

Present: Sri Utpal Misra (JO Code:WB00659)
Judge, Commercial Court at Alipore
Money Suit 31/2023
CNR No. WBSP18-000169-2023

Order No. 2

Date: 19.10.2023

In the matter of:

Suit for recovery of sum of Rs. 23,00,86,664/- and injunction valued at Rs. 100/-.

AND

In the matter of:

M/s. Haldia Water Services Private Limited.

Vs.

Haldia Development Authority.

Appearance

Mr. Abhrajit Mitra... Ld. Sr. Advocate
Mr. Altamas Alim...Ld. Advocate
Mr. Sumit Biswas..Ld. Advocate
Mr. Rajashree Bhowmick...Ld. Advocate
Mr. Arjun Syal...Ld. Advocate

For the Plaintiff/Petitioner.

Order

The record is put up today on the prayer of the Plaintiff/Petitioner who intends to move both the application being I.A. No. 01 of 2023 and I.A. No. 02 of 2023.

It is emanated from the record that the Plaintiff filed the instant suit for recovery of money and damage valued at Rs. 23,00,88,664/- against the Defendant herein with an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC).

Office notes that there is no caveat against any parties to this present proceeding.

With this present suit Plaintiff also filed an application for contemplation of leave under Section 12A of the Commercial Court Act, 2015 (for short CCA) which was registered as I.A. No. 01 of 2023.

Today, the Plaintiff/Petitioner also files the Original Board Resolution dated 7th August, 2023 authorized by Sourav Daspatnaik, Director.

I.A. No. 01 of 2023

Mr. Mitra, Ld. Sr. Counsel appearing on behalf of the Plaintiff moves the present application for seeking exemption from pre-institution mediation and settlement by grating of leave under Section 12A of the Commercial Court Act, as amended from time to time, on the ground that some urgent relief is sought for in order to protect the interest of the Plaintiff.

I have heard this present application being no. I.A. No. 01 of 2023 at great length and perused and considered.

On bare perusal of the plaint it appears that the suit contemplates an urgent interim relief as the Plaintiff/Petitioner by filing necessary application under Order XXXIX Rules 1 and 2 read with Section 151 of Code of Civil Procedure, 1908 has prayed for. Therefore, the leave as sought for by the Plaintiff in this instant interlocutory application is granted.

Accordingly, the instant interlocutory application being no. 01 of 2023 is hereby **disposed of**.

I.A. No. 02 of 2023

1. The instant application is filed by the Plaintiff herein under Order XXXIX Rules 1 and 2 of CPC. praying for an order of temporary injunction restraining the Defendant from deducting any amount from the revenue collection account towards variable license fee in terms of Article 12.1.2 (b) of the Concession Agreement date 16.08.2019 alongwith other adjutant prayers.

2. Case of the Petitioner as stated in the instant application is as follows.

3. The Plaintiff/Petitioner is engaged in the business of providing services such as treatment and distribution of water and collection of payment from the customers from the city of Haldia. On the other end, the Defendant/Respondent is the Haldia Development Authority (HAD), the nodal agency for Haldia region, West Bengal and responsible for development of urban infrastructure in Haldia.

4. The Petitioner entered into a Concession Agreement (in short CA) dated 16.08.2019 with the Respondent. Under the said CA, the Petitioner was granted the exclusive right, licence and authority during the subsistence of the Agreement to operate the Project as defined in CA, which is the services, delivery and was further required to operate & maintain and manage the project and the water supply system, including repair and renovation thereof and also ensure smooth and regular supply of water to the Respondent's customers.

5. As per Article 12.2.1(a) and (b) of the CA is required to pay the Respondent a fixed licence fee amounting to Rs. 24,00,00,000/- each year along with 65.5% of the incremental revenue earned by the Petitioner during a concession year was to be shared with the Respondent. The Petitioner as per terms of Article 13.3 of the CA, was entitled to issue invoice and collect water charges in the name and on behalf of the Respondent as per the customer services rules and water tariff applicable on such date and/or such water tariff as may be applicable from time to time. The Petitioner states that pursuant to CA, the Petitioner has been duly paying the fixed licence fees, without any default. Despite their legitimate dues being remain unpaid by the esteemed customers of the Respondent.

6. The contention of the Petitioner is that from the commencement of commercial operations by the Petitioner there have been several defaulting customers of the Respondent who have simply failed to pay their dues for the usage of the water despite the Petitioner having raised invoice and despite several reminders and request. As regard, Mr. Mitra, Ld. Sr. Counsel appearing for the Petitioner submits that in terms of Article 13.5 of the CA, was under an obligation to protect the interest of the Petitioner by making an endeavor to recover the outstanding amounts from such defaulting customers, and in case the Respondent fails to do so within the period of 30 days from the intimation by the Petitioner, then the Respondent was liable to compensate. Whereas, despite fully being aware that the esteemed customers of the Respondent has been not making the payment, the Respondent has been demanding the licence fees from the Petitioner in terms of Article 12.1.2 of the CA for their unjust enrichment. But, the Petitioner has been providing the Respondent esteemed customers with an uninterrupted supply of water despite all the aforementioned hardships, with the goal of putting the public at large at ease.

