



THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Revisional Jurisdiction)

DATED : 23.04.2019

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

CRP No. 9 of 2017

Petitioner : Golden Tobacco Limited

versus

Respondent : Sikkim Tobacco Limited

Appearance

Mr. Sudesh Joshi and Ms. Sujatha Shirolker, Advocates for the Petitioner.

Mr. Manish Kumar Srivastava, Mr. Udai P. Sharma, Mr. Passang Tshering Bhutia and Mr. Kusan Limboo, Advocates for the Respondent.

ORDER

Meenakshi Madan Rai, J

1. Assailing the Order dated 18.09.2017, in Civil Execution Case No. 1 of 2014, the Petitioner is before this Court *inter alia* praying that the impugned Order be set aside and the learned District Judge, East Sikkim, at Gangtok, be directed to appoint a Commissioner to find out the market and the present value of the machines to enable execution of the Order of this Court in CRP No. 03 of 2015 dated 09.03.2017. Further, the learned District Judge be directed to



ascertain whether seals on the machines as per the Order of the Hon'ble Supreme Court are still in place or whether the machines had been tampered with or damaged by the Respondent. A direction was also sought to make the Respondent pay the market value of the machines to the Petitioner, the Respondent having violated the Order of the Hon'ble Supreme Court by removing the seals and tampering with the machines.

2. Before the learned trial Court, the Petitioner herein was the Decree Holder and the Respondent was the Judgment Debtor and shall hereinafter be referred to as D.H. and J.D. respectively.

3. The learned trial Court on 18.09.2017 pronounced the impugned Order rejecting the application filed by the J.D. under Order XXI, Rule 58, read with Section 151 of the Code of Civil Procedure, 1908 (*hereinafter the "CPC"*). The J.D. vide the application had *inter alia* brought to the notice of the learned trial Court that vide its Order of 07.08.2017, a Warrant of Attachment had been issued for the machines of the D.H., lying in the factory premises of the J.D. at Majhitar, Rangpo, East Sikkim. Vide the same Order (07.08.2017), the learned trial Court had also ordered the D.H. to deposit a sum of Rs. 2,92,86,700/- (Rupees two crores, ninety two lakhs, eighty six thousand and seven hundred) only, along with interest at the rate of 15% per annum on the aforesaid



amount, from the date of Award till the date of payment i.e. 11.09.2017, as per the Award of the learned Arbitrator. The D.H. failed to comply with the Order of the learned trial Court and make the deposit. Consequently, in view of this failure, the J.D. by filing the petition under Order XXI, Rule 58, read with Section 151 of the CPC prayed that the Order of attachment passed by the Court on 07.08.2017 be recalled and the J.D. be permitted to partly realize its dues from the D.H., through public auction of the machines.

4. In response to the said application filed by the J.D., the D.H. had contended that as per the Arbitration Award dated 28.12.2007 and the Decree of the Hon'ble Supreme Court, dated 02.02.2010, there was a clear cut direction to return the twenty one machines to the D.H. This had been violated by the J.D. by non-compliance. That, the J.D. had no right to seek permission to auction the machines instead of returning them to the D.H. That, it "appeared" from the Report (evidently reference is being made to the Nazir's Report, dated 11.09.2017) that the J.D. had tampered with the machines and did not want it to be inspected by the D.H. to prevent them from enjoying the fruits of the Decree. That the J.D. had filed a Company Petition for executing the Arbitration Award before the Hon'ble High Court of Bombay in a Winding Up Case, i.e. Company Petition No. 03 of 2011, wherein the Hon'ble High Court had passed orders and directed the D.H. to deposit the amount in twelve weeks. In



view of this Order, the question of auctioning the machines of the D.H. does not arise, hence the petition be dismissed.

5. The learned trial Court on consideration of the submissions rejected the petition vide the impugned Order dated 18.09.2017. The learned trial Court in the same Order referred to its Order dated 07.08.2017 which had been passed after the D.H. had filed an execution petition, seeking execution of the Decree. The Order also reflected that the Nazir of the Court had executed the Warrant on 11.09.2017 and filed the Report of Attachment before the learned trial Court.

6. Pursuant to this Report of the Nazir, the records of the learned trial Court reveal that a "Written Statement" was filed by the D.H. on 14.09.2017, to the Nazir's Report in addition to his reply to the petition of the J.D. under Order XXI Rule 58 read with Section 151 of the CPC. The learned trial Court in the impugned Order besides considering the petition *supra* also took into consideration the 'Written Statement' against the Report of the Nazir and while agreeing with the D.H. that the Nazir of the Court is not a Technical person, however observed that the specifications of the machines had been mentioned at Serial Nos. 1 to 9 in the Order dated 07.08.2017, in accordance with which the Nazir had attached the twenty one machines. The learned Trial Court while addressing the issues raised in the "Written



Statement” of the D.H. to the Nazir’s Report, in the impugned Order dated 18.09.2017, has *inter alia* further observed as follows;

“Hence, there is no question of examination of the machine (*sic*) by a technical person.

It is averred that the commercial life of the concerned machines was 10 years from March 1983. The machines are very old as recorded in the Arbitration Award dated 28.12.2007 as such there is no question of the examination of the working condition of the machines. Hence, prayer of the Decree holder is hereby rejected.”

The learned trial Court in the impugned Order would also observe that, the “Written Statement” of the D.H. to the Report of the Nazir was in fact an indirect prayer for issuance of a Commissioner, for inspection of the twenty one machines lying in the factory premises of the J.D. Referring to the decision of the Hon’ble Supreme Court, dated 02.02.2010 and the Order of this Court dated 09.03.2017, the plea of the D.H. for sending a technical person to verify the machines was rejected.

7. Aggrieved by this aspect of the Order, the instant Revision has been filed where the D.H. has delved into the facts of the case at great length and what transpired between the parties. The attention of this Court was drawn to the Arbitration Award dated 28.12.2007, the order of the Supreme Court dated 02.02.2010, the proceedings before the learned trial Court and also the Order of this Court dated 09.03.2017. It is apposite to state here that this Court is



seized of the facts, the Order of this Court in CRP No. 3 of 2015 would be sentinel to this circumstance.

8. Before this Court, learned Counsel Mr. Sudesh Joshi for the D.H. submitted that the seals of the machines had been broken indicating that they had been tampered with and thereby damaged instead of being returned untampered to them by the J.D. That, when the Nazir went to the place where the machines were kept it was lying in the open and not protected. That, the Report reflects that the Nazir had attached all the properties with the assistance of the Manager of the J.D. Company with the assurance that he would not sell or use it without prior permission of the Court but had failed to take custody of the machines. He had in fact handed it over to the Manager of the J.D. Company to keep it in his custody, thereby defeating the purpose of the attachment order. Hence, it was urged that a technical person ought to be appointed to assess the condition of the machines as the Nazir's Report does not state which machines were attached, the types of machines, the conditions they were in or identification thereof. That, the learned trial Court be directed to take necessary steps, as reflected in the prayers.

9. Learned Counsel for the J.D. submitted that it is apparent from the records of the matter that the D.H. came to know that the machines were scrap in the year 1995 itself. That, in the Arbitration Award dated 28.12.2007 they did not



ask for restoration of the machines, neither did the Arbitration Award or the Order of the Hon'ble Supreme Court require the J.D. to return the machines in working order. It is clear that the machines were of the year 1983 and were to be in working condition for up to ten years, that period having lapsed, it is no longer in working condition. That, the Arbitration Award also clearly indicates that the machines were not in working order. That, it serves no purpose to appoint a technical person to assess the condition of the machines which were already scrap, hence the order of the learned trial Court requires no interference.

10. I have carefully heard and considered the rival arguments forwarded by both learned Counsel and I have also perused the impugned Order and all records pertaining to the matter.

11. What emanates from the records furnished before this Court is that, the Hon'ble Supreme Court vide its Order dated 27.11.1984 in Special Leave Petition (Civil) No. 11286 of 1984 and Transfer Petition No. 439 of 1984, transferred *Suit No. 51 of 1983 (Sikkim Tobacco Co. Ltd. Vs. Golden Tobacco Co. Ltd. and others)*, *Suit No. 3 of 1984 (Himal Enterprises Pvt. Ltd. Vs. Golden Tobacco Co. Ltd. and others)*, and *Suit No. 36 of 1984 (Golden Himal Investment Pvt. Ltd. Vs. Sikkim Tobacco Co. Ltd. and others)*, all pending before the District Judge, Gangtok, Sikkim to the Hon'ble Supreme



Court. The matter between the parties herein was referred to arbitration and Mr. Justice A.C. Gupta, retired Judge of the Hon'ble Supreme Court appointed as the Sole Arbitrator. During the arbitration proceedings, Mr. Justice A.C. Gupta expressed his inability to proceed in the matter, whereupon, the Hon'ble Supreme Court vide its Order dated 07.12.2001, in I.A. No. 1 in Transfer Case (Civil) No. 12-14/1985, appointed Mr. S.C. Agarwal, former Judge of the Hon'ble Supreme Court as the Sole Arbitrator. Mr. Justice S.C. Agarwal passed the Arbitration Award on 28.12.2007 which *inter alia* is as follows;

"1) STL is entitled to retain 3 machines mentioned at Sr. Nos. 1, 3 and 5 of Annexure 'A' to the Statement of Claim.

2) GTC is entitled to return of 21 machines mentioned at Sr. Nos. 1 to 6, 8, 9, 11 to 14, 16 to 20 and 22 to 25 of Annexure 'A' to the Counter Claim.

3) GTC shall pay to the Claimants towards their claim an amount of Rs.2,92,36,700=00 within a period of one month from the date of award. In case GTC fails to pay the said amount of Rs.2,92,86,700=00 within a period of one month it would pay interest @ 15% per annum on the aforesaid amount of Rs.2,92,86,700=00 from the date of award till the date of payment.

4) The parties will bear their own costs in the proceedings."

12. Being aggrieved and dissatisfied with the Award, the D.H. was before the Hon'ble Supreme Court, who vide its Order, dated 02.02.2010, in "*Transferred Case (Civil) Nos. 12-14 of 1985*" dismissed the objections filed by the D.H. and the Award dated 28.12.2007 became a Rule of the Court. The



Order of the Hon'ble Supreme Court dated 02.02.2010 is as follows;

" ... Objections to the Award dated 28th December, 2007 given by Hon'ble Mr. Justice S.C. Agarwal, former Judge of this Court are rejected. Decree be prepared in terms of the Award.

I.A. Nos. 2-5 are accordingly, dismissed.
..."

The D.H. being aggrieved by the Order dated 02.02.2010 *supra*, preferred a Review Petition bearing No. 2101-2104 and a Curative Petition bearing No. 21-24 of 2012, both of which were disposed of by the Hon'ble Supreme Court on 13.01.2011 and 22.03.2012, respectively.

13. So far as the seals on the machines are concerned, the Arbitration Award reflects that under the Order of the District Magistrate, East Sikkim at Gangtok, dated 02.11.1983, the machines were put in possession of the S.P., East for safe custody till 10.11.1983 and the machines were put under seal in the factory building. The learned District Judge issued an interim injunction restraining removal of machines and maintenance of status quo. The D.H. moved an application for modification of the said Order to permit removal of the machines and the J.D. moved an application for clarification of the Order dated 07.11.1983 to permit removal of the seals. Both these applications were dismissed by the learned District Judge by Order dated 11.05.1984.



14. No specific Order of the Hon'ble Supreme Court pertaining to sealing of machines was pointed out to this Court by the D.H. It is thus apparent from the records available before this Court that the Hon'ble Supreme Court has made no orders for sealing of the machines. Evidently the twenty one machines were put under a common seal in the factory building on the orders of the District Magistrate, East, Gangtok, Sikkim. That apart, the Arbitration Award reflects as follows;

"... The learned Sole Arbitrator, on April 4, 1984, passed an order appointing Mr. Mukul Mudgal, Advocate, **as Commissioner to remove the seals affixed on the factory building of STL as also the seals on the three machines stated to be lying outside the factory building and to see that they are taken inside the factory building.** It was also directed that two technically qualified persons, each side to select one, would inspect the 21 machines lying in the STL premises, prepare an inventory of the same and also make an assessment of their present condition."

(Emphasis supplied)

15. Thus, from the extract of the Arbitration Award *supra*, it is clear that if at all, three machines which were said to be outside the factory building were sealed but the twenty one machines were in the factory building of the J.D., and the building was sealed. Besides, it is evident from the Arbitration Award that an inspection of the machines were carried out and the Technical Expert Mr. Krishnamurthy of the D.H. Company reported that the twenty one machines were no longer in working condition. The Award reflects as follows;



"... By order dated November 26, 1986, the learned Sole Arbitrator appointed Mr. Mukul Mudgal, Advocate as Commissioner for inspection of the machines and to make a report whether machines were in order. Mr. Mudgal was authorized to engage an engineer to assist him and accompany him during inspection. Since an inspection had not been carried out in pursuance of the said order, the learned Sole Arbitrator, by order dated December 17, 1994, again gave a direction regarding inspection of the machines at Rangpo. In pursuance of the said direction, the Advocate-Commissioner, Mr. Mukal Mudgal inspected the machines on June 1, 1995. The machines were also examined by Mr. Krishnamurthy, a Technical Expert of GTC, and the report of the Advocate-Commissioner along with the Technical Report of Mr. Krishnamurthy were submitted before the learned Sole Arbitrator. **As per the inspection report dated June 5, 1995 of Mr. Krishnamurthy, 21 machines are no longer in working condition and would require extensive repair at a very high cost to restore them to a working condition and even this might not be possible as the machines might have in fact been reduced to scrap.**

...

.....
The total number of machines lying at the factory premises of STL at Rangpo in Sikkim is 24 as mentioned by the Hon'ble Supreme Court in the Order dated November 27, 1984. The learned Sole Arbitrator Mr. Justice A.C. Gupta also in Order dated April 4, 1985 whereby Mr. Mukul Mudgal, Advocate was appointed as Commissioner, **has mentioned that 3 machines were stated to be lying outside the factory building and 21 machines were lying in the factory premises of STL. ..."**

(Emphasis supplied)

16. In this context it is relevant to refer to page No. 82 of the Arbitration Award which at "Claim No. 5" and "Claim No. 10" has addressed the claim of the J.D. with regard to the machines but bears no reference to seals on any machine.



This is reflected in the following pages of the Arbitration Award as extracted hereinbelow;

[Page No. 24]

"...On October 13, 1983, a First Information Report [FIR No.800/83] was registered at Police Station, Connaught Place, New Delhi on the basis of a complaint dated October 10, 1983 made against Mr. B.K. Sreshtha under Sections 406 and 420 IPC for misappropriation of machines and on October 26, 1987 warrant was issued by Metropolitan Magistrate, New Delhi on the basis of the said FIR authorizing search of the machines and requiring their production before the Court. On October 30, 1983, a police party reached the factory premises of STL in Sikkim, and seized the machines. Under order of the District Magistrate, East, Gangtok, Sikkim dated November 2, 1983 the machines were put in possession of S.P.[East], Sikkim for safe custody till November 10, 1983 **and the machines were put under seal in the factory. ...**"

[Page No. 115]

"... **In pursuance of the said direction, seals were placed by the Police to secure safe custody of the machines which were lying in the factory premises of STL in Sikkim. ...**"

[Page No. 117]

...It is, thus, evident that the machines were initially placed under seal on the directions of the District Magistrate (East), Sikkim dated November 2, 1983 which order was operative till November 10, 1983 but in the meanwhile Mr. B.K. Shreshta of STL had obtained an order from the District Judge, Sikkim, Gangtok, in Suit No. 51 of 1983 on November 7, 1983, restraining removal of the machines and for maintaining status quo and the said order continued till September 25 1984 when it was set aside by Sikkim High Court in but (*sic*) that order of the Sikkim High Court was not implemented during the pendency of the Special Leave Petition filed by STL in the Supreme Court. **This would show that sealing of the machines has continued on the basis of the interim order which was obtained by STL in Civil Suit No.51 of 1983 which continued to be operative till the reference of the dispute to Arbitration and during the pendency of**



the arbitration proceedings also the machines have remained under seal because no Interim Award could be made in favour of either of the parties. GTC cannot, therefore, be held responsible for the machines being placed under seal. The situation that resulted in machines being placed under seal arose on account of the refusal on the part of the STL to return the machines. STL cannot, therefore, raise objection against the claim of GTC for damages for wrongful retention of the machines on the ground that STL cannot be held responsible for such damages since the machines were under seal and they were not utilized by STL. In the circumstances non-utilisation of the (sic) machines by STL on account of the machines having been put under seal cannot be a justification for denying the claim of GTC for damages since GTC was deprived of the use of the machines on account of wrongful retention of the machines by STL. ...”

(Emphasis supplied)

The above extracts clearly shed light on the affixation of seals.

