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

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Judgment delivered on: 15.12.2022

+ **FAO(OS) (COMM) 295/2022 & CM APPL. 45618/2022, CM APPL. 45619/2022, CM APPL. 45620/2022 & CM APPL. 49377/2022**

RAM KRIPAL SINGH CONSTRUCTIONS PVT. LTD Appellant

versus

INDIAN OIL CORPORATION LTD Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Amit Pawan, Mr. Arun, Mr. Hassan Zubair Waris, Ms. Shivangi and Mr. Aakarsh, Advocates.

For the Respondent: Mr. Rajeev Sharma, Senior Advocate with Ms. Reeta Mishra, Mr. Abhishek Birthray, Mr. Prateek Seth, Mr. Kartikey Tripathi and Mr. Aman Kumar, Advocates.

CORAM:-

**HON'BLE MR. JUSTICE SANJEEV SACHDEVA
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR**

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Appellant impugns Order dated 13.10.2022 whereby the application of the respondent under Order 39 Rules 1 and 2 CPC has been dismissed holding that the application for injunction does not survive, and directing that it is open to the Appellant to take appropriate remedies impugning the

Fax of Acceptance dated 07.10.2022 and for claiming damages and other reliefs as may be permissible in law.

2. Appellant had filed the subject suit seeking declaration that invocation by the Respondent of Clause 4.7.4.0 of General Conditions of Contract was illegal and void *ab initio*. Appellant had also sought a declaration that the contract does not require the Appellant to supply Hot Dipped Galvanised Iron Bolt or Steel section, and if it did require supplying the same, the supply would be at the existing market rate as extra works. A mandatory injunction is also sought against the Respondent to provide the maps/plans/drawings for the underground pipes/cables/utilities at the work site so that the Appellant can carry out the work in question at a fast pace.

3. Pursuant to Notice Inviting E-Tender for piling and civil and structural works for capacity expansion project at the Respondent's Oil Refinery at Barauni, Appellant was awarded the contract for Engineering Procurement Construction and Material-22 ('EPCM-22') which comprises of 25 segments. The dispute is with regard to one of the 25 segments.

4. It is an admitted position that for the expansion project, one of the segments i.e., EPCM-22 was awarded to the Appellant, and there are other similar segments awarded to third parties. The dispute pertains to the termination of the contract with regard to one of the 25 segments which Respondent has terminated on the ground of delay in performance by the Appellant, and awarded the same to a third party.

5. Learned counsel for the Appellant contends that termination has been done on the ground of delay in performance. He submits that there is substantial material on record to show that the Appellant was not at fault in the execution of the contract and the site on which the work was to be executed was admittedly not made available by the Respondent as the same was encroached upon by material of third party contractors of the Respondent. He submits that since the termination is wrongful, and the relevant clause contains a negative covenant, Respondent could not have terminated the contract and an injunction was liable to be granted restraining the Respondent from terminating the contract and allotting it to a third party with regard to one of the segments.

6. On a query from the learned counsel for the Appellant, the categorical answer is that 25 segments are not so integral that one of them cannot be separated from the others. The admitted position is that one of the segments could have been independently allotted to a third party for execution. The only question that arises for consideration is as to whether the termination of one of the 25 segments is rightful or wrongful.

7. We notice that in the prayer clause of the Suit, the Appellant has sought a simplicitor declaration that the termination is wrongful. There is no consequential relief prayed for injunction restraining the Respondent from allotting the terminated segment to a third party or permitting the Appellant to execute the work.

8. Learned counsel for the Appellant submits that no notice requiring the Appellant to remedy the breach was issued in terms of Section 20 of the Specific Relief Act, 1963 (hereinafter referred to as the Act).

9. However, reference may also be held to the provisions of Section 20A of the Specific Relief Act, 1963 which reads as under:-

“20A. Special provision for contract relating to infrastructure project,- (1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.

Explanation- For the purposes of this section, section 20B and clause (ha) of Section 41, the expression “infrastructure project” means the category of projects and infrastructure Sub-Sectors specified in the Schedule.....”.

Section 20A prohibits a court from granting injunction in a case involving a contract relating to infrastructure project as specified in the schedule. The respondent refinery is an oil refinery which is covered in serial no. 2, category- Energy, being an oil refinery and as such in terms of Section 20A read with Section 41 (ha), an injunction cannot be granted to the Appellant. Grant of injunction in the present case would entail that the third party that has been subsequently awarded the contract would not be able to perform the contract till the time the Suit is disposed of which would impede and delay the progress and completion of the expansion project of the oil refinery.

10. In view of the specific provision of 20A of the Act, the reliance placed by learned counsel for the Appellant on Section 20 of the Act is misplaced.

