

HON'BLE SRI S.V.BHATT

W.P.No.729 of 2015

ORDER:

The petitioners assail communication No.W.CON.148/A/G/3994/WC.3 dated 30.12.2014 and W.CON.148/A/G/3994/WC.3 dated 13.01.2015 of the 3rd respondent and seeking to terminate the contract dated 30.08.2011 by forfeiting the security deposit and encashing the performance guarantee, without considering the representations dated 05.01.2015 and 16.01.2015, as illegal, arbitrary and unconstitutional.

Heard Sri C.V.Mohan Reddy and Sri L.Ravi Chander, learned Senior Counsel for the parties.

To appreciate the purport of impugned communication and for convenience, the relevant portions are excerpted:

“In spite of repeated instructions to you by the Deputy Chief Engineer, Construction S.C.Railway, Kadapa vide letters/notices No.HX/Con./W.148/HQ/ NDL-YA/EW/R-41 dated 16.10.2014 and 21.10.2014 as well as by this office Slow Progress Notice-1 dated 01.12.2014 and Slow Progress Notice-2 dated 08.12.2014, you have failed to show adequate progress and submit detailed programme for completing the work.

2. As you have failed to abide by the instructions issued to show/adequate progress of work, you are hereby given 7 days notice in accordance with clause 62 of Standard General Conditions of contract to make good the progress, failing which further action as provided in clause 62 of the Standard General Conditions of Contract viz., to terminate your contract and complete the balance work without your participation will be taken”

13.01.2015

“Seven days notice under clause 62 of Standard General Conditions of Contract was given

to you under this office letter of even number dated 30.12.2014, but you have taken no action to show adequate progress of the work.

2. A detailed reply of your letter dated 05.01.2015 has already been given by this office letter of even number dated 09.01.2015.

3. You are hereby given 48 hours notice in terms of clause 62 of Standard General Conditions of Contract to make good the progress of works, failing which and on expiry of this period, your above contract will stand rescinded and the work under this contract will be carried out independently without your participation and your security deposit shall be forfeited and performance guarantee shall be encashed and consequences which may please be noted.”

On 11.07.2011, respondent Nos.2 and 3 awarded the work of “construction of new BG line from Nandyal to Yerraguntla stations – Earth work in formation, Construction of minor bridges, Construction of new station building, Relay, Battery, Generator, Equipment rooms, Cover over platforms, FOB, platforms, drains and circulating area at Madduru station and execution of miscellaneous works from chainage 0.00 mm to 15000.00 mm between Nandyal and Maddur stations - Reach – 41” (for short, referred as subject work).

On 30.08.2011, agreement was entered into between the parties. The revised agreement value is Rs.43.54 crores. The petitioners claim to have shown substantial progress in execution of work and the respondents after considering the totality of circumstances have extended the period of performance from time to time. Finally, through letter No.W.CON.148/A/G/3994/WC.3 dated 02.09.2014, the period of completion of subject work is extended till 31.03.2015 without penalty under clause 17-A (ii) of the General Conditions of Contract (GCC). The other conditions, stipulations etc., of agreement dated 30.08.2011 shall remain in tact.

The disputes between the parties have arisen during the currency of extended period of performance. The case of respondents is that the

petitioners have not been showing adequate progress in the performance of subject work and at this rate, the petitioners will not be in a position to complete the subject work within the extended period of performance by 31.03.2015. The respondents under these circumstances issued slow progress notices to petitioners either calling upon them to expedite the performance or in default of adequate progress, the respondents will be constrained to invoke available options under the GCC. The petitioners have through reply dated 05.01.2015 explained the steps taken for timely completion of the subject work. The respondents replied through communication dated 09.01.2015 and reiterated their stand that the work is not progressing as expected by the respondents. Through the letter dated 09.01.2015, the respondents *inter alia* observed as follows:

“9. The LOA has been issued on 11.7.2011 but you have commenced the work on 19.9.2011 with a delay of 2 months. If the work has been commenced immediately soon after the issue of LOA the delay would not have been caused. As such the project getting delayed is on your account only. Even though the original period of completion is 10 months from the date of issue of acceptance letter you have commenced the work with a delay of 2 months. Your statement that the rains have commenced from 05.7.2014 to 28.10.2014 is not correct. You would have executed the balance left over works during this period. Your version that you are progressing with the work fast and the same is going on from the end of December 2014 is also not correct since you have engaged very less labour, materials & machinery etc.

10. The project is targeted for completion by March 2015 and as such extension has been granted without penalty vide Clause No.17 (A) (ii) of GCC up to 31.03.2015 instead of 31.7.2015 as requested by you. On several occasions you have been advised to speed up the work duly mobilizing adequate labour, material and machinery etc., but there is no response from your end and you are simply delaying the work by mobilizing very less labour, material and machinery etc., and as such the completion of work is badly delayed.

It is also to bring to your notice that considering further extension of completion beyond March 2015 up to July 2015 is not at all a problem if you are able to show proportionate progress of work in commensuration of time consumed and complete the main work which is required for engine rolling to achieve the target.”

It is in this background the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India is invoked by the petitioners. It is not in dispute that the subject work is being executed under a pure and simple commercial contract. It is also not disputed about the options available to the respondents to terminate the contract, if the circumstances warrant such compulsive decision. But the petitioners assail the impugned correspondence as arbitrary and contradictory to the extension granted through letter dated 02.09.2014. The threatened stand taken by the respondents through letter dated 09.01.2015 is contrary to the material available on record. According to the petitioners, the notices for all purposes show that the respondents are pre-determined to terminate the agreement without considering the replies given by the petitioners or the latest status report filed during the pendency of this writ petition and such termination, if effected, will cause irreparable loss and hardship.

On the other hand, the respondents contend that the totality of circumstances are that the progress shown by the petitioners is not at all satisfactory, and the Railways for timely completion of work is best advised to take a final decision in this matter and no writ petition, much less against show cause notices, is maintainable. The learned senior counsel appearing for the respondents has tried to impress upon this Court that the immediate past conduct of petitioners or the reply filed in this Court, if taken note, the petitioners cannot complete the subject work for years to come.

It is stated that the respondents have issued slow progress notices and

a decision as is warranted in the facts and circumstances of the case in the best interest of Railways will be taken and the contract provides for enough remedies to the aggrieved parties. The respondents pray for dismissal of the writ petition.

The petitioners as well as respondents have filed detailed pleadings and documents in support of their respective contentions. As noted above, the jurisdiction of this Court is invoked against the show cause notice of slow progress and for expediting the subject work. The petitioners in fear of termination and encashment of bank guarantees, more particularly before the replies are considered by the respondents, have filed the present writ petition. This Court at this stage of the matter either for jurisdictional reasons or the scope of impugned correspondence cannot sit in judgment on the issues between the parties.

The consideration is certainly pre-mature.

Having regard to the totality of circumstances and also to ensure fairness in action and adherence to consideration of material available on record, the writ petition is disposed of directing the respondents to consider the reply of petitioners dated 05.01.2015 and also the progress memo filed in the writ petition while taking a decision on the future course of action under the subject agreement and communicate the decision to petitioners. The available remedies in law are left open to the parties aggrieved against the final decision taken in this behalf. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

23.02.2015

23rd February, 2015

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