

(2006) 12 CAL CK 0008

Calcutta High Court

Case No: A.P.O. No. 291 of 2006, G.A.N. 2456 of 2006, W.P. No. 962 of 2004 with A.P.O.T. No"s. 399, 400, 401, 402, 403, 404, 405 and 406 of 2006

Jute Corporation of India

APPELLANT

Vs

The Empire Jute Co. Ltd. and
Others

RESPONDENT

Date of Decision: Dec. 15, 2006

Acts Referred:

- Essential Commodities Act, 1955 - Section 3, 3(3)

Citation: (2007) 1 ILR (Cal) 393

Hon'ble Judges: Prabuddha Sankar Banerjee, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Bikash Ranjan Bhattacharyya, Nandini Mitra and S. Mukherjee, for the Appellant; S.K. Kapoor, Debasish Kundu and R.N. Ghosh, for the Respondent

Judgement

Bhaskar Bhattacharya, J.

All these nine mandamus appeals were heard analogously as those arise out of nine different writ-applications filed by the Respondents herein against the common Appellant and are directed against an order dated July 28, 2006 passed by a learned single Judge by which His Lordship disposed of those nine writ applications after rejecting the application filed by the Appellant in those writ-applications for a direction upon the writ-Petitioners to pay the carrying-cost along with interest which were lying with the learned advocate-on record of the writ Petitioners as per an earlier interim order passed in those writ-applications.

2. Nine different writ-application is were filed by the Respondents herein against the Appellant who figured as the Respondent No. 1 and the Jute Commissioner, who appeared as Respondent No. 2 in those writ-applications wherein they prayed for the following relief:

(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.

(e) A writ of and/or order and/or direction in the nature of prohibition do issue prohibiting the Respondents from not allotting the Petitioners' allotment of supply of B-Twill gunny bags to various agencies with effect from 1st June, 2004 onwards on the alleged ground of the Petitioner No. 1's alleged failure to purchase raw jute compulsorily from JCI;

(f) A writ of and/or order and/or direction in the nature of certiorari do issue directing the Respondents to produce before this Hon"ble Court the entire records of this case so that conscionable justice may be done.

(g) Rule Nisi in terms of prayers (a) to (f) above;

(h) An interim order issue directing 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 as per the various purchase orders.

(i) An interim order do issue directing 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.

(j) An interim order do issue restraining the Respondent No. 2 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.

(k) An interim order do issue permitting the Petitioners to supply B-Twill gunny bags at the prices prevailing on the month of issuance of the production control orders even in case supplies are made in the succeeding months.

(l) An interim order do issue restraining the Respondents from not allotting the Petitioners' allotment of supply of B-Twill gunny bags to various agencies with effect from 1st June, 2004 onwards on the alleged ground of the Petitioner No. 1's alleged failure to purchase raw jute compulsorily from JCI;

(m) Ad interim order in terms of prayers (h) to (l) above;

(n) Pass such further or other orders as this Hon'ble Court may deem fit and proper;

3. The case made out by the writ Petitioners may be summed up thus:

(a) The writ Petitioner No. 1 is a limited company duly incorporated under the provisions of the Companies Act, 1956 having its office at the place mentioned in the cause title of the writ application. The writ Petitioner owned eight jute mills. By a notification published in the official gazette in exercise of power conferred u/s 3 of the Essential commodities Act 1955, the Central Government had issued the Jute and Jute textiles Control Order, 2000, inter alia, giving power to the jute Commissioner to fix price, control production of jute textiles and regulate stock of raw jute.

(b) The said Control Order 2000 was further amended by a notification dated November 1, 2002 by which Clause 5 of the Control Order was amended. Clause 3 of the said Control Order had conferred power to the Jute Commissioner to notify the minimum price at which any variety of raw jute or any grade or specifications of such variety of raw jute may be purchased or sold and different price could be fixed for different order or different variety of grades and specifications of raw jute subject to the condition that such price was based on the minimum support price fixed by the Central Government. In fixing such price or prices, the Jute Commissioner should have regard to the quality of the raw jute or jute textiles, the railway freight and other expenses necessary for the transport of raw jute or jute textiles from the producing centre to the area or areas in relation to which such price or prices is or are fixed, estimated cost of production necessary to make the same available at the fair price or any other relevant factor.

(c) Para 3 of Clause 3 of the said Control Order had conferred upon the Jute Commissioner the power to notify from time to time the maximum or minimum price or both at which any variety of jute bags or any grade or specifications of such variety as may be purchased or sold for use under the Jute Packaging Materials (compulsory use in packing commodities) Act, 1987.

