

(2011) 06 BOM CK 0119

In the Bombay High Court

Case No : Appeal From Order No. 53 of 2011

Suchetan Exports Pvt. Ltd.

APPELLANT

Vs

Gupta Coal India Limited

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Sales of Goods Act, 1930 — Section 19, 45, 46, 47, 48

Citation : (2011) 4 ALLMR 688 : (2011) 4 BomCR 303 : (2011) 113 BOMLR
2351 : (2011) 4 CivCC 265 : (2011) 5 MhLj 475

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : Anand Jaiswal and A.G. Gharote, for the Appellant; A.S. Mardikar, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.—This appeal is preferred by the Defendant No. 1 in Special Civil Suit No. 187 of 2011 challenging the order dated 16.4.2011 passed by the learned Third Joint Civil Judge, Senior Division, Nagpur, allowing the application Exh.5 for grant of temporary injunction filed by the Respondent No. 1 Plaintiff and directing the Respondent No. 2, (who is the original Defendant No. 2), to hand over the balance Coal in its possession to the Plaintiff on payment of rent, if any, due to him by the Plaintiff.

2. The Appellant is the original Defendant No. 1, the Respondent No. 1 is the original Plaintiff, the Respondent No. 2 is the original Defendant No. 2 and the Respondent No. 3 is the original Defendant No. 3. The parties shall, hereinafter referred to according to their original status as "Plaintiff", "Defendant No. 1", "Defendant No. 2" and "Defendant No. 3."

3. The undisputed factual position which emerges from reading the entire plaint and the written statement, needs to be stated as under-

on 12.4.2010 an Agreement for Sale and Purchase of South African Coal of 16,943 MTs was entered into between the Plaintiff and the Defendant No. 1. The Plaintiff agreed to sell the said quantity of Coal to the Defendant No. 1 at the price, which was determined at US Dollars 111.75 Per MT. Clause-3 of the said agreement prescribes the specifications and the quality of Coal agreed to be sold. On 22.4.2010 the Plaintiff and the Defendant No. 1 entered into another High Seas Sale Agreement. Clause-2 of the said agreement recites that the seller (Plaintiff) has imported 16,943 MTs Steaming Non Coking Coal in bulk of South African Origin and shipped per vessel MV Novios Meridian under Bill of Lading Nos. 2, 3 and 4 all dated 8.4.2010 arriving at Dharamtar Port. Clause-3 of the said agreement recites that the seller (Plaintiff) has agreed to sell and buyer (Defendant No. 1) has agreed to purchase the consignment on "High Seas Sale Basis", subject to the terms and conditions specified there under. Clause-3 (b) in said agreement states that the quality determined and certified by an Independent Inspection Agency at Disport is final and binding on both parties.

4. On 22.4.2010, the vessel MV Novios Meridian containing Coal imported through Defendant No. 3 Venkatesh Karriers Limited, reached Dharamtar Port, Mumbai. The Coal was delivered to the Defendant No. 2, M/s. United Shippers Limited as stevedore agent. On the same day, the Plaintiff raised and delivered High Seas Sales Invoice for an amount of Rs. 8,25,46,296/- upon the Defendant No. 1, for sale of said Coal. The Defendant No. 2 handed over the total quantity of 9542.920 M Ts Coal to the Defendant No. 1, till the date of the filing of the suit. The Defendant No. 1 has paid the total amount of Rs. 3,42,88,767/- to the Plaintiff. The balance quantity of Coal of 7400.080 M Ts is lying with the Defendant No. 2, out of total Coal of 16,943 M Ts, received by it from the Plaintiff.

