Items 3. 19-11-2024

sg Ct. 37

In The High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side
Commercial Division

FMAT 433 of 2024
CAN 1 of 2024

Orissa Metaliks Pvt. Ltd.
Versus
Titagarh Rail Systems Ltd.

Mr. S. N. Mookherjee, Sr. Adv.
Mr. Krishnaraj Thaker
Mr. Debrup Bhattacherje
Ms. Askhita Bohra
Ms. Yamini Mookherjee
…for the appellant
Mr. Sabyasachi Chaudhury
Mr. Satadeep Bhattacharya
Mr. Sourav Bhagat
Mr. Jishnujit Roy
Mr. Dipayan Dan
Ms. Sriparna Mitra
…for the respondent

1. The appeal is arising out of an order dated 1st October, 2024 passed by the learned Judge, Commercial Court at Alipore in connection with an application filed by the plaintiff for injunction and attachment of the amounts claimed in paragraph 64 of the petition. The learned Commercial Court passed an ex-parte ad interim order directing the respondent to set aside and/or secure a sum of Rs.7,75,44,000/- in the designated bank account of ICICI Bank, AJC Bose Road till the returnable date i.e. 2nd December, 2024. This order is under challenge.

2. The plaintiff has furnished a bank guarantee in favour of the appellant against mobilization advance of

Rs.7,75,44,000/- and had extended the validity of performance guarantee from time to time. The appellant has also from time to time extended the performance under the contract and lastly on 11th September, 2023 whereby the time to deliver the wagons was extended till 31st October, 2023 on the basis of the request made by the plaintiff.

3. Mr. S.N. Mookherjee, learned Senior Counsel appearing on behalf of the appellant has referred to few emails of the appellant dated 6th October, 2023, 9th October, 2023 and 23rd October, 2023 to show that in spite of extension of time, no attempt was made by the plaintiff to deliver the wagons within 31st October, 2023, as a result whereof, the appellant has no other option but to invoke the bank guarantee. In fact, it is argued that the plaintiff had not disclosed that the amount covered under the bank guarantee was in the nature of mobilization advance in order to enable the plaintiff to perform the contract. He has referred to the letter of termination dated 13th November, 2023 to argue that the time was the essence of the contract. Since there was no possibility of the supply of the wagons within the extended time, the appellant had invoked the bank guarantee and realized the amount that was advanced to the plaintiff. The money, in fact, belongs to the appellant and the plaintiff cannot have any claim over the said money. It is further argued that the cause of action, if any, arose on 31st October, 2023, as suit was instituted towards end of September 2024 and there was no urgency for the learned Commercial Judge to decide the matter ex parte and pass a drastic order thereby restraining the appellant from operating from bank

guarantee to the extent indicated in a suit for damages. It is further submitted that the order was silent with regard to the case of urgency being made out by the plaintiff in the injunction application and unless the Court is satisfied that there is a grave urgency and the service of notice be jeopardized the valuable rights of the plaintiff. The discretionary jurisdiction cannot be invoked. Mr. Mookherjee has prayed for vacating of the interim order.

4. Per contra, Mr. Sabyasachi Chaudhury, learned Counsel appearing for the plaintiff submits that the defendant was aware of the fact that in the month of December, 2022, prior to executing of the contract, RDSO had held meetings with all the major wagon manufacturers including the petitioner wherein their intention of changing the specification of Wagons from four doors to two doors with measures to block two doors was discussed and it was due to such change in the specification, the original terms and conditions of the contract could not be terminated and the appellant being aware of such decision of RDSO and realizing that the plaintiff was not responsible for the delay as extended the time for performance from time to time and having regard to the fact that the bank guarantee last furnished had a claim period till 30th June, 2024 the appellant should have participated in the mediation proceeding and tried to resolve the dispute without invoking the bank guarantee and thereby depriving the plaintiff of the value of the work executed by the plaintiff under the contract. Mr. Chaudhury has also submitted that in realizing that the plaintiff was not responsible for the delayed performance while

extending the time the appellant did not impose the LD Clause period.

