

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP(I)(COMM) 436/2017**

Reserved on: 25th October, 2017
Date of decision: 3rd November, 2017

ERA INFRA ENGINEERING LTD.

..... Petitioner

Through Ms. Geeta Luthra, Sr. Adv. with Mr.
Rahul Pandey and Mr. Prateek Yadav,
Advocates.

versus

STEEL AUTHORITY OF INDIA

..... Respondent

Through Mr. Sanjay Jain, ASG with Mr. Kartik
Rai, Ms. Veronica Mohan, Mr. Anshul
Rawat, Ms. Suman Mathur and Mr.
Ashish, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

IA No.12297/2017 (Exemption)

Allowed, subject to all just exceptions.

The application is disposed of.

OMP(I)(COMM)436/2017 & I.A.No.12296/2017 (Stay)

This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed by M/s Era Infra Engineering Ltd., the petitioner herein praying for the following reliefs:-

“a. During the pendency of the present Petition, stay the operation of the Tender being floated on 26.09.2017, 28.09.2017, 29.09.2017 and 04.10.2017 for the balance work of the project for being arbitrary and illegal;

b. Restraining the Respondent from opening and awarding the tender for the balance work to any third party;

c. During the pendency of the present Petition, direct the Respondent to allow the Petitioner to continue with the balance work;

d. During the pendency of the present Petition, direct the Respondent to release the withheld amount in order to complete the aforesaid work.”

2. Mr. Sanjay Jain, learned Additional Solicitor General appears for the respondents on advance notice and has also been heard.

3. The petitioner had been awarded the work of execution of structural work for setting up BOF (Basic.Oxygen Furnace) & CCP (Continuous Casting Shop) (Pkg. No. 033-B) (hereinafter referred to as the "Project") by the respondent at its Bhilai Steel Plant, Bhilai vide Agreement No. PCC/13/09 dated 30.09.2009. The completion period was 24 months from effective date i.e. 30.09.2009.

4. It is alleged by the petitioner that the respondent has been changing the scope of the project from time to time. Reference of this Court was drawn to various letters including letter dated 01.06.2017 in this regard.

5. It is alleged that due to various hindrances on the project site, for no fault of the petitioner, progress of the work was hampered, which resulted in delay which cannot be attributed to the petitioner.

6. It is further alleged that the time was not the essence of the contract, inasmuch as, Clause 49 of the General Conditions of Contract (in short GCC), provides that the completion period would be extended if the delay has occurred due to any fault by the respondent or change in scope of work.

7. The petitioner had earlier filed a petition being Arb.P. No.90/2017, titled *M/s Era Infra Engineering Ltd. v. Steel Authority of India Limited* seeking appointment of an arbitrator to adjudicate the dispute that had arisen between the parties in relation to the above contract. This Court vide its order dated 24.03.2017 permitted the petitioner to approach the Indian Council of Arbitration (in short ICA) for constitution of an Arbitral Tribunal not later than 10 days from the date of the order. I am informed that the petitioner duly approached the ICA, however, there was delay on its part in depositing the fee demanded by ICA, because of which the arbitration proceedings are yet to commence. The respondent contends that this delay has been caused for reasons solely attributable to the petitioner.

8. In the meantime, the respondent issued a notice dated 03.06.2017 invoking Clause Nos.43 and 51.2.2 of the GCC alleging negligence and failure on the part of the petitioner in executing the subject contract and further calling upon the petitioner to remedy such breach within 14 days from the date of issuance of said notice, failing which the respondent threatened termination of the agreement. The petitioner replied to the above notice vide its letter dated 17.06.2017. The petitioner vide its separate letter dated 08.06.2017 also requested for extension of time for

completion of project till 31.06.2018. The respondent, vide its letter dated 27.06.2017 extended the time upto 31.12.2017. Relevant portion of the said letter is reproduced herein below:

“On examination of your request for extension, the issues raised by you shall be dealt during the detailed delay analysis as per provisions of contract at a later date. However, considering the continuity in deployment of resources for execution of contract and in the larger interest of the successful completion of the project management accords extension of time up to 31.12.2017 with RRLD, without delay analysis at this stage.”

9. Relying on the above letter, it is contended by the learned Senior counsel for the petitioner that notice dated 03.06.2017 had become infructuous and deemed to be withdrawn.

