
(2014) 11 OHC CK 0075

In the Orissa High Court

Case No : Writ Petition (Civil) No. 8256 of 2014

Agarwal Coal Corporation Private Limited

APPELLANT

Vs

Paradip Port Trust

RESPONDENT

Date of Decision : 25-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 11 OHC CK 0075

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Judgement

Biswanath Rath, J.—By filing this writ petition, petitioners seek for quashing of the impugned order vide Annexure-1 and the impugned letter vide Annexure-6. Petitioners also seek a restrain order against the opposite parties No. 1 to 3 by restraining each of them from invoking the Bank guarantee of the petitioners' Company towards shortfall of MGT in respect of plot Nos. CD-5 and Ex CM Power Plot over which the disputed cargo has been unloaded.

2. During course of argument, the petitioners have restricted their claim vide Annexure-1 available at page 17 to the item Nos. 1 & 4 in the statement of recovery of plot MGT amount only.

Facts as borne from the writ petition is that the cargo in question belongs to opposite party No. 4 which was required to be sold to the petitioners' Company in pursuance of an agreement on 14.05.2012 between the opposite party No. 4 in one part and the petitioners' Company on the other. After getting into the contract, the petitioners' Company i.e. the buyer nominated the vessel (MV, Nasco gem), consequent upon which 52,796 Metric Tons of Indonesian Steam Coal were loaded from the ship on 26.05.2012. The opposite party No. 4 i.e. the seller violated the terms & conditions of the contract and the cargo which was supplied as per the specification contained in clause (3) of the agreement and the ASH content was above rejection level thereby automatically rendering the cargo as rejected until the acceptance of the buyer.

3. The petitioners contended that as per the terms & conditions of the contract and the letter of credit, shipping documents were to be provided within five working days before arrival of the vessel, but the opposite party No. 4 failed to comply with the said requirement and the documents were supplied only one day before arrival of the vessel. It is submitted that as per the circular of the Customs Department dtd. 15.03.2012, the vessel can be allotted berth only after submission of bill of entry and to avoid pre-berthing the company processed the documents and filed the Bill of Entry on bona fide faith. As the documents were not provided to the petitioners" Company five days behind the arrival of the vessel, the seller and the buyer who were at the relevant point of time present at Bali coaltrans, petitioners" company expressed its intention about the rejection of the cargo. At this stage the representative of the opposite party No. 4 requested the petitioners" Company to discharge the cargo on a condition that discussion on the issue would take place later mutually at Indore.

While the matter stood thus and in the midst of the dispute entirely attributable to the seller of the Cargo, the carrier vessel discharged the cargo over two temporary plots allotted to the petitioners" company being plot No. CD-5 measuring an area of 7200sqm (Non Siding) and Ex CM Power plot measuring an area of 8000sqm (Non Siding) for the period from 05.06.2012 to 31.07.2012. The cargo was discharged on 12.06.2012 without the original Bill of Lading and the Delivery Order in favour of the petitioners" Company. However, subsequently the Delivery Order was issued to the petitioners" company on 13.06.2012 by the representative of the vessel/carrier, M/s. Seatrans Ship Management Services Pvt. Ltd. which delivery order was subsequently cancelled on 11.07.2012 by M/s. Seatrans Ship Management Services Pvt. Ltd. and on the instruction of the vessel owner, fresh Delivery Order was issued for the disputed cargo in favour of M/s. Ben Line Agencies India Pvt. Ltd., an agent of the seller/supplier of the Cargo FLAME SA. At this stage by letter dtd. 10.09.2012, the Paradip Port Trust wrote to the petitioners" company for evacuation of cargo Ex-MV NASCO GEM sailed on 12.06.2012. It is submitted by the petitioners that by the time, the letter was issued through the Paradip Port Trust it was very much conscious of the fact that the delivery of the order in favour of the petitioners" company had already been cancelled since 11.07.2012.

4. It is further submitted that after one month of discharging the cargo in question from the vessel MV. NASCO GEM the opposite party No. 4 filed a suit against the MV. NASCO GEM and the vessel was arrested at Singapore while bunkering for the sole reason that the cargo had been mis-delivered to the petitioners on the premises that the opposite party No. 4 was holding the original bill of lading. However, the vessel was released by giving bank guarantee before the Hon"ble High Court of the Republic of Singapore by the owners of the vessel. As a consequence of which, the original bill of lading was received by the banker of the petitioner after thirty days after sailing of the vessel. It is further submitted that even though the vessel set sail, the bill of lading was never handed over to the petitioners" Company. Without producing the bill of lading the

receivers submitted a letter of indemnity to discharge the cargo. However, after completion of discharge the owners nominated agent who had issued the delivery order in favour of the petitioners cancelled the delivery order and a fresh delivery order was issued in favour of the authorized representative of the opposite party No. 4. On 22nd & 23rd of October, the vessel owners Attorney M/s. Rajah and Tann had a meeting with the petitioners' company, Seatrans, OSL and expert opinion was sought for during their visit to Indore. While the matter stood thus, the High Court of the Republic of Singapore on the basis of an application made by the vessel owner, by order dtd. 20.12.2013 passed the order apart from several directions with liberty for M/s. Agarwal Coal Corporation Pvt. Ltd., the petitioners", to be appointed as agent to assist or facilitate the sale of the subject cargo.

5. Following the detailed order for sale of the cargo including the above directions an advertisement was published for sale of the cargo on 21.03.2014 by Sea Trans on the basis of which M/s. Vedanta Aluminum Ltd., Jharsuguda, Odisha expressed its intention for purchase of the Steam Coal and the matter was under negotiation for sale of the cargo. When the sale was in progress, the opposite party No. 3 issued the impugned demand notice directing the petitioners' Company to pay an amount of Rs. 78,97,724/- (Seventy-eight lakhs ninety-seven thousand seven hundred twenty-four only) for non fulfillment of MGT in respect of four plots including the two plots involved herein on the ground that the petitioners have not been able to fulfill the target of required quantity of the tonnage for import of cargo in respect of the two plots. Petitioners alleged that the impugned calculation has been made on the basis of a statement of recovery of plot MGT quantity as would be evident from the statement appended to the impugned demand notice under Annexure-1.

6. Petitioners submit that the impugned demand is bad in as much as the cargo could not have been discharged nor moved from the disputed plots after its discharge in the month of June, 2012 as the subject matter of cargo was sub-judice before the Hon"ble High Court of the Republic of Singapore wherein the ownership of the cargo was under dispute. It is next contended by the petitioners that the opposite party No. 4 was disputing the ownership of cargo and therefore, the original bill of lading and the DO was not available with the petitioners' company for dispatch of cargo.

7. It is next contended by the learned counsel for the petitioners that since a huge quantity of Steam coal was lying over the plots no further unloading could have been made over the said plots until removal of the cargo from the said plots. Learned counsel for the petitioners also contended that the MGT demand if any, raised by the opposite parties No. 1 to 3 is payable by the opposite party No. 4 and the vessel owners who are responsible for non-dispatch of the cargo from the aforesaid two plots leading to non-fulfillment of the MGT in respect of the said two plots.

8. It is next contended that the impugned demand has been raised on the basis

of letter dtd. 07.01.2013 which has been issued on the basis of a resolution of the Board of Trustees of opposite party No. 1 dtd. 26.12.2012 which is prospective in nature and does not apply to the imports made prior to 01.04.2013. It is submitted by the petitioners that present import has been made in the month of June, 2012 i.e. much prior to the letter dtd. 07.01.2013. The petitioners also raised a question on the authority and jurisdiction of the authority to impose such a penalty, on the plea that the Major Ports Trust Act does not confer any such power upon the Board of Trustees.

It is on these premises the petitioners sought for setting aside of the impugned order vide Annexure-1 and also for restraining the opposite parties No. 1 to 3 from invoking the Bank guarantee of the petitioners' company.

9. Per contra the opposite parties No. 1, 2 & 3 on their appearance have filed a counter inter alia contending that the dispute raised by the petitioners involves disputed question of facts, which cannot be gone into under writ jurisdiction. Petitioners have no right to agitate the issue in view of the decision of the Hon'ble Apex Court in case of Yazdani International P. Ltd. Vs. Auroglobal Comtrade P. Ltd. and Others, .

On the question of Bank guarantee, these opposite parties submitted that the Bank guarantees created for the purpose are unconditional Bank guarantees. In view of decision of Hon'ble Apex Court reported in Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, in a case in between Himadri Chemicals V. Coaltar there can be no interference in such matters. The opposite parties further submitted that the matter relates to a contractual dispute between the petitioners' Company and the opposite party No. 4 and in view of a decision reported in Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., , no enforcement of any contractual disputes can be entertained under Article 226 of the Constitution of India. Opposite parties further submitted that the obstruction at the end of the petitioners as well as the decision at the intervention of the Hon'ble High Court of the Republic of Singapore has nothing to do with regard to claim on account of shortfall towards plots MGT by the Paradip Port Trust (PPT).

10. It is next contained by the opposite parties No. 1 to 3 that the MGT Scheme was introduced by the Port vide Board Resolution No. 76/2012-13 dtd. 26.12.2012. The objective of the introduction of the MGT Scheme is to ensure that the existing resources of the port is optimally utilized and the traders do not get undue advantage in blocking the plot for unlimited period creating shortage of storage yard. The plot MGT scheme provides that a licensee has to handle @ 15 MT/sqm per annum in case of the siding plot and @ 10 MT/sqm per annum for non-siding plots. As the petitioner was in possession of 25,200 sqm in the non-siding plot, it was required to handle 2,20,768 MT of cargo per annum, failing which the plot holder is required to pay the differential amount i.e. shortfall quantity equivalent to the wharfage payable. Petitioners during the financial year 2013-14 have handled only 37,100 MT. As such there is a huge shortfall of 1,83,668 MT, against which the petitioners have to pay the MGT

amount of Rs. 78,97,724/- (Rupees Seventy-eight lakhs ninety-seven thousand seven hundred twenty-four only).

