

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 13/02/2020****Judgment Delivered on : 24/02/2020****Writ Petition (C) No. 31 of 2020**

1. ARSS-SIP (JV), a joint venture having its registered office at 129, Transport Center, Rohtak Road, Punjabi Bagh, New Delhi.
2. M/s. ARSS Infrastructure Projects Ltd. having its registered office at plot No. 38, Sector A, Zone D, Mancheshwar Industrial Estate, Bhubaneswar, Odisha
3. M/s. Shyam Indus Power Solutions Pvt. Ltd. having its registered office at Building No. 16A, Najafgarh Road, Moti Nagar, Shivaji Marg, New Delhi - 110 015

---- Petitioners**Versus**

1. Union of India, through the Secretary Ministry of Railways, Rail Bhawan, 1, Raisina Road, New Delhi.
2. South East Central Railway, through its General Manager, Headquarter, Bilaspur, Chhattisgarh.
3. Chief Administrative Officer (Construction) South East Central Railway, Bilaspur, Chhattisgarh.
4. Chief Engineer (Construction-I), South East Central Railway, Bilaspur, Chhattisgarh.

---- Respondents

For Petitioner	: Shri Amrito Das, Advocate.
For Respondent/Railways	: Shri H.S.Ahluwalia, Advocate.

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C.A.V. Judgment**Per P.R. Ramachandra Menon, Chief Justice**

1. Annexure P/1 order dated 02.01.2020 terminating the contract awarded to the Petitioner, referring to the laxity and non-attaining any progress in the work is under challenge. It is contended as arbitrary, insofar

as the time for completion of the work was being extended from time to time under para 17-A of the General Conditions of Contract (*for short 'the GCC'*) involving a circumstance where the delay is on the part of the Railways/awarder (unlike the case covered by para 17-B where the delay is on the part of the Contractor). Termination of the contract on 02.01.2020 is stated as arbitrary in all respects; since, as per Annexure P/6 dated 07.11.2019, the time to complete the work was extended till 31.03.2020.

2. We heard Shri Amrito Das, the learned counsel appearing for the Petitioner as well as Shri H.S.Ahluwalia, the learned Standing Counsel representing the Respondent/Railways.

3. The sequence of events reveal that Annexure P/3 notification inviting tender (*for short 'the NIT'*) dated 29.12.2015 was issued by the 2nd Respondent for various works such as soil investigation, design of bridges, execution of earth work, minor bridges, major bridges, RUBs, extension of FOB, Staff Quarters and other service buildings, supply of ballast and other miscellaneous works in Lajkura-Raigarh section in connection with the construction of 4th line between Jharsuguda-Bilaspur, covering a distance of about 59 KMs. The Petitioner-Joint Venture undertaking participated in the bid and on coming out successful, Annexure P/4 Letter of acceptance (*for short 'the LoA'*) dated 21.09.2016 was issued to them. In furtherance to this, agreement dated 13.06.2017 came to be executed between the Petitioner and the Railways and as per the specific terms, the work had to be completed within a total span of 24 months.

4. It is the case of the Petitioner that due to various reasons attributable to the Railways, the work was getting delayed. The field was set by the Railways much belatedly and the drawings and designs were supplied only in the year 2019. Since the Railways are aware of the factual position, the time for completion of the work was extended from time to time, all with

reference to para 17-A of the GCC *i.e.* because of the fault on the part of the Railways and not on the part of the Contractor. The first extension was as per the order dated 01/02.11.2018, whereby the time was extended till 31.03.2019. A supplementary agreement was executed on 09.01.2019 with the same set of terms and conditions as agreed earlier. The second extension was effected from 06.05.2019 to 30.06.2019, the third one from 11.07.2019 till 31.10.2019, and the fourth extension was vide Annexure P/6 from 07.11.2019 till 31.03.2020. All the above instances were by invoking para 17-A of the GCC (due to the fault of the Railways) and not by invoking clause 17-B (due to the fault on the part of the contractor). It is pointed out that the Petitioner was taking all earnest efforts and it was progressing with full pace.

5. While so, Annexure P/7 notice dated 25.11.2019 was issued to the Petitioner stating that the progress in work was quite poor and the Petitioner was given seven day's time to expedite the work. This was followed by Annexure P/9 notice dated 27.12.2019 giving just two day's time (48 hours) to do the work and show good progress in this regard. It is stated that the Petitioner had submitted replies in response to the notices, however, it was without any regard to the explanation offered by the Petitioner and paying only scant regards to Annexure P/6 order already passed granting extension of time from 07.11.2019 to 31.03.2020, that the Annexure P/1 order came to be passed on 02.01.2020 (under clause 62 of the GCC) rescinding the contract. The Petitioner was also prohibited from participating in the bid to be issued for completing the balance work under the above tender, besides forfeiting the performance guarantee and the EMD/Security Deposit, effected by the Petitioner. This is sought to be challenged in the writ petition on various grounds.

6. A reply has been filed from the part of the Respondents producing copies of various documents as Annexure R/1 to R/25 to substantiate that the course and proceedings pursued by the Railways. The averments and allegations raised by the Petitioner have been sought to be rebutted and the lapse on the part of the Petitioner in doing any substantial work, despite granting several opportunities and extension of time, stands explained in the return.

7. The Petitioner has filed some additional documents on 04.01.2020 and 14.01.2020, in response to which, reply dated 29.01.2020 has been filed by the Respondents, also producing additional documents as Annexure R-26 and Annexure R-27.

8. Shri Amrito Das, the learned counsel for the Petitioner points out that the termination of the contract as per Annexure P-1 on 02.01.2020, despite the extension of time to complete the work till 31.03.2020 granted as per Annexure P-6, is nothing but arbitrary and illegal in all respects. The learned counsel submits that there is absolutely no basis for the alleged delay/lapses on the part of the Petitioner in completing the work. Even though, Annexure P-4 LoA was issued way back on 21.09.2016 and the agreement was executed on 13.06.2017, the various pre-requirements to be satisfied by the Railways as agreed, particularly with reference to (i) cable clearance; (ii) diversion of forest roads; (iii) cutting of trees; and (iv) shifting of pipelines, was never done by the Railways and further, the drawings and designs came to be supplied only in the year 2019. The lapse on the part of the Railways in meeting the requirements/discharging the duty on their part, was very much known to them and it was accordingly, that the time for completion of the work was extended on four different occasions, firstly as per the order dated 01.11.2018 (Document G) and the last one as per Annexure P/6 from 07.11.2019 to 31.03.2020. All such extensions were under

para 17-A of the GCC, which reckons the delay on the part of the Railways; unlike para 17-B which is with reference to the delay on the part of the Contractor. Having admitted the delay/lapse on the part of the Railways/awarder of the contract, it was never open for the Railways to shift the liability to the shoulders of the Petitioner all of a sudden and to have the work terminated as per Annexure P/1 which hence is sought to be interdicted. The learned counsel submits that the right to rescind the contract with reference to clause 62 of the GCC is only in a case covered by para 17-B and not under para 17-A of the GCC. Which provision under clause 62 of the GCC has been violated by the Petitioner is not pointed out by the Respondents. It is also contended that the initial agreement dated 13.06.2017, pursuant to the extension of time ordered on 01.11.2018 was renewed as per a supplemental agreement dated 09.01.2019 with the same terms and conditions. But no agreement was executed pursuant to the second, third and fourth extensions and this being the position, clause 62 of the GCC (which was to be invoked, based on the agreement) can never be pressed into service as there is no valid agreement in terms of Article 299 of the Constitution of India.

9. Shri Ahluwalia, the learned Standing Counsel for the Respondent/Railways submits that there is no dispute with regard to the terms and conditions of the NIT or the GCC. It is pointed out that the Petitioner has not given the correct picture in the writ petition and has attempted to mould the case simply with reference to paragraph 17-A of the GCC mentioned in the orders granting extension of time to contend that termination of the contract within the extended period is wrong and unsustainable. The Petitioner has never referred to the several notices issued by the Respondent-Railways at different points of time, in connection with the various items of works involved and the inordinate delay either in starting or acquiring the minimum level to have it finished on time. The learned counsel points out with reference to the

"subject" dealt with in Annexure P/4 LoA that the work involved, as admitted by the Petitioner in paragraph 3 of the writ petition, involves different items and there was no hindrance with regard to the commencement or continuation of the work in respect of many items. The main objection/hindrance pointed out by the Petitioner are only under four heads *i.e.* cable clearance, diversion of forest road, cutting of trees and shifting of pipelines: There was absolutely no bar or hindrance in commencing other works, which was not done by the Petitioner. The supply of designs and drawings of the bridges was delayed because of the lapses and delay on the part of the Petitioner in effecting soil testing and meeting the various requirements and this has been specifically adverted to in the various notices/letters issued by the Respondents. It is also pointed out that the work was quoted and undertaken by the Petitioner after a clear understanding as to the scope of the work, as revealed from the "certificate of familiarisation" executed and given by the Petitioner/contractor showing the work details therein. Specific reference is made to Annexure R/1 dated 10.08.2017 which is the first letter issued by the Railways, about one year after the issuance of Annexure P/4 LoA, pointing out that only negligible extent of work was done by the Petitioner, despite the lapse of one year. Further reference is made to the subsequent letters issued by the Railways on 23.08.2017, 24.10.2017 (Annexure R/1) and 28.10.2017 (Annexure R/2) referring to the various lapses on the part of the Petitioner and clearly intimating that the progress of work was not satisfactory. It was also specifically mentioned that the design and drawings were getting delayed because of the lapse on the part of the Petitioner with regard to soil exploration. A specific chart was also given in Annexure R/2 which reveals that under many heads, the work done till date was virtually 'nil', or only to a meagre extent. Annexure R/2 was followed by Annexure R/3 letter dated 06.12.2017 issued by the Railways. Here again, the lack of progress in respect of various works has been clearly

