

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P.(C) No. 3320 of 2020

Maa Bhagwati Construction, A Partnership Firm Through Its Partner Parul Rai, S/o. Shri Rajesh Kumar Rai, Aged About 34 Years, Resident Of Flat No. 107, First Floor, Vaishali Pride, Minocha Colony, Bilaspur, District- Bilaspur, Chhattisgarh 495001

---- Petitioner

Versus

1. State Of Chhattisgarh, Through- Principal Secretary, Public Works Department, Mahanadi Bhawan, Mantralaya, Atal Nagar, Naya Raipur, Chhattisgarh
2. Engineer-In-Chief, Public Works Department, Nirman Bhawan North Block, Sector-19, Atal Nagar, Naya Raipur, Chhattisgarh
3. Chief Engineer, Public Works Department, Raipur Zone, Raipur, Chhattisgarh
4. Superintending Engineer, Public Works Department, Circle No. 1, Raipur, Chhattisgarh
5. Executive Engineer, Public Works Department, Raipur Division No. 2, Medical College Parisar, Raipur, Chhattisgarh

---- Respondents

For Petitioner	:	Mr. Anand Dadariya, Advocate
For State/Respondents	:	Mr. Rahul Jha, Govt. Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

11.08.2021

Heard

1. The case of the petitioner is that pursuant to NIT dated 01.05.2017, the petitioner participated and the tender was accepted on 05.07.2017 wherein the work order was issued on 18.09.2017 and as per the work order, the date of completion period was 18 months.
2. Learned counsel for the petitioner would submit that the petitioner completed his job much before the prescribed period of 18 months i.e. on 17.03.2019 and the work was executed on 12.11.2018. He would submit that since the agreement contains the clause of incentive bonus as per clause 5.3, in case the work is completed before the target date then the

contractor would be entitled for incentive bonus from 0.25% (zero point two five percent) to 5% (five percent). It is further submitted that the note appended to would show that the contractor has to give an undertaking in writing that he has "WAIVED" all his RIGHT to claim/demand extension of time. It is further submitted that the petitioner sent a communication on 05.11.2018 which was posted on 26.12.2018 (Annexure P-7) which was much before the completion time period of 17.03.2019. However, the claim for bonus was denied for the reason that the undertaking was given after completion of the work. It is further submitted that the issue was referred initially to the Superintendent Engineer and eventually was decided by the Chief Engineer wherein also the finding though was in favour of the petitioner that he completed the work within time but undertaking has been given after the completion of work, as such, the benefit of clause 5.3 would not be available. It is further submitted that the said finding is completely against the spirit of clause 5.3 which is engrafted in the agreement so that a person executing the contract would not claim the inflated escalated budget for completion of the job and the expense of the State is saved. It is further submitted that since there is no dispute about the completion of the work within time, therefore, this Court would have the jurisdiction and direct the respondents to pass an order to pay the incentive bonus as per clause 5.3.

3. Per contra, learned State counsel would submit that the petitioner after completion of the job gave the undertaking, therefore, it would lose its significance; consequently, the State has disputed the claim of the petitioner. He further submits that as per the agreement clause 28 in case of like nature of dispute, the petitioner can file a petition before the arbitration tribunal and as such no relief can be granted in this petition.

4. Heard learned counsel appearing for the parties and perused the documents.
5. The undisputed facts are that pursuant to NIT dated 01.05.2017, the petitioner's tender was accepted on 05.07.2017 and the work order was issued on 18.09.2017. In the work order, the completion of the job period was of 18 months which would end on 17.03.2019.
6. Clause 5.3 speaks about 'incentive bonus' along with note appended thereto, in case the work is completed within time. For the sake of brevity, clause 5.3 with the note is reproduced herein :

“5.3 Incentive bonus:- Notwithstanding the provision contained in clause 5.1 and 5.2 above, if the contractor does not desire “Extension of Time” AND “WAIVES” his right to claim any extension of time and yet – complete the contract (Excluding maintenance period if any) before the original time allowed for completion (as mentioned in the N.I.T or Agreement form “A”) then and then only the contractor shall be entitled to and shall be paid “INCENTIVE BONUS”. The Incentive Bonus shall be paid to the contractor at the rate of 0.25% (zero point two five percent) of the contract price per week of early completion subject to a maximum of 5% (five percent) of the contract price. Part of the week if more than 3 days shall be deemed to be one full week.

Note:- The contractor has to give an undertaking in writing that he has “WAIVED” all his RIGHT to claim/demand extension of time.”

7. The petitioner completed his job work on 12.11.2018 with a completion certificate (Annexure P-5) and the undertaking as was required as per clause 5.3 was sent on 26.12.2018 by a letter dated 05.11.2018 (Annexure P-7). Subsequently, when the petitioner claimed for the incentive bonus as per clause 5.3, it was denied on the ground the same was submitted after the completion of the job, as such, the petitioner

would not be entitled for any incentive bonus. Eventually, the matter was referred to the Superintending Engineer and the Chief Engineer also reiterated the finding of the Superintending Engineer and found that the undertaking was given after completion of the job, therefore, the benefit of clause 5.3 would not be given to the petitioner.

8. Therefore, in all practical purpose, the petitioner was not satisfied with the decision of the Chief Engineer and the instant petition has been filed. Clause 28 contains an arbitration clause which for the sake of brevity is reproduced herein.

ARBITRATION CLAUSE:

Clause 28 : Except as otherwise provided in this contract all question and dispute relating to the meaning of the specification, designs, drawings and instruction herein before mentioned as to thing whatsoever in any way arising out of or relating to the contract designs, drawings, specification, estimate, concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the abandonment there of shall be referred to the Superintending Engineer for his decision, within a period of 30 (thirty) days of such an occurrence(s). There upon the Superintending Engineer shall give his written instructions and/or decisions, after hearing the contractor and Executive Engineer within a period of 15 (fifteen) days of such request. This period can be extended by mutual consent of parties.

Upon receipt or written instructions or decisions, of Superintending Engineer the parties shall promptly proceed without delay to comply such instructions or decisions. If the Superintending Engineer fails to give his instruction or decisions in writing within a period of 15 (fifteen) days or mutually agreed time after being requested and/or, if the party (es) is/are aggrieved against the decision of the superintending Engineer, the aggrieved party may within 30 days prefer an appeal to the Chief

Engineer, who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chief Engineer will give his decision within 30(thirty) days, or such, mutually agreed period.

If any party is not satisfied with the decision of the Chief Engineer he can file the petition for resolving the dispute through arbitration in the arbitration tribunal.

A reference to Arbitration Tribunal shall be no ground for not continuing the work on the part of the Contractor. Payment as per original terms and condition of the agreement shall be continued by the Executive Engineer in accordance with clause 8 above.

9. Reading of the aforesaid clause would show that the petitioner since was not satisfied with the decision of the Chief Engineer, he has to file the petition for resolving the dispute through the arbitration in the arbitration tribunal. It cannot be said that it is an admitted fact or undisputed fact when the very payment of incentive is an issue, interpreting the timing of the undertaking as per clause 5.3. The arbitration clause in the agreement would take into sweep the word satisfaction; meaning thereby, the petitioner when is not satisfied with the judgment of the Chief Engineer then he should have resorted to a remedy of filing the petition for resolving the dispute through the arbitration in the arbitration tribunal as per the Act. Therefore, without any comment on the merit since the agreement contains an arbitration clause and both the parties are bound by it, I am not inclined to go into interpretation of timing of submission of the undertaking as per clause 5.3. This Court will not exercise its power under Article 226 of the Constitution to grant the relief. The petitioner shall be free to resort to seek the remedy before the arbitration tribunal. Accordingly, the petition is dismissed.

Sd/-
(Goutam Bhaduri)
Judge