

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Shekhar B. Saraf

W.P.A. 12367 of 2021
Debashish Mitra
-Versus-
Union of India & Ors.

For the Petitioner

: Mr. Ranjan Kali,
Ms. Mitul Chakraborty

For the Respondents

: Mr. Rajib Mukherjee,
Ms. Shreyasi Bhaduri

Heard on : August 19, 2021 & September 02, 2021

Judgment dictated in open Court on : September 02, 2021

Shekhar B. Saraf, J.:

1. The instant writ petition under Article 226 of the Constitution of India is directed against termination of the work order by notice dated July 08, 2021 and corrigendum dated July 09, 2021 communicated to the petitioner due to non-performance as per the corresponding work-order agreement signed between both the parties.

FACTS:

2. The petitioner submitted his bid in pursuance of the NIT (Notice Inviting Tender) by BSNL dated February 15, 2020 for outsourcing of maintenance and provisioning of landline and broadband network from last pillar to customer premises for a period of two years in Shibpur Cluster of business areas and consequently he was declared as the successful bidder and the lowest tenderer in respect of the bid document. Later, the work order was issued in his favour on May 27, 2020 wherein the terms and conditions of the NIT was made applicable to the work order.
3. It is alleged by the petitioner that some disruptions were made by the previous contractual laborers of the respondent no. 4 while he was discharging his duty under the allotted work-order. It is also alleged by the petitioner that the respondent took no steps to resolve the issue of disruptions caused by previous contractual laborers.
4. Finally, the petitioner states that instead of resolving the dispute the respondent no. 4 has tried to absolve itself from all responsibilities. After exchange of letters between both the parties regarding non-performance of work, a final letter for termination of work dated July 08, 2021 was rendered to the petitioner against which he has come before this court.

ARGUMENTS:

5. Counsel for the petitioner submits that the reason of termination provided in the notice dated July 8, 2021 is for non-performance under clause 3.6 (b) of Section 3, Part A of the NIT. He further submits that clause 3.6 (b) requires notices for non-performance to be provided for three consecutive months before final termination that were never issued to the petitioner.
6. He further submits that the corrigendum dated July 9, 2021 retrospectively cancelled the work order from July 1, 2021. He submitted that such retrospective annulment is without any basis in law. In light of the above notices, it is petitioner's submission that the respondent authorities have not acted in terms of their own contract and the cancellation notices are accordingly void ab initio.
7. Mr. Mukherjee, learned Counsel appearing on behalf of the Bharat Sanchar Nigam Limited has placed certain documents showing notices of non-performance issued by the company upon the petitioner on various dates, such as, August 10, 2020, November 10, 2020, February 21, 2021, July 19, 2021 and July 22, 2021 to indicate that several notices have been sent to the petitioner for the poor performance and it is in furtherance to those notices that the ultimate termination letter dated July 8, 2021 was issued.
8. Mr. Mukherjee further submits that in the above letter dated June 2, 2021 the petitioner had agreed to be released from the work-order on and from July 1, 2021. Mr. Mukherjee also submits that the non-disclosure of this

letter dated June 2, 2021 in the writ petitioner amounts to suppression of material facts, and accordingly, the writ petition should be dismissed in limine. Further, he assiduously argues that the petitioner has not come before this Court with clean hands and therefore, he has no right to any relief whatsoever. The second limb of challenge is with respect to maintainability of the writ petition with regard to presence of the Arbitration Clause in the NIT. Accordingly to him, the Arbitration Clause acts as a bar to the Writ Court.

ANALYSIS WITH ORDER

9. I have heard the learned counsels appearing for both the parties and perused materials on record.
10. With regard to the point of maintainability of the writ petition, it is to be noted that Arbitration Clause in the tender document does not act as a bar to the writ jurisdiction. Catena of judgments of the Hon'ble Supreme Court and also this Hon'ble Court have stated the legal position which is no longer res integra.
11. In the case of ***Union of India –v- Tania Construction (P) Ltd.***, reported in ***(2011) 5 SCC 697***, the Hon'ble Supreme Court held that presence of Arbitration Clause is not a bar for invoking writ remedy. The Court held that alternate remedy does not fetter the power of constitutional courts to give relief when there is injustice. Relevant paragraph of the judgement is extracted below:

“33. Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.”

