

GAHC010126262019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/163/2019

M/S GAGAN DEAL TRADE PRIVATE LTD.,
A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956 HAVING
ITS REGISTERED OFFICE AT 140, CR AVENUE, 1ST FLOOR, KOLKATA-
700007 AND HAVING ITS GUWAHATI OFFICE AT GORCHUK, NH-37,
GUWAHATI- 781035, ASSAM, TO BE REP. BY SRI NISHANT AGARWAL, S/O-
SRI B.L. AGARWAL, R/O- ANIL PLAZA, 2ND FLOOR, G.S. ROAD,
GUWAHATI- 781005.

VERSUS

THE FOOD CORPORATION OF INDIA AND 4 ORS
REP. BY ITS CHAIRMAN AND MANAGING DIRECTOR, HEAD QUARTER,
KHADYA SADAN, 16-20 BARAKHAMBA LANE, NEW DELHI-01.

2:THE DEPUTY GENERAL MANAGER
STORAGE

HEAD QUARTER

KHADYA SADAN
16-20 BARAKHAMBA LANE
NEW DELHI-01.

3:THE EXECUTIVE DIRECTOR
NORTH EAST ZONE

FOOD CORPORATION OF INDIA
G.L. PUBLICATION BUILDING
LACHIT NAGAR
G.S. ROAD
GUWAHATI- 781007.

4:THE GENERAL MANAGER
ASSAM REGION

FOOD CORPORATION OF INDIA
REGIONAL OFFICE
ASSAM REGION
G.S. ROAD
PALTAN BAZAR
GUWAHATI- 781008.

5:THE BRANCH MANAGER
HDFC BANK LTD.

G.S. ROAD
GUWAHATI- 781005

Advocate for the Petitioner : MR. D SAIKIA

Advocate for the Respondent : SC, F C I

BEFORE
HONOURABLE THE CHIEF JUSTICE
HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Mr. D. Saikia, Sr. Advocate.
Mr. B. Gogoi, Advocate.

For the Respondents : Mr. P. K. Roy, Sr. Advocate.
Mr. S. K. Chakraborty, Advocate.
Mr. R. Chakraborty, Advocate.

Date of Hearing : 01.06.2023

Date of Judgment : 12.06.2023

JUDGMENT & ORDER (CAV)

(A.D. Choudhury, J)

1. Heard Mr. D. Saikia, learned Senior Counsel assisted by Mr. B. Gogoi, learned counsel for the appellant. Also heard Mr. P. K. Roy, learned Senior Counsel assisted by Mr. S. K. Chakraborty, learned counsel for the respondent Nos. 1, 2, 3 and 4 and Mr. R. Chakraborty, learned counsel for the respondent No.5.
2. The present intra court appeal is directed against the judgment and order dated 04.05.2019 passed by the learned Single Judge whereby, the writ petition being WP(C) 5955/2015, preferred by the appellant assailing an action of termination of contract and encashment of bank guarantee, was negated.
3. Pursuant to an NIT dated 10.04.2014 issued by the respondent i.e. Food Corporation of India Limited, The appellant/ writ petitioner, was awarded a contract to construct a 50,000 M.T. capacity Non Railways Siding Godown at Village-Ouguri, Kachamari, Nagaon, Assam on Build, Own and Operate basis for a guaranteed period of 10 (ten) years @ Rs.6.93 per Qt. per month. However, alleging occurrence of Force Majeure events, the appellant sought change of site of construction and extension of time. Though, time was extended for a limited period, however, change of site was rejected and the authority terminated the contract and encashed Bank Guarantee and also forfeited security deposits by an order dtd. 30.04.2015 alleging violation of terms of Contract. The said order was assailed in the writ petition.
4. In the aforesaid factual backdrop, let this Court first look into the Bid

clauses and Contract Conditions which are essential for determination of the present lis, which are as follows:

- I. The godown was to be constructed on Build, Own and Operate basis over the land offered by the appellant within a scheduled time of 12 (twelve) months from the issuance of the acceptance letter (in the case of the petitioner letter is dated 11.09.2014.)
- II. Successful bidders are required to furnish a security deposit for completion of construction in time @ Rs. 40/- per M.T. for non railway siding godowns and @ Rs. 60/- per M.T. for railway siding godowns.
- III. In terms of Clause-7 of the NIT dated 10.04.2014, those bidders, who do not own or hold land but intend to acquire land by way of ownership/ registered lease, are to be acquired within 120 days from date of issuance of acceptance letter. Such Bidders are also required to furnish a supplementary guarantee in the form of Bank Guarantee @ of Rs. 100/- per M.T.
- IV. The Acceptance Letter (supra) also mandated production of the documents of ownership of the land/ lease deed mentioned in the technical bid along with approval of construction within 120 days from the date of issuance of the letter of acceptance and it was further provided that in the event of failure, the contract would be cancelled, supplementary guarantee revoked and security deposit would be forfeited.
- V. The Bidder was to enclose the details of the site, layout plan, indicating the location of the site showing the approach to the main road along with the Bid and change of such site shall not be agreed

