
(2015) 07 CAL CK 0069

In the Calcutta High Court

Case No : CC No. 16 of 2014, APO No. 293 of 2014 and CS No. 77 of 2013

Dankuni Steels Ltd.

APPELLANT

Vs

Ajit Kumar Bothra and Others

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2015) 07 CAL CK 0069

Hon'ble Judges : Manjula Chellur, C.J.; Joymalya Bagchi, J

Bench : Division Bench

Advocate : Ranjan Deb, Senior Advocate, Dipak De and Neolle Banerjee, for the Appellant; Tilak Bose, S.N. Mitra, Ratnanko Banerji, Reetobroto Mitra, Anindita Ghosh, Pradip Saraogi, D.N. Sharma and Sadhana Mukhopadhyay, Advocates for the Respondent

Judgement

Joymalya Bagchi, J—APO No. 293 of 2014 and CC No. 16 of 2014 have been heard analogously and are being disposed of by a common judgment and order.

2. The genesis of the case, in summary, is as follows:

The respondent No. 1, Sarat Chatterjee & Co. (VSP) Pvt. Ltd. [in short R-1 (Sarat)] operates as a handling-cum-clearing agent for and on behalf of Concast group of companies, comprising of the appellant and respondent No. 4 herein, for importation of cargo by the said group of companies at Visakhapatnam Port.

3. In March, 2012, R-1 (Sarat) was intimated by the Concast group of companies that a huge consignment of metallurgical coke was arriving at Visakhapatnam Port in vessel M.V. Filia Joy under six bills of lading and was called upon to clear the consignment on its behalf. Respondent No. 2, LMJ International Limited [in short R-2 (LMJ)], an export house, also claimed that they had title over 10000 MT of the aforesaid consignment of metallurgical coke transported by the said vessel on the basis of two bills of lading, namely, bills of lading Nos. 1 and 2, which were claimed to be in its possession. On 23rd March, 2012 a tripartite

agreement was entered into by and between the respondent No. 2 (LMJ) and respondent No. 3, Balaji Coke Industries Pvt. Ltd. [in short R-3 (Balaji)], from whom appellant claimed to have purchased the coke, relating to clearing and delivery of 10000 MT coke to R-2 (LMJ) out of the aforesaid consignment.

4. Under such circumstances, R-1 (Sarat) discharged the cargo from M.V. Fila Joy comprising of 29,380.551 MT of metallurgical coke and stored the said cargo at Customs Bonded Warehouse being R-5, R-1 (Sarat) intimated R-2 (LMJ) that its request to keep separate stock of 10000 MT of coke over which it was making claim was not possible. Copy of such e-mail was also forwarded to the representative of the Concast group of companies. R-1 (Sarat) was intimated by R-2 (LMJ) and R-3 (Balaji) not to clear 10000 MT of coke in favour of the Concast group of companies.

5. On 19th October, 2012 another consignment of 26560 MT coke of the Concast group of companies arrived in M.V. Glovis Master and the said goods were discharged and stored in the same Customs Bonded Warehouse being R-5. Upon a phased payment of customs duty, a part of the aforesaid consignment of coke being 38764.75 of MT of coke, as claimed by the appellant (38,902 MT as per R-1) was handed over to the appellant. Remainder of the goods were kept at Customs Bonded Warehouse R-5, [duty uncleared 6250 MT, duty cleared 931.751 MT as per the appellant, (793.52 MT as per R-1], Godown of R-2 (LMJ) [duty cleared 4966.540 MT] and Godown of Ripley and Co. in the possession of R-1 (Sarat) [duty cleared 4717.530 MT]. It is claimed by R-1 (Sarat) that shifting of a part of the duty cleared goods to the godown of R-2 (LMJ) and Ripley separately was within the knowledge of the representative of the Concast group of companies.

6. In the meantime, R-2 (LMJ) took out an application under Section 9 of the Arbitration and Conciliation Act being AP No. 933 of 2012 and on 6th December, 2012 an order was passed directing R-1 (Sarat) to deliver 10000 MT coke to the respondent No. 2 (LMJ) subject to certain conditions.

7. In a subsequent application being AP No. 1068 of 2012 taken out by R-2 (LMJ), further order dated 21st December, 2012 was passed appointing Joint Special Officers to permit R-2 (LMJ) to remove the said goods under their supervision.

8. In the face of the aforesaid orders, a Civil Suit being CS No. 17 of 2013 was filed by R-4 (Concast) against one Burdwan Iron and Steel Company Private Limited and R-1 (Sarat) with regard to undelivered cargo that had arrived by M.V. Glovis Master. Subsequently, the appellant filed the present suit being CS No. 17 of 2013, inter alia, seeking a decree for delivery of the entire consignment of metallurgical coke lying at Customs Bonded Warehouse, R-5, Ripley and LMJ Godown and cancellation of the tripartite agreement between R-1 (Sarat), R-2 (LMJ) and R-3 (Balaji) dated 23rd March, 2012 and the orders were passed in AP No. 933 of 2012 and AP No. 1068 of 2012 (supra) respectively.

