GAHC010082272020

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

Case No. : WP(C) 2487/2020

1:SENBO - NAYAK
IS A JOINT VENTURE OF NAYAK INFRA PVT LTD A COMPANY INCORPORATED UNDER THE COMPANIS ACT, 1956 AND IS HAVING ITS REGD OFFICE AT SWARUPNANDA ROAD, LUMDING 782447, P.O- LUMDING, DIST- NAGAON, ASSAM SENBO ENGG PVT LTD A COMPANY INCORPORATED UNDER THE COMPANIES ACT, AND HAVING ITS DULY AUTHORISED DIRECTOR SRI ANANTA CHARAN NAYAK, SWARUPA NANDA ROAD, LUMDING, DIST- NAGAON, ASSAM

VERSUS

1:THE UNION OF INDIA AND 5 ORS
REP. BY THE SECRETARY, MIN OF RAILWAYS, RAILWAY BOARD, RAILWAY BHAWAN, NEW DELHI-

2:GM/ CONSTRUCTION
OFFICE OF THE GM/CON
NORTH EAST FRONTIER RAILWAY
MALIGAON
GUWAHATI- 01

3:THE CHIEF ADMN OFFICER/ CON -I
NF RAILWAY
MALIGAON
GUWAHATI- 01

4:THE CHIEF ENGINEER/ CON - II
N F RAILWAY
MALIGAON
GUWAHATI- 11

5:THE DY CHIEF ENGINEER/ CON-II/BRBH
SCL
NF RAILWAY, SILCHAR

6:FA AND CAO/ CON-I
N F RAILWAY
MALIGAON
GHY- 1

Advocate for the Petitioner : MR G N SAHEWALLA

Advocate for the Respondent : SC, RAILWAY

BEFORE
HONOURABLE MR. JUSTICE N. KOTISWAR SINGH

ORDER

Date : 17-06-2020

Heard Mr. G.N. Sahewalla, learned Senior counsel for the petitioner and Mr. G. Goswami, learned Standing Counsel, Railways.

2. Considering the nature of the case and also as submitted by learned Senior counsel for the petitioner, this Court is of the view that the present writ petition can be disposed of at this stage without issuing any formal notice to the respondents.

3. This writ petition arises out of the termination of contract which was awarded in favour of the petitioner for execution of certain works relating to construction of Single Line BG Tunnel No.1 (App. Length 1733 RM) from km 2.090 to Km 3.823 in between station Bhairabi to Sairang in connection with construction of New Railway BG Line from Bhairabi to Sairang, Mizoram. It appears that the said work was to be completed within 24 months. However, the petitioner could execute about 98% of the work in about 84 months. The petitioner states that because of various difficulties faced in the course of execution of the work, the Railway authorities themselves extended the time up-to 30.04.2020. However, as his bad luck would have it, because of the Covid pandemic, the petitioner could not complete the remaining work because of which the Railway authorities issued the notices of termination of the contract as provided under the terms and condition of the agreement, by a 7 days notice and second by a 48 hours notice vide notice dated 04.03.2020 and 19.03.2020. Thereafter, termination notice was issued on 23.03.2020 (wrongly typed as 23.03.2019 in the termination letter).

4. It has been submitted by learned Senior counsel for the petitioner that though the petitioner admits certain financial difficulties faced by him, which has been clearly mentioned in the petition, the fact remains that the remaining work is only 2% which the petitioner could not complete because of the Covid pandemic as most of the labourers had refused to work in that area and also because of various restrictions imposed by the State of Mizoram. Accordingly, it has been submitted that the Railway authorities ought to have considered these aspects before terminating the contract of the petitioner.

5. On the other hand, learned Standing Counsel, Railways has submitted that it is not only this contract but as many as 12 contracts which were awarded to the petitioner by the Railway authorities but the petitioner has not been able to complete any of these contracts, and from his precarious financial position, which had come to the notice of the Railway authorities, the Railway authorities are satisfied that the petitioner will not be in a position to execute the remaining part of the contract and since the work is a long pending work and there is a proposal to inaugurate the Railway lines by 31.03.2021, the Railway authorities had to take the extreme step to terminate the contract so as to enable the Railway authorities to complete the work within a specific timeframe.

6. Further, it has been submitted by learned Standing Counsel of the Railways that there is a contract agreement between the petitioner and the Railway authorities which contains an arbitration clause and, as such, if the petitioner is aggrieved by any action of the Railway authorities, the petitioner would be free to invoke the arbitration clause.

7. Having heard learned counsel for the parties, this Court is of the view that normally, when there is a contract agreement between the parties which specifically contains an arbitration clause, the Court exercising jurisdiction under Article 226 would be loath to intervene in such a dispute. Ordinarily, and under normal course, this Court would not have at all entertained this petition. However, there are certain situations, which this Court has taken note of, which have been highlighted by the petitioner, particularly the fact that almost 98% of the work has been completed as admitted by the Railway authorities themselves and, thus, only 2% of the work remains to be completed. Moreover, the fact that the Covid pandemic has caused serious disturbances in the execution of the work can certainly be taken judicial note by this Court. In fact, the Government of India had issued certain directions vide Office

Memorandum dated 19.02.2020 and 13.05.2020 taking into consideration the sudden Covid pandemic creating an extra-ordinary difficult situation for everybody and accordingly, had advised that if the performance in whole or part of the obligation under the contract is delayed due to any reason of *force majure* for a period exceeding 90 days, either party may at its option terminate the contract without any financial repercussion on either side. Further, in the Office Memorandum dated 13.05.2020, it has been mentioned that where an application is made by a contractor who is not in default of any contractual obligations, or where the *force majure* clause is invoked by the contractor and the requirement of *force majure* clause is fulfilled, the Government Department/agency may return the value of the performance security to the contractor as is proportional to the supplies made /contract work completed to the total contract value. Thus, the petitioner contends that he would be entitled to payment for the works executed also rather than forfeiting the bank guarantees.

8. In the above background, it has been submitted by learned Senior counsel that unfortunately when the Railways decided to terminate the contract, the aforesaid important policy decisions of the Government had not been taken into account by the Railway authorities and if the Railways did take into account the aforesaid Government decisions, the petitioner is optimistic and hopeful that the Railway authorities might not have taken the decision to terminate the work and might have allowed the petitioner to continue the contract by completing the remaining 2% work.

9. Learned Standing Counsel, Railways has argued that any reconsideration now will be merely a futile exercise for the reason that the petitioner is almost bankrupt and will not be in a position to complete the work. Moreover, the petitioner has never invoked the *force majure* clause.

10. Be that as it may, these are aspects, perhaps, the Railways can re-examine, rather than keep this writ petition pending so that in the event the Railways are satisfied with the explanation so furnished by the petitioner, the Railway authority can certainly review their decision to terminate the contract and can allow him to complete the remaining 2% of the work, which the petitioner contends, he can complete within a reasonable time.

11. Accordingly, this writ petition is disposed of with the direction to the petitioner to

submit a detail representation to the Railway authorities within two weeks which shall be considered by the respondents, more particularly, respondent Nos.2 and 3 and, thereafter, take a decision as to whether the termination notice already issued by the Railways can be reviewed and accordingly, do the needful as observed by this Court above which exercise, in the interest of the work, shall be completed within a period of three weeks from the date of receipt of such representation by the Railways.

12. The writ petition is disposed of as above.

JUDGE

Comparing Assistant