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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) No.1452/2000

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23rd November, 2012

UNIVERSAL GLASS & ANR.

..... Plaintiffs

Through: Mr. Anil Airi with
Ms. Simar K. Narula &
Ms. Shreya Bhandari, Advs.

VERSUS

KANUDIA BEVERAGES LTD. & ORS.

..... Defendants

Through: Ms. Garima Prasad, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The present suit has been filed by the plaintiffs/sellers of glass bottles, for recovery of Rs.34,52,683/- against the buyer/defendant no.1. Of the total amount claimed the amount of Rs.20,99,570/- is the principal amount. The defendant no.2 is pleaded to be liable jointly and severally with

the defendant no.1 inasmuch as defendant no.2 is stated to have also undertaken to pay the amount to the plaintiffs.

2. The facts of the case are that the plaintiffs are manufacturer of glass bottles. The defendant No. 2 is a multi-national company which sells soft drinks, including in glass bottles. The defendant No. 2 has various franchisee, and one such franchisee was the defendant No. 1. The defendant no.1/franchisee therefore required bottles for bottling the soft drinks, and which were thereafter to be sold in the market. The defendant No. 3 is bottler of the buyer/defendant No. 1. During months of June and July 1997, the plaintiff sold 3,57,000 bottles in 14,875 crates/cases to the defendant No. 1. The defendant No. 2-company was interested to ensure that its business does not suffer on account of non-supply of bottles, and it had therefore undertaken to the plaintiffs vide the letter dated 24.06.1997 to make payment to the plaintiffs for the bottles. After the supply of the bottles, for the value of which this suit is filed, disputes and differences arose as the defendant No. 1 claimed that the bottles which were sold by the plaintiffs to the defendant No. 1, and which were further given to the defendant No. 3 for bottling of the soft drinks, were defective. The defectiveness arose as per the case of the defendant No. 1 on three counts. The first count was that

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there was breakage during transportation of the bottles from the plaintiffs to the defendant No. 1/defendant No. 3. The second reason for the defective bottles is alleged to be that during the bottling of the soft drinks on account of bad quality of bottles there was breakage and hence such bottles had to be discarded. The third and final reason was that after the bottled soft drinks were sold by the defendant No. 1 to its distributors it transpired that gas had leaked out from the bottles on account of defective quality of the bottles. The defendant No. 1 has therefore prayed for dismissal of the suit.

3. I note at the outset that neither the defendant No. 2 nor the defendant No. 3 have appeared in these proceedings. They have not filed their written statements and, therefore, also have led no evidence. They have been proceeded ex parte. The suit is only contested by defendant No. 1/buyer.

4. The following issues were framed in this suit on 07.05.2007:-

- “1. Whether the plaint is signed and verified and the suit instituted by a duly authorized person? OPP
2. Whether defendant no.1 is not liable to the plaintiff for the bottles supplied to the defendants? OPD-1
3. Whether the defendants were entitled to adjust any amount on account of defective bottles? If so, the extent thereof? OPD.

4. Whether the plaintiff is entitled to recover any balance amount on account of the bottles sold? If so, against which of the defendants and the amounts thereof? OPP
5. Whether the plaintiff is entitled to any interest? Is so, at what rate, on what amount and for which period? OPD
6. Relief.”

Issue No.1

5. This issue is not pressed on behalf of the defendant No. 2 and it is therefore decided in favour of the plaintiffs.

Issue Nos. 2 to 4

6. Issue Nos. 2 to 4 can be disposed of together inasmuch as they pertain to the liability alleged by the plaintiffs of the defendant Nos. 1 and 2 and the denial thereof.

7. So far as the issue as to whether defendant No. 2 is jointly or severally liable with the defendant No. 1, there is one document being the letter dated 24.6.1997 of the defendant no.2 to the plaintiffs, and which has been proved and exhibited as Ex. PW-1/4. This letter specifically states that the defendant No. 2 will make the payment of the bottles sold to the defendant No. 1. Therefore, reading of this letter shows that the defendant no.2 did undertake and made itself liable for making payments of the bottles.

