GAHC010100822020

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

Case No. : WP(C)/2981/2020

HLK INFRASTRUCTURE PVT. LTD.
1ST FLOOR, GALA NO. 108, N1 BLDG, PHASE 1,MUNISURAT COMPAOUND,
THANE, THANE-421302, MAHARASHTRA

VERSUS

INDIAN OIL CORPORATION LTD. AND 4 ORS.
HAVING ITS REGISTERED OFFICE AT INDIAN OIL BHAVAN, GO9, ALI
YAVAR JUNG, BANDRA (ESAT), MUMBAI-400051, MAHARASHTRA

2:INDIAN OIL CORPORATION LTD.
ASSAM OIL. DIVISION DIGBOI REFINERY
P.O. DIGBOI
TINSUKIA
ASSAM
PIN-786171

3:THE CHIEF GENERAL MANAGER (TECHNICAL)
INDIAN OIL CORPORATION LTD. ASSAM
OIL DIVISION DIGBOI REFINERY
P.O. DIGBOI
TINSUKIA
ASSAM-786171

4:THE GENERAL MANAGER (CNTRACTS)
INDIAN OIL CORPORATION LTD. ASSAM
OIL DIVISION DIGBOI REFINERY
P.O. DIGBOI
TINSUKIA
ASSAM-786171

5:PUNJAB NATIONAL BANK
DILSHAD GARDEN NEW DELHI 110095
REP.BY ITS BRANCH MANAGE

Advocate for the Petitioner : MR. R DUBEY

Advocate for the Respondent : MR G K DEKA

Linked Case : I.A.(Civil)/1946/2020

INDIAN OIL CORPORATION LTD.
(ASSAM OIL DIVISION)
HAVING ITS REGD. OFFICE AT DIGBOI REFINERY
P.O. DIGBOI
TINSUKIA
ASSAM
PIN-786171
REP. BY ITS EXECUTIVE DIRECTOR

VERSUS

HLK INFRASTRUCTURE PVT. LTD.
1ST FLOOR
GALA NO. 108
N1 BLDG
PHASE 1
MUNISURAT COMPAOUND
THANE
THANE-421302
MAHARASHTRA

Advocate for : S N SARMA
Advocate for : MR. R DUBEY appearing for HLK INFRASTRUCTURE PVT. LTD.:
Advocate appearing for respectively.

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

Date : 27.11.2020

Heard Mr. S. N. Sarma, learned senior counsel assisted By Mr. K. Kalita, learned counsel for the petitioner. Also heard Mr. R. Dubey and Ms. A. B.

Kayastha, learned counsels for the opposite party/respondent.

By order dated 23.11.2020, this Court issued notice on this I.A. In view of the urgency expressed by the applicant/IOCL and as prayed for by the learned counsel for the opposite party/writ petitioner, liberty was granted to the opposite party/writ petitioner to file their obligations and as agreed to by the counsels for the parties, the matter was fixed today i.e. 27.11.2020 for consideration of this I.A. No objection is filed on behalf of the opposite party/writ petitioner. However, as agreed to by the learned counsel for the parties, the I.A. is taken up for consideration.

2. This IA has been filed by the applicant IOCL seeking vacation, modification/alteration of the order dated 03.08.2020 passed by this Court in WP(C) No. 2981/2020 whereby it was directed as under:-

> *Heard the learned counsel Mr. R. Dubey appearing for the petitioner, pertaining to the prayer for interim relief.*
>
> *Issue Notice to the respondents.*
>
> *I have considered the request of Mr. Dubey that the termination notice dated 29.05.2020 issued by Chief General Manager (Technical), Indian Oil Corporation stands stayed until further order. It is also directed that the respondents shall not invoke the bank guarantee until further order.*
>
> *The matter may be listed after 4 (four) weeks.*
>
> *The petitioner shall take steps. A copy of this order be given to Mr. Dubey under signature of the Court Master.*

3. The applicant IOCL issued the Work Order No. 25613500 dated 21.08.2018 in respect of the works "*Interior, Electrical and HVAC works of extension of CTA Hornbill Guest House for VIP and VVIP Guest in IOCL Digboi Refinery Township".* The bid was accepted in terms of the E-tender No. DRE1185035 dated 11.06.2018 submitted by the opposite party/writ petitioner. The estimated contract value for the entire work is Rs.1,25,13,403/- (One Crore Twenty Five Lakh Thirteen Thousand Four Hundred Three Only) exclusive of GST. The duration of the contract is for 6(six) months from the date of award of

work order.

