

*

HIGH COURT OF DELHI

%

Date of decision: August 11th, 2008

1. +

FAO(OS) 258/2008

Sagar Warehousing Corporation

...Appellant

through

Mr.Valmiki Mehta, Sr.Adv with
Ms.Lalita Kohli and Ms.Charu,
Advocates

Versus

1.Pawan Hans Helicopters Limited

...Respondent no.1

through

Ms.Ritu Bhalla & Mr.Dhruv
Dewan, Advocates

2. M/s AES Aerospace Limited

...Respondent no.2.

through Nemo

3.M/s Fly Jac Forwarders

...Respondent no.3.

(now known as Fly Jac Logistic Pvt.Ltd)

Through

Mr.Rajendra Gupta & Mr.Naresh
Joshi, Advs.

2.

FAO(OS) 259/2008

M/s Fly Jac Forwarders

...Appellant

(now known as Fly Jac Logistic Pvt.Ltd)

Through

Mr.Rajendra Gupta & Mr.Naresh
Joshi, Advs.

Versus

1.Pawan Hans Helicopters Limited

...Respondent no.1

through

Ms.Ritu Bhalla & Mr.Dhruv
Dewan, Advocates

2. M/s AES Aerospace Limited ...Respondent no.2.
Through Nemo

3. Sagar Warehousing Corporation ...Respondent no.3.
Through
Mr.Valmiki Mehta, Sr.Adv with
Ms.Lalita Kohli and Ms.Charu,
Advocates

Coram :

Hon'ble Mr.Justice Manmohan Sarin
Hon'ble Mr.Justice Manmohan

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

Manmohan Sarin, J.

1. By this common judgment, two appeals namely FAO(OS) 258/2008 filed by M/s Sagar Warehousing Corporation and FAO(OS) 259/2008 filed by M/s Fly Jac Forwarders (now known as Fly Jac Logistic Pvt.Ltd.) are being decided, as challenge in both the appeals is to the common order and judgment dated 22nd April, 2008 by which IA No.7864/2003 preferred by appellant Sagar Warehousing Corporation and IA No.7863/2003 preferred by appellant M/s Fly Jac Forwarders were decided, assailed in the present appeals. Both the appellants by the respective I.As had sought vacation of the ex parte ad interim order passed by the learned Single Judge on 20th February,

2002. Directions had also been sought by the appellants for removal of the goods by Pawan Hans Helicopters Ltd after paying the dues of the appellants for transportation and warehousing charges. Vacation of the restraint on the appellant from alienating, encumbering and disposing of the goods was also sought.

2. For facility of reference, Sagar Warehousing Corporation-appellant in FAO (OS) 258/2008 is being referred to as 'SWC', M/s Fly Jac Forwarders-appellant in FAO(OS) 259/2008 as 'FJF', Pawan Hans Helicopters-respondent no.1 in both the appeals as 'Pawan Hans' and the foreign purchaser of the goods M/s AES Aerospace Limited-respondent no.2 in both the appeals is being referred to as 'AES'.

The applications for interim relief, namely, CM.7826/2008 in FAO(OS)258/2008 and CM.7828/2008 in FAO (OS).259/2008 were dismissed vide order dated 26th May, 2008 while judgment in the appeals was reserved.

3. The facts relevant for the disposal of two appeals may be briefly noted:-

(i) Pawan Hans had entered into an agreement with AES on 16th June, 1999 for the sale of 19 Westland Helicopters and spares and accessories for a sum of £ 9,00,000. The agreement to sell was followed by two addendums dated 24th

September, 1999 and 31st May, 2000 making a provision for shipment of the helicopters and goods in not more than two consignments. Consideration of £ 9,00,000 was also split up corresponding to the value of the consignment shipped. The first consignment of six helicopters with spares was shipped to AES with a sum of £ 4,50,000 being 50% of the total sale consideration being remitted to Pawan Hans. The agreement ran into rough weather when the second consignment of 13 helicopters with spares were to be delivered.

(ii) In terms of the agreement, AES, the buyer was to take delivery from New Delhi and Bombay by deputing an authorized transporter. The term "authorized transporter" was defined in the contract to mean any transporter having demonstrated the capacity to transport part of the package from Safdarjung Airport, New Delhi to Mumbai and from Juhu Airport, Mumbai to Mumbai Customs Port as approved by the purchaser (emphasis supplied). In the instant case, it is common ground that AES had appointed FJF as the authorized transporter. This becomes apparent from the letter dated 30th September, 1999 written by Pawan Hans to FJF which is reproduced for facility of reference:-

"We have been advised by M/s AES Aerospace Ltd, England that Fly Jac Forwarders, New Delhi has been appointed by them for inland transportation of Westland 30 helicopters and related package in India. Earlier the Govt of India

had approved the disposal of Westland 30 package in favour of AES Aerospace Ltd., UK.

You are requested to contact the undersigned for arranging inland transportation of the package from Safdarjung Airport, New Delhi to Juhu Airport, Bombay and Mumbai/New Mumbai Port. Please note that the entire job should be completed before end of Nov 1999."

(iii) AES issued further instructions regarding movement of cargo vide its letter of November 4, 1999. AES again vide its letter of November 9, 1999 instructed FJF to arrange godown facilities in Mumbai in case the full cargo cannot catch the planned vessel. The cost of warehousing was to be paid by AES through Pawan Hans on presentation of the bill. In the event, the second consignment of 13 helicopters with spares was delivered to FJF, who in turn appointed SWC as the warehousing agents and the goods are presently stored with SWC. This happened not in the recent past but as far back as on 26th December, 1999.

(iv) AES is stated to have gone into liquidation. Hence the agreement of purchase is not being performed and the delivery of the goods has not been taken by them. The helicopters and spares continue to be stored in the warehouse of SWC. FJF and SWC have been demanding the payment of transportation and warehousing charges. Pawan Hans has not cleared or paid any of these amounts on the basis that liability

for transportation as also the allied charges was to be borne by AES.

(v) Pawan Hans in the circumstances filed a petition under section 9 of the Arbitration and Conciliation Act, 1996 for restraining AES or its agents from alienating or disposing the shipment of helicopters and spares lying with SWC. The learned Single Judge vide orders dated 20th December, 2002 granted an ex parte ad interim injunction restraining FJF and SWC from alienating, encumbering or otherwise disposing of the goods. Direction was also sought that Pawan Hans be permitted to lift helicopters and spares only upon payment of the warehousing and transportation charges of SWC and FJF.

4. The learned Single Judge by the impugned order dismissed the two applications filed by the appellants. He further permitted Pawan Hans to lift goods without payment of warehousing or transportation charges vide impugned order dated 22nd April, 2008. Aggrieved by the said order, appellant-SWC filed FAO(OS) 258/2008 and appellant-FJF filed FAO(OS) 259/2008.

5. We have heard Mr.Valmiki Mehta, learned senior counsel on behalf of SWC and Mr.Rajinder Gupta on behalf of FJF. FJF have adopted the arguments made by the learned senior counsel Mr.Valmiki Mehta. In addition, Mr.Gupta

submitted that there was no justification whatsoever for the court to permit Pawan Hans to take possession of the goods without payment of the dues of the transporter. Mr.Valmiki Mehta, learned senior counsel assailed the impugned order by urging that FJF and SWC were not parties to the arbitration agreement and yet the learned Single Judge while deciding Section 9 petition filed by Pawan Hans as also the applications moved by the appellants allowed Pawan Hans to take possession of the helicopters without making the payment i.e either to appellant-SWC or appellant-FJF. This virtually amounted to decree of possession being passed against the appellants without the Pawan Hans ever filing a suit for possession. Learned senior counsel further submits that the appropriate remedy for the Pawan Hans was to file a suit for possession in which the appellant could have filed its counter claims and defended or opposed the prayer for possession. Counsel submitted that discretionary powers under section 9 of the Arbitration and Conciliation Act are intended for preservation of the property which is subject matter of arbitration. It cannot be used as a camouflage or a ruse to seek possession and that too with the appellant being deprived of the payment of their legitimate dues.

6. Let us consider the above submissions in the light of the findings and the view taken by the learned Single Judge. The learned Single Judge on a consideration of the agreement terms between Pawan Hans and AES reached the conclusion that the property in the good was to pass only upon entire sale consideration being paid. This is a common ground that entire sale consideration has not been paid and only £ 4,50,000 has been paid. Under Section 9 of Sales of Goods Act, 1930 property in goods pass when intended to be passed. Section 19(1) of Sales of Goods Act, 1930, clearly provides 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 terms of the agreement between Pawan Hans and AES, property was to pass only upon payment of the sale consideration. Since only a sum of £ 4,50,000 has been paid, the property in goods has not passed on to AES and continues to vest in Pawan Hans.

7. Perusal of the agreement clearly shows that transporter was to be appointed and nominated by AES and the goods were to be transported by the "appointed transporter" so nominated. In the instant case, FJF had been nominated and appointed by the AES. Accordingly, FJF could only be the agent of AES and not that of Pawan Hans. There was no privity of

contract between Pawan Hans and FJF or SWC. There is no merit in the contention of appellant-FJF that it dealt with Pawan Hans on a principal to principal basis or appointment of FJF was under the agreement by Pawan Hans. FJF had been appointed by the AES as the approved transporter. Correspondence exchanged also reveals that the liability for charges of FJF or that of SWC was to be borne by AES, even if payment was contemplated to be made through Pawan Hans upon bills being presented. In the instant case, payment of sale consideration not having been made to Pawan Hans, the question of payment by Pawan Hans of the bills presented by FJF would not arise since the same was the liability of AES. We are of the view that the order passed by the learned Single Judge subserves the ends of justice and is fair and equitable. Besides the same would clearly fall within the ambit of Section 9(2) (a) and (e) of the Arbitration and Conciliation Act, 1996 as the order is in respect of goods which are the subject matter of an arbitration agreement and the order of restraint on appellants, who are not parties to the arbitration agreement is intended to preserve and protect the goods. The plea of the learned Single Judge having exceeded his jurisdiction is mis-conceived. The helicopters in question had been lying at the ware house since December, 1999 with no prospect of AES taking delivery of the same,

having gone into liquidation. The goods because of lying unused would be subjected to attrition and it would be a national waste.

In these circumstances, it was just and proper that pending the arbitration proceedings, Pawan Hans be permitted to take possession of the goods and retain the same. Pawan Hans as the owner of the goods and complete sale consideration having not been paid to it was entitled to its possession and these could not be retained by FJF and SWC on the ground that their charges had not been paid. There was no fetter on FJF and SWC to recover the transportation and warehousing charges from AEC.

We find no merit in the appeals. Both the appeals are dismissed.

Manmohan Sarin, J.

Manmohan, J.

August 11th, 2008
ssb