pointed out and a 'flow chart' has been given, showing the poor performance in doing the work by the Petitioner. The subsequent letters dated 13.02.2019 (Annexure R/6), 05.03.2019 (Annexure R/7) and letter dated 22.06.2019 (Annexure R/9) issued by the Railways also refer to the specific instances of delay and poor result displayed by the Petitioner with regard to the work involved under various heads. Though, the Petitioner has submitted Annexure R/5 letter dated 23.01.2019, it is only to provide a 'bar chart', assuring that the work will be completed as shown in the chart; which however has not been materialised. Similarly, nothing is stated in Annexure R/8 reply dated 11.03.2019 of the Petitioner, wherein no complaint regarding any hindrance is pointed out. The letter dated 06.06.2019 (Annexure R/10) was submitted by the Petitioner for extension of time, wherein also the factual aspect as to the lapses/lack of progress is not disputed.

10. The Respondents have given para-wise remarks as to the work in progress in Annexure R/11 report dated 06.07.2019, in response to Annexure R/10 letter dated 06.06.2019, seeking for extension of time, which clearly points to the lapses on the part of the Petitioner. Annexure R/16 dated 25.10.2019 is another petition for extension of time preferred by the Petitioner also giving a bar chart. It was on finding that no substantial improvement was taking place, that the Respondents issued Annexure R/18 notice dated 25.11.2019 giving seven days' time to make good the lapses and show substantial improvement. This was replied by the Petitioner as per Annexure P/8 dated 29.11.2019 wherein the Petitioner contends that the work could not be done during the last four months due to prolonged monsoon and though the mobilisation of the machinery was done but on account of transportation problem, the work could not be done as desired. Reference is also made to the steps for mobilisation of the resources, adding that the construction materials have also been arranged for the remaining work for major and minor bridges and it will come to a full swing by the next week, in turn

requesting that the seven days' notice may kindly be withdrawn. In terms of the NIT and the agreement, a further notice was issued by the Railways vide Annexure R/19 on 22.12.2019 giving separate figures as to the work done till 07.12.2019 and the works done after 07.12.2019. Many other columns in this regard show the result in the negative or as minimal. The said notice also observes that as far as the financial progress is concerned, the work was done only to an extent of 22% and that the figures disclosed that it would not be completed on the targeted date. It was in the said circumstance, that Annexure P/9 notice of 48 hours was issued on 27.12.2019 in terms of the NIT/Agreement. In Annexure P/10 reply dated 28.12.2019, there is no complaint that the Railways was at fault in any manner, but for stating that some action as mentioned therein has already been taken to commence/make good the progress of the work. The Railways in the said circumstance, called for a report from the Site Engineer, a copy of which is produced as Annexure R/23 dated 31.12.2019, which reveals that in respect of the work covering a total length of 59 KMs, work was done only in respect of 19 KMs. The work in progress, at snail's pace, was moving only in 14 sites; while no work was being done in 8 sites. It was after considering all the above facts and figures that the Respondent Railways were constrained to pass Annexure P/1 order dated 02.01.2020 putting an end to the contract, as there was no other alternative. The learned counsel submits that, by virtue of 'clause 1.38' of the NIT dealing with the dispute resolution mechanism, there is an effective alternate remedy for the Petitioner by way of Arbitration, read with clause 6 of the GCC and that the writ petition is not maintainable in the said circumstance.

11. After hearing both the sides and on going through the materials on record, it is seen that the version of the Petitioner that the contract came to be terminated all of a sudden, despite the extension granted vide Annexure P/6 till 31.03.2020 is not correct. The lack of progress in the work in respect

of many items (under the different types of works awarded to the Petitioner) as per Annexure P/4 LoA and the Agreement executed pursuant to the Annexure P/3 tender were specifically brought to the notice of the Petitioner at different points of time. The hindrances pointed out by the Petitioner with reference to cable clearance, diversion of forest roads, cutting of trees and shifting of pipelines are not *prima facie* seen connected to many of the works. The lack in progress pointed out in several letters issued by the Railways, giving a flow chart, is not properly answered by the Petitioner. No much dispute is raised as to the quantum of work done by the Petitioner, nor is there any specific denial as to the finding on facts by the Railways in respect of such works. In any view of the matter, the disputes if at all any in this regard can only be finalised on the basis of evidence to be adduced. The fact finding exercise cannot be undertaken by this Court in a proceeding under Article 226 of the Constitution of India. That apart, there is an effective alternative remedy for the Petitioner as pointed out by the Respondents by way of 'Arbitration', in terms of 'clause 1.38' of the Special Conditions, read with clause 63 of the GCC.

12. In the said circumstances, we find it difficult to entertain this writ petition. It is accordingly dismissed without prejudice to the rights and liberties of the Petitioner to pursue other appropriate remedy in accordance with law. No costs.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE