

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Date of Decision: 07.04.2015

CWP No.17881 of 2014

M/s Amar Builders

...Petitioner

Versus

State of Haryana & others

...Respondents

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CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Sanjay Kaushal, Senior Advocate, with
Mr. Arjun Shukla, Advocate, for the petitioner.

Mr. Vishal Garg, Additional Advocate General, Haryana,

HEMANT GUPTA, J.

This order shall dispose of aforementioned two writ petitions i.e. CWP No.17881 of 2014, wherein challenge is to the order dated 31.07.2014 (Annexure P-17), whereby the contract awarded to the petitioner 'for construction of Government College at Bapoli, District Panipat' was terminated and CWP No.17882 of 2014, wherein challenge is to the order dated 31.07.2014 (Annexure P-19), whereby the contract awarded to the petitioner 'for construction of various type of residences for Revenue Officers in Mini Secretariat, Panipat' was terminated.

In CWP No.17881 of 2014, the petitioner was allotted work for construction of Government College at Bapoli, District Panipat for a contract

price of Rs.5,46,05,836/-. The said contract was to be completed within 18 months. The petitioner asserts that on furnishing of bank guarantee for a sum of Rs.27,30,3000/-, the site was handed over to the petitioner, but the drawing of the work were not supplied to the petitioner. The petitioner was informed on 01.08.2012 and 29.08.2012 that the pace of construction work is very slow and was advised to increase the speed of work. In response thereto, the stand of the petitioner was that though the construction of two houses was started, but in respect of remaining units there were many decisions pending. It appears that such stand of petitioner is relevant for the other writ petition as the present writ pertains to construction of college building and not the houses. Thus, there was delay was on account of not handing over the drawings and because of heavy rains. Thereafter, the petitioner sought release of payment of Rs.1 crore, but the same was not released. It is pointed out that instead of releasing the outstanding payment, the respondents shot numerous notices stating that the progress of work is not satisfactory and also threatened the petitioner that the action would be initiated against it under clause 59.1 of the contract agreement. Thereafter, the petitioner explained that due to ban of mines in the State, the raw material is not available in the market, which is delaying the timely completion of the project. It is also pointed out thereafter a show cause notice was issued to the petitioner on 20.06.2014 to the effect that the pace of the work at site was very slow and that the petitioner has completed only 50% of the work. The petitioner alleges that such notice was issued to the petitioner because the petitioner did not meet with the illegal demands of respondent No.4. Apart from submitting the reply to such show cause notice, the petitioner also filed an appeal before respondent No.2 – the

Superintending Engineer, Circle PWD B&R Branch, Karnal under clause 24.2 of the conditions of contract. However, such appeal was not decided though it was obligatory to decide the same within a period of 90 days. The petitioner asserts that the delay in completion of the project was attributable only to the respondents and that instead of deciding the appeal, the contract itself was terminated on 31.07.2014.

In reply, the respondents pointed out that there was Dispute Redressal system in terms of clause 24 and Arbitration in terms of clause 25 of the Contract agreement. It has been averred that the petitioner has miserably failed to achieve the milestone laid down in the agreement and has sought extension of time limit vide communication dated 06.08.2013. It has been pointed out that site and the drawings were handed over to the petitioner on 15.06.2012 vide Annexure R-2. It has been also asserted that all decisions were taken timely and delay was not due to drawings, but due to other reasons attributable to the petitioner. It has been averred that the petitioner has raised the demand of Rs.1 crore without evaluating the quantum of work and without any detail as required under clause 42 of the contract conditions. It has been pointed out that payments of Rs.46,61,010/- and Rs.29,50,855/- have been made to the petitioners on 10.11.2012 and 11.02.2013 respectively, but thereafter the petitioner delayed the execution of the contract.