5. Since the Defendant No. 1 has failed to pay the balance amount of Rs. 5,82,58,560/-, the Plaintiff has filed the Special Civil Suit No. 187 of 2011 for a declaration, that the Defendant No. 1 has committed breach of contract and the agreements dated 12.4.2010 and 22.4.2010, stand cancelled and terminated. The Plaintiff has claimed return delivery of balance Coal of 7400.080 M Ts, lying with the Defendant No. 2 and has claimed a decree for an amount of Rs. 1,22,04,349/- against the Defendant No. 1, towards the balance payment of Coal of 9542.920 M Ts delivered to it, by the Defendant No. 2. The Plaintiff has also claimed an amount of two percent per month on the total amount of Rs. 8,25,46,296/- at the reducing rate from 21.5.2010, till its realization. The Plaintiff has also claimed demurrage charges of Rs. 45,18,952/- incurred up to the date of filing of suit and the L/c discounting charges of Rs. 7,19,483/-. The Plaintiff has claimed permanent injunction restraining the Defendant No. 2 and 3 from handing over balance Coal of 7400.080 M Ts lying with the Defendant No. 2 at Dharamtar Port, Mumbai either to the Defendant No. 1 or to any other person. By way of application for grant of temporary injunction under Order 39 of CPC Code, the Plaintiff also claimed an order restraining the Defendant No. 2 and 3 not to hand over the custody of balance Coal of 7400.080 M Ts to the Defendant and also sought a direction in the form of mandatory injunction to the Defendant

No. 2, to hand over the balance Coal of 7400.080 M Ts to the Plaintiff.

6. The Defendant No. 1 opposed the claim of the Plaintiff, by filing written statement. The Defendant raised a dispute about the quality of the Coal supplied by the Plaintiff. For this purpose, he has relied upon the condition in Clause-3, under the heading "specifications", in the agreement dated 12.4.2010. The Defendant No. 1 took the stand that the Coal supplied was not of quality, which was agreed in between the parties. According to the Defendant No. 1 the Gross Calorific Value of the South African Coal agreed to be supplied was of 6400 Kcal/Kg and the volatile matter was to be in the range of 24-27 %. According to the Defendant No. 1, the Gross Calorific Value of the Coal supplied by the Plaintiff was of 6230 Kcal/Kg, whereas the volatile matter was at 29.92%. In support of this, the Plaintiff placed on record a Certificate of Sampling and Analysis said to have been issued by SABS an Independent Inspection Agency at Disport on 14.4.2010, which according to him is binding upon the Plaintiff in terms of Condition in Clause-3 (b) of the agreement dated 22.4.2010. The Defendant No. 1 has also relied upon the report of GEO CHEM Laboratories Pvt. Ltd. dated 10.5.2010. According to him, the deficiencies in the Coal supplied in respect of aforesaid two aspects, increases the costs of burning the Coal for the consumer, thereby lowering its market value and increasing consumption for the end user. The Defendant No. 1 has demonstrated the manner in which the quality of Coal agreed to be supplied, as found to be deficient. The stand is taken that the Defendant No. 1 is entitled to set off in the price of the goods, the rate and the amount which is required to be determined, on the basis of the reports.

7. Though in the plaint, there is no whisper about the quality of Coal supplied by the Plaintiff to the Defendant No. 1, Shri Anil Mardikar, the learned Counsel appearing for the Plaintiff does not dispute the deficiencies pointed out by the Defendant No. 1 in respect of it, in the statement showing the difference in the Gross Calorific Value and the volatile matter. He has however, relied upon the Clause-4 in the agreement dated 12.4.2010 and has urged that the said Clause provides agreed formula of price adjustment, in case if it is found that the Gross Calorific Value of the Coal is lesser than one specified in the Clause-3 of specifications. He does not dispute that the Gross Calorific Value agreed, was 6400 Kcal/kg (ADB), whereas the Gross Calorific Value of the Coal supplied, was 6230 Kcal/kg (ADB). He submits that in such situation, the price has to be determined in accordance with the formula laid down in Clause-4 of the agreement dated 12.4.2010. He submits that the price of Coal was of Rs. 8,25,46,296/-, determined on the basis of the formula agreed, by taking into consideration the Gross Calorific Value of 6230 Kcal/kg (ADB) Coal supplied to the Defendant No. 1 and hence, there is no room to make complaint in respect of it. He further submits that the cost of Coal has been reduced proportionately on the basis of the quality of Coal supplied and hence, the Defendant No. 1 is bound to pay the cost as per Invoice to the Plaintiff. He further submits that the difference in the volatile matter had no concern with the fixation of price or its adjustment on the basis of the formula laid down in the Clause-4 of the

agreement dated 12.4.2010.

