ORDER OCD–2

APOT/63/2023
WITH
AP/70/2023
IA NO: GA/1/2023

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

KOSC INDUSTRIES PVT. LTD.
VERSUS
LAKHOTIA INFRA TECHNOLOGIES PVT. LTD.

BEFORE:

THE HON'BLE JUSTICE HARISH TANDON
THE HON'BLE JUSTICE PRASENJIT BISWAS

[COMMERCIAL DIVISION]

Date : 2nd March 2023.

APPEARANCE:

Mr. Tridib Bose, Advocate
Mr. Shounak Mukhopadhyay, Advocate
Mr. V.V.V. Sastry, Advocate
Mr. Sourav Roy, Advocate
...... for Appellant.

Mr. Rajarshi Dutt, Advocate
Mr. Deepak Kr. Jain, Advocate
Mr. Rahul Poddar, Advocate
...... for Respondent.

The Court:- The ad interim order of injunction was refused solely on the ground that the plaintiff/petitioner is guilty of suppression of material facts and therefore has not approached the Court with clean hands.

Obviously, injunction being a discretionary relief cannot be extended to a person who is guilty of suppression of material facts. A distinction must be remembered between suppression of facts and suppression of material facts. Every fact which does not have any link with the cause of action, if not disclosed, cannot be brought within the purview of suppression. But, the fact which is relevant and is regarded as an integral part of the cause of action, if suppressed by the plaintiff, the Court shall not exercise its discretion in passing order of injunction.

There is no reflection in the impugned order as to what facts have been suppressed and not disclosed in the application and whether those facts have a vital role to play in ascertaining the cause of action and for granting an ad interim order of injunction.

The facts emanating from the application reveals that there was an order issued by the respondent styled as 'purchase order' constituting an agreement for placement of MS Props of various quantities at an agreed rental per piece per month. Pursuant to such purchase orders, the supply was effected and it would appear from the said purchase orders that post-dated cheques were issued by the respondent as security deposits and the two months' rent in advance was also required to be paid to the petitioner. It has been stated in the said application that pursuant to the aforesaid purchase orders, the materials were placed in the custody of the respondent and were used and utilised for the purpose of construction. According to the petitioner, the respondent is bound to pay certain amounts in terms of the said purchase orders but there was reluctance in this regard shown by the respondent. The pleading in the said application includes the correspondences between the petitioner and the respondent through WhatsApp and email which, prima facie, appear to have some bearing on the dues in respect of the aforesaid materials placed in the custody of the respondent. However, at a later point of time, a dispute was raised with regard to the quality of the materials being substandard and the rates being exorbitant, which led to denial of any claim in respect thereof.

In the backdrop of the aforesaid facts, the matter has been referred to arbitration and approach is made under Section 9 of the Arbitration and Conciliation Act, 1996 for protection and preservation of 800 pieces of MS Props lying with the respondent. The respondent has been very vocal in its stand that there is a gross suppression of material facts as one of the purchase orders has not been disclosed nor pleaded in the said application. It is, however, submitted by the respondent that only 600 pieces of MS Props are lying with the respondent and not 800 as alleged by the petitioner. It is further submitted that the post-dated cheques claimed to have been issued as security deposit are not in respect of the aforesaid purchase orders but in respect of the non-disclosed purchase order and therefore there is a mala fide attempt on the part of the petitioner in proceeding on the basis the dishonour of the aforesaid cheques. It is further submitted that despite the matter having been referred to arbitration, the statement of claim has not been filed and reliance is sought to be placed upon an email.

The aforesaid contention is refuted by the learned advocate for the petitioner who submits that the statement of claim has been filed yesterday.

Be that as it may, we do not intend to enter into the aforesaid disputed facts as we are considering the prayer for an ad interim order to be passed in a proceeding on the basis of the facts disclosed in an application under Section 9 of the Arbitration and Conciliation Act, 1996. The claim is in respect of the purchase orders disclosed in the said application and according to the petitioner, there are dues to the extent of Rs.50 lakh and odd which imbibe within itself the compensation / damages as well as the interest. It appears in the course of the hearing as also from the impugned order that the materials belonging to the petitioner are lying in the custody of the respondent. Whether the post-dated cheques are in relation to the purchase orders being the subject matter of the arbitration as well as the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 is a triable issue to be decided after affording an opportunity to disclose the materials in this regard. We cannot overlook the fact that the said post-dated cheques were presented and returned without encashment. The proceedings under Section 138 of the Negotiable Instruments Act has been launched which, admittedly, is not regarded as a proceedings for recovery of money. Be that as it may, the pleadings in the said application would manifest that the petitioner claimed certain dues in respect of the use and utilisation of the materials lying in the custody of the respondent and apprehends that those materials may be dissipated rendering the award, if any passed, infructuous. The moment this Court finds that there is no dispute that the materials lying in custody of the respondent belong to the petitioner, whether the claim would ultimately be allowed or not is a matter of trial but protection to the property must be secured and the Court shall not permit a litigant to render a person remediless.

There is an existence of a prima facie case and assimilation of the facts narrated in the said application, in our opinion, tilts the balance of convenience in favour of the petitioner and in the event the ad interim order is not passed and the property lying with the respondent is not protected, it would cause irreparable loss and injury. Accordingly, the respondent is restrained from transferring, alienating and/or disposing of the materials lying with them belonging to the petitioner for a period of three months from date or until further order whichever is earlier.

Since the instant appeal arises from refusal to pass an ad interim order and the trial court is in seisin of the same, the direction for exchange of affidavits has been passed, it would a futile exercise to keep the appeal pending.

In view of the above, both the appeal and the application are disposed of.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)

s.kumar