

GAHC010015802016



IN THE GAUHATI HIGH COURT

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

WP(C) 2958/2016

M/S Sun Security Services

A Proprietorship Firm having its office at House No. 211, R.G. Baruah Road, Guwahati-781024, Represented by its Proprietor Maj, Surajit Barman

.....**Petitioner**

VERSUS

1.The Union of India,

Represented by the Secretary to the
Ministry of Railways, New Delhi

2.North East Frontier Railway,

Maligaon, Guwahati
Represented by its General Manager

3.Senior Coaching Depot Officer, North

East Frontier Railway, Maligaon,
Guwahati

.....**Respondents**

BEFORE

HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

For the petitioner

: Mr. D. P. Borah, Advocate.

For the respondents

: Mr. A. Barkakati, SC, Railway.

Date of hearing : 12.06.2024

Date of Judgment/Order : **12.06.2024**

JUDGMENT & ORDER

Heard Mr. D.P. Borah, learned counsel for the petitioner. Also heard Mr. A. Barkataki, learned Standing Counsel for the Railway.

2. By filing this petition under Article 226 of the Constitution of India, the petitioner is challenging inter-alia, the letter dated 04.05.2016 issued by the Senior Coaching Deport Officer, whereby the work of "Pad locking of coaches at Guwahati and Kamakhya station, stick line Guwahati & Kamakhya, pit line Guwhati, New Guwahati and Kamakhya for a period of 2 years" has been rescinded.

3. The case of the petitioner is that the petitioner was allotted the work of Pad locking of coaches at Guwahati and Kamakhya station, vide contract agreement dated 25.09.2014 for a period from 26.05.2014 to 24.05.2016. Accordingly, the petitioner commenced the subject work. However, later on, the said work was terminated for which, the present writ petition has been filed.

4. Mr. D. P. Borah, learned counsel for the petitioner submits that the work has been terminated without issuing the 7 days notice as required under the provisions of the subject contract. He accordingly submits that the termination order is in gross-contravention of the provisions of the natural justice and hence, the same warrants judicial intervention of this Court under Article 226 of the Constitution of India.

5. Mr. A. Barkataki, learned Standing Counsel for the Railway Department though conceded that the requisite 7 days notice which has to be preceded before issuing the 48 hours notice was not issued in the subject matter, however, he submits that the same could have been taken before the authority of the Railway in terms of Clause-64 relating to settlement of dispute as provided under the contract agreement.

6. Heard the parties and perused the materials available on record.

7. It appears that the petitioner was awarded the work of Pad locking of coaches at

Guwahati and Kamakhya station, in terms of the contract agreement dated 25.09.2014. It further appears that vide letter dated 14.12.2014, the Railway authorities has issued a '7 days notice' in accordance with Clause-62 of the Standard General Conditions of Contract to the petitioner to commence work/to make good the progress failing, which action as provided in Clause-62 of the SGC i.e. to terminate the contract shall be issued. Pursuant to the aforesaid '7 days notice', the petitioner vide letter dated 21.12.2015 responded to the Railway authorities stating that they have resumed the work of pad locking services at different places like Guwahati and Kamakhya station w.e.f. 21.12.2015. It further appears that the Railway authorities vide letter dated 23.12.2015 allowed the petitioner to resume the work with immediate effect as per the terms and conditions of the contract.

8. Surprisingly, thereafter, on 23.04.2016, it appears that the Railway authorities has issued '48 hours notice' in terms of the Clause-62 of the GCC based on the '7 days notice' issued on 14.12.2015 to the petitioner to resume work else on expiry of the said period, termination of the contract shall be issued. Thereafter, vide letter dated 04.05.2016, the Railway authorities terminated the subject work allotted to the petitioner.

9. In order to appreciate the rival contentions of the parties, pertinent to refer to Clause-63 of the contract agreement:-

63. Determination of contract owing to default of contractor: - (1) If the Contractor should: -

(i) Becomes bankrupt or insolvent, or

(ii) Make an arrangement with of assignment, in favour of his creditors, or agree to carry out the contract under a Committee of Inspection of his creditors, or

iii) Being a Company or Corporation, go into liquidation (other than a voluntary (liquidation for the purposes of amalgamation or reconstruction), or

iv) Have an execution levied on his goods or property on the works, or

(v) Assign the contract or any part thereof otherwise than as provided in Clause 7 of (these conditions, or

(vi) Abandon the contract, or

(vii) Persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or

(viii) Fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period or

(ix) Fail to remove materials from the site or to pull down and replace work after receiving from the Engineer notice to the effect that the said materials or works have been condemned or rejected under Clause 25 and 27 of these conditions, or

(x) Fail to take steps to employ competent or additional staff and labour as required under clause 26 of the conditions, or

(xi) Fail to afford the Engineer or Engineer's representative proper facilities for inspecting the works or any part thereof as required under clause (28) of the conditions, or

(xii) Promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent or servant to any officer or employee of the Railway or to any person on his or on their behalf in relation to the execution of this or any other contract with this Railway.

(xiii)

(A) At any time after the tender relating to the contract has been signed and submitted by the Contractor, being a partnership firm admit as one of its partners or employ under it or being an incorporated company elect or nominate or allow to act as one of its directors or employ under it in any capacity whatsoever any retired engineer of the gazetted rank or any other retired gazetted officer working before his retirement, whether in the executive or administrative capacity, or whether holding any pensionable post or not in the Engineering Department of the Railways for the time being owned and administered by the President of India before the expiry of two years from the date of retirement from the said service of such Engineer or Officer unless such Engineer or Officer has obtained permission from the President of India or any officer duly authorized by him in this behalf to become a partner or a director or to take employment under the contract as the case may be.

