IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

205

CWP-3433-2017
Date of decision: 07.09.2022

M/S BHARTI ENTERPRISES ....Petitioner

VERSUS

UNION OF INDIA AND OTHERS ....Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

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Present :- Mr. Kavinder S. Chibber, Advocate for
Mr. P.S. Khurana, Advocate
for the petitioner.

Mr. Gehna Vaishnavi, Senior Govt. Counsel
for respondents No.1 & 2.

Mr. G.B.S. Gill, Advocate for
Mr. Gaurav Dhir, Advocate
for respondent No.3.

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VINOD S. BHARDWAJ, J. (Oral)

The present Civil Writ petition has been filed under Article 226/227 of the Constitution of India seeking issuance of writ in the nature of Certiorari for quashing the action of the respondents in retaining the security amount of Rs. 3,68,696/- (Annexure P-2).

2. Learned counsel appearing on behalf of the petitioner contends that the petitioner is engaged in the business of dealing with scrap material and had participated in the tender process initiated by respondent No.2 to invite the tender/bids from the eligible persons for disposal of scrap material on behalf of respondent No.3. It is submitted that consequent to the bid submitted by the petitioner, a communication was received by the petitioner on 06.02.2014 from the office of respondent No.2 whereby the petitioner was declared as a successful

bidder and a letter of acceptance was conveyed to the petitioner. He further contends that the petitioner had deposited the first installment as per terms and conditions of the letter of allotment/contract on 19.02.2014 for lifting the first part of the quantity of scrap and the second installment was delivered on 10.03.2014 with all acknowledgments. The third installment was to be paid on or before 22.03.2014. He submits that there is a provision for deposit of penalty in case of delay of payment and that the petitioner calculated the period and deposited the third installment alongwith penalty of Rs. 8,884 @ 1% of the balance payment through demand draft dated 04.04.2014 after making due adjustment of the security amount of Rs. 3,68,696/-. A request was made by the petitioner for seeking permission to deposit the third installment alongwith penalty on 07.04.2014 which was however not accepted for the reason that the last date to deposit the installment alongwith penalty for delayed payment was 05.04.2014. It was contended by the petitioner that the demand draft in question had been got prepared on 04.04.2014 and the petitioner was under the impression that since 05.04.2014 was a holiday and 06.04.2014 was a Sunday, the payment in question was submitted on the next working day i.e. on 07.04.2014 in view of Clause 11.1 (iii) of the Agreement. He thus contends that the petitioner was not at fault and that by virtue of Section 10 of the General Clauses Act, 1897 pertaining to computation of time, if any act or proceeding is required to be undertaken by a prescribed day and if the Court or Offices are closed on that day or the last day of the prescribed period, the act or the proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or offices are open.

3. He contends that the respondents have not disputed the aforesaid assertion of the petitioner that 05.04.2014 and 06.04.2014 were holidays and the office was not working. It is thus contended that the installment was deposited with penalty in time as permissible under Clause 11.1 (iii) of the agreement.

4. Response on behalf of respondents had been filed. Learned counsel appearing on behalf of respondents No.1 & 2 has contended that third installment was to be paid on or before 22.03.2014. However, the petitioner had not paid the due installment upto 09.04.2014 and that the demand draft dated 04.04.2014 was received in the Office of respondent No.2 vide letter dated 07.04.2014 on 09.04.2014. Hence, there was a delay of 18 days in receiving the third installment. She contends that the petitioner is not entitled to be given any benefit of the demand draft issued on 04.04.2014, as the last date for receiving of the amount along with penalty was 05.04.2014. She further contends that the requisite steps as per the agreement were to be undertaken by respondent No.3 and they have taken a decision that since the amount was tendered late, the security deposited by the petitioner deserves to be forfeited.

5. Mr. G.B.S. Gill, Advocate for has appeared on behalf of respondent No.3 and contends that as per Clause 11.1 Part (iii) and Clause 15 of General Terms and Conditions of E-Auction, the additional period of 14 days was granted with late fee and the respondent No.3 reserved the right to not to accept the payment and, the sale of the lot would automatically stand cancelled and the earnest

money/security deposit is also liable to be forfeited by the respondent No.3-Nigam.

6. Reference is made to the clauses as under:

> *"As per clause no. 11.1 part (III) and Clause no. 15 of General Terms and conditions of E-Auction, the Principal(Nigam)/MSTC's was having right not to accept the payment with or without late penalty after the expiry of time fixed or even within additional period of 14 days, at Principal(Nigam)/MSTC's (in-consultation with principal)and in such an event the sale of the lot was automatically stands cancelled and the Earnest Money/Security Deposit is also liable to be forfeited by the Nigam. The relevant extract of clause no. 11.1 part (III) and Clause no. 15 of General Terms and condition of E-Auction is reproduced hereunder for ready reference:*
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> ***"Clause no. 11.1 part (III)-For any delay in making payment within the time limit specified, the due payment may be made together with late penalty @0.5% per week or part thereof on the due amount for the period of delay within 14 days from the due date. However, Principal or MSTC in consultation with principal reserves the right not to accept the payment with or without the late penalty after expiry of the above mentioned time limits or even within the aforesaid additional period of 14 days, at Principal/MSTC's (in-consultation with principal) sole discretion and in such an event the sale of the lot will be automatically cancelled and the Earnest Money/Security Deposit (as the case may be) will automatically stand forfeited.***
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> ***Clause no. 15-Payment towards materials value and other dues is to be made as stipulated in Sale ordercum acceptance letter, if there is a default in payment as per terms of the sale order cum acceptance letter, the***

> ***security deposit mentioned theirin will stand forfeited automatically without any further notice"***
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> *Since the petitioner had not deposited the 3rd and last instalment within stipulated period to the Nigam, hence sale of scrap stood cancelled automatically and security deposited by the petitioner also forfeited in terms of ibid conditions of E-Auction."*

7. It is thus argued that there was no fault on the part of answering respondent and the delay was at the hands of the petitioner, the orders passed by the respondent-authorities forfeiting the security deposit are valid and in accordance with the terms of the contract. It is further contended that as per the terms of the contract, in the event of any dispute or difference relating to interpretation of the terms of the appeal, the same was referable to arbitration under Clause 3.0 and that the petitioner has an alternative remedy available to him to approach the arbitrators.

8. I have heard learned counsels appearing on behalf of the respective parties and have gone through the pleadings as well as record appended alongwith the instant petition.

9. There is no dispute in the present case that the installment in question was to be deposited on or before 22.03.2014. The grace period of 14 days expired on 05.04.2014. It is the case of the petitioner that since 05.04.2014 and 06.04.2014 were office holidays, he had deposited the requisite draft as well as the penalty for late payment in terms of the Contract Clause 11.1 (iii) on 07.04.2014, however, the respondents did not accept the said payment. Consequently a representation was sent to the concerned authorities and the petitioner was compelled to send the demand draft along with the said

representation. In the responses filed by the respondents, they have taken a plea that 05.04.2014 was not a Bank holiday and resultantly, the payment could have been deposited. They have chosen not to respond to the fact as to whether the office was closed on the said day or not. Furthermore, a specific averment has also been made in the petition that the petitioner had approached the respondent No.3 along with the entire payment on 07.04.2014 itself and that they refused to accept the same. There is no denial in the written statement filed by the respondents to the aforesaid specific pleaded case of the petitioner as well. It was under the said compulsive circumstances that the demand draft which was prepared on 04.04.2014 was sent by the petitioner after appending the same along with representation. A mail in this regard was also sent by the petitioner on the same day i.e. 07.04.2014. The draft along with the representation sent on 07.04.2014 was received by the respondents on 09.04.2014. It cannot be made open to the respondents to take benefit of their own wrong by not accepting the payment which was being tendered within the terms and conditions of the contract and as per the applicable statutory provisions enshrined in Section 10 of the General Clauses Act,, 1897. It is apparently a case where the respondent authorities played mischief and did not allow the petitioner to make good the tender or submission of the third installment along with the penalty. It would be incomprehensible that the petitioner would not be interested in securing the release of the scrap, especially when the draft in question had already been got prepared on 04.04.2014 itself. He was not the one who would have gained by retaining the draft for himself, especially when the petitioner was vigilant enough to be following up with the respondent-authorities and conveying his grievance of non-acceptance of the draft by the officials of respondent No.3.

10. The uncontroverted averments of the petitioner alongwith steps taken by him to submit the draft is a contemporaneous evidence and reflects bona fide efforts on the part of the petitioner. There would ordinarily be no reason as to why any person with reasonable prudence would not approach the concerned authority & instead resort to sending the drafts by registered post, if the authority was willing to accept the same. The non-denial of the specific pleading in this regard made by the petitioner further fills the scales in favour of the petitioner and persuades this Court to accept the submission of the petitioner.

11. The respondent-Department/authorities cannot thus be permitted to take any advantage of a lapse which is being alleged against the petitioner, whereas the said lapse is attributable to the deliberate misconduct on the part of the officials of the respondent-authorities.

12. This leads to the second objection raised on behalf of the respondents that an arbitration clause exists in the present case and that in the event of any dispute, the petitioner ought to take recourse to the remedy of arbitration.

13. The aforesaid contention is being noticed to be rejected. The respondents being perpetrators of an illegality themselves cannot be permitted to contend that a dispute created by them ought to be resolved solely by way of an arbitration by attributing the lapse to the petitioner. Such a conduct on the part of the agencies and

instrumentality of the State deserves to be deprecated. An attempt at creation of a dispute when there was none and to raise a plea of alternate forum would amount to allowing compounding of the agony of a citizen and such attempt, ought not to be promoted.

14. The Hon'ble Supreme Court in the matter of ***ABL International Ltd. V. Export Credit Guarantee Corporation of India Ltd.*** reported as (2004) 3 SCC 533, had held that it was no longer *res integra* that a writ petition under Article 226 of the Constitution is maintainable at the instance of an aggrieved party to enforce a contractual obligation of the State or its instrumentality when the State acts in an arbitrary manner, as follows:

> *10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy v. State of Mysore was followed subsequently by this Court in the case of D.F.O. v. Ram Sanehi Singh [(1971) 3 SCC 864] wherein this Court held:*
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> > *"By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy case there can be no doubt that the*

petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

11. In the case of Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd. [(1983) 3 SCC 379] this Court following an earlier judgment in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] held:

The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporations Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226.

12. The learned counsel appearing for the first respondent, however, submitted that this Court has taken a different view in the case of LIC of India v. Escorts Ltd. [(1986) 1 SCC 264] wherein this Court held:

"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law

> *domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder."*

15. Ordinarily, this Court would be inclined to impose cost upon respondent agencies for such blatant disregard of the contractual and statutory provisions aimed to defeat rights of a citizen and to force him to undergo the process of litigation which could have been resolved at the first instance and by referring to appropriate statues, however, taking a lenient view in the matter, the said cost is not being imposed.

16. The present petition is accordingly allowed and the order (Annexure P-2) directing forfeiture/retention of the security amount of Rs. 3,68,696/- of the petitioner is set aside. Respondents are directed to release the aforesaid security amount along with interest at the rate of 6% from the date of filing of the present petition till disbursement of

the aforesaid amount.

(VINOD S. BHARDWAJ)
JUDGE

SEPTEMBER 07, 2022

Vishal sharma

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No