
(2019) 10 BOM CK 0075

In the Bombay High Court

Case No : Commercial Notice Of Motion (L) No. 2044 Of 2019 In Commercial Arbitration Petition (L) No. 948 Of 2019

Vanit Gupta And Ors

APPELLANT

Vs

Delta Iron & Steel Company P. Ltd And Ors

RESPONDENT

Date of Decision : 22-10-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9
Indian Sale Of Goods Act, 1930 — Section 13, 14, 19, 19(2), 25, 27, 30(2), 45, 46, 47, 47(2)(1)(a), 47(2)(1)(b), 47(2)(1)(c), 49, 62, 62(2)(1)(a), 62(2)(1)(b), 62(2)(1)(c)
Indian Contract Act, 1872 — Section 171, 182
Companies Act, 1956 — Section 294
Code Of Civil Procedure, 1908 — Order 40 Rule 1, Order 39 Rule 3
Bombay High Court (Original Side) Rules, 1980 — Rule 596

Citation : (2019) 10 BOM CK 0075

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Dinyar Madon, Jamshed Master, Kausar Banatwala, Gauri Sakhardande, Chirag Sarawagi, Tushar Goradia, S.U. Kamdar, Karl Tamboly, Parinaz Vakil, Aishwarya Singh, Krishna Jethani, M.M. Vashi, Manisha Desai, M.P. Vashi, D.N. Kher, P.K. Nardele

Final Decision : Dismissed

Judgement

1. The applicant Shri Vanit Gupta, who is not a party to the above arbitration petition, has filed this Notice of Motion. The Arbitration Petition is filed under section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act") by the petitioner - JSW Steel Ltd. (referred as Petitioner), against the original respondent no. 1 - Delta Iron & Steel Co. Pvt. Ltd., respondent no. 2 - Yatin Steels India Pvt. Ltd. and respondent no. 3 - ARK Industries Pvt. Ltd. (referred as Respondents). The applicant is a third party to the transactions which have taken place between the petitioner and the respondents pertaining to sale of iron coils (for short 'the goods') to the respondents.

2. The petitioner approached this Court in the above Petition filed under section 9 of the Act, principally on the ground that there is a Franchise Agreement dated 1 July 2018 entered between the petitioner and the respondents. The contention of the petitioner is that as clear from the various clauses of the Franchise Agreement, the respondents were under an obligation to make payments within 7 days from the date of invoice, in cases where the material was dispatched from the Vijaynagar plant and within 7 days from the date of invoice date in cases where the said material was dispatched from the Dolvi plant. The petitioner has contended that between April and June, 2019, the respondents placed 17 purchase orders with the petitioner for a supply of 23516 MT (mega tons) of these goods, for total principal amount of Rs.121,35,85,585/-. The petitioner contended that on the date of filing of the petition, under the invoices for the said period between April and June 2019, amounts remained outstanding and payable by the respondents to the petitioner and particularly since July 2019 a total principal amount of Rs.20,39,90,685/- was due and payable by the respondents to the petitioner. Exhibit B to the petition is a tabular representation of the payments to be made by the respondents against the invoices raised by the petitioner, including the dates on which the same fell due. It is on the above premise, the present Section 9 petition was filed and moved for urgent ad-interim orders.

3. The petitioner had moved the Arbitration Petition for ex-parte reliefs against the respondents. On 23 August 2019 this Court (K.R. Shriram, J.) passed an order interalia granting the petitioner ad-interim relief in terms of prayer clauses (k) and (l) of the petition. The said order reads as under:

"1. At the outset, Mr.Khambata, senior Advocate for petitioner tenders draft amendment to the petition which is taken on record and marked 'X' for identification. Leave to amend as per the draft granted. Amendment to be carried out forthwith.

2. Heard Mr.Khambata. The reason for moving without notice is given in paragraph-22 of the petition.

3. Petitioner is a company manufacturing steel and its allied products and claims to be one of the largest in the business of manufacturing steel and its allied products in India. Respondent nos.1, 2 & 3 are sister concerns of each other engaged in the business of dealing in iron and steel products in all districts in the State of Maharashtra. Petitioner appointed respondents as franchise to set up and operate a JSW SHOPPEE for promoting and selling exclusively certain products of petitioner. Petitioner entered into franchise agreement on 1.7.2018 with respondent no.1 as also its sister concerns respondent nos.2 & 3. Clause 7.2.1 of the agreement is the arbitration clause.

4. Clause-12 of the agreement deals with right of lien of petitioner and it provides that although the risk in the products passes to the Franchisee from the date of dispatch of the products to the carrier and delivery being taken by the

Franchisee, the title to the products shall pass to the Franchisee only upon receipt of invoice amount by the Franchisor. Clause-12 also provides that Franchisor shall have lien on the products so delivered to the extent of unpaid purchase price of products and the Franchisor shall be entitled to exercise the lien to recover the unpaid purchase price by taking back the products and shall be entitled to sell the same to some other dealer and adjust the sum so realized against the unpaid purchase price.

5. Petitioner has been supplying products from time to time and according to petitioner as on 14.8.2019 there is an outstanding of about Rs.19 crores. Petitioner gave a notice demanding payment on 14. 8.2019 and respondents replied admitting about Rs.9 crores. Mr.Khambata states that set off of claim by respondents is incorrect but at the same time, admittedly over Rs.9 crores is payable.

6. In view of what is stated in paragraph-22 read with paragraph- 25 of the petition and in view of the admission of respondents to the tune of at least Rs.9 crores, I am satisfied that there is a prima facie case for ex-parte ad-interim injunction made out.

7. Therefore, ad-interim order in terms of prayer clauses-(k) and (l) is granted and the same read as under :-

"(k) order and direct that pending the hearing and final disposal of the Arbitral proceedings and for a period of 12 weeks thereafter, the Respondents be restrained themselves and through its officers and/or its directors and/or its subordinates and/or its servants and/or agents from in any manner whatsoever taking any steps to dispose of the said Materials belonging to the Petitioner and in the possession of the Respondent at least to the extent of the amounts due and payable to the petitioner, including the Principal Amounts and Interest thereon as set out in the Particulars of Claim at Exhibit H hereto;

(l) order and direct that the Court Receiver be appointed and/or such other fit and proper person be appointed as Receiver with all the powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908 to inter alia take stock and custody of the said Materials belonging to the Petitioner and in the Respondents' possession, whether stored at the latter's warehouses or otherwise wherever situate."

8. The Court Receiver High Court, Bombay shall keep the impugned goods under his seal in the safe custody of respondents. Court Receiver is authorized to seek police assistance if required and police authorities of concerned police station shall render all possible help to the Court Receiver including deployment of such number of police personnel as required on production of an authenticated copy of this order. The Court Receiver to do the needful and submit a report to this court by 7.9.2019.

9. The Advocates for petitioner will lodge an authenticated copy of this order with the office of the Court Receiver within two days of an authenticated copy being

made available. Upon an authenticated copy being lodged with the Court Receiver, compliance with Rule 596 of the Bombay High Court (O.S) Rules is dispensed with.

10. This order is not to be uploaded until the execution of this order by the Court Receiver.

11. Time to comply with the provisions of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 is extended for a period of one week from such time as the Court Receiver implements this order.

12. This order will operate till 16.9.2019. Liberty to respondents for variation of this order with 24 hours prior notice to petitioner is granted.

13. All parties including the Court Receiver are directed to act on an ordinary copy of this order, duly authenticated by the Associate of this Court.

Stand over to 13.09.2019."

4. The applicant has moved this Notice of Motion being aggrieved by the sealing action taken by the Court Receiver, against the applicant's goods, in pursuance of the aforesaid order passed by this Court. The applicant inter alia contends that some goods in respect of which Court Receiver has been appointed by this Court and which were lying in the premises of the cutters/ warehouses are actually goods sold to the applicant by the respondents and the petitioner cannot have any claim against these goods. It is the applicant's case that there was no privity of contract, whatsoever between the petitioner and the applicant. The applicant contends that having purchased the goods and having paid the price for the same to the respondents, there was no question of the petitioner claiming any rights on these goods. It is contended that the applicant is a bonafide purchaser of the goods for value without notice of the contract between the petitioner and the respondents. Accordingly, the present Notice of Motion has been filed by the applicant praying for the following reliefs:

a) That this Hon'ble Court be pleased to pass necessary orders and/or directions directing the learned Court Receiver, High Court, Bombay to forthwith release/de-seal the goods of the applicant/Non-party respondent as described in Exhibit "A" hereto and handover possession thereof back to the applicant/non-party respondent;

b) That this Hon'ble Court be pleased to pass necessary orders and/or directions vacating the order dated 23 August 2019 to the extent of the goods of the applicant/non party respondent as described in Exhibit "A" hereto;

c) For interim and ad-interim in terms of prayer clauses (a) and (b) above be granted;

d) for such other and further reliefs as this Hon'ble Court deems fit and proper under the circumstances of the case."

