

(2006) 04 KL CK 0019
In the High Court Of Kerala
Case No : Arbitration A. No. 6 of 2006

Paragon Steels Pvt. Ltd.

APPELLANT

Vs

European Metal Recycling Ltd.

RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37, 54(2), 54(4), 9

Citation : AIR 2006 Ker 303 : (2006) 4 ARBLR 299 : (2006) 2 ILR (Ker) 472 : (2006) 2 KLT 917

Hon'ble Judges : K.S. Radhakrishnan, J;K.M. Joseph, J

Bench : Division Bench

Advocate : V. Giri and S. Ananthakrishnan, for the Appellant; Prasanth S. Prathap Sr. Advocate, V.J. Mathew, Tisvy Vincent, Bijish B. Tom and Naveena Antony, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—This appeal is preferred u/s 37 of the Arbitration and Conciliation Act, 1996, (for short "the Act") against the interim order passed in LA. No 95 of 2006 in O.P. (Arb.) No. 15 of 2005.

2. For the disposal of this case parties are referred to according to their status in the court below. O.P. (Arb.) No. 5 of 2006 was an application filed by the petitioner before the District Court u/s 9 of the Act seeking an order of injunction restraining the first respondent from removing the goods comprising of steel scrap approx. 37,000 M.T being discharged from the vessel "New Wind" lying at Cochin Port without securing the claim of the petitioner in a sum of U.S. \$ 1,497,940.29 and for a direction to the Cochin Port Trust not to release the cargo to the first respondent until further orders and also for other consequential reliefs. An interim application LA. 95 of 2006 was moved to that effect.

2A. Learned District Judge allowed the application holding that a sum of 13,59,000 US Dollars would be sufficient to secure the claim of the petitioner and gave a direction to the Cochin Port Trust to detain scrap worth that amount as

security to safeguard the interest of the petitioner. In the alternative first respondent was also permitted to take the cargo on furnishing Bank guarantee for 13.5 lakhs US Dollars within a period of one month failing which it was ordered that the petitioner would be at liberty to sell the cargo through court auction as security for the award that may be passed in that case. First respondent is aggrieved by the above direction and has filed this appeal.

3. Shri V. Giri, learned Counsel appearing for the first respondent -appellant submitted that the court below has committed a serious error in entertaining petition u/s 9 of the Act. Counsel submitted that application u/s 9 could be maintained by the party who is governed by the ICC Rules of Arbitration only if request is made and arbitrator is appointed. Counsel made specific reference to Article 23 of the ICC Rules of Arbitration. Reference was also made to the decision of the Apex Court in Bhatia International Vs. Bulk Trading S.A. and Another, contending that the interim prayer in terms of Section 9 can be granted only if the same is in conformity with the ICC Rules of Arbitration. Counsel submitted, the claim raised by the petitioner has not even reached the stage of reference to the Arbitral Tribunal. In such circumstances, interim relief sought for u/s 9 according to the counsel cannot be granted. Counsel also made reference to Ext. A1 contract No 3283/2005 dated 21.09.2005 with specific reference to other terms of the contract. Counsel submitted if the L. Cs for the entire shipload are not received before the last date stipulated the seller has the right to delay or renegotiate the prices or cancel the contract or sell the material to any other buyer and then only recover the difference from the first respondent. Counsel made reference to Sub-section (4) of Section 54 of the Sale of Goods Act and submitted that where the seller expressly reserves a right of resale on the buyer making default, seller has to resell the goods and then to claim damages. Counsel submitted petitioner has not taken any steps to sell the goods and to claim damages as provided in terms of the contract. In support of his contention counsel placed reliance on the decision of a Division Bench of the Bombay High Court in Maharashtra State Electricity Board, Bombay Vs. Sterlite Industries (India) Ltd., which was later affirmed by the Apex Court in AIR 2001 2933 (SC) . Counsel also made reference to the decision of a Division Bench of this Court in Bismi Abdulla & Sons v. Regional Manager F.C.I. Trivandrum and Anr. 1986 KLJ 158 and contended that seller can claim damages for the difference between the contract price and the price fetched on resale of the goods where the seller had the right to resell u/s 54(2) of the Sale of Goods Act.

