OCD –4

ORDER SHEET

AP-COM/876/2024

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

ANNAPURNA SWADISHT LIMITED

VS

TUSCON PORTFOLIO PRIVATE LIMITED AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 12th November, 2024.

Appearance:
Mr. Sorasij Dasgupta, Adv.
Mr. Pourush Bandyopadhyay, Adv.
Mr. Samrat Mukherji, Adv.
Ms. Dakshayani Basu, Adv.
Mr. Rik Mukherji, Adv.
.... for the petitioner
Mr. Sourojit Dasgupta, Adv.
Ms. Rupal Singh, Adv.
Mr. Ashok Kumar Singh, Adv.
...for respondents

The Court: The petitioner prays for an order of injunction restraining the respondents from presenting eight post dated cheques for encashment. During the pendency of the application, three of the eight cheques have already been presented for encashment. Relief is now restricted to the other five post dated cheques. The petitioner submits that the cheques were issued in terms of an agreement between the parties. The petitioner had agreed to purchase the business assets of the respondents on certain terms and conditions. According to the terms and conditions of the said agreement, the parties had agreed that the purchase consideration would be Rs.28 crores. Such consideration was to be paid in a particular manner, as laid down in the agreement. The initial purchase consideration was Rs. 20 crores which was to be paid before the first closing date. Out of which,Rs.50 lakhs would be paid before the execution of the agreement.

In the agreement, the respondents had been represented as seller no. 1 and seller no. 2. It was further agreed that the purchaser would be liable to pay interest at the rate of 9.50 % per annum on Rs. 19,50,00,000/-, being the balance amount of initial purchase consideration on and from April 1, 2024, till the actual date of payment. Consideration of Rs. 3 crore would be paid under deferred payment mechanism through 12 post dated cheques for the amount of Rs. 25 lakhs each. Such post-dated cheques would be due and payable on the 21st day of each month, starting from April, 2024 and the same was to continue till March, 2025. Rs. 5 crore was to be paid again under the deferred payment mechanism, on the expiry of six months from the execution date, through a post dated cheque.

The petitioner contends that Rs. 50 lakhs was paid in equal proportion to seller nos. 1 and 2 (25 lakh each). 12 post-dated cheques were also issued, out of which two cheques had been encashed by the respondents. The petitioner claims to have taken steps to fulfill its initial obligations under the contract. The dispute arose with the issuance of the petitioner's letter terminating the contract, dated June 18, 2024. The reason for such termination, as mentioned by the petitioner, was that the management was not agreeable to the acquisition of the business assets in view of the potential risk associated with the transaction. Products which were to be acquired under the agreement were not meeting the needs and requirements that were envisaged at the time of signing of the contract. The shortfall in the product satisfaction further compelled the petitioner to reconsider the business proposal. In the light of the issues raised, the petitioner terminated the contract and requested the respondents not to deposit and/or encash any further cheques that were in their possession. Additionally, the petitioner prayed for refund of Rs. 1 crore that had already been paid by them.

The respondents responded to the notice by a letter dated July 9, 2024, alleging that the petitioner had breached its part ofthe obligation by not making payment of the remaining Rs. 19,50,00,000/-, although the time to make such payment was extended and such extended time was made the essence. The payment of meagre sum of Rs. 1 crore was contrary to the terms of the contract. It has been specifically mentioned that in view of the mutual business interest of the companies, the respondent did not take any steps under the agreement for enforcement of the balance consideration against the petitioner. The respondents enumerated the losses they had suffered on account of such failure on the part of the petitioner and raised objections to certain public announcements which were made by the petitioner with regard to the acquisition of the assets of the respondents.

Mr. Sorasij Dasgupta, learned advocate for the petitioner submits that after the termination notice, another notice was issued to the respondents which should be treated as a part of the earlier notice. The petitioner had made the respondents aware of the fact that the payment of Rs.19,50,00,000/- was not due as the respondents had not obtained a "no objection" from their lender bank.

Mr. Dasgupta referred to Clause 4 of the agreement, i.e., the conditions precedent which the seller had to fulfil before the payment became due. According to the conditions, the Board of Directors of the sellers would have to pass appropriate resolution approving the transaction completed under the agreement and also the execution of the transaction documents. The Board of Directors of the seller 1 had to approve the sale of the factory and factory land to the purchaser and the Board of Directors of the seller 2 had to approve the sale and assignment of seller 2's intellectual property rights to the purchaser. Further condition was that in respect of the existing loans 1 and 2, the sellers were to obtain a "no-objection" certificate from the existing lender, in the form and manner to the satisfaction of the purchaser. According to Mr. Dasgupta, the said obligations had not been fulfilled. Thus, the condition to pay Rs.20 crores before the first closing date had not become operative against the petitioner on account of failure of the sellers to comply with the conditions precedent, which have been mentioned hereinabove. In addition to the above obligations, the seller had other obligations to fulfil, as per clauses 5.2.1. The sellers were required to cause the lender to provide an up-to date balance confirmation in relation to the existing loans- 1 and 2. Delivery of the movable assets and the obligation to furnish to the purchaser the final no-due certificate from the lender, confirming that all outstanding amounts had been paid and all security guarantees were released etc., were not fulfilled. It is further submitted that these obligations were to be fulfilled by the sellers on or before the first closing date and a simultaneous obligation was cast upon the petitioner to pay the amount of Rs.20 crores. Without the seller having complied with the conditions precedent as stated in Clauses 4 and 5 of the contract, the obligation of the buyer to pay Rs.20 crores did not arise.

