PW3 that consequent upon execution of Tripartite LoI dated 14/01/2016 no subsequent formal agreement was entered into inter se parties to the lis.

25. Claim of plaintiff for recovery of money of principal amount of Rs. 34,95,687/- and interest @ 12% per annum amounting to Rs.11,39,011/- with pendente lite and future interest arises out of (i) invoice Ex. PW3/3 dated 16/07/2016 of Rs. 1,59,563/-; (ii) balance amount of Rs. 14,20,415/- claimed as outstanding and due against the invoice Ex PW3/4 dated 30/06/2016 of Rs.38,82,629/- and (iii) invoice Ex PW3/5 dated 16/07/2016 of Rs. 19,15,709/-.

26. As per plaintiff aforesaid invoices Ex PW3/3, Ex PW3/4 and Ex PW3/5 were issued in terms of LoI dated 26/09/2015 and Tripartite LoI dated 14/01/2016.

27. It is the version and defence of defendant no. 1 in filed written statement and testimony of DW1 that plaintiff did not provide any services in the month of April, 2016. It is also the defence of defendant no. 1 that 2015 LoI and the Tripartite LoI were not concluded contracts. 2015 LoI inter alia stipulated "you are requested to sign copy of this letter in acceptance of the above terms and conditions of this contract". However, no signatures of the authorized representative of plaintiff were appended in 2015 LoI nor plaintiff produced any copy of 2015 LoI signed by authorized representative of plaintiff. As per Tripartite LoI, clause 5 therein stipulated "we will be entering into a formal agreement with you in due course of time". No formal agreement subsequent to Tripartite LoI was ever executed inter se parties to the lis nor was ever produced before the Court with pleadings or during evidence.

28. It is also defence of defendant no. 1 that it had duly informed the plaintiff that due to contractual obligation between defendant no. 2 and third party i.e., LION MANPOWER, the services of the plaintiff would only be required from May 2016 vide (i) email dated 25/03/2016 (at page 31 of documents of plaintiff); (ii) email dated 30/03/2016 (at page 33 of documents of plaintiff) and (iii) email dated 23/04/2016 Ex DW1/2. It is also the defence of defendant no. 1 that defendant no. 1 had only communicated to plaintiff to be "stand by" and in case of third party creating any disturbances, plaintiff was to step in and provide any service prior to May 2016. It is also the defence of defendant no. 1 that by email dated 30/06/2016 Ex PW4/3 plaintiff admitted to be on stand by and by email dated 23/04/2016 Ex DW1/2 sent by plaintiff to defendant no. 1 the plaintiff had shown its readiness to provide its services from 30/04/2016 midnight whereas these aforesaid emails have been admitted by plaintiff without any contest/demur whatsoever.

29. Ld. Counsel for the plaintiff had argued that by defendant no. 1 there was unequivocal admission of documents (i) 2015 LoI; (ii) Tripartite LoI; (iii) email dated 25/03/2016 sent by defendant no. 1 to plaintiff; (iv) email dated 30/03/2016 sent by defendant no. 1 to plaintiff; (v) email dated 19/05/2016 sent by defendant no. 1 to plaintiff; (vi) email dated 16/08/2016 sent by Mr. Clement Fernandez, Senior Manager in Accounts Department of defendant no. 1 to plaintiff; whereas the above said email dated 16/08/2016 sent by Mr. Clement Fernandez finds mention the total

outstanding dues of the plaintiff tallying with the invoice numbers and invoice dates.

30. Following is the text of above said email dated 16/08/2016 at page nos. 41 and 42 of paper book of plaintiff and admitted by defendant no. 1 in the affidavit of admission/denial of documents of plaintiff:-

> "From: Clement Fernandes <clement.fernandes@delex.in> Sent: 16 August, 2016 10.00 AM To: 'Mandeep' Cc: daljit@delex.in;'SRIRAM';aj@aviaxpert.net;ja@aviaxpert.net;sushil@aviaxpert.net Subject: RE: TOTAL OUTSTANDING DUES Dear Mandeep, Please find attached herewith details of TDS accounted against the below bills.

