



IN THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Appellate Jurisdiction)

RFA No.3 of 2017

M/s. Himalaya Distilleries Ltd.,
Majitar, Rangpo,
Sikkim. ... **APPELLANT**

versus

- 1. M/s. Dreambox Marketing(A) Pvt. Ltd.,
Techno Plaza Commercial Complex,
Motilal Nehru Road, Panbazar,
Guwahati-781001
Assam.

- 2. Mr. Bonoraj Choudhary,
Managing Director,
M/s. Dreambox Marketing(A) Pvt. Ltd.,
Techno Plaza Commercial Complex,
Motilal Nehru Road, Panbazar,
Guwahati-781001
Assam.

Also at:
Mr. Bonoraj Choudhary,
Latika Bhawan,
Buddha Mandir,
Abhoy Nagar,
Agartala-799005
Tripura.

... **RESPONDENTS**

RFA No.6 of 2017

M/s. Himalaya Distilleries Ltd.,
Majitar, Rangpo,
Sikkim. ... **APPELLANT**

versus

- 1. The Commandant,
128 Bn. C.R.P.F.,
Spun Silk Mill, Jagiroad,
Morigaon, Assam.

- 2. M/s. Dreambox Marketing(A) Pvt. Ltd.,
Through its Managing Director,
Shri Bonoraj Choudhary,
9, Techno Plaza, Motilal Nehru Road,
Panbazar,
Guwahati-781001, Assam.

... **RESPONDENTS**



RFA No. 03 of 2017 : M/s Himalaya Distilleries Ltd. vs. M/s Dreambox Marketing (A) Pvt. Ltd. & Anr.
RFA No. 06 of 2017 : M/s Himalaya Distilleries Ltd. vs. The Commandant 128 Bn. C.R.P.F. & Anr.
RFA No. 07 of 2017 : M/s Himalaya Distilleries Ltd. vs. The Commandant 156 Bn. C.R.P.F. & Anr.

RFA No.7 of 2017

M/s. Himalaya Distilleries Ltd.,
Majitar, Rangpo,
Sikkim.

... **APPELLANT**

versus

1. The Commandant,
156 Bn., C.R.P.F.,
Kukumare, Dhaligaon,
Bongaigaon, Assam.
2. M/s. Dreambox Marketing(A) Pvt. Ltd.,
Through its Managing Director,
Shri Bonoraj Choudhary,
9, Techno Plaza, Motilal Nehru Road,
Panbazar,
Guwahati-781001, Assam.

... **RESPONDENTS**

BEFORE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, C.J.

For Appellant : Mr. Udai P. Sharma, Advocate.

For Respondents : Mr. A. Moulik, Senior Advocate with Ms. K. D. Bhutia,
Advocate.

Date of Hearing : 21.11.2020 and 23.11.2020

Date of Judgment : 30.11.2020

JUDGMENT

RFA No.3 of 2017, RFA No.6 of 2017 and RFA No.7 of 2017, on being listed together, were heard and are being disposed of by this judgment. The appellants are same in all the appeals. In RFA No.3 of 2017, defendants are M/s. Dreambox Marketing(A) Pvt. Ltd. and Bonoraj Choudhury, who is the Managing Director of the defendant no.1. In RFA No.6 of 2017 and RFA No.7 of 2017, the defendant no.1 is the Commandant, 128 Bn., C.R.P.F. and the Commandant, 156 Bn., C.R.P.F., respectively. Defendant no.2 in both the aforesaid appeals is M/s. Dreambox Marketing(A) Pvt. Ltd., represented by its Managing Director.



2. Mr. Udai P. Sharma, learned Counsel appears for the appellant in all the three appeals while Mr. A. Moulik, learned Senior Counsel appears for defendants in RFA No.3 of 2017 and for defendant no.2 in RFA No.6 of 2017 and RFA No.7 of 2017. Mr. Karma Thinlay, learned Central Government Counsel appears for defendant no.1 in RFA No.6 of 2017 and RFA No.7 of 2017.

3. RFA No. 03 of 2017 is preferred against the judgment and decree dated 30.05.2017 passed by the learned District Judge, East Sikkim at Gangtok in Money Suit No. 810 of 2013. RFA No. 06 of 2017 is preferred against a judgment and decree dated 31.05.2017 passed by the learned District Judge, Special Division-II, Sikkim at Gangtok, in Money Suit No. 18 of 2015. RFA No. 07 of 2017 is preferred against a judgment and decree dated 31.05.2017 passed by the learned District Judge, Special Division-II, Sikkim at Gangtok, in Money Suit No. 19 of 2015. The appellant is the plaintiff in respect of the three suits out of which the present appeals arise.

4. Learned Counsel for the parties are *ad idem* that decision in RFA No.3 of 2017 will have substantial bearing in the outcome of RFA No.6 of 2017 and RFA No.7 of 2017. Mr. Sharma has submitted that IA No.4 of 2019 for amendment of Memorandum of Appeal to add additional grounds is pending. Mr. Moulik submits that it being a first appeal, the appellant may urge the grounds mentioned in the Memorandum of Appeal without there being any amendment of the Memorandum of Appeal.

5. Noting the above preliminary submissions, I will presently advert to the case of the plaintiff/appellant in RFA No.3 of 2017.

RFA No. 03 of 2017

6. The plaintiff is a private limited company registered under the Registration of Company Act, Sikkim, 1961 and is engaged in the business of



manufacturing and distribution of Indian Made Foreign Liquor (IMFL). Defendant No.1 is a company registered under the Companies Act, 1956. The defendants on 03.03.2007 had entered into a Memorandum of Understanding (MoU) with the plaintiff for marketing of IMFL products of the plaintiff to para-military forces in North-East India and civil-bonded warehouses. The MoU was initially for two years with an option to renew the same for a further period of two years. The MoU, though renewed and validated till 31.03.2010, was not fully acted upon. Though Clause 2 of the MoU stipulated that payment is to be made by defendant no.1 to the plaintiff through Letter of Credit (L/C) after 70 days from the date of dispatch of goods on a consignment to consignment basis, however, as the defendants expressed difficulty, a different arrangement was worked out for smooth operation of the business whereby it was decided that defendants would deposit an ad hoc minimum amount by way of 60 days' post-dated cheques drawn in favour of the plaintiff. The defendants, after procuring supply orders from the para-military forces, place supply orders to the plaintiff and thereafter, the plaintiff directly supplies the goods to the para-military forces along with the invoice which contains terms and conditions on its overleaf.

