

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : February 27th, 2008

Date of Decision : March 3rd, 2008.

+ **CS (OS) 1396/2001**

M/S ALBERT & CO (P). LTD. Plaintiff
Through Mr., Advocate

versus

M/s RAJASTHAN BREWERIES Ltd. Defendant
Through Nemo

Mr. Justice S. Ravindra Bhat:

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat:

1. The plaintiff has, in this suit, sought for a decree in the sum of Rs. 1,27,57,362/- with *pendente lite* and future interest at 18% per annum against the defendant.
2. The Plaintiff company was incorporated on 16.11.1998 and registered in the office of the Registrar of Companies at Chennai. It took over the entire business, assets and liabilities of the Partnership firm known as M/s. Albert and Co.,(hereafter referred to as “the Firm”). The Defendant M/s. Rajasthan Breweries Limited, is a Company incorporated under the Companies Act, 1956, having its registered office at 111th KM Stone, Delhi-Jaipur Highway, District Alwar. It was manufacturing beer

under the brand “STROHS”. It needed finance, through letter of credits for purchase and import of packing materials, and raw materials including tins, cans, malt, etc. The defendant agreed to appoint the firm as the C& F agent of Andhra Pradesh State, and approached the latter to provide finance up to the maximum sum of Rs.150 lakhs. The firm was to open letter of credits for the goods, raw materials, packing materials, including cans tins, malt to be imported for manufacturing Beer at the defendant’s factory. The firm agreed to provide such financial assistance subject to certain terms and conditions. A written agreement between the defendant and the firm was entered into on 22nd May, 1998; it was called a Memorandum of Understanding (hereafter called “MOU”).

3. The salient features of the MOU were:

- i) The Firm was to open letter of credit to the maximum limit of Rs.1.50 crores on account of the defendant, favouring its suppliers, towards import of tins, cans, malt and raw materials for the defendant’s use, for production at in its factory.
- ii) The defendant, immediately on import of the goods in question was to hand over and deliver them to the Firm, which had exclusive charge, control and possession over such goods. The goods were to be used exclusively to manufacture beer, in the defendant’s factory, and not be used for any other purposes.
- iii) The goods were to be stored in a separately earmarked go down, for the firm. The defendant did not have any right to take out any goods or materials without prior permission and consent from the firm.
- iv) The defendant was entitled to claim and take delivery of the goods, materials, etc., from the Firm proportionate to the extent of the

payment made by it, or equivalent value of Beer delivered to the firm.

- v) The amount of Rs.1.50 crores financed was repayable by the defendant within 2 months from the date of demand, in case the firm so desired, and in case defendant was unable to repay the amount it agreed to grant lease and license to the firm, or its nominees, to run the said factory on lease basis. The firm could realize and recover its arrears by running, manufacturing and selling the products.
- vi) In the case of margin money required for opening the letter of credit, the defendant agreed to pay interest at 1% over and above the bank rate for the period the money was blocked.
- vii) The defendant was to pay/ reimburse all expenses/ bank charges incurred by the firm, in connection with opening the letter of credit immediately, alternatively the defendant agreed to deliver the stock of beer to the firm for equivalent amounts.
- viii) The defendant agreed to execute a power of Attorney in favour of the firm to do all acts and deeds which it was entitled to do under the MOU and also keep the firm indemnified against all acts, actions, losses, claims or damages.
- ix) That the firm was to have the first right over the products/beer produced by the defendants, to the extent of the amount which was re-payable.
- x) That the Delhi Courts were to have jurisdiction, in case of disputes between the parties.

4. Pursuant to the said MOU, the defendant executed a Power of Attorney in favour of the firm on 22.5.98. The firm Banker, M/s. Bank of Ceylon, Chennai

Branch, opened letters of credit, favouring a foreign supplier of cans M/s. Emirates Can Company Ltd., Jebel AW Free Zone, Dubai, it also had placed orders for importing aluminium cans with easy open ends (330 ml) of a quantity of 14,78,200 sets through Invoice No.5750, dated 25.5.98 shipped under Bill of Lading NSAUFGO-71-JJJ N001, dated 25.5.98 to value of Rs.49,07,624/-. It is averred that the Firm transferred the title to said goods under High seas Sales Contract, to the defendant which was confirmed by the letter under its letter dated 8.6.98. The defendant had agreed for payment of a sum of Rs.2,50,000/- towards charges for transfer of the Import licence over and above the value of the goods imported, namely Rs.49,07,624/-. The goods were landed, cleared and stored in the defendant's godown in its factory premises, according to the terms and conditions of the MOU.

5. It is averred that though the defendant agreed not to utilize the materials/goods imported, without the permission and consent of the Firm and without making payment on supplying beer (for the equivalent value), it unauthorizedly and illegally utilized the goods and raw materials. Neither was payment made, nor was any the equivalent quantity of beer supplied to the firm.

6. The firm as C & F Agent for the defendant in the State of Andhra Pradesh, had applied for and obtained all licenses required market the beer in that state in its (defendants) name. The latter had sent only nine truck loads containing a quantity of 2,16,000 cans of beer which was supplied by the firm to the Andhra Pradesh Beverages Corporation Ltd. However, a portion of payments for such supplies was received by the defendant itself and the remaining portion, payable by APBCL was attached by M/s. EICHER Span Financial Services Ltd., (in C.S. No.519/97 on the file of the Madras High Court) against the defendant; the said amount was also appropriated by that company. There was no repayment either in the form of cash or in the form of goods by the defendant to the firm. But at the same

time, the entire materials imported were illegally used or consumed by the defendant.

7. The plaintiff avers that apart from the aforesaid transfer of the cans, the firm had also opened an inland letter of credit for the purchase of shrink film/malt which was also required as raw material for the manufacture of beer. Orders were placed with M/s. Compac Systems for supply of 2000 Kgs. of shrink film and with M/s. Barmalt India Ltd., for 60 mts of malt. Payment was made for such material by the Firm through letter of credit. Those materials were given by the firm to the defendant for the manufacture of beer, in terms of the MOU. The materials were also used by the defendant without the consent or permission of the firm and without effecting supply for the said value as agreed. Accordingly the plaintiff bases its claims in the present suit. The amounts claimed towards aluminium cans are as follows:

Value of 14,78,200 aluminium cans sold as per	
Bank of Ceylon Bank advice	51,70,820.00
ADD : L/C Opening Charges/ Amendment charges, etc.,	36,408,00

	52,07,228.00
 ADD: Service charges at 10%	 5,20,722.00

	57,27,590.00
ADD :	
1. Special Import license charges	
at the rate of 6.5% on Rs.50,00,000/-	3,25,000.00
2. Special Import License charges	
for Rs.90,00,000/- at 3.20%	2,79,000.00
3. The interest thereon from 1.9.98 to	
30.9.99 at 18% p.a.	<u>13,17,092.00</u>
 Total amount due under the head as on 30.9.99	 <u>76,49,042.00</u>

8. The plaintiff avers that the amounts due and payable by the defendant to the firm on account of the financing of shrink film, malt and other incidental and miscellaneous expenses are as follows :-

1.	Value of 2000 kgs. of shrink film supplied by M/s. Compac Systems	1,66,324.00
2.	L/C opening charges/amendment charges/ Bank commission/Insurance	8,522.00
3.	Value of 60 MTS of malt supplied by M/s. Marmalt India Ltd.,	8,07,803.00
	ADD : L/C opening charges	4,4791.00

	Total	9,87,440.00
	ADD Service charges at 10%	98,744.00

	Total c/o	10,86,184.00

ADD :

1.	Amount paid to APBCL towards Earnest Money Deposit on behalf of the Defendant	5,00,000.00
2.	Label Registration fees paid to APBCL on behalf of the defendant	50,000.00
3.	Amount paid to defendant's representative Mr. Kannan	24,000.00
	Interest on the above from 1.9.98 to 30.9.99 at 18% p.a.	3,38,172.00

	Total amount as on 30.9.99	<u>19,98,356.00</u>

9. The defendant's case, in its written statement, is one of general denial. It avers that the general terms as contained in Para 7 the MOU stipulated that it is under the obligation to supply a minimum of 25000 cases per month from 15th April,

1998. In order to meet this obligation, the defendant took the necessary steps to enhance the production capacity of its plant. It invested a huge amount of money on account of enhancing the capacity. However, the plaintiff was to get the necessary permits for sale of beer in its state. The defendant had also entered into another agreement dated 30th May, 1998 with the Plaintiff where it was agreed that it would receive the aluminium cans imported by the plaintiff on behalf of the defendant and would be sent to their factory for storage and bonding in their factory premises for the plaintiff under its charge and hypothecation, after customs clearance, to be supplied to Andhra Pradesh Corporation. It is alleged that the plaintiff defaulted in this regard and the defendant cannot be found fault with.

