

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of order : 10th April, 2023**

+ **O.M.P.(I) (COMM.) 106/2023**

M/S C GOPAL REDDY AND COMPANY Petitioner

Through: Mr. Vikas Mehta, Mr. Mayan
Prasad, Ms. Anshula Grover, Ms.
Nitika Grover and Mr. Adith,
Advocates

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE

DEVELOPMENT CORPORATION LTD & ANR.....Respondents

Through: Ms. Laxmi Chauhan, Mr. Lalit
Chauhan, Mr. Gaurav Rai, Ms.
Swetalana Rout, Ms. Nikita
Chauhan, Ms. Jasmine Chauhan,
Ms. Shambhvi Mansingh,
Advocates for R-1 alongwith Mr.
K.K. Sharma (NHIDCH)

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. 6479/2023 (Exemption)

Exemption allowed subject to just exceptions.

The application stands disposed of.

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1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) has been filed on behalf of the petitioner *inter alia* seeking an *ad interim* stay on the Termination Order dated 7.3.2023, as well as on the Notice inviting bids dated 24.2.2023 issued by the Respondent No. 1 with respect to the "Construction of 2 Laning with Hard Shoulder of Peren - Dimapur section on NH -129A from Design Km 126.775 to Km 146.208 (Length - 19.433 Km) in the state of Nagaland on EPC mode (PKG-11) under NH(O)- TSP" (hereinafter referred to as the ‘said Contract’).

Submissions

2. Learned counsel for the Petitioner submitted that the Petitioner is a partnership firm engaged in the business of construction of roads, and highways having its registered office at Anantapur, Andhra Pradesh. Respondent No.1 is National Highways & Infrastructure Development Corporation Ltd. (hereinafter referred to as 'NHIDCL'), a fully owned company of the Ministry of Road Transport & Highways, Government of India with its registered office in New Delhi.

3. It is submitted that the Petitioner was awarded the works of execution of said Contract vide Letter of Acceptance dated 19.07.2021 for a Contract Price of Rs.117,50,00,001/- excluding GST, with a construction period of 18 months commencing from the Appointed Date that was fixed as 25.08.2021.

4. It is stated that there are admitted defaults on part of the Respondent in the performance of its obligations under the contract

including delay in providing the land and Right of Way (ROW) for carrying out the works under the contract, due to which the Petitioner was unable to perform its obligations under the contract within the original time schedule of the contract.

5. It is further submitted that despite the aforesaid hindrances that were not attributable to the Petitioner, the Petitioner achieved Milestones 1 and 2 mentioned in the contract before the Schedule date. However, due to the delay in providing ROW and due to unusual rain and delay in payments by the Respondent, the Petitioner by letter dated 14.10.2022 sought an extension of time 04.05.2023 from 25.02.2023 for completion of the awarded contract. Without considering the reasons stated in the said extension letter, the Respondent Authority Engineer recommended an extension of the contract till 02.04.2023. Despite the aforesaid, Respondent No. 1 failed to grant any extension to the Petitioner.

6. Learned counsel further stated that without considering the Petitioner's extension of time application, the Respondent on 12.01.2023 issued a Notice of Intention to Terminate the Contract under Clause 23.1 of the Contract Agreement. Petitioner by its letter dated 25.01.2023 filed a detailed response to the aforesaid notice wherein various defaults on the part of the Respondent and the various force majeure events were pointed out. Further, without considering the reply to the Notice and without giving any hearing to the Petitioner, Respondent No. 1 merely by repeating the allegations made in its Notice dated 12.03.2023 terminated the Contract on 07.03.2023. Further, such termination has taken place without even considering the Extension of Time Application of the

Petitioner dated 14.10.2022.

7. It is therefore submitted that grave prejudice will be caused to the Petitioner if the effect of the Termination Notice is not stayed by this Hon'ble Court pending the invocation of Arbitration by the Petitioner. It is submitted that the Petitioner is therefore seeking interim protection by way of an Order of Stay on the effect and operation of the Termination letter dated 07.03.2023 issued by Respondent No. 1. It is submitted that despite the various delays by Respondent No. 1, the Petitioner had already achieved progress of 71% in milestone-3. It is further submitted that if the Extension of Time Application had been considered as per the terms and conditions of the contract the Petitioner was fully capable of completing the project work within the extended time frame.

