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WEB COURT **KRISHNAN RAMASAMY, J.**

This application was filed to grant an interim injunction restraining the respondent, by itself, or through its directors, partners, men, servants, agents, associates, officers, representatives, and/or all other persons acting on its behalf from in any manner, taking any coercive steps for the recovery of the amount of Rs.8,57,388/- from the applicant pursuant to the letter dated 23.08.2022.

2. The respondent invited the e-tenders on 14.06.2021 for the supply of Steel Fish Plates. In response to the said invitation of tenders issued by the respondent, the applicant submitted the tender bid on 15.07.2021. Thereafter, belatedly on 12.11.2021 after the expiry of almost 4 months, a Letter of Acceptance [LOA] was issued by the respondent for the supply of 4200 numbers of Steel Fish Plates at a basic rate of Rs.1,730/- not inclusive of tax. Even after the issue of LOA, the purchase order was only issued on 16.12.2021 i.e., after the expiry of over one month from the date of issue of the said LOA. The applicant submitted that the LOA was issued after a



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period of 4 months from the date of submission of tender bid on 15.07.2021

and after a period of one month therefrom, the purchase order was issued.

3. The learned counsel appearing for the applicant would submit that from the date of receiving of the purchase order, the applicant had been earnestly attempting to begin production of the Steel Fish Plates, however, due to incessant rains in Raipur, where the applicant's manufacturing facility was located, production could not be carried out as electricity had been cut off. The applicant had put in a lot of effort to restore the electricity and after three weeks electricity was restored, however the applicant had lost significant production time.

4. In the month of February 2022, due to the war between the Russia and Ukraine, the prices of the raw materials saw an enormous and steep hike that was unexpected and sudden. Therefore, the applicant submit that it was impossible to supply the joggled fish plates at the rates agreed 6 months ago. The applicant waited for the prices of raw materials to stabilise, however, the prices were steeply rising as the war was escalating.



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5. Under these circumstances, the respondent sent a letter dated 07.04.2022 to the applicant requesting to supply the Steel Fish Plates within two months as the same was required urgently. In reply the applicant sent a letter dated 11.04.2022, to foreclose the purchase order and to cancel the LOA issued by the respondent, highlighting the hiking in prices of raw materials and invoking the Force Majeure clause. Further the learned counsel for the applicant also submitted that the non availability of the raw materials during the war period also made the applicant to foreclose the purchase order.

6. Under these circumstances, in spite of the request made by the applicant, now the respondent is threatening the applicant that they would recover a sum of Rs.8,57,388/- by withholding the payment from the applicant, pursuant to the letter dated 23.08.2022. The learned counsel for the applicant submitted that the applicant has been executing some four other contracts and the respondent intend to recover the general damages for non-supplied quantity to an extent of Rs.8,57,388 /- from the other deals of



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the Railways against the applicants. Hence, without any other option, the present application is filed for the appropriate orders.

7. In reply, Mr.AR.L.Sundaresan, learned Senior counsel appearing for the respondent would submit that the said contract came into existence from the date of issuance of LOA based on the offer submitted by the applicant. Further, he contended that the applicant knows the tendering procedure of Railways very well and had agreed for all the tender conditions while submitting the offer bid. Therefore, the applicant is estopped from going back on the obligation of the contract. It was further submitted that the purchase order will be issued following the issuance of LOA only and the completion of delivery should be done within 6 months from the date of issue of purchase order. However, in the present case, the purchase order was issued on 16.12.2022 and the applicant has not supplied any quantity of the tendered item even after a lapse of about three and half months after issue of the purchase order. Only on receipt of respondents' letter to start the supply of material, the applicant had replied with various reasons on the delay such as incessant rain, electrical break down and increase in price of



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input items due to Ukraine war. However, during the same period the applicant had supplied Fish Plates and materials to the other Contracts but had not taken any effort to supply even a part quantity under this purchase order.

8. The learned Senior counsel would also submit that the Russia-Ukraine war was started in the end of Feb 2022 but the LOA was issued on 12.11.2021. Hence, the applicant had sufficient time to procure the raw materials and the applicant has not submitted any reasonable evidence to the respondent to invoke the Force Majeure clause. By referring the Price Variation Clause, the learned Senior counsel would submit that the applicant's request to cancel the purchase order on 11.04.2022 on account of rise in price of Billet in the month of March 2022, is not agreeable and the price variation is not a part of Force Majeure clause. Further, the reason of COVID-19 situation is also not acceptable, as there is no effect of COVID-19 on price hike during the period from July 2021 to December 2021, and no proof has been submitted by the applicant in that regard. He also contended that if the applicant had intention to supply the materials within



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the delivery period, they would have purchased the raw material immediately after issue of LOA i.e., 12.11.2021. So, in this case Force Majeure clause is not applicable. Hence prays to dismiss the application.

9. Heard the learned counsel for the applicant and the learned Senior counsel appearing for the respondent and perused the materials available on record.

10. From the perusal of records, it is clear that the respondent invited the e-tenders on 14.06.2021. On 15.07.2021, the applicant submitted the tender bid. On 12.11.2021, the LOA was issued by the respondent for the supply of 4200 numbers of Steel Fish Plates. After the expiry of one month period from the date of issuance of LOA, i.e., on 16.12.2021, the respondent issued the purchase order. Therefore, the applicant's contention was that due to the delay on the part of the respondent in issuance of LOA and also the purchase order and also due to the COVID-19 situation and war against the Ukraine and Russia, he was not able to plan the procurement of the material from outside the Country. The applicant was not able to get the raw



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materials from abroad for some point of time due to the war. According to the applicant, it was difficult to get raw materials as expected, due to the price shoot up in many fold and that is the reason why he has sent a letter dated 11.04.2022 to foreclose the invoice dated 16.12.2022. However, it was also submitted by the learned counsel for the applicant that the respondent had issued four other contracts, for which, he has been executing the contract as per the terms of the contract. As far as this contract is concern, they were not able to procure the materials in time, which made them to foreclose this contract. The non-procurement of the materials as expected is a Force Majeure clause in terms of Clause 38 of the contract, which reads as follows:

“38.0 FORCE MAJEURE CLAUSE:

38.1 Force Majeure means as an event beyond the control of the supplier and not involving the supplier's fault or negligence and which is not foreseeable. Such events may include, but are not restricted to acts of the purchaser either in its sovereign or contractual capacity, wars or revolutions, hostility, acts of public enemy, civil commotion, sabotage, fires, floods, explosions, epidemics, quarantine restrictions, strikes, lockouts and freight embargoes. However, it should not be used by a party to effectively to escape liability for bad performance



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38.2 If there is delay in performance or other failures by the supplier to perform its obligation under its contract due to event of a Force Majeure, the supplier shall not be held responsible for such delay/failures.

38.3 If a Force Majeure situation arises, the supplier shall promptly notify the purchaser in writing of such conditions and cause thereof within twenty one days of occurrence of such event with reasonable evidence thereof. Unless otherwise directed by the purchaser in writing the supplier shall continue to perform its obligation under the contract as far as reasonably practical, and shall seek all reasonable alternative means for performance not prevented by the Force Majeure event.

38.4 If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of Force Majeure for a period exceeding sixty days, either party may at its option terminate the contract without any financial repercussion on either side.”

11. A perusal of the said clause makes it clear that a situation of War or revolution would be the cause to declare the Force Majeure. In the present case, the contention made by the applicant was that due to the war, he was not able to import the materials, which appears to be a convincing arguments. However, on the other hand, the learner Senior counsel



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submitted that the War was declared in the end of February 2022 whereas the purchase order was issued in the month of December. Therefore, he would contend that the said reason cannot be an acceptable ground to invoke the Force Majeure clause. The applicant had not only pointed out the reason of declaration of war between the Ukraine and Russia but he has also highlighted the COVID-19 and that apart, they had also stated the reason of the delay on the part of the respondent in issuance of the LOA and also the purchase order. The aforesaid delay aspect made the applicant unable to plan the procurement. Even during the COVID-19 situation, the applicant had planned the procurement of the material, but in the meantime, the war was declared. The applicant had not foreclosed immediately after the issuing of invoice on 16.12.2022. It appears that he has made an attempt to procure the materials in spite of the reasons of delay in confirming the LOA, issuing the invoices and also facing the COVID-19 situation and in the interregnum, the war between the Russia and Ukraine came into picture. Thereafter only the applicant was not able to perform the contract. The aforesaid reasons are beyond the control of the applicant, which is clearly a reason for invoking the Force Majeure clause.



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12. Under the circumstances, the applicant has been executing four other contracts. Therefore, if any deduction is made against the bills of other contracts for the alleged liquidated damages in the present case, definitely it would affect the liquidity of the applicant and he would face the financial crisis. Since the present dispute can be referred to the arbitration, the applicant had also file a original petition in Arb.O.P.(Com.Div.)No.13 of 2023 for the appointment of Arbitrator.

13. Under the circumstances, this Court is of the view that unless and otherwise the applicant is protected by way of a interim order, his right will be prejudicially affected.

14. The applicant has made out *prima facie* case and the balance of convenience is in the favour of the applicant.

15. Hence, there shall be an order of interim injunction as prayed for until one month from the date of commencement of arbitration proceedings.



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Thereafter, the parties are at liberty to approach the Arbitrator to get appropriate orders to modify or otherwise as decided by the parties. It is made clear that the Arbitrator shall decide the issue independently without influencing any of the observations made by this Court in this order.

16. Accordingly, this application is disposed of.

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