IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

JUSTICE SUJOY PAUL

&

JUSTICE AMAR NATH (KESHARWANI)

ON THE 14th FEBRUARY, 2023

ARBITRATION APPEAL No. 18 OF 2023

BETWEEN:-

M/S RAJKUMAR AGRAWAL THROUGH ITS PARTENER SHRI MUDIT AGARWAL S/O SHRI RAJKUMAR AGARWAL AGED ABOUT 44 YEARS, OCCUPATION BUSINESS, R/O 21 NAYAGAON COOPERATIVE HOUSING SOCIETY JABALPUR (MADHYA PRADESH)

.....APPELLANT

(BY SHRI SARABVIR SINGH OBEROI - ADVOCATE FOR APPELLANT)

AND

1. **UNION OF INDIA THROUGH ITS SECRETARY MINISTRY OF DEFENCE, RAKSHA BHAWAN, NEW DELHI (DELHI)**

2. **CHIEF ENGINEER (FY) HYDERABAD MILITARY ENGINEER SERVICES, OPPOSITE PARADE GROUND, SARDAR PATEL ROAD, SECUNDERABAD - 500003**

3. **GARRISON ENGINEER (I) (P) FY KHAMARIA DISTRICT JABALPUR – 482005 (MADHYA PRADESH)**

4. **MILITARY ENGINEER SERVICES, THROUGH ITS CHIEF ENGINEER (FY) HYDERABAD OPPOSITE PARADE**

GROUND, SARDAR PATEL ROAD, SECUNDERABAD - 500003

5. **CHIEF ENGINEER, JABALPUR ZONE, MILITARY ENGINEER SERVICES, 1, RIDGE ROAD, JABALPUR 482001 (MADHYA PRADESH)**

6. **GARRISON ENGINEER (EAST), MES NEAR COD, JABALPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI PUSHPENDRA YADAV – ASSISTANT SOLICITOR GENERAL)

……

This Arbitration Appeal coming on for hearing this day, ***JUSTICE SUJOY PAUL*** *passed the following:*

J U D G M E N T

In this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (in short "Arbitration Act") the parties are at loggerheads on the question of validity of order dated 23/01/2023, whereby the Court below has dismissed the application preferred by the appellant under Section 9 of the Arbitration Act.

Facts and contentions :

2. The Court below in the impugned order has reproduced the factual backdrop of the entire matter extensively. The learned counsel for the parties fairly submitted that the Court below has taken pains to reproduce the contentions of both the parties. The grievance of the appellant is that although Court below was kind enough in mentioning the factual backdrop of the matter explicitly and even reproduced the arguments of the parties, it did not deal with the argument of the

appellant in correct perspective. Thus, there is no need of reproduction of factual backdrop and the contentions raised because the order of Court below is already pregnant with those necessary details. What is required to be seen is that whether necessary ingredients for grant of interim relief viz - *prima facie* case, balance of convenience and irreparable loss were established by the appellant or not. The ancillary question raised by Shri Oberoi is whether the Court below while assessing the claim of appellant for interim relief, has rightly applied the aforesaid factors of existence of *prima facie* case, balance of convenience and irreparable loss.

3. In order to bolster this submission, learned counsel for the appellant submits that *prima facie* case was clearly established because the appellant fulfilled his part of obligation arising out of contract. The work could not be started because of lethargic attitude of the respondents. The letter of acceptance dated 03/03/2021 which was followed by deposit of performance security by the appellant could not proceed further because work order was issued on 01/04/2021, which was handed over to the appellant on 12/04/2021. Thereafter, in the wake of second wave of COVID-19 and consequential lock down, the site was not handed over to the appellant till 09/08/2021. The date of completion of work was fixed as 08/02/2023. In spite of issuance of work order, the construction work could not be started till December as final earth level and layouts were not provided to appellant by the respondents.

4. Shri Oberoi submits that the inspection of the site showed that beneath it there were rocks and to remove that a permission was sought

for blasting. The permission of respondents is required in the teeth of Clause-7 of the contract. The said permission was never granted.

5. Beneath the site, there existed a rock foundation which is clear from the communication of respondent No.3 dated 23/02/2022 (Annexure A/14). Awaiting the formal permission from the respondents, the appellant could not commence the work. After a lapse of more than three months, since no positive response was given by the respondents, the appellant sent a communication dated 12/04/2022 (Annexure A/15) informing the respondents that he is facing loss unnecessarily because of unutilised machinery and manpower deployed at the site. Ultimately, the appellant by communication/notice dated 12/04/2022 (Annexure A/15) expressed his anguish and informed the department that if his grievances are not redressed, he will have no option but to terminate the contract and this letter/communication may be treated as a notice for the said purpose. Since this letter went in vain, the appellant by communication dated 12/08/2022 (Annexure A/17) rescinded/terminated the contract. Thereafter in total ignorance of appellant's letter dated 12/08/2022 (Annexure A/17), the respondent sent a letter dated 07/09/2022 blaming the appellant for the delay in execution of the work. It is further directed that if the appellant does not commence the work within two weeks, the matter would be reported to the competent authority.

