

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

+ O.M.P. 178/2013 and I.A.No.3669/2013

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Date of decision : 31st MAY, 2013

HRD CORPORATION

..... Petitioner

Through : Mr. Sunil Gupta, Sr. Adv.
with Mr. Shailendra Swarup,
Ms. Bindu Saxena, Mr. K.K.
Patra, Ms. Aparajita Swarup
and Ms. Neha Khattar,
Adv.

versus

GAIL(INDIA) LTD

..... Respondent

Through : Mr. Parag Tripathi, Sr. Adv.
with Mr. Tejan Karnia, Mr.
Nitesh Jain, Mr. Surendu
Das and Mr. Shakti, Adv.

CORAM :-

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

O.M.P. 178/2013 and I.A.No.3669/2013

1. The petitioner is seeking interim injunction for restraining the respondent from selling the wax produced at its new plant namely HDPE/LLDPE Plant at its Petro Chemical Complex at Pata, U.P. to any third party. The petitioner is also seeking a direction to the respondent to supply the entire quantity of wax produced at its aforesaid plant to the petitioner according to the terms of the

agreement dated 1st April, 1999.

2. Vide *ex-parte* order dated 25th February, 2013, this Court issued notice to the respondent and in the meantime, restrained the respondent from selling wax to the third party till the next date of hearing.

3. The respondent has filed I.A.No.3669/2013 under Order XXXIX Rule 4 of the Code of Civil Procedure for vacation of the *ex-parte* order dated 25th February, 2013.

4. The pleadings in OMP No.178/2013 and I.A.No.3669/2013 are complete. Both the parties have also filed brief note of submissions in terms of the order dated 17th April, 2013.

5. Brief Facts

5.1. On 1st April, 1999, the petitioner entered into an agreement with the respondent in which the respondent agreed to sell/supply the entire quantity of HDPE wax produced at its plant at its Petro Commercial Complex at Pata, U.P. to the Petitioner for a period of 20 years.

5.2. In 2002, the respondent envisaged the installation of a new plant. The respondent commenced the erection of the new plant in 2004 and the same was commissioned in December, 2007.

5.3 The respondent is selling wax from the new plant to third parties since April, 2012.

5.4. According to the petitioner, the wax produced from the new plant is covered under the agreement dated 1st April, 1999 and has therefore, approached this Court for injunction. However, according to the respondent, the wax from the new plant is not

covered under the agreement dated 1st April, 1999 and therefore, the respondent can sell the wax to third parties.

5.5. The following question as to the interpretation of the term ‘Plant’ in the agreement dated 1st April, 1999 has arisen for consideration in this petition:-

‘Whether the term ‘Plant’ in the agreement dated 1st April, 1999 means only the plant that existed at the time of the agreement dated 1st April, 1999 as alleged by the respondent or it includes the new plant set-up by the respondent as contended by the petitioner?’

6. Agreement dated 1st April, 1999

6.1. In order to interpret the meaning of the word ‘plant’ in the Agreement dated 1st April, 1999, it is necessary to reproduce the relevant portions of the Agreement which are as under:

“WHEREAS The SELLER has set up an HDPE/LLDPE Plant (“The Plant”) at its Petrochemical Complex at Pata, in State of Uttar Pradesh (India) (hereinafter called ‘UPPC’). AND WHEREAS the said Plant is expected to produce 3.6 KTA of Low grade HDPE Wax as a by-product.

AND WHEREAS the BUYER has offered to purchase the entire quantity of HDPE Wax that shall be produced at the SELLER’s Plant at UPPC.

AND WHEREAS in pursuance of the said offer the SELLER has agreed to sell and deliver to the BUYER HDPE Wax produced at the Plant at UPPC on the terms and conditions hereinafter contained.

NOW, therefore, the parties hereto hereby agrees as follows:

ARTICLE-1: EFFECTIVE DATE AND DURATION

1.1 This Agreement shall become effective on the date of execution and unless terminated as per the provisions hereof, and shall remain in effect for a period of 20 (Twenty) years.

ARTICLE-2: PURCHASE AND SALE

2.1 SUPPLY & SALE BY SELLER

a) Throughout the term of this Agreement, but subject to the terms and conditions hereof, the SELLER shall supply and sell to the BUYER all the HDPE Wax produced **at Seller's Plant** at UPPC from and after the date of commencement of production.”

(Emphasis supplied)

7. Submissions of the Petitioner

7.1. The word ‘Plant’ in the Agreement is used in wide sense

7.1.1. The word ‘Plant’ has been used in the Agreement dated 1st April, 1999 in the wider sense of being the whole industrial project or complex or factory and it denotes and connotes the entire industrial set-up of GAIL including various units of production, existing at present and to be established in future over 20 years.

7.1.2 The claims of GAIL in I.A. 3669/2013 are not borne out from the text of the agreement. The agreement does not mention Mitsui Plant at all.

7.1.3. If, as per the contention of GAIL, the agreement were to pertain to only one of the two plants, then it means the specifically mentioned Swing ‘HDPE/LLDPE Plant’. HDPE Mitsui Plant

which is not even mentioned. This narrow meaning of 'plant' would result in the agreement being rendered absurd and nugatory because the 'HDPE/LLDPE Plant' admittedly does not even produce wax.

7.1.4. In order to carry a reasonable and sensible meaning, wider meaning of 'Plant' has to be attributed to the agreement because that alone would include both the HDPE/LLDPE as well as the HDPE units, the former unit not being capable and the latter unit alone being the unit actually capable of producing wax as by-product. If the narrow meaning of 'Plant' is applied, then the HDPE/LLDPE unit alone will be included and that unit is not even the unit producing wax.

7.1.5. The word 'plant', as used in the agreement, has been and is required to be read and understood in the widest sense of the GAIL project or complex or factory at Pata in its entirety comprising multiple units, i.e. the HDPE/LLDPE unit as well as HDPE unit and thereafter, any further HDPE unit or other unit capable of production of wax.

7.1.6. The use of the word 'expected' in the agreement shows that wax production in itself did not exist at the time of execution of the agreement and was still to come into being on a future date. Had the very first HDPE plant alone been the subject matter of the agreement, then the expression 'expected to produce' would not have been used. The capacity of the very first HDPE plant was known to be 2% of the main product and admittedly, it was on an average 1700 MTA i.e. 1.7 KTA of wax. If increase or

enhancement in production of wax was to be achieved in future by means of an additional unit or furnace or otherwise had not been contemplated, then a much less quantity of wax would have been mentioned and by no means the word 'expected' would have been used.

7.1.7. GAIL in its Annual Report of 2002 in para 5.4.1 read with para 10 mentions that the Mitsui plant on an average produces 1700 MTA of wax i.e. 2% of the main product viz. 1,00,000 MTA of HDPE. That being so, the parties intended that GAIL is expected to establish and commission, at least, two such Mitsui units for HDPE production of 1,00,000 MTA each: then alone, the parties would have been able to achieve $1700+1700=3400$ MTA or 3600 MTA = 3.6 KTA of wax as a by-product. As such, the parties intended to include not one but, at least, two or even more units of Mitsui technology. Had only one such unit been contemplated, then the expected quantity would have been in the vicinity of 1.7-2.0 KTA of wax.

7.1.8. In GAIL's Annual Report for Financial Year 2006-07, GAIL had itself described the HDPE capacity of the plant in its aggregate as 3,10,000 TPA and has declared that it is expanding the said capacity to 4,10,000 TPA. In other words, GAIL uses the word 'Plant' in the widest sense as including its HDPE/LLDPE Swing Plant of 2,10,000 MTA + 1st HDPE plant of 1,00,000 MTA and also the 2nd HDPE Plant of 1,00,000 MTA capacities. In the same report, GAIL refers to the 2nd HDPE plant as 'New HDDPE unit of 1,00,000 TPA' and says that it will 'enhance' the polymer

capacity of the company to 4,10,000 TPA. This shows that GAIL itself recognizes the distinction between ‘the Plant’, on the one hand, and one of the units of the plant, on the other hand, and also recognizes the enhancement of the total capacity of the Plant by the addition of any such unit. The same distinction is also found in GAIL’s Annual Report for Financial Year 2007-08 where it repeats the ‘increase’ in the capacity of Pata from 3,10,000 TPA to 4,10,000 TPA by ‘addition of a new cracker furnace and a new polymer unit’.

