

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

% **Date of decision: 11th January, 2017**

+ **CS(OS) 1433/1999 & IA Nos.1875/2000 (u/O 37 R-3 CPC),
6363/2000 (u/O 37 R-4 CPC) & 6388/2000 (for condonation of
delay in filing leave to defend)**

UNION OF INDIA (UOI) Plaintiff

Through: Mr. Vijay Joshi, Adv.

Versus

KALYANPUR CEMENTS LTD. Defendant

Through: Mr. Girish Kumar & Ms. Pooja
Singh, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff Union of India (UOI) instituted this suit under Order XXXVII of the CPC for recovery of Rs.4,34,78,523/- with future interest from the defendant Kalyanpur Cements Ltd. pleading:

- (i) That the defendant was a cement producer and cement being a controlled commodity, under the provisions of the Cement Control Order, 1967 read with Sections 18(G) and 25 of the Industries (Development & Regulation) Act, 1951, the ex factory price of the cement produced by the defendant was fixed at Rs.168.91 paise per metric tonne and the said price was modified from time to time.
- (ii) That the defendant, depending upon its sale of cement, was to pay every month into the Cement Regulation Account (CRA) maintained by the plaintiff at Delhi.

- (iii) That as per the books of account maintained by the plaintiff in respect of CRA, a sum of Rs.2,10,94,588/- was due from the defendant to the plaintiff as on 1st January, 1991 and which the defendant failed to pay inspite of repeated demands.
- (iv) That the defendant, vide its letters dated 23rd August, 1989, 4th August, 1993 and 12th May, 1997 acknowledged the said debt and made part payment of Rs.10,00,000/- in two instalments of Rs.5,00,000/- each on 3rd February, 1998 and 4th June, 1998.
- (v) That though the defendant after making said part payment requested for time to pay the balance amount but did not pay.
- (vi) That the defendant submitted an application on 3rd August, 1989 seeking deferment in payment of CRA dues and promised to pay the amount in quarterly instalments of Rs.10,00,000/- beginning the quarter January-March, 1994 and to pay interest at 10% per annum.
- (vii) That the Government i.e. the plaintiff had also sanctioned moratorium on repayment of CRA dues for a period of four years.
- (viii) That the defendant however did not honour its aforesaid commitment also.
- (ix) That the defendant is liable to pay interest at the rate of 10% per annum from 1st January, 1991 to 7th January, 1995 and after that at the rate of 15% as ordered by the Supreme Court qua another company in a similar case.
- (x) That inclusive of the said interest, a sum of Rs.4,34,78,523/- is due and for recovery of which this suit was being filed.

2. The suit was entertained and summons for appearance issued and upon the defendant entering appearance, summons for judgment were issued.
3. On 7th May, 2001 i.e. before the service of summons for judgment, the counsel for the plaintiff and the counsel for the defendant sought reference to the Lok Adalat and the matter was accordingly referred.
4. Evidently no settlement was arrived at and summons for judgment were issued and IA No.6363/2000 for leave to defend and IA No.6388/2000 for condonation of delay in applying for leave to defend were filed.
5. On 15th July, 2002, the counsel for the defendant stated that the defendant intended to move an appropriate application as the defendant company was before Board for Industrial and Financial Reconstruction (BIFR).
6. Though no such application was filed but the order dated 21st April, 2003 records that the counsel for the plaintiff had verified that the defendant had approached the BIFR with application No.7266/2002 and BIFR was seized of the matter; accordingly the proceedings in the suit were stayed sine die with liberty to either of the parties to get the same revived if so advised.
7. Neither party applied for revival of the suit and the Registry of its own listed the suit on 2nd February, 2007 when it was informed that the defendant was still before the BIFR. After several adjournments, vide order dated 3rd February, 2009, the proceedings in the suit were again adjourned sine die with liberty to the parties to revive the same as and when the order was passed by the BIFR.
8. Again none applied for revival of the suit and the Registry of its own listed the suit on 13th August, 2015 when court notice was issued to the

defendant.

9. The defendant filed an affidavit stating that though the claim for rehabilitation of the defendant had been sanctioned by BIFR but steps for modification of the said scheme were underway.

10. On 21st November, 2016, it was enquired from the counsel for the defendant whether the defendant in its books of accounts and statements filed before the BIFR showing the amount claimed by the plaintiff in this suit as due to the plaintiff. It was further observed that if it was not so, the question of stay of proceedings under Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) would not arise. Accordingly, the matter was adjourned with a direction to the defendant to file an affidavit in this regard and with a further direction that if affidavit is not filed, Director of the defendant in a position to make a statement should remain present before the Court.

11. Though no affidavit is on record but the counsel for the defendant states that an affidavit dated 14th December, 2016 of Mr. Manoj Kumar, Manager (Legal) of the defendant has been filed.

12. The counsel for the plaintiff also states that an advance copy of the same was received.

13. The Registry to place the said affidavit on record.

14. The counsel for the defendant has in Court handed over a copy of the said affidavit and the same is taken on record.

15. The defendant in the said affidavit has stated i) that as per Clause 14.2 of the Scheme sanctioned by BIFR, a sum of Rs.2.08 crores is contributable by the defendant to the CRA; ii) relief in this regard has been sought from the Ministry of Commerce and Industries; iii) that the defendant in its

financial restructuring package has provided for the sum of Rs.208.23 lacs being the principal amount payable to the Government of India.

16. Today, the counsel for the defendant mentioned the matter just before lunch stating that the proceedings have to remain stayed on account of Section 22 of SICA.

