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

\+ CS(OS) 1586/2009

SARA INTERNATIONAL LIMITED ..... Plaintiff
Through: Mr. Abhinav Vasisht, Senior Advocate Amicus Curiae.
Ms. Anuradha Mukherjee, Advocate with Mr. Abhijit Mittal and Ms. Jyoti Dastidar, Advocates for plaintiff.

versus

RIZHAO STEEL HOLDING GROUP COMPANY LIMITED ..... Defendant
Through: None.

% Date of Decision: 30th May, 2013

**CORAM:**
**HON'BLE MR. JUSTICE MANMOHAN**

**J U D G M E N T**

**MANMOHAN, J: (Oral)**

1. Plaintiff has filed the present suit for recovery of US$ 2,72,110.91 along with pendente lite and future interest at the rate of 6% per annum from the date of filing of the present suit till its realization along with costs.

2. The facts of the present case are that the defendant placed a purchase order on the plaintiff for supply of 41,000 Wet Metric Tonne (WMT) processed Indian Iron Ore Fines (goods) produced from mines in India with minimal 61% Iron (Fe) content. For this purpose, the

parties entered into a formal contract dated 28th January, 2008. The iron ore was sent vide two shipments. The present dispute pertains to the second and final shipment of 6000 WMT of iron ore fines.

3. In accordance with the formal contract dated 28th January, 2008, Assayers of the plaintiff and defendant conducted tests at loading port and certified presence of Iron (Fe) content to be above 61% in the goods.

4. On 23rd March, 2008, the plaintiff's shipment reached Lanshan Port, China and the defendant unloaded the shipment on 25th March, 2008. On the same day itself, defendant informed the plaintiff that as per CIQ analysis at the discharge port, the content of Iron (Fe) was found to be only 60.59%.

5. Since the analysis was different at the loading port, plaintiff requested that testing by CIQ be done in presence of its representative on fresh samples. Plaintiff also sought appointment of neutral umpire for testing in accordance with the provisions of the formal contract dated 28th January, 2008.

6. The defendant vide e-mail dated 09th May, 2008 demanded payment of US$ 136,013.57 on account of deficiency in content of Iron (Fe). Further, instead of carrying out fresh test, defendant in September, 2008, lifted the goods from Lanshan Port, China without allowing any further test.

7. The defendant also refused to pay the balance 2% for the shipment, that means, US$ 116,883.68.

8. On 25th July, 2008, plaintiff entered into a contract with a third party, namely, M/s. Horner Resources (International) Company for

supplying 20,300 WMT Iron Ore Fines cargo to Lanshan Port, China. When the goods reached the Lanshan Port, China on 29th August, 2008, M/s. Horner Resources (International) Company rescinded the contract.

9. After seventy-five days of the third party goods having reached Lanshan Port, China, plaintiff identified a new buyer M/s. Zhejiang Materials Industry International Company Limited and executed a contract on 14th November, 2008. It is pertinent to mention that as per Customs Law of China if goods lie for more than ninety days on port, the Custom Authorities are bound to auction and sell the goods.

10. In pursuance to the said contract, M/s. Zhejiang Materials Industry International Company Limited opened a Letter of Credit in favour of the plaintiff. However, before the plaintiff could negotiate the Letter of Credit, it received an e-mail on 20th November, 2008 from M/s. Zhejiang Materials Industry International Company Limited stating that they had received an intimation from the Port Authorities that part of the cargo had been attached and sealed by the Intermediate People's Court (Rizhao).

11. It later transpired that the defendant had filed a proceeding before the Intermediate People's Court (Rizhao) on 10th November, 2008 wherein the court directed sealing of plaintiff's cargo to the extent of 6000 WMT amounting to USD 141,163.14/- inclusive of interest @ 6%.

12. Subsequently, the defendant vide its e-mail dated 24th November, 2008 demanded that the plaintiff instruct M/s. Zhejiang to pay a sum of US$ 140,440.57 to the defendant from the amount due

from M/s. Zhejiang Materials Industry International Company Limited to the plaintiff.

