

(2008) 06 BOM CK 0165

In the Bombay High Court

Case No : Appeal From Order No. 71 of 2007

M/s. Lithoferro

APPELLANT

Vs

M/s. Resources International and M/s. Resourceful
Earthmovers

RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 24(A)

Citation : (2008) 06 BOM CK 0165

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : M. S. Usgaonkar, with Mr. Iftikhar Agha, for the Appellant; S.D. Lotlikar with Mr. Shivan Dessai, for the Respondent

Judgement

N.A. Britto, J.—This appeal is directed against Order dated 4-5-2007 of the learned Civil Judge, Senior Division, Quepem, by which temporary injunction has been granted against the defendants. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

2. The dispute between both the parties is as regards a property admeasuring 62.525 sq. meters, having survey No. 40/1 and Land Registration No. 6728 of which the plaintiff no.2 has become the owner by virtue of a sale deed dated 17-1-2007, and as regards about 3000 WMT of low grade iron ore stored upon the said property and another 2000 WMT stored outside it, the ownership of which is disputed.

3. Some more facts are required to be stated to dispose of this appeal.

4. Admittedly, the defendant holds a mining lease known as "Deugotemolavoril Dongor" situated at Sangoda of Sanguem Taluka within which the aforesaid suit property is situated. The plaintiffs are sister firms, if I may use that expression. Defendant is also a firm registered under the Partnership Act, 1932. The defendant had an agreement for raising iron ore with plaintiff no.2 and for sale of

ore with plaintiff no.1, both dated 13-2-1993. Admittedly, both the said agreements have come to an end on 30-11-2007 after the filing of the suit and the application for temporary injunction. By virtue of two other agreements also dated 13-2-1993 Shri Vasant Vithal P. Velguenkar alias Vasant Prabhu Tendulkar and his wife Vasanti P. Tendulkar agreed to sell the suit property and handed over its vacant and peaceful possession of the said property in part performance of the said agreement, and, by another agreement of the same date executed between plaintiff no. 1 and the said Vasant and his wife Vasanti Tendulkar the plaintiff no. 1 agreed to pay compensation for loss of agricultural yield as well as for the damage to the said property. As per this agreement dated 13-2-1993 between the said Tendulkars, the predecessors in title of plaintiff no.2, it was agreed between plaintiff no. 1 and the said Tendulkars that plaintiff no. 1 would pay compensation at the rate of 7.50 per sq. meter amounting to Rs. 3,00,000/- in the manner stipulated therein. This compensation was payable on account of loss of agricultural yield which would be suffered by the said Tendulkars between the date of agreement for sale and execution of the sale deed as well as damages which may be caused to the said property due to the mining activities of the said purchasers. Upon the death of the said Vasant V. Velguenkar, and, in the inventory proceedings held thereafter, the suit property came to be allotted to Sudin Vasant Prabhu Tendulkar who thereafter along with his wife by sale deed dated 17-1-2007 sold the suit property to plaintiff no. 2, a nominee of plaintiff no. 1, with plaintiff no. 1 as confirming party.

5. The plaintiff no. 2 extracted the ore last in January, 1999 and as per the plaintiff it was sold in November, 1999 and that was the last mining transaction between the plaintiffs and the defendant. It is the case of the plaintiffs that from the year 1999 the plaintiff suspended the operations in the said mine since excavation was not economically feasible. Thereafter, there was an inter se dispute between partners of the defendant and by Order dated 24-10-2001 a receiver was appointed and the Court receiver stopped the plaintiff no.2 from interfering in the said mine. However, subsequently the said Special Civil Suit No. 203/91/A was compromised and the two agreements with the plaintiffs were declared to be null and void, namely, the ore raising agreement and the sale of ore agreement, with effect from 1-12-1992. The said compromise took place on or about 22-3-2006 and the defendant firm continued with Raju and Vaishali Neugi as partners and thereupon the defendant has entered into new agreements for the extraction of ore from the said mining lease with M/s. Haradesh Ores and M/s. Sociedade de Fomento Industrial Limited, respectively, who, admittedly have not been made parties to the suit. Thereafter by letter dated 23-5-2006 the plaintiff no.2 wrote to M/s. Sociedade de Fomento Industrial Limited that they would pay Rs. 22/-per tonne in consideration for allowing and co-operating with the plaintiffs to lift the ore lying in the said property and the said mine after procuring a N.O.C. from the said Sudin Tendulkar. As per the plaintiffs the said letter was issued as it would be commercially viable for the plaintiffs and expedient in view of the demands and prices of the iron ore at that

