



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.03.2022

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.2604 of 2022 &
W.M.P.Nos.2750 & 2751 of 2022

M/s.NBCC (INDIA) LIMITED
(A Government of India Enterprise)
NBCC Bhawan,
Lodhi Road,
New Delhi - 110 003.

.... Petitioner

Vs.

M/s.Bharat Heavy Electricals Limited
(A Government of India Undertaking)
Power Sector - Southern Region,
Periyar EVR Building, 690 , Anna Salai,
Nandanam,
Chennai - 600 035
Also at:
Power Sector - Souther Region,
Tek Towers, No.11, Old Mahabalipuram Road,
Okkiyam Thoraipakkam,
Chennai - 600 097.

...Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorari, to call for the records and quash the Termination/Withdrawal Notice Ref.BHEL:PSSR:SCT:1884 Pkg 1/2022/102 dated 02.02.2022 issued by the Respondent herein.

For Petitioner : Mr.Vijay Narayan,
Senior Counsel for
Mr.Prasad Vijayakumar

For Respondents : Mr.R.Sankara Narayanan
Additional Solicitor General
assisted by
Mr.K.Harishankar

O R D E R

Both the petitioner and the respondent are Navaratna Public Sector Undertakings. The petitioner is the National Buildings Construction Corporation (India) (hereinafter referred to as



'NBCC'), and respondent, Bharat Heavy Electronics Limited (hereinafter referred to as 'BHEL').

2. BHEL floated a tender on 07.01.2020 on the E-Procurement Portal for civil, architectural, mechanical, electrical and allied work calling for bids in regard to Natural Draught Cooling Towers (NDCT's) along with supply of materials, labour, tools and the plants as required for the same.

3. NBCC submitted its bid on 15.02.2020 and the offer of the petitioner was accepted by the respondent and a Letter of Intent (LOI) awarded on 12.06.2020. This was followed on 15.06.2020 with the unqualified acceptance of the petitioner to the LOI. The parties agreed on 23.09.2020 that zero date of work, signifying commencement of work, shall be taken to 05.09.2020.

4. The Covid pandemic had intervened on 23.03.2020 in the meanwhile, and on 23.03.2020, a national lockdown was declared by the Government of India, notwithstanding which, the parties consciously, agreed upon the dates and the scheduling of work as aforesaid.

5. BHEL, being concerned with the slow and sluggish pace of work on the part of NBCC had proceeded to issue several communications commencing 08.07.2020 onwards complaining about poor establishment, delay in execution of work and lack of infrastructure and resources. On 27.11.2020, a notice came to be issued by BHEL threatening partial withdrawal of the scope of work to which NBCC retorted on 28.11.2020 stating that such a threat was unwarranted in light of the contract conditions.

6. The preliminary objection raised by the respondent is of maintainability of the writ petition, in the presence of an alternate dispute mechanism by way of an arbitration clause. The petitioner defends the writ petition stating that in cases where there is a fundamental violation of the rights of the parties, Courts have thought it fit to intervene in writ jurisdiction, notwithstanding the presence of the alternate remedy of arbitration.

7. Both NBCC and BHEL rely upon the judgment of the Hon'ble Supreme Court in the case of Joshi Technologies International Inc. Vs. Union of India and Others [(2015) 7 SCC 728]. In that matter, the Court was concerned with the allegation of infringement of public law rights in the execution of a Government contract and held that such infringement, if established, may be challenged even in a writ petition under Article 226 of the Constitution of India. The doctrines of legitimate expectations, reasonableness and fairness may be invoked in the event of violation of a public law element.



