

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 11TH DAY OF JULY 2018

THE HON'BLE MRS. JUSTICE PUSHPA SATHYANARAYANA

O.A. Nos.441 & 442 of 2018

O.A. No.441 of 2018:-

In the matter of Sec.9 of the
Arbitration and Conciliation
Act 1996

and

In the matter of the Purchase
Contract dated 09.02.2018
No.72198S010 between
M/s.Karthick Gupta Exports &
another and Ecom Agro Trade
Limited, U.K.

M/s.Karthick Gupta Exports,
a partnership Firm, rep. by its
Partner, Mr.S.Muthukumar,
No.99, Main Road, Pudupet,
Thorappadi, Madura, Panruti Taluk-607 108
and now presently address at No.10/11,
V.Andikuppam Village, N.A.L.Perumal Koil Street,
Rajeswari Nagar, Panruti-607 106. ... Applicant

-Versus-

1. M/s.Ecom Agro Trade Limited,
rep. by its Director, Mr.Alec Hayley,
10th Floor, No.55, Old Broad Street,
London-EC2M 1RX, United Kingdom.
2. Blue Leaf Trading Company,
VII/705(A), Choornikara,
Kunathery Jn., Thaikkattukara,
Erakulam, Kerala.
3. CMA CGM Agencies Private Limited,
5th Floor, Ajeejay House,
Block A, 15 Pack Street,
Kolkata-700 016.
4. The Chief Commissioner of Custom (Imports),
Custom House, No.15/1, Strand Road,
Near Fairley Place, BBD Bagh,
Kolkata-700 001. ... Respondents

Original Application praying that this Hon'ble Court be pleased to pass an order of interim injunction restraining the respondents 3 & 4 herein from in any manner, releasing the two consignments of raw cashew nuts of Nigeria Origin covered under the Bill of Lading Nos.LGS0132164A consisting of 04 Containers and LGS0132164B consisting of 02 containers to the 1st & 2nd respondents or their men, agents, servants or notified parties upon arrival of the said consignments at the Kolkotta Port, pending disposal of the arbitral proceedings.

O.A. No.442 of 2018:-

In the matter of Sec.9 of the
Arbitration and Conciliation
Act 1996

and

In the matter of the Purchase
Contract dated 14.02.2018
No.72198S013 between
M/s.Karthick Gupta Exports &
another and Ecom Agro Trade
Limited, U.K.

M/s.Karthick Gupta Exports,
a partnership Firm, rep. by its
Partner, Mr.S.Muthukumar,
No.99, Main Road, Pudupet,
Thorappadi, Madura, Panruti Taluk-607 108
and now presently address at No.10/11,
V.Andikuppam Village, N.A.L.Perumal Koil Street,
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These original applications coming on this day before this court for hearing the court made the following order:-

Seeking to injunct the respondents 3 and 4 from in any manner releasing the two consignments of raw cashew nuts of Nigeria origin covered under the Bill of Lading Nos.LGS0132164A consisting of 04 containers and LGS0132164B consisting of 02 containers to the first and second respondents, upon their arrival of the said consignments at the Kolkatta Port, pending disposal of the arbitral proceedings, these applications have been filed.

2. The applicant is a Partnership firm carrying business in cashew nuts. The applicant entered into two contracts with the first respondent, a U.K. Company, through the second respondent, the agent of the first respondent, for importing 150 M.T. of raw cashew nuts of

Nigeria origin. For the aforesaid transaction, the applicant paid an advance of USD 32,100 and USD 16,800 through bank remittance. Based on the said contracts, the applicant entered into forward High Seas Sales contracts with its customers for the supply of cashew nuts. The applicant was given a draft Bill of Lading on 07.03.2018 showing the proposed consignment of 06 containers of 100 M.T. of cashew nuts to be shipped on 15.03.2018. However, the first respondent shipped only 70 M.T. on 15.03.2018 and 30 M.T. was shipped on 28.03.2018 through the Vessel operated by the third respondent. The balance 50 M.T. was not shipped by the first respondent.

3. It is alleged by the applicant that though the final port of destination, as per the contracts, is Tuticorin, respondents 1 and 2 with an ulterior motive, diverted the consignment to Kolkata Port through Colombo Port causing huge monetary loss and damage to the applicant, since it had to purchase the cashew nuts from the market in higher prices. In addition to the advance paid to the first respondent, due to the delay in consignment, the applicant suffered approximately Rs.1.20 Crores loss, which, it sought to be compensated by respondents 1 and 2. The applicant sent an e-mail dated 24.04.2018 to the respondent 1 and 2 calling for settlement, failing which, it would invoke the arbitration

clause. It is in this background, the applicant has approached this Court with the aforesaid prayer.

4. The first respondent filed a detailed counter affidavit denying all the allegations. It is stated that the applicant breached the terms of the contract, thereby the first respondent was forced to divert the shipped consignment, which is perishable in nature, to another prospective purchaser and the advance amount paid by the applicant was set-off for the losses caused to the first respondent by the act of the applicant. It is also claimed by the first respondent that the applicant has not approached this Court with clean hands and suppressed several material facts, and hence, it is not entitled for the relief prayed for. The first respondent stated that none of the respondents are residents within the jurisdiction of this Court and the respondents 2 to 4 are not even parties to the contracts and hence, these applications cannot be maintained on the file of this Court. The applicant failed to prove its readiness to perform its part of the obligation of the contract and hence, the interim order is liable to be vacated. It is also the claim of the first respondent that the applicant has not taken any steps to initiate arbitration proceedings, but falsely stated in the affidavit that it had initiated arbitration proceedings. In fact, the

Contracts specifically provide that the seat for arbitration is at London, England and therefore, these applications are liable to be dismissed *in limine*.

5. The third respondent filed a common affidavit stating that the applicant cannot maintain these applications against it, being the third party to the contract, as the application could be filed only against the party to the contract/agreement. It is also stated by the third respondent that there was a dispute between the applicant and the first respondent and the third respondent is no way concerned with the dispute. The applicant paid only 15% of the value of the cargo and as such, the title of the cargo is yet to get transferred to the applicant. Hence, the claim of the applicant is untenable. It is also stated that the draft bill of lading would not confer any right on the applicant, since there is no concluded contract and the cargo could be delivered only on the holder or the endorsee of the original Bill of lading. It is also stated that the containers are now lying at the Container Freight Station, Kolkata, causing storage charges of Rs.10,83,729.18 as on 30.06.20148 and the consignment could not be delivered to the person to whom it was shipped thereby making its principal liable for breach of the contract. The third respondent sought for vacating the interim order, since the applicant failed to go for

arbitration.

6. Mr.N.Ramakrishnan, learned counsel appearing for the applicant, submitted that the applicant suffered huge loss due to the delay in the shipment of the consignment, as it had entered into various contracts with third parties, based on the contract with the first respondent to supply cashew nuts and it has to purchase the same in the market with higher prices to fulfil its obligations.

7. Mr.T.V.Ramanujam, learned Senior Counsel appearing for the first respondent, submitted that the applicant has not approached this Court with clean hands and there is a suppression of material facts to grab the interim order. It is further contended that the interim order of this Court operates against the delivery of the consignment to the prospective buyer at Kolkata, who had paid substantial amount for the consignment, making the first respondent liable for the losses, that could be suffered by the prospective buyer. Hence, it is contended by the learned Senior Counsel that these applications are liable to be dismissed.

8. Mr.Arun Anbumani, learned counsel for the second respondent, submitted that the applicant has filed an affidavit before this Court stating that it had initiated arbitration proceedings, but the materials available on

record proves the contrary. Hence, he prays for imposing cost on the applicant.

9. Mr.S.Raghunathan, learned counsel for the third respondent, while reiterating the submission made by the third respondent in the counter affidavit, emphasised that since the containers are lying at the Container Freight Station, it has to incur storage charges / detention charges. It is his contention that if there is a breach of contract of supply by the first respondent, the applicant could seek for damages before the appropriate forum, for which, the consignments need not be detained.

10. This Court heard the learned counsel for the parties and perused the materials on record.

11. Admittedly, the applicant and the first respondent entered into contracts. There is a breach on the part of the parties to the contract. There are allegations and counter allegations, which cannot be gone into by this Court in these applications filed under Section 9 of the Arbitration and Conciliation Act, 1996. The contract provides for arbitration of disputes under the English law and the seat of arbitration is in London to be carried out by The Nut Association in terms of its Rules of Arbitration and Appeal. Though, the applicant claimed that it had initiated arbitration proceedings, there is not an iota of evidence to substantiate its version. Admittedly, the

interim order granted by this Court on 27.04.2018 was extended on 11.06.2018 till 18.06.2018 and it is not in dispute that the parties have not taken any coercive steps till date.

12. In the above circumstances, these applications are disposed of in the following terms :

(i) The applicant is directed to initiate arbitration proceedings within two weeks from the date of receipt of a copy of this order. Till such time, the interim order already granted and extended by this Court shall continue to operate.

(ii) The applicant is at liberty to file any appropriate application seeking interim relief before the Arbitral Tribunal, in accordance with law.

(iii) If the applicant fails to initiate the arbitration proceedings, as directed above, the interim order shall stand vacated automatically, without reference to this Court.

Sd/-P.S.N.J

11.07.2018

//Certified to be a true copy//

Dated this the day of 2018

jj 23/07/2018.

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.