

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

+ **IA No. 8109/2011 in CS(OS) 437/2011**

%

Reserved on: 26th September, 2013

Decided on: 21th October, 2013

M/S PARK SIDE LIMITED

..... Plaintiff

Through: Mr. Anupam Srivastava, Mr. Anil
Kumar Chandel and Mr. Chandra
Shekhar, Advocates.

versus

M/S BLUES LUXURY IMPEX PVT LTD

..... Defendant

Through: Mr. Sidharth Dutta, Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

IA No. 8109/2011 (u/Order XXXVII Rule 3 CPC by Defendant)

1. By this application under Order XXXVII Rule 3 CPC the Defendant seeks leave to defend.

2. Learned counsel for the Defendant contends that a summary suit under Order XXXVII CPC can be based only on a written contract and all invoices cannot be deemed to be a written contract. Invoices relied upon by the Plaintiff do not have the necessary terms of agreement. The invoice only gives number of articles and the value thereof. Neither the brand name nor the quality of the goods is mentioned. Further particulars of sellers, terms of supply, and place of supply are not mentioned. Thus no terms of contract are incorporated in the invoices and only term of payment is noted. Being

devoid of terms and conditions of the contract, the invoices cannot be said to be a binding contract. The decision in *M/s Lohmann Rausher Gmbh vs. M/s Medisphere Marketing Pvt. Ltd*, 2005 (80) DRJ 9 relied upon by the Plaintiff is not applicable to the facts of the present case. Hence the Defendant is entitled to grant of leave to defend. Reliance is placed on *M/s Sunil Enterprises and another vs. SBI Commercial and International Bank Ltd.*, 1998 (5) SCC 354; *Bharat Forge Ltd. vs. Onil Gulati*, 121 (2005) DLT 357; *A.R. Electronic Pvt. Ltd. vs. R.K. Graphics Pvt. Ltd.* 97 (2002) DLT 913; and *Simba F.R.P. (P) Ltd. vs. Department of Tourism, Lucknow, Uttar Pradesh*, 1995 (34) DRJ 273.

3. Learned counsel for the Plaintiff submits that all conditions necessary for the determination of the contract are mentioned in the invoices. Merely by not mentioning that the disputes will be subject to a particular jurisdiction would not take the invoices out of the purview of a contract between the parties. The present case is covered by the decision of this court in *Lohman Rausher Gmbh* (supra). Along with the invoices the Plaintiff has also enclosed the bill of lading. By email dated 18th June, 2009 they agreed to make part payment and no grievance with regard to the quality of goods was raised. The Plaintiff and Defendant were in continuous course of

correspondence through emails. Further Sections 41 and 42 of the Sales of Goods Act are applicable to the facts of the present case. If the goods were not of the same description the Defendant ought to have returned the same and not sold them further. The first intimation about the rejection of the goods was given only after Plaintiff's notice seeking payment was served on the defendant. The Defendant made part payments and thus was stopped from disputing the quality of the goods thus no case for leave to defend is made out and the application be dismissed and the suit be decreed.

4. I have heard learned counsel for the parties.

5. The present suit under Order XXXVII has been filed by the Plaintiff which is a private limited company incorporated under the laws of the Republic of Mauritius and engaged in the business of selling fashion garmets under the name and style of KARL KAISER, NIELS and CERRUTI 1881. The suit has been filed through its authorized representative Mr. Didier Camboulives. The Defendant is also a private limited company incorporated under the Companies Act, 1956 having its corporate office at South Extension-I, New Delhi and is engaged in the business of retail selling of high end fashion garments. The Defendant placed orders upon the Plaintiff

vide its invoice dated 16th April, 2009 bearing PK04/2009/454 for the supply of the following goods.

DESCRIPTION	QUANTITY	UNIT PRICE	AMOUNT USD
Woolen Jackets	213	60.00	12,780.00
Cotton Trouser	300	14.00	4,200.00
Polo Shirts	606	08.00	4,848.00
Linen Shirts	500	10.00	5,000.00
Cotton Shirts	2084	10.00	20,840.00
Woolen Suits	1028	100.00	102,800.00
TOTAL			150,468.00

6. It was agreed between the parties that the entire consideration of USD 1,50,468/- was to be paid in four equal installments of USD 36,617/- in the months of May, 2009, June, 2009, July, 2009 and August, 2009 respectively. The Plaintiff supplied the consignment of the goods and shipped the same on 9th April, 2009. The goods reached India on or around 20th April, 2009 whereafter they were inspected by the Defendant and the custody of the consignment was taken after clearing the custom duty. Despite having accepted the receipt of goods the Defendant did not make the payments as per the agreed schedule. After great persuasion and follow up, the Plaintiff received a payment of USD 24,965/- on 11th August, 2009.

