6th July, 2023
(AK)
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W.P.A 12900 of 2023
IA No: CAN 1 of 2023

Harji Engineering Works Pvt. Ltd.
Vs.
Union of India and another

Mr. Kishore Dutta
Mr. Rupak Ghosh
Mrs. Sweta Gandhi
...for the petitioner.

Mr. Asit Kumar De
...for the Union of India.

Mr. Rohit Das
Ms. Kishwar Rahman
Mr. Preetam Majumdar
...for the respondent no.2.

Learned senior counsel for the petitioner contends that the respondent authorities have acted in contravention of law and natural justice in floating a new tender for the completion of the balance work, which was yet to be completed by the petitioner in terms of a contract awarded to the petitioner, without permitting the petitioner to conclude its work.

It is submitted that despite the private respondents having given the petitioner an option to complete the balance work, prior to such extension itself, the new tender was floated.

It is submitted that during pendency of the writ petition, a termination notice was issued against the petitioner by the respondent authorities, which is also required to be challenged.

Learned counsel appearing for the respondent authorities controverts the submissions of learned senior counsel for the petitioner and argues that sufficient opportunities were given to the petitioner to complete the work awarded to the petitioner.

However, in spite of such option being given and a further extension being given even after the floating of the impugned new tender, the petitioner failed to complete such work in time, due to which the contract of the petitioner was terminated on June 11, 2023.

It is further argued that, in the meantime, the new tender has been given effect to by awarding the balance work to a third party, which has already undertaken such balance work.

Learned counsel appearing for the respondent authorities also places reliance on the relevant clauses of the fresh tender, floated in the meantime by the respondents, and indicates that the same included a procedure for subsequent reverse auction after the technical bid opening date.

That apart, it is submitted that a six-month window was left for awarding the contract in terms of the new tender, which gave ample time to the respondent authorities to assess whether the petitioner is able to complete the work awarded to the petitioner, in terms of the extension, in the meantime.

However, in view of the petitioner having failed to utilize such opportunity, the new tender was given effect to subsequently.

Learned counsel for the respondents cites two judgments of the Supreme Court in support of the contention that the window of interference under judicial review in a tender process is extremely limited, particularly in respect of public projects.

The first judgment cited is *N.G. Projects Limited vs. Vinod Kumar Jain and others* reported at *(2022) 6 SCC 127* and the second *Food Corporation of India and others vs. Jagannath Dutta and others* reported at *1993 Supp (3) SCC 635*.

Upon a consideration of the submissions of parties, the chronology of events in the present matter can be summed up as follows:

After the petitioner having sought to foreclose the contract on certain allegations on January 5, 2023, a communication was issued by the respondent - Bharat Heavy Electricals Limited (BHEL) on January 6, 2023 whereby the BHEL warned the petitioner that the petitioner had not submitted any request letter for time extension nor had taken any action from their side to continue the work.

It was also mentioned in the said letter that, despite lot of persuasions by BHEL vide previous letters, the petitioner had allegedly failed to submit request letter for time extension in line with Clause 2.11.1 of the General Conditions of Contract (GCC), along with balance work completion plan, within the stipulated time period, that is, by January 3, 2023.

However, in the second paragraph of the letter dated January 6, 2023, the BHEL gave a further opportunity to the petitioner to arrange for immediate submission of a request for time extension, along with taking corrective measures regarding augmentation of manpower etc. towards fulfillment of contractual obligations, failing which the BHEL might be left with no option other than exercise its right to complete the work through suitable alternatives at the 'Risk and Cost' of the petitioner in line with the provision of the contract (2.7.2 of the GCC).

Thereafter, the BHEL, upon the petitioner having not applied for extension till then, floated the impugned new tender on February 2, 2023.

Subsequently, on February 10, 2023, an application for extension was made by the petitioner, upon which an extension was granted on April 1, 2023, till April 4, 2023.