It is also pointed out that initially, the Tender Approval Committee accepted the recommendations of the SE (Karnal) for termination of the contract in its meeting held on 12.06.2014. However, in its 2nd meeting held on 17.06.2014, the Tender Approval Committee, which was attended to by 11 Members including Chief Engineers (CE) (Roads);

CE (Bridges); CE (Buildings); ED (HSRDC); CE (NABARD) & ED (HARRIDA); CE (NH); CE (E&M), it was decided to issue a show cause notice to the contractor i.e. the petitioner as to why contract should not be terminated. Ultimately, on 24.07.2014, the Tender Approval Committee in its 3rd meeting decided that competent authority i.e. employer may take action for termination of contract in accordance with terms and conditions of contract agreement. It is, thereafter, an office order was issued constituting a Committee consisting of Sub Division Engineers and Junior Engineers for final measurements of the work done.

Having heard learned counsel for the parties, we find that the petitioner has challenged the termination of the contract in a writ petition even though the conduct of the petitioner cannot be said to be free from blemish. The contract was to be completed within 18 months. There is categorical assertion that the design and the site was handed over to the petitioner on 15.06.2012. In the rejoinder, the fact of handing over of site was not disputed rather it has been asserted that respondent No.3 has written to Sub Divisional Engineer to supply ADC building to the petitioner, which was handed over in September, 2013. The said building is part of the contract, which is subject matter of CWP No.17882 of 2014. In respect of college building, there is no assertion either in the writ petition or in the rejoinder that the site was not handed over or the building plans were not made available. It appears that the petitioner has made averments in the petition relating to contract of construction of residences of the Revenue Officers in the present petition though the present writ petition pertains to construction of Government College building.

Since the petitioner has failed to execute the contract within time prescribed, we do not find that the petitioner can be permitted to dispute the termination of the contract by way of present writ petition. Consequently, the instant writ petition is dismissed.

Now coming to CWP No.17882 of 2014, the contract for construction of various residences for Revenue Officers in Mini Secretariat, Panipat was given to the petitioner on 07.04.2012 with a stipulation that the buildings have to be constructed within 18 months. The assertion of the petitioner is that though the site was handed over, but the drawings of the work to be executed were not handed over. The petitioner is said to have written on 01.02.2013 and 23.02.2013 i.e. after 9 months from the date of the execution of the agreement, that the work at the site was going on in full swing and that the drawings have not been received. The petitioner conveyed that the time of starting the construction would be considered from the date of receipt of the drawings. It was on 13.03.2013, directions were issued to the Sub Divisional Engineer, PWD (B&R), Panipat to supply the drawings for Additional Deputy Commissioner's residence (ADC) to the petitioner i.e. after 10 months from the allotment of the work. On 16.08.2013, the petitioner was served with a notice to the effect that the progress of work is not satisfactory/slow speed and not as per norms fixed in the milestone of contract agreement. In response thereto, the petitioner explained that the drawings for the ADC residence was handed over to him only a week ago and except for that particular building all the milestones of the project have been achieved by them. The petitioner was again served with a notice dated 14.11.2013 to the effect that the petitioner is causing delay in achieving the milestone. The petitioner asserts that since no

positive response is received and respondent No.4 started demanding illegal gratification/bride from the petitioner, the petitioner was left with no other option, but to file an appeal before the respondent No.2 – the Superintending Engineer, Karnal Circle, PWD B&R Branch, Karnal on 23.06.2014 in terms of clause 24.2 of the conditions of the contract. However, instead of deciding the appeal, the petitioner was served with show cause notice dated 24.06.2014 stating that only 60% of the work has been completed by the petitioner and ultimately the contract has been terminated on 31.07.2014.

In reply, the stand of the respondents is that the site and the drawings were handed over to the petitioner, which is acknowledged by the petitioner in its letter dated 05.09.2012 (Annexure P-6). The drawings were handed over to the petitioner immediately after the mobilization of machinery, labour and material to the site of work. It is asserted that the petitioner itself has stated that he had received the drawings, but the rainy season started, therefore, the delay was not due to the issuance of drawings. Vide communication dated 05.09.2012, the petitioner itself admitted that the work is going on at a good speed and assured that it will complete the work within the stipulated period. It is further asserted that the petitioner executed the work as per drawings supplied to him, but with a very slow pace. The petitioner sought release of payment of Rs.1 crore, but without giving any detail of the work executed. It has been further pointed out that till January, 2013, work to the tune of Rs.69.50 lacs was executed, therefore, the demand up to Rs.1 crore could not have been raised. It has been further pointed out that a sum of Rs.28 lacs is payable out of which liquidated damages of Rs.27,30,2911/- is to be recovered from the petitioner. Therefore, the claim of the petitioner is that due payment has not been released is not tenable.

