
(2009) 10 BOM CK 0064

In the Bombay High Court

Case No : Appeal From Order No. 60 of 2009

Timblo Private Limited

APPELLANT

Vs

Smt. Kamalini R. Painguinkar and Others

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Arbitration Act, 1940 — Section 9

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2010) 1 ALLMR 369 : (2010) 1 BomCR 914 : (2010) 7 RCR(Civil) 1007

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : V.B. Nadkarni and Y.V. Nadkarni, for the Appellant; S.G. Dessai and C. Mascarenhas, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—Learned Advocates appearing for the respective parties have agreed for disposal of both these appeals, finally, at the stage of admission itself.

Background in brief:

2. Respondents, who are common in both appeals are Mine Owners who are, for the sake of brevity, referred to as Mine Owners.

The appellants are Limited Companies.

Both the appellant-Companies are seen to be belonging to one and the same group of Management/Promoters. Two different contracts are entered by mine owner with these different appellants. These two transactions are in fact a package.

Respective appellants in Appeal No. 61/09 and 60/09 are referred to for the sake of brevity as "Buyer" and "Extractor".

3. It appears that there are legal impediments in subleasing of the mining

licence. Most of the Mine Owners and buyers / extractors have devised modality of entering into two contracts, one with buyer and another with extractor to undertake mining activity and processing. Same modality has been used/adopted in the present case as well.

4. The Mine Owners have been giving the work of extraction and processing to a firm or undertaking, which is a different business organization or to different commercial entity from the Buyer. The ore so extracted and treated is sold to the Buyer already contracted for. A long term arrangement is ordinarily worked out with the extractors and Buyer in the shape of a written contract / agreement.

5. In the suits at hand, the background and the modalities which reveal from record and respective submissions are summarized as follows:

(a) Deployment of Large amount of men machinery, monetary resource and expertise is required to be done for extraction and treatment of the Ore.

(b) Mine Owners normally do not have the arrangement of men Machinery and resource for extraction of the Ore and the treatment thereon.

(c) The Buyer and the extractor therefore, enter into contracts with Mine owners for a long tenure.

(d) The Buyer, therefore, make arrangement of a concern of its business associate to extract the Ore and to do the processing of ore for converting the raw Ore into marketable varieties of Ore.

(e) Such marketable Ore is sold by the Mine Owner to the Buyer.

(f) The Buyer pays to the Mine Owner the agreed price towards the marketable varieties of iron ore.

(g) Mine Owner pays to the extractor the charges towards extraction job work / labour / processing.

(h) Such contracts provide for an exclusive right of extraction and at purchase, in favour of extractor and Buyer.

(i) These contracts also contain a negative covenant operating against the Mine Owner stipulating that during currency of the of the agreed duration for extraction and sale, the Mine Owner is not entitled either to allot the work of extraction or sell the varieties at marketable ore, produced from the Mine to any other person other than the party with whom the agreement had been entered.

(j) It is common knowledge that these Agreements that those are replication of practice in vogue.

6. In present case, two separate Agreements were entered on 16.06.2003 by the Mine Owner namely:

(i) One with appellant in Appeal From Order No. 60/2009 - the Agreement for

extraction; and another

(ii) Another with the appellant in Appeal From Order No. 61/2009 - the Agreement for extraction sale.

7. Perusal of the Agreement entered with Buyer reveals that crucial clauses contained therein which govern the subject matter are Clause Nos. 4(a), 9 and 22 of the Agreement for Sale. These clauses would be referred to wherever required by quoting those.

8. It appears that parties were under a belief that the first spell of agreed period of five years had to end on 15.06.2008. The appellant-buyer states that it has sent letter dated 19.11.2007 to the Mine Owner, offering / opting to renew and proposing a meeting for that purpose and for signing of agreement.

9. The letter dated 19.11.2007 contains expression of decision to continue to buy under earlier arrangement. It is alleged that this letter was accompanied by a draft Agreement in which the clause pertaining to the price of varieties of iron ore to be sold by Mine Owner to the Purchaser was left blank.

10. The Buyer claims that:

(a) This letter was delivered to each of the respondents-Mine Owners by Registered Post, with Acknowledgment and were delivered to the concerned.

(b) The postal acknowledgments thereof are received and photocopies whereof are kept on record.

(c) The buyer has then sent another letter dated 05.05.2008 requesting for a meeting and reiterates that they have already exercised the option for renewal.

11. The allegations as regards letter of offer dated 19.11.2007 and reminder dated 05.05.2008 are disputed by the mine owners.

Mine Owners, by letter dated 13.06.2008, communicated their stance in which they have not referred to buyer's letter dated 05.06.2008. Mine-owners have stated in their letter dated 13.06.2008, that, as earlier spell of five years had come to an end on 15.06.2008 and no arrangement or Agreement had emerged as regards relationships between the parties for the period thereafter, their relations under earlier contract have come to an end.

12. Present appellants have gathered from Mine Owners' letter dated 13.06.2008 that the Mine Owners were thereby disputing their obligation to continue with the contract of extraction and for sale under the Agreements dated 16.06.2003, any further, and they were about to enter into an arrangement for the extraction and sale with some other party.

13. According to the appellants, a dispute had arisen between parties to contract, and an Arbitration, was the recourse available under the Agreement, and it was to be resorted.

Applications u/s 9 of the Arbitration Act and respective case

14. The appellants have then appointed Arbitrator. In order to secure and protect own interest for seeking interim relief, the appellants have moved an application u/s 9 of the Arbitration Act before the District Court, South Goa, at Margao.

In the body of Petition u/s 9 of the Act, after giving in details the background of transactions, the nature of Agreement and all other details, the appellants prayed for interim relief to last until conclusion of Arbitration.

15. The relevant averments which form the crux of the matter are seen in paragraph 24 and 25 of the application u/s 9. It would be useful to quote those paragraphs instead of narration, which read as below:

24. The aforesaid clause makes it abundantly clear that during the subsistence of this Agreement or any subsequent renewal thereof, the Respondents are restrained from entering into any contracts with a third party for the Sale of Ore from the "SUIT MINE". In the present scenario therefore, once the applicant has exercised option vide letter dated 19.11.2007, the "Sale Agreement" stands renewed for a further period of five years commencing from 16th of June 2008 till 15th of June 2013.

25. The applicant states that since 26.06.2003 till date, the applicant has been exclusively purchasing the said ore in terms of the agreement. The applicant states that the applicant has not committed a single default under the "Sale Agreement". The applicant states that even though the Agreement dated 16.06.2003 has been validly renewed for a further period of five years, vide letter dated 13.06.2008 addressed by the Respondents No. 2 and 4 to the applicant, the said respondents have falsely contended that there will be no Agreement in existence after 15.06.2008 unless a fresh Agreement is executed. The applicant therefore apprehends that the respondents may sell or agree to sell ore from SUIT MINE to any third party and therefore seeks urgent relief from this Hon"ble Court in order to protect the Applicant's interest under the "Sale Agreement" which has subsequently been renewed vide letter dated 19.11.2007.

16. The application u/s 9 has been opposed by Mine Owners by filing reply on affidavit. The objections raised therein are summarized as follows:

(a) What is admitted is as below:

- (i) The execution of Agreement and transactions based thereon;
- (ii) The contract is renewable at sole option of buyer;
- (iii) There exists a negative covenant.

(b) What is denied is as below:

- (i) Continuation of contract beyond first spell of five years is possible barely because it is provided by the contract.

(ii) That there were meetings and negotiations pursuant to alleged offer for renewal.

(iii) Price of the marketable Ore of different grades was not required to be agreed upon afresh.

(iv) The obligation to sell the Ore any more subsists.

(c) It is urged that:

(i) The purchasers too have understood the Agreement to mean the same thing what the Mine Owners mean.