7.1.9. In the website of GAIL (as accessed on 07.03.2013), GAIL has mentioned the distinction between its plant, on the one hand, and unit or trains of production, on the other. It has, once again, referred to the entire capacity of its plant at Pata as being the aggregate of all the three units viz. $210000 + (2 \times 100000) = 410000$ MTA and indicated further increase in the total capacity to 500000 MTA by adding a 6th furnace and debottlenecking of the plant at Pata.

7.1.10. In the Minutes of 184th meeting of the Board of Directors of GAIL on 27th November, 2012, it is recorded that initially GAIL had resolved that it would expand the capacity of its project at Pata by installing a new Swing LLDPE/HDPE unit of 120 KTA. Thus, an individual manufacturing plant is referred to as a ‘unit’ and not as ‘plant’.

7.2. GAIL’s plea is barred by *Res Judicata*

7.2.1. The Arbitral Tribunal’s Award between the parties dated 8th April, 2006 has already decided that GAIL is bound to sell the

entire wax produced in its Pata complex to the petitioner and it cannot sell the same to any third party. Though GAIL had on 30th April, 2004 resolved to establish a second HDPE plant or unit or train of production of Mitsui technology (*vide* minutes of 207th meeting of BOD of GAIL), it did not take the plea before the Tribunal that, in any case, it would not be liable to supply wax to the petitioner from its upcoming second HDPE plant/unit/train of production. The present plea of GAIL is barred by *res judicata*/constructive *res judicata* in view of the award of the Arbitral Tribunal.

7.2.3. The issue whether the petitioner is entitled to specific enforcement of the contract for supply of wax for a period of 20 years was decided by the Arbitral Tribunal *vide* award dated 8th April, 2006.

7.2.4. The Arbitral Tribunal in the award dated 8th April, 2006 also decided that the supply of wax by GAIL to the petitioner must continue to be made for the period of 20 years only at the price arrived at by following the mechanism contained in the agreement and not at the market price or international price prevailing at any time during the period of 20 years.

7.2.5. The petitioner, in February 2013, discovered sale of HDPE wax from the New Plant to the third parties from the invoice in favour of M/s Faith Industries dated 6th February, 2013.

7.2.6. The petitioner has a legal right to an interim as well as a perpetual mandatory injunction directing specific performance of its contract with GAIL by an order commanding GAIL to continue

to supply wax from its Pata plant (including from both the 1st HDPE unit as well the 2nd HDPE unit of the Pata plant) only and exclusively to the petitioner and not to any 3rd person or party for a period of 20 years.

8. Submissions of the Respondent

8.1. The Petition is not maintainable

8.1.1. The petition under Section 9 of the Act is not maintainable because the HDPE Wax is produced in the New Plant does not form part of the Agreement dated 1st April, 1999 and the same is not covered by the Award. The petitioner is therefore, not entitled to the Wax produced at its New Plant under the Agreement. The dispute sought to be raised by the petitioner is not covered by the arbitration clause contained in the agreement. The petition filed under Section 9 of the Act is therefore, not maintainable.

8.1.2. In the commercial contracts, there can never be a specific performance as damages would always be an adequate remedy, that even if there is no specific termination clause, from the very nature of the agreement, which is private commercial transaction, the same could be terminated and such contract cannot be specifically performed. Damages is not only the adequate remedy but can easily be ascertained by the petitioner placing on record price of similar wax in the national/international market. The reference is made by the respondent to Sections 14(1)(a) and 41(e) of the Specific Relief Act.

