AD-101
Ct No.09
16.12.2022
TN

WPA No. 21617 of 2022

M/s Roy Enterprises and another
Vs.
The State of West Bengal and others

Ms. Sanghamitra Nandy
.... for the petitioners

Mr. Sujit Sankar Koley
.... for the WBSEDCL

Learned counsel for the petitioners argues that the petitioners had entered into a contract with the West Bengal State Electricity Distribution Company Limited (WBSEDCL)-authorities for a job in the nature of interior civil and electrical works, installation of air conditioning system, fire protection system, lift and allied works at the G+4 Storied Office Building inside the Data Center Compound, New Town. Such contract was entered into on October 06, 2020.

It is submitted that there was a Force Majeure Clause in the said contract as well as a clause regarding payment of Liquidated Damages if the contractor failed to complete the work within the time specified in the contract or any extension thereof.

In the present case, learned counsel submits, there was communication between the parties for a prolonged period, and the petitioners clearly indicated their difficulty in not being able to complete a portion of the work inasmuch as installation of a freight lift was concerned, which was also stalled due to the Covid-19 pandemic.

That apart, it is submitted that the contract stipulated that, lifts had to be installed by the Otis company. However, the Otis company itself was under lockdown during a major portion of the relevant period, for which the work was also delayed. However, the WBSEDCL raised bills for the partial work done by the petitioners. Ultimately, the entire work was concluded by the month of December, 2021.

Learned counsel appearing for the WBSEDCL submits that the Force Majeure Clause did not contemplate the pandemic situation or anything akin to the same, although the contract was entered into during a period when the pandemic was on.

As such, the provisions of Clause 22, stipulating Liquidated Damage, have to be complied with.

That apart, learned counsel points out that Clause 5 of the contract clearly indicates that time is the essence of the contract and the entire work was to be completed within the stipulated completion time, that is, within eight months from the date of site handover.

Upon considering the submissions of the parties, it is clear that the specific contract between the petitioners and the WBSEDCL was that the elevators-in-question had to be installed only of the Otis Company and none other. Sub-clause (5) of Clause 4 at page-21 of the writ petition clearly indicates that the supply, delivery, installation & commissioning of "Otis-make" one passenger lift and one goods lift through the OEM or their authorized agency was to be undertaken.

Although Clause 5 of the contract stipulates that time is the essence of the contract, one clause of the contract cannot be read in isolation from the others. A harmonious construction of all the clauses of the contract, read as a whole, indicates that the clause for liquidated damage, that is, Clause 22, in the case of failure of the contractor to conclude the work within time, was qualified by the Force Majeure Clause, that is, Clause 35 of the contract.

A plain reading of Clause 35 indicates that the contractor was exempted from the liability to pay any liquidated damage for delay/failure to perform the contract for reasons of force majeure such as acts of God, acts of the public enemy, acts of Governments, fire, flood, *epidemics,* quarantine restriction, strikes, etc.

Since the Covid-19 pandemic was an epidemic of epic proportions, there cannot be any reason why the same should be exempted from the fold of the Force Majeure Clause in the contract.

That apart, the force majeure clause mentions certain instances of acts of God which are inclusive in nature and not exhaustive, even as per the language used in Clause 35. Since the said clause clearly qualifies Clause 22, which pertains to liquidated damage, it cannot be said that the contractor would be liable to pay liquidated damages for the period-in-question, since the contractor was prevented from completing the entire work due to the supervening impossibility of the pandemic lockdown and its fall-out, which was beyond the control of the contractor.

Moreover, the *bona fides* of the contractor was clear inasmuch as the contractor had completed the rest of the job, apart from the installation of a single freight (goods) lift. In any event, the entire work was concluded within the extended period, that is, by December, 2021.

Furthermore, the contractor had written to the Otis company, intimating its compulsions in view of the essential nature of the job. However, a period out of the pandemic was lost due to the cease of work in the Otis company itself in view of the lockdown ensuing from the pandemic.

The partial deduction of 63 days, allowed by the WBSEDCL, and its insistence upon payment of liquidated damages for the other 83 days, out of the total 146 days of delay, is irrational and arbitrary.

In view of the clauses of the contract, the petitioners were not liable to pay a single paisa in lieu of liquidated damages.

Hence, WPA No. 21617 of 2022 is allowed, thereby directing the WBSEDCL to disburse the entire dues of the petitioners without deducting any amount on account of liquidated damages for the delay, if any, occasioned in completion of the work by the petitioners. Such disbursal, it is expected, shall be done as expeditiously as possible, preferably within one month from date.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)