

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.08 of 2023

Sri Niroj Kanti Dhar

..... Petitioner(s);

Versus

The State of Tripura & another

.....Respondent(s)

For Petitioner(s) : Mr. G.K. Nama, Advocate.

For Respondent(s) : Mr. D. Sarma, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

25/01/2024

Heard learned counsel for the parties.

2. Petitioner seeks appointment of an independent Arbitrator in terms of Clause 22.1 and 22.2 of the agreement and the work order dated 14.09.2016 issued by the Executive Engineer, Kumarghat Division PWD (R&B), Kumarghat, Unakoti Tripura in respect of the dispute in relation to execution of "Construction of 1000 seated capacity town hall at Kumarghat, Unakoti District, Tripura/SH Building and ancillary works. Reference is made to the order dated 11.01.2024 which is quoted hereunder :

"Heard Mr. G. K. Nama, learned counsel for the petitioner and Mr. M. Debbarma, learned additional Government Advocate for the State.

[2] Petitioner seeks appointment of an Independent Arbitrator in terms of Clause 22.1 and 22.2 of the agreement bearing No.19/CE/EE/KD/2016-17 and the work order dated 14.09.2016 issued by the Executive Engineer, Kumarghat Division, PWD(R&B), Kumarghat, Unakoti Tripura in respect of the dispute which has arisen in connection with the execution of the construction of 1000 seated capacity town hall at Kumarghat, Unakoti District, Tripura/SH: Building portion including acoustic works, internal water supply, sanitary installations and other miscellaneous works for an estimated cost of Rs.5,28,42,157/- which was awarded in favour of the petitioner at 11% below the tendered value.

[3] According to the petitioner the work was to be completed within a period of 24 months with effect from 29.09.2016 to 29.09.2018. However, the work would not be completed within the stipulated period due to fault on the part of the Department. The extension of time was granted lastly up to 07.03.2022 in various stages. By referring to letter dated 10.02.2022 (Annexure-2) the petitioner contends that the complete drawing of the work was handed over after 6(six) years of the work order. The cost of materials and other ancillary expenses including wage of labourers increased substantially. Therefore, the petitioner vide letter dated 28.02.2022 requested the Department to consider the issue of price escalation. He made representation on 07.11.2022 (Annexure-4) to the Executive Engineer, Kumarghat Division, PWD(R&B), Kumarghat, Unakoti Tripura with a request to close the agreement and (i) release the payments for the work done, (ii) finalizing the earth work done in cutting the tilla land, (iii) releasing price

escalation as per clause 10 of the CC, (iv) cost on loss on overhead as per law of land and (v) loss of profit with interest. However, since the request was not heeded to he made representation on 16th January 2023(Annexur-5) to the Superintending Engineer, 1st Circle, PWD(R&B), Kumrghat, Unakoti Tripura under clause 22.2 along with the claims for early decisions. Having failed to elicit any response he then approached the Chief Engineer, PWD (Building), Capital Complex, P.O. Knjaban, Agartala, West Tripura, respondent No.2 for appointment of an Arbitrator under clause 22.2 of the Conditions of Contract (Anexure-6). On failure to do so he approached this court for appointment of an independent Arbitrator.

[4] Mr. G. K. Nama, learned counsel for the petitioner submits that the delay in execution of the work is not on the part of the contractor. Therefore, the dispute may be referred to an independent Arbitrator to decide the claims.

[5] Respondents have appeared and filed a counter affidavit. The relevant details of the execution of the works, the agreement entered into with the petitioner, the relevant dates for completion of the work are not disputed by the respondents. However, it is stated that the petitioner vide letter dated 28.02.2017 requested the concerned Executive Engineer to provide layout of construction and design & drawing so that the work may be started without further delay. The petitioner had exhausted almost 5(five) months in earth excavation work by then. Thereafter, the Executive Engineer, vide letter dated 26.04.2017 and 27.02.2018 (Annexure-R/2 and R/3) had asked the petitioner to submit bar chart so that the work could be completed within stipulated period but the petitioner did not submit the same. The respondents further referred to Clause-65(1.2) of Section VI of the Agreement which requires that one set of drawings shall be furnished free of cost to the Bidder. Drawings for any particular activity shall be issued to the Bidder at least 30 days in advance of the scheduled date of the start of the activity. However, no extra claims by the Bidder towards any delay in issuance of drawing or change in drawings shall be admissible. The Superintending Engineer shall intimate the Bidder 7 days in advance regarding any delay in issuance of drawings, for any particular stage of works. For any delay due to issuance of drawings, for any particular stage of work the Bidder shall be granted extension of time. The respondents had further stated that the petitioner was responsible for not submitting the bar chart of work programme and as such department cannot be blamed for delay in issuance of drawings without the bar chart. It is further stated that the petitioner was unable to maintain the steadiness of the work as because proportionate progress of the work is not satisfactorily and the work may not be completed within stipulated period of time i.e. 28.09.2018. He was asked to expedite the work vide letter dated 26.04.2017. The petitioner has a very poor degree of workmanship & was unable to get an electrical service connection for the worksite. The concerned Executive Engineer took all initiative and extended all possible assistance by forwarding his letter dated 04.05.2017 to the Deputy General Manager, Electrical Division No.V, Kumarghat, Unakoti Tripura regarding installation of service connection at the worksite. Moreover, the petitioner had failed to arrange raw materials like sand, wood etc. for execution of the work. In that respect also his request was forwarded to the Sub-Divisional Forest Officer, Kumarghat vide letter dated 03.05.2018. It is thus clear that all cooperation was made by the Executive Engineer by extending necessary assistance to the petitioner to complete the work within time. In spite of that progress of the work was at a snail's pace. Petitioner had a poor infrastructure for execution of the work. It is stated that petitioner has vide letter dated 21.01.2020 expressed his inability to continue the work unless Department paid the outstanding bills as per the running accounts bills which is in violation of the terms and conditions of the contract which is not expected from a 1st class contractor like the petitioner. Petitioner had also declared that he will suspend the work for non-payment of the full amount as per running accounts bills submitted by him which again a violation of the terms and conditions of the contract. It is submitted that payments were made regularly to the petitioner as per availability of fund. The stipulated date for completion of work was 09.03.2021 and thereafter, extension of time was granted by the competent authority in public interest. The petitioner after elapse of stipulated date of completion of the work verbally requested to consider the price escalation for balance work to be carried out and only then he would continue to work. However, the executive engineer also informed him verbally that time extension will be granted in due course but other points are to be considered as per clauses of the Agreement. The petitioner, thereafter, suspended his work vide letter dated 28.02.2020. The respondents rely upon clause 44.1 of the agreement and submit that there is no provision for price escalation and price adjustment is not applicable for the work for which stipulated time for completion is less than or equal to 24 months. At para 4.16 of the affidavit the respondent stated that on availability of fund Rs.5,86,00,000/- was paid to the petitioner.