9. In the said suit, the appellant sought for various interim reliefs. By an ad interim order dated 14th March, 2013 a learned Single Judge of this Court directed that any removal of the metallurgical coke which arrived by the two vessels, M.V. Filia Joy and M.V. Glovis Master will abide by interim orders to be passed.

10. In appeal, an Hon'ble Division Bench of this Court by order dated 19th March, 2013 directed learned Single Judge to hear out the interlocutory application upon exchange of affidavits and restricted the observation of the learned Single Judge to 10000 MT of metallurgical coke alone.

11. In spite of the aforesaid order passed by the Division Bench, R-1 (Sarat) did not deliver the remainder of the goods to the appellant and accordingly a contempt application being CC No. 49 of 2013 was taken out by the appellant which was disposed of on 13th December, 2013 wherein the Bench directed R-1 (Sarat) to raise bills for its handling and other service charges along with supporting documents within three weeks from the date of order and upon payment of such bills so raised R-1 (Sarat) would be under an obligation to comply with the direction of effecting delivery leaving aside 10000 MT of metallurgical coke. It was further stated that if no bills are raised it would be open to the appellant to contend that there is no outstanding dues on account of handling charges.

12. Thereafter the present contempt application being CC No. 16 of 2014 was taken out alleging non-compliance of the direction given by this Court in its orders dated 19th March, 2013 and 13th December, 2013. On the other hand, GA No. 103 of 2014 was taken out by R-2 (LMJ) for clarification of the order dated 13th December, 2013 passed in CC No. 49 of 2013.

13. On 28th June, 2014 advocates on record of the respective parties were appointed as Joint Special Officers to visit the godown of R-2 (LMJ) where the disputed goods were claimed to be lying and to give a report. Joint Special Officers gave a report that there was no goods in the subject godown.

14. By order dated 21st February, 2014 the clarification application was disposed of and it was observed that the good sense may prevail upon the contemnors and they would comply with the order in the meantime.

15. Subsequently, contempt rule was issued upon R-1 (Sarat) and one Ajit Kumar Bothra on January 6, 2014.

16. In the meantime, learned Single Judge by order dated 16th July, 2014 disposed of the interlocutory application by directing that the appellant shall be entitled to delivery of 10000 MT of metallurgical coke upon furnishing a bank guarantee to the tune of Rs. 21 crores in favour of the Registrar, Original Side. Remainder quantity of metallurgical coke brought by M.V. Filia Joy and M.V. Glovis Master or both as available with R-1 (Sarat) shall be handed over to the appellant or R-4 (Concast), as the case may be.

17. The said order has been appealed in APOT No. 457 of 2014.

18. Mr. Deb, senior counsel appearing for the appellant submitted his client was entitled to the entire consignment of metallurgical coke imported in the vessels M.V. Filia Joy and M.V. Glovis Master. There can be no claim of R-2 (LMJ) over the title of the goods as the sale between R-2 (LMJ) and R-3 (Balaji) was complete. R-2 (LMJ) in the proceeding under section 9 of the Arbitration and Conciliation Act had claimed unpaid seller's lien over the subject consignment and subsequently is claiming title over the goods. He further submitted that as R-2 (LMJ) had failed to establish prima facie title over the goods and there was no justification to secure his claim by calling upon his client to furnish a bank guarantee to the tune of Rs. 21 crores. Furthermore 5000 MT of coke kept at LMJ godown had been delivered to R-2 (LMJ). He submitted that as the price of the goods is variable and is rapidly going down in the market it would be just and proper to modify the order and direct sale of the uncleared goods lying in R-5 godown to secure the claim, if any, of R-2 (LMJ). With regard to contempt, he submitted that the alleged contemnors intentionally withheld facts from the Court and had belatedly taking up the plea of non-payment of handling and other charges as justification for non-compliance of the order although they had not raised their bills within the time stipulated by the Court vide order dated 13th December, 2013.

