

**A.P. No. 13 of 2021
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division**

**M/S. GANAPATI TECHNOLOGY SERVICES P LTD.
v.
THE STATE FISHERIES DEVELOPMENT CORPORATION LTD.**

For the Plaintiff : Mr. Sakya Sen, Advocate
For the Defendant : Mr. Jishnu Chowdhury, Advocate
Hearing concluded on : January 18, 2021
Judgment on : February 3, 2021

DEBANGSU BASAK, J. :-

1. The petitioner has assailed notices dated April 22, 2020, August 19, 2020 and December 2, 2020 issued by the respondent and has sought an order directing the respondent to deposit a sum of Rs. 60,12,579/- with the Registrar, Original Side or to furnish security for the value thereof, by this application.

2. Learned Advocate appearing for the petitioner has submitted that, the petitioner participated in a tender of the respondent. The respondent had issued a notice inviting tender dated October 10, 2020 for construction of Fish Marketing Complex at Nalban Fisheries Project.

The petitioner had participated in such e-tender. Upon the technical and the financial bids being opened and evaluated, the respondent declared the petitioner as the lowest bidder. The respondent had issued a letter of acceptance dated December 10, 2018 for the construction of Fish Marketing Complex at Nalban Fisheries Project. The parties had entered into and executed a formal agreement. According to the learned Advocate for the petitioner, the respondent did not make over a copy of the formal agreement to the petitioner despite repeated requests and demands.

3. Learned Advocate appearing for the petitioner has submitted that, the respondent could not provide unhindered worksite to the petitioner till middle of March, 2019, despite issuing work order on December 18, 2018. The petitioner could commence work from the middle of March, 2019. The petitioner had completed the RCC casting upto the first floor by September 19, 2019. The petitioner had completed 90% of brick work and plastering work. He has submitted that, despite the petitioner asking the respondent for itemized bill of quantity for electrical and sanitary/plumbing work, in order to procure the materials and executed the work, the same was not provided to the petitioner till May 13, 2020. However, the respondent did not provide

the lay out plan for installation of the same. Therefore, the petitioner could not procure the materials and start installation work. He has referred to the correspondence exchanged in this regard between the parties.

4. Learned Advocate for the petitioner has submitted that, the petitioner submitted its 1st Running Account bill by the middle of August, 2019. The respondent however has not paid the 1st Running Account bill. He has submitted that, the 2nd Running Account bill was also submitted which is yet to be paid.

5. Learned Advocate appearing for the petitioner has submitted that, the execution of the project was delayed due to breaches committed by the respondent. The petitioner had requested for extension of time to complete the project by a letter dated December 30, 2019.

6. Learned Advocate appearing for the petitioner has submitted that, the respondent issued another notice inviting tender for work for Cold Chain at Nalban Fisheries Project on December 3, 2018. The petitioner had participated in such e-tender and became successful therein. The respondent had issued a letter of acceptance for the work

of Post-harvest Operation and Cold Chain at Nalban Fisheries Project on January 15, 2019 to the petitioner. The respondent had requested the petitioner to execute a formal contract. The parties had executed a formal contract. Again, the respondent did not make over a copy of the formal contract to the petitioner despite requests and demands.

7. Learned Advocate appearing for the petitioner has submitted that, hassle and hindrance free worksite for post-harvest operation and cold chain at Nalban Fisheries Project was not finalized and handed over to the petitioner till April, 2019. After the site was handed over, and the petitioner receiving the layout plan, the petitioner had started construction work from May, 2019. The petitioner had completed the RCC casting upto roof as per the approved drawings. The petitioner had requested the respondent for detailed mechanical layout/elevation plan to enable the petitioner to finalise the equipments for cold storage and blast freezer in order to procure the materials and commence installation work. The respondent did not provide such details. Therefore, the petitioner could not finalise the procurement of the equipments. In respect of such work, the petitioner had submitted the 1st Running Account bill to the respondent which the respondent has not paid.

8. Learned Advocate appearing for the petitioner has submitted that, the respondent had delayed in handing over the worksite for the project. The respondent has also breached other terms and conditions of the contract between the party which has led to the delay in the completion of the work. He has submitted that, the respondent had issued a show-cause notice dated April 22, 2020 in respect of the project for construction of Fish Marketing Complex at Nalban Fisheries Project alleging non-execution of the work. The respondent had issued a notice dated August 19, 2020 imposing compensation under Clause 2 of the conditions of the contract both in respect of the construction of Fish Marketing Complex at Nalban Fisheries Project and the Post harvest Operation and Cold Chain at Nalban Fisheries Project. The petitioner had responded to such notice by the advocate's letter dated September 1, 2020. The respondent had issued a notice dated December 2, 2020 terminating both the contracts. The respondent had purported to forfeit security deposit including the earnest money of the petitioner. The petitioner had invoked the arbitration clause and issued a notice with regard thereto by a letter dated December 2, 2020.