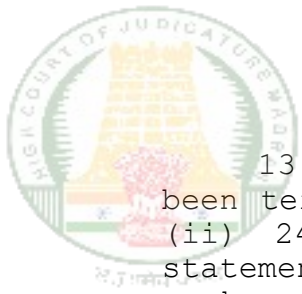
8. BHEL draws specific attention to paragraph 69.1 of the judgment, wherein the Court re-emphasizes that litigation would not be entertained by Courts in such cases unless it is established that the action questioned has an element of public law character attached to it. At paragraph 69.2 the Court says that where the contract provides for an alternate mode of dispute settlement, the High Court would normally refuse to exercise its jurisdiction under Article 226 and would prefer to relegate the parties to the said mode of settlement.

9. In ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd. [(2004) 3 SCC 553], paragraphs 12 and 13 thereof, the Court emphasizes that though, as a norm, Courts will not intervene in matter of contract, there is no cast iron rule in this regard in terms of which jurisdiction of courts, including under Article 226, will stand ousted. It is thus, a matter of discretion to be exercised by the Court, on a case to case basis, as to whether intervention is warranted or otherwise.

10. The grievance of the petitioner is in relation to the termination of contract by the respondent. Though conceding to the delay in commencement of project and mobilization of resources, petitioner would point out that, in fact, there was delay on the part of BHEL as well in supplying material and, according to them, there is sufficient material available on record, for them to be able to establish such delay. The delay on their part was entirely due to unforeseen and unique conditions caused by the pandemic.

11. There had been severe hardships caused by reason of the migration of labour that had been instrumental for the delay caused. At any rate, they state that they are ready to recommence and continue the contract, if the impugned order of termination were set aside. I am not inclined to go into the details of correspondences stated to have been exchanged by the parties, to explain the allegations and counter-allegations put forth in this writ petition.

12. It would suffice, in my view, to refer to one communication, dated 20.11.2021 addressed by BHEL to NBCC, to the effect that the latter had achieved only 22 crores worth of work as against the projected work of 120 crores i.e. 18.3% in 13 months of subsistence of the contract. That is, and to put it differently, overall, for a project spanning thirty months, NBCC had achieved only 22 crores of work in 13 months as against a total contract value of 283.5 crores i.e. 7%, thereof. This communication is part of a compilation filed by the respondents on 14.02.2022, containing various e-mails and letters stated to have been exchanged between the parties.



13. NBCC also argues that the contracts ought not to have been terminated when their tenure expired only on (i) 05.03.2023 (ii) 24.03.2023 and (iii) 21.06.2023. The veracity of this statement has to be weighed in proportion to the statement of work completed, as set out in communication dated 20.11.2022, the public money at stake and the delay in completion of a public infrastructure project.

14. NBCC would urge that there was a requirement for extension of all Government contracts by a period of six months bearing in mind the Covid pandemic and they should have been extended this benefit. However, Notification in this regard has been issued on 13.05.2020 and parties have agreed upon the zero date/effective date for commencement, as 05.09.2020, with full knowledge of the aforesaid Notification. The benefit of six months has thus already been factored in by the parties in deciding the effective date of commencement, especially the petitioner, when it agreed to commence work on 05.09.2020.

15. Yet another argument of NBCC is to the effect that the contract has been awarded to a third party with a substantial extension of time and that in addition, costs attributable to delay has been mulcted upon the petitioner, adding insult to injury. According to the petitioner, this would result in a drain of public money and is also against public interest. However, these are matters to be established by the petitioner before the Arbitrator as they involve the determination of various facts.

16. There is thus, in my considered view, no infringement of public law element made out by the petitioner. On the contrary, there is enough prima facie evidence to establish the existence of several disputed facts to convince this court not to intervene in the matter at this stage and under Article 226 of the Constitution. The preliminary objection on the ground of maintainability raised by the respondent is accepted and the parties relegated to alternate dispute resolution as per contract. Since I have relegated the parties to arbitration, all observations in this order are to be seen only in the context of deciding the aspect of maintainability.

17. In the present matter, the contract, admittedly, provides that the law governing the contract and Courts shall be Indian law, and the Courts in Delhi, Calcutta/Nagpur/Chennai shall have jurisdiction respectively in relation to matters under the Contract, as provided for under Clause 2.21 thereof.

