

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

+ **RFA No. 195/2006**

% **11th September, 2018**

M/S PHARM CHEM

..... Appellant

Through: Mr. Ankur Singh, Advocate
(9695100202)

versus

SHANDONG MINMENTALS CO. LTD.

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 7.3.2006 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of Rs.10,60,346/- alongwith interest.

2. The facts of the case are that the appellant/plaintiff is the buyer of goods. The goods in question is a pharmaceutical chemical

namely Erythromycin Thiocyanate. The defendant no.1 was the seller of the goods and being a resident of China, acted through the defendant no.2, who is the agent of defendant no.1. Appellant/plaintiff pleaded that the material which was purchased by the appellant/plaintiff from the defendant no.1 through the defendant no.2, though was to be 2000 KGA, keeping in mind that the issue of actual weight is not of relevance, inasmuch as what is relevant is the activity basis in the weight of the material being sold. Activity basis means that the material is quantified by taking into account the per milligram unit of potency which normally is in micrograms(UG). The per kilogram activity is derived by multiplying the net weight of material with the per milligram level of potency and dividing the result by 1000. Appellant/Plaintiff pleaded that it opened a Letter of Credit of USD 89,000 in favour of the respondent no.1/defendant no.1/seller for the total quantity of 2000 KGA. The Letter of Credit (LC) in favour of respondent no.1/defendant no.1/seller had been opened with respondent no.3/defendant no.3/bank on 18.11.2003 and on 8.12.2003 the appellant/plaintiff was notified by the respondent no.3/defendant no.3/bank that documents have been presented under

the subject LC dated 18.11.2003. The appellant/plaintiff on the basis of the face value of the documents received the subject goods but on examination of the same by the expert, it was found that there was a shortage because though the net physical weight of the goods received by the appellant/plaintiff was 2698.87 KGA but in reality on account of the activity level of the goods the actual weight of the goods which were received by the appellant/plaintiff was only 1482 KGA. The appellant/plaintiff thus pleaded a short delivery of 518 KGA, and for which weight, it was claimed that the respondent no.1/defendant no.1/seller was not entitled to receive the amount of Rs.10,60,346/-.

3. When the suit was filed, the appellant/plaintiff had claimed injunction against restraint of payment under the Letter of Credit, which though was not granted but subsequently vide order dated 11.3.2004 passed by this Court, the respondent no.3/defendant no.3/bank was directed to keep an amount of Rs.10,60,346/- in an FDR inasmuch as this amount was not paid by the defendant no.3 to the defendant no.1 under the subject Letter of Credit dated 18.11.2003. It is this amount which the appellant/plaintiff claims from the defendants in the suit.

4. Defendant no.1 did not appear and contest the suit. Defendant no.1 was proceeded against ex parte on 27.5.2004.

5. Suit was contested only by defendants no.2 and 3. Respondent No. 2/Defendant no.2 denied its liability on the ground that the liability would only be of the respondent no.1/defendant no.1/seller. It was also contended that there is no short delivery as is alleged by the appellant/plaintiff. However, it was also pleaded by the respondent no.2/ defendant no.2 that it informed the respondent no.1/defendant no.1/seller about the short supply and which was duly admitted by him in its e-mail.

6. Respondent no.3/Defendant no.3/Bank had pleaded that it is not liable because the dealings of a bank are only limited to documents and not with goods.

7. After issues were framed, appellant/plaintiff, led evidence and this has been recorded in para 9 of the impugned judgment, and which reads as under:-

“9. Sh. Lalit Kumar Jain a partner of the plaintiff appeared as PW-1 and filed his affidavit Ex.Pw1/A in which all the facts as contained in the plaint were mentioned. Sh. K.S. Bunkar appeared as PW-2 and proved copy of LC and letters. Sh. Vivek Ram Mohan PW-3 was examined to

prove the reports Ex.PW-1/16 and PW1/17. He had identified signatures of Sh. Nilesh Jatia on these reports. This witness had also proved the photographs Ex.PW1/16A and PW1/16B of the drums which had been surveyed by him. Defendant no.2 had produced Sh. Vasant Srivastava (DW1), Defendant no.3 did not produce any evidence.”

8. Issues 1,2,3 & 8 framed in the suit are as under:-

1. Whether the Plaintiff is entitled to the relief of declaration, as prayed for? OPP
2. Whether the Plaintiff is entitled to claim the relief, in the alternative that it is entitled to recover a sum of Rs. 10,60,346/- from Defendants no. 1 & 2?OPP
3. Whether the Plaintiff is entitled to claim relief of injunction against Defendant no. 3 as prayed for? OPP
8. Whether the Plaintiff is entitled to interest, if so, at what rate and on what amount and for what period? OPP

9. Trial court has decided these issues no. 1,2,3 and 8 against the appellant/plaintiff because trial court had held that the letter of appellant/plaintiff Ex.PW1/20 showed that it was the respondent no.1/defendant no.1/seller who was defrauded by its supplier, and therefore, respondent no.1/defendant no.1/seller cannot be held liable. This finding of the trial court in paras 20 and 21 of the impugned judgment is however clearly baseless, firstly, because the letter Ex.PW 1/20 is not written by the appellant/plaintiff to the respondent no.1/defendant no.1/seller inasmuch as this letter

Ex.PW1/20 is written by the respondent no.2/ defendant no.2 to the respondent no.1/ defendant no.1/seller. Therefore, in any case no reliance could have been placed upon Ex.PW1/20, secondly even if reliance is placed on Ex.PW1/20 that cannot take away the liability of the respondent no.1/ defendant no.1/seller simply on the ground that he has been cheated by his own supplier. Trial court while dismissing the suit has further held that the Survey Report filed by the appellant/plaintiff as Ex.PW1/16A and Ex.PW1/16B cannot be said to be proved because the person who prepared the reports was not brought into the witness box. The relevant paragraphs of the trial court in this regard are paras 20 to 23, and these paras read as under:-

“20. The plaintiff has relied on its letter Ex.PW1/20. In Ex.PW1/20, it was mentioned by the Plaintiff to the Defendant no.1 as under:-

Thanks for your sincere efforts to take the matter with the manufacturer. In our opinion, you please sue the manufacturer in court of law so that you get your money back even after few months because he has cheated you. As you were not knowing the difference in KG and KGA, this has put you in problem. Therefore, take up the matter legally and we will support you also in whatever way it is possible.

21. If this letter is read in its entirety, it will be clear that defendant no.1 had not played a fraud on the plaintiff. Ex.PW1/20 written by the plaintiff to defendant no.1 itself indicates that the plaintiff also, to some extent, accepted the fact that defendant no.1 was not knowing the difference between KG and KGA. Fraud was the basis of the suit. Once the element of fraud is taken away, the plaintiff cannot get the relief. Here, I would like to make use of the observations made by the Hon'ble High

Court in Interol ICS's case (Supra) in para 11 which has already been reproduced above. The evidence of fraud in this case is neither clear nor is proved to the knowledge of defendant no.1.

22. Now as regards the quality of the goods is concerned, the plaintiff has not examined the person who had carried out the inspection and had given the reports Ex.PW1/16 and Ex.PW1/17. The photographs Ex.PW1/16A and 16B proved by PW-3 are of no help to the plaintiff. The number etc., mentioned on the drums are not legible. These drums cannot be connected with Ex.PW1/16 and Ex.PW1/17. Both these documents do not bear signatures of PW-3. The statement of Vivek Ram (PW3) is very brief. It is being reproduced in its entirety.

“I have been working as a Surveyor for the last four years in Glad Stone Agencies Ltd. I have seen the original surveyor report Ex.PW1/16 available on the judicial file. It does not bear my signature. However, it bears signature of one of the directors of the concern. I have seen him signing, therefore, I can identify his signatures, his name is Mr. Nilesh Jatia. His signatures appear at point A on all the six pages of Ex.PW1/16. Ex.PW1/17 also bears signature of Mr. Nilesh Jatia. These documents also bear the seal of our concern. Ex.PW1/16A & Ex.PW1/16B are of the drums which had been surveyed by me. The reports Ex.PW1/16 & Ex.PW1/17 are correct.”

23. I equate his case with a case of supply of gold where the buyer had asked the supplier to supply him gold of 24 carats and the supplier supplies the gold of 18 carats only. The expert could have said about the purity of the gold. If such an expert is not examined, the claim of the buyer would automatically fail. In our case, the Plaintiff has not examined Shri Nilesh Jatia to prove the reports. It was for Mr. Nilesh Jatia to say that the products were not as per KGA, which were to be supplied to the Plaintiff as per invoice.”

10. I cannot agree with the reasoning and conclusion of the trial court because as per the contract entered into between the appellant/plaintiff with respondent no.1/defendant no.1/seller, the liability of the respondent no.1/defendant no.1/seller was as per the net

weight derived on activity basis of the pharmaceutical ingredient. Just because the respondent no.1/defendant no.1/seller may have been defrauded by its supplier, this cannot mean that respondent no.1/defendant no.1/seller is not liable under privity of contract with the appellant/plaintiff. Respondent no.1/Defendant no.1/Seller may sue its supplier but that does not mean that appellant/plaintiff is bound to pay for the goods which it did not receive. Trial court has fallen into an error by refusing to rely upon the Survey Report Ex.PW1/6 and Ex.PW1/17 merely on the ground that the concerned Director of the Survey Company Glad Stone Agencies Ltd. did not appear in the witness box inasmuch as the signatures of the Director Mr. Nilesh Jatia has been proved by the witness PW-3 Sh. Vivek Ram. In fact, counsel for the appellant/plaintiff has rightly pointed out that the actual real survey was done by none other than the witness Sh. Vivek Ram PW-3, though eventually the report was prepared and signed by the Director, Mr. Nilesh Jatia, of the company Glad Stone Agencies Ltd. In any case, once there is a report filed by the appellant/plaintiff, and no counter report was filed by respondents no. 1 and 2/ defendants no.1 and 2, there is no reason why the survey reports filed by

appellant/plaintiff should not be believed by the courts. I therefore set aside the reasoning and conclusion of the trial court and hold that the appellant/plaintiff is entitled to the suit amount.

11. Admittedly, the suit amount is lying in an FDR with the respondent no.3/ defendant no.3/bank, and this amount will satisfy the claim of the appellant/plaintiff and the respondent no.3/defendant no.3/bank therefore will pay the FDR amount of Rs. 10,60,346/- alongwith the entire interest accrued thereon to the appellant/plaintiff in full and final satisfaction of the claim of the appellant/plaintiff in the subject suit. I may note that though the claim of the appellant/plaintiff will be satisfied from the aforesaid FDR, it is observed that the trial court was unjustified in dismissing the suit against respondent no.2/defendant no.2 by holding that respondent no.2/defendant no.2, and who is admittedly an agent of respondent no.1/ defendant no.1/seller, was not liable because counsel for the appellant/plaintiff has rightly pointed out to the Court that the first exception to Section 230 of the Contract Act, 1872 clearly provides that though ordinarily an agent is not liable for and on behalf of the

principal, but once the principal of the agent is situated abroad, agent also becomes personally liable.

12. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court is set aside. Suit of the appellant/plaintiff is decreed for a sum of Rs. 10,60,346/- with the *pendente lite* and future interest at the same rate at which the FDR has been created and renewed by the respondent no.3/defendant no.3/bank on the principal amount of Rs. 10,60,346/-. Parties are left to bear their own costs. Decree sheet be prepared.

SEPTEMBER 11, 2018/ib

VALMIKI J. MEHTA, J