7. The further case of the Petitioner is that in accordance with Article 10.2.4 (b) of the CA, the Petitioner has been submitting budgets for the expenditure on Operation & Maintenance of the Project Facilities (in short O&M Budget) for each month of the subsequent concession year, but the Respondent has not approved or suggested any changes to them till date. More so, the year 2 and 3 budgets were sent to the Respondent for their approval in the year 2022, as the Respondent for best reason known to him appointed the independent engineer in February 2022 after the lapse of 2 years, be that as it may admittedly the Respondent despite acknowledging the fact the budgets have been shared are not approving and the same can be corroborated from the minutes dated 27.09.2022 and 15.12.2022.

8. Then, on 29.06.2023, the Flocculation Chambers of the New Water Treatment Plant at Geonkhali completely collapsed due to heavy flooding leading to corresponding structural damage of the entire Civil, Structural, Mechanical & Electrical equipment. As per initial reports due to poor

workmanship, faulty construction, poor design and poor quality materials used water retaining wall of RCC make of flocculation chamber collapsed and crack developed in existing structure and crack also developed in DAF building, breaking the DAF wall and damaged electric instruments and equipment. However, in the larger interest of the project, war like efforts were undertaken by the Petitioner to immediate resume operations to provide water from the New WTP by the 06.07.2023 through a make shift arrangement agreed with Respondent.

9. Thereafter, on 11.07.2023, the Petitioner issued a notice under Article 17(1)(a)(i) of the CA wherein it was stated that the aforesaid event has severely affected the Petitioner's ability to perform its obligations under Article 7.1.1 (iii), including others in terms of Article 7.1 of the CA in general and in turn Petitioner is apprehending substantial loss of business and revenue. Therefore, in view of the aforesaid dire situation and the consequent adverse commercial implications that Petitioner shall suffer, the Petitioner called upon the Respondent to consider the period commencing June 29, 2023 until the normalization of the current situation, as an event beyond the reasonable control' and consequently a Force Majeure event under the CA as contemplated under Article 17.1(A)(i) of the CA since the unfortunate incident could not have been foreseen by the Petitioner and was beyond the control of the Petitioner and also not due to any fault of Petitioner.

10. Based on the aforesaid fact, Mr. Mitra, Ld. Sr. Counsel states the Petitioner has been facing ballooning liability, as the revenues is increasing as the volume of water supplied by the Petitioner to the esteemed customers of the Respondent has increased, but the revenue share of the Petitioner is still decreasing as the esteemed customers of the Respondent have not been paying their dues, despite the uninterrupted supply of water. On the top of that Petitioner is being forced to pay the licence fees, despite there being no collection from the defaulting customers of the Respondent and furthermore the Petitioner is being forced to take up the repair work of the collapsed of New WTP, despite there being no fault of the Petitioner.

11. Mr. Mitra further states that the said claim has never been disputed and as such the Petitioner is entitle to a sum of Rs. 23,00,88,664/- and if any interim order is not passed by this Court, there is sheer probability that the Respondent might take active steps to make this suit infructuous by deducting the any license fee from the revenue appropriate account which will not only prejudice the rights of the Petitioner but also affect the final adjudication of the suit. However, Mr. Mitra restrains himself from praying any reliefs as prayed for in the instant application but only prays an order by way of *status quo* on the revenue appropriation account.

12. Considering the above, the Petitioner has made out a *prima facie* case as mentioned hereinabove for obtaining an ad interim ex parte order. The balance of convenience and inconvenience also lies in favour of the Petitioner to obtain an order of *status quo* and if such order is not passed, it is assumed that the Petitioner's right, as delineated in the instant case, somehow be forged by the Respondent.

13. Therefore, considering the submissions as well as perusing the instant application, parties are directed to maintain the *status quo* in respect of the revenue appropriation account/revenue collection account as on this day until any further order be passed by this Court.

14. All the payers enumerated in this application will be considered after the hearing Respondent/Defendant.

15. Issue notice calling upon the Defendant/Respondent to show cause as to why the order of status quo shall not be allowed.

Plaintiff/Petitioner is also directed to serve the plaint, instant application and all annexure annexed hereto within 48 hours upon the Respondent and the Plaintiff/Petitioner is also directed to file the affidavit of service within 48 hours (excluding Durga Puja vacation).

The interim order shall continue till the next returnable date or until further orders, whichever is earlier. The Respondents shall be at liberty to apply for vacation, variation and/or modification of the interim order upon notice to the Petitioner.

To date i.e. **16.12.2023 at 11:30 a.m.** for S/R, A/D and appearance of the Defendant/Respondent.

Both the parties are to act forthwith on the basis of the downloaded copy of this Order.

Dictated and corrected by me

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram