15-07-2024
Item No.9
Subrata Bhattacharyya
AR(C)

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction
Appellate Side

WPA No.4995 of 2024
M/s. M. L. Trehan
-vs-
Indian Oil Corporation Limited & Ors.

Mr. Assit Baran Raut
Mr. Tuhin Subhra Raut
Mr. Asit Kumar Chowdhury
Mr. Shyamal Ghatak …for the petitioner

Mr. Sayak Ranjan Ganguly
Mr. Pratip Mukherjee
Ms. Srijani Ghosh
Ms. Indrani Majumdar …for the respondents

1. The writ petition has been filed challenging an order dated November 27, 2023 issued by the Engineer-in-Charge, Indian Oil Corporation, Haldia Refinery. By the said order the authority took the following decision, which is quoted below:-

"In this connection, we would like to state that,
1. Due to your unsatisfactory performance including failure to make contract labour payment and other reasons mentioned in termination letter, IOCL had to terminate the, contract. IOCL being constrained has to make direct labour payment to your engaged contract workers, execute works at your risk and cost as per provision of the work order, which has been duly intimated to you. Presently, an agency has been lined up and executing balance works of your scope at your risk and expense.
2. Following clarifications are being issued in response to your letter/email dated 14.09.2023, 18.09.2023, 19.10.2023, 31.10.2023 (sl. No. 18, 20 of above referred documents):
Yours contention that you M/s ML Trehan as Contractor, is not under any obligation to execute the contract as per the contractual terms and

conditions for the reason of non-execution of the contract agreement, is not tenable for the following reasons:

(i) Clause 7.0.1.0 (i) (1) of the General Condition of Contract reads as under:

"Notwithstanding anything elsewhere herein provided and in addition to any other right or remedy of the OWNER under the Contract or otherwise (including the right of the OWNER to claim price discount due under the provisions of Clause 4.4.0.0 hereof or otherwise), the OWNER shall be entitled to terminate the Contract by written notice at any time during the currency on or after the occurrence of any one or more of the following events, omissions or contingencies, namely:

(i) Failure to execute the Contract in terms of the Form of Contract forming part of the Tender Documents within 30 (thirty) days of notice in this behalf from the OWNER;"

(ii) The invitation to offer (NIT published by IOCL) and the bid submitted by you with acceptance is the acceptance of offer by you. The offer of the successful bidder (M/s ML Trehan) when accepted by the Owner (M/s IOCL) is a valid contract. Thus, the Letter of Acceptance (LOA) is a definite acceptance of the offer and constitutes a binding and valid contract between the parties.

iii) The job was started by you and you have received the site hand over letter.

Therefore, failure in execution of the contract as per the form of the contract which forms part of the tender documents is an omission on the part of the contractor and it is also a ground for termination of the contract and taking actions including Risk & Expense and recoveries as per tender conditions and subsequent actions which comes into effect when letter of acceptance is issued to the Contractor.

3. In view of above, risk and expense amount has been worked out amounting to Rs. 64,39,202.47 /- (Rs. Sixty Four Lacs Thirty Nine Thousand Two Hundred Two and Paisa Forty Seven only). Further there is additional recovery amounting to Rs. 1,04,65,482.00/-(Rs. One Crore Four Lacs Sixty Five Thousand Four Hundred Eighty Two only), which IOCL has to expense for making direct wage payment to your engaged workers upon your failure to make payment. Hence total due from M/s ML Trehan to M/s Indian Oil Corporation Limited works out to Rs. 1,69,04,684.47 /- (Rs. One Crore Sixty

Nine Lacs Four Thousand Six Hundred Eighty Four and Paisa Forty Seven only), for WO No. - 28802230 dated 27.04.2023. Detail calculation is attached as Annexure-A.
4. You are therefore requested to deposit the said amount to M/s IOCL bank account as per the following details:

Name of Bank:	STATE BANK OF INDIA, IOC Haldia Refinery Campus Branch, Haldia - 721606
Name of Account Holder	INDIAN OIL CORPORPORATION LIMITED
Account Number	10521992237
IFSC Code	SBIN0007090
Branch	IOC Haldia Refinery Campus Branch, Haldia (07090)
Branch Code	07090

5. It may please be noted that the above mentioned claim is provisional in nature and IOCL reserves it's rights to lodge additional claims, if any. Further, final claim amount shall be decided and communicated to M/s ML Trehan on completion of work carried out vide separate contract at your risk and expense in line with clause no.7.0.9.0 of General Conditions of the contract (GCC), finalization of due arrears for revision of labour wages as per Special Conditions of Contract clause no. 1, 2, 3 and other relevant clauses of contract.
6. The above mentioned claim of IOCL will be adjusted with your due bills for the works executed against the subject work order. As stipulated in the clause 7.0.3.0, 7.0.4.0 of GCC, you are once again advised to submit detail measurement of the completed works performed by you under the contract along with all supporting documents within 15 days of issue of this letter for the purpose of checking and determining the final amounts due to you or payable by you and report to our office on 15.12.2023 for finalization of measurement/ bill."