8. On 9.2.2011, the Trial Court passed an ex parte order of injunction restraining the Defendant No. 2 and 3 from handing over the custody of balance Coal weighing 7400.080 M Ts to any person, more particularly to the Defendant No. 1. By an impugned order dated 16.4.2011 passed below Exh.5, the Trial Court has allowed the application and has confirmed the ad-interim injunction granted on 9.2.2011. The Trial Court further passed an order of mandatory injunction directing the Defendant No. 2 to hand over the balance Coal of 7400.080 M Ts in its possession, to the Plaintiff on payment of rent if any, due from the Plaintiff to him.

9. Relying upon Clause-3 (a) of the agreement dated 22.4.2010, the Trial Court has held that the Defendant No. 1 has agreed that there shall be lien of the Plaintiff over the Coal imported by him, till the agreed price of the same is paid by the Defendant No. 1. The Trial Court has rejected the argument of the Defendant No. 1 based upon Section 46(1)(a) read with Section 47(1) of the Sale of Goods Act, 1930 that lien over the goods is available only till unpaid seller is in possession of the goods. The Trial Court recorded the finding that the Plaintiff has prima-facie shown that the Defendant No. 1 agreed to pay full agreed consideration to the Plaintiff within seven days of the agreement dated 22.4.2010 and till then the Plaintiff shall have the lien over the Coal. It has further recorded the finding that the Defendant has not paid the price in full and hence, he is not entitled to Coal. It has further recorded the finding that the Defendant No. 2 has admitted that the Plaintiff is the owner of the Coal and he is therefore, now estopped from saying that he has no concern with the Plaintiff and the Defendant No. 1. It has further recorded the finding that the question of quality of Coal is a disputed question of fact, which is required to be gone into and since the Defendant No. 1 has not paid the full price of the Coal, the Plaintiff was entitled to grant of temporary injunction of mandatory nature, otherwise the Plaintiff would suffer an irreparable loss.

10. Prima-facie the factual controversy has been reduced to a greater extent. The fact of execution of both the agreements dated 12.4.2010 and 22.4.2010 and its contents thereof, are not in dispute. The subsequent agreement dated 22.4.2010, does not make any reference to the earlier agreement dated 12.4.2010. There is nothing on record to show that the High Seas Sale Agreement dated 22.4.2010, is either in modification or in continuation of the earlier agreement dated 12.4.2010. True that, the agreement dated 22.4.2010 specifies quantity of Coal to be 16,943 M Ts, but it does not contain the specifications regarding the quality of Coal to be supplied, its price and the adjustment of price in accordance with it, as is contained in earlier agreement dated 12.4.2010. Clause-3 (b) of the agreement dated 22.4.2010 recites that the quality determined and certified by an Independent Inspection Agency at Disport is final and binding on both parties. However, the parties seem to be at consensus-ad-idem in respect of the price of Coal to be at US Dollars 111.75 Per

MT, the Gross Calorific Value of the Coal to be at 6400 Kcal/Kg and the decision in respect of it given by an Independent Inspection Agency at Disport, is to be treated as final and binding upon the parties.

11. Though, there is not even a whisper about the quality of Coal supplied by the Plaintiff to the Defendant No. 1 in the plaint, Shri Anil Mardikar, the learned Counsel appearing for the Plaintiff has agreed, that the Gross Calorific Value of the Coal supplied was 6230 Kcal/Kg instead of 6400 Kcal/Kg, as was agreed. The Defendant No. 1 has produced on record two certificates said to have been issued by an Independent Inspection Agency of SABS on 14.4.2010 and the report of GEO CHEM Laboratories Pvt. Ltd. dated 10.5.2010. In view of this, it has to be held prima-facie that there is no dispute that the Coal supplied was deficient in the quality. The Trial Court has, therefore, committed an error in recording the finding that the dispute regarding quality of Coal supplied, needs to be gone into, to determine the Gross Calorific Value of the Coal supplied.

