

(2009) 01 CAL CK 0033

In the Calcutta High Court

Case No : G.A. No. 67 of 2006 and C.S. No. 293 of 2005

IMR Metallurgical Resources AG.

APPELLANT

Vs

Hindustan Newsprint Limited and Another

RESPONDENT

Date of Decision : 30-01-2009

Acts Referred:

Citation : (2009) 01 CAL CK 0033

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—The above interlocutory application has been taken out by the plaintiff for a direction upon the respondent to nominate a surveyor mutually agreed by the plaintiff for the purpose of sampling and analysis of the cargo being the subject matter of the above suit. If necessary, a fit and proper person and/or agency be appointed as surveyor by this Hon"ble Court for the purpose of carrying out sampling and analysis of the cargo being the subject matter of the suit, injunction restraining the first respondent, its servants and agents from utilising, removing, consuming and/or dealing with the entire balance quantity of goods being the subject matter of the suit. Short fact in the suit is that the plaintiff in terms of an agreement by Purchase Order bearing No. 990083 dated 26th July 2005 supplied steaming (non-coking) coal of Indonesian origin weighing about 40,000 M.Ts. at a price of U.S.\$20,42.800 & Cochin basis the said quantity of coal was shipped from the port of Muara Satui Anchorage South Kalimantan, Indonesia and was discharged at Cochin Sea Port, Ernakulam District in the State of Kerala.

2. In terms of the original and modified purchase order the payment of the said coal was to be made in two instalments namely 75 per cent by irrevocable letter of credit against discharge of document and the balance 25 per cent was to be paid by the first defendant to the plaintiff after receipt of sampling and analysis report as also drought survey weight report at destination port after making

necessary arrangement in variation against total moisture, ash calorific value (K. Cal /kg.). fines content etc. In terms of the said agreement , it was provided amongst other, on arrival of the consignment at discharge port, mutually accepted an independent Inspection Agency shall draw three samples in the presence of the representatives of purchaser and supplier. One sample will be tested by the independent Inspection Agency at discharge port and one sample will be tested at HNL Laboratory. The aforesaid consignment thereafter arrived at the port of Cochin. The plaintiff also received 75 per cent of the agreed price of the said goods on document being discharged and the payment of balance 25 per cent was and still is due and payable and the same was to be paid on receipt of the above report of the surveyor. At the time of discharge of the goods from the port of Indonesia the plaintiff caused a survey and analysis report to be prepared and it was found moisture, ash contents and calorific value were in conformity with the specification stipulated in the purchase order. As the goods arrived at port of Cochin there had been tremendous down pour and as a result whereof the discharge of the coal from the board the vessel were not only delayed but the entire coal got wet. Consequently weight and moisture contents of coal got increased and calorific value of the said coal was deteriorated to a large extent. The defendant No.1 without concurrence or agreement of the plaintiff engaged the second defendant for survey, sampling and also for analysis of wet coal. The second defendant submitted a report, wherein it says that there has been unusual variation of the ash content, wet and calorific value. The plaintiff has challenged the appointment of second defendant and its report, in the suit. It is claim and contention of the plaintiff that the report has been prepared by the defendant No. 2 without having any lawful appointment by reason of the fact it is not the mutual choice of the parties in terms of the agreement. The report of the second defendant as regard moisture contents is completely at variance with that of one prepared at load port in terms of the said agreement. If the said report is accepted then there will be a tremendous loss of the plaintiff, as the first defendant would not make payment of balance 25 per cent.

3. The first defendant has contested this application contending that firstly this Court has no territorial jurisdiction, secondly there is no cause of action nor justiciable right. It is also contended by the first defendant that the appointment of the respondent No. 2 was never objected to and it was to the notice and knowledge of the Indian agent of the plaintiff.

4. It is further submitted by the first defendant that an application for rejection of the plaint has been taken on the ground of jurisdiction, and the same is pending.

5. It is appropriate to note that at the ad interim stage this Court passed order allowing to draw and preserve the sample of the said coal lying at the Railway yard of the first defendant and such sample has been kept and preserved. At the ad interim stage this Court held by a judgment and order dated 19th January 2006 that this Court has territorial jurisdiction.

6. Mr. Debal Banerjee appearing for the plaintiff contends that this Court by judgment and order referred to above held that this Court has jurisdiction and the same is not appealed against. Therefore, the first defendant is estopped from raising the plea of jurisdiction once again. He contends that appointment of the second defendant done unilaterally by the first defendant and its report of sampling, surveying and analysis of the coal at the port of discharge are challenged in the suit. The payment of the balance 25 per cent price of the goods supplied is absolutely depending upon the correct report of analysis. Unless fair and impartial report is prepared by an expert on lawful appointment and there would be serious injustice to his client. He has drawn my attention to the relevant part of the purchase order and submits that the terms of agreement for sale and supply of the goods clearly provide that surveyor is to be appointed at the port of there discharge upon mutual agreement of the parties. He submits that there has been no mutual agreement at all to appoint the second defendant. Therefore, the report prepared and submitted by the second defendant is of no value and is not binding upon his client.

