2011 PLRonline 0100

Supreme Court Of India

Before: Justice Altamas Kabir, Justice Cyriac Joseph.

Union Of India v. Tantia Construction Pvt.ltd

Special Leave Petition (Civil) No. 18914 Of 2010

18.04.2011

(i) Constitution of India, Article 226 – Maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties – Well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable – Constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities – Notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company. [Para 27]

(ii) Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. [Para 27]

Judgment

ALTAMAS KABIR, J.

1. The sole Respondent, M/s. Tantia Construction Pvt. Ltd., filed writ petition, being CWJC No.14055 of 2008, against the Petitioners herein, inter alia, for the issuance of a writ in the nature of Certiorari for quashing the order dated 18th August, 2008, passed by the Deputy Chief Engineer (Construction), Ganga Rail Bridge, East Central Railway, Dighaghat, Patna, calling upon the Respondent Company to execute the enlarged/extended quantity of the contract work pursuant to Tender No.76 of 06-07. Further relief has been prayed for by the Respondent Company for a writ in the nature of Mandamus directing the Petitioners herein to let it complete the reduced quantity of work relating to the construction of the Rail Over-Bridge at Bailey Road, which did not include the additional work in respect of the extended portion of the Viaduct and to close the contract and, thereafter, to make payment for the contract work which it had executed pursuant to the aforesaid Tender.

2. During the hearing of the writ petition several issues were identified regarding the Petitioners right to force the Company to execute the additional work of constructing the Viaduct which was neither within the scope of the work nor within the schedule of work comprised in Tender No.76 of 06-07. A connected issue was also identified as to whether in a Risk and Cost Tender, the nature of work provided for in the Tender could be altered and

whether such action would be in violation of Articles 14 and 19(1)(g) of the Constitution of India, besides being against the principles of natural justice and contrary to the clauses in the General Conditions of Contract included in the Tender document.

3. It appears that on 12th December, 2006, the East Central Railways (ECR) invited Risk and Cost Tender No.76 of 06-07 for the work of construction of a Rail Over-Bridge at Bailey Road over the proposed Railway Alignment over the Ganga Bridge at Patna for an approximate cost of 15.42 crores. The Tender documents provided that the contract work was to be completed within 15 months from the date of issuance of the letter of acceptance. Upon the tenders being opened on 27th December, 2006, the contract was awarded to the Respondent Company and a letter of acceptance was issued to the Respondent Company on 12th/13th February, 2007. The contract work was accepted at a cost of 19,11,02,221.84p. and an agreement was thereafter entered into between the East Central Railways and the Respondent Company in respect of the contract work, whereby a Rail Over-Bridge was to be constructed with two abutments on both sides and three piers in between. The work also included 500 meters of approach road with Reinforced Earth Retaining Walls to a maximum height of 15 meters on both sides of the Rail Over-Bridge.

4. On account of some of the procedural work, including the change of the span of the bridge, change in the design of the pier cap, the requirement of shifting obstacles like a temple, police station, electrical pole, etc. and also due to heavy rains, the construction of the wall was delayed. The delay in preparation of the designs and drawings which involved the work of a specialized agency also contributed to the delay. On account of changes in the design whereby the Viaduct had to be extended involving an additional cost of 36.11 crores, the Petitioner No.6 requested the Respondent Company to convey its consent for execution of the complete work, including the revised work. By its letter dated 13th February, 2008, the Respondent Company wrote back to the Petitioner No.6 that they did not want to take up the construction of the extended Viaduct which was not covered in the Agreement dated 30th April, 2007. The Respondent Company refused to give their consent for the execution of the complete work at the revised cost of 36.11 crores. On such refusal the Railways floated a separate Tender No.189 of 2008 for the additional work of the extended portion of the Viaduct for the Road Over-Bridge at Bailey Road. The approximate cost earmarked for the said work was 24.50 crores. As there was not much response to the said Tender, the date for submission of the Tender was extended from 9.4.2008 till 23.5.2008 and the assessed cost of work was revised and re-assessed at 26,35,96,878.63p. Corrigendums were issued from time to time in connection with the said Tender for the additional work and ultimately two firms, namely, Allied Infrastructures and Projects Pvt. Ltd. and Arvind Techno Engineers Pvt. Ltd. quoted the rate for execution of the works as 34,11,16,279.39p. and 35,89,93,215.66p. respectively, for the additional work only.

5. While the Tender process for the extended contract on the Viaduct was going on, keeping in view their long relationship, the Respondent Company wrote to the Petitioner No.6 on 12th April, 2008, agreeing to execute the varied contract at the same rate, terms and conditions of the contract agreement, but on condition that the price increase, due to the Price Variation Clause, would be payable to the company. It was also indicated that the Company would have no claim for reduction in quantity by more than 25% in the

agreement.