4. Counsel appearing for the first respondent Sri Prasanth S. Pratap contended that there was a binding contract between the parties and since first respondent has committed breach of the terms of the contract petitioner has got the right to settle the dispute under the ICC Rules of Arbitration laid down by the International Chamber of Commerce. Petitioner had already informed the first respondent of his intention to refer the dispute to arbitration as per the contract. Before and after initiating the arbitration proceedings petitioner has got a legal right to invoke Section 9 of the Arbitration and Conciliation Act. In support of his

contention, counsel placed reliance on the decision of the Apex Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., . Counsel also submitted as per the terms of the contract, disputes have to be settled following the provisions of the Indian law. Before settling the disputes through arbitration under the Rules of English law and also on the basis of the procedure laid down by the International Chamber of Commerce, petitioner has got the legal right to invoke Section 9 of the Arbitration and Conciliation Act and consequently counsel submitted that the court below is justified in granting the interim order of injunction. Referring to other terms of contract counsel submitted that the option is always on the seller either to deal with or renegotiate the price or to cancel the contract or sell the materials to any other firm and to recover the difference. Counsel submitted that the mere fact that those options are available to the seller would not debar the petitioner in taking recourse to common law remedies. In support of his contention counsel placed reliance on the ruling of the King's Bench Division in Shipton, Anderson & Co. Ltd v. Micks, Lambert & Co. Vol. 55 Lloyd's List Law Reports, page 384.

5. We find it unnecessary to express any final opinion on the various contentions raised since the disputes have to be finally resolved through arbitration as provided under Ext. A1 contract. We may however refer to the essential facts for examining the various issues raised before us by the parties. Petitioner is a company incorporated under the laws of United Kingdom and carries on the business of export of steel scrap and other metals. Respondent is a private limited company incorporated under the Indian Companies Act. Petitioner has entered into sale contract bearing No 3283/05 dated 21.9.2005 with the first respondent for sale of 27,000 metric tons shredded steel scrap at a price which was fixed as per Ext. A1 contract. Time for delivery has also been stated in the contract, so also the terms of payment. The contract has used the expression "we have sold" and the quantity mentioned is 27,000 metric tons of shredded steel scrap. Price is also fixed as US \$ 285.75 PMT C.I.F.F.O, Cochin. Provision for arbitration is also provided in the contract, which reads as follows:

All disputes, controversy, which may arise between buyer/seller under this contract, should be settled under the Rules of Indian Law. The rules of arbitration shall follow those laid down by the International Chamber of Commerce whose arbitration procedures and arbitrators both parties accept. This method is to be adopted only after all reasonable efforts to settle amicably have failed. The place of arbitration shall be London.

Ext. A1 contract has fixed the quantity, price, description etc. and also the factum of sale. Terms of payment specified in Ext. A1 is that payment by irrevocable letter of credit to be operative at the hands of the seller latest by 7.5.2005. Ext.A2 would indicate that first respondent company had written a letter to the petitioner for extending the time for opening letter of credit. Ext. A3 letter dated 26.10.2005 sent by the petitioner to the first respondent would indicate that they have fixed the vessel MV George Lyres to perform the transaction. Request was

also made to expedite the opening of letter of credit. Ext. A4 is another letter addressed to the first respondent informing them that they have failed to open the letter of credit even within the extended period. Further extension was also granted. Exts. A5 and A6 are true copies of fax messages sent by the solicitors of the petitioner to the first respondent requesting them to perform the contract. On going through the above documents as well as Ext. A1 contract, we are in agreement with the court below that first respondent has failed to perform the terms of the contract though we are not expressing any final opinion on the matter since the matter has to be finally adjudicated by an Arbitral Tribunal.

6. We may now examine as to whether petition u/s 9 of the Arbitration and Conciliation Act is maintainable. For easy reference, we may quote Section 9.

9. Interim measures, etc. by Court A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with " Section 36, apply to a court:

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient;

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

True ICC Rules of Arbitration also give conservatory and interim measures. Rule 23 of the ICC Rules of Arbitration, which is relevant for the purpose of this case, is extracted below for easy reference.

Article 23.

Conservatory and Interim Measures.

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

7. Article 4 of the ICC Rules deals with request for arbitration. Article 5 relates to answer to request: counterclaims. Article 6 relates to effect of the Arbitration Agreement and Article 7 relates to general provisions before the Arbitral Tribunal. Articles 13 to 23 refer to arbitral proceedings. Article 13 states that the Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted and Article 23 states that as soon as the file has been transmitted to it, the Arbitral Tribunal may at the request of a party, order any interim or conservatory measure it deems appropriate. Sub-clause (2) of Article 23 states that before the file is transmitted to the Arbitral Tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. Section 9 of the Arbitration and Conciliation Act, 1996 read with Article 23(2) of the ICC Rules of Arbitration, in our view, would enable a party to invoke the provisions of Section 9 as an interim measure till application is moved before the Arbitral Tribunal constituted under the ICC Rules of Arbitration.

8. Apex Court in Bhatia International's case, supra had occasion to consider the impact of the provisions of the Arbitration and Conciliation Act, 1996 in the matter of international commercial arbitrations governed by the ICC Rules of Arbitration. That was a case where ICC had already appointed a sole arbitrator. First respondent in that case made an application u/s 9 seeking an order of injunction restraining the authorities from alienating, transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties. Plea of non maintainability was raised contenting that Part I of the Act would not apply to arbitrations where the place of arbitration is not in India. Plea was rejected by the III Additional District Judge. Writ Petition was preferred before the Madhya Pradesh High Court and the same was rejected which was confirmed by the apex court. Referring to Section 9 of the Act, Apex Court held that the application for interim measure can be made to the courts in India, whether or not the arbitration takes place in India, before or during

arbitral proceedings. The court held provisions of Part I would apply to all arbitrations and proceeding relating thereto. The court held that where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitration held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. There is nothing to show in Ext. A1 that parties have expressly or impliedly excluded any of the provisions of Part I of the Act. Article 23 of the ICC Rules of Arbitration states that competent judicial authority can grant interim relief and in such cases application can be made u/s 9 of the Arbitration and Conciliation Act before the judicial authority.

9. In view of the above mentioned legal position, we are in agreement with the court below that the petition preferred u/s 9 of the Act is perfectly maintainable.

10. Counsel urged even if the petitioner has got any right to sell the materials to any other buyer, difference in price can be appropriated only if it is established that the seller has suffered damages. Counsel submitted, in other words, if the seller is compelled to effect a sale for lower price on account of the breach committed by the buyer, then only the seller would get the right to recover damages, relatable to the difference between the contract price and the price at which it was actually sold. According to the counsel, right to claim difference is squarely rested on the event of a sale of the same cargo which the seller is compelled to sell to a third party at a lower rate consequent upon the sale of cargo to any other buyer. Counsel submitted there is no subsequent sale and there is no right to recover damages as well. Counsel submitted that the statement that the goods were sold on 16.9.2005 was made only at the appellate stage, though the goods were stated to have been sold on 16.9.2005. Counsel submitted in that event petitioner is not entitled to get any relief on the ground that the first respondent had committed breach of contract. We find it difficult to accept the plea of the first respondent. Even if the goods were sold, what was the actual amount due to the petitioner is a matter to be decided by the Arbitral Tribunal. We have already found prima facie that it was the first respondent who had committed breach of contract. In our view, we will not be justified in making a final judgment on the issue since the matter is to be decided by the Arbitral Tribunal. Petitioner has claimed damages on the plea that the first respondent had broken the contract. If it is established it is always open to the petitioner to claim damages for breach of contract. We therefore find no error in the order passed by the court below holding that those issues are to be decided by the arbitrator.

11. Counsel appearing for the first respondent made a request that the conditions stipulated by the court below be varied and made an offer that the first respondent is willing to furnish Bank guarantee for one crore rupees followed by corporate guarantee and personal guarantee by Directors as well as immovable property towards security for the amount claimed. Counsel for the

petitioner did not accede to that offer. Counsel submitted, in the facts and circumstances of the case, there is no reason to vary the conditions stipulated by the court below. We also find no reason to take a different view since the goods retained is not perishable goods and the price of the goods may vary due to market conditions. Considering the volume of business transacted by the first respondent and considering the fact that the first respondent has purchased steel scrap from third parties in large quantities we are not prepared to say that first respondent would not be in a position to comply with the directions given by the court below. For the above mentioned reasons, we find no reason to vary the directions given by the court below. Appeal lacks merits and the same would stand dismissed.