

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 21705 of 2024
With
CAN 1 of 2024

Simplex Infrastructures Limited
Vs.
State of West Bengal & Anr.

For the writ petitioner	:-	Mr. Jishnu Saha, Sr. Adv. Mr. Saumya Tandon, Adv. Mr. Arjun Basra, Adv. Mr. Aishwarya Kr. Awasthi
For State	:-	Mr. Biswabrata Basu Mallick, AGP. Ms. Parna Roy Chowdhury, Adv.
Hearing concluded on	:-	12.02.2025
Judgment on	:-	25.03.2025

Amrita Sinha, J.:-

1. The petitioner participated in a bidding process floated by the Superintending Engineer State Highway Circle no. IV in the year 2011 and emerged as the L1 bidder. Work order was issued to the petitioner on 14th February, 2011 and the work was to be completed within a period of four years. The Notice Inviting Tender contained a provision for arbitration under Clause 25 of WBF No. 2911 ii.
2. After completion of the work certain dispute arose and the petitioner applied for invoking the provision for arbitration for settlement of the disputes. The prayer of the petitioner stood rejected by communication

dated 12th July, 2023 on the ground that though the Notice Inviting Tender contained the arbitration clause but due to the implementation of the notification of the State being no. 558/SPW dated 13th December, 2011 published in the Kolkata Gazette Extraordinary on 15th December, 2011, the provision for arbitration stood omitted.

3. Rejection of the request for arbitration for settlement of the disputes is impugned in the instant writ petition. It has been submitted that the petitioner was never intimated as regards the omission of the provision for arbitration. The Notice Inviting Tender clearly prescribed the said provision. The authority could not have changed the terms and conditions relying on which the petitioner submitted its bid. The same will amount to changing the rules of the game after the game started, which is impermissible in law.
4. In support of the aforesaid submission the petitioner relies upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Union of India vs. Vertex Broadcasting Company Private Limited & Ors.*** reported in ***(2015) 16 SCC 198***.
5. Learned advocate for the State respondents rely on the notification omitting the arbitration clause and submits that, at this stage the same cannot be invoked by the petitioner for resolution of the dispute. It has been submitted that it is not believable that the petitioner was not aware of the omission of the arbitration clause. The petitioner did

not challenge the omission when it was initially notified in the official gazette.

6. It has been submitted that as the omission of the arbitration clause was published in the official gazette, the petitioner cannot be permitted to take the plea that the same was not within its knowledge or the same was not communicated separately. The moment the notification is gazetted, it has to be taken that it has been widely published and the petitioner cannot claim benefit citing ignorance of the same. There is no requirement of giving separate information.
7. The State has also sought to raise an issue with regard to the maintainability of the writ petition on the score that whether the petitioner was aware of the omission of the arbitration clause or not is a disputed fact. The petitioner stresses on the fact that the omission was not made known, whereas; the State contends that by virtue of the publication in the official gazette, the fact ought to have been known to the petitioner. Disputed question of fact ought not to be resolved before the writ court.
8. Learned advocate for the State relies on the decision delivered by the Hon'ble Supreme Court in the matter of ***Kerala State Electricity Board & Anr. Vs. Kurien E.Kalathil & Ors.*** reported in ***(2000) 6 SCC 293***, and in the matter of ***Union of India & Ors. vs. Puna Hinda*** reported in ***(2021) 10 SCC 690***. Reliance has also been placed on the judgment delivered by the Hon'ble Division Bench of the High

Court of Madhya Pradesh in the matter of ***Wagad Infraprojects Private Limited vs. Aryavrat Projects Developers Private Limited*** reported in ***(2024) SCC Online MP 7383***.

9. What is to be adjudicated is whether the notification dated 13th December, 2011, omitting the arbitration clause, can be made applicable in the facts and circumstances of the instant case.
10. I have heard and considered the submissions made on behalf of both the parties and perused the materials on record.
11. The Notice Inviting Tender dated 6th January, 2011 in response to which the petitioner submitted its bid contained the clause for arbitration. The said clause reads as follows: "Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contracts designs, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion of abandonment thereof shall be referred to the sole arbitration of the Chief Engineer of the Deptt. Should the Chief Engineer be for any reason unwilling or unable to act as such arbitrator, such questions and disputes shall be

referred to an arbitrator to be appointed by the Chief Engineer. The award of the arbitrator shall be final, conclusive and binding on all parties to his contract”.

12. The period for completion of the subject work was four years. The last date and time for applying to purchase the bidding document was 15th March, 2011, the period of sale of the bidding document was between 21st March, 2011 to 22nd March, 2011, date and time of pre-bid meeting was 25th March, 2011, the date of opening the bid was 11th April, 2011, the date of verification of the documents was between 20th April, 2011 to 21st April, 2011 and the date of displaying the final list of the qualified bidders was 10th May, 2011. There was a provision for extension of time for conclusion of the work. A declaration had to be submitted by the bidder declaring that the bidder promises to abide by the stipulations of the contract documents.
13. A communication was made to the petitioner on 3rd February, 2012 mentioning that the cost of the project will increase as the length of the bridge will be increased and the petitioner was requested to send its consent as the execution of the excess work would be under the same terms and conditions of the subject Notice Inviting Tender (NIT). Consent was given by the petitioner on the same date.
14. The petitioner was issued a letter of acceptance on 3rd February, 2012 and the reference number mentioned in the letter of acceptance is the number of the Notice Inviting Tender dated 6th January, 2011. Formal

work order was issued in favour of the petitioner on 14th February, 2012 referring to the memo number mentioned in the letter of acceptance. As issues cropped up with regard to finalization of claim the petitioner invoked the arbitration clause mentioned in the NIT.

