

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

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Date of decision: 4th July, 2013

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CS(OS) 713/2010

JINDAL STEEL & POWER LIMITED

..... Plaintiff

Through: Mr. Pinaki Misra, Sr. Adv. with
Mr. Atul Shanker Mathur, Ms.
Shruti Verma, Mr. Aseem
Chaturvedi and Mr. Abnisaar
Bairagi, Advs.

Versus

N.S. ATWAL

..... Defendant

Through: Mr. Rajshekhar Rao and Mr. Adit
S. Pujari, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.12936/2011 (of the defendant for leave to defend)

1. The plaintiff has sued under Order 37 of the CPC for recovery of principal sum of Rs.2,98,39,060/- along with interest at the agreed rate of 10% per annum accrued thereon with effect from April, 2007 to March, 2008 and thereafter @ 12% per annum from April, 2008 till institution of this suit in February, 2010 i.e. total Rs.4,00,44,341.20p, pleading:

- (i) that the defendant is the sole proprietor of M/s Guru Mehar Construction;

- (ii) that in December, 2000, the defendant approached the plaintiff with offer to conduct the excavation activities required by the plaintiff at its mining site near Dongamohua village, District Raigarh, Chhattisgarh;
- (iii) that after negotiations and deliberations, the plaintiff awarded to the defendant, the contract for hiring of heavy earthmoving equipments and services for excavation works for a total period of four years i.e. till March, 2005 vide Work Order dated 02.03.2001;
- (iv) that vide letter dated 13.06.2005, the defendant requested the plaintiff to provide a one time soft loan of Rs.7.17 crores recoverable over the period of five years on the ground that the defendant needed to replace and revamp the existing equipments;
- (v) that the plaintiff agreed to so provide financial assistance to the defendant as is evident from the letters exchanged between the parties and disbursed the loan to the defendant and the defendant agreed to the plaintiff deducting installments from the amounts becoming due and payable by the plaintiff to the

defendant on the basis of bills raised by the defendant for the work done under the aforesaid Work Order;

- (vi) that thereafter the defendant vide its letter dated 16.06.2005 informed the plaintiff that he needed a soft loan of Rs.500 lacs but since the plaintiff had agreed to provide a sum of Rs.300 lacs only, the said sum of Rs.300 lacs would be repayable by way of monthly installments of Rs.10 lacs along with interest over a period of 30 months starting from November, 2005;
- (vii) that the plaintiff released a total sum of Rs.563 lacs to the defendant from 18.06.2005 to 17.11.2005, out of which a sum of Rs.450 lacs was paid directly to the defendant and a sum of Rs.113 lacs paid to SREI Infrastructure Finance Ltd. for and on behalf of the defendant towards lease financing of equipment;
- (viii) that the defendant vide letter dated 24.11.2005 admitted and acknowledged the receipt of the aforesaid loan amount and requested for the same to be repaid over a period of five years instead of 30 months as agreed earlier and which was agreed to by the plaintiff;

- (ix) that the defendant vide letter dated 19.07.2006 further requested for release of a sum of Rs.200 lacs for meeting its working capital requirement and further Rs.275 lacs to make down payment to financiers from whom he had got the required equipments financed on leasehold basis;
- (x) that in response to the aforesaid request, the defendant was provided additional financial assistance of Rs.100 lacs on 02.08.2006;
- (xi) that thus during December, 2004 till August, 2006 total financial assistance of Rs.663 lacs was provided by the plaintiff to the defendant;
- (xii) that the plaintiff vide its letter dated 17.07.2006, on the request of the defendant, agreed to renew the Work Order for the period starting from 15.02.2006 till 31.03.2007 and a formal Work Order dated 04.08.2006 was issued by the plaintiff and accepted by the defendant;
- (xiii) that the defendant failed to perform his obligations under the Work Order and the plaintiff vide its letter / notice dated 08.11.2006 terminated the said Work Order and called upon the

defendant to pay the sum of Rs.548.64 lacs along with interest and also to pay the liquidated damages;

