The Empire Jute Co. Ltd. And Ors vs The Jute Corporation Of India Ltd. And ... on 12 October, 2007

Equivalent citations: 2007 AIR SCW 6930, 2007 (14) SCC 680, AIR 2007 SC (SUPP) 1733, 2008 CLC 237 (SC), (2008) 1 ANDHLD 70, (2008) 1 ALL WC 119, (2008) 2 ANDH LT 34, (2008) 1 ICC 420, (2008) 1 SCT 29, (2007) 4 CURCC 146, (2007) 12 SCALE 514, (2008) 1 RECCIVR 151, (2007) 4 ARBILR 74, (2007) 7 SUPREME 224

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Bench: S.B. Sinha, H.S. Bedi

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           CASE NO.:
Appeal (civil)  4877 of 2007

PETITIONER:
The Empire Jute Co. Ltd. and Ors

RESPONDENT:
The Jute Corporation of India Ltd. and Anr

DATE OF JUDGMENT: 12/10/2007

BENCH:
S.B. Sinha & H.S. Bedi

JUDGMENT:
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J U D G M E N T [Arising out of SLP(C) No. 862 OF 2007] WITH CIVIL APPEAL NO. 4878 OF 2007 [Arising out of SLP(C) No. 1343 of 2007 AND CIVIL APPEAL NO. 4879 OF 2007 [Arising out of SLP(C) No. 1602 of 2007 S.B. SINHA, J

1. Leave granted.

2. These appeals are directed against the judgment and order dated 15.12.2006 passed by a Division Bench of the Calcutta High Court in APO No. 291 of 2006, A.P.O.T. No. 401 to 406 of 2006 in WP Nos. 962, 966, 967, 969, 970, 971 & 972 of 2004 and A.P.O.T. No. 399 of 2006 in W.P. No. 1566 of 2004 and A.P.O.T. No. 400 of 2006 in W.P. No. 973 of 2004 respectively. Factual matrix being in narrow compass, we will notice the relevant facts.

3. First Appellant is owner of a jute mill. In exercise of power conferred upon it under Section 3 of the Essential Commodities Act, Government of India made an Order in the year 2000 known as Jute and Jute Textile Control Order, 2000 . By reason of the said order, powers were conferred on

the Jute Commissioner to regulate stock of raw jute, fix price and control production thereof. In exercise of the power conferred upon him under the said Order, the Jute Commissioner issued Production Control Orders (PCO) to various jute mill owners directing them to manufacture B Twill Gunny Bags of specified quality upon compulsory purchase of raw jute from the Corporation. Non-compliance of the directions was to result in application of penal provisions.

4. Indisputably, the Jute Commissioner sent the particulars of the said Production Control Order to the Jute Corporation of India Ltd. for the purpose of issuing necessary sale contract in order to enable the Jute manufacturers to take delivery of the requisite quantities of raw jute specified in the production control Order which the jute manufacturers were required to compulsorily purchase from the Corporation.

5. Indisputably, again the Commissioner in exercise of its power conferred under Section 3(3) of the Control Order fixed the price of 50 kg B- Twill jute bags for the delivery in the month of December 2002 provisionally at Rs. 1712.77p per hundred bags. The price for the said bags was arrived at upon taking into account hundred percent JCI in raw jute linkage i.e. the mills should compulsorily purchase raw jutes only from the Jute Corporation of India.

6. The quality of raw jute supplied by the respondent under the contract of sale was said to be of much inferior quality. However, factum of entering into a sale contract by the appellant with respondent No.1 is not in dispute. Admittedly, Appellants did not purchase raw jute from the respondent No.1 for the period of October 2003 to April, 2004. For fulfilling its undertakings, allegedly, they had to purchase raw jute on credit from the open market.