(d) Clause 5 of the said Control Order gave power to the Jute Commissioner to specify the maximum and minimum quantity of raw jute, which a jute manufacturer may have in his possession. The amended provision is of Clause 5 (I) of the said Control Order had further given power to the Jute Commissioner to specify the maximum of minimum quantity of raw jute which a manufacturer should purchase from any specified person or agency, having regard to the Para (a) to (g) of Clause 5 (2) of the aid Control Order.

(e) The office of the Jute Commissioner, thereafter allocated production control orders on various jute manufacturers for supplying diverse quantities of B-Twill bags to such persons and agencies as may be specified by the Director General, supplies and disposal. Such Production Control Orders are well placed by the Office of the Jute Commissioner on various jute mills depending on the capacity of the jute mills.

(f) In such Production Control Orders, the jute manufacturers were directed under Clause 5 (1) of the Jute and Jute Textiles Control Order, 2000, to compulsorily purchase the quantities of raw jute specified therein from the Jute Corporation of India Limited against the order of the B-Twill bags so placed on the jute manufacturers. A sample copy of the Production Control Order issued by the office of the Jute Commissioner was annexed to the writ application.

(g) After the office of the Jute Commissioner placed the Production Control Orders on the jute mills, the office of the Jute Commissioner sent the particulars of such Production Control Order to the Jute Corporation of India Limited with the request to the Jute Corporation of India Limited to issue necessary sale-contract in order to enable the jute manufacturers to take delivery of quantities of raw jute specified in the Production Control Order which the jute manufacturers were required to compulsorily purchase from the Jute Corporation of India Limited against the Production Control Order for B-Twill bags placed on the jute manufacturers by the office of the Jute Commissioner.

(h) In the Production Control Orders issued from the office of the Jute Commissioner it was clearly mentioned that for the purpose of manufacturing B-twill jute bags, a specified quantity of raw jute would have to be purchased from the Respondent No. 1. Thus, it was clear that the raw jute to be purchased from the Respondent No. 1 would have to be used by the writ Petitioners for manufacturing and supplying the quantity of those bags in terms of the Production Control Order issued by the Jute Commissioner.

(i) The compulsory purchase of the raw jute from the Jute Corporation of India as per specific direction of the Jute Commissioner issued under Clause 5 of the Control Order was always linked only to the Production Control Order issued and/or requisition for production of jute bags issued by the Jute Commissioner in favour of the concerned jute mills. Compulsory purchase of raw jute from the Jute

Corporation of India was never linked with the direct orders procured by any jute mill.

(j) Subsequently by a further letter dated December 2, 2002, the Jute Commissioner in exercise of powers conferred u/s 3 (3) of the Control Order fixed the ex-factory 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 had been computed after taking into account hundred per cent JCI is raw jute linkage i.e. the mills should compulsorily purchase raw jutes only from the Jute Corporation of India.

(k) The quality of raw jute that was supplied by the Respondent No. 1 under the sale-contracts was of much inferior quality than that mentioned or specified in the sale-contract. From time to time, several representations in this regard were made by the writ-Petitioners to the Respondents and majority of the consignments of raw jute supplied by the Jute Corporation of India were of inferior quality and with those materials, it was not possible to adhere to the norms laid down by the Jute Manufacturers Development Council for manufacturing B-Twill jute bags of 665 gms.

(l) inasmuch as the writ-Petitioners were statutorily obliged to purchase quantities of raw jute from the Respondent No. 1 in order to fulfil their obligation under the Production Control Order issued by the Jute Commissioner, the writ Petitioners had no other alternative but to enter into the sale contract with the Respondent No. 1.

(m) The Respondent No. 1, however, taking advantage of the Letters of Credit, invoked the same and realised the full payment for the consignment so supplied on the basis of nominal weight without waiting to ascertain the actual weight or the fact, whether the consignment of raw jute so supplied were as per specifications mentioned in the sale contract or as per bye-laws and rules of East India Jute and Hessian Exchange.

(n) The Respondent No. 1 was supplying inferior quality of raw jute with impunity knowing fully well that the Respondent No. 1 would be able to realise the full value of consignment of raw jute supplied by invoking the Letters of Credit irrespective of the fact whether or not consignment conforms to the norms of the Jute Manufacturers Development Council and specifications mentioned in the sale contract. Moreover, the jute bags could not be made from such inferior quality of goods nor could those raw jutes be sold in the open market.

(o) In view of the inaction on the part of the Respondent No. 1 in supplying raw jute as per specifications laid down in the sale-contract and as per the norms of the Jute Manufacturers Development Council, the writ Petitioners were suffering business loss.

(p) The Jute Mills survived only by reason of purchase of raw jute from open market. They could avail of usual trade credit for three months whereas having been

compelled to purchase the raw jute in accordance with the linkage from the Jute Corporation of India, the jute mills were required to make advance payment and thereafter, they received the materials and that too, of inferior quality after one and half months or two months.

(q) For the reasons enumerated above, the writ Petitioners could not purchase the raw jute from the Respondent No. 1 for the period from October, 2003 to April, 2004. However, in order to ensure that it did not fail to supply B-Twill gunny bags to the various procurement agencies, the Petitioners had to purchase the shortfall of the raw jute on credit from the open market and had to cause supplied thereof after conversion of the same.

(r) Despite causing regular supplies, the Respondent No. 2 recently threatened that would not allot any further material under the Production Control Order with effect from the month of June, 2004 onwards inasmuch as the writ Petitioners allegedly failed and neglected to purchase the raw jute from Respondent No. 1 in the ratio as was directed in the various Production Control Orders. In threatening to take such coercive and punitive action against the Petitioners, the Respondent No. 2 wrongfully and illegally failed to take into consideration to the fact that in spite of the hindrances and predicaments of the Petitioners as indicated above, they had caused regular supplies of the gunny bags as per Production Control Order.

(s) In the event of non-purchase of the linked quantity of jute, the Respondent No. 1 was entitled to levy a sum of Rs. 25 per quintal per month as carrying charge and further, late delivery charge at the rate of 2 per cent per month subject to a maximum of 5 per cent for delay in supply of B-Twill gunny bags. Therefore, when such penal measures are already invoked, the threat on the part of the Respondent No. 2 to deny the Petitioners' further allotment of supply was wholly arbitrary, wrongful, unreasonable and illegal and such decision amounted to double jeopardy.

4. During the pendency of the writ-application, the writ Petitioners themselves prayed before the learned Single Judge for permitting them to withdraw the raw jute on instalments on opening the Letters of Credit. On the prayer of the writ-application, a learned single Judge, on June 30, 2004, passed an interim order recording that the writ-Petitioners would take delivery of raw jute from the Jute Corporation which was allotted to them and would clear the backlogs within 6 months by 6 equal instalments after opening Letters of Credit. His Lordship further recorded an undertaking given on behalf of the writ Petitioners through their learned advocate that they would comply with the terms of the agreement, and that the Jute Corporation would also give linkage for the month of July, 2004.

5. After issue of the aforesaid interim order, the Jute Corporation of India issued a letter dated July 6, 2004 directing the writ Petitioners to make payment of 1/6th quantity of the jutes along with carrying-cost as per Clause 5.0 of the sale-contract. By the said letter it was further brought to the notice of the writ Petitioners that

since the relevant sale-contracts had already been sent to them, the issue of fresh contract did not arise and the writ-Petitioners were directed to make arrangement of payment of the carrying-cost.

6. Challenging the aforesaid direction of the Jute Corporation, the writ-Petitioners filed fresh interlocutory application thereby praying for an interim order restraining the Jute Corporation from demanding any carrying-cost pursuant to the letter dated July 6, 2004. The said application was disposed of by the learned single Judge vide order dated July 19, 2004 by directing that so far as the carrying-cost was concerned, the writ Petitioners would keep the amount in separate account with their learned advocate". The learned advocate of the writ Petitioners was directed to keep the amount in fixed deposit with any nationalized bank. It was, however, made clear that only after the aforesaid deposit, the writ Petitioners would be entitled to take delivery of the jute.

7. Subsequently, the Jute Corporation filed an application before the learned single Judge for a direction upon the learned advocate for the writ-Petitioners to handover the amount lying with him with interest accrued thereon.

8. Another learned single Judge of this Court, however, heard out the writ application itself along with the said application and by the order impugned herein was pleased to hold that the Appellant was not entitled to get any carrying-cost as per Clause 5.0 of the contract and at the same time, disposed of the writ applications by holding that those had become infructuous.

9. Being dissatisfied, the Jute Corporation of India has come up with these appeals against the order impugned by which all the writ applications and the separate applications filed by the Appellant in those writ applications were disposed of.

10. Mr. Bhattacharya, the learned senior advocate appearing on behalf of the Appellant has severely criticized the order passed by the learned single Judge. According to Mr. Bhattacharya, the writ-Petitioners having agreed to take delivery of the entire raw jutes during the pendency of the writ-application, it was no longer open to them to dispute the terms of the contract as onerous and as such, they are bound by the terms of the agreement. Mr. Bhattacharya by referring to various paragraphs of the writ-application, particularly paragraph 42 thereof, contended that the writ-Petitioners never disputed the authority of the Appellant to impose carrying cost for delayed payment in terms of the agreement and on the other hand, they contended that there being specific clause in the agreement for levying carrying-cost for delayed purchase at the rate of Rs. 25/- per quintal per month with late delivery charge, there was no just ground of denying further allotment of raw jute to the writ Petitioners. According to Mr. Bhattacharya, the learned single Judge erred in law holding that the Appellant was not entitled to recover the carrying-cost for the delayed acceptance of the goods at the instance of the writ Petitioners by totally misreading the admission of the writ-Petitioners in the writ-application itself.

Mr. Bhattacharya, therefore, prays for setting aside the order passed by the learned single Judge by which His Lordship held that the Appellant was not entitled to get any carrying-cost in facts of the present case and for passing direction upon the learned advocate for the writ Petitioners to handover all the amount lying in the Bank account as per earlier interim order including the interest accrued thereon.

11. Mr. Kapur, the learned senior advocate appearing on behalf of the writ-Petitioners/ Respondents has, however, supported the order passed by the learned single Judge and has contended that on the true interpretation of Clause 5.0 of the contract the Appellant was not entitled to get any carryng-costs. According to Mr. Kapur, the question of imposing carrying-cost arises only when the Letters of Credit is found to be not in order but in a case, Mr. Kapur continues, where there is no defect in the Letters of Credit and at the same time, the same has not been returned to the purchasers for the defect, the said clause cannot have any application. Mr. Kapur, therefore, prays for dismissal of these appeals after affirming the order passed by the learned single Judge.

12. Therefore, the first question that arises for determination in these appeals in whether the writ Petitioners after taking advantage of the interim order passed in the writ-application by withdrawing the raw jute after the stipulated period and after compelling the present Appellant to release further allotment, can dispute their liability to pay carrying-cost which they admitted in the writ applications.

13. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the grievance of the writ-Petitioners in the writ-applications was that the Appellant cannot compel them to take delivery of the raw jute as per terms and conditions of the contract and for non-compliance of such onerous terms on the part of the writ Petitioners, the Appellant cannot stop further allotment of raw jutes to the writ-Petitioners. However, after filing of the writ application, for the reason best known to them, without pressing those grievancs, they prayed for permission to take delivery of all the raw jutes which they did not accept within the time stipulated and at the same time, they also prayed for direction upon the Appellant to supply fresh raw jutes in the same terms of the agreement which they called burdensome in the writ-applications, and the learned single Judge permittted such prayer which is virtually contrary to the stance of the writ Petitioners taken in those applications. After taking benefit of the said interim order, they, however, subsequently, disputed the right of the Appellant to impose carrying-cost for taking late delivery and on their objection, the learned single Judge directed them to deposit the carrying-costs with their learned advocate subject to the final decision of the writ-application.

14. In our view, the writ-Petitioners having decided to take delivery of the raw jutes in terms of the agreement and having asked for Court's intervention for a direction upon the Appellant to supply fresh raw jute as per Control Order, they cannot now back out from their undertaking to comply with the terms of the Control Order nor

can they dispute the legality of the Control Order. The earlier interim order granted by the learned single Judge indicates that it was the writ-Petitioners who prayed for fresh supply of raw jutes in terms of the Control Order and at the same time, also wanted to take delivery of the goods previously allotted to them by six different instalments. After taking advantage of the interim order, by their own conduct they have waived their right to challenge the terms of the agreement as arduous.

15. The next question is whether the Clause 5.0 of the agreement is attracted in the facts of the present case.

16. In our opinion, the learned single Judge totally misread the terms of the agreement between the parties and also overlooked the admission of the writ-Petitioners in paragraph 42 of the writ-application wherein they explicitly accepted the authority of the Appellant to impose carrying-cost and delayed surcharge for taking late delivery of the goods and contended that in view of such clause providing sufficient protection of the interest of the Appellant in case of late acceptance of the goods by the purchasers, there was no justification for imposing the restriction for fresh supply of raw jutes on the ground of not taking delivery within the stipulated time.

17. The learned single Judge, in our view, totally misinterpreted Clause 5.0 of the agreement which provides that the purchasers are liable to pay carrying cost and delayed surcharge for not taking delivery of goods within the time stipulated in the selfsame clause. 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 instal

ments 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 the Clause 5.0 can be invoked only in cases of furnishing defective Letters of Credit and delay due to the removal of the defects in the Letters of credit. In the case before us, undisputedly the writ-Petitioners had the responsibility of (not Sic) taking delivery of the goods within the period mentioned in the said clause. There is no dispute that within the said 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 take the goods within a specified period and for not taking delivery they are required to pay carrying-cost and delayed surcharge, 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. We, therefore, direct the parties to settle the amount through arbitration in terms of the agreement. The arbitrator 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. However, the fact that Clause

5.0 is attracted in this case in concluded by this order.

23. All these mandamus-appeals are disposed of in terms of this order. In the facts and circumstances, there will be, however, no orders as to costs.

Prabuddha Sankar Banerjee, J.

I agree.