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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 6th February, 2018

Date of decision : 08th May, 2018

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RFA 339/2008 & CM No.41975/2017

RADHEY SHYAM

..... Appellant

Through: Mr. Ashutosh Lohiya, Mr. Sanyam Khetarpal, Ms. Pragya Srivastava and Mr. Armaan Grover, Advocates. (M:9873674225)

versus

HINDUSTAN ZINC LTD

..... Respondent

Through: Mr. Shashank Singh, Mr. Arjun Minocha and Mr. Gourav Vig, Advocates. (M:9971818401 & 9810366666)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The question that arises in the present appeal is whether the Appellant/Plaintiff (*hereinafter 'Plaintiff'*) is entitled to the discount termed as '*distance rebate*' of Rs.400/- per MT of sulphuric acid, purchased from the Respondent/Defendant (*hereinafter 'Defendant'*).

2. The Defendant is a manufacturer of sulphuric acid and the Plaintiff used to purchase the same in bulk quantities from the Defendant. One such transaction entered into between the Plaintiff and Defendant is by a letter dated 19th September, 2003 which is in Hindi language. The terms of the said letter translated into English, are as under:

"We are your old customers and we lift between 2000 to 2500 tonnes of sulphuric acid every month but now your price has increased and it

does not appear to be profitable. We had spoken telephonically to Shri Ravi Gupta and between 20th September, 2003 to 31st October, 2003, we will lift 3500 tonnes of sulphuric acid from your Chittore (Unit). We will provide security of Rs.1 Lakh. The following conditions have been agreed.

Sulphuric Acid 98% Rate

Rs. 1700/- per tonne distance rebate Rs.400/- per tonne.

Payment 100% advance

Sale will be done in Delhi and neighbouring Haryana and UP.

C-form has been submitted to you. E-1 form for this has to be given.

*Signed by Shri Ganesh Chemicals
Radhay Shyam, Proprietor.”*

3. Admitted facts are that Rs.1 Lakh security amount was given by the Plaintiff who also lifted the entire quantity of 3500 MT of sulphuric acid by making an advance payment. After the entire purchase was made by the Plaintiff, it demanded from the Defendant, that the distance rebate of Rs.400/- per MT + rebate of Rs.100/- per MT which was also to be given, be paid. Repeated reminders, both verbal and in writing, were given to the Defendant vide letter dated 6th November, 2003, 2nd December, 2003, 13th December, 2003, 18th December, 2003, 8th February, 2004, 9th February, 2004, 16th February 2004 and 6th March, 2004. However, there was no response and hence the Plaintiff issued a legal notice on 31st July, 2004 demanding payment. In its reply dated 24th/27th August, 2004 the Defendant denied the claims of the Plaintiff.

4. The suit under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter CPC) was accordingly filed. The Trial Court was not convinced

as to the maintainability of the suit under Order XXXVII CPC. Accordingly, the suit was directed to be tried as an ordinary suit vide order dated 8th August, 2005. The Plaintiff prayed for the following reliefs.

“(a) A decree for sum of Rs.19,99,000/- (Rs. Nineteen Lac Ninety Nine Thousand Only) may kindly be passed in favour of plaintiff and against the defendant.

(b) Pendent-lite and future interest @ 6% may kindly be awarded to the Plaintiff and against the Defendant.

(c) The cost of the suit may also be awarded to the Plaintiff’

5. In the written statement, the Defendant contended that the Plaintiff had not abided by the terms of the contract. According to the Defendant, the material was to be sold exclusive in Delhi territory but the Plaintiff had sold the material in Rajasthan, Punjab and UP. The Defendant averred that the consolidated customer wise record showing the details of sale of 3500 MT was never supplied to the Defendant to enable the issuance of the credit note. The Defendant also contended that great financial loss was caused to its customers in Haryana, UP, Rajasthan and Punjab as the Plaintiff could not have competed in these territories with its existing customers. It took the stand that the Plaintiff could not have sold in Haryana and UP and since the details of the sales were not furnished, the Plaintiff was not entitled to the distance rebate. It was also contended that Form 31 which was required to be furnished was also not furnished i.e., interstate sale transit form issued by Government of UP for sales made from Rajasthan to UP. Since the forms were not submitted the Plaintiff was not entitled for the rebate.

