

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.11 of 2018
(Through video conferencing mode)**

Union of India

...

Appellant

Mr. S.S. Kashyuap, CGC

-versus-

***M/S. Track and Towers Infractech
(P) Ltd.***

...

Respondent

Mr. B.P.Tripathy, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER

26.07.2022

Order No.

- 06.** 1. Mr. Kashyuap, learned advocate, Central Government Counsel appears on behalf of appellant (Union of India/Railway). He submits, the Tribunal correctly appreciated termination of the contract to be under condition 62 in General Conditions of Contract. The condition provided for the contingencies and forfeiture of security deposit. The Tribunal allowed forfeiture but on adjustment.
2. By impugned judgment dated 10th November, 2017, the Court below set aside part of the award, to direct refund of security deposit. He submits, order for termination of contract was duly made invoking condition 62, by giving firstly 7 days notice and thereafter 48 hours notice. The Court below

erred in setting aside that part of award and hence, there should be interference in appeal.

3. Mr. Tripathy, learned advocate appears on behalf of respondent (contractor). He draws attention to the reasoning in impugned judgment to submit, the only possible view was given thereby. Condition 61 was applicable regarding termination of the contract. His client had approached the employer to invoke the condition. However, the employer wrongfully invoked condition 62. Relied upon passage from impugned judgment is reproduced below.

“The learned counsel for the petitioner contended that Clause 62 of GCC can be invoked, if there is a breach in the contractual work but in the instant case, under the difficult circumstances, it could not be fully accomplished and therefore, it was to be terminated, as per Clause 61(1) thereof. Admittedly, the petitioner supplied certain quantity of ballast and thereafter, intimated the opposite party regarding the difficulties being faced in executing the rest of the contractual work, which is amply substantiated by the relevant documents submitted to the Court having been obtained under the RTI Act, 2005. The recommendation of the concerned official dated 08.04.2009 towards administrative approval for the closure of the contract, a letter dated 17.04.2009 for obtaining sanction from the competent authority vis-à-vis financial concurrence and other correspondence, including one more letter dated 27.04.2009 requesting its closure under Clause 61(1) of GCC and the subsequent reply of the authority concerned dated 29.04.2009 with an advice for alternative arrangement for supply of ballast ad to consider the proposal for the closure of the contract later on have been referred to and relied upon in order to satisfy the Court that the termination under Clause 62 of GCC to be illegal. In fact, the aforesaid correspondences exchanged between the officials have not been denied by the learned counsel for the

opposite party. As per Clause 61 of GCC, the parties were entitled to terminate the contract, when cessation of work was felt or deemed necessary for certain cause(s). The fact of facing difficulty and inability to proceed with the contractual work is, prima facie, established from the necessary correspondences between the concerned officials of the opposite party. It was constantly recommended for administrative approval and financial concurrence towards closure of the contract, which is clearly evident from the materials on record. Instead of invoking Clause 61(1) of GCC, the competent authority advised for alternative arrangement and deferred the proposal for closure of the contract and finally, terminated the same under Clause 62 thereof."

4. Conditions 61 and 62 provided for termination of the contract. While condition 61 gave right to the Railway to terminate the contract, condition 62 provided for termination of the contract owing to default of contractor. Under both conditions, authority to terminate was with Railway. Hence, the contractor had to seek termination under condition 61. The Railway, on finding fault with the contractor, terminated under condition 62.

5. Condition 61 is reproduced below.

*"61. (1) **Right of Railway to determine the contract.** – The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefor shall be conclusive evidence thereof.*

*(2) **Payment on determination of contract.** – Should the contract be determined under sub-clause (1) of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the work, the Railway shall admit and consider such claims as are deemed reasonable*

and are supported by vouchers to the satisfaction of the Engineer. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive.

(3) The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract."

6. The Tribunal while dealing with the controversy on termination of the contract recited that Railway had given seven days notice to contractor to make good progress of the work. The contractor even then failed to commence work. Finally, 48 hours of notice dated 12th June, 2009 was issued and thereafter the contract terminated in terms of condition 62. Hence, the Tribunal remarked, adequate opportunity was given to the contractor to complete the work on it being well aware of all the odds and hindrances at site, the topography, facilities, resources, man power, administrative cooperation from Railway and State Government etc. The Tribunal concluded, failure for completion of work in time by the contractor seemed to be due to lack of their sincere efforts. The Tribunal held, thus, the termination of contract is justified and the claim is partially acceptable to the Tribunal to the extent of release of final bill.

7. On perusal of condition 62 Court has been unable to find allowing for payment on final bill upon termination thereunder. Instead, forfeiture and adjustment have been provided. It is under condition 61(2) there is

provision for payment of expenditure incurred by the contractor in expectation of completing the whole work, for the Railway to admit and consider such claims as are deemed reasonable and supported by vouchers to the satisfaction of the engineers. This includes value of approved materials at site and work done to date by the contractor, to be paid for. It is clear therefore, both the Tribunal and Court below looked at the facts constituting termination of contract as coming under condition 61. While the Tribunal thereafter focused on the Railway having issued 7 days and 48 hours notices to view the termination as under condition 62, it actually awarded under condition 61. In the circumstances, Court appreciates concurrent finding on facts by both the Tribunal and the Court below but correct finding on those facts by the Court below.

8. Impugned judgment is confirmed.
9. The appeal is dismissed.

(Arindam Sinha)
Judge

Prasant