7. He contends that the purported report records wide variation from that of what is prepared at the port of loading. He further submits that there will be no prejudice at all if the sample already collected is analysed by an independent body appointed upon mutual agreement of the parties or by the Court, and the same is produced at the time of hearing. In terms of the ad interim judgment and order of this Court sample is preserved unless analysis is done and report is submitted quality of the sample will deteriorate, if not become useless. Therefore, he contends that while weighing balance of convenience and inconvenience order as prayed for should be passed.

8. Mr. A.K. Chatterjee, learned Senior Advocate contends that since point of jurisdiction and also the justiciability of the plaintiff's alleged right is questioned in the present suit, this Court should not pass any interim order, unless it finds these issues are in favour of the plaintiff. He submits that factually the second defendant was appointed at the port of discharge at Cochin and such appointment was never objected to by the plaintiff's Indian agent namely M/s. Rawmet Commodities Pvt. Ltd. It is well settled principle of law that without deciding the question of jurisdiction and maintainability no interlocutory order should be passed. He further contends just because there will be no prejudice nor proposed order will hurt parties, Court will not pass any order automatically as the plaintiff has to establish its right first. In support of his submission he has drawn my attention to a Division Bench Judgment reported in Babulal Choukhani Vs. Western India Theatres Ltd. and Another, .

9. I have gone through the pleadings produced before me. The question posed before me in this interlocutory application is whether any order should be passed by this Court for appointment of surveyor for the purpose of conducting test of samples of the coal already drawn and preserved and also for preparation of report thereof. Mr. Chatterjee has rightly said that this Court without deciding the

question of jurisdiction and maintainability will not think of passing any interlocutory relief. This proposition of law is very well settled and I don't need to seek for any authority on this proposition. The applicability of the aforesaid principle is always depending upon the fact of the case so I examine whether the plaintiff has been able to make out case to get interlocutory relief or not. I have already noted that on the question of jurisdiction this Court at the ad interim stage held that this Court has jurisdiction and the said ad interim judgment and order has not been set aside by the appeal Court and the same is still pending. No fresh decision on this point is required at this stage as I have passed an interlocutory order allowing to draw sample and to preserve it at the ad interim stage. It appears parties have accepted the said order and said sample is still preserved. In any event I am of the prima facie view the plaintiff has been able to establish his justiciable right as the issue involved in the present suit is whether appointment of second defendant has been made in terms of the agreement or not. I have seen the relevant terms which records without any uncertainty that appointment has to be made upon mutual agreement of the parties. The first defendant in the affidavit of course says that appointment of second defendant was done to the notice and knowledge of the agent of the plaintiff and there has been no objection at any point of time. This statement and averment however has been denied and disputed in the affidavit in reply. In view of the aforesaid statement and rival statement on oath it is difficult at this stage to accept the contention of the first defendant. This controversy needs to be decided at the time of the trial of the suit on witness action. From the correspondences disclosed in the pleading and produced before me it shows that there has been serious dispute regarding appointment of second defendant in terms of the purchase order. I find that the fair and accurate analysis report regarding the contents of the coal has got serious effect on the question of payment of the balance price. If the report of surveyor as to quality in terms of purchase order is not obtained and submitted the plaintiff is disentitled to 25% of aggregate price, being the balance amount due and payable. Under those circumstances it cannot be said that plaintiff has not been able to make out a justiciable right. I am therefore, unable to accept the contention of Mr. Chatterjee that the plaintiff has not been able to make out justiciable right in the plaint.

10. Next objection raised by Mr. Chatterjee regarding sufferings and prejudice is not the criteria. The Division Bench judgment cited by Mr. Chatterjee as quoted above in paragraph 40 has noted the actual position of law for granting perpetual injunction. There cannot be dispute to the proposition of law laid down by Their Lordships in the said judgment on fact in that case. Their Lordships held in the same paragraph amongst other that: "..... principle on which Court grants injunction is not that injunction will hurt party against whom it is granted, but grants an injunction on the principle that the applicant for injunction must satisfy the Court if it has made out a case within the law clothed with an order of injunction from this Court".

11. I have already observed plaintiff has been able to make out a case, therefore, this judgment is not applicable in this case. I find Mr. Banerjee's contention is quite helpful to hold that there must be an independent surveyor for testing and analysing the sample already preserved and kept. While considering the balance of convenience and inconvenience if such order is passed the first defendant will not be prejudiced on the other hand if the suit ultimately succeeds, the plaintiff will suffer for by that time sample preserved will lost its quality and it would be useless. At this stage it is not necessary to examine whether there is strong chance of success, it is good enough now whether strong debatable case having been made out or not. Such report, however, will not be a binding factor for the time being upon both the parties and it will be scrutinised at the time of hearing of the suit. I accordingly direct both the parties to choose an independent surveyor within a period of one month from the date of receipt of the copy of this order failing which this Court will appoint. The appointment if made, mutually will be without prejudice to the rights and contentions of parties.

12. This application is allowed. Costs and expenses for conducting analysis and report of the surveyor shall be borne by the plaintiff at the first instance and this will abide by the result of the suit. The matter will appear "To be mentioned" to see whether appointment is made or not, six weeks, hence.