- (xiv) that the defendant challenged the legality and validity of the termination and raised a claim to the tune of Rs.436 lacs on account of non adjustments and being due to him under the Work Order though not disputing the outstanding of Rs.548.64 lacs in the loan account;
- (xv) that the plaintiff denied the claim of the defendant of Rs.436 lacs and claimed the amount of Rs.2,98,39,060/- towards principal outstanding loan amount and Rs.163.86 lacs under the work order;
- (xvi) that the plaintiff thereafter filed an Arbitration Application No.53/2009 under Section 11 of the Arbitration and Conciliation Act, 1996 before this Court. The said petition was dismissed vide judgment dated 03.12.2009 holding that the loan transaction was independent of the Work Order and not arbitrable under the arbitration clause in the Work Order; and

(xvii) that hence this suit for recovery of principal outstanding of Rs.2,98,39,060/- under the loan account with interest as aforesaid.

2. The suit was entertained under Order 37 of the CPC and summons for appearance were issued. The delay of 2/3 days in entering appearance was condoned vide order dated 12.04.2012 subject to payment of costs of Rs.20,000/-. In response to the summons for judgment, the defendant seeks leave to defend on the following grounds:

- (i) that the suit is not maintainable under Order 37 of the CPC;
- (ii) that there is no contract for payment of interest at 10% as claimed;
- (iii) that the claim is barred by limitation; the loan is pleaded to have been given between 17.06.2005 and 02.08.2006 and the limitation for seeking recovery thereof was three years only;
- (iv) that the parties have contractual relationships for over 12 years;
- (v) that the defendant had resisted the petition under Section 11 of the Arbitration Act filed by the plaintiff pleading that the dispute pertaining to soft loan advanced by the plaintiff to the

defendant were an entirely different transaction and not subject matter of the arbitration clause in the Work Order;

- (vi) that the arbitration proceedings initiated by the plaintiff arising out of disputes in relation to the Work Order are pending before the sole Arbitrator;
- (vii) that the legal notice dated 08.11.2006 showed an outstanding of Rs.5,48,64,000/- towards the loan amount but in the suit, the principal amount has been claimed to be Rs.2,98,39,060/- only;
- (viii) that 'assuming though not admitting' even if the said amount is payable by the defendant towards the purported loan amount which could have been adjusted with the securities and other funds belonging to the defendant and held back by the plaintiff;
- (ix) that the termination of the Work Order was *mala fide*; elaborate pleadings have been made in that regard but which it is not felt necessary to record the same being not germane to the matter in controversy; and,
- (x) that the defendant has claims of much larger amount against the plaintiff and which are subject matter of arbitration.

3. The plaintiff has filed reply to the leave to defend application.
4. The counsels have been heard.
5. The counsel for the defendant has argued; i) that the plaintiff has not filed the original documents on the basis whereof the suit has been filed, the suit is thus not maintainable under Order 37 of the CPC; ii) that there is no contract between the parties on the basis whereof a liquidated amount of money claimed in the suit can be said to be due from the defendant to the plaintiff; iii) that the suit claim is barred by time; and, iv) that all these raise triable issues and for which leave has to be granted to the defendant.
6. Per contra, the senior counsel for the plaintiff has drawn attention to:
 - (i) letter dated 13.06.2005 of the defendant to the plaintiff asking for a soft loan of Rs.7.17 crores recoverable over a period of five years;
 - (ii) letter dated 16.06.2005 of the defendant to the plaintiff confirming the agreement arrived at between the parties;
 - (iii) letter dated 24.11.2005 of the defendant to the plaintiff thanking the plaintiff for the loan to the tune of Rs.4.50 crores and for making payment of Rs.50 lacs to the financier of the defendant

on behalf of the defendant and requesting for the said loan to be repayable in five years time;