19. Mr. Bose, senior counsel appearing for R-1 (Sarat) and Ajit Kumar Bothra, that is the alleged contemnors, submitted that customs duty in respect of the part of the goods have not been cleared till date and the same is within the knowledge of the appellant and R-4 (Concast). He further submitted that due to non-clearance of goods from the customs warehouse (R-5) his client was slapped with notices for penal charges by the authorities and they have also been bearing all expenses for preserving the goods in Ripley godown. He further submitted that in terms of order dated 6th December, 2012 in AP No. 933 of 2012 goods lying at LMJ godown were delivered to R-2 (LMJ). He relied on the delivery order issued by his client in that regard and the pleadings of R-2 (LMJ) in AP No. 1068 of 2012 as well as in the affidavits sworn on behalf of R-2 (LMJ) in proceedings by and between the parties wherein R-2 (LMJ) had admitted delivery of such goods. He also submitted that stock management agreement with R-2 (LMJ) was not renewed after February, 2013 as delivery order had been issued giving rise to the irresistible inference that goods at LMJ godown had been delivered to R-2 (LMJ). He submitted that his client is entitled to handling charges and stock management charges for which bills have been raised though belatedly. He further submitted that his client has lien over the goods in his custody. He submitted that the alleged contemnors had no intention of violating the orders of the Court and had always sought to comply with them to the best of their abilities.

20. Mr. Mitra, senior counsel appearing for respondent No. 2 submitted that the bills of lading Nos. 1 and 2 are in possession of his client and therefore there can

be no dispute as to the ownership of the goods covered in the said bills. He submitted that sale between his client and R-3 (Balaji) had not taken place and price of the goods had never been paid. He submitted that the goods at LMJ godown were in the possession of R-1 (Sarat) and if the same are not found then R-1 (Sarat) ought to be made responsible. He further submitted that the interest of his client to the extent of 10000 MT in the subject goods ought to be protected. He denied the allegation that his client in pleadings had admitted delivery of goods lying at LMJ godown and submitted such pleadings are to be read as a whole and not in isolation.

21. We have considered the submissions of the parties.

22. It appears that from the pleadings and the submissions of the parties that the status of the subject goods are as follows:

23. We find that the consignment of metallurgical coke brought by M.V. Filia Joy and M.V. Glovis Master were cleared by R-1 (Sarat) on behalf of the appellant and R-4 (Concast). Out of the said consignment, R-2 (LMJ) has staked a claim over 10000 MT of coke as it is in possession of the documents of title of the said goods, namely, bills of lading Nos. 1 and 2.

24. The issue as to whether the said goods, that is, 10000 MT of coke, had been sold by R-2 (LMJ) to R-3 (Balaji) or not is to be decided on trial. However, there is nothing on record to show that R-2 (LMJ) was paid the sale price of the said goods and hence a strong prima facie case of lien as unpaid seller is made out in its favour in respect of the said goods.

25. With regard to the claim that goods which were kept by R-1 (Sarat) in LMJ godown were in fact delivered to R-2 (LMJ), we are of the opinion that no definite conclusion can be arrived at thereon on the basis of affidavits alone and the same is to be thrashed out on evidence during trial. Hence, value of 10,000 MTs of coke out of the entire consignment is required to be set apart to secure the claim of R-2 (LMJ) till the disposal of the suit.

26. We are also of the view that in view of the vagaries of the market and the likelihood of price of coke going down and to avoid further escalation of demurrage charges it would be prudent to sale 10,000 MTs of coke out of the remainder stock to secure the claim of R-2 (LMJ). Appellant and/or R-4 (Concast) shall be at liberty to take delivery of remainder of the goods after clearing of the customs duty and port charges thereon in accordance with law.

27. In this backdrop, we are of the opinion that a Special Officer be appointed to inspect the aforesaid godowns and make an inventory of the goods lying therein and thereafter to take steps for sale of 10,000 MTs of coke out of the stock lying at R-5 and Ripley godown. The sale price of the aforesaid consignment after clearance of customs duty and port charges thereon shall be deposited by the Special Officer with the Registrar, Original Side, who shall keep the same in an interest bearing fixed deposit account in a nationalized bank subject to the result

of the suit. The appellant and/or R-4 (Concast) shall be at liberty to take delivery of remainder of the stock lying in the godowns after clearing the customs duty and port charges thereon, if any, in accordance with law. This order shall not preclude R-1 (Sarat) from taking steps for recovery of its handling and other service charges in accordance with law, if so advised.

28. APO No. 293 of 2014 and GA No. 2806 of 2014 are accordingly disposed of.

29. In the aforesaid factual matrix and in view of the fact that customs duty was not cleared in respect of a substantial portion of the goods and in the light of the modification of the order alleged to have been violated, as aforesaid, we are inclined to drop the contempt proceeding initiated against the alleged contemnors.

30. Contempt Rule in CC No. 16 of 2014 stands discharged.

Manjula Chellur, J.

I agree.

LATER:

Mr. Rabi Prasad Mukherjee, Advocate, Bar Library Club, is appointed as Special Officer to execute the direction of the Court i.e. in respect of the sale of coke.

Tentatively the remuneration of the Special Officer is fixed at Rs. 50,000/- to be shared equally by both appellant and the respondent LMJ.

All parties including statutory authorities concerned including customs shall act in terms of the above order.