6. Considering the pleadings the following issues were framed in the suit

on 16th March, 2006.

“1) Whether there was privity of contract between the plaintiff and defendant? OPP

2) Whether the defendant had authorized the plaintiff to sell the goods outside Delhi as well? OPP

3) Whether plaintiff is entitled to the recovery of the suit amount from the defendant? OPP

4) Whether plaintiff is entitled to any interest on the suit amount? If so, at what rate and for what period? OPP”

7. The Plaintiff led the evidence of its proprietor Shri Radhey Shyam (PW 1). He deposed as under:

“I was lifting sulphuric acid from Chittorgarh under oral contract. I do not remember where I have sold the lifted sulphuric acid under the said oral contract. I was lifting sulphuric acid prior to the said oral contract. It is correct to suggest that I was lifting bulk quantity of sulphuric acid and was availing quantity rebate of Rs.100/- per metric ton. I do not remember what rebate was available to me under the said contract of lifting 3500 Metric Ton of sulphuric acid from 19.9.2003 to 31.10.2003 with the defendant. Vol. It was a special rebate of Rs.400/- per Metric Ton. I do not remember whether the said rebate was a distance rebate or special rebate. This present plaint is filed by my counsel and the same was prepared by my counsel on my instructions. It is correct to suggest that in the plaint it is mentioned that I will be availing a Distance Rebate @ Rs.400/- per metric ton for lifting 3500 Metric Ton from 19.9.2003 to 31.10.03. I do not know the meaning of Distance Rebate. Vol. However, I know Hindi meaning of Distance Rebate. It is

correct to suggest that the meaning of Distance Rebate is the selling the goods at a long distance from the place of lifting. I can not tell the distance from Chittor to Delhi. The distance may be 500-600 kms. It is correct to suggest that there was a condition to sell the lifted sulphuric acid within a specific circle (Delhi ke saath lagte). Delhi ke saath lagte means area adjoining such as UP and Haryana. There was no specific condition upon me to sell the goods in specific area (not even the adjoining UP & Haryana). Whatever I have written in my suit is correct. It is wrong to suggest that there was specific condition for selling the said sulphuric acid within the territory of Delhi only. I need not to give the details the goods mentioned in the suit which I have sold to the customer. It is also correct that I have not furnished the details to the defendant as well as to the court. It is also correct that neither in the court proceedings nor in any of the correspondence with defendant, the plaintiff has divulged where the goods has been sold by me to my customers. Except disputed letter dated 19.9.03 there is no mention of the words "Delhi ke saath lagte" in any correspondence made between the parties.

Q. Whether in the letters written by Hindustan Zinc there is mention of "Delhi only" or not?

Ans. I have not read any such letter in which there is condition of selling goods in "Delhi only".

.....

It is wrong to suggest that I have sold some goods in the area of Rajasthan, Punjab & Gurajat."

8. On behalf of the Defendant, Shri. Rohit Parmar (DW-1) who is working in the Rajasthan, Udaipur Office gave the evidence. He admits that

Shri Ravi Gupta was the Deputy Manager, Sales. In his deposition he stated as under:

“It is correct that I took Rs.6,00,000/- from plaintiff and the delivery order of Rs.5,00,000/- was issued while Rs.1,00,000/- was retained as security. No written contract was executed with the plaintiff. It is incorrect to suggest that we had surplus acid which we sold to the plaintiff. It is correct that we gave a rebate of Rs.400/- per metric ton to the plaintiff. It is correct that earlier plaintiff was allowed rebate of Rs.100/- per metric ton. The rebate of Rs.400/- per metric ton and of Rs.100/- per metric ton cannot be given simultaneously.

.....
It is correct that plaintiff had purchased 3500 metric tons of acid and we had agreed to give a rebate of Rs.400/- per metric ton. Vol. That rebate was subject to the plaintiff selling the acid in Delhi only. It is incorrect to suggest that there was no condition for sale in Delhi only. I do not have any documentary evidence to show any agreement that plaintiff would sell acid in Delhi only.

.....
It is incorrect to suggest that there was no deletion of any portion in letter dated 19/09/03. It is incorrect to suggest that the condition for sale exclusively in Delhi is afterthought.”

9. The primary contention of the Defendant was that the letter dated 19th September, 2003 as produced by Plaintiff was incorrect. It was claimed by him that the letter had a deletion when it was faxed, i.e. the words “*ke saath lagte Haryana and UP*” were deleted from the sentence “*Sale-Delhi ke saath lagte Haryana and UP mein beche*” thereby leaving the words “*Sale-*

Delhi mein beche”. Thus the Plaintiff could have only sold in Delhi.

10. The basic contention of Ld. Counsel Mr. Shashank Singh, therefore, was that the Plaintiff could not have sold in the neighbouring areas of Delhi i.e. Haryana and UP and the products had to be sold only in Delhi. The distance rebate of Rs.400/- per MT could be availed of only when the products were sold in Delhi. The documents that have been placed on record are the original letter which was faxed dated 19th September, 2003. This letter does not have any deletion of word Haryana and UP. In the reminders i.e. 2nd December, 2003 and 13th February, 2003 there are notings that customer wise records are being demanded by the Defendant. However, admittedly, the same were not given. The receipts of the letters on behalf of the Plaintiff are admitted by the Defendant. The Defendant’s stand has always been consistent that the Plaintiff could have sold the products only in Delhi and not outside. The Defendant further relies upon the other invoices to claim that the Plaintiff did not make the sales as agreed.

11. The question that, therefore, arises is as to whether sulphuric acid could have been sold outside Delhi by the Plaintiff. The Trial Court has doubted the Plaintiff’s conduct on the basis that the letter dated 19th September, 2003 has been produced in original by the Plaintiff and if the said letter was actually sent, the Plaintiff could not have had possession of the said letter. This Court is of the opinion that in instances where correspondence between parties takes place through fax, it is not unusual for the parties to merely fax the letters and not post confirmation copies thereafter. Thus, nothing much can be made out of the conduct that the original letter dated 19th September, 2003 remained in the possession of the Plaintiff. If the same was sent by fax, which fact was not disputed, then the

original could remain with the Plaintiff.

12. The further question that then arises is as to whether there was a deletion in the letter. On this, the oral evidence is not convincing either way. It is very much possible that in the copy of the letter Mark 'X' which has been produced by the Defendant scratching out the words "*ke saath lagte Haryana and UP*" may have been done after the fax was received. The alternative theory could also be that the original letter dated 19th September, 2003 was photocopied and the words were deleted before the fax was sent by the Plaintiff. The Court is unable to determine whether scratching out of these words was done by the Plaintiff before faxing the letter or made by the Defendant after the fax was received.

13. What however does not make sense is that the mention of C-form and E-1 form continues to exist in both versions of the letter. C-forms are issued for local sales and E-1 forms are issued for interstate sales. Both versions of the letter dated 19th September, 2003 i.e. Ex.PW-1/1 facsimile Mark 'X' has a reference to C-form and E1-form. Thus, the mere scratching out of Haryana and UP would not solve the problem. Mention of E-1 form in this letter itself shows that the parties contemplated sales outside of Rajasthan. In this context, the oral evidence is relevant as the Plaintiff's witness categorically denies having agreed to sell the products only in Delhi. The witness agrees that the meaning of distance rebate is selling of goods at a long distance from place of lifting.

