

**COMMERCIAL COURT AT ASANSOL**

**(FOR THE DISTRICTS OF MURSHIDABAD, BIRBHUM, PURBA  
BARDHAMAN, PASCHIM BARDHAMAN, PURULIA AND BANKURA)**

Present :- Shaikh Kamal Uddin.  
Judge, Commercial Court at Asansol.

JO Code :- WB01311.

**Misc. Arbitration (Commercial) : 04/2025**

**CNR No:WBB17-000016-2025**

Mackeil & Company Pvt. Ltd.

. . . . . Petitioner

V/s

The Principal Chief Materials Manager,  
Chittaranjan Locomotive Works and another.

. . . . . Respondent (s)

**Order No – 02**

**Dated : 12/03/2025**

The case record is put up on the prayer of the petitioner.

The petitioner seeks leave to move the application seeking ad-interim order in terms of prayer (c) of the application having regard to the urgency involved in the instant matter.

Perused the materials on record.

This is an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter short referred to as A & C Act, 1996).

Marginal note of the office shows that there is no caveat.

The alleged cause of action falls within the jurisdiction of this Court.

Having regard to the pecuniary value of the subject matter, this Court has jurisdiction to hear the instant application.

Ld. Senior Counsel of the petitioner is permitted to move the application for ad-interim order. The supplementary affidavit filed by the petitioner is taken on record.

Heard the Ld. Senior Counsel of the petitioner.

Perused the application which is supported by an affidavit and the documents enclosed with the application.

The facts leading up to the litigation out of which the present application under Section 9 of the A & C Act, 1996 arises is briefly stated as follows :-

- (1) The petitioner is engaged in the business of manufacturing metal and chemical products and is the only Indian manufacturer that developed indigenously aluminum gear casing for WAP-5 Loco.
- (2) The petitioner participated in the tender issued by the respondent No.1 for delivery of "GEAR BOX CASE (MACHINED) FOR WAP-5 AS PER DRG. No.1210-01.113-004, ALT-2" in 318 numbers. The bid of the petitioner was accepted and the respondent No.1 issued purchase order on 16/11/2020. The total value of the order was Rs.32,69,54,880.00/- for delivery of 318 numbers of items and the basic rates of the items were Rs.9,18,000/-. In the purchase order the Indian Railways Standard Conditions of Contract including the Arbitration agreement was incorporated.
- (3) Against the purchase order dated 16/11/2020 the petitioner through 8 different tranches supplied 60 numbers of items out of the requisite 318 numbers because of recession and the Pandemic of COVID-19.
- (4) All of a sudden, the respondent No.1 on 25/03/2022 issued a cancellation advice for 232 items and made a claim of Rs.2,38,53,312/- as damages towards extra expenditure in terms of clause 0702 of IRS Conditions of Contract, 1970. The said amount was directed to be paid within 21 days.
- (5) Subsequently, the respondent No.1 issued a reinstatement advice on 12/07/2022 reinstating the purchase order dated 16/11/2020 and in terms of the said order 232 numbers of gear box case was deliverable. After the reinstatement advice dated 12/07/2022 the petitioner vide 5 different tranches managed to supply 20 numbers of deliverables out of the

requisite 232 numbers and the reason for such short fall was increase in costing of aluminum and other overhead expenses.

