

\$~3.

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

+ LPA 160/2020

M/S VIJ CONTRACTS (P) LTD

..... Appellant

Through: Ms. Sangeeta Bharti, Mr. Ashish
Kumar & Mr. Rameezuddin Raja,
Advocates.

versus

MIS IRCON INFRASTRUCTURE &
SERVICES LTD.

..... Respondent

Through: Mr. Abir Phukan & Mr. Ashkrit
Tiwari, Advocates for respondent
No.1.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

19.06.2020

%

C.M. No. 12903/2020

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

C.M. No. 12904/2020

3. Exemption allowed, subject to all just exceptions.
4. The Court Fees be paid within a week.
5. The application stands disposed of.

LPA 160/2020 & C.M. No. 12902/2020

6. The present Letters Patent Appeal is directed against the order dated 09.06.2020 passed by the learned Single Judge in W.P.(C.) No.3396/2020 preferred by the appellant. The appellant had preferred the said writ petition to challenge the termination notices dated 07.02.2020 and 15.05.2020 issued by respondent No.1, i.e. M/s IRCON Infrastructure & Services Ltd. The learned Single Judge rejected the writ petition by holding that the question – as to whether the default could be attributed to respondent No.1, was a disputed question of fact, which could not be determined by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India. The learned Single Judge relegated the petitioner/ appellant to its contractual remedies and observed that the petitioner/ appellant would be entitled to agitate its rights and contentions in appropriate proceedings and in accordance with law. The learned Single Judge also observed that respondent no.1-M/s IRCON Infrastructure & Services Ltd. should comply with the mandate of Clause 36 of the Special Conditions of Contract for resolution of disputes. The writ petition was, accordingly, disposed of with a direction to respondent No.1 to initiate the said process under Clause 36 of the Special Conditions of Contract within a period of one week from the date of the impugned order.

7. The submission of learned counsel for the appellant is that the partial termination vide termination letter dated 07.02.2020 and the final termination vide letter dated 15.05.2020, are completely arbitrary and *mala fide*. The scheduled date of completion of work was 05.02.2020. The appellant sought extension of time on 04.02.2020. Even prior to that, the

respondent No.1 issued show-cause notices to the appellant on 16.01.2020 – whereby the appellant was granted seven days time to explain its slow progress; and another notice dated 03.02.2020 – whereby the appellant was granted 48 hours to explain its inaction qua the contract. The submission of learned counsel for the appellant is that the appellant, time and again, sent several communications to respondent No.1 pointing out the reasons for the appellant not being able to execute the works. Those reasons were not attributable to the appellant.

8. Learned counsel for the appellant has further submitted that on 16.01.2020 itself, a meeting was held between respondent No.1 and all the contractors working at the site – which included the appellant, wherein the respondent No.1 extended the time for completion of works by all the contractors – including the appellant, to 29.02.2020. In spite of that, the notice dated 03.02.2020 was issued to the appellant, and contract partially terminated on 07.02.2020.

9. The further submission of learned counsel for the appellant is that while partially terminating the contract on 07.02.2020, respondent No.1 proceeded to invoke the entire Performance Bank Guarantee of the appellant, even though, only partial invocation of the Bank Guarantee should have been resorted to, if at all. Learned counsel submits that the aforesaid conduct of the respondent No.1 demonstrates *mala fide*, and invocation of the complete Bank Guarantee amounting to Rs.2.75 Crores crippled the appellant financially and rendered the appellant incapable of performing any further works.

10. Learned counsel for the appellant further submits that even after passing of the impugned order by the learned Single Judge, the respondent No.1 has not acted in good faith with a view to settle the disputes. Respondent No.1 issued three communications – one after another, calling the appellant only to measure the works which the appellant had performed and simultaneously, respondent No.1 also proceeded to float another tender for completion of balance works, which were earlier awarded to the appellant.