time to pay to the said M/s. Sociedade de Fomento Industrial Limited as an additional amount in consideration for their co-operation to lift the said iron ore but the same did not materialize.

6. The learned trial Court has come to the conclusion that whether the contracts(i.e. of extraction and sale) are subsisting or not is a triable issue. In my view, it is not. Admittedly, the ore raising agreement as well as the sale of ore agreement were operative from 1-12-1992. Clause 1 of the ore raising agreement provided that this agreement would initially be in force for a period of 5 years commencing from 1-12-1992 and ending from 30-11-1997 and at the expiry of the aforesaid period it would stand renewed automatically on the same terms and conditions, for a period of 7 years ending on 30-11-2004. Clause 13 of the agreement for sale of ore provided that it would remain in force for 3 periods of 5 years each from 1-12-1992 to 30-11-2007 and all terms and conditions would remain the same for the year 2004 whilst the balance of 3 years the prices were to be mutually negotiated for the options to renew the same for a further period of 3 years. Admittedly, the last time the ore was extracted was in January, 1999 and sold in November, 1999 and thereafter neither of the two agreements have been operated. It is not the case of the plaintiffs that after 2004 the agreement for sale was renewed as per Clause 13 of the said agreement. Learned Counsel on behalf of the defendant has placed reliance on the case of Vasant Sakhambari Sanas v. Chabildas Sobhagchand(1973 Bom. L. R. 584). That was a case where rent was not at all agreed upon but it was specifically provided that the rent would be mutually agreed upon in future and hence, it was held that the agreement was not a mutual contract which could be specifically enforced. Admittedly, the sale of ore agreement was not renewed after 2004 as contemplated by Clause 13 of the said agreement, and, in any event both the said agreements have come to an end after 30-11-2007 and therefore in such a situation it cannot be said that the said agreements raise triable issues.

7. The dispute between the parties needs to be looked at in two aspects.

8. The learned trial Court did not give any particular finding in relation to the provisions of Mines and Mineral(Development and Regulations) Act, 1957(Act, for short). That was necessary in the light of the fact that the defendant had a subsisting mining lease over the suit property of which the plaintiff no. 2 claims to be the owner. There is no dispute that the suit property now belongs to plaintiff no. 2 and the learned trial Court has held that the Defendant has no right to enter the said property. Mr. Usgaonkar, learned Senior Counsel submits that the learned trial Court could not have restrained the Defendant from entering upon the suit property as the Defendant was a holder of a mining lease and the Defendant was liable only to pay compensation as determined by the authorities. Learned Senior Counsel further submitted that the predecessors in title of plaintiff no.2 had already given their consent by virtue of agreement dated 13-3-1993 and therefore the Defendant could not be restrained in the light of the said consent. Learned Senior Counsel has further referred to the

provisions of Section 24(A) of the Act and has submitted that in case the plaintiffs are entitled to compensation only then the plaintiffs would not be entitled to obtain an injunction. Learned Senior Counsel therefore submits that the Defendant could not be prohibited from entering the suit property. Learned Senior Counsel has placed reliance on Section 24(A) of the Act and Rule 22(h) and Rule 72 of the Mineral Concession Rules, 1960.

9. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel on behalf of the plaintiffs submits that the Act cannot make any fundamental difference as far as the rights of the owners are concerned and that is irrespective of who holds the mining lease. Learned Senior Counsel further submits that plaintiff no.2 has purchased the suit property and until the compensation payable to plaintiff no.2 is determined first, the Defendant cannot enter the suit property. Both the learned Senior Counsel have relied on several Judgments of this Court, some of which are found mentioned in para 17 of the order of the learned trial Court but which apparently do not hold the field as they have been set aside by the Apex Court.

10. Section 24(A) of the Act deals with rights and liabilities of a holder of prospecting license or mining lease. Sub-Section(1) provides that on the issue of a prospecting license or mining lease under this Act and rules made thereunder, it shall be lawful for the holder of such license or lease, his agents or his servants or workmen to enter the lands over which such lease or license had been granted at all times during its currency and carry out all such prospecting or mining operations as may be prescribed. The proviso states that no person shall enter into any building or upon an enclosed Court or garden attached to a dwelling house(except with the consent of the occupier thereof) without previously giving such occupier at least seven days notice in writing of his intention to do so.

Sub-section(2) further, inter alia, provides that the holder of prospecting license or mining lease referred to in sub-section(1) shall be liable to pay compensation in such manner as may be prescribed to the occupier of the surface of the land granted under such license or lease for any loss or damage which is likely to arise or has arisen from or in consequence of the mining or prospecting operations.

Sub-Section(3) further provides that the amount of compensation payable under sub-section (2) shall be determined by the State Government in the manner prescribed.

11. Rule 72 deals with payment of compensation to the owner of surface rights, etc. and Rule 73 deals with assessment of compensation for damage.

12. Sub-Rule(1) of Rule 72, inter alia, and to the extent it is relevant, states that the holder of a mining lease shall be liable to pay to the occupier of the surface land over which he holds the mining lease such annual compensation as may be determined by an Officer appointed by the State Government by Notification in this behalf in the manner provided by Sub-Rule(2) to (4). Sub-Rule(2) states

that in the case of agricultural land, the amount of annual compensation shall be worked out on the basis of the average net income from the cultivation of similar land for the previous three years. Sub-Rule(3) provides that in the case of non agricultural land for the previous three years the amount of annual compensation shall be worked out on the basis of average annual value of similar land for the previous three years. Sub-Rule(4) provides that the annual compensation referred to in Sub-Rule(1) shall be payable on or before such date as may be specified by the State Government in this behalf. Rule 22 deals with the matter pertaining to the applications for the grant or renewal of mining leases. It, inter alia, provides what an application for a grant of lease should contain and other requirements. Clause (h) of Sub-Rule(1) of Rule 22 provides that it shall also contain a statement in writing that the Applicant has, where the land is not owned by him, obtained surface rights over the area or has obtained consent of the owner for starting mining operations. Provided that no such statement shall be necessary where the land is owned by the Government. The next proviso states that no such consent of the owner for starting mining operations in the area or part thereof may be furnished after execution of the lease deed but before entry into the said area. The third proviso states that no further consent would be required in the case of renewal when consent has already been obtained during the grant of the lease.

13. The requirements of Rule 22 are those which are to be met by an Applicant at the time of the grant or renewal of a mining lease but that is not the case at hand. Admittedly, the defendant has a valid and subsisting mining lease in its favour and not only that the said mining lease was also operated by the Defendant through the plaintiff no.2, after paying the compensation for surface rights by plaintiff no. 1 by virtue of the said agreement dated 13-3-1993. The said compensation could be presumed to have been paid, on behalf of the defendant who had the mining lease and who had given the contract to plaintiff no.2 for extraction and to plaintiff no.1 for sale of the ore to be extracted. Since compensation was paid to the predecessors in title of plaintiff no. 2 before plaintiff no. 2 purchased the suit property with the consent of plaintiff no. 1 and the mine was otherwise operated in the suit property, in my view, the Defendant could not have been restrained from entering upon the suit property, and, therefore, the grant of injunction by the learned trial Court, in this view of the matter, could not be sustained. Hence, it deserves to be set aside.

