

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.292/2010 & CM Nos.7873-74/2010

Accord Alloys Ltd.Appellant through
Mr. Neeraj Kishan Kaul, Sr.
Adv. with Ms. Geetika
Panwar, Adv.

versus

Asia Minerals Ltd.Respondent through
Mr. Vikas Singh, Sr.
Adv. with Mr. Kumar Mihir,
Adv.

% Date of Hearing: April 29, 2010

Date of Decision: May 05, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether reporters of local papers may be allowed to see the Judgment? No
2. To be referred to the Reporter or not? No
3. Whether the Judgment should be reported in the Digest? No

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order of the learned Single Judge pronounced on 21.4.2010. The learned Single Judge had vacated the *ex parte ad interim* injunction restraining Defendant No.1/Respondent No.1 from proceeding any further with the arbitration initiated at its instance in London, being Arbitration Case No.7972 titled Asia Minerals Ltd. –vs- Accord Alloys Ltd. On the hearing held on 30.5.2008, it had

specifically been recorded that the Plaintiff was not claiming any relief against the Arbitrator (Defendant No.2) approached by Defendant No.1 for deciding the dispute and, therefore, no summons need be issued to him. Summons were, therefore, only issued to Respondent No.1. We mention this fact because the Appellant has ventilated a grievance that the Arbitrator ought not have proceeded any further in the matter even if he had not been injuncted from doing so. We find no substance, whatsoever, in this submission, particularly because it was the Plaintiff/Appellant who had itself stated that Summons be not issued to Defendant No.2. In the event, it appears that even Defendant No.1 has not appeared before the Arbitrator who appears to have passed a Preliminary Award.

2. In the impugned Order, the learned Single Judge has delved deep into the dispute and delivered a detailed Order, holding that the contract between the parties had not been novated by them and hence the compact to arbitrate upon the dispute was fully binding on the adversaries. Mr. Vikas Singh, learned Senior Counsel appearing for the Respondent, has sought to rely on ***Wander Ltd. -vs- Antox India P. Ltd.***, (1990) Supp SCC 727 but we cannot appreciate the

relevance. ***Wander Ltd.*** enunciates that the discretion employed by a Court can only be altered by the Appellate Court only if it manifests perversity. In other words, the Appellate Court would not substitute the discretion of the lower Court with its own. The question before us is whether the contract between the parties had been changed or novated. There is no discretion which has been exercised by the learned Single Judge in returning a verdict on this point and the refusal to extend the interim Order or preserve the injunction already granted is not a discretionary exercise. Having said that, we must also record at the threshold a statement made by learned counsel for the Defendant that since the impugned Order partakes of the nature of a *prima facie* view, the Defendant would be quite prepared to allow the Arbitrator a clean slate for finally and ultimately deciding whether the arbitration agreement subsists between the parties. We put this proposition to Mr. Neeraj Kishan Kaul, learned Senior Counsel for the Appellant with the logical appendix that the Appellant should agree to withdraw the Suit. On both counts, learned Senior Counsel for the Appellant, on instructions, has declined the offer.

3. At the stage where the learned Single Judge had found himself, he was bound to return an answer on the three cardinal principles relating to the grant of *ad interim* injunction, that is, the existence of a *prima facie* case, and the appreciation of the factual matrix indicating whether the balance of convenience as well as the likelihood of irreparable injury being caused to the Applicant would warrant the grant of the *ad interim* injunction. So far as the first question is concerned, that is, existence of a *prima facie* case, the learned Single Judge has opined that there were only two aspects of the contract between the parties which had been changed. Firstly, that in place of the requirement of the supply conforming to SiMn 65 per cent managanese, the Plaintiff could make supplies conforming to SiMn 60 per cent. Secondly, in place of the earlier price of US \$ 760 per MT, Defendant No.1 had agreed to pay US\$ 790 per MT. The correspondence between the parties is replete with opening statements made by Defendant No.1 to the effect that the communication was without prejudice to their rights under the existing Contract. Furthermore, the letter dated 24.4.2007, as also other correspondence, explicitly refers to the Contract dated 27.2.2007 between the parties. All

through the negotiations reference was made to the Letter of Credit as mentioned in the said Contract. We are entirely in agreement with the conclusion of the learned Single Judge that there was no novation of the contract and, therefore, the Arbitration Agreement had not been superseded. So far as the factors of balance of convenience and irreparable injury are concerned, neither will be undermined or adversely affected by the insistence that the parties should adjudicate their disputes through arbitration.

4. Learned Senior Counsel for the Appellant has laid emphasis on *Andheri Bridge View Coop. Hsg. Society Ltd. – vs- Krishnakant Anandrao Deo*, AIR 1991 Bombay 129 in which a learned Single Judge has held that where there are material or substantial changes which go to the root of the agreement, then the assumption of law is that a new agreement has emerged. The learned Single Judge has correctly analysed this Judgment not to be ubiquitously applicable to all situations. It appears to us that in the context of the present case the Plaintiff was finding it difficult in shipping Manganeses having a minimum content of 65 per cent and it was on this subject that negotiations were

confined, along of course with the price. *Prima facie*, all other Terms and Conditions had not been cast adrift.

5. We may clarify that IA No.6904/2008, in respect of which the Appeal is stated to have been filed, has been disposed of by the composite impugned Order. Accordingly, the present Appeal shall be deemed to have been dismissed in respect of the challenge to the decision in IA Nos.9521/2008, 8121/2008, 8152/2008, each of which has been dismissed. There shall be no order as to costs.

6. The decision in *Spentex Industries Ltd. -vs- Dunvant S.A.*, 2009(X) AD(D) 162 is of relevance. The Bench observed that if a party is desirous of challenging an Award, whether domestic or international, it should file Objections/Applications as contemplated by the Arbitration and Conciliation Act, 1996 ('A&C' Act). The Plaintiff's contention was that it had not agreed to the Arbitration Clause. It had been opined that once a valid arbitration agreement was shown between the parties, then the Suit was not maintainable since the proper remedy was to first raise the dispute regarding jurisdiction of the arbitrator before the arbitration itself under the mandates of Section 16 of the A&C Act and thereafter filing of Objections under Section 34

of the A&C Act or showing cause in terms of Section 48 of the A&C Act as to why an Award ought not be enforced in India.

7. We may briefly reflect on any aspect of the case; briefly because it appears not to have been raised before the learned Single Judge. The parties have agreed that the venue or seat of Arbitration in the present case is London. The Defendant is not resident in India but in Hong Kong. Therefore, before assuming jurisdiction in a matter such as this, the Court should be fully satisfied that it possesses territorial jurisdiction and that it would be expedient to exercise it.

8. Appeal is without merit and is dismissed. Pending applications are also dismissed.

(VIKRAMAJIT SEN)
JUDGE

(A.K. PATHAK)
JUDGE

May 05, 2010
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