

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

Date of Reserve: 27th July, 2009
Date of Order: 4th August, 2009

OMP No. 118/2008

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04.08.2009

M/s I.C.Textiles Ltd.

... Petitioner

Through: Mr. Yoginder Handoo, Advocate

Versus

SAN-A Trading Co. Ltd.

... Respondent

Through: Mr. Sachin Datta, Ms. Lakshmi
Ramamurty and Ms. Shiela Arora, Advocates

JUSTICE SHIV NARAYAN DHINGRA

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the reporter or not? | Yes. |
| 3. Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

By this petition under Section 34 the petitioner has filed objections against an interim award dated 13.11.2007 passed by the learned Arbitrator directing the petitioner to handover the machines to the respondent.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner and respondent entered into a contract of sale and purchase dated 7th June, 2001 whereunder the respondent was to sell 5 sets of Murata No.7-V-Mach-Coner automatic Cone Winder Type Magazine (machines). The shipment

of these five sets of machines was to be made in two parts; in first part two machines were to be shipped and in second part three machines were to be shipped by 15th June, 2001 and the end of December, 2001 respectively. The delivery of machines was to be made on receiving initial payment of around 16% amount. The balance payment for machines was to be made by the petitioner in 04 installments. The first set of two machines was shipped by respondent and received by the petitioner under bill of lading dated 10th July, 2001. The second shipment was made only of two machines instead of three machines (since the petitioner had failed to open Letter of Credit for third machine) vide bill of lading dated 6th October, 2001. Pertaining to the first shipment of two sets of machines, the first two installments were paid however, the next two installments of DM-1,48,617/- due on 1.1.2003 and DM-1,45,078.50 due on 30.1.2003 were not paid. Similarly pertaining to second shipments also, two installments were paid and two installments of the similar amount were not paid.

3. The petitioner had entered into a separate agreement titled as “Deeds of Reserve and Charge of Property” with the respondent on 22nd February, 2002 for each shipment. This Deed of Reserve and Charge of Property provided that the machines in possession of the petitioner shall stand charged as reserve of property in favour of the respondent to secure deferred payment of the price due thereon in terms of invoices and the petitioner at its own expenses shall get this Deed of Charge registered with Registrar of

Companies. It was also provided that the petitioner shall not further sell, transfer or part with possession, pledge, charge, mortgage or hypothecate these machines to any third party and shall not transfer rights in the machines whatsoever to any third party till the entire outstanding amount of deferred payment of DM-5,66,160/- for each shipment was paid to the respondent by the petitioner. This Deed further provided that in case of any default by the petitioner in making deferred payment of installments as per the invoices or in case of any other kind of misconduct or breach of its undertaking as described in the Deed, the entire outstanding amount of the deferred payment shall become payable forthwith to the respondent as liquidated damages and if these liquidated damages were not paid within two weeks of its becoming due, the petitioner shall return the custody and possession of the machines to the respondent and the respondent shall then be entitled to dispose of the machines as it deemed appropriate and shall have unrestricted right of sale of the machines and apply the proceeds towards realization of the amount of liquidated damages that had become due. The amount so realized was to be adjusted towards liquidated damages under intimation to the petitioner and excess, if any, was to be refunded and if there was shortage the petitioner was liable to make up the same. The "Deed of Reserve and Charge of Property" also had an arbitration clause. According to this clause, all disputes concerning the Deed were to be resolved through arbitration of Mr. Munabu Nonoguchi, Area Manager, Sales Department of Murata Machinery Limited.

4. When the petitioner failed to pay the remaining two installments of each of the machines, the respondent invoked arbitration clause. Mr. Munabu Nonoguchi, the named Arbitrator however expressed his inability to conduct the arbitration proceedings. The petitioner thereafter moved an application under Section 11(6) of the Arbitration & Conciliation Act, 1996 before the Supreme Court and thereafter wrote a letter to the named Arbitrator to reconsider his decision and inform if he could undertake the arbitration. During the pendency of the petition under Section 11(6) before the Supreme Court, the named Arbitrator Mr. Munabu Nonoguchi gave his consent to conduct the arbitration proceedings. The Supreme Court therefore appointed him as the Arbitrator under Section 11(6) of the Arbitration & Conciliation Act, 1996 to conduct the arbitration proceedings. The petitioner had also pleaded before the Supreme Court that since the petitioner company was before BIFR, no arbitration could take place. This argument was turned down by the Supreme Court.