14. The second aspect is as regards the low grade ore extracted and which is stacked in the suit property. Mr. Lotlikar, learned Senior Counsel has submitted that the ore stacked outside the suit property has already been removed by the Defendants. The learned trial Court has held that the plaintiffs have established prima facie that the ore belongs to the plaintiffs. However, whether the ore belongs to the plaintiffs or the Defendant is a matter which can be decided only at the trial. Nevertheless, the learned trial Court was right in observing that the plaintiffs were entitled to purchase the said ore i.e. run of the mine which was 58% Fe. In fact, the relevant clause in the sale agreement states that the mine

owner agrees to sell exclusively and the buyers agree to buy the entire marketable quantity of iron ore, run of mine(ROM), marketable quality of ore means ROM with Fe above 58% produced from the aforesaid mining lease. However, if, the buyer desires to buy ROM with low Fe contents and is found suitable for its use they may also purchase the same also exclusively on same terms and conditions.

15. Mr. Usgaonkar, learned Senior Counsel on behalf of the Defendant points out to the affidavit in reply dated 30-4-2007 and submits that the said ore which is lying within the suit property has not been paid for by the plaintiffs. He further points out to para 25 and submits that the payment of price was being done at the time of transport of the ore from outside the mining lease area. Mr. Usgaonkar has also referred to the letter dated 23-5-2006 and submitted that in case the ore was purchased by the plaintiffs, the plaintiffs would not have offered to pay Rs. 22/- towards the ore and Rs. 8/-towards Government royalty by their letter dated 23-5-2006. Mr. Usgaonkar submits that since the ore is between 21% to 52% Fe the Defendant is ready and willing to take it at the rate of Rs. 190/-per WMT and in case the plaintiffs can pay more than the said amount of Rs. 190/-per WMT the plaintiffs would be entitled to take the same.

16. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel points out that the ore was required to be sold at the pit heads and since the ore had gone away from the pit heads it is to be presumed that the ore lying in the suit property was purchased by the plaintiffs. Referring to letter dated 23-5-2006, Mr. Lotlikar submits that the said letter was written in the course of negotiation since otherwise the plaintiffs would be obstructed in removing the same. Mr. Lotlikar further submits that unless the Fe contents are first known, the plaintiffs would not be in a position to make any offer.

17. Admittedly, whether the ore belongs to the plaintiffs or the Defendant is a matter which can be decided only at the conclusion of the trial. Apparently, the said ore or run of the mine remained in the suit property because then it did not have much market value which it has acquired with passage of time and probably for that reason both the parties are now claiming for the same. Since there is a dispute as regards its ownership, it would be in the interest of justice as well as in the interest of both the parties that the said ore is disposed of after ascertaining its grade or Fe contents. Whichever party takes it, it is bound to deposit the amount obtained in the Court to be paid to the party who establishes its ownership at the trial of the suit.

18. In the circumstances, M/s. Italab(Goa) Pvt. Ltd. Is hereby appointed as an independent surveyor to ascertain the grade of the said ore mining rejects stacked in the suit property. This will be done within a period of two weeks. After the Fe contents are known, both the parties would be at liberty to take the same at the highest value. In other words, whoever offers a higher price, amongst the parties would be entitled to take the same but deposit the amount received in the Court to be allotted to the party who succeeds in establishing its ownership.

The ore shall be transported from the site by trucks and weighed at Maina weigh bridge in the presence of the representatives of both the parties. One copy of the weigh bridge slip will be given to either of the parties.

19. Mr. Lotlikar, learned Senior Counsel on behalf of the plaintiffs prays for stay of the operation of this order. Mr. Usgaonkar, learned Senior Counsel objects. Considering the facts and circumstances of the case the prayer for stay is rejected. S. O. - 15th July, 2008.