10. The defendant avers that the plaintiff is under an obligation to pay damages to the defendant for its negligence. It avers that the calculation made by the plaintiff for recovery against the defendant is baseless and has no sanctity in the eyes of law. Due to the acts of omission and commission of the plaintiff, the defendant suffered huge losses. The defendant denies that it was ever evasive and did not fulfil its obligations under the MOU, after utilizing the materials made available to it. It submits that in terms of the agreement signed between the plaintiff and the defendant as on 28.03.1998 the defendant was obliged to arrange permits for APBCL, to remit excise duty amounts and import fees to the State Government.

11. The defendant alleges that the plaintiff failed to arrange required permits for the supply of beer causing thereby serious loss to it. Further according to Clause 9 of part -1 of the MOU the plaintiff had to maintain an office at Hyderabad and to appoint Sales Manager/Representative and other staff required but plaintiff failed to do so against its market. It was further agreed that the materials would be taken out only on condition that the defendant would fill those cans with Stroh's beer and deliver the cans to the plaintiff for distribution within the territory of Andhra

Pradesh. It was also agreed that the defendant was not to sell or deliver the said sealed cans of Stroh's beer to a third party without prior permission from the plaintiff in writing except Andhra Pradesh Market. The plaintiff failed in all its obligations stipulated in the said agreement thereby causing severe loss to the defendant and instead of admitting their fault, the plaintiff chose to demand erroneous amounts which is inadmissible. The plaintiff had to procure permits for the supply of beer within the territory of Andhra Pradesh but it could not arrange for those permits; it never informed the defendant about its inability to do so. The plaintiff did not take care to make arrangements in view of the fact that the goods imported by it on behalf of the defendant for manufacture of beer, had limited shelf life, in spite of their knowledge that if the goods were not consumed within the period, it would become useless.

12. The defendant, which was initially represented and had filed its written statement, later defaulted in the prosecution of its case. It was consequently, set down *ex-parte* by the court, on 4-1-2008. The court noted, on that date, that the defendant was unrepresented on four previous dates, i.e 27-8-2007, 24-9-2007, 4-10-2007 and 1-11-2007.

13. The plaintiff filed affidavit through evidence of its Manager, R. Sam Raj Daniel, who deposed to being authorized to sign and verify the affidavit and other documents through a Board resolution dated 21st January 2008 of the Plaintiff Company, marked as Ex. PW1/1. PW-1 verified that Shri Albert Chakkaravarthy S/o Mr. S. Albert one of the directors of the Plaintiff Company had signed the plaint before him; it was identified at Point A, of Ex. PW 3/2. The witness deposed that the Plaintiff was incorporated on 16.11.1998 with the Registrar of Companies, Tamil Nadu, and had taken over the entire business, assets and liabilities of the Firm. The Certificate of Incorporation of the Plaintiff Company was exhibited as Ex. PW1/2.

The Memorandum of Association and Articles of Association of the Plaintiff Company were exhibited as Ex. PW1/3. He also deposed about being personally acquainted with the facts.

14. According to PW-1, the Defendant was engaged in the business of manufacturing beer under the brand name 'STROHS', for which it needed finance. The Defendant approached the firm, which was its cost and freight agent for the territory of Andhra Pradesh, for the purpose of obtaining such finance and the firm agreed to provide it subject to certain terms and conditions. The MOU dated 22.05.1998 was accordingly executed; it was marked in evidence as Ex. PW1/4. In terms of the said document, the Firm was to open letters of Credit to the maximum sum of Rs.1.5 crore for and on account of the defendant in favour of suppliers of raw materials to the Defendant, to be used for production at its factory. The firm was to have exclusive charge, control and possession of the raw materials and they could not to be used for any purpose other than manufacture of beer at the Defendant's factory. The witness also deposed about the conditions in the agreement, and the defendant, in its terms having issued two Powers of Attorney in favour of the Firm which were received by the Firm; they were exhibited as Ex. PW 1/5.