5. It is further submitted that the letter of termination dated 30th November, 2023 is silent about the reason for modification and alteration of the specification consequent upon the direction of RDSO. The plaintiff having extended the period from time to time realizing that the plaintiff is not responsible for the delay, could not have invoked the bank guarantee and should have waited till the claim period i.e. 30th June, 2024 in order to enable the plaintiff to discharge their obligation and performance of the contract.

6. We have considered the order passed by the learned Single Judge in which the learned Single Judge has recorded the submission made on behalf of the plaintiff and on the basis of such submission made, passed an ex parte ad interim order as indicated above on a satisfaction being recorded that the trinity test for injunction has been fulfilled. The learned Commercial Judge has also held that the invocation of the bank guarantee is ex facie bad on the face of the record and therefore, the petitioner has been able to make out a prima facie case and as such, a protection is necessary as irreparable injury is likely to cause if not granted.

7. The bank guarantee was invoked on 30th October, 2023 although the claim period was till 30th June, 2024. The plaintiff after the termination of the contract invoked Section 12A of the Commercial Courts Act, 2015 and referred the dispute to mediation. Surprisingly, the appellant did not participate in the mediation proceeding. The mediation

proceeding was pending for four months. The appellant alleged that they have counter claim of Rs.200 crores and odd and they have demanded the said amount in December, 2023 but till date, they have not either referred the dispute to mediation or file any suit for recovery of the said amount. It was after a non-starter report was filed in April 2024 that a suit has been instituted in September, 2024. The first two prayers in the interlocutory application appear to be in the nature of attachments before judgment. However, if the Court comes to a finding even prima facie that the invocation was wrongful, appropriate orders may be passed to secure the claim of the plaintiff in the suit depending upon the facts and circumstances of the case. It appears from the impugned order that the emails dated 6th October, 2023, 9th October, 2023 and 29th October, 2023 have not been referred to and considered by the learned Commercial Court. Having regard to nature of the controversy and that the Commercial Court was approached in September 2024 in respect of dispute that arose in 30th October, 2023 and having regard to the pleading made in paragraph 58 of the injunction petition where the plaintiff had admitted that the cause of action arose first time on 31st October, 2023 upon the respondent wrongfully invoking the bank guarantee and thereafter on 13th November, 2023 upon the respondent wrongfully and illegally purporting to terminate the contract. We are of the view that a notice ought to have been given before an ex parte order of this nature is passed. However, it was open for the Trial Court to pass an order in terms of the prayer (a) and give an opportunity to the respondent to deliver their defence. There is also no finding of the learned Trial Court that the appellant is an impecunious situation and in the event a decree is passed it would be rendered infructuous.

8. Mr. Mookherjee, learned Senior Counsel, in course of the submission has referred to a letter dated 1st November, 2024 form the ICICI Bank which had restrained the plaintiff to take steps towards operation of the account in view of the order of injunction.

9. In view of the nature of the order, we make this matter returnable before the Commercial Court, Alipore on 26th November, 2024 to consider the matter with regard to the injunction prayed for by the plaintiff in presence of the defendant. It would be open for the appellant to file such document or limited pleading in the meantime upon prior service to the plaintiff, to show that the said order could not have been passed in the first place and ought not to be continued.

10. The learned Commercial Court shall re-visit the order of injunction granted earlier after taking into consideration the materials to be disclosed by the defendant and shall decide whether the learned Commercial Judge shall continue with the interim order or vacate the interim order uninfluenced by any observation made in this order.

11. The interim order passed by the learned Commercial Judge shall continue till 27th November, 2024 any exclusion beyond that period should be by a reasoned order.

12. This order should be placed by the parties before the learned Commercial Judge for advancing the returnable date.

13. There is no need for service of any further notice upon the appellant as they are represented by their counsel.

14. The appeal and the connected application are, accordingly, disposed of with the aforesaid directions.

15. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)