

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22.04.2008

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IA 7863/2003, IA 7864/2003 and OMP 444/2002

PAWAN HANS HELICOPTERS LTD.

... Petitioner

- versus -

M/S AES AEROSPACE LTD

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rajiv Datta, Sr. Advocate with Mr Dhruv Dewan

For the Applicant in IA 7863/03: Ms Sheel Sethi

For the Applicant in IA 7864/03: Ms Lalita Kohli

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

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| 1. | Whether Reporters of local papers may be allowed to see the judgment ? | YES |
| 2. | To be referred to the Reporter or not ? | YES |
| 3. | Whether the judgment should be reported in Digest ? | YES |

BADAR DURREZ AHMED, J

1. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') seeking interim measures of protection which include restraining the respondent or its agents from alienating, encumbering, disposing of, selling, destroying, etc., the goods in question and in allowing the petitioner to remove the said goods from the warehouse of M/s Sagar Warehousing Corporation and shift the same to its premises at Mumbai.

2. On 20.12.2002, this Court, after hearing the petitioner and after considering the contents of the petition, was of the view that a *prima facie* case for granting *ex parte* ad interim injunction in terms of prayer (a) of the petition had been made out and accordingly it was so ordered. Prayer (a) of the petition reads as under:-

“(a) Restrain the respondent or its agents, more particularly M/s Fly Jac, having its office at 516-517, Vishal Tower, 10 District Centre, Janak Puri, New Delhi-110058 and M/s Sagar Warehousing Corporation, having its registered office at 18, Eastern Chambers, 2nd Floor, Poona Street, Nandlal Jani Road, Masjid (East), Mumbai-400 009, from alienating, encumbering, disposing of, wasting, destroying, selling, or in any way creating any lien or third party rights.”

3. By virtue of IA No.7863/2003, M/s Fly Jac Forwarders Transporters has sought the vacation of the *ex parte ad interim* order passed on 20.12.2002. It has also sought a direction that the petitioner be made to pay the pending bills of M/s Fly Jac Forwarders Transporters and of M/s Sagar Warehousing Corporation as well as to make payments of the future bills till the removal of the goods from the warehouse of M/s Sagar Warehousing Corporation. A prayer is also made that the petitioner be directed to remove the goods after paying the said dues till the date of removal of the goods.

4. IA No.7864/2003 is an application filed on behalf of M/s Sagar Warehousing Corporation praying that the *ex parte ad interim* order dated 20.12.2002 be vacated and the parties be directed to make the payment of the pending bills in respect of warehousing of the goods in question and to

direct them to remove the goods from the applicant's warehouse immediately upon making payment of the warehousing charges.

5. The petitioner entered into an agreement on 16.06.1999 for the sale of 19 Westland Helicopters and spares for a sum of UK Pound Sterling 9,00,000 which was followed by two other addenda dated 24.09.1999 and 31.05.2000 whereby it was agreed that the packages will be lifted in not more than two consignments and that the payment of the total amount of UK Pound Sterling 9,00,000 will be bifurcated into two payments corresponding to the approximate value of the consignments shipped.

6. The agreement defines “approved transporter” to mean any transporter having demonstrated the capacity to transport part of the package from Safdarjung Airport, New Delhi and from Juhu Airport, Mumbai to Mumbai Customs Port as approved by the purchaser (the respondent herein). Clause 6 of the Contract relates to delivery and Clause 6.1 thereof stipulates that the purchaser (the respondent herein) shall take delivery or arrange to take delivery by deputing an “approved transporter” in respect of six helicopters from New Delhi and thirteen helicopters from the vendor (the petitioner herein) from Mumbai on FOB basis. Clause 6.4 also stipulates that the packages shall be removed / lifted from the date of receipt of the acceptance certificate by the vendor. It specifically stipulates that the vendor shall not be liable for the safe custody thereof from that date. Clause 10 of the said agreement relates to transport. It stipulates that the

purchaser shall, at its own expense, enter into a contract with an approved transporter for the transport of the packages from the vendor's premises at New Delhi and Mumbai to Mumbai Customs Port for taking the Packages out of India. The vendor was also required to provide free ingress and egress to the approved transporter at all reasonable times and to arrange for all passes/ permits, security clearances etc., if required. Clause 13 is the arbitration clause which provides for arbitration in respect of disputes between the petitioner and the respondent