(ii) The blank spaces for the price to be negotiated and agreed, left in the draft agreement forwarded with letter dated 19.11.2007, proves that similar understanding of the agreement prevailed in the mind of both parties to the contract.

(iii) No special efforts are required to ascertain the intention of parties underlying the Agreement, as it is plain and obvious.

(iv) It is duty spelt out from the agreement that unless prices are agreed six months before expiry of first spell of 5 years, the right of purchase extract etc. comes to an end at the close of first spell of 5 years.

(d) The loss the purchaser would suffer would be compensable in terms of money.

(e) There is no case for interim relief made out by Buyer/Extractor.

17. The learned Trial Court heard and decided the application and rejected the same by impugned Orders. The purchaser/extractors, who are aggrieved by those Orders are before this Court in these two appeals from Orders.

Of hearing in this Court

18. An application was filed by the appellant in each appeal styling it as an application for stay. As there was no order to be executed, and hence application misplaced, said application was disposed with liberty to file fresh and proper application.

19. Both learned Advocates had conceded for final disposal of appeal at the stage of motion hearing.

20. Heard both the learned Senior Advocates at length.

21. While the learned Advocate for the appellant was in the process of rejoinder, in answer to queries by the Court it had transpired that exhaustive details referring to irreparable loss, etc., were not brought by the buyer before the District Court, nor those were placed on record of this Court. Advocate for the appellant, therefore, orally sought leave to amend and substitute the application which was granted. The appellant has then converted the application for leave for additional evidence under Rule 27 of Order 41 of Civil Procedure Code.

In this application for leave to produce additional evidence, various documents of common knowledge which were not filed in the District Court were filed.

22. This application for leave to produce additional evidence has been strongly opposed, as well contents of the documents too are replied by filing reply and rejoinder. Respective Submissions

23. Submissions of respective Advocates do mainly surround the:

(1) Facts.

(2) As to what is the exact interpretation of the recitals in agreements through which the tenure of absolute right of exploration and buying was agreed.

(3) Conditions precedent to renewal.

(4) Law governing interpretation of deeds.

(5) Scope of powers u/s 9 of Arbitration Act.

(6) Scope of scrutiny and interference in appeal.

24. Both learned Advocates have cited various Judgments in support of respective submissions as follows : A-1. Appellant's citation on merits.

(1) I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.,

(2) Vijay Minerals Pvt. Ltd. Vs. Bikash Chandra Deb,

(3) Arjun Singh alias Puran Vs. Kartar Singh and others,

(4) K. Venkataramiah Vs. A. Seetharama Reddy and Others,

(5) JT 2000 (Supp.) 3 SC 90 (State of Rajasthan v. T. N. Sahani and Ors. A-2-Appellant's citations on the point of additional evidence.

(6) Dalpat Kumar and another Vs. Prahlad Singh and others,

(7) Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others,

(8) M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others,

(9) 1996 AIHC 3412 (Atchut v. S. Velingcar v. Timblo Limited).

(10) Hardesh Ores Pvt. Ltd. Vs. Hede and Company, .

(11) (1991) 5 S.C.C. 167 (Hind Plastics and Anr. v. Collector of Customs, Bombay and Anr.)

(12) Friends Cooperative Housing Society Limited and Others Vs. The Nagpur Improvement Trust, The State of Maharashtra, Department of Urban Land Development, Matru Seva Sangh and Sati Mata Shikshan Sanstha and Others, R-1 - Respondent 's citations on merits.

- (1) Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another,
 - (2) State of U.P. and Others Vs. Lalji Tandon (Dead),
 - (3) Hardesh Ores Pvt. Ltd. Vs. Hede and Company,
 - (4) Wander Ltd. and Another Vs. Antox India P. Ltd.,
 - (5) Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others,
 - (6) Percept D"Mark (India) Pvt. Ltd. Vs. Zaheer Khan and Another,
 - (7) Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.,
 - (8) Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others,
- R-2 -Respondent's Citations on permissibility of additional evidence are:
- (a) 2008 Bom K 595 (Suman Balkrishna Zodge v. Alaka Suresh Zodge and Ors.)
 - (b) N. Kamalam (Dead) and Another Vs. Ayyasamy and Another, .