18. Clause 2.21 is two pronged. The first part, that is, clause 2.21.1 deals with arbitration generally, excluding specific provisions elsewhere in the contract, and states that amicable settlement between the parties shall first be attempted



as a measure of dispute resolution, failing which, arbitration may be resorted to by an Arbitrator appointed by the Head of BHEL Power Selection Region. Clause 2.21.2 is specific to a transaction qua two public sector enterprises or Government Departments and provides for a separate and distinct method of dispute resolution.

19. The clauses read as follows:

2.21 ARBITRATION

2.21.1 Except as provided elsewhere in this Contract, in case amicable settlement is not reached between the parties, in respect of any dispute or difference; arising out of the formation, breach, termination, validity or execution of the Contract; or, the respective rights and liabilities of the parties; or, in relation of any provision of the Contract; or, in any manner touching upon the Contract, then, either Party may, by a notice in writing to other Party refer such dispute or difference to the sole arbitration of an arbitrator appointed by Head of the BHEL Power Sector Region issuing the Contract. It shall not be open to the Contractor to object to such arbitrator only on the ground that such arbitrator is an employee/ex-employee of BHEL or has dealt with or has expressed any opinion on any issue touching upon the Contract.

The Arbitrator shall pass a reasoned award of the Arbitrator shall be final and binding upon the Parties.

Subject as aforesaid, the provisions of Arbitration and Conciliation Act, 1966 (India) or statutory modifications or re-enactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The seat of arbitration shall be _____ (the place from where the contract is issued)

2.21.2 In case of Contract with Public Sector Enterprise (PSE) or a Government Department, the following shall be applicable:

In the event of any dispute or difference relating to the interpretation and application of the provisions of the Contract, such dispute or difference shall be referred by either Party for arbitration to the sole arbitrator in the Department



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of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the arbitrator shall be binding upon the Parties to the dispute, provided, however, any Party aggrieved by such award may make further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary or Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties hereto finally and conclusively.

2.21.3 The cost of arbitration shall be borne equally by the Parties.

2.21.4 Notwithstanding the existence or any dispute or differences and/or reference for the arbitration, the Contractor shall proceed with and continue without hindrance the performance of its obligations under this Contract with due diligence and expedition in a professional manner.

20. To my mind, it is unambiguous that it is Article 2.21.2 that would apply to the present case, as it is specific to a contract between two public sector enterprises i.e. NBCC and BHEL. Learned AAG, however, would attempt to bring the matter within the cover of 2.21.1 assuring the Court that there would be no resistance by BHEL should the parties resort to the procedure under Article 2.21.1. He concedes that the provisions of the Arbitration and Conciliation Act, 1996 would apply to a dispute qua the parties and urges that the parties avail of arbitration as provided for in 2.21.1.

21. However, the question of jurisdiction would flow only from the agreement between the parties and not by concession and thus the clauses must be interpreted solely upon the strength of what they contain. The contract provides for two modes of ADR mechanisms; one, where the contract is between BHEL/ NBCC and a private party, by resort to the provisions of the 1996 Act or where the contract is between two PSUs by resort to the mechanism under 2.21.2.

22. In this regard, it is relevant to refer to Office Memorandum dated 22.05.2018 entitled Settlement of commercial disputes between Central Public Sector Enterprises (CPSE(s)) inter se and CPSE(s) and Government Department(s)/Organization



३.१.२. अनेक प्रकारचे

MOM between BHEL and M/s NBCC (I) Ltd at BHEL Site Office,
Yadadri TPS dated 04.02.2022 Regarding Demobilisation:

1.	Joint measurement will start from 07.02.2022 onwards and completion by 10.02.2022
2.	Free issue items steel and cement to be reconciled by M/s NBCC and return the excess materials to BHEL by 12.02.2022.
3.	BHEL instructed M/s NBCC to make the Labour Payment
4.	M/s NBCC informed that their own materials like scaffolding pipes, clamps and Tower crane etc will be either taken by them (as per the contractual provision) or they will discuss with the new vendor for settlement, this will be confirmed by M/s NBCC by 07.02.2022.
5.	M/s NBCC requested BHEL to release the Dec21 RA bill payment. BHEL informed that as the Risk and cost is operated, total liability to be assessed then decision will be taken for payment. HR and Statutory documents shall be submitted by M/s NBCC.



