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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 18th July, 2023

+ LPA 557/2023 & CM APPLs. 36106/2023, 36107/2023

SAURABH METALS PVT. LTD. Appellant

Through: Ms. Purni Gupta and Ms. Henna George, Advocates.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Vineet Dhanda, CGSC with Mr. Vinay Yadav, Mr. Archit Agarwal and Ms. Durga Dass Vashist, Advocates for R-1/ UOI.

Mr. Santosh Kumar Rout and Mr. Abhishek Chakraborty, Advocates for R-4/ PNB.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. M/s Saurabh Metals Pvt. Ltd, a Micro Small and Medium Enterprise ["MSME"] unit, has filed the present appeal against judgment dated 12th July, 2023, whereby learned Single Judge has dismissed their writ petition and upheld the decision/ action of Ministry of Railways, Union of India [Respondent No. 1] to forfeit the Performance Bank Guarantee ["PBG"] of Rs. 25.20 lakhs. This PBG was furnished by the Appellant on 30th November, 2021, as a part of their contractual obligations under a tender floated by Respondent No.1 [hereinafter, "impugned judgement"].



2. As the impugned judgement extensively narrates the facts of the case, we will recount only the essential facts which are necessary for contextualizing our decision:

2.1. Appellant-Company, a MSME unit engaged in the business of engineering goods, participated in Tender No. 2021/RS(WTA)-149/Tender/516 floated by Respondent No. 1 for supply of BOX N/ BG Axle (22.9 Tonne Axle Load). The acceptance of their bid was communicated through letter dated 17th November, 2021, which *inter alia* required the Appellant to furnish a PBG for 03% of the value of the contract *i.e.*, Rs. 25.20 lakhs.

2.2. The above condition was fulfilled on 30th November, 2021 and consequently, Respondent No. 1 placed a Developmental Order on 29th December, 2021 on the Appellant. With the approval of Appellant's Quality Assurance Plan under the Developmental Order, the contract stood concluded.

2.3. However, owing to lack of necessary capital to fulfil their obligations, the Appellant wrote to Respondent No. 1, requesting them to issue a cancellation advice for the aforesaid Developmental Order with no financial repercussions, in terms of the 'Vivad se Vishwas- I' scheme issued by the Ministry of Finance, Government of India on 06th February, 2023 and revised on 11th April, 2023 [*hereinafter*, "the Scheme"]. In response, on 08th June, 2023, Respondents declined to give the benefit of the Scheme and cancelled the Developmental Order, thus forfeiting and invoking the PBG, as per clause 0504 of the Indian Railway Standard Conditions.

2.4. The Appellant challenged the aforesaid communication in W.P.(C) 8456/2023, wherein on 13th June, 2023, the Court granted an interim order



restraining invocation of the PBG. Later, the writ petition was dismissed through the impugned judgment, holding as under:

“10. As far as performance security is concerned, paragraph 2(iv) of the Scheme requires the original delivery period/completion period to be between 19.02.2020 and 31.03.2022. Admittedly, the present case does not fall within these parameters. I am therefore of the view that the contention of the Government of India in its communication dated 22.05.2023 to this effect cannot be faulted.

11. I am also of the prima facie view that Ms. Gupta’s reliance upon paragraph 2(v) of the scheme is misplaced. The aforesaid clause applies to cases of forfeiture of bid security [earnest money deposited or action for debarment of tender]. In the present case, the bank guarantee in question was submitted under Clause 13 of the “Instructions to Tenderers”, and was to secure performance of the contract. Clause 11 of the Instructions to Tenderers specifically provides that earnest money deposit was not required. The case therefore falls within paragraph 2(iv), which covers “performance security”, rather than paragraph 2(v) of the Scheme.