11. Learned counsel for the appellant has placed reliance on two decisions of the Supreme Court, namely *Madhya Pradesh Power Management Company Limited Vs. Renew Clean Energy Private Limited & Another*, (2018) 6 SCC 157; and *ABL International Ltd. and Another Vs. Export Credit guarantee Corporation of India Ltd. and Others*, (2004) 3 SCC 553.

12. Learned counsel submits that in the first case, i.e. *Madhya Pradesh Power Management Company Limited* (supra), the High Court had set aside the termination of the contract by the employer, and the employer had approached the Supreme Court. The Supreme Court held that since the contract was at the final stage, and the contractor had invested heavily in the contract by procuring land and making huge investment, termination was not justified. Instead, the employer could levy penalty upon the contractor.

13. In the second case, i.e. *ABL International Ltd.* (supra), the Supreme Court held that where the employer is an instrumentality of the State, it had the obligation to act fairly and justly and that it could not act arbitrarily. The Supreme Court also held that the writ Court could examine the aspect of

arbitrariness, and in an appropriate case, the writ Court could even examine disputed questions of fact.

14. On the other hand, learned counsel for the respondent No.1 – who appears on advance notice, submits that under Clause 50.1(i)(h) of the GCC, the employer, i.e. respondent No.1, was entitled to assess whether the contractor was unlikely to be able to complete the whole work, or part thereof, within time because of poor record of progress. On that basis, the respondent No.1 could terminate the contract, if it reached the conclusion that the contractor would not be able to complete the works within time. The said clause, insofar as it is relevant, reads as follows:

“50.1 Conditions leading to determination of contract

i. If the Contractor

x x x x x x x

h. fails to adhere to the agreed programme of work or fails to complete the works or parts of the works within the stipulated or extended period of completion, or is unlikely to complete the whole work or part thereof within time because of poor record of progress, or”

15. Learned counsel for respondent No.1 submits that the appellant had been able to achieve only about 16.08% completion of work on the date of termination, which is 15.05.2020. As noticed above, the scheduled date of completion of work was 05.02.2020. Therefore, even after a lapse of three months and ten days of the scheduled date of completion, the appellant had not been able to make much progress, and there was no likelihood of the appellant being able to complete the work even in the foreseeable future.

16. Learned counsel further submits that respondent No.1 acted in compliance of the order of the learned Single Judge and for that purpose, on repeated occasions, issued notices to the appellant to come to the site for measurement of the works. Learned counsel submits that it was necessary to assess the ground situation, namely the extent of the work performed by the appellant, to be able to make any further progress in the matter of settlement. The appellant, however, avoided those meetings and did not come to the site even to measure the works.

17. Having heard learned counsels, we are inclined to dismiss the petition.

18. The contract was partially terminated on 07.02.2020. By this termination, the scope of work left to be performed by the appellant was substantially reduced. Even according to the appellant, the time for completion of the remaining works was extended to 29.02.2020. That completion, even according to the appellant, was not achieved. The appellant claims that the appellant was not responsible for the delay. The respondent No.1, obviously, controverts this position, as is evident from its letters of termination dated 07.02.2020 and 15.05.2020.

19. Thus, there is a serious dispute of facts as to which of the parties was in breach and responsible for the delay. The issue whether termination of the contract, firstly, on 07.02.2020 partially, and finally on 15.05.2020 constitutes breach on the part of the respondent No.1, is a seriously disputed question of fact. Such disputed questions of facts would normally not be examined by the writ Court, particularly when the contract provides for remedy to deal with such like situations. According to the respondent No.1,

the appellant was able to achieve only 16.88% completion of the work till the date of final termination i.e. 15.05.2020, which was well beyond the original date of completion of the contract, which was 05.02.2020.

20. Prima facie, therefore, it cannot be said that the partial termination of the contract on 07.02.2020, and final termination on 15.05.2020 is *ex facie* arbitrary, or unreasonable. At the same time, it remains to be examined upon detailed consideration of all the facts and circumstances, whether the breach of the contract lay at the door of the appellant, or the respondent. We make it clear that we have not returned any finding of fact on this aspect.