15. The witness also deposed that the Firm had opened Letters of Credit from M/s. Bank of Ceylon, Chennai Branch, in favour of a foreign supplier of cans M/s. Emirates Can Company Ltd., Jebel AW Free Zone, Dubai, and the Firm had placed orders for importing 14, 78, 200 sets of aluminium cans with easy open ends (and capacity of 330 ml). These were purchased under invoice No.5750 dated 25.05.1998, and were shipped under Bill of Lading NSAUFGO-71-JJJ N001, dated 25.05.1998 at a value of Rs.51,70,820/-. They were paid for by the Firm through its letter of credit. The original Bank receipts were exhibited as Ex. PW1/7 (Collectively). The Firm had then entered into a High Seas Sales Contract with the

Defendant for the sale of the above mentioned aluminium cans to it. The High Seas Sales Contract was sought to be exhibited as Ex. PW1/8; however, it could not be marked, since its original was not produced. The witness deposed that Defendant was bound to make payment for the sale of cans to it. In addition, the Defendant was bound to pay a sum of Rs.2,50,000/- towards charges for the transfer of the import licence effected by the firm. These liabilities were sought to be established through the defendant's letter to the firm, dated 08.06.1998, exhibited as Ex. PW1/9. A hypothecation agreement dated 30th May 1998 was also entered into between the Defendant and the Firm; it was marked as Ex. PW1/10.

16. According to PW-1, on landing, the cans were stored at the godown earmarked for the Firm, in the defendant's factory premises, in terms of the agreement. Yet, in violation of the agreed terms of the MOU and the hypothecation agreement, the Defendant utilized the goods without either the consent of the Firm, or making any payment to it, or supplying equivalent amount of beer. PW-1 also stated that in addition, in its capacity as C & F Agent of the Defendant for the territory of State of Andhra Pradesh, the firm had obtained licenses for the marketing of the Defendant's beer in that State. Nine truck loads of beer containing 2,16,000 cans were supplied by the Firm to the Andhra Pradesh Beverages Corporation Ltd., but a portion of the payment for such supplies was received by the Defendant and the remaining portion payable by APBCL was attached by M/s. BICHER Span Financial Services Ltd., in C.S. No. 519/1997 in the High Court of Madras, and was appropriated by the APBCL. Thus, the firm received no payment for services rendered by it.

17. PW-1 deposed that the Firm had opened an inland Letter of Credit for the purchase of shrink film/ malt (raw materials in the manufacture of beer). An order was placed by the Defendant on M/s Compac Systems for the supply of 2000 Kg. Of

shrink film and another order was placed by it on M/s. Bar Malt India Ltd., for 60 mts of malt, and payment was made by the Firm through its letter of Credit. The original Bank receipts in this regard were marked as Ex. PW1/11. However, these materials were also wrongly utilized by the Defendant without the Firm's permission and without any payment to it. He deposed that despite repeated requests and reminders from the firm, the Defendant failed to make payment in respect of its liabilities towards the firm in relation to the supply of 14,78,200 aluminium cans, sale of 2,16,000 cans to APBCL and the supply of shrink film dated 04.10.2000 and five debit notes raised on the Defendant by the Firm, in respect of its liability towards supply of shrink film/malt. The debit notes were exhibited as Ex. PW1/12, Ex. PW1/13, Ex. PW1/14, Ex. PW 1/15, Ex. PW1/16, Ex. PW1/17, Ex. PW1/18. PW-1 exhibited, a letter dated 30.09.1999 and a letter dated 04.10.2000 along with five debit notes raised on the Defendant by the firm, in respect of its liability towards supply of aluminium cans as Ex. PW1/19, Ex. PW1/20, Ex. PW1/21, Ex. PW1/22, Ex. PW1/23, Ex. PW1/24, Ex. PW1/25.

18. According to PW-1, a letter dated 04.12.1999 was also sent to the defendant by the Firm demanding payment for its various liabilities but instead a response was received vide letter of the defendant dated 14.12.1999 denying its liability on untenable grounds. A copy of the letter dated 14.12.1999 was exhibited as Ex. PW1/26. A legal notice dated 01.06.2000 was then sent to the Defendant by the Firm, demanding payment towards supply of aluminium cans to it, which is exhibited as Ex. PW1/27.

