

CASE NO.:
Appeal (civil) 1427 of 2004

PETITIONER:
National Aluminium Co. Ltd.

RESPONDENT:
Gerald Metals SA

DATE OF JUDGMENT: 27/02/2004

BENCH:
N Santosh Hegde & B P Singh.

JUDGMENT:
J U D G M E N T

(Arising out of SLP(C)No.3202 of 2004)

SANTOSH HEGDE, J.

Heard learned counsel for the parties.

Leave granted.

This appeal arises out of a dispute between the parties to this appeal which under an agreement between the parties has to be referred to arbitration as contemplated under Clause 26 of the agreement between the parties.

Pending disposal of the said dispute by the arbitrators the respondent herein moved an application under section 9(d) of the Arbitration and Conciliation Act, 1996 praying for the grant of ex parte injunction restraining the appellant herein from transferring or alienating the earmarked alumina lying in the appellant's Silos in Vishakapatnam Port area to any party other than the respondent herein.

The said application was opposed by the appellant herein on various legal and factual grounds including the maintainability of the application as also the jurisdiction of the trial court to make any interim order under the said provision of the Act.

The trial court after hearing the parties however considered it appropriate to make the following interim order :

"In the result, the application is allowed and the respondent shall allow the despatch of cargo to the petitioner immediately on payment of original price to the respondent, and on providing bank guarantee for the difference of price agreed between the petitioner and the respondent and the price on which Alumina is being sold in the international market at the latest, and the security shall lie with the court and the party that wins in arbitral proceedings shall take it after disposal of arbitral proceedings basing on the direction given therein. The petitioner is ordered accordingly."

An appeal filed by the respondent against the said order of the trial court under section 37 of the 1996 Act before the High Court of Judicature Andhra Pradesh at Hyderabad came to be rejected. While doing so the High Court slightly modified the

order of the trial court in the following terms :

- "1) The Gerald Metals shall be permitted to lift 33,300 MT +/- 5% of Alumina on payment of agreed rates,
- 2) That in addition to agreed rates, the Gerald Metals shall also give a bank guarantee of an amount which is the difference between the agreed rate and the rate of US \$ 430 per MT of Alumina in favour of NALCO. The bank guarantee shall be furnished before the Registrar (Judicial) of this Court to avoid delay in the matter who shall transmit it to NALCO.
- 3) The bank guarantee shall be encashable by NALCO if they succeed in the arbitration.
- 4) No order as to costs."

In this appeal various grounds both legal and factual have been raised by the parties to this appeal in their pleadings as well as the arguments addressed on behalf of them.

We however on facts of this case think it unnecessary to go into those questions of fact and law even for the purpose of deciding this interlocutory application filed under section 9(3) of the Act which will ultimately be subject to the award that may be made in the arbitration proceedings. However we think it necessary that with a view to protect the interest of both the parties to make some modifications in the impugned order. We do so because of the fact that the claim of the respondent herein is yet to be decided by the arbitrators. However we notice by the impugned order the courts below have directed the compulsory sale of alumina which according to the appellant is their property to the respondent which the appellant contends cannot be done at an interlocutory stage because once their property is sold in the event of they succeeding before the arbitrator restoration of the property will become impossible. However we are not inclined to accept this argument because it is the case of the appellant themselves that they were ready and willing to sell the subject matter of dispute (the Alumina) for the best price in the market. Therefore the sale of the said goods by itself would not in any manner cause irreparable loss to the respondent. On the contrary, if the respondent is not allowed to purchase the said goods there is a possibility of it suffering comparatively a greater loss than that may be suffered by the appellant by directing it to sell the goods to the respondent. We however feel since as of today the appellant is the owner of the property if the respondent is interested in purchasing the same then without prejudice to the contentions of either party the appellant may be paid the value of the goods as was prevailing on the relevant date. Actually this is the purport of the orders of the two courts below by the said courts instead of directing payment of the market value of the goods have only directed the payment for the contractual value of the goods which is US \$ 430 per MT. However the courts below have directed the respondent to secure the difference in the value of the goods by directing the respondent to furnish a bank guarantee. While doing so the High Court has fixed the market value of the goods at US \$ 430 and directed the respondent to furnish a bank guarantee for the difference in the amount between the agreed rate and the rate of US \$ 430 per MT of the goods to be sold by the appellant to the respondent as per the terms of the agreement.

Having heard the arguments of the parties we are of the considered opinion if the respondent should be permitted to take possession of the goods at an interim stage which the appellant claims it has no right to, we think the appellant's interest should also be properly secured which can be done by

calling upon the respondent to pay to the appellant the value of Alumina which takes possession from the respondent @ US \$ 430 per MT before they take possession of the said goods.

There is a serious dispute between the parties in regard to the actual market value of the goods at the relevant date while the appellant contends that the same is US \$ 460.80 per MT. The respondent contends it is much less than that since we in this appeal do not want to go into that disputed question of fact and as an interim arrangement we direct the respondent to pay @ US \$ 430 per MT of the Alumina to be purchased by the respondents from the appellant because that is the figure tentatively fixed by the High Court. We further direct the respondent to furnish a bank guarantee for the balance amount of US \$ 31.80 per MT which the appellant claims to be the market value before taking delivery of the goods in question. The appellant will file an undertaking in this Court that in the event of the arbitration award fixing a price less than what is fixed by us or making the appellant liable to pay any sum that may become liable to pay, assuring this Court to make due payment, the same shall be paid in terms of the award within the time to be stipulated in the award if any, within 3 months from the date of the award with interest, if so awarded.

With the above modifications this appeal is disposed of.