by FCI after submission of bid

- VI. The specific location of the land proposed by the Bidder would not be permitted to be changed at any stage after submission of the Bid under any circumstances and failing which, the EMD, supplementary guarantee, security deposit and performance guarantee furnished by the bidder were liable to be forfeited / revoked.
- VII. The EMD was liable to be forfeited if the bidder resiled from his offer and / or modifies the term and condition thereof. The bank guarantee submitted as supplementary guarantee is also liable to be encashed along with the forfeiture of EMD in such an eventuality.
- VIII. In the event, the godown is not completed on specified land mentioned in the Bid document and not handed over within the stipulated period or there is any breach of condition of the contract, security deposit is liable to be forfeited.
- IX. The Clause 59 of the contract document defines Force Majeure to be any event or circumstance or a combination of events which are beyond the reasonable control of the affected party and because of such circumstance/ event, the affected party could not implement the agreement with exercise of reasonable skill and care. Such eventuality should not result from the negligence of the party and the event should be in the nature of incapacitating and of severe magnitude having material adverse effect.
- X. A procedure has been laid down for invoking the Force Majeure Clause which includes giving notice by describing in reasonable effect

of such an event and estimated secession of Force Majeure.

XI. It was also provided that in a situation such an event continues to exist, the parties will be at liberty to terminate such agreement.

5. The appellant/ writ petitioner did not hold or own land but proposed to acquire the same. Accordingly, supplementary guarantee was also submitted.
6. The writ appellant projected in the writ petition that it could not complete acquisition of the land within time stipulated due to occurrence of events which fell within the Force Majeure Clause and accordingly, sought for extension of time and permission to change the site. Initially, time was granted and therefore, it was also projected that the fact of granting extension of time itself confirmed that the respondent corporation admitted existence of such a situation. Therefore, the contract could not have been terminated and the security deposit and special deposit could not have been forfeited.
7. The stand of the Respondent Corporation was that by way of incorporation of Clause-43 and Condition No. 20 of NIT, it was specified that site cannot be changed at any stage under any circumstances and Clause-8 did not absolve the petitioner from the obligation to acquire the specified land and to submit the documents within 120 days from the date of acceptance of letter. The prayer for extension of time was granted in public interest. However, the petitioner failed to do the needful within the time extended on prayer of the petitioner.

It was yet another contention that the Corporation had acted as per the terms stipulated in the contract and the same cannot be termed to be illegal or arbitrary.

The fortuitous events sought to be explained by the writ petitioner do not qualify to fall within the Force Majeure Clause inasmuch as the words or expressions used in covenant between the parties are to be looked into.

8. The learned Single Judge rejected the contentions of the petitioner and dismissed the writ petition by arriving at the following conclusions:

- I. Paragraphs 5 and 6 of the acceptance letter dated 11.09.2014 mandated the construction of godown within 12 (twelve) months from the date of such letter and also mandates extension of validity of the bank guarantee till 08.01.2015 and the writ petitioner admittedly could not complete the construction or submit the required documents.
- II. Clause-43 of the MFT did not permit change of site after submission of bid.
- III. Time was extended till 07.07.2015, however, the petitioner instead of submitting the documents sought for change of location.
- IV. Invitation of Bid for execution of work is not an offer. Only after the offer given by the petitioner in the shape of its standard and after the acceptance of the same, it became a binding contract.
- V. The contract so entered into by the successful bidder and the government or other authority is governed by the doctrine of privities and therefore, the matter involved is under domain of law which is a private one without any elements of public law.
- VI. To decide the contention of the writ petitioner that it was placed in a situation that the execution of the contract entered into between the parties itself had become impossible, requires evidence inasmuch

as a party seeking excuse of non performance is to prove that non performance was due to an impediment beyond its control and it could not have reasonably been foreseen by it at the time of making of the contract and such determination cannot be made in a writ proceeding.

VII. As law is well settled that in the course of commercial dealings when an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending dispute subject to the exception that there is a fraud in connection with bank guarantee and the beneficiary wants to take advantage of it and the other exception relates to those cases where encashment would result in irretrievable harm and in absence of any of the aforesaid exceptions, the power under Article 226 of the Constitution of India cannot be exercised.

9. Mr. D. Saikia, learned senior counsel assailing the aforesaid judgment argued that obstructions were created by certain powerful organizations objecting acquisition of agricultural land by the petitioner, for which, the petitioner could not acquire the land in the selected locality and the situation flared up to an extent that employees working under the petitioner were also beaten up. Therefore, the petitioner was compelled to invoke Force Majeure Clause.