11. The opposite parties also submitted that the activities and administration of the major ports is governed by the Major Port Trust Act, 1963. The Land Policy Guideline 2010 empowers the Paradip Port Trust for introduction of MGT scheme for improvement of the performance of the port. The petitioners being land owner are well covered under the scheme. Problems concerning the petitioners vis-?-vis the opposite party No. 4 have nothing to do with the scheme.

12. The opposite parties also contended that the petitioners being a licensee for the four plots mentioned in the Annexure-1 and the plot MGT being a cargo related charge, the petitioners are liable to pay irrespective of delivery of order issued in favour of the agents or not.

13. In response to the counter at the instance of the opposite party Nos. 1 to 3, the petitioners by filing a rejoinder submitted that in spite of the interim direction for no coercive action to be taken against the petitioners pursuant to letter dtd. 08.04.2014, the port authorities forced the petitioners for depositing the amount involved. As a consequence of which the petitioners were constrained to deposit a sum of Rs. 65,36,000/- (Rupees Sixty-five lakhs thirty-six thousand only) on 27.05.2014 towards the MGT penalty amount under protest. The petitioners reiterated its stand already taken in the writ petition that in view of the problem arose, due to the arrest of the vessel outside India, the petitioners were not in a position to despatch the cargo lying idle for long period. There was difficulty also on the part of the petitioners for non receipt of the delivery orders in time and without the delivery order the cargo stacked on the alleged plots could not have been despatched. The petitioners claim that it has absolutely no liability for despatch as the dispute is entirely attributable to the opposite party No. 4. So the opposite parties if at all have any demand they should collect it from the opposite party No. 4 and free the petitioners from the said liability.

14. By filing an additional affidavit the petitioners brought some information regarding its deposit the up to date rent/license fee for the entire period up to 02.07.2014 and submitted that calculation on the head of MGT charges will be amounting to double jeopardy. During course of argument, the learned counsel bringing a document at Annexure-3 to the notice of the Court further contended that since the petitioners applied for plot upto 31.07.2012, the petitioners could not have been charged on the head of MGT beyond 31.07.2012.

15. There is no dispute that the petitioners were the land owners in respect of plot Nos. C.D.-5 and Ex-C.M. Power Plot on its own submission it has also cleared the license fee for all the plots including the above two plots up to July, 2014.

16. On its own submission storage of particular materials (Steam Coal) on the alleged plots for long time because of dispute or delay in discharge of materials on the alleged plots were of a consignment out of an agreement between the

petitioners and the opposite party No. 4, for which the petitioners cannot put the blame on the Paradip Port Trust and since the petitioners could not be able to meet the required quantity of materials as determined vide letter dtd. 07.01.2013 it is bound to suffer and as a consequence, it has no other alternate than to pay for it. Further on the own admission of the petitioners that after the dispute in relation to the particular vessel visa-vis the cargo got resolved by virtue of an interlocutory order dtd. 20.12.2013 by the High Court of the Republic of Singapore by appointing the petitioner No. 1 company as the agent to assist or facilitate the sale of subject cargo and following such direction of the High Court of the Republic of Singapore, the particular company went for an advertisement published for sale of cargo published on 21.03.2014 clearly establishes that the plot No. CD-5 and Ex-CM Power plot as appearing at item No. 1 & 4 of Annexure-1 were occupied with particular cargo in between 01.04.2013 to 31.03.2014. The office order vide Annexure-6 by virtue of which the charging at Annexure-1 has been made being binding on the petitioners for their occupying both the above plots for the entire period involved as referred to hereinabove the petitioners were required to meet with requirement of particular MGT w.e.f. 01.04.2013. The fact that the petitioners have only handled with 37,100 MT during this period not being controverted the petitioners admittedly runned with heavy shortage and consequently following the conditions at clause (iii) of the office order dtd. 07.01.2013 (Annexure-6), pursuant to which the petitioners had submitted the required Bank guarantee as an commitment to meet with the required MGT and following the further condition vide clause (V) of the office order dtd. 07.01.2013 (Annexure-6) the Board of the port had every authority to encash the Bank Guarantee for the equivalent wharfage in respect of the shortfall quantity of MGT and hence I hold the demand raised by the Paradip Port Trust is absolutely a valid one.

17. The submission of the petitioners that for their clearing the up-to-date rent/license fee for the period upto 02.07.2014 makes it clear that petitioners were the occupier of all the Four plots involved in demand vide Annexure-1 and well covers the entire period involved therein. Payment of up-to-date rent/license fee has no connection with charging on shortfall in maintaining the MGT as both the components are independent of the other.

18. I have gone through the decisions cited by the opposite parties referred to herein supra and find the same have no application to the present circumstances.

19. Under the above facts & circumstances, I find the writ petition has no merit consequently the writ petition stands dismissed. Interim order passed during pendency of the writ petition stand recalled. However, there shall be no order as to cost.