19. The above factual narrative shows that the plaintiff's claims for the sum of Rs. 1,27,57,362/- are divided into two parts; one concerns the amounts payable by the defendant towards the credit extended for importing cans. This is premised on the basic sum of Rs.51,70,820.00. To this, the plaintiff has added L/C Opening Charges/

amendment charges etc. being Rs. 36,408,00 to arrive at the figure of Rs.52,07,228.00. It has then claimed service charges at 10% which is Rs. 5,20,722.00, leading to a figure of Rs. 57,27,590.00. It thereafter claims special import license charges at the rate of 6.5% on Rs.50,00,000/-, i.e. Rs. 3,25,000.00; special import license charges for Rs.90,00,000/- at 3.20%, working out to Rs. 2,79,000.00 and claims an overall interest from 1.9.98 to 30.9.99 at 18% p.a (Rs.13,17,092.00). The grand total on this head of claims is thus worked out at Rs. 76,49,042.00 (Rupees seventy six lakhs, forty nine thousand, and forty two only). The plaintiff has been able to establish that Rs. 51,70,820 was credited under advice of the Bank of Ceylon; it has relied upon Ex. PW-1/7. However, the claims as far as service charges at 10%, and special import license for Rs. 50,00,000/- and Rs. 90,00,000/- have not been established through any documentary or credible evidence. The agreement between parties does not mention that the plaintiff was entitled to charge such 10% amount. Its claim for a percentage of the value of import, as import license fees could have been sustained, if some materials had been disclosed to the court, that such sums were actually paid, or incurred. As far as Rs. 36,408/- being bank charges for the letter of credit are concerned, although no account is shown, yet the amounts can be accepted as a reasonable expense for the credit made available to the defendant. The plaintiff has therefore, been able to establish its entitlement to Rs. Rs.52,07,228/-.

20. As regards the other heads of claim, the plaintiff has shown the value of 2000 kgs. of shrink film supplied by M/s. Compac Systems as Rs. 1,66,324/-; this too is part of Ex.PW-1/7. The L/C opening charges/amendment charges/Bank commission/Insurance on this head is Rs. 8,522/-. Similarly, the value of 60 MTS of malt supplied by M/s. Marmalt India Ltd. is Rs. 8,07,803/-. The L/C opening charges on this head are Rs.4,4791/-. The total of these amounts claimed is Rs. 9,87,440/-.

The plaintiff has proved this through Ex.PW-1/7. However, other amounts such as 10% service charges; Rs. 5,00,000/- paid to APBCL towards Earnest Money Deposit on behalf of the Defendant; Label Registration fees paid to APBCL on behalf of the defendant, (Rs. 50,000/-) and the sum of Rs. 24,000/- paid to the defendant's representative, Mr. Kannan are unsupported by any evidence.

21. From the above discussion, it is apparent that the plaintiff has proved its case, to the extent of Rs. 61, 94,628/- (Rupees sixty one lakhs, ninety four thousand six hundred and twenty eight only). The defendant has not denied the nature of transaction, or even that the amounts were spent for its purpose, by the plaintiff. Its defense is to level unspecific general allegations against the plaintiff, in the performance of the other contract. That contract has not been placed on record. The defendant does not show how its terms were interrelated with the conditions spelt out in the MOU or the other arrangements, brought on record by the plaintiff. There is no doubt that the transaction between the parties was a commercial one. The plaintiff's amounts were blocked, and the defendant has made no attempt to return them all these years. The plaintiff is therefore entitled to 15% interest on the said amounts.

22. The plaintiff is therefore entitled to succeed against the defendant, to the extent of Rs. 61, 94,628/- (Rupees sixty one lakhs, ninety four thousand six hundred and twenty eight only). The defendant, in addition, is liable to pay *pendente lite* and future interest @ 15% on the said amount, till its realization.

23. The suit is accordingly decreed in favour of the plaintiff, in the above terms, against the defendant, with costs. Advocate's fee is quantified at Rs. 30,000/-.

DATED: 3rd March, 2008

S. RAVINDRA BHAT
JUDGE