- (iv) letter dated 19.07.2006 of the defendant to the plaintiff requesting for a loan of Rs.2 crores for working capital;
- (v) letter dated 22.11.2006 of the defendant to the plaintiff confirming that the loan amount was being recovered from the running bills raised by the defendant on the plaintiff;
- (vi) letter dated 05.01.2007 of the defendant to the plaintiff not controverting the payment on loan account;
- (vii) reply filed by the defendant in Arbitration Application No.53/2009 supra, also not denying the loan transaction and only pleading the same to be not arbitrable;

7. The senior counsel for the plaintiff has relied on:

- (i) ***Rickmers Verwaltung GMBH Vs. Indian Oil Corporation Ltd.*** (1999) 1 SCC 1 laying down that it is the duty of the Court to construe the correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties which could create a binding contract between them and on the basis thereof has contended that if from the

correspondence an unequivocal and clear contract emerges, the claim would be maintainable under Order 37 of the CPC;

- (ii) ***Corporate Voice (P) Ltd. Vs. Uniroll Leather India Ltd.*** 60 (1995) DLT 321 where on the basis of letters exchanged between the parties, the suit under Order 37 CPC was entertained;
- (iii) ***Deutsche Ranco GMBH Vs. Mohan Murti*** 52(1993) DLT 288 laying down that the counter claim of the defendant is not a defence to a suit under Order 37 of the CPC; and
- (iv) ***R. Kumar & Co. Vs. Chemicals Unlimited*** AIR 2001 Bombay 116 where on the basis of letters addressed by the defendant to the plaintiff pointing out the amounts stated in their books of accounts to be their liabilities towards the plaintiff, the suit under Order 37 was held maintainable.

8. The counsel for the defendant in rejoinder again invited attention to para 31 of the leave to defend making detailed pleadings with respect to the illegality of the termination effected by the plaintiff of the Work Order and referred to the judgment dated 31.08.2012 of this Court in CS(OS) 2859/2011 titled ***GE Capital Services India Vs. May Flower Healthcare***

Pvt. Ltd. laying down that the suit for a balance amount due on a loan account does not fall under Order 37 of the CPC and that merely because the plaintiff has a strong case on merits cannot be a ground to entertain the suit under Order 37.

9. During the hearing on 23.01.2013, it was enquired from the counsel for the defendant whether the defendant in his own books of accounts was showing any loan due to the plaintiff. On the counsel for the defendant being not able to reply, it was deemed appropriate to examine the defendant under Order 10 of the CPC and the defendant was directed to appear on 31.01.2013 for recording of his statement along with his books of accounts i.e. ledger and balance sheet of the relevant years and till date, showing the loan account with the plaintiff and to state as to how much money on the loan account according to him was due to the plaintiff without adjustment of his counter claim against the plaintiff.

10. In response to the aforesaid, the defendant appeared on 31.01.2013 and produced a bunch of documents comprising of 30 sheets containing *inter alia* the balance sheet of M/s Guru Mehar Construction, sole proprietary of the defendant and in which the sum of Rs.2,98,39,060/-, being the principal amount claimed in the suit, was shown as loan outstanding to the plaintiff as

on 31.03.2011. Ex.P1 was put on the said documents and in view thereof need was not felt to record the statement of the defendant and the counsels were heard further.

11. The counsel for the defendant in his further submissions frankly stated that in view of the defendant himself in his balance sheet showing the outstanding of Rs.2,98,39,060/- towards the plaintiff, the said liability could not be disputed. His contention however was, liability to repay the said amount was intertwined with the Work Order disputes with respect where to were subject matter of pending arbitration proceedings between the parties.

12. Per contra, the senior counsel for the plaintiff contended that the conduct of the defendant as has emerged from the aforesaid, is contumacious; that though the plaintiff was desirous of having the claims on the loan account also adjudicated in arbitration proceedings but it is the defendant who had opposed the same and cannot now be heard to argue to the contrary.

13. The counsel for the defendant in rejoinder has argued that the defendant, if made to pay the loan amount before his claims under the Work Order are adjudicated, would be devastated and on humanitarian grounds the

adjudication in this proceeding should await the outcome of arbitration proceeding.

14. As far as the plea of the maintainability of the suit under Order 37 of the CPC is concerned, though undoubtedly there is no document on the basis whereof, the defendant can be said to have admitted the liability in the balance principal amount of Rs.2,98,39,060/- towards the plaintiff but in my opinion, in view of the subsequent admission by the defendant of the liability in the principal amount claimed in the suit, the same pales into insignificance. This Court, if were to, inspite of such admission by the defendant, go into technicalities as to the maintainability of the suit under Order 37 of the CPC, would be lending credence to the perception “the law is an ass – an idiot” echoed by Mr. Bumble in Charles Dickens ‘Oliver Twist’. Justice cannot be frustrated by legalistics. It is the duty of every court to prevent its machinery from being made a sham, thereby running down the rule of law itself as an object of public ridicule. It will and must prove any stratagem self defeating if a party indulges in making the law a laughing stock, for the court will call him to order. Justice Krishna Iyer in *Bushing Schmitz Private Limited v. P.T. Menghani* (1977) 3 SCR

312 quoted with approval Lord Erskine "there is no branch of the jurisdiction of this Court more delicate than that, which goes to restrain the exercise of a legal right". He further held "But the principle of unconscionability clothes the court with the power to prevent its process being rendered a parody". Once it is clear that there is no dispute of the sum of Rs.2,98,39,060/- being due from the defendant to the plaintiff in the loan account, the Court will not enter into an academic exercise and pronounce on technicalities. The Supreme Court in *T. Arvindandam Vs. T.V. Satyapal* AIR 1977 SC 2421, *Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I* (2004) 9 SCC 512 and *ITC Limited Vs. Debts Recovery Appellant Tribunal* (1998) 2 SCC 70 has held that the Courts are not to prolong litigations, the fate whereof is otherwise clear and at the expense of other cases requiring adjudication. Even if not under Order 37 of the CPC, the plaintiff under Order 12 Rule 6 CPC or under Order 15 is entitled to a decree in the principal sum of Rs.2,98,39,060/-. Recently also, in *Krishna Devi Malchand Kamathia v. Bombay Environmental Action Group* (2011) 3 SCC 363, the Supreme Court observed that justice is only blind or blindfolded to the extent necessary to hold its

scales evenly; it is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.

15. As far as the claim for interest is concerned, there is undoubtedly no agreement as to the rate of interest @ 10% or @12% on which the plaintiff has claimed interest for the period prior to the institution of the suit. Though the correspondences between the parties mentions of the payment of interest but the senior counsel for the plaintiff has not shown any document containing agreement as to rate of interest or show rate at which interest was being paid by the defendant to the plaintiff. The plaintiff has also not explained the basis for claiming interest @ 10% or 12%. However, it has been held in ***Khera Handloom Supply Vs. O.B. Exports*** 41(1990)DLT343, and ***Rama Vision Ltd. Vs. Babbar Vision India Pvt. Ltd.*** 67(1997)DLT281 that merely because there is no agreement as to the rate of interest, is no ground not to entertain the suit under Order 37 of the CPC.

16. Considering the entirety of the facts and circumstances, I am of the view that grant of interest at the rate of 8% per annum from 01.04.2008 being the year in which the plaintiff has instituted the arbitration application

under Section 11 of the Arbitration Act against the defendant would subserve the purpose.

17. Once the plaintiff is found entitled to a decree, the same cannot be denied or stalled for the reason of pendency of a claim in a separate proceeding by the defendant against the plaintiff, as is clear from ***Deutsche Ranco GMBH*** supra, though in execution, if such claim is allowed by then, the same may have relevance under Order 21 Rule 18 CPC.

18. The application for leave to defend is accordingly disposed of.

19. Axiomatically, a decree is passed in favour of the plaintiff and against the defendant for recovery of Rs.2,98,39,060/- together with interest at 8% per annum thereon with effect from 01.04.2008 till the date of institution of the suit, *pendente lite* and till the date of recovery. The plaintiff shall also be entitled to costs of the suit as per the Schedule.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 4th, 2013
'gsr'