Invoice Date	Invoice #	Period	Service	Invoice value	TDS	
02.05.2016	APL/ST/ 16-17/056 2016	April'	Loader	3,414,589.00	68,819.00	TDS Pr & T Ser
					45,860.00	TDS Contra Sub
31.05.2016	APL/ST/ 16-17/123 2016	May'	Lease Rent-BFL/ Trolley	317,738.00	5,550.00	TDS REN PLA MAC (2%
31.05.2016	APL/ST/ 16-17/124 2016	May'	Loader	4,194,460.00	84,537.00	TDS Profes & Tech Servic
					56,538.00	TDS Contra Sub
30.06.2016	APL/ST/ 16-17/171 2016	June'	Lease Rent-BFL/ Trolley	319,126.00	5,550.00	TDS REN PLA MAC (2%

30.06.2016	APL/ST/ 16-17/172	June' 2016	Loader	3,882,629.00	77,912.00 TDS Pro Tec Ser
					51,942.00 TDS Contra Sub
16.07.2016	APL/ST/ 16-17/181	01.07. 2016 to 15.07. 2016	Lease Rent- BFL/ Trolley	159,563.00	2,775.00 TDS REN PLA MAC (2%
16.07.2016	APL/ST/ 16-17/182	01.07. 2016 to 15.07.	Loader	1,915,709.00	38,442.30 TDS Pro Tec Ser
					25,628.22 TDS Contra Sub
				Total	14,203,814.00

Brgds
Clement G Fernandes"

31. Ld. Counsel for defendant no. 1 had argued that dues of the plaintiff were cleared by defendant no. 1 and nothing remained payable whereas as early on 29/09/2016 by email defendant no. 1 informed plaintiff that no services were provided for April, 2016 and accordingly no payment would be made for said month of April, 2016 and said email dated 29/09/2016 is at page no. 48 of documents of plaintiff. Ld. Counsel for defendant no. 1 also argued that by email dated 03/11/2016 defendant no. 1 had informed plaintiff again that no services were provided for the month of April, 2016, so no payment would be paid for said month and such positions were not disputed by plaintiff then. Copy of said email dated 03/11/2016 is at page no. 95 of the documents of plaintiff. Ld. Counsel for defendant no. 1 had argued that defendant no. 1 had followed an accounting system termed FIFO i.e., 'First In First Out' under which the payment is adjusted against the earlier invoice raised, irrespective of when the payment is made and therefore, the payments released by defendant no. 1 were

incorrectly adjusted for the month of April, 2016 by the plaintiff. Ld. Counsel for defendant no. 1 also argued that it is borne out of cross examination of DW2 that the payment for the month of April 2016 was adjusted against May 2016 and June 2016 invoices in the books of defendant no. 1 whereas there is no cross examination of DW2 on this point. It is also the defence of defendant no. 1 that no services were provided by plaintiff during the month of April, 2016 whereas payments made were adjusted against invoice raised for April 2016 instead of adjustment for the services provided for subsequent months of May 2016 and June 2016 and present plaint is an attempt of plaintiff to seek additional payment from defendant no. 1 without providing any services for the month of April, 2016. Domestic Airport is a security sensitive area and all workers required permits to enter the airport premises. DW1 in his affidavit Ex DW1/A testified that the service recipient is always informed in advance of the manpower and plant and machinery which would be deployed. Above said version of DW1 in his affidavit Ex DW1/A was unrebutted and unchallenged as no cross examination was done by plaintiff/Ld. Counsel on this point. No airport permits, licenses, airport entry permits etc. showing deployment of staff by the plaintiff had been produced.

32. Supreme Court in the case of Narayan Bhagwantrao Gosavi Balajiwale vs Gopal Vinayak Gosavi & Ors. (supra) inter alia held that an admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.

33. Hon'ble Ms. Justice Pratibha M. Singh of Delhi High Court in case of M/s. Utility Powertech Limited vs M/s. Amit Traders (supra) inter alia held as follows:-

"19. On the issue of TDS deduction, the Trial Court may have erred as the settled position is that deduction of TDS does not constitute an admission of liability. The Trial Court may be wrong in holding that the TDS certificate by itself constitutes an admission of liability. This is not so, inasmuch as the TDS can be deducted even on the expectation of estimated liability. Independently of the TDS certificate, the liability of the Defendant is quite clear. The Supreme Court in Commissioner of Income Tax v. Gujarat Fluoro Chemicals, (2012) 13 SCC 731 categorically held that "both advance tax as well as TDS are based on estimation of income by the assessee." The Bombay High Court as well, in S.P Brothers v. Biren Ramesh Kadakla, (2009) 1 Bom CR 453 has held that "the issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act.....The TDS certificate is primarily to acknowledge the deduction of tax at source." The judgement dated 27th November, 2012 in Bigdot Advertising & Communications Pvt. Ltd. v. Union of India [CS(OS) No.226/2000] was dealing with the question of the person who is liable once the TDS certificate is issued. It is not a precedent on the proposition that if a TDS certificate is issued, it amounts to admission of liability. ....."

34. Division Bench of Bombay High Court in the case of S.P Brothers vs Biren Ramesh Kadakia (supra) inter alia held that issuance of TDS certificate does not amount to acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act and Full Bench judgment of Bombay High Court in the case of Jyotsna K. Valia vs T.S. Parekh & Company, 2007 (3) Bom. C.R. 772 (F.B.) (O.S.), decided on 26/04/2007 puts the matter beyond doubt. The TDS certificate is primarily to acknowledge the deduction of tax at source. The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction. When a written contract is produced before the Court, its contents are the best evidence.

35. In view of law laid in cases (i) M/s. Utility Powertech Limited vs M/s. Amit Traders (supra) and (ii) S.P Brothers vs Biren Ramesh Kadakia (supra); the deduction of TDS does not constitute an admission of liability. Above elicited text of email dated 16/08/2016 sent by Mr. Clement Fernandez, Senior Manager in Accounts Department of defendant no. 1 to plaintiff finds clear mention that the provided details are of TDS accounted against the bills detailed therein. Accordingly, the issuance of TDS certificates or their details do not amount to acknowledgment of liability by defendant no. 1.

36. Supreme Court in the case of Vice-Chairman, Kendriya Vidyalaya Sangathan & Anr. vs Girdharilal Yadav (supra), inter alia held that in terms of Section 58 of the Evidence Act, 1972 facts admitted need not be proved. It is also a well settled principle of law that the principles of natural justice should not be stretched too far and the same cannot be put in a straitjacket formula.

37. Supreme Court in the case of Narbada Devi Gupta vs Birendra Kumar Jaiswal & Anr. (supra) inter alia held that the legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue". The situation is, however, different where the documents are produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibits by the court. When the documents were admitted and then exhibited; there is no further burden of proof on the party to lead additional evidence in proof of the writing of those documents and their execution by its scribe.

38. Supreme Court in the case of P. C. Purushothama Reddiar vs S. Perumal (supra) inter alia held that once a document is properly admitted, the contents of that documents are also admitted in evidence though those contents may not be conclusive evidence.

39. While dealing lis in criminal revision jurisdiction at admission stage and appreciating the provisions of Prevention of Food Adulteration Act, 1954 and its Rules of 1955; Delhi High Court in the case of Bal Kishan vs State & M.C.D (supra) held that where a particular material assertion is made in examination in chief and the witness is not cross examined in respect of that assertion then it will be taken that the party affected admits the truth of that assertion.

40. Supreme Court in the case of Muddasani Venkata Narsaiah (Dead) though LRs vs Muddasani Sarojana (supra) inter alia held that cross examination is a matter of substance not of procedure; one is required to put one's own version in cross examination of opponent. The effect of non-cross-examination is that the statement of witness has not been disputed. The effect of not cross examining the witnesses has been considered by Supreme Court also in case of Bhoju Mandal vs Debnath Bhagat, AIR 1963 SC 1906. A party is required to put his version to the witness. If no such questions are put, the Court would presume that the witness account had been accepted; as was held in the case of Chuni Lal Dwarka Nath vs Hartford Fire Insurance Co. Ltd., 1957 SCC OnLine P&H 177. Madhya Pradesh High Court in the case of Maroti Bansi Teli vs Radhabai, 1943 SCC OnLine MP 128 also held that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross examination by other party must be accepted as fully established.

41. Supreme Court in the case of Iqbal Basith & Ors. vs N. Subbalakshmi & Ors. (supra) relied upon the case of Iswar Bhai C. Patel vs Harihar Behera, (1999) 3 SCC 457, wherein it was held that having not entered into the witness box and having not presented himself for cross examination, an adverse presumption has to be drawn against such a party/witness on the basis of the principles contained in Illustration (g) of Section 114 of the Evidence Act, 1872.

42. Supreme Court in the case of Tulsi & Ors. vs Chandrika Prasad & Ors. (supra) inter alia relied upon the cases of (i) Sardar Gurbakhsh Singh vs Gurdial Singh, AIR 1927 PC 230;

(ii) Martand Pandharinath Chaudhari vs Radhabhai Krishnarao Deshmukh, AIR 1931 Bom 97 and (iii) Sudhir Ranjan Paul vs Chhatter Singh Baid, (1999) 3 Cal LT 261 (HC) and observed that even the Privy Council emphasized the need of examination of the parties as witnesses; more so, when one party in pleadings averred and attributed of certain acts having been done by such opposite party, then the such opposite/other party has to examine himself/herself to deny commission of such act as so alleged by other party.