However, this does not mean that the liability of the defendant No. 1 as buyer of the goods stood wiped off. The defendant No. 1 is the main contracting party with the plaintiffs, and therefore, the defendant no.1 as the seller was in law bound to make payment to the plaintiffs/sellers. In the letter Ex. PW-1/4, there is no language that since the payment is to be made by the defendant No. 2, the defendant No. 1 will be no longer liable. Therefore, in my opinion, this letter only contains an additional liability taken upon itself by the defendant No. 2 to make payment, and which will make the defendant No. 2 jointly and severally liable with the defendant No. 1, who in law is liable as the buyer of goods under a contract with the plaintiffs. I, therefore, hold that both the defendants no. 1 & 2 are jointly and severally liable in case of any dues which are found by this judgment to be payable to the plaintiffs.

8. On the aspect that the defendant No. 1 has received the bottles, the same is not in dispute. The plaintiffs have mentioned the factum with regard to supply of bottles in paras 11 and 12 of the plaint and the defendant No. 1 does not dispute that the bottles i.e. which are 3,57,000 in number were duly supplied. What the defendant No. 1 claims is that the bottles were defective for the three reasons as stated in the narration above. Let us

examine each of these three defences of the defendant No. 1 inasmuch as the onus of proof that the bottles were defective is on the defendant No. 1 which has taken these defences. If the onus is not discharged by the defendant No. 1, then, the defendant Nos. 1 & 2 would be liable for value of the 3,57,000 bottles supplied on such lesser amount after giving adjustment for value of defective bottles.

9. So far as the first aspect of breakage during transportation is concerned, the plaintiffs have filed two inspection reports dated 20.08.1997 and 22.08.1997. These two inspection reports have been exhibited as Ex. PW-1/12 and PW-1/12A. These inspection reports have been prepared at the premises of the bottler of the defendant no.1 i.e the defendant No. 3 and in the presence of the representative of the defendant No. 2. The requirement of inspection of the premises of defendant no.3 was because defendant no.3 had complained to the defendant no.1 that the bottles received by defendant no.3 on behalf of the defendant no.1 from the plaintiffs were defective as there was breakage on the counts of transportation breakage and defective quality breakage. As per the inspection report Ex.PW-1/12, 7632 bottles are found to have been broken during transportation. The value of such bottles numbering in 7632 is Rs.44,876/- i.e. 7632 multiplied by Rs.5.88 per bottle.

Therefore, from the principal amount of Rs.20,99,570/-, this amount of Rs.44,876/- shall stand reduced. The next inspection report which is Ex. PW-1/12A does not pertain to any breakage of bottles during transportation and it pertains to breakage of bottles during filling up of the soft drinks. This document will therefore be considered immediately hereafter under the heading of adjustment entitlement of the defendant No.1 for the bottles which have broken during the filling up process by the defendant No.3, the bottler of the defendant No.1.

10. It was the case of the defendant No.1 that its bottler/defendant No.3 complained to it that various bottles were found to have been broken during the process of bottling of the soft drinks in the factory of defendant No.3. There are various letters which were exchanged between the defendant No.1 and the plaintiff no.1 in this regard, however, I need not refer to all of them and it is sufficient to refer to three of the letters/ documents which would decide this issue. The first is the letter of the defendant No.3 to the defendant No.1 dated 26.5.1998 and which has been proved and exhibited as Ex.DW1/20. This letter is found to have been written almost one year after the supply having been affected during June and July, 1997. Though the counsel for the plaintiff sought to dispute the

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contents of this letter, however, since the plaintiffs themselves have filed the debit note raised by the defendant No.1 upon the plaintiffs Ex.PW1/13 for the amount as stated in Ex.DW1/20 of ₹ 1,83,372/-, I am inclined to accept the letter Ex.DW1/20. Of course, there is an issue raised by the plaintiffs as to how a debit note of the defendant No.1 raised on the plaintiffs could be of 24.1.1998 when Ex.DW1/20 is later in point of time i.e 26.5.1998, however, in my opinion, not too much of a controversy can be raised on this because probably it appears that the debit note contains a typing mistake as to the date and possibly the correct date may have been 24.1.1999. In any case, since the plaintiffs themselves have filed and proved the debit note for the amount in question thus it means that this debit note was in fact raised upon the plaintiffs by the defendant No.1 for the amount of ₹ 1,83,372/-. Since there is the inspection report dated 22.8.1997 (Ex.PW1/12A) filed by the plaintiffs themselves, and which report does mention the defectiveness of the bottles at the point of time of filling up of the soft drink at about 0.39% of the number of the bottles, in my opinion, the claim of the defendant No.1 upon the plaintiffs for defective bottles of Rs.1,83,372/- stands proved.

