

Form No. J.(2)
Item No. 10/cp

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

DELIVERED ON: 10.07.2024

PRESENT :

Hon'ble Justice Shampa Sarkar

WPA No. 9099 of 2024
With
CAN 1 of 2024

M/s. BPCPL-AND-ARETPL (JV) & Anr.
Vs.
Eastern Coalfields Limited & Ors.

Mr. Debajyoti Basu
Mr. Diptomoy Talukder
Mr. D. Ghosh

....for the petitioners.

Mr. Debnath Ghosh
Mr. Pradipta Bose
Mr. N. Banerjee

.....for the respondents.

JUDGMENT

1. The petitioners entered into a contract with the Eastern Coalfields Limited. The petitioners have challenged the order dated November 22 2023. By the said order, the contract was terminated. The

petitioner no. 1 was banned from the business for a period of two years and penalty was imposed.

2. Mr. Basu, learned advocate appearing on behalf of the petitioners, has assailed the order on the following grounds: -

- a) The order was arbitrary.
- b) The order was issued by the Engineer-in-Charge/Agent CL Jambad OC(H) Patch who did not take the hearing. The order was also not authored by the said authority. It was merely a communication on behalf of the management.
- c) The authority, i.e., the Engineer-in-Charge who issued the show cause notice was under an obligation to hear the petitioners and pass necessary orders.
- d) Non-compliance of such procedure was in violation of the principles of natural justice.
- e) The order talks about the unsatisfactory performance of the work, without any details. Such allegation appears to be vague. The factum of breach of the terms and conditions of the contract and how the petitioners had failed to fulfil the provisions of Clause 9 of the contract, were matters of evidence. No such evidence was discussed in the order. The authority should have clearly indicated each and every

breach and failure on the part of the petitioners to execute the work and how such breach had resulted in loss to the tendering authority.

- f) Clause 6.2 was invoked without there being any indication of the same in the show cause notice.
- g) The civil suit was filed on a separate cause of action and the order impugned was not a subject matter in the said suit.

Thus, the writ petition is maintainable.

3. Reliance is placed on the following decisions: -

- 1) Gullapalli Nageswara Rao & ors. Vs. Andhra Pradesh State Road Transport Corporation & anr., reported in AIR 1959 SC 208.
- 2) M.P. Power Management Company Limited, Jabalpur vs. Sky Power Southeast Solar India Private Limited & Ors., reported in (2023) 2 SCC 703.
- 3) Isolators and Isolators vs. Madhya Pradesh Madhya Kshetra Vidyut Vitran Company Limited & anr., reported in (2023) 8 SCC 607.

4. Gullapalli Nageswara Rao (supra) is relied upon in order to substantiate the claim that divided responsibility would be destructive to the very concept of judicial hearing. Such a procedure defeated the object of personal hearing. Personal hearing enabled the authority concerned to watch the demeanor of the witnesses, and clear up his doubts during the

course of arguments. If one person hears and another person decides, then personal hearing becomes an empty formality.

5. M. P. Power Management Company Limited, Jabalpur (supra) is relied upon in support of the contention that relegating the petitioner to arbitration in view of the dispute resolution clause, would not be proper. It is submitted that in this case, the procedure followed by the tendering authority in terminating the contract, invoking the clause of forfeiture of security deposit, banning the petitioners, invocation of bank guarantee etc. were contrary to the principles of fairness and reasonableness and the writ court must interfere in order to prevent miscarriage of justice. Arbitrariness in the action of the said authorities permit the petitioners to approach the constitutional court for necessary relief.
6. Isolators and Isolators (supra) has been relied upon in support of the contention that when a particular penalty is imposed without the same being referred to in the show cause notice, the said imposition of penalty in the ultimate order cannot not be sustained in law as the noticee did not get an opportunity to answer to such proposed penalty.
7. Mr. Ghosh, learned advocate appearing on behalf of the tendering authority, submits that the petitioners filed a suit on the self-same cause of action and failed to get an order of injunction. The petitioners withdrew the suit without any liberty to file afresh on the self-same cause of action.

Thus, the writ petition could not be filed challenging the termination notice and the procedure followed by the authority. The writ petition is barred under Section 23(1)(4) of the Code of Civil Procedure. It is next contended by the learned Advocate that although the prayers in the suit did not include the impugned notice dated November 22, 2023, the order of the learned Civil Judge (Senior Division), 2nd Court, Asansol in Title Suit No. 217 of 2023 will indicate that the court had also taken into consideration the termination notice and had rejected the prayer for temporary injunction.