13. Meanwhile having received intimation from M/s. Zhejiang Materials Industry International Company Limited, the plaintiff vide its e-mail dated 21st November, 2008 protested against the illegal and coercive demand of the defendant. Since considerable emphasis has been laid on the said e-mail, the same is reproduced hereinbelow:-

> *"From: vivek*
> *Sent: Friday, November 21, 2008 1.45 PM*
> *To: sans*
> *Subject: Fw: MV SILVER SEN-sara*
> *Attachments: MV SILVER SEN-demurrage & final payment eml*
>
> *----Original Message-----*
> *From: vivek shukla*
>
> *To: Victor Wang*
> *Cc: Jenny, Sans*
> *Sent: Friday, November 21, 2008 10.44 AM*
> *Subject: Re: MV SILVER SEN-sara*
>
> *Dear Victor*
>
> *Ref below mail, this is to draw your attention to the issue of disputed amount of USD 141,163.14 for the cargo sent per MV Silver Sen. While we strongly believe that there was some prob with the samples drawn by CIQ and hence the quality has been showing less. The same has been our stance since the beginning of this issue, however now your company has gone ahead and got some sealing order for attaching part of our cargo, lying at Lanshan port, which was discharged per MV Bao Long men. This has been sold to another of our associates and they want to take delivery of this cargo after doing custom*

*clearance, however now your attachment order is a big hinderance. While we still hold on to out stand, but unfortunately the 90 days period after discharge of cargo is about to expire next week and hence we are being forced to make this remittance under duress. We are very disappointed by this kind of forceful tactics being adopted by your company, without even intimating or serving an official copy of the court order. We reserve all right to protect our interest in whatsoever way possible.*

*You would recollect that there was a demurrage at disport due to slow discharging amounting to USD 5,149.57. This is supposed to be deducted from the amount being shown by your company as outstanding.*

*Hence the amount should read as USD 136013.57. The mail regarding confirmation is attached herewith for your ready reference.*

*B Reg/Vivek.*

*----Original Message—*
*From: Jenny*
*To: Sans*
*Cc: Vivek Shukla ; Lalit Mohan : Victor Wang*
*Sent: Friday, November 21, 2008 8:02 AM*
*Subject: Re-MV SILVER SEN-sara*

*Dear Sans,*

*Here again I am sending you the bank details for the final payment USD 141,163.14 due to Rizhao Steel, pls. arrange the payment asap.*

*BENEFICIARY BANK: BANK OF CHINA RIZHAO BRANCH*

*BANK ADDRESS:* *No.18, HUANGHAI I LU, RIZHAO, SHAN DONG, CHINA*
*BENEFICIARY:* *RIZHAO STEEL HOLDING GROUP CO., LTD.*
*A/C NO.:* *406074767508091014*
*SWIFT:* *BKCHCNBJ51E*
*TLX:* *320020 BOCRZ CN*

*Thanks & Best regards."*

14. Learned counsel for plaintiff submits that in view of the economic duress brought upon by the defendant, plaintiff was left with no other option, but to pay US$ 140,440.57. She submits that the aforesaid payment was vitiated by economic duress inasmuch as M/s. Zhejiang being a Chinese company was bound by the order of the Chinese Court which was obtained without any notice or intimation to the plaintiff and the plaintiff's valuable consignment was struck on the Chinese shores. She further points out that there was a real threat of auction of balance 14,300 WMT of Iron Ore which was part of the consignment for M/s. Zhejiang Materials Industry International Company Limited by the Chinese Custom Authorities since the period of ninety days was expiring on 29th November, 2008. The counsel further submits that the defendant's act of approaching the Chinese court after two months of having lifted the consignment was not bona fide as the contract dated 28th January, 2008 provided for Neutral Umpire testing [Clause 10(4] and Arbitration [Clause 15] under SIAC. Hence according to her, recourse to court proceedings and failure to intimate the court order till last few days, when M/s. Zhejiang's consignment was under threat of auction, was done by the defendant to

coerce the plaintiff to pay the illegal demand, as otherwise it would loose 14300 WMT in customs auction.

15. Learned counsel for plaintiff submits that the said payment was not a voluntary act and the plaintiff had protested at the coercion exercised by the defendant vide its e-mail dated 21st November, 2008.

16. As to what constitutes the economic duress, she placed reliance on the observations of the Privy Council in ***Pao On & others V. Lau Yiu & another, 1979 (3) All ER 65 (PC)*** and ***Universe Tankships Inc. Of Monrovia V. International Transport Workers Federation and Others, (1983) 1 AC 366***. The relevant portion of the judgment in ***Universe Tankships Inc. Of Monrovia V. International Transport Workers Federation and Others*** (supra) is reproduced hereinbelow:-

> *"The classic case of duress is not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him.....The absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred.....But none of these evidential matters goes to the essence of duress. The victim's silence will not assist the bully, if the lack of any practicable choice but to submit is proved. The present case is an excellent illustration. There was no protest at the time, but only a determination to do whatever was needed as rapidly as possible to release the ship. Yet nobody challenges the judge's finding that the owner acted under compulsion."*

