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

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*Date of Decision: 05.10.2021*

+ **ARB. A. (COMM.) 47/2021 and IA Nos. 11856/2021, 11857/2021 & 11858/2021**

**STEEL AUTHORITY OF INDIA LIMITED** ..... Petitioner

Through: Mr. Joy Basu, Sr. Advocate  
with Mr. Ashish Rana, Mr.  
Kanak Bose and Mr. Anurag K.  
Singh, Advocates.

versus

**M/S S.P. SINGLA CONSTRUCTIONS  
PVT. LTD.**

..... Respondent

Through: Mr. Akhil Sibal, Senior  
Advocate along with Mr.  
Anirudh Wadhwa and Ms  
Deboshree Mukherjee.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**VIBHU BAKHRU, J. (ORAL)**

1. Steel Authority of India Limited (hereinafter 'SAIL'), a company incorporated under the Companies Act, 1956, has filed the present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, impugning an order dated 21.08.2020 (hereinafter 'the impugned

order’) passed by the learned Arbitral Tribunal (by majority) under Section 17 of the A&C Act.

### ***Factual Context***

2. SAIL issued a Notice Inviting Tenders (Tender Notice bearing no. DGM/PCC/TK/5(749) R/2009/3090) inviting tenders from eligible/pre-qualified bidders for the construction of flyovers for its steel plant located at Bhillai on a Divisible Turnkey Contract basis.

3. Thereafter, on 18.06.2010, SAIL issued the Notification of Award / Letter of Acceptance in favour of the respondent. On 14.07.2010, SAIL and the respondent entered into a Contract for “*Construction of Flyover at 3 locations and Road Network (Package no.: 111-01) at Bhillai Steel Plant, Bhillai*” (hereinafter ‘the Project’). In terms of the contract dated 14.07.2010 (hereinafter ‘the Contract’), the Project was to be completed within a period of two years, that is, on or before 14.07.2012.

4. Admittedly, the said Project was not completed within the stipulated time period. SAIL alleges that the delay in completion of the Project is attributable to the respondent as it failed to take the applicable permits as and when required under the Contract and, deliberately and intentionally ignored the time schedules and instructions under the Contract, the General Clauses of the Contract (GCC) and the Schedules stipulated therein.

5. The aforesaid disputes between the parties were referred to

arbitration before the Arbitral Tribunal comprising of three members and the arbitration proceedings commenced on 07.01.2019.

6. Thereafter, on 18.07.2019, SAIL issued a letter to the respondent providing details for the balance work to be completed, and requested the respondent to resume the works regarding flyover no. 2 within a period of ten days and to start the piling work for the two abutments of ROB-1 within a period of fifteen days.

7. On 03.08.2019, SAIL once again requested the respondent to resume the balance works within seven days of receipt of the letter, failing which it would be presumed that the respondent was not interested in resuming the said works. The said letter also stated that the respondent was not performing its obligations in accordance with Clause 6.2 of the GCC, which stipulated the performance of contractual obligations by both the parties during the pendency of conciliation or arbitration proceedings.

8. On 23.08.2019, SAIL issued a Notice of Negligence under Clause 37 of the GCC to the respondent. In the said notice, SAIL referred to Clause 6.2 of the GCC and put the respondent to notice to resume the balance works of all the flyovers within fourteen days from the issuance of the said notice and to perform and complete its contractual obligations, failing which, SAIL would be compelled to initiate appropriate action. The respondent responded to the aforesaid notice by a letter dated 05.09.2019 and stated that the notice issued by SAIL under Clause 37 of the GCC *“is an operative repudiation of*

*contract, unconstitutional, illegal and unconscionable, would be defended by us at the risk and cost of the Employer”*

9. On 29.08.2019, the respondent filed an application under Section 23(3) of the A&C Act and submitted an amended Statement of Claims, as further disputes had arisen between the parties.