5. The record would indicate that the grievance of the petitioner is in respect of the goods sold by the petitioner to the respondents in respect of which, according to the petitioner, the price/consideration has not paid to the petitioner by the respondents as per the terms and conditions of contract (franchise agreement), the details of which are set out in Exhibit B to the Arbitration Petition. It is the petitioner's case that under the contract as entered between the petitioner with the respondents, the petitioner would have a lien on these goods which were sold to the respondents for unpaid price of the goods. The petitioner contends that, hence, this Court (K.R. Shriram, J.) taking a prima facie view of the matter by an ex-parte ad-interim order dated 23 August 2019 (supra) appointed the Court Receiver of this Court as the Receiver of the said goods, who has taken physical possession of the goods.

6. At the hearing of this Notice of Motion, on the earlier occasion, the applicant made a grievance that there were certain goods belonging to the applicant for which the Court Receiver was appointed by this Court which were not included in the list at Exhibit B to the Arbitration Petition. On this Mr. Kamdar, learned senior counsel for the petitioner had fairly agreed that if there were goods which are not part of Exhibit B, then the petitioner's would not have any objection for those goods being deleted from the purview of the order passed by this Court on 23 August 2019. This Court accordingly on 18 September 2019 passed the following order:

"1. Mr.Kamdar, learned Counsel for the petitioner-JSW Steel Ltd., on instructions of Mr.Amit Murjani, Deputy Manager, Legal, and Mr. Bijoy Jose, Senior Manager, Sales, authorised representative of the petitioner,makes a statement that his client would not have any objection for the goods/coils which are not part of 'Exhibit B' to the petition, to be released in favour of the applicant by the Court Receiver. Statement is accepted.

2. The learned Court Receiver, High Court, Bombay is accordingly directed to take appropriate steps and release the goods/coils in favour of the applicant before the adjourned date of hearing. To the above effect, the order dated 23 August 2019 passed by this Court (K.R.Shriram, J.) stands modified.

3. Let this notice of motion be placed for hearing on 23 September 2019 at 3 p.m. when an endeavour of the Court is to hear the parties on the remaining disputes and pass final orders on the notice of motion.

4. Mr.Kamdar has made the above statement without prejudice to therights and contentions of the petitioner that an amount of Rs.20 crores is due and payable by respondent nos.1 to 3 to the petitioner which is disputed by Mr.Vashi who appears for respondent Nos.1 to 3.

5. Mr.Kamdar also states that his clients do not admit that the applicant-Vanit Gupta, has become the owner of the goods.

6. Court Receiver shall undertake the exercise of release of the goods in

presence of the representatives of the parties.

7. The parties shall exchange the list of the goods/coils to be released which be furnished to the learned Court Receiver to release the goods.

8. Court Receiver has submitted a report dated 18 September 2019 which is stated to be a Site Report. It shall form part of the record. Copies of the said report be made available to the parties."

7. Consequently, about 66 coils/goods were released in favour of the applicant and this came to be recorded by further order of this Court dated 23 September 2019 which reads thus:

"1. Stand over to 26 September 2019 at 3.00 p.m.

2. Mr. Madon, learned senior counsel for the applicant has made statement that in pursuance of the earlier orders, and discussion which has taken place, about 66 coils are released in favour of the applicant. The adjudication therefore would confine to the balance coils which Mr. Madon would state are about 60. The parties would be heard on all the issues on the adjourned date of hearing.

3. Ad-interim orders passed earlier, shall continue to operate till the adjourned date of hearing subject to the modification by the earlier orders.

4. All contentions of the parties are expressly kept open."

8. Now the question is of about 60 number of coils which still remain in custody of the Court Receiver, on which the applicant is making a claim to contend that these are the goods bonafide purchased by the applicant from the respondent for valuable consideration and thus there is no justification in appointing the Court Receiver qua these goods which are legally sold to the applicant by the respondents.

9. The case of the applicant is that the applicant is in the business of buying, selling, importing and exporting steel and allied products since about 35 years as a sole proprietor in the name of Sri Enterprises and is one of the reputed and oldest business houses in the trade of steel. The applicant's group is known as "LK Group".

10. The applicant had travelled out of Mumbai on 23 August 2019 when on 24 August 2019, the applicant received a phone call from Mr. Kirit Doshi of Deep Steels informing that the Court Receiver along with police assistance had visited the cutters/warehouses at Taloja and were sealing the goods of the applicant. The applicant along with his son immediately rushed to the cutters/warehouses where Mr. Govind and others of the Court Receiver were present, who informed the applicant that they were acting in pursuance of the order dated 23 August 2019 passed by this Court. The applicant on going through the order pointed out to the representative of the Court Receiver, that the goods which were being sealed did not belong to the petitioner and/or of the respondents and were not in possession of the respondents. The applicant informed that he is the owner and

in possession of the goods and that the order of the Court pertains only to the goods belonging to the petitioner and in possession of the respondents. Nonetheless the goods were sealed by the Court Receiver. The Court Receiver has wrongly sealed the goods belonging to the applicant. The applicant has contended that he was introduced to one Mr. Dhanesh Mehta of respondent no. 1 around 3 years back by a steel broker named Mr. Mahinder Beriwal and since then the applicant has been regularly dealing with them. It is the applicant's case that the applicant in his normal day-to-day business purchased from the respondents these goods (HR coils). The applicant is a bonafide purchaser of the wrongly sealed goods and is in no manner connected with the disputes inter-se between the petitioner and the respondents. The applicant has contended that the applicant has paid the entire consideration in connection with the wrongly sealed goods either by RTGS, Letter of Credits, Debit Notes/ Credit Notes and/ or against sale. It is contended that some of the goods which are sealed are purchased by the applicant almost a year back. The applicant has annexed at Exhibit A to the Notice of Motion a list setting out the names of cutters/ warehouses and the details of the goods purchased which are wrongly sealed by the Court Receiver. It is stated that this list clearly mentions coil numbers, one of the petitioner and other of the cutters/ warehouses. The list also bears the signature and rubber stamp of the concerned cutters/warehouse.

11. The applicant has contended that the normal business method as followed between the applicant and respondents was that the applicant used to telephonically place orders with the respondents (vendors) for purchase of these goods. These goods are big sheets of steel rolled into a huge coil. In the day-to-day functioning and working of the business, the HR coil rolls are directly sent by the sellers, namely, by respondent no. 1 and respondent no. 3 to the cutters/ warehouse. For this purpose, respondent nos. 1 and 3, at the first instance, used to issue a coil transfer letter (an intimation). The transfer letter as per the day to day business practice is always addressed to the cutter/warehouse, the details of the goods to be transferred in favour of the applicant. The applicant used to confirm the same with cutter/warehouse about the receipt of the said coil transfer letter. Respondent nos. 1 and 3 thereafter used to raise their tax invoice in favour of the petitioner's concern which mentions CGST and SGST. Thereafter the entire amount of the invoice including the tax amounts were paid by the applicant to respondent no. 1 and/or 3 as the case may be. The applicant's case is that the applicant has filed up-to-date CGST and SGST returns with the authorities and all taxes in connection with the invoices are paid up-to-date.

12. The applicant contends that the method of business was that the applicant used to give instructions to the cutter/warehouse either to cut the HR coils in particular sizes or sometimes the applicant used to in turn sell the said HR coils directly to other buyers. In that case, identical procedure was followed and the applicant used to issue a coil transfer letter. The coils thereafter were either directly collected or continued to be warehoused by the buyers at the concerned cutters/warehouses. In respect of these goods which are sealed and as per the

applicant wrongly, for the release of which, this Notice of Motion has been filed, respondent no. 1 and/or 3 have issued coil transfer letters as also invoices were in respect of these goods. The applicant had paid the entire amounts to respondent no. 1 due and payable under these invoices. The applicant contends that the applicant is thus the owner of the said goods as also in possession of these goods.