7. After the receipt of the goods there were three communications between the Plaintiff and the Defendant through emails on 18th June, 2009, 25th June, 2009 and 22nd July, 2009. In none of the emails the Defendant made a grievance regarding the quality or the quantity of the goods received. Further the Defendant sold the goods to its customers and collected the sale proceeds. However, despite the same did not make payment to the Plaintiff. Finally the Plaintiff sent a legal notice dated 6th May, 2010 inter alia demanding a sum of USD 1,25,468/-. This notice was duly served on the Defendant. For the first time in the reply dated 25th June, 2010 to the notice it was stated that upon delivery of the goods it was found that the samples shown by the Plaintiff's representative in March, 2009 and the goods actually delivered were not the same and did not meet the minimum quality standards. It was further stated that the entire deal was based upon the goodwill enjoyed by the plaintiff in the market and on the basis of quality assurance standards, guaranteed by the plaintiff and thus terms of such a sale were not reduced in writing. The Defendant also sought refund of the entire sum received by the Plaintiff, that is, USD 25,000/- with interest @ 18% per annum.

8. The invoice dated 16th April, 2009 in the present is reproduced as under:-

“INVOICE

To,

BLUES LUXURY IMPEX PRIVATE LTD. PK04/2009/454
1ST FLOOR, H-64, SOUTH EXTENSION PART-1
NEW DELHI-110049
INDIA
ATT: MR. DINESH SEHGAL
20.04.2009

Date: 16.04.2009
Shipment Date

DESCRIPTION	QTY	UNIT PRICE USD	AMOUNT USD
Woolen Jackets	213	60.00	12,780.00
Cotton Trouser	300	14.00	4,200.00
Polo Shirts	606	8.00	4,848.00
Linen Shirts	500	10.00	5,000.00
Cotton Shirts	2084	10.00	20,840.00
Woolen Suits	1028	100.00	102,800.00
Total	USD 4731		150,468.00

Terms of payment: Payment in 4 installments by T.T.

May 09	USD 37,617
June, 09	USD 37,617
July, 09	USD 37,617
Aug, 09	USD 37,617

BANK DETILS; State Bank of Mauritius Ltd., State Bank Tower
1, Queen Elizabeth-II, Avenue
Port Louis, Mauritius
IBAN : MU93 STCB 1170 0262 0000 5991 0000 00”

9. The present case is clearly covered by the decision of this Court in *M/s Lohmann Rausher Gmbh v. M/s Medisphere Marketing Pvt. Ltd., 2005 (80) DRJ 9* wherein it was held-

“18. It is not the case of the defendant that the invoices do not conform to the purchase order. As noted, the invoices raised contain the description of the goods, quantity and price. As noted, conditions of payment stand reflected in the invoice. Additionally, delivery address also finds mentioned in the invoice. All features pertaining to a contract of sale of goods are to be reflected in the two invoices. The invoices are a complete contract, required by law, where the contract pertains to sale of goods.

19. The invoices in question would, Therefore, fall within the category of a written contract within the contemplation of Order xxxvII Rule 2 of the Code of Civil Procedure.

20. Section 41 and Section 42 of the Sale of Goods Act reads as under:-

"41. Buyer's right of examining the goods.-

- (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

42. Acceptance.- The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

21. As per the mandate of Section [41](#) of the Sale of Goods Act, the defendant not having inspected the goods in question prior to delivery, had a right to inspect the case on delivery and report defects within a reasonable time of delivery. If not rejected within reasonable time, mandate of Section [42](#) stipulates that the defendant would be deemed to have accepted the goods.

22. Undisputably, goods under first invoice were received in the month of May, 2000 and under the second invoice in the month of September, 2000. Defendant, on receipt of the goods, did not indicate to the plaintiff that the goods were defective till as late as 31.12.2001. This was when the plaintiff had served upon the defendant a legal notice in the month of October, 2001.

23. Rejection of the goods predicated on a stand that the goods were sub-standard and defective on 31st December, 2001 is not within a reasonable period of time considering the fact that the goods under the first invoice were received in the month of May, 2000 and under the second invoice were received in the month of September, 2000. Rejection indicated on 31st December, 2001 was after one year and seven months of receipt of goods under the first invoice and one year and three months after receipt of goods under the second invoice. Defendant, as per mandate of Section [42](#) of the Sale of Goods Act is, Therefore, deemed to have accepted the goods.

24. Three communications from the defendant to the plaintiff being the communications dated 31.1.2001, 30.3.2001 and 3.4.2001 may be noted.

"Dear Dr. Pichler,

-Thanx for your email of 31.01.