43. Supreme Court in the case of Vidhyadhar vs Manikrao & Anr. (supra) inter alia held that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh vs Gurdial Singh, AIR 1927 PC 230; followed by Kirpa Singh vs Ajaipal Singh, AIR 1930 Lahore 1; Martand Pandharinath Chaudhari vs Radhabai Krishnarao Deshmukh, AIR 1931 Bom 97; Gulla Kharagjit Carpenter vs Narsingh Nandkishore Rawat, AIR 1970 MP 225; Arjun Singh vs. Virendra Nath, AIR 1971 Allahabad 29 and Bhagwan Dass vs. Bhishan Chand, AIR 1974 P&H 7. A presumption under Section 114 of the Evidence Act, 1872 accordingly can be drawn against a party who did not enter the witness box.

44. Supreme Court in the case of Adivekka & Ors. vs Hanamavva Kom Venkatesh (Dead) by LRs. & Anr. (supra) inter alia held that non examination of the party to the lis would lead to drawal of an adverse inference against such party.

45. Admitted case of plaintiff is that the claim laid in the suit is based upon amounts of invoices; of which part claim is of part of an invoice. It is also admitted case of the parties that the parties to the lis are maintaining books of accounts. Plaintiff and defendants, all are companies incorporated under the provisions of The Companies Act. There is no fact averred on record in any pleading and evidence led by parties that there was any impediment/constraint in way of either plaintiff or defendant no. 1 in filing of the statement of account of each other in their respective books of accounts maintained in ordinary course of nature.

46. Gujarat High Court in the case of Jay Ambe Industries vs Garnet Specialty Paper Ltd. (supra) inter alia held that a ledger, though an account book, has no evidentiary value unless the entries made therein are proved by independent evidence which, in other words, would mean that there must be corroboration of entries which corroboration can be supplied by proving the transaction or by proving the entries in the Daily cash book or Roznama. Without corroboration, entries in the ledger cannot be brought within the purview of Section 34 of the Evidence Act. It was held therein that :-

> "i) that ledger by itself may not be the proof of transaction and no liability can be fastened on the basis of an entry in the ledger alone unless it is corroborated by some other evidence;
>
> ii) ledger can be taken into consideration and would become relevant u/s 34 of the Evidence Act only when there is corroborative evidence on record in support of the entries made therein or in support of the transaction between the parties;
>
> iii) that what form of evidence is to be led to corroborate the entries in the ledger would largely depend on the facts of each case. If the entries in the ledger are not denied by the defendant, it may not require any corroboration."

Various provisions of the Evidence Act were appreciated therein. It was also held therein that the definition of the term 'evidence' in Section 3 of the Evidence Act lays down that evidence means and includes statements made by the witnesses, which are called oral evidence, and documents produced before the court, which are called documentary evidence. A bare perusal of Section 59 of the Evidence Act states that all facts, except the 'contents' of documents, may be proved by oral evidence. Needless to say, that once the document is proved in the manner provided under the provisions of the Evidence Act, the contents of that document are also proved. It is for that reason that the Evidence Act advisedly lays down that the contents of a document can be proved by proving the document in the usual manner, a proposition that emerges unequivocally from a combined reading of Sections 59, 61 and 62 of the Evidence Act.

47. Fact remains that for this Court the entries in the ledger account in books of the plaintiff as well as in the books of defendant no. 1 would have thrown sufficient light with respect to the manner and nature of adjustment made therein to payments made by defendant no. 1 to plaintiff. Of course such payments made and their entries in ledger in themselves would not have been sufficient enough as conclusive proof to the transaction for which such payment was made. Onus to prove issue no. 1 is

on plaintiff. Plaintiff has not placed on record (i) ledger account of defendant no. 1 in books of plaintiff; (ii) vouchers regarding receipt of payments from defendant no. 1 by plaintiff company depicting as to for which invoices such payment was so treated in books of plaintiff; (iii) Daily Cash Book or Roznama or Journal depicting entries made for payments made by defendant no. 1 to plaintiff depicting as to for which invoices such payments were so treated in books of plaintiff. Onus to prove issue no. 1 will not shift on defendant unless plaintiff discharges its burden to prove such issue. In this fact of the matter, non-examination of (i) KTS Moorthy, signatory of written statement of defendant no. 1 and Chief Financial Officer of defendant no. 1; (ii) Mr. Daljit, the then Vice President of defendant no. 1 and (iii) Mr. Clement Fernandez, Senior Manager in Accounts Department of defendant no. 1; cannot be termed as fatal to the defence raised by defendant no. 1; though so argued by Ld. Counsel for plaintiff.