8.1.3. The petitioner has not come with clean hands. The petitioner has deliberately chosen not to inform either the learned Tribunal in the earlier round of litigation or this Court as to what it is doing with the wax and how much profit is being made. It would show that whole case of the petitioner is an attempt to force the respondent which is a public sector undertaking to keep on supplying the wax even though there is no contract/obligation so that the petitioner can make unconscionable profits. Thus, case of the petitioner is hit by the principle of unjust enrichment, particularly at the cost of the respondent, which is a public sector undertaking.

8.1.4. There is another aspect relating to the conduct of the petitioner. There is a current litigation between the parties. In view of the regular nature of the arbitration proceedings in respect of plant 1, the principles of fairness and interest of justice require that the petitioner ought to have given advance notice to the respondent as the matter is a crucial matter involving long term *ad interim* specific performance of a commercial contract and more so, when a copy of the application under Rule 13 of ICADR Rules seeking interim measures from the learned Tribunal was served on the respondent seeking same reliefs as sought in the present petition. In such circumstances, a party which for no apparent reason seeks to snatch *ex-parte* orders, must necessarily answer the question of extreme urgency which compelled the petitioner. The prayers in the application under Rule 13 of the ICADR Rules are same as the prayers in the present petition.

8.2. The New Plant does not form part of the Agreement

8.2.1. The new plant does not come within the purview of the agreement as:

8.2.1.1. It was only in 2002 that the respondent envisaged a new plant which was conceived to have a new downstream swing LLDPE/HDPE plant and ultimately it decided to set up the said new HDPE plant which had an estimated investment of Rs.650 crores by respondent. This was not at all contemplated at the time of entering into the agreement. The respondent commenced erection and commissioning of the new plant in 2004 and the same was commissioned in December, 2007.

8.2.1.2. The Annual Reports of the respondent for Financial Year 2006-07 and Financial Year 2007-08 record the planning and commissioning of the new plant.

8.2.1.3. The agreement clearly provides in recitals that “The Seller has set up an HDPE/LLDPE Plant at its Petrochemical Complex at Pata, in Uttar Pradesh”. The above clause unambiguously demonstrates that the agreement was in relation to the plant then existing and not for any other HDPE plants that may be set up by respondent in future. The plain reading of the above clause shows that it cannot in manner be interpreted to bring plurality of plant in the agreement.

8.2.1.4. At the time of the agreement in 1999, the respondent did not even envisage setting up the new plant and hence, the same does not in any manner fall within the purview of the agreement. Neither of the parties could reasonably foresee nor contemplate

that all subsequent or future plant(s). Therefore, the petitioner cannot claim anything more than what is covered under the agreement.

8.2.1.5. The agreement clearly does not contemplate any future or subsequent plant and refers to only the plant which has been set up. The agreement in no manner can be construed to include supply of any goods produced by the respondent at its new plant.

8.2.1.6. The website of the respondent also states that “GAIL has plans to augment the installed capacity further by putting up new plants of HDPE/LLDPE by 500 KTA at Pata, which is targeted to be operational by Financial Year 2013-14”. If the argument of the petitioner has to be accepted, then each and every plant that respondents sets up would come under the agreement. Such an interpretation of the agreement sought to be given by petitioner if liable to be rejected.

8.3. New Plant is a separate Plant or Train

8.3.1. The respondent uses different nomenclature for Wax of Plant 1 and new plant. The wax being produced from Plant 1 and sold to petitioner under the agreement uses the nomenclature as “LP wax flakes – OW”. On the other hand, the nomenclature used for the wax produced from new plant is “LP wax Flakes (N)” where “N” stands for HDPE-2 plant, i.e. new Plant.

8.3.2. Admittedly, the invoice issued by the respondent to M/s Faith Industries Private Limited, Gandhi Nagar for sale of wax, would show under the heading “Description of Goods” that the

invoice has been issued for sale of wax from New Plant, i.e.; “HDPE-2 Batch” and not from existing plant.

8.3.3. In petrochemical industry, a plant is also termed as ‘Train’ since it receives feedstock from the upstream plant of Ethylene. However, the Plant 1 and Plant 2 are independent and different downstream plants. Hence, mere usage of the terms ‘Train-1’, ‘Train-2’ does not mean that both the trains are part of same plant.