13. The applicant further contends that the applicant also has a credit arrangement with Union Bank of India, Mid-Corporate Branch, Nariman Point, Mumbai, wherein the monthly stock holding of the applicant at the cutters/warehouses of the goods belonging to the applicant are liened or hypothecated and a charge is created in favour of Union Bank of India as per the terms and conditions of the credit facility sanctioned of a particular amount. The applicant has accordingly contended that the goods which are sealed by the Court Receiver belong to the applicant and the same are hypothecated in favour of the Union Bank of India, as the applicant has borrowed funds against these hypothecated goods which need to be repaid to the bankers for which the applicant was also forwarding monthly statement of the goods to Union Bank of India

14. The applicant has relied on number of documents to indicate that the applicant is the owner and in possession of the goods namely tax invoice, coil transfer letters, ledger account in the normal day to day course of business indicating payment of amounts to respondent no.1 and/or respondent no.3. The applicant has also contended that when the Court Receiver went to seal the goods, the cutter/warehouse informed the Court Receiver that the goods do not belong to respondent no.1 and/or respondent no.3 and that the goods belong to the applicant. It is thus contended that neither the petitioner nor respondent nos.1 and 3 have ownership rights over the goods which are sealed, as they solely belong to the applicant, nor the petitioner or the respondents have any lien on the goods which are sealed by the Court Receiver. The existing lien prior to the sealing was of the Union Bank of India as the goods were hypothecated at the behest of the applicant to the said bank. It is thus necessary that an ex-parte order dated 23 August 2019 passed by this Court needs to be set aside to the extent it concerns the goods belonging to the applicant. It is contended that the applicant is suffering huge loss apart from a trauma and loss of reputation when the applicant is the bonafide purchaser of the goods. The applicant is in no manner aware and concerned about the disputes between the petitioner and the respondents, being absolutely a third party. The applicant has borrowed funds against the hypothecated goods from Union Bank of India which need to be paid back to the bankers. Thus, if the order is continued and the reliefs as prayed for is not granted, huge monetary loss would be suffered by the applicant without any fault. It is further contended that the Steel Industry is also going in a recession and the rates of steel are falling day by day and if the order of sealing being continued, it would not permit the applicant to sell the goods which would lead to a situation wherein the rates would have fallen and the applicant would have suffered huge losses. It is submitted that this would also bring about a

situation that the applicant would be declared as NPA if there is default in making payment to its bankers.

15. There is a reply affidavit filed on behalf of the petitioner of Mr. Bijoy Jose inter alia contending that for several reasons the documents which are relied upon by the applicant are not reliable. It is contended that there is absence of petitioner's coil codes on the purported invoices raised by respondent nos. 1 and 3 as in the ordinary practice the petitioner assigns individual codes to each of its H.R. coils which serves to identify such coil. It is contended that the alleged invoices, however, do not mention the petitioner's / manufacturer's given coil codes and thus it is not possible to ascertain from a mere perusal of the invoices whether the goods which are sold by the respondents to the applicant, were in fact the petitioner's goods. It is contended that there are also inconsistencies between the invoices and coil transfer slips. It is contended that the applicant cannot claim ownership on the handwritten list of the goods sealed by the Court Receiver, in the absence of substantive evidence. It is contended that the said list also cannot be relied on to establish any relationship between the applicant and the warehouse/cutters. It is contended that in the ordinary course of business, the cutters/warehouses deal with traders like the respondents and/or the applicant alone, the petitioner, a manufacturer, does not maintain direct contact with them as cutters receive a majority of their business from such traders who have strong professional ties with such traders. It is in these circumstances, the physical verification of the goods is incumbent before such veracity can be attached to said lists purportedly prepared by the cutters. It is contended that there are apparent inconsistencies in Exhibit "A" and "B" relied on behalf of the applicant. There are also inconsistencies in the 'statement of paid Stock position' which do not refer to stock which are stored with cutter/ warehouse and the same discrepancies as set out in paragraph 11 of the affidavit. It is further contended that the applicant has admitted that some of the stock is unpaid which is contended on the basis of the stock statement, as also in regard to the said unpaid stock the location has not been disclosed. The petitioner also contends that the applicant has referred to several purported sales to respondent no. 3. It is the petitioner's contention that from the ledger as annexed by the applicant, it appears that the applicant is re-selling the goods to respondent no. 3 that what it has allegedly purchased from respondent no. 1 and that no proper and necessary documentation has been provided to substantiate the nature and genuineness of these sales given that respondent nos. 1 and 3 are sister concerns. It is contended that the applicant in respect of certain goods has either issued a corresponding letter of credit which has not become due or has wholly failed to pay in respect of the same. It is thus contended that it is unclear whether the applicant is in fact the owner of the corresponding goods. It is thus contended that it is not possible to ascertain the veracity of the applicant's claims that some of its goods are wrongly sealed and are required to be de-sealed. It is thus contended that these circumstances necessitate reconciliation and physical re-verification of the goods by a Court Commissioner or preferably a forensic audit

expert together the parties, including inspection of underlying documents in relation to the same.

16. There are two additional affidavits filed on behalf of the petitioner namely of Mr.Manish Sharma, Manager, Sales and another affidavit of Mr.Bijoy Jose, both dated 3 September 2019. The affidavits are quite similar. The contention in these affidavits is that one Mr.Rajaram Gurav who is an employee of respondent no.1- Delta Iron and Steel Co.Pvt.Ltd. is in fact acting as a sales agent for the applicant, and certain information in that regard including 'Whats app' messages are placed on record to contend that for many years Mr.Rajaram Gurav was known to be a person working with respondent no.1. The tenor of the affidavits is that internally respondent nos.1 and 3 are not different.

17. The applicant has filed a rejoinder affidavit denying the allegations as made in the affidavits dated 3 September 2019 of Mr.Manish Sharma and Mr.Bijoy Jose, to contend that the petitioner has come with a false and bogus case. It is reiterated that the applicant is a bonafide owner and in possession of wrongly sealed goods in respect of which the prayers are made in the notice of motion. It is stated that the Court Receiver was informed about the same and despite which the goods were wrongly sealed. It is contended that the petitioner is attempting to go into trivial negligible issues and were attempting the hair-spitting all the documents in order to create complications and confusion. It is contended that there is nothing wrong in the 'whats app' messages as relied on by Mr.Manish Sharma and Mr.Bijoy Jose as Mr.Rajaram Gurav was in the service of the applicant since 19 August 2019 and therefore, was entitled to issue such messages. Mr.Rajaram would be justified in responding, if he receives messages from the prospective purchasers.

18. There is also a rejoinder affidavit dated 9 September 2019 of the applicant to the reply affidavit filed on behalf of the petitioner denying the case of the petitioner. The applicant contends that the Court Receiver was directed only to take possession of the goods belonging to the petitioner and in possession of the respondents, however, the Court Receiver has exceeded its jurisdiction and the directions of this Court in the order dated 23 August 2019, as the Court Receiver wrongly sealed the goods the details of which are set out in the Notice of Motion which were not belonging to the petitioner and were not in possession of the respondents as the applicant is the owner of these goods. It is contended that the petitioner has deliberately not dealt with the statements in the affidavit in support, thus the contention of the applicant is deemed to be admitted by the petitioner.

19. It is contended that the applicant in any case has made out a case for de-sealing of these wrongly sealed goods. The applicant in its rejoinder to the various reply affidavits has set out the market practice as how the goods reached the warehouse and how the code numbers are assigned. In regard to the discrepancies as pointed out on behalf of the petitioner in regard to the weight and name of Paramshakti Steel Ltd., it is stated that in regard to the stock of the

applicant's goods at Paramshakti Steel Limited the name as also the weight is mentioned. It is stated that in fact this is a classic case of the petitioner trying to mislead the Court. It is stated that the unpaid stocks are in connection with the round bars and not HR coils and the Chartered Accountant has already certified the ledger account in that regard.