[6] Mr. M. Debbarma, learned additional Government Advocate for the State submits that the delay in execution of the work is completely attributable to the petitioner and not to the Department. The time extension was granted in the interest of the public service for completion of the work and the petitioner agreed to execute balance work. He

also refers to Clause-54.5(b) of the agreement which provides that cost difference for balance unexecuted work is recoverable from the petitioner. He submits that the delay is completely attributable to the petitioner and there is no scope for price escalation/ price adjustment as per clauses of the agreement. Dispute is, therefore, not amenable to arbitration.

[7] Mr. G. K. Nama, learned counsel for the petitioner in reply submits that the averments made in the counter affidavit do not deny the existence of a dispute relating to price escalation and price adjustment due to delay in execution of work for which extension of time was granted by the respondents themselves. This Court in exercise of the powers under Section 11(6a) of the Arbitration & Conciliation Act, 1996 is not required to examine the merits of the dispute between the parties. Instead, if the arbitration clause provides for appointment of an Arbitrator on the existence of a dispute arising out of the agreement in question, reference may kindly be made to an independent Arbitrator since the respondent No.2 has failed to discharge his contractual responsibility in appointment of an independent Arbitrator in terms of clause 22.2 of the agreement. He submitted that since the respondents are the employees of the department, therefore in view of the neutrality principle an independent Arbitrator could only be appointed.

[8] I have considered the submission of the learned counsel for the parties and taken note of the material pleadings. The petitioner has prayed for appointment of an Arbitrator in connection with the agreement (certified copy which has been placed by the petitioner) and the work order dated 14.09.2016 in respect of the dispute relating to payment of dues towards the items such as balance outstanding payments for work done but not measured, price escalation, loss on overhead etc. as per representation made by the petitioner to the Executive Engineer, Kumarghat Division, PWD(R&B), Kumarghat, Unakoti Tripura; the Superintending Engineer, 1st Circle, PWD(R&B), Kumarghat, Unakoti Tripura and the Chief Engineer, PWD (Bulding), Kinjaban, Agartala, respondent No.2. The affidavit of the respondents in substance denies the claim of the petitioner on merits. Statements made by the respondents do not dispute the existence of an arbitration clause and the disputes raised by the petitioner, though according to them, substantial payment to the extent of Rs.5,86,00,000/- have already been made in favour of the petitioner.

[9] As such, this court is of the view that the petitioner has made out a case for appointment of an independent arbitrator. I, therefore, propose to appoint Hon'ble Mr. Justice Subhasis Talapatra, former Chief Justice of Orissa High Court and former Judge of this Court as an Arbitrator to decide the dispute between the parties. The Registry is directed to seek consent of His Lordship and a declaration in terms of schedule-VII read with Section 12(1) of the Arbitration and Conciliation Act, 1996. The instant order be communicated to the learned proposed Arbitrator by the Registry.

Accordingly, list the matter on **25.01.2024** along with the consent and declaration on the part of the proposed Arbitrator."

3. The proposed Arbitrator Hon'ble Mr. Justice Subhasis Talapatra, former Chief Justice of Orissa High Court and former Judge of this Court has conveyed his consent for being appointed as an Arbitrator in respect of the disputes raised by the petitioner referred to herein and also submitted a declaration in terms of the provisions of the Arbitration and Conciliation Act, 1996.

4. Learned counsel for the parties, therefore, submit that the proposed Arbitrator may be appointed to adjudicate the dispute between the parties.

5. In view of the reasons recorded in the order dated 11.01.2024 and the consent and declaration submitted by the proposed Arbitrator, I hereby appoint Hon'ble Mr. Justice Subhasis Talapatra, former Chief Justice of Orissa High Court and former Judge of this Court, as an Arbitrator to decide the dispute between the parties. Learned Arbitrator is requested to take into consideration the Schedule of Model Fees prescribed under Schedule IV and the timeline prescribed under Section 29-A of the Arbitration and Conciliation Act, 1996 as amended.

6. Registry is directed to communicate the instant order along with a copy of the entire pleadings of the instant application to the learned Arbitrator forthwith.

7. The instant petition stands disposed of.

(APARESH KUMAR SINGH), CJ