48. Ex PW3/4 is the invoice dated 30/06/2016 raised by plaintiff upon defendant no. 1 towards providing loader by plaintiff at Delhi Domestic Terminal 1D to defendant no. 1 during the month of June, 2016 and though there appears to be typographical error at portion X1 to X2 where there is mention that the attached attendance sheet is for the month of May, 2016 whereas the attached sheet describes loading services during June, 2016 with description for number of loaders provided in the morning shift; afternoon shift and night shift on each and every day of June, 2016 totaling 5000 loaders so described therein.

49. Similarly Ex PW3/5 is the invoice dated 16/07/2016 raised by plaintiff upon defendant no. 1 towards providing loader at Delhi Domestic Terminal ID during the period from 01/07/2016 to 15/07/2016 and with it is the attached sheet describing similarly number of loaders/loading services provided for morning shift; afternoon shift and night shift for each and every day for the period from 01/07/2016 to 15/07/2016 totaling 2469 loaders so described therein.

50. The dispute mainly revolves for services for period of April, 2016. Invoice Ex PW3/6 dated 02/05/2016 raised by plaintiff upon defendant no. 1 is for 170 loaders allegedly provided at Delhi Domestic Terminal 1D during April, 2016 by plaintiff to defendant no. 1 wherein rate per loader detailed is Rs. 13,494/- and the sum of invoice is Rs. 34,14,589/- which also includes Royalty @ 30%, Service Tax @ 14% and Swachh Bharat Cess @ 0.50%. Along with invoice Ex PW3/6 there are no details attached with respect to number of loaders provided shift-wise for morning shift, afternoon shift and night shift for each day of April, 2016 as like it was so provided in above said Ex PW3/4 and Ex PW3/5.

51. Plaintiff cannot feign ignorance of knowledge of the bone of contention and raising of dispute by defendant no. 1 for non-providing of any services of loaders for the month of April, 2016 which as above said was clearly informed by defendant no. 1 to plaintiff as above elicited by (i) email dated 29/09/2016 (copy at page 48 of documents of plaintiff) and (ii) email dated 03/11/2016 (copy at page 95 of documents of plaintiff). Before institution of the case plaintiff was fully aware of the bone of contention/dispute inter se parties to the lis.

52. Demand notice Ex PW1/7 dated 06/12/2017; demand notice Ex PW1/8 dated 19/03/2018 sent under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 by the

plaintiff to defendant no. 1 were with respect to operational debt of defendant no. 1 as per invoice Ex PW3/6 dated 02/05/2016 for amount of Rs. 34,14,589/- as amount of unpaid operational debt by defendant no. 1 to plaintiff and on these premise plaintiff as Operational Creditor had filed petition under Section 9 of The Insolvency and Bankruptcy Code (in short IBC) against the defendant no. 1 Corporate Debtor for initiation of Corporate Insolvency Resolution Process (in short CIRP) on the ground that defendant no. 1 Corporate Debtor defaulted in making payment of Rs. 34,14,589/- against aforesaid invoice Ex PW3/6 dated 02/05/2016 despite Section 8 notice served upon the defendant no. 1 Corporate Debtor on 19/03/2018. Plaintiff has filed copy of order dated 11/12/2018 Mark A of Hon'ble NCLT, Division Bench Chennai in CP/618/IB/CB/2018 wherein also bone of contention inter se parties to the lis was whether or not loader services were provided by plaintiff to defendant no. 1 for the month of April, 2016. Before Hon'ble NCLT as above said and in the above elicited notices Ex PW1/7 and Ex PW1/8 also the dispute raised was with respect to non payment of the operational debt of Rs. 34,14,589/- with respect to invoice Ex PW3/6 dated 02/05/2016. It was not the case of plaintiff in the entire year 2018 that payment of invoice Ex PW3/6 dated 02/05/2016 was made by defendant no. 1 to plaintiff and outstanding payments from defendant no. 1 receivable by plaintiff were with respect to (i) Ex PW3/3 dated 16/07/2016 of Rs. 1,59,563/-; (ii) balance amount of Rs. 14,20,415/- out of invoice Ex PW3/4 dated 30/06/2016 of Rs. 38,82,629/-; and (iii) invoice Ex PW3/5 dated 16/07/2016 for Rs. 19,15,709/-. The entire pleadings in the plaint contain version put forth which is not akin to the version put forth in above elicited notices Ex PW1/7 and Ex PW1/8. In this fact of the matter, it was more so incumbent upon the plaintiff for discharge of its onus on this issue to bring all available documents and evidences from books of account maintained in ordinary course of business by plaintiff company in the evidence led and these documents could have been (i) financial year wise ledger account of defendant no. 1 in books of plaintiff; (ii) Daily Cash Book or Roznama or Journal; (iii) vouchers prepared for receipt of amounts by plaintiff from defendant no. 1 company and their treatment for particular invoice(s) raised by plaintiff upon defendant no. 1; (iv) audited financial accounts of relevant financial years.

53. Delhi High Court in the case of State Bank of India vs Kanahiya Lal & Ors.(supra) inter alia held that the promise to pay as required under Section 25(3) of the Indian Contract Act need not be express and can be implied or inferred as well. Any acknowledgment of liability is necessarily an admission of the fact that the maker owes money to the creditor. The only corollary of such an acknowledgment is that the same is payable and that the person making the acknowledgement would pay such amount or else there would be no requirement of making any such acknowledgment. There is a distinction between an acknowledgement under Section 18 of the Limitation Act and a promise under Section 25 (3) of the Indian Contract Act inasmuch as though both have the effect of giving a fresh lease of life to the creditor to sue the debtor, but, for an acknowledgement under Section 18 of the Limitation Act to be applicable, the same must be made on or before the date of expiry of the period of limitation whereas such a condition is non-existent so far as the promise under Section 25 (3) of the Indian Contract Act is concerned. A promise under Clause 3 of Section 25 of the Indian Contract Act, even made after the expiry of the period of limitation would be applicable and would cause revival of the claim, notwithstanding the limitation. Under Section 25 (3) of the Indian Contract Act, a promise in writing to pay in whole or in part, a time barred debt is not void.

54. Section 2(b) of The Indian Contract Act, 1872 reads as under:-

> " 2. Interpretation-clause-
>
> .....
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;"

55. Section 9 of The Indian Contract Act, 1872 reads as under:-

> "9. Promises, express and implied--In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

56. Accordingly, Section 9 of The Indian Contract Act provides that if the proposal of acceptance is made in words, the promise is said to be express but under other circumstances it remains an implied promise.

57. Any written acknowledgment after the confirmation of the balance amount can safely be treated as a promise to pay and not mere acknowledgement.

58. Karnataka High Court in the case of Sudarshan Cargo Pvt. Ltd. vs M/s. Techvac Engineering Pvt. Ltd. .(supra), inter alia held that Section 18 does not provide that acknowledgement has to be in any particular form or to be express. Even a statement which, if literally construed, does amount to an acknowledgement, may be sufficient, if it implies an admission of liability. A narrow interpretation should not be put on what constitutes acknowledgement under Section 18. An acknowledgement is an admission by the debtor to the creditor indicating that he owes money to the creditor. The acknowledgement requires to be examined in the light of surrounding circumstances by an admission that the writer owes a debt. Generally speaking, a literal construction of the statement on which the acknowledgement is sought to be founded should be given. If there is an admission of fact of which the liability in question is a necessary consequence, it should be taken as an acknowledgement. The term 'acknowledgement' has to be construed in its plain literary sense. If the intention of the parties is to acknowledge a pre-existing debt within the period of limitation, then it is an acknowledgment under the Limitation Act, 1963. An unconditional acknowledgement implies a promise to pay because that is the natural inference if there is no other contrary material.

59. Supreme Court in the case of South Eastern Coalfields Ltd. & Ors. vs M/s. S. Kumar's Associates AKM (JV) (supra) inter alia held that Letter of Intent (in short LoI) merely indicates a party's intention to enter into a contract with the other party in future. No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a LoI as a binding contract if such an intention is evident from its terms. But then the intention to do so must be clear and unambiguous as it takes a deviation

from how normally a LoI has to be understood. Supreme Court in the case of Dresser Rand S.A. vs Bindal Agro Chem Ltd., (2006) 1 SCC 751 inter alia held that there are cases where a detailed contract is drawn up later on account of anxiety to start work on an urgent basis. In that case it was clearly stated that the contract will come into force upon receipt of letter by supplier, and yet on a holistic analysis it was held that the LoI could not be interpreted as a work order.