14. The Defendant's witness admits that he does not have any documentary evidence to show that the Plaintiff had to sell only in Delhi. The Defendant's witness also admits that the C-form of sales tax was submitted by the Plaintiff and 4% Central Sales Tax was deposited by the

Defendants. There are a large number of conjectures in the Defendant's evidence that the same vehicle could not have been used for lifting the goods and that in view of the time period which was taken by the Plaintiff's vehicle for making the to-and-fro trips, he inferred that the goods were unloaded within Rajasthan. According to the Defendant's witness, the mandatory Form 31 which is an interstate sales transit form issued by the Government of UP for the sales made from Rajasthan to UP was not produced. Thus, the Defendant's witness inferred on the basis of the trips made by the various tankers, unloading the goods had taken place in Rajasthan itself and various documents which are mandatory if a vehicle entered into Delhi, Rajasthan and UP were not produced by the Plaintiff. The Defendant's witness, in fact, states that the Plaintiff was repeatedly called upon to produce the documents to show that they are entitled to rebate in the form of distance rebate.

15. A perusal of the letter dated 19th September, 2003 both in original and in its facsimile version clearly shows that the parties understood the meaning of the term distance rebate and in any event, the sulphuric acid was not to be sold in the state of Rajasthan alone. However, on the basis of comparison of these two letters it is held that the conjectural evidence of the Defendant about the frequency of the trips by the tankers cannot be a reason to presume that the Plaintiff sold the goods in Rajasthan. The Plaintiff had admitted that the goods have been sold outside Rajasthan i.e., in Delhi, Haryana and UP. From the perusal of the correspondence, it appears that the Defendant contended that the Plaintiff was not entitled to sell in Haryana and UP. The consistent stand of the Defendant is that it should have been sold only in Delhi. This is not made out even from Mark 'X'. The mention of E1 Form

itself shows that the interstate sales from Rajasthan to other states was permissible. It cannot, therefore, be held that the goods ought to have been sold only in Delhi and not in UP and Haryana which are nearer to Rajasthan. If the term Distance Discount was to have such a specific connotation, the same ought to have been specified by means of mentioning the distance at which it had to be sold. However, the letter is loosely worded. Such specificity as is being pointed out by the Defendant to deny the discount is not contained in the letter. The Court has to go by the document on record. Even the evidence of the Defendant in respect of the trucks, their dates of trips, their unloading etc., are very tenuous. The said evidence appears to be a stretched argument, only in order to deny the discount. The nature of the contract, i.e., which was entered into by means of a mere letter shows that the Defendant had a huge stock of Sulphuric acid, which its Sales Manager convinced the Plaintiff to purchase on the basis of a discount being offered. After the Plaintiff had paid the advance, lifted the stock, sold it and thereafter claimed the discount, the Defendant refused to honour its part of the bargain, by reading between the lines of the letter. The letter is simple in its reading and does not need to be interpreted in a complex manner.

16. The Plaintiff would thus be entitled to the distance rebate for sales made in Delhi, Haryana and UP. However, the Plaintiff cannot get a double rebate i.e. of Rs.400/- per MT along with Rs.100/- per MT. The Plaintiff is only entitled to the rebate of Rs.400/- per MT. If the Plaintiff has sold the products in Rajasthan or in Punjab, the Plaintiff would not be entitled to any rebate.

17. The impugned decree is, therefore, modified and it is held that the Plaintiff is entitled to the distance rebate of Rs.400/- per MT only on the

quantity of sulphuric acid which it has sold in Delhi, Haryana and UP, subject to producing all the necessary invoices and proof of payments of local taxes and transit charges. The Plaintiff is also entitled to the refund of the security amount of Rs.1,00,000/- and the balance sum of Rs.74,312/- which is admittedly due. Discount of Rs.100/- per MT is not liable to be granted. The Defendant is directed to reconcile the accounts with the Plaintiff and give the rebate at the rate of Rs. 400/- per metric tonne in the terms contained herein above. The Plaintiff is entitled to simple interest @ 6% from date of filing of the suit, till date of payment, on the amount found due and payable. The reconciliation be done within four weeks and payments be made within a period of four weeks thereafter. The impugned judgment and decree is modified in the above terms.

18. Appeal is disposed of with the above observations along with the pending application.

MAY 08, 2018/dk

PRATHIBA M. SINGH
Judge