20. There is also a reply affidavit to the notice of motion filed on behalf of respondent no.1 of Mr.Akshay Jain- Director of respondent no.1 who confirms that respondent no.1 has sold the goods sealed by the Court Receiver to the applicant for valuable consideration. It is further contended that the money received from the applicant were paid over to the petitioner by making ad-hoc payments. It is stated that there is nothing wrong in the market practice that the steel which is purchased by the applicant as per the market requirement is re-purchased by respondent no.1 and this indicates the trading which happens in the steel market and it depends on the understanding of the market. It is submitted that these are usual market practices and there is nothing dishonest about a well accepted trade practice in the market. It is contended that the petitioner has deliberately tried to twist the facts. In paragraph 8 of the affidavit, it is contended that the applicant had purchased the HR coils/goods from the respondents and have paid the entire consideration by RTGS, Letters of Credit, cheques and/or against sale, which is then paid by respondent nos.1 and 3 to the petitioner from time to time. Respondent no.1 confirms the details as set out by the applicant in respect of such concluded sale such as number of invoices, names of cutters, details of warehouses etc. at a chart which is annexed at "Exhibit A" to the affidavit in support of the notice of motion. Respondent no.1 has also contended that after selling the material in question to the applicant, the respondents have paid GST and have filed GST returns with the concerned authorities. In regard to the discrepancies in the Code numbers, respondent no.1 has contended that it is complete distortion of facts by the petitioner as it is contended that code numbers given by the petitioner on each HR coils runs into 10 digits or more. It is stated that invariably the respondents, the applicant, cutters, etc. have to deal large quantity of HR coils and hundreds of coils every day and it is not practical to refer to the 10 digits or more code number given by the petitioner, and therefore, as a well established market practice, on receiving the HR Coils from the petitioner, the respondents would paint their own code numbers on HR coils. It is stated that after the applicant purchases the same HR coils from the respondents, the delivery will be taken by the applicant and the applicant will keep the HR coils in the godown of the cutters and the cutters write down or paint their own code number on the HR coils. It is thus contended that when the petitioner deals with the respondents, the same will be in terms of the coil code number given by the petitioner, and similarly when the respondents deal with the applicant or any other buyer, the respondents will deal with the coil code number given by the respondents and/or cutter coil number and when the applicant deals with his customers, the applicant would use the cutter's code number. It is for this reason in each invoice raised by the petitioner on the

respondents, invoice raised by the respondents on the applicant and letter issued by the cutters if perused, the chain from the petitioner's godown to the cutter's godown can easily be established. It is stated that the deponents of the affidavit are aware about the market practice but have suppressed the same from this Court.

21. There is another affidavit of Mr.Rajiv Bakshi dated 12 September 2019 filed on behalf of the petitioner stated to be affidavit in rejoinder to respondent no.1 and respondent no.3's affidavit. The petitioner inter alia contends that respondent nos.1 and 3 are operating hand in gloves with the applicant. The petitioner has denied the contentions as urged on behalf of respondent no.1 on all counts, including the contention on the trade practice, on the applicant being the owner of the said goods etc., which need not be referred to in detail.

22. On the above pleadings, the learned senior counsel for the parties have made their respective submissions.

23. Mr. Madon, learned senior counsel for the applicant has drawn my attention to various documents placed on record, namely, invoices, delivery notes, proof of payment of GST returns. Referring to the pleadings, Mr. Madon would contend that indisputedly the applicant is the owner of the goods having paid the full consideration amount to respondent nos. 1 and/or 3 and considering the clear position in law, the petitioner would not have any right whatsoever once the physical possession of the goods was with the applicant. Mr. Madon has contended that the petitioner is asserting its rights on the goods on presumption that they belong to respondent nos. 1 and 3 under the Franchise Agreement dated 1 July 2018 and more particularly on the basis of Clause 12, namely, "Right of lien" as agreed between the petitioner and respondents. Mr. Madon has contended that this agreement itself is doubtful for the petitioner to assert any right in as much as the agreement is stated to be of 1 July 2018 while on the stamp paper it is dated 14 September 2018 and a copy, as placed on record, is also not signed on behalf of the petitioner as also the names of two witnesses of the petitioner is kept blank.

24. Mr. Madon referring to the provisions of Section 19(2) of the Sale of Goods Act would contend that the petitioner cannot claim any lien on the goods which were sold by the respondents to the applicant and bonafide purchased by the applicant. Mr.Madon would submit that even assuming that there is a lien on these goods in favour of the petitioner, there is waiver of lien on the part of petitioner. Mr. Madon referring to Clause 2.1.7 of the Franchise Agreement would contend that even if it is assumed that the respondent is not the owner of the goods, however, by virtue of section 27 of the Sale of Goods Act, the petitioner cannot exercise any right of lien. Mr. Madon would next contend that the contention of the petitioner that the petitioner had a lien on these goods is also contrary to the provisions of Sections 30(2), 46 and 49 of the Sale of Goods Act when admittedly the petitioner had parted with the possession of the goods. It is contended that these provisions clearly recognize the applicant's rights in respect

of the said goods. In support of his contention, Mr. Madon has placed reliance on the decision of the Single Judge of this Court in JRY Investments Private Ltd. vs. Deccan Leafine Services Ltd. & Ors., 2003 SCC Online Bom 1134 and the decision of the Division Bench of the Delhi High Court in Delhi International Airport P. Ltd. vs. Union of India & Ors. 2017 SCC Online Del 7021

25. Mr.Vashi, learned senior counsel for respondent nos.1 and 3 has made the following submissions:-

(i) It is submitted that there is suppression of MOU dated 19 July 2018 which was entered between the petitioner and respondent no.1 for the period 2018-2019, which was to remain valid for one year from 1 April 2018 to 31 March 2019. It is his contention that once this agreement had expired the petitioner would not have contended that there is any sale made after the expiry of this agreement and there can be any unpaid price for the said goods.

(ii) It is submitted that this MOU has been suppressed by the petitioner in obtaining the ex-parte ad-interim orders. It is contended that for the year 2019-2020 a fresh memorandum of understanding dated 9 May 2019 was signed whereunder respondent no.1 had agreed to purchase various steel products quantity of which is 786 metric tonnes. It is contended that both these MOUs do not have any arbitration agreement and thus the petition itself is not maintainable.

(iii) The purchases undertaken under the MOU dated 9 May 2019 also cannot be the subject matter of the present proceedings in the absence of any arbitration agreement. Mr.Vashi would refer to the reply affidavit as filed to the petition of Mr.Akshay Jain dated 7 September 2019 to contend that the Franchise agreement dated 1 July 2018 is executed on a stamp paper dated 14 September 2018 and stated by the petitioner to be executed on 22 September 2018. It is submitted that even the signatures on behalf of the petitioner are not existing on the copy which is annexed to the petition and therefore, all these considerations are imperative for the Court to disbelieve this document and consider granting any discretionary reliefs. It is his contention that the franchise agreement is not acted upon inasmuch as as provided in Clause 2.1.1 an amount of Rs.10 lakhs was never paid by respondent no.1 to the petitioner/franchiser. Mr.Vashi would accordingly submit that there is no case made out for grant of any ad-interim relief. In support of his contention Mr.Vashi has relied upon the decision of the Supreme Court in S.P.Chengalvaraya Naidu (Dead) By Lrs vs. Jagannath (Dead) by Lrs & Ors. (1994)1 SCC 1, to contend that the ex-parte order is obtained by the petitioner by playing fraud on the Court and by suppressing the documents and therefore, would not be entitled to any relief.

26. Mr.Kamdar, learned senior Counsel for the petitioner in support of the ex-parte order passed by this Court and opposing the notice of motion filed by the applicants, has made the following submissions:-

(i) It is submitted that there is no suppression of any of the relevant documents.

It is submitted that the franchise agreement was acted upon which is clear from the fact that respondent no.1 had opened a JSW Shopee as per the franchise agreement which is not disputed by respondent no.1. It is submitted that by the memorandum of understanding dated 19 July 2018 the financial year 2018-19 is not relevant as the MOU pertains to an incentive which is being offered by the petitioner to the respondents, as clear from the various clauses of the MOU. It is submitted that the sales are actually being undertaken under the franchise agreement and the incentives and additional incentives are governed by the MOU for the financial year 2018-19 as also there was a subsequent MOU for the period 2019-2020.

(ii) Referring to various clauses of the MOU's, it is stated that it is totally misconceived and untenable for the respondents to contend that the MOUs are relevant or there is suppression of MOUs, as they are irrelevant in so far as the amounts which are due and payable by respondent nos. 1 and 3 to the petitioner, under the sales which had taken place under the franchise agreement.

(iii) Mr.Kamdar has referred to the franchise agreement and various clauses therein, to contend that the petitioner has a lien on the goods as agreed between the parties in Clause 12 thereof, on goods which are sold under the franchise agreement and for recovery of price of the said goods.

(iv) It is submitted that right of lien is required to be recognized under the Sale of goods Act as also under the provisions of the Contract Act. In this regard Mr.Kamdar would refer to the provisions of Section 13, 14, 19, 25 and 62 of the Sale of Goods Act as also the provisions of Section 171 of the Indian Contract Act.

(v) It is thus contended that the petitioner's claim is under the franchise agreement under which the petitioner has a lien on the goods. Mr.Kamdar would submit that the contention as urged on behalf of the applicant that there is waiver of the lien, is untenable. It is his submission that lien would continue to exist under the franchise agreement, and not only when the goods are sold but till the purchasers make payment of the price. Mr.Kamdar has contended that there cannot be a question of any waiver of right by the petitioner till the price is paid, as the right to recover the price would accrue only after the goods are sold and till the goods are sold, the right remains a prospective right to sale the goods. It is his contention that only when the goods are sold, the new right to recover amounts would accrue. In support of his contention Mr.Kamadar has placed reliance on the decision of the Supreme Court in Sikkim Subba Associates Vs. State of Sikkim (2001)5 SCC 629.

(vi) It is contended that respondent nos.1 and 3 had no right to sell the goods till the price of the goods was paid by the respondents to the petitioner, and this becomes relevant considering the provisions of Section 25 of the Sale of Goods Act which would restrict the right of respondent no.1 to sell the goods and further Clause 12.1 under which the petitioner and respondents have agreed on the petitioner's lien on the goods.

(vii) Mr.Kamdar referring to the provisions of Section 62 of the Sale of Goods Act would contend that it recognizes the right to lien contrary to Section 47. He has accordingly made submissions referring to the provisions of Section 19, 25 and 62 of the Sale of Goods Act, as to what would be the purport of the provisions as applicable to the facts of the present case.

(viii) It is submitted that it is open to a party to make a contract differently. This principle is well recognized as can be seen from the decision of the Supreme Court in *Contship Container Lines Ltd. Vs. D.K.Lall & Ors.* (2010)4 SCC 256. It is thus his submission that the contract is accordingly required to be understood in the manner it is executed and recognized in law and in the manner as suggested by him. It is his submission that if this position is recognized then the provisions of Section 47 and 49 are not applicable.

(ix) Mr.Kamdar submits that the applicant cannot contend that he is a bonafide purchaser without notice. It is contended that Mr.Rajaram Gurav who is acting on behalf of the applicant is deemed to have knowledge of the franchise agreement. It is thus contended that respondent nos.1, 2 and 3 have inter se transactions and they are in fact one entity and have adopted this modus operandi to create third party rights with an intention to defeat the rights of the petitioner so as to deprive the petitioner of the amounts due and payable to it for sale of the goods. In this context Mr.Kamdar has referred to the pleadings on record and more particularly affidavit of Mr.Bijoy Jose. It is contended that the petitioner has fairly permitted release of those goods which were not part of 'Exhibit B'. It is submitted that there is no manner of doubt and there is clear admission of liability as seen from the messages as exchanged between the representative of respondent no.1 and that of the petitioner.

(x) Mr.Kamdar in support of his submission relies on the decisions in *Arunima Baruah Vs. Union of India & Ors.* (2007)6 SCC 120; *MRF Ltd. Vs. Manohar Parrikar & Ors.* (2010)11 SCC 374; *Royal British Bank Vs. Turquand* (1843-60) ALL E.R. Rep.435; *Sitaram Bindraban vs. Chranjilal Brijlal & Ors.* AIR 1958 Bom 291; *Shashikala Devi Vs. Central Bank of India & ors.* (2014)16 SCC 260; *Suchetan Exports Pvt.Ltd. Vs. Gupta Coal India Ltd. & Ors.* (2011)13 SCC 83; *Consolidated Coffee Ltd. & Anr. Vs. Coffee Board, Bangalore & Ors.* (1980)3 SCC 358.

27. Mr.Madon, learned senior Counsel for the applicant in rejoinder would submit that the contention as urged on behalf of the petitioner on the non waiver of the rights of the petitioner, cannot be accepted. In this context he has referred to the provisions of Sections 14 and 27 of the Sale of Goods Act. It is next submitted that the petitioner has no reply to the documents as placed on record on behalf of the applicant that the goods are purchased as also GST amounts are paid which would show that these are bonfide transactions. It is submitted that the applicant has no concern whatsoever either with the petitioner or the respondents except for the transactions which are entered into and for which consideration was paid by the applicant to the respondents to purchase the

goods in question. Mr.Madon would accordingly submits that none of the contentions as urged on behalf of the petitioner and on behalf of respondent no.1 can affect the legal rights of the applicant to the goods which are lawfully purchased by the applicant.

Reasons and Conclusion

28. Having heard the learned senior counsel for the parties and having perused the record, the question which arises for determination in this Notice of Motion is as to whether the applicant who is a third party to the dispute between the petitioner and respondent no. 1 would be entitled to the release of the goods as claimed, which are sealed by the Court Receiver in pursuance of the exparte order dated 23 August 2019 passed by this Court. The adjudication of this motion would involve consideration of the inter se rights between the petitioner and the respondents, on one hand, under the franchise agreement and on the other hand, rights of the applicant who state to have independently purchased the goods from the respondents.

29. Some relevant facts are required to be noted. Although the respondents pointing out discrepancies on the document of the Franchise Agreement dated 1 July 2018, entered between the petitioner and the respondents, it appears from record that the said agreement was acted upon. This for the reason that it is not in dispute that the respondents have purchased the goods from the petitioner during the relevant period and the respondent no. 1 also established a "JSW Shoppe". It also appears that though this Franchise Agreement was entered on 1 July 2018 but it was executed on 22 September 2018 on stamp paper dated 14 September 2018.

The term of the agreement is for a period of 5 years from the date of execution as provided in Clause 1.2 of Franchise Agreement. Further a duly executed document by the respondent is also produced for perusal of the Court. In my opinion these discrepancies would not matter in view of a duly executed agreement being available and when the said agreement was acted upon. It also appears that the petitioner has entered into a Memorandum of Understanding dated 19 July 2018 with the respondents for the F.Y. 2018-19 which was for a period from 1 April 2018 to 31 March 2019 and a subsequent MOU for the year 2019-20 was arrived at on 9 May 2019 for a total MOU quantity of 78000 metric tons (MT). From the perusal of the conditions in these MOUs it is clear that these are in the nature of incentives which are offered by the petitioner on the sales which would take place under the Franchise Agreement.

30. The arbitration agreement between the parties is contained in the Franchise Agreement as provided for in Clause no. 7.2 and 7.2.1. As the sale of goods between the petitioner and respondents had taken place under the Franchise Agreement, it cannot be accepted that this petition under section 9 is not maintainable, as there is clearly an arbitration agreement between the parties. It also appears that the MOU may not be of relevance when the actual sale

transaction are required to be considered. The contention as urged by Mr. Vashi, learned senior counsel for respondent nos. 1 and 3 that the non-disclosure of the MOU is required to be considered as a material suppression, in my opinion, cannot be accepted considering the non-relevancy of the MOU. Mr. Vashi's contention that the dispute is required to be seen only in the context of MOU which has no arbitration agreement, also cannot be accepted to non-suit the petitioner. In my opinion, prima facie, there is sufficient material to indicate that the Franchise Agreement was acted upon between the petitioner and respondents and the sales were undertaken under the Franchise Agreement, the validity of which was for a period of 5 years w.e.f. 22 September 2018. Thus, in my opinion, though it is well settled that suppression would defeat the entitlement to any discretionary relief as seen from the decision as cited by Mr. Vashi, in the facts of the present case, the principle as laid down in the said decision would not be applicable, as the MOU's are not that relevant, so that by non-disclosure of the same the petitioner is deriving any unfair benefit or advantage to itself, to the prejudice of the respondents.

31. In the context of the reliefs as prayed by the applicant, some clauses of the Franchise Agreement are required to be noted as also referred by the learned senior counsel for the parties. These clauses are:

1.1 The Franchisor hereby appoints the Franchisee as its non exclusive Franchisee on the terms and conditions stated herein to handle, store sell the products of the Franchisor from JSW SHOPPE and the Franchisee accepts the appointment under this agreement.

1.2 Unless otherwise terminated in accordance with clause 5, the terms of appointment of the franchisee shall commence from date of execution of this agreement and shall remain in force for a period of Five (5) years subject to the performance by the Franchisee of the obligation as stimulated in this agreement. At the discretion of the franchisor, the terms of this agreement may be extended to such further period on such terms and condition as may be decided then by the franchisor, which shall be communicated in writing to franchisee.