60. Delhi High Court in the case of Ram Sharan Das Batra vs Reliance Webstore Limited (supra) also placed implicit reliance on the pronouncement of the Supreme Court in the case of Dresser Rand S.A. vs Bindal Agro Chem Ltd. (supra), holding that the letter in question which is under scrutiny before said Court was a letter written by the defendant to the plaintiff and it only stipulated the conditions which may be fulfilled and work charges, before entering into a final agreement and that letter was clearly only a letter of intent, letter of comfort and not enforceable as a contract.

61. 2015 LoI inter alia is for deployment of 75 Baggage Trolleys @ Rs. 3250/- per unit and 5 Baggage Freight Loader (BFL) @ Rs. 23,000/- by plaintiff to defendant no. 1 for two years contract from 01/10/2015 and said rates were all inclusive viz., maintenance/ servicing/repairs, fuel etc.

62. Tripartite LoI dated 14/01/2016 inter se parties to lis finds mention of the period of contract to be from 01/02/2016 to 31/01/2019; whereas it provided following rates for plaintiff for the period from 01/02/2016 to 31/03/2018 for providing to defendant no. 1 of (i) 200 loaders per day @ Rs. 12913/- per loader per month and (ii) 10 supervisors per day @ Rs. 12913/- per supervisor per month; whereas as per terms and conditions laid therein the attendance of manpower was to be monitored on daily basis and in case of any absenteeism the replacement was to be done on immediate basis. It was also laid in said Tripartite LoI that plaintiff will deploy manpower at Airport under intimation to both defendants.

63. True that in terms of Tripartite LoI, no formal agreement was entered into between plaintiff and defendant no. 1 later to Tripartite LoI dated 14/01/2016. Fact also remains that Ex PW3/6 invoice dated 02/05/2016 for alleged providing of loaders by plaintiff to defendant no. 1 for amount of Rs. 34,14,589/- is not accompanied by any details of provided/standby number of loaders for service for (i) morning shift; (ii) afternoon shift and

(iii) night shift, date-wise for every day of April, 2016. Despite the knowledge of denial of defendant no. 1 of providing of loaders services for the month of April, 2016; plaintiff has not led any evidence of names, particulars of the loaders, shift-wise, date-wise provided to/placed stand by for defendant no. 1 for the month of April, 2016 nor plaintiff has filed nor proved on record any amount disbursed to any such loaders provided to/placed stand by for defendant no. 1 during the month of April, 2016 by the plaintiff. Shorn of above said necessary evidence on record, which could be produced by plaintiff and is not produced; this Court is left with no other option but to presume in terms of Illustration (g) of Section 114 of The Indian Evidence Act, 1872 that if such evidence had been produced by the plaintiff, it would have been unfavourable to plaintiff who withheld it.

64. Supreme Court in the case of State of Madhya Pradesh vs Nomi Singh & Anr. (supra) inter alia held that in respect of relief claimed by a plaintiff, he has to stand on his own legs by proving his

case. Plaintiff has to discharge/satisfy the burden of proof in respect of relief claimed and the burden of proof cannot be shifted on the defendants.

65. Supreme Court in the case of Rajinder Pershad (Dead) by LRS. vs Darshana Devi (supra) inter alia held that if the correctness of the statement of witness is questioned, an opportunity must be given to the witness during cross examination to explain his statement, otherwise the credibility of the witness cannot be impeached. Such witness is to be so given the opportunity to explain his statement by drawing his attention to that part of it which is objected to as untrue, otherwise such part of the statement of witness cannot be impeached and/or credibility of such witness for such part of statement cannot be impeached.

66. Supreme Court in the case of Man Kaur (Dead) by LRs. vs Hartar Singh Sangha (supra) reiterated the well recognized legal position stated in the case of Vidhyadhar vs Manikrao, (1999) 3 SCC 573, that where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. Also was laid by Supreme Court in the case of Janki Vashdeo Bhojwani vs Indusind Bank Ltd., 2005 (2) SCC 217 that Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal but said term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

67. Calcutta High Court in the case of Traders Syndicate vs Union of India (supra) inter alia held that that if the correctness of the statement of witness is questioned, then opportunity must be given to such witness during cross examination by putting question on that point and in absence of such cross examination it can be taken that the cross examining party/Counsel had accepted the case of the party of such witness on said point in its entirety.

68. PW3 in cross examination admitted that plaintiff company maintained in a sheet in computer system the details of provided manpower and that sheet is attached with invoice. PW3 also admitted that before issuance of invoices Ex PW3/3 to Ex PW3/6 no details were shared with defendant no. 1 as plaintiff was having all details with it including in LoI. In reply to demand notice dated 19/03/2018 issued by plaintiff, defendant no. 1 through Counsel in reply notice dated 31/03/2018 (copy at pages 81 to 85 of documents of plaintiff) expressly sought details and documentary evidence from plaintiff in relation to its claim of recovery against defendant no. 1. Plaintiff did not provide any details and documentary evidence to defendant no. 1 accordingly nor has placed on record any proof of providing of services of loaders in the month of April, 2016 to defendant no.

1.

69. Plaintiff has also neither filed on record nor proved the documents for quantum of loss or damage suffered by plaintiff for putting its manpower of loaders on standby in the month of April, 2016 for claiming damages in lieu thereof from defendant no. 1 whereas for award of reasonable compensation for damages or loss caused by breach of contract, damage or loss caused is sine qua non, for the applicability of the Section 74 of The Contract Act, 1872.

70. Supreme Court in the case of Kailash Nath Associates vs Delhi Development Authority & Anr., (2015) 4 SCC 136 had elicited the law on compensation for breach of contract under Section 74 as follows:-

> "43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:
>
> 1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.
>
> 2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
>
> 3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.
>
> 4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.
>
> 5. The sum spoken of may already be paid or be payable in future.
>
> 6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
>
> 7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public

auction before agreement is reached, Section 74 would have no application."

71. Bombay High Court in the case of Oil and Natural Gas Corporation Ltd. vs Essar Oil Limited (supra) appreciated the pronouncements of Supreme Court in the case of Kailash Nath Associates vs Delhi Development Authority & Anr. (supra) that unless and until the loss is pleaded and proved, it cannot be recovered by the owner from the contractor.

72. Bombay High Court in the case of Continental Transport Organization Private Limited, Mumbai vs Oil and Natural Gas Corporation Limited, Mumbai (supra) had appreciated the decision of Supreme Court in the case of Kailash Nath Associates vs Delhi Development Authority & Anr. (supra) that if damage or loss is not suffered, the law does not provide for a windfall. It was held that the expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It was held that it is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if is a genuine pre- estimate of damage or loss, can be awarded. If loss is capable of being calculated and is being proved, it would not fall under Section 74 of the Indian Contract Act.

73. Delhi High Court in the case of Dhampur Sugar Mills Ltd. vs Bharat Petroleum Corporation Ltd. (supra) inter alia held that though the Agreement provides for liquidated damages, it was for the petitioner to have shown that it suffered any damages due to such alleged default of the respondent. As held by Supreme Court in the case of Kailash Nath Associates vs Delhi Development Authority & Anr. (supra), since Section 74 of the Indian Contract Act, 1872, awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section and where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in case where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

74. This is not a case where loss is incapable of being calculated or proved. It is also not a case that the damage or loss sustained by plaintiff was either difficult or impossible to prove. The case set up by the plaintiff is that it had provided manpower on standby on asking of defendant no. 1 in the month of April, 2016 for the services of loaders at IGI Airport. It was neither difficult nor impossible for plaintiff to either prove loss or damage suffered and could very well produce the documents for payments to such loaders for rendered services for being on standby in the month of April, 2016 at IGI Airport for the morning, afternoon and night shifts respectively at IGI Airport with all details and particulars; if such amount were paid to such loaders kept on standby in the month of April, 2016.

75. In this fact of the matter, from the evidence on record, in view of foregoing discussions, by preponderance of probabilities, plaintiff has failed to prove for being entitled for recovery of Rs. 46,34,698/- from defendant no. 1 as claimed. This issue is decided accordingly against the plaintiff and in favour of defendant no. 1.

Finding on issue no. 2

2. Whether plaintiff is entitled for any interest? If so at what rate; for which period and on what amount? OPP.

76. In view of above findings on issue no. 1; when plaintiff is held not entitled for recovery of amount claimed; then plaintiff is also not entitled for any interest, as claimed. This issue is decided against the plaintiff and in favour of defendant no. 1.

Relief

77. In view of above discussions, findings on issue nos. 1 and 2 above, the suit for recovery of money with interest and cost filed by plaintiff against defendants is dismissed.

78. No order as to costs.

79. Decree-sheet be prepared accordingly.

80. File be consigned to record room.

GURVINDER PAL SINGH SINGH
Date: 2023 10:44:56 +

ANNOUNCED IN OPEN COURT (GURVINDER PAL SINGH)
District Judge (Commercial Court)-02
st

On 21 January, 2023. Patiala House Court, New Delhi.

(DK)