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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. (I) (COMM.) 253/2016

P.E.C. LIMITED

..... Petitioner

Through: Mr. Rajesh Kumar & Mr. G.K. Singh,
Advocates.

versus

KANDLA ENERGY & CHEMICALS LTD. AND ANR. Respondents

Through: Mr. Akhil Sibal, Ms. Manmeet Kaur, Mr.
Yashvardhan Bandi & Mr. Nikhil Chawla,
Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

05.10.2016

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1.This is a petition filed by P.E.C. Limited, a Government of Indian Enterprise against Kandla Energy and Chemicals Limited (Respondent No.1) and Adani Ports and Special Economic Zone Limited (Respondent No.2) under Section 9 of the Arbitration & Conciliation Act, 1996 ('the Act') seeking certain interim reliefs.

2. The background facts are that Respondent No.1 approached the Petitioner for financing the import of 2,000 MT of Heavy Aromatics of South Korean origin from a Singapore supplier. An agreement dated 7th May, 2014 was entered into in terms of which the Petitioner agreed to finance the import by opening a letter of credit ('LC'). Among the terms and conditions of the said Agreement, Respondent No.1 pledged the cargo in favour of the Petitioner and agreed to store it at its own cost and risk. The Petitioner had the first charge on the cargo to be issued by Respondent

No.1 in its favour. The other condition was that in the event of failure of Respondent No.1 to pay the entire cost of import within the due date/usance period of the LC, the Petitioner was at liberty to sell the goods/cargo to any third party without reference to, and at the cost and risk of Respondent No.1. A further condition was that Respondent No.1 would indemnify the Petitioner in case of any loss, damage or cost which the Petitioner might incur or suffer with regard to the import or in relation to the Agreement.

3. The Agreement contained an arbitration clause in terms of which the arbitration was to take place in accordance with the Rules of Arbitration of Indian Council of Arbitration. The venue of Arbitration was to be New Delhi and Delhi Courts were to have jurisdiction.

4. It is stated that in terms of the above Agreement, the Petitioner got established an LC on 8th May, 2014 with its banker, the State Bank of Travancore, Parliament Street, New Delhi in favour of supplier for a sum of USD 21,00,000/-. It is stated that the import was made on 23rd May, 2014. Respondent No.1 executed a Deed of Pledge dated 11th June, 2014, pledging the cargo of value of USD 2112140.57 under the said LC.

5. Respondent No.1 and the Petitioner entered into a High Seas Sale Contract on 11th June, 2014 whereby Respondent No.1 agreed to sell the cargo to the Petitioner.

6. Respondent No.2, the owner of the Kandla port, confirmed by a letter dated 14th June, 2014 that it had received the cargo of 2002.010 MT of Heavy Aromatics and that it had been stored at its bonded warehouse. It undertook that it would release the cargo to Respondent No.1 only after a

No Objection Certificate ('NOC') was given by the Petitioner and that the charges for storing were to be borne by Respondent No.1 in terms of the Contract between Respondent Nos.1 and 2 entered into on 24th September, 2013.

7. At the request of Respondent No.1, the Petitioner rolled over the LC on three occasions i.e., on 19th September, 2014, 17th November, 2014 and 13th February, 2015. On 11th February, 2015, Respondent No.1 executed a Deed of Undertaking in favour of the Petitioner and issued 13 cheques towards re-payment of the amount financed for the import. Three more cheques were issued in similar fashion. These cheques when presented for payment were dishonoured. Five complaints were instituted against Respondent No.1 by the Petitioner under the Negotiable Instruments Act, 1881.

8. By an e-mail dated 19th February, 2016, Respondent No.1 forwarded a letter dated 12th February, 2016 from the Office of the Principal Commissioner of Customs at Mundra, Gujarat requesting Respondent No.1 to clear the cargo and pay the storage charges. Respondent No.2 sent to Respondent No.1 a final notice dated 5th January, 2016 under Section 48 of the Customs Act, 1962 ('CA') stating that Respondent No.2 was empowered to sell the cargo in its custody if the custom duties were not cleared within ten days.

9. By a letter date 23rd February 2016, the Petitioner informed the Customs authorities of its proposal to bring to sale by way of auction the cargo pledged in its favour by Respondent No.1. It requested the Customs authorities to defer the auction proposed by them and to grant the

Petitioner sixty days' time to conclude the process of sale by auction. According to the Petitioner, as on 20th May, 2016, a sum of Rs.13,20,94,675/- was due from Respondent No.1.

10. It is in the above circumstances that the present petition was filed on 1st June, 2016 praying *inter alia* for orders injuncting Respondent Nos.1 & 2 from selling, transferring, alienating and/or creating any third party interest or parting with possession of 2002.01 MT of Heavy Aromatics pledged with the Petitioner and lying in the bonded warehouse of Respondent No.2 at Mundra till such time as the entire dues of the Petitioner were recovered from Respondent No.1. The further interim reliefs were for attachment of the cargo and for a direction to Respondent No.2 to allow the Petitioner to have access to the cargo for initiation of the auction sale.

11. On 3rd June, 2016, this Court passed an interim order restraining Respondent Nos. 1 & 2 from selling, transferring, alienating and/or creating any third party interest or parting with possession of the 2002.01 MTs of Heavy Aromatics pledged with the Petitioner and lying in the bonded warehouse of Respondent No.2 at Mundra.

12. On 31st August, 2016, a further order was passed in the absence of the counsel for the Respondents, permitting the Petitioner to initiate the steps to auction the goods lying with Respondent No.2, and for Respondent No.2 to allow the Petitioner to take the samples of the products for that purpose. A copy of the auction notice was directed to be given to Respondent No.1. The request of the Petitioner was to be considered on the following date.

13. At this stage, it is required to be noticed that Respondent No.1 has despite service not been appearing in these proceedings. In fact,

Respondent No.1 has been unresponsive even to the communication addressed to it by the Petitioner as well as Respondent No.2. In effect, therefore, Respondent No.1 has disappeared from the scene.

14. Soon thereafter Respondent No.2 filed IA No.11610/2016 seeking clarification/modification of the order dated 31st August, 2016. Respondent No.2 sought a direction to the Petitioner that it would not sell, alienate, transfer and create any third party interest in the goods without clearing the outstanding dues of Respondent No.2. The alternative prayer was that if the Petitioner had to auction the goods by way of open tender, the amounts due to Respondent No.2, being the custodian of the goods as per the CA, would be adjusted/paid first. The Court then passed an order on 20th September, 2016 allowing the prayer of the Petitioner that it be permitted to take steps for auction notice subject to the condition that it would not create a third party interest or sell the materials in the market till the following date.

15. Mr. Rajesh Kumar, learned counsel for the Petitioner, submitted that under Section 48 of the CA, it was incumbent on Respondent No.2 to obtain permission of the proper officer of the Customs before proceeding to bring the goods to sale by way of auction. Reference is also made to Section 142A of the CA, which states that the liability for customs duties shall be the first charge. It was, accordingly, submitted that the sequence of application of the proceeds as listed out in Section 150 of the CA would be subject to Sections 48 and 142A of the CA. Further, relying on Sections 172, 176, 180 & 181 of the Contract Act 1872, Mr. Kumar submitted that as a pledgee, the Petitioner, in any event, has the first charge on the cargo which was in the bonded warehouse and the said lien had to be honoured

notwithstanding the statutory dues. He placed reliance on the decisions in ***The Bank of Bihar v. The State of Bihar (1972) 3 SCC 196*** and ***Central Bank of India v. Siriguppa Sugars & Chemicals Ltd. and Ors. (2007) 8 SCC 353***.

16. In response to the query whether an order under Section 9 of the Act could be obtained against Respondent No.2, which was not a party to the arbitration agreement, Mr. Kumar sought to place reliance on the decision in ***Sagar Warehousing Corporation v. Pawan Hans Helicopters Ltd. AIR 2009 Del. 8***.

17. Countering the above submissions, Mr. Akhil Sibal, learned counsel appearing for Respondent No.2, first pointed out that no order under Section 9 of the Act can be passed against Respondent No.2, particularly since it has an independent right as regards the cargo. He relied on the decisions in ***Dorling Kindersley (India) Pvt. Ltd. v. Sanguine Technical Publishers 2013 (3) Arb LR 52 (Del)*** and ***VLS Finance Ltd. v. BMS IT Institute Private Limited & Ors. 220 (2015) DLT 113***.

18. Mr. Sibal also referred to Section 150 of the CA, which according to him set out the 'waterfall' as regards the sequence of charge on the cargo lying in the bonded warehouse of Respondent No.2. He pointed out that the storage charges could be recovered even ahead of the customs dues. The dues of the owner of the cargo were to be settled only thereafter. In support of this proposition, he placed reliance on the decision of the Division Bench of this Court in ***Associated Container Terminals Ltd. v. Union of India (2008) 226 ELT 169***. It is, accordingly, submitted that this Court ought not to pass any order which would be contrary to the statutory

scheme.

19. The above submissions have been considered. In the first place, it requires to be noticed that, ordinarily, a direction under Section 9 of the Act will not be issued to a party which is not a party to the arbitration agreement. However, this Court has in a series of judgments including ***Dorling Kindersley (India) Pvt. Ltd.*** (*supra*) held that Section 9 of the Act does not limit the jurisdiction of the court to pass appropriate interim orders which might affect third parties deriving a title “from the party to the agreement unlike the third party having an independent right.” In the said decision, the Court referred to the decision of the Full Bench of the Bombay High Court in ***Girish Mulchand Mehta v. Mahesh S. Mehta*** 2010 (2) *Mh LJ* 657.

20. The above decision was followed in ***VLS Finance Ltd.*** (*supra*). In both these decisions, however, it was clear that the third party was claiming a right under a party to the agreement and not an independent right. As far as the decision in ***Sagar Warehousing Corporation*** (*supra*) is concerned, the Court in that case justified the passing of an interim order against an entity which was not a party to the arbitration agreement by referring to Sections 9(1)(ii)(a) and 9(1)(ii)(e) of the Act on the ground that it was not intended to protect and preserve the subject matter of the agreement which were the goods kept in the warehouse. The goods sold were helicopters together with their spares.

21. The distinguishing feature as far as the present case is concerned is that what the Petitioner is essentially seeking to recover is the money owed to it and, therefore, bringing the goods pledged in its favour as security to sale

by way of public auction. The second distinguishing feature is that the third party in the present case, which is Respondent No.2, is not deriving the title to the goods through Respondent No.1. As the owner of a bonded warehouse, it has an independent right to the goods.

22.It is necessary at this stage to refer to Sections 48, 142A and 150 of the CA which read as under:

“48. Procedure in Case of Goods not Cleared, Warehoused, or Transshipped within Thirty Days after Unloading. –

If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transshipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof:

Provided that –

- (a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;
- (b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.”

“142A. Liability under Act to be first charge. — Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), and the Insolvency and Bankruptcy Code, 2016, be the first charge on the property of the assessee or the person, as the case may be.”

“150. Procedure for Sale of Goods and Application of Sale Proceeds. –

(1) Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall, after notice to the owner thereof, be sold by public auction or by tender or with the consent of the owner in any other manner.

(2) The proceeds of any such sale shall be applied –

(a) firstly to the payment of the expenses of the sale,

(b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods,

(c) next to the payment of the duty, if any, on the goods sold,

(d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods,

(e) next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods. ...”

23. Section 48 of the Act provides for sale of the imported goods, with the permission of the proper officer, if such goods are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station. Section 142A of the Act provides for any amount of “duty, penalty, interest or any other sum payable by an assessee or any other person” under the CA shall, except to the extent provided in Section 529 of the Companies Act and the other Acts mentioned in Section 142A of the CA, “be the first charge on the property of the assessee or the person, as the case may be”. The expression

“any other sum payable by an Assessee or any other person under this Act” would naturally include not just the customs duty but any other charges including storage charges that may be payable to a port authority.

24. Section 150(1) of the CA states that where the goods are to be sold under the provisions of the CA, they should, after notice to the owner thereof, be sold by public auction or by tender. Section 150(2) of the CA provides the sequence in which proceeds of the auction should be applied. It is categorical that it has to be first applied to payment of the expenses of sale. Next, it has to be applied to the payment “of the freight and other charges, if any, payable in respect of the goods sold, to the carrier.” Thirdly, it has to be applied to “the payment of the duty, if any, on the goods sold.” Fourthly, it has to be applied to “the payment of the charges in respect of the goods sold due to the person having the custody of the goods.” This refers to, as the case may be, the person or entity in-charge of warehouse or storage area in whose custody the goods are kept, which in this case would be Respondent No.2. Fifth in the sequence is the payment of any amount due to the Central Government under the provisions of the CA or any other law relating to customs, and the balance, if any, “shall be paid to the owner of the goods.”

25. It is, therefore, seen that the owner of the goods is last in the sequence. The Petitioner as a pledgee could at best be said to have stepped into the shoes of the owner and, therefore, in terms of Section 150 of the CA, the dues of the Petitioner would have to await the settlement of the customs duty and dues of Respondent No.2.

26. The Court is unable to agree with the submission of the learned counsel

for the Petitioner as a pledgee in terms of Sections 172, 176, 180 & 181 of the Contract Act, its dues deserve precedence over the dues of the Customs and Respondent No.2.

27. The decision in *The Bank of Bihar* (*supra*) and the subsequent decision in *Central Bank of India* (*supra*) did not consider a situation where monies owed to the Customs as well as the port/warehousing entity. In both those cases, the simple question was regarding the rights of the pledgee over those of unsecured creditors and even the Government. In the present case, however, the statute i.e. the CA itself provides for the sequence for settling of the dues of the various parties from the proceeds of the auction sale. A harmonious reading of Sections 48, 142A and 150 of the CA makes it clear that subject to the compliance with the requirements of those provisions, the proceeds of the auction sale should be utilised first for the payment of the customs dues; thereafter the dues of the entity in whose custody the goods are kept (which in this case is Respondent No.2) and only thereafter the owner of the goods (which in this case is in effect the Petitioner). The decision in *Associated Container Terminals Ltd.* (*supra*) underscores that the dues owed to the port or the custodian of the goods would deserve precedence over the customs duty in view of Section 63(2) of the Act. In any event, as far as the Petitioner is concerned, its dues would have to await in the order of precedence, the settling of the dues of Respondent No.2.

28. It was then urged by the counsel for the Petitioner that it does not serve anyone's purpose if the goods are not immediately brought to sale by way of public auction. He prayed that the Petitioner should be permitted to go ahead with the auction sale and the money be directed to be deposited in

this Court. He urged that this Court could later decide how the money should be disbursed. Mr. Sibal, learned counsel appearing for Respondent No.2 on the other hand insisted that it should be made clear that the sale of the goods by way of auction is taking place under Section 150 of the CA and that the manner in which the sale proceeds would be applied would have to be in accordance with that provision.

29. The Court finds merit in the submission of Mr. Sibal that the sale of the goods can take place only in terms of Section 150 of the CA. The goods in question are imported and have not been cleared within a period of thirty days after such import. Sections 48 read with Sections 142A and 150 of the CA are straightway attracted. Therefore, the sale of the warehoused goods has to take place only in accordance with Section 150 of the CA and the proceeds thereof have to be applied in the manner provided therein. The dues of the customs authorities and that of Respondent No.2 have a priority over those of the Petitioner and the sale proceeds will have to be applied to settle the dues in that order. Consequently, the question of permitting the Petitioner as a pledgee of the goods to bring the goods to sale by way of public auction does not arise.

30. In the matter of enforcing the pledge in favour of the Petitioner, the clauses in the Agreement between the Petitioner and Respondent No.1 have to give way to and are subject to the statute i.e. the CA. Consequently, the interim relief sought by the Petitioner cannot be granted. However, it is made clear that without any unnecessary delay, Respondent No.2 should initiate the process, if it has not done so already, to bring the goods to sale by way of public auction after notice to the Petitioner. The application of the proceeds of such auction sale will abide by the

‘waterfall’ provision of Section 150 of the CA.

31. The interim orders passed by this Court, thus, far, stand vacated. The petition is disposed of in the above terms with no orders as to costs.

OCTOBER 05, 2016

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S. MURALIDHAR, J.