Mr. Sourojit Dasgupta, learned advocate for the respondents opposes the prayer on various grounds. His first contention is that an injunction restraining the respondents from encashing the cheques, is prohibited by law. According to Mr. Dasgupta, the termination of the agreement was not in accordance with the conditions of the contract. The respondents did not acknowledge the communication of the petitioner as a termination notice. The respondents cannot be prevented from presenting the cheques and initiating any legal proceeding against the petitioner upon dishonour of the same. Any injunction of such nature, would be hit by the provisions of Section 41(d) of the Specific Relief Act, 1963. The termination was not made prior to the closing date, that is, April 15, 2024 and the respondents had a rightful claim for specific performance of the contract. Unilateral termination was not permissible as per the contract. The pleadings, do not disclose the grounds on which an injunction should be passed, restraining encashment of the cheques. According to Mr. Dasgupta, only the subject matter of the dispute which was to be arbitrated upon, can be protected and such protective or preventive order could go beyond the scope and subject matter of arbitration. Reliance has been placed on a decision of the Delhi High Court in Ajay Verma vs. East India Company & Ors.; reported at 2007 (96) DRJ 212, in support of the contention that an injunction cannot be issued, restraining a party from encashing post dated cheques.

Heard the parties.

The execution of the business transfer agreement is not in dispute. The existence of the arbitration clause for resolution of any dispute/controversy/ claim or disagreement, arising out the said agreement, is also not in dispute. The petitioner claims to have already issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said act'), invoking arbitration.

The question is whether the interim protection as prayed for can be granted to the petitioner under the facts of the case, upon balancing the convenience and inconvenience of the parties. A, prima facie, case with regard to existence of a dispute between the parties has been established and the fact that the cheques have been presented for encashment even after the termination and request of the petitioner. They have been dishonoured, due to the stop payment instruction given to the bank by the petitioner. They are matters of record.

While the petitioner terminated the contract on the ground of non-compliance of the terms by the seller and also on the refusal of its board to continue with the transaction in view of the short fall in the equipments and machinery as also lack of business prospects, the respondents refused to accept such termination as valid in law and asked the petitioner to comply with their part of the agreement by paying off the balance sum. With regard to the issuance of the notice of termination prior to the first closing date, the records reveal that sometime in July 9, 2024, the respondents informed the petitioner about its failure to pay off the money within the extended date. Prima facie, it appears that the first closing date had been extended and the termination notice was given before such date. The questions whether the termination was in accordance with the contract or not, whether the contentions of the respondents as contained in the notice dated July 9, 2024, were correct or whether the petitioner's notice was in consonance with the terms and conditions of the contract, are matters which have to be decided by the arbitrator.

It is an admitted position that six cheques have already been placed for encashment which were dishonoured and the petitioners are facing criminal proceedings. The issue is whether similar consequences must follow with the presentation of each cheque, resulting in multiplicity of proceedings. Prima facie, this is not a case in which post dated cheques were issued as a promise to pay the consideration money to the respondents and the petitioner had avoided its liability and did not keep adequate funds in the bank with the intention to defraud the respondents. The assets are not with the petitioner. They have not been delivered. This is a case where a dispute arose and the contract was terminated. The documents are part of the records. The respondents were requested not to encash the cheques. The respondents were aware of the request and responded to the same, but continued to present the same knowing fully well that they would be dishonoured. It is also true that the petitioner had paid an amount of Rs.1 crore at the initial stage. The parties were communicating with each other with regard to the dispute/termination etc. Paragraph 37 of the application, records the pleading that the petitioner apprehends that the respondents would be encashing the cheques, in violation of the instruction of the petitioner. Under such circumstances, the cheques do form a part of the subject matter of the dispute. Mr. Sourojit Dasgupta's contention that the provisions of Section 9 of the said Act, does not contemplate any injunction of this nature cannot be accepted by the Court for the simple reason that Section 9(1)(ii)(e) provides that other interim measures and protections as may appear to the Court to be necessary and convenient, may be granted. The pleadings indicate that the petitioners have also made out a case that the cheques should be treated as void and cancelled and, in my prima facie opinion, this issue should also be a part of the arbitration.

Mr. Sourojit Dasgupta submits documents to show that the bank had granted the no-objections. These documents display that the 'no objections' were issued much after termination of the agreement by the petitioner. The other approvals from the Board could not be produced. Thus, this court finds that the petitioner has rightly demonstrated that the seller's objection had not been fulfilled. Prima facie case and balance of convenience and inconvenience are in favour of the petitioner and in granting an interim relief.

The decision in Vishal Gupta vs. Udai K. Lauria; reported at 2009 SCC online Del 2713 (supra) is not applicable in the facts of the case as the case before the Delhi High Court was not in connection with a dispute which arose out of termination of a contract and the consequent cancellation of post dated cheques which had been issued prior to termination of the contract. The petitioner therein sought specific performance of the contract.

Under such circumstances, this Court directs that the remaining cheques shall not to be presented for encashment subject to the condition that the petitioner will maintain a sum of Rs.1 crore in any bank account or by way of fixed deposit as the case may be and the details of the same shall be supplied to the respondents before 21st November, 2024. This amount shall be maintained for a period of six months or until further orders, whichever is earlier, as may be passed in the appropriate proceeding. The earlier proceedings arising out of dishonour of cheques shall continue in accordance with law.

All observations made hereinabove are tentative and for disposal of this application. The application being AP-COM 876 of 2024 is disposed of.

All parties are to act on the basis of the server copy of this order.

(SHAMPA SARKAR, J.)

tr/sp