

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP(I)(COMM) No.407/2018**

% **20th November, 2018**

SAVAN GODIAWALA, IN HIS CAPACITY OF
LIQUIDATOR AND ON BEHALF OF LANCO
INFRA TECH LIMITED

..... Petitioner

Through: Mr. Sandeep Sethi, Senior
Advocate with Mr. Vijayant
Paliwal, Advocate with Mr.
Jasveen Kaur, Advocate and
Ms. Srishti Khare, Advocate
(M. No.8527696008)

versus

STEEL AUTHORITY OF INDIA LIMITED &
ANR.

..... Respondents

Through: Mr. Parag P. Tripathi, Senior
Advocate with Mr. Arun
Kathpalia, Senior Advocate,
Mr. Mandeep Singh Viniak,
Advocate, Ms. Anjali Sharma,
Advocate, Mr. Deepak Bashta,
Advocate and Mr. Lalitaksh
Joshi, Advocate for respondent
No.1(M. No.9810011235).
Mr. Karan Khanna, Advocate
with Mr. Mohit Taneja,
Advocate for respondent
No.2(M. No.7838971053).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

I.A. No.14596/2018(exemption)

1. Exemption allowed subject to just exceptions.

I.A. stands disposed of.

O.M.P.(I)(COMM) No. 407/2018 and I.A. Nos. 15751/2018 (under Section 151 CPC) & 17753/2018 (for condonation of delay)

2. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 whereby the petitioner seeks an injunction order against the respondent no. 1 from in any manner acting upon the impugned Termination Notice dated 24.09.2018. An injunction order is also prayed by the petitioner to restrain the respondent no. 1 from invoking the Performance Bank Guarantee dated 20.01.2014 (valid for 5 years) for a sum of Rs. 50 crores. *Ad-interim ex parte* orders are also prayed *qua* the aforesaid two prayers.

3. On 26.10.2018, this Court passed the following order :

1. Counsel for the petitioner says that petitioner will file a detailed affidavit setting out exactly and how the proposed assignee of the contract to whom the contract is sought to be assigned fulfils all the necessary technical bid

requirements of the contract which was originally awarded to Lanco Infratech Limited.

2. The affidavit will be supported by the relevant documents and cross reference will be made in the affidavit to the relevant portions of the documents. The said affidavit be filed within four days from today.

3. Respondent no. 1 will file reply affidavit to the affidavit which is now to be filed by the petitioner within four days thereafter. Petitioner will file rejoinder affidavit if so required within a period of four days of filing of the affidavit by respondent no. 1.

4. Besides the fact that this order is without prejudice to the respective rights and contentions, however, it is noted that this Court prima facie feels that respondent no. 1 can take a holistic view of the matter that in case the proposed assignee satisfies the technical bid parameters, then there is no reason why the respondent no. 1 should not be interested in going through the contract as regards its performance and which performance, already started with the contracting company Lanco Infratech Limited, and which is presently in liquidation.

5. Re-notify on 20th November, 2018.”

4. The petitioner has filed its affidavit as per Order dated 26.10.2018. The respondent no. 1 has filed its affidavit in response thereto. The petitioner has in the meanwhile moved an application being ***I.A. No. 15751/2018*** for amendment of the petition whereby the petitioner seeks to amend the petition to bring on record the facts that the proposed assignee of the contract being, M/s Tasra Mining and Energy Company Private Limited, was eligible to submit the original bid as it was technically and financially competent to do so. This

amendment was prayed along with a prayer for taking on record an additional affidavit dated 31.10.2018. Basically, the petitioner wants to bring on record the fact that the proposed assignee M/s Tasra Mining and Energy Company Private Limited was financially and technically competent as the original contracting party M/s Lanco Infratech Limited which was awarded the original contract being the Coal Mining Services Agreement (*hereinafter 'CMSA'*) dated 23.09.2013 by the respondent no. 1.

5. The respondent no. 1 has filed a reply to the amended petition itself, and therefore really *I.A. No. 15751/2018* is not effectively opposed, of course, without prejudice to the rights of the respondent no. 1 to contest the petition on merits by denying the averments and prayers as made by the petitioner.

6. The facts of the case are that the respondent no. 1 has entered into a CMSA on 23.09.2013 with M/s Lanco Infratech Limited. The petitioner is acting through Mr. Savan Godiawala, who is the Liquidator acting on behalf of M/s Lanco Infratech Limited. Mr. Savan Godiawala is an insolvency professional, and so appointed by the National Company Law Tribunal, Hyderabad Bench vide Order

dated 27.08.2017 for M/s Lanco Infratech Limited. Mr. Savan Godiawala effectively is none other than, and acting for and on behalf of M/s Lanco Infratech Limited. After the CMSA dated 23.09.2013 was entered into between petitioner and respondent no. 1, a part of the contract was sub-contracted by M/s Lanco Infratech Limited to its sub-contractor M/s Thriveni Ramka Mining Private Limited. This sub-contracting was done with the approval of respondent no. 1 as per the respondent no. 1's Letter dated 05.05.2017. As per clause 25 of the CMSA dated 23.09.2013, if M/s Lanco Infratech Limited goes into liquidation, then, the respondent no. 1 was entitled to terminate the agreement after giving a 30-day notice. This 30-day notice has been given by the respondent no. 1 in terms of respondent no.1's Termination Notice dated 24.09.2018 and which was treated as the 30-day notice required as per the order dated 27.09.2018 passed by the learned single Judge of this Court in ***OMP(I) (COMM) No. 377/2018***.

7. Therefore, it is seen that the undisputed position emerging on record is that the parties are bound by the CMSA, and this contract entitles the respondent no. 1 to terminate the same on the petitioner going into the liquidation. Admittedly the petitioner is in

liquidation and the petition has been filed through Mr. Savan Godiawala, in his capacity as a liquidator of M/s Lanco Infratech Limited. Therefore, clearly respondent no. 1 was completely justified in seeking termination of the contract on the basis of Clause 25 of the CMSA which provided for termination of the contract in case M/s Lanco Infratech Limited went into liquidation, and which it has.

8. On behalf of the petitioner, to seek the reliefs prayed, reliance was placed upon a Letter dated 15.03.2018 issued by respondent no. 1 as per which respondent no. 1 is said to have permitted assignment of CMSA originally awarded to M/s Lanco Infratech Limited in favour of M/s Tasra Mining and Energy Company Private Limited, and this company is a wholly owned subsidiary company of M/s Lanco Infratech Limited. It is argued on behalf of the petitioner that respondent no. 1 after issuing its Letter dated 15.03.2018, the respondent no. 1 could not now back-out of the same, unilaterally, without giving reasons, much less valid reasons for withdrawing the permission for the assignment.

9. In order to appreciate this argument urged on behalf of the petitioner, reliance has been placed upon the Letter dated

15.03.2018 issued by the respondent no. 1. This letter is reproduced as under :

“Ref. No.: ED(CD)/Tasra/17-18/406

Date : 15.03.2018

To
Mr. Savan Godiawala
The Resolution Professional (RP) of M/s Lanco Infratech Limited,
Appointed by National Company Law Tribunal (NCLT)

Sub: Suggested Assignment of Coal Mining Service Agreement between SAIL and M/s Lanco Infratech Limited.

Dear Sir,

In pursuance to the request from the Resolution Professional of M/s Lanco Infratech Limited vide letter InLanco/560, dated 6th Jan' 2018 and subsequent deliberation on 16.01.2018 by you as Resolution Professional of M/s Lanco Infratech Limited appointed by National Company Law Tribunal (NCLT) on advantages of assigning Coal Mining Service Agreement executed between SAIL and M/s Lanco Infratech Limited dated 23rd September, 2013 to M/s Tasra Mining & Energy Company Private Limited (TMECPL) a 100% subsidiary of M/s Lanco Infratech Limited and subsequent clarification vide your letter no. InLanco/564, dated 13th March, 2018.

