

ORDER

OCD-1

APOT/66/2023
WITH
CS/39/2023
IA NO: GA/1/2023
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

SIMPLEX INFRASTRUCTURE LTD.
VERSUS
INDIAN BANK AND ANR.

BEFORE:

THE HON'BLE JUSTICE HARISH TANDON
THE HON'BLE JUSTICE PRASENJIT BISWAS
[COMMERCIAL DIVISION]

Date : 11th April, 2023.

APPEARANCE:

Mr. Jishnu Saha, Sr. Advocate
Mr. Suddhasatva Banerjee, Advocate
Mr. Debraj Sahu, Advocate
Mr. Sourav Ghosh, Advocate
Mr. Snehashis Sen, Advocate
..... for the appellant/ petitioner

Mr. Santosh Kr. Ray, Advocate
Ms. Sonal Agarwal, Advocate
Ms. Antalina Guha, Advocate
...for the respondent no.1

Mr. S. K. Mal, Advocate
Mr. Bimalendu Das, Advocate
Mr. Shomrik Das, Advocate
...for the respondent/defendant no.2

The Court:- The appeal arose from an order refusing to pass an ad interim order of injunction on invocation of bank guarantee issued by the appellant's banker situated within the territorial jurisdiction of this Court.

At the time of admitting the appeal, we passed an ad interim order restraining the respondent no.1 from making payments under the bank guarantee bearing no. 009581G170000077 dated 24.11.2017 for a period of three weeks from date or until further order subject to the condition that an undertaking shall be given by the appellant that pending disposal of the instant appeal if the tenure of the bank guarantee expires, it would continue to renew the same. Obviously the aforesaid order was passed bearing in mind that in the event it is found from the stand of the respondents that the invocation is justified, the equity must play a pivotal role in order to bring an equilibrium between the rights of the parties. Though the Single Bench has found that the bank guarantee is unconditional and irrevocable but on prima facie perusal of the terms in the clauses contained in the bank guarantee, we found that it is subject to certain conditions and, therefore, the invocation was interdicted for a limited period. The obvious reason for passing an ex parte ad interim order was founded upon the assertion made in the plaint as well as the application for injunction. The respondent no.2 after ascertaining the quantum of the damages which they perceived to have suffered because of untimely completion of the project was duly adjusted from the bills submitted by the appellant for the works already done and the balance amount was found to be payable to the appellant by the said respondent no.2. The moment the appellant was entitled to an amount from the respondent no.2, we find no justification in invocation of the bank guarantee as there is no default for which a further adjudication on

quantification on damages are required. However, a plea has been taken by the respondent no. 2 that the suit as framed and the cause of action pleaded therein is not amenable to the jurisdiction of this Court because of a specific clause relating to forum excluding the jurisdiction of this Court and furthermore, there is a specific clause relating to the disputes to be adjudicated upon by an arbitrator. It is further contended that such point is required to be decided as the Court lacking inherent jurisdiction should refrain from passing any interim order.

It is to be remembered that the instant appeal is against a refusal to pass an ex parte ad interim order of injunction and, therefore, the scope of the appeal is limited in the sense that the contesting respondent shall demonstrate before the Court on the basis of the pleadings made in the plaint as well as the injunction application that there is no case made out for passing an ex part ad interim order of injunction. The moment the contesting respondent relies upon the facts not pleaded, it would be proper that he should be afforded an opportunity to file affidavits and after the contested hearing, the Court may decide whether an order of temporary injunction be passed pending the suit. We, therefore, do not intend to go into the aforesaid facts because of the fact that the application for temporary injunction is pending before the Single Bench and all points sought to be taken before us, if taken therein, may be decided on merit.

We, therefore, direct the respondent no.2 to file affidavit-in-opposition to the application for temporary injunction within four weeks from date; reply, if any, shall be filed within two weeks therefrom.

The Single Bench is requested to make endeavour to dispose of the application for temporary injunction as expeditiously as possible preferably within three weeks from the date of the period of expiration of exchange of affidavits. We have made it clear that any observations made hereinabove including the fact that we have passed ex parte ad interim order shall have no persuasive effect at the time of deciding an application for temporary injunction upon exchange of affidavits.

Since the protection has already been given to the appellant, the interim order passed on 3rd March, 2023 by this Court shall continue till the disposal of the application for temporary injunction or until further order, whichever is earlier.

With the aforesaid observations, the appeal and the application are disposed of.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)