9. Learned Advocate appearing for the petitioner has submitted that, disputes and differences have arisen between the parties in

respect of the two projects. Such disputes and differences are common in nature. According to him, they should be combined together and referred to single composite arbitral reference. He has submitted that, the arbitration clause in both the contracts are identical and hence the disputes and differences and/or claims between the parties herein could be resolved by a composite single reference. He has referred to the arbitration clause and the notice dated December 2, 2020 invoking Section 21 of the Arbitration and Conciliation Act, 1996.

10. Learned Advocate appearing for the petitioner has submitted that, the respondents have combined to the two contracts and have termed both as one integral contract as will appear for the contents of the notices issued by the respondent. In support of his contention that a composite reference is permissible, learned Advocate appearing for the petitioner has relied upon **2018 Volume 15 Supreme Court Cases page 678 (Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Anr.)**, **2013 Volume 1 Supreme Court Cases page 641 (Chloro Controls India Private Limited v. Severn Trent Water Purification INC. & Ors.)**, **2020 SCC Online Bombay 391 (Narendra Hirawat & Co. v. Sholay Media Entertainment Pvt. Ltd. & Anr.)** and **2010 SCC**

Online Bombay 1900 (Board of Control for Cricket in India v. KPH Dream Cricket Private Limited).

11. Learned Advocate appearing for the respondent has submitted that, the parties had entered into two separate contracts. He has referred to the two notices inviting tenders and submitted that, the two notices inviting tenders are separate and distinct and that they are not related to the other. He has submitted that, the parties entered into two separate and individual contracts. These two contracts should not be clubbed together. According to him, two contracts are separate and distinct. He has relied upon ***2005 Volume 1 Calcutta High Court Notes 572 (Ajoy Kumar Saha v. Ashok Leyland Finance Ltd.)*** and ***2017 Volume 9 Supreme Court Cases 729 (Duro Felguera, S.A. v. Gangavaram Port Limited)*** in support of his contentions that, there being two separate and distinct contracts, separate references are required to be made.

12. On the merits of the case, learned Advocate appearing for the respondent has submitted that, the contracts are determinable in nature. Therefore, such contracts cannot be said to be specifically enforceable. The respondent has terminated the two contracts. Such

termination should not be stayed by the Court. In support of such contention, he has relied upon **1991 Volume 1 Supreme Court Cases 533 (Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors.)**.

13. Learned Advocate appearing for the respondent has submitted that, the petitioner is in breach of terms and conditions of the contract. The petitioner had delayed the execution of the work. The petitioner had applied for an extension of the time to complete the contract. The petitioner had been issued a show-cause notice. He has referred to the correspondence exchanged between the parties where the respondent had placed on record that the petitioner was yet to complete the work. He has submitted that, ultimately, the respondent was forced to issue a termination notice.

14. In support of the contention that, the Court should not interfere with a notice of termination, learned Advocate appearing for the respondent has relied upon **AIR 2003 Delhi 214 (M/s. Vidya Securities Ltd. v. M/s. Comfort Living Hotels Pvt. Ltd.)** and **2001 Volume 3 Calcutta High Court Notes 654 (Sikaria Divinity Private Limited v. State of West Bengal)**.

15. The issue of maintainability of the proceedings as has been raised by the respondent requires consideration. According to the respondent, the parties had entered into two separate and distinct contracts containing individual arbitration agreements and therefore, the two contracts cannot be clubbed together in one reference.

16. In **Ajoy Kumar Saha (supra)**, a hirer had entered into 12 hire purchase agreements in respect of 12 vehicles. There had been separate agreements for each of the vehicles. The hirer had filed one application under Section 9 of the Act of 1996 in respect of the 12 vehicles. In such factual matrix, the Division Bench has held that, separate applications under Section 9 of the Act of 1996 in respect of each of the vehicle should have been made.

17. **Duro Felguera, S.A. (supra)** has dealt with the concept of composite reference. It has held that, when there are separate contracts each having independent existence with separate arbitration clauses then there cannot be a single arbitral tribunal. It has however dealt with such concept in the context of international commercial arbitration. It has noticed that, in the event, the arbitration agreement is such that, it is wide enough to make it comprehensive and bring

within its ambit, agreements ancillary to the mother agreement then, the entire disputes arising out of the mother and the ancillary agreements can be settled by a composite reference.

18. In the facts of the present case, the respondent had issued a notice inviting tender for construction of Fish Marketing Complex at Nalban Fisheries on October 10, 2018. The petitioner having been found as the lowest bidder had been awarded the contract in respect thereof. The parties had entered into a formal contract with regard thereto. The respondent had issued a notice inviting tender dated December 3, 2018 for Post-harvest Operation and Cold Chain at Nalban Fisheries Project. Again, the petitioner having been found as the lowest bidder had been awarded a contract with regard thereto. The parties had entered into a formal contract for the same. Neither of the two formal contracts in respect of two projects had been placed before Court by the parties. According to the petitioner, the respondent had never made over a copy of the formal contracts to the petitioner despite demands.

19. ***Ameet Lalchand Shah & Ors. (supra)*** has dealt with the issue of composite arbitration. In the facts of that case, although, there were

different agreements involving several parties, it was a single commercial project. The Court had found that, the disputes between the parties to various agreements could be resolved only by referring the four agreements or parties thereon to arbitration. The Court had done so in view of the fact that, although several parties were involved, it was a single commercial project that was sought to be executed through several agreements/contracts.

