

\$~3

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

% ***Date of decision: November 18, 2022***

+ **FAO(OS) (COMM) 74/2022 & CM APPL. 14936/2022 (for stay)**

**SHUBHAM HP SECURITY FORCE INDIA
PVT. LTD.**

..... Appellant

**Through: Mr. Sidharth Chopra, Advocate with
Mr. Ashok Shivaji Wayadanda and
Mr. Sanjay Rai in person**

versus

CENTRAL WAREHOUSING CORPORATION Respondent

**Through: Mr. Prabhas Bajaj and Mr. Ajay
Sabharwal, Advocates**

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T (oral)

1. Vide the present appeal, the appellant is seeking setting aside of the impugned order/ judgment dated 11.03.2022 passed by the learned Single Judge in OMP(I) (COMM) 79/2022. Pertinently, the said petition was filed by the appellant seeking to restrain the respondent from acting upon letter of termination dated 16.11.2021 issued by the respondent and further consequential measures, which was dismissed by learned Single Judge of this Court observing as under:

“23. Reading of the aforementioned clauses indicates that the Contract is determinable at the option of CWC in the event of breach committed by Shubham. Shubham’s prayer restraining CWC from acting upon Termination Notice #3, is not sustainable in law. At this stage, granting stay of termination, would necessarily entail this Court first forming an opinion, albeit a prima facie one, that the termination effected by the Respondent was misconceived and contrary to the terms of the Agreement. Considering the nature and scope of the

present proceedings, such an exercise cannot be undertaken by this Court, particularly in light of the settled position in law, repeatedly emphasised by this Court, that it is not permissible for any party to seek an injunction on the termination of an agreement.

.....

xxxx

25. That apart, under Section 14(d) read with Section 41 of the Specific Relief Act, 1963, when a contract is determinable, and cannot be specifically enforced, no injunction against termination and enforcement of the contract can be issued. In the present petition, granting such a relief would amount to granting the relief of restoration of SAMA which in other words would amount to enforcement of the contract. The contract being prima facie determinable, grant of such a relief is impermissible in law. Besides, the Court, at this stage, cannot go into the justification of the CWC's action and the same would have to be examined in the ensuing arbitration proceedings that the parties are likely to undertake.

26. Though this petition is liable to be dismissed on the aforementioned grounds alone, nevertheless, the Court has also prima facie examined the merits and the contentions urged by Mr. Uppal.

.....

xxxxx

34. Before parting, the Court must also note that on 10th February, 2022, CWC issued a fresh tender for appointment of Strategic Alliance Management Operator at Dronagiri Node, and it has reportedly received bids which are to be opened today. Shubham's insistence for stay of the impugned Termination Notice at this juncture would completely upset the entire tender process that CWC has undertaken."

2. Notice issued.
3. Learned counsel for respondent accepts notice.
4. Learned counsel for appellant submits that while passing the impugned order, the learned Single Judge has failed to appreciate that the Strategic Alliance Management Agreement dated 18.04.2020 (SAMA) is determinable at the will of the respondent-Corporation, however, admittedly the impugned termination letter was on the grounds of failure to rectify material breach and thus, the said Agreement was a non-determinable.

5. Learned counsel for appellant further submits that the learned Single Judge while passing the impugned order erred in noting that the appellant herein had not rectified the breach within a period of 30 days from the date of the show cause notice whereas the admittedly the same was not to be rectified within 30 days as admittedly on 02.11.2021 parties had a meeting wherein the appellant had agreed to replenish the bank guarantee.

6. It is further submitted by learned counsel for appellant that learned Single Judge while passing the impugned order also failed to look into the termination notice dated 16.11.2021 wherein it was categorically stated by the respondent-Corporation that since the appellant had not even undertaken to rectify the breach, they were terminating the contract and the said fact is completely contrary to the respondents own minutes of meeting dated 02.11.2021 wherein it was categorically stated that the process had been initiated by the appellant and the said fact was not considered while passing the impugned order.

7. Learned counsel for appellant also submits that learned Single Judge while passing the impugned also did not consider the fact that under Clause 14.1 any of the parties could seek constitution of the joint committee, at any stage, however, the learned Single Judge while passing the impugned order erred in stating that once the contract has been terminated the same could not be looked into.

8. It is further submitted that the learned Single Judge has failed to appreciate that the bank guarantee as renewed by the appellant in terms of the SAMA had been encashed by the respondent from time to time ensuring without prejudice that the rent is adjusted out of the bank guarantee and the minimum guarantee for work as set out under the Contract was also

encashed by the respondent showing thereby that any breach as submitted by the respondent was cured by way of encashment of the bank guarantees.

9. Learned counsel for appellant further submits that the learned Single Judge has failed to appreciate that the appellant has duly responded to the notices of the respondent from time to time and the said fact has been fortified in terms of the Minutes of Meeting dated 02.11.2021 wherein the respondent has recorded the submission of the Strategic Alliances Management Operator (SAMO) during the personal hearing that a loan of Rs.20 Crores has been sanctioned by M/s Bombay Finance India Pvt. Ltd. and the legal vetting of SAMOs property and its valuation is under process. This fact goes on to show that the breach as alleged by the respondent had been cured by the appellant and the appellant duly informed the respondent about the same.

10. *Per Contra*, learned counsel for respondent submits that respondent had entered into an agreement dated 18.04.2020 with the appellant for Strategic Alliance and Management of the CFS, Dronagiri Node for a period of 15 years. It is further submitted that after the award of the contract on 18.04.2020, the appellant miserably failed in discharging its obligations under the contract.

11. Learned counsel for respondent further submits that the appellant could not generate any substantial business at the facility, not even the Minimum Guaranteed Throughput, as per its obligations under the Agreement. Further, even at the initial stages of the agreement, the appellant had failed to submit the bank guarantee in terms of its obligation under the aforesaid Agreement, compelling respondent to issue notices to the appellant. Learned counsel further submits that vide order dated 23.12.2020,

this Court granted time till 10.01.2021 to the appellant to submit the bank guarantee which was further extended till 25.01.2021 by a subsequent order of this Court.

12. Learned counsel for respondent further submits that appellant submitted the bank guarantee for an amount of Rs.7.75 crores on 25.01.2021, in terms of its obligations under the aforesaid Agreement. Even thereafter, appellant failed to generate any business at the CFS and it was handling negligible quantities of cargo, much less than even the Minimum Guaranteed amount. Since the appellant was not generating the business for the payment of even the Minimum Guaranteed amount to the respondent, a number of communications were issued to the appellant, demanding the outstanding amount, as per the contractual obligation of the appellant, to be paid to the respondent.

13. Learned counsel for respondent further submits that further, a communication dated 08.07.2021 was issued by the respondent to the appellant, demanding the outstanding amount of Rs. 3.93 crores (as on 30.6.2021) to be paid within a period of 10 days, however, appellant failed to comply with this demand. Accordingly, respondent was compelled to issue another Notice dated 04.08.2021 to the appellant, stating that on account of appellant's failure to pay the outstanding amounts to the respondent, the respondent has been constrained to encash the bank guarantee. The outstanding amount of Rs.4.85 crores has been adjusted from the bank guarantee amount of Rs.7.75 crores. The balance security of Rs.2.90 crores is available with respondent. Appellant was called upon to take steps to replenish the bank guarantee in terms of the Agreement but appellant failed to take any steps in this regard. Consequently, respondent

was compelled to issue a Show Cause Notice dated 20.08.2021 to the appellant, calling upon the appellant to replenish the bank guarantee in terms of its obligations under the Agreement, failing which respondent shall be constrained to, *inter alia*, terminate the Agreement for breach on the part of the appellant.

14. Be that as it may, learned counsel for parties jointly submit that a Sole Arbitrator may be appointed to adjudicate the dispute between the parties.

15. Accordingly, we hereby appoint **Mr. Justice (Retd.) Mohammad Rafiq, former Chief Justice of Himachal Pradesh (Mobile: 9414055777)** as the Sole Arbitrator to adjudicate the dispute between the parties by giving liberty to the parties to take steps as per law within two weeks from the date of initiation of the arbitration proceedings.

16. The fee of the learned Arbitrator shall be governed by the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

17. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

18. In view of above, the present appeal stands disposed of.

19. Pending application also stands disposed of.

20. A copy of this order be sent to the learned Arbitrator for information.

(SURESH KUMAR KAIT)
JUDGE

(SAURABH BANERJEE)
JUDGE

NOVEMBER 18, 2022

rk