12. In the case of ***Utsav Resort Pvt. Ltd. -v- Managing Director, West Bengal Tourism Development Corporation Ltd.***, reported in **2019 (3) CHN (Cal) 654**, this court came up with similar findings on the issue of alternate remedy. I had discussed this issue in detail in the abovementioned judgement and held that arbitration clause is not a bar to the writ jurisdiction of the High Courts when arbitrariness is committed by the state authorities. Relevant paragraph of the judgment is delineated below:

“17. Upon examination of the judgements cited by both Counsel appearing for the parties, I am of the view that there is no absolute bar in entertaining the writ petition when the writ petitioner can show a clear case of arbitrariness having been committed by the State authority. It is also clear that an alternative remedy in the nature of an arbitration clause does not take away the discretionary power of the Writ Court to entertain a writ petition. The real test is whether the State authority has acted de hors the Constitutional mandate enshrined in Article 14 of the Constitution of India. Arbitrariness by a State authority is not just impermissible but also strikes at the very

root of the guarantees provided under the Constitution. It is for this reason that the extraordinary power has been given under Article 226 of the Constitution to the High Courts to annul and rescind any such arbitrary action that is based on extraneous considerations. The High Court is duty bound to act in such circumstances.”

13. In the event, principles of natural justice are not followed and/or the authorities act in a patently illegal manner, the extraordinary jurisdiction is always open to a petitioner. If one applies the above test for determination of arbitrariness in the present case, it would not be wrong to say that the respondent authority acted in an arbitrary manner by not following the conditions of the NIT. The respondent authority terminated the work-order without giving three consecutive notices to the petitioner. The above condition has been clearly mentioned in clause 3.6 (b) of Section 3, Part A of the NIT which states, “*The contract(s) will be terminated & PGB forfeited, upon non-performance & failure to meet all the SLAs i.e., MTTR, provisioning, fault clearance and repeat faults parameters for consecutive 3 months. Notice shall be served for non-performance in 1st month, 2nd month and 3rd month before final termination*”.

14. Counsel for the respondent has placed reliance on various notices issued to the petitioner on scattered dates regarding faulty or unsatisfactory performance of the petitioner as per the conditions of the work order. I do not find weight in the above argument as the same does not amount to fulfilment of conditions delineated in clause 3.6 (b) of the bid document. The notices have to be issued consecutively for three months as per the bid

document signed between the parties. Not fulfilling the mandate of clause 3.6 (b) certainly amounts to arbitrary action. Accordingly, I hold that in the present case Arbitration Clause does not bar a remedy by way of a writ petition.

15. The second issue that needs to be examined by this court is with regard to suppression of material facts. The counsel for the respondent has alleged that the petitioner's non disclosure of the letter dated June 2, 2021 in which he seeks to be released from the work amounts to suppression of material facts for adjudicating the present matter. The law on the issue of suppression of material facts is no longer res integra as various judgements by the Hon'ble Supreme Court and High courts have settled this issue as well.

16. In the case of **S.J.S. Business Enterprise (P) Ltd. -v- State of Bihar** reported in **(2004) 7 SCC 166**, the issue of suppression of material facts was resolved by the Hon'ble Supreme Court. It was held by the Apex Court that suppression of a material fact by a litigant disqualifies him from obtaining any relief but the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. Relevant paragraph of the judgement is presented below:

“13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would

have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken [R. v. General Commrs. for the purposes of the Income Tax Act for the District of Kensington, (1917) 1 KB 486: 86 LJKB 257: 116 LT 136 (CA)]. Thus, when the liability to income tax was questioned by an applicant on the ground of her non-residence, the fact that she had purchased and was maintaining a house in the country was held to be a material fact, the suppression of which disentitled her to the relief claimed [Ibid.]. Again when in earlier proceedings before this Court, the appellant had undertaken that it would not carry on the manufacture of liquor at its distillery and the proceedings before this Court were concluded on that basis, a subsequent writ petition for renewal of the licence to manufacture liquor at the same distillery before the High Court was held to have been initiated for oblique and ulterior purposes and the interim order passed by the High Court in such subsequent application was set aside by this Court [State of Haryana v. Karnal Distillery Co. Ltd., (1977) 2 SCC 431 : AIR 1977 SC 781] . Similarly, a challenge to an order fixing the price was rejected because the petitioners had suppressed the fact that an agreement had been entered into between the petitioners and the Government relating to the fixation of price and that the impugned order had been replaced by another order [Welcom Hotel v. State of A.P., (1983) 4 SCC 575: 1983 SCC (Cri) 872: AIR 1983 SC 1015].”

