



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 27th DAY OF JANUARY 2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.A.No.824 of 2021

In the matter of Arbitration and Conciliation
Act, 1996

and

The Letter of Internt of BHEL date
17.10.2019 read with the General Conditions
of Contract (GCC), Special Conditions of
Contract (SCC) and Technical Specifications
(TCC)

M/s.Sree Saravana Engineering Bhavani Pvt.Ltd.,
Rep by its Authorized Signatory
Mr.L.Mohankumar
267-A, Mettur Main Road,
Bhavani 638 301
Erode District.

...Applicant

-Versus-

Bharat Heavy Electricals Ltd.,
Rep.by its Additional General Manager,
Sub Contracting and Purchases
BHEL Power Sector - Southern Region,
No.690, Anna Salai,
Nandanam,
Chennai 600 035.

... Respondent

Original Application praying that this Hon'ble Court be pleased to
grant an order of ad-interim injunction restraining the respondent, its men or
agent, officials or any sub-contractor appointed by the respondent from in



anyway interfering with the performance of the work under the contract and letter of intent dated 17.10.2019 pending disposal of the arbitral proceedings.

This Original Application coming on this day before this court for hearing in the presence of Mr.V.Anand, Advocate for the Applicant herein and Mr.K.Harishankar, Advocate for the respondent herein and upon reading the Judges Summons and the Affidavit of L.Mohankumar filed herein, and this Court is not inclined to grant interim relief as prayed for by the applicant, nonetheless, especially bearing in mind that it is a measure and pay contract, before the third party contractor commences execution of the balance work contract, it is just and necessary that the nature and quantity of work executed by the applicant until the last date of execution be measured in accordance with the contractual mechanism in such regard and for such purpose, this Court propose to issue directions and **it is ordered as follows:-**

(i) That the respondent herein be and is hereby directed to provide a reasonable notice and call upon the applicant to be present at the project site while measurements are recorded of work done until the last date of execution of the contract by the applicant and upon being called upon to be present, the applicant herein be and is hereby directed to be present for the above purpose.



(ii) That such measurements shall be recorded in the relevant

WEB COPY measurement book or other record maintained in accordance with the contract.

(iii) That the respondent herein be and is hereby directed to complete such exercise as a condition precedent to the commencement of work by the balance work contractor.

WITNESS THE HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 27th DAY OF JANUARY 2022.

Sd./-

ASSISTANT REGISTRAR (Comm.Cases)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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21.02.2022

O.A.No.824 of 2021

ORDER

DATED :27.01.2022

THE HON'BLE MR. JUSTICE
SENTHILKUMAR RAMAMOORTHY

FOR APPROVAL: 21.02.2022

APPROVED ON: 23.02.2022



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IN THE HIGH COURT OF JUDICATURE AT MADRAS

D A T E D : 27.01.2022

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

O.A.No.824 of 2021

M/s.Sree Saravana Engineering Bhavani Pvt. Ltd.,
Rep. by its Authorized Signatory,
Mr.L.Mohankumar,
267-A, Mettur Main Road,
Bhavani-638 301
Erode District.

.. Applicant

Vs

Bharat Heavy Electricals Ltd.,
Rep. By its Additional General Manager
-Sub Contracting and Purchase
BHEL Power Sector- Southern Region,
No.690, Anna Salai,
Nandanam,
Chennai-600 035.

... Respondent

PRAYER : This Application is filed under Section XIV Rule 8 of the High Court Original Side Rules r/w.Order 39 Rules 1 and 2 of C.P.C. R/w.Section 9 (2)(d) of the Arbitration and Conciliation Act, 1996 praying to grant an order of ad-interim injunction restraining the respondent, its men or agent, officials or any sub-contractor appointed by the respondent from in any way interfering with the performance of the work under the contract and



letter of intent dated 17.10.2019 pending disposal of the arbitral proceedings.

For Petitioner : Mr.V.Anand

For Respondent : Mr.K.Harishankar

ORDER

The applicant seeks to prevent the respondent from, directly or indirectly, interfering with the performance of work under the contract and letter of intent dated 17.10.2019 pending disposal of arbitral proceedings.

2. The respondent floated a tender for the execution of civil and architectural work of the non-plant structures/buildings at the 2 x 660 MW Udankudi Supercritical Thermal Power Project at Kallamulli Village, Tiruchendur Taluk, Tuticorin District. Pursuant thereto, the applicant was the successful bidder. Consequently, a letter of intent dated 17.10.2019 was issued in favour of the applicant. The contract awarded to the applicant is governed by the General Conditions of Contract (GCC), Special Conditions of Contract (SCC) and Technical Conditions of Contract(TCC) among other contract documents. The contract was awarded on a measure and pay basis by annexing a bill of quantities thereto. The contract stipulated a time for completion. Significantly, both the GCC and TCC enable the employer to terminate the contract and award the unfinished portion of work to a third



party contractor at the risk and cost of the original contractor. The present application is filed upon receipt by the contractor of two notices by which the risk and cost clause was invoked by the employer.

3. The applicant seeks interim relief largely on two grounds. The first ground cited by the applicant is that the employer prevented the contractor from executing work in accordance with the prescribed time lines by failing to comply with the employer's obligations under the contract. The second reason cited by the applicant is *force majeure*. By drawing reference to the *force majeure* clause, i.e. Clause 2.20 of the GCC, it is contended that performance was affected both by floods and the Covid-19 pandemic, which are expressly or generically enumerated as *force majeure* events. The applicant also refers to the reply dated 10.11.2021 to the contractual notice dated 26.10.2021 and, in particular, to the reasons set out therein for the inability of the applicant to complete work within the stipulated time.