8. It is further submitted that the Petitioner is willing to undertake the balance works, subject to an extension being given by the Respondent on account of Events of Default attributable to the Respondent. It will be in the public interest to allow the Petitioner to complete the balance works. It is therefore submitted that the contract has been terminated arbitrarily, illegally and mala fide manner, and accordingly merits to be stayed.

9. *Per contra*, learned counsel for Respondent No.1 vehemently opposed the submissions made by the petitioner and submitted that the instant petition is nothing but a mischievous attempt to derail and delay the project. In the instant case, the impugned termination letter has been issued following the due procedure prescribed under the contract entered into between the parties. It is stated that a prior notice specifying the

Intention to Terminate the Contract under Clause 23.1 (ii) of the Contract Agreement" was issued by NHIDCL HQ, on 12.01.2023. In response thereto, the Petitioner vide letter dated 25.01.2023, has made its representation against the said notice.

10. It is stated that the said response was thoroughly examined by Authority Engineer based on ground conditions and it was the opinion of the Engineer that the Contractor had failed to achieve the milestones as per the provision of Schedule-J who then recommended the termination of the said contract. It is therefore stated that due to non-exhaustive fundamental breaches and in view of the petitioner's default in fulfilling contractual obligations, the Authority terminated the Contract Agreement signed on 17.08.2021 in accordance with Clause 23.1 (ii).

11. Therefore, the instant petition is nothing but an abuse of process and merits to be dismissed.

12. Heard learned counsel for the parties and perused the record.

Analysis & Findings

13. This Court, at this stage is not concerned with the merits/correctness of the termination of the contract by Respondent No. 1 and any remedies arising therefrom. These questions may be raised before the parties in the course of arbitral proceedings and may be adjudicated therein. The only question before this Court is to adjudicate the question of stay/injunction against the said termination.

14. As per records, on 12.01.2023, a notice specifying the Intention to

Terminate the Contract under Clause 23.1 (ii) of the Contract Agreement" was issued by Respondent No.1. In response thereto, the Petitioner vide letter dated 25.01.2023, has made its representation against the said notice.

15. It is stated by Respondent No.1 in the termination letter that the said response was thoroughly examined by Authority Engineer based on ground conditions and was denied vide letter dated 11.02.2023. It was the opinion of the Engineer that the Contractor had failed to achieve the milestones as per the provision of Schedule-J due to poor planning, and poor deployment of machines and manpower. Accordingly, the Authority's Engineer recommended the termination of the project under the relevant provision pertaining to "Termination for Contractor Default".

16. In the instant case, the impugned termination letter notes that due to non-exhaustive fundamental breaches and in view of the EPC Contractor's default in fulfilling contractual obligations, the Authority terminated the Contract Agreement signed on 17.08.2021 in accordance with Clause 23.1 (ii). The petitioner is seeking an injunction against the said termination order passed by Respondent No.1.

17. Learned counsel for the petitioner has *prima facie* argued that the contract is non-determinable and since Respondent no.1 is a government organisation, the court can step in to stay the termination, but, in the opinion of the court, this submission cannot be countenanced. It is the opinion of this Court, that a different yardstick cannot be applied in a commercial contract by a State actor. This Court has perused the

Termination Letter dated 07.03.2023 issued by Respondent No. 1. There is no arbitrariness or gross unreasonableness made out in the action of termination. In absence of violation or non-compliance of proper procedure or demonstrable unfair action of termination that is violative of Article 14 of the Constitution of India, the exceptional ground for the court to exercise the power of judicial review is *ex facie* absent.

18. As regards the question of the grant of injunction on the said termination order is concerned, it is pertinent to refer to the law regarding the grant of injunctions as applicable to the case at hand.

19. The Petitioner has approached this Court under Section 9 of the Act, which reads as under:

“9. Interim measures, etc. by Court.—

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration

agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a

period of ninety days from the date of such order or within such further time as the court may determine.