- (6) A representation was made to the respondent No.2 on 02/05/2023 whereby the petitioner expressed it's inability to receive further quantity of order at the existing price. The respondent No.1 appreciating the difficulties of the petitioner issued a modification advice on 04/03/2024 whereby the respondent No.1 extended delivery period for reinstated quantity of 8 sets for 3 months from the date of modification advice against PO Sr No.004 without LD but with denial clause.
- (7) Thereafter, all of a sudden, the respondent No.1 issued cancellation advice on 11/07/2024 for 238 numbers of deliverables and also imposed demurrage charge of Rs.2,44,70,208/- on the ground that the petitioner had failed to supply the materials. Subsequently, by a letter dated 11<sup>th</sup> July, 2024 the respondent No.1 communicated to the petitioner that the demurrage amount will be recovered from the outstanding bills. The representation of the petitioner dated 24/07/2024 for waiving the demurrage was rejected by the respondent No.2 vide letter dated 22/10/2024.
- (8) The Ld. Senior Counsel for the petitioner submitted that demurrage has been exercised in term of clause 2403 of the IRS Conditions of Contract but the said clause can only be invoked if there is an ascertained sum of money due and payable under the subject contract. He also submitted that the damages in the instant case has not been ascertained and it is only upon an adjudication with regard to the quantum of damages by an Arbitral Tribunal or a competent Court of Law, the respondent can invoke clause 2403. Reference has been made to the decision of *Union of India V/s. Raman Iron Foundry (1974) 2 SCC 231* where it has been held by the Hon'ble Apex Court that "a claim for un-liquidated damages does not give rise to a debt until the liability is

*adjudicated and damages assessed by the decree or Order of a Court or other adjudicatory authority.”*

- (9) The Ld. Senior Counsel referring to annexure M of the supplementary affidavit submitted that a bill dated 09/08/2024 to the tune of Rs.19,82,400/- was processed by the respondent authorities but the entire amount was deducted by imposing capricious and illusionary damages and deductions. He also submitted that the said bill is not related to the present tender but is in connection with another tender work. The Ld. Senior Counsel also submitted that the petitioner has every reason to believe that the respondents will realize the alleged damages from the pending bills of the petitioner in connection with other works even before ascertaining the actual damages and in that event the petitioner will suffer irreparable loss and injury and the business of the petitioner will also be in the danger of being damaged and or wrongfully affected.
- (10) I have heard the Ld. Senior Counsel for the petitioner and have also perused the materials on record.
- (11) The respondent No.1 vide letter dated 11<sup>th</sup> July, 2024 had issued the cancellation notice for 238 numbers of deliverables and had imposed penalty of Rs.2,44,70,208/- for alleged failure of the petitioner to supply the materials. No notice was however issued to the petitioner prior to imposing the penalty and the basis for calculating damages was also not mentioned by the respondent No.1 in the letter dated 11<sup>th</sup> July, 2024. Even if, clause 2403 of IRS Conditions of Contract allow the respondents to withhold or retain by way of lien any sum of money due and payable to the contractor / petitioner against any claim of the respondents, the principles of natural justice must be read into such provisions. *Prima facie*, I am of the view that the respondents action of imposing penalty and deducting damages from the pending bills without following due process violates the principles of natural justice and contractual fairness. That apart, the damages allegedly

sustained by the respondents have not been ascertained. In the case of Raman Iron Foundry (Supra) it has been held by the Hon'ble Apex Court that :

*“11. .... when there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages.”*

In the case on hand, damages have not been ascertained either by the Arbitral Tribunal or by any competent Court. Therefore, if in the present situation if the respondents deduct any money from the bills of the petitioner in respect of other contract with the Indian Railways, the petitioner will suffer irreparable loss and injury. Thus, prima facie case has been made out by the petitioner and the balance of convenience and inconvenience is also in favour of the petitioner in granting an ad interim order of injunction.

- (12) Accordingly the respondents and or their men and agents are restrained from the deducting any money in respect of other contract of the petitioner with the Indian Railways and or companies where railway is a shareholder in terms of prayer (c) till the next date of hearing which is fixed on **02/04/2025**.

The petitioner is directed to serve copy of the Section 9 application, the supplementary affidavit along with all documents as well as a copy of this order to the respondents and file affidavit of service on the next date.

The petitioner is also directed to take steps for appointment of Arbitrator by the next date.

The respondents are given liberty to seek discharge / variation of the interim order.

**D/C by me.**

**Judge, Commercial Court  
At Asansol**

**Judge, Commercial Court  
At Asansol**