5. After the matter was referred to the learned Arbitrator, the petitioner raised objection before the Arbitrator that he had no jurisdiction. This objection was dismissed by the learned Arbitrator and the Arbitrator passed impugned interim award whereby he declared that the four sets of machines shipped to the petitioner were not the property of the petitioner and the title over the machines had not transferred to the petitioner in view of the contract between the parties and in view of "Deeds of Reserve and Charge of Property", the petitioner was

liable to return these machines to the respondent. He observed that since the title and ownership of the machines was that of the claimant/respondent, these machines would not form assets or properties of the petitioner company. The petitioner herein was directed to bring the interim award to the notice of the BIFR and IDBI. If, the petitioner had created another charge in favour of any one, it would have no effect in respect of rights of respondent over the machines. Since, the machines shall not form property of the petitioner, so the same would not be subjected to the orders of BIFR.

6. In the objections raised by the petitioner under Section 34, the petitioner has taken a stand that the learned Arbitrator had no jurisdiction to entertain the claim of the respondent in view of the fact that 'contract of sale', through which the machines were sold to the petitioner provided for a different arbitration clause requiring each of the parties to appoint one Arbitrator. It is argued that the arbitration clause existing in the "Deeds of Reserve and Charge of Property" being a clause contrary to the main contract, the clause of the main contract shall govern the arbitration proceedings.

7. I consider that this objection is not tenable and cannot even be raised at this stage because of principle of constructive *res judicata*. The petitioner was at liberty to raise this question before the Supreme Court when the application under Section 11(6) of the Act was pending and the Supreme Court was to consider whether there was an arbitration clause between the parties and

whether there was a valid dispute existing between the parties. Since the petitioner did not raise the issue before the Supreme Court that the arbitration clause under which Mr. Munabu Nonoguchi was appointed as Arbitrator was not the valid arbitration clause, the issue cannot be raised now.

8. The other objection raised by the petitioner is that the learned Arbitrator wrongly entered into the controversy whether the title over the property/machines vested in the petitioner or the respondent. This issue was not referred to the Arbitrator and this issue could not fall within the ambit and scope of “Deeds of Reserve and Charge of Property”. This issue could only be decided on the basis of terms and conditions of contract of sale. No dispute under the contract of sale was referred to the Arbitrator and the learned Arbitrator wrongly assumed jurisdiction to decide this issue. It is also argued that presuming that the Arbitrator had jurisdiction to decide this issue, the Arbitrator decided the issue contrary to settled legal position and the award was bad on this count.

9. The learned Counsel for the respondent has refuted these objections by stating that the Arbitrator acted within the scope of contract and the issue of title over the property was incidental to the main issue and had to be decided by the Arbitrator.

10. The main issue was the right of the respondent to seek possession of the machines in terms of “Deeds of Reserve and Charge of Property” to realize the amount and the possession of machine could be granted only by deciding

that the title of the property/machines did not vest in the petitioner. The learned Arbitrator therefore had considered the terms of contract of sale and the terms of “Deeds of Reserve and Charge of Property” and after considering the both, he held that the title in the machines vested in the respondent/claimant.

11. The parties had first entered into an MoU dated 29th March, 2001 which contained the detailed understanding as arrived at between the parties regarding purchase of five machines. This MoU provided that the detailed terms and conditions of the contract shall be mutually finalized between the parties on receipt of formal proforma invoice from respondent company. It was specifically provided in MoU that if any of the conditions of proforma invoice was not acceptable to petitioner then the contract would be over and the MoU would be null and void. After this MoU, the contract for sale was entered into on 7th June, 2001 and, the payment terms for the machines for first shipment and second shipment were specified. The payment terms showed that 16% payment was to be made at the time of opening of LoC by the petitioner and remaining 84% payment was to be in four semi-annual i.e. six monthly installments. These installments were called deferred payment and were payable with interest of 5% to start after 180 days of the date of bill of lading. The payment terms which formed part of the contract specifically provided as under:

5. The all contracted goods shall be belonging to the SELLER, until the BUYER completely finished the payment of full contracted amount. The BUYER shall accept and sign

“Reserve of Property” of which shall be made by the BUYER’s cost.