1.3 The Franchisee recognizes and acknowledges that the Franchisor has a right to appoint any distributor, stockiest, consignment, agents, selling agents, and dealer at any time in territory as mutually agreed between the parties for its products.

1.4 The Franchisee shall not sub-franchise and shall not appoint any sub-franchisee without written approval from the Franchisor.

1.5 The Franchisee shall not be deemed to be the Sole Selling Dealer within the meaning of Section 294 of the Companies Act, 1956. The Franchisee acknowledges that it will not have the status of an agent as provided under section 182 of the Indian Contract Act, 1872 or any modification thereof. The Agreement between the Franchisor and the Franchisee will be on a principal-to-principal basis only.

2. FRANCHISEE OBLIGATIONS

2.1.7 The Franchisee shall keep the provisions of this Agreement and all information disclosed to it concerning the Franchisor confidential and the Franchisor's assets and businesses and not otherwise publicly available information shall be kept confidential and shall not be disclosed by the Franchisee without prior written consent of the Franchisor, unless otherwise required by law.

2.2 Installation and Maintenance

2.2.1 The JSW SHOPPE showroom shall be as per designs, specifications and model provided by the Franchisor. Any deviation in the area required for the JSW SHOPPE will be at absolute discretion of the Franchisor.

2.2.2 The Franchisee shall be responsible for identifying the premises for opening the JSW SHOPPE. The JSW SHOPPE premises shall be finalized by the Franchisee in consultation with the Regional and Head Office marketing team of the Franchisor.

2.2.5 The Franchisee shall bear all the maintenance charges for the JSW SHOPPE.

2.2.6 The Franchisee shall maintain the JSW SHOPPE and all aspects (interior or exterior) in good condition and should not temper with the standardized layout during the terms of this agreement.

2.2.7 The Franchisee shall have some or all of the following elements as advised by the Franchisor - Products Presentation Table, Cash Counter, Cash Bank Counter, Brochure display, Graphic Signage's (value Panels), Cash back logo, Front facade, LCD, DVD, Products display table "A". Products display table "B", Graphic Panels above table "A" computer with internet facility and landline telephone connectivity.

2.2.8 The Franchisor reserved the right to alter/change any design or display parameters pertaining to JSW SHOPPE interior or exterior in time with market requirements.

3. PRICING, INVOICE AND PAYMENT TERM

3.1 The Franchisee shall sell all the Franchisor's product range provided in the JSW SHOPPE at the maximum retail price as and when fixed and communicated by the Franchisor to the Franchisee.

3.2 At the time dispatch, the Franchisor shall raise its invoice for supply of products on the Franchisee, which shall be dispatched along with other related documents at the time of delivery of the Products to the Franchisee. In case of any discrepancy in the invoice or quality of quantity, then the Franchisee shall within three (3) working days intimate in writing to the Franchisor, failing which, the amount due under the invoices shall be deemed to have been accepted for payment.

3.3 All payments under such of the invoice shall be made within the period determined by the Policy of the Franchisor to be announced from time to time from the date of the invoices, by way of cheques payable at par or by demand draft drawn in favor of the Franchisor. In the event of delay in payments beyond stipulated period, then the Franchisee shall pay simple interest at the rate of eighteen percent (18%) per annum from the date of when the payment was due until the actual payment and/or realization on the outstanding payments to the Franchisor.

3.4 All payments to the Franchisor under this Agreement shall be exclusive of sales, value added, service, consumption tax or taxes or similar nature, which shall be paid for or reimbursed by the Franchisee at the applicable rates.

12. RIGHT OF LIEN

12.1 Although the risk in the Products passes to the Franchisee from the date of dispatch of the product to the carrier and delivery being taken by the Franchisee. The title to the Products shall pass to the Franchisee only upon receipt of invoice amount by the Franchisor.

12.2 The Franchisor shall have lien on the Products so delivered to the extent of unpaid purchase price of Products and the Franchisor shall be entitled to exercise the lien to recover the unpaid purchase price by taking back the Products and shall be entitled to sell the same to some other dealer and adjust the sum so realized against the unpaid purchase price. This right is without prejudice to the Franchisor's other rights and remedies to recover the outstanding dues and / or other dues and / or the differential price of the Product.

13. SURVIVAL OF PROVISIONS

13.1 Provisions under Clause 2.1.7 (Confidentiality), Clause 4A (Indemnity), Clause 6.1 (Communication and Notices), Clause 7.1 (Settlement and Disputes), Clause 7.2 (Arbitration), 7.3 (Governing Law), Clause 12 (Right of Lien) and such other provisions which by their nature would survive shall survive termination of this Agreement."

32. The claim of the petitioner against the respondents as seen from the averments as made in the arbitration petition is in respect of goods sold by the petitioner to the respondents, the details of which are set out in Exhibit B to the arbitration petition. Perusal of Exhibit B are the sale transactions as stated by the petitioner to have taken place from 28 April 2019 to 21 June 2019. It has also transpired that during the pendency of this Motion, certain goods which were sealed by the Court receiver and which were not part of Exhibit B, already stand released in favour of the applicant and the applicant is now making a claim for about 60 HR coils which are part of Exhibit B and which according to the applicant are sold by the respondents to the applicant. The applicant contends that in respect of these 60 HR coils, the petitioner cannot have any claim. By this gesture, the petitioner has recognized that there were valid sales by the

respondents in favour of the applicant qua these goods which were now being separated and/or agreed to be released by the petitioner on their description not being available in Exhibit B to the petitioner. What is material is that the position of the goods which were agreed to be released by the petitioner and the goods which have continued to remain sealed, is not different, as both the sets of goods are purchased by the applicant under similar and/or identical documents. Merely because some of these goods did not form part of the list at Exhibit B to the petition, the petitioner agreed to release the same, whereas some still continue to remain sealed, although purchased under valid and similar documents. Mr. Madon would accordingly contend that the petitioner cannot dispute the sale transactions in all these goods which are similar in nature and which are conclusive between the respondents and the applicant.

33. As seen from the submissions as noted above, Mr. Madon, learned senior counsel for the applicant has contended that the applicant has independent rights once these goods are sold to the applicant by the respondents and nothing contained in the Franchise Agreement can affect the rights of the applicant, who is a bonafide purchaser for value without any notice of the agreement entered between the petitioner and the respondents (Franchise Agreement). The basis on this contention is that these are valid purchase transactions for which finance was raised by the applicant from Union Bank of India and that full amount/consideration is paid qua these purchases to the respondents, as also the tax (GST) is paid and GST returns are also filed. Mr. Madon's submission is that the applicant has an unimpeachable right in law over these goods, as claimed and entitlement to these goods.

34. Per contra, Mr. Kamdar as noted above has submitted that considering the terms and conditions of the Franchise Agreement, the applicant cannot claim any absolute rights in respect of these goods and the rights of the petitioner to recover the unpaid price of the goods is required to be recognized considering the provisions of Franchise Agreement and the relevant provisions as would be applicable under the Sale of Goods Act, 1930 read with the provisions of the Indian Contract Act, 1872.

35. Thus the question is whether the applicant would be entitled to the release of goods as claimed, which are sealed by the Court receiver

36. It would be necessary to note the relevant provisions of the Sale of Goods Act as also referred on behalf of the parties. Section 14 of the Sale of Goods Act provides for implied undertaking as to the title, in case of Sale and Agreement to sell as also the implied warranty of quiet possession of the goods by the buyer and of the goods to be free from any charge or encumbrances in favour of the third party, not declared or known to the buyer before or at the time when the contract is made. Section 19 provides that when there is contract of sale of ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and to ascertain the intention of the parties, regard shall be had to the terms of the contract, the

conduct of the parties and the circumstances of the case. Section 25 pertains to reservation of right of disposal by the seller until certain terms are fulfilled. Section 27 provides for sale by a person who is not the owner and provides that the buyer acquires no better title to the goods than the seller had, unless the owner of the goods by his conduct precluded from denying the seller's authority to sell. Section 30 provides for a seller or buyer in possession of the goods after sale. In the present context, sub-section (2) provides that where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer of the goods by that person, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the effect, as if such lien or right did not exist. Section 45 defines as to when a seller can be a "Unpaid Seller". Section 46 provides for right of the unpaid seller. Section 47 provides for the unpaid seller's lien who is in possession of the goods and his entitlement to retain possession of them until payment or tender of the price is made as provided in sub-section 1(a) to (c). Sub-section (2) of Section 47 provides for sellers right to exercise lien notwithstanding that he is in possession of the goods as an agent or bailee for the buyer. Section 49 provides as to when an unpaid seller of goods loses his lien thereof and accordingly, termination of lien of the unpaid sellers as set out in sub-section (1)(a) to (c) and sub-section (2). Section 62 provides for exclusion of implied terms and conditions under a contract of sale and provides that where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both parties to the contract. There is some argument advanced also on the provisions of Section 171 of the Contract Act on behalf of the petitioner.

37. For convenience, it would be desirable to note these provisions as the arguments as made on behalf of the parties revolve around the legal position as would emerge on the applicability of these provisions and the law in that regard. These provisions read thus:-

"SALE OF GOODS ACT, 1930

14. Implied undertaking as to title, etc.

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is -

- (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) an implied warranty that the goods shall be free from any charge or

encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

19. Property passes when intended to pass. -

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

25. Reservation of right of disposal. -

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange; and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

Explanation. - In this section, the expressions "railway" and "railway administration" shall have the meanings respectively assigned to them under the Indian Railways Act, 1890 (9 of 1890).

27. Sale by person not the owner.-

Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

30. Seller or buyer in possession after sale.-

(1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

45. "Unpaid seller" defined.-

(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act-

(a) when the whole of the price has not been paid or tendered;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

46. Unpaid seller's rights.-

(1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

Unpaid seller's lien

47. Seller's lien.-

(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-

(a) where the goods have been sold without any stipulation as to credit;

(b) where the goods have been sold on credit, but the term of credit has expired;

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

49. Termination of lien.-

(1) The unpaid seller of goods loses his lien thereon-

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) when the buyer or his agent lawfully obtains possession of the goods;

(c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

62. Exclusion of implied terms and conditions.-

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, or by usage, if the usage is such as to bind both parties to the contract."

THE INDIAN CONTRACT ACT, 1872

"171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers-

Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general

balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

38. Having noted the contractual provisions as also the relevant provisions of the Sale of Goods Act, at the outset it needs to be emphasised that here is a case where the seller-petitioner did not retain the possession of the goods. If this be so then the question for consideration is whether nonetheless any lien of the petitioner under Clause 12 of the contract can be said to exist.

39. Section 47 of the Act clearly provides that the lien of an unpaid seller of the goods, who is in possession of these goods, would be to retain possession until payment or tender of the price as provided for in sub-clauses (a), (b) and (c) or sub-section (2) of Section 47. In the present case even this statutory lien cannot be recognized as the petitioner has parted with the possession of the goods by making delivery of the goods to the respondents.

40. The legal position which would emerge is that once the goods having been delivered to the respondents and even assuming that the price/consideration had remain unpaid, the consequence as postulated by Section 49 of the Sale of Goods Act takes effect, namely that the petitioner-unpaid seller of goods, would lose its lien once the delivery of goods is effected to the respondents. More particularly when there is nothing on record to indicate that the petitioner had reserved its rights of disposal of the goods by the respondents/buyers. By delivery of possession, there is also an automatic consequence which would take place in terms of Section 49 of the Sale of Goods Act, namely that once these goods are delivered to the respondents, it would amount to petitioner waiving its rights under Clause 12 and its sub-clauses under the franchise agreement.

41. The above discussion is although on the principal contract between the petitioner and the respondents. However, in regard to the rights of the applicant in the notice of motion is concerned, the argument of Mr.Madon, is of the applicant being a bonafide purchaser of the goods without notice of such lien. Mr.Madon has contended that even assuming if any such lien of the petitioner existed, the same cannot be recognized and is of no legal effect in the facts of the case, in regard to the sale of the goods by the respondents as made to the applicant. This inasmuch as the franchise agreement itself prohibits the respondents to disclose any information to any third party. Clause 2.1.7 of the franchise agreement as noted above created an obligation on the respondents/franchisee to keep the provisions of the agreement and all information concerning the franchiser, confidential and no information could have been disclosed without the written permission of the petitioner. There is much substance in these contentions of Mr. Madon. There is no material on record to indicate that the applicant was at any point of time aware, much less in a manner known to law, of the terms and conditions of the franchise agreement and more particularly the right of lien. Apart from the fact that the applicant was not aware of any right of lien existing in favour of the petitioner, which in fact is

none however by the very clause in the agreement, the applicant was not supposed to know any rights in respect of the goods which are purchased by the applicant from the respondents, for which valuable consideration was parted and accounted for and even taxes paid thereon.

42. Even Section 25 of Sale of Goods Act which provides for reservation of the right of disposal of goods cannot come to the aid of the petitioner. On a holistic consideration of the facts and circumstances and the documents on record, in my opinion, it cannot be accepted that the petitioner reserved any right of disposal of the goods at the hands of the buyer (respondents) as per Clause 12 of the Franchise Agreement. The Court cannot be oblivious to the trade practices and commercial intention of the parties as placed on record in extenso. On the basis of these very trade practices and invoices and other documents, the petitioner itself agreed to release 66 of the sealed goods.

43. In the peculiar facts of the case, the petitioner intended that the purchaser of the goods from the respondent would be prevented from having any knowledge of the franchise agreement and that such purchaser would remain totally unconnected with the contractual arrangement under the Franchise Agreement entered between the petitioner and the respondent. Moreover, proviso to Section 27 will recognize such a sale in favour of the applicant in the ordinary course of business. Also this is a case where the petitioner has not demonstrated any fraud on the part of the applicant.

44. Mr. Madon , learned senior counsel for the applicant would be correct in relying on the decision of learned Single Judge of this Court in JRY Investments Pvt. Ltd.(supra) to support his argument of the applicant being a bonafide purchaser without notice. In this case, the Court considering the provisions of Section 27 of the Sale of Goods Act and taking a review of the law, made the following observations in paragraphs 36 to 41 of the judgment:

36. Mr. Tulzapurkar, learned counsel for the plaintiffs submitted that the sale of the shares by defendant No. 1 was not a sale by the owner of the shares. It is not possible to accept the contention of Mr. Tulzapurkar, learned counsel for the plaintiffs that the plaintiffs not having conveyed any title in the shares to defendant No. 1, the purchasers from defendant No. 1 acquired no better title to the goods than the seller as provided by Section 27 of the Sale of Goods Act, 1930. As observed earlier, the plaintiffs did not create a pledge and indeed transferred title in the shares to defendant No. 1. Therefore, it cannot be said that the sale by defendant No. 1 of the shares is sale by a person who is not an owner thereof.

37. Assuming for the sake of argument that the plaintiffs did not convey title in the shares to defendant No. 1, it does not ipso facto lead to the conclusion that defendants Nos. 18, 14 and 35 who purchased shares from defendant No. 1 could not get any title in the shares. There are certain exception to the rules that no person can pass a better title to another than he himself possesses. The law

acknowledges cases when a person having no title to the property may acquire and pass good title to a bona fide purchaser for a value without any knowledge or by virtue of any defect in the title of the person conveying the same. The Calcutta High Court has set out these classes of cases in *Smt. Sumitra Debi Jalan v. Satya Narayan Prahladka*, wherein the Calcutta High Court observed in paragraph 47 as follows (page 362):

"47. In this case it has been clearly established on evidence that title to shares such as the shares in suit passes from hand to hand freely by delivery with blank transfer deeds duly signed by the registered holders. There is evidence also that the purchasers could not have found out if there were any defect in title to these shares at the time of purchase and thus in my opinion these shares are negotiable according to the law merchant, custom and/or practice of the Calcutta Stock Exchange. No doubt under the Sale of Goods Act 'shares' are goods but that do not preclude them from being negotiable according to custom, practice or the law merchant."

38. The Calcutta High Court has further observed in paragraphs 48 and 49 as follows (page 362):

"48. There may arise cases also when the true owner may be estopped from asserting his title against a bona fide purchaser for value without notice of any defect in title although from whom such bona fide purchaser acquires such title has no title to pass: Section 27 of the Sale of Goods Act.

49. The principle of bona fide purchaser for value without notice acquiring a good title although the person conveying the same had no title had further been extended and recognised on the ground of mercantile convenience."