(3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under subsection (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.”

20. The principles for the grant of interim relief under the said provision are: (i) a good *prima facie* case, (ii) the balance of convenience being in favour of the grant of interim relief and (iii) irreparable injury or loss to the applicant being caused upon the denial of interim relief.

21. The Act, however, is not to be interpreted in isolation, it rather acts in accordance with other provisions of law including the Indian Contract Act, 1872 and the Specific Relief Act, 1963.

22. Clause 23 of the Contract provides for termination. Clause 23.1 specifically provides for Termination for Contractor Default. The relevant provision thereunder reads as follows:

“(ii) Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.”

23. A mere perusal and reading of the aforementioned provision of the contract signify that the contract is determinable at the option of the Authority in the event of a Contractor Default.

24. Section 41 of the Specific Relief Act reads as under:

“41. Injunction when refused.—An injunction cannot be granted—

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in criminal matter;

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project;

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.”

25. As per Section 41 of the Specific Relief Act, an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

26. Section 14 of the Specific Relief Act mentions a list of the contracts that cannot be specifically enforced. The said provision includes “a contract which is in its nature determinable” and reads as under:

“14. Contracts not specifically enforceable.—*The following contracts cannot be specifically enforced, namely—*

(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of Section 20;

(b) a contract, the performance of which involves the performance of a continuous duty which the court

cannot supervise;

(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable.”

27. Section 41 vide clause (ha) states that an injunction cannot be granted in cases where it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto.

28. Therefore, under Section 14(d) read with Section 41 of the Specific Relief Act, when a contract is determinable, and cannot be specifically enforced, no injunction against termination and enforcement of the contract can be issued.

29. As held in a plethora of judgments including ***Rajasthan Breweries Ltd. v. Stroh Brewery Co.*, 2000 SCC OnLine Del 481, *Bharat Catering Corpn. v. IRCTC*, 2009 SCC OnLine Del 3434 and *Inter Ads Exhibition (P) Ltd. v. Busworld International Cooperatieve Vennootschap Met Beperkte Anasprakelijkheid*, 2020 SCC OnLine Del 351**, and as recently held by a Coordinate bench of this Court in the case of ***Shubham HP Security Force (P) Ltd. v. Central Warehousing Corpn.*, 2022 SCC OnLine Del 739**, it is a settled position in law that it is not permissible for any party to seek an injunction on the termination of an agreement in the case of a determinable contract. Considering the nature and scope of the present proceedings, such an exercise cannot be

undertaken by this Court.

30. Therefore, the petitioner's prayer restraining the Termination of the Contract Agreement by Respondent No. 1, is not sustainable in law. At this stage, granting a stay of termination would necessarily entail this Court first forming an opinion, *albeit a prima facie* one, that the termination effected by the respondent was misconceived and contrary to the terms of the agreement.

31. In the present petition, granting such relief would amount to granting the relief of restoration of the contract between the parties which in other words would amount to enforcement of the contract. The contract being *prima facie* determinable, the grant of such relief is impermissible in law. Besides, the court, at this stage, cannot go into the justification of the Acts of Respondent No.1 and the same would have to be examined in the ensuing arbitration proceedings that the parties are likely to undertake. That apart, no irreparable loss is going to be caused to the petitioner as the petitioner can always be compensated by way of damages, and as such no case for specific performance is made out by the petitioner

32. Before parting, the court must also note that on 24.2.2023, Respondent No. 1 issued a fresh tender inviting international competitive bids from eligible contractors for carrying out the balance work in the said project. Therefore, the insistence for a stay of the impugned termination letter at this juncture would completely upset the entire tender process that Respondent No.1 has undertaken. This is neither desirable

nor warranted in a public infrastructure project to keep the same in abeyance until the disposal of the disputes. In any case, the same is not permissible in view of the restraint under Section 41(ha) of the specific Relief Act.

33. Accordingly, in view of the aforesaid, the instant petition being devoid of merits stands dismissed.

34. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

APRIL 10, 2023

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Click here to check corrigendum, if any