OD-1

ORDER SHEET

WPO/475/2016

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

SEBABRATA BOSE & ASSOCIATES (P) LTD.
VS
KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY & ORS.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 25th April, 2022.

Appearance:
Mr. Probal Kr. Mukherjee, Sr. Adv.
Mr. Debonik Banerjee, Adv.
Mr. Akash Ganguly, Adv.

Mr. Satyajit Talukdar, Adv.
Ms. Sanchari Chakraborty, Adv.
Mr. Soumik Chakraborty, Adv.

The Court: The affidavit-in-reply, filed in Court today, be taken on record.

The petitioner is a contractor who has done several works for the erstwhile Kolkata Metropolitan Water and Sanitation Authority (respondent no.1 in the present writ petition). One of such works was for the Uluberia water treatment plant project and the other for a similar work in respect of Bansberia.

The learned Senior Advocate appearing for the petitioner contends that although the contracts between the parties contemplate that, in lieu of liquidated damages for delay, the employer may deduct the amount of such damages from "any money in his hands" due or which may become due to the contractor, such clause is not applicable in respect of the balance work allegedly done by the employer through some other contractor, on the petitioner's failure to carry out the work required, in the perception of the employer.

By placing reliance on Clauses 46(1) and (3) and 48(3), it is submitted that the two operate in different fields.

Whereas the liquidated damages for delay, up to a ceiling of 10% of the total contract price for the whole works, can be deducted from any money in the hands of the employer which is or would become due to the contractor, in respect of the expenses consequent on and incidental to the rest of the work being done by other persons, the same is recoverable only by deduction by the employer from any sum due or which may become due to the contractor in respect of the contract-in-question itself and not from any money in the hands of the employer which may be due to the petitioner.

Learned counsel appearing for the respondent authorities submits that Clauses 46 and 48 have to be read in conjunction with Clause 60 of the contract between the parties (both the Uluberia and Bansberia contracts have similar clauses).

It is submitted that, in terms of Clause 60, the employer may, after giving 14 days' notice in writing to the contractor, enter upon the site and expel the contractor and get the work done by some other contractor or agency and, in such event, the sum or sums due as per the certificate of the Engineer would be payable to the employer by the contractor, which would be recoverable as a debt due by the contractor to the employer accordingly.

In the present case, by relying on several communications made by the respondent authorities to the petitioner, learned counsel for the respondents argues that both the liquidated damages for delay to the tune of about Rs.1.52 crore and penalty as contemplated under Clauses 47(3) and 60 of the contract had become due, the total being around Rs.5.40 crore, from the contractor to the employer/respondent. Such dues were in respect of the Bansberia project. However, since the admitted dues payable by the respondent authorities to the petitioner, as appearing at page 54 of the writ petition, is to the tune of **Rs.82,48,925**/-, the respondents withheld the amount payable by virtue of the Uluberia project to the petitioner, since such amount was less than the dues to the respondents from the contractor under the heads as indicated above in respect of the Bansberia project.

Upon hearing learned counsel for the parties, it is relevant to take note of the exact language of Clause 46, sub-clauses (1) and (3) as well as Clause 48(3) of the contracts, both in respect of the Bansberia and Uluberia projects.

Such clauses are set out below:

> *"46(1)* ***Liquidated Damages for Delay*** *- If the Contractor shall fail to achieve completion of the Works within the time prescribed by Clause 42 hereof, then the Contractor shall pay to the Employer the sum stated in the Contract as liquidated damages for such default and not as a penalty for every day of part of a day which shall elapse between the time prescribed by Clause 42 hereof and the date of certified completion of the Works. The Employer may without prejudice to any other method of recovery, deduct the amount of such damages from any money in his hands, due or which may become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor form his obligation to complete the Works, or from any other of his obligations and liabilities under the Contract."*

> *"… …*
>
> *(3)* ***Extent of Liquidated Damages*** *– The liquidated damages referred to in sub-clause (1) for delay of each day or part thereof, shall be at the rate of one percent (1%) or such smaller amount as the Employer may decide, or the total value of the Contract Price excluding the value of such part or section of the works as may have been covered by certificate of completion in terms of the provisions of sub-clause (2) above, Provided however that in no case shall be total amount of liquidated damages exceed ten percent (10%) of the total Contract Price for whole Works."*

> *"… …*
>
> *48(3)* ***Remedy on contractor's failure to carry out work required*** *- If the Contractor shall fail to do any such work as aforesaid requirement by the Engineer, the Employer shall be entitled to employ and pay other persons to carry out the same, which in the opinion of the Employer, the Contractor was liable to do at his own expense under the Contract. In the said event, all expenses consequent thereon or incidental thereto shall be recoverable from the Contractor by the Employer, or may be deducted by the Employer from any sum due or which may become due to the Contractor."*

Upon a plain reading of the said provisions, it is evident that although the dues in respect of liquidated damages for delay is recoverable from "any money" in the hands of the employer which is due or which may become due to the contractor under Clause 46(1), Clause 48(3) contemplates that any such amount which has been expended to carry out the work through some other contractor or agency, may be deducted by the employer from any sum "due or which may become due to the contractor".

Significantly, the expression “any money in his hands”, which is stipulated in Clause 46(1), is conspicuous by its absence in Clause 48(3) and/or even Clause 60(1) which has been relied on by the respondents.

As such, as rightly argued by the learned Senior Advocate appearing for the petitioner, the dues as contemplated under Clause 48(3), read in conjunction with Clause 60 of the contracts, have to be recovered as a public demand, under the concerned Act governing such amounts. However, the additional remedy of deduction from any money in the hands of the employer, due to the contractor, is not available in respect of Clauses 48(3) and 60 of the contracts.

In the present case, 10% of the liquidated damages for delay charged in respect of the Uluberia Project has already been deducted from the amount payable to the petitioner by the respondent authorities while calculating the balance due of **Rs.82,48,925**/-.

In so far as the Bansberia Project is concerned, the alleged dues in respect of all expenses consequent on or incidental to the balance work having been carried out by other agency/contractor than the petitioner is recoverable in due course of law under the Public Demands Recovery Act. As such, in the present case, the respondent authorities acted *de hors* their power under the contracts between the parties and/or law in withholding the entire dues in respect of Uluberia Project to the petitioner, after deducting the maximum 10% liquidated damages for delay in respect of Uluberia Project.

Hence, WPO/475/2016 is allowed, thereby directing the respondent authorities to disburse in favour of the petitioner the amount of **Rs.82,48,925**/- which is the admitted due to the petitioner in respect of the work done by the petitioner in respect of Uluberia Project, along with Rs. 1 crore, deposited by the petitioner with the respondent authorities as security deposit for the Uluberia Project, as expeditiously as possible, but positively within May 31, 2022.

In so far as the alleged dues in respect of the defaults of the petitioner under the contract for the Bansberia Project are concerned, it will be open to the respondent authorities to take recourse to due process of law in recovering such amount, if due, in accordance with law from the petitioner. However, the prayer of the writ petitioner for interest on the amount payable as per this order by the respondents is refused, since there was scope of *bona fide* doubt in the mind of the respondents with regard to the actual calculations regarding the amounts due and payable to the petitioner.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)

bp./K.Banerjee