7. It is the case of the plaintiff that during Financial Year 2008-2009, plaintiff supplied goods valued at Rs.1,70,42,754/- to the para-military forces as per supply orders placed by the defendants and the amount was collected by the defendants. However, defendants made payment of only Rs.96,19,169/- in favour of the plaintiff. Similarly, for the Financial Year 2009-2010, total supply made by the plaintiff was valued at Rs.2,51,85,763/-, out of which defendants paid only a sum of Rs.1,38,20,953/-. For the Financial Year 2010-2011, out of total goods valued at Rs.1,68,73,496/-, defendants made payment of only Rs.86,68,166/-. Thus, for the above three financial years, while the total



goods supplied was valued at Rs.5,91,01,952/-, the defendants made payment of only Rs.3,21,08,288/- in favour of the plaintiff, thus, withholding a sum of Rs.2,69,98,834/-. The defendants, after depositing 60 days' post-dated cheques for a minimum agreed amount for each invoice, was required to render account for the difference between the quoted price and the post-dated cheque and to raise Debit Note against actual expenses and if the same was found to be satisfactory, the plaintiff was required to issue Credit Note. However, the defendants, after collecting payment from the para-military forces, went on postponing rendering of account and raising Debit Note for actual expenses incurred, and had failed to remit the balance amount to the plaintiff and to honor the post-dated cheques issued by it.

8. For such failure, the plaintiff had no other option but to terminate the MoU. However, in order to maintain continuity, before a fresh MoU/Agreement was signed, they had verbally agreed to continue the business on new terms which included payment to be made directly to the plaintiff by the para-military units. After repeated requests, the defendants finally sent the Statement of Account, invoice by invoice. However, Statement of Account was not furnished for the Financial Year 2008-2009, which means that defendants owe a sum of Rs.73,23,594/- to the plaintiff.

9. The Debit Notes submitted by the defendants consisted of expenses incurred by the defendants under the heads of (i) transportation charges, (ii) breakages & shortages charges, (iii) marketing & selling expenses, (iv) travelling & boarding expenses, (v) interest of money involvement on credit basis, (vi) margin of Dreambox Marketing, (vii) expenses for processing of import permit and (viii) expenses for processing tender. It is stated that out of the same, as per mutual agreement, the defendants were entitled to only margin money appearing at Sl. No.(vi). It is stated that Sl. No. (iii), Sl. No. (iv) ,Sl. No. (vii) and Sl. No. (viii) are to be borne by the defendants from



their margin money. In connection with Sl.No.(i) and Sl. No. (ii), Books of Account along with Money Receipts and Vouchers were demanded. With regard to Sl.No.(v), it is stated that the plaintiff realized its payment only after the defendants had collected money from para-military forces. It is further pleaded that the defendants failed to furnish the Money Receipts despite requests made by the plaintiff.

10. The plaintiff had agreed to an amount of Rs.11,76,040/- for the Financial Year 2009-2010 and Rs.5,69,400/- for the Financial Year 2010-2011 towards "Margin of Dreambox Marketing" as well as the claim made by the defendants for Rs.50,72,740/- towards transportation charges, breakage & shortage charges, import permit processing charges and tender processing charges for which Money Receipts were sent. Pending rendering of accounts, the defendants had agreed to increase initial payments by Rs.30/- per case containing 12 bottles and the defendants had started paying on the agreed increased rate since January, 2011, but had not made payment of additional Rs.30/- per case for shipments prior to January, 2011.

11. It must be noted at this stage that collection of payment from defendant no.1, as stated in paragraphs 5 and 13 of the plaint, did not arise as defendant no.1 is the entity with whom the MoU was executed. It appears that plaintiff was actually referring to collection of payment from the para-military forces.

12. In an attempt to make an amicable settlement, a meeting was arranged in Delhi on 31.03.2011 where defendants were represented by Somraj Choudhury. In the meeting, it was mutually agreed upon and decided that the plaintiff would instruct the para-military forces to make payment of goods directly to the plaintiff. Defendants, however, failed to adhere to the agreement and had also failed to honor four post-dated



cheques that it had drawn in favour of the plaintiff for a total sum of Rs.22,41,372/-. It is stated that even accepting all the Debit Notes sent by the defendants on their face value and allowing the expenses under various heads as sent by the defendants, for the three financial years, the defendants owed a minimum amount of Rs.1,51,67,244/-.

13. Following prayers were made in the suit:-

- “(i) direct the defendants to furnish all the actual money receipts for verification for the financial years 2009-2010 and 2010-2011 and also furnish debit notes with supporting money receipts for the financial year 2008-2009 for verification to be carried out by this Hon’ble Court;
- (ii) to determine the amount due and payable by the Defendant in favour of the plaintiff;
- (iii) pass a decree in favour of the plaintiff and against the defendants for the amount to be determined by this Hon’ble Court along with interest @ 12% from the date of invoice till the same are realized;
- (iv) pass a decree for recovery of the above said sum along with interest;
- (v) award the cost of suit to the plaintiff and against the defendants;
- (vi) pass a decree for such other relief or reliefs to which the plaintiff may be entitled to under the law and this Hon’ble Court may deem fit and necessary.”

14. The defendants filed a written statement along with a counter-claim. It is stated that the MoU was a business tie-up with the plaintiff. As the defendants were already engaged in the business of supplying IMFL to various para-military forces and civil-bonded warehouses, the plaintiff had approached the defendants with a request to deal with its products so that business of the plaintiff increases. It is denied that defendants were



authorized/ appointed to procure orders for the products of the plaintiff and it is stated that they were engaged by the plaintiff by giving full authority to submit tender in the name of defendant no.1, which is evidenced under the MoU and further confirmed by two letters dated 26.04.2007, by which, terms of the MoU dated 03.03.2007 were further clarified. The MoU dated 03.03.2007 was renewed up to 31.03.2010. A fresh MoU was entered into between the plaintiff and the defendants on 19.03.2010 for a period of two years commencing from 01.04.2010 up to 31.03.2012, but the plaintiff with ulterior motive had not even whispered about the same and had suppressed the existence of the said MoU dated 19.03.2010. It is denied that the defendants were appointed as an agent of the plaintiff and that MoU was not actually acted upon though validated till 31.03.2010. It is pleaded that in terms of MoU dated 03.03.2007 and MoU dated 19.03.2010, the defendants are entitled to collect payment from the para-military forces against supply orders procured from para-military forces by participating in the tender process in its own name and at their quoted rates. The defendants procured import permit from the Excise Department of the Government of Assam and dispatched the same to the plaintiff for onward dispatch of goods to various para-military units and civil-bonded warehouses because it is the convention that the manufacturer dispatches goods to the consignee directly.

15. It is pleaded that the plaintiff had received entire dues for the goods supplied for the Financial Years 2008-2009, 2009-2010 and 2010-2011. It is also stated that during the relevant financial years, the plaintiff had supplied goods amounting to Rs.5,88,00,584/- and not Rs.5,91,01,922/- and the plea taken by the plaintiff that the defendants had withheld a sum of Rs.2,69,98,834/- is a false statement. It is stated that the defendants had to resort to stop payment of post-dated cheques as the plaintiff, by violating the MoU dated 19.03.2010, sought to receive payment directly from the



para-military units. It is pleaded that the balance amount remaining after adjusting the ex-distillery price (for short, EDP)/ex-factory price (for short, EFP) of the plaintiff is the margin of the defendant company. The defendants being marketing associate of the plaintiff as per the MoU, there is no question of rendering accounts to the plaintiff. It is specifically stated that the defendants never sent any Statement of Account to the plaintiff, invoice by invoice, or otherwise and that only Debit Notes were issued by the defendants showing the difference between EFP/EDP + Export Fee + Central Sales Tax and the billing amount to the para-military forces for the purpose of maintaining the accounts. Defendants bear transportation charges and the defendants pay to the plaintiff by cheque the EFP/EDP + Export Fee + Central Sales Tax, to which amount only, the plaintiff is entitled to. In terms of the minutes of the meeting dated 13.12.2010, the defendants agreed to increase the rate of EDP by Rs.30/- per case containing 12 bottles with effect from 01.01.2011. Defendants denied exchange of any e-mail as well as any understanding with the plaintiff regarding payment to be received by the plaintiff from the para-military forces directly. It is pleaded that though the suit of the plaintiff seems to be a suit for accounts but the plaintiff had neither furnished any account regarding its claim nor any copy of accounts to the defendants and therefore, the suit ought to be dismissed at the threshold.

16. By raising a counter-claim, it is pleaded that the plaintiff had invited the defendants to a meeting on 13.12.2010 at New Delhi for increasing EDP by Rs.30/- per case and had agreed to pay all the expenses of the representative of the defendant no.1 and accordingly, the defendants had raised a Debit Note for a sum of Rs.30,502/- dated 06.01.2011 but the same had not been paid by the plaintiff. Accordingly, defendants claim a sum of



Rs.30,502/- from the plaintiff with up to date interest @18% per annum from 06.01.2011 till final payment.

17. By filing written objection to the counter-claim, the plaintiff pleaded that the plaintiff had not agreed to pay any expenses of the representative of the defendant no.1 and therefore, question of making payment of the aforesaid amount does not arise.

18. Initially, two issues were framed. Subsequently, two additional issues were framed. The issues finally settled are as follows:-

- “(i) Whether the defendants are liable to pay a sum of Rs.1,51,67,244/ (Rupees One crore Fifty-One lakh Sixty-Seven thousand Two hundred & Forty-Four) only for the goods supplied to the para-military forces based in North-East India? (onus of plaintiff)
- (ii) Whether the claim of the plaintiff amounting to Rs.74,23,594/- (Rupees Seventy-Four lakh Twenty-Three thousand Five hundred & Ninety-Four) was barred by the law of limitation? (onus of defendants)
- (iii) Whether the defendants are entitled to a sum of Rs.30,502/- (Rupees Thirty thousand Five hundred & Two) only from the plaintiff? (onus of defendants)
- (iv) Whether the plaintiff is entitled to any reliefs? (onus of plaintiff)

19. In support of its case, the plaintiff examined its constituent attorney, Shri K. B. Biswakarma, as PW-1 and one Shri H. K. Dey, as PW-2. The defendants examined Shri Bonoraj Choudhury, the defendant no.2, as DW-1 and Shri Somraj Choudhury, as DW-2.

20. Mr. Udai P. Sharma, learned Counsel for the appellant submits that learned Trial Court erred in law in holding that Debit Notes exhibited by the appellant were manufactured documents instead of holding the Debit Notes exhibited by the defendants as manufactured documents. It is also



submitted that learned Trial Court committed error of law in not sending the Debit Notes exhibited by both the plaintiff and the defendants for scientific and forensic examination. That apart, out of 120 Debit Notes submitted by the defendants, only 10 invoices had been submitted in support of the Debit Notes. In this connection, he has drawn the attention of the Court to Exhibits-D/P to Exhibit-D/W and submits that none of them tallied with the Debit Notes. He submits that the learned Trial Court failed to examine the evidence on record in its correct perspective while dismissing the suit of the plaintiff and in holding that claim for the sum of Rs.74,23,594/- is barred by limitation. With reference to paragraphs 25 and 52 of the written statement, it is submitted that the defendants had admitted payment of only Rs. 3,21,08,288/- out of total amount of Rs. 5,88,00,583/-, and thus, acknowledged that a sum of Rs. 2,69,98,834/- is due to the plaintiff but this aspect was overlooked by the learned Trial Court. It is submitted that the learned Trial Court committed error in law as well as of facts in decreeing the counter-claim of the defendants without there being any acceptable evidence on record.

21. Mr. A. Moulik, learned Senior Counsel for the respondents submits that the plaintiff miserably failed to prove its case and the case of the plaintiff is based on falsehood. There is no admission by the defendants that any amount was due to be paid by the defendants to the plaintiff. While the plaintiff had suppressed the MoU dated 19.03.2010, in cross-examination of the witnesses of the plaintiff, it has become manifestly clear that the parties had executed MoU dated 19.03.2010 and the same was also acted upon and the business of the parties were conducted accordingly. It is submitted that invoices as enclosed in Exhibits-D/P to Exhibit-D/W, reference to which is made in IA No.4 of 2019, were samples/proforma of the invoice to enable the appellant to prepare the invoice to be submitted to the para-military



forces and being sample, obviously, invoices are not signed. He has submitted that the learned Trial Court rightly did not place any reliance on the Debit Notes exhibited by the plaintiff. He has drawn the attention of the Court to the cross-examination of PW-1 to submit that the same would demonstrate that the Debit Notes exhibited by the plaintiff are manufactured documents. He, however, submits that having regard to the MoUs entered into by and between the parties, nothing hinges on the Debit Notes.

22. It is submitted by him that EDP is an agreed upon price between the plaintiff and the defendants and based on that, the defendants used to make payment to the plaintiff. The plaintiff had received its due price for the supplies made and evidence of PW-1 and PW-2 itself demolishes the claim of the plaintiff. With regard to the claim of Rs.74,23,594/- for the Financial Year 2008-2009, he submits that there is no basis for such a claim and besides, the claim is rightly held by the learned Trial Court to be barred by limitation. He submits that Exhibit-D-AA and Exhibit-D-AE go to show that no amount was due to be paid by the defendants to the plaintiff.

23. The MoU dated 03.03.2007 is exhibited by DW-1 as Exhibit-D/B. Exhibit-D/B goes to show that the second party, i.e. defendant no.1, was appointed as a marketing associate to market IMFL to para-military forces and civil-bonded warehouses in Eastern and Northern India for a period of two years with effect from 03.03.2007, renewable for a further period of two years at mutual option on the terms and conditions indicated therein. Clause 2 provides for payment term which is to the effect that defendant no.1 will make payment to the plaintiff through L/C after 70 days from the date of dispatch of goods (consignment to consignment). Clause 4 provides that Himalayan Distilleries Limited (HDL), i.e. the appellant, will raise the bill in the name of BSF/ITBP etc. with the instruction that the payment should be made by the BSF/ITBP in favour of Dreambox Marketing(A) Pvt. Ltd.,



Guwahati, i.e. the defendant no.1. Clause 5 provides that for the release of L/C, HDL will make an invoice or bill in the name of consignee M/s. Dreambox Marketing(A) Pvt. Ltd., Pan Bazar, Guwahati-701001, which will be produced before Canara Bank. Clause 6 provides that for the difference amount between the quoted price and EDP, Dreambox Marketing will give a Debit Note to HDL against expenses incurred for sales promotion, selling expenses, etc. and thereafter, HDL will issue a Credit Note. Clause 7 provides that payment shall be made by third party (i.e. para-military forces) in favour of M/s. Dreambox Marketing(A) Pvt. Ltd., Guwahati, i.e. defendant no.1, at the quoted rate of second party (i.e. M/s. Dreambox Marketing(A) Pvt. Ltd.). The first party (M/s. Himalaya Distilleries Ltd.) shall not collect payment from the third party. In case the third party remits payment directly to the first party by mistake against the invoice value, the first party shall remit the payment back to the second party immediately. Clause 8 provides that the payment shall be adjusted by the second party after deduction of ex-factory price as mentioned in Annexures-1 from the quoted rate (as mentioned in the invoice) to the third party for the margin of the second party (i.e. royalties and sales promotional expenses). Clause 12 provides that the first party is selling the goods at Ex-Distillery, Majitar, Sikkim. Though there was no whisper in the plaint with regard to MoU dated 19.03.2010, in cross-examination, PW-1 admitted execution of MoU dated 19.03.2010, Exhibit-D/A. MoU dated 19.03.2010, Exhibit-D/A, is identical to the MoU dated 03.03.2007, Exhibit-D/B.

24. A combined reading of paragraphs 5 and 11 of the plaint goes to show that though in terms of Clause 2 of MoU dated 03.03.2007, the defendants were required to make payment to plaintiff through L/C, as the defendants verbally expressed their difficulties, an arrangement was worked out to the effect that the defendant would deposit an ad hoc minimum amount by way



of 60 days' post-dated cheques drawn by the defendants in favour of the plaintiff. PW-1, in his cross-examination, however, admitted that defendants never expressed any difficulty in opening L/C and that system of opening L/C was stopped at the instance of the plaintiff. There is no pleading and naturally, no evidence as to how the minimum amount was worked out. PW-1 stated that the cheques issued to the plaintiff by the defendants were for the amount of the EDP of IMFL goods and the government levies and that Annexure-1 in Clause 8 of both the MoUs shows the EDP/basic price of IMFL at which the goods are to be sold to the defendants. It appears that though it was recited in the MoU that no amendment or other modification of the agreement shall be valid or binding on either party unless reduced to writing and executed by the parties, the system of deposit of post-dated cheques continued till the present suit was filed and therefore, notwithstanding the recital, because of the course of conduct of the parties over a prolonged period of time, it has to be accepted that Clause 2 of the MoU was given a complete go-bye.

25. Immediately after execution of MoU, Exhibit-D/B, a letter dated 26.04.2007, Exhibit-D/E, but noted as Exhibit-D/F (there is another Exhibit-D/F, which is a letter dated 30.05.2008) was issued stating that the plaintiff company could offer margin to the defendant no.1 after deduction of EDP from quoted price as indicated in the invoice issued to para-military units and civil-bonded warehouses. It is also stated therein that the plaintiff company would issue Credit Note against invoice value for the margin money or the defendant no.1 may adjust the balance amount as its margin after deduction of EDP + Export Fees + Insurance + CST + transportation charges from the invoice value. This letter goes to show that plaintiff permitted the defendants to adjust the balance amount remaining from the invoice amount after deductions as indicated as their margin money. PW-1



admitted in his cross-examination that the plaintiff had never issued any Credit Note. Another letter dated 26.04.2007, Exhibit-D/D, was issued by the authorized signatory of the plaintiff stating, amongst others, that defendant no.1 is authorized to submit tenders, negotiate prices and collect supply orders on behalf of plaintiff company and that they will not collect any payment against the invoice value from para-military units.

26. Three different copies of Annexure-1, referred to in the MoUs, were exhibited as Exhibit-D/G. Exhibit-D/G gives rates of basic price, i.e. EDP of IMFL products for different years. Letter dated 05.03.2007, Exhibit-D/J, is a letter issued by the plaintiff to the defendants quoting "most competitive rate/basic price" of the products mentioned therein for making supplies to para-military units in Assam, Meghalaya and Tripura. The rates were reiterated by letter dated 24.04.2007, Exhibit-D/K. Exhibit-D/F, as noticed earlier, is a letter dated 30.05.2008 confirming revised EDP with effect from 01.04.2008. Exhibit-D/H, a letter dated 20.01.2009, is another letter wherein EDP of various products are indicated.

27. PW-2 stated that the defendants, while participating in the tender, quote their own rate, which includes EDP, Export fees, Central Sales Tax, transportation, insurance, own margin money, etc. and if the bid submitted by the defendants is accepted, the para-military forces place supply orders to the defendants and not to the plaintiff. The defendants, in turn, issue their own supply orders to the plaintiff requesting to supply different quantities of various items to the para-military forces. Defendants then make payment to the plaintiff towards its entitlement and purchase the goods from the plaintiff. In cross-examination, PW-2 was shown various supply orders which he had received from the defendants. I will refer to only one exhibit, Exhibit-D/O. With reference to the aforesaid exhibit, PW-2 stated that he had received of a cheque for Rs.2,79,828/- dated 22.11.2008



from the defendant company towards price of goods which included EDP, CST @ 2% and Export Fees. With reference to all the exhibits pertaining to supply orders received by him, he stated that the he had received different cheques for different amounts which included EDP of the goods supplied, Central Sales Tax and Export Fees paid to the plaintiff by the defendant company towards entitlement of the plaintiff company for purchase of the goods and the plaintiff, upon receipt of the amount, dispatches the goods to the para-military forces directly and the para-military forces release the payment to the defendants and not to the plaintiff. He also stated that such payments do not suggest that the same were by way of any part-payment to the plaintiff. PW-2 also admitted that that defendant no.1 had been appointed as a marketing associate and not as an agent. He further stated that the profit margin of the defendants is the difference of quoted price, which is reflected in the invoice price, and the EDP.

28. How the transactions were carried out can be seen, by way of illustration, from Exhibit-4 and Exhibit-9. Exhibit-4 is a letter dated 19.03.2011 addressed to the plaintiff by the defendant company placing a supply order for Commandant, 68 Bn., C.R.P.F., Veneer Mills, Monkholi, for 600 cases of 750 ml. of Himalayan Pride XXX Rum. Quoted rate is shown as Rs.785/- per case and the total amount including CST is Rs.4,80,420/-. Based on the aforesaid supply order, plaintiff raised invoice dated 08.04.2011, Exhibit-9, upon the consignee, i.e. the Commandant, for Rs.4,80,420/-. An endorsement is there in Exhibit-9 that post-dated Cheque No.020577 dated 08.06.2011 for Rs.2,72,310/- was received. Exhibit-D/P to Exhibit-D/W are letters, with which, amongst others, supply order and cheque are enclosed. The supply orders are similar to Exhibit-4. The unsigned invoices, which are also enclosed with Exhibit-D/P to Exhibit-D/W, carry no value and as rightly submitted by Mr.Moulik, they are enclosed as



sample for guidance to the appellant for preparing the invoice to be submitted by the appellant to the para-military forces. Having regard to the evidence of PW-2, it is evident that the cheque amounts represent EDP, which is already fixed in terms of Annexure-1,+CST+Export Fees. It is relevant to note that PW-1, in his cross-examination, stated that the plaintiff sells its IMFL products to other organizations, wholesalers, etc. at the EDP rate only. PW-2 had stated that out of the cheque amount, CST and Export Fees being Government levies, EDP is the entitlement of the plaintiff.

29. Both PW-1 and PW-2, in their cross-examination, had stated that the two MoUs did not visualize that the defendants have to submit any accounts to the plaintiff. PW-1 also admitted that in the MoUs, there is no stipulation that the defendant company, after collecting invoice amount from para-military forces, shall pay back the sum to the plaintiff company.

30. From MoUs and the cross-examination of witnesses of the plaintiff it is seen that the para-military forces make payment to defendant no.1 at the quoted rate of the defendant no.1 and that plaintiff does not collect payments from para-military forces. In case by mistake the payment is remitted by the para-military forces to the plaintiff, the plaintiff is required to remit the payment to the defendant no.1 immediately. There is no requirement that after receipt of payment from the para-military forces, the defendant no.1 has to remit the amount to the plaintiff. What is visualized is that the payment shall be adjusted by the defendants after deduction of EDP/EFP as stated in Annexure-1 from the quoted rate as mentioned in the invoice to the para-military forces for the margin of the defendants. There is also no requirement of furnishing of any account to the plaintiff by the defendants.



31. Submission of Mr. Sharma that in paragraphs 25 and 52, the defendants admitted that a sum of Rs.2,69,98,834/- is due to the plaintiff is misconceived. There is no such admission in the aforesaid paragraphs. In paragraph 25, amount paid to the plaintiff is shown as Rs.3,21,08,288/-, whereas in paragraph 52, after giving the break-up for relevant financial years, the amount is reflected as Rs.3,21,07,688/-. There is a difference of Rs.600/-. Be that as it may. What the defendants have essentially stated in the aforesaid paragraphs is that the amount paid by them to the plaintiff is the entitlement of the plaintiff.

32. There is a dispute with regard to the Debit Notes furnished by the plaintiff being Exhibits-17(1) to 17(42) and the set of Debit Notes furnished by the defendants being Exhibits-D/C (collectively). It was deposed on behalf of the plaintiff that the Debit Notes, Exhibit-17(1) to Exhibit-17(42) were sent by the defendants by putting the same in an envelope, Exhibit-18 and was received in the month of March, 2011. In Exhibit-18, address is shown as Managing Director..... SBL... Pvt. The address seen in the Exhibit-18 is not complete but it appears that the same was addressed to Managing Director of one SBL Pvt. Ltd., Delhi. PW-1 admitted that none of the Debit Notes, Exhibit-17(1) to Exhibit-17(42), received in the envelope, Exhibit-18, are in the letter head of the defendant no.1 company. PW-1 also admitted that all the Debit Notes marked as Exhibit-17(1) to Exhibit-17(42) could not have been put inside Exhibit-18 at a time. Besides, though all the Debit Notes, which were put inside Exhibit-18, were stated to have been received in the month of March, 2011, it is seen that Exhibit-17(39), Exhibit-17(40), Exhibit-17(41) and Exhibit-17(42) are Debit Notes of post-March, 2011. It is in that context, the learned Trial Court had opined that the submission of the learned Counsel for the defendants that documents



marked as Exhibit-17(1) to Exhibit-17(42) are manufactured documents for the purpose of the case could not be ruled out.

33. In paragraph 14 of the plaint, it is pleaded that Debit Notes submitted by the defendants consisted of 8 heads. Exhibits-17(1) to 17(42) also contain 8 heads. The Debit Notes exhibited by the defendants as Exhibits-D/C (collectively), on the other hand, only show margin of Dreambox Marketing(A) Pvt. Ltd., being the difference in amount between the quoted price and the EDP. There is no stipulation in the MoUs that the defendants have to justify their expenses and along with Debit Notes, they would have to furnish Money Receipts as pleaded in the plaint. Therefore, plea taken by the plaintiff that the defendants did not furnish Money Receipts for transportation charges and breakages & shortages charges has no basis. Nowhere it is pleaded by the plaintiff, what according to it, constitutes margin money of the defendants. PW-2, as noticed earlier, stated that the profit margin of the defendants is the difference of quoted price, which is reflected in the invoice price, and the EDP. In the above scenario, plea set up in the plaint that the defendants must adjust marketing & selling expenses, travelling & boarding expenses, expenses for processing of import permit and expenses for processing tender from their profit margin has no legs to stand. It is also not understood what the plaintiff intended to say with regard to interest of money involvement on credit basis, which was stated to be another head of the Debit Notes of the defendants, that it realized payment from the defendants after the defendants had collected payment from the para-military forces. Apart from the fact that there is no evidence regarding when the defendants had collected payments from the para-military forces, the MoUs did not provide that the plaintiff would be entitled to any amount from the invoice amount. Even if it is assumed that the Debit Notes, Exhibit-17(1) to Exhibit-17(42), are the Debit Notes sent by



the defendants, then also, the same do not, in any way, improve the case of the plaintiff. In view of the evidence on record and the MoUs, the Debit Notes will not have any role to play and therefore, submission of Mr. Sharma that the learned Trial Court committed error of law in not sending the Debit Notes for forensic examination has no merit.

34. The plaintiff had alleged withholding of amounts by the plaintiff for three Financial Years, namely, 2008-2009 to 2010-2011, i.e. up to 31.03.2011. The suit was filed on 09.11.2011. The learned Trial Court was not justified in holding that the claim for Rs.74,23,594/- is barred by limitation inasmuch as the learned Trial Court had taken starting point of limitation from 01.04.2008, which is the beginning of the Financial Year 2008-2009. However, the same will not have any material difference as on an appreciation of evidence on record and in view of the discussion, I find that the plaintiff has failed to prove that any amount was due to it from the defendants for the three Financial Years, namely, 2008-2009 to 2010-2011.

35. Exhibit-D/AA is a letter dated 26.05.2010 issued by the authorized signatory of the plaintiff to defendant no.1 certifying that the defendant no.1 has no dues for the Financial Years 2007-2008 and 2008-2009. Exhibit-D/AE is a letter dated 01.03.2011 issued by the plaintiff to Somraj Choudhury of defendant no.1, stating, amongst others, that defendant no.1 has no dues till that day. The aforesaid exhibits had been admitted by PW-1. This admission also goes to show that no dues were payable by the defendants to the plaintiff for the Financial Years 2008-2009, 2009-2010 and for the Financial Year 2010-2011 up to 01.03.2011.

36. In view of the above discussion, issue nos. 1 and 2 are decided against the plaintiff.



37. Learned Trial Court in issue no. 3 held that the defendants are entitled to a sum of Rs.30,502/-. While coming to the aforesaid conclusion, learned Trial Court observed that the plaintiff had not filed written statement to the counter-claim of the defendants. It was held that DW-2, Bonoraj Choudhury, was also not cross-examined on the issue of counter-claim as well as on the contents of Exhibit-D/N (collectively). The observation of the learned Trial Court that the plaintiff did not file written statement is not correct. A written objection to the counter-claim was filed by the plaintiff praying for dismissing the counter-claim. It was denied that the plaintiff had agreed to pay all the expenses of the representative of the defendant Company while going for the meeting at Delhi. Learned Trial Court also referred to the evidence on affidavit of PW-2 at paragraphs 26, 27 and 28. Exhibit-D/N (collectively) is a letter dated 06.01.2011 issued by DW-2 to the appellant with reference to the discussions he had with the Managing Director of the plaintiff towards his expenses for travelling, food and lodging at Delhi for attending the meeting dated 13.10.2010, wherein Debit Notes and plane tickets, etc. were enclosed. However, there is no evidence establishing that the appellant had agreed to bear the expenses of the representative of the defendant Company for the meeting that was held in Delhi.

