

(2021) 10 CHH CK 0047
In the Chhattisgarh High Court
Case No : Arbitration Appeal No. 19 Of 2021

South Eastern Coalfields Limited

APPELLANT

Vs

M/S Sadbhav Engineering Ltd

RESPONDENT

Date of Decision : 22-10-2021

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 9(1)(i)(d), 9(1)(ii)(d), 9(1)(ii)(e), 37

Commercial Courts Act, 2015 — Section 13

Citation : (2021) 10 CHH CK 0047

Hon'ble Judges : Sanjay K. Agrawal, J; Arvind Singh Chandel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Invoking the appellate jurisdiction of this Court under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996') read with Section 13 of the Commercial Courts Act, 2015, this arbitration appeal has been preferred by the appellants questioning the impugned order passed by the Commercial Court (District Level) granting application under Section 9 of the Act of 1996, as unsustainable and contrary to law.

2. Respondent No.1 herein filed an application under Section 9 of the Act of 1996 seeking interim measures under Section 9(1)(ii)(d) & (e) of the Act of 1996 stating inter alia that the contract awarded to it was terminated on 7-2-2021 illegally and he was blacklisted vide order dated 12-5-2021 and the order of recovery dated 12-5-2021 and the order of encashing the bank guarantee dated 13-5-2021 were passed against it. It has been further stated that pursuant to the order of termination dated 7-2-2021, the order of blacklisting dated 12-5-2021 and the order of recovery dated 12-5-2021; bank guarantee has also been sought to be encashed on 13-5-2021, and respondent No.1 has claimed that the action of the appellants herein is illegal, arbitrary and unreasonable and not bona fide, and the orders impugned have been passed without giving

opportunity. It is also the case of respondent No.1 that as per clause 13 of the general terms and conditions of the contract, dispute should be resolved firstly by an in-house committee to be constituted by the appellants herein and if could not be resolved by that committee, then it should be resolved by appointing an arbitrator under clause 13A of the general terms and conditions of the contract. Injunction was sought to stay the effect and operation of the termination order, the order of blacklisting and the order seeking recovery dated 12-5-2021 restraining the appellants SECL from encashing the bank guarantee and other interim reliefs were also claimed in the application under Section 9 of the Act of 1996.

3. Reply was filed by the appellants herein opposing the application under Section 9 of the Act of 1996. It has been admitted that the contract has been terminated and respondent No.1 has been blacklisted and bank guarantee has been directed to be encashed and amount is being recovered from respondent No.1 herein.

4. The learned Commercial Court after hearing the parties and after going through the pleadings, by the impugned order dated 31-5-2021, set aside the order of blacklisting debarring respondent No.1 to take part in future tenders and also directed that respondent No.1 is entitled to remove equipments, machinery and further directed that no recovery shall be made till the settlement of account / dispute by constitution of an in-house committee as per clause 13 of the general terms and conditions of the contract and thereafter, by appointment of arbitrator as per clause 13A, however, permitted the SECL to encash the bank guarantee.

5. This appeal has been preferred by the appellants / SECL merely on the ground that the order setting aside the order of blacklisting of respondent No.1 Company debarring it to take part in future tenders, is clearly unsustainable and bad in law in view of Section 9(1)(ii)(d) & (e) of the Act of 1996.

6. Mr. Vivek Chopda, learned counsel appearing for the appellants, would submit that part of the impugned order passed by the learned Commercial Court to the extent of setting aside the order blacklisting respondent No.1 by order dated 12-5-2021 and further quashing the order debarring it take part in future tenders is totally unsustainable and bad in law, as the Commercial Court would have no jurisdiction to quash the order of blacklisting and debarring to take part in future tenders in a proceeding under Section 9 of the Act of 1996. However, he would further submit that respondent No.1 had already removed the equipments and the present appellants have already encashed the bank guarantee as per the order of the Commercial Court and the order has been partly executed. As such, the impugned order {paragraph 39(i)} i.e. quashment of the order of blacklisting and further debarring to take part in future tenders, is liable to be set aside.

7. Mr. Rishabh Garg, learned counsel appearing for respondent No.1, would submit that the impugned order passed by the learned Commercial Court

quashing the order of blacklisting and debarring respondent No.1 herein to take part in future tenders by order dated 12-5-2021, is strictly in accordance with law. However, he would further submit that in compliance of the order passed by the Commercial Court in paragraph 39(ii) of the impugned order, equipments and machinery have already been removed and the SECL had already invoked bank guarantee. However, he would also submit that even the order passed by the Commercial Court in paragraph 39(iii) directing no recovery till the settlement of account / dispute by constitution of in-house committee as per clause 13 of the general terms and conditions of the contract and thereafter by appointment of arbitrator as per clause 13A, is strictly in accordance with law.

8. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

9. In a proceeding initiated under Section 9 of the Act of 1996, the impugned order has been passed by the Commercial Court and in that view of the matter, it would be appropriate to notice the provisions contained in Section 9(1)(ii)(d) & (e) of the Act of 1996 which state as under: -

"9. Interim measures, etc. by Court.-(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) xxx xxx xxx

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) to (c) xxx xxx xxx

(d) interim injunction or the appointment of a receiver;

(e) 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."

10. By virtue of Section 9(1)(ii)(d) of the Act of 1996, the Commercial Court has power and jurisdiction to grant interim injunction. An interlocutory / interim injunction is an injunction that is limited so as to apply only until the final hearing or final determination by the court of the rights of the parties; and accordingly it issues in a form that requires that, in the absence of a subsequent order to the contrary, it should continue up to but not beyond the final hearing of the proceedings. The two matters with which the court is concerned in granting an injunction of this kind are, first the maintenance of a position that will most easily enable justice to be done when its final order is made, and secondly, an interim regulation of the acts of the parties that is, in other respects, the most just and convenient in all the circumstances. The purpose of an interim injunction

is to regulate the position of the parties pending trial, whilst avoiding a decision on issues which could only be resolved at trial. The interim measures are either prohibitory (not to perform certain specified acts) or occasionally mandatory (directed to performance of specified acts so as to restore an antecedent position). (See page 394 under heading "Interim Injunction" of Malhotra's "Commentary on the Law of Arbitration",

Fourth Edition by Indu Malhotra (Volume 1).)

11. After hearing the parties, by the impugned order, paragraph 39, following order has been passed by the learned Commercial Court which states as under: -

"39- For what has been discussion herein-above, the present petition is decided in the following manner:-

(i) That the order of black-listing the petitioner and barring him to take part in future tenders is not sustainable in the eyes of law and is hereby quashed;

(ii) That the petitioners are entitled to remove their equipments, machineries and other material which was permitted by the respondent nos.1 & 2 to mobilize on the site;

(iii) That no recovery can be effected against the petitioner till the settlement of account/dispute by constitution of in-house committee as per clause 13 and thereafter by appointment of Arbitrator as per clause 13A;

(iv) That respondent nos.1 & 2 are entitled to encash the Bank Guarantee."

12. So far as the impugned order contained in paragraph 39(ii) is concerned, there is no dispute between the parties that pursuant to the order of the Commercial Court, respondent No.1 Company has removed its equipments, machineries and other materials and as such, it need not be interfered with by this Court in appeal. Similarly, it is not in dispute that the appellants herein have encashed the bank guarantee pursuant to the order of the Commercial Court. So far as the relief of order contained in paragraph 39(iii) of the impugned order in which it has been directed that no recovery can be effected against respondent No.1 till the settlement of account / dispute by constitution of in-house committee as per clause 13 and thereafter by appointment of Arbitrator as per clause 13A is concerned, the same appears to be in accordance with law, as it will facilitate the resolution of dispute between the parties as per the arbitration agreement entered into between them. Therefore, that part of order also need not be interfered with and we hereby affirm the order of the learned Commercial Court to that extent.

13. Now, the only part which has been contested by learned counsel for the parties is the order of blacklisting and debarring respondent No.1 herein to take part in future tenders which has been quashed by the learned Commercial Court. It is the case of the appellants herein that even respondent No.1 herein did not pray for quashing of the order of blacklisting which has been passed against

respondent No.1 on 12-5-2021 and further, respondent No.1 was debarred from taking part in future tenders.

14. True it is that respondent No.1 did not pray for quashing the order of blacklisting which has been passed against it by order dated 12-5-2021 and it is also beyond the scope of Section 9(1)(i)(d) of the Act of 1996. The Commercial Court in its jurisdiction under Section 9 of the Act of 1996 would have jurisdiction to pass interim injunction or such other interim measure of protection as may appear to it to be just and convenient, but certainly, it would not include to quash the order of blacklisting and the Commercial Court would have no jurisdiction to quash the order of blacklisting proceeding under Section 9 of the Act of 1996 in the garb of granting interim injunction as it is absolutely without jurisdiction and beyond the scope of power under Section 9 of the Act of 1996.

15. Accordingly, the part of order passed by the Commercial Court directing quashment of the order of blacklisting dated 12-5-2021 filed as Annexure A-37 before the Commercial Court and debarring respondent No.1 herein from taking part in future tenders, is hereby set aside, as the same is without jurisdiction and without authority of law. Rest of the order passed by the Commercial Court qua paragraphs 39(ii), (iii) & (iv) of the order impugned is hereby maintained. However, respondent No.1 herein is at liberty to proceed in accordance with law against the order of blacklisting and debarring it by order dated 12-5-2021, if so advised.

16. The arbitration appeal is allowed to the extent indicated herein-above. No order as to cost(s).