6. In turn, by communication dated 10/10/2022 a final notice was given to the appellant asking him to recommence the work within 15 days failing which Clause 54 of the Contract would be invoked and contract would be cancelled.

7. The respondent called upon the appellant to attend a meeting. The appellant filed an application under Section 9 of the Arbitration Act before the Commercial Court Jabalpur which was registered as MJC AV 291/2022. The learned Commercial Court was kind enough in granting ad-interim relief to the appellant by restraining the respondents from encashing the performance security of Rs.28,00,000/- by order dated 14/01/2023 (Annexure A/27).

8. By order dated 16/01/2023 (Annexure A/28), the respondent terminated the contract of appellant and decided to forfeit the performance security deposited by the appellant in utter disregard to the order of Court below dated 14.01.2023.

9. Upon receiving notices, the other side entered appearance before the learned Commercial Court. After hearing both the parties, the Court below by order dated 19/01/2023 (Annexure A/30) dismissed the application filed under Section 9 of the Arbitration Act.

10. Shri Oberoi, criticized the order of Court below and urged that all the necessary ingredients for grant of interim relief were available in his case. The appellant could make out a strong *prima facie* case because admittedly, the appellant by invoking Clause-56 of the contract has terminated/rescinded the contract on 12-08-2022. A contract which stood terminated at the instance of the appellant as per the relevant clause, could not have been again terminated under the garb of Clause-54 by the Employer. Thus, the appellant could make out a strong *prima facie* case, and the court below has committed an error in giving a finding in para-11 of the impugned order that there exists no provision regarding termination of contract by the Contractor.

11. Clause-56 of contract has escaped notice of the court below. So far *balance of convenience* is concerned, Shri Oberoi submits that the performance security amount is lying with the respondents. If in arbitration proceedings, the appellant ultimately fails, the said security can very well be encashed by the respondents. The appellant in the application filed under Section 9 of Arbitration Act categorically pleaded in this regard. But Court below has failed to examine this aspect in correct perspective.

12. It is submitted that in all future contracts, there will be a Clause wherein the appellant would be required to disclose whether pursuant to any previous contract entered upon by him was there any forfeiture of performance security. In the event of such disclosure, the appellant will not get any future contract. This future loss cannot be quantified and compensated in terms of money and this deprivation amounts to irreparable loss.

13. The Court below has not taken into account this aspect of irreparable loss while giving finding in this regard in the impugned order. Since, all the ingredients for grant of relief were in favour of the appellant, Court below should have allowed the application. In support of his contentions, learned counsel placed reliance on **2005 SCC OnLine Del 1249 (Hindustan Construction Co. Ltd. & Another Vs. Satluj Jal Vidyut Nigam Ltd.)** and **2014 SCC OnLine Del 3389 (Isco Track Sleepers Pvt. Ltd. Vs. Delhi Airport Metro Express Pvt. Ltd. & Another)**.

Contention of respondents :

14. Sounding a *contra* note, Shri Pushpendra Yadav, learned ASG supported the impugned order. He submits that Clause-56 is applicable in cases of 'term contract'. The appellant has not shown any material whatsoever before the Court below to show that instant contract was indeed a 'term contract'. In absence thereof, the Court below has not committed any error of fact or law in giving the finding that there exists no provision of termination of contract at the instance of the contractor.

15. Learned counsel for the respondent also placed reliance on certain clauses of contract and urged that if contractor ultimately succeeds in the arbitration / appropriate proceedings, his performance security amount can be refunded back. Thus, necessary ingredients for granting interim relief were not available. During the course of hearing, learned counsel for the respondents submits that he is relying on the same stand of respondents which is reproduced by the Court below in para-4 of the impugned order.

16. Parties confined their arguments to the extent indicated above.

17. We have heard the parties at length and perused the record.

Findings :

18. The Court below in para-13 of the impugned order considered the judgment of Supreme Court reported in **2007(6) SCC 798 (Arvind Constructions Co. (P) Ltd. Vs. Kalinga Mining Corpn.)**. The operative portion reads as under :

> "13. …...But we may indicate that we are *prima facie* inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognized principles governing the grant of interim

injunctions and other orders of interim protection or the appointment of a Receiver."

[Emphasis supplied]

19. Recently in **Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited** reported in **2022 SCC OnLine SC 1219**, it was held that -

> **"39. In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC.**
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> **40. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.**
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> **41. Section 9 of the Arbitration Act provides that a party may apply to a Court for an interim measure or protection *inter alia* to (i) secure the amount in dispute in the arbitration; or (ii) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.**
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> **48.** Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount

> in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good *prima facie* case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.
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> **49.** If a strong *prima facie* case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.
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> **(Emphasis supplied)**

20. The well recognized factors governing the field of interim injunction are : (i) *prima facie* case, (ii) balance of convenience and (iii) irreparable loss.

21. So far ***prima faice*** case is concerned, learned counsel for the parties have taken a diametrically opposite stand before us on the question of termination of contract by either side. As noticed above, Shri Oberoi placed heavy reliance on clause 56 of the contract and urged that contract can be terminated by either side by giving 6 weeks' notice which was indeed given on 12.04.2022 whereas Shri Yadav, learned ASG submits that Clause-56 can be invoked in case of 'term contract' and appellant could not establish before the Court below that contract in question is a 'term contract'.

22. In para-11 of the impugned order, the learned Court below has opined that there exists no provision in the contract regarding termination of contract by the contractor. The Court below did not deal with Clause-56 of contract in specific. No finding is recorded that Clause-56 is inapplicable because it relates to 'term contract' and appellant failed to establish that he was signatory to a 'term contract'. Thus, on the aspect of *prima facie* case, the Court below was required to examine the case of the parties by taking into account Clause 54 and 56 and then give a finding whether contract could have been terminated by the appellant / contractor. In that case, court must decide whether termination of contract at the instance of Union of India thereafter was *prima facie* permissible or not. This aspect has not been considered with accuracy and precision.

23. About **balance of convenience**, we find substance in the argument of Shri Oberoi that in the event the contractor is defeated in the legal battle before the appropriate forum, the performance security lying with the employer can be encashed by them and therefore, balance of convenience is also in favour of the appellant. The only relief prayed for by the appellant is not to encash/forfeit the said performance security. This aspect has not been noticed by the Court below.

24. To elaborate the submission regarding **irreparable loss**, Shri Oberoi placed reliance on para-3 of the impugned order. Relevant portion of which reads as under:-

> "3. ..... if the respondent authorities are allowed to illegally penalize the applicant and forfeit the performance security without its fault, as the same will have a negative impact on applicant's

> prospects for future contracts, which cannot be compensated in terms of money, therefore pass appropriate orders thereby restraining the respondents from forfeiting the performance security and from taking any coercive action against the applicant till the adjudication of the dispute by an Arbitral Tribunal."
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> **(Emphasis Supplied)**

25. It is strenuously contended that although Court below has reproduced the contention regarding negative impact on Contractor's prospects, did not consider and deal with it while deciding the question of *irreparable loss*. The only reason which persuaded the Court below to take a decision on the facet of *irreparable loss* is that if performance security is forfeited, it can be compensated in terms of money by the employer as per the terms of contract.

26. The reproduced portion of para- 3 of impugned order shows that anxiety and grievance of appellant was that if performance security is permitted to be forfeited and encashed, it will have an adverse impact on contractor's future prospects. Admittedly, this specific contention of appellant has not been dealt with by the Court below in relevant para of the impugned order wherein aspect of *irreparable loss* was considered.

27. In view of foregoing analysis, in our opinion, the Court below has not considered the aspect of *prima facie* case, *balance of convenience* and *irreparable loss* with necessary clarity. A microscopic reading of the stand of parties reproduced in the order and findings given on it shows that a) Court below has not considered Clause-54 & 56 of the contract while arriving at a conclusion regarding availability of '*prime facie'* case. b) Court below has not considered the aspect of *balance of*

convenience in true spirit and c) while considering the aspect of *irreparable loss*, the aspect of negative impact on appellant's future prospect has escaped notice of Court below. Since necessary parameters for grant of interim relief were not meticulously considered by Court below, we cannot countenance the impugned order dated 23.01.2023. Resultantly, the said order is set aside. The Case No.MJCAV No.291/2022 is restored in the file of the Commercial Court, Jabalpur.

28. The parties shall appear before the Commercial Court, Jabalpur on **22.02.2023**. The Court below shall rehear the parties afresh and pass a fresh order in accordance with law expeditiously, preferably within 15 days from the next date of hearing. Till a fresh decision is taken by the Commercial Court, the respondents shall not encash/forfeit the performance security.

29. It is made clear that this Court has not expressed any opinion on the merits of the case. The Registry shall *forthwith* sent copy of this order to the Commercial Court, Jabalpur.

30. The appeal is **allowed** to the extent indicated above.

(SUJOY PAUL)
JUDGE

(AMAR NATH (KESHARWANI))
JUDGE

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