2. The petitioner submits that the order impugned suffers from various irregularities. First of all, in the absence of a concluded contract between the parties, the tendering authority did not have the power to terminate the contract and deduct the dues from the petitioner's account, unilaterally. As the agreement had not been executed pursuant to the issuance of the letter of acceptance, there

was no contract between the parties. The arbitration clause contained in the General Conditions of Contract (GCC) would not be applicable in this case as there was no agreement to go to arbitration.

3. It is next submitted that the tendering authority engaged the workers and made payments, before the petitioner could take over the work. As the IOCL refused to pay any money to the contractor, the question of the contractor fulfilling his obligations under the contract, would not arise. The unilateral deduction of the alleged dues in the absence of an agreement was arbitrary, illegal and malafide. Thus, the writ court must interfere. Reference is made to page 11 of the writ petition which is the letter issued by the petitioner in answer to several show cause notices issued by the IOCL.

4. Mr Mukherjee, learned advocate for the IOCL submits that the letter of acceptance was issued to the petitioner which amounted to a concluded contract, as per the GCC. Once there was an offer and an acceptance, the contract was concluded. The execution of the agreement was a formality, which got delayed only because the contractor did not do the needful. The letter of acceptance also indicated the steps to be taken by the petitioner prior to execution of the formal agreement. The said document indicates that all the terms and conditions shall be governed by the General Conditions of Contract and the petitioner had duly accepted such letter without any protest. The petitioner ought to have invoked the

arbitration clause.

5. Heard learned advocates for the respective parties. The first issue is whether the writ petition should be entertained in the facts and circumstances of this case. It appears from the records that the petitioner was granted ample opportunity to pay up the dues of the workers, to pay the security deposit as required by the letter of acceptance and to furnish duly filled-in deed with stamp papers, for execution of the agreement. It also appears that the petitioner had been given extension of time to make good the deficiencies which had been pointed in the show cause notices.
6. The petitioner was asked to pay the wages to the labourers and workers as they had started an agitation. The petitioner was also asked to arrange for the materials required for the job with his own resources. The authorities were compelled to arrange for the materials and pay the workers, in order to stop the agitation. The said amounts were made recoverable from the money of the petitioner. Such right was exerted by the authority on the basis of the GCC.
7. Apart from the three e-mails which were written to the petitioner, notices were also issued. The first notice dated June 14, 2023 indicated the violation of the terms and conditions of the contract. The authority enumerated the deficiencies:- (a) wage sheet of the workers were not placed. (b) payment of wages for May 2023 to the engaged workers had not been made. (c) Calculation showing PF return of the workers for the month of May

2023, was not furnished. This was a violation of the Contract Labour (Regulation and Abolition) Central Rules, 1971. (d) In view of the petitioner's failure, IOCL as the principal employer was constrained to make direct payment to the labourers for the month of May 2023, although such labourers were engaged by the petitioner. The payment was made, based on the documents submitted by the petitioner's site supervisor. It was specifically mentioned that the amount due shall be deducted from the bills as per the GCC. The petitioner was asked to deposit the PF and ESI declarations of the workers, failing which, the authority had decided to take penal action.

8. Another show cause notice was issued on June 23, 2023 enumerating the deficiencies.

"Following are some of the points where you have failed to execute the contract:
1. You have not submitted Initial Security Deposit within ten days of issue of letter of acceptance as per Cl. 2 of LOA, neither submitted it till now. This violates GCC clause 7.0.1.0 (i) (k) for termination of contract.
2. You have failed to provide sufficient materials at site even after repeated reminders, for which IOCL has to arrange for materials through own resources as your Risk and Cost as per GCC clause 4.7.3.0. A notice was served to you on 14.06.2023, which you didn't respond neither supplied any material after that. Accordingly another notice was served on 30.06.2023. to take materials at your risk and cost for another 30 days. Non-supply of materials has affected the progress of jobs. This violates General Conditions of contract (GCC) clause 7.0.1.0 (i)- (c), (d), (e). (t).
3. You have failed to make labour payment for your engaged workers for the month of May 2023, neither deposited any PF, EST for the engaged workers till now. IOCL, being principle employer, have to make the labour payment directly to your engaged workers. Necessary deductions for this shall be made from your dues. This has been

notified to you as violation of contract vide letter di. 14.06.2023 & email dt. 19.06.2023.
4. You have failed to attend progress review meeting which has been intimated by you time to time, neither you have send any authorised representative to attend the meeting and resolve the issues. This violates GCC clause 7.0.1.0 (I- (g). (h).
5. At present there is no action from your side and you have nearly abandoned the site, due to which M/s IOCL has been forced to execute the entire works at your Risk and Cost as per GCC clause 4.7.3.0.
6. You have not submitted any measurements and bills for the work done by you till now, though it has been requested by IOCL."

