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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : January 20, 2012*
Judgment Pronounced on: January 30, 2012

+ RFA(OS) 17/2002

ELOF HANSSON (I) PVT. LTD. & ANR. Appellants
Through: Mr.Darpan Wadhwa, Ms.Seema Sundd,
Ms.Shikha Bhardwaj, Ms.Ritika Ahuja,
and Ms.Jai Shree Shukla, Advocates.

versus

SHREE ACIDS & CHEMICALS LTD. Respondent
Through: Mr.Nikhilesh Krishnan, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. An ex-parte decree dated 05.02.2002 is challenged by the appellants, and suffice would it be to state that since the appellants did not participate at the trial, the fate of the appeal would be decided with reference to the pleadings in the plaint and the ex-parte evidence led at the trial.

2. We therefore commence our journey by noting the relevant averment in the plaint. They are to be found in paragraphs 3 to 7 of the plaint, which we shall be soon reproducing, but before that would highlight that the respondent 'Shree Acids & Chemicals Ltd.' was the plaintiff and the appellants were the defendants in the suit. The two appellants are: 'M/s.Eloff Hansson (India) Pvt. Ltd.' impleaded as defendant No.1 and 'M/s.Eloff Hansson Abforsta Sweden'

impleaded as defendant No.2. Paragraphs 3 to 7 of the plaint read as under:-

“3. The defendant No.1 is a Private Limited Company and has its registered office at 907, Vikram Towers, 16, Rajendra Place, New Delhi-110008. The defendant No.2 is a Public Limited Company incorporated in Sweden and has its registered office at FORSTA LAUGGATON-17, S-41380, GOTEBARG, SWEDEN. The defendant No.1 is a wholly owned subsidiary company of the defendant No.2.

4. The defendant No.1 vide its letter dated 8th January 1997 had offered to supply mixed waste (hard mixed) to the plaintiff company. The defendant No.1 represented that the mixed waste will be imported from USA; that it can supply 300 MT of such mixed waste within January/February 1997 at the rate of US\$75 Per MT, that the supply can be made against the Letter of Credit to be opened by the plaintiff Company in favour of M/s.Espee Trading Corporation, 1359, Broadways, Suit No.2210, NY 110018, New York, USA. The defendant No.1 specifically assured that the mixed waste will be of good quality.

5. Believing the representations made by the defendant No.1, the plaintiff company placed an order for 100 MT of mixed waste and also opened a letter of Credit No.9018-N/97 with PUNJAB NATIONAL BANK, ECE House, Connaught Place, New Delhi, in favour of M/s.Espee Trading Corporation as required by the defendant No.1.

6. Vide its letter dated 15.1.1997, the defendant No.1 required the plaintiff company to amend the letter of Credit to cover 200 MT of mixed waste i.e. for US\$ 15000 (Fifteen thousand only) as the goods had already been containerized. Accordingly, the plaintiff company got the L/C amended for US\$ 15000. The shipment for 171.985 MT arrived at Mumbai on or about 15th April 1997. The goods were got cleared

by the plaintiff company after payment of requisite custom duties and other charges amounting to ₹54,824/- (Rupees Fifty four thousand eight hundred twenty four only) and ₹1,37,600/- (Rupees One Lakh Thirty Seven thousand Six hundred only) respectively. However, when the goods were decontainerized and were loaded in the trucks, it was revealed that the mixed waste was bad. It contained high percentage of moisture. Out of the total goods received, 56.220 MT was sent by the plaintiff company to the factory of M/s.Shree Industries Limited, situated at Ahmedabad Kandla Highway, Village Rajoda, Bavla, Ahmedabad, Gujrat and rest of the material was transported to its factory at Gajraula. The plaintiff company spent an amount of ₹1,91,369/- (Rupees One Lakh Ninety One thousand three hundred sixty nine only) in transporting the goods to its own factory and also to the factory of M/s.Shree Industries Ltd.

7. Immediately complaints regarding the material were brought to the notice of the defendant No.1 and it was required to send its representative to inspect the material at Bavla as well as Gajraula. In spite of repeated efforts, the defendant No.1 took no steps to get the material inspected till 1st week of May 1997. Even in the first week of May 1997, it got inspected the material lying only at Bavla factory and on inspection, complaints made by the plaintiff company were found correct. The material not only contained high percentage of moisture but also contained various other defects and as a result thereof, out-throw was as high as 30% to 50%. The plaintiff company also requested the defendant No.1 to get the material inspected at Gajraula but till date it has not done so. Vide its letter dated 13th May 1997, the defendant No.1 informed the plaintiff company that in view of the complaints made by it in the material, M/s.Espee Trading Corporation will divert the quantity elsewhere within 10-15 days time. The defendant No.1 also offered the claim of US\$ 5130 in case

the plaintiff company accepts the material as it is. However, no breakup whatsoever was given of the said amount.”

3. A perusal of the aforesaid paragraphs of the plaint would reveal that qua defendant No.1 it was pleaded in the plaint that it is a private limited company incorporated in India and was the wholly owned subsidiary company of defendant No.2, registered in Sweden. It is further pleaded against defendant No.1 that it represented that 300 MT of mixed waste could be supplied against Letter of Credit to be opened in the name of M/s.Espee Trading Corporation, 1359, Broadways, USA and that, as pleaded in paragraph 5, the plaintiff placed an order for 100 MT mixed waste and opened an LC in favour of M/s.Espee Trading Corporation. It is further pleaded that the goods supplied were defective.

4. The only averment qua defendant No.2 is that it is the holding company of defendant No.1.

5. Section 230 of The Indian Contract Act, 1872 reads as under:-

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.— In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.—Such a contract shall be presumed to exist in the following cases:-

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal;
- (3) where the principal, though disclosed, cannot be sued.

