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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: February 21, 2011

Judgment pronounced on: March 09, 2011

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**C.S. (OS) No. 873/2004 and
CCP No.155/2004**

% M/s. S.P.R. Sales Private Limited ... Plaintiff
Through: Mr. P.V. Kapoor, Senior Advocate
with Mr. Inderjeet Sharma, Mr. Vimal
Nagrath, Ms. Karishma Singhal, Ms.
Ikasha Bhalla, Advocates.

versus

M/s. G.M. Breweries Limited ... Defendant
Through: Mr. Ashwani Matta, Senior Advocate,
with Mr. Sunil Agrawal and Mr.
Dinesh Kumar, Advocate.

C.S. (OS) No. 692/2005

% M/s. G.M. Breweries Limited ... Plaintiff
Through: Mr. Ashwani Matta, Senior Advocate,
with Mr. Sunil Agrawal and Mr.
Dinesh Kumar, Advocate.

versus

M/s. S.P.R. Sales Private Limited ... Defendant
Through: Mr. P.V. Kapoor, Senior Advocate
with Mr. Inderjeet Sharma, Mr. Vimal
Nagrath, Ms. Karishma Singhal, Ms.
Ikasha Bhalla, Advocates.

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

1. Whether the Reporters of local papers may be allowed to see the judgment?
 2. To be referred to Reporter or not?
 3. Whether the judgment should be reported in the Digest?
- No.

(hereinafter referred to as *GM Breweries*) is the bone of contention in these two suits, which were consolidated vide order of 22nd November, 2005 and the suit of *SPR Sales*, i.e., C.S. (OS) No. 873/2004 for recovery of the balance sale price of Bottling Line, i.e., for Rs.39,37,160/- with interest was treated to be the lead case.

2. The undisputed facts are that suit of *SPR Sales* for recovery of Rs.46,16,159/- is based upon supply Order of 28th May, 2003, in respect of the Bottling Line comprising of five machines with accessories worth Rs.66,74,051/- and out of the said amount, Rs.38,63,367/- was paid by *GM Breweries* at their factory at the time of commencement of the delivery of the said machines and the remaining amount was payable in twelve installments of Rs.2.5 lacs, with effect from 1st June, 2003, vide twelve post dated cheques, the details of which finds mention in paragraph No: 5 of the plaint instituted by *SPR Sales*.

3. It is the case of the *SPR Sales* that payment of Rs.27,36,891/- only was received till July, 2003, thereby leaving balance of Rs.39,37,160, which with interest constitutes the suit amount. As per *SPR Sales*, from 27th July, 2003 till 19th November, 2003 there were complaint from the *GM Breweries* regarding some minor problems in mono block and for installation and commission of the case packer, which was immediately attended to by the engineers of the *SPR Sales*. However, in December, 2003, *GM Breweries* had made complaint to the *SPR Sales*, that Rotary

by *GM Breweries* against *SPR Sales* in the High Court of Mumbai to recover the part payment of *Rs.27 lacs* is made towards the machine in question and *Rs.37 lacs* as damages for the purported loss suffered by *GM Breweries* because the average speed of the machines in question was 150-160 BPM instead of 240 BPM.

4. Since the relations between the litigating parties were cordial and because earlier also, a Bottling Line was supplied by *SPR Sales* to *GM Breweries*, therefore, there was accommodation between the parties to ensure successful running of Bottling Line in question and the communications exchanged between the parties during the period from January, to March/April, 2004 has been relied upon in these proceedings. The nature of communications exchanged between the parties is evident from the letter of 22nd April, 2004 (Ex.P-16) sent by *SPR Sales* to *GM Breweries* suggesting the measures to achieve the optimum speed of the Bottling Line, which are as follows:-

- (i) *The breakage of some bottles is only because of manual cleaning of the bottles, which cannot keep pace with the speed of the machine in feeding the bottles to the Rinsing Machine.*
- (ii) *The desired daily output by the machine cannot be achieved for the reason that the persons employed in cleansing the bottles get tired which results in slow feeding the machine.*

- (iii) *There is no doubt that the bottling line supplied by*

line can be checked by putting in operation soaker washer with it.

(iv) In the lines already supplied soaker washers are in operation with the result that no such complaint has ever been made.

(v) We have already told that there is shortage of space where the line is set up. In case conveyor is enlarged and the strength of the manual workers is increased, the line will positively work at the maximum speed of 220 BPM."

5. Pertinently, what was communicated by *GM Breweries* to *SPR Sales* vide letter of 30th January, 2004 (Ex. D-27), is as under:-

"However, taking into consideration our past relationship, we can also explore the possibility of retaining the machine with the existing speed, if proper price concession is offered by you to compensate by the lower output of the entire bottling line...."

6. The consistent stand of *GM Breweries* as reflected in the communications of 20th November, 2003 (Ex.D-19) and 20th March, 2004, (Ex.D-32), has been that despite requests, *SPR Sales* on one pretext or the other, did not take back the Bottling Line in question nor had returned the part payment received. According to *GM Breweries*, once *SPR Sales* admits that the maximum speed of Rotary Rinsing Machine is 220 BPM, no further demonstration is required. It is matter of record that *SPR Sales* had made a counter claim in the suit filed by *GM Breweries*, which was

of 29th October, 2004, a Local Commissioner was appointed to visit the factory premises of *GM Breweries* to report as to whether the Bottling Line in question comprising of (i) Bottle Rinsing Machine Conveyor & Machine Parts; (ii) Monoblock Filing Cum Sealing Machine, Conveyor & Machine Parts; (iii) Cap Elevator; (iv) Carton Packer; and (v) Carton Sealer & Conveyor 2 Ft., was functioning or not and in compliance of this order, learned Local Commissioner had submitted his Report (Ex.PW-1/2).

7. The composite Issues, which arose in these two suits, are as follows:-

- i) Whether the Plaintiff is a duly incorporated Company and the suit has been signed, verified and instituted by a duly authorized person? OPP*
- ii) Whether the Defendant in Suit No.873/2004 is liable to pay the balance price of the machinery supplied to him by the Plaintiff as stated in the plaint, if so to what extent? OPP*
- iii) Whether the machinery supplied to the Defendant was defective, as alleged in the written statement or to the specifications? OPP*
- iv) Whether the suit has been valued properly for the purposes of Court fee and jurisdiction? OPP*
- v) Whether the Plaintiff in C.S. (OS) No. 692/2005 is entitled to recover the price of the machinery and damages from the Defendant, if so to what extent?*

- vii) *Whether the counter claim has been properly valued for the purposes of Court fee and jurisdiction and if so to what effect? OPP (C.S. (OS) No. 692/2005)*
- viii) *Whether the parties are entitled to recover the interest, if so, at what rate and for which period? Onus on parties.*
- ix) *Whether the Plaintiff is entitled to seek directions against the Defendant to supply Form 'C'? OPP (C.S. (OS) No. 873/2004)*
- x) *Relief.*

8. The common evidence led in these two suits is of PW-1 - Shri Swaran Singh, Director of M/s. S.P.R. Sales Pvt. Ltd., PW-2 – Mohd. Qayum, from Courier Service, regarding proof of delivery of the consignment of the Bottling Line in question, PW-3 – Shri Rajshekhar Rao, Local Commissioner, who has proved his Report Ex.PW-1/2, regarding inspection of the factory premises of *GM Breweries*, and that of DW-1 - Shri S. Swaminathan, Finance Manager/Authorised Signatory of M/s. G.M.K. Breweries Ltd. and its factory manager, DW-2 – Shri J.K. Alphanso.

9. Learned Senior counsel for the parties had made their submissions and counter submissions and had painstakingly taken this Court through the aforesaid evidence and the documents on record. The decisions in *M/s. Dura-Line India Pvt. Ltd. vs. M/s. BPL Broadband Network Pvt. Ltd.*

vs. M/s. Indian Charge Chrome and others, AIR 1994 SC 626; *M/s. Sha Thilokchand Poosaji vs. Crystal and Co.*, AIR 1955 Madras 481; *Narional Traders vs. Hindustan Soap Works*, AIR 1959 Madras 112 (V46 C 36); *S.S. International vs. Union of India*, 123 (2005) DLT 287; O.S.A. No.301 of 2001 & V.C.M.P. No.7112 of 2004; *Binny Ltd. (Engineering Division) vs. Mayur Flooring Pvt. Ltd.*, decided on 13.12.2006; *Indochem Electronic and Anr. Vs. Additional Collector of Customs, A.P.*, (2006) 3 SCC 721; Suit Appeal No.173 of 1980, titled as *Calicut Engineering Works (P) Ltd. vs. Batliboi Ltd.*, decided on 01.09.2006; *Deutsche Homoopathie-Union Dhu-Arzneimittel GMBH & Co. KG vs. R.K. Import Pvt. Ltd. & Anr.*, 141 (2007) DLT 378, CDJ 2007 MHC 554 & CDJ 2006 Cal HC 556, were referred to, during the course of hearing.

10. Upon consideration of the submissions made, meticulous examination of the recorded evidence and on the perusal of the decisions cited, the findings returned are as follows:-

Issue No.(vi) & (vii)

11. At the outset, learned senior counsel for the *SPR Sales*, i.e., Defendant in C.S. (OS) No. 692/2005, had rightly not pressed these two Issues, as the same would be substantially the subject matter of consideration in adjudication of Issues No.(ii), (iii) & (v). So, no findings are required to be returned on these two Issues, which were not pressed at the hearing of this matter.

question were supplied by *SPR Sales* to *GM Breweries* during the period from 27th July, upto 19th November, 2003, and in December, 2003, there were some problems in one of the components, i.e., mono block and in installation and commission of the case packer of the Bottling Line in question and the outstanding balance of the Bottling Line in question was Rs.39,37,160/-.

13. During the course of hearing, learned senior counsel for the *GM Breweries* had made an endeavour to show that the Bottling Line in question was defective and to illustrate it, had drawn the attention of this Court to the cross-examination of PW-1 – Shri Swaran Singh of *SPR Sales* to point out that the purchase order to supply a Bottling Line in question was made on 28th May 2003 and the first supply against the aforesaid purchase order, of Rotary Rinsing Machine was made on 4th June, 2003 and since it takes two to three & half months to manufacture the Rotary Rinsing Machine and three to five days to test it, therefore, without testing the Rotary Rinsing Machine in question was supplied by *SPR Sales* to *GM Breweries* and to assert so, it is culled out from the cross-examination of PW-1 – Shri Swaran Singh of *SPR Sales* that on receiving the order in question, immediately *SPR Sales* had placed the order on Jagat Industries to supply the machine in question.

14. To say the least, the aforesaid contention is entirely conjectural for the reason that on this aspect, without further cross-examination of PW-1 –

Local Commissioner indicates that the Bottling Line in question was in operation and was hastily shut down on his arrival. No objections to the aforesaid Report (Ex.PW-1/2) were filed and even in the cross-examination of the learned Local Commissioner (PW-3), it could not be brought out that the Bottling Line in question was not in working order. The following conclusions of the Local Commissioner remain unassailable:-

- “(a) That all the pieces of machinery supplied by the Plaintiff, as set out the order dated 29.10.2004 passed by your Lordship were present at the site and appeared to be in good condition.*
- (b) The fact that the labeling machine was powered, and the presence of water near and inside the rinsing machine and the presence of large amounts of colorless liquid in and around the bottling machine seems to indicate that the machine was being used a short while before we entered the premises.*
- (c) The presence of the hose that was draining out liquid from the tank in the bottling machine clearly supports the said inference.*
- (d) The state of the conveyor belt is inconsistent with the statement of Mr. Almeida that the bottling line had been shut down for nearly six months now.*
- (e) The presence of shards of glass under the conveyor belt at various places is also inconsistent with the theory of non-use.*

down for six months.

- (g) The said fact would have been easily appreciated by a bare perusal of photographic evidence, which was not permitted by the Defendant's officials.*
- (h) It thus appears that the Defendant is presently using the machine supplied by the Plaintiff for its bottling purposes and that the said machinery was shut down hastily upon news of our arrival. The entire reason for delaying our entry into the factory premises appears to have been to prevent anybody from witnessing the fact that the said machinery was being used for bottling purposes."*

15. The entire tenor of the cross-examination of the star witness of *SPR Sales*, i.e., PW-1 Shri Swaran Singh is centered around the speed of the Bottling Line in question and there is hardly any cross-examination of this witness regarding the Bottling Line in question being defective. Rather, the question put to PW-1 - Shri Swaran Singh of *SPR Sales* in cross-examination, itself suggests that the Bottling Line in question was in running condition. The precise question put in this regard, is as under:-

"Q. Whether the employees of the Defendant (GM Breweries) were running the Bottling Line supplied by you properly?

A. Yes. It is correct that no complaint was made regarding earlier Bottling Lines supplied by us to them. "

examination of this witness regarding the Bottling Line in question being defective. Pertinently, there is no suggestion to this witness PW-1 Shri Swaran Singh of *SPR Sales* that the Bottling Line in question was defective. Infact, there is no basis to conclude that the Bottling Line in question was not in running condition. Now, what remains to be seen is, as to whether the Bottling Line in question was as per the specification and in this regard, PW-1 – Shri Swaran Singh of *SPR Sales* has though conceded that there is no test report for running of the Bottling Line in question at 240 BPM but he has reiterated that the Bottling Line in question has the capacity to be operational at the speed of 240 BPM but the manner of feeding of bottles may result into less production.

17. During the course of hearing, much emphasis was laid on the submission that the *SPR Sales* had not asked the Local Commissioner to run the machine in question at the speed of 240 BPM. This will not be of any consequence for the reason that even the *GM Breweries* had not also asked the Local Commissioner to have got it done. In any case, this was not required to be done, because it was beyond the purview of the Local Commissioner to have got it done. Whether by use of new bottles, the optimum speed would be obtained or not, would not be decisive because neither side has led any evidence to establish as to what was the optimum speed of the Bottling Line in question. Whether the bulk cap elevator shaft was rusted or not and if the stainless steel shaft gets rusted or not, would not be conclusive in determining the speed of the machine in question,

relevant is the admitted correspondence, i.e., letter of 20th March, 2004 (Ex.D-32), written by Shri J.K. Alphanso (DW-2) of *GM Breweries* to *SPR Sales* admitting that the maximum speed of the Bottling Line in question is 180 BPM only. The question put on this aspect to Shri J.K. Alphanso (DW-2) and the answer given thereto without any clarification, would speak for itself. It reads as under:-

“Q. Is it correct that in your letter dated 20.03.2004 (Ex.D-21) you have stated that the line works at a maximum speed of 180 BPM only? (At this stage, the record of the case has been placed before the witness)

A. It is correct.”

18. On the strength of the aforesaid available evidence, it can be safely concluded that the maximum speed of the Bottling Line in question is 180 BPM only. In view of the aforesaid conclusion, reference to Section 12(2), Section 15 and Section 16(1) of the Sales of Goods Act and to Section 39 of the Contract Act by learned Senior Counsel for *GM Breweries* and decisions reported in AIR 1955 Madras 481; AIR 1959 Madras 112; AIR 1994 SC 626; 123 (2005) DLT 287; CDJ 2007 MHC 554 & CDJ 2006 Cal HC 556, to highlight as to under what circumstances repudiation of contract is permissible, is rendered unnecessary in view of the findings, as aforesaid and particularly in the light of the admitted correspondence by *GM Breweries* to *SPR Sales* of 30th January, 2004 (Ex. D-27), whereby

retaining of the Bottling Line in question was contemplated by *GM*

19. The legal position on this aspect is well established and as highlighted in **Bengal Corporation** (supra), is as under:-

“In a suit by the seller where the buyer sets up a breach of warranty and claims damages in diminution or extinction of the price claimed by the seller by exercising his right under Section 59 of the Act, actual damages have to be proved. The measure of damages again is really not different from the measure adopted in the law of contract. In assessing the damages which the buyer would be entitled to under Section 59 of the Act, two things have to be found out. The first conclusion that the Court has to arrive at is what is the value or price of the goods which were contracted to be bought and sold. The Court has further to find out as to what is the value or price of the goods in respect of which a breach of warranty is being set up. Having done so, the Court has to deduct the second figure from the first and the difference would be the measure of damages which the buyer is entitled to in diminution or extinction of the price claimed by the seller.”

20. Since *GM Breweries* had not physically surrendered the Bottling Line in question, therefore *GM Breweries* cannot legitimately claim to recover the part payment of Rs.27,36,891/-. So far as the question of damages allegedly suffered by *GM Breweries* on account of loss of profits etc., are concerned, I find that this claim remains totally unsubstantiated. Therefore, the findings on Issue no.(iii) as well as on Issue no.(v) are necessarily required to be returned against *GM Breweries*. Accordingly, Issue No.(iii)

Line in question has to be considered in the light of the fact that the Bottling Line in question has been found to be having the maximum speed of 180 BPM and not 240 BPM as projected and so, the balance payment has to be on diminutive basis for Bottling Line in question, which would be as follows:-

<i>Total Basic Price of the machine (Taking speed 180 BPM) on prorate basis (55,21,650 * 180/240)</i>	<i>Rs.41,41,238.00</i>
<i>Excise Duty (Govt. Dues)</i>	<i>Rs.8,83,464.00</i>
<i>Central Sales Tax (Govt. Dues)</i>	<i>Rs.2,56,205.00</i>
<i>Total Price of the machine (Speed 180 BPM)</i>	<i>Rs.52,80,907.00</i>
<i>Insurance Charges paid on behalf of GM Breweries</i>	<i>Rs.12,732.00</i>
<i>Total Principal amount of the machine</i>	<i>Rs.52,93,639.00</i>
<i>Payment received from time to time till 21.11.2003</i>	<i>Rs.27,36,891.00</i>
<i>Balance amount</i>	<i>Rs.25,56,748.00</i>

22. In the light of the aforesaid conclusion, while deciding Issue No.2, it is held that *SPR Sales* is entitled to recover from *GM Breweries*, the principal amount of Rs.25,56,748/- as the balance price of the bottling line in question, on diminutive basis.

Issue No.(i) & (iv)

23. Both these issues were rightly not pressed at the time of hearing, because it is abundantly proved that suit is filed by *SPR Sales* on the basis

valued for the purpose of Court fee and jurisdiction. Both these Issues are accordingly answered.

Issue No.(viii)

24. Interest at the rate of 24 % per annum, as stipulated in the invoices concerning the supply of Bottling Line in question, is claimed. Reliance upon decision in ***M/s. Dura-Line***, (*supra*) is misplaced as it was a case under Order 37 of CPC distinguishable on facts and as such, cannot be of any assistance in determining the rate of interest in the present proceedings. In the instant case, the claim for interest at the rate of 24% per annum is clearly exorbitant, as the basis to claim such a high rate of interest has not been disclosed. In any case, in the facts and circumstances of this case, the reasonable rate of interest would be 9% per annum. Accordingly, it is held that *SPR Sales* is entitled to the interest @ 9% per annum on the decreed amount, w.e.f., 10th August 2004, till realization of the decretal amount. This Issue is accordingly answered.

Issue No.(ix)

25. There is no dispute that against the supply of Bottling Line in question *GM Breweries* was to supply statutory Form-C, which admittedly, has not been supplied and therefore, *SPR Sales* is legitimately entitled to seek a direction to *GM Breweries* to supply the said *Form-‘C’*. Accordingly, *GM Breweries* is directed to supply aforesaid *Form-‘C’* in question to *SPR Sales* within twelve weeks failing which *GM Breweries* shall pay Central

Issue No.(x)

26. In the light of the aforesaid findings, C.S. (OS) No. 873/2004 is decreed against *GM Breweries* for a sum of Rs.25,56,478/- with interest @ 9% per annum with effect from 10th August 2004 till realization, and GM Breweries to furnish Form-‘C’, failing which, pay Central Sales Tax at the rate of 4% against Form-‘C’, in question and C.S. (OS) No. 692/2005 is dismissed, while leaving the parties to bear their own costs. Decree Sheet be drawn forthwith.

CCP No. 155/2004 in C.S. (OS) No. 873/2004

27. It is a matter of record that during the pendency of the suit proceedings, this petition was lying dormant and no submissions were made on this petition by either side and rightly so, as I find that no case for initiating the contempt proceedings is made out. Accordingly, this petition is dismissed.

28. Both these suits and the CCP are accordingly disposed of.

Sunil Gaur, J.

March 09, 2011
pkb/rs