

T.S. – 5/2023(CC)

**Present : Neyaz Alam
Judge, Commercial Court at Rajarhat,
North 24 Parganas**

(CNR NO. WBNP19-000053-2023)

J.O : WB01398

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01.04.2023

No caveat is filed as per note of the office.

The petitioner/plaintiff filed a put up petition praying for moving the application under Order XL Rule 1 read with S. 151 CPC, however, the Ld. Counsel submitted to treat the application as one under Order XXXIX Rule 1 & 2 and read with Order XL Rule 1 read with S. 151 CPC on the ground of urgency. Leave is also sought to move the injunction application without exploring the mandate of section 12(A) of Commercial Court Act on the ground of urgency. Leave is granted.

The petitioner filed the suit for damages, permanent injunction and declaration and in the suit filed the application one under Order XXXIX Rule 1 & 2 and read with Order XL Rule 1 read with S. 151 CPC which is taken up for hearing.

Heard. Considered and allowed.

Issue notice upon the respondent calling upon them to show cause within 15 days from the date of receipt of the notice as to why the temporary injunction as prayed for shall not be granted against them.

Perused the plaint, injunction application and the annexures filed on behalf of the petitioner.

Considered the submissions advanced by the Ld. Counsel for the petitioner.

The petitioner is a body corporate duly registered under the provisions of Companies Act, 1956 is engaged in the business of offering end-to-end Heating, Ventilation, Air Conditioning and Mechanical Electrical and Plumbing solutions and services for a wide spectrum of clientele.

The respondent is a company duly registered under the provisions of Companies Act, 1956, and a PAN-India construction company in the field of infrastructure works. The respondent was awarded construction works of IISER Campus at Berhampur, Odisha vide Agreement No. 01/EE CUM SM/IPD/2019-20 dated 03.09.2019 by the CPWD.

Brief facts of the suit is that on or about July, 2020, the representatives of the respondent approached the petitioner herein to bid for providing its services that would include SITC (Supply, Installation, Testing and Commissioning) of HVAC

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works including Building Management System in the campus of Indian Institute of Science Education & Research (IISER) at Berhampur, Odisha, as a sub-contractor.

The respondent, thereafter, issued a Letter of Intent (LOI) bearing No. NKG/LOI/IISER/MEP/2020/46 dated 31 July, 2020, in favour of the petitioner for an amount of Rs. 19,50,00,000.00/- (Rupees Nineteen Crores Fifty Lacs only). The payment was to be released as follows :-

Against supply of chiller on pro-rata basis: 80%;

Against supply of balance equipment on pro-rata basis: 70%;

Against installation of (sr. a) on pro-rata basis: 10%;

Against installation of (sr. b) on pro-rata basis: 20%;

Against commissioning & completion on prorata basis: 5%;

Against seasonal tests & hand over on pro-rata basis: 5%;

2.5% will be deducted from all RA bills towards security deposit, which will be released after successful completion of Defect Liability Period.

It is submitted that as agreed to between the parties, the payment for chillers was to be released after fifteen days of receipt of material at site and for balance items, payment would be released thereafter.

Subsequently, the Notice of Award NoA/NKG/Berhampur/MEP/2020/60 dated 30th September, 2020, was executed between the parties.

Soon thereafter, the petitioner commenced the project works in terms of the said Notice of Award. The petitioner allotted 11 employees for the instant project works, out of which 5 employees were deputed on the project site and 6 employees were deputed at the petitioner's head office.

It is alleged that as per Clause 1.18, Part 1 of the sub-work of the HVAC System, contained under the said Notice of Award, the respondent was supposed to append drawings with the tender documents, depicting the measurements and installation lay-out of various equipment, tentative duct, cable and pipe routes etc. Accordingly, the petitioner was to prepare the required drawings in terms of the said Notice of Award and to submit the same to respondent.

Further alleged the respondent revised the academic building designs on 16th April, 2021, and further, the input regarding the health care and guest house, was provided to the petitioner on 10th June, 2021, and the input regarding the community center was provided on 25th June, 2021. Furthermore, the petitioner received partial approvals during the month of July, 2021, and though the drawings

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were approved, the capacity of equipment and quantity were changed in the month of March, 2022. In spite of continuing delay on the part of the respondent in providing final approval of the drawings, capacity of equipment and quantity, the petitioner re-submitted the said drawings, which are pending approval by the respondent, till date. The said delays on the part of the respondent in providing the said inputs and/or drawings were posing major hurdles for the petitioner, causing unwarranted delays.

