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

RESERVED ON : AUGUST 25, 2017

DECIDED ON : NOVEMBER 13, 2017

+ **CS(OS) 2059/2006, CC 274/07 (for extension of time), IA 5354/10 (For direction) , 5355/10 (u/O XII R 6 CPC), 10441/15 (Delay), 10442/15, 10443/15 (u/O XII R 6 CPC), 10444/15 (Delay), 10643/15 (u/S 151 CPC), 10644/15 (u/S 151 CPC), 10845/16 (Delay) & OA 172/16 (u/R 4 C II DHC Rules)**

HINDALCO INDUSTRIES LTD. Plaintiff

Through : Mr.Atul Shanker Mathur, Advocate
with Ms.Nimita Kaul & Mr.Vivek
Mathur, Advocates.

versus

WHITE METALS INDS. PVT. LTD Defendant

Through : Mr.Prasad Subramonium, Sr. Advocate
with Mr.Naveen Chawla & Mr.Mayank
Bughani, Advocates.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P GARG, J.

1. Present suit for recovery of 3,75,64,364.00 has been preferred by Hindalco Industries Ltd.(hereinafter 'the plaintiff') against White Metals Inds.Pvt.Ltd. (hereinafter 'the defendant').

2. Briefly stated, the plaintiff's case as pleaded in the plaint is that the defendant approached the plaintiff-company to effect sale of its products as a dealer on various terms and conditions agreed between the

parties. After effecting the sales, the plaintiff used to raise invoices in respect of sales made to the defendant from time to time against the running account. As per the arrangement, the defendant was required to make the payment of the invoices within a period of 45 days, at times through letters of credit and at other times through the other mode of payment. It is averred that the plaintiff at request of the defendant from time to time sold and supplied to the defendant various consignments of the products during the period 20.11.2005 till 9.2.2006. The defendant made part payments only against two invoices; and neglected to pay the amount of the remaining invoices. The plaintiff raised the invoices during this period against the supplies of the products in the sum of ₹3,18,92,818/-. The defendant against the outstanding amount paid a sum of ₹3,68,658/- only and the outstanding dues payable by the defendant were to the tune of ₹3,15,24,160/-. After considering the credit/debit notes issued in respect of the discounts, claims, expenses etc. for a sum of ₹10,55,839/-, the defendant owed a sum of ₹3,28,80,353/- to the plaintiff.

3. It is further pleaded that the plaintiff supplied the products to the defendant on principal to principal basis as a dealer/customer under good faith by virtue of Consignment Agency Agreement dated 20.06.2000, which was initially valid for a period of three years i.e. uptill 19.06.2003. It was subsequently extended till 30.05.2005 and thereafter till 31.03.2006.

4. It is further averred that there was an outstanding amount of ₹3,96,93,758.36 as on June, 2000. Mutual arrangement for settlement of dues was executed between the parties vide agreement dated

20.06.2000 and letter of the defendant dated 2.6.2003. As per the said agreement the defendant was to pay interest on the outstanding amount @ 10% p.a. as a special case; the defendant was to clear the principal dues within the mutually agreed time schedule. The defendant was liable to pay interest amounting to ₹86,10,008/- on the said outstanding amount. An amount of ₹48,49,568/- was adjusted from the commission/discount against the future supplies under the new account transaction i.e. the account maintained after frozen of the earlier liability of ₹3,96,93,758.36. The defendant was thus liable to pay the balance outstanding interest amounting ₹37,60,440/- which he failed to pay.

5. By a communication dated 2.6.2003, the defendant pursuant to the agreement dated 20.06.2000 acknowledged its liability and its commitment to clear the entire outstanding dues as per the agreement. The defendant, however, did not meet the time schedule and the contract period was extended till 30.05.2004. Vide communication dated 31.08.2005, the plaintiff informed the defendant that out of the total interest amounting to ₹86,10,008/- only a sum of ₹48,49,568/- has been received leaving a balance of ₹37,60,440/-. The defendant is further liable to pay ₹9,23,571/- against the supplies made to the defendant as a consignment agent against the five challans dated 30.12.2005. The amount of challans issued by the plaintiff is ₹6,02,541/- and the defendant has paid only a sum of ₹35,916/- leaving a balance of ₹5,66,625/-. After adjusting the debit/credit memos, a sum of ₹9,23,571/- is still outstanding. The defendant failed to clear the outstanding amount despite various reminders; hence the suit.

6. The suit is contested by the defendant. In the written statement, the defendant controverted the allegations of the plaintiff and informed that in March, 2000, management of INDAL was taken over by HINDALCO i.e. the plaintiff. After taking over the charge, the plaintiff offered two price options to all its customers i.e.(a) prices linked to metal price with base prices as NALCO prices and (b) prices linked to prevalent market conditions. The defendant exercised its option and opted for prices linked to metal price with base prices as NALCO. Vide letter dated 20.06.2000 INDAL accepted all the proposals of the defendant dated 31.01.2000 regarding settlement of old outstanding and a conclusive agreement was reached between the parties for further trading. By the said agreement dated 20.06,2000, the defendant was appointed as consignment agent w.e.f. 01.07.2000; the old outstanding amount was reconciled and freezed, which was to be cleared within a period of three years. The defendant was to pay simple interest @ 12% p.a. on the reducing balance on the freezed outstanding. The interest was to be calculated jointly in writing at the end of every quarter and the total interest amount will be cleared in 4th year after the outstanding amount so freezed is fully cleared. It was further agreed that new purchases will be made by the defendant against cash payment and the defendant was entitled to 2% cash discount. It is alleged that the plaintiff started interfering into the terms of the contract dated 20.06.2000 and expressed its desire to withdraw the NALCO linked pricing structure which was objected to by the defendant. Taking advantage of unequal bargaining power, the plaintiff unilaterally withdrew the pricing mechanism in the contract and withdrew the Nalco

linked pricing structure. The plaintiff started charging the defendant at much higher prices. The defendant was under compulsion to continue the business with the plaintiff. By a letter dated 17.04.2003, the defendant raised its protest and objected to the policy.

7. It is further claimed that the defendant cleared the entire old outstanding dues with the hope to rejuvenate the old relationship. However, there was no change in the plaintiff's behavior as a result of which the defendant suffered huge losses in business. Letter dated 2.1.2006 was written to the plaintiff pointing out the discrepancies in the calculations which was against the terms agreed between the parties. Various letters issued by the defendant remained unresponsive. The plaintiff further stopped giving necessary statutory documents like E-1 Sales Tax Forms and TDS certificates etc. forcing it to pay the penalties to different government authorities. On 14.09.2006, the plaintiff was again asked to reconcile the accounts in view of difference in the calculation under various heads, it had no impact upon the plaintiff.

8. It is further stated that the present suit is not maintainable and has not been filed by a duly authorized person. All the averments in the plaint regarding defendant's liability to pay dues were specifically denied and controverted.

9. The defendant in the Counter-Claim (CC No.274/2007) pleaded that as per the clause 6 of the agreement dated 20.06.2000, the defendant was to clear the outstanding dues within a period of three years. The defendant has paid an amount of ₹4,45,47,799.68 against the liability of previous outstanding of ₹3,96,93,758.36. Thus the amount of ₹48,54,041.32 has already been paid in excess to the plaintiff which

it has failed and neglected to pay despite repeated requests and demands. It is further pleaded that in violation of the agreement dated 20.06.2000 between the parties, the plaintiff over-charged the defendant for the material supplied; the plaintiff raised inflated invoices. The total overcharges from the period 2000 to 2006 were to the tune of ₹6,06,20,415.04. The plaintiff had been paying over and above the actual price of the goods purchased as per the agreed upon NALCO basic metal price and had virtually paid in excess of the goods supplied by the year 2002. If the excess amount along with the already paid installments for frozen debt amount, is considered, it would have the effect of wiping of the entire frozen debt amount in the year 2002 itself. The defendant is thus entitled to interest of ₹1,40,00,000/- for the excess of payments made from the year 2002 to 2006. The plaintiff is also liable to pay the defendant penalties paid by him to different government authorities due to the plaintiff's failure to send the necessary statutory documents like E-1 Sales Tax Forms and TDS certificates etc. The plaintiff was liable to pay ₹52,76,422.15 and ₹12,62,409.40 as penalties on account of non-submission of E-1 forms.

10. It is further pleaded that on 10.11.2006 and 12.11.2006, the defendant in fulfillment of its obligation went personally to hand over to the plaintiff the sales tax forms as required from it; these were, however, not accepted. It resulted in loss of about ₹30,00,000/- for which the defendant stood absolved, as having fulfilled its obligations. The defendant was also entitled to a sum of ₹18,15,299.40 as debt balance after accounting for all the credit notes. The defendant was further entitled to ₹1,04,00,000/- towards cash discount difference

which was denied to it. A sum of ₹1,13,404.44 was also outstanding against the plaintiff for non-encashing of Margin money cheques by the plaintiff. Since the plaintiff has failed to pay the amount, hence the instant Counter Claim.

11. In the replication, the plaintiff denied the averments of the defendant as well as the claims described in the Counter Claim.

12. On the basis of the pleadings of the parties in the suit and Counter Claim, following issues were framed on 20.01.2009:-

(i) *Whether Mr.Rajesh Sharma through whom the present suit has been filed was duly authorized to sign, verify and institute the said suit and if not, to what effect?* OPP

(ii) *Whether the agreement dated 20.06.2000 executed between the plaintiff's erstwhile M/s Indian Aluminum Company Ltd. (INDAL) and the defendant was a continuing agreement and binding upon the plaintiff?* OPD

(iii) *Whether the plaintiff is entitled to recover the suit amount from the defendant?* OPP

(iv) *Whether the counter claim filed by the defendant against the plaintiff is barred by time?* OPP

(v) *Whether the defendant is entitled to recover any amount from the plaintiff and if so, under what heads of the counter claim and to what amount?* OPD

(vi) *Whether the plaintiff or the defendant is entitled to any interest and if so, at what rate, on what amount and for which period?* OP Parties.

(vii) *Relief.*

13. The plaintiff was accorded several opportunities to produce its witnesses. At one stage, the plaintiff placed on record affidavit by way of evidence of its witness Rajesh Sharma. However, subsequently, the plaintiff opted to produce evidence of some other individual as Rajesh Sharma who was no more in the company. The plaintiff was unable to produce any evidence despite various opportunities and finally the evidence stood closed.

14. The defendant examined DW-1 (Ranjeet Kumar Kapoor). The plaintiff was given numerous opportunities to cross-examine him, however, the witness could not be cross-examined and finally, the right of the plaintiff to cross-examine the witness was closed.

15. I have heard the learned counsel for the parties and have examined the file. Issue-wise findings are as under:-

Issue No.1

16. As observed above, the plaintiff did not adduce any evidence despite various opportunities granted. No evidence has emerged to prove if the present suit has been filed by a duly authorized person. No document is on record to prove that Rajesh Sharma by whom the present suit was filed was duly authorized to sign, verify and institute the suit. No Board resolution authorizing Rajesh Sharma has been proved. Specific objection was taken by the defendant in the written statement that the present suit was not properly instituted and Rajesh Sharma was not authorized to sign and verify the pleadings. Apparently, there is no valid suit instituted on behalf of the plaintiff.

17. This issue is decided in favour of the defendant and against the plaintiff.

Issue No.3

18. The burden to prove this issue was heavily upon the plaintiff. Learned counsel for the plaintiff urged that in para 3 of the plaint, it was specifically averred that at the request of the defendant, the plaintiff had sold and supplied to the defendant various consignments of the products during the period from 20.11.2005 to 9.2.2016. The defendant had made part payments only against two invoices; it failed and neglected to pay the amount of remaining invoices despite receipt of the products. The plaintiff raised invoices during this period to the tune of ₹3,18,92,818/-. Against this outstanding amount of the invoices, the defendant paid only a sum of ₹3,68,658/- and balance outstanding dues payable by him were ₹3,15,24,160/-. In the written statement there was no specific denial to these averments by the defendant; it stood admitted by him. Relying on *Nagindas vs. Dalpatram Icharam alias Brijram and Ors.* (1974) 1 SCC 242; *Sudhir Engineering Company vs. Nitco Roadways Ltd.* 1995 (34) DRJ 86; *United Bank of India vs. Naresh Kumar and Ors.* (1996) 6 SCC 660; *M. Venkataramana Hebbar (Dead) by LRs vs. M. Rajgopal Hebbar and Others* (2007) 6 SCC 13 401 and *Gian Chand and Brothers vs. Ratan Lal alias Rattan Singh* (2013) 2 SCC 606, it was urged by the counsel that on the basis of the admission, the defendant was liable to pay the said outstanding dues. This contention has been controverted by the defendant. It is urged that no admission about the liability was ever made by the defendant.

19. As noted above, the plaintiff did not examine any witness to prove the averments in the plaint. The plaintiff did not produce any credible document on record to establish if the defendant was liable to

pay ₹3,68,658/- for the goods supplied to the defendant from the period 20.11.2005 to 9.2.2006. In the written statement read as a whole, the defendant denied its liability to make the said payment. Under the head 'material facts', it was urged that the plaintiff had agreed to appoint the defendant as consignment agent w.e.f. 1.7.2000. As per the Agreement dated 20.06.2000, the old outstanding amount was reconciled and freezed; it **were** to be cleared within three years. The defendant was to pay interest at the rate of 12% p.m. on reducing balance on the freezed amount; new purchases were to be made against cash payment entitling the defendant to 2% cash discount. The base price of the new purchases was linked to NALCO base price of the metal. It is further urged that the plaintiff started interfering into the terms of the contract dated 20.06.2000 and expressed its desire to withdraw the NALCO linked price fixation; which was objected to by the defendant. Taking advantage of his monopoly position, the defendant was pressurized to agree to the unreasonable demands. The plaintiff withdrew the NALCO linked pricing structure and started charging the defendant at much higher prices. It is further urged that on 17.04.2003, a letter was written to Mr. Sumit Banerjee objecting to the policy and indicated the credit of difference. Another letter dated 15.05.2003 was written protesting to the blocking of supply of material to the defendant; request was made to solve all the disputes between the parties. The plaintiff stopped supplies to the defendant by withdrawing the premium products as a result of which the defendant suffered losses. Finding no other alternative, the defendant thought to exit from the business relationship. On 2.1.2006, a letter was written to the plaintiff pointing the discrepancies in the

calculations which were completely against the terms agreed between the parties; request was made to reconcile the accounts in the spirit of the agreement dated 20.06.2000. The said letter was never responded to and the plaintiff abruptly and arbitrarily blocked all the supplies against the pending delivery order and the defendant was asked to surrender the dealership. Instead of settling the accounts, the plaintiff again wrote a letter dated 14.03.2006 asking for the alleged dues. It was responded by a letter dated 20.03.2006 and it was pointed out that there were wrong calculations; the demand was wrong and discrepancies were pointed out for reconciliation of the accounts. It is further alleged that the plaintiff stopped giving necessary statutory documents like E-1 Sales Tax Forms and TDS certificates etc. The plaintiff adopted no-talk policy for reconciliation of accounts. No response was given to various letters written by the defendant to the plaintiff.

20. Apparently, there were disputes and differences between the parties regarding the exact payment to be payable by the defendant to the plaintiff. The plaintiff never responded to the letters written by the defendant urging him to reconcile the accounts. It was upon the plaintiff to establish that the demands raised in the invoices were entirely in terms of the express contract executed between the parties and there was no deviation to it. Various allegations in the written statement proved by DW-1 (Ranjeet Kumar Kapoor) remained unchallenged and unrebutted. Adverse inference is to be drawn against the plaintiff for not examining any witness to prove averments in the plaint and to deny the specific allegations raised by the defendant in the written statement by cross-examining DW-1 (Ranjeet Kumar Kapoor). The document

placed on record by the plaintiff in the suit (page 339 part 1 volume 2 dated 31.8.2005) reveals that it was a letter written by the plaintiff to the defendant; it had reference to their recent discussion regarding payment of overdue interest on the old outstanding of ₹3,96,93,758.36. The plaintiff conveyed vide this letter that they were agreeable to charge a lower rate of interest on the overdue amount i.e., instead of 12% p.a. it would be 10% p.a.

21. DW-1 (Ranjeet Kumar Kapoor) in his evidence by way of affidavit (Ex.DW-1/A) proved various documents (Ex.DW-1/1 to Ex.DW-36). The witness was not cross-examined by the plaintiff despite opportunities granted. I have examined some letters written by the defendant to the plaintiff. In letters Ex.DW-1/12, DW-1/13, DW-1/15, DW-1/16, DW-1/18, DW-1/19, DW-1/26, DW-1/28 and DW-1/29, grievances were raised from time to time regarding the demands raised by the plaintiff; these were never addressed or responded. The plaintiff did not produce any evidence to prove that these complaints raised by the defendant in the above referred documents were baseless and had no consequence. From the contents of the documents, it can be inferred that there was no unequivocal or clear admission of the liability raised by the plaintiff in regard to the invoices raised from period 20.11.2005 to 9.2.2016 as urged.

22. The settled position is that the admission should be clear, specific and unequivocal.

23. The issue, thus, is decided in favour of the defendant and against the plaintiff.

Issues No.2, 4 and 5

24. These issues are taken together as they are interrelated. The defendant has filed Counter Claim to recover ₹9,34,08,955.08 under various heads detailed in para 24 of the Counter Claim. At the outset, it may be mentioned that during arguments learned counsel for the counter claimant's claims for item No.4 i.e. penalty for non-submission of E-1 Form i.e. ₹6,51,051.80 and item No.7 i.e. loss on account of reduction in cash discount i.e. ₹1,04,00,000/-. Regarding other claims, the learned counsel for the counter claimant urged that the evidence of DW-1 has gone unrebutted and the defendant is entitled for the amount claimed. Various documents have been proved on record by the defendant to establish that excess payment was made to the plaintiff which it was not liable to pay in terms of the agreement dated 20.06.2000. The plaintiff had no legal authority to unilaterally change the terms and conditions of the said agreement to cause undue loss to the defendant.

25. Learned counsel for the plaintiff controverting the contentions urged that no material evidence has been produced as to how bills raised by the plaintiff for the goods supplied were not in consonance with the terms of the agreement. Mere exhibition of documents without legal proof has no relevance.

26. Perusal of the record reveals that the plaintiff took over the management of INDAL in March, 2000. Before taking over the charge, various transactions had taken place between the defendant and INDAL. Plaintiff's claim is that the outstanding dues payable by the defendant to INDAL were assessed and by an agreement dated

20.06.2000, old outstanding amount was reconciled and freezed to be cleared within a period of three years with interest @ 12% p.a. on reducing balance. A sum of ₹3,96,93,758.36 was the outstanding dues that time. The defendant has claimed that it has since paid ₹4,45,47,799.68 which is in excess to the tune of ₹48,54,041.32. The defendant, however, did not produce any oral or documentary evidence to substantiate as to how and when the payment of ₹4,45,47,799.68 was made to the plaintiff. No details of such payment have come on record to ascertain if excess payment of ₹48,54,041.32 was made by the defendant to the plaintiff.

