Non-Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8645 OF 2014
(Arising out of Special Leave Petition (Civil) No.16210 of 2014)

Orissa Manganese & Minerals Ltd. ...Appellant

Versus

Synergy Ispat Pvt. Ltd. ...Respondent

J U D G M E N T

Chelameswar, J.

1. Leave granted.

2. Aggrieved by the judgment dated 16th May 2014 of the High Court of Calcutta in A.P.O.T. No.460/2012, the respondent therein filed this appeal.

3. The impugned order is a reversing order in appeal against the judgment and order dated 5th September, 2012 of single Judge of the Calcutta High Court in A.P.

No.245/2012 by which the learned single Judge rejected an application filed under Arbitration & Conciliation Act, 1996 holding that the appellant was not entitled to interim injunction in aid of his claim for specific performance of an agreement to sell iron ore.

4. The factual background of the case is as follows.

5. The appellant herein secured a mining lease originally from the State of Bihar (now Jharkhand) in the year 1996. However, the appellant could not secure the necessary approval under the Forest Conservation Act, 1980. Therefore, the mining operation had to be kept under suspension.

6. Sometime in the year 2005-2006, at the instance of the respondent herein, the appellant entered into two agreements. According to the appellant (we say so because what exactly is the purport of the agreements is a matter pending consideration in arbitration, therefore, we do not wish to make any definite statement in that regard), one of

the agreements is that the mining activity pursuant to the mining lease secured by the appellant (referred to supra), shall be carried on by M/s. Metsil Exports Pvt. Ltd. (Metsil) which is said to be an associate company of the respondent herein on various terms and conditions, the details of which may not be necessary. The agreement is dated 27.2.2005 between the appellant herein and Metsil. The agreement is styled as 'Raising Contract'. The second agreement is between the appellant and the respondent herein for the sale of iron ore extracted by Metsil for being utilised in a sponge iron plant to be jointly set up by the appellant and the respondent herein. According to the appellant, both the contracts are inter dependent. Failure of the first contract automatically results in failure of the second contract.

7. However, the appellant claims to have realised on 22nd June, 2007 that the 'Raising Contract' by which the activity of mining was sought to be entrusted to Metsil is in violation of Rule 37 of the Mineral Concession Rules, 1960, therefore, the appellant sent letters to the respondent as well as to the

Metsil purporting to terminate both the contracts. It is stated at the Bar that, admittedly, Metsil never questioned the termination of the contract. However, the respondent company chose to dispute the legality of the decision of the appellant in terminating the agreement for sale of iron ore. The respondent filed an application (A.P. No.922/2011) under Section 9 of the Arbitration and Conciliation Act, 1996 praying, *inter alia,* for an order of injunction restraining the appellant herein from selling iron ore to the third party. It may be mentioned here that subsequent to the decision of the appellant to terminate both the agreements, the appellant commenced the mining operation from January 2009. The learned single Judge of the Calcutta High Court, by his order dated 14.11.2011, declined to grant any *ad interim* order as sought by the respondent. By an order dated 14.3.2012, the said A.P. No.922/2011 was disposed of.

8. Thereafter, the respondent preferred another application in A.P. No.245/2012 in which an interim order came to be passed on 29.3.2012 restraining the appellant

herein from selling any part of the iron ore extracted from the mines in question without first offering the entire extract to the respondent. Aggrieved by the same, the appellant herein carried the matter in appeal under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 before a Division Bench of the High Court in A.P.O.T. No.184/2012. By a consent order dated 17.4.2012 in the abovementioned A.P.O.T., the parties agreed for the appointment of one Shri Pradeep Kumar Ghosh, Senior Advocate, as the Arbitrator to adjudicate upon the dispute between the parties. The said A.P.O.T. came to be finally disposed of by an order dated 9.5.2012 with a direction that the appellant would sell iron ore to the respondent, if the respondent so opted, at the prevailing market price during the pendency of the arbitration proceedings.

9. The respondent herein filed an Special Leave Petition(C) No.20425/2012 in this Court challenging the order dated 9.5.2012 passed in A.P.O.T. No.184/2012. The said SLP was

disposed of by an order dated 27.7.2012, the relevant portion of the order reads as follows:

> "The Division Bench of the High Court in the impugned order observed as follows:
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> We, therefore, substantially modify the order passed by the learned Trial Judge as above and this will continue till the decision of the learned Arbitrator or until further order which might be passed by learned Trial Judge at the final hearing of the interlocutory application whichever is earlier. The findings and observation of the learned Trial Judge so also ours shall be regarded as being tentative, and it will not be binding effect either at the time of hearing of the arbitration agreement or at the time of final hearing of the interlocutory application pending before learned Trial Judge.
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> The above observations of the Division Bench fully protect the interest of both parties……."

10. A.P.O.T. No.245/2012 eventually came to be disposed of by an order dated 5.9.2012. The relevant portion of the order reads as follows:

> "The Petitioner is not entitled to any interlocutory injunction in aid the claim for specific performance of the selling agreement that it has carried to the arbitral reference. In the light of the prima facie view taken that the Metsil and the petitioner combine had entered into a composite arrangement with the respondent, the petitioner's knowledge of the alleged breach of the agreement by the Respondent would date back several months before it made the polite enquiry with the respondent by its letter of December 24, 2009. Such delay would amount, in the circumstances to latches and conduct encouraging the respondent to believe in the petitioner's endorsement and acceptance of the breach. The petitioner is not entitled to any order in furtherance of its claim on account of the negative covenant since the selling agreement cannot be seen to be a stand-alone contract. In any event, the negative covenant in clause 14.1 of the selling agreement entitled the petitioner to exclusively obtain the ore extracted from the Ghatkuri mines by Metsil and the petitioner ought to have been aware, in the light of the facts now brought on record by the

respondent, that the raising agreement with Metsil had been terminated by the respondent."

11. Aggrieved by the same, the respondent carried the matter in appeal in A.P.O.T. 460/2012. By the order impugned herein, the High Court had set aside the order of the single Judge in A.P. No.245/2012, thereby, allowing Section 9 application filed by the respondent in part. The operative portion of the order reads as follows:

> "The respondent is restrained by an order of injunction to sell the iron ores excavated from the disputed mines to any third party without first offering to the appellant and is, further, directed to maintain accounts of the iron ores raised from the said mines since the commencement of the mining operation subject, however, to the result of the arbitral proceeding.
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> We make it clear that the findings arrived at by the Hon'ble Single Judge and, also, by us are limited for the purpose of disposal of the application under Section 9 of the Arbitration and Conciliation Act and are without prejudice to the rights and contentions of the parties before the learned arbitrator."

12. We have heard Shri Kapil Sibal, learned senior counsel appearing for the appellant and Shri Salman Khurshid, learned senior counsel appearing for the respondent.

13. The impugned order is an order passed in a proceeding arising in an application under Section 9 of the Arbitration & Conciliation Act, 1996. The arbitration proceedings between the parties herein are admittedly pending where the main

question is - whether the respondent is entitled to seek specific performance of the agreement dated 27.02.2005 by which the appellant agreed to sell iron ore excavated from the mines specified in the agreement to the respondent? If the answer to the said question is in affirmative then the next question would be – what is the rate at which the appellant is required to sell the iron ore to the respondent?

14. By the order under appeal, the High Court directed the appellant not to sell the iron ore to any third party without first offering the same to the respondent herein and also to maintain accounts of the iron ore raised by the appellant from the said mines from the date of commencement of the mining operation.

15. It is the categoric stand of the appellant herein in the SLP that during the pendency of this litigation, the appellant has already set up a beneficiation-cum-pelletisation plant where the entire quantity of iron ore extracted by the appellant is being consumed as a raw material. Therefore, the question of the appellant selling the iron ore to any third

party does not arise at all. Consequently, the second question of offering the ore for sale to the respondent before selling it to a third party equally does not arise.

16. While ordering notice on18.7.2014 in the instant appeal, it was directed by the Court that the appellant "will maintain record/account of all the ore consumed" by the appellant "during the pendency" of this matter.

17. When the matter was taken up for hearing it was once again reiterated by the appellant that they have in fact been captively consuming the entire iron ore extracted from the mines in question.

18. Shri Sibal, learned senior counsel appearing for the appellant made a submission at the bar that this Court may record an undertaking made by the appellant that the appellant will not sell any part of the iron ore extracted from the mines in question to any third party during the pendency of the arbitration proceedings. He also made a submission

that the entire iron ore extracted would be consumed captively in the plant belonging to the company.

19. On the other hand, Shri Khurshid, learned senior counsel appearing for the respondent submitted that the respondent has existing export obligations incurred on the basis of the agreement between the parties herein (referred to supra) and, therefore, the appellant must be directed to sell the iron ore excavated by it to the respondent at the current market rate subject to the condition that the respondent is entitled to recover the differential amount between the current market price and the amount agreed upon between the parties by the agreement in question, in the event of the respondent's success in the arbitration proceedings.

20. In view of the categorical assertion made by the appellant and the undertaking that the appellant would consume the entire iron ore excavated captively, we do not see any reason to give any direction to the appellant to sell the iron ore to the respondent during the pendency of the

arbitration. Such a direction, in our opinion, would virtually amount to the enforcement of the agreement in issue without adjudication of the right of the respondent to seek specific performance of the agreement. No doubt, if the appellant company were to be selling the iron ore excavated by it to any third party, there was some justification by the respondent to seek an interim direction to the appellant to sell the ore to the respondent, subject ofcourse to the determination of the cause finally in the arbitration proceedings. But it is not the case here.

21. The learned senior counsel for the respondent further submitted that in case an interim order is not granted, even if the respondent eventually succeeds in the arbitration proceedings and obtains an award for the specific performance of the agreement in question, the success would remain only on paper as huge amount of mineral excavated by the appellant would already have been sold by that time and there is no way of the respondent obtaining the said mineral.

22. No doubt, if the respondent eventually succeeds in the arbitration, it would be entitled to specific performance of the agreement in question. The respondent can always seek monetary compensation for the loss sustained by it by virtue of the non supply of the minerals by the appellant during the pendency of the arbitration proceedings.

23. For the abovementioned reasons, we dispose of this appeal recording an undertaking of the appellant that during the pendency of the arbitration proceedings the appellant will not sell any part of the iron ore excavated from the mines covered by the agreement in question and such ore would be consumed captively by the appellant in its plant and the appellant would maintain a complete account of the minerals excavated and consumed captively by the appellant.

24. In the facts and circumstances of the case, there will be no order as to costs.

.....J.
(J. Chelameswar)

.....J.
(A.K. Sikri)

New Delhi;
September 12, 2014