9. The authority informed the petitioner what steps had been taken and what steps would be taken. The relevant portions are quoted below:-

"Showcause notices were served to you on above issues, which you could not reply satisfactorily within the stipulated timeframe.
Notwithstanding any other terms of contract, you are hereby informed that because of the above mentioned reasons but considering your medical issues as cited and commitments given in email dt. 22.06.2023 & 25.06.2023; M/s IOCL is giving you one more opportunity of 15 days to mobilise properly at site, supply all materials, tools, tackles, make labour payment within the due time and execute the works as per contract conditions.
In case of your failure. M/s IOCL shall remain constrained to initiate actions to terminate your contract as per contract GCC 7.0.1.0 i(c), i(d), i(e), i(f), i(g), i(h), i(k) and other relevant clauses. The balance job including the direct jobs already executed or to be executed till by IOCL, termination, shall be done through other agencies at your risk and cost basis as per contract GCC clause no. 4.7.3.0, 4.7.4.0, 7.0.9.0 and other relevant clauses."

10. Intimation notice for risk, cost and termination was issued on August 23, 2023. Reasons were given as to why the authorities proposed to terminate the

contract. The relevant portion is quoted below:-

> "This is to inform you that we haven't received any reply to the above showcause notice neither you have taken clearance of statutory dues.
> Considering above facts and for the reasons stated in the referred showcause notice, this is to inform you that we are hereby proceeding with action for termination of your contract (WO. No. 27715922) for your failure as conditions of the contract (GCC).
> The works which IOCL has been constrained to execute at your risk and cost due to your non-performance/ contractual violations shall be recovered from you including penalties as per GCC clause 4.7.3.0, 4.7.4.0 and other relevant clauses.
> The balance works post termination, shall be executed by IOCL through other agencies, which is in the process of tendering. The amount expenses by. IOCL to execute the balance works for the remaining contract period post termination shall be recovered from you at your risk and expenses including additional administrative and supervision charges in line with contract GCC clause no. 7.0.9.0, 4.7.3.0, 4.7.4.0 and other relevant clauses as applicable.
> After termination, actions for Holiday listing shall also be initiated against you as per provisions of contract."

11. Further notices were issued on August 29, 2023 and September 1, 2023. The contents of the notice dated August 29, 2023 is quoted below:-

> "(1) The contract for "Sanitary and Housekeeping works at Haldia Refinery Township for the year 2023-24" was awarded to you vide WO No. HCLSK22346/ 28802230 dated 27.04.2023 with a completion period of 12 (Twelve) months reckoned from the date of handing over the site i.e. 01.05.2023.
> (2) Your performance under this contract had been very unsatisfactory right from the beginning. In spite of repeated follow up vide our letters/ e-mails as referred above, you did not mobilize sufficient materials, equipments at site. You have not submitted Initial Security Deposit for the job. You have failed to make wage payment to your engaged contract workers including not providing statutory

dues throughout the period, for which IOCL being principle employer has to make direct wage payment for continuous three months. Expenditure incurred by IOCL in order to run the job due to your non-performance shall be recovered from your dues at your risk and cost as per General Conditions of Contract (GCC) clause no. 4.7.3.0, 4.7.4.0 and other related clauses.
(3) Final showcause notice for termination of contract vide our letter ref. no. M/CL/T/23-24/28802230/03 dt. 30.06.2023 was issued to you with a timeline of 15 days. Through the same letter, it was intimated that the balance job after termination of contract shall be executed by IOCL through other agencies at your risk and cost basis as per contract GCC clause no. 47.3.0, 4.7.4.0, 7.0.9.0 and other relevant clauses.
(4) Since you haven't replied to the letter neither taken any actions to execute the works, intimation Notice for Risk & Cost & Termination of contract vide our letter ref. no. M/CL/T/23-24/28802230/04 dt. 24.08.2023 was issued to you. No reply is received to this letter.
(5) Under above circumstances, due to your poor performance and failure to execute the works as per contractual terms and conditions, we hereby terminate the contract with you against WO no. 28802230 dated 27.04.2023 with effect from 01.09.2023, inter-alia, in terms of the provisions of Clause 7.0.0.0 of General Conditions of Contract (GCC) in general and sub clause 7.0.1.0 i(c), i(d), i(e), i(f), i(g), i(h), i(k) of GCC in particular with rights and liberties of Haldia Refinery to complete the work at your risk and expenses as stipulated in clause 7.0.9.0 and other applicable provisions of the GCC as per terms and conditions of this contract including but not limited to those specified under Clause 7.0.0.0 of the GCC.
(6) As stipulated in the clause 7.0.3.0, 7.0.4.0 of GCC you are advised to submit measurement of the completed works performed by you under the contract for the purpose of checking and determining the final amounts due to you or payable by you."

