

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 4548 of 2024

Petitioner :- M/S Safety Controls And Device Ltd Thru
Authorized Representative Shri Prakash Chandra Joshi

Respondent :- Construction And Design Services Jal Nigam
Lko.Thru. Its Director And 3 Others

Counsel for Petitioner :- Utsav Mishra,Gaurav
Mehrotra,Pritish Kumar,Shobhit Singh

Counsel for Respondent :- Rishabh Kapoor

Hon'ble Alok Mathur,J.

1. Heard Shri J.N. Mathur, learned Senior Advocate assisted by Shri Gaurav Mehrotra,, along with Shri Tushar Mittal, learned counsel for petitioner, Shri Rishabh Kapoor, learned counsel for respondents and perused the material available on record.

2. By means of the present petition, the petitioner has challenged the order dated 20.09.2024 passed by the Presiding Officer, Commercial Court, Lucknow thereby entertaining the application under Section 9 of the Arbitration & Conciliation Act, 1996 has issued notices to opposite party no. 2 but has declined to pass the order on the application for interim relief under Order 39, Rule 1 and 2 C.P.C. restraining the defendants from encashing the bank guarantee stating that such an order cannot be passed in an ex-parte manner but can be passed after hearing both the parties and proceeded to fix the matter on 09/10/2024.

3. The brief facts as stated by the petitioner is that a tender was floated on 24.12.2021 by opposite party no. 2 for construction of Governmen Homeopathic Medical College at Pindara, Varanasi for an estimated cost of Rs.3128.79 Lakhs. The petitioner company had participated in the said process and their bid being the lowest as L-1 was granted the said tender.

After acceptance of the bid of the petitioner, a letter of acceptance was issued by the General Manager of the respondents in favour of the petitioner and 10% of the bid amount was directed to be released in favour of the petitioner company as mobilization advance against a bank guarantee of the equivalent amount which was to be executed by the petitioner company in favour of the Director Construction and Design Services, U.P. Jal Nigam and detailed agreement was also entered between the petitioner and the respondents on 15.03.2022 for construction of Homeopathic University and Hospital in Varanasi, which was to be completed within a period of 24 months from the date of signing of the agreement. The petitioner in pursuance of the aforesaid agreement as well as mobilization advance given to him started construction on the said piece of land made available by the respondents. No sooner than the work had commenced, the petitioner came to know that there is a restraining order of the High Court, which was passed at the behest of the owners of the land, and order of status quo was passed on 05.07.2022 in Writ B No. 1193 of 2022. It is on the interim direction of the High Court dated 05/07/2022 that the petitioner was unable to raise any further construction on the said land. It has further been brought on record that the aforesaid writ petition was finally allowed by order dated 13.10.2023 and the land accordingly reverted back to his original owners and respondents did not have any ownership over the said land and hence the petitioner could not continue any construction thereon.

4. The dispute in the present case has arisen on issuance of letter dated 17.09.2024 by the Project Manager of the U.P. Jal Nigam addressed to the petitioner wherein it has been stated that a mobilization advance for an amount of Rs. 3,05.87 lakhs had been given to the petitioner against the bank guarantee

given by him, while the petitioner has done work only worth Rs.11.5 lakhs and initially the construction work was stalled due to the interim order of this Court but subsequently the writ petition filed by the owner of the land has been allowed on 13.10.2022 and accordingly, no further construction can be done on the said land. It has also been recorded that this issue has already been considered at the Highest Level of the State Government and another Homeopathic Hospital has been decided to be constructed in nearby area for an amount of Rs.4990.53/- lakhs for which purposes the land has already been earmarked and the said building is to be constructed on the fresh guidelines issued by the National Commission of Homeopathic, for which purposes fresh tender process would be initiated.

5. In the said letter, the petitioner has further been directed to refund the entire amount of mobilization advance of Rs.305.87 lakhs with interest within a period of three days failing which the bank guarantee shall be invoked.

6. The petitioner on receipt of the letter dated 17.09.2024 immediately approached the Commercial Court by filing an application under Section 9 of the Arbitration & Conciliation Act, 1996 along with an application for interim relief seeking to injunct the opposite parties from invoking the bank guarantee. It is on the application of the petitioner that the Commercial Court has declined to give him protection at the interim stage on the ex-parte basis and issued notices to the opposite parties fixing the next date as 09.10.2024.

7. Learned counsel for the petitioner has submitted that the impugned order passed by the Commercial Court is illegal and arbitrary and considering the facts and circumstances of the present case, it was incumbent upon the Commercial Court to

have pass necessary orders protecting the interest of the petitioner and restrained the respondents from invoking the bank guarantee. He submits that the provision in this regard has already been made in the agreement entered into between the petitioner and the respondents dated 15.03.2022 where under clause 52.5 which provides for foreclosure of the contract due to abandonment or reduction in scope of the work. He submits that the present factual scenario does not fall into the ambit of clause 52.5 as neither the petitioner abandoned the contract nor there is any reduction in scope of the work. It is stated that once it became clear that the project could not be proceeded with in light of the interference made by the High Court then it was incumbent upon the respondents to have duly informed the petitioner of this fact and subsequently proceeded to cancelled the contract. He submits that till date the contract has neither been cancelled nor is any order from the respondents asking the petitioner to stop the construction activities.

8. He further submits that according to clause 53.2 of the said contract, the contract has to be determined and only after determination of the contract engineers have to issue a certificate for the value of the work done, the reasonable cost of removal of Equipment, repatriation of the Contractors personal employed solely on the Works, and the Contractors costs of protecting and securing the Works and less advance payment received up to the date of the certificate, less other recoveries in terms of the Contract and less taxes due to be deducted at sources as per applicable law.

9. It is stated that no exercise has been done by the respondents prior to passing of the impugned orders in compliance of clause 53.2, which provides for payment upon rescission/

determination of the contract. He further submits that accordingly, the order which has been passed in haste seeking to invoke the bank guarantee is clearly contrary to the express provisions of the contract itself.

10. Learned counsel for petitioner has also alleged fraud on the respondents with regard to the fact that they were parties before the High Court in all the writ petitions where the land on which the Homeopathic Medical College is being constructed was disputed. The interim order was passed by this Court and subsequently, the writ petition was allowed but the respondent did not pass any orders intimating the petitioner about the said proceedings and accordingly the petitioner in pursuance of the agreement had continued to work till date were informed about the restraining orders passed by the High Court. Such conduct according to the petitioner of the respondents clearly amount to fraud, and further submitted that without giving any opportunity to the petitioner with regard to the valuation of the work done by him and the money spent in procuring the goods had to be duly valued with participation of the petitioner which has not been done so far and unilaterally without considering any material the impugned order it has been stated that the petitioner has done work worth Rs. 11.5 lakhs.

11. He further submits that the entire exercise of invoking bank guarantee has been done by the respondents without adhering to the express provisions of the contract. It is the aforesaid circumstances the petitioner has sought protection till his application is duly considered by the commercial Court, on the ground that in case the bank guarantee is invoked the application would be rendered infructuous. It is further submitted that in the similar circumstances, this Court in the case of ***Raj Kumar Batra Vs. Smt. Usha Batra in writ petition***

Misc. Single No. 31145 of 2019 had protected the petitioner under similar circumstances.

12. Shri Rishabh Kapoor, learned counsel for respondents has vehemently opposed the writ petition. He submits that though notices have not been received by them but they came to know about the proceedings initiated by the petitioner, which has been annexed along with the writ petition.

13. He has submitted that the respondents themselves have been directed to abandon the said project at the behest of the State Government and he has denied the allegations of fraud as alleged by the petitioner. He further submits that there is no infirmity in the invocation of bank guarantee and submits that the jurisdiction of the writ court in interfering matters regarding bank guarantee are extremely limited but does not dispute the fact that the Court has power to interfere in such matters where it has been shown that the invocation is on account of fraud or clear violation of the terms of the agreement between the parties. He has relied upon the judgment of the Supreme Court in the case of **Hindustan Steelworks Construction Ltd. Vs. Tarapore & Co. and another** reported in (1996) 5 SCC 34. He has submitted that the respondents themselves had come to know about the intention of Government to construct a new Homeopathic Medical College only on 30.08.2024 and the proceedings against the present project have been initiated only after receipt of the said letter.

14. Having heard rival submission of learned counsel for parties. This Court is only called upon for a limited interference in the proceedings before the Commercial Court, and specially with regard to the order dated 20/09/2024 where the Commercial Court has declined to pass orders on the application under Order 39, Rule 1 and 2 of C.P.C. filed by the

petitioner The trial court has declined to protect the interest of the petitioner with regard to the invocation of the bank guarantee stating that it would not be equitable to pass such an order ex-parte and accordingly had fixed the next date as 09.10.2024 for appearance of the respondents and for consideration of the application for interim relief.

15. Learned counsel for petitioner on the other hand has submitted that as per the impugned order only three days time was given to the petitioner to pay the entire amount failing which the bank guarantee was to be invoked.

16. It is further noticed that there is no dispute that the petitioner had raised certain construction, subsequent to the grant of contract, and which has been mentioned in the impugned notice itself stating that the said construction has been valued to be of Rs.11.5 lakhs. The petitioner has submitted that the value of amount involved and spent by the petitioner was much higher what has been valued by the respondents. Even if considering for a moments that the contention of the respondents is correct with regard to the estimation of the work which has been done by the petitioner on the allocated land, it is not conceivable as to why they asked the petitioner to refund the full amount of Rs. 305.87 lakhs along with interest, without deducting the amount admittedly spent by him. Even the interest component cannot be justified at this stage, since, there is no provision for refund of the mobilization amount with interest as per the contract entered into between the parties.

17. The petitioner on the other hand has alleged that the act of the respondents is fraudulent and the same is denied by the respondents and considering the aforesaid matter and especially the fact that the matter is listed before the Commercial Court for consideration of the application of the petitioner for interim

relief on 09.10.2024, this Court does not intend to make any observation on the merits of the case at this stage, as it may adversely affect the interest of the parties. Accordingly, after due consideration of the rival contentions, this Court is of the considered view that prima-facie Case for interference under article 227 of the Constitution of India has been made out and the rights of the petitioner deserves to be protected till necessary orders are passed by the Commercial Court on the application for interim relief under Order 39, Rule 1 and 2 C.P.C.

18. Shri Rishabh Kapoor, learned counsel for respondents has submitted that the respondents have taken due cognizance of the proceedings pending before the Commercial Court initiated at the behest of the petitioner and they shall the putting in appearance before the Commercial Court before the next date fixed.

19. Considering that more than two weeks are still remaining for the next date before the trial court, learned counsel for respondent submits that the respondents shall also file their written submission, and it shall be open for the Commercial Court to pass necessary orders after hearing both the parties. Accordingly, in the aforesaid circumstances, no purpose would be served to keep the instant petition pending and the same is disposed of with a direction to the Commercial Court to consider the application for interim relief of the petitioner in Suit No. 86 of 2024 either by the next date fixed as 09.10.2024 or any other subsequent date within next ten days to be fixed at the discretion of the Court shall proceed to consider and decide the application under order 39 rule 1 & 2 filed by the petitioner in accordance with law. Till the application and order 39 rule 1 & 2 is decided, the respondents are restrained

from encashing the bank guarantee, and it is further clarified that the issue of encashing the bank guarantee will be subject to the orders passed by the commercial Court is directed hereinabove.

20. The parties undertakes to cooperate in the proceedings pending before the trial court with regard to the disposal of the application for interim relief and it is further clarified that the Commercial Court shall not be influenced by any observations made by this court in the present order while deciding the application of the petitioner.

21. Accordingly, the impugned order dated 20.09.2024 passed by the Presiding Officer is interfered with only to the extent that the bank guarantee shall not be invoked by the respondents till necessary orders are passed in pursuance of the direction issued by this Court by the Commercial Court in Suit No. 86 of 2024.

22. With the aforesaid observations/directions, this petition is disposed of.

(Alok Mathur, J.)

Order Date :- 21.9.2024
Virendra