17. Learned counsel for plaintiff pointed out that Chitty on Contract 30th Edition at 7-006 has held as under:-

> *".....Further, because duress does not truly deprive a party of all choice, but only presents him with a choice between evils, it is not possible to inquire simply whether the party relying on duress had "no choice"; the inquiry must necessarily be as to the nature of the choices he was presented with."*

18. Since, this Court was not in agreement with the arguments of learned counsel for the plaintiff, it appointed Mr. Abhinav Vasisht, Sr. Advocate as Amicus Curiae.

19. To explain the concept of economic duress, Mr. Vasisht has painstakingly taken this Court through Treatise, Chitty on Contracts, (Thirtieth Edition) Volume – I, Chapter 7. The relevant extracts of Chitty on Contracts (supra) referred by Mr. Vasisht are as under:-

> *a. 7-008 "Legitimacy of the pressure or threat. Once it is accepted that the basis of duress does not depend upon the absence of consent, but on the combination of pressure and absence of practical choice, it follows that two questions become all-important. The first is whether the pressure or the threat is legitimate; the second, its effect on the victim. Clearly, not all pressure is illegitimate, nor even are all threats illegitimate. In ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper...".*
>
> *b. 7-012 "...It has been said that a threat to destroy or damage property may amount to duress. It is now accepted that the same is true of a true of a threat to seize or detain goods wrongfully...".*
>
> *c. 7-024 "Causation in general. In all cases of duress it is necessary that the victim's agreement was caused by the duress. However, it appears that the nature of*

*the causation required differs according the nature of the duress".*

*d. 7-026 "Causation in duress to goods....It seems likely that the victim must show that, "but for" the threat, he would not have entered the contract. We will see that if has been said that this is the appropriate test of causation in economic duress and given the similarity of duress of goods and economic duress, the same test of causation seems appropriate".*

*d. 7-027 "Adopting a "but for" test would place cases of economic duress on par with cases of negligent or non negligent misrepresentation. This seems appropriate".*

*e. 7-031 "Reasonable alternative. It is certainly relevant whether or not the victim had a reasonable alternative. The victim's lack of choice was emphasised by Lord Scarman in the Pao On and Universe Sentinel cases and has clearly been an important factor in those cases in which relief has been given..."*

*f. 7-034 "Protest.In the Pao On case it was said that it was relevant whether or not the victim protested. This again seems to be a question of evidence as whether or not the threat had a coercive effect. It has been accepted for many years that when a payment is made in order to avoid the wrongful seizure of goods, protest "affords some evidence...that the payment was not voluntarily made", but that the fact that the payment was made without protest does not necessarily mean that the payment was voluntary".*

*g. 7-035 "Independent advice. Likewise in the Pao On case it was said that it is relevant whether or*

> *not the victim had independent advice. The relevance of this is perhaps less obvious: access to legal advice, for example, will not increase the range of options available to the victim, and lack of advice therefore cannot be an absolute requirement. However, whether or not the victim appreciated that he had an alternative remedy and what the practical implications of following it would be are relevant to the question of causation".*

20. Mr. Vasisht submits that commercial contracts can be avoided on the ground of economic duress if facts of the case justify such a decision. He points out that this Court in ***Double Dot Finance Limited Versus Goyal MG Gases Limited & Another, 2005 (117) DLT 330***, held that there was no economic duress and the said order was upheld by a Division Bench of this Court in ***Goyal MG Gases Limited Versus Double Dot Finance Limited, 2009 (2) Arb L R, 655.***

21. He further points out that in ***Unikol Bottlers Ltd. Versus M/s. Dhillon Kool Drinks & Anr., AIR 1995 Delhi 25, (Paragraphs 31 to 37),*** the concept of economic duress was discussed in detail and was recognized, but once again the Court, in the facts of that case, did not find any economic duress. The learned Single Judge in the said case observed, "*.....while dealing with the question of duress/ coercion and unequal bargaining power one is really concerned with the question of free will, i.e. did not parties enter into the agreement with a free will? It is the plaintiff who has raised the question of its will being dominated by the defendants and, therefore, not being a free agent. Therefore, the plaintiff is on test. It has to be ascertained whether the*

*plaintiff exercised a free will or not while entering into the Supplemental Agreement. For this purpose there are several factors which need to be looked into. They are-*