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6.	M/s NBCC informed that they have stopped the work from 04.02.2022 and work related to curing and quality lab-Cube testing will be carried on.
7.	M/s. NBCC once again requested for extra claims up to the termination notice. BHEL will review.
8.	Handing over of all NDCTS should be completed within 15 days to restart the work by another vendor.
9.	All relevant permission like Gate pass, Vehicle pass, safety permits, induction cards etc shall be surrendered to BHEL within 15 days.

26. The writ petition has been filed by NBCC on 08.02.2022 and the affidavit executed by the deponent on 07.02.2022. The affidavit is conspicuous by absence of any reference to the above minutes. When the matter had come up for admission on 10.02.2022, I had ordered notice to the respondents and had recorded in paragraph 2 to 4 as follows:

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2. Mr.Vijay Narayanan, learned Senior Counsel appearing for Mr.Prasad Vijaykumar, learned counsel for the petitioner, on record, would submit that work was ongoing in full speed at the time of receipt of the impugned termination notice and, given a chance, the petitioners are fully willing and equipped to continue with the work. This is recorded and if so, let the work continue till next date of hearing.

3. List on 24.02.2022.

4. Interim stay."

27. When the matter was listed after completion of pleadings on 09.03.2022, NBCC would point out that though in possession of an interim stay it was not permitted to enter the site of work and continue with the contract and they would urge that the Court take a serious view of BHEL's inaction in this regard, bordering on contempt.

28. The premise upon which interim protection had been obtained was that NBCC was poised and ready to continue with the work and the impression created was that things remained status quo between the parties as regard the continuance of the contract, and that valuable time as well as resources were available on-site to continue the work.



29. It is thus to avoid wastage of time as well as ensure deployment of available men and material that the work was directed to continue. Had the agreement of the parties to demobilize been brought to the notice of the Court, it is likely that there would have been no interim protection granted at all. BHEL would urge that there has been gross suppression which is willful and intentional.

30. NBCC concedes to the omission brushing it away as an unintended one, and not willful as sought to be portrayed. In my view, non-disclosure of minutes dated 04.02.2022 is wholly inappropriate, bordering on suppression of material facts, but in light of Mr.Narayan's submission that there had been no intention to suppress, I leave this issue at that.

31. BHEL has also drawn attention to the provisions of Section 20A of the Specific Relief Act, 1963 inserted by way of amendment on 01.08.2018 laying an embargo on the grant of injunctions in infrastructure projects. The contract between the parties before me squarely relates to an infrastructure project and it is in public interest that it resumes and continues as expeditiously and efficiently as possible.

32. This aspect of the matter has been noticed by a Division Bench of the Manipur High Court at Imphal in the case of Niraj Cement Structurals Ltd. Vs. Union of India and others ((2020) SCC Online Mani 185), specifically, paragraph 113 thereof. It is thus imperative that BHEL resume and proceed with the contract as expeditiously as possible.

33. This writ petition is dismissed, connected miscellaneous petitions are closed and there will be no order as to costs.

Sd/-
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

M/s.Bharat Heavy Electricals Limited
(A Government of India Undertaking)
Power Sector - Southern Region,
Periyar EVR Building, 690 , Anna Salai,
Nandanam,
Chennai - 600 035.

Also at:
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Chennai - 600 097.

+2ccs to M/s.K.Harishankar, Advocate, S.R.No.20528

W.P. No.2604 of 2022 &
W.M.P.Nos.2750 & 2751 of 2022

VSN-II (CO)
SU(05/05/2022)