12. In the absence of the benefit of the Scheme being available to the petitioner, I do not find any ground of fraud or special equities to justify an injunction against the invocation of the bank guarantee. The petitioner’s own case is that it was unaware of the infrastructure required for compliance of its contractual obligations. It is stated in the writ petition that the petitioner submitted a tender for supply of 1000 axles only on account of the fact that a quotation for less than 50% of the tendered quantity was deemed to be unresponsive. I am unable to accept, at least at this stage, that a contracting party, even if it is an MSME, can be absolved of its contractual obligations on such a ground. It is for a party to satisfy itself that it is capable of executing a contract before participating in a tender. In fact, Mr. Dhanda has drawn my attention to a communication dated 03.07.2021 signed by the petitioner, in which the petitioner has stated that it has examined the relevant specifications and is aware of the nature of the stores required, and that it undertakes to supply the stores in accordance with the requirements.

13. Having regard to the aforesaid position, I do not find any ground to injunct the encashment of the subject bank guarantee in the present proceedings under Article 226 of the Constitution.

14. The petition is, therefore, dismissed and the interim order dated 13.06.2023 is vacated. All pending applications are disposed of.

15. The parties are free to avail of all contractual remedies in respect of their respective claims and counter claims, if any.”

3. Ms. Purti Gupta, counsel for Appellant, assails the impugned judgment contending as follows:

3.1. Since the tender in question was categorized as a ‘development tender’ under the ‘Make in India’ scheme, no financial loss or prejudice



would be caused to Respondent No. 1 on account of its cancellation. No operational cost has been incurred as the quantity of axles to be supplied under the tender (2000 units) is insignificant in comparison to the annual purchase quantity (about 2,00,000 units).

3.2. The minimum requirements for setting up the necessary plant and machinery and other technical parameters were not mentioned in the tender documents. Despite genuine efforts and substantial investments to develop the axles, unfortunately, Appellant could not meet the target. Therefore, Appellant must not be made to bear the consequences of Respondent No. 1's failure to make proper disclosure in the tender documents.

3.3. Appellant is a 'small' enterprise and could not arrange Rs. 200 crores required for setting up the plant and machinery required for production of the wheel axles. Had they been aware of the voluminous expenditure required to fulfil the tender, they would have not applied for the same. Respondent No. 1 has perpetrated fraud upon Appellant by not revealing the scale and equipment required for manufacturing of the axles. The tender documents also do not specify as to which MSMEs would be unfit to participate in the tender.

3.4. Reliance is placed upon judgements in *Himadri Chemical Industries Ltd. v. Coal Tar Refining Company*¹ and *Standard Chartered Bank v. Heavy Engineering Corporation Ltd.*,² wherein criteria for irretrievable justice or special equities pertaining to cases of bank guarantees was laid down.

¹ 2007 8 SCC 110.

² 2019 SCC Online SC 1638.



3.5. Appellant is entitled to refund of 95% of the performance security as provided under the Scheme, which is intended to aid MSMEs in case of defaults in deliveries under the contract.

4. Heard the counsel and considered the afore-noted contentions. Despite Ms. Gupta's passionate presentation of the Appellant's case, we remain unconvinced by the arguments put forth by her, for reasons discussed hereinafter.

5. First and foremost, it must be highlighted that the PBG presented by the Appellant is unconditional. Appellant's banker has firmly pledged to expeditiously settle the claimed amount, upon Respondents' demand. This commitment stands independent of any disputes raised by the Appellant relating to the Respondent No.1's liability. Thus, Appellant's banker is legally bound to release the necessary payments to Respondents, regardless of any dispute or contention put forward by the Appellant.

6. Ms. Gupta strongly relies on clause 2(iv) and (v) of the Scheme dated 11th April, 2023, to urge that Respondents cannot forfeit the entire PBG amount. However, in our opinion, her contention is misplaced. Clause 2(iv) explicitly affords protection to MSMEs against forfeiture of performance security if the delivery period under the contract was between 19th February, 2020 and 31st March, 2022. In the given case, it is undisputed that the expected delivery date under the Developmental Order was 26th July, 2022. Evidently, benefit of this clause cannot accrue to Appellant as the delivery date surpasses the cut-off period. Apropos clause 2(v), it must be noted that the same does not apply to the Appellant as the stipulation provided therein pertains to forfeiture of bid security or debarment action, which is not the situation here. Clause 11 of the Instructions to Tenderers waives the



requirement of making an earnest money deposit and the only precondition was of furnishing a security deposit under clause 13. Thus, the learned Single Judge's holding on the issue of non-applicability of the Scheme to Appellant is correct.

7. The law on imposition of a stay on the invocation of PBG, as laid down by the Supreme Court on various occasions, needs no reiteration. In general, courts exercise caution and are hesitant to intervene in such cases. Our approach has consistently been conservative, and injunctions are seldom granted, unless in exceptional circumstances depicting clear and compelling evidence of fraud that fundamentally affects the underlying transaction. Therefore, the Appellant bears the burden of proving fraud voiding the underlying transaction.

8. The other exception to the general rule of non-intervention by the court, is the ground of "special equities". This exception may apply if there is a risk of irretrievable injury or irretrievable injustice if an injunction is not granted. However, here again, it is for the Appellant to establish a compelling case, with clear and convincing evidence.

9. Ms. Gupta's arguments fail to align with the exceptions mentioned hereinabove. Moreover, in the pleadings, Appellant admits to their inability to meet the tender requirements. Although Ms. Gupta asserts that Appellant became aware of the contractual requirements only during their representatives' visit to the Wheel Axle Plant in Bangalore on 29th June, 2022, but such delayed awareness does not serve as a valid excuse to avoid the contract. This assertion in fact, raises doubts on Appellant's willingness to fulfil the contractual commitments, and indicates that they are deliberately evading the contract. It is implausible that Appellant was unaware of the



substantial investment needed for production of wheel axles. They willingly participated in the tender, which demonstrates awareness of requirements and their obligations under the contract. Nonetheless, it was their responsibility to conduct due diligence and to ensure that they possess capabilities to execute the contract, before participating in the tender process. In this case, Appellant's failure to fulfil their obligations cannot be overlooked on account of alleged ignorance of capital investment. For the above reasons, we are of the opinion that the Appellant-Company cannot be allowed to evade its contractual responsibilities by preventing Respondent No.1 from encashing the PBG.

10. The Appellant has also alleged that Respondent No. 1 perpetrated fraud by not disclosing the scale of investment and equipment required by the tenderer. They claim that Respondent No. 1 ought to have specified that MSMEs were unfit to participate due to huge investment requirements of about Rs. 200 crores. We do not agree. The allegation is entirely unsubstantiated and appears to have been levelled only in an attempt to bring the case within the exceptional ground of 'fraud' for seeking stay on invocation of PBG.

11. Ms. Gupta's attempt to seek equitable relief by emphasizing the Appellant's status as a MSME, fails to sway the Court. While MSME status may be a relevant factor to consider, but that does not in itself demonstrate a case of irretrievable injustice or special equities. The size or scale of the Appellant's operations alone does not establish a compelling case for grant of exceptional and discretionary relief of injunction. Appellant has failed to prove that enforcement of PBG would result in severe and irreparable harm that cannot be adequately compensated through monetary damages.



12. We would like to clarify that at this juncture, we cannot conclusively ascertain whether Respondent No. 1 has directly incurred financial losses or significant operational costs due to cancellation of the Developmental Order. Our current examination is focused on evaluating the contractual obligations of the involved parties, rather than assessing the financial gains or losses experienced by Respondent No. 1.

13. Thus, due to lack of compelling evidence, specificity in the plea, and absence of special equities, the Court finds no grounds to stay the invocation of the PBG in this matter. We do not find any infirmity in the view taken by the learned Single Judge.

14. Dismissed, along with other pending applications.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

JULY 18, 2023/d.negi
(Corrected and released on 25th July, 2023)