4. Pursuant to the work order allotted to the opposite party/writ petitioner, it was asked to proceed with the aforesaid work in terms of the agreement executed by and between the applicant/IOCL and the opposite party/writ petitioner pursuant to the said contract.

5. It is the case of the applicant that although the date of commencement of work was 21.08.2018 as per work order, the opposite party/writ petitioner had visited the site for "Kick off" meeting only on 14.11.2018, on which date the several points were discussed including the target date for commencement of complement procurement action which was agreed to by the opposite party/writ petitioner as 25.11.2018. Pursuant thereto there were several communications exchanged between the parties by which the applicant reminded the opposite party/writ petitioner that the work was not being executed as per the schedule and no follow up action was being carried up by the opposite party/writ petitioner. The applicant vide communication dated 15.12.2011 issued a show cause to the opposite party/writ petitioner to show cause as to why the contract should not be terminated. The opposite party/writ petitioner by communication dated 08.01.2019 responded to the show cause notice and assured the applicant of completion of the work awarded to the opposite parties. Thereafter as per references made by the opposite party/writ petitioner, sub-contractors for execution of the work was also appointed vide communication dated 25.06.2019.

6. However, by communication dated 14th October, 2019, the opposite party/writ petitioner was informed that the sub-contractor had completely stopped the work at site and had refused to execute the work as a sub-contractor of the opposite party/writ petitioner. In this regard, there was several communications exchanged between the applicant and the opposite party/writ petitioner, copies of which are enclosed to the I.A. as annexures.

7. In spite of assurances being made by the opposite party/writ petitioner, since the work did not commence as per the schedule, a communication dated 03.12.2019 by E-mail was addressed to the opposite party/writ petitioner informing them of the intention of the applicant to terminate the contract and execute the balance job at the risk and cost of the opposite party/writ petitioner if the work is not started immediately. The applicant, however, requested the opposite party/writ petitioner to intervene and request their sub-contractor to complete the remaining work at the earliest.

8. Thereafter, by Communication No. DR/CVLT/30/2020/05 dated 29.01.2020 a show case letter issued by the applicant to the opposite party/writ petitioner. Pursuant there to a meeting was held on 06.02.2020 between the applicant and opposite party/writ petitioner and it was agreed that the opposite party/writ petitioner will proceed with the execution of the balance works contracted within 2(two) working days. However, the opposite party/writ petitioner having failed to proceed with the work as discussed/agreed to the applicant by communication No. DR/CVLT/20/20/83 dated 29.05.2020 issued the termination notice. This termination Notice is under challenge by the opposite party/writ petitioner in the connected writ petition being WP(C) No. 2981/2020.

9. This Court by order dated 03.08.2020 while issuing notice to the respondents passed the following order:-

> *Heard the learned counsel Mr. R. Dubey appearing for the petitioner, pertaining to the prayer for interim relief.*
>
> *Issue Notice to the respondents.*
>
> *I have considered the request of Mr. Dubey that the termination notice dated 29.05.2020 issued by Chief General Manager (Technical), Indian Oil Corporation stands stayed until further order. It is also directed that the respondents shall not invoke the bank guarantee until further order.*

The matter may be listed after 4 (four) weeks.

The petitioner shall take steps. A copy of this order be given to Mr. Dubey under signature of the Court Master.

10. Being aggrieved by the ex-parte order dated 03.08.2020 passed by this Court, the present I.A. has been filed by the applicant seeking modification/vacation of the interim order.

11. The learned senior counsel appearing for the IOCL strenuously urged that this interim order was passed ex-parte and because of this interim order, the balance work sought to be executed by the applicant by way of a fresh Tender which is already under way, cannot be proceeded with in view of the stay of the Termination Notice. In view of the urgent nature of works, the interim order dated 03.08.2020 passed by this Court be recalled and/or vacated/cancelled to enable the IOCL to proceed with the balance work left incomplete by the writ petitioner, through other third party contractors.

12. The learned senior counsel urged that the instant Tender being in the realm of non-statutory contract entered by and between the parties, namely, applicant and the opposite party/writ petitioner, the parties are bound by the agreement entered into and executed by and between the parties.

13. Mr. S. N. Sarma, learned senior counsel referred to the provisions of Section 9 which provides for "Arbitration" It is the submission of the learned senior counsel for the applicant that in view of the existence of the arbitrator clause in the agreement executed by and between the parties, there is no scope for the writ petitioner to approach this Court seeking judicial review under Article 226 of the Constitution of India and pray for any order including interim orders in respect of any disputes or differences which may have arisen pursuant to the contract and the agreement entered by and between the parties.

14. The learned senior counsel refers to the judgment of this Court rendered in the case of *Indian Oil Corporation and Ors. –Vs- Deka Consultancy and*

Agency Services reported in *1999 (2) GLT 217* to refer to the ratio laid down by a Division Bench of this Court that in cases of contract where arbitration clauses are available, writ Court would not ordinarily venture into deciding the disputes arising out of the contract. The learned senior counsel has also pressed into service a Judgment dated 19.03.2020 passed by the Co-ordinate Bench of this Court in WP(C) No. 9019/2019. The learned senior counsel has also referred to an order dated 02.01.2020 passed in I.A.(C) No. 4285/2019 whereby this Court had vacated the interim order passed in the concerned writ petition in view of the availability of the arbitration clause.

15. Per contra, Mr. Dubey, learned counsel appearing for the applicant strenuously urges that the reasons for termination of the contract are not germane to the impugned termination as sought to be projected by the applicants/respondents. According to Mr. Dubey, the petitioner asked for extension of time and the same was granted. However, without putting him to notice, the respondents IOCL had enforced the clause of termination and had issued the impugned termination order. Mr. Dubey, learned counsel refers to page No.- 137 Annexure- 4 of the writ petition to refer to the Office Memorandum dated 13.05.2020 and submits that the Government of India because of the Covid-19 pandemic situation had issued an Office Memorandum dated 13.05.2020, to the effect that contractual obligations between the parties will not be considered to be at default because of non-performances between the parties in view of the Covid-19 situation.

16. Mr. Dubey, learned counsel strenuously urges that the availability of alternative remedy like arbitration would not be an absolute bar in approaching the writ court.

17. After hearing the learned counsels for the parties, before proceeding further, it is necessary to refer to the clauses of the contract agreement, more particularly, Clause pertaining to Termination of Contract and Arbitration.

18. The relevant portions of the same are extracted below:-

"*SECTION 7*
TERMINATION

7.0.0.0 TERMINATION

7.0.1.0 Notwithstanding anything elsewhere herein provided and in addition to any other right or remedy of the OWNER under the Contract or otherwise (including the right of the OWNER to claim price discount due under the provisions of Clause 4.4.0.0 hereof or otherwise), the OWNER shall be entitled to terminate the Contract by written notice at any time during the currency on or after the occurrence of any one or more of the following events or contingencies, namely:

(i)(a) Default or failure by the CONTRACTOR of any of the material obligations of the CONTRACTOR under the Contract;

(b) Failure to start the work within 10 (ten) days of handing over the job site to the CONTRACTOR, and in the event of more than one job site being involved, failure to start the work at each job site involved within 10 (ten) days of handing over of the concerned job site to the CONTRACTOR or within such extended period(s) as may be permitted by the OWNER in this behalf;

(c) Failure to commence any work at any job site in accordance with the time prescribed in this behalf in the Progress Schedule;

(d) Failure to carry out on the works or any of items to meet the Progress Schedule;

(e) Failure to provide at each job site sufficient labour, material, equipment, machinery, temporary work and/or facilities required for the proper and/or due execution of the work or any part thereof;

(f) Failure to execute the works or any of items in accordance with the Contract;

(g) Disobedience of any order or instruction of the Engineer-in-Charge and/or Site Engineer;

(h) Negligence in carrying out the works or carrying out of work found to be unsatisfactory by the Engineer-in-Charge;

(i) Abandonment of the works or any part thereof;

(j) Suspension of the entire works or any part thereof, for a period of 14 (fourteen) days or more without due authority from the OWNER or Engineer-in-Charge.

(k) Failure to deposit the Initial Security Deposit within 30 (thirty) days of receipt by the CONTRACTOR of Acceptance of Tender or within such extended periods) as may be permitted by the OWNER in this behalf;

(l) Failure to execute the Contract in terms of the Form of Contract forming part of the Tender Documents within 30(thirty) days of notice in this behalf from the OWNER;

(ii) If the CONTRACTOR is incapable of carrying out the work;

(iii) If the CONTRACTOR misconducts himself in any manner;

(iv) If there is any change in the constitution of the CONTRACTOR (if a firm) or in the circumstances or organization of the CONTRACTOR, which is detrimental to the interests of the work or the OWNER;

(v) Dissolution of the CONTRACTOR (if a firm) or commencement of liquidation or winding up (whether voluntary or compulsory) of the CONTRACTOR (if a company) or appointment of a receiver or manager of any of the CONTRACTOR's assets and/or insolvency of the CONTRACTOR (if a sole proprietorship) or any Partner of the CONTRACTOR (if a firm);

(vi) Distress, execution, or other legal process being levied on or upon any of the CONTRACTOR's goods and/or assets;

(vii) Death of a CONTRACTOR (if an individual);

(viii) If upon any change in the Partnership/constitution of a CONTRACTOR's organization (if a Partnership), the OWNER shall refuse to continue the contract with the re-constituted firm;

(ix) If the CONTRACTOR or any person employed by him shall make or offer for any purpose connected with the Contract any gift, gratuity, royalty, commission, gratification or other inducement (whether money or in any other form) to any employee or agent of the OWNER;

(x) If the CONTRACTOR shall sub-contract the whole or any part of the work in contravention of the provisions of Clause 4.8.1.0 hereof or the CONTRACTOR shall assign or attempt to assign his interest or any part thereof in the Contract.

(xi) The occurrence of any other act, event, misfeasance, malfeasance or omission in respect of which the Contract Documents or any declaration furnished in terms thereof or pursuant thereto provides for termination of Contract.

7.0.1.1 The decision of the General Manager, as to whether any of the events/ contingencies mentioned in Clause 7.0.1.0 hereof, entitling the OWNER to terminate the Contract, has occurred or not, shall be final and binding upon the CONTRACTOR.

7.0.2.0 The notice of termination shall set forth, in addition to a statement of the reason(s) for terminating the contract, the time(s) and place(s) for conducting a survey and measurement of the work performed under the Contract up to the date of termination for the purpose of determining the final amount(s) due to the CONTRACTOR therefor. The reason(s) for the termination stated in the notice of termination, shall be final and binding upon the CONTRACTOR.

7.0.3.0 ……
7.0.4.0 …….

7.0.5.0 …….
7.0.6.0 ……..
7.0.7.0 ……..
7.0.8.0 ……..
7.0.9.0 ……..
7.1.0.0 ……..

7.2.0.0 No amount shall be due and payable to the CONTRACTOR upon or in the event of termination of the Contract unless and until the entirety of the works contemplated in the scope of work shall have been completed in all respects to the satisfaction of the OWNER and following such completion, the Defect Liability Period in respect thereof as herein otherwise provided for has elapsed and all payments finally due on any account to the OWNER and/or other CONTRACTOR(s) in respect of all liabilities in respect thereof has been determined.

7.3.0.0 …….

SECTION 9
ARBITRATION

9.0.0.0 ARBITRATION

9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, and any dispute arising out of any claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the

CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.

9.0.1.2 If a dispute arises with reference to any of the matters referred to in Paragraphs (i) to (iv) of Clause 9.0.2.0 hereof before the appointment of the sole Arbitrator under this clause, such dispute shall be referred for arbitration under Clause 9.0.2.0 hereof and the appointment of the sole Arbitrator under this Clause shall be subject to any without prejudice to Clause 9.0.2.0 and the sole Arbitrator so appointed shall refrain from proceeding in the arbitration so far as concerns any such disputed matter under the decision of the General Manager or his nominee under Clause 9.0.2.0 in respect thereof. If the dispute arises during the course of the arbitration proceedings commenced under Clause 9.0.1.0 with respect to any of the said matters, the sole Arbitrator shall forthwith refrain from proceeding further in the arbitration so far as concerns any such disputed matters until the decision of the General Manager or his nominee under Clause 9.0.2.0, and if necessary, the sole Arbitrator so appointed under this Clause shall direct the parties before him for the purpose to make reference of such dispute(s) to the General Manager or his nominee under Clause 9.0.2.0