20. In ***Chloro Controls India Private Limited (supra)***, the Court had considered the principle whether, any non-signatory party could be subjected to arbitration. It has held that, a non-signatory party could be subjected to arbitration provided the transactions were with a clear intention of the parties to bind both the signatory as well as the non-signatory. It has held as follows :-

“73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where

performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.”

21. Under Section 7 of the Act of 1996 an arbitration agreement has to be in writing between identifiable parties referring specified disputes in respect of a defined legal relationship whether contractual or not. A composite reference is permissible under the Act of 1996. In order to make a composite reference, various factors have to amalgamate so as to make a composite reference possible. There has to be a mother agreement and ancillary agreements governing the parties. The concerned arbitration agreement or the mother agreement should be comprehensive enough to bring within its fold agreements ancillary to the mother agreement so that, the disputes arising out of or in connection with the mother agreement or the ancillary agreement can

be settled by a composite reference. If the parties have entered into several agreements in respect of a single commercial project, then also, the disputes and differences arising out of the various agreements could be resolved by referring the parties to a composite arbitration. Essentially, there has to be a single commercial project under which, there may or may not be several contracts or agreements involving various parties. The arbitration agreement of the single commercial project should be wide enough to encompass the parties to the subsequent agreements. Again if there are two or more contracts and they are so intertwined with each other so as to prejudice the parties should separate arbitrations are held, then a composite reference can be made.

22. Although the Act of 1996 has stipulated that, there must be a written agreement between the parties to refer the disputes and differences to arbitration, ***Chloro Controls India Private Limited (supra)*** has recognised an exception thereto, that is to say, any non-party to an arbitration agreement can also be subjected to arbitration. However the same has to be in exceptional circumstances and upon a finding that, the transaction in question is of a composite nature where performance of the mother agreement may not be feasible without the

aid, execution and performance of supplementary or ancillary agreements for achieving the common object and collectively having bearing on the dispute. The Court must also arrive at a finding that, a composite reference would serve the ends of justice. Only then, the Court can direct a non-party to the arbitration agreement to arbitration.

23. The petitioner has pleaded that, the notice inviting tender, general rules and contracts for the guidance of contractor, condition of contract, additional condition, additional terms and conditions of the contract and specification for works had formed an integral part of the formal contracts.

24. The parties have proceeded on the basis of the arbitration clause in the general rules of contracts for the guidance of contractors in respect of the two tenders formed the arbitration agreement between the parties and is embodied in Clause 25 thereof. The general rules and contracts for the guidance of contractors which contains Clause 25 in respect of the two notice inviting tenders, have the same Clause 25 which is as follows :-

“Clause 25 : *Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions*

herein before mentioned and as to the quality, workmanship or materials used on the work or as to any other question, claim, right matter or things whatsoever. In any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders or those conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of chairman West Bengal Fisheries Corporation Ltd. Should the Chairman WBFC Ltd. be for any reason unwilling or unable to act as such arbitrator, such questions and disputes shall be referred to an arbitrator to be appointed by the Chairman WBFC Ltd. The award of the arbitrator shall be final, conclusive and binding on all parties to this contract.”

25. In the facts of the present case, it cannot be said that the parties had entered into a contract for a single commercial project. The respondent had floated two separate tenders. The parties had entered into two separate contracts. Each of the contracts had been named separately. Each of the contracts entered into between the parties had different scope and ambit of work as the name of the two contracts suggest. The first contract in point of time had been for Cold Chain at

Nalban Fisheries Project while the second contract had been for construction of Fish Marketing Complex at Nalban Fisheries Project. The execution of the two contracts, as appears from the materials made available on record, have been at the Nalban Project. During the period of execution of the contracts, the parties, have corresponded by treating the contracts as separate and distinct. They have also corresponded with each other referring to the two contracts in one letter. In my view, reference to the two contracts in a single letter, does not make the two contracts to be intertwined with each other so as to allow for a composite reference to be made.

26. As has been held in ***Duro Felguera, S.A. (supra)***, where there are separate contracts which having independent existence with separate arbitration clauses, there cannot be a single arbitral tribunal. In the facts of the present case, it cannot be said that the parties had entered into a mother agreement for one commercial project and that the second agreement was ancillary to the first agreement. The Fish Marketing Complex contract being second in point of time cannot be said to ancillary or subservient to the Post-harvest Operation and Cold Chain contract although there were to executed at the Nalban Fisheries Project.

27. There being two separate contracts, and, since, the facts do not demonstrate that has been a single commercial project, in my view, a composite reference is not possible. In such circumstances, a composite reference for the disputes and differences arising out of two separate contracts, is not maintainable. Consequently a single petition under Section 9 of the Act of 1996 in respect of separate contracts is not maintainable.

28. In view of the issue of maintainability being answered in the negative, in favour of the respondent and as against the petitioner, this Court has not decided other contentions of the parties with regard to interim protection. Such issues are kept open.

29. AP 13 of 2021 is disposed of accordingly.

[DEBANGSU BASAK, J.]