03 **02.02.23**

Ct. No. 37

Ab & akd

In the High Court at Calcutta
Civil Appellate Jurisdiction
Commercial Division

F.M.A.T. 447 of 2022
CAN 1 of 2022

M/s. Eastern Coalfields Ltd. & Ors.
Vs.
M/s. Mados Infro Project Pvt. Ltd. & Ors.

Mr. Tilak Bose,
Mr. Saunak Sengupta,
Mr. Pradipta Bose.
... for the appellants.

Mr. Probal Kumar Mukherjee,
Mr. Rajat Dutta.
... for the respondent no. 1.

The instant appeal arises from an order no. 15 dated 26th September, 2022 passed by the Commercial Court at Asansol in Money Suit No. 07 of 2022, by which an ad interim order dated 23rd February, 2022 is made absolute. By virtue of the ad interim order the appellants were restrained from giving effect to the letter dated 29th January, 2022 so far as to close the issue with final measurement subject to any order if passed by the Hon'ble Court in the pending writ petition.

It is not in dispute that the joint venture participated in a tender process and emerged successful therefrom and a tender was awarded for executing the work of extraction of coal by utilizing and using their resources. Three legal entities constituted the said joint venture represented by the Managing Partner and the contract was entered into with such joint venture on the terms and conditions incorporated in the General Terms and Conditions of contract as well as the special contract.

The dispute arose when the said joint venture could not meet the requirements of the appellants under the contract and contemplation was made to rescind and/or terminate the contract. It appears that one of the constituents of the joint venture has siphoned of the money from the account of the joint venture depriving the other constituents, which causes the complete halt of the mining project.

Before we proceed to adumbrate the other salient facts, it would be profitable to quote the relevant terms and conditions of the General Terms and Conditions. Clause (9) of the General Terms and Conditions relates to the termination, suspension, cancellation and foreclosure of the contract as under:

> *"9. TERMINATION, SUSPENSION, CANCELLATION AND FORECLOSURE OF CONTRACT:*
>
> *The Company shall, in addition to other remedial steps to be taken as provided in the conditions of contract, be entitled to cancel the contract in full or in part, if the contractor*
>
> *(a) makes default in proceeding with the works with due diligence and continues to do so even after a notice in writing from the Engineer-in-charge, then on the expiry of the period as specified in the notice*
>
> *or*
>
> *(b) fails to achieve a monthly agreed quantity of 75% (Seventy five per cent) for a period of 6 (six) consecutive months or for cumulative period of six months within any continuous period of 18 (eighteen) months, save and except to the extent of non-availability caused by i) a Force Majeure event or ii) an act of omission of company, not occurring due to any default of the contractor.*
>
> *Or*
>
> *(c) commits default/breech in complying with any of the terms and conditions of the contract and does not remedy it or fails to take effective steps for the remedy to the satisfaction of the Engineer-in-charge, then on the expiry of the period as may be specified by the Engineer-in-charge in a notice in*

writing

or

(d) fails to complete the work or items of work with individual dates of completion, on or before the date / dates of completion or as extended by the company, then on the expiry of the period as may be specified by the Engineer-in-charge in a notice in writing

or

(e) shall offer or give or agree to give any person in the service of the company or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for act/acts of favour in relation to the obtaining or execution of this or any other contract for the company

or

(f) obtains a contract with the company as a result of ring tendering or other non-bonafide method of competitive Bidding

or

(g) transfers, sublets, assigns the entire work or any portion thereof without the prior approval in writing from the Engineer-in-charge. The Engineer-in-charge may give a written notice; cancel the whole contract or portion of it in default."

Sub-clause (b) of Clause (9) is a centre of debate in the instant proceeding providing that if a monthly agreed quantity of 75% for a period of six consecutive months or for cumulative period of six months within any continuous period of eighteen months, the appellants are entitled to cancel the contract in full or in part. In fact, by a letter dated 17th November, 2021 the appellants invoked the provisions contained in Clause 9(b) of the General Terms and Conditions of a contract agreement and called upon the joint venture for final survey measurement of the overburden and coal in the patch awarded from 24th November, 2021 and further invited the attention of the joint venture to bring the survey official to the present site for such measurement.

