

29.12.2020
Item No SPL.5
Crt.No.8(DB)
K.B./b.r.

FMAT No. 592 of 2020
IA No. CAN 1 of 2020

M/S ACE Enginnering Infratech (I) Pvt Ltd.
-vs-
Bharat Heavy Electricals Ltd.

Mr. Ritabrota Mitra
Mr. Suvashish Sengupta
Mr. Sarosij Dasgupta
Mr. Pawan Maheswari
Ms. Nabanita Dey

... For the appellant.

Mr. Aniruddha Bhattacharya

... For the respondent.

The appellant before us has challenged a Notice Inviting Tender dated 19th December, 2020 by which the respondent seeks to complete the balance part of an architectural job (the contract) by the successful bidder at the risk and cost of the appellant. The urgency shown is that the due date for submitting offers and opening of tender is 15.00 hours on 29th December, 2020, which is today.

The dispute relates to the termination of the contract by the respondent which was due to be executed by the appellant contractor. The case of the appellant is that the appellant was prevented from completing the work by reason of the pandemic. The work was due to be executed in Bangladesh and the deadline for completing the work was extended from time to time by the

respondent. The contract was terminated on 13th October, 2020 during the extended time period. It is the case of the appellant that about 95% of the work has already been completed.

By an order dated 19th October, 2020, a Division Bench of this Court, while refusing to stay the termination of the contract by the respondent, directed that the respondent shall not take any steps against the appellant till 16th December, 2020. This order was stayed by the Supreme Court on 16th December, 2020.

Mr. Reetobroto Mitra, learned counsel appearing for the appellant, places the order under appeal passed by the Commercial Court at Rajarhat on 23rd December, 2020 which was passed in an application filed by the appellant under Section 9 of The Arbitration and Conciliation Act, 1996 before the Commercial Court. The impugned order refused relief to the appellant but recorded that the section 9 application has been heard at length and fixed the matter on 6th January, 2021 for passing orders on the said application.

Counsel submits that the respondent could not proceed in terms of the notice inviting tender and fix the 29th December, 2020 for opening the offers from prospective tenderers when the matter has been reserved “for orders” by the Commercial Court.

Mr. Aniruddha Bhattacharya, learned counsel for the respondent submits that the Supreme Court by the

order of 16th December, 2020 not only stayed the order of the Division Bench of this Court but also that of the Commercial Court dated 20th October, 2020. Counsel submits that the notice inviting tender issued by the respondent does not intend to engage the third party for completing the balance part of the contract but is confined to the opening bids on 29th December, 2020.

Upon hearing learned counsel for the parties, we note that the application filed by the appellant before the Commercial Court at Rajarhat heard and kept for orders on 6th January, 2021.

Second, the order of the Commercial Court dated 20th October, 2020 restrained the respondent from giving effect to the letter of termination dated 13th October, 2020 and further restrained the respondent from engaging any third party for carrying out the balance quantity of the work under the project till 26th November, 2020.

The admitted position is that the interim order has since been extended from time to time and was subsisting on 23rd December, 2020 when the order under appeal was passed by the Commercial Court.

In this factual background, we are unable to fathom the basis for the respondent in proceeding with the Notice Inviting Tender and fix 29th December, 2020 for opening of the bids. Whatever be the merits of the matter, the sanctity of orders passed by a Court would be

irrevocably diminished if a party is permitted to alter the state of affairs which existed on the date of the matter being kept reserved for a decision. Indeed, if the respondent now proceeds under Clause II of the Notice Inviting Tender and allows the balance part of the work to be executed by a third party/successful bidder, the petitioner's application before the Commercial Court will be rendered completely infructuous.

It is also clear from the order of the Supreme Court that the said order was confined to the order passed by the Division Bench of this Court and not the Commercial Court at Rajarhat as urged on behalf of the respondent.

In view of the reasons as stated above, the respondent is directed to stay its hands in terms of issuing a work order to the prospective / successful bidder till 8th January, 2021. It is made clear that the respondent can proceed with the opening of bids etc. in the meantime but will wait until the Commercial Court at Rajarhat pronounces its order on 6th January, 2021.

The order under appeal dated 23rd December, 2020 is accordingly modified in terms of the above. It is expected that the order on the application filed by the appellant will be pronounced by the Commercial Court on the date indicated in the order impugned.

CAN 1 of 2020 and FMAT 592 of 2020 are, accordingly, disposed of in terms of the above.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties on compliance of necessary formalities.

(Kausik Chanda, J.)

(Moushumi Bhattacharya, J.)