12. It is the contention of the learned Counsels S/Shri Anand Jaiswal and Avinash Gharote for the Defendant No. 1 that the Coal supplied is deficient, also in respect of volatile matter which was agreed to be in the range of 24-27%. Shri Anil Mardikar, the learned Counsel appearing for the Plaintiff, does not dispute that prima-facie, the volatile matter was at 29.92%, which was deficient. He however, submits that this fact has no bearing on the question of determination of price of the Coal agreed to be supplied. According to him, the agreement dated 12.4.2010, prescribes the formula regarding price adjustment, in case if it is found that the Coal supplied is deficient in quality. The learned Counsels appearing for the parties, do not dispute that the formula of price adjustment as specified in Clause-4 of agreement dated 12.4.2010, does not take into consideration the volatile matter, but it depends upon the Gross Calorific Value of the Coal. It is also not the claim in the written statement filed by the Defendant No. 1, that as per the agreement, the price of the Coal supplied is required to be adjusted by taking into consideration not only the Gross Calorific Value of the Coal, but also a volatile matter. In view of this, it has to be prima-facie held that the price adjustment, in case of deficient Coal is governed by Clause-4 in the agreement dated 12.4.2010 in which volatile matter has no role to play.

13. I am not impressed by the arguments of the learned Counsels Shri Jaiswal and Shri Gharote for the Defendant No. 1 that the plaint averments are silent, as to the deficiencies in the quality of Coal supplied and the adjustment of price in accordance with the formula contained in the agreement dated 12.4.2010. It is the stand taken in the written statement itself by the Defendant No. 1, that the price, as was determined in Clause-4 of the agreement dated 12.4.2010 at US Dollars 111.75 Per MT, was required to be adjusted in accordance with the formula, specified in said Clause. In view of this, the Court will have to proceed on the footing that the price of the Coal supplied, was required to be adjusted on the basis of the formula introduced in Clause-4 of the agreement dated 12.4.2010, by taking into consideration the Gross Calorific Value of the Coal at

6230 Kcal/Kg only.

14. The Plaintiff claims to have determined in such value in accordance with this formula and has arrived at the total cost of Rs. 8,25,46,296/-, which is the Invoice price. When the specific question was put up to the learned Counsels appearing for the Defendant No. 1 as to whether the Defendant No. 1 is ready and willing to deposit the entire Invoice price in the Trial Court after deducting the amount already paid, a Pursis has been filed on 4.5.2011 and marked as "X" for identification stating therein, that the Defendant No. 1 is ready to deposit the costs of the balance Coal of 7400.080 M Ts, which according to the Plaintiff comes to Rs. 3,60,05,280/-. The learned Counsel appearing for the Plaintiff has filed on record a statement marked as "Y" for identification showing, that an amount of Rs. 1,22,04,349/- is required to be paid by the Defendant No. 1 towards the Coal of 9542.920 M Ts already lifted by it, from the Defendant No. 2. It further shows the cost of the balance quantity of Coal of 7400.080 M Ts lying with the Defendant No. 2, as Rs. 3,60,05,280/-. It indicates the demurrage charges recoverable from the Defendant No. 1, as Rs. 45,18,952/- and the discounting of L/c charges of Rs. 7,19,483/-. The amount of interest calculated as per the agreement, has been shown at Rs. 85,10,059/-. Thus, according to the Plaintiff, the total cost, which is to be recovered from the Defendant No. 1 in respect of the transaction in question, is of Rs. 6,19,58,123/-.

15. The response of the learned Counsels appearing for the Defendant No. 1 is that it is not a suit filed by the Plaintiff for recovery of money for the goods supplied, but the suit is filed for cancellation/termination of the contract dated 12.4.2010 and 22.4.2010 and the question is governed by the provisions of Section 46(1)(a) read with Section 47(1) of the Sale of Goods Act, 1930. Relying upon Clause-3 (b) of the agreement dated 22.4.2010, it has been urged that the title and ownership of the goods in question has already passed on to the Defendant No. 1. When the entire quantity of Coal was delivered to the Defendant No. 2 for the purpose of transmission to the buyer (Defendant No. 1) without reserving the right of disposal of the goods, the lien on the goods stands terminated in view of the provisions of Section 49(1)(a), (b) and (c) of the Sale of Goods Act, 1930. According to them, the Plaintiff would at the most be an "unpaid seller" as defined u/s 45(1)(a) of the said Act, entitled only for recovery of cost of goods supplied. It is their further submission that since the Plaintiff has lost the possession of the Coal, the question of exercise of rights of "unpaid seller", as contained in Section 46 and the seller's lien, as contemplated by Section 47 of the said Act, does not arise.

16. Shri Mardikar, for the Plaintiff has relied upon the provisions of Section 19 of the said Act to urge, that Section 45 to 49, are all subject to the provisions of Section 19 and where there is a specific contract, the relationship shall be governed by the terms of the contract. He has further relied upon the provisions of Section 62 of the Sale of Goods Act, 1930 to urge, that where any right, duty or liability would arise under a contract of sale by implication of law, it may be

negatived or varied by express agreement or by the course of dealing between the parties.

17. The Trial Court has taken into consideration the provisions of Section 46(1) (a) read with Section 47(1) of the Sale of Goods Act, 1930 and has recorded the findings, that the Plaintiff shall have the lien over the Coal till full price of the Coal is paid. Keeping in view the terms of the contract and various provisions of the Sale of Goods Act, relied upon by the learned Counsels appearing for the parties, the view taken by the Trial Court, seems to be the possible view of the matter on prima-facie assessment of the case. The question whether the Defendant No. 2 is holding the possession of the Coal for and on behalf of the Plaintiff or on behalf of the Defendant No. 1, is required to be gone into and relying upon the admission of the Defendant No. 2, the Trial Court has recorded the finding, that the Plaintiff is the owner of the Coal, lying with Defendant No. 2. The Trial Court has recorded the finding that the Defendant No. 1 has not paid full price of the Coal and hence, the Plaintiff was entitled to grant of an injunction. In my view, no fault can be found with the possible view taken by the Trial Court, on prima-facie assessment of the case.

18. No doubt, it is true, that the suit in question is for cancellation/termination of the contract and for return of the Coal. The question is whether the Trial Court has committed an error in passing an order of mandatory injunction, directing the Defendant No. 2 to hand over the balance Coal in its possession to the Plaintiff, for the reason of non-payment of cost of Coal by the Defendant No. 1, to the Plaintiff. The contention of the learned Counsels appearing for the Defendant No. 1 is that the grant of such mandatory injunction, amounts to granting the entire relief claimed in the plaint, which may or may not be granted by the Trial Court at the time of the final disposal of the suit.

19. It cannot be disputed that it is always open for the Court, in exercise of its jurisdiction under Order 39, Rule 1 and 2 read with Section 151 of the CPC to pass an order of mandatory injunction to strike the balance between the parties and to avoid an irreparable loss being caused to either of the parties. Hence, no jurisdictional error can be found with the order of the Trial Court, directing the Defendant No. 2 to hand over the balance Coal in its possession, to the Plaintiff for the reason of non-payment of the cost of Coal, by the Defendant No. 1. The Defendant No. 1 cannot be permitted to take the delivery of the balance Coal and to utilize it pending the decision of the suit without making payment in respect of it. Undisputedly, the price of Coal paid by the Defendant No. 1 is not for the entire quantity of Coal agreed to be purchased. In such an eventuality, if the injunction is refused, then it is the Plaintiff who would not only be losing the entire Coal, but shall also be deprived of the cost of Coal, which it has incurred not only for purchase of the Coal, but also for further processing the delivery of it to the Defendant No. 1. One does not know, whether retention of the Coal as it is with the Defendant No. 2, would further deteriorate the quality of the Coal or would increase the cost of the Coal. The incidences of business have now a days

become uncertain. Hence, the present position needs to be taken into consideration to strike the balance between the parties.