Therefore, as a result of allowing of two heads of claim of

Rs.44,876/- (for breakage during transportation) and Rs.1,83,372/- (for
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breakage during filling), the defendant No.1 will hence be entitled to an adjustment of a total amount of Rs.2,28,248/- which will be reduced from the principal amount claimed by the plaintiffs.

11. The final issue which now remains is as to whether the defendant No.1 is entitled to the claim on account of alleged defectiveness of bottles resulting in the leakage of the gas contained in the soft drinks which came to notice after selling the bottles. Counsel for the defendant No.1 has drawn the attention of this Court to a letter dated 10.3.1998, Ex.DW1/13, written by the defendant No.1 to the plaintiffs in support of the defence. However, this letter, in my opinion, cannot be said to be proved inasmuch as except making an oral statement that this letter was sent to the plaintiffs, there is no proof that this letter was ever received by the plaintiffs. This letter Ex.DW1/13 contains a heading of having been sent by registered AD, however, neither any registered postal receipt has been filed nor has been filed the AD card with respect to this letter. Also, there is no mention of this letter in any of the correspondence which has been exchanged between the plaintiffs and the defendant No.1.

12. Counsel for the defendant No.1 then sought to place heavy reliance upon the letter of the plaintiff No.1 to the defendant No.1 dated CS(OS) No.1452/2000

15.4.1998, Ex.PW1/14A to prove the defective bottles issue as noticed by the distributors of the defendant no.1. It is argued on the basis of this letter that the defendant No.1 is entitled to reduction of price of 3517.41 cases of bottles i.e approximately 84449 bottles. Since the language of this letter is relevant I would like to reproduce the same in its entirety and it reads as under:-

“15th April 98

UG/Sales/98/

M/s Kanudla Beverages
365, Harris Ganj
Kanpur-208 004

Kind Attn: **Mr. Ashok Sharma –Vice President**

Sub: **300 ML. sport Cola Glass Bottles**

Dear Sir,

We thank you for the kind courtesy extended to our Mr. Naresh Gupta – Manager (Q.C.), Mr. Ahsok Mathur (Adviser-Marketing & Sales) and the undersigned on 10/11th April 1998 at Kanpur.

As per the discussions, we would like to enumerate the following points :-

- 1) As per the visual inspection carried out at your Godown at Kanpur, we had noted the following:-
 - a) Empty stock of Sport Cola Bottles 3517.41 cases (84448 Bottles)

2) Since you will take another one month to get your plant ready for production, you are unable to run the bottles on the line and observe gas leakage, if any, as reported by you. However, it was decided in consultation with Mr. Dinesh Satti of Cadbury Schweppes and your General manager-Mr. Goswamy that you will be agreeable to run these bottles at your plant at your convenience to ascertain the problem of Leakage of Gas. This conclusion was arrived, because the above stock which was filled at Prem Nath Monga & Sons, Meerut and Shipped to you for distribution was checked thoroughly at Meerut by our Q.C. team alongwith Mr. Satti where the Joint Report mentioned the Gas Leakage as 0.39% (Report enclosed for your reference). This report has been as per the observation while your bottles were being filled at Meerut.

3) As agreed with your Mr. Goswamy, you will be collecting all other Sport Cola Bottles lying at your Lucknow Godown and the same is to be brought to your Kanpur Godown by 30th April for our Inspection and this would be the final figure which we will take into account for replacement, **if any**, for the defective bottles.

4) We have agreed to supply you 4000-5000 cases of any flavour, if you desire, at the time of inauguration of your factory. For this purpose, we request you to please send us advance payment by way of D.D. as agreed.

5) Since you have shown us the stock (3517.41 cases) which **may be defective**, we request you to please hold up the payment only for this and release the balance amount to us immediately.