38. In that view of the matter, the finding of the learned Trial Court that the defendants are entitled to a sum of Rs.30,502/-, as claimed in the counter-claim, cannot be sustained. Issue no.3 is, accordingly, decided against the defendants.

39. In view of the above discussions, the appeal is partly allowed. Decision of the learned Trial Court dismissing the suit of the plaintiff is upheld. Decision of the learned Trial Court allowing the counter-claim of the defendants is set aside and the counter-claim is dismissed.



RFA No.06 of 2017 and RFA No. 07 of 2017

40. In the plaint of Money Suit No.810 of 2013, out of which RFA No. 3 of 2017 had arisen, reference was made to Money Suit No.13 of 2012 and Money Suit No.14 of 2012. Subsequently, Money Suit No.13 of 2012 and Money Suit No.14 of 2012 were registered as Money Suit No.19 of 2015 and Money Suit No.18 of 2015, respectively. It was stated in Money Suit No.810 of 2013 that the aforesaid two Money Suits were instituted for an amount of Rs.5,26,320/- each as despite clear instruction given on the invoices to make payment directly to the plaintiff, M/s. Dreambox Marketing(A) Pvt. Ltd. had illegally collected payment from the C.R.P.F. battalions and the C.R.P.F. battalions had also committed illegality in making payment to M/s. Dreambox Marketing(A) Pvt. Ltd.

41. Learned Counsel for the parties had submitted that the decision in RFA No.03 of 2017 would substantially cover the present two appeals. The plea set up in Money Suit No.18 of 2015 and Money Suit No.19 of 2015 that the plaintiff had instructed defendant no.1 to make payment for the supply of IMFL to it directly is the distinctive feature of these two suits as this plea was not raised in Money Suit No. 810 of 2013. At this stage, it will be appropriate to briefly notice the case set up by the plaintiff in the aforesaid two suits as well as to take note of the case of the defendants.

42. The plaint in Money Suit No. 18 of 2015 and in Money Suit No.19/2015 is almost identical. Reference is made to the MoU dated 03.03.2007 and averments are made with regard to business transactions in between the plaintiff and the defendant company, which are already noticed while discussing RFA No.03 of 2017. It is pleaded that after a meeting was held by the Managing Director of the plaintiff with the defendant no.2, wherein defendant no.2 was represented by one Shri Somraj Choudhury, it was



mutually agreed upon and decided that the plaintiff thenceforth was to instruct the defendant no.1 to make payments to it directly in respect of the goods manufactured and supplied by the plaintiff. It is stated that an e-mail was sent with the entire transcript of the meeting and its outcome and the same was followed by a letter dated 06.04.2011, stating that the old arrangement between the plaintiff and the defendant no.2 was to immediately cease and that request was made to defendant no.2 to come to Sikkim to draw up a new agreement. In these two suits, reference is made to the MoU executed on 19.03.2010, but with a rider that the same was neither assented by the plaintiff nor acted upon by the parties.

43. In Money Suit No. 810 of 2013, as noticed supra, no mention was made about MoU dated 19.03.2010.

44. In the usual course of business, the plaintiff had received two letters, both dated 23.05.2011, for supply of 500 cases of Himalayan Pride XXX Rum (750 ml.) and 100 cases of Royal Orchid Whisky (750 ml.) to be supplied to the Commandant, 156 Bn., C.R.P.F., Dhaligaon, (Money Suit No.19/2012) and to the Commandant, 128 Bn., C.R.P.F., Spun Silk Mill, Jagiroad, (Money Suit No.18 of 2015). Accordingly, plaintiff raised invoice dated 28.05.2011 in respect of Commandant, 156 Bn., C.R.P.F. and invoice dated 27.05.2011 in respect of Commandant, 128 Bn., C.R.P.F. The invoice amount in both the cases was Rs.5,26,320/-.

45. It is the case of the plaintiff that there was a specific instruction in Clause 6 in the overleaf of the invoice that payment shall be remitted by Demand Draft drawn in favour of Himalaya Distilleries Ltd., payable at Gangtok, Sikkim. Despite issuance of legal notice, as no amount was paid, suits came to be filed. It is also stated that the Commandant, 128 Bn.,



C.R.P.F. had written a letter dated 21.08.2011 stating that the payment would be made in favour of defendant no.2.

46. The written statement filed by the defendant no.1 in both the cases is more or less identical save and except the dates and particulars applicable in the respective cases. It is pleaded that 68 Bn., C.R.P.F. had floated a tender for purchase of IMFL from various suppliers/marketing agents. The rate quoted by the defendant no.2 was found to be most favourable and accordingly, defendant no.2 was engaged as supplier of defendant no.1. It is pleaded that the defendant no.1 had no direct contact with plaintiff and IMFL was purchased through its authorized distributor and therefore, there is no obligation of the defendant no.1 to make payment to the plaintiff. It is stated that defendant no.1 had made payment to defendant no.2 in accordance with the terms and conditions of the comparative statement which was agreed upon by and between defendant nos. 1 and 2.

47. The written statement filed by defendant no.2 in both the suits is also more or less identical. It is specifically pleaded that MoU dated 19.03.2010 was given effect to and was acted upon by both the plaintiff and defendant no.2 and based on the said MoU dated 19.03.2010, the defendant no.2 was making supply of liquor to various para-military forces of the North-Eastern Region and payment instructions in all the invoices were made in favour of defendant no.2. It is denied that there was any e-mail exchange between plaintiff and defendant no.2 or that there was any understanding that the plaintiff would receive payment directly from the para-military forces. The defendant no.2 also denied to have received any letter dated 06.04.2011. It is further pleaded that while forwarding the import permit to make supplies to the aforesaid battalions, two undated cheques for Rs.2,81,760/-, each, being the entitled amount of the plaintiff against the IMFL to be dispatched, were sent and the same were duly received by the plaintiff. However, the



plaintiff tried to receive the entire amount of the invoices from the defendant no.1.

