**25.04.2023**

Court : **37**
Item : **03**
Matter : **FMAT**
Status : **DO**
Bench ID : **266049**
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**IN THE HIGH COURT AT CALCUTTA**
**Civil Appellate Jurisdiction**
**(Commercial Division).**
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**FMAT (ARBAWARD) 9 of 2023**
with
**CAN 1 of 2023**

Steel Authority of India Limited
*Vs.*
Raasi Refractories Limited

**Mr. Suddhasatva Banerjee, Advocate**
**Mr. Chayan Gupta, Advocate**
**Mr. Sayantan Chatterjee, Advocate**
……for the Appellant
**Mr. Aniruddha Bhattacharya, Advocate**
……for the Respondent

By the impugned order, an *ad interim* order of injunction granted on March 28, 2022 which was passed by the Commercial Court restraining the appellant/authority from giving effect to the Risk and Purchase Clause as contained in the commercial terms and conditions of the contract between the parties without the permission of the Court stood confirmed. The contract was awarded in favour of the respondents for supply of 91 steel ladles and the commencement of delivery was indicated as on May 1, 2021 and to be completed on/or before May 31, 2022. The security deposit being 3% of the total value of the contract has also been furnished. It appears that during execution of the said supply there is an allegation and counter-allegation as to non-adherence of the time limit indicated in the contract which led to the invocation of the Risk and Purchase Clause appearing in the contract.

On the other hand, the respondent contends that 8 sets of steel ladles were duly supplied within the stipulated time as extended subsequently but the further supply could not be made because of unreasonable withholding of the price for the supply, as already been made.

Be that as it may the appellant do not accept the contention of the respondent and proceeded to make over the shortfall of the supply by floating a tender and awarding a contract to a third party. Since the contract contains an arbitration clause and, in fact, the Arbitrator has already been appointed and is in seisin of the matter, the respondent approached Commercial Court with an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'). It was argued before the Commercial Court that the appellant herein is not entitled to invoke the Risk and Purchase Clause when the appellant themselves have intentionally and illegally withheld the substantial amount even after extending the period of supply.

Reliance was placed upon two Single Bench judgments i.e. Bombay High Court rendered in ***Golkonda Engineering Enterprises Limited Vs. Principal Chief Materials Manager, CSMT*** reported in ***(2020) SCC Online Bom 5287*** and Delhi High Court rendered in ***Steel Authority of India Limited Vs. S.P. Singla Constructions Pvt. Ltd.*** reported in ***(2021) SCC Online Del 4645***, for the proposition that there is no impediment on the part of the Court to pass a restraint order against invocation of a Risk and Purchase Clause and accepting the proposition sought to be derived from the aforesaid two reported judgments, the Commercial Court passed an ex parte *ad interim* order of injunction restraining the appellant from invoking the Risk and Purchase Clause. Even after the disclosure of the defence in an affidavit filed after the service of notice, the Court proceeded to confirm the said order which is impugned herein.

At the first instance, we feel that it would be profitable to ascertain the proposition of law laid down in the above mentioned reports. In ***Golkonda Engineering Enterprise (supra),*** the dispute arose in relation to a six purchase order for supply of the PVC Insulated Armored Unscreened Copper Conductor containing a Risk and Purchase Clause which postulates that the said clause would be operative for nine months instead of six months as provided in the IRS terms and conditions of the contract and the same shall not be applicable where 10% security deposit has been taken from the supplier as on the commission of a default in supply, the security deposit shall be forfeited and the quantities unsupplied shall be procured independently without risk and cost of the original supplier. However, in case where the security deposit has not been furnished, the recovery can be made by initiating the proceeding in IRS terms and conditions of the contract. It was further made clear that the said Risk and Purchase Clause shall not be applicable for safety items.

It appears that in the above-noted case, the Single Bench held that the purpose and object for incorporation of the Risk and Purchase Clause is essentially to recover the cost for procurement of the unsupplied goods to be recovered from the defaulting supplier. It was expressly indicated that the Court should not restrain a party from issuing a fresh tender and/or procuring the quantity of the unsupplied goods as the recovery is largely depended upon the obligation of a defaulting party and the evidence is required to be led in this regard. Nowhere it is suggested in the said judgment that a blanket order restraining the party from invoking the Risk and Purchase Clause can be passed.

A clarification has been made that in the event, costs and expenses incurred for procurement of the unsupplied goods from a third party is incurred, the defaulting supplier shall make good of the loss so suffered which undeniably depends upon the quality of the evidence and the obligations under the contract.

So far as the judgment rendered in case of ***Steel Authority of India (supra)***, the Single Bench observed that the interim order does not impinge upon the Risk and Purchase Clause in its entirety nor interdict the right of the SAIL from procuring the goods from the third party as the interim order is restricted against taking any precipitate steps in that regard. While observing its right to do so, in paragraph 27 thereof it is categorically held that since the SAIL was not precluded from the balance works under the contract either directly or indirectly or through any contractor, the only question which involves in such dispute is the additional cost incurred by the SAIL on the balance work, to be recovered from a defaulting supplier.

In both the cases, we do not find that the law has been expounded to the effect that the moment the Risk and Purchase Clause is invoked and a contention is made that there is no default or lapses on the part of the supplier, the Court should grant a blanket order in this regard. Any order restraining a party from procuring the unsupplied goods through a separate source having perceived the default to have occurred has a larger impact in the commercial obligations and/or obligations towards the third party.

Admittedly, the SAIL is engaged in manufacturing activities and have obligations to the third parties and if a blanket order of stay from invoking the Risk and Purchase Clause is passed, it would largely effect the manufacturing activities of the SAIL and, therefore, we do not agree with the view of the Commercial Court that it was a fit case where an order in terms of prayer 'A' of the application under Section 9 of the said Act is required to be passed.

However, our attention is drawn to clause 17 of the contract by the learned Advocate for the respondent to contend that it gives an unbridled and unfettered right to the appellant to withhold any amount due on supply of the goods not only under the contract in question but any other contract and, therefore, there is a good reason that they should be restrained from invoking the Risk and Purchase Clause.

In course of hearing, we have been given to understand that a sum of Rs.2 Crores and odd had already been disbursed to the respondent and there is further apprehension in the respondent that the future amount for supply may be withheld if the injunction is vacated. There appears to be disagreement amongst the parties whether the said amount, so disbursed and/or released and/or paid to the respondent pertains to a subject contract or any other contract to which we do not want to delve into.

Since the injunction order restraining the appellant from invoking the Risk and Purchase Clause does not appear to be reasonable, even the principles laid down in the above-noted report do not suggest so, the said order, in our opinion, needs interference.

The order impugned is thus **set aside**.

However, it is made clear that the recovery amount under the Risk and Purchase Clause largely depends upon the obligation of the parties under the contract, the nature of default and the liability which are essentially a question of fact depending upon the quality of evidence to be led thereupon, but parties are at liberty to take appropriate steps before the Arbitral Tribunal which shall be decided on merit.

However, the appellant shall make the payments in respect of the supply of the goods to the respondent without prejudice to their rights and contention, if not already paid, and subject to the ultimate decision taken by the Arbitral Tribunal.

With these observations, the appeal being **FMAT (ARBAWARD) 9 of 2023** is **disposed of** along with connected applications.

**(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**