*1. Did the plaintiff protest before or soon after the agreement?*

*2. Did the plaintiff take any steps to avoid the contract?*

*3. Did the plaintiff have an alternative course of action or remedy? If so, did the plaintiff pursue or attempt to pursue the same?*

*4. Did the plaintiff convey benefit of independent advice?"*

22. After hearing learned counsel for the plaintiff and the amicus curiae, this Court is of the opinion that the necessary ingredients to successfully avoid a contract on the ground of economic duress claim are:-

(a) Pressure which is illegitimate;

(b) Its effect on the victim i.e. that the pressure must be a significant cause inducing the Claimant to enter into the contract;

(c) Lack of reasonable alternative i.e. that the practical effect of the pressure was that there is compulsion on, or a lack of practical choice for, the victim.

23. A Court while deciding an issue of economic duress has also to keep in mind whether there was protest by the victim before or soon after the impugned contract and whether the victim had benefit of independent advice.

24. It is pertinent to mention that in ***DSND Subsea Ltd. v. Petroleum Geo Services ASA 2000 WL 1741490*** , the Court observed that "*Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."*

25. In ***CTN Cash and Carry Ltd. v. Gallaher Ltd. [1994] 4 All ER 714***, the Court stated that the fact that the Defendant was in a monopoly position as the sole distributor of popular brands of cigarettes was irrelevant and could not convert what was not otherwise duress into duress since the common law does not recognise the doctrine of inequality of bargaining power in commercial dealings. Steyn LJ in the case observed, "*I also readily accept that the fact that the defendants have used lawful means does not by itself remove the case from the scope of the doctrine of economic duress.....On the other hand, Goff and Jones The Law of Restitution (3rd edn, 1986) p 240 observed that English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress..... Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'. But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress."*

26. Lord Scarman in ***Pao On and others*** *(supra),* itself observed, "*Duress, whatever from it takes, is a coercion of the will so as to*

*vitiate consent.....in a contractual situation commercial pressure is not enough. There must be present some fact 'which could in law be regarded as a coercion of his will so as to vitiate his consent.'.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not."* (emphasis supplied).

27. The Indian Supreme Court while dealing with the concept of inequality of bargaining power between contracting parties in ***Central Inland Water Transport Corporation Limited and Anr. Vs. Brojo Nath Ganguly and Another, (1986) 3 SCC 156*** held *'This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction.....The court must judge each case on its own facts and circumstances."*

28. This ratio was followed by the Supreme Court in ***Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Ors., 1991 Suppl. (1) SCC 600*** when it observed that *"This Court, however, reiterated that this principle would not apply where the bargaining power of the contracting parties is equal or almost equal. This*

*principle would not apply where both parties are businessmen and the contract is a commercial transaction.....”*

29. Since admittedly both the plaintiff and defendant are companies and the contracts executed between them was commercial, this Court is of the opinion that in view of the aforesaid Supreme Court judgments, the principle of economic duress does not apply to the present case. In any event, the plaintiff has not even claimed any declaration seeking to have the Agreement dated 25th November, 2008 declared as void. Further, it is difficult to assume illegitimate pressure in the present case as the alleged pressure or coercion was a consequence of an order of a Court of law in China.

30. Even assuming that the principle of economic duress applies to a commercial contract, this Court is of the opinion that the plaintiff fails to satisfy all the four tests/factors stipulated in ***Unikol Bottlers Ltd.*** (Supra).

31. This Court is of the view that the plaintiff satisfies only the first out of the four tests/factors stipulated in ***Unikol Bottlers Ltd.*** (Supra). Though, the plaintiff protested before the execution of the impugned agreement, yet it failed to exercise either of the two adequate alternative remedies immediately available to it instead of entering into the Agreement dated 25th November, 2008.

32. During 20th and 29th November, 2008, plaintiff could have approached either the very same Court which had issued the attachment/sealing order for its modification/variation or applied to the writ Court for stay of the attachment/sealing order.

33. The plaint is also silent on the issue of availability and/or exercise of alternative remedy or benefit of independent legal advice.

34. Consequently, as the principle of economic duress does not apply to a commercial contract and all the four tests/factors stipulated in ***Unikol Bottlers Ltd.*** (Supra) are not satisfied, present suit is dismissed, but with no order as to costs.

35. Before parting with this case, this Court would like to place on record its appreciation for the services rendered by Mr. Abhinav Vasisht, learned Amicus Curiae.

**MANMOHAN, J**

**MAY 30, 2013**
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