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

% *Date of Judgment: 29.09.2021*

+ **O.M.P.(I) (COMM.) 325/2021 & I.A. 12675/2021**

DIMECO THROUGH ITS INDIAN AGENT

KRITI INTER TRADE

..... Petitioner

Through: Mr. Rakesh Tikku, Sr. Advocate
with Mr. N.L. Ganapathi and Mr. Sidhant
Garg, Advocates

versus

CENTRAL ORGANISATION FOR MODERNIZATION
OF WORKSHOPS THROUGH CONTROLLER OF
STORES & ANR

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying as under: -

- “i) grant an interim injunction restraining the Respondents from taking any coercive measures based on the Final Rejection Memo bearing No.

Mech/M&P/2300/11 dated 26.08.2021
issued by Respondent No.2;

- ii) pass an ex-parte ad interim order in terms of prayer (I) above;
- iii) award costs of this Petition to the Petitioner;"

2. Respondent no.1 (hereafter 'COFMOW') had invited a Global Bid Invitation Notice to tender for the supply of 'Cut to Length Line machine on turnkey basis' (hereafter 'the CTL Machine'). The said Notice Inviting Tender was published on 30.04.2010. On 01.07.2010, the petitioner (a French company) submitted its bids through its Indian agent. The bids were opened on 02.07.2010 and the petitioner was found to be the Lowest Bidder (L-1). It is stated that between September, 2010 to August, 2011, COFMOW sought certain clarifications and the same were provided. Thereafter, on 02.09.2011, COFMOW issued a Letter of Acceptance. Thereafter, on 13.10.2011, the parties entered into a contract (hereafter 'the Contract'), whereby the petitioner agreed to supply the CTL Machine. The petitioner claims that on 20.07.2012, the Deputy Railway Advisor, Embassy of India, Paris inspected the CTL Machine and certified that the same conformed to the contractual specifications.

3. On 02.08.2012, the petitioner raised a commercial invoice for EUR 1,575,901.50 (for supply on FOB basis). It received 80% of the said invoice payment being EUR 1,260,721.20 on 30.08.2012 but, has not received the balance payment as yet.

4. The petitioner states that on 08.10.2012, the CTL Machine was

delivered to the Rail Coach Factory, Kapurthala (respondent no. 2). Thereafter, it was installed at the site. The petitioner acknowledges that its Indian Agent received a sum of ₹13,97,833/- from COFMOW. The petitioner states that initially the 'Prove Out' of the CTL Machine could not be successfully conducted due to various reasons attributable to the respondents including the poor quality of Input Coil. However, the petitioner claims that 'Prove Out' of the CTL Machine was successfully conducted from 19.11.2014 to 20.11.2014.

5. The petitioner states that respondent no. 2 was required to issue a Proving Test Certificate (PTC), which was a pre-condition for the petitioner to be paid the balance amount of 20%. The petitioner claims that its Indian Agent sent several letters to COFMOW during the period 2015 to 2018 regarding the issuance of PTC, however, respondent no. 2 failed to issue the same. The petitioner claims that the delay was on account of certain internal issues *inter se* the respondents with regard to the unilateral change in the parameters of 'Levelling Accuracy' by respondent no.2.

6. The petitioner alleges that in the meanwhile respondent no. 2 did not maintain the CTL Machine and failed and neglected to take measures for protecting it from rain and weather. COFMOW was required to bear the cost of comprehensive maintenance even during the warranty period, but it had failed to take any steps in this regard. The respondents also did not enter into an Annual Maintenance Contract with the petitioner

7. It is also averred in the petition that meetings were held between the parties for re-commissioning of the CTL Machine in question, but

no effective steps were taken.

8. On 24.06.2021, respondent no.2 sent a letter calling upon the petitioner to rectify the CTL Machine immediately, failing which, it threatened to reject the CTL Machine and would take steps to recover the amounts from the petitioner. Thereafter, respondent no. 2 issued a notice dated 09.07.2021 once again calling upon the petitioner to rectify the CTL Machine, failing which it would take action under Clause 2102 of the General Conditions of Contract (GCC). The Indian Agent of the petitioner responded to the said notices.

9. Thereafter, respondent no. 2 issued two further notices dated 30/31.07.2021 and 09.08.2021, once again threatening that if the CTL Machine was not made operational, it would take action under Clause 2102 of the GCC. The Indian Agent of the petitioner responded to the said notices disputing the allegations made therein.

10. On 26.08.2021, respondent no. 2 issued a Final Rejection Memo rejecting the CTL Machine and further, quantifying the recoveries to be made from the petitioner at ₹1793 lakhs. This has led the petitioner to file the present petition.