15. Admittedly, it appears that no information or communication was made to the petitioner intimating the omission of the arbitration clause and the aftereffect of the same. When the petitioner submitted its bid, the arbitration clause was very much there. Even on the date when the bid was opened and the petitioner emerged as the successful bidder, the arbitration provision was very much available.
16. The notification dated 13th December, 2011, for the first time, omitted the provision for resolution of disputes through arbitration. The notification mentions that 'henceforth no provision for arbitration for resolution of disputes that may arise out of contracts to be entered into by the department with the contractors for the purpose of carrying out execution of the public works'. The gazette notification is meant for disseminating information to all concerned.
17. In the case at hand, though the contract was not formally executed prior to the publication of the notification, but it cannot be denied that the contract was executed in furtherance to the NIT published prior to the publication of the notification. Any addition and/or alteration in the terms and conditions of the Notice Inviting Tender ought to have been made known to the bidder by way of a corrigendum.

18. It is not unnatural for a dispute to crop up either in the midst or at the end of the contract. It may have been that the bidder submitted its bid only after noticing that an in-house provision for dispute resolution in the form of arbitration was incorporated in the NIT. It may have been that had the bidder noticed that the dispute resolution clause was absent, the bidder would not have participated in the bidding process. There was enough time between the publication of the notification in December, 2011 and the issuance of the letter of acceptance and the work order in February, 2012 for issuance of a corrigendum intimating the bidder about the change to be brought in the NIT. The same was not done. During the entire period for which the work was executed, the change in the terms and conditions of the NIT was not communicated to the contractor.
19. The submission of the State that as the notification was published in the official gazette, accordingly, the same ought to have been within the knowledge of the petitioner and there was no requirement of any formal communication regarding the change, cannot be accepted by the Court. It may have been that the subject notification was within the knowledge of the petitioner, but whether the same would be made applicable in case of the subject tender work, should have been made known to the petitioner. It may not be absolutely incorrect or improper for the petitioner to have an impression that as the contract was in respect of the NIT which contained the arbitration clause accordingly, the subject notification will not be applicable in this case.

20. A bidder responds to a Notice Inviting Tender only after going through the terms and conditions mentioned therein and only after being satisfied that the parties will be bound by the said terms and conditions. Any change in the terms and conditions after the bidding process is over and after selection of the eligible bidder will amount to an alteration in the terms and conditions of the initial Notice Inviting Tender. A selected bidder ought to have been given opportunity to respond to the change that is being brought in the Notice Inviting Tender. Unilateral change of the terms and conditions without prior or later intimation to the selected bidder, will amount to violation of the principle of natural justice, equity and fair play. An option ought to be given to the selected bidder to agree to the purported change. A selected bidder cannot be forced or compelled to perform the work on changed terms and conditions without disclosing the change.
21. In *Puna Hinda* (supra) the Court accepted the settled proposition that there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. Discretion lies with the High Court. Here, there is hardly any dispute. Only the issue of applicability of a notification is being deliberated upon.
22. In *Kerala State Electricity Board* (supra) the Court held that the dispute relating to interpretation of the terms and conditions of a contract could not have been agitated under Article 226 of the Constitution of India. The same is a matter for adjudication by the

Civil Court or in arbitration if provided for in the contract. The terms and conditions of the contract are not being interpreted herein.

23. In *Wagad Infraprojects* (supra) the Court held that a party to the contract cannot be permitted to withdraw the admission when the respondent has acceded to the stand without any demur. Here, also the NIT on which the parties proceeded provided the arbitration clause and hence, the parties should abide by the same.
24. In *Vertex Broadcasting* (supra) the Court held that a party could not have departed from the terms of NIT unilaterally and on refusal of the licensees to accept such modified terms resorted to the forfeiture. The Court perused the terms of NIT and the terms contemplated in the final draft license agreement and opined that the final license agreement contained terms and conditions which go far beyond what is mentioned in NIT.
25. I am unable to accept the contention of the State that there is any disputed question of fact. It is also not a case where the petitioner seeks to interpret any terms and conditions of the contract. There is hardly any dispute in the facts and the Court is not required to interpret any of the terms and conditions of the contract. Only the applicability of the notification is to be adjudicated.
26. I am of the considered opinion that the rejection of the petitioner's prayer has been made on misinterpretation of the applicability of the notification omitting the arbitration clause. It has to be taken that the

tender process started with the publication of the Notice Inviting Tender and any steps taken in continuation of the said NIT has to be reckoned from the date of publication of the NIT. If any change is to be made in the terms and conditions of the NIT after the bidding process is over and the bidder is selected, the same is required to be brought to the notice of the selected bidder. The change of pricing was duly intimated to the petitioner, but for reasons best known, omission of the arbitration clause was not intimated.

27. Change in the terms and conditions of the Notice Inviting Tender after conclusion of the bidding process usually ought not to be made. If change is required the same must be on notice to the successful bidder. Consent has to be obtained from the bidder. In the absence of consent of one of the parties to the change in the terms and conditions of the Notice Inviting Tender, the same cannot be made applicable unilaterally.
28. In view of the above, the impugned order of rejection is held to be illegal and bad in the eye of law. The parties would be bound to act strictly in accordance with the terms and conditions available on the date of publication of the Notice Inviting Tender. The notification dated 13th December, 2011 cannot be made applicable in the facts and circumstances of the instant case. The impugned order dated 12th July, 2023 is, accordingly, set aside.

29. The writ petition stands allowed. The connected application stands disposed of.
30. No costs.
31. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)