

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 in the arguments addressed on behalf of them. On facts of this case, we think it unnecessary to go into these questions of fact and law even for the purpose of disposing of this appeal which we intend doing it on the grounds of equity and balance of convenience only. In that process, 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. But in the meanwhile if the respondent is not permitted to lift the goods in question it is likely to be put to great hardship. At the same time, if appellant is not allowed to collect the fair price of its goods it will be deprived of the monetary value of the goods. The rights of the parties to receive the goods and value payable will be ultimately decided by the arbitrators. Therefore, we think it appropriate that while the respondents should be permitted to take the goods, the appellants should be paid as an interim measure the present value of the goods. There seems to be some dispute with regard to the present value of the goods. Since both the parties have produced different valuation, we think it appropriate to fix the value of the goods as fixed by the High Court at US \$ 430 per MT. On that basis, we, in modification of the orders of the courts below, direct the appellant to permit the respondent to remove from their Silo at Vishakapatnam balance of quantity of Alumina agreed to be sold to the respondent on it receiving its value fixed by way of this interim order at the rate of US \$ 430 per MT. On receipt of such value from the respondent, appellant will start loading the goods not later than 7th March, 2004. In the meantime the parties will exchange necessary documents and also complete all procedural formalities for the purpose of loading and exporting the goods within the date stipulated hereinabove. However, the respondent apart from the interim value fixed by us will also furnish a bank guarantee to the satisfaction of the Registrar General of this Court for a sum equivalent to the difference in value as claimed by the appellant and value now fixed by us i.e. at the rate of US \$ 31.80 per MT within a week from today. [US \$ 460.80 \026 US \$ 430]

The appellant in turn, will give an undertaking signed by its authorised officer to this Court undertaking to pay all sums which may become payable by it under the award within 6 weeks from the same becoming payable. This undertaking shall be filed with the Registry of this Court within 4 weeks from today.

The above arrangement is interim in nature and is subject to the award that may be made in the arbitration proceedings.

We make it clear that we have not expressed any opinion on the legal arguments raised in this appeal nor on the factual issues except to the extent of the interim arrangement made hereinabove.

With the above modifications this appeal is disposed of.

JUDIS