9.0.2.0 Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration

Agreement embodied in Clause 9.0.1.0 with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject- matter of any reference or submission to arbitration under Clause 9.0.1.0, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be referred to the General Manager for decision by the General Manager or his nominee and shall be decided by the General Manager or his nominee, as the case may be (whose decision shall be final and binding on the OWNER and the CONTRACTOR) prior to the Arbitrator appointed under Clause 9.0.1.0 proceeding with or proceeding further with the reference, as the case may be. The said excluded matters are:

(i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement;

(ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR under Clause 9.0.1.0 is a Notified Claim;

(iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0.2.1 The General Manager or his nominee shall act as a persona designate or expert and not as an arbitrator and the provisions of the Indian Arbitration and Conciliation Act, 1996 or any law governing arbitration shall not apply to proceedings before the General Manager.

9.0.2.2 The General Manager shall render his decision on the basis of the material placed before him either by the OWNER or by the CONTRACTOR, and if the CONTRACTOR fails to place material before him, the General Manager shall assume that the CONTRACTOR has no material to place and may render his decision accordingly.

9.0.3.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re-enactment(s) and/or modification(s) thereof and of the Rules framed there under shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

(a) The Arbitrator shall give his Award separately in respect of each Claim and/or Counter-Claim as the case may be; and

(b) The Arbitrator shall not be entitled to review any decision, opinion or determination (howsoever expressed) which is stated to be final and/or binding on the CONTRACTOR in terms of the Contract Documents.

(c) Any procedure applicable to the arbitration shall be subject to the provisions of Clauses 9.0.1.0 and 9.0.2.0.

9.0.4.0 The venue of the arbitration under Clause 9.0.1.0 shall be New Delhi, provided that the Arbitrator may with the consent of the OWNER and the CONTRACTOR agree upon any other venue, while the arbitration under Clause 9.0.2.0 shall be at the place where the General Manager is located, provided that the Arbitrator may with the consent of the Contractor agree upon any other venue.

9.1.0.0 CONCILIATION

9.1.1.0 At any time prior to or during arbitration of any arbitral dispute(s) pursuant to Clause 9.0.1.0, the CONTRACTOR may seek resort to the Conciliation Machinery under the Indian Oil Conciliation rules, 2014 as amended and/or re-enacted from time to time. The proposal for conciliation shall be made to the General Manager.

9.1.2.0 The said Rules are available on the OWNER's website"

19. A perusal of the termination clause reveal that termination in terms of Section 7 of the contract agreement can be effected in the events of or on contingencies mentioned from Serial No. (i) to Serial No. (Xi). It is seen that in terms of Section 7 the impugned Termination order was issued and which is

subject matter of challenge in the writ petition No. 2981/2020.

20. Section 9 of the agreement provides for arbitration. As per clause 9.0.2.0, any disputes or differences in respect of the matters except those referred to in the said clause from "(i) to (iii) can be referred for arbitration. The reference to arbitration shall be subject to the provisions of Clause 6.7.1.0, 6.7.2.0 and 9.0.2.0. Prima facie, it appears that the disputes leading to the termination of the contract awarded to the writ petitioner, are referable to Arbitration under Section 9 of the Agreement.

21. The OM dated 13.05.2020 relied upon strongly by the opposite party was issued by the Government of India with reference to the Covid-19 pandemic situation in respect of the contractual obligations between the parties and contract. A careful perusal of the Office Memorandum dated 13.05.2020 would reveal that this particular notification is in respect of enforcement of Force Majeure Clauses available in various contracts. It is provided therein that any Force Majeure Clause which has been invoked by any party to a contract in respect of its contractual obligation on or after 19th February, 2020 will not be considered to be non-performance of the contractor. Clause- 5 of the said Office Memorandum clearly states as under:-

> "*It is clarified that invocation of FMC would be held valid only in a situation where the parties to the contract were not in default of the contractual obligations as on 19th February, 2020. It is further clarified that invocation of FMC does not absolve all non-performances of a party to the contract but only in respect of such non-performance as is attributable to a lockdown situation or restrictions imposed under any Act or executive order of the Government/s on account of COVID-19 global pandemic. It may be noted that subject to above stated all contractual obligations shall revive on completion of the period".*

22. Clause 5 of the said notification categorically provides that for availing

benefits under the Office Memorandum dated 13.05.2020 contractual obligations between the parties should not be in default as on 19th February, 2020. In respect of the present proceeding, the intention of the applicant to terminate the contract and execute the balance job at the risk and cost of the opposite party/writ petitioner was communicated to the opposite parties/writ petitioner as far back as 3rd December, 2019 and the show cause notice was issued on 29.01.2020. Pursuant thereto by minutes of the meeting dated 06.02.2020 held between the applicant and the writ petitioner, it was stated that the commencement of the work and a modality of execution of the balance work will be provided by the writ petitioner within 2(two) working days i.e. 10th February, 2020. It is evident from the materials available that the work did not commence on 10th February or any date thereafter.

