IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 1ST DAY OF JULY 2015/10TH ASHADHA, 1937

WA.No. 1261 of 2015 () IN WP(C).19734/2013

AGAINST THE ORDER/JUDGMENT IN WP(C) 19734/2013 of HIGH COURT OF KERALA DATED 27-11-2014

APPELLANT(S):

THE KERALA MINERALS AND METALS LIMITED,
REPRESENTED BY ITS MANAGING DIRECTOR,
CHAVARA, KOLLAM.

BY ADVS.SRI.K.ANAND (SR.)
SMT.LATHA KRISHNAN
SRI.M.N.RADHAKRISHNA MENON

RESPONDENT(S):

M/S. RABI TRADING COMPANY,
DEALER OF COAL AND PETRO COKE
A REGISTERED PARTNERSHIP FIRM -
REPRESENTED BY ITS PARTNER
A.R.AKABAR SHAREEF, 6, THANDAVARAYA STREET,
ARIYALUR, TAMIL NADU 621 704.

BY SRI.S.R.DAYANANDA PRABHU

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 01-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ASHOK BHUSHAN, CJ
&
A.M.SHAFFIQUE, J

W.A.No. 1261 of 2015

Dated this the 1st July, 2015

JUDGMENT

Shaffique, J.

The respondent in W.P(C).No.19734 of 2013 is the appellant herein, who challenges the judgment dated 27.11.2014.

2. The Writ Petition was filed by the respondent herein, who is hereinafter referred to as the petitioner, seeking for a direction for releasing the payment of ₹21,13,335/- together with interest at the rate of 12% from 6.3.2012.

3. The short facts involved in the Writ Petition would disclose that the appellant invited tenders for supply of Petro Coke. The petitioner submitted tender, which was accepted and Exhibit P1 is the copy of the tender, which indicates that the total requirement of the Petro Coke is 13750 metric tonnes. The terms of the tender further

indicates that the successful tenderer shall have to cater to the increase in requirement, if any, during the contract period, at the same price and terms and conditions. The petitioner offered to supply the said material. The appellant by Exhibit P3 letter dated 26.4.2011 informed the petitioner about the landed cost and called upon them to confirm the cost at that rate. The petitioner by Exhibit P4 letter dated 27.4.2011 agreed to supply 50% of the tender quantity as per the terms and conditions stated in Exhibit P1. Pursuant to the same, Exhibit P7 purchase order dated 3.5.2011 for 1000 MT was issued by the appellant. The petitioner also submitted necessary Earnest Money Deposit as well as Security Deposit in terms with the conditions in the purchase order. Subsequently, the appellant issued another purchase order dated 10.5.2011 for supply of 4125 metric tons of Petro Coke and called upon the petitioner to furnish Earnest Money Deposit as well as Security Deposit. By Exhibit P11 letter dated 21.5.2011, the petitioner submitted that the purchase order issued for the quantity of 4125 metric tons of Petro Coke is without their consent and they will not be in a position to supply the same. They could only supply 1000 metric tons, therefore, the purchase order was returned. While so, the petitioner started supplying the materials and according to the appellant, the petitioner supplied 289.76 MT of Petro Coke over a period of time. When the petitioner sought for the value of materials supplied, the petitioner was paid only ₹10 lakh. The balance amount was not paid on the contention that certain amounts had been kept as Earnest Money Deposit and Security Deposit towards the supply to be made by the petitioner for the quantity of 4125 MT of Petro Coke. Further it was also indicated that the appellant has suffered loss which had to be compensated by the petitioner.

4. The Writ Petition was filed inter alia contending that the action of the appellant in not paying the value of goods, and withholding of security deposit and earnest money is arbitrary and illegal.

5. Counter affidavit has been filed by the respondent inter alia stating that the tenders were invited for supply of 13750 MT of Petro Coke and the petitioner had agreed to supply 50% of such quantity. Finally purchase order was issued for supply of 1000 MT of Petro Coke, which was enhanced to 4125 MT. The petitioner has not honoured the purchase order and has violated the terms and conditions of the contract. It is submitted that the petitioner had submitted a bank guarantee for ₹5,60,631/- as security deposit. The Earnest Money Deposit was ₹2 lakhs. It is, therefore, contended that since the petitioner has violated the terms of contract agreed upon, the appellant is entitled to retain the amount as claimed.

6. The learned Single Judge after considering the factual aspects involved in the matter formed an opinion that since the contract has not been terminated so far and the petitioner having supplied certain quantity, payment has to be effected based on the terms of contract. If the appellant has suffered any damage, it is for the appellant

to approach the Civil Court and claim the same. It is also observed that the Earnest Money Deposit and Security Deposit need not be released to the petitioner presently, but refund of the said amount and continuation of withholding EMD and security deposit will depend upon the decision of the Civil Court. In the result, the Writ Petition was disposed of observing that if the appellant fails to approach the Civil Court for recovery of loss, EMD and Security Deposit shall be released to the petitioner on the expiry of two months. It is also observed that the bank guarantee shall be renewed for a period of two months and renewal thereafter will depend upon the decision of the Civil Court. Further it is observed that if any amount quantified as damages exceeds the amount payable to the petitioner, it is open for the appellant to retain any amount which is due to the petitioner towards supply based on the order of the Civil Court. The issues regarding breach and interest payable were left open.

7. It is argued by the learned counsel for the appellant that the Writ Petition itself was not maintainable and that the learned Single Judge should not have directed the appellant to approach the Civil Court for forfeiture of the Earnest Money Deposit and Security Deposit. The learned counsel also relied upon the judgment of the Supreme Court in ***State of Uttar Pradesh and others v. Bridge and Roof Company (India) Ltd.*** (1996(2) SCC 22) and ***Kerala State Electricity Board v. Kurien E.Kalathil*** [(2000)6 SCC 293] to contend for the position that when the parties are not covered by any statutory contract, the contracts are to be treated as coming within the realm of private law, breach of which cannot be adjudicated in a Writ Petition filed under Article 226 of the Constitution of India. Further reference has been made to the judgment of the Supreme Court in ***Maula Bux v. Union of India*** [(1969)2 SCC 554] and the judgment of the Calcutta High Court in ***Naresh Chandra Guha v. Ram Chandra Samanta and others*** (1952 AIR (Cal.) 93).

8. On the other hand, learned counsel appearing for the petitioner submits that the terms of the contract clearly indicated that the obligation of the petitioner was only to supply a quantity of 1000 MT of Petro Coke or something in excess of that over a period of time, i.e., within one month and it was not open for the appellant to have called upon the petitioner to supply huge quantity of material within the said one month period. It is contended that as far as Exhibit P7 purchase order is concerned, though the petitioner has submitted the Earnest Money Deposit and Security Deposit and the supply of 289.760 MT was made, the value of the material has not been paid so far. No attempt has been made by the respondent to cancel the said contract as well. As far as Exhibit P10 purchase order is concerned, the petitioner did agree to supply the said material and no Earnest Money Deposit or Security Deposit was furnished. In that view of the matter, it was not open for the appellant to adjust any amount as Earnest Money Deposit or Security Deposit from the

amount, which was actually payable to the petitioner. It is, therefore, submitted that the action of the appellant in not paying the value of the material supplied is arbitrary and illegal and therefore being an arbitrary action on the part of the appellant, the learned Single Judge was justified in issuing the direction.

9. Having regard to the aforesaid factual situation, we do not think that in a matter involving consideration of a private law, the writ court can decide the disputed facts. But as far as the present case is concerned, the claim is for payment of value of the materials supplied. The clauses in the tender clearly indicate that if there is breach of contract on the part of the contractor, it shall be open for the awardee of the work to forfeit the Earnest Money Deposit and the Security Deposit. Further, as far as the purchase order, Exhibit P7, is concerned, the petitioner had been supplying materials and the contract has not been cancelled so far. Therefore, during the pendency of the said contract for the supply effected, the

petitioner is entitled for payment of the said amount.

10. The contention of the appellant that they could adjust the amount payable for the materials already supplied by the petitioner towards Earnest Money Deposit and Security Deposit for the purchase order which had been returned by the petitioner, apparently is unjustifiable. They cannot adjust any amount due to the petitioner as value of material supplied, towards Earnest Money Deposit or Security Deposit for a supply which was not accepted by the petitioner. Under such circumstances, the petitioner is entitled for the actual value of the materials that they have supplied.

11. But, as far as the Earnest Money Deposit and Security Deposit which had already been given by the petitioner is concerned, if the petitioner seeks to get refund of the same and if there is dispute between the parties with regard to breach of contract, on account of non performance of any contract by the petitioner, it is open for the appellant to forfeit the same and this Court

cannot direct refund of the same. The remedy of the petitioner is to approach the Civil Court to get refund of the same.

12. Coming to the claim for damages as far as the appellant is concerned, so far they have not quantified any loss alleged to have been suffered by them in this transaction. It is always open for them to do so. This Court need not give any direction as such.

12. Though this contract also is one which comes under the realm of private law, having regard to the facts involved in the matter and especially on account of the fact that retention of the value of the goods for the last three years appears to be an arbitrary action on the part of the appellant, we are of the view that the judgment of the learned Single Judge requires to be modified in the following lines:

(i) It shall be open for the appellant to forfeit the Earnest Money Deposit and Security Deposit in terms of Exhibit P7 purchase order and if the petitioner requires refund of the said amount, it shall be open for them to approach the Civil Court and seek appropriate measures.

(ii) As far as the payment of value of goods supplied is concerned, the appellant is bound to pay the said amount. Hence, there will be a direction to the appellant to pay the petitioner the value of goods without any deduction within a period of one month from the date of receipt of a copy of this judgment. Appellant's right to approach the Civil Court is left open.

ASHOK BHUSHAN
CHIEF JUSTICE

A.M.SHAFFIQUE
JUDGE

vgs