10. The respondent, however, issued yet another notice dated 07.09.2017 alleging therein that in spite of notice dated 03.06.2017 there was no considerable improvement in deployment of resources and finishing activities of the petitioner. It was further contended that this failure amounted to ‘negligence’ on the part of the petitioner as per Clause 43 of GCC. The petitioner was called upon to remedy the same within a period of 15 days, failing which “suitable action” as deemed necessary as per contract was threatened to be initiated by the respondent. The respondent had also, vide letters dated 02.08.2017 and 09.08.2017 removed certain areas of works from the scope of petitioner alleging non-performance in completion of work.

11. The petitioner had duly represented against the above letters and withdrawal of the work, however, the respondent floated tenders dated 26.09.2017, 28.09.2017 and 29.09.2017 for the work which was part of the contract awarded to the petitioner.

12. The petitioner filed a petition under Section 9 of the Act before this Court being OMP(I)(COMM) No.408/2017, titled ***M/s Era Infra Engineering Ltd.v. Steel Authority of India Ltd.***

13. The above mentioned petition was disposed of by this Court vide its order dated 09.10.2017. As much reliance has been placed on this order, the same is reproduced herein below:

“1. The petitioner, by this petition under Section 9 of the Arbitration & Conciliation Act, seeks a restraint on the respondent from floating and awarding a tender for the balance work of the project which has been awarded to the petitioner.

2. The petitioner was awarded the work for execution of structural work for setting up of Basic Oxygen Furnace (BOF) and Continuous Casting Shop (CCP) (Pkg. No.033-B) at Bhilai Steel Plant, Bhilai vide Agreement dated 30.09.2009.

3. As per the petitioner, the stipulated period for completion of the project was 24 months. The petitioner’s case is that the project could not be completed within the stipulated period on account of reasons beyond the control of the petitioner and for delay attributable solely to the respondent.

4. It is further submitted that post the award of the contract, there were several deviations and increase in the scope of the work requiring further additional time for completion of the project. It is contended that the time for completion of the contract has now been extended till 31.12.2017.

5. *The petitioner approached this Court as the respondent had invited tenders by the Notices Inviting Tenders dated 26.09.2017, 28.09.2017 and 29.09.2017. Learned counsel for the petitioner submits that the tenders dated 28.09.2017 and 29.09.2017 were not in the knowledge of the petitioner when the petition was filed as they were limited tenders.*

6. *Learned counsel for the petitioner submits that the cause of action arose as the respondent had sought to invite bids for completion of a portion of the balance work which already stands allotted to the petitioner and for which extension of time has been granted till 31.12.2017.*

7. *Learned Additional Solicitor General appearing for the respondent disputes the contention that the delay is attributable to the respondent. He, however, submits that the petitioner was negligent in executing the contract and the delay is attributable to the petitioner.*

8. *Without prejudice to the said contentions, learned ASG submits that the respondent has an absolute right to terminate the contract at any stage. He submits that no notice of termination has yet been issued to the petitioner.*

9. *Learned ASG submits that with a view to avoid any delay in execution of the work, the tenders have been invited so that as and when and, if required, a bidder is finalised and the petitioner is required to be substituted, appropriate action, as stipulated in the contract Agreement dated 30.09.2009, could be initiated.*

10. *Learned ASG further submits that the steps to invite bids have been taken so as to avoid any delay and hiatus in the continuance of the execution of the project, which is of public importance and, in case need arises to terminate the contract of the petitioner, appropriate action, as stipulated in the Agreement dated 30.09.2009, shall be taken.*

11. *Learned ASG submits that prior to the award of contract to any third party, appropriate steps, in terms of Agreement dated 30.09.2009, shall be taken qua the petitioner.*

12. In view of the above statement given by the learned ASG, the petition is disposed of with liberty to the petitioner to take such remedies, as may be available in law, impugning any adverse action that may be taken or threatened to be taken by the respondents against the petitioner with regard to the subject contract.

13. The petition is, accordingly, disposed of in the above terms.

14. It is clarified that this Court has neither examined nor considered the contentions of the petitioner or the respondent on merits of their respective stands.