6. In the meantime, the Respondent Company, vide its letter dated 27th April, 2008, submitted the revised work programme for the left-over work. The same was accepted and the time for the execution of the left-over work was extended till 31st December, 2008.

7. In response to the letter written on behalf of the Respondent Company on 12th April, 2008, the Petitioners called upon the Respondent Company by its letter dated 15th June, 2008, to execute the varied quantity of work.

8. In response to the said letter dated 15th June, 2008, the Respondent Company wrote back to the Railways on 1st July, 2008, stating that they had given their consent to execute only the reduced quantity of work, the cost of which worked out to 12,37,49,888/-. However, the Railways once again asked the Respondent Company by its letter dated 18th August, 2008, to carry out the complete work, including the additional work of the Viaduct, at an approximate cost of 36.11 crores.

9. Aggrieved by the stand taken by the Railways, the Respondent Company filed a Writ Petition, being CWJC No.14055 of 2008, before the Patna High Court, challenging the directions given by the Railway Authorities for completion of the entire work, including the extended work. It was the contention of the Respondent Company that having failed to get any suitable response to the fresh Tender floated in respect of the additional work, it was not open to the Petitioners to compel it to complete the same at an arbitrarily low price, particularly when the additional work was not part of the original Tender.

10. The learned Single Judge accepted the case made out by the Respondent Company, holding that there was no breach of the agreement entered into between the Petitioners and the Respondent Company, since it was the Petitioners themselves who had altered the agreement by separately tendering the extended work. The learned Single Judge observed that consequently the entire work could not be thrust upon the Respondent Company and the Railways was free to get the Viaduct constructed separately by any other contractor, as it had contemplated earlier. The learned Single Judge further observed that since the Respondent Company was ready to do the balance work from the left-over tender, the rescinding of the entire work by the Railways and to re-tender the entire block could not certainly be at the risk and cost of the Respondent Company. The learned Single Judge also observed that the Respondent Company could not be saddled with the cost of work which it had never undertaken to execute.

11. On such findings, the Writ Petition was allowed and the Railways was advised to expeditiously clear the payments of the Respondent Company in respect of the work already completed by it.

12. The matter was taken in appeal to the Division Bench by the Petitioners herein in LPA No.603 of 2009. The Division Bench by its judgment and order dated 29th July, 2009, upheld the judgment of the learned Single Judge and dismissed the Appeal. It is against the said order of the Division Bench dismissing the appeal filed by the Petitioners that the present Special Leave Petition has been filed. 11

13. The same submissions, as had been advanced before the High Court, were also advanced before us by the learned Additional Solicitor General, Ms. Indira Jaising. She urged that the contract of the Respondent Company had been rightly terminated in accordance with clause 62 of the General Conditions of Contract upon the Respondents refusal to comply with the forty eight hours notice served on it. The learned ASG submitted that since under the terms of the Agreement entered into between the parties, the Petitioners were entitled to vary or alter the nature of the work for which the contract was given, the Respondent Company was under a contractual obligation to complete the work, including the varied work under the contract.

14. The learned ASG submitted that the Petitioners had no intention of compelling the Respondent Company from completing the work. On the other hand, it was the Respondent Companys obligation to complete the work under the contract. It was the Respondent Company which had, by its letter dated 12th April, 2008, agreed to do the varied work at the same rate, terms and conditions, subject to the applicability of the Price Variation Clause. It was only thereafter that by his letter dated 15th June, 2008, the Petitioner No.6 asked the Respondent Company to execute the varied quantities of work on the Rail Over-Bridge at the same rate and on the same terms and conditions. It was upon the Respondent Companys failure to do so that notice was given to it under clause 62 of the General Conditions of Contract on 10th October, 2008, indicating that after the expiry of the notice, the contract would stand rescinded and the work under the contract would be carried out at the risk and cost and consequences of the Respondent Company. The said notice was followed by a letter dated 17th October, 2008 sent to the Respondent Company by the Petitioners rescinding the contract and informing the company that the work under the contract would be carried out at the companys risk and cost.

15. It was also submitted that the agreement between the parties provided for arbitration in respect of all disputes and differences of any kind arising out of or in connection with the contract whether during the progress of work or after its completion and whether before or after the termination of the contract. It was urged that in view of the said arbitration clause, the Writ Court was not competent to decide the issue involved in the dispute which had been raised by the Respondent Company.