23. These facts are not disputed by the learned counsel appearing for the opposite party/writ petitioner. In the face of such undisputed facts, the benefit conferred by the Office Memorandum dated 13.05.2020 cannot be claimed by the opposite party/writ petitioner, merely, because the termination notice was issued on 29.05.2020. Furthermore, the writ petitioner also did not refer to any communication which reveals that the Force Majeure Clauses was invoked by the writ petitioner at any point of time.

24. As discussed above, the benefit of the Office Memorandum is only in respect of the contractual obligations for parties to a contract who were not in default of the contractual obligations as on 19th February, 2020 and because of Covid-19 pandemic situation the contractors were forced to invoke the Force Majeure Clauses(FMC). It was further clarified therein that invocation of FMC does not absolve all non-performances of a party to a contract, but only in respect of such non-performance as is attributable to a lock down situation or restrictions imposed under any Act or any executive order of the Government on account of Covid-19 Global pandemic. Subject to the above stated, all contractual obligations shall revive upon completion of the period. The benefit

sought to be claimed by the opposite party/writ petitioner in respect of its contractual obligations which it had admittedly, prima facie, defaulted well prior to 19th February, 2020, on the facts pleaded appears to be not applicable in the case of the writ petitioner. As such the claim of the benefit of the Office Memorandum dated 13.05.2020 sought to be made by the learned counsel for the opposite party/writ petitioner, is prima facie not tenable in the facts of the present case.

25. The judgments referred to by the learned counsel for the applicant/IOCL pertain to exercise of judicial review under Article 226 in matters arising out of the commercial contracts where the agreement provides for arbitration as an alternative method of dispute resolution. The judgments relied upon by the learned counsel for the applicant are not dealt with at the moment inasmuch as, in the present I.A., the only question is the continuance and/or extension of the interim order passed by this Court. The validity/correctness of the termination notice as well as locus of the petitioner to challenge the termination by way of the present writ proceedings in the face of the provisions for arbitration and conciliation further in the contract agreement are subject matters of the writ petition being WP(C) No. 2981/2020. Since, the parties are yet to file proper affidavits in the writ petition, this question including the question of locus are left open to be decided at the time of hearing of the writ petition without expressing any opinion on the merits by way of this order.

26. Having heard the learned counsels for the parties and keeping in view the balance of convenience between the parties and also in the interest of execution of the work which is in public interest, this Court is of the view that the interim order dated 03.08.2020 calls for modification to a limited extent. Accordingly, the interim order dated 03.08.2020 is modified only to the extent to permit IOCL to proceed with the balance/uncompleted works in a time bound manner and for which it is stated that fresh tender has been called for and the same is in the process of being settled with other third party contractors. The interim

order dated 03.08.2020, accordingly, stands modified. The stay granted by this Court by order dated 03.08.2020 in respect of the Termination Notice dated 29.05.2020, is vacated. The IOCL is permitted to proceed for execution/completion of the balance work left in respect of the instant Tender Works, to be completed through other third party contractors. In this respect, the IOCL is permitted to proceed accordingly.

27. It is made clear that modification of this interim order is done only to enable the applicant/respondent to proceed with the balance work through a fresh contract in view of the public interest involved. The obligations of the applicant viz-a-viz the writ petitioner will continue to be governed in terms of the agreement entered by and between the parties and executed on 21.08.2018.

28. It is also made clear that the Bank Guarantee, if any, pledged by the writ petitioner shall not be invoked without leave of this Court. The question of the validity and/or the correctness of the termination notice dated 29.05.2020 issued by the applicant/IOCL will be subject to the outcome of the writ petition.

29. Needless to say, if in the event, the writ petition filed by the petitioner is allowed then all consequential reliefs available to the writ petitioner in terms of the contract will be available.

30. I.A. is accordingly allowed to the extent indicated above and disposed of.

JUDGE

Comparing Assistant