



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR
BENCH, NAGPUR.**

COMMERCIAL APPEAL NO.6 OF 2023

[M/s. MS Support Service Pvt. Ltd. ..V/s.. Sr. Divisional Mechanised Engineer,
Central Railway and Ors.]

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's order.*

Court's or Judge's order

Mr B. N. Mohata, Advocate for Appellant.
Mr N. Deshpande, Dy. S.G.I. for Respondents.

CORAM : NITIN W. SAMBRE AND ABHAY J. MANTRI, JJ.

DATE : 30th NOVEMBER, 2023.

. Impugned in the present proceedings is an order passed below Exhibit – 1 on 7th November, 2023 in Miscellaneous Civil Application No.749 of 2023, by the District Judge - 2, Nagpur, wherein the Appellant has invoked the remedy under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “the Act of 1996”). The basis for invoking aforesaid remedy is, the contract entered into between the present Appellant and Respondent on 22nd June, 2022 for supply of manpower for executing the work of cleaning of passenger bogies etc. Admitted fact is, Appellant suffered a termination notice dated 28th November, 2023, copy of which is placed on record by Mr Deshpande, learned Deputy Solicitor General of India for the Respondents whereby contract awarded to Appellant came to be terminated. Till this date, the Appellant has not questioned the same, however, in response to the Court’s query, we are informed that the Appellant has intention to take recourse to the arbitration proceedings.

2. The Appellant's prayer under Section 9 of the Act of 1996 came to be rejected by the Court below on the ground that the Appellant is not likely to suffer irreparable loss. The Appellant has approached before the Court below with following prayers :

"1) To direct the non-applicants not to cancel the contract agreement No.NGP/M/Contract/MCC-OBHS, dated 22/6/2022, till the final outcome of the arbitration.

2. To direct the non-applicants not to invoke the bank guarantee till the final outcome of the arbitration."

3. As far as prayer No.1 is concerned, same has rendered infructuous in view of notice of termination of contract dated 28th November, 2023. As far as the issue as regards grant of injunction from invoking the bank guarantees is concerned, this Court is required to be sensitive to the law laid down by the Hon'ble Apex Court as to the circumstances in which an order of injunction can be passed restraining the party from invoking the bank guarantee. Admittedly the case in hand, the termination of contract is based on the abandonment of the contractual work by the Appellant.

4. The Counsel for the Appellant has claimed that the issue as regards the adjudication of the differences between the parties are to be taken up before Arbitrator for adjudication of the rights of the Appellant. Already, the Appellant has submitted the security deposit which is valid till 2024. He would further claim that the bank guarantee in the present case is required to be directed not to be

invoked in view of there being a *prima facie* case in favour of Appellant.

5. While countering the aforesaid submissions, Mr Deshpande learned Dy. S. G. I. for Respondents would invite our attention to the terms of contract particularly Clause 7.4 (f) which provides for termination of the contract in case if the party like Appellant abandons the contract. According to him, in view of various communications such as dated 4th October, 2023 and similar communications issued earlier, the Respondents Authorities are left with no other option but to terminate the contract of the Appellant. According to him, the Court below was justified in making an observation that in case if the Appellant succeeds in arbitration proceedings, he will be entitled for all the monetary benefits including that of damages. As such, he would urge that the present appeal is liable to be rejected.

6. We have appreciated the submissions.

7. The fact remains that the Appellant has suffered the termination of contract dated 22nd June, 2022 *vide* termination notice dated 28th November, 2023. Of course, it is always open for the Appellant to take recourse to the arbitration proceedings in the light of Arbitration Agreement which is admittedly part of the agreement dated 22nd June, 2022.

8. As far as the invoking of the bank guarantee is concerned, the Clause (3) of the bank guarantee which is an independent contract in categorical terms permits the Respondent to encash the bank guarantee. The Counsel for the Appellant though has drawn support from the judgment of the Hon'ble Apex Court in the matter of *Hindustan Construction Company Ltd. vs. State of Bihar and Ors.*, reported in *DGLS (SC) 1513*, so as to claim that the Appellant intends to take recourse to the remedy of arbitration, in which the rights of the parties shall be adjudicated, however, that by itself will not act as an embargo on the right of the Respondents to encash the bank guarantee. At least to that extent, no Clause in the bank guarantee or in agreement can be noticed.

9. Apart from above, the Court below while rejecting the prayer for grant of injunction thereby restraining the Respondents from encashing the bank guarantee has rightly observed that the Appellant has every right to claim damages and other monetary benefits in the arbitration proceedings.

10. Merely because the Appellant has submitted the security along with the contract by itself will not create a right in favour of the Appellant to claim an injunction thereby restraining the Respondents from encashing the bank guarantee. Once the failure of the Appellant to perform his part of contract, as per the agreement dated 22nd June, 2022, is formed to be basis for the termination, the necessary consequences based on the recitals in the said contract

makes it open to the Respondents to encash the bank guarantee.

11. In the aforesaid background, in our opinion, no case for causing indulgence is made out. The appeal, as such lacks merit, stands dismissed.

(ABHAY J. MANTRI, J.)

(NITIN W. SAMBRE, J.)