16. It was lastly contended that the scope of the work did not change, despite the variation of the design and planning. It was submitted that it was only a case where the quantity of the work was decreased in one sense, but increased in another, and the costs involved on account of such variation was worked out and a fresh figure was computed which the Respondent Company was bound to accept under the terms of the contract. It was submitted that the same would be evident from Clause 23.2 relating to the quotation of rates whereby the Railway Administration reserved the right to modify any or all the schedules, either to increase or to decrease the scope of the work. It was submitted that the termination of the contract on account of violation of the terms thereof could not be quashed by the Writ Court to resurrect the contract which had already been terminated and the only recourse available to the Respondent Company was to have the matter decided in arbitration.

17. Appearing for the Respondent-Company, Mr. Soumya Chakraborty, learned Advocate, submitted that from the facts as revealed during the hearing of the Writ Petition and the Letters Patent Appeal, it would be apparent that the initial contract signed between the parties on 27.12.2006 was ultimately abandoned. Mr. Chakraborty submitted that on account of an alteration in the design of the Rail Over-Bridge, which included a completely new work project, a fresh Tender had to be floated since the new work could not be treated to be part of the initial contract. Having regard to the estimated cost of the variation involved, the Petitioners did not receive adequate response to the said Tender. On the other hand, two Tenderers submitted their offers at a much higher rate than was fixed as the estimated cost of the work which had been added to the existing work on account of the alteration in the design of the Rail Over- Bridge. Noting the problem that the Petitioners were faced with, with regard to the completion of the Rail Over-Bridge, the Respondent Company, keeping in mind its long association with the Railways, offered to complete the varied work at the same rates and conditions of contract, subject to the applicability of the Price Variation Clause. Mr. Chakraborty submitted that by its letter dated 12th April, 2008, the Respondent Company had referred to the variation of the work by the agreement entered into between the Railways and the Respondent Company on account of the alteration of the original design. Mr. Chakraborty submitted that it had never been the Respondent Companys intention to execute the entire work, including the variation on account of the alteration of the design, at the same rates and the terms and conditions and that such offer was confined only in respect of the balance work left over from the contract executed on 27th December, 2006. Mr. Chakraborty submitted that the same would be evident from the fact that in the letter of 12th April, 2008, it had also been indicated that the Respondent Company would have no claim for reduction in quantity by more than 25% in the agreement. Mr. Chakraborty submitted that the Petitioners had clearly misunderstood the scope and intent of the letter dated 12th April, 2008, written on behalf of the Respondent Company and had interpreted the same to mean that its offer also covered the extended work on account of the change in the design of the Rail Over-Bridge.

18. It was also contended that since the Petitioners had illegally terminated the contract with the Respondent Company, the Writ Court had stepped in to correct such injustice. In fact, Mr. Chakraborty also submitted that the objection taken on behalf of the Petitioners that the relief of the Respondent Company lay in arbitration proceedings and not by way of a Writ Petition was devoid of substance on account of the various decisions of this Court holding that an alternate remedy did not place any fetters on the powers of the High Court under Article 226 of the Constitution.

19. In support of his aforesaid submissions Mr. Chakraborty firstly relied and referred to the decision of this Court in Harbanslal Sahnia vs. Indian Oil Corporation Ltd. [(2003) 2 SCC 107] , wherein this Court observed that the Rule of exclusion of writ jurisdiction by availability of an alternative remedy, was a rule of discretion and not one of compulsion and there could be contingencies in which the High Court exercised its jurisdiction inspite of availability of an alternative remedy. Mr. Chakraborty also referred to and relied on the decision of this Court in Modern Steel Industries vs. State of U.P. and others [(2001) 10 SCC 491] , wherein on the same point this Court had held that the High Court ought not to have dismissed the writ petition requiring the Appellant therein to take recourse to arbitration

proceedings, particularly when the vires of a statutory provision was not in issue.

20. Reference was also made to the decision of this Court in Whirlpool Corporation vs. Registrar of Trade Marks [(1998) 8 SCC 1] ; National Sample Survey Organisation and Another vs. Champa Properties Limited and Another [(2009) 14 SCC 451] and Hindustan Petroleum Corporation Limited and Others vs. Super Highway Services and Another [(2010)3 SCC 321] , where similar views had been expressed.

21. Mr. Chakraborty submitted that while enacting the Arbitration and Conciliation Act, 1996, the Legislature had intended that arbitration being the choice of a private Judge agreed upon by the parties themselves to settle their disputes, there should be minimum interference by the regular Courts in such proceedings. In this regard, Mr. Chakraborty referred to Section 5 of the aforesaid Act which indicates that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said Part. Mr. