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HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No. 68 of 2016

1. M/s Mcnally Bharat Engineering Co. Ltd. Ecospace Campus 2 B 11 F/12 (Cold Plot No. A A 11/ Bik 3) New Town, Rajarhat North, 24 Parganas Kolkata- 700156

2. M/s Southern Cooling Towers Private Ltd., Kolkata 38B, Pratapaditya Road, Kolkata 700026

---- Appellants

Versus

- Steel Authority Of India Through: G.M (Proj- P C C) T K Bhilai Steel Plant, Bhilai District Durg, Chhattisgarh 490001

---- Respondent

For Appellants : Shri Prafulla Bharat and Shri Anand Shukla, Adv.
For Respondent : Shri Kasif Shakeel, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra

Order On Board

11/01/2017

1. Present is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act, 1996') calling in question the order passed by the District Judge, Durg, rejecting the appellants' application under Section 9 of the Act, 1996.

2. The appellants and the respondent entered into a contract concerning design, engineering, manufacture/fabrication, delivery FOR site, storage at site, preparation and submission of all

drawings for civil, mechanical, structural, piping, technology, electrical, instrumentation and automation, material handling (ACVs) and other facilities, construction and erection drawings, construction and erection as per approved drawings, site testing, painting, commissioning and fulfillment of performance guarantee parameter as per detailed scope of work and agreed technical specification for the external water system for mills and fire water pumps (package No.077.02) house under modernization and expansion of Bhilai Steel Plant. The value of the contract was Rs.121.75 crores approximately. The Bhilai Steel Plant allegedly terminated the contract even before the scheduled date on the ground that the appellants do not have sufficient funds to complete the project within scheduled period and further that the appellants have achieved only 58% progress during the relevant period and it was impossible for them to complete the remaining 42% works in the remaining 4 months of the contract.

3. Be that as it may, the contract contains arbitration clause and the appellants wanted to invoke the arbitration clause by initiating conciliation proceedings. At the same time, the appellants moved an application for interim protection under Section 9 of the Act, 1996 before the District Judge, Durg. The only prayer made in the application was to restrain the respondents from making recovery under risk and cost clause of the agreement. The application was contested by the respondent on the plea, amongst others, that the risk and cost amount is yet to be calculated as fresh contract has not been finalized, therefore, the application is not maintainable being premature.

4. In the impugned order, the District Judge has found that the

appellants have a good prima facie case in their favour but at the same time the application has been rejected on the ground that balance of convenience and irreparable loss is not in their favour.

5. In course of hearing before this Court also, Shri Kasif Shakeel, learned counsel for the respondent would submit that such invocation of risk and cost clause of the agreement has not been arrived at as calculation of the amount under the said head is yet to be made. He would also submit that bank guarantee executed by the appellants in favour of the respondent has been invoked/ encashed and the said amount shall be adjusted towards risk and cost amount, as also that no other amount in the appellants' account under the subject contract is alive with the appellants for making recovery against risk and cost amount.

6. At this stage, Shri Bharat, learned counsel for the appellants would submit that the appellants are executing other contracts with the respondent and as soon as risk and cost amount is calculated, recovery shall be made from the amount payable to the appellants in other contracts, therefore, the appellants shall suffer irreparable loss. He would also submit that in the event the recoveries from other contracts are made, the appellants may be left cash starved to execute other contract which will ultimately affect the work of Bhilai Steel Plant.

7. Having heard learned counsel for the parties and perusal of the documents, it would appear that when strong *prima facie* case is made out in favour of the appellants, ordinarily recovery against risk and cost should not be made during the pendency of the arbitration proceedings.

8. In the matter of **Shankarlal Debiprasad Rathore Vs. State of M.P. and others** {1978 M.P.L.J. 419}, the Madhya Pradesh High Court has held that when the plaintiff has made out a prima facie case and raised triable issue, ordinarily injunction should be allowed.

9. In the matter of **M/s Laxmi Construction Company Vs. State of Chahttisgarh & Others** {(WPC No.2205/2012, 2206/2012 & 2207/2012}, the Division Bench of this Court has held that when arbitration proceeding is yet to finalize, the State Government should not make recovery of the amount from the contractor before finalization of the arbitration proceeding.

10. Considering the entire fact situation of the case, I am of the considered view that the District Judge should have allowed the application under Section 9 of the Act, 1996.

11. Accordingly, the appeal is allowed and the impugned order is set aside. The appellants' application under Section 9 of the Act, 1996 is allowed and the respondent is restrained from making any recovery from the appellants under the risk and cost clause of the agreement during the pendency of the arbitration proceeding. However, this order shall not be understood to have restrained the respondent from re-awarding the contract to new contractor.

Sd/-
Judge
(Prashant Kumar Mishra)

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