8. Relying on Clause 6 of the general conditions which is a part of the tender document, it is submitted that the document provided that in the event the contractor failed to make progress he would be liable to pay penalty. It is further contended that forfeiture, invocation of the bank guarantee and the steps taken as per Clause 9.2 and the sub-clauses therein, were all over and above the penalties payable by the contractor. It is thus contended that the general conditions provided for imposition of penalty if a breach was detected and the show cause notice was issued with details of the breach. In case of breach, the penalty clause would be attracted. This was explicitly provided.
9. Heard the parties. The court finds that several opportunities were granted to the petitioners to complete the work. The procedure followed by the

authority from the stage of issuance of stop work order till the ultimate decision in terminating the contract and banning the petitioners are, *prima facie* in accordance with the terms and conditions of the contract.

10. Clause 6.2 talks about the contractor being liable to pay penalty. Such condition is a part of the tender document and is applicable whenever there is a breach. The show cause notice was issued alleging certain breaches. The answer of the petitioners was not found to be acceptable. Thus, on the specific finding of the authority that there had been breach, the penalty clause became automatically applicable.
11. With regard to the applicability of Clause 9(b), the argument of Mr. Bose is that the petitioners had actually completed more than 70% of the work for six consecutive months. Thus, the first part of Clause 9(b) had been fulfilled. This is a disputed question which the writ court cannot go into as scanning of the progress of the work, and the measurements taken etc. would require dealing with voluminous documents.
12. Clause 9.2 provides the consequences. Forfeiture of security deposit, banning and taking over possession of the site to carry out the balance work by any other agency, invocation of bank guarantee, are all consequences of cancellation.
13. Although the order impugned was not a part of the plaint, the proceedings initiated by the tendering authority as also the show cause notice and the

proposed actions to be taken including termination, banning etc. were subject matters of the suit. The petitioners withdrew the suit after having failed to obtain any order of temporary injunction. The order rejecting the prayer for temporary injunction elaborately discusses also the process of termination.

14. It appears to this court that the learned Civil Judge (Senior Division) took into account the facts leading to the issuance of the show cause notice culminating in the termination of contract and passing of the order impugned. The relevant portion of the decision is quoted below:-

“The facts juxtaposed requires this Court to reach to a justified and prudent conclusion on dealing with the petitions which are nothing but affidavit against affidavit. Fact remains, a project job was awarded to the plaintiff which was not satisfactorily completed, be it for whatever reason, as a result of which the contract was terminated by defendant no.1. The plaintiff hammered upon the fact that the agreement by which it was inducted in the project is alive and existent till this day and expressed its eagerness to perform the contract with due diligence, if given a fair chance. The plaintiff sings the same tune but quite astonishingly the plaintiff chose to file a suit for declaration seeking a right to continue the work coupled with a permanent injunction of restraining the defendant no. 1 from taking coercive or punitive action, instead of opting to file a suit for specific performance which would have been the ideal recourse. When the plaintiff is eager to perform its part of contract and at the same time wants to get its rights enforced in accordance to terms of the

agreement, then a suit for specific performance of contract would have been the ideal way to deal with its claim. Be that as it may, the written communications (letters and e mails) exchanged between the parties may now be taken up for valuable consideration. This Court is confronted with letters dated 26.09.2023, 22.11.2023 and an e mail dated 22.11.2023. The sum and substance of all these communications unanimously speak of the fact that the project job was at first directed as 'stoppage of work and final measurement' and thereafter 'termination of contract along with banning of business'. A mail dated 30.09.2023 sent by the plaintiff as a reply to the show cause notice dated 26.09.2023 reveals of a request for withdrawal of the decision of stoppage of work and measurement by the defendant no. 1. But the letter by the defendant no. 1 on 22.11.2023, finally terminating the contract is nothing but putting an end to all hopes. The tapestry of facts thus brought this plaintiff to the Court with a suit for declaration, with a prayer for permanently restraining the defendant no. 1 from taking any punitive or coercive action. ***** apprehended of some penal action to be taken against him in a judicial proceeding and thus he approached with such a prayer. Section 41 of the Specific Relief Act, 1963 postulates circumstances when injunction can be refused by the Court and one of the grounds for refusal stated therein is to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. When such a bar is imposed by the statutory provisions, the relief prayed by the plaintiff cannot be entertained by the Court. This apart, it cannot be denied that the contract was not terminated arbitrarily, as the plaintiff was admittedly allowed a personal hearing on 18.07.2023,

awarding a further chance to work for reaching the committed target. But the show cause letter dated 26.09.23 served upon the plaintiff reveals that it was instructed to stop work for poor performance and necessary action for termination was contemplated to be taken. It is not the case of the plaintiff too, that the contract was surreptitiously terminated behind its back.