12. The contents of the notice dated September 1, 2023 are quoted below:-

"You are hereby required to show cause in writing within 15 days from the date hereof why you be not placed on the "holiday list and be debarred from entering into any contracts with Indian Oil Corporation Ltd. / be not de-listed from the list of approved Vendors/ Contractors of Indian Oil Corporation Ltd., for the following reasons:

(1) Your performance under this contract had been very unsatisfactory right from the beginning. In spite of repeated follow up vide our letters/ e-mails as referred above, you did not mobilize sufficient materials, equipments at site. You have not submitted Initial Security Deposit for the job. You have failed to make wage payment to your engaged contract workers including not providing statutory dues throughout the period, for which IOCL being principle employer has to make direct wage payment for continuous three months.

(2) Final showcause notice for termination of contract vide our letter ref. no. M/CL/T/23-24/28802230/03 dt. 30.06.2023 was issued to you with a timeline of 15 days. Intimation Notice for execution of work at your Risk & Cost & Termination of contract vide our letter ref. no. M/CL/T/23-24/28802230/04 dt. 24.08.2023 was issued to you. No reply is received to these letters.

(3) Due to your poor performance and failure to execute the works as per contractual terms and conditions, the above referred contract has been terminated with effect from 01.09.2023, inter-alia, in terms of the provisions of Clause 7.0.0.0 of General Conditions of Contract (GCC) in general and sub clause 7.0.1.0 i(c), i(d), i(e), i(f), i(g), i(h), i(k) of GCC in particular with rights and liberties of Haldia Refinery to complete the work at your risk and expenses as stipulated in clause 7.0.9.0 and other applicable provisions of the GCC as per terms and conditions of this contract including but not limited to those specified under Clause 7.0.0.0 of the GCC. This has been informed to you vide letter ref. M/CL/T/23-24/28802230/05 dt. 28.08.2023, sent vide email dt. 28.08.2023.

Your reply, if any, should be supported by all documents and documentary evidence which you wish to rely in support of your reply.

Should you fail to reply to this Show Cause notice within the time and manner aforesaid, it will be presumed that you have nothing to say, and we shall proceed accordingly.

Your reply, if any, and the documents / documentary evidence given in support shall be taken into consideration prior to arriving at a

decision.
You are also requested to provide the details of Firms/ Agency/ Company where you are a proprietor or you are a partner."

13. The authority indicated that due to unsatisfactory performance and violations of the LOA and GCC, the contract was terminated. The invitation to offer (NIT) was published by IOCL. The bid submitted by the petitioner was accepted. LOA was issued. In the LOA, the conditions of GCC were made applicable. The petitioner accepted the LOA. The work order was issued. The site was handed over on May 1, 2024. Two months had lapsed since the petitioner commenced the work. A perusal of the communication clearly indicate why the authority was compelled to issue the order impugned. Apart from illness and non-execution of the agreement, the petitioner could not counter the allegations made by the employer. Several notices and opportunities were given to the petitioner. The petitioner nearly abandoned the site and IOCL had to do the entire work. His reply was casual and without any rebuttal to the specific allegations made. The security deposit had not been made during the entire period. The required formalities for execution of the deed had not been completed by the petitioner.

14. This is not an exceptional case where a writ court should interfere. The principles of natural justice have been followed. The petitioner could not point out any procedural irregularity. The findings of fact cannot be gone into.

15. The letter of acceptance clearly indicated that the GCC would apply. The GCC has an arbitration clause. An arbitration clause can be a part of the contract or a separate agreement or entered into even by exchange of letters. Moreover, Section 7(5) of the Arbitration and Conciliation Act, 1996 provides as follows:-

> "7(5) The reference in a contract to a document containing an arbitration clause constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

16. Both the parties agreed that GCC would apply, even if the deed was not formally executed. The fact that there was an offer and acceptance and the work order had been issued are not disputed. The petitioner also engaged his men.

17. Thus, the allegations of the petitioner that the IOCL proceeded independently and unilaterally and engaged their own workers and made payments behind the back of the petitioner, are not supported by any documents. The disputed questions of fact cannot be decided in this writ petition.

18. The writ petition is dismissed. The petitioner is at liberty to approach the appropriate forum in accordance with law.

Certified copy of this order, if applied for, shall be made available to the parties.

[Shampa Sarkar, J]