In the rejoinder, the petitioner has reiterated that the drawings were handed over in the month of September, 2012 only; therefore, the termination of the contract is not justifiable.

A perusal of affidavit (Annexure R-2) shows that the petitioner has undertaken to complete the work in all respect up to 02.10.2014. The Tender Approval Committee consisting of 9 members decided to cancel the contract in its meeting held on 12.06.2014. However, such decision was reconsidered on 17.06.2014, wherein it was decided to issue a show cause notice. The Tender Approval Committee in its 3rd meeting held on 24.07.2014 resolved that the competent authority i.e. the employer may take action for termination of contract in accordance with terms and conditions of the contract agreement. Thereafter, a Committee consisting of Sub Division Engineers and Junior Engineers was constituted for the final measurement of the work done.

At the very outset, learned counsel for the respondents has raised a preliminary objection that there is an arbitration clause to resolve the disputed questions of fact between the parties. It is argued that whether there is delay on the part of the petitioner or on the part of the respondents is a disputed question of fact, therefore, such question cannot be appropriately decided by the writ Court.

On the other hand, learned counsel for the petitioner refers to the judgments of Hon'ble Supreme Court in Harbanslal Sahnia & another Vs. Indian Oil Corporation Ltd. & others (2003) 2 SCC 107 and Union of India & others Vs. Tania Construction Private Limited (2011) 5 SCC 697 to contend that rule of exclusion of the writ jurisdiction on account of availability of alternative remedy is in discretion of the Court and is not

mandatory. Therefore, since the action of the respondents is patently illegal, this Court in a writ jurisdiction should interfere to avoid the illegalities. It is contended that the action against the petitioner is only on account of mala-fides of respondent No.4, but the said respondent has not filed reply in its individual capacity, but as a representative of respondent Nos.1 to 3, therefore, adverse inference should be raised against the respondents.

Having heard learned counsel for the parties, we do not find any merit in the present writ petition. In respect of allegations of mala-fides, suffice it to state that the decision to terminate the contract has not been taken by respondent No.4 alone. In fact, he is not even member of the Tender Approval Committee, which has considered the termination of the contract. In fact, at one point of time, the Tender Approval Committee accepted the recommendations of the Superintendent Engineer to terminate the contract, but later on withdrew that decision and decided to issue another show cause notice to the petitioner.

Learned counsel for the petitioner was at pains to argue that the drawings were not handed over in time, but from the reading of the affidavit, a copy of which has been attached with the written statement as Annexure R-2, it is apparent that vide letter dated 06.08.2013, the petitioner has undertaken to complete the work in all respect upto 02.10.2014. The petitioner has not made any grievance in respect of non-handing over of the drawings. As per the written statement, there was some delay in supplying drawings of one of the residences i.e. of the Additional Deputy Commissioner. Therefore, we find that the delay in handing over of the drawings is not justified and is being raised to cover up its delay in not completing the construction.

The judgment in Harbanslal Sahnia's case (supra) is to the effect that the bar of jurisdiction of any alternative remedy is rule of discretion and not of compulsion. There is no dispute about the proposition laid down. Examining the merits of the case, we find that it is the petitioner, who has defaulted in performing the contract, but is raising a bogey of delay in handing over drawings so as to avoid contractual obligations.

Consequently, we do not find any merit in the present writ petition as well. The same is also dismissed.

(HEMANT GUPTA)
JUDGE

07.04.2015
Vimal

(LISA GILL)
JUDGE