

A JAI BALAJI INDUSTRIES LTD.

v.

PEC LTD. & ORS.

(Civil Appeal No. 7155-56 of 2009)

OCTOBER 27, 2009

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**[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]**

*Interim Order:*

- C *Import – Indian company entering into a purchase agreement with a foreign company – In terms of agreement quality and quantity of goods were to be inspected by buyer at Port of loading – Thereafter buyer entering into High Seas Sale Agreement with Government Company, which was described as “seller” – A deed of pledge executed pledging entire consignment to seller – Buyer stated to have purchased a part of the consignment and since it did not meet the tests relating to quality of goods, buyer rejected the entire consignment and refused to take delivery thereof from “seller”*
- D *– Suit filed by buyer against seller claiming inter alia return of advance amount – Plaintiff also prayed for interim injunction restraining the seller from encashing the security – Single Judge of High Court granting interim order in favour of buyer, but the Division Bench on appeal, granting liberty to seller to encash the cheques on furnishing bank guarantee*
- E *– HELD: It has to be kept in mind that the suit is still pending before High Court and rights and liabilities of parties are yet to be worked out in the suit – Whether the Bill of Lading has been endorsed in favour of plaintiff by defendant is also a matter to be decided in the suit – On a *prima facie* assessment of terms and conditions of the agreement between the parties, the responsibility relating to quantity and quality of the cargo was to be that of the plaintiff – Nothing has come to notice of the Court whereby defendant was*

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prevented from encashing the cheques stated to have been given by way of security – Order of Division Bench protects the plaintiff as the defendant would furnish bank guarantee of the like amount – Furthermore, goods in question are to be sold by receiver appointed by Court and sale proceeds have been directed to be handed over to plaintiff – It has also to be kept in mind that defendant has already paid for the goods to the foreign company – Therefore, there is no reason to interfere with the order passed by the Appeal Court of the High Court – Export-Import – High Seas Sale Agreement.

C CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7155-7156 of 2009.

From the Judgment & Order dated 1.9.2009 of the High Court at Calcutta in APOT No. 235 of 2009 in GA No. 1682 of 2009 and APOT No. 249 of 2009 in GA No. 1764 of 2009.

Abhrant Mitra, Rajshree Kajaria, Gaurav Kejriwal for the Appellant.

Sanjeev Narula Subramonium Prasad for the Respondents.

The following Order of the Court was delivered

**O R D E R**

1. Permission is granted to file the special leave petitions.
2. Leave granted.
3. We have heard learned counsel for the parties at the very initial stage for issuance of notice since the Respondent No.1 was duly represented on caveat.
4. These appeals are directed against the judgment and order dated 1st September, 2009 passed by the Division Bench of the Calcutta High Court in APOT No.235 of 2009 and

A APOT No.249 of 2009 and connected applications allowing the appeals in terms of the following order :

(a) The appellant/defendant will be at liberty to encash the cheques and appropriate the amount subject to furnishing a Bank Guarantee of like amount to be furnished in favour of the Registrar, Original Side.

B We also grant liberty to the appellant to furnish a letter of undertaking to furnish Bank Guarantee for like amount from a Nationalised Bank in favour of Registrar, Original side. Registrar, Original Side until the formal Bank Guarantee is furnished as directed and upon doing so, the cheques may be encashed. The appellant shall keep the Bank Guarantee renew till the disposal of the suit. The Bank Guarantee should be kept to the credit of this suit.

(b) The Receiver already appointed shall sell the goods after issuing an advertisement in the Newspapers, once in "Statesman" once in "Ajkai" and once in

C Hindi in "Sanmarg", either by way of public auction or by private party subject to confirmation by the Court. The cost charges and expenses of sale will be borne by the appellants at the first instance. Further, ad hoc remuneration of 500 GMs should be paid to the Receiver.

D (c) We also grant liberty to the parties to bring the intending buyers.

E (d) The Receiver after confirmation of sale shall handover the sale proceeds to the respondent/ plaintiff. The appellant is directed to renew the said Bank Guarantee till the disposal of the suit.

F (e) The suit is expedited.

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Plaint to be served forthwith, if not already served, upon Advocates-on-Record for the defendant in the suit, by the Advocate-on-Record for the plaintiff. Written statement within 3 weeks from the date the certified copy of this judgment is made available, cross order for discovery two weeks thereafter, inspection two weeks thereafter and the suit is directed to appear in the prospective list." A

5. From the materials on record it appears that the appellant entered into an agreement on 28th July, 2008 with, a foreign seller for purchase of 7100 metric tonnes of Manganese Ore which was to be sold by the said foreign party under a CIF contract and discharged at Paradeep Port. In terms of the said agreement, the quality and quantity of goods were to be inspected by the buyer at the Port of Loading. Thereafter, the appellant and the Respondent No.1, a Government Company, entered into a High Seas Sale Agreement on 25th September, 2008, wherein the Respondent No.1 has been described as "seller" of the goods and the appellant is described as the "buyer". Under the terms of the said Agreement, the appellant was to pay to the Respondent No.1 a sum of US\$ 48,25,188.40 as 100% value of the documents plus 1.5% trading margin of documents, as payment for the documents. It was also agreed that the Respondent No.1 would endorse the Bill of Lading in favour of the appellant. A Deed of Pledge was also executed whereby the entire consignment was pledged to the Respondent No.1-Company. B C D E F

6. The vessel carrying the consignment of Manganese Ore arrived at Paradeep Port and the goods were discharged on or about 8th October, 2008, and, thereafter, transferred to a warehouse. It appears that the goods were dispatched to the appellant's factory premises at Durgapur and Raniganj in West Bengal and were allegedly unloaded on plots within the appellant's factory premises purportedly leased to the Respondent No.1-Company. It is also the case of the appellant G H

- A that out of the said consignment of 7100 metric tonnes of Manganese Ore, the appellant purchased 100 metric tonnes from the Respondent No.1 with the intention of testing the quality of the said ore.
- B 7. Allegedly, the said ore did not meet the tests relating to its quality and, consequently, the appellant rejected the entire consignment and refused to take delivery thereof from the Respondent No.1-Company. That is the genesis of the dispute which arose between the parties.
- C 8. The appellant filed a suit, being C.S.No.137 of 2009, in the Calcutta High Court in its Ordinary Original Civil Jurisdiction claiming return of an advance amount of Rs.2,85,28,926/- and Rs.35,30,000/-, being the price of 100 metric tonnes, aggregating a sum of Rs.3,20,58,926/- and Rs.2,52,08,526/-
- D paid towards various duties, charges and freight etc. The appellant also prayed for an injunction to restrain the Respondent No.1-Company from encashing the security which had been given by the appellant to the extent of Rs.20,31,25,956/- and for damages. In the suit an application for interim orders was also made for the following reliefs :
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  - F (a) Commissioner/Special Officer be appointed to make inventory of the manganese ores lying at the respondent No.1's leased plots in the factories of the petitioner at Durgapur and Raniganj and thereafter to take steps for drawing of samples and get the same analysed through and/or by such agency as this Hon'ble Court may deem fit and proper including National Test House, Alipore, Calcutta;
  - G (b) Injunction restraining the respondent No.1 from depositing and/or encashing the said cheque dated December 14, 2008, bearing no.242474 for Rs.20,31,25,956/- drawn on Allahabad Bank, Calcutta Main Branch;
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- (c) Direction upon the respondent no.1 to cancel and return the said cheque bearing no.242474, dated December, 2008 for Rs.30,31,25,956/-, drawn on Allahabad Bank, Calcutta Main Branch; A
- (d) Appropriate direction upon the respondent no.1 to remove the manganese ore lying at the respondent no.1's leased plots being portions of the factory premises of the petitioner at Raniganj and Durgapur within such time as may be fixed by this Hon'ble Court; B
- (e) In default of the respondent no.1 removing the manganese ore from the said leased plots in the factory premises of your petitioner, Receiver be appointed by this Hon'ble Court with all powers under order 40 of the Code of Civil Procedure including sale of manganese ore lying at the leased plots of the respondent no.1 in the factory premises of the petitioner at Durgapur at Raniganj, either by public auction or by private treaty and to deposit the sale proceeds thereof with the Registrar, Original Side; C D
- (f) Ad-interim order in terms of above prayers; E
- (g) Costs and incidental to this application be borne by the respondent no.1; F
- (h) Such further orders be made and/or directions be given as this Hon'ble Court may deem fit and proper." G

9. On 18th May, 2009, the learned Single Judge passed an interim order, as prayed for, in regard to encashment of the security deposit till 22nd May, 2009. Thereafter, the interim order was extended and the appellant herein was directed to revalidate the cheque dated 14th December, 2008, which was H

- A purported to have been given by way of security to the Respondent No.1, by another six months from the date of receipt of the order. Thereafter, the Respondent No.1-Company filed an application for vacating the interim order while the appellant sought continuance thereof.
- B 10. After hearing the parties at length on 12th June, 2009, the learned Single Judge rejected the prayer made on behalf of the respondent-Company to vacate the interim order, and, instead, passed the following order :
- C "To ascertain the quality of the balance goods lying in the leased plots of the respondent no.1 Mr. Amit Gupta, Adv., 1st Floor, Bar Library Club is appointed Receiver at an initial remuneration of 500 GMs. For purposes of drawing samples and getting the same analysed through the National Test House, Alipore, Calcutta. Report be filed by the said agency on the next date of hearing.
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This order is passed as from the report if it appears that the goods are as per specifications there will be no reason for the petitioner to refuse lifting of the goods.

- E Accordingly, the interim order granted will continue till ten weeks. Directions are given for filing affidavits:

F Affidavit-in-opposition be filed within four weeks from date; affidavit-in-reply thereto, if any, be filed within two weeks thereafter. Matter to appear in the list seven weeks hence."

- G 11. Aggrieved thereby, the Respondent No.1 herein preferred APOT No.235 of 2009 and APOT No.249 of 2009 before the Division Bench of the Calcutta High Court and the same were disposed of finally by the Appeal Court by its order dated 1st September, 2009, extracted hereinabove, whereby the order of the learned Single Judge was set aside and replaced by the said order.
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12. As mentioned hereinbefore, these appeals are directed against the said order of the Division Bench of the Calcutta High Court. A

13. On behalf of the appellants it has been contended that under the High Seas Sale Agreement, the Respondent No.1 was to endorse the Bill of Lading in favour of the appellant, but that the same was never done and the consignment of Manganese Ore was never made over to the appellant and has remained in the custody of the Respondent No.1 ever since it was discharged at Paradeep Port. It was also submitted that after having purchased 100 metric tonnes of the said ore for the purpose of testing, when it was found that the same was sub-standard material, the appellant had expressed its inability to accept the consignment. It was also submitted that without delivering the consignment, the Respondent No.1 was not entitled to encash the cheques, which had been made over to it by way of security deposit. B

15. It was lastly contended that the appellant had no obligation to take delivery of the entire goods since the Agreement provided that the goods were to be delivered part-by-part. C

16. The case made on behalf of the appellant was vehemently opposed on behalf of the Respondent No.1 on the ground that the High Seas Sale Agreement was merely a means of import of the said ore into India by the appellant and the Respondent No.1 was merely a facilitator for the said purpose. In fact, the role of the Respondent No.1 was to import the goods and, thereafter, to make over the same to the Appellant as it had no use for the Manganese Ore. In fact, the same would be evidenced by the Deed of Pledge, whereby the goods continued to be in the control and possession of the Respondent No.1 till the same were delivered to the appellant. It was also the case of the Respondent No.1 that the consignment of Manganese Ore had always been with the H

A appellant in its own godown and that the Bill of Lading had also been endorsed in favour of the appellant, whereupon the title to the goods had passed to the appellant.

17. From the submissions made on behalf of the parties, B it will appear that the appellant is aggrieved by the fact that besides having paid a sum of Rs.20,31,25,856/- by a postdated cheque to the Respondent No.1, the appellant had also been deprived of the goods, the value whereof had greatly diminished since it was received at Paradeep Port on or about 8th October, 2008. On the other hand, not only would the C Respondent No.1 retain control over the consignment but it would also have unjustly enriched itself to the extent of the security provided by the appellant in terms of the order of the High Court impugned in these appeals.

D 18. In deciding these appeals, we have to keep in mind the fact that the suit is still pending before the Calcutta High Court and the rights and liabilities of the parties are yet to be worked out in the suit. The question whether the Bill of Lading had been endorsed in favour of the appellant or not by the

E Respondent No.1 is also a matter to be decided in the suit on evidence. Furthermore, the appellant has itself indicated that it was not willing to accept the consignment since it was of sub-standard quality and had deteriorated further since it was discharged at Paradeep Port. As has been pointed out by the

F learned Single Judge in her order of 12th June, 2009, the appellant in its undertaking had agreed to pay the balance amount in respect of the imported goods on their first demand without demur and protest and to honour the cheques issued in favour of the Respondent No.1 on their presentation on the dates indicated. Furthermore, a further undertaking was given

G not to intimate the bankers to stop the payment of the cheques delivered to the Respondent No.1 and also not to close the account without the permission of the Respondent No.1.

H 19. On a *prima facie* assessment of the terms and

conditions of the Agreement entered into between the appellant and the Respondent No.1 on 7th August, 2008, the responsibility relating to the quantity and quality of the cargo was to be that of the appellant and Clause 8 of the said Agreement indicates that the Respondent No.1 would not be responsible for any shortage in the quantity and quality of the cargo at the loading point as well as at the delivery point. Nothing has come to our notice whereby the Respondent No.1 was prevented from encashing the cheques alleged to have been given by way of security.

20. In our view, it would not be proper for us to delve into the details of the matter at this stage since the order of the Division Bench in appeal protects the appellant, while granting liberty to the Respondent No.1 to encash the cheques and appropriate the amount upon furnishing a Bank Guarantee of the like amount which was to be kept renewed till the disposal of the suit. Furthermore, the goods in question are to be sold by the Receiver appointed by the Court and the sale proceeds have been directed to be handed over to the appellant herein. Balance claims, if any, will have to be decided in the suit filed by the appellant. Apart from the above, it has also to be kept in mind that the Respondent No.1 has already paid for the goods to the foreign buyer.

21. We, therefore, see no reason to interfere with the judgment and order passed by the Appeal Court of the Calcutta High Court in APOT No.235 of 2009 and APOT No.249 of 2009. The appeals are, accordingly, dismissed. We make it clear that the observations made in this order are only for the disposal of the appeals which have been directed against the interim orders and the Trial Court will be at liberty to proceed in the suit uninfluenced by any of the said observations.

22. There will be no order as to costs.

R.P.

Appeals dismissed.