8.3.4. In the application filed before the learned Arbitral Tribunal, the petitioner has sought preservation of Wax produced at respondent’s plant which the respondent is allegedly disposing off by offering it as Premium PE wax from line 2 to the third parties. The new plant does not produce any premium wax as alleged and there is no line 2 present in the new plant and that the new plant cannot in any manner be construed as Line 2 as it is a separate plant altogether.

8.4. Respondent is under obligation to supply entire quantity of Wax produced only of Plant 1

8.4.1. The agreement clearly spells out that ‘the plant’ is expected to produce 3,600 MTA of LP wax from the Mitsui plant at UPPC, Pata and that the entire LP was to be supplied to Marcus, Haldia produced by ‘the plant’ in the premises of UPPC, Pata without reference to any quality requirements. The respondent has been supplying the entire quantity of Wax produced at the plant 1 as contemplated in the agreement.

8.4.2. The petitioner has contended that HDPE Train-1 can provide up to 1700 MTA of wax and hence it is logical that the next HDPE Train –II can together produce 3400 MTA Wax. In fact, the plant (or plant 1) had supplied 3249 MT (approx.) and 3242 MT (approx.) of Wax during 2008-09 and 2009-10, respectively. Therefore, the contention of the petitioner that plant (Plant 1) and New Plant (Plant 2) together can produce 3400 MTA wax is baseless and untenable. The contention of the petitioner that plant (Plant 1) and new plant (plant 2) together can produce 3,400 MTA wax is wrong and erroneous as the total production of Wax from Plant 1 and Plant 2 exceeds 4,500 MTA whereas the expected capacity of production is 3,600 MTA under the agreement.

8.4.3. The output of new plant has not affected the output of the plant -1 and, therefore, there is no prejudice caused to the petitioner, who is being supplied wax from existing plant-1 without any change in compliance of the award.

8.4.4. Further, the production of Wax varies with the polymer grade which is being produced in the upstream plant. The revenue generated from selling Wax (which is the by-product) is only 0.2% of the revenue from the sale of Polymer (which is the main product). The respondent has no intention to lower the production of its main product i.e. polymer merely to reduce its bye-product.

8.5. No case made out for grant of any interim injunction

8.5.1. The petitioner has failed to satisfy any of the principles for grant of injunction, i.e. prima facie case, balance of convenience

and irreparable loss and injury. On the other hand, the respondent has strong *prima facie* case in its favour and balance of convenience is also in favour of the respondent the respondent has been recently selling 210 MT of Wax per month (approximately) produced at the New Plant which has been generating revenue of Rs.1.22 crores (approximately) per month. Unless the order is vacated, the respondent will suffer irreparable loss of revenue, profit, business opportunity as well as loss of reputation and goodwill in the domestic and global market. Further, it would cause severe prejudice since the order restrains the respondent from selling all wax even though the petitioner has no right over the wax being produced from the new plant.

8.5.2. The petitioner has been buying wax from the respondent out of plant 1 at the basic price of Rs.32,950/- per MT as per the price fixed by the learned Arbitral Tribunal where as the market price of the same is much higher. The petitioner is evidently seeking to achieve its wrongful attempt to grab the wax produced at respondent's new plant at the same price fixed by the learned Arbitral Tribunal which is almost half of the present market value of the wax. It is wrongful and mala fide intention of the petitioner to create market monopoly in wax.

9. Finding

On careful consideration of the rival contentions of the parties, the findings of this Court are as under:-

9.1. The language of the agreement dated 1st April, 1999 is clear, unambiguous and capable of only one interpretation that the

respondent had agreed to sell all the HDPE wax from the plant existing at that time and therefore, the term “Plant” in agreement dated 1st April, 1999 would not cover the HDPE wax produced by the respondent in their new Plant commissioned in December, 2007. The agreement dated 1st April, 1999 clearly records that the respondent **‘has set-up an HDPE/LLDPE Plant (“the Plant”)**’ at petrochemical complex at Pata in U.P. It is further recorded that **‘the said Plant’** is expected to produce 3.6 KTA of HDPE wax as a by-product. It is further recorded that the respondent has agreed to sell the HDPE wax produced **‘at the seller’s plant’**. Article 2.1 of the agreement records that the respondent shall supply/sell of HDPE wax produced at the respondent’s **‘plant’** to the petitioner.