17. In the case of ***Bhriguram De -v- State of West Bengal*** reported in **2019**

(1) CHN (CAL) 598, this court held that any petitioner seeking a writ of mandamus has to approach the court with clean hands and has to produce before the court all the material facts that are relevant for adjudication of the said matter. Relevant paragraphs of the judgement are delineated below:

“23. As seen from the various judgments discussed above, the Indian and English Courts have consistently taken the view that one who approaches the Court must come with clean hands. It is the bounden

duty of the Court to keep the stream of justice absolutely clean. Anyone who approaches must give full and fair disclosure of all the materials. The Courts must not allow anyone to abuse the court process. In case the petitioner conceals anything that is known to be material such an action would lead to an inference of fraud, and even if not fraud, definitely would lead to a presumption that the petitioner has not approached the court with clean hands.

24. One must be even more careful when one approaches this court in its extra ordinary jurisdiction for seeking a writ of mandamus and no person can be permitted to adopt dubious, dishonest and fraudulent means and make false averments or conceal the facts while submitting such a writ petition. If a person does so, not only is the petitioner not entitled to any relief from the Court but should be subject to exemplary costs so as to deter future litigants from pursuing a similar course of action.

25. I have no hesitation in saying that the doors of justice would be closed for a litigant whose case is based on falsehood or suppression of material facts. Fraud and justice never dwell together. They are alien to each other. Fraud pollutes the sanctity, regularity, orderliness and solemnity of the judicial proceedings. It is the bounden duty of the Court to keep the stream of justice absolutely clean.

26. Finally, upon examination of the above-mentioned judgments, it is axiomatic that any petitioner seeking a writ of mandamus, has to approach the court with clean hands and to produce before the court all material facts that are relevant for adjudication of the said matter. The principle of *uberrima fides* - abundant good faith - as stated in *The King vs. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington* reported in (1917) 1 KB 486 applies in the present case. A petitioner who does not bring on record the relevant true facts before the court, does not deserve to get any relief from the court.”

18. In order to decide whether such non-disclosure of letter dated June 02, 2021 amounts to suppression of material facts, the court must examine whether such communication by the petitioner has been acted upon by the respondent authorities. On this query, the counsel for the respondent answered in the negative. Further, in my view, it must be noted that the communication via letter dated June 02, 2021 is not relevant as it was not acted upon by the respondent authorities and the termination letters have no whisper of the above letter and are not predicated on the same. The relevance of a particular fact has to be examined as per the ratio of judgement in ***Bhriguram De (supra)*** - mere communication of a letter for release from work by the petitioner is not relevant for the purpose of adjudicating the present issue. Therefore, I hold that the above communication through a letter presenting the intention to be released does not amount to a material fact for adjudicating the issue at hand. The petitioner has not concealed something which has attained finality and the same is irrelevant in the sense that it would not render the current adjudication proceedings vitiated or meaningless. Hence, in my opinion, no fraud or dishonest intention appears from the petitioner's side and he has come before this court with clean hands. Accordingly, in my view, there has been no material suppression of the facts by the petitioner.

19. On an analysis of the contract/bid document, it is clear that clause 3.6 (b) of Section 3, Part A of the NIT requires the authorities to issue three notices on three consecutive months for non-performance upon the petitioner before final termination. It is an admitted position that though the notices

were issued to the petitioner, the same were not issued as per the said clause, and therefore, the termination as per clause 3.6 (b) of Section 3, Part A of the bid document is illegal, arbitrary and therefore not valid.

20. In light of the above facts, the impugned notices are quashed and set aside.

The petitioner should be allowed to carry out the balance work of the work order dated May 27, 2020.

21. With regard to the letter dated June 2, 2021 issued by the petitioner, no action has been taken by the authorities till date. Furthermore, having terminated the contract of the petitioner the authorities have categorically acted de hors the letter dated June 2, 2021. However, this lis does not relate to the said letter of June 2, 2021, and accordingly, respondent authorities shall be at liberty to act upon the said letter in accordance with law. I make it clear that I have not delved into the issue as to whether the respondents are legally entitled to act on the letter dated June 2, 2021 at this stage.

22. With the above observations, this writ petition is disposed of. All parties are to act on website copy of this order.

(Shekhar B. Saraf, J.)