Clause 9.2 of the General Terms and Conditions contained the provisions of post cancellation and/or termination of contract wherein a notice is to be given by the appellants for taking a final measurement for the works executed till the date of cancellation or termination of a contract. The said Clause 9.2 is extracted as below:

> *"9.2 On cancellation of the contract or on termination of the contract, the Engineer-in-charge shall have powers:*
>
> *(a) To take possession of the site and carry out balance work through any other agency.*
>
> *(b) To give the contractor or his representative of the work 7(seven) days notice in writing for taking final measurement for the works executed till the date of cancellation or termination of the contract. The Engineer-in-charge shall fix the time for taking such final measurement and intimate the contractor in writing. The final measurement shall be carried out at the said appointed time notwithstanding whether the contractor is present or not. Any claim as regards measurement which the contractor is to make shall be made in writing within 7(seven) days of taking final measurement by Engineer-in-charge as aforesaid and if no such claim is received, the contractor shall be deemed to have waived all claims regarding above measurements and any claim made thereafter shall not be entertained.*
>
> *(c) After giving notice to the contractor to measure up the work of the contractor and to take such whole or the balance or part thereof, as shall be executed out of his hands and to give it to another contractor or take up departmentally, to complete the work. The contractor whose contract is terminated shall not be allowed to participated in future bidding for period of minimum twelve months."*

It is interesting to note that after the invocation of Clause 9(b) of the General Terms and Conditions on 17th November, 2021 one of the constituents of the joint venture namely M/s. Mados Infro Project Private

Limited approached the appellate authority and signified its intention to continue with the mining project to the exclusion of the other constituents of the joint venture. The appellants initially did not accept the aforesaid proposal but later on sought for a 'No Objection' from the other constituents of the joint venture, which, in fact, was done and by a letter dated 17th February, 2022 the appellants permitted the said constituent to resume mining operation on and from 23rd January, 2022.

Before the letter dated 17th February, 2022 the appellants issued another letter dated 29th January, 2022 indicating that the moment the contract has been terminated, in terms of Clause 9(c) and Clause 9.2, the final measurement be done in presence of the surveyor to be appointed by the said constituent to conclude the entire dispute.

For abundant precaution it is hereby made clear that the moment the dispute has arisen and the contract was terminated, the matter was referred to the Dispute Settlement Committee in terms of the General Terms and Conditions, but nothing could borne therefrom at a relevant stage, which constrained the respondent no. 1 to approach the Commercial Court for recovery of money allegedly due and payable by the appellants.

The ad interim order of injunction was granted solely on the ground that the Dispute Settlement Committee has not taken a final decision and, therefore, any action taken in the meantime would cause an irreparable loss and injury to the plaintiff/respondent no. 1 and, therefore, the appellants cannot proceed on the basis of the letter dated 29th January, 2022; whereby and whereunder it intended to make a final measurement for closure of the contract. At the time when the temporary injunction application came up for final disposal, the Dispute Settlement Committee had taken a decision, which is reflected from the findings recorded therein, but the interim order was made absolute on the premise that the proposed action of final measurement is prelude to termination of contract and in the event the contract is awarded to a third party, it may cause irreparable loss and injury.

There appears to have a fallacy in the impugned order for the simple reason that the final measurement cannot be said to be prelude to termination of contract, but consequences post termination. The moment the contract is terminated the measurement is required under Clause 9 of the General Terms and Conditions to be undertaken so that the work already done may be identified and the claim of the party may be crystallized. Furthermore, the ad interim order of injunction was granted solely on the ground that the Dispute Settlement Committee did not take the decision by that time and, therefore, it is imperative on the part of the appellants to wait till the decision of the said committee and if any action is taken may bring the situation irreversible. The moment it was brought to the Court that the Dispute Settlement Committee has taken a decision making the ad interim order absolute cannot be said to be a proper course.