11. Mr Tiku, learned senior counsel appearing for the petitioner submitted that the action of respondent no. 2 in rejecting the CTL Machine at this stage is wholly illegal and also contrary to the terms of the Contract between the parties. He referred to Clause 2102 of the GCC, which contained the provisions regarding the right of the Consignee (the respondents in this case) to reject goods. He submitted that in terms of the said clause, the CTL Machine could be rejected within ninety days of the stipulated time provided for commissioning

the machine or ninety days after the machine has been commissioned. He submitted that in either event, the respondents have no right to reject the machine, which was delivered to the respondents several years ago. He further stated that the petitioner was entitled to recover the balance consideration being 20% of the price of the CTL Machine that has not been paid as yet.

12. As noted at the outset, the petitioner seeks an order restraining the respondents from taking any coercive steps against the petitioner pursuant to the Final Rejection Memo dated 26.08.2021. On a pointed query from the Court as to what are the coercive steps that the petitioner apprehends would be taken by the respondents, Mr Tiku submitted that respondents could proceed to sell the CTL Machine if the petitioner did not remove the same, and also recover the costs paid for the same.

13. Clearly, no interim orders restraining the respondents from taking any such steps are warranted. According to the petitioner, the supply of the CTL Machine was completed several years ago and the possession of the CTL Machine had passed to the respondents. In view of this stand, the petitioner would not be prejudiced in any manner if the respondents proceed to sell the CTL Machine, as according to the petitioner, the CTL Machine belongs to the respondents. If the petitioner prevails in its claim before the Arbitral Tribunal, it would be entitled to the balance amount due under the Contract and the respondents claim for any recovery of any amount from the petitioner would fail. Plainly, no interim orders requiring the respondents to preserve the *status quo* as to the CTL Machine is necessary as any

action that the respondents may take in respect of the machine, would not prejudice the case of the petitioner.

14. Mr Tiku, stated that although it has not been specifically prayed but since the CTL Machine is a subject matter of dispute between the parties, the same was required to be preserved. The said contention is also unmerited. Undisputedly, the Court is empowered to pass orders regarding interim measures of protection under Section 9 of the A&C Act for preservation of goods, which are a subject matter of the arbitration agreement [Section 9(1)(ii)(a) of the A&C Act] or for preservation of any property or thing, which is the subject matter of dispute [S. 9(1)(ii)(d) of the A&C Act]. But such orders can be passed only in cases where the same are necessary in aid of the arbitral proceedings and to ensure that the parties are not prejudiced pending the adjudication of disputes.

15. In *Cotton Corporation of India Limited v. United Industrial Bank Limited & Ors.: (1983) 4 SCC 625* the Supreme Court of India held that “*an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceedings.*”

16. A Coordinate bench of this Court, in the case of *Ashwani Minda & Anr. v. U-Shin Ltd. & Anr.: 2020 (3) ArbLR 204* had referred to a previous decision of this Court in *Raffles Design Int’l India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors.: (2016) 234 DLT 349*, albeit, in the context of a foreign seated arbitration, and, held as under:

“Court in the said case (Raffles) traced out the history and

rationale of the Amendment Act and the intent of the Legislature in amending Section 9, which was to enable parties to approach the Courts in India to seek interim orders in aid of the arbitration proceedings.”

17. In *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.* (2007) 7 SCC 125, the Supreme Court examined, in detail, the scope of Section 9 of the A&C Act and held as under:

“11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient

while passing interim measures under Section 9 of the Act.

19. Recently, in *Fourie v. Le Roux* [(2007) 1 WLR 320 : 2007 UKHL 1 (HL)] the House of Lords speaking through Lord Scott of Foscote stated : (WLR p. 333, para 32)

“An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief.”

And concluded : (WLR pp. 333-34, para 33)

“33. Whenever an interlocutory injunction is applied for, the Judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. The yardstick in Section 37(1) of the 1981 Act, ‘just and convenient’, must be applied having regard to the interests not only of the claimant but also of the defendant.”

18. In the present case, the petitioner’s case is not prejudiced in any manner by the respondents’ disposing the CTL Machine in question.

19. Therefore, no such orders are warranted to preserve the subject matter of the disputes. The petitioner may have a monetary claim against the respondents and/or require to defend a monetary claim that the respondents may prefer against the petitioner. No interim orders, as are sought by way of this petition, are necessary for preservation of the rights as asserted by the petitioner.

20. In view of the above, this Court does not consider it appropriate

to grant any relief as sought in this petition. The same is disposed of. The pending application is also disposed of.

21. It is, however, clarified that nothing stated in this order shall be construed as an expression or opinion on merits of the disputes sought to be raised by the petitioner and all contentions of the parties are reserved.

SEPTEMBER 29, 2021

pkv

VIBHU BAKHRU, J

[Click here to check corrigendum, if any](#)