4. The applicant further contends that time is not of the essence of the contract because the respondent permitted the applicant to proceed with work beyond the stipulated time limit. The judgment of the Hon'ble Supreme Court in *General Manager, Northern Railways and another v. Sarvesh Chopra*, AIR 2002 SC 272, is placed in support of the contention



that the employer is not entitled to terminate a contract if time is not of the essence. The applicant also contends that the contractor is entitled to remedies in such event. The last contention of the applicant is that the applicant approached the Court even before the risk and cost tender was finalised. Therefore, the balance of convenience is in favour of the applicant/contractor who has executed substantial work. It is stated that the contractor would be put to heavy loss unless interim protection is granted.

5. These contentions are refuted by the respondent. The respondent contends that the relief claimed by the applicant cannot be granted in terms of Section 41(ha) of the Specific Relief Act, 1963 (the Specific Relief Act), as amended. In particular, the respondent contends that an injunction cannot be granted if it would impede or delay progress or completion of any infrastructure project. With reference to the nature of the project, the respondent states that this is a contract in relation to a power project awarded by TANGEDCO to the respondent. Consequently, it undoubtedly qualifies as an infrastructure project. The next contention of the respondent is that clause 2.7.2 of the GCC clearly enables the respondent to withdraw a portion of the contract or terminate the contract and get the unexecuted portion executed by another contractor at the risk



a notice in terms of clause 2.7.2 was issued on 26.10.2021. Upon receipt of the reply dated 10.11.2021 from the applicant, a further notice was issued on 27.11.2021 by which the applicant was informed that a risk and cost tender for completion of balance works has been floated and that the applicant is not entitled to participate in such tender.

6. As regards the *force majeure* clause, the respondent adverted to sub-clause 2.20.2 thereof and pointed out that the *force majeure* clause requires the contractor to immediately report to the respondent the causes of delay. By referring to the reply dated 10.11.2021, the respondent points out that the events of delay admittedly took place in the year 2019 and that the applicant did not invoke the *force majeure* clause and seek an extension of time by citing the floods as a reason therefor. Likewise, it is stated that the COVID – 19 pandemic was also not cited as a *force majeure* event contemporaneously.

7. With regard to progress of work and measurements in relation thereto, the respondent refers to the monthly plan reports and submits that the said monthly plan reports set out the nature and quantity of work executed by the applicant as of the end of the previous month. The



respondent also points out that the applicant does not claim that measurements were not recorded in respect of executed work.

8. Upon considering the above contentions, at the outset, it should be noted that it is not advisable or appropriate to draw definitive conclusions in these proceedings since it would prejudice parties in the arbitral proceedings. The first contention to be dealt with is whether Section 41(ha) of the Specific Relief Act would prevent the applicant from maintaining the present application. The respondent contends that the project is an infrastructure project, and the applicant does not deny such contention. As to whether the grant of injunctive relief would impede or delay the progress or completion of work, the applicant contends that it would not in as much as the balance work contract has not been awarded as on date. Therefore, the applicant contends that it would be in a position to proceed with and conclude the balance work expeditiously if an interim injunction is granted. The respondent, on the contrary, says that an injunction would delay the project by preventing the award of the balance work contract. The documents on record indicate that the progress of work was delayed due to multiple reasons. At this juncture, on the basis of documents on record, it is not possible to arrive at a firm conclusion as to the attribution of responsibility for delay. However, the applicant has failed



to establish *prima facie* that the respondent is responsible for delay. Based on the documents on record, it is not possible to conclude with certainty as to whether the grant of injunction would impede the progress of work. However, it is a material factor to bear in mind while dealing with this application.

9. The respondent referred to clause 2.7.2 of the GCC and contended that the said clause undoubtedly enables the respondent to terminate the contract and award the balance work contract on risk and cost basis. On perusal thereof, *prima facie*, the said clause enables such termination on risk and cost basis. This contention is refuted by the applicant by citing the *force majeure* clause. In contemporaneous correspondence, the applicant did not cite the *force majeure* clause and seek an extension of time. While the applicant contends that the contractual mechanism is merely procedural, unless the *force majeure* clause is invoked contemporaneously, *prima facie*, it would be difficult for parties to assess the impact of such *force majeure* event, even if accepted, and rework the time line commensurately. Therefore, for interlocutory purposes, the applicant has failed to establish that the termination is invalid on account of *force majeure* events. As regards the contention that time is not of the



finding on this issue in interlocutory proceedings inasmuch it would entail a consideration of the correspondence relating to the events of delay and attribution of responsibility in respect thereof.

10. Although the original risk and cost tender that was floated in December 2021 was subsequently cancelled, it is brought to my attention that a fresh tender was floated on 17.01.2021 and that the technical bid is scheduled to be opened on 01.02.2022.

11. When the above facts and circumstances are viewed cumulatively, I am not inclined to grant interim relief as prayed for by the applicant. Nonetheless, especially bearing in mind that it is a measure and pay contract, before the third party contractor commences execution of the balance work contract, it is just and necessary that the nature and quantity of work executed by the applicant until the last date of execution be measured in accordance with the contractual mechanism in such regard. For such purpose, I propose to issue directions.

12. Accordingly, O.A.No.824 of 2021 is disposed of with the following directions:



(i) The respondent is directed to provide a reasonable

WEB COPY notice and call upon the applicant to be present at the project site while measurements are recorded of work done until the last date of execution of the contract by the applicant. Upon being called upon to be present, the applicant is directed to be present for the above purpose.

(ii) Such measurements shall be recorded in the relevant measurement book or other record maintained in accordance with the contract.

(iii) The respondent is directed to complete such exercise as a condition precedent to the commencement of work by the balance work contractor.

Sd./-S.K.R.J
27.01.2022

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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