The matter has been examined by SAIL in consultation with SAIL-Corporate Law. We under the provision of Coal Mining Service Agreement, Clause '31' hereby permit M/s Lanco Infratech Limited to assign the Coal Mining Service Agreement to M/s Tasra Mining & Energy Company Private Limited, a 100% subsidiary of M/s Lanco Infratech Limited.

Further, you are hereby requested to depute authorized person(s) for execution of agreement with SAIL on behalf of M/s Tasra Mining & Energy Company Private Limited.

Thanking you,

sd/-

(S.K. Basak)
ED, Collieries Division”

(Underlining Added)

10. In my opinion, this Letter dated 15.03.2018 cannot be said to be finally binding upon respondent no. 1 that there has infact taken place an actual assignment of the contract in favour of M/s Tasra Mining and Energy Company Private Limited, inasmuch as, the last line of this aforesaid letter makes it clear that assignment is only complete on the execution of the agreement of the respondent no. 1 with M/s Tasra Mining and Energy Company Private Limited. Also, this Court cannot permit the petitioner to take benefit of the Letter dated 15.03.2018 because this Letter dated 15.03.2018 signed by one Mr. S.K. Basak has not been validly issued as Mr. S.K. Basak is not the competent/final/decision making authority in the respondent no. 1 to take the decision for assigning the CMSA of M/s Lanco Infratech Limited to M/s Tasra Mining and Energy Company Private Limited. In fact, the respondent no. 1 in its counter-affidavit to the main petition has stated departmental proceedings were initiated against Mr. S.K. Basak for illegally issuing the Letter dated 15.03.2018, and that he has been visited with appropriate penalty for illegally issuing the

Letter dated 15.03.2018. Therefore, in my opinion, the petitioner cannot place reliance upon the Letter dated 15.03.2018 that the same had the final effect of causing an actual assignment of the CMSA awarded to M/s Lanco Infratech Limited in favour of M/s Tasra Mining and Energy Company Private Limited.

11. Though this argument is not raised on behalf of the respondent no. 1, but in my opinion, the petition is liable to be dismissed and is accordingly also dismissed in view of the provisions of Section 14 and 41(e) of the Specific Relief Act, 1963. Section 14(1)(b) and (d) specifically prohibit grant of specific relief of a contract because of which a court is required to go into many details of a very detailed contract, and the court has to supervise the implementation of a contract which contains too many details requiring constant supervision. A huge, complicated and humongous Coal Mining Services Agreement containing dozens of terms, and requiring performance in hundreds of different ways, surely is a contract which will fall under Section 14(1)(b) and/or (d) of the Specific Relief Act. Once specific performance cannot be granted, then, Section 41(e) of the Specific Relief Act provides that an

injunction cannot be granted because by grant of injunction staying the cancellation of a contract, effectively the court will be ordering specific performance of the contract, and which it cannot as per Section 14 of the Specific Relief Act. Hence, for this additional reason this Court cannot grant the relief prayed in this petition of staying of the impugned Termination Notice dated 24.09.2018, and to this extent the relief claimed, the petition is liable to be dismissed on account of the provisions of Sections 14(1) and 41(e) of the Specific Relief Act. Section 14(1) and Section 41(e) of the Specific Relief Act read as under:

“Section 14. Contracts not specifically enforceable.-(1) The following contracts cannot be specifically enforced, namely:-

.....

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

.....

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.”

Section 41. Injunction when refused.- An injunction cannot be granted-

.....

(e) to prevent the breach of a contract the performance of which would not be specifically enforced”

12. Once the Termination Notice dated 24.09.2018 becomes final, and the petitioner is not entitled to assign the contract to M/s. Tasra Mining and Energy Company Private Limited, obviously, then there does not arise the grant of injunction against invocation and encashment of the bank guarantee, inasmuch as this relief is predicated on the continuation of the CMSA with the assignee M/s Tasra Mining and Energy Company Private Limited, and this assignment has neither taken place, nor can the respondent no.1 be otherwise forced to do so, as is already discussed above.

13. In view of the aforesaid discussion, I do not find any merit in the petition and the same is therefore dismissed.

NOVEMBER 20, 2018
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VALMIKI J. MEHTA, J