7. Apprehending that no further raw material would be allotted to it, and/or punitive action will be taken against them, a writ petition was filed by the appellant before the Calcutta High Court inter alia praying for the following reliefs:-

> (a) A declaration be passed that the respondent no. 2 does not have any power, competence and / or authority to direct and / or order the petitioners to compulsorily purchase raw jute from the respondent no. 1 for effecting supply of B-Twill gunny bags of 665 gms.

(b) A writ of and / or order and / or direction in the nature of mandamus be issued commanding the respondents not to force the petitioners to compulsorily purchase raw jute from the respondent No. 1 for effecting supply of B-Twill gunny bags of 665 gms under the various production control orders.

(c) A writ of and/or order and / or direction in the nature of mandamus be issued commanding the respondents to allocate and supply consignment of raw jute as per productivity norms of Jute Manufacturers Development Council for manufacture of B-Twill Jute bags of 665 gms.

(d) A writ of and/or order and/or direction in the nature of mandamus be issued commanding the respondent no. 2 to desist from forcing the petitioners to supply B-Twill gunny bags at the lower of the price prevailing for the period/month as mentioned in the individual Production Control Orders

and that prevailing for the period subsequent thereto in the event your petitioners are otherwise unable to supply B-Twill gunny bags within the period as mentioned in the individual purchase order.

8. Despite, making the aforementioned prayers, the appellant however, made an offer before a learned Single Judge of the High Court that the backlog would be cleared within six months in six equal installments after opening a letter of credit and if any payment is to be made by them, they will take necessary steps therefor. Pursuant to or in furtherance of the said interim order, the appellant deposited the amount, in question. On or about 6.7.2004, the Corporation issued a letter to the which reads as under :

> WP No. 962 & 966 to 973 of 2004 Dear Sirs, With reference to your letter nos. nil dated 30.06.2004 and 02.07.2004 on the above subject we would like to advise you to make payment arrangement of the 1/6 (one sixth) quantity of pending contracts along with the carrying cost within 7 (seven) days from the date of receipt of this letter, as per Clause 5.0 of the Sale Contracts which has already been intimated to you vide our letters dated 7.1.03, 17.11.03, 8.10.03, 4.12.03, 16.12.03, 26.12.03, 13.1.04, 16.1.04, 6.2.04, 19.2.04, 04.03.04, 19.3.04, 22.3.04 and 12.4.03.

It may please be noted that since the relevant Sale Contracts have already been sent to you, the question of issuance of fresh contract does not arise. You are, therefore, advised to make payment arrangement along with carrying cost enabling us to take further action in this regard.

9. The Division Bench by its order dated 15.12.2006 directed :

> There is no dispute that within the time mentioned in the said clause the writ petitioners did not take delivery of the goods and complained before the Court that for not taking such delivery, they should not be deprived of future allotment. We have already indicated that they themselves realized their fault and decided to take late delivery by installments on payment of the price fixed under the contract and prayed for a direction upon the appellant to allot further raw jutes in terms of the agreement. After getting benefit of the interim order, they cannot now refuse to pay the carrying cost for taking late delivery. The learned Single Judge wrongly interpreted the said clause by holding that the present case was not one of furnishing defective Letters of Credit and that Clause 5.0 can be invoked only in cases of furnishing defective letters of credit. In the case before us, undisputedly the writ petitioners had the responsibility for taking delivery of the goods within the period mentioned in the said clause. There is no dispute that within the same period delivery was not taken. Subsequently, by virtue of the interim order, they got delivery and also prayed for a fresh allotment on opening Letters of Credit. It is preposterous to suggest that the purchasers who are under obligation in terms of agreement to lift the goods within a specified period and for not taking delivery they are required to pay carrying cost and delayed surcharges, will not be required to pay such penalty unless defect is found in the Letters of Credit even though they lifted the goods beyond the stipulated time. If

> we accept the aforesaid proposition, the purchasers can avoid that clause by not taking delivery of goods or without opening any Letters of credit in favour of the appellant by contending that there was no defect in the Letters of Credit.
>
> We, thus, find that the learned Single judge erred in law in holding that the writ petitioners were under no obligation to pay the carrying cost and other charges mentioned in clause 5.0 of the agreement even if they do not lift the goods within the time stipulated therein or if they do not furnish any letters of Credit in favour of the appellant.
>
> We, therefore, set aside the order impugned and hold that the appellant is entitled to get the carrying costs and other charges mentioned in Clause 5.0 of the agreement for breach of the terms of the agreement at the instance of the writ petitioners and that in this case, there has been violation of that clause at the instance of the writ petitioners.
>
> We, accordingly, allow these appeals and direct the learned advocate for the writ petitioners to handover the entire amount lying in the bank account pursuant to the interim order passed by the learned Single Judge inclusive of interest accrued thereon within a fortnight from today.

10. Having said so, the Division Bench directed the parties to settle the amount through Arbitration in terms of agreement in regard to the quantum of the carrying charges payable by the appellant to the respondents stating;

It appears from the agreement between the parties that in case of any dispute arising out of the said agreement there is an arbitration clause. Whether the amount deposited with the learned advocate for the writ petitioners was sufficient to cover the carrying cost and other charges in terms of clause 5.0, is a question of fact and for resolving such disputes detailed investigation is necessary which is beyond the scope of the original writ applications. We were compelled to decide the question of applicability of the Clause 5.0 only because of the interim order granted by the learned Single Judge in favour of the writ petitioners although they ultimately did not press their grievance taken in the writ application. In such a situation, the learned Single Judge ought not to have granted any interim order in favour of the writ petitioners. Interim orders are granted in aid of the final relief claimed in judicial proceedings so that for not passing the interim relief, the final relief may not become inappropriate. But the law is equally settled that if the judicial proceedings fail in the long run, the Court granting interim order in favour of the losing party should undo the harm, if done to the successful party, in view of the interim order. By deciding the question of applicability of Clause 5.0 and passing direction for return of the money, we have merely undone the loss suffered by the appellant for the interim order passed by the learned Single Judge.

We, therefore, direct the parties to settle the amount through arbitration in terms of the agreement. The arbitration will adjust the amount that will be handed over to the appellant by the learned advocate for the writ petitioners by virtue of this order while assessing the actual amount payable by

the writ petitioners to the appellant due to taking delayed delivery of the goods.

11. Mr. S. Bagaria, learned senior counsel appearing on behalf of the appellant submitted that although there may not be any dispute with the legal proposition that a suitor cannot take advantage of interim order passed in his favour, but it is also trite that the interim order must be given effect to in terms of the contractual obligations of the parties and, if in terms thereof, the appellant was not liable to pay the carrying cost, clause 5.0 of the sale agreement being not applicable, they cannot be fastened with the said liability. Strong reliance in this behalf has been placed on Central Bank of India Ltd., Amritsar Vs. The Hartford Fire Insurance Co. Ltd. [AIR 1965 SC 1288].

12. Mr. Bikash Bhattacharyya, learned senior counsel appearing on behalf of the first respondent, on the other hand, would submit that the appellant had filed a writ petition on the premise that the statutory order is not applicable. Such a prayer having been given a complete go-bye and the appellant having prayed for passing an interim order to its benefit, by undertaking to clear the backlog of purchases in six instalments, it was bound to pay the carrying charges. The Division Bench, Mr. Bikash Bhattacharyya, would submit has rightly opined that the carrying charges being payable, only quantum thereof would be subject matter of a dispute within the meaning of arbitration agreement entered into and by and between the parties.

13. Before embarking upon the respective contentions of the learned counsel, we may notice the relevant terms of the contract:

> 2.0 Mode of delivery : For EX-GODOWN DELIVERY: The responsibility of lifting the goods at their own cost within _____ will lie with the buyers.
>
> 2.1 In the event of buyer s failure to take godown delivery, within the delivery period indicated above, an amount of Rs. 25/- per qtl. Per month shall be levied over and above the price indicated at Annexure-II. The Corporation shall have the option to cancel the contract for the failure of the buyer to lift the goods by _____ and to exercise any and/or all the options as stipulated at (i), (ii), (iii) & (iv) of Clause No. 16.0 of the contract.
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> XXX XXX XXX 5.0 Payment terms : Through confirmed and irrevocable Letter of Credit and/or Bank Draft/Pay Order preferably through a nationalized bank at Kolkata covering the full value of the entire quantity of jute covered by is contract and other incidental costs to be signed by the buyers and furnished to us by 26.03.04 at the latest. In case the Letter of Credit furnished by the buyer within the stipulated date as indicated above, was found to be not acceptable to JCI, the same would be returned to the buyer for amendment and for the period taken by the buyer for resubmission of the Letter of Credit after necessary amendment, the buyer shall be liable to pay carrying cost at the rate of Rs. 25/- per quintal per month or part thereof.

XXX XXX XXX 8.0 Procedure for claim settlement : All claims on account of quality shall be settled according to Bye-

Laws & Rules of EIJ&HE. The allowable moisture regain percentage shall be 18% for July, August, September and October and 16 % for the remaining 8 months, November to June. The buyers shall clearly indicate the extent of the claims (in terms of percentage) on quality and condition. No joint inspection shall be arranged and no claim shall be entertained by the Corporation unless the buyers clearly indicate the extent of claim in the manner mentioned herein above and within the time specified in the bye-laws and rules of the EIL&HE.

In case of EX-GODOWN DELIVERY, the weight shall be determined at the point of delivery ex-godown based on weight recorded on lorry challan or the certificate of weighment signed by the authorized representative of the buyers and the Corporation. For this purpose the certificate to be given may be in the Form of Annexure-III.

Based on the settlement of claim for quality, condition and weight if the buyers are found to be entitled to recover any amount from the Corporation, payment should be made within 15 days from the date of receipt of the debit note.

9.0 Arbitration : All disputes or differences whatsoever arising between the parties put of/or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on both the parties.

XXX XXX XXX 16.0 In the event of any delay or failure on the part of the buyer in making payment arrangement acceptable to JCI within the stipulated period under the contract and/or his/their failure/refusal to take delivery of the contracted quantity as per Clause 4.1 of the contract as also to perform any of the terms of the contract, the Corporation shall have the right to exercise any and/or all of the following options:

i) Canceling the contract;

ii) Canceling the contract and charging the buyers for difference, if any, between the contract prices and the market price on the date of canceling the contract.

iii) Canceling the contract and selling the goods in any manner deemed fit by the Corporation and charging the buyer for the difference between the contract price and the not value realized from such after adjustment of all expenses incurred by the Corporation in this regard; and

iv) To realize any other amount which the Corporation might have to pay for retaining the goods inclusive of carrying charges wherever applicable.

14. Construction of the contract entered into by and between the parties is in question before us. There exists an arbitration agreement. The Arbitration Agreement is of wide amplitude; by reason whereof not only the dispute relating to quality of the jute sought to be supplied by the respondent No.1 may be gone into, the construction, meaning and operation and effect of the contract or breach thereof, if any, would have also fallen for determination of an Arbitrator.

15. It is not correct to contend that clause 8.0 provides for procedure for claim settlement. The said provision in regard to the quality of jute supplied has in our opinion nothing to do with clause 9.0. The arbitration agreement entered into by and between the parties is independent of clause 8.0. It is now well settled that when there exists an arbitration agreement, the writ court ordinarily would not exercise its discretionary jurisdiction to enter into the dispute.

16. The learned Single Judge embarked upon the question of construction of the agreement. In a sense, the Division Bench overturned the said decision. Construction of the agreement therefor fell for consideration of the High Court. Division Bench, as noticed hereinbefore, itself opined that the arbitration clause should be taken recourse to for the purpose of computation of the quantum of the carrying cost. The question of payment of carrying cost by the appellant in favour of the respondent would arise provided the same is payable. Payability of such carrying cost would, thus, depend upon construction of clause 2.0 read with clause 5.0 of the sale contract.

17. Respondent, no doubt, could have taken recourse to clause 16.0 of the agreement in terms whereof it could realize any amount which the Corporation might have to pay. Disputed fact was required to be gone into before a definite opinion could be arrived at as to whether in the facts and circumstances, the obligation to pay the carrying cost was applicable.

18. The power of judicial review vested in the superior courts undoubtedly has wide amplitude but the same should not be exercised when there exists an arbitration clause. The Division Bench of the High Court took recourse to the arbitration agreement in regard to one part of the dispute but proceeded to determine the other part itself. It could have refused to exercise its jurisdiction leaving the parties to avail their own remedies under the agreement but if it was of the opinion that the dispute between the parties being covered by the arbitration clause should be referred to arbitration, it should not have proceeded to determine a part of the dispute itself.

19. Similar question arose for consideration in M/s. Bisra Stone Lime Co. Ltd. etc. Vs. Orissa State Electricity Board and another [AIR 1976 SC 127] wherein it was held that the High Court may refuse to exercise its jurisdiction, if there exists a valid arbitration clause stating; 4. It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission would have great force if the sole question involved were the scope and ambit of the power of the Board under Sections 49 and 50 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the court has discretion under Section 34 of the Arbitration Act or under Article 226 of the Constitution and that the court is better posted to decide

such questions. The arbitration clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of clause 13 therein. We are therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves.

20. A similar view was taken by this Court in Sanjana M. Wig (Ms) Vs. Hindustan Petroleum Corpn. Ltd. [(2005) 8 SCC 242 holding; 2. The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious. Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefor the parties are required to lead evidence both oral and documentary which can be determined by a domestic forum chosen by the parties, the Court may not entertain a writ application (See Titagarh Paper Mills Ltd. v. Orissa SEB and Bisra Stone Lime Co. Ltd. v. Orissa SEB)

13. However, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

21. Relying on some of the earlier decisions of this Court, this Court held:

> It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefore, the writ petition may be held to be maintainable; but indisputably therefore such a case has to be made out. It may also be true, as has been held by this Court in Amritsar Gas Service and E. Venkatakrishnathat the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.

22. The legal position has undergone a substantial change, having regard to Section 5 of the Arbitration and Conciliation Act, 1996 vis-`-vis provisions of Arbitration Act, 1940. The said provision reads as under:-

> . Extent of judicial intervention Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

23. In terms of 1940 Act, even a civil suit could have been entertained subject of course to exercise of the court s jurisdiction under Section 21 thereof. Section 5 of 1996 Act takes away the jurisdiction of

the Court. There cannot be any doubt whatsoever, the provision of the 1996 Act must be given effect to.

24. As the disputed facts as also the law are required to be determined by the Arbitrator, we are of the opinion that all disputes between the parties should be directed to be resolved upon taking recourse to the arbitration agreement contained in clause 9.0 of the Sale Order.

25. We therefore, direct;

(a) In exercise of a jurisdiction under Article 142 of the Constitution, in the peculiar facts and circumstances of this case, all disputes and differences between the parties be referred to the arbitration in terms of clause 9.0 of the contract.

(b) Reference to arbitration would be deemed to be one under the 1996 Act.

(c) The parties would be at liberty to approach the High Court for any other or further direction(s).

(d) The learned Arbitrator would make an Award within a period of four months from the date of entering into reference.

(e) All amount deposited by the appellant with the learned advocate on record towards the carrying charges should be paid to the second respondent, wherefor an appropriate receipt would be given.

(f) Such payment shall be without prejudice to the rights of the parties before the Arbitrator and shall be subject to any other or further order or direction that may be issued by the learned Arbitration in his Award.

26. These appeals are allowed to the aforementioned extent. In the facts and circumstances of this case, the parties shall pay and bear their own costs.