17. However the counsel for the defendant was informed that vide Notification dated 25th November, 2016 SICA has been repealed with effect from 1st December, 2016 and thus the question of this proceedings remaining stayed under Section 22 of SICA did not arise.

18. The counsel for the defendant then stated that under the repeal notification, there is a provision for 180 days to approach the National Company Law Tribunal (NCLT) for the same relief as claimed before BIFR and adjournment be granted on that ground.

19. However the counsel was informed that even if that be so, once there was no equivalent to Section 22 of SICA, the question of proceedings in this suit remaining stayed would not arise. Adjournment sought was denied finding the suit to be of the year 1999.

20. The counsel for the defendant upon being asked to argue the applications for leave to defend and for condonation of delay in applying therefor again seeks adjournment inspite of having been informed that the matter cannot be adjourned.

21. The counsel for the defendant does not argue inspite of opportunity.

22. In this view of the matter, there is no option but to dismiss IA No.6363/2000 for leave to defend and IA No.6388/2000 for condonation of delay in applying for leave to defend, for non prosecution.

23. I may however record that the defendant in the application for

condonation of delay, without specifying the date on which the summons for judgment were received, has pleaded that DGM, Legal Affairs of the defendant who had received the summons was unwell due to cardiac problem and was on medical leave from 3rd April, 2000 till 23rd May, 2000 and joined duties on 24th May, 2000 and thereafter leave to defend application was being filed.

24. The defendant being a company and it being not the case of the defendant that the functioning of the defendant had come to a standstill for the aforesaid reasons, the defendant cannot take advantage of illness of one of its officials. Legislature has provided for the time schedule for applying for leave to defend and the said time schedule cannot be defeated by invoking such vague and specious grounds.

25. Be that as it may, I have already noticed above that the defendant, in the Scheme for rehabilitation sanctioned for it by the BIFR, has already admitted liability to the plaintiff in the principal amount claimed in the suit. I have wondered as to on what ground can the defendant now seek leave to defend.

26. The plaintiff, on the basis of the pleadings, has made out a case for the suit being maintainable under Order XXXVII of the CPC. A perusal of the documents filed also show the pleadings to be in consonance with the documents filed.

27. A perusal of the leave to defend application of the defendant also does not show the defendant to have disputed the material averments made in the plaint on the basis whereof the suit claim is made. The defendant has merely sought to put the plaintiff to proof and made vexatious denial.

28. The counsel for the defendant at this stage draws attention to Grounds 1 and 5 taken in the application for leave to defend and contends that while repealing the Cement Control Order, no provision was made for recovery of any amount.

29. I have enquired from the counsel for the defendant, whether the said repeal results in the amounts due from the defendant when the Cement Control Order was in force, ceasing to be due.

30. The counsel for the defendant has not made any further submission.

31. No merit is found in any case in the said contention. Clause 9 of the Cement Control Order required every producer of cement to, in respect of each transaction effected of sale of cement, pay into the CRA an amount equivalent to the amount by which the free price of cement realised exceeded the control price of cement. Clause 11 thereof provided for the maintenance of CRA and money so collected in the CRA to be spent in the manner provided. With effect from 1st March, 1989, though the said Clause 9 of the Cement Control Order providing for the payment by the cement producers in the CRA was omitted, but Clause 11 providing for the maintenance of the CRA and spending of the amount collected therein was continued. Supreme Court in *Union of India Vs. Glaxo India Limited* (2011) 6 SCC 668, in the context of the Drugs (Prices Control) Order, 1979 held that the question whether the statutory obligation subsists in respect of a period prior to repeal of a provision of a statute or any sub-ordinate legislation promulgated thereunder has to be ascertained on legal consideration apposite to the particular context. It was held that the previous liability for a period prior to supersession of a notification is not wiped out as the effect of supersession of an Notification / order is not to altogether

obliterate the Notification / order which is superceded and the liabilities accrued or incurred under the earlier notification remains unaffected, since supersession is effected from the date of notification and not retrospectively so as to abrogate the earlier notification from the date of its commencement. In the present case, from the retention of Clause 11 supra providing for the manner in which the monies collected in CRA were to be spent, notwithstanding the omission of Clause 9 providing for collection of monies in CRA, it is evident that the liability incurred by the defendant for payment into CRA was not wiped out on cessation of future liability for payment in CRA. Reference in this regard can also be made to *State of Orissa Vs. Titaghur Paper Mills Co. Ltd.* 1985 (Supp) SCC 280.

32. Thus on merit also I am satisfied that the defendant has not disclosed any sufficient cause for condonation of delay in applying for leave to defend or for grant of leave to defend.

33. Accordingly, IA No.6363/2000 for leave to defend and IA No.6388/2000 for condonation of delay in applying for leave to defend are dismissed.

34. The question arises with respect to interest.

35. I have enquired from the counsel for the plaintiff whether there is a statutory provision on the basis whereof interest at the rate of 10% and at the rate of 15% has been claimed.

36. The counsel for the plaintiff has not shown any statutory provision.

37. Considering all the facts and circumstances, I am of the view that the plaintiff should be held entitled to pre-suit interest as claimed but to future interest from the date of institution of the suit and till the date of payment, at the rate of 10% per annum only.

38. A decree is accordingly passed in favour of the plaintiff and against the defendant for recovery of Rs.4,34,78,523/- with interest at 10% per annum from the date of institution of the suit till realization.

39. The plaintiff shall also be entitled to costs of the suit.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

JANUARY 11, 2017

‘gsr’

(Corrected & released on 19th January, 2017)