39. In the present case, it is clear that the other defendants had no reason to suspect that there was any defect in title of defendant No. 1 particularly since the shares stood in the name of defendant No. 1 as beneficial owner upon transfer by the plaintiffs. These circumstances of the shares standing in the name of defendant No. 1 as beneficial owner of the shares in the records of the depository participant was clearly attributed to the act of plaintiff in transferring the shares instead of creating a pledge in accordance with the Depositories Act. The other defendants obviously had no notice of any defect in title of defendant No. 1, assuming there was, and they must therefore be taken to be bona fide purchasers without notice. Therefore, it would be appropriate in the interest of justice to hold, assuming that defendant No. 1 did not get title to the shares that the true owner, i.e., the plaintiffs must be taken to be estopped from asserting its title against bona fide purchasers for value without notice of any defect in the title. This situation is certainly brought about by the conduct of the plaintiffs who had transferred the shares and not created a pledge. It must be noted that the plaintiffs have pleaded that they have been defrauded by defendant No. 1 in that defendant No. 1 has obtained the shares and has not advanced the loan to the plaintiffs. Since the plaintiffs admit that they did not write any letter demanding

a loan as contemplated by Clause 24 of the loan agreement, it is difficult to see any case of fraud on the part of defendant No. 1. As observed earlier, defendant No. 1 claims to be ready and willing to disburse the loan and in any case the correspondence between the plaintiffs and the defendants does not contain a whisper that defendant No. 1 has committed a fraud. Even in the case of fraud, the Supreme Court has made the following observations in regard to the status of innocent purchasers in *Central National Bank Ltd. v. United Industrial Bank Ltd.*, . In paragraph 10, the Supreme Court observed as under (page 184):

"If an innocent purchaser or pledgee obtains goods from the person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the rights of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined it is sufficient to enable him to create title in favour of an innocent transferee for value without notice. This proposition is well recognised in English law and seems to us to be well founded on principle. In *Cahn v. Pockett's Bristol Channel Steam Packet Co.* [1899] 1 QB 643 (CA) at page 659(A) Collins LJ, made the following oft quoted observation:

'However fraudulent a person in actual custody may have been, in obtaining the possession, provided it does not amount to larceny by trick and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can, by his disposition, give a good title to the purchaser.'

40. Their Lordships have observed that the position would be different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person such as a case where A obtains possession of goods from the owner by falsely representing himself to be B. Such is clearly not a case here.

41. In an early case, this court in *Fazal D. Allana v. Mangaldas M. Pakvasa*, AIR 1922 Bom 303, 311, this court observed as follows:

"Where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a bona fide purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser."

45. It is significant to refer to the provisions of Section 30 and the consequences which in full force are applicable to the facts of the case. Sub-section (2) of Section 30 clearly provides for a situation in which the applicant in the present case would stand, namely the applicant, being a person who has brought these goods with the consent of the seller (respondents) and is in possession of the

goods or the documents of title to the goods and receiving the same in good faith without any notice of any lien or other right of the original seller qua the goods. It would be thus deemed that by virtue of sub-section (2) of Section 30 such a lien of the original seller (petitioner) did not exist.

46. In my opinion, the sale of the goods in question in favour of the applicant by the respondent, as the facts stand would have a legal sanctity also considering the provisions of Section 62 of the Sale of Goods Act which recognises any right, duty or liability arising under a contract of sale by implication of law, which can be negated or varied either by express agreement or by course of dealing between the parties or by usage.

47. The case as pleaded by the petitioner if accepted is likely to create a chaos, as in that event, the Court would be discarding the established trade practice culminating into conclusive sale of goods in favour of third parties like the applicant, who had paid full price for the goods, and cause an irreparable injury and damage to such a purchaser. Hence to accept the argument of Mr. Kamdar to continue to detain the goods of the applicant would lead to disastrous commercial consequences for the applicant and add to the prejudice already caused due to the sealing of the goods. It also appears from the record that the petitioner in relation to the agreement in question even in the past had not recognized any embargo on the respondents rights to sell the goods to third parties, which appears to be a usual trade practice.

48. I am afraid that the provisions of Section 171 can be made applicable in the facts of the case, to deny the applicant his lawful entitlement to the goods delivered to the applicant in the normal course of business by the respondent. The decision of the Supreme Court in Board of Trustees of the Port of Bombay & Ors. vs. Sriyanesh Knitters (1999) 7 SCC 359 in my opinion is clearly not applicable in the facts of the case. Moreover, the entire complexion of applicability of the provisions of Section 171 of the Contract Act changes when the goods of the unpaid seller are bonafide purchased by third party like the applicant and such rights in favour of a bonafide purchaser being clearly recognized by sub-section (2) of Section 30 of the Sale of Goods Act read with the provisions of Section 47 and 49 of the Sale of Goods Act, which clearly provides that unpaid seller of goods loses his lien when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods or when the buyer or his agent lawfully obtains possession of the goods or by waiver thereof.

49. The decision in Suchetan Exports Pvt. Ltd. (supra) was a case of a High Seas sale agreement. The Court held that determination of lien over goods for which part of sale consideration has been paid would depend upon the terms of agreement and in the facts of the case. It was held that delivery of goods to stevedore cannot be held to mean that the title and ownership of the goods passed over to the buyer and that the lien over the goods stood terminated. It is in this context, the Court made observation in paragraph 19 that the "terms of

the High Seas sales agreement appear to indicate that till the entire sale price was paid by the petitioner to respondent no. 1, and respondent no. 1 would retain its lien over the coal in question and title would also pass to the petitioner on payment of the full price of the goods".

50. Even the decision in *Rasiklal Kantilal and Company vs. Board of Trustee of Port of Bombay & Ors.* (2017) 11 SCC 1, would not be applicable to the facts of the case where the question was whether the issue was on a claim to demurrage charges for the period anterior to the appellant's acquisition to the title of the goods and whether the appellant was entitled to remission of the amount towards demurrage. It is in this context, the Court has made observations as contained in paragraph 58, observing as to what Section 171 would mean in recognizing the right of lien of the categories of persons as recognized by the said provision.

51. Mr. Madon would also be correct in referring to the decision of Division Bench of Delhi High in *Delhi International Airport P. Ltd.* (supra) to contend as to what would be the position of the person dealing with a franchise even assuming that such a person who is a third party is aware about the Franchise Agreement. The Court in paragraph 58 of the said decision had observed as under:

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor."

52. There are some decisions cited on behalf of the parties, which I do not intend to discuss, as the propositions canvassed by these decisions are well settled, however, the same are not only applicable to the facts of the case and a reference to the same would be wholly academic in view of my above observations.

53. Having considered the record and the position in law, I am convinced to hold that the case of the applicant that the goods as claimed by the applicant to be bonafide purchased by them, being wrongfully sealed is required to be accepted. In my opinion, the petitioner has attempted to create a confusion by referring to some discrepancies in coil numbers etc. However, on prima facie consideration of the documents of title to the goods coupled with other documents of delivery, GST payment etc. as pointed out on behalf of the applicant and respondent no. 1, would clearly indicate that not only the respondents but also the warehouse keepers and cutters have recognized the ownership of these goods to be of applicant. Even otherwise the material as relied upon by Mr. Kamdar learned senior counsel for the petitioner to contend that the sealed goods as claimed by the applicant belonged to the petitioner is substantially vague and weak. The

contention of Mr. Kamdar in merely pointing out discrepancies in the coil numbers do not inspire any confidence to hold that these goods as claimed by the applicant belong to the petitioner.

54. In the aforesaid circumstances, Notice of Motion filed by the applicant would require to be allowed. It is accordingly allowed in terms of prayer clauses (a) & (b) which reads thus:

"a) That this Hon'ble Court be pleased to pass necessary orders and/or directions directing the learned Court Receiver, High Court, Bombay to forthwith release/de-seal the goods of the applicant/Non-party respondent as described in Exhibit "A" hereto and handover possession thereof back to the applicant/non-party respondent;

b) That this Hon'ble Court be pleased to pass necessary orders and/or directions vacating the order dated 23 August 2019 to the extent of the goods of the applicant/non party respondent as described in Exhibit "A" hereto;"

55. The Receiver who is present in the Court is directed to forthwith take further consequential steps to give effect to this order.

56. Disposed of in the above terms. No costs.

57. At this stage learned Counsel for the Petitioner seeks stay of this Order. Mr. Madon learned Counsel for the Applicant has vehemently opposed the prayer and has submitted that the Applicant has already suffered substantial losses.

58. Having regard to the observations as made in the foregoing paragraphs, in my opinion, the request for stay ought not to be accepted. It is accordingly rejected.