To sum up the discussion and to its entirety, it can thus be concluded that the contract was terminated to the knowledge of the plaintiff and the specific performance was not sought at any point of time. The relief claimed by way of injunction cannot be allowed.

The plaintiff's application for injunction is a misconceived one and thus deserves rejection.

It needs special mention that the Ld. Counsel representing the defendants relied upon the judgments passed by the Hon'ble Supreme Court in M/S N.G PROJECTS LTD Vs VINOD KUMAR JAIN & ORS which highlighted upon the scope of the courts in granting injunctions to infrastructure projects as enshrined in the amended provisions of the Specific Relief Act Sec 20-A and 41(ha). But this court would prefer not to extend any discussion in that aspect as the schedule assigning or marking the projects to be infrastructure projects is not readily available to this court and more over the context was raised neither in the pleadings nor at the time of argument.

Relegation to seek damages is also the choice of the party concerned.

Hence in the light of the foregoing discussions, it is

ORDERED

The prayer for temporary injunction is rejected on contest without any order of costs.

The injunction application dated 16.11.2023 is disposed of.”

15. This important issue is noted. The writ petition has been filed without praying for any leave from the civil court to proceed either before this forum, or before any other competent forum when the suit was withdrawn.
16. The decision in Gullapalli Nageswara Rao (supra) will not be applicable in this case. I do not find that the petitioner has been able to make out a case of arbitrary action by the authorities. The procedure was followed and the findings are assailable before the appropriate forum.
17. The decision in M.P. Power Management Company Limited, Jabalpur (supra) reported in (2023) 2 SCC 703 does not apply. Isolators and Isolators (supra) will also not be applicable as the circumstances leading to the issuance of the order impugned do not give rise to a cause of action for invocation of Article 14 of the Constitution of India. I do not find the existence of any overwhelming circumstances leading the writ court to strike down the order impugned. The remedy of arbitration provided in the contract is an effective and fair means of preventing miscarriage of justice. There is no palpable unreasonableness and mala

vide in either the procedure followed by the authority or in the final outcome of such proceeding.

18. The relevant portion of the order impugned is quoted below: -

“(a) Termination of contract in full w.e.f. 04.10.2023 in full as per Clause no. 9(a), 9(b) and 9(c) of GTC of agreement awarded to M/s BPCPL AND ARETPL(JV) for the work of Hiring of HEMM for extraction and transportation of 12.60 L Te. Coal, Removal and Transportation Kenda Area.” of 83.50 L cum of OB and Re-handling of 35.10 L cum OB at CL Jambad OC Patch in Kenda Area.

(b)Imposing the proposed penalty of Rs, 1,31,19,870/- as per Clause No. 62 of GTC & Rs.16,86,88,124/- without limiting to this amount as per GTC which will be assessed and recovered by EIC as per terms of Agreement.

(c) Banning of business of contractor i.e. M/s. BPCPL AND ARETPL (JV) and its constituent partners for a period of two years from the date of issue of order as per clause 9(b) of GTC of NIT/Agreement and as per clause 2(v) of Guideline of Banning of Business as per Agreement.

(d)After termination of contract, the balance unexecuted quantities shall be offered for execution by floating an open tender in line with the parameters of the terminated contract.”

19. Reasons have been supplied by the authority in justification of issuance of the order of termination of the contract, banning of business, forfeiting the security deposit, invocation of the bank guarantee and imposition of penalty. The reasons supplied are quoted below: -

“Your performance from January 2023 to June 2023 with regard to achievement vs. mutually agreed targets (removal of OB + Coal production) is only 46.44 % after due consideration of hindrance, for a cumulative period of 6 months which is below 70% of the monthly agreed quantity which attracts clause No. 9(b) of GTC of the Agreement/NIT.

Due to your repeated poor performance, ECT. has incurred a huge loss.

Accordingly, a Show Cause notice vide ref. no. BC/AGENT/SIDULL-CL SAMBAD/3-24/1820 dated 10.07.2023 was served to you by Engineer in Charge, CL. Jambad OC(H) Patch to explain within stipulated time, as to why action should not be taken to terminate your contract for poor performance of your firm as per GTC/Agreement.

You have submitted your reply via email dated 13.07.2023 & your representative also submitted a reply vide letter no. BPL AND ARETPL(JV)/2023/99, dated 14.07.2023.

The Management after scrutiny of the said reply observes that your reply is not satisfactory. Thereafter a letter vide ref no. ECL/AGENT/SIDULI-CL JAMBAD/23-24/1881 dated 14/07/2023 has been issued to you for personal hearing under natural justice. The personal hearing was conducted on 18.07.2023 (from 10 am to 5 pm) and your views and management's views were recorded.

During the personal hearing, you committed to achieve the targets in July23, but going through your achievement for OB and Coal production till July23, it is observed that you failed to achieve the target of July23 without sufficient reasons.

Further, you committed to provide Grader from last week of July 2023, and also committed to provide pumping arrangement within 7 days of the personal hearing (which was conducted on 18.07.23).

It is regretted that none of your commitments were fulfilled apart from continuous failure to achieve targeted production.

Management has advised you to stop the work as to conduct final measurement on 07.08.2023 vide letter no ECL/AGENT/SIDULI-C L JAMBAD/23-24/1988 dated 30.07.2023.

In response to the above letter, you have requested vide letter no.BPCL AND ARETPL(JVY/2023/108 Dated: 05.08.2023 to continue the work, Management has taken a lenient view and instructed you to continue the work with immediate effect vide letter no. ECL/AGENT/SIDULI-CLAMBAD/ 23- 24/ 2018 Dated: 07.08.2023.

At the same, you were advised to achieve a monthly target on a regular basis to avert any penal action against you under the contract.

Further looking into your performance from July 23 to. September 23, your achievement with respect to committed target is only 2.52% after due consideration of hindrance. It is regretted to note that in spite of providing you sufficient chances to perform your work, your performance is not satisfactory.

Considering the above facts and your unsatisfactory performance, the management served the another letter vide ref no. ECL/Agent/SIDULI-C L JAMBAD/23-24/2353 Dated: 26.09.2023 to you (M/s. BPCPL AND ARETPL (JV)) instructing to stop the mining operation w.e.f. 03.10.2023 for final measurement of work & further necessary action regarding termination of the contract in full as per

clause No. 9(a), 9(b) and 9(c), Banning of Business as per clause 9(b) and getting the balance quantity executed by other means as per clause no. 9.2 of GTC of NIT/Agreement of contract.”

20. Whether the reasons are correct, justified or borne out from the evidence, are matters which the writ court cannot delve into because such procedure would require scanning and appreciation of evidence. The veracity and the correctness of the reasons provided cannot be gone into by the writ court, in view of the disputed questions of fact. Scanning of evidence is not permissible under the writ jurisdiction.
21. In *State of U.P. v. Bridge & Roof Co. (India) Ltd.* [*State of U.P. v. Bridge & Roof Co. (India) Ltd.*, (1996) 6 SCC 22], the Apex noted that the contract in question contained articles providing, inter alia, for settlement of disputes by reference to arbitration and the very resort to Article 226 was found to be misconceived in the circumstances. The Court also laid down as follows:-

“16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any

amount is due to the respondent from the appellant Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition viz. to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.”

22. The Hon'ble Apex Court, in Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd., reported in 2024 SCC OnLine SC 26 held the following:--

“137. This Court in the case of Reliance Infrastructure Limited v. State of Maharashtra has held that while exercising its power of judicial review, the Court can step in where a case of manifest unreasonableness or arbitrariness is made out.

138. In the present case, there is not even an allegation with regard to that effect. In such circumstances, recourse to a petition under Article 226 of the Constitution of India in the availability of efficacious alternate remedy under a statute, which is a complete code in itself, in our view, was not justified.

139. No doubt that availability of an alternate remedy is not a complete bar in the exercise of the power of judicial review by the High Courts. But, recourse to such a remedy would be permissible only if extraordinary and exceptional circumstances are made out. A reference in this respect could be made to the judgments of this

Court in the cases of Radha Krishan Industries v. State of Himachal Pradesh and South Indian Bank Ltd. v. Naveen Mathew Philip.”

23. This writ petition should not be entertained. There appears to be an efficacious remedy under the terms and conditions of the contract, for settlement of disputes, including an arbitration clause. The petitioners are at liberty to take appropriate steps in accordance with law.
24. It also *prima facie* appears that the show cause notice and the order impugned were issued by the same authority as per the terms and conditions.
25. The observations made hereinabove, are tentative and restricted to the disposal of the writ petition. If the petitioners avail of the remedy under the contract, all points raised by either party, including the maintainability of the proceeding shall be decided by the competent authority without being influenced by this order.
26. The writ petition is accordingly disposed of. There shall be no order as to costs.
27. In view of such disposal of the writ petition, the connected application being CAN 1 of 2024 is also disposed of.
28. All parties are to act on the basis of server copy of this judgment and order.

(Shampa Sarkar, J.)