Further state the petitioner continued to execute the works allotted as per the said Notice of Award and raised several RA Bills in lieu of such works such as supply of insulation material, G.I. sheet, pumps & chillers.

It is contended that all of a sudden, the respondent, vide its letter No. NKG/IISER/Berhampur/2022/121 dated 25th May, 2022, directed the petitioner to stop work and closed the contract under the garb of alleged abnormal delay and non-performance. However, the respondent did not itself act upon its own communication and encouraged the petitioner herein to submit revised proposal and revised BOQ for continuation of the major portion of the works.

Further contended that the entire delay was caused by the respondent and the same is pinned on the petitioner with ulterior motives. During discussions in one of the aforesaid deliberations with the respondent, it was confirmed by the petitioner that the balance work can be completed in a matter of few months' time, as desired by the respondent, but the respondent never released the amended Purchase Order (PO) and did not give opportunity to conclude the work. The petitioner was interrupted repeatedly by the respondent, only with the intention to avoid payment.

Further there were no replies to the petitioner's telephonic calls, messages, emails, despite in-person' visiting to the respondent's office. Moreover, the petitioner duly completed the engineering and designing part of the contract. It was only the approvals to the aforesaid increase in quantities along with extra items which were kept pending by the respondent along with the revised/amended Purchase Order to take up works.

It is submitted that it is clear that the respondent illegally terminated the agreement between the parties. The correspondences between the parties also reveal that the respondent had, in fact, engaged other third-party independent contractors to carry out operation of the works which were originally allotted to the petitioner. In the circumstances, the petitioner is entitled for the goods which had

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been supplied as per the original agreement for the works done to moneys retained from the RA bills and the damages for the illegal termination of the contract including loss of project management/overhead costs.

It is contended that inspite of the delay and other unwarranted hindrances caused by the respondent the petitioner caused substantial work as per the LOI but the respondent has not complied the commitment to make the payment as scheduled and arbitrarily and illegally terminated the contract withheld the machinery and intending to use the same by the third party contractor, moreover the respondent has significantly withheld the amount owed to the petitioner causing severe loss and injury.

The petitioner further submits that the chillers remain uninstalled and stored within the site. If the same is used, then it will cause depreciation of its value and the same represents the security for the petitioner company against the unpaid dues of the respondent.

It is submitted that petitioner company, on or about February, 2023, received information from various persons at the site that the respondent and/or its representatives and/or agents/assigns through other third parties were intending to use and/or operate and/or dispose of the chillers which were stored there on 31st March, 2022. In this regard, the petitioner company immediately sent an e-mail dated 06th February, 2023, calling upon the respondent to refrain from taking any action which would depreciate the value of the chillers in any manner whatsoever.

The petitioner apprehends that the respondent and/or its consultants/agents and/or assigns will take or are about to take/initiate actions to deal with and/or use the chillers, thereby depreciating its value.

It is pointed out that the cause of action arose on 25th May,2022, when the respondent, vide its letter No. NKG/IISER/ Berhampur /2022/121, directed the petitioner to stop work and closed the contract under the garb of alleged abnormal delay and non-performance. The cause of action further arose, when the respondent caused to issue a Legal Notice dated 14th October,2022 through their learned advocate, falsely claiming alleged losses and damages. Plaintiff cause to reply to the said notice vide letter No. SPJ/ABS/NKG/Reply/01/2022-23dated 17th November, 2022, denying disputing the claim. As such, the claims of the petitioner are within a period of limitation.

:: Findings of the court ::

Deducing the factual matrix, it transpires that the petitioner is a body corporate duly registered under the provisions of Companies Act, 1956 is engaged in the business of offering end-to-end Heating, Ventilation, Air Conditioning and Mechanical Electrical and Plumbing solutions and services for a wide spectrum of clientele and the respondent is a company and a PAN-India construction company in the field of infrastructure works.

The respondent was awarded construction works of IISER Campus at Berhampur, Odisha vide Agreement No. 01/EE CUM SM/IPD/2019-20 dated 03.09.2019 by the CPWD.