48. In both the cases, identical issues were framed, which are:

- (1) Whether the defendant no.1 had floated a tender through the 68 Bn., C.R.P.F. for supply of IMFL from various suppliers/marketing agents? (onus of defendant no.1)
- (2) Whether defendant no.1 had paid to defendant no.2 a sum of Rs.5,26,320/- as price of 500 cases of Himalayan Pride XXX Rum (750 ml.) and 100 cases of Royal Orchid whisky (750 ml.) as per the supply order of defendant no.1? (onus of the plaintiff)
- (3) Whether the plaintiff is entitled to any other reliefs? (onus of plaintiff)

49. In both the suits, plaintiff's constituent attorney, K. B. Biswakarma, who also deposed as PW-1 in the Money Suit No.810 of 2013, was examined as PW-1 and another employee, M. B. Majhi was examined as PW-2. In Money Suit No.18 of 2015, defendant no.1 examined the Second-in-Command, Arvind P. Anand as D1W1 and in Money Suit No.19/2015, the defendant no.1 examined the Deputy Commandant, Gyachho Tshering Lepcha as D1W1. The Managing Director of defendant no.2, Mr. Bonoraj Choudhury was examined as D2W1 in both the suits.

50. The learned Trial Court had taken up issue nos.1 and 2 together in both the suits and it was held that it is more or less an admitted position that 68 Bn., C.R.P.F. had floated a tender for supply of IMFL pursuant to which the defendant no.2 was engaged as a supplier of IMFL. In Money Suit No.18 of 2015, it was recorded that defendant no.1 had made payment of Rs.4,23,470/- and the amount of Rs.1,02,850/- was not paid as the matter is *sub judice*. In Money Suit No.19 of 2015, it was recorded that defendant



no.1 had paid a sum of Rs.5,22,413/- against the total invoice amount of Rs.5,26,320/- to the defendant no.2. Issue no.3 was decided against the plaintiff having regard to the evidence on record.

51. The plaintiff had exhibited, as Exhibit-7, the invoice dated 27.05.2011 for the amount of Rs.5,26,320/- in Money Suit No.18 of 2015. In Money Suit No.19 of 2015, the plaintiff had exhibited as Exhibit-7, the invoice dated 28.05.2011 for the amount of Rs.5,26,320/-. In Clause 6, printed on the reverse side of the invoices, it is written as follows: "Payment shall be remitted by Demand Draft drawn in favour of Himalaya Distilleries Ltd., payable at Gangtok, Sikkim." D1W1, in Money Suit No.18 of 2015, had exhibited an invoice dated 27.05.2011 for the amount of Rs.5,26,320/-, as Exhibit-D1-C, and in Clause 6, printed on the reverse side of the invoice, it is written as follows: "Payment shall be remitted by crossed Demand Draft drawn in favour of Dreambox Marketing(A) Pvt. Ltd. payable at Kahilipara, Guwahati (SBI Code No. 04420)/ or deposit on cash payment directly online to our SBI account No.30389786188. Dreambox Marketing(A) Pvt. Ltd. has sole authority to receive all kinds of payments from you." Similarly, in Money Suit No.19/2015, D1W1 exhibited an invoice dated 28.05.2011 for the amount of Rs.5,26,320/-, as Exhibit-D1-A, wherein Clause 6 was identical with Exhibit-D1-C. Thus, the invoices exhibited by the plaintiff and by the para-military forces, i.e. defendant no.1 in both the suits, were different as far as Clause-6 is concerned.

52. The learned Trial Court had observed that once the parties are held to be governed by the MoU, it is of no significance what was written on the reverse side of Exhibit-7 as the MoU prohibited the plaintiff from directly seeking payment from para-military forces.



53. In both the suits, a Deed of Compromise dated 15.04.2014 (Exhibit-13), which was entered into between the plaintiff and the defendant no.2 of the respective suits, were exhibited. The Deeds of Compromise were in respect of compromise effected in two complaint cases, which were filed alleging dishonour of cheques for Rs.2,81,760/- each, issued by the defendant no.2. In the written statement of defendant no.2, it is mentioned that two cheques for Rs.2,81,760/- each were issued while forwarding the import permit to make supply to the Commandant of 128 Bn., C.R.P.F. and the Commandant of 156 Bn., C.R.P.F. It is recorded in Exhibit-13 that the plaintiff had acknowledged the payment of amount of Rs.2,81,760/- as full and final settlement of its claim and that it will have no claim in any form for the cheques that were dishonoured and that the dispute involved in the matter had been fully and finally settled.

54. Cross-examination of PW-1 had taken place at the first instance in Money Suit No.18 of 2015. While he was cross-examined in Money Suit No.19 of 2015, he was confronted with his cross-examination in Money Suit No.18 of 2015. In cross-examination of PW-1 by defendant no.2, it is admitted by PW-1 that business, in question, between the parties was guided by various clauses of the MoU, which were duly acted upon by the parties and that as per Clause 7 of the MoU, payment against the goods supplied by the plaintiff to the para-military forces is required to be made by the para-military forces directly to the defendant no.2 at the quoted rate of the defendant no.2 and that the plaintiff cannot collect payment from the para-military forces. Plaintiff could not prove that there was any other agreement with the defendant no.2 enabling it to demand payment from defendant no.1. Therefore, there is no basis for the claim of the plaintiff that it is entitled to receive the payment of the invoice amount from the defendant no.1 during the subsistence of the MoU dated 19.03.2010.



RFA No. 03 of 2017 : M/s Himalaya Distilleries Ltd. vs. M/s Dreambox Marketing (A) Pvt. Ltd. & Anr.
RFA No. 06 of 2017 : M/s Himalaya Distilleries Ltd. vs. The Commandant 128 Bn. C.R.P.F. & Anr.
RFA No. 07 of 2017 : M/s Himalaya Distilleries Ltd. vs. The Commandant 156 Bn. C.R.P.F. & Anr.

55. In view of the above discussion, there is no merit in these two appeals and, accordingly, the same are dismissed. IA No.4 of 2019 stands disposed of in the light of the observations made in paragraph 4.

Chief Justice

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