12. Thereafter parties entered into “Deeds of Reserve and Charge of Property” on 22nd March, 2002 and this Deed provided as under:

4. The Seller shall be entitled at any time and without notice to visit and inspect the machinery.

5. In case of any default by the Buyer in making the deferred payment as per the installments detailed in the Invoice or any other kind of misfeasance or breach by it of any of its undertakings/obligations as described in this Deed, the entire outstanding amount of the deferred payment of DM 566,160.00 shall be payable forthwith and without demur to the Seller as liquidated damages. If this liquidated damages is not paid within 2 weeks of thus becoming due the Buyer shall return custody and possession of the machinery to the Seller. The Seller shall then, at its option, be entitled, to such disposal of the machinery as it deems appropriate including the right of unrestricted sale to apply the proceeds towards realizing the amount of liquidated damages thus due to it. If the Seller avails itself of the option of such sale, the amount of liquidated damages shall be adjusted as conveyed in writing by the Seller to the buyer, by the amount of the sale-proceeds; the excess, if any, to be refunded. The remaining part of the liquidated damages, after such adjustment should that take place, shall then be the amount of liquidated damages due and payable forthwith to the Seller.

13. The learned Arbitrator concluded that the intention of the parties was clear from these terms and conditions that title in machinery was to pass to the petitioner only on payment of full price by the petitioner to the respondent and the title was not to pass until and unless the full price was paid to the respondent. He observed that the intention of parties was an important factor to decide the

question whether the transaction between the parties was a hire-purchase or a sale. Mere use of certain words in certain context would not itself determine the nature of transaction and all the documents are to be harmoniously construed. The learned counsel for the petitioner, on the strength of *Damador Valley Corporation v. The State of Bihar* AIR 1961 SC 440, argued that the contract between the parties was not a hire-purchase agreement but it was a outright sale and title in the machines passed to the petitioner the moment petitioner received these machines. He submitted that non-payment of installments would only entitle the respondent to claim the balance due amount through Court of law and respondent cannot have a right to possess machines since the machines were the property of the petitioner. He argued that in the contract for sale, there was no provision for hire-purchase or for return of the goods at any time during subsistence of the contract. The learned Counsel also relied upon *K.L.Johar & Co. v. Deputy Commercial Tax Officer* AIR 1965 SC 1082 to press this argument.

14.. In *Damodar Valley Corporation* case (supra) the Supreme Court observed that the useful test to determine a controversy whether the particular agreement was a contract of mere hiring or it was a contract of purchase on the system of deferred payment of purchase price, was to see if there was any binding obligation on the hirer to purchase the goods. A mere contract of hiring, without more, was a species of the contract of bailment, which does not create a title in the bailee. Ordinarily, a contract of hire-purchase confers no title on the

hirer but a mere option to purchase on fulfillment of certain conditions. A contract of hire purchase may also provide for agreement to purchase the things hired on deferred payment subject to condition that the title of things does not pass until all the installments have been paid. Thus, reliance by the petitioner on Damodar Valley Corporation case is misplaced. In case of Damodar Valley Corporation, the Corporation had sold the goods on deferred payment with an option to re-purchase the goods at residual price after the contract and it was not a contract of hiring. That is why, for the purpose of sales tax, it was considered a transaction of sale and not a transaction of hiring as contended by the Corporation. However, in the present case, the parties had entered into a contract with clear understanding that the title of the goods shall pass to the petitioner only when the entire purchase price had been paid by the petitioner and so long as the purchase price was not paid by the petitioner, the title in the goods was to remain with the respondent.

15. The interpretation of a contract by Courts is required only where the intention of parties cannot be gathered from the terms of the contract or the terms and conditions given in the contract are not clear and need analyzing. An effort is made through analysis to find out as to what the intention of the parties was. Where the intention of parties is reflected clearly and unequivocally from the terms and conditions of the contract, the Court/Arbitral Tribunal cannot, by interpretation modify or change the terms and conditions of the contract and

infuse an intention between the parties which was not there. It was clearly provided in the MoU that if terms and conditions of invoice were not acceptable, the contract would come to an end. When the terms and conditions of payment were sent to the petitioner it was made clear to the petitioner that title in machines will pass to the petitioner only when the petitioner had paid the entire purchase consideration. The petitioner did not raise objection on these terms and conditions and accepted those. The subsequent conduct of the petitioner of executing “Deed of Reserve and Charge of Property” wherein it was reiterated that respondent shall have right to repossess the machines in case the payment was not made, shows that it was again reaffirmed by the petitioner that the title of the machines shall be with the respondent so long as the entire payment was not made. In view of the contractual provisions as agreed between the parties, the learned Arbitrator rightly came to the conclusion that the title in the machines was that of the respondent.

16. In Polymat India (P) Ltd. & Anr. v. National Insurance Co. Ltd. & Ors. (2005) 9 SSC 174 Supreme Court observed that it was the duty of the Court to interpret the document of contract as was understood between the parties strictly without altering the nature of contract as it may affect the interests of the parties adversely. I, therefore find no force in the objection of the petitioner that the learned Arbitrator did not interpret the contract properly.

17. The contention of the petitioner that the Arbitrator exceeded his jurisdiction in devolving upon the issue whether the contract of sale was a hire-purchase agreement or not and passing of the title to the petitioner is also baseless. The Arbitrator was adjudicating the dispute arisen in respect of the claim of the respondent that respondent was entitled to possess the machines in lieu of the dues not paid by the petitioner in terms of the “Deed of Reserve and Charge of Property”. In order to decide this issue, it was necessary for the Arbitrator to go into the question whether the title had passed to the petitioner or it was with the respondent. This question was also required to be gone into by the learned Arbitrator since the petitioner had raised an issue that the petitioner company was before BIFR and the Assets of the petitioner company could not be attached or taken away by any debtor. In order to see whether the machines, for which the petitioner had not made payment, were assets of the petitioner so as to bring them under the purview of BIFR; it was necessary for the Arbitrator to go into the question if the title had passed to the petitioner or not. The question was incidental to the dispute to be adjudicated by the Arbitrator. I, therefore find no force in this objection.

18. The other objection raised by the petitioner is that the Arbitrator did not give proper hearing to the petitioner. The petitioner drew my attention to the proceedings before the Arbitrator to force this point. After going through the proceedings, I find that the Arbitrator had given sufficient opportunity to both the

parties to present their case. Merely because at one hearing he had not drawn detailed proceedings and had posted the matter for consideration would not mean that he did not follow the principles of natural justice. It is to be kept in mind that an Arbitrator is not to follow the same detailed procedure as is followed in the Courts. Normally, the parties engage Counsels who appear before the Arbitrator on their behalf. The Counsel appearing before the Arbitrator are the same who appear in the Courts and they expect the Arbitrator to proceed in the same manner as proceedings take place in the Courts. This conception of parties that Arbitrator has to follow the same procedure as is followed in the Courts is misplaced. An Arbitrator has only to see that he follows the principle of natural justice and gives opportunity of hearing to the parties. He can decide upon his own procedure, unless and until the parties have agreed to adopt specific procedure to be followed by the Arbitrator. The Arbitrator is not bound to follow any specific procedure and he can decide the matter between the parties only on the basis of affidavits and documents and if he feels there was no necessity of recording oral evidence, he can dispense with oral evidence. It is not necessary for Arbitrator to succumb to the pressure of a party to follow a specific procedure and continue the proceedings in a specific manner as desired by one party.

I find no force in the petition. The petition is hereby dismissed.

August 04, 2009

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SHIV NARAYAN DHINGRA, J.