9.2. At the time of the agreement dated 1st April, 1999, the respondent did not even contemplate setting-up a new plant. The respondent envisaged the new plant only in 2002, commenced the erection in 2004 and commissioned the same in December, 2007.

9.3. There is no material on record to show that even the petitioner could reasonably foresee or contemplate any subsequent or future plants by the respondent.

9.4. There is no clause in the agreement dated 1st April, 1999 for sale/supply of wax to be produced by the plants to be set-up by the respondent in future.

9.5. If the parties intended to cover the plants to be set up by the respondent in future, the Agreement would have clearly recorded the same.

9.6. The intention of the parties at the time of the agreement dated 1st April, 1999 is also clear from the plain reading of its terms that the parties intended to cover the wax produced from the existing plant at that time.

9.7 This Court does not agree with the petitioner's submission that the word 'Plant' in the agreement dated 1st April, 1999 has been used in a wider sense to cover the entire industrial product/complex or factory existing in 1999 or to be established in future over 20 years.

9.8 This Court also does not agree with the petitioner's contention that the Annual Reports, website and minutes of Board Meeting of the respondent be looked into to interpret the meaning of the term 'Plant'. The respondent can use the word 'Plant' at different places, in different context and in different manner. The reference can be made to other documents to find out the true meaning of the term "Plant" if there had been any ambiguity in the meaning of the term 'Plant' in the agreement dated 1st April, 1999. However, since the meaning of the term 'Plant' in the agreement dated 1st April, 1999 is clear and unambiguous, no other document is required to be looked into to import a different meaning.

9.9 The petitioner cannot claim anything more than what is covered by the terms of the agreement which has to be interpreted giving *literal* meaning unless, there is some ambiguity therein.

9.10 The agreement is to be interpreted giving the actual meaning to the words contained in the agreement and it is not permissible for the Court to make a new agreement.

9.11 The agreement has to be interpreted without giving any outside aid.

9.12 The terms of the agreement have to be constructed literally without altering the nature, as it may affect the interest of either of the parties adversely.

9.13 It is also well settled that an agreement is interpreted according to its purpose. The Court is required to determine the ultimate purpose of an agreement by the joint intent of the parties. It is not the intent of the single party; it is the joint intent of both the parties from the entirety of the agreement and circumstances surrounding its formulation.

9.14 It is the Court's duty to give effect to the bargain of parties according to their intention and when that bargain is in writing, the intention is to be looked from the words used. If those words are clear, there is very little that the Court has to do. The Court must give effect to the plain meaning of the words.

9.15 There is no merit in the petitioner's argument that the respondent's defence is barred by principles of *res judicata*. The arbitration proceedings between the parties related to the HDPE wax produced by the respondent from its existing plant. There was no issue relating to the wax produced by the respondent at the new plant before the learned Arbitrators and no finding has been given

by the learned Arbitrators in this regard. There was no occasion for the respondent to raise this defence before the learned Arbitrators and, therefore, the plea of constructive *res judicata* is also not made out.

9.16 The petitioner does not have a *prima facie* case for grant of injunction sought for as the wax produced by the respondent from the new plant is not covered under the agreement dated 1st April, 1999 and the respondent is continuously selling the same to third parties since April 2012. The balance of convenience is also in favour of the respondent and against the petitioner as the present market price of the wax produced by the respondent is above Rs.55,000 per MT whereas the respondent is supplying the wax from the existing plant to the petitioner at the price of Rs.32,950 per MT. The respondent would suffer irreparably if the interim injunction is granted to the petitioner.

10. Conclusion

10.1. In the facts and circumstances of this case, this Court is of the view that the petitioner is not entitled to the interim injunction prayed for. OMP No.178/2013 is therefore dismissed. IA No. 3669/2013 is allowed. Interim order dated 25th February, 2013 stands vacated.

J.R. MIDHA, J

MAY 31, 2013

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