The matter took a turn in course of hearing, more particularly, after noticing the letter dated 17th February, 2022 issued to the respondent no. 1 as to whether the letter of termination dated 17th November, 2021 can be regarded as impliedly waived or withdrawn. Ordinarily if a party alters his position and conveys his intention to continue with the contract after the letter of termination, it would tantamount to waiver of the notice of termination, as the party terminating the contract did not intend to proceed on the basis thereof.

Our attention is drawn to several letters issued after the letter dated 17th February, 2022 alleging that despite the request having been made to continue with the work, there was no resumption of the work and, therefore, the notice of termination cannot be treated to have been waived. The aforesaid contention can be fortified from the letter dated 17th April, 2022 issued by the appellants to the respondent no. 1, wherein it is categorically averred that the respondent no. 1 stopped the execution of work on and from 9th November, 2021. It is further indicated therein that despite the several requests having been made to resume the work there was a complete silence. The letter further revealed that the respondent no. 1 was withdrawing the fleet of the equipments from the secured mining premises, which indicates the intention of the said respondent not to continue with the work despite an offer being made for resumption thereof. However, there is an allegation and counter-allegation in this regard. According to the respondent no. 1, it resumed the work after the permission was granted, but later on compelled to stop the same as the appellants did not clear the running account bills.

As indicated above, we could have safely presumed that the letter of termination was withdrawn upon issuance of a letter dated 17th February, 2022, but the moment the work is not resumed, the aforesaid permission for resumption of work is regarded as an offer requiring the reciprocal concurrence to make it concluded contract. The intention of the appellants was laudable that they intended to resume the mining work and offered the respondent no. 1 in this regard, which appears to us has not been responded nor acted upon. The letter dated 7th April, 2022 was issued by the appellants in response to a letter of the respondent no. 1 on 5th April, 2022. In the said letter the respondent no. 1 after making an allegation that the bills since past 16 to 17 months have not been paid, the EMI could not be paid, which put immense pressure on the cash flow and, therefore, it is advisable that the idle equipments to be moved to the other site of the appellants. It is further indicated that the matter is under active consideration of the Dispute Settlement Committee and till the time such decision is not taken, the respondent no. 1 may continue the production until the matter is resolved.

What is apparent from the aforesaid letter that at least till 5th April, 2022 there was no resumption of work and, therefore, the offer to resume the work was not accepted nor the conduct of the respondent no. 1 suggests so. The moment the offer is not accepted, it does not ipso facto render the earlier termination of contract waived or withdrawn. Furthermore, the Dispute Settlement Committee has already taken a decision and, therefore, there was no justification on the part of the court below in making the ad interim order absolute, which was passed solely on the ground that no decision was taken by the said committee.

The terms of the contract would reveal that the measurement is the consequential steps upon termination of contract and cannot be regarded as an origin or prelude to termination of work. We cannot overlook the fact that the extraction of coal through a mining activity is an useful natural resources used in many industrial activities even for generation of electricity. The disruption in extracting the coal from the mine has a cascading effect on the development of the country and, therefore, the court cannot be a mute spectator in taking into consideration the reality.

Obviously the contracting parties are bound by the terms of the contract and cannot wriggle out therefrom. Had it been a case that there has been a complete departure from the contract or the terms and conditions incorporated therein, the law is to be respected even if the consequence may be harsh.

In the instant case we find that that the Clause containing termination of contract was invoked and the consequences to follow thereupon was contemplated. The Trial Court ought not to have stayed the operation of the letter dated 29th January, 2022 by which the final measurement was contemplated being the follow up action after the termination of contract without returning its findings of the validity and legality of the letter of termination.

As we found that the letter of termination was issued invoking the clause, which cannot be said to be per se illegal, the order impugned cannot be sustained. The order impugned is set aside.

We are informed in course of hearing that an application under Order VII Rule 11 of the Code of Civil Procedure has been filed by the defendants/appellants, which is pending before the Commercial Court at Asansol. We expect and hope that the said Commercial Court shall expedite the hearing of the said application and shall make endeavour to bring it to its logical end within three weeks from the next date so fixed for hearing of the same.

The appeal succeeds.

There will be no order as to costs.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)