

SUCHETAN EXPORTS P. LTD.

v.

GUPTA COAL INDIA LIMITED AND ORS.
(Special Leave Petition (C) No. 20100 of 2011)

AUGUST 02, 2011

[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER
SINGH NIJJAR, JJ.]

Contract – High Seas Sale Agreement – Respondent no.1/seller and Petitioner/purchaser entered into an Agreement for sale and purchase of 16,943 metric tonnes of South African Coal – Respondent no.1 delivered the entire consignment of 16,943 metric tones through Respondent no.3 to Respondent no.2 (the stevedore agent) for transmission to Petitioner – Respondent No.2 handed over 9,542.920 metric tonnes to the Petitioner – Balance quantity of coal amounting to 7400.082 metric tones remained with Respondent No.2 – Respondent no.1 raised High Seas Sales Invoice – Dispute between Respondent No.1 and Petitioner – Respondent No.1 filed Civil Suit, inter alia, for a declaration that the Petitioner had committed breach of contract and also claimed return of the balance quantity of coal, amounting to 7400.082 metric tonnes, lying with Respondent No.2 and for a decree against the Petitioner towards the balance payment of the 9,542.920 metric tonnes of coal delivered to it by Respondent No.2 – Respondent No.1 also claimed permanent injunction to restrain Respondent Nos.2 and 3 from handing over the balance amount of coal measuring 7400.082 metric tonnes lying with Respondent No.2, either to the Petitioner or to any other person – Respondent No.1 also prayed for an interim order in the same terms and also sought a direction in the form of a mandatory injunction to Respondent No.2 to hand over the balance coal to Respondent No.1 – On 9-2-2011, trial court passed an ex-parte order of injunction restraining

- A Respondent Nos.2 and 3 from handing over the custody of the balance coal weighing 7400.082 metric tonnes to any person and particularly to the Petitioner – Subsequently, by its order dated 16-4-2011, the trial court also allowed the application of Respondent No.1 for temporary injunction and
- B confirmed the ad-interim injunction granted earlier on 9-2-2011 – The trial court also passed an order of injunction in mandatory form directing Respondent No.2 to hand over the balance coal of 7400.082 metric tonnes in its possession to Respondent No.1 on payment of rent, if any, due from the said
- C Respondent – High Court modified the order of the trial court passed on 16-4-2011 by directing the Petitioner to deposit an amount of Rs.6,19,58,123/- in the Trial Court, within a period of six weeks and further directing that if such amount was deposited within a stipulated period by the Petitioner, the application for grant of temporary injunction filed by
- D Respondent no.1 shall stand dismissed – Held: Having entered into an agreement to purchase the coal in question it was upto the Petitioner to fulfill its obligation towards the payment of the price of the coal and to lift the same from the Stevedore/Respondent No.2, having particular regard to the
- E fact that the Agreement was a High Seas Sales Agreement which entails clearance of the goods from the vessel and its entrustment with the Stevedore which involved heavy costs per diem – Prima facie, the terms of the High Seas Sales Agreement appear to indicate that till the entire sale price was
- F paid by the Petitioner to Respondent No.1, Respondent No.1 would retain its lien over the coal in question and title would pass to the Petitioner only on payment of the full price of the goods – However, having regard to the fact that an opportunity had been given to the Petitioner to lift the said balance
- G quantity of coal on deposit of Rs. 6,19,58,123/- within the stipulated period of six weeks, the instant SLP is disposed of, by modifying the order of the High Court to the extent that in the event the Petitioner deposits the amount directed to be deposited by the High Court, after deduction of the price of
- H the coal already lifted by Respondent No.1 within a period of

four weeks, the Petitioner will be entitled to lift the remaining quantity of coal lying in the custody of Respondent No.2 – In default of such deposit, the order of the High Court, subject to the above modification, will continue in full force – Sale of Goods Act, 1930 – s.45(1)(a), s.46(1)(a) r/w s.47(1) and s.49(1)(a),(b) and (c) .

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 20100 of 2011.

From the Judgment & Order dated 06.06.2011 of the High Court of Judicature at Bombay, Nagpur Bench in Appeal from Order No. 53 of 2011.

Meenakshi Arora for the Petitioner.

Devashish Bharuka for the Respondents.

The Order of the Court was delivered by

ORDER

ALTAMAS KABIR, J. 1. This order is being passed at the stage of notice on the Special Leave Petition filed by Suchetan Exports P. Ltd., which was the Defendant No.1 in Special Civil Suit No.187 of 2011 filed by Gupta Coal India Limited, the Respondent No.1 herein.

2. Some of the facts disclosed in the Complaint and the Written Statement are not disputed. It is not disputed that on 12.4.2010, the Plaintiff and the Defendant No.1 entered into an Agreement for sale and purchase of South African Coal measuring 16,943 metric tonnes. The Plaintiff agreed to sell the said quantity of coal to the Defendant No.1 at US \$111.75 per metric tonne. On 22.4.2010, the Plaintiff, i.e., the Respondent No.1 herein, entered into another High Seas Sale Agreement with the Defendant No.1/Petitioner herein. Clause 2 of the said Agreement provides that the Plaintiff/Respondent No.1 herein had imported 16,943 metric tonnes of Steaming Non Coking

A Coal in bulk of South African origin and had shipped the same
on MV Novios Meridian arriving at Dharamtar Port, under Bill
of Lading Numbers 2, 3 and 4, all dated 8.4.2010. Clause 3 of
B of the Agreement provides that the Plaintiff had agreed to sell and
the Defendant No.1 had agreed to purchase the consignment
of the coal on High Seas Sale basis, subject to the terms and
conditions specified thereunder. Clause 3(b) of the Agreement
provides that the quality determined and certified by an
independent inspecting agency at Disport would be final and
binding on both the parties.

C 3. On 22.4.2010, the aforesaid vessel containing coal
imported through the Respondent No.3, Venkatesh Karriers
Limited, reached the Dharamtar Port at Mumbai and according
to the case made out in the plaint, the coal was delivered to
D the Respondent No.2, M/s United Shippers Limited, as the
stevedore agent. On the same day, the Respondent No.1/
Plaintiff raised and delivered a High Seas Sales Invoice for an
amount of Rs. 8,25,46,296/- upon the Petitioner herein for sale
of the said coal. Consequent thereupon, the Respondent No.2
E handed over the total quantity of 9,542.920 metric tonnes to the
Petitioner till the date of filing of the suit. The balance quantity
of coal amounting to 7400.082 metric tonnes was lying with the
Respondent no.2 out of the total quantity of 16,943 metric
tonnes received by it from the Petitioner.

F 4. Since the Petitioner failed to pay the balance sum of
Rs. 5,82,58,560/-, the Respondent No.1 filed Special Civil Suit
No.187 of 2011, *inter alia*, for a declaration that the Petitioner
had committed breach of contract and that the Agreements
dated 12.4.2010 and 22.4.2010 stood cancelled and
G terminated. The Respondent No.1 also claimed return of the
balance quantity of coal, amounting to 7400.082 metric tonnes,
lying with the Respondent No.2 and for a decree for an amount
of Rs. 1,22,04,349/- against the Petitioner towards the balance
H payment of the 9,542.920 metric tonnes of coal delivered to it
by the Respondent No.2. Certain other claims were also made

regarding interest and payment of demurrage charges incurred after the date of filing of the suit, as also the L/C discounting charges of Rs. 7,19,483/-. The Respondent No.1 also claimed permanent injunction to restrain the Respondent Nos.2 and 3 from handing over the balance amount of coal measuring 7400.082 metric tonnes lying with the Respondent No.2 at Dharamtar Port, Mumbai, either to the Petitioner or to any other person. By an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, the Plaintiff/Respondent No.1 also prayed for an interim order in the same terms and also sought a direction in the form of a mandatory injunction to the Respondent No.2 to hand over the balance coal to the Respondent No.1.

5. The claim of the Respondent No.1 was opposed by the Petitioner by filing a Written Statement. On 9.2.2011, the trial court passed an ex-parte order of injunction restraining the Respondent Nos.2 and 3 from handing over the custody of the balance coal weighing 7400.082 metric tonnes to any person and particularly to the Petitioner. Subsequently, by its order dated 16.4.2011, the trial court allowed the application of the Respondent No.1 for temporary injunction and confirmed the ad-interim injunction granted earlier on 9.2.2011. The trial court also passed an order of injunction in mandatory form directing the Respondent No.2 to hand over the balance coal of 7400.082 metric tonnes in its possession to the Respondent No.1 on payment of rent, if any, due from the said Respondent.

6. Aggrieved thereby, the Petitioner preferred an appeal before the Nagpur Bench of the Bombay High Court, being Appeal from Order No.53 of 2011.

7. From the submissions made on behalf of the respective parties, the High Court noted that after taking into consideration all the claims of the Respondent No.1, the total amount due from the Petitioner in respect of the transaction was Rs. 6,19,58,123/- . On the other hand, it was the Petitioner's claim that the suit as filed by the Respondent No.1 was not for recovery of money

- A for the goods supplied, but for cancellation/ termination of the Agreements dated 12.4.2010 and 22.4.2010, which were governed by the provisions of Section 46(1)(a) read with Section 47(1) of the Sale of Goods Act, 1930. On behalf of the Petitioners, it was also contended before the High Court that
- B the title and ownership of the goods had already passed to the Petitioner. It was also urged that when the entire quantity of coal was delivered to the Respondent No.2 for the purpose of transmission of the same to the Petitioner without reserving the right of disposal of the goods, the lien on the goods stood
- C terminated in view of the provisions of Section 49(1)(a), (b) and (c) of the aforesaid Act. It had also been urged that at best the Respondent No.1 herein would be an "Unpaid Seller" as defined in Section 45(1)(a) of the aforesaid Act, and would be entitled only to recovery of cost of the goods supplied. It was
- D also submitted that since the Respondent No.1 had lost its possession over the coal, even the question of exercise of the rights of an unpaid seller and the seller's lien, did not arise.

8. Taking into consideration the submissions made on behalf of the respective parties and the materials placed on
- E record, the High Court by the impugned order allowed the appeal in part and modified the order of the trial court passed on 16.4.2011 in Special Civil Suit No.187 of 2011, in the following manner :-

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

- G (b) If such amount is deposited, within a stipulated period by the defendant no.1, the application Exh.5 for grant of temporary injunction filed by the plaintiff, shall stand dismissed.

- H (c) If the defendant no.1 fails to deposit an amount of Rs.6,19,58,123/- (Rupees Six Crores Nineteen Lacs Fifty

Eight Thousand One Hundred Twenty Three Only), within a stipulated period, the order of injunction passed by the Trial Court below Exh.5 on 16.4.2011, shall continue to operate pending the decision of the suit.

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

9. Appearing for the Petitioner/Defendant No.1, Mr. Ranjit KumaMr. Biji Mathew, Adv.r, learned Senior Advocate, reiterated the submissions which had been made before the High Court. In addition, learned senior counsel indicated that since the Petitioner had already paid a total sum of Rs. 3,42,88,767/-, including payments made to the customs and port authorities, to the Respondent No.1, the trial court as also the High Court, erred in directing the Petitioner to deposit a further sum of Rs.6,19,58,123/- as against the balance quantity of the coal, in order to lift the same. Mr. Ranjit Kumar also urged that the High Court had also erred in passing a conditional order that if the amount as indicated hereinabove was deposited within the stipulated period by the Petitioner, then the application for temporary injunction filed by the Respondent No.1 would stand dismissed. However, in default of deposit of the said amount within the stipulated period, the order of injunction passed by the trial court would continue to operate pending the decision of the suit. Mr. Ranjit Kumar submitted that having regard to the provisions of the Sale of Goods Act referred to hereinabove and in particular Section 49(1)(a) thereof, once the Respondent No.1 had lost possession over the goods, it also lost its lien thereupon and is no longer entitled to pray for recovery of the goods from the Respondent No.2.

10. Mr. Ranjit Kumar submitted that the Petitioner was ready and willing to deposit the balance price of the remaining

A quantity of the coal measuring 7400.082 metric tonnes for lifting the same and the other claims of the Respondent No.1 towards demurrage and port charges etc. could be decided by the trial court in the pending suit.

B 11. Mr. Ranjit Kumar also urged that by allowing the Respondent No.1's prayer for interim relief and passing a mandatory order of injunction thereupon, both the trial court as well as the High Court, had provided the Respondent No.1 with the ultimate relief prayed for in the suit at the interim stage and if the remaining quantity of coal was allowed to be removed by C the Respondent No.1, the suit of the Respondent No.1 would stand decreed at the interim stage.

D 12. Mr. Ranjit Kumar's submissions were opposed by Mr. P.S. Patwalia, learned Senior Advocate appearing for the Respondent No.1 Company. It was urged that on the failure of the Petitioner to deposit the amounts in terms of the orders passed by the trial court, as also the High Court, the interim order staying the handing over of the balance quantity of goods by the Respondent No.2 to the Respondent No.1, stood E vacated and thereafter different quantities of coal had been lifted by the Respondent No.1 from the Respondent No.2 in order to recover the amounts already paid by it to the foreign seller. It was submitted that not only was the Respondent No.1 F out of pocket in respect of the sale price already paid by it to the foreign seller, but even the Petitioner had not paid the price of the coal which was lying with the Respondent No.2, which had compelled the Respondent No.1 to lift the balance coal lying with the Respondent No.2 and to dispose of the same after the period stipulated by the High Court for deposit of the outstanding dues had expired. G

H 13. We have carefully considered the submissions made on behalf of the respective parties and we see no reason to interfere with the orders passed by the trial court and the High Court. Having entered into an Agreement to purchase the coal in question it was upto the Petitioner to fulfil its obligation

towards the payment of the price of the coal and to lift the same from the Stevedore/Respondent No.2, having particular regard to the fact that the Agreement was a High Seas Sales Agreement which entails clearance of the goods from the vessel and its entrustment with the Stevedore which involved heavy costs per diem. In this regard, paragraph 3 of the aforesaid Agreement, inter alia, provides that the Respondent No.1/seller would have a lien over the cargo unless payment was made in full and the Petitioner/purchaser subrogated its right of insurance claim in favour of the Respondent No.1. It was also stipulated that the quality was to be determined and certified by an independent inspection agency of Disport and the same would be final and binding on both the parties. It was further stipulated that the seller would thereupon transfer the rights in respect of the goods to the buyer by endorsing in favour of the buyer a set of negotiable documents and hand over the same to the latter.

14. Prima facie, the terms of the High Seas Sales Agreement appear to indicate that till the entire sale price was paid by the Petitioner to the Respondent No.1, the 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.

15. It would not be proper for us at the interlocutory stage to make any further observations regarding the rights of the parties in respect of the balance quantity of coal which was lying with the Respondent No.2 after delivery of 9,542.920 metric tonnes to the Petitioner out of the total consignment of 16,943 metric tonnes. However, in view of Mr. Ranjit Kumar's submissions and having regard to the fact that an opportunity had been given to the Petitioner to lift the said balance quantity of coal on deposit of Rs.6,19,58,123/- within the stipulated period of six weeks, we dispose of the Special Leave Petition by modifying the order of the High Court to the extent that in the event the Petitioner deposits the amount directed to be

- A deposited by the High Court, after deduction of the price of the coal already lifted by the Respondent No.1 within a period of four weeks, the Petitioner will be entitled to lift the remaining quantity of coal lying in the custody of the Respondent No.2. In default of such deposit, the order of the High Court, subject to
- B the above modification, will continue in full force.

16. In the facts of the case, the parties will bear their own costs.

B.B.B. Special Leave Petition disposed of.