7. The dispute in the present case is with regard to the second consignment which was lifted from Delhi by the approved transporter (M/s Fly Jac Forwarders Transporters) (applicant in IA 7863/2003). The said Fly Jac Forwarders Transporters lifted the goods from New Delhi for shipment at Mumbai. However, instead of taking the goods for shipment at Juhu Airport, Mumbai, because there were certain delays on account of the respondent, the same had been temporarily moved by the said Fly Jac Forwarders Transporters to a warehouse owned by M/s Sagar Warehousing Corporation. The said goods were warehoused at Sagar Warehousing Corporation on or around 26.12.1999. Since then the second shipment is lying at the said warehouse. The difficulty is that the respondent has apparently gone into liquidation and an official liquidator has been appointed in the U. K. Nobody has come forward to receive the goods on behalf of the respondent. Insofar as the petitioner is concerned, the learned counsel for the petitioner pointed out that, while the risk was that of the

respondent from the moment the approved transporter took charge of the goods, the title in the goods remained with the petitioner as per the agreement indicated above till the full payment was received from the respondent. At this juncture, it may be relevant to note that clause 7 of the addendum of 24.09.1999 specifically stipulated that the title in the goods would only pass to the purchaser once the full payment of GBP 9,00,000 under the said agreement is received by the vendor upon the delivery of the package FOB Mumbai for shipment to U. K.

8. The question that arises in the present case is with regard to the continuance of the *ex parte ad interim injunction* order that was passed by this Court on 20.12.2002 and what further orders, if any, can be passed. As noted above, M/s Fly Jac Forwarders Transporters as well as M/s Sagar Warehousing Corporation have filed applications being IA 7863/2003 and IA 7864/2003 seeking vacation of the said *ex parte ad interim* order. The main ground taken by them is that although they are not parties to the agreement between the petitioner and the respondent, the order that has been passed on 20.12.2002 directly affects them. In fact, according to them, they are not even agents of the respondent. According to them, their relationship with the respondent in the present case was on a principal to principal basis. They contend that the order has been passed by this Court on the false statement made by the petitioner that they were agents of the respondent. The prayer in the petition has also been made on the basis that they (Fly Jac Forwarders Transporters and Sagar Warehousing Corporation)

are agents of the respondent. They submit that if they are able to show that they were not agents, then the order would not apply to them and all that they are seeking is that they be relieved of the injunction that was passed against them without their being parties in the present case.

9. On the other hand, the learned counsel for the petitioner submitted on the strength of the clauses of the agreement between the petitioner and the respondent as well as the two addenda that it is clear that M/s Fly Jac Forwarders Transporters were the approved transporters as per the agreement between the parties. The goods had been delivered by the petitioner to the approved transporters and immediately thereafter the approved transporters acted as agents of the respondent for transportation for shipment from Mumbai to U.K. Although the title in the goods did not pass to the respondent, the said M/s Fly Jac Forwarders Transporters would have to be construed as agents of the respondent. Reference was also made to Sections 186 and 187 of the Contract Act, 1872 wherein it is provided that an agency can be inferred by the circumstances governing the relationship between the parties. According to the learned counsel for the petitioner there is sufficient indication in the contractual terms as well as correspondence between the parties to indicate that the said M/s Fly Jac Forwarders Transporters acted as agents of the respondent. Insofar as M/s Sagar Warehousing Corporation is concerned, the learned counsel for the petitioner submitted that firstly, there is no privity of contract with them. Secondly, it is an admitted position that M/s Sagar Warehousing

Corporation was selected as the warehouse for the goods by M/s Fly Jac Forwarders Transporters only upon an oral understanding between them. Therefore, it was submitted, there is no connection between the petitioner and M/s Sagar Warehousing Corporation. The only connection between the petitioner and M/s Fly Jac Forwarders Transporters is also to the extent that the latter was the “approved transporter” as per the agreement between the petitioner and the respondent. According to the petitioner, the approved transporter was an agent of the respondent whereas according to the respondent this was not so. According to them, they acted on principal to principal basis and therefore, cannot be saddled with the liability which they were by the order passed by this Court on 20.12.2002. The learned counsel for the petitioner relied upon the following judgments:-

