16-10-2023
Item no.3 & 4
Subrata
Bhattacharyya
AR(C)

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Commercial Division)

FMAT(ARBAWARD) No.49 of 2023
M/s. STA-CC(JV) & Anr.
-vs-
Eastern Coalfields Limited & Ors.
with
CAN No.1 of 2023
and
FMAT(ARBAWARD) 50 of 2023
Eastern Coalfields Limited & Ors.
-vs-
M/s. STA-CC(JV) & Anr.
with
CAN No.1 of 2023

Mr. Debajyoti Basu
Mr. Subhojit Seal
Mr. Diptomoy Talukder
Mr. Dibyendu Ghosh ...for **STA-CC(JV)**
[the appellants in FMAT(ARB)/49/2023 & respondents in FMAT(ARB)/50/2023]

Mr. Debnath Ghosh
Syed Nurul Arefin
Mr. Saptarshi Mal
Syed Moyeenul Arefin ...for **ECL**
[the appellants in FMAT(ARB)/50/2023 & respondents in FMAT(ARB)/49/2023]

A supplementary affidavit filed on behalf of the appellants in FMAT(ARB) 49 of 2023) – M/s STA-CCA(JV) & another – be taken on record.

These are two appeals from the judgement and order dated 4th October 2023 passed in an application under section 9 of the Arbitration and Conciliation Act, 1996 made by the learned Judge, Commercial Court, Asansol.

Eastern Coafields Limited (in short ECL) is aggrieved by that part of the order restraining it from invoking the bank guarantee in question furnished by M/s. STA-CC(JV) (in short STA).

STA wanted further protective orders in this application and have preferred a separate appeal.

The application is fixed for hearing before the learned court below on 24th November 2023. We can make out the seriousness of the learned judge to dispose of the matter from a direction to the parties to bring short written notes of argument to the court on that date.

The dispute between the parties arises out of a works contract. Under the contract, STA was entrusted with the work of removal of overburden, that is, top of the soil, extraction of coal and so on. Admittedly, there was delay in commencement of work. STA's explanation of the delay was that certain circumstances arose which made it impossible for them to perform the contract. They have pleaded "supervening impossibility" or what is in common law also known as "frustration of the contract" by supervening events. According to ECL, STA was squarely responsible for the delay and poor performance.

To cut the long story short, these disputes escalated and as a result ECL rescinded or terminated the contract. They have entrusted the performance of the balance work to a third party and have tentatively claimed of around Rs.64 crore in damages against STA.

At the time of execution of the contract, STA furnished a performance guarantee. ECL wants to invoke this bank guarantee, alleging inability by STA to perform the contract.

A writ application was preferred by STA in this court claiming substantial reliefs as sought in the section 9 application. It was refused by this court. An appeal was preferred before a division bench of this court. No substantive order was passed. However, ECL was asked not to encash the bank guarantee for a limited time to enable the parties to avail of their remedies by arbitration. A Special Leave Petition from this order was also disposed of asking the parties to avail of this right.

Hence, the section 9 application before the learned court below.

The situation is that still no arbitrator has been appointed.

The contract has been terminated. STA says that the contract could not be performed because of supervening impossibility, that is, say according to them, there was no fault in their part. Hence, they are not liable to face any consequence arising out of alleged repudiation of the contract by them.

Mr Basu, learned counsel appearing for STA, expressed deep apprehension that his client has already been debarred or blacklisted from bidding in any tender issued by ECL.

Mr Ghosh, learned counsel representing ECL, submits that there is no such decision up to now. He submits challenging the order that it is devoid of any reasons. Furthermore, the court ought not to have restrained his client from invoking an unconditional bank guarantee.

In the section 9 application, some key issues have to be determined prima facie.

Foremost amongst them is whether the contract was rightly rescinded or not. Secondly, whether ECL could invoke the bank guarantee in case STA is able to establish that there was supervening impossibility in performing the contract? Thirdly, whether ECL is entitled to blacklist STA from their future contracts?

This prima facie case can only be evaluated after consideration of affidavits by that court.

Nonetheless, a substantial question has been raised.

Dispensing with all formalities, we have heard out the appeals.

We make the following order to balance the equities pending hearing of the section 9 application.

ECL shall maintain status quo regarding invocation of the bank guarantee, subject to the condition that STA shall keep the bank guarantee suitably renewed upon intimation to ECL, till further orders of the learned court below.

ECL shall be entitled to make their claim against STA in an appropriate jurisdiction, but shall not for the time being attempt to recover the amount from any sum or fund of STA lying with them or from their bill.

STA shall not be debarred from participating in any tender process of ECL. However, ECL can exercise their right of debarring STA strictly according to law, after giving the organization a right to be heard and by a reasoned decision. Any existing order of debarment stands revoked.

The court below will dispose of the section 9 application within a period of three months from date without granting any unnecessary adjournments.

The above observations are prima facie. This order is also interim in nature.

The appeals and the connected application are thus disposed of.

[I.P. Mukerji, J]

[Biswaroop Chowdhury, J]