

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2017

PRONOUNCED ON .02..2017
CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

Application No.341 of 2017 in
Application No.5304 of 2015 in
A.No.4318 of 2011 in C.S.No.65 of 2011

Geodis Overseas Private Limited
Earlier at 2 B& C, Ega Trade Centre
318, Poonamallee High Road,
Kilpauk, Chennai now at address
Dowlath Tower, 12th Floor,
No.59, 61& 63, Taylors Road
Kilpauk, Chennai -600 010
Thorugh Samdarshi Lamba
Manager legal and
Company Secretary

.. Applicant/1 Respondent
.. Applicant/1 Defendant

vs.

1. Falcon Tyres Limited
K.R.S.Road, Metagali,
Mysore (Karnataka)
570 016

.. 1st respondent/plaintiff

2. Maersk India P. Limited
CFS Division, No.78,
Anuppampattu Village,
T.H.Road, Ponneri Taluk
Thiruvallur District, Tamil Nadu
Chennai -601 203

.. II respondent/II Defendant

Application filed under Order XIV Rule 8 of Madras High Court Original Side Rules read with Section 151 of CPC.

For applicant/D1	: Mr.A.P.S.Aluwallia for M/s. T.N.C.Kaushik
For R1/Plaintiff	: No appearance
For R2 /D2	: V.Aravamudan

ORDER

Originally, the suit in C.S.No.65 of 2011 has been filed by the original plaintiff for different mandatory injunction reliefs. Along with the said suit, the plaintiff filed O.A.No.87 of 2011 for interim mandatory injunction directing the 1st defendant to pay the detention charges and demurrages and to clear the plant and machinery, in which a conditional order was passed directing the plaintiff to deposit Rs.2,32,12,382/- by way of Fixed Deposit in the name of the Registrar General to the credit of the above suit and with further direction to clear the Cargo in the event of the conditions being complied with. Against the said order, the

original 1st defendant filed an Application in A.No.1397 of 2011 to vacate the above interim order of injunction. Both the applications were jointly taken up and, this Court, vide order dated 21.4.2011, disposed of the aforementioned applications with specific directions to mitigate the risk and loss to both parties.

2. While so, the original 1st defendant filed an application in A.No.4318 of 2011 to attach the complete cargo mentioned in the Schedule to the judges summons lying at the factory premises of the plaintiff at K.R.S. Road, Metagali, Mysore, Karnataka 570 016, and to bring the same into the custody of this Court for selling the same through publication auction to realize the sum of Rs.6,10,85,913.96 p. This Court, after hearing both parties, vide detailed order dated 04.07.2012, directed the original plaintiff to deposit a sum of Rs.3,05,42,956.98 within one week from the date of receipt of the said order, failing which the cargo lying at the factory premises of the plaintiff at K.R.S.Road,

Metagali, Mysore, Karnataka shall stand attached and be brought to the custody of this Court to be brought for public auction and the amount due to the plaintiff under the order, dated 21.4.2011, shall be realised from and out of the amount realised through public auction and the balance sum, after defraying the expenses for attachment and for bringing the same into the custody of the Court.

3. The aforesaid application, i.e. Application No.4318 of 2011 was listed under the caption "for being mentioned" on 13.08.2012 at the instance of the original 1st defendant on the ground that the particulars regarding the local court through which the order of attachment is to be effected, were omitted to be mentioned. This Court, while observing that no separate application is necessary to include such particulars, revised para 16 of the said order, with a direction that the cargo shall stand attached through District and Sessions Court, Mysore. The rest of the directions given in the earlier order were confirmed.

4. Aggrieved against the said order, the original plaintiff filed an application No.5304 of 2015 seeking to modify the said order, i.e. order dated 13.8.2012. Further, the original plaintiff also filed Original Application No. 821 of 2015 for granting interim injunction restraining the original 1st defendant from dismantling, removing or otherwise acting in any manner to the detriment of the running of the factory. Since the parties, after serious arguments in the aforesaid applications, were agreed for extension of time, this Court, vide order dated 04.9.2015, had directed the original plaintiff to deposit the sum of Rs.3,05,42,956.98 as directed by this Court on 13.8.2012 in three instalments, i.e., a sum of Rs.1,00,00,000/- (Rupees one Crore only), towards first instalment on or before 31.11.2015; another sum of Rs.1,00,00,000 (Rupees One Crore only) towards second instalment on or before 01.02.2016 and the balance sum of Rs.1,05,42,956/- towards 3rd and final instalment on or before 31.3.2016, and in the event of failing to deposit the aforementioned sum, the earlier order shall prevail.

5. In these circumstances, the captioned application has been filed by the 1st defendant qua modification of the order dated 04.9.2015 made in A.No.5304 of 2015 in C.S.No.65 of 2011 and also for appointment of an Advocate or a retired District Judge as Commissioner to conduct the auction, sale and delivery of entire 79 scheduled machines, which are lying at the factory premises of the original plaintiff, and further payment of Rs.3,05,42,956/- (Rupees three Crores five Lakhs Forty Two Thousand Nine Hundred and fifty sixty only).

6. It is the contention of the applicant/original 1st defendant that in compliance of the order passed by this Court in the aforementioned Application, the applicant / original 1st defendant went to Mysore along with the Principal District and Sessions Judge, Mysore to dismantle the machines. The valuer, who accompanied with them, assessed the market value of the 17 machines i.e. Post Curing Inflator Units as Rs.1,16,90,000.00/-. According to the learned counsel for the applicant/original 1st

defendant that, the valuer, who assessed the market value, mislead the Court, however, the estimate cost of bringing all these machines back to the custody of this Court and warehouse for 1 month would be around Rs.1,00,00,000/-(Rupees One crore only).

7. It is also the contention of the applicant/original 1st defendant that he has already incurred cost of Rs.14,53,500/- (Rupees Fourteen Lakhs Fifty Three Thousand Five Hundred Only) for cutting the electricity connections and pipe lines of the scheduled machines; for doing the valuation of the machines, for checking need of the capacity of the cranes to lift the machines and to check the route /viability to bring the machines and out of factory premises to the main road of the campus on 28 to 30th July 2015. Therefore, it is the contention of the applicant/original 1st defendant that it would be appropriate and interest of justice and to save further unnecessary cost towards dismantle, loading, unloading, survey, transportation, warehousing and public

auction etc., an Advocate or retired District Judge or such other person as the local commissioner or auctioneer to conduct the auction, sale and delivery of 79 schedule machines at factory premises of the plaintiff at KRS Road, Metagalli, Mysore, Karnataka under police protection so that original order dated 21.4.2011 would be satisfied in letter and spirits. Hence, the learned counsel prayed for modification of the said order.

8. Heard the learned counsel for the applicant/original 1st defendant and 2nd defendant. No representation for the 1st respondent/original plaintiff.

9. According to the applicant/1st defendant, the machineries can be auctioned in the factory premises of the plaintiff company itself. It is the contention of the applicant/original 1st defendant that the original plaintiff did not abide the order dated 21.4.2011 in A.No.4318 of 2011, wherein this Court has passed the following directions:

"31.

(i) *Within a week from today, the first defendant shall file necessary documents before the Customs Department and have the machineries covered by all the nine invoices and the 87 units of machineries, assessed to duty, including anti dumping duty, if any. The representatives of the plaintiff shall also be associated with this process, so that immediately upon the assessment being completed, the plaintiff comes to know of the liability.*

(ii) *Within a week from the date of assessment by the Customs Department, the plaintiff shall directly pay the duty levied by the Customs Department, including the anti dumping duty as demanded by them, without prejudice to their right to establish before the Customs Department that anti dumping duty was not leviable in respect of some of the machineries and also without prejudice to*

their contentions that it is the sole responsibility of the first defendant to pay the excess anti dumping duty. If the plaintiff succeeds in their claim before the Customs Department, they would get refund of the excess duty paid, directly from the Customs Department. If the plaintiff fails in their claim for refund, they are at liberty to seek amendment of the plaint, so as to seek recovery of the excess duty paid, if such payment was attributable to any mistake on the part of the first defendant. It will then be open for the first defendant to contest such claim on the ground that there was no mistake on their part.

(iii) After the payment of the customs duty and anti dumping duty by the plaintiff, the first defendant shall obtain necessary certifications from the Customs Department, for production to the liner and/or to the second defendant, so that the cargo can be cleared.

(iv) *Within a week from the day, the first defendant shall pay the entire detention and other charges to the liner and obtain a valid delivery order in original.*

(v) *Within a week of procuring the delivery order from the liner, the first defendant shall submit the other documents such as Bill of Entry, Examination Order and the relevant certificates from the customs Department, to the second defendant and also pay the entire demurrage charges as claimed by the second defendant. Immediately thereafter, the first defendant shall de stuff the containers and arrange to dispatch them to the location at which the cargo was to be delivered by the first defendant, as per their original contract.*

(vi) *Within a week from today, the second defendant shall surrender the fixed deposit receipt handed over by the plaintiff in*

pursuance of the orders passed on 28.01.11, to the Registrar General, The Registrar General shall sign the necessary discharge or make necessary endorsement on the original fixed deposit receipt and handover the same to the counsel for the first defendant, upon the counsel for the first defendant producing proof (a) that the Customs Department had cleared the cargo (b) that the liner has issued valid delivery orders and (c) that the second defendant as well as J.M. Baxi & Co., and GDL had released the entire cargo of 87 units covered by 9 invoices, for transportation by road to the factory of the plaintiff.

(vii) After getting a delivery order from the liner and after getting the cargo released from the second defendant, the first defendant shall file a memo into court, after serving a copy upon the counsel for the plaintiff indicating the total expenses incurred by the first defendant towards detention charges and demurrage.

(viii) Within a week from the date of service of such a memo, by the first defendant and the counsel for the plaintiff, the plaintiff shall deposit into court, an amount equivalent to 50% of the amount indicated in the memo filed by the first defendant. If the plaintiff fails to deposit said amount, the first defendant will have a lien over the cargo and will have a right to approach this court for its sale by way of public auction and the realization of the money. If the money is so deposited by the plaintiff, it would be open to the first defendant to seek payment out of the said amount, subject however to the right of the plaintiff to amend their claim in the plaint, so as to seek recovery of the said amount.

To facilitate the parties to understand the obligations imposed upon each one of them, it is clarified that I have made the plaintiff liable to pay the entire anti dumping duty in

the first instance and proceed against the first defendant for the recovery of the same by seeking amendment of the plaint, in case they are not able to get refund of the same from the Custom Department. Similarly I have made the first defendant liable to make payment of the entire amount of detention charges and demurrage in the first instances so that the cargo is cleared and made available for transportation to Mysore. But, I have made the plaintiff to deposit 50% of these charges, after the clearance of the cargo, so that the loss on this account is shared by both parties in equal proportions for the present, with liberty to the plaintiff to amend the pleading and with liberty to the first defendant to make a counter claim for the remaining half. No costs."

10. Subsequently, this Court, vide order dated 13.08.2012 amended the order dated 04.7.2012. This Court affirmed the original order dated 21.4.2011 and held as follows:

".. ..5. This court, having passed the order, directing the plaintiff to deposit Rs.3,05,42,956.98 into court, in default of compliance of which, directing attachment of cargo lying at K.R.S. Road, Metagali, Mysore, Karnataka, omitted to mention the local court through which attachment, if any, is to be effected. On such facts and circumstances, no separate application is necessary to include such particulars and this Court is inclined to do so, by revising para 16 of the order as follows:

"16. In the result, this application is ordered by directing the plaintiff to deposit Rs.3,05,42,956.98 within one week from the date of receipt of this order, failing which the cargo lying at the factory premises of the plaintiff at t K.R.S. Road, Metagali, Mysore, Karnataka shall stand attached **through District and Sessions Court, Mysore** and be brought to the custody of this court to be brought for public auction and the amount due to the plaintiff under the order, dated 21.4.2011, shall be realized from and out of the amount after defraying the expenses for

attachment and for brining the same into the custody of the court and for conducting the public auction shall be deposited to the credit of the suit. This application is accordingly ordered. . . .”

11. To be noted, challenging the aforementioned order dated 21.04.2011, O.S.A.No.323 of 2012 was filed, wherein, the following conditional order was passed:

“1. There will be an order of interim stay on condition that the petitioner/appellant complies with the impugned order passed by the learned single judge, by depositing a sum of Rs.3,05,42,955.98 on or before 10.09.2012

2. On such deposit being made, the 1st respondent shall not be entitled to withdrawn the same, till the disposal of the appeal;

3. If the petitioner fails to comply with the conditional order, the stay order granted today, will stand automatically vacated and it will be open to the 1st defendant to proceed further. “

12. The original plaintiff again failed to comply with the above order and moved an application for modification of the order dated 27.08.2012, but the same was dismissed on 13.09.2012. Thereafter, the appeal filed by the original plaintiff was also dismissed as withdrawn.

13. From the records, it is seen that, again, the applicant/ original 1st defendant moved an applications in O.A.No.821 of 2015 and A.No.5304 of 2015 seeking modification of the order dated 13.08.2012 and for a direction that "to auction in Mysore only two or three machineries which would fetch Rs.3.05 Crores, after procedure to be laid down by this Court for the purpose of valuation, advertisement, inspection, reserve price, appointment of retired judge to supervise the entire procedure etc." However, during the course of arguments in the above application, they undertook to pay the amount in three instalments. It is useful to extract the said order dated 04.9.2015, which reads as follows:

“ 4. After serious arguments, the parties agreed for extension of time as follows:

The applicant/plaintiff is directed to deposit the sum, as above mentioned, in three instalments and the first instalment of Rs.1,00,00,000/- shall be deposited on or before 30.11.2015. The second instalment of Rs.1,00,00,000/- shall be deposited on or before 01.02.2016 and third instalment of Rs.1,05,42,956/- on or before 31.03.2016. On the failure of the applicant/ plaintiff to comply with the payment of instalments, as stated above, 17 items, as mentioned in the list of machineries submitted by the applicant/plaintiff, shall be brought for sale and after defraying the expenses for attachment and for bringing the same into the custody of the Court and for conducting the public auction the balance sum shall be deposited to the credit of the suit C.S. No.65/2011 and the amount due to the first defendant shall be realised from and out of such amount in terms of the earlier orders. If there is any short

fall, it shall be deposited by the applicant/plaintiff, failing which, the earlier order for bringing other properties for sale shall prevail. ..”

14. Since the original plaintiff has not chosen to comply with the aforementioned order also, the applicant herein/original first defendant has come forward with the captioned application seeking modification of the said order.

15. The aforementioned order, i.e. order dated 04.9.2015, clearly shows that in the event of failure to pay the instalments stipulated therein, the earlier order, i.e. the order for bringing other properties for sale shall prevail. Admittedly, the 1st respondent herein/original plaintiff has not deposited the said amount and that, there is no representation on his side. Therefore, it is very clear that original plaintiff has not complied with the various orders passed by this Court.

16. Now it is the contention of the learned counsel for the applicant/original 1st defendant that since the machineries are heavy, it is very difficult to lift the same. Further, loading and transporting the machines to Chennai is also very difficult. Similarly, dismantling of machines will also incur heavy expenditure. In these circumstances, the instant prayer is made for appointment of the Advocate or retired District Judge, as Commissioner to auction the properties in the factory premises of the plaintiff at Mysore itself.

17. I find that there is some considerable force in the argument advanced by the learned counsel for the applicant/original 1st defendant. Therefore, I am of the view that the machineries can be ordered to be auctioned in the factory premises of the plaintiff at K.R.S Road, Metagali, Mysore, Karnataka in the presence of the retired Judge, who shall conduct auction in the manner known to law, after giving due publication

in the familiar dailies. Accordingly, as prayed, the captioned application is disposed of with the following directions:

(i). Mr.C.Manikkam, District Judge, (Retired), having residence at 22, 1st Floor, Raj Enclave, Lakshmi Nagar 6th Street, Jalladian Pet, Medavakkam, Chennai – 600 100 (Mobile No: 8098478135) is appointed as the Commissioner.

(ii). The Commissioner, shall conduct auction, after giving due publication in the familiar dailies, (one issue of English Daily Newspaper; in one issue of Tamil Daily newspaper and in one issue of Kannada Daily newspaper) after ascertaining the number of machineries to be auctioned.

(iii). The publication will indicate the upset price, the last date for

receipt of the sealed tender(s), the date for opening the tender forms / auction bids, the mode of auction and the other relevant informations that may be required as per law.

(iv). The expenditure for publication shall be borne by the applicant /original 1st defendant and the same shall be adjusted from the sale proceeds which will be deposited in Court later.

(v).The Commissioner will be entitled to seek police assistance, if necessary, from the concerned police station through Chief Judicial Magistrate, Mysore.

(vi). The Chief Judicial Magistrate, Mysore, shall render all assistance that will be sought for by the Commissioner.

(vii). The Commissioner Fee is fixed at Rs.1,00,000/- (Rupees one lakh only) and shall be payable by the applicant/1st defendant directly to the Commissioner.

(viii). In addition to fee, the learned Commissioner will be reimbursed the expenses, if any, *albeit*, on actual basis. The burden of fee and expenses shall be borne by the applicant/original 1st defendant.

(ix) The Commissioner shall complete the entire exercise within three months from the date of receipt of a copy of this order and thereafter will file a report to this Court.

(x) The sale proceeds shall be deposited to the credit of the suit in C.S.No.65 of 2011. All expenses borne by the

applicant/original 1st defendant shall be
recovered from the sale proceeds.

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Index : Yes/No

Internet : Yes/No

Note to office:

Issue copy by 08.02.2017

N.SATHISH KUMAR, J

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Pre-delivery order in
Application No.341 of 2017 in
Application No.5304 of 2015 in
A.No.4318 of 2011 in C.S.No.65 of 2011

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