- (i) *National Highways Authority of India v. China Coal Construction Group Corpn.: 2006 (87) DRJ 225;*
- (ii) *Firm Ashok Traders & Anr. v. Gurumukh Das Saluja & Anr.: (2004) 3 SCC 155;*
- (iii) *Coats Viyella India Ltd. v. India Cement Ltd. & Anr.: (2000) 9 SCC 376;*
- (iv) *Loon Karan Sohan Lal v. Firm John and Co. & Ors: AIR 1967 Allahabad 308;*
- (v) *Khub Chand & Ors v. Chittar Mal: AIR 1931 Allahabad 372.*

10. Before I consider the decisions cited by the learned counsel for the petitioner, it would be appropriate to set out the provisions of Section 9 of the said Act. The said section reads as under:-

“9. Interim measures, etc. by Court.—A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:—

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) interim injunction or the appointment of a receiver;
 - (e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

11. Section 9 (ii) provides for issuance of interim measures of protection in respect of the matters specified in, *inter alia*, sub-clauses (a), (b) and (c). Section 9 (ii) (a) relates to preservation, interim custody or sale of “any goods” which are the subject-matter of the arbitration agreement. This is the provision with which this case is concerned. Sub-clauses (b) and

(c) relate to, *inter alia*, the securing of any amount in dispute in arbitration and the detention, preservation or inspection of “any property or thing” which is the subject-matter of the dispute in arbitration. The present case, as noted above, squarely falls within Section 9 (ii) (a) which deals with the preservation, interim custody or sale of “any goods” which are the subject-matter of the arbitration agreement. In the present case, the petitioner had agreed to sell the said goods to the respondent for a sum of GBP 9,00,000. M/s Fly Jac Forwarders Traders was appointed as the “approved transporter” by the respondent in pursuance of clause 6.1 of the agreement dated 16.06.1999 between the petitioner and the respondent. The said M/s Fly Jac Forwarders Traders took delivery of 6 helicopters from New Delhi from the petitioner. The said goods were lifted from New Delhi for shipment at Mumbai. Because there were certain delays allegedly on behalf of the respondent, the said M/s Fly Jac Forwarders Transporters did not take the goods for shipment at Juhu Airport, Mumbai and temporarily moved the same to a warehouse owned by M/s Sagar Warehousing Corporation on or around 26.12.1999. According to M/s Fly Jac Forwarders Transporters, the said goods were warehoused under the instructions of the respondent that the respondent would incur the liability for warehousing and the same would be paid to M/s Fly Jac Forwarders Transporters through the petitioner. There is no direct commitment by the petitioner to make any such payment. In fact, the petitioner does not have any privity of contract with M/s Sagar Warehousing Corporation. The liability for paying warehousing charges, therefore, would rest on M/s Fly Jac Forwarders

Transporters and / or on the respondent, but certainly not on the petitioner.

12. It is for the interim measure of protection of the said goods which are lying at M/s Sagar Warehousing Corporation since 26.12.1999 that the present petition had been filed by the petitioner. The order that was passed on 20.12.2002 was in exercise of the powers granted under Section 9 of the said Act so as to preserve the goods which constituted the subject-matter of the arbitration agreement. The order was made in respect of the preservation of the goods and, therefore, it cannot be contended by M/s Fly Jac Forwarders Transporters or M/s Sagar Warehousing Corporation that since they were not parties to the arbitration agreement or the present petition, no such order could have been passed. It is in this light that the decisions cited by the learned counsel for the petitioner have to be seen. In ***National Highways Authority of India v. China Coal Construction Group Corpn (supra)***, I had occasion to, *inter alia*, consider the questions as to whether an intervenor can be impleaded as a party in a petition under Section 9 of the said Act ? And, as to whether such an intervenor would be entitled to seek clarification of an order passed by the court on such a petition? In answer to the said questions, it was found that the intervenor in that case had no privity of contract with the petitioner, nor was the intervenor a party to the arbitration proceedings. It was observed that Section 9 of the said Act is with reference to arbitral proceedings and just as the intervenor cannot be a party in the arbitral proceedings pending between the parties thereto, he would have no *locus standi* in the proceedings under

Section 9 of the said Act. It was also noted that the interim orders that may be passed under Section 9 or Section 17 are with reference to the parties to the arbitration and in connection with the subject-matter thereof. The intervenor's application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 was, in that case, disallowed on these grounds. The said decision clearly demonstrates that a person who is not a party to the arbitration agreement cannot seek a variation of an order passed under Section 9 of the said Act. Moreover, the order that is passed under Section 9 of the said Act is one which is in respect of and in connection with the subject-matter of an arbitration agreement, which in this case happens to be movable goods which are lying in the warehouse of M/s Sagar Warehousing Corporation. The order that has been passed is not one which is against M/s Fly Jac Forwarders Transporters or M/s Sagar Warehousing Corporation, but is one which has been passed for the preservation and interim custody of the said goods as an interim measure of protection.

13. The next decision relied upon by the learned counsel for the petitioner was that of the Supreme Court in the case of ***Firm Ashok Traders & Anr (supra)***. The provisions of Section 9 of the said Act came up for interpretation before the Supreme Court. While discussing as to who can approach this court under Section 9, the Supreme Court observed that the right conferred by Section 9 cannot be said to be one arising out of a contract and that the qualification which the petitioner invoking jurisdiction

of the court under Section 9 must possess is of being “a party” to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection under Section 9. The Supreme Court observed that this has relevance only to his *locus standi* as an applicant and has nothing to do with the relief which is sought from the court or as a right to be canvassed in support of the relief. The Supreme Court also observed that the court, under Section 9, only formulates interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Considering these observations in the context of the present case, it is apparent that the petitioner is a party to the arbitration agreement and, therefore, clearly has *locus standi* for moving the present petition. The orders that are passed by the court under Section 9 are merely by way of interim measures so as to protect the rights of the parties which would be subject to adjudication before the arbitral tribunal.

14. In ***Coats Viyella India Ltd.***(*supra*), the Supreme Court observed that a contracting party cannot shift his liability under the contract to a third party which has no contractual relationship with the other contracting party. This decision was relied upon by the learned counsel for the petitioner to support his contention that the petitioner has no privity of contract with either M/s Fly Jac Forwarders Transporters or M/s Sagar Warehousing Corporation. This being the case, it was contended that the petitioner is not liable to pay any charges either to M/s Fly Jac Forwarders Transporters or M/s Sagar Warehousing Corporation in respect of the transportation of the

said goods from Delhi to Mumbai or in respect of warehousing charges of the said goods lying in the warehouse of M/s Sagar Warehousing Corporation. *Prima facie*, I am in agreement with the submission of the learned counsel for the petitioner and I am also of the view that the Supreme Court decision in ***Coats Viyella India Ltd (supra)*** is apposite. The petitioner does not have any privity of contract with either M/s Fly Jac Forwarders Transporters or M/s Sagar Warehousing Corporation. The former was appointed as the approved transporter under clause 6.1 of the said agreement by the respondent. The latter was selected by M/s Fly Jac Forwarders Transporters without any reference to the petitioner. Therefore, the question of the petitioner being liable for the charges sought to be raised by M/s Fly Jac Forwarders Transporters and / or by M/s Sagar Warehousing Corporation does not arise.

15. The Division Bench decision of the Allahabad High Court in ***Loon Karan Sohan Lal (supra)*** was referred to by the learned counsel for the petitioner for the proposition that, according to the definition in Section 182 of the Indian Contract Act, 1872, an agent never acts on his own behalf, but always on behalf of another and that he either represents his principal in any transaction or dealing with a third person or performs any act for the principal. The act of the agent is deemed in law to be not his own but of the principal. It was noted that the crucial test of the status of an agent is that his acts bind the principal.

16. Referring to another Division Bench decision of the Allahabad High Court in the case of *Khush Chand and Others (supra)*, the learned counsel for the petitioner contended that agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. These decisions were referred to in the backdrop of the controversy as to whether M/s Fly Jac Forwarders Transporters and M/s Sagar Warehousing Corporation were agents of the respondent or not ? As noted above, the original case of the petitioner was that both M/s Fly Jac Forwarders Transporters and M/s Sagar Warehousing Corporation were agents of the respondent, whereas the learned counsel appearing on behalf of the latter were of the view that they were not agents of the respondent, but had a principal to principal relationship with the respondent.

16. At this juncture several important questions need to be considered. They are:-

- 1) Did the property in the goods in question pass to the respondent ?
- 2) Could the petitioner be regarded as an unpaid seller ?
- 3) Was the petitioner in possession of the goods in question or had he parted with possession ?
- 4) Could the goods be regarded to be in transit ?

- 5) Did the petitioner have any lien in respect of the said goods ?
- 6) Whether the petitioner has a right to stoppage of the said goods, if held to be in transit ?
- 7) Does the petitioner have a right to re-sell the said goods ?

17. Section 19 of the Sale of Goods Act, 1930 specifically provides that the property passes when it is intended to pass. Section 19 (1) stipulates that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. In this context, it would be pertinent to reiterate that clause 7 of the addendum of 24.09.1999 specifically stipulated that the title in the goods would only pass to the purchaser (respondent) once the full payment of GBP 9,00,000 under the said agreement was received by the vendor (petitioner) upon the delivery of the package FOB Mumbai for shipment to U.K. Admittedly, the petitioner has not received the agreed price of GBP 9,00,000. The intendment under the said clause is clear that unless and until the petitioner received the full price for the said goods, the property in them would not pass to the respondent and would continue to vest in the petitioner. In the light of Section 19 of the Sale of Goods Act, 1930, it can be safely concluded, at this stage, that the property was intended to pass only upon the full payment of GBP 9,00,000 by the respondent to the petitioner. That has not happened, therefore, the property has not passed to the respondent. This

being the position, the agreement dated 16.06.1999 alongwith its addenda would only be regarded as an agreement to sell within the contemplation of Section 4 (3) of the Sale of Goods Act, 1930 and not as a sale. The agreement to sell has not matured into a sale inasmuch as the conditions that were required to be fulfilled, subject to which the property in the goods was to be transferred, have not been fulfilled. Therefore, in law, no sale has taken place and the parties had only entered into an agreement to sell.

18. Section 45 of the Sale of Goods Act, 1930 defines an unpaid seller as a seller of goods when, *inter alia*, the whole of the price has not been paid or tendered. The petitioner has not received the agreed sale price of GBP 9,00,000. Clearly, the petitioner is an unpaid seller within the meaning of the Sale of Goods Act, 1930.

19. As regards the question of possession, whether M/s Fly Jac Forwarders Transporters and M/s Sagar Warehousing Corporation are regarded as agents of the respondent or not, the fact is that the goods in question had been taken delivery of by M/s Fly Jac Forwarders Transporters from the petitioner and the same were no longer in the control of the petitioner. Therefore, it must be concluded that the petitioner had parted with possession of the goods.

20. Section 51 of the Sale of Goods Act, 1930 deals with the duration of transit. Sub-section (1) provides that the goods are deemed to

be in the course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee. Sub-section (2) stipulates that if the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. In the context of these provisions, the question of whether M/s Fly Jac Forwarders Transporters acted as agents of the respondent or merely as a carrier gains importance. If M/s Fly Jac Forwarders Transporters was an agent of the respondent and took delivery of the goods from the petitioner at New Delhi, the transit would be at an end. However, on the other hand, if M/s Fly Jac Forwarders Transporters did not act as an agent of the respondent, but merely as a carrier for the purpose of transmission to the respondent, the transit would not be at an end until the respondent or his agent in that behalf takes delivery of the said goods from M/s Fly Jac Forwarders Transporters. So, the question of whether the transit has come to an end or not would depend upon whether or not M/s Fly Jac Forwarders Transporters was an agent in that behalf of the respondent. That is a debatable question and it would be appropriate if the same is left open at this stage.

21. As regards the question of lien in respect of the said goods, it is apparent that an unpaid seller has a lien on the goods for the price “while he is in possession of them”. This is apparent from a reading of Section 46 (1) of the Sale of Goods Act, 1930. It is a settled proposition that if the unpaid

seller does not have possession of the goods, he cannot have lien on such goods [*See: AIR 1926 PC 38: Maneckji Pestonji Bharucha v. Wadilal Sarabhai and Co.*]. It must also be noted that in the facts and circumstances of the present case, no sale has taken place and, therefore, the petitioner continues to have title over the goods in question even though the same are not in its possession. A person cannot have lien on his own goods. [*See: AIR 1938 PC 152 Nippon Yusen Kaisha v. Ramjiban Serowgee*].

22. The right of an unpaid seller to stoppage of goods in transit is provided under Section 46 (1) (b). Just as in the case of lien on the goods, this right of stopping the goods in transit is also dependent on the fact that the property in the goods has passed to the buyer. I have already mentioned that the property in the goods in question has not passed to the respondent. Therefore, the right of stoppage of goods in transit would not be available under Section 46 (1) (b) of the Sale of Goods Act, 1930, but this does not mean that the petitioner would not have the right to the said goods. This is so because by virtue of Section 46 (2) of the Sale of Goods Act, 1930 where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. While Section 46 (1) relates to an unpaid seller's rights where the property in the goods has passed to the buyer, Section 46 (2) deals with the rights of an unpaid seller where the property in the goods has not passed to the buyer. The petitioner, as observed earlier, is

an unpaid seller within the meaning of the Sale of Goods Act, 1930. The properties in the goods in question have not passed to the respondent. Therefore, although the petitioner cannot exercise any lien in respect of the said goods, nor can it ask for stopping the goods in transit as contemplated under Section 46 (1) (b), the petitioner can certainly ask for the return of the goods being the owner thereof because no sale has taken place and the respondent is not interested in completing the sale.

23. The right to resell the goods in question as available to an unpaid seller under Section 54 (2) of the Sale of Goods Act, 1930 would not be available to the petitioner. This is so because the statutory power of resale under Section 54 (2) arises only if the property in the goods has passed to the buyer, subject to the lien of the unpaid seller. Where the property in the goods has not passed to the buyer, the seller has no right of re-sale under Section 54 (2). This is what has been held by the Supreme Court in the case of *P.S.N.S. Ambalavana Chettiar and Co. Ltd. v. Express Newspapers Ltd.*: AIR 1968 SC 741. But, this does not mean that the petitioner would not have any right to sell the goods in question. The right to re-sell which is contemplated under Section 54 (2) has certain implications. In such an eventuality, the seller can claim as damages the difference between the contract price and the amount realised on re-sale of the goods, in case the latter price was less than the contract price. On the other hand, if the amount realised on the resale of the goods was much higher than the

contract price, the seller would be entitled to retain the profit. This is, of course, subject to the unpaid seller giving a notice to the buyer of his intention to re-sell.

24. The petitioner is the owner of the goods lying in the warehouse of M/s Sagar Warehousing Corporation. The petitioner is entitled to seek preservation of the said goods as an interim measure. The arbitration proceedings have not progressed much, if at all. It would be in the interest of all concerned that the arbitration is proceeded with without any delay or let up. However, till the disputes between the petitioner and the respondent are resolved, the goods in question need to be preserved. One way would be to continue the order dated 20.12.2002. But, that would mean continued hardship on M/s Sagar Warehousing Corporation. Thus, the only reasonable and equitable solution to this impasse would be that the goods are taken possession of by the petitioner and retained by it till further orders are made by the arbitral tribunal. Insofar as M/s Fly Jac Forwarders Transporters are concerned, they cannot have any lien on the goods, either as agent of the respondent or as carriers, because the goods do not belong to the respondent at all, the sale not having been completed. Whatever remedy they may have in respect of the charges, costs and expenses would be against the respondents and not against the petitioner. Therefore, they cannot have any objection to the goods being taken possession of by the petitioner without any payment being made by the petitioner to M/s Fly Jac Forwarders Transporters or M/s Sagar Warehousing Corporation. The latter

also cannot have any claim against the petitioner because the petitioner has no privity of contract with it and the goods belong to the petitioner. It is ordered accordingly. It is clarified that the views expressed on the facts are only of a *prima facie* nature. M/s Flay Jac Forwarders Transporters and M/s Sagar Warehousing Corporation are free to pursue such remedies as are available to them under law for receiving their charges and dues.

These applications and the petition stands disposed of.

BADAR DURREZ AHMED
(JUDGE)

April 22, 2007
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