

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 1510 OF 2015

ITD Cementation India Limited

..... Petitioner

VERSUS

AMS Concrete (India) Private Limited

..... Respondent

Mr.Simil Purohit, a/w. Mr.Peshwan Jehangir, Mr.Ayush Agarwala, Mr.Anindya Basarkod, i/b. Khaitan & Co. for the Petitioner.

Mr.Naveen Chomal for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 7th AUGUST, 2015

P.C.

By this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, the petitioner seeks an order and injunction against the respondent to remove plant, machinery and equipments as described in Ex.JJ of the petition from the site as described in prayer (a) of the petition or in the alternate seeks appointment of the Court Receiver or other some fit and proper person as a receiver with a direction to remove the respondent's plant, machinery and equipments from the site of the petitioner.

2. By consent of parties, the arbitration petition is disposed of finally at the ad-interim stage.

3. Since the affidavit in reply is tendered in court today and copy thereof is furnished to the learned counsel appearing for the petitioner in court, I have permitted the learned counsel for the petitioner to proceed on the basis of denial.

4. Learned counsel appearing for the respondent undertakes to get the affidavit

in reply affirmed and agrees to file the same before this court during the course of the day. Learned counsel has also agreed to furnish the copy of the affirmed copy of the affidavit in reply upon the petitioner's advocate simultaneously. It is made clear that if the affidavit duly affirmed is not affirmed during the course of the day and not filed today, the same would not be taken on record. Some of the relevant facts for the purpose of deciding this petition are as under :-

5. The petitioner was appointed as a contractor by the Rail Vikas Nigam Limited, Government of India Enterprise, by way of a contract dated 5th March, 2014 for the construction of seven stations on Newgaria Airport Corridor of Kolkata Metro Railway Line on the terms and conditions as recorded in the said agreement. The petitioner required substantial quantities of ready mix concrete and awarded the said contract to the respondent by work order dated 1st October, 2014 on the terms and conditions recorded therein.

6. It is the case of the petitioner that since the respondent committed gross delay in supply of the said material under the said work order dated 1st October, 2014, the petitioner terminated the contract on 30th April, 2015. The petitioner thereafter by notice dated 21st May, 2015 called upon the respondent to remove all such plant, machinery and equipments from the site of the petitioner. In response to the said notice, the respondent alleged that on one hand the petitioner had directed the respondent to take out all plant, machinery and equipments in a maximum period of 15 days from the date of the said letter dated 21st May, 2015 but on the contrary had restrained the staff and agents of the respondent from entering the site and alleged to have started using plant, machinery and equipments which were established at the costs of the respondent.

7. Mr.Purohit, learned counsel appearing for the petitioner invited my attention to the relevant terms and conditions of the work order issued by the petitioner and also the correspondence exchanged between the parties. He submits that since there was gross delay on the part of the respondent in performing their part of the obligation under the said work order, the petitioner has already terminated the said contract and proposes to award the contract to another contractor with a view to comply with the terms and conditions stipulated in the contract awarded to the petitioner by the Rail Vikas Nigam Limited. He submits that the petitioner has not been using any such plant and equipments of the respondent lying at site and wants the respondent to remove the same.

8. Learned counsel appearing for the respondent on the other hand submits that the respondent may challenge the termination order effected by the petitioner by invoking the arbitration agreement recorded in the said work order. He submits that the learned arbitrator would have jurisdiction to go into the validity of such termination order issued by the petitioner. He submits that the respondent may apply for specific performance of the said contract before the learned arbitrator and in the event of the respondent succeeding in the arbitral proceedings before the learned arbitrator, the respondent would use the said machinery and equipments and other infrastructure set up at site by the respondent. He submits that the petitioner cannot be allowed to award the contract to any other contractor and at the same time ask the respondent to remove such plant, equipments and other infrastructure from the site.

9. It is submitted by the learned counsel that the reliefs as claimed in this petition under section 9 does not fall under any of the interim measures permissible under section 9 of Arbitration and Conciliation Act, 1996. He submits

that under section 9 (ii) (a), this court can pass an interim measures so as to preserve any of the items which are the subject matter of the arbitration agreement. He submits that if the reliefs as prayed are granted by this court, it would be contrary to section 9 (ii) (a) of the Arbitration Act.

10. Learned counsel for the respondent submits that the respondent is ready and willing to proceed with the work awarded to the respondent by the petitioner and is agreeable to provide all co-operation to the petitioner in that regard.

11. Mr.Purohit, learned counsel appearing for the petitioner in rejoinder invited my attention to the letter dated 22nd June, 2015 addressed by the respondent through its advocate and in particular the claims quantified by the respondent at Rs.6,41,01,012/-. It is submitted that the respondent has already quantified their claim in terms of money for all such plant, equipments and other infrastructure setout in the said letter at site and thus the respondent cannot oppose the reliefs as prayed by the petitioner.

12. It is not in dispute that the contract awarded to the respondent has been already terminated by the petitioner. There is no stay of such termination order issued by the petitioner so far. The respondent has not filed any proceedings either under section 9 or invoking arbitration agreement till date.

13. A perusal of the reply dated 22nd June, 2015 clearly indicates that the respondent has already quantified their claim in terms of money for all such equipments, machinery and infrastructure alleged to have been set up on the site of the petitioner. In my view even if the respondent succeeds in the arbitral proceedings in its claim for specific performance and even if these plant,

machinery and equipments are removed for the time being from the site, the respondent can re-mobilise all such plant, machinery, equipments on site. Even if there is any loss suffered by the respondent in view of the removal of such plant, equipments and infrastructure from the site, the respondent would be entitled to seek monetary claim before the arbitral tribunal. A perusal of the said letter dated 22nd June, 2015 clearly indicates that the reliefs sought to be claimed would be in the nature of the monetary claim. It is however made clear that if any claim for specific performance of the contract is prayed by the respondent in the arbitral proceedings, the arbitral tribunal can consider the same on its own merits.

14. Insofar as the submission of the learned counsel for the respondent that the respondent is ready and willing to co-operate and provide all co-operation to the petitioner if the respondent is allowed to perform the remaining part of the obligation under the contract awarded to the respondent is concerned, the learned counsel for the petitioner submits that the termination is justified and his client is not agreeable to withdraw the letter of termination and to permit the respondent to continue the balance part of the performance. I am thus not inclined to accept this submission of the learned counsel for the respondent.

15. Insofar as submission of the learned counsel for the respondent that the reliefs claimed in the present petition under section 9 for direction to the respondent to remove all such plant, equipments and infrastructure described in Ex.JJ cannot be granted is concerned, in my view there is no merit in this submission of the learned counsel for the respondent. Under section 9 (ii) (a) of the Arbitration Act, this court has power to grant interim measure and protection in respect of the preservation of the goods which are the subject matter of arbitration agreement. The petitioner has already terminated the agreement. In my view if

the plant, machinery, equipments are directed to be removed, the respondent can preserve the same at their own risk and cost. In my view there is thus no substance in the submission of the learned counsel for the respondent.

16. I am thus inclined to grant the interim measures as prayed by the petitioner in terms of prayer clause (a). Respondent is directed to remove all such plant, machinery, equipments as described in Ex.JJ within 15 days from the date of this order. It is made clear that if the respondent does not remove such plant, machinery and equipments in terms of prayer (a), Court Receiver stands appointed in respect of such plant, machinery and equipments who shall remove the same and handover to the respondent.

17. Parties as well as the Court Receiver to act on authenticated copy of this order.

18. Arbitration petition is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]