The petitioner happens to be the sub-contractor and Notice of Award NoA/NKG/ Berhampur/MEP/2020/60 DT. 30TH September, 2020 was executed between the petitioner and respondent and work was affected thereto.

As per Clause 1.18, Part 1 of the sub-work of the HVAC System, contained under the said Notice of Award, the respondent was supposed to append drawings with the tender documents, depicting the measurements and installation lay-out of various equipment, tentative duct, cable and pipe routes etc. Accordingly, the petitioner was to prepare the required drawings in terms of the said Notice of Award and to submit the same to respondent.

Anyway, work progressed substantially and various goods and machineries relating to the entrusted work was sold out to the respondent for installation, however, in course of the work project the respondent in order to avoid making payment raised multiple frivolous allegation and withheld timely payment although the respondent has received full payment from the principal entity i.e. CPWD. The matter was agitated for clearing the pending and current bills instead of honouring the respondent closed the work and terminated the agreement causing severe loss and injury with note that not a single farthing has been paid so far.

It is further pointed out that the petitioner supplied chiller to the respondent who acknowledged to have received in good condition and promised to make clear payment within 15 days of receiving the machine. The respondent is backing out from the payment and intend to defraud the petitioner by not making payment and with ill motive terminated the agreement and making effort to get the balance work done with third party sub-contractor using the plant and machineries sold to the respondent without adjusting the claim of the petitioner. The Ld Counsel for the

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petitioner pointed out the provisions of S. 45, 46(1)(c) and S.55 of the Sale of Goods Act, 1930 claiming his right of resale being unpaid seller.

From the conspectus of the fact as stated above it appears that the petitioner being the sub-contractor was given the Notice of Award from the respondent and the respondent was the successful bidder against the tender conducted by the CPWD and pursuant to the agreement between the parties the petitioner affected substantial work and sold out the plant and machineries to the respondent for the purpose of installing and commissioning of centralized Air Conditioning system at the campus of Indian Institute of Science Education & Research (IISER) at Berhampur, Odisha. The respondent upon receipt of the chiller machine was supposed to make payment within 15 days thereof but refused to part with the payment although received full payment from the principal tenderer and further with intention to deprive the petitioner the respondent has arbitrarily and illegally terminated the agreement and employed third party sub-contractor to complete the rest work utilizing the plant and machineries sold to the respondent without the price paid, therefore, the petitioner has made out a prima facie arguable case in his favour which requires adjudication at the time of trial. The balance of the convenience and inconvenience is also inclined in favour of the petitioner and the petitioner will suffer irreparable loss and injury if in the event the respondent applies the plant and machineries sold to the respondent without clearing the outstanding thereby causing depreciation of the value of the machine.

Therefore, the petitioner has successfully qualified the requirement or touchstone of three principles in the grant of temporary injunction viz.

- a. Prima facie case,
- b. Balance of convenience and inconvenience,
- c. Irreparable loss and injury.

At this preliminary stage the court is restricted to the plaint, sworn statement of the petitioner/ petitioner with annexed documents, together with the averments made therein. Thus, the law on the issue emerges to the effect that an ad-interim injunction shall be granted by the Court after considering all the pros and cons and preferably after issuing short notice but in exceptional cases, equitable and discretionary injunction can be exercised where by protective order needed to be passed as in the instant case at least to protect the right of the petitioner for time being by passing ex-parte ad-interim injunction.

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Hence, it is,

ORDERED

“an ex-parte ad-interim order of injunction restraining the respondents, its representatives/agents and /or assigns from using, installing, operating, damaging, disposing off and/or any act which would cause value depreciation and/or loss and damage of the said chillers are hereby granted till **17.04.2023**”.

Petitioner is directed to comply the provisions U/O 39 rule 3(a) and (b) of the code of Civil Procedure at once and furnish to the respondent :

1. a copy of the injunction application;
2. a copy of the affidavit filed in support of the temporary injunction application;
3. a copy of the plaint;
4. copies of documents on which the petitioner relies and
5. an affidavit stating that the copies stated above have been so delivered or sent.

Requisites forthwith.

To date for S/R and appearance, hearing of temporary injunction application, W.O, if any, in the meantime.

Sd/- Neyaz Alam

Judge

Commercial Court at Rajarhat
North 24 Parganas