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WPO/2848/2022
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

M/S SHYAM TAKNIKI UDYOG
VS
UNION OF INDIA AND ORS

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 4th July, 2023.

Appearance:
Mr. Priyankar Saha, Adv.
Ms. Parna Mukherjee, Adv.
. . .for the petitioner.

Mr. Asok Kr. Chakraborty, Sr. Adv of ASG.
Mr. Sanajit Kumar Ghosh, Adv.
. . .for the respondents.

The Court: Heard learned counsel for the parties. Learned counsel for the petitioner contends that several extensions were given to the petitioner to complete the work contemplated under a contract awarded to the petitioner by the Railway Authorities. The last such extension, granted on July 27, 2022, clearly mentioned that the terms and conditions of the contract would remain unaltered during the extended period from August 1, 2022 to January 31, 2023. It was further stipulated that no increase of additional rates and claims of recoveries which had not been already envisaged in terms and conditions of the contract would be leviable either by the petitioner or by the purchaser in respect of the extended period. It is pointed out that it was further stipulated in the said communication that the grant of extension of completion period up to January 31, 2023 was without any LD (Liquidated Damages).

It is contended that soon thereafter, by several communications, the respondent authorities started to invoke Clause 62 of the Standard General Conditions of Contract, egging on the petitioner to commence works to make good the progress, failing which, in terms of Clause 62, the respondents would allegedly terminate the contract of the petitioner and complete the balance work without the participation of the petitioner. It is submitted that several such letters were issued by the respondent authorities, the last one being on September 15, 2022.

However, no follow-up steps were taken by the respondents on the previous letters. Only after seven days from the expiry of the stipulated period of seven days subsequent to the September 15, 2022 communication, a notice was given to the petitioner on September 29, 2022, giving the petitioners 48 hours, apparently in terms of Clause 62, to commence the works or to make good the progress of works, failing which the respondent indicated that the contract of the petitioner would be rescinded and the work would be carried out independently without the petitioner's participation and that the security deposit would be forfeited and performance guarantee would also be encashed and any other consequences might follow.

It is argued that the respondent authorities acted *de hors* the law and in violation of natural justice in terminating the contract of the petitioner much prior to the expiry of the extended period, which was to take place on January 31, 2023.

It is further argued that even in terms of Clause 62 of the General Conditions of Contract, it was the incumbent duty of the respondent authorities to issue the 48 hours' notice contemplated therein immediately upon expiry of the stipulated period of seven days upon the first notice being issued under Clause 62. Having not done so, the 48 hours' termination notice issued by the respondents is vitiated by the terms of the contract itself.

It is further alleged that, if notionally the respondents were allowed under Clause 62 to take as much time as they wished to follow up the seven days' notice under Clause 62, for the purpose of issuing the 48 hours' notice, the respondents could very well follow up on a stale cause of action by issuing a 48 hours' termination notice much after the issuance of seven days notice, despite the petitioner having substantially undertaken and/or even completed the work in the meantime. Hence, the interpretation as sought to be lent by the petitioner, it is argued, has to be attributed to Clause 62.

Learned Senior Counsel appearing for the respondent authorities submits that as many as eight extensions were given to the petitioner.

That apart, it is contended that the last extension was given to the petitioner without prejudice to the rights and contentions of the respondents to terminate the petitioner's contract, as envisaged in the original contract.

Learned Senior Counsel also places reliance on Clause 61 of the General Conditions of Contract, which also stipulates that the railway authorities shall be entitled to determine and terminate the contract at any time if, in the opinion of the railway, the cessation of work becomes necessary owing to paucity of funds or any other cause whatsoever.

Upon hearing learned counsel for the parties, it is seen that the writ petition was initially entertained by a learned Single Judge of this Court during vacation, inter alia on the ground that the arbitration clause provided in the contract is not an absolute bar to the interference by the Writ Court. It was specifically observed that the Court was of the firm view that in the facts of the case, an alternative remedy for arbitration, which of course is a contractual remedy agreed upon by the parties, could not stand in the way of entertaining the writ petition at this stage.

As is obvious from the said initial order itself, the fact that the writ petition was entertained on such premise does not mean that a different order cannot be passed at the final hearing of the writ petition, upon a full consideration of merits of the writ petition. That apart, even the said order of the Coordinate Bench stipulates that the writ petition was being entertained "at this stage" (that stage).

The petitioner, in any event, has to come within the limited window on interference in the writ petition. In the present case, in so far as the first argument of the petitioner is concerned, the same cannot stand on solid ground, in view of the specific language of the extension granted to the petitioner by the respondent. In the communication regarding extension dated July 27, 2022, although it was stipulated that the extension was without any liquidated damages, such concession was confined only to such liquidated damages for grant of such extension.

However, the last paragraph of the same communication clarified that the terms and conditions of the contract would remain unaltered during the extended period and no increase of additional rates and claims of recoveries, which had not been already envisaged in terms and conditions of the contract, would be leviable either by the petitioner or by the purchaser in respect of the extended period. The net effect of such provision is that the terms of the original contract held good, having remained unaltered even during the extended period. The effect of the extension of the outer limit of completion of the contract was merely to postpone the last date of completion of the contract work.

However, all original conditions of the contract, including Clause 62, remained intact in so far as the parties were concerned.

The argument of the respondent authorities regarding applicability of Clause 61 of the contract cannot be accepted, since the respondent authorities clearly invoked Clause 62 as indicated in their communications, and chose not to invoke Clause 61.

It is Clause 62 which is to be considered in the instant case. Upon a consideration of Clause 62, it is seen that at least two sub-provisions thereof, being Clause 62(1)(vii) and (viii), are germane in the present context. The first provides for persistent disregard of the instructions of the Engineer, or contravention of any provision of the contract, and the second contemplates failure on the part of the contractor to adhere to the agreed programme of work by a margin of 10% of the stipulated period, as grounds to justify the invocation of Clause 62 for termination.

The last paragraph of Clause 62 (1) clearly provides that a prior notice of seven days, from the delivery of the notice, had to be given for the contractor to make good his default. In the present case, the respondent authorities waited for fourteen days after the issuance of the notice before taking further steps in the matter. Such additional period of about a week was obviously left to leave no manner of doubt as regards the delivery of notice more than seven days prior to taking further follow-up steps. Hence, since the next step of issuing a 48 hours' notice was taken within a reasonable period thereafter, it cannot be said that the respondent failed to invoke the provisions of Clause 62.

Hence, in so far as the decision-making process of the respondent authorities is concerned, I do not find any violation of the stipulation of Clause 62 inasmuch as a preceding notice of seven days was given and only after delivery of the same, leaving a little more than seven days thereafter, 48 hours' notice was issued for termination of the contract.

Hence, *per se*, there is no irregularity or illegality or violation of natural justice and/or gross contravention of any provision of the contract between the parties in so far as the termination is concerned.

Accordingly, the consequential invocation of the bank guarantee by the respondent authorities cannot also be faulted, being a contractual fallout of the termination. As far as the allegation, that the invocation was done in contravention of an interim order passed by the Court, is concerned, it has been argued by the respondent authorities that the invocation was made two days prior to the passing of the ad interim order. In any event, the said amount, covered by the original bank guarantee issued by the petitioner, shall abide by the outcome of the arbitration proceeding, if taken out by the parties.

It is clarified that whereas this Court, being a writ court, refuses to interfere in the matter in the absence of any gross illegality and/or abuse of the process of Court and/or in the absence of any patent arbitrariness or mala fides on the part of the respondent authorities, nothing in this order shall preclude either of the parties to approach an Arbitral Tribunal agreed upon by the parties in accordance with law, for a resolution on merits of the factual dispute as to whether the petitioner could be said to be liable for termination of its contract and the consequential actions taken by the respondents, upon a consideration of the factual premise in the context of Clause 62 of the General Conditions of Contract.

It is the beyond the scope of the writ court to enter into the detailed query, on examination of evidence as to whether, on facts, the respondent was justified in invocation Clause 62, in so far as the alleged violation of the said clause by the petitioner is concerned.

Hence, it will be open to the parties, as indicated above, to take up all issues before the Arbitrator, if the parties so choose, with regard to the question of whether the petitioner is guilty of violation of Clause 62 of the General Conditions of Contract on the facts of the case.

Accordingly, WPO No. 2848 of 2022 is dismissed in the light of the above observations, granting liberty to the parties to invoke the arbitration clause in the contract on merits of the case.

It is further clarified that the arbitral tribunal, if so moved by the parties, shall arrive at its finding independently and in accordance with law, without being undue influenced in any manner by any of the observations made herein, as far as the merits of the disputes are concerned.

(SABYASACHI BHATTACHARYYA, J.)

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