

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

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OMP No.328/2009

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Date of decision: 09.07.2009

BHUMIKA ENTERPRISES PVT. LTD. Petitioner

Through: Through: Mr. T.K. Ganju, Sr. Advocate
with Ms. Roopa Dayal and Ms. A Patra,
Advocates.

Versus

ATUL ENTERPRISES Respondent

Through: Mr. S.K. Sharma with Mr. Mayank
Bansal, Advocates.

AND

OMP No.331/2009

**MRS. SAROJ BALA,
PROPRIETOR ATUL ENTERPRISES** Petitioner

Through: Mr. S.K. Sharma with Mr. Mayank
Bansal, Advocates.

Versus

BHUMIKA ENTERPRISES PVT. LTD. Respondent

Through: Mr. T.K. Ganju, Sr. Advocate with Ms.
Roopa Dayal and Ms. A Patna,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

RAJIV SAHAI ENDLAW, J.

1. The two petitions have been preferred by the two parties to the
agreement dated 5th March, 2009 containing an arbitration clause.

M/s. Bhumika Enterprises Pvt. Ltd. (BEPL) petitioner in OMP No. 328/2009 had put on sale certain machineries/buildings scrap etc. at its works at Udaipur as detailed in Annexure 1 to the Agreement; M/s. Atul Enterprises (AE) (through its proprietor Ms. Saroj Bala) petitioner in OMP No. 331/2009 had agreed to buy the same for a total sale consideration of Rs. 7 crores under the said Agreement dated 5th March, 2009. The said consideration was agreed to be paid in installments commencing from 20th March, 2009 till 5th September, 2009 as mentioned therein and of which post dated cheques were delivered by AE to BEPL. It was inter alia a term of the said Agreement that, on receipt of each installment, BEPL in consultation with AE would approve a lot from the list of machinery in annexure 1 that AE can dismantle and remove from the premises and the value of such machinery shall not exceed the installment paid by AE; that if AE lifts more than the amount paid till then BEPL shall forfeit all monies paid till then and put up the entire remaining machinery for sale as per its discretion; that if AE did not pick up the lot as approved on the due date, the payment of the next installment shall still become due; that AE shall not be entitled to withdraw or cancel and in case it does so, all monies paid till then shall be forfeited by BEPL; time was the essence of the Agreement and it was further provided that upon failure of AE to lift the entire machinery within the agreed time and the grace time agreed, damages as mentioned therein shall be levied for a further term of 30 days and whereafter BEPL shall have the right to forfeit all the money paid till then and to dispose of the entire machinery; the sale was to be on as is where is basis.

2. Some of the cheques having been dishonoured, BEPL issued notice of termination of the Agreement to AE and which has resulted

in the petitions being filed. In OMP No.; 328/2009 BEPL has claimed the relief of restraining AE from interfering with BEPL selling, transferring or creating third party rights in the machinery and building scrap lying at the premises or from removal thereof. In OMP No. 331/2009 AE has claimed the interim measures of staying the operation of the letter dated 4th June, 2009 of BEPL of termination of the Agreement and for directing BEPL to maintain status quo ante as it existed on the date of execution of the Agreement. Vide ad interim orders dated 15th June, 2009 the parties were directed to maintain status quo in respect of machinery and building scrap lying at the premises of BEPL. The said order was subsequently modified on 2nd July, 2009 with the consent of the parties, to be with respect only to the machinery subject matter of the Agreement and not with respect to other machinery at the said premises of BEPL which did not form part of the Agreement.

3. The dispute and controversy between the parties is as to the amount paid by AE to BEPL till date; whether the machinery admittedly removed till date was at the instance of AE and/or by its nominees or by BEPL surreptitiously in breach of the Agreement.

4. It is not disputed that prior to the Agreement dated 5th March, 2009 (supra) Agreements dated 14th February, 2009 and 25th February, 2009 with respect to same subject matter were also executed by the parties. The said Agreements are identical to the agreement dated 5th March, 2009 save that the consideration mentioned in the Agreement dated 14th February, 2009 is Rs. 8.51 crores and in the Agreement dated 25th February, 2009 is Rs. 7.51 crores. The documents show that the consideration was so reduced on the request of AE and for the reason of the fall in the prices of

scrap at that time. The counsel for AE has on the contrary contended that in fact the sale consideration was Rs. 8.51 crores only and on the insistence of BEPL, payments were made in cash by AE to BEPL and on successive payments being made in cash agreements reducing the sale consideration were executed and the cheques which were given under the said two earlier agreements, were returned by BEPL to AE against cash. It is further contended that the documents containing the request of AE for reduction in sale consideration were obtained by BEPL at the time of signing of the Agreement of 5th March, 2009. The counsel for AE, in this regard also relied upon the stamp papers used for the three agreements and contended that the same were purchased by BEPL on the same date and bear consecutive numbers. It is the submission of AE that besides the sum of Rs. 1.51 crores paid in cash, a further sum of Rs.2.07 crores has been paid till 20th April, 2009 making a total payment of Rs. 3.58 crores to BEPL.

5. The senior counsel for BEPL controverts the aforesaid position and has relied upon the documents of reduction of sale consideration and denied having received Rs. 1.51 crores in cash. It is contended that a total sum of Rs. 1.48 crores has been received from AE till date as shown in the statement filed by BEPL along with its documents and leaving a balance of Rs. 5.52 crores out of total agreed sale consideration of Rs. 7 crores.

6. The counsel for the AE contends that in spite of AE having made the aforesaid payment of Rs.3.58 crores till date AE has not removed any machinery or scrap from premises of BEPL, till date. At the time of hearing on 2nd July, 2009, it was contended by the counsel for AE that BEPL has surreptitiously removed machinery worth Rs. 3

crores from the premises. Invoices raised by BEPL on other parties with respect to sale of the machinery forming subject matter of the Agreement have been filed by AE along with its petition.

7. Per contrary the senior counsel for BEPL has contended that the machinery which is alleged to have been surreptitiously removed by BEPL in fact was removed and invoices aforesaid were drawn at the instance of AE; that AE did not have sales tax number of its own in Rajasthan from where machinery was to be removed and AE being a scrap dealer himself had after entering into the Agreement with BEPL identified the actual buyers of the material and asked BEPL to effect sale directly in favour of the said purchasers leading to the invoices aforesaid. BEPL has also filed letters received from the said purchasers to the effect that they had lifted the said goods from premises of BEPL after striking a deal with AE and that their negotiations were with AE. The senior counsel for BEPL has also drawn attention to the statement of payments received, filed by BEPL in which all the said payments have been accounted for besides certain other payments also received in cash from other parties brought by AE and to whom the goods were delivered at the instance of AE.

8. It is further the contention of BEPL supported by documents, that BEPL was desirous of dismantling the machinery and factory premises aforesaid for purposes of another project on the said premises and if the said machinery is ordered to remain at site as contended by AE, the same will lead to the project of the BEPL being delayed, leading to incalculable damages to BEPL. The senior counsel has further contended that the time was made the essence of the Agreement for this reason only. It is further contended by the

senior counsel for BEPL that considering the nature of the Agreement, the same is not specifically enforceable under the provisions of the Specific Relief Act. Several judgments have been cited in this regard. It is contended that even if AE succeeds in establishing the averments aforesaid, the claim of AE against BEPL shall at best be a monetary claim and for which the proposed project aforesaid of BEPL cannot be jeopardized. It is informed that BEPL has in terms of the agreement already appointed the arbitrator. On enquiry as to whether the order of status quo could not be granted for securing the amount, if any, ultimately found due to AE, the senior counsel has drawn attention to the petition of AE and contended that that is not the case with which AE has come before the Court; the petition of AE is on the premise of AE being entitled to status quo ipso facto during the pendency of the arbitration proceedings.

9. On 2nd July, 2009 during hearing, it was put to the counsel for AE whether AE was willing to lift the plant, machinery and goods in terms of the Agreement lying at site, since according to it, as on that date goods worth Rs. 3 crores had been removed and the goods worth balance value of Rs. 5.51 crores were still lying in the factory premises of BEPL. The counsel for AE at conclusion of hearing had stated that since the statement that goods worth Rs. 3 crores had been removed was made on the basis of the status existing as on the date of filing of OMP No. 331/2009 i.e. 12th June, 2009, AE before accepting or rejecting the offer would like to inspect the premises again. As such the matter was adjourned to today only for the purposes AE responding to the said offer of the Court. On suggestion of the counsel for the parties on that date and to avoid any further delays, a Court Commissioner was also appointed to draw up an

inventory of the machinery, building's scrap subject matter of Agreement lying at site. The commission has been executed and the Court Commissioner has filed the report.

10. The counsel for AE has today further contended that on inspection it has been found that today goods/building's scrap of value of Rs. 2.5 crores only are lying at site and valuable items are missing. It is also contended that a list of plant and machinery forming part of the agreement was prepared by parties while negotiating the contract. The same does not form part of any of the agreements. A copy thereof has been handed over in court. Several items as mentioned in the said list are averred to have been removed by BEPL. The counsel has on query also stated that AE is not interested in specific performance of the Agreement and in any case the agreement is now incapable of specific performance.

11. The counsel for AE has however contended that BEPL has acted fraudulently not only in matter of receiving the huge sum of RS. 1.51 crores in cash and also in removing the machinery surreptitiously not only prior to the filing of the petition but also thereafter and in preparing successive agreements and also taking all the documents including letter dated 5th May, 2009 filed by BEPL, from AE in advance and thus equities are not in favour of BEPL and thus AE is entitled to the order of status quo. It is now orally contended that the said order be also made to secure the monetary award, if any, in favour of AE. He contends that BEPL has obtained the letters aforesaid from its purchasers and that though AE does not have a sales tax number in Rajasthan but the temporary sales tax could have been obtained within hours in case of such transactions.

12. It being the admitted position that the agreement is not specifically enforceable, no case of restraining BEPL from removing the machinery or of maintaining status quo of the property is made out. If AE is not interested in purchasing goods at site and/or if BEPL cannot be compelled to sell the same to AE, no purpose will be served by retaining the same. An inventory has already been prepared. The photographs filed by court commissioner also show that if the goods are ordered to remain as they are, there may be pilferages and deterioration. While the claim of AE is monetary only, and yet to be established if the said machinery/building's scrap are not permitted to be removed immediately, the property of BEPL shall be wasted and cannot possibly be put to use for the new project as claimed. In fact during the hearing on 2nd July, 2009 an offer was given to the counsel for AE to furnish security for such losses which will be suffered by BEPL if the order of status quo is to be continued but the same was declined.

13. As far as the prima facie of the case is concerned at this stage, though the stamp papers suggest that same were bought at the same time but in view of the documents bearing the admitted signatures of AE, it cannot be said that actual sale consideration is 8.51 crores or was reduced against payments in cash. Moreover in my view, AE being itself a party to the illegality alleged, cannot take the said stand before the Court.

14. As far as the averments of BEPL having surreptitiously removed the goods to detriment of AE and of AE in-spite of paying the huge amount of Rs.3.58 crores having not removed single machinery from the premises is concerned, the same is also prima facie unbelievable. It was a term of the Agreement that the

machinery shall be permitted to be removed in proportion to the payments made. AE is not a novice in the business. During the course of hearing, the counsel for AE on instructions had stated that AE has annual turnover of over 25 crores. I find it hard to believe that AE, in spite of having paid the said monies would not have removed the proportionate machinery. Similarly the reliance by AE on the invoices by BEPL in favour of third parties is at this stage prima facie met by the letters of such third parties of having dealt with AE. It is not disputed that cheques given by AE have bounced. BEPL in terms of the agreement is entitled to forfeit monies paid till now and to sell to machinery to others.

15. In the circumstances aforesaid AE on the basis of the averments in its petition is not found entitled to the interim measures claimed.

16. As aforesaid, AE neither has prima facie case in its favour nor will suffer irreparable injury if the machineries are removed and sold by BEPL. The balance of convenience is also not in favour of AE. While claims of AE are for monies allegedly paid and damages, if the machinery is not allowed to be removed, the new project of BEPL will be held up causing incalculable loss to BEPL.

17. Though AE has not made out a case of securing monies if any ultimately found due, the senior counsel for BEPL has contended that the factory premises itself are worth 50 crores and are unencumbered.

18. OMP No.331/2009 in the circumstances is dismissed and OMP No. 328/2009 is allowed. AE shall not interfere in the dismantling and removal of the machinery by BEPL from the premises aforesaid.

19. Needless to add that any observation made herein shall not affect the determination of the matter on merits during the arbitration proceedings. Parties are however left to bear their own costs.

20. The counsel for BEPL states that the expenses incurred in the commission besides the fee of the commissioner were born by BEPL and in accordance with the order of the Court AE shall reimburse its share within 15 days.

IA No. 7884/2009 in 328/2009 and IA NO. 7903/2009 in 331/2009

The petitions having been disposed of, these applications have become infructuous and are dismissed.

RAJIV SAHAI ENDLAW,J

July 09, 2009
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