27. Defendant's plea is that the plaintiff overcharged the counter claimant for the materials supplied as it unilaterally changed the price fixation mechanism in terms of agreement dated 20.06.2000. It is urged that the price of the material supplied to be charged was linked to NALCO basic metal price. However, in violation of the said term of the agreement the plaintiff raised inflated invoices on the actual market price and the defendant was entitled to get it recovered; it came to ₹6,06,20,415.04 for the period from 2000 to 2006. Again, no worthwhile evidence has come on record to show if the defendant was liable to pay the price of the material supplied to it linked to NALCO base price. It has come on record that subsequently the plaintiff informed the defendant about the change of price pattern and it was accepted by the defendant. Not only that, the defendant continued to accept the supply on the changed price mechanism throughout and at no stage, the defendant on any ground/reason opted to rescind the contract. The defendant did not raise any objection when the payments on the

changed price pattern were made regarding some invoices to the plaintiff. In the present Counter-Claim, the plaintiff has sought return of the alleged excess payment for the period from 2000 to 2006 which on the face of it is beyond the period of limitation too. There was no compulsion for the defendant to continue with the agreement dated 20.06.2000 and if there was any unilateral deviation of the said agreement, the defendant was at liberty to exit; it was not so done. The defendant cannot be permitted to first accept the goods without any demur and then to ask for excess payment made for the goods received.

28. Besides this, no cogent evidence has been produced by the defendant to prove as to what was the actual loss suffered by it. The defendant did not examine any evidence from NALCO to ascertain as to what were its prices during the relevant period.

29. The defendant has not specifically denied the receipt of the goods for the period disclosed in para 3 of the plaint. Its only concern was that the accounts were not reconciled and certain payments claimed by it in various letters were not adjusted or accounted for. The defendant, however, did not reveal as to what was the value of the goods/products received by it from the plaintiff for the period from 20.11.2005 to 9.2.2006. It also did not disclose as to what was the total payment made by it during this period towards the goods/products purchased. It was further not disclosed as to how much amount was required to be accounted for or adjusted by the plaintiff and what else was the liability of the defendant to make the payment of the goods. It is not defendant's case that it was not liable to pay a single penny for the goods received during the period from 20.11.2005 to 9.2.2006 which were purportedly

to the tune of ₹3,18,92,818/-. Merely because the plaintiff was unable to establish its case due to non-examination of any witness, it does not give right to the defendant to deny the entire payment and to lodge Counter-Claim. It is relevant to note that prior to filing of the present suit in 2006, the defendant did not initiate any legal proceedings against the plaintiff for the recovery of the said dues. Only in the suit filed by the plaintiff for recovery of the amount for supply of the goods, the defendant came with the Counter Claim for the first time in 2007.

30. The defendant in its evidence by way of affidavit Ex.DW-1/A has produced certain documents Ex.DW-1/34, DW-1/33 and DW-1/30. It has, however, not proved as to who had prepared the statements and what was the basis for its preparation. Original record was never produced. It is unclear as to how the defendant had prepared the Statement of Adjustment (Pages 41 to 223 in Part III) taking the difference between the 'rate agreed' and 'rate charged'. No material has come on record to show as to what was the 'rate agreed' on the relevant dates depicted in the comprehensive chart. Since there is no clinching evidence to prove the liability of the plaintiff for the sums claimed in the Counter-Claim, the issues have not been proved by the defendant. The issues are decided in favour of the plaintiff and against the defendant.

Issue No.6

31. In view of the findings on issues No.1 to 5, this issue has become redundant and is disposed of as such.

Relief

32. In the light of the above discussion, the suit filed by the plaintiff is dismissed with costs.
33. Counter-Claim filed by the defendant is also dismissed with costs.
34. Decree-sheet be prepared accordingly.

NOVEMBER 13, 2017/sa

**S.P.GARG
(JUDGE)**