

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7977 of 2020

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M/S M.K. Gupta & Company, through its Partner Bishnu Kumar Gupta Male, aged about 58 Years, S/o Late Ram Niwash Gupta, R/D Metro Heights, 2.5 Mile, Sevoke Road, P.O. and P.S. Siliguri District-Darjeeling-734001 (West Bengal).

... .. Petitioner/s

Versus

1. The Union of India through the General Manager (W), Northeast Frontier Railway, Maligaon Gauhati-781011.
2. The Divisional Railway Manager (Works) DRM Office, Katihar Division, Northeast Frontier Railway, P.O. Katihar, District Katihar-854105.
3. The Senior Divisional Finance Manager (Incharge) Katihar Division, Northeast Frontier Railway, District-Katihar-854105.
4. The Senior Divisional Engineer, Coordination Katihar Division, Northeast Frontier Railway, District-Katihar-854105
5. The Divisional Engineer Line Katihar Divisional, Northeast Frontier Railway, District-Katihar-854105
6. The Assistant Divisional Engineer/1/New Jalpaiguri Katihar Division, Northeast Frontier Railway, District-New Jalpaiguri-734004
7. The Senior Section Engineer Works, NEW JALPAIGURI Katihar Division, Northeast Frontier Railway, District-New Jalpaiguri-734004

... .. Respondent/s

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Appearance :

For the Petitioner/s : Ms.Anukriti Jaipuriyar, Adv.
For the Respondent/s : Mr. Anshuman Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date : 26-10-2021

Heard learned counsel for the petitioner and counsel for the respondents. Learned counsel for the petitioner has filed an undertaking to remove all defects pointed out by the Stamp Reporter as and when required. It is accordingly directed that all defects pointed out by the Stamp Reporter be removed within one month hereof.



2. The present writ petition has been filed for the following reliefs as formulated by the petitioner-

“1(i) For issuance of writ in the nature of Certiorari to quash and set aside the Memorandum No. W/362/17-18/ROB/Fulbari- Gazoldova/L/ W-2 dated 03.06.2020 whereby and whereunder the penalty of liquidated damages to the tune of Rs. 53,50,108.85/- (Rupees Fifty Three Lakhs Fifty Thousand One Hundred Eight and Eighty-Five Paise) have been imposed upon the Petitioner for the grant of extension of time of work contract during the COVID-19 pandemic period from 31.03.2020 to 31.07.2020.

(ii) To hold and declare that the imposition of penalty of Rs. 53,50,108.85/- for grant of extension of time of work contract during the COVID-19 global pandemic from 31.03.2020 to 31.07.2020, despite the Force Majeure Clause 17 of Indian Railways Standard General Conditions of Contract (hereinafter to be referred as “the GCC”) in effect is illegal and unjust.

(iii) For issuance of writ in the nature of Mandamus directing and commanding the Respondent authorities to allow the Petitioner to complete the approved balance work which is less than 10% of the work contract and has been put on hold by the Railway authorities vide



*Letter No. W/362/17-18/ROB/Fulbari-Gazoldova/L/W-2
dated 15.07.2020.*

*(iv) To pass any other relief or reliefs for which
the petitioner is found to be entitled in the facts and
circumstances of the case.”*

3. The short facts of the case, according to the petitioner-firm, are that it participated in Tender Notice No. KIR/Engg./03 of 2018 floated by the respondent authorities for construction of road overbridge at Fulbari-Gazoldoa Canal Road, and on being found duly eligible, a letter of acceptance was issued on 25.05.2018. Thereafter, the contract agreement was entered into between the petitioner and the respondents on 01.08.2018 for total estimated cost of the work of Rs. 10,00,09,289.13/- which was scheduled to be completed by 24.11.2019. Owing to certain reasons, the work was delayed and a request for extension of time under Clause 17A of the General Conditions of Contract (the “GCC”) on 08.11.2019 was made by the petitioner, which was granted without liquidated damages till 31.03.2020 vide letter dated 09.01.2020 issued by the respondents. On the same day i.e. on 09.01.2020, the respondents also proposed for variation in quantities of work which was also required to be sanctioned by the Railway authorities in writing, pending which the work was not to proceed in terms of Clause 41 of the GCC. The proposed variation was not sanctioned and



approved by the respondent authorities within the extended time till 31.03.2020. Besides, in view of the outbreak of COVID-19 and consequent national lock-down on 24.03.2020 onwards, the work could not proceed and accordingly, a request was made on 27.03.2020 for extension of time till 31.07.2020. On such request, the Sr. Section Engineer, Work, New Jalpaiguri noted that 90% of the work had been completed and that the Railway would not suffer any loss if such extension were granted. However, by the impugned letter dated 03.06.2020, a penalty of Rs. 53,50,108.85/- was imposed upon the petitioner for grant of extension of time from 31.03.2020 to 31.07.2020.

4. Ms. Anukriti Jaipuriyar, learned counsel for the petitioner submits that the action of the respondent Railway in imposing the penalty is completely arbitrary and unjustified in the facts and circumstances of the case. It is submitted that in view of the variation proposed by the Railway on 09.01.2020 (Annexure-P/5), the petitioner could not execute the work in view of Clause 41 of the GCC until modification was made in writing and signed by the parties. It is the specific stand of the petitioner that the proposed modification has not been sanctioned in writing until expiry of the extended time of 31.03.2020 rather the same was



communicated much later vide letter dated 10.06.2020 by the Railways (Annexure-P/10).