15. Order Dasti under the signatures of the Court Master.”

14. It is submitted that the respondent realizing that it cannot award the same work to a third party till the contract of the petitioner is existing, in an arbitrary manner, terminated the contract vide its Termination Letter dated 21.10.2017.

15. I may only emphasize that the prayer made in the present petition has been quoted above only to show that no prayer against the Termination Letter dated 21.10.2017 has been made by the petitioner. On the other hand, the present petition has been filed seeking a restraint on the respondent from acting on the tender floated on 26.09.2017, 28.09.2017, 29.09.2017 and 04.10.2017 for the balance work of the project. At the outset I am, therefore, of the opinion that without challenging the Termination Letter dated 21.10.2017, the prayer made by the petitioner cannot be granted. It is true that various submissions have

been made against the Termination Letter in the body of the petition, however, as noted above, no prayer in that regard has been made.

16. In any case, I would proceed to consider the submission made by learned Senior counsel for the petitioner.

17. It is first contended that there was no default in execution of the work on the part of the petitioner. In fact, the period of completion has already been extended by the respondent till 31.12.2017. It is therefore contended that the termination is premature and arbitrary. I am, however, not impressed with the said argument. A bare perusal of the letter dated 27.06.2017, quoted by me above, would show that the extension had been granted on ad-hoc basis and with clear stipulation that the request for extension and the issue raised therein “shall be dealt during the detailed analysis as per the provision of the contract at a later date”. It was specifically provided in the letter that the extension is “without delay analysis at this stage”. Therefore, in my opinion, it cannot be said that merely because the respondent had extended the completion period till 31.12.2017, it had in any manner accepted the contention of the petitioner in this regard and/or waived its notice dated 03.06.2017.

18. It is next contended by learned Senior counsel for the petitioner that the Termination Letter is not in terms of Clause 43 and/or 51.2.2 of GCC. It is contended that the Letter dated 03.06.2017 stood impliedly withdrawn with the extension granted on 27.06.2017 and the later letter dated 07.09.2017 was not in terms of the above clause.

19. I would first quote the two clauses in question:

43 NEGLIGENCE

43.1 If the contractor does not execute the work in accordance with the time schedule stipulated in the Appendix-2 and shall neglect to execute the work with due diligence or expedition or shall refuse or neglect to comply with any reasonable order given to the Contractor in writing by the Employer in connection with the Work or shall contravene the provisions of Contract, the Employer may give notice in writing to the Contractor to make good the failure, neglect or contravention complained of within such time as may be deemed reasonable by the Employer and in default of compliance with the said notice, the Employer without prejudice to its rights hereof, may rescind or cancel the Contract holding the Contractor fully liable for the damages that the Employer may sustain including all amounts paid to the Contractor by the Employer for all such Facilities which may become in fructuous due to such cancellation.

43.2 Should the Contractor fail to comply with such notice within the period as mentioned in the notice or any other period considered reasonable by the Employer for such compliance from the date of serving thereof, then and in such case, without prejudice to the Employer's right hereof, the Employer shall have at its option the right to take the affected work wholly or in part out of the Contractor's hands and may complete the work, as envisaged in the Contract either departmentally or by awarding fresh Contract(s) to any other person or firm or company to execute the same, at the risk and cost of the Contractor.

43.3 In such event the Employer shall, without being responsible to the Contractor for wear and tear to the same, be entitled to seize and take possession and use all materials, construction equipment, tools tackles and other things of the Contractor which may be at the site for use at any time in connection with the Facilities to the exclusion of any right of the Contractor over the same and the Employer shall be entitled to retain and apply any sum which may otherwise be then due as per the Contract or any other Contract from the

Employer to the Contractor as may be necessary for the payment of the cost of execution of such Facilities as aforesaid.

43.4 If the cost of executing the Work as aforesaid shall exceed the sum due to the Contractor and the Contractor fails to make good the deficit within the specified period, the Employer shall have the right to lien over the said materials, tools, tackles, construction plant or other things and properties of the Contractor as may not have been used up in the completion of the Work and may be sold by the Employer after serving due notice to the Contractor and such proceeds applied towards the adjustment of such difference and the cost of incidentals to such sale. Any outstanding balance existing after crediting the proceeds of such sale shall be paid by the Contractor on the demand of the Employer but when all expenses, cost and charges incurred in the completion of the Facilities are paid by the Contractor, all such materials, tools, tackles, construction plant or other things not used in the completion of the facilities and remaining unsold shall be removed by the Contractor with the written permission of the Employer.

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51.2.2 If the Contractor

- a) has abandoned or repudiated the Contract*
- b) has without valid reason failed to commence work on the Facilities promptly or has suspended the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed*
- c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause*

- d) *refuses or is unable to provide sufficient materials, services or labour (adequate resources) to execute and complete the Facilities in the manner specified by EMPLOYER.”*

Then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor fails to remedy the same or to take steps to remedy the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of termination to the Contractor.”

20. I have already given my *prima facie* finding above that the notice dated 03.06.2017 cannot be stated to have been withdrawn, even impliedly, due to the extension granted vide letter dated 27.06.2017. In the notice dated 03.06.2017 Clauses 43 and 51.2.2 of GCC had been clearly invoked. Equally, in the notice dated 07.09.2017, the respondent had clearly detailed, the acts which are considered “negligence” in terms of Clause 43 of GCC on the part of the petitioner. Therefore, the notice dated 21.10.2017, *prima facie*, cannot be said to have been issued without prior notice or in violation of Clause 43 and/or 51.2.2 of GCC. The veracity of the incidents of default alleged by either party cannot be gone into in these proceedings and would have to be considered by the Arbitral Tribunal after taking evidence. *Prima facie*, however, there are allegations of abandonment of work against the petitioner. Equally, there is admitted withdrawal of work at earlier stage, which has remained unchallenged.

21. Though, no prayer against this termination notice has been made, in my opinion, the petitioner would not have been entitled to any injunction of the operation of the same in view of Section 41(e) r/w Section 14(1)(a) and (c) of the Specific Relief Act, 1963. Learned Senior Counsel for the petitioner has relied upon the judgment dated 27.02.2003 of this Court in ***Pioneer Publicity Corporation v. Delhi Transport Corporation & Ors.***, OMP No.8/2003 to contend that the respondent being an authority, the freedom that exists under the realm of private contract in respect of the performance of contractual obligation does not apply in the same measure to it, the respondent, therefore, must justify its action for termination of the contract before it was otherwise determinable. In my opinion, the said judgment would not apply to the facts of the present case. The agreement, in the above referred judgment, had a provision prohibiting the claim of grant of compensation. Further, the contract was for a period of three years and was being sought to be terminated before the expiry of the said period. In the present case, no such clause prohibiting a claim for wrongful termination has been brought to my notice. Further, I have already discussed the effect of the extension of the period for completion of work till 31.12.2017 on the notice(s) dated 0306.2017 and 07.09.2017.

22. The petitioner's reliance on order dated 09.10.2017 passed by this Court in OMP(I)(COMM) 408/2017 is equally unfounded. It is an admitted case that as on the date of passing of the said order, the respondent had not yet terminated the agreement of the petitioner. In that light the contention of learned ASG was recorded in paragraphs 10 and

11 of the order to the effect that the tenders in question have been floated with a view to avoid any delay in execution of the work and prior to the award of contract to any third party, appropriate steps, (sic termination), in terms of the Agreement dated 30.09.2009, shall be taken qua the petitioner. The termination now having been effected through a letter dated 21.10.2017, I fail to understand how the above order can be of any aid to the petitioner.

23. I may also note that this Court vide its order dated 24.03.2017 passed in Arb.P. No. 90/2017 had permitted the petitioner to approach ICA for constitution of an Arbitral Tribunal not later than 10 days from the date of the order. It is only vide cheque dated 05.10.2017 that the petitioner has deposited the demanded fee with ICA. Therefore, the arbitration proceedings have not yet commenced. In my view, therefore, the petitioner is not entitled to any relief in the present petition.

24. In view of the above discussion, I find no merit in the present petition. The present petition along with pending application are accordingly dismissed with no order as to cost.

25. I may only hasten to add that my above observations are, *prima facie*, in nature and would not, in any manner, be binding on the Arbitral Tribunal or prejudice either party in such Arbitral Proceedings.

NAVIN CHAWLA, J

NOVEMBER 3, 2017/vp