However, thereafter, the petitioner's contract was apparently terminated on June 11, 2023, upon giving a notice of termination on June 10, 2023 by the BHEL, on the allegation that despite the time having been extended, the petitioner failed to complete its work in terms of the contract awarded to it.

Upon a perusal of the communication dated January 6, 2023, it is evident that the same was not merely a reminder to the petitioner to apply immediately for submission of request for time extension, but also a warning to the petitioner that they had failed to avail previous opportunities of applying for extension of time and/or completion of the work.

After having waited for a reasonable period, for almost one month, awaiting such extension application from the petitioner, the BHEL floated the new tender on February 2, 2023.

Notably, in Clause 17.0 of the said tender document, it was stated that the validity of the offer shall be for six months from the latest due date of offer submission (including extension, if any), unless specified otherwise.

Clause 18.0 of the same also stipulated that the BHEL shall resort to Reverse Auction for the tender. Reverse Auction was to be conducted among the techno-commercially qualified bidders.

The date of opening of the tender, on the techno-commercial aspect, was February 13, 2023. Hence, the BHEL kept sufficient leeway reserved for awaiting the completion of the work by the petitioner within the time which was extended at the behest of the BHEL.

Such floating of the tender at the relevant juncture, that is, on February 2, 2023, thus, cannot be faulted *per se*, since the BHEL could not have waited till the eleventh hour, till after failure of the petitioner, to initiate proceedings for floating a tender completion of the balance work by a third party sufficiently in advance, keeping in view the urgent and public nature of the work contemplated.

Subsequently, on February 10, 2023 upon the petitioner having applied for extension of time to complete its work, an extension was duly granted by the BHEL on April 1, 2023 till April 4, 2023.

It is relevant to mention that in the meantime, no effect had been given to the new tender floated by the BHEL by awarding work to any third party.

However, after waiting sufficiently for two months thereafter, a termination notice was issued on June 10, 2023 and the termination of the petitioner's contract was effected on June 11, 2023, on the allegation that the petitioner, despite getting such extended time and two months thereafter, failed to complete its work.

Even without going into the veracity of such allegations and/or the merits of the said allegations, it is clear that as on the date of filing of the writ petition, there was no irregularity or illegality on the part of the BHEL merely by floating the new tender which has been assailed in the writ petition.

In view of the above developments, it can be seen from the records that the BHEL had acted sufficiently in consonance with the principles of natural justice and in terms of the contract, rather, going out of its way to give several extensions to the petitioner for completion of the work.

Hence, the writ petition, as it stands, does not justify any interference with the tender process.

However, a subsequent cause of action arose for the petitioner during pendency of the writ petition, by termination of the contract.

The termination of the contract of the petitioner on June 11, 2023, during pendency of the writ petition, is not the subject matter of the present writ petition and is only a subsequent cause of action which has been brought to the notice of the court by way of an interlocutory application filed in connection with the writ.

Hence, the right of the petitioners has to be reserved with regard to intended challenge, if any, against such subsequent termination.

However, insofar as the present writ petition is concerned, the same cannot succeed in view of the observations made above.

Accordingly, WPA 12900 of 2023 is dismissed on contest, without any order as to costs. CAN 1 of 2023 is, accordingly, dismissed as well.

Nothing in this order shall preclude the petitioner from challenging the subsequent termination of the petitioner on June 11, 2023 and/or the notice of termination which resulted in such termination by way of a fresh writ petition.

If a fresh writ petition is so filed against such termination by the petitioner, the writ court shall decide the same afresh, in accordance with law and without being swayed in any manner by any of the observations made herein.

It is further made clear that since an objection as to maintainability of the present writ petition and the prospective writ petition on the ground of availability of an arbitration clause in the contract between the parties has been taken by the respondents, the question of maintainability of the subsequent writ petition, if so filed, is left open to be decided in the fresh writ petition.

Since no affidavits have been called for, it is deemed that none of the allegations made by the parties are admitted by the other parties.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)