

\$~22

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

%

Judgment delivered on: 24.02.2021

+ FAO 503/2018 & CM APPL.44748/2018

HINDUSTAN ZINC LTD

..... Appellant

versus

DURHA CONSTRUCTION PVT LTD

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner: Mr. Prashanto Chandra Sen, Senior Advocate with Mr. Pallav Mongia and Mr. Pratik Das, Advocates (through Video Conferencing).

For the Respondent: Mr. Naveen Sharma, Advocate.

**CORAM:-**

**HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

**JUDGMENT**

**SANJEEV SACHDEVA, J. (ORAL)**

1. Appellant impugns order dated 04.08.2018 whereby, on an application filed by the respondent/plaintiff under Order 11 Rule 12 read with Rule 21 Code of Civil Procedure (CPC for short), the defence of the appellant has been struck off, for failure to comply with the order dated 14.01.2016 passed under Order 11 Rule 12 CPC.

2. Subject suit for recovery was filed by the respondent against the appellant contending that the respondent/plaintiff was a given work order by M/s. Bharat Heavy Electricals Ltd for erection and

commissioning of 80 Mega Watt Capacity Power Plant.

3. Bharat Heavy Electricals Ltd in turn awarded a sub contract to the respondent/plaintiff for the said purpose as respondent was an approved vendor/contractor for the same.

4. It is contended in the plaint that the appellant company had introduced an incentive scheme for rewarding the respondent company in carrying out the erection and commissioning of the plant and accordingly issued a letter/scheme of incentive dated 26.02.2007.

5. It is contended that the respondent/plaintiff duly executed the work as per the scheme, however, the benefit of the scheme was not granted to the respondent/plaintiff. Consequently, the subject suit was filed.

6. One of the issues arising in the suit was as to whether the respondent had completed the work within the time schedule so as to be entitled to the monetary incentives. The case of the plaintiff was that the work orders for the sections of erection and commissioning of the plant, which were to be done by the respondent/plaintiff, had a co-relation to the work protocols entered into between the appellant and M/s. Bharat Heavy Electricals Ltd.

7. It is contended that it was only when Bharat Heavy Electricals Ltd handed over possession of certain sections of the work, which were to be completed prior to the commencement of the work by the respondent/plaintiff, that the time limit as stipulated in the incentive

schemes would get triggered.

8. Respondent filed an application under Order 11 Rule 12 CPC seeking discovery of the *work protocols* entered into between the appellant, Bharat Heavy Electricals Ltd and the respondent. The contention of the respondent is that the *work protocols* after their execution were in the power and possession of the appellant.

9. The first application under Order 11 Rule 12 CPC filed by the respondent was dismissed by the Joint Registrar. Thereafter respondent filed another application under Order 11 Rule 14 CPC which was also dismissed by the Joint Registrar. Subsequent thereto subject application under Order 11 Rule 12 CPC was filed which was also rejected by the Joint Registrar.

10. In a Chamber appeal said application was allowed by this learned Single Judge by order dated 14.01.2016.

11. Order dated 14.01.2016 specifically directed the appellant to discover, in accordance with law and as provided in the specified form, the documents being the *work protocols* entered into by the appellant/defendant with M/s. BHEL pertaining to such *work protocols* which had a direct bearing on the work which was sub contracted by the appellant to the respondent. The Court clarified that appellant need not discover documents being the *work protocols* entered into between it and BHEL which had no bearing with respect to the obligations of the respondent under the work orders issued by

the appellant to the respondent. The needful was directed to be done within a period of eight weeks.

12. Order dated 14.01.2016 also notices the fact that the pecuniary jurisdiction of the High Court had been enhanced. The Court by order dated 14.01.2016 transferred the Records to the jurisdictional Court under the District & Sessions Judge and directed the parties to appear before the District Judge on 22.03.2016.

13. It is an admitted position that said order dated 14.01.2016, under Order 11 rule 12 CPC, was not complied with by the appellant within the period of eight weeks.

14. It is pointed out by learned senior counsel for the appellant that on 12.04.2017, when the matter was taken up for consideration by the Trial Court, the Trial Court, mistakenly took up the application under Order 11 Rule 12 CPC filed by the respondent afresh. It was pointed out by the appellants themselves that the application already stood disposed of.

15. Thereafter, on 18.11.2017 subject application under Order 11 Rule 21 CPC was filed by the respondent seeking striking off of the defence of the appellant for failure to comply with order dated 14.01.2016.

16. Reply to the application under Order 11 Rule 21 was filed by the appellant on 12.04.2018. Along with the reply appellant filed an affidavit purportedly under Order 11 Rule 12 read with Rule 13 CPC

stating as under:-

*“I state that the officers of the defendant company who were in-charge of erection and commissioning of the 80 Mega Watt Captive Power Plant at Chanderiya (“Project”), which is the subject matter of the present suit, have left the organization. Further, the records pertaining to the Project are also very old. I state that the documents set out in the First Schedule hereto are not traceable in the records of the Defendant; and despite best efforts being made, the defendant has not been able to trace these documents (if at all these were available with the defendant during the execution of the Project). I therefore state that these documents are not in the possession, custody or power of the defendant.”*

17. The Trial Court by the impugned order dated 04.08.2018 has noticed that the contention raised by the appellant was that the records sought to be produced are old and as such could not be produced. The Trial Court held that such a contention, if at all, should have been raised before the High Court at the time of consideration of the application under Order 11 Rule 12 CPC and not at the said stage.

18. The Trial Court has also noticed that the appellant was trying to hide behind the excuse of procedural delays occasioned in transfer of the case to the District Court, which the Trial Court found was not relevant for compliance of the subject order.

19. The Trial Court has also held that the contention of the appellant that the concerned officers who were in-charge of the relevant record had left their organization was a vague plea as neither

detail of such officers nor facts relating to them leaving the organization had been furnished.

20. Trial Court accordingly has held that since there was no compliance by the appellant of the order dated 14.01.2016, the defence was liable to be struck off and consequently it was struck off.

21. Before this Court also learned senior counsel for the appellant has strenuously contended that there was no wilful default in as much as the documents were not available and it was also so pointed out in the reply to the application under Order 11 Rule 12 CPC.

22. Learned senior counsel further relies on the decision of the Supreme Court in *Babbar Sewing Machine Company vs. Trilok Nath Mahajan*, (1978) 4 SCC 188 to contend that the provisions of Order 11 Rule 21 CPC, having serious repercussions, should not be lightly applied but should be applied in extreme cases.

23. I am unable to accept the contention of learned senior counsel for the appellant for the reason that perusal of the reply to the application under Order 11 Rule 12 CPC itself shows that the stand was not that the documents were not available but the stand taken by the appellant at the time was that the documents are very voluminous.

24. The relevant portion of the reply reads as under:-

*“A perusal of the application, however, will demonstrate that the request made therein is no different from the earlier application filed by the plaintiff for production of documents, which was dismissed by this Hon’ble Court*

*vide order dated July 17, 2012. The present application is also not in terms of the order dated July 17, 2012 as is being portrayed. Be that as it may, it is submitted that the plaintiff has sought discovery of all the work front protocols for the equipments set out in paragraph 2 of the application. It is submitted that there are approximately 100-150 work fronts protocols. For every single equipment, there are several protocols; and there are several such equipments. Apparently, the plaintiff's request is for all the work handing protocols for all such work fronts. Such generic request, therefore, has evidently been filed in the hope of discovering some material without any light on the relevancy of the documents; and ought to be dismissed. The plaintiff's request is based on a vague and somewhat peremptory statement that the documents set out in the application would prove the authenticity of the chart marked as Annexure A. It is however, submitted that it is settled law that Court does not collect evidence for a party; and also does not permit roving enquiry to fish out information which may or may not be relevant."*

*(underlining supplied)*

25. The extracted portion of the reply shows that the contention of the appellant was that there were approximately 100-150 *work front protocols*. For every single equipment there were several protocols and several such equipments and such a generic request was filed merely in the hope of discovering some material without any light on the relevance of the documents.

26. This objection of the appellant was addressed by the learned Single Judge while passing the order dated 14.01.2016 under Order 11 Rule 12 CPC wherein it is specifically directed that the *work*

*protocols* entered into by the appellant with BHEL would be limited to such *work protocols* which had a direct bearing on the work which was sub contracted by BHEL to the respondent and the *work protocols* which had no bearing need not be discovered. This narrowed down the volume of the documents which the appellant was required to discover.

27. Admittedly, appellant did not comply with the order within eight weeks as directed by the Court. Even thereafter as noticed hereinabove, when the application was mistakenly being taken up by the Trial Court afresh on 12.04.2017, it was pointed out by the appellant themselves that the application already stood disposed of. This shows that the once again on 12.04.2017 were reminded of the order dated 14.01.2016. Despite being once again reminded about the said order, it was not complied with.

28. The affidavit dated 12.02.2018, alleged to have been filed in response to the order dated 14.01.2016 is filed alongwith the reply to the application under order 11 rule 21 seeking striking off the defence. This affidavit is filed exactly after one year of 12.04.2017 and that is over two years and three months after the passing of the original order.

29. As noticed above, the appellants have still not discovered the documents as directed but has taken the stand “*Further, the records pertaining to the Project are also very old. I state that the documents set out in the First Schedule hereto are not traceable in the records of*

*the Defendant; and despite best efforts being made, the defendant has not been able to trace these documents (if at all these were available with the defendant during the execution of the Project). I therefore state that these documents are not in the possession, custody or power of the defendant.*

30. The affidavit is completely vague. In the affidavit appellant has not shown as to why and how these documents are no longer in their possession, custody or power. The stand rather is that *the defendant has not been able to trace these documents (if at all these were available with the defendant during the execution of the Project).*

31. It is not denied that the *work protocols* were executed at the relevant time. It is an admitted position that these documents were executed. By the nature of the documents, they were to be in possession of the appellants.

32. If these documents were executed and were supposed to be in the possession of the appellant, it was obligatory on the part of the appellant to have discovered them and if they were not available then to have explained, in the affidavit, as to why the documents were no longer in its power and possession.

33. Since appellant has not given any explanation, it is clear that appellant is refusing to discover the said documents. Adverse inference is also liable to be drawn that the discovery of documents would not be favourable to the appellant for their defence.

34. In that view of the matter, I find that this is an extreme case where the provisions of Order 11 Rule 21 CPC should be applied. The conduct of the appellant as noticed above would clearly bring it within the category of *extreme cases, where there is contumacy on the part of the defendant or a wilful attempt to disregard the order of the court as laid down by the Supreme Court in Babbar Sewing Machine Company vs. Trilok Nath Mahajan (Supra)*.

35. I find no infirmity in the impugned order or any merit in the appeal.

36. The appeal is accordingly dismissed.

37. Copy of the Order be uploaded on the High Court website and be also forwarded to learned counsels through email.

**SANJEEV SACHDEVA, J.**

**FEBRUARY 24, 2021/rk**