Relying on the Annexure-I series annexed to the Writ petition, Mr. Saikia, learned Senior Counsel tried to impress upon this Court that there were obstructions from the aforesaid organizations and local people and such incidents/events clearly entitled the writ appellant to invoke the

Force Majeure Clause. However, the learned Single Judge did not consider such tangible material available on record and learned Single Judge also did not consider the fact that the extension of time granted by the Corporation in the aforesaid backdrop fortified the stand of the petitioner.

The learned Senior Counsel further submits that the petitioner brought sufficient material on record to show that in similar circumstances, time for completion were sufficiently extended in different parts of India by the Corporation, which acted arbitrarily in case of the petitioner only, by not granting sufficient time and thus discriminated the petitioner. The learned Single Judge ignored such material.

Mr. Saikia, learned Senior Counsel referring to the Minutes of SLC meeting dated 14.05.2015 submits that the SLC itself granted extension admitting and recording the difficulties faced by the petitioner and also referred the matter to HLC for approval but without awaiting such Approval, revoked the bank guarantee ignoring the fact the bank guarantee was extended on 08.01.2015.

10. Per contra Mr. P.K. Roy, learned Senior Counsel representing the Corporation, argues that there was no scope, either under the bid clause or under the acceptance letter to change the site inasmuch as suitability of the site was one of the important criteria on the basis of which bids were evaluated. Therefore, the request of the appellant, though was considered liberally and time was extended, however, in view of prayer for change of site, the Corporation was left with no option but to terminate the contract and forfeit / revoke the bank guarantee as well as EMD in terms of stipulations provided in the bid document and the contract.

Mr. Roy, learned Senior Counsel further contends that in rejecting the writ petition, the learned Single Judge has not committed any error either in law or facts and therefore, no interference is required by this Court.

11. This Court has given thoughtful consideration to the arguments advanced by the learned counsels for the parties and also perused the materials available on record.
12. In the case in hand, there is no dispute that the writ appellant failed to acquire the land within the stipulated period and it is also not in dispute that the writ appellant requested the change of site. Therefore, admittedly under the terms of the contract and bid conditions, the contract was liable to be cancelled and the EMD and bank guarantee were liable to be forfeited/ revoked. Therefore, such action on the part of the respondent Corporation under the terms of the contract as aforesaid, cannot be treated to be in violation of any fundamental or any other legal right of the writ appellant so as to persuade the writ Court to exercise the extraordinary power under Article 226 of the Constitution of India.
13. Now coming to the invocation of the Force Majeure Clause, it is by now well settled that in a case where contract is required to be rescinded on account of a Force Majeure event, the burden to prove that such an event existed, is on the party claiming Force Majeure. Unless there is compelling evidence that a contract cannot be performed under any circumstance, the Court generally does not favour the party resorting to such a clause.
14. In support of this plea of Force Majeure, heavy reliance was placed by Mr. Saikia, learned Senior Counsel, upon the Annexure-I series, which are documents/communications purportedly filed by certain organisations before the State/revenue authorities demanding not to transfer

agricultural land. Even if it is assumed that such events occurred, a writ Court in exercise of its extraordinary power cannot conclude, on the basis of this material that the events narrated therein were in the nature of 'incapacitating' and of 'severe magnitude' having material adverse effect and created compelling situation under which, the contract could not be performed by the writ petitioner. It is also essential to establish that such eventuality has not resulted from the negligence of the party claiming benefit of Force Majeure.

15. Law is by now well settled that a Writ Court in exercise of its extraordinary jurisdiction cannot adjudicate upon disputed questions of the fact inasmuch as the claim of the writ petitioner regarding the occurrence of event leading to a Force Majeure situation is not admitted. Therefore, this Court cannot make any assessment and determination on the basis of the aforesaid Annexures that the situation was so compelling to grant benefit of Force Majeure Clause to the petitioner.
16. The other aspect of the matter is that the petitioner prayed for change of Site. Such course of action, under the terms of the contract as discussed herein above, is not permissible under any circumstances and such action is liable to be treated as violation of terms of the Contract. Therefore, the rejection of prayer of the petitioner to change of site could not have been acceded to by the respondents.
17. The Arguments of Discrimination advanced by Mr. Saikia also do not find favour of this Court in as much as a writ Court Cannot presume discrimination until and unless it is shown that the petitioner and the other entities were treated differently under similar circumstances to the prejudice of the petitioner. The situation/condition under which other

bidders in other states were granted more time are not available before this Court inasmuch it is also not a case that petitioner was not at all granted extension of time. The fact still remains that the petitioner sought change of site, which course of action is not at all permissible under the Contract.

18. Therefore, in view of the aforesaid, this Court is of the considered opinion that the learned Single Judge has rightly dismissed the writ petition. The impugned order dated 04.05.2019 does not suffer from any infirmity warranting interference in the intra-Court appellate jurisdiction of this Court. Accordingly, the present writ appeal also stands dismissed being devoid of any merit. Parties to bear their own cost.

JUDGE

CHIEF JUSTICE

Comparing Assistant