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ORDER SHEET
APOT/213/2021
WITH
CS/181/2021
IA NO: GA/1/2021
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
(Commercial Division)

NARSINGH ISPAT LTD
VS
LUCKY COKE MANUFACTURERS

BEFORE:
The Hon'ble JUSTICE I. P. MUKERJI
The Hon'ble JUSTICE ANIRUDDHA ROY
Date : 22ND DECEMBER, 2021.

Appearance :
Mr. S. N. Mookherjee, Learned Advocate General
Mr. Reetobrata Mitra, Adv.
Mr. Anirban Kar, Adv.
Mr. Pramit Kr. Shee, Adv.
Ms. Nibedita Mukherjee, Adv.
Ms. Vedatri Bhattacharya, Adv.
...For the appellant

Mr. Anirban Ray, Adv.
Ms. Rituparna De Ghose, Adv.
Ms. Micky Chowdhury, Adv.
Mr. Arnab Sardar, Adv.
...For the respondent

The Court : We admit the appeal. As the point involved in this appeal is quite short, we propose to hear it out today, dispensing with all formalities.

This is an appeal from a judgement and order dated 14th December, 2021, made by a learned single judge of this Court vacating the ex parte ad interim order dated 16th September, 2021. By that order, an order of injunction had been made restraining the respondent “from selling or transferring an amount of coal or coke which would be equivalent to Rs.18 lakhs which is presently found to be due and owing to the petitioner by reason of the shortfall. The injunction shall remain in place for a period of four (4) weeks from date.

Since this order has been made ex parte, the respondent shall be at liberty of varying the same upon service to the respondent which shall be within a week from date.

List this matter after three (3) weeks."

The reliefs claimed in the plaint are, inter alia, as follows :

a) "Declaration that the plaintiff is the owner of 95 MT of coke manufactured by the defendant as per specification of Purchase order;

b) A decree for perpetual injunction restraining the defendant, its men, agents and assigns from dealing with and/or alienating or in any manner encumbering 95 MT of coke owned by the plaintiff;

c) A decree for mandatory injunction directing the defendant, its men, agents and assigns to deliver 95 MT of coke to the plaintiff;

d) Alternatively a decree for perpetual injunction restraining the defendant, its men, agents and assigns from dealing with or encumbering or alienating 137 MT of coal supplied by the plaintiff to the defendant;

e) Alternatively, a decree for a sum of Rs. 18,35,840/- as pleaded in paragraph 24 hereinbefore;"

The reliefs claimed to suggest that the cause of action in the suit is specific performance of an agreement for sale and delivery of a special type of movables not easily available in the open market and in the alternative, a claim for damages.

Mr. Mookherjee, learned Advocate General appearing for the appellant submits that there was an oral contract between the parties whereunder his clients supplied imported coal to the respondent to convert it into LAM Coke of a particular description, specification and quality. Thereafter, the manufactured coke would be required to be delivered back to the appellant.

Mr. Anirban Ray, learned advocate appearing for the respondent submits that no such case has been made out. He said that no contract to the above effect had been pleaded. The parties had separate transactions for supply of coal by the appellant to the respondent and for purchase of coke by them from the respondent.

The learned single judge by passing the order dated 16th September, 2021 had remarked that the appellant had been able to establish a prima facie case, and "a clear case of shortfall has been made out in the petition as also the petitioner making payment of Rs.1.05 crores to the respondent".

The learned judge while vacating the interim order on 14th December, 2021 has gone by an entirely different route opining that there could be no injunction on a property which is not in dispute in the suit. His lordship held that the appellant was guilty of suppressing that its directors had been arrested for alleged offences and that at the time the ex parte order was sought, they were in jail. The appellant was seeking only a money decree and not specific performance of a contract, his lordship held.

This impugned judgement and order was passed on an application by the respondent for vacating the said ex parte interim order. This order, like the order of 16th September, 2021 was made without the respondent filing an affidavit-in-opposition.

First of all, we are of the considered opinion that the interim application and the application for discharge of the interim order should be heard out together after exchange of affidavits in the following manner in each of the application :

Affidavit-in-opposition be filed by 10th January, 2022.

Affidavit-in-reply be filed by 17th January, 2022.

Furthermore, the respective rights of the parties are uncertain and would continue to remain uncertain until the entire evidence in the suit is produced. On exchange of affidavits at least the prima facie case of the parties can be finally adjudged. If the appellant is able to establish a case, whereby the respondent would be required to specifically deliver a quantity of coke of a particular special quality to them, in that case, if that coke is not available with the respondent, then damages may not be adequate to compensate the appellant. Injunction may follow. In the alternative, if the appellant is not able to so establish damages may be sufficient. Injunction cannot be issued.

The respondent may prove its case of absence of any contract, independent dealings in coal and coke by the parties on different monetary consideration, or try to establish that what the appellant seeks is a pure and simple money decree, where the injunction order cannot be issued.

Till these facts are at least prima facie established, the balance between the parties has to be maintained on a consideration of the balance of convenience.

We partly affirm the impugned order of the learned single judge dated 14th December, 2021 vacating the order of the injunction made on 16th September, 2021.

We direct that at all times the respondent shall have set apart in their stock 95 metric tons of LAM Coke.

At any time, the respondent requires that quantity they will be free to take it away but replace it by the same quantity, within a week.

The respondent shall supply a statement of this stock retained by them in terms of this order every fortnight to the advocate-on-record for the appellant. This interim order will continue till 26th February, 2022 or until further order by the learned trial judge.

We make it absolutely clear that all issues involved in the suit and in the interlocutory application and the application for vacating the interim order are kept open to be decided by the learned trial judge.

The appeal (APOT No.213 of 2021) and the connected stay application (IA GA No.1 of 2021) are disposed of accordingly.

(I. P. Mukerji, J.)

(Aniruddha Roy, J.)

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