6. The said Section was interpreted by the Supreme Court in the decision reported as AIR 1962 SC 538 Radhakrishna Sivadutta Rai & Ors. vs. Tayeballi Dawoodbhai, and as per the language of the Section which admits of no two meanings, an agent who acts on behalf of a principal is not personally liable unless there is a contract to the contrary. As per the three presumptions listed in the Section aforesaid to the exception to the rule that an agent who acts on behalf of a principal is not personally liable, the presumptions to support a contract to the contrary would be where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad, or where the agent does not disclose the name of the principal and lastly when the principal though disclosed cannot be sued.

7. The pleadings in the plaint would reveal that vis-à-vis defendant No.1 it has specifically been pleaded by the plaintiff that at the instance of defendant No.1 the plaintiff agreed to import goods to be exported from USA by M/s.Espee Trading Corporation on whom the Letter of Credit was to be opened and was opened. Though not pleaded in the plaint as to what was the role of defendant No.1, it is apparent from the pleadings that the case of the plaintiff was that defendant No.1 was acting on behalf of M/s.Espee Trading Corporation i.e. was the agent of M/s.Espee Trading Corporation. The plaint would reveal that the transaction between the plaintiff and M/s.Espee Trading Corporation was on principal-to-principal basis. It is a case where the defendant No.1 has expressly acted as an agent of the disclosed principal i.e. M/s.Espee Trading Corporation. It is not the case pleaded that though the

principal was disclosed, the principal cannot be sued. Even the documents proved at the ex-parte evidence led by the plaintiff would show that the defendant No.1 had always made it clear that M/s.Espee Trading Corporation was the principal and alone was liable under the contract. We note one such letter filed by the plaintiff which is dated 01.08.1997 written by defendant No.1. This is the letter of offer which triggered the contract. It reads as follows:-

"DT.: 1997 01 08
M/s.Shree Acids And Chemicals Ltd.
Azadpur Mandi,
Delhi.

Kind Attn.: Mr.Sandeep Mittal, JMD

Sub: Contract for 300 MT Mix Waste (Hard Mix).

Our Principals confirm having agreed to ship above quantity as discussed with you in Delhi. On behalf of our principals M/s.Espee Trading Corpn. USA we are giving hereunder the terms and conditions of the supply:-

Product : Mixed Waste (Hard Mix)

Origin : USA

Quantity: 300 MT with permissible variation of + -10%
USD 75/MT + interest @9%/annum for a
period of maximum 180 days from B/L date.

Price basis: CIF Bombay by sea.

Shipment: Jan/Feb. 97

Payment: By an irrevocable telex operative Letter of
Credit opened through any bank in New York
and payable at the counters of negotiating
Bank in New York.

LC to be advised through Bank of India, 277
Park Avenue, New York, NY 10172 USA.

L/C SHOULD INDICATE FOLLOWING SPECIFIC CLAUSE

DRAFTS DRAWN ON NEGOTIATING BANK IN NEW YORK
ACCEPTABLE AND L/C MUST AUTHORISE THE
NEGOTIATING BANK TO CLAIM REIMBURSEMENT ON DUE
DATE BY DEBITTING THEIR ACCOUNT MAINTAINED WITH
THEM (OR) OTHER BANK IN NEW YORK.

Beneficiary: M/s.Espee Trading Corpn. 1359 Broadway
Suit No.2210, NY 1100 18, New York USA.

LC to permit : Part shipment & Transhipment.

LC validity : LC should be void for 60 days for
shipment from L/C opening date and 25
days from B/L date for negotiation.

Validity : This contract is valid for establishing L/C
on or before 20th Jan. 97.

Kindly establish the L/C at your earliest and let's have
the particulars per return.

With best regards.

K M R NAMBIAR
ASTT. MKTG. OFFICER"

8. For reasons unknown, the plaintiff has not sued
M/s.Espee Trading Corporation. The appellant No.1 i.e.
defendant No.1 has clearly acted as the agent of a disclosed
principal and that the principal alone is liable under the
contract thus would not be personally liable for any breach by
its principal. As regards appellant No.2, we do not find any
averment that on lifting the corporate veil of defendant No.1, it
is actually defendant No.2 who was conducting the business.

Thus, qua defendant No.2 the suit has to fail for the reason, the suit fails against defendant No.1 and assuming the corporate veil of defendant No.1 was liable to be lifted, it would not be liable at all and secondly for the reason, there are no pleadings that the corporate veil of defendant No.1 needs to be lifted.

9. The appeal has to be allowed and the impugned decree has to be set aside, but before bringing the curtains down we would note the observations of Lord Denning (MR) in the decision reported as 1968 (2) QB 545 Tehran-Europe Co. Ltd. vs. ST Belton Tractors Ltd. wherein he observed that the principle of law evolved over 200 years ago (which finds itself reflected in Section 230 of The Indian Contract Act, 1872) was out of sync with modern business practices and was thus to be ignored.

10. But that is for the legislature to look into.

11. The appeal is allowed. Impugned judgment and decree dated 05.02.2002 is set aside and the suit filed by the respondent against the appellants is dismissed, leaving the parties to bear their own costs.

12. Amount deposited by the appellants with the Registry of this Court, pursuant to interim orders passed, if not already returned to them, would be returned with interest accrued thereon and the cheque would be drawn in the name of appellant No.1, alternatively, the Registry may endorse the FDR in the name of appellant No.1 and this would absolve the Registry from the liability to pay half-and-half to the appellants.

13. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JANUARY 30, 2012
Dk.