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

Date of decision: 13th December, 2022

+ **O.M.P.(I) (COMM.) 337/2022**

M/S MANIRATNAM ENTERPRISES Petitioner

Through: Mr.Manoj Swarup, Sr. Adv. with
Mr.Akbar Ali, Mr.Neelmani Pant,
Ms.Megha Singh and Mr.Anirudh
Bankura, Advs.

versus

M/S RAJPUTANA FERTILIZERS Respondent

Through: Mr.K.S. Mahadeva and
Mr.Rangarajan, Advs. for
respondent
Mr.Siddharth Sangal, Ms.Nilanjani
Tandon, Mr.Lalit Allawadhi,
Advs. for intervener.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

I.A.20513/2022 [U/Or. I Rule 10 read with Section 151 of the Code of Civil Procedure, 1908]

1. This application has been filed by the 'Kapda Mill Mazdoor Union' seeking intervention in the present petition.
2. The learned counsel for the applicant has been heard in opposition to the prayer made in the main petition.
3. The application is accordingly disposed of.

Signature Not Verified

Digitally Signed By:RENUKA

NEGI

Signing Date:15.12.2022

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I.A.21179/2022 [U/s 151 of the Code of Civil Procedure, 1908 to take on record estimated cost of scrap lying in Modi Cloth Mill Compound]

4. The learned senior counsel for the petitioner does not press this application.

5. The same is accordingly disposed of as withdrawn.

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6. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short, the 'Act') praying for an order protecting the subject property/scrap lying in the Modi Mill Premises, Modi Nagar, Ghaziabad, Uttar Pradesh, and for the grant of *status quo ante* as on 15.04.2022, that is, the date of issuance of the Notice of Termination by the respondent.

7. As I am intending to appoint an Arbitrator with the consent of the learned counsels for the parties in ARB.P.1283/2022, titled *M/s Maniratnam Enterprises v. M/s Rajputana Fertilizers*, I shall only briefly deal with the facts of the present petition, leaving it open to the Arbitrator to consider the appropriate order on hearing the parties on an application under Section 17 of the Act, if so filed, by the petitioner.

FACTUAL BACKGROUND

8. The disputes between the parties have arisen in relation to the 'Agreement for Sale of Scrap' dated 19.01.2021 executed between the parties. The same was preceded by an earlier Memorandum of Understanding dated 20.12.2018 and an Agreement dated 19.07.2019, as also some prior litigations, the details whereof may not be relevant for the

purpose of the present petition.

9. In terms of the said Agreement, the petitioner is to purchase the scrap lying in the above mentioned premises of the respondent for a total consideration of Rs.12,34,00,000/- (Rupees Twelve Crore Thirty-Four Lakh only), out of which the petitioner, as on the date of the Agreement, has already paid Rs.5,34,00,000/- (Rupees Five Crore Thirty-Four Lakh only); leaving a balance of Rs.7,00,00,000/- (Rupees Seven Crore only). Even for Rs.5,34,00,000, a balance of Rs.2,84,00,000/- (Rupees Two Crore Eighty-Four Lakh only) was to be paid.

10. The respondent, claiming default to the tune of Rs.65.73 Lakh in payment of the invoices raised, issued the impugned Notice of Termination dated 15.04.2022 to the petitioner.

SUBMISSIONS ON BEHALF OF THE LEARNED SENIOR COUNSEL FOR THE PETITIONER

11. The learned senior counsel for the petitioner submits that the impugned Notice of Termination cannot be given effect to inasmuch as it does not give the mandatory seven-day '*Defect Cure Period*' to the petitioner as required in Clauses 10 to 12 of the Agreement.

12. He further submits that the subject matter of arbitration deserves to be preserved during the pendency of the arbitration and in any event, till the Arbitrator enters into the reference.

13. He submits that in fact, the petitioner has made an over payment to the respondent and this fact was clearly brought to the notice of the respondent vide reply dated 30.04.2022 to the impugned Notice of Termination. He submits that the termination of the Agreement,

therefore, is liable to be set aside and the Agreement deserves to be specifically enforced.

SUBMISSIONS ON BEHALF OF THE LEARNED COUNSEL FOR THE RESPONDENT

14. On the other hand, the learned counsel for the respondent submits that the relief of injunction cannot be granted to the petitioner as the contract by its own terms was determinable in nature. He submits that the petitioner can always be compensated in terms of money/damages.

15. The learned counsel for the respondent further submits that the impugned Notice of Termination clearly states that various opportunities were given to the petitioner to rectify its defect in making the payment. Therefore, the impugned Notice of Termination was preceded with the '*Defect Cure Period*', however, the petitioner failed to cure the defects, leaving the respondent with no option but to terminate the Agreement.

16. He further submits that upon termination of the agreement, the respondent has entered into an arrangement with one '*Arsh Enterprises*' and certain scrap has already been removed by the said entity by making payment to the respondent. He submits that therefore, no interim protection deserves to be passed in favour of the petitioner at the present stage.

SUBMISSION ON BEHALF OF THE LEARNED COUNSEL FOR THE KAPDA MILL MAZDOOR UNION

17. The learned counsel for '*Kapda Mill Mazdoor Union*' submits that the scrap is being sold to pay the dues owed by the respondent to the workers and, therefore, any order of injunction would prejudicially affect the workers.

ANALYSIS AND FINDINGS

18. I have considered the submissions made by the learned counsels for the parties.

19. At the very outset, it is emphasized that any observation made by the Court in the present order is only *prima facie* in nature as the respondent is yet to file its response to the present petition.

20. Clause 8 of the Agreement *inter-alia* provides for the payment schedule as under:

“8. The Seller shall now raise invoices for an amount of Rs. 2,84,00,000/- (rupees two crores eighty four lacs), being the difference between Rs. 5,34,00,000/- (rupees five crores thirty four lacs) and Rs. 2,50,00,000/- (rupees two crore fifty lacs) for which invoices have already been raised.

SCHEDULE AND MODE OF PAYMENT

The Buyer shall make payment of the balance sale consideration of Rs. 7,00,00,000/- and GST and other levies in the following:

(a) The Buyer shall pay a sum of Rs. 15.55 for every kilogram of steel scrap removed from the Premises and Rs. 2.50 for every brick removed from the Premises. The Buyer shall make payment at these rates for steel scrap and bricks removed until the payments fully discharge the remaining sale consideration of Rs.7,00,00,000/- due and the GST and other applicable levies on this sum and also fully discharge the sum of Rs. 45,00,000/- being the GST and levies already paid by the Seller earlier.

(b) The payment referred to in Sub-Clause (a) above shall be made by the Buyer by a post-dated cheque payable at Delhi. The cheque shall be dated for the third day from the day of removal for each day. The cheque shall be delivered by the Buyer to the Seller contemporaneous with the

removal for that day, and so on and so forth with reference to each day of removal.

(c) The Seller shall raise invoices for Rs.2,84,00,000/- (rupees two crores eighty four lacs), as referred to in Clause 8 above, and these invoices shall be raised at the rate of Rs.25,00,000/- per invoice every week on the Buyer. The invoices shall be raised together with GST and other applicable levies. The Buyer shall make payment for the portion of the GST and other levies against these invoices (which remains unpaid) within a period of 3 (three) days from the date on which each invoice is raised and the payment shall be made by RTGS or cheque at New Delhi. These invoices shall be raised until such time the entire amount of Rs. 2,84,00,000/- is covered.

*(d) No removal of scrap from the Premises shall be allowed to be made unless the challan evidencing such removal is counter signed by the representative of the Seller.
xxxxxxx”*

21. Clauses 10 and 11 of the Agreement provide for the ‘Defect Cure Period’, and on failure thereof, termination of the Agreement, and read as under:

“DEFAULT IN PAYMENTS AND TERMINATION

xxxx

10. If the Buyer fails to make any payment or fails to honour any cheque under this Agreement the Buyer shall forthwith be barred from making any further removal of scrap from the Premises: In such an event, the Buyer shall make good such default within a period of 7 (seven) days from the date of any such default. The Buyer shall also make all other payments due up to date under this Agreement within the period of 7 (seven) days as stated above. The Buyer shall be allowed to restart the work of removal of scrap only after he

*has made all up to date payment as stated above.
11. If within this period of 7 days referred to in Clause 8 above the Buyer fails to make good the payments as stipulated therein, the Seller shall be at liberty to terminate this Agreement and the Buyer shall vacate the Premises forthwith. Upon any such termination, the Buyer shall have no claims of whatsoever nature on the Seller in connection therewith."*

22. The respondent issued the Notice of Termination dated 15.04.2022 to the petitioner alleging as under:

"9. My client states that pursuant to -the Agreement, you began to remove the remainder of the scrap from, the Premises. My client periodically raised invoices for such removal, and you made periodic payments for the scrap you removed. However, at no point of time were the payments that you made sufficient to meet the cumulative value of scrap that you removed. Your payments were always far short of the cumulative value of scrap that you removed from the Premise. You defaulted in payment on a number of occasions and these included instances when the cheques that you issued for the removal of scrap were dishonoured for insufficiency of funds. Following concerns repeatedly raised by my client on your defaults, and on your inability to meet the cumulative value of scrap on any occasion through payments, you repeatedly assured my client that you would make good these defaults and that you would make payments directly into the RTGS Account maintained by my client. My client put up with your defaults and your repeated breach of the terms and conditions of the Agreement only because my client hoped that you would live up to your promises and assurances of payment. You have, however, failed to live up to your promises and assurances of payments. You have therefore continued to be in breach of the terms and conditions of the Agreement and have left my client with no option therefore but to take such action as may be necessary in the

circumstances which are warranted by the terms and conditions of the Agreement.

10. My client states that it had raised invoices for the removal of the scrap by you aggregating to a sum of Rs. 10.0316 crores (including GST). These invoices were raised up to 31.03.2022. Out of these invoices raised, you have, as on the date of this notice, paid only a sum of Rs. 9.3743 crore. Thus, as on the date of this notice, there is a sum of Rs. 65.73 lacs due and payable by you for scrap removed by you in respect of which my client has raised invoices up to 31.03.2022. This sum of Rs. 65.73 lacs includes GST of a sum of Rs. 27 lacs. It also includes a sum of Rs. 16,000/- towards electricity charges which you have failed and neglected to pay under Clause 15 of the Agreement, and which sum my client has been compelled to pay on account of your default. You gave repeated promises and assurances to my client that you would make payment of this sum of Rs. 65.73 lacs without delay. You have, however, failed and neglected to do so right up to the date of this notice.”

23. In response thereto, the petitioner vide reply dated 30.04.2022 *inter-alia* asserted as under:

“10. That the total scrap weight lifted by us from 21.12.2021 till this 3.4.2021 is 20,47,571 Kilogram . as per our records. Whereas as per the prescription you have taken is 21,22,247 kilogram. According to your figure, you were to be paid Rs.3,30,00,940/-from the rate of Rs.15.55 per kg of the agreement. Even after adding 81.00 lakh GST the amount to be given to you was Rs. 4,11,00,940/- against which payments has been already made to you in the following manner :

21.1.22 to 12.4.22 by cheque/ R.T.G.S

4,15,72,720/-

21.1.22to 3.4.22 by cash

84,87,000/-

Total

5,00,59, 720/-

Apart from this, 3.4.2022 to 30.4.22

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*the amount which has been deposited by our parties____??
directly against the sale of goods to Mr. Lachhi ram Sharma. The details of which were____
also not given by him saying that Seth ji has forbidden.*

Thus, an amount of Rs.1 crore has been paid in excess of the amount to be paid against the goods lifted so far with G.S.T. As per the agreement, a total of Rs. 7 crore and G.S.T is to be paid, out of which Rs. 5 Crore has been paid. Running payment is to be made by us at the rate of per kg as per the terms of the agreement and not as per your invoicing amount.”

24. Interestingly, while in the reply dated 30.04.2022, the petitioner has claimed that based on the scrap already removed an excess payment has been made to the respondent, in the ‘List of Dates and Events’ filed with the present petition, the petitioner asserts as under in relation to the said reply:

“Petitioner gave a written notice for compromising the disputes and differences with the respondent by saying that your claimed dues of Rs.65.73 Lacs do not actually exist as petitioner has already paid in excess Rs.... in process of obtaining the documentation of mill required prior to removal of scraps. The expenditure in order get the clearance certificate from the concerned Labour Authority and etc. was to be borne by respondent as agreed between the parties in presence of Dr. Devendra Siwach. The petitioner paid dues amount (calculations shall be done in case required by Court/Arbitral Tribunal).”

25. The above assertion does not match with the letter now produced. I must note that the petitioner along with the petition had not even annexed a copy of the said reply dated 30.04.2022. The same came to be filed only

on a query raised by this Court during the course of the arguments.

26. Be that as it may, the parties are today at a dispute as to whether the petitioner has made the payment for the scrap already removed from the premises of the respondent. The Agreement also provides for termination of the Agreement in the event of there being a payment remaining outstanding by the petitioner even upon the expiry of the seven-day period. As stated by the respondent, the respondent has already entered into an arrangement with a third-party namely '*Arsh Enterprises*', who have already removed some scrap pursuant to the new arrangement. I may also note that the impugned Notice of Termination was challenged by the petitioner by way of the present petition only sometime in November, 2022, that is, with a delay of almost seven months.

27. In view of the above, no interim protection can be granted to the petitioner at the present stage.

28. The petition is accordingly dismissed, however, reiterating that it shall be open to the petitioner to claim an appropriate order from the learned Arbitrator in this regard, who shall consider any prayer so made by the petitioner, without being prejudiced or influenced by any observation made in the present petition.

NAVIN CHAWLA, J

DECEMBER 13, 2022/Arya/AB