21. The contract in question is a works' contract. Such a contract cannot be specifically enforced. That being the position, it cannot be reinstated. In our view, the only remedy available to the appellant, at this stage, would be to claim a declaration with regard to the termination being illegal, and on that basis to claim damages. It would be for the competent forum to examine the said issue upon appreciation of the evidence that the parties may lead.

22. Since the contract cannot be specifically enforced, there can be no stay of the termination which has already taken effect, partially, on 07.02.2020, and finally on 15.05.2020.

23. We find merit in the submission of learned counsel for respondent No.1 that respondent No.1 could invoke Clause 50.1(i)(h) to determine the contract if it found that the contractor was unlikely to be able to complete the whole work, or part thereof within time because of poor record of progress. Consequently, it cannot be said that the action of respondent No.1

in terminating the contract partially on 07.02.2020, and finally on 15.05.2020, was arbitrary or irrational.

24. Here itself, we may clarify that whether the conclusion drawn by the respondent No.1 – that the appellant was unlikely to be able to complete the whole work, or part thereof, within time and with regard to the poor record of progress of work is a matter of fact, which we have not gone into and it would be for the parties to agitate these issues before the competent forum.

25. So far as invocation of the complete bank guarantee by respondent No.1 at the time of partial termination of the contract is concerned, learned counsel for the appellant, apart from making a statement to the aforesaid effect, has not shown to us as to which clause or term of the bank guarantee, or the contract, limits the right of respondent No.1 to invoke the same in its entirety. We are in no position to examine this issue. A general averment of mala fides is, in any event, not sufficient. The appellant does not say who within the organisation of respondent No.1 is harbouring mala fides, and for what reason. In the absence of such particulars, the allegations of mala fides are neither here, nor there.

26. Reliance placed by learned counsel for the appellant on the aforesaid two decisions is of no avail in the facts of the present case. As noticed hereinabove, *Madhya Pradesh Power Management Company Limited* (supra) was a case where the contractor had performed majority of the works under the contract. Moreover, the contractor had invested heavily in the contract by procuring land and making huge investments. It was in that background that the Supreme Court did not interfere with the order of the

High Court restoring the contract. The same cannot be said about the present case inasmuch, as, respondent No.1 has claimed that only 16.88% of the contract work has been performed by the appellant till the date of final termination. The decision in *ABL International Ltd.*(supra), in our view, is not attracted in the facts of the present case, since we do not find the partial termination, or the final termination of the contract to be *ex facie* arbitrary, or unjust. Both the termination notices set out the reasons for the action taken.

27. So far as the grievance of the appellant with regard to non-compliance of the directions issued by the learned Single Judge is concerned, once again, we find that the stand of the appellant is not correct. The respondent No.1 issued 3 communications to the appellant calling the appellant for recording the joint measurements. The appellant did not proceed for the meeting at the site to record the measurements of the work done. We agree with the stand of respondent No.1, that even to hold any negotiations or talks for settlement, it was necessary to first assess the quantum of work done by the appellant. During such assessment, the parties could have examined the reasons for the work not being completed within the stipulated, or even the extended time. Moreover, settlement between the parties does not necessarily mean restitution of the contract. Settlement could also mean mutual understanding and final settlement between the parties, post the termination.

28. For the aforesaid reasons, we do not find any merit in the present appeal and dismiss the same.

29. At this stage, learned counsel for the appellant has submitted that the appellant would proceed to the site to hold settlement talks with respondent No.1 and for mutually measuring the works performed by the appellant.

30. Let the appellant's representative proceed to the site for measurement of works and other purposes on 22.06.2020 at 11:00 a.m., and thereafter, on such dates as may be mutually fixed by the parties.

31. The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

RAJNISH BHATNAGAR, J

JUNE 19, 2020

B.S. Rohella