25. Though various disputed questions are raised and submissions are made at length, the matter revolves around limited questions which are as follows:

- (1) What is the duration of initial-first spell i.e. tenure of agreement wherein appellants can operate without renewal ?
- (2) Whether by virtue of Agreements dated 16.06.2003, is it necessary for the parties to arrive at fresh consensus or Agreement as regards prices for the sale of marketable mineral Ore of various grades and as regards job work charges for extraction of processing, after expiry of first spell of five years to enable the appellants to continue their exclusive right under agreements/contracts dated 16.06.2003?
- (3) Whether the Buyer / Extractor have exercised the option to continue beyond 1st spell of 5 years ?
- (4) Whether additional evidence should be allowed as necessary or otherwise ?
- (5) In whose favour the aspects of balance of convenience and irreparable loss weigh ?
- (6) Do appellants have case for order of interim relief prayed for ?
- (7) What shall be the interim order and on what terms?

25. Scrutiny of submissions and perusal of records reveals that the case is governed mainly by facts, and which alone, are decisive of the issue involved and are limited to the interpretation of various clauses of the agreement.

26. Clauses 4(a), 9 and 22 of the Agreement for sale are quoted for ready reference, herein below:

...

Clause 4. (a) This agreement shall come into force on the day of execution of this agreement and shall initially remain in force for a period of 5(five) years from the date of execution of this agreement and the same shall be renewed by the SELLER for further like periods of five years at the sole option of the BUYER on the same terms and conditions herein contained. In the event the BUYER desires to renew the agreement for further period of 5(five) years, the BUYER shall exercise the option of renewal at least six months before the expiry of the period so also the revision in the rates shall also be finalized six months earlier.

(b) Only the BUYER shall be entitled to terminate this Agreement and its renewals and not the SELLER. However the BUYER shall be entitled to terminate this agreement and its renewals for the following reasons by giving 2 calendar months" prior notice in writing to the SELLER:(i) If the purchase of the ore hereby agreed is not economically viable due to recession in the domestic and/or international market or for any other reason/s.

(ii) In the event the economic condition of the BUYER weakens or the BUYER decides to close down its mining business.

(iii) for misrepresentation of the Clause 1(a to j), breach of any of the terms of this agreement and for dissatisfactory performance of the SELLER.

(iv) In the event of occurrence and continuance of the conditions/situations stated in para 20 and 21 of this agreement.

(Quoted from page 133 to 134 of Appeal from Order No. 60/2009)

Clause 9 -Price : the price payable by the BUYER to the SELLER for all the marketable wet metric ton (WMT) iron ore to be sold from the area of the said Mine/Lease shall be as under:

Due to the peculiar chemical and physical specifications of Silicious ore the price payable for silicious ore with 50% Fe content and above will be as under:

That the above rate Clauses shall be revises after every 5 (five) years as per Clause 4 supra.

i. That these rates will be also subject to increase by mutual discussions, whenever there is substantial increase in rate of H.S.D. Explosives, machinery and other inputs.

ii. Sales tax if applicable shall be on account of BUYER and shall be charges extra on the above rates.

The BUYER shall deposit a sum of Rs. 10,00,000/-(Rupees Ten Lakhs only) with the SELLER at the time of execution of this agreement which shall be refunded at the time of termination of this agreement, without interest.

(Quoted from page 134 to 135 of paper book of Appeal from Order No. 60/2009)

22. The SELLER hereby solemnly declares that he has exclusive right and

authority to enter into and execute this agreement with the BUYER which the SELLER has done out of his own freewill and consent in the manner hereinafter appearing; that the said Mine/Lease is absolutely free and clear from any charges, liens or any encumbrances of whatsoever nature. Further that the BUYER by observing and complying with the terms and condition of this agreement is entitled to the undisturbed purchase of the entire quantities of marketable iron ore from the said Mine/Lease without interference, interruption, claim or demand whatsoever from or by the SELLER or his heirs, administrators, assignees or from any person lawfully or suitably claiming from through or under the SELLER and even if such claim is made it will be unlawful and the entire responsibility of its cost and consequences shall rest upon the SELLER and the SELLER further agrees and undertakes that so long as the BUYER is ready and willing to purchase the marketable iron ore from the SELLER at any time hereinafter, the SELLER shall not enter into any agreement for sale of marketable SELLER shall not enter into any agreement for sale of marketable iron ore from the said Mine/Lease to any other person/s and shall further sell the entire marketable iron ore, only to the BUYER"s herein."

(Quoted from page No. 138 of Paper book from Appeal From Order No. 60/2009)

27. Rules of interpretation of deeds as can be drawn from various treaties as based on law laid down by Courts is the only guiding path thereto.

28. Ratio of various precedents relied upon by parties in this behalf can be summarized as follows:

(a) Draw plain meaning;

(b) Find out real intention between the parties at the time of entering into agreement, and ascertain what is actually agreed;

(c) What parties have behaved later on is not decisive of the intention;

29. Keeping in mind these settled rules of interpretation of deeds, this Court has seen through the clauses of the agreements.

30. Gist or summary of stipulations of paras quoted above the conclusions which have to be reached are as follows:

(a) Duration

1. First Spell of duration for contract for sale is for five years from the date of agreement.

2. Second spell is for five years.

3. Renewal for second spell is at sole option of the Buyer.

4. Renewal has to be on the general terms and conditions contained in the agreement which are to be the same.

5. If the Buyer wants to renew the agreement for further period of five years after first two spells, it can be done solely at the Buyer's option.

6. A revision of rates has to be agreed for such extension beyond first two spells, 6 months prior to last date i.e. ending of total 10 years spell.

(b) Price during different spells.

1. Purchase rate is fixed for spell of first two years.

2. For next three years different prices for different Ore grades have been fixed.

3. Purchase rate is fixed for next five years for different Ore grades following first spell of 5 years.

4. There is a provision for increase in the agreed price if there is substantial increase in the rate of consumables such as fuel, explosives and other inputs and expenses.

(c) Renewal

Buyer has to exercise the option for renewal atleast six months before the expiry of period.

(d) Negative covenant.

1. The Seller is under obligation not to sell or dispose off in any manner iron ore to be extracted from their Mine to any person other than the buyer during initial spells or of extended term.

2. Buyer has exclusive right and title to purchase the iron ore without interruption.

(e) General assurance by seller

1. The Seller has agreed to sell at all times to Buyer even after the agreed spells the marketable ore extracted from their Mine until Buyer is willing to purchase and price is agreed.

31. The above quoted conclusions emerge as the only conclusions which spell out from the agreement and the conduct of the parties.

Reasons for this conclusion

32. Of Duration

(a) Had there been any other intention, clauses 4(a) and 9 would not have consisted the stipulation referring to agreed prices for first five years and another agreed price for second spell of five years.

(b) This agreed period for price of Ore covers this entire period of ten years i.e. two successive spells of 5 years each.

(c) The stipulation as to second spell of five years has to be considered as a

positive promise since the price of marketable ore of different grades has to be paid during second spell of five years has been stipulated expressly and with no room for ambiguity in this regard.

(d) Fresh price to be agreed essentially refers to the third spell or second renewal after completion of ten years. Second renewal after ten years is considered to be absolutely right so long an agreement on the price is possible.

(e) In an eventuality, whenever the buyer is willing to pay the price, if any quoted by the seller, not only for second renewal i.e. third spell but even for all future period (Para 22), the Mine owner cannot sell the ore to any other party.

33. Of Renewal

(a) By letter dated 19.11.2008, buyer has communicated the intention of renewal. This option renewal was forwarded by registered post. Photocopies of acknowledgments thereof are placed on record.

(b) No affidavits have been filed by respondents denying receipt and explaining their purported signatures.

(c) Mine owners claim that renewal can take place only upon agreeing on price afresh for second spell of five years.

(d) On the sole ground that common reading of clause Para 4(a) Clause / Para 9 of the agreement for sale already stipulates the price of the ore fixed thereby, for duration of first renewal i.e. second spell of 5 years, fresh consensus or actual agreement on the price of ore is not at all contemplated, rather is dispensed with.

(e) It is open to the parties to discuss fresh price considering increase in price of consumables and stores, machinery and other inputs, which is very well provided for by Clause 9 as can be seen from the underlined part thereof which is once again quoted below:

That these rates will be also subject to increase by mutual discussions, whenever there is substantial increase in rate of H.S.D. Explosives, machinery and other inputs.

(f) This would be adjustment of price, and not a fresh agreement.

(g) The effect of forwarding the draft agreement as an accompaniment of letter communicating exercising the option i.e. letter dated 19.11.2008, and failure of the parties to arrive at an agreement as to price, since it is clear that price of ore for second spell of 5 years i.e. for duration of first renewal was already fixed, and no sooner option to continue is exercised, and it is unqualified, the exclusive right to purchase and extract continues.

(h) The option for renewal was exercised with no ambiguity. Therefore, though there is no fresh agreement as to increase of price, the contract for sale stood renewed.

(i) If a dispute arises as to need of increase in price on account of clause-proviso quoted in para No. 30 supra, it was and is capable of resolution through Arbitration.

(j) More over, it is not the case of mine owners that in crease was to be discussed on the ground of increased cost of extraction. This eventuality arises only when extractor demands more rates for extraction and processing.

(k) Therefore, on facts this Court finds that the option of renewal was duly exercised and it is absolute. It has no deficiency.

Of additional evidence.

34. Production of additional evidence is required to be allowed, being the matters of common knowledge to the parties and contents thereof being generally acceptable and explained where ever required. Present is not a case in strict terms of suit and appeal arising after full trial. The matter is being considered for interlocutory arrangement, until parties submit to and get an arbitral award.

35. To consider such evidence as Court would consider necessary can and should always be allowed, whether or not the appellate Court / forum is guided by Rule 27 of Order XLI of C.P.C. Maids of justice cannot and ought not become the masters. Sole rational behind Rule 27 of Order XLI has to be seen in judicial discipline and doctrine of fair opportunity to the respondent who is forced to face and defend against such additional evidence.

36. Bare mention of Rule 27 of Order XLI would flash in the mind of Appellate Court the range of stages in full trial of suit. Plaintiff discloses his pleadings and documents and lets lead the defendant to the foundation of case of plaintiff, and upon this defendant elects his defence and limit his evidence. It is the scheme of law that the plaintiff ought not either be negligently or due to a foul play, withhold some evidence and then bring it of late in trial or in appeal and hit the defendant from behind.

37. Bringing the evidence timely i.e. at the stages appointed by law is a condition precedent in the process of fair trial. Has the trial ever begun in present case ? Answer is in the negative. Parties have proceeded with the hearing in the District Court for interim relief u/s 9 of Arbitration & Conciliation Act of 2000 barely on documents and affidavits. Parties are in the trade, the system and Courts for very long period. Neither of the facts, the information and evidence, now being brought before this Court is a matter of surprise or an act of hitting from behind. There is no denial of fair hearing, or seeking to produce evidence in the background of any indolence during long drawn trial in past.

38. Strong objections to the production of additional evidence are all based on technicalities, rather than a shield against injustice. Aim of objection is not the cause of justice but to use the letter of law, with which approach this Court does not subscribe and holds that application for producing additional material needs to be allowed.

39. The application for leave to produce additional evidence is, therefore, allowed. Worth of this evidence is discussed at appropriate stage.

Of Right enforceable

40. It is seen from the contract for extraction that it has been very well notified to the Mine owner that the extractor has to invest, arrange for men machinery resources etc., at a very large magnitude, test there is no reason or rational to agree to sell the ore at the price which is fixed to cover different spells of time covering ten years.

41. Moreover, few undisputed facts do attribute knowledge of various factors to the Mine owner namely:

i) The Mine owners have been getting done the extraction from others, in past for very long duration.

ii) The terms of agreement which were entered between Mine owner and the parties who were extracting and buying in past, are admittedly on the same pattern, and are on long duration basis.

iii) Former buyer / extractor too claimed exclusive / sole right to extract and to buy based on those agreements.

iv) Mine Owners are admittedly knowing that they along with present appellants have suffered a litigation initiated by former extractor and buyer who were operating on similar contract in immediate past, when the Mine owners entered into contract extraction and sell with appellants.

v) Said Litigation i.e. Special Civil Suit No. 19/06 which is still pending. In order to protect the interest of the said plaintiff, and present appellant is required to deposit amount in the Court at the rate of Rs. 400/-per metric ton under the orders passed by this Court and this fact is very much within the knowledge of Mine owners.

vi) Above points indicate that the buyer has a stack which is far larger in magnitude then the stake of the Mine owners.

vii) If the Mine owners change the agency i.e. extractor and buyer, their gain would be ranging between Rs. 25 to Rs. 45/-per metric ton for different grades for marketable iron ore, which price difference is conceded to by appellant.

viii) The magnitude of investment and stake of the purchasers, the magnitude of their loss could be around Rs. 500/-to even Rs. 1500 per metric ton, in the background that according to Mine owners prices of ore in China have reached the price of Rs. 8600/- per metric.

ix) It has not come on record that now the Mine owners have capacity to undertake the extraction by themselves.

42. On the facts which emerge from record and on plain interpretation of

agreements it is clear that:

- a) The appellants have in their favour a right emerging from a contract with a fixed duration, agreed price, sole right of buying and extracting and a negative covenant binding on the mine owner, entered with open eyes and full knowledge of operation of such a covenant.
- b) The appellants have in their favour a legally enforceable right.
- c) The respondents/mine owners have the burden of obligation of reciprocating the Buyer / Extractor's right.
- d) The mine owners have denied the right of appellants.
- e) The breach has commenced and may fructify if not restrained by induction of third party in place of Buyer and Extractor.
- (f) The breach of obligation is capable of prevention by an injunction.

Of irreparable loss, balance of convenience, etc.

43. The aspect governing the factors as to irreparable loss can be summarized as follows:

- (a) The loss of Mine Owners if prevailing arrangement and contract continued is at the most at the rate of Rs. 25/- to Rs. 45/- per metric ton.
- (b) This loss too is notional, as mine owners are under an obligation of a negative covenant and are bound under a positive promise to continue with the contract for 5 years second spell of solely at the option of the buyer, and way back on 19.11.2008, buyer has exercised said option.
- (c) The loss which the purchaser/extractor would suffer would be colossal and in multiples than the loss which the Mine owners anticipate to be their loss.
- (d) Buyer has in its hand export commitment, which fact has not been disputed.
- (e) Mine owners do not have a commitment on hand or against them except their obligation under the contract with the purchaser and extractor and the purchaser.
- (f) The Buyer & Extractors having arranged for men and machinery and investment, all this cannot be used elsewhere being men and equipment of peculiar-mining use, and therefore the loss which they shall suffer would be so extreme that it would ruin them.
- (g) The remedy by way of damages in such case can never do the total restitution and hence loss and damage which the plaintiffs shall suffer is really of the nature which can be described as irreparable.
- (h) As the Mine owners do not have arrangement of extraction of their own for want of resources and men machinery investment and infrastructure, they are not likely to suffer loss on account of these arrangements remaining idle or

unused or being required to be deployed else where.

44. Though application for additional evidence is allowed, the admitted documents in the shape of agreements, other evidence already on record before District Court and adequately demonstrates that the obligation cast upon the Mine owner was obvious and vivid.

45. The additional evidence undoubtedly amplifies whatever facts are emerging from documents in the shape of agreements etc. already on record.