-There is no reason to not answer your mail or fax pertaining to the overdue payments, infact when I met you in late Nov' 00 the payment for invoice 1108748 for the amount of DM 35178.14 had already been done to our bankers but it seems that due to delay of this payment beyond 180 days the Reserve Bank of India (R.B.I.) stopped the remittance & advised our bankers to get a 'No interest Charge' certification from the principal company, hence you are advised to send us a certificate to this effect immediately so that we can seek R.B.I.'s permission for release of this payment.

-Anyhow by now the payment of Inv. 1116864 amount DM 41321.- is also due so in order to avoid any further misunderstanding between us we will expedite this payment this month because this can be released immediately as it is well within the R.B.I. Credit guidelines.

-Now, coming back on the subject of 'Help' to reach the Earthquake affected state of Gujarat let me inform you that in the past 2 weeks a lot of Lohmann dressings etc. available ex-stock has already been picked up by the Rescue authorities & sent free of cost to Gujarat. The requirement exists in large numbers for Dressings/Cellacast so if you can rush supplies of whatever is available it will add a lot to the image of Raucher-Lohmann in India plus to this humanitarian cause.

-Yes, whatever payment delays are at our end, needless to worry they are safe & in the process now even though we have contributed a lot as a company to the Country's crisis situation.

-Please let us have your comments on what's available so that we can advise you how & where to ship!

Best regards,

Rajan Bajaj."

"Dear Dr. Pichler,

Please refer your email of 29.3.

Both your payments are awaiting RBI clearance & the necessary 'No Interest Certificate' has been submitted. Due to year ending March 31 there seems to be a delay in processing this approval from RBI. This is not in our hands, we can only follow up with the Government authorities- normally it get cleared- one thing we promise that your money is safe & definitely will be cleared in April' 01.

Because of these delays we had no option but to go ahead & open the L/C for Euro 23,816.84 against your PFI of 15.2.

These goods Along with what we supplied in Jan' 01 are for the Earthquake Relief Fund hospitals run by the State Government & there is a delay in realizing the monies from them at present. In order to secure your monies we opened the L/C but we need more product to complete our orders with the Government to realize our monies.

There is no question of non-payment whether we do business or not, we are an old company & our association is long to think about other activities.

You will be receiving the original L/C this week or early next week if you feel like, please cooperate & send material A.S.A.P. by Air freight to New Delhi on CIF or CNF basis otherwise please send your non-acceptance to the bank with a copy to us.

Add a few brochures Raucher-Lohmann complete booklet Curapore/Opraflex/Cellacast brochures 50 only. Our business with you will get back to normal within the next quarter, I am sure.

Regards,
Rajan Bajaj."

"Dear Dr. Pichler,

By the time we were ready to pay your second invoice it had also crossed 180 days & Therefore we had to apply to RBI for clearance & used the same certificate for both the invoices. We do not require another letter from yourselves & assure that during this month these payments will be cleared.

The second invoice was not paid also due to the fact that our payments were stuck with the Government & they only got released on March 31, when the Government ending the fiscal year.

So, please understand the situation that the delays are primarily due to the Government supplies made to the Earthquake areas & money realization took a long time.

Please acknowledge receipt of L/C for Euro 23816.84.

Also you were supposed to visit us this year! What are your plans, once you visit us you will have more confidence in our operations.

Regards,
Rajan Bajaj""

10. Even in the decision relied by the defendant in *Bharat Forge Ltd. v. Onil Gulati*, AIR 2005 Delhi 369 it was held that an invoice which incorporates the particulars of seller, purchaser, description of goods, weight,

quantity, rates and price including sale tax and other dues accompanied with additional terms would be regarded as a written contract on acceptance by the respondent.

11. In the present case, a perusal of the invoice shows that it specified the description of the goods, quantity, unit price, final amount, terms of payment i.e. payment in 4 installments by T.T. on May, 2009, June, 2009, July, 2009 and August, 2009. The bank details with IBAN details were also specified. Thus, merely because the invoice does not say that the disputes would be subject to which jurisdiction, it cannot be said that the invoice is not a concluded contract. Further the defendant for the first time raised objection with regard to quality of the goods in its reply dated 25th June, 2010 to the legal notice dated 6th May, 2010 of the plaintiff after having made part payments. After receipt of goods there have been correspondences between the parties which reads as under:-

“Roland Fan Ian

From: Éva Kaiser” eva.kaiser@karlkaisergroup.com
To: “Roland Fan Ian” r.fanian@kade.intnet.mu
Sent: Wednesday, July 29, 2009 11:55 AM
Subject: FW:payment

Eva Kaiser
Managing Director

Karl Kaiser
Parkside Ltd.

Longtillbuilding
Route Royale
Arsenal

Mauritius

Tel: +230 249 22 70
Cell: +230 250 20 37
Mail : eva.kaiser@karlkaisergroup.com

-----Original Message-----

From : Abhay Gupta [mailto: abhay@bluesclothingcompany.com]
Sent: Wednesday, July 22, 2009 12:56 PM
To : Eva Kaiser
Cc: Ankush aggarwal
Subject: Re:payment

Dear eva,

I understand from accounts that documents have been put into the bank. As soon as they have cnfimation, they will mail you directnly.
Kind regards,
Abay

-----Original Message-----

From: Éva Kaiser” <eva.kaiser@karlkaisergroup.com>
To: “blues abhay” <abhay@bluesclothingcompany.com>
Sent: Wednesday, July 22, 2009 2:09 PM
Subject: Payment

>Dear Abhay,
>

>Dinesh informed me, that payment of 50% of the merchandise
>will be made today.
>Can you pls send me copy of transfer, which I need to
>discount the invoice

>as I have an important payment to make tomorrow.”

“>Eva Kaiser

>Managing Director

>

>Karl Kaiser

>Parkside Ltd.

>

>Longtillbuilding

>Route Royale

>Arsenal

>

>Mauritius

>

>Tel: +230 249 22 70

>Cell: +230 250 20 37

>mail : eva.kaiser@karlkaisergroup.com

>

>-----Original Message-----

>from : Eva Kaiser [mailto: eva.kaiser@karlkaisergroup.com]

>Sent: Tuesday, June 23, 2009 1:31 PM

>To: Abhay Gupta

>Cc: didier

>Subject: RE:***PROBABLY SPAM*** Re: payment

>Importance: High

>

>Dear Abhay,

>

>Can you plse inform me whether payment has been effected.

>This is now urgent, and I ask you, please, to proceed

>immediately with may/june installments

>Best regards

>eva

>

>Eva Kaiser

>Managing Diretor

>

>Karl Kaiser

>Parkside Ltd.
>
> Longtillbuilding
>Route Royale
>Arsenal
>
>Mauritius
>Tel: +230 249 22 70
>Cell: +230 250 20 37
>mail: eva.kaiser@karlkaisergroup.com
>
>-----Original Message-----
>From:Abhay Gupta [mailto: abhay@bluesclothingcompany.com]
>Sent: Thursday, June 18, 2009 4:47 PM
>To : Eva Kaiser”

“Roland Fan Ian

From: Éva Kaiser” eva.kaiser@karlkaisergroup.com
To: “Roland Fan Ian” r.fanian@kade.intnet.mu
Sent: Wednesday, July 29, 2009 11:55 AM
Subject: FW:***PROBABLY SPAM***Re. ***PROBABLY SPAM***Re:payment

Eva Kaiser
Managing Director

Karl Kaiser
Parkside Ltd.

Longtillbuilding
Route Royale
Arsenal

Mauritius

Tel: +230 249 22 70

Cell: +230 250 20 37

Mail : eva.kaiser@karlkaisergroup.com

-----Original Message-----

From : Abhay Gupta [mailto:abhay@bluesclothingcompany.com]

Sent: Thursday, June 25, 2009 6:02 PM

To : Eva Kaiser

Subject:***PROBABLY SPAM***Re:***PROBABLY SPAM***

Re:payment

Dear eva,

I have asked DS to advise me the payment schedule since he directly controls finance department.

I will advise you as soon as this is done

best regards,

Abay

-----Original Message-----

From: "Éva Kaiser" <eva.kaiser@karlkaisergroup.com>

To: "blues abhay" <abhay@bluesclothingcompany.com>

Sent: Thursday, June 25, 2009 4:19 PM

Subject: FW:***PROBABLY SPAM***Re:payment

>Dear Abhay,

>

>Did you receive this email?

>Kindly reply

>Thank you

>Best regards eva

>"

12. In none of these emails, the quality of the goods has been objected to.

The goods are deemed to have been accepted as no objection to the quality has been raised after more than one year of their acceptance. Moreover, the defendant had got the goods on the basis of reputation and goodwill of the

plaintiff in the market as is also admitted in the reply to the notice and further admitted that terms of such a sale i.e. assurance of standard were not recorded in writing. It is thus evident that the defendant admitted the implied guarantee.

13. In view of aforesaid discussion, I find no reason to grant leave to defend to the defendant as no triable issue is raised. Application is consequently dismissed.

CS(OS) No.437/2011

Since the leave to defend application of the defendant stands dismissed, the suit of the plaintiff is decreed in favour of the plaintiff and against the defendant for USD 1,25,468/- with interest @9% per annum from the date of institution of the present suit till realization.

Suit is disposed of accordingly.

(MUKTA GUPTA)
JUDGE

OCTOBER 21, 2013
‘vn’