5. It is then submitted on behalf of the petitioner that in any event, in view of COVID-19 pandemic, complete lock-down in the country had been imposed on 24.03.2020. Accordingly, the petitioner vide letter dated 25.03.2020 requested for extension of time to complete the work till 31.07.2020. The request of the petitioner was found to be justified as evident from the very fact that the Sr. Section Engineer forwarded the request to the Divisional Engineer, observing that no loss to the Railway would be caused upon extension of time. In this regard, the petitioner invites reference to Clause 17 of the GCC which contemplates that in the event of Force Majeure, either party was required to give notice within a period of 30 days from the date of occurrence and neither party was entitled to terminate the contract by reason of such event.

6. Learned counsel for the respondent Railway appears and has been heard. He relies on the counter affidavit to oppose the writ petition, submitting that the petitioner cannot take advantage of the short overlapping period of lock-down with effect from 24.03.2020 for about a week till expiry of the extended time of 31.03.2020. It is submitted that admittedly 90% of the work had



already been completed and the petitioner could have very well have completed the remaining work before 31.03.2020, especially in the backdrop of the fact that girders were launched over the piers by the petitioner.

7. Having heard the parties and on consideration of materials on record, this Court finds merit in the writ petition. It is not in dispute that by letter dated 09.01.2020, the respondent Railway proposed variation in the quantities of work which was finally sanctioned by letter dated 10.06.2020 (Annexure-P/10). It is relevant to advert to the provisions of Clause-41 of the GCC at this stage –

“41. Modification To Contract To Be In Writing : In the event of any of the provisions of the contract requiring to be modified after the contract documents have been signed, the modifications shall be made in writing and signed by the Railway and the Contractor and no work shall proceed under such modifications until this has been done. Any verbal or written arrangement abandoning, modifying, extending, reducing or supplementing the contract or any of the terms thereof shall be deemed conditional and shall not be binding on the Railway unless and until the same is incorporated in a formal instrument and signed by the Railway and the Contractor, and till then the Railway shall have the right to repudiate such arrangements.”

8. From the above, there can be no gainsaying that a bar was cast on the petitioner from carrying out the work during the



period between 09.01.2020 and 10.06.2020 pending sanction of the proposed variation. The stand of the respondent Railway that the petitioner had launched girders over the piers within the overlapping period of lock-down from 24.03.2020 to 31.03.2020 has been explained in Para-18 of the petitioner's rejoinder to the effect that in absence of approval of variation under Clause 41 of GCC, the petitioner was at risk of being denied payment for any work done until sanction of the proposed variation. However, the petitioner with the bona fide intention of completing as much of the project as possible, assumed monetary risk and carried out minor work of protective nature such as preventing land from sliding and applying bolts to the several metalize pieces of girder to create a block of specified metres of girder.

9. It is well known that there was nationwide lockdown from 24.03.2020 due to COVID-19 pandemic. Clause 17 of the GCC takes into consideration the untoward situation of this nature in the following terms –

“17. Force Majeure Clause : If at any time, during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of any war, hostility, acts of public enemy, civil commotion, sabotage, serious loss or damage by fire, explosions, epidemics, strikes, lockouts or acts of God (hereinafter, referred to events) provided, notice of the happening of any such event is given by either party to



the other within 30 days from the date of occurrence thereof, neither party shall by reason of such event, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non-performance of delay in performance, and works under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, and the decision of the Engineer as to whether the works have been so resumed or not shall be final and conclusive, PROVIDED FURTHER that if the performance in whole or in part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding 120 days, either party may at its option terminate the contract by giving notice to the other party.”

10. The petitioner vide letter dated 16.04.2020 (Annexure-P/8) duly apprised the Railway in compliance with the said Clause 17 of the GCC which requires notice of such event to be given by either party within 30 days of the occurrence. A specific reference was made to Clause 17 of the GCC containing the Force Majeure clause. In this view of the matter, it is difficult to appreciate the action of the respondents in imposing penalty by way of liquidated damages for extension of time which is in the teeth of the specific terms of Clause 17 of the GCC and prohibits a party from making claim for damages against the other party in respect of non-performance or delay in performance of the work. From the statement made in para-1(iii) of the counter affidavit, it



transpires that the work has since been completed on 31.07.2020 within the extended period from 01.04.2020 to 31.07.2020.

11. The respondents have not come up with any satisfactory reasons in order to justify the imposition of liquidated damages for extension of time or why the petitioner has been denied the benefit of Clauses 41 and 17 of the GCC.

12. In these circumstances, I hold that the authorities have arbitrarily and unjustifiably imposed liquidated damages of Rs. 53,50,108.85/- upon the petitioner which cannot be sustained. Accordingly, the impugned order dated 03.06.2020 is set aside and the petitioner shall be entitled to all consequential benefits.

13. In the result, this writ application stands allowed.

14. Office shall follow-up to ensure that all defects are removed and compliance with the notices of this Court are made by the petitioner within the stipulated time provided in para 1 hereinabove, failing which the matter shall be brought to the notice of this Court.

(Vikash Jain, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	29.10.2021
Transmission Date	