46. The applicants moving the Trial Court u/s 9 of Arbitration Act, have made out, prima facie, a very strong case, and the strength is so strong and obvious that it is not refutable on the grounds which defence raised.

47. Mine owners' obligation is undeniable. Balance of facts, law and justice all do tilt in favour of the appellants. The defence is extremely weak though the tone is otherwise.

48. The aspects of irreparable loss are also so obvious that one does not need a microscopic view, a discrete scrutiny, the comparative losses are grossly visible.

49. In so far as the loss and damage which respective may suffer is as found by this Court in Para No. 34 (VII and VIII). Thus annual loss which the appellant shall suffer is over Rs. 500/-per metric tonne of ore while for the respondents it is @ Rs. 25 to 45 per metric tonne. Interest of the respondents can be protected by imposing certain conditions on Buyer.

50. This Court has noted alternate submission of learned Senior Advocate Mr. Sardesai that the mine owners are not liable, but if Court considers it to be necessary, they are ready to deposit in Court amount of Rs. 400/-per metric tonne, which amount was fixed by this Court after hearing the parties to the contest therein to mitigate liability if any arising in pending Spl. Suit No. 19/2006 against mine owners and present appellants which amount present appellant is depositing. Learned Advocate Mr. Dessai further urges that such deposit would meet any damages if Buyer / Extractor suffer.

51. Considering the collective effect, it is clear that loss to appellants is for higher in magnitude than loss to the mine owners. The loss to Buyer is about 10 to 15 multiples of loss to the mine owners. As the price of ore is fixed and fluctuation is meagre this loss and its preventive measures are recon-able. This loss can be mitigated by directing the Buyer to furnish a continuing security by way of Bank guarantee and directing monthly deposit towards weight in tonnes of processed ore delivered to Buyer.

52. This Court is of considered view that by way of conditions for grant of interim relief, the Buyer should comply with following conditions:

(a) Shall deposit in District Court, Margao, a Fixed Deposit drawn in the name of Registrar of District Court, Margao or furnish a Continuing Bank Guarantee of a nationalized Bank invocable at Panaji, covering annual tonnage for average of

first spell of five years in favour of Registrar of District Court, District South Goa, Margao, @ Rs. 40/-per metric tonne of processed ore at flat rate, with intimation to mine owners. The Bank Guarantee, if furnished, shall remain in force till sixty days after Order of discharge by Arbitrator or by any Court.

(b) Further deposit by way of Fixed Deposit Receipt in the name of Registrar of District Court Margao, every month for amount calculated @ Rs. 40/-per metric tonne of total weight of processed ore of actual delivery to the Buyer irrespective of laboratory reports and its class or variety.

(c) This arrangement of delivering fixed deposit receipts shall continue in operation till conclusion of arbitration and sixty days after supply of certified copy of Award or completion of second spell of five years whichever event occurs earlier and interim protection and deposit shall then forthwith stop operating.

53. In the result, the appeals are allowed in the following terms:

(a) Both Appeals are allowed with costs.

(b) Impugned Orders are set aside.

(c) Appellant's Arbitration application No. 10 and No. 11 of 2009 of the file of District Court, Margao, are allowed.

(d) Injunction shall operate against mine owners so long conditions stated in paragraph No. 52(b) are fulfilled.

(e) One month's time is granted to fulfill / comply with condition (a) in para No. 52.

(f) The injunction shall operate and remain in force during pendency of arbitration and sixty days after delivery of certified copy of award or the completion of five years of renewal whichever period would end prior, and subject to compliance of conditions contained in foregoing to Order Clause (d) and (e).

(g) The Arbitrator shall be competent to deal with the manner in which the Bank Guarantee and amount in deposit in the form of fixed deposit receipts shall be dealt with.

(h) Observations contained in this Judgment shall not bind the Arbitrator who would be bound to decide the reference according to facts as brought before him, law and justice.

(i) Status quo as prevailing between the parties shall remain in operation for four weeks from today.