17. As far as assessing the present value and market value of the machines are concerned, the Arbitration Award at page No. 119 reflects that the expected commercial life of the machines is ten years, the relevant portion is extracted below for easy reference;

“... The Replacement Value for each machine, **as on March 1983**, has been shown and the total Replacement Value for the 21 machines is placed at Rs.218.14 lakhs. **The expected commercial life of the machines is placed as 10 years and Rs.21.814 lakhs has been taken as depreciation @ 10% for one year.** Rs.39.265 lakhs has been computed as interest on the capital amount of Rs.218.14 lakhs @ 18% per annum. Entrepreneurs’ risk based on 5 years pay back period has been calculated @ Rs.43.6328 lakh for one year. The total amount towards hiring charges has been



worked out at Rs. 104.707 lakhs for one year
i.e. Rs.8,72,558=00 per month. ...”

(Emphasis supplied)

18. Hence, the commercial life and value of the machines require no further elucidation. The Arbitration Award nowhere mentions that the twenty one machines were to be returned to the D.H. in working condition neither does it lay down that the status and value of the machines were to be ascertained before handing over. The Order of this Court dated 09.03.2017 in C.R.P. No. 03 of 2015 mentions no such direction either. It is a misconception and erroneous assumption of the D.H. which reflects, that the D.H. has failed to understand the intent and purport of the Arbitration Award or the substance of the Orders of this Court. It is unfathomable as to why the D.H. should aver that *"It means the Respondent has violated Supreme Court order by illegally opening the seals and tampered the machines of Petitioner and used for their benefits thereby damaged the very valuable imported machines of petitioner thereby cheated the petitioner as well as Hon'ble Supreme Court and disobeyed the order."* As already discussed hereinabove no order of the Hon'ble Supreme Court issues with regard to the sealing of the machines, consequently the question of disobedience does not arise.

19. We may also relevantly refer to I.A. No. 4 of 2008 in Transfer Case (Civil) No. 12-14 of 1985 before the Hon'ble



Supreme Court wherein the D.H. had averred *inter alia* as follows;

"...9. It is submitted that in view of the above mentioned facts the claimant has suffered additional loss quantification whereof will have a vital bearing on the hearing and disposal of the Objections filed by the Applicant under Section 30 of the Arbitration Award, 1940. **It is consequently essential in the interest of justice that present value of the machines as on date be assessed in order that a fair and reasonable disposal of the respective claims can be arrived at. ...**"

(Emphasis supplied)

The following prayers had been made by the D.H.;

"a) Appoint a Court Commissioner to inspect the machines belonging to the Applicant lying in the premises of Messrs Sikkim Tobacco Limited and assess of the present value thereof; and

b) direct the Court Commissioner to take the help of technically qualified persons as necessary; and

c) Pass such order or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

(Emphasis supplied)

The prayers of the D.H. in I.A. No. 4 of 2008 were dismissed by the Order of the Hon'ble Supreme Court, dated 02.02.2010, in "*Transferred Case (Civil) Nos. 12-14 of 1985*" *supra*. In the face of the specific decision of the Hon'ble Supreme Court, the D.H. cannot reagitate the matter before the learned trial Court and proceed to approach this Court in revision seeking valuation of the machines by technically qualified persons.



20. The argument that the Nazir had not taken possession of the machines is incongruous and banal as the Nazir could not have moved the machines and brought it along with him. It is sufficient that he complied with the procedure prescribed. The grievance of the D.H. that "it appeared" from the Report of the Nazir, that, the J.D. had tampered with the machines has no legs to stand as the Report of the Nazir dated 11.09.2017 makes no such statement as evident on its careful perusal neither does the Report reflect that the machines were in the open as alleged by the D.H.

21. From the facts and circumstances reflected above, it is indeed unequivocally apparent that the instant petition is devoid of merit and has been filed only to delay compliance with the Award of the Arbitrator. In the aforesaid circumstances, no reason whatsoever emanates to interfere with the findings of the learned trial Court.

22. Accordingly, the Revision Petition is rejected and dismissed with costs of Rs.25,000/- (Rupees twenty five thousand) only, to be paid by the D.H. to the J.D. within fifteen days from today, failing which the D.H. will be entitled to interest at the rate of 9% per annum till payment of the cost imposed.

23. Copy of this Order be sent to the learned trial Court.



24. Records of the learned trial Court be remitted forthwith.

(Meenakshi Madan Rai)
Judge
23.04.2019

Approved for reporting : **Yes**
Internet : **Yes**

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