10. Thereafter, on 09.09.2019, during the pendency of disputes before the learned Arbitral Tribunal, the respondent filed an application under Section 17 of the A&C Act, *inter alia*, seeking maintenance of *status quo* in all further disputes between the parties in respect of their legal relationship, whether contractual or not; an interim measure directing SAIL to provide, without prejudice, funding corresponding to the estimated cost furnished by the respondent by its letter dated 17.07.2019; and direct SAIL to provide physical and legal possession of the whole site in an unimpeded state as specified in Clause 10.2 of the GCC and provide approvals of all the drawings along with required variation orders, in accordance with the Contract.

11. On 19.09.2019, the learned Arbitral Tribunal issued notice, however, it passed no orders regarding the application filed by the respondent under Sections 17 and 23(3) of the A&C Act. It also directed SAIL to file its reply by 15.10.2019 and further, fixed a meeting on 08.11.2019 at the Bhilai Steel Plant for an amicable discussion between the parties to mutually settle their disputes. By a letter dated 05.11.2019, the respondent informed SAIL its inability to attend the meeting fixed on 08.11.2019 by the Arbitral Tribunal and

suggested that the meeting be fixed on or after 23.11.2019.

12. In the meanwhile, by a letter dated 09.11.2019, SAIL issued a Risk Purchase Notice under Clause 37 of the GCC read with Clause 44.2 of the GCC to the respondent to take immediate steps to expedite the execution of the work within a period of fourteen days from the date of the notice, failing which, SAIL would terminate the Contract and employ a third party to complete the balance works at the risk and cost of the respondent.

13. In the aforesaid context, on 22.11.2019, the respondent filed an application under Section 17 of the A&C Act before the learned Arbitral Tribunal, seeking an interim relief for stay of the Risk Purchase Notice dated 09.11.2019.

14. On 23.11.2019, the learned Arbitral Tribunal allowed the respondent's application dated 29.08.2019 under Section 23(3) of the A&C Act for amendment of claims. The Tribunal further directed that SAIL would not give effect to the Risk Purchase Notice dated 09.11.2019 until disposal of the respondent's application under Section 17 of the A&C Act.

15. Thereafter, on 24.08.2020, the Arbitral Tribunal passed the impugned order holding that, *prima facie*, the respondent was not responsible for the delay in execution of the Contract. The Tribunal held that SAIL could, without prejudice to the rights of both the parties, continue to carry on the balance works, either through the respondent or another contractor.

16. The Tribunal was of the view that the said Contract could be terminated under Clause 44.1.1 of the Contract for any reason attributable to the respondent. The Arbitral Tribunal observed that certain steps were required to be undertaken by SAIL to provide an encumbrance free site to the respondent and the same had not been done. The Arbitral Tribunal also clarified that its view was a *prima facie* view based on the inspections carried out by the Arbitral Tribunal as were noted in Procedural Orders nos. 7 and 9 passed by the Arbitral Tribunal on 09.07.2019 and 19.09.2019 respectively. The Arbitral Tribunal also stated in the event, the site in question becomes free from all the encumbrances, SAIL could approach the Arbitral Tribunal and the impugned order could be given a fresh look.

17. On 25.08.2020, Shri Ashok Sharma, one of the learned Arbitrators, passed a dissenting order and held that the application preferred by the respondent under Section 17 of the A&C Act is liable to be rejected. The learned Arbitrator observed that Clauses 37 and 44 of the GCC provided the right to SAIL to terminate the agreement under certain circumstances as well as “for any reason”. The learned Arbitrator held that the Contract, in its very nature, is a determinable one and thus, cannot be specifically enforced. Further, Sections 14(d) and 41(e) of the Specific Relief Act, 1963 create a prohibition on the issuance of an injunction directing the specific performance of the contract between the parties and therefore, there can be no stay of the Risk Purchase Notice dated 09.11.2019.

18. The learned Arbitrator also held that an injunction granting a

stay in respect of the Risk and Purchase Notice dated 09.11.2019 would lead to further delay in completion of the Project and in view of Section 20A read with Section 41(ha) and the Schedule to the Specific Relief Act, 1963, an injunction having the effect of delaying an infrastructure project cannot be issued. The learned Arbitrator further observed that the present dispute regarding the Risk and Purchase Notice dated 09.11.2019 issued by SAIL has originated after reference to and constitution of the Arbitral Tribunal and therefore, the said notice gives rise to a fresh cause of action, which is beyond the scope, reference and jurisdiction of the Arbitral Tribunal and requires a fresh reference to arbitration.