(B) Fail to give at the time of submitting the said tender:-

(a) The correct information as to the date of retirement of such retired engineer or retired officer from the said service, or as to whether any such retired engineer or retired officer was under the employment of the Contractor at the time of submitting the said tender, or

b) The correct information as to such engineers or officers obtaining permission to take employment under the Contractor, or

c) Being a partnership firm, the correct information as to, whether any of its partners was such a retired engineer or a retired officer, or

d) Being an incorporated company, correct information as to whether any of its directors was such a retired engineer or a retired officer, or

(e) Being such a retired engineer or retired officer suppress and not disclose at the time of submitting the said tender the fact of his being such a retired engineer or a retired officer or make at the time of submitting the said tender a wrong statement in relation to his obtaining

permission to take the contract or if the Contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor.

Then and in any of the said cases, the Engineer on behalf of the Railway may serve the Contractor with a notice to that effect and if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being a made good and carry on the work or comply with such directions as aforesaid to the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48 hours notice in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and after expiry of 48 hours notice, a final termination notice, should be issued and adopt either or both of the following courses:

(i) To carry out the whole or part of the work from which the Contractor has been removed by the employment of the required labour and materials, the costs of which shall include lead, lift, freight, supervision and all incidental charges

(ii) To measure up the whole or part of the work from which the Contractor has been removed and to get it completed by another Contractor, the manner and method in which such work is completed shall be in the entire discretion of the Engineer whose decision shall be final and in both the cases (x) and (y) mentioned above, the Railway shall be entitled (i) to forfeit the whole or such portion of the security deposit as it may consider fit, and (ii) to recover from the Contractor the cost of carrying out the work in excess of the sum which would have been payable according to the certificate of the Engineer to the Contractor if the works had been carried out by the Contractor under the terms of the contract, such certificate being final and binding upon the Contractor, Provided, however, that such recovery shall be made only when the cost incurred in excess is more than the security deposit proposed to be forfeited and shall be limited to the amount by which the cost incurred in excess exceeds the security deposit proposed to be forfeited. The amounts thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may become due to the Contractor by the Railway under this or any other Contract or otherwise.

Provided always that in any case in which any of powers conferred upon the Railway by sub-clause (1) of Clause 62 hereof shall have become exercisable and the same shall not be exercised, the non-exercise thereof shall not constitute a waiver of any of the conditions

thereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the Contractor for which his liability for past and future shall remain unaffected.

9. A perusal of the aforesaid clauses in the contract agreement shows that before terminating the work in connection with the said contract, a '7 days notice' has to be first issued, where after, if the work does not resume, another notice giving '48 hours notice' to the petitioner to resume work has to be issued, failing which the work can be terminated in terms of the aforesaid clause. Thus, termination has to be preceded by two notices.

10. In the present case, admittedly, upon the '7 days notice' issued on 14.12.2015, the petitioner resumed the work which was also allowed by the respondent authorities. Therefore, the said '7 days notice' dated 14.12.2015 has become obsolete.

11. In view of the above, reference of the '7 days notice' dated 14.12.2015, in the '48 hours notice' dated 23.04.2016 is of no consequence. Under the provisions of the contract agreement the '48 hours notice' has to be preceded by a '7 days notice'. Admittedly, no '7 days notice' has been issued to the petitioner before rescinding the contract. Non issuance of the first notice to the petitioner is in contravention of the terms and conditions of the contract agreement. Resultantly, prejudice is caused to the petitioner for which the principle of natural justice has totally failed.

12. In the present case, since the said notice admittedly has not been issued to the petitioner before issuing the '48 hours notice' followed by the impugned rescinding order, the impugned rescinding order dated 04.05.2016 is per-se illegal.

13. The argument of the respondent counsel to the effect that an alternative remedy for settlement of the dispute is available under the contract agreement and hence, this writ petition ought not to be entertained cannot be accepted. It is settled law that availability of effective and efficacious remedy is not an absolute bar for exercising jurisdiction under Article 226 of the Constitution of India, but only a self restraint empowered by the Court, upon itself. It is further well settled law that where the writ petition seeks enforcement of any of the fundamental rights and/or where there is failure of principles of natural justice and/or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged, availability of alternative and efficacious remedy is of no consequence.

14. Pertinent to refer to the decision of the Apex Court in the case of **Whirlpool Corporation vs Registrar Of Trade Marks, Mumbai & Ors** reported in **1998 8 SCC 1**, paragraph 14 and 15 is reproduced herein below:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

15. Reference is also made in the case of **Harbanslal Sahnia and Anr. vs Indian Oil Corpn. Ltd. and Ors.** reported in **2003 2 SCC 107**, wherein the Apex Court in paragraph 7 held as under:

7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such

circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

16. In the instant case, the first notice has not been issued. Thus, the second contingency is attracted. Thus, availability of alternative remedy is of no consequence. As such, the writ petition succeeds.

17. Accordingly, the letter dated 04.05.2016 issued Senior Coaching Deport Officer, whereby the work of "Pad locking of coaches at Guwahati and Kamakhya station, stick line Guwahati & Kamakhya, pit line Guwahati, New Guwahati and Kamakhya for a period of 2 years" is hereby set aside and quashed.

18. Resultantly, the writ petition stands allowed and disposed of.

JUDGE

Comparing Assistant