A.P. No. 308 of 2020
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side
Cuprum Bagrodia Limited
v.
Gainwell Commosales Private Limited

For the petitioner : Mr. Ranjan Bachawat, Sr. Advocate
Mr. Debnath Ghosh, Advocate

For the Respondent : Mr. S.N. Mitra, Sr. Advocate
Mr. Anirban Ray, Advocate
Mr. Shounak Mitra, Advocate
Mr. Rishav Dutt, Advocate

Hearing concluded on : January 19, 2021

Judgment on : February 9, 2021

DEBANGSU BASAK, J. :-

1. The petitioner has sought interim protection under section 9 of the Arbitration and Conciliation Act, 1996 by way of the present petition.

2. Learned Senior advocate appearing for the petitioner has submitted that, the petitioner carries on business of coal mining. The petitioner has been using the High Wall Mining System for extracting coal. In such system, a specialised machinery is utilised. The only manufacturer of such machinery in India is the respondent. The petitioner had placed an order for delivery of High Wall Miner, model HW 300 on the respondent to be

delivered by August 2018. The petitioner had also placed a separate order for the Low Seam Cutter Module CM210 on the respondent to be used together with the High Wall Miner, model HW 300.

3. Learned Senior Advocate appearing for the petitioner has submitted that, the parties have entered into a contract for supply of High Wall mining system on May 10, 2019. He has referred to the various terms and conditions of such contract. He has submitted that, such contract has stipulated the terms of payment. He has drawn the attention of the court to the terms of payments as specified in the contract. He has submitted that, the respondent was supposed to procure vital parts of the machinery from Caterpillar, the USA manufacturer. He has submitted that, the petitioner has always been and still is ready and willing to pay for the machinery. He has referred to the clause of the contract which has dealt with the title, property and risk. He has referred to Clause 7 of the contract which has stipulated the delivery date, transportation, insurance, assembly and testing of the machinery. He has submitted that, under clause 8 of the contract, the contract cannot be cancelled after execution of the same.

4. Learned Senior advocate appearing for the petitioner has submitted that, the contract for supply of the machinery is by its nature non-terminable. The parties have not terminated the contract. He has submitted that, the petitioner cannot purchase such machinery from any other manufacturer in India. The respondent is the only manufacturer.

5. Learned Senior Advocate appearing for the petitioner has referred to the scope of supply and pricing under the contract. He has submitted that, the machinery that the respondent had agreed to supply, has a particular number being GHWM 00186.

6. Learned Senior Advocate appearing for the petitioner has submitted that, the respondent had part performed the contract. The petitioner had paid such portion of the total contracted value for the machinery as was required under the contract to be paid. He has submitted that, the petitioner inspected the machinery that the respondent was manufacturing for the petitioner. On such inspection, the petitioner had found that, the work for the machinery not to be up to the mark. He has submitted that, the petitioner became aware that the respondent was trying to enter into the business arena of the petitioner and was trying to utilise the machinery that was meant for the petitioner, for execution of a

contract that the respondent entered into with the coal companies. According to him, the respondent had diverted the machinery belonging to the petitioner for the use of the respondent.

7. Learned Senior Advocate appearing for the petitioner has submitted that, the respondent has taken different stand at different points of time with regard to the manufacture and delivery of the machinery. He has referred to the orders passed from time to time by the court. He has submitted that the Receiver appointed by the Court could not find the machinery. He has referred to the Receiver's report. He has submitted that, the Receiver recorded that, the machinery meant for the petitioner was not found at the manufacturing area of the respondent. He has drawn the attention of the Court to the purchase orders for purchasing parts of the machinery that the respondent placed before the Receiver. He has submitted that the purchase orders which the respondent claims to have placed for the purpose of buying different components of the machinery to be manufactured and supplied to the petitioner, were not for the machinery of the petitioner. Such orders were for the next machinery that the petitioner has been assembling at its works. The respondent had manufactured the machinery having number GHWM 00186. The part of

the machinery that the Receiver has found in his two visits are parts of the machinery bearing number GHWM 00187.

8. Learned Senior Advocate appearing for the petitioner has submitted that, the respondent is now manufacturing a machinery with the serial number 187. The machinery with the serial number 186 belongs to the petitioner. The respondent had manufactured such machinery bearing serial No. 186 and is now wrongfully and illegally utilising such machinery for its own use. The court should take appropriate measures so as to make the machinery bearing serial number 186 available to the petitioner.

9. The respondent has opposed the application. Learned Senior Advocate appearing for the respondent has submitted that, the parties had entered into a contract on May 10, 2019. He has referred to various provisions of the contract between the parties. He has submitted that, the contract contains provisions for delay. The contract has provisions for the time schedule for delivery. He has referred to paragraph 10 of the petition and submitted that, the petitioner had delayed in making the stage wise payments. Referring to clause 7.1 of the contract, learned senior advocate appearing for the respondent has submitted that, in case of delay of receipt of stage payments, the time for delivery will get extended. He has

referred to an electronic mail dated January 10, 2020 and has submitted that, the time to make delivery stood extended from February 5, 2020 to April 30, 2020.

10. Learned senior advocate appearing for the respondent has referred to the averments made in the petition as well as the correspondence exchanged between the parties. He has also referred to the affidavits used by the parties. He has submitted that, there was delay in payment on the part of the petitioner which caused the delay in delivery. Subsequently, the petitioner had expressed a desire to procure a different machinery. The parties had negotiated on such machinery. Ultimately, the petitioner had gone back to the original specifications. The petitioner had consumed time in negotiating with the respondent on the kind of machinery that it wants to purchase. In fact, there has been no delay on the part of the respondent. The petitioner had wanted changes in the specifications of the original machine. Ultimately, the parties had agreed to a delivery schedule and progress of work on September 7, 2020. The petitioner had moved the court on October 14, 2020. He has submitted that, the delay if any, in making and delivering the machinery, cannot be attributed to the respondent.

11. Referring to clause 6 of the contract, learned senior advocate appearing for the respondent has submitted that, the title to the machinery has been agreed to pass to the petitioner on delivery. Since the petitioner has not paid the entire agreed amount and the manufacture of machine is yet to be completed, the title to the machinery has not passed to the petitioner. The claim of the petitioner is at best on account of loss and damages for which no mandatory order of injunction as prayed for should be passed. He has referred to and relied upon Sections 19 and 21 of the Sale of Goods Act, 1930. In support of his contentions, he has relied upon ***1995 SCC online Bombay 43 (The Commissioner of Sales Tax, Maharashtra State, Bombay v. M/s. Mazgaon Dock Ltd.)*** and ***1975 Volume 3 SCC 424 (T.V. Sundram Iyengar & Sons v. State of Madras)***. According to him, the parties had set the time to make the delivery at large. He has referred to Section 55 of the Indian Contract Act, 1872 and ***1979 Volume 2 SCC 70 (Hind Construction Contractors v. State of Maharashtra)***.

12. Learned senior advocate appearing for the respondent has submitted that, the petitioner is guilty of suppression of facts which are material for the purpose of adjudication of the disputes between the parties. He has referred to the averments made by the respondent in the affidavit in

opposition and particularly to paragraph 3 thereof. He has submitted that, the petitioner is not entitled to any interim protection.

13. The petitioner had entered into a contract with the respondent for purchase of a High Wall Miner, Model HW 300, Low Seam Cutter Module CM210 and one High Wall Mining system including a Cutter Module to be manufactured under licence from Caterpillar, USA along with spare parts and services. Apparently, the respondent is the sole manufacturer of such machines under licence from Caterpillar, USA. The parties have entered into a contract dated May 10, 2019 for such purpose. Such contract has an arbitration clause. The Court has been informed in the course of hearing of the petition that the petitioner made a reference of the disputes and differences to arbitration in terms of the arbitration agreement.

14. By and under the contract dated May 10, 2019, the petitioner had agreed to pay a sum of Rs. 60,12,93,000/- in staggered manner for the machinery. A sum of Rs. 6 crores had been agreed to be paid along with the execution of the contract. A sum of Rs. 6 crores had been agreed to be paid within 30 days from the date of signing of the contract again receipt of initial component package and a sum of Rs. 12 crores within 90 days from first payment against receipt of major components. The payment

clause in the contract dated May 10, 2019 had provided for the balance payments are to be made in a staggered manner.

15. The dates of payments which the petitioner has disclosed in paragraph 10 of the petition states that, the first payment had been made on May 15, 2019 for a sum of Rs. 6 crores. The next payment made by the petitioner had been on July 26, 2019 for a sum of Rs. 6 crores and the third payment had been made on January 15, 2020 for the sum of Rs. 12 crores. The schedule of payment as has been disclosed by the petitioner in its petition demonstrates that the petitioner did not pay in accordance with the agreed payment schedule under the contract. Whether the petitioner had been justified in doing so and the ultimate consequences thereof should best to be decided in arbitration.

16. The contract dated May 10, 2019 had provided that the delivery of the machinery will be 8 months and 10 days from the date of receipt of 10 per cent advance payment on ex-work basis. The payment terms has also stipulated that, the receipt of subsequent payments as per the payment terms are imperative to maintain the delivery schedule. According to the petitioner, it had made production linked payment to the respondent.

According to the respondent, the petitioner had failed to adhere to the agreed payment, under the contract dated May 10, 2019.

17. The parties had held joint inspection of the machinery on July 17, 2019 and on November 12, 2019 to ascertain the progress of the manufacture. By an electronic mail dated November 20, 2019, the petitioner had called upon the respondent to state the firm delivery schedule of the machinery. According to the petitioner, the respondent had to inform the petitioner as to the firm delivery date by November 11, 2019. By an electronic mail dated November 23, 2019, the respondent had informed the petitioner that the machinery should be ready for ex-work Asansol by the last week of April, 2020. The respondent had stated in such e-mail that such date was the firm schedule. The respondent had called upon the petitioner to release balance payments at the earliest.

18. It appears from the materials made available on record, that, on January 2, 2020 a meeting had been held between the parties where, the team of the banker of the petitioner was also present. The respondent had confirmed that the machinery would be delivered by April 30, 2020 if the third advance payment of Rs. 12 crores was made on January 15, 2020.

The petitioner had paid the sum of Rs. 12 crores on January 15, 2020 as has been noted above.

19. According to the petitioner, the respondent had failed to deliver the machinery within the stipulated date of April 30, 2020. The petitioner had by the e-mail dated May 8, 2020 asked the respondent for the schedule of the pre-despatch testing of the machinery to enable the petitioner to send its representatives for inspection.

20. The country as also the whole world has been suffering from the ongoing pandemic. The Central Government as well as the State Government had declared lockdown. By an electronic mail dated May 9, 2020, the respondent had informed the petitioner that in view of the Covid-19 pandemic, the operations at the factory and plant of the respondent remained suspended. In response to the electronic mail dated May 9, 2020, the respondent through its electronic mail dated May 15, 2020 had informed the petitioner that there has been no change in the lock down notification.

21. According to the petitioner, it had sent reminders on June 16, 2020 and July 31, 2020 with regard to pre-despatch inspection. According to the petitioner, the respondent has not replied thereto. According to the

respondent, the petitioner had modified its order consequent upon which, the respondent could not manufacture and deliver the machinery by April 30, 2020. The respondent has also taken the plea of the pandemic and the declaration of the lockdown for inability of delivery the machinery within April 30, 2020.

22. The documents disclosed by the parties suggest that, the parties had agreed to a delivery of the machinery on April 30, 2020 subject to the petitioner making the payments as agreed in the contract. The documents in this proceeding as has been disclosed and as annexed to the several affidavits that they have used suggest that, the petitioner had made three payments and that those payments were not in accordance with the time prescribed under the contract. There are correspondence on record namely, electronic mail dated August 01, 2020, August 15, 2020 and August 25, 2020 which have suggested that, the parties were negotiating a different specification of the machinery from what was earlier agreed to. The parties have relied a minutes of the meeting dated August 10, 2020. The minutes of the meeting dated August 10, 2020 apart from the other machinery that the respondent was to supply to the petitioner, has dealt with the machinery in-question. The minutes has recorded that there would be cost escalation and that the issues with regard to the cost

escalation and the delivery would be discussed finally on mutually agreed terms. By the electronic mail dated September 07, 2020, the petitioner had called upon the respondent to provide the delivery schedule with month wise progress so that the same can be monitored by the customer of the petitioner and also the banker of the petitioner. The petitioner had sent a reminder electronic mail on September 15, 2020.

23. By an electronic mail dated September 15, 2020, the respondent has placed on record the mutually agreed points, inter alia, to the effect that the cutter module would be GCM 235 in place of GLM 210. The respondent has also informed the petitioner that there would be substantial cost escalation because of the changes and that cost escalation for changing cutter module GLM 210 to GCM 235 should be paid by the petitioner.

24. The parties had exchanged further electronic mails. By the electronic mail dated October 01, 2020 the petitioner has stated that it did not want any change in the scope of supply. The petitioner had specified that the equipment should be supplied as per the contract.

25. The contention of the respondent that, the delay in delivery of the machinery that has been occasioned, is not attributable to the respondent,

prima facie appears to be of some substance. The petitioner did not make the payments strictly in accordance with the terms of the contract. The petitioner is yet to pay the entirety of the amount agreed. The parties had negotiated a modification of the specifications of the machinery. Ultimately, by the electronic mail dated October 1, 2020, the petitioner had stated that, it did not want any change in the scope of supply. There has been a declaration of lockdown during the ongoing pandemic. Therefore, up to the period of October 1, 2020, prima facie, it appears that, the respondent cannot be faulted for not having the machinery in a deliverable state. The parties had been negotiating the specifications till October 2020. Therefore, it would be a naive to except that the machinery would be made ready by the respondent immediately after October 1, 2020 given the nature of the machinery. The petitioner had approached Court on October 14, 2020 when the first order was passed.

26. By interim orders, the Court had appointed a Receiver over the machinery. According to the petitioner, the respondent had manufactured the machinery meant for the petitioner and had sent that machinery to a different place. In fact the respondent had been using such machinery or at least was contemplating user of such machinery. According to the respondent, it could not manufacture the machinery as ordered by the

petitioner in view of the pandemic, non payment and negotiations with regard to specifications contending till October 1, 2020.

27. The Receiver appointed by the Court had visited the workshop of the respondent twice. The petitioner has not produced any material to conclusively establish that, the machinery lying at the workshop of the respondent is not that of the petitioner and that, the respondent had manufactured another machinery and had taken the same away. It is not for the Court to fish out evidence for any of the parties. The onus is on the petitioner to establish by cogent evidence that, the machinery lying on the floor of the respondent is not that what has been made for the petitioner under the contract but some other machinery. The respondent has also failed to establish the whereabouts of the machinery that the petitioner claims that the respondent had manufactured for the petitioner.

28. There is one more aspect to the matter. Admittedly, the petitioner has not paid the entire amount for the machinery. Out of sum in excess of 60 crores required to be paid under the contract, the petitioner has paid a sum of Rs. 20 crores.

29. Section 19 of the Sale of Goods Act, 1930 has stipulated that, property in the goods passes when the same has been intended to pass by

the parties. In the facts of the present case, Clause 6 of the contract has specified that, the risk and title to the machinery shall pass to the petitioner on delivery. Section 21 of the Sale of Goods Act, 1930 has specified that, where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has noticed thereof. In the facts of the present case, the contract has obligated the respondent as the seller to manufacture the machinery in accordance with the specification of the petitioner as the buyer and make the machinery at a deliverable state. Admittedly, the respondent is yet to make the machinery at a deliverable state. Therefore, prima facie, it appears that, the petitioner not having paid the entirety for the machinery and the machinery not being in deliverable state, it cannot be said that, the title to the machinery has passed on to the petitioner. Therefore, at this stage, the question of passing a mandatory order directing the respondent to deliver the machinery to the petitioner does not arise. The machinery, appears on the basis of the materials made available on record not to be in a deliverable state. The petitioner has failed to establish that the other machinery with the petitioner is speaking of, is actually the machinery which is meant for the petitioner.

30. The respondent has referred to and relied upon Section 55 of the Indian Contract Act, 1872. In the facts and circumstances of the instant case the issue as to whether, the respondent is entitled to declare a portion of the contract void or the issue as to whether there was delay by reason of failure of the petitioner in not adhering to the terms of the contract or the issue as to what would be the respective rights and obligations of the parties under the contract by reason of the alleged non performance by the respondent should best be decided in the arbitration.

31. ***T.V. Sundram Iyengar & Sons (supra)*** has considered the issue as to whether the supply for consideration of bus bodies constructed and fitted to chassis provided by the customer amounts to sale chargeable to sales tax or not. It has answered such issue by holding that the supply of the bus bodies after fitting them to the chassis supplied by the customer amounts to sale of goods. In ***M/s. Mazgaon Dock Ltd. (supra)***, the Court has considered the issue whether the transaction of building and supplying a motor launch is a works contract and not a sale. It has answered such issue by holding that the contract was for sale of the complete motor launch.

32. The Supreme Court in Hind Construction Contractors (supra) has held that, whether time is of the essence of the contract, is a question of intentions of the parties to be gathered from the terms of the contract. Applying such ratio to the facts of the present case, at this interim stage it would not be appropriate to garner the intentions of the parties and come to a definite finding without affording the parties an opportunity to lead evidence in the arbitration.

33. In view of the discussions above, the application of the petitioner fails. AP No. 308 of 2020 is dismissed. The Receiver appointed stands discharged without the requirement to submit accounts.

[DEBANGSU BASAK, J.]