11. Further, reliance placed by learned counsel for the Appellant upon the judgment of the Supreme Court '*Adhunik Steel Ltd. v. Orissa Manganese and Minerals Ltd.*', (2007) 7 SCC 125 to contend that it is open to the court to grant an injunction even in cases where damages may be an alternative remedy is also misplaced for the reason, that the said judgment is not applicable to the facts of the present case.

12. In the case of *Adhunik Steel Ltd (supra)*, the issue was with regard to a mining lease and the Supreme Court noticing that in case the right to mine was allotted to a third party pending arbitration, then minerals would have been extracted from the mine by a third party. The Supreme Court prevented allotment of a mining lease to a third party but permitted the alleged defaulting party to extract minerals itself. This relief was granted keeping in view the provisions of Rule 37 of Mineral Concession Rules, 1960 which restricted the alleged defaulting party from entering into the similar transaction with third entities.

13. In the case of *Adhunik Steel Ltd (supra)*, the question was extraction of minerals which would have become the property of the aggrieved party. In the present case, the issue is with regard to the profit that the Appellant would have earned in case the Appellant is permitted to complete the contract. In case the termination is wrongful, the Appellant would be entitled to claim damages/compensation for such wrongful termination.

14. We may also note that the contract by its very nature is a terminable contract.

15. It is a settled proposition of law that in cases where the contracts are terminable and the termination is wrongful, the remedy of the aggrieved party would be to claim damages for wrongful termination.

16. A Coordinate Bench of this High Court in the case of '*Rajasthan Breweries Ltd. v. The Stroh Brewery co*', AIR 2000 Delhi page 450, held as under:

"13. However, the principles of equity governing specific performance are almost same in Indian law and English law. The discretion of the Courts of England while enforcing the specific performance of a contract is subject to the same constraints as are applicable in the Courts in India. Under the English law specific performance of contractual obligation is available only in equity and is subject to various restrictions, which have been explained by G.H. Treitel in his work "The Law of Contracts" 6th Edition pages 764 to 775 as follows:

- (i) Specific performance will not be ordered where damages are adequate remedy.*
- (ii) If the party applying for relief is guilty of a breach of the contract or is guilty of wrongful conduct.*
- (iii) If the Contract involves personal service.*
- (iv) If the contract requires constant supervision.*
- (v) If the party against whom specific performance is sought is entitled to terminate the contract.*

At page 775, it is stated in the aforementioned work:

“If the party against whom specific performance is sought, is entitled to terminate the contract, the order will be refused as the defendant could render it nugatory by exercising his powers to terminate. This principle - applies whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance.”

14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law. This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

19. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek

compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.”

17. The Division Bench in the case of *Rajasthan Breweries Ltd. (Supra)* further held that Specific performance will not be ordered where damages are adequate remedy or where the party applying for relief is guilty of a breach of the contract or is guilty of wrongful conduct or where the contract involves personal service or where the contract requires constant supervision or where the party against whom specific performance is sought is entitled to terminate the contract. If the party against whom specific performance is sought, is entitled to terminate the contract, the order will be refused as the defendant could render the direction to perform nugatory by exercising his powers to terminate. This principle has been held to be applicable whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance.

18. Further it has been laid down that clause (e) of Section 41 of the Act lays down that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. If it

is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law.

19. This, however, has been held subject to the exception that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. The Division Bench has further held that if it is ultimately found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the plaintiff would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements.

20. No doubt, injunction can be one of the remedies that the Court can grant, however grant of injunction is a discretionary relief, and in given set of facts, the court may decline to grant injunction.

21. In the facts of the present case, it is noticed by the learned Single Judge that post determination the contract already stands awarded to another contractor vide Fax of Acceptance dated 07.10.2022. Learned Single Judge has already reserved the remedy of the Appellant to assail the Fax of Acceptance dated 07.10.2022 whereby the contract has been awarded to a third party.

22. It is not in dispute that no such proceeding impugning the Fax of Acceptance have been initiated by the Appellant till date

23. As noticed hereinabove, the Appellant in the suit has neither claimed any damages/compensation for wrongful termination nor sought any injunctive relief against the Respondent from terminating the contract, however, has merely sought a declaration that the termination is wrongful, and despite the court reserving the right of the Appellant to impugn the Fax of Acceptance to a third party, no such steps have been taken by the Appellant till date.

24. In these circumstances, we are of the view that there is no infirmity in the order of the learned Single Judge declining to grant an injunction, and holding that since the contract already stands awarded to a third party, the application for injunction does not survive.

25. Consequently, we find no merit in the appeal. The appeal is, accordingly, dismissed.

26. Since the appeal is dismissed, all pending applications are disposed of in terms thereof.

SANJEEV SACHDEVA, J

RAJNISH BHATNAGAR, J

DECEMBER 15, 2022/ib