Thanking you and assuring you of our best services at all times,

Yours faithfully,
for UNIVERSAL GLASS”

(Emphasis added)

13(i). A reading of the aforesaid letter shows that all the plaintiffs said in this letter is that there is a doubt with respect to the quality of bottles contained in 3517.41 cases which will be examined. There is no admission that the bottles contained in 3517.41 cases are actually defective. All that the plaintiffs said is that if such number of cases containing the bottles are defective, then, qua that defective bottles, the payment can be kept pending, and, that should not entitle the defendant No.1 to stop the balance payment with respect to other cases of bottles supplied.

(ii) In my opinion, the fact that the marketed bottles were not defective becomes clear from the fact that pursuant to the letter Ex.PW1/14A dated 15.4.1998 the plaintiff No.1 wrote four communications dated 27.6.1998, 4.7.1998, 11.8.1998 and 18.8.1998, Ex.PW1/15, Ex.PW1/15A, Ex.PW1/15B and Ex.PW1/15C respectively to the defendant no.1 whereby the plaintiff No.1 repeatedly asked the defendant No.1 to fix a date for inspection of the bottles which were lying at the Lucknow godown of the defendant No.1. Inspection was to be done to determine the issue of defective bottles. However, there was no response by the defendant No.1 to these letters and no date of inspection was fixed by the defendant no.1.

Once the defendant No.1 failed to respond to these letters and failed to fix a
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date for inspection of the bottles, which were lying at the Lucknow godown, and thus there was no examination as to defectiveness of the bottles contained in 3517 cases as stated above, on a preponderance of probabilities, it is held that there were no bottles which were found to be defective after selling of the soft drinks in the market. I may add that if really the bottles sent in the market, i.e to the distributors of the defendant No.1, were defective because gas had leaked from the same on account of lack of requisite quality of bottles, then, the defendant No.1 would have surely received various letters of its distributors pointing out to the defective quality of the bottles, however, admittedly not a single document or letter of the distributors of the defendant No.1 to the defendant No.1 has been filed to establish that the distributors of the defendant No.1 had told that the bottles which were supplied by the defendant No.1 were defective and gas from the soft drinks was leaking from the bottles.

(iii) Counsel for the defendant No.1 argued that the defendant No.1's witness Sh. Ashok Sharma as DW-1 has deposed in his affidavit of the bottles in the market being defective on account of leakage of gas, however, in my opinion, mere oral statement in a case such as the present, and more so when there has been exhaustive cross-examination of this

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witness that no such defect exists, cannot mean that there results discharge of onus of proof which was upon the defendant No.1. I may also state that when this witness was put a specific question with respect to the letters of the plaintiff No.1 Ex.PW1/14A, Ex.PW1/15A to Ex.PW1/15C, this witness could not deny that no date was fixed by the defendant No.1 for examining the alleged defective bottles from which the gas had leaked.

14. I accordingly hold that whereas the defendant No.1 is entitled to adjustment only for a sum of Rs.2,28,248/- on account of first two heads of defences of breakage of the bottles in transportation and breakage of bottles during the filling up of the soft drinks, and, the defendant No.1 is not entitled to any adjustment for any alleged losses which have been caused on account of leakage of gas after supply of the bottles containing the soft drinks in market.

Issue No.5

15. Though the transaction is a commercial transaction, however since the defendant No.1 has proved some valid disputes raised by it with respect to defectiveness of part of the supply, I am not inclined to grant any pre-suit interest to the plaintiffs. The plaintiffs, however, will be entitled to pendente lite and future interest till payment @ 12% per annum simple.

Relief.

16. In view of the above discussion, the suit of the plaintiffs is decreed against the defendant Nos.1 and 2, and whose liability will be joint and several for a sum of Rs.20,99,570 minus Rs. 2,28,248 i.e. Rs. 18,71,332/-. Plaintiffs will also be entitled to pentente lite and future interest @ 12% per annum simple on this amount of ₹18,71,332/-. Parties are left to bear their own costs. Decree sheet be prepared.

VALMIKI J. MEHTA, J

NOVEMBER 23, 2012
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