20. For the present, both the parties seem to be interested in retaining the Coal and have candidly admitted, that the cost of Coal has enhanced, though the quality is deficient. Obviously, the Defendant No. 1 has purchased the Coal for the purpose of trading, at the cost agreed to be paid. Hence, an order of injunction will have to be passed, to effectuate the terms of agreements rather than to frustrate it and this will promote the object of entering into an agreement. If the suit is allowed, the Plaintiff will be entitled to get balance quantity of Coal of 7400.080 M Ts and to recover cost of Coal of 9542.920 M Ts. If the suit is dismissed then the Plaintiff will have to file suit for recovery of unpaid amount of Coal supplied. There is nothing on record to show that the Defendant No. 1 has raised any sort of protest in respect of Invoice price of the Coal. On the contrary, the stand of the Defendant No. 1 in its written statement is that the price is required to be adjusted as per formula in Clause-4 of the agreement dated 12.4.2010. Obviously, the Defendant No. 1 would be fetching the price higher than one, for which he has purchased the Coal. In such a situation, the Trial Court ought to have passed a conditional order of mandatory injunction to arrange equities, to balance the interests of both the parties and to avoid an irreparable loss being caused to either of the parties. Hence, the unconditional order of injunction passed by the Trial Court, cannot be sustained and the same will have to be modified.

21. The Plaintiff has given the statement marked as "Y" for identification, indicating the balance amount of Rs. 6,19,58,123/- to be recovered from the Defendant No. 1 inclusive of the cost of Coal and other charges. No doubt, that this is not a suit for recovery of money for the goods supplied and the charges incurred, but it is a suit for cancellation/termination of the contract and return of Coal. Though there is no prayer for recovery of money for the goods supplied, either in the plaint or in the application of Exh.5, it is open for this Court to impose all such conditions for grant of injunction, to balance equities and protect the interests of the parties at interim stage. The learned Counsel for the Plaintiff has urged that the Plaintiff is required to make the payment of Coal which he has purchased for supply to Defendant No. 1. Hence, the Defendant No. 1 needs to be directed to deposit an amount of Rs. 6,19,58,123/- in the Trial Court within a period of four weeks from today, failing which the order of injunction passed by the Trial Court, shall operate pending the decision of the suit. If the Defendant No. 1 deposits such amount in the Trial Court within a stipulated period, then the application for injunction, shall stand rejected. Upon depositing of such amount, the Plaintiff would be at liberty to move the separate application for withdrawal of the said amount, which shall be decided by the Trial Court, within a period of six weeks from the date of service of the copy of such application, upon the Defendant No. 1 or his Counsels.

22. In view of above, the appeal is partly allowed and order passed by the Trial

Court below Exh.5 on 16.4.2011 in Special Civil Suit No. 187 of 2011, stands modified as under-

(a) The Defendant No. 1 is directed to deposit an amount of Rs. 6,19,58,123/- (Rupees Six Crores Nineteen Lacs Fifty Eight Thousand One Hundred Twenty Three Only) in the Trial Court, within a period of six weeks from today.

(b) If such amount is deposited, within a stipulated period by the Defendant No. 1, the application Exh.5 for grant of temporary injunction filed by the Plaintiff, shall stand dismissed.

(c) If the Defendant No. 1 fails to deposit an amount of Rs. 6,19,58,123/- (Rupees Six Crores Nineteen Lacs Fifty Eight Thousand One Hundred Twenty Three Only), within a stipulated period, the order of injunction passed by the Trial Court below Exh.5 on 16.4.2011, shall continue to operate pending the decision of the suit.

(d) The Plaintiff shall be at liberty to file an application for withdrawal of the said amount if deposited by the Defendant No. 1 and the same shall be decided by the Trial Court, within a period of four weeks from the date of serving copy of the application, upon the Defendant No. 1 or his Counsels.

(e) There shall be no order as to costs.