19. Aggrieved by the impugned order, SAIL filed the present appeal.

### ***Submissions***

20. Mr Basu, learned senior counsel appearing for SAIL contended that the impugned order is liable to be set aside on several grounds. First, he submitted that the Arbitral Tribunal has, in effect, directed specific performance of the Contract, which is contrary to the Specific Relief Act, 1963. He submitted that the Contract is determinable and therefore, no orders could be passed compelling specific performance of the Contract.

21. Second, he submitted that the impugned order, in effect, stays the Risk and Purchase Notice dated 09.11.2019, which is beyond the scope of Section 9 of the A&C Act as it is not in aid of the arbitral

proceedings. He submitted that the dispute regarding action of SAIL in issuing the Risk and Purchase Notice dated 09.11.2019 was not a subject matter of dispute before the Arbitral Tribunal and therefore, no order interdicting the same could be passed.

22. Lastly, he submitted that the Arbitral Tribunal has, in effect, modified the Risk and Purchase Notice dated 09.11.2019 and directed SAIL to execute the work on the basis of a no default on the part of the respondent and, the same is beyond its jurisdiction.

### ***Reasons and Conclusion***

23. The contentions advanced by Mr Basu are unsubstantial. First of all, the Arbitral Tribunal has not interdicted SAIL from executing the balance work remaining to be executed under the Contract either by itself or through another contractor. The directions issued by the Arbitral Tribunal are only for preserving the rights and contentions of the parties. Clearly, if it is found that the respondent is not in breach of any of its obligations, SAIL's action under the Risk And Purchase Clause would be unsustainable. However, given the disputes between the parties, the Arbitral Tribunal permitted SAIL to carry on the works at its own risk, which in any event SAIL is entitled to do under the Contract. The Arbitral Tribunal has made it amply clear that this is without prejudice to the rights of either parties. The Arbitral Tribunal has not precluded SAIL from canvassing that it is entitled to terminate the contract on account of negligence on the part of the respondent and to get the balance work executed through another contractor. Mr

Basu's contention is premised on the assumption that the Arbitral Tribunal has set aside the notices dated 23.08.2019 and 09.11.2019. It is clear from the impugned order that the Arbitral Tribunal has not done so. It has, at the interim stage, restrained SAIL from taking any precipitate steps in that regard while preserving its rights to do so.

24. The contention that the impugned order is beyond the jurisdiction of the Arbitral Tribunal is also unpersuasive. Admittedly, the dispute between the parties relates to whether the respondent has delayed the execution of the contract or that SAIL has failed to perform its reciprocal obligations and is responsible for the delay. Clearly, if the Arbitral Tribunal finally determines that the respondent is not in breach of any of its obligations under the Contract, any further steps including the notices dated 23.08.2019 and 09.11.2019, which are premised on the basis that the respondent has failed to perform its obligations under the Contract, would be unsustainable. Having stated the above, it is not necessary for this Court to examine the dispute in any detail. The question whether any final relief can be granted in respect of notices dated 23.08.2019 and 09.11.2019 is also open for the parties to agitate before the Arbitral Tribunal.

25. At this stage, it is also relevant to refer to the findings of the Arbitral Tribunal. The same are reproduced below:

“80. I am of the view that:-

- (i) The contract is sought to be terminated on the ground of delay on the part of the claimant. There is no

dispute that the contract can be terminated for any reason but that reason should be in existence and should be attributable to the claimant.

- (ii) If the procedural Orders No.7 and 9 quoted above are taken note of, then it becomes apparent that the site is not available for work. This is a prima facie view based on the inspection carried on by the Tribunal and in the proceedings which have been noticed in the procedural orders.
- (iii) The words “for any reason” for termination of the contract would mean a reason for which the claimant is responsible. As at present such is not the situation, the respondent was supposed to make available the entire site, which was not done.
- (iv) Even now, the drawings are incomplete. The respondents have to deposit a sum of Rs.3 crore with the Railways before they can interfere with the Railway lines.
- (v) The respondents were supposed to take certain steps such as providing encumbrance free site. This has not been done. In this situation, the respondents who have failed to perform their part of the contract cannot take and insist that there is failure or negligence on the part of the claimant.
- (vi) The contract could not be terminated for the reason of delay which prima

facie is not attributable to the claimant. It is the respondent who has to first perform its part of the contract.

81. However, taking note of the detailed submissions made that the work should not be stopped, I am of the view that the interim order requires to be modified. The respondent without prejudice to rights of both parties, can resort carry on with the work at his own risk and cost, if they so desire under Clause 44.1 i.e. Termination for Employer's Convenience, either from a new party or from the claimant. The claimant has all his machinery at the site which can be utilized. It is further clarified that as and when the site become free from encumbrances the respondent can approach this Tribunal and the order passed under Section 17 can be given a fresh look.
82. Thus, it is held that:-
- (a) The contract is almost 10 years old. The claimant had expressed a wish that it may be relieved from performing the contract on account of increase in the cost during the intervening period attributable to the Respondent's obligation under Clause 10 of GCC. This request has not be considered.
  - (b) That the conditions of the contract i.e. condition No.37 and condition No.44(2) are being taken into consideration. Condition No.37 visualizes negligence on the part of the claimant and condition No.44 visualizes default on the part of the claimant. In this case, none of these factors are present. There is failure on the

part of the respondent to provide the encumbrances free site in the process 10 years has been lost with financial impacts thereof to prolongation cost and increase in the cost of construction which in itself is a issue between the parties.

- (c) That the respondent can carry on work at its own risk and cost. This can be got done without prejudice to rights of both parties under clause 44.1 instead of 44.2 from the claimant who has all machinery lying or from any person whom the respondent feels is capable of doing the work.
- (d) The respondent can approach this Tribunal again when it feels that the site is available and the work can be continued. The provisions of Specific Relief Act have been taken note of and by making observations at para (a) and (b) above, the supposed hindrance in the matter of carrying on the work would not be there. The plea of the claimant's as summarized in para 20 have been taken note of and be read as part of the reasoning or the conclusion arrived at.
- (e) I have stated in the beginning, the findings recorded are relevant only for the purpose of this interim application. Parties are free to make submissions on the main disputes.
- (f) That the reason given for termination is delay on the part of claimant, as the facts and the situation as it exists and as noticed in the procedural order

reproduced above, the claimant is not responsible for delay at present.

- (g) As prima facie the non-existing reason has been given for terminating the contract, this cannot be ignored. Any reason would mean a reason which exists and not a reason for which the claimant cannot be held responsible.
- (h) As the contract enables the arbitral tribunal to decide all disputes arising out of the contract and this dispute having arisen out of the contract, this tribunal would have jurisdiction.”

26. The Arbitral Tribunal had returned the finding that SAIL is responsible for the delay in execution of the Contract. However, it was also clarified in the impugned order that the findings are only tentative and only for the purposes of the interim application. In view of the above, no interference with the impugned order is warranted by this Court in these proceedings.

27. It is clear that the parties are not precluded from canvassing their respective contentions before the Arbitral Tribunal and the Arbitral Tribunal is yet to finally adjudicate the disputes. SAIL is not prejudiced in any manner, at this stage, as it is not precluded from carrying on the balance work under the Contract, either directly or through any other contractor. The question whether the additional costs for carrying on the balance works can be recovered from the respondent is dependent on the adjudication of the issue as to which party is in breach of its obligations.

28. It is also relevant to note that the impugned order (majority view) is dated 21.08.2020 and the present appeal was filed on 19.04.2021 after a considerable delay. On this ground as well, no interference with the impugned order is warranted in these proceedings.

29. For the reasons stated above, the appeal is dismissed. All pending applications are also disposed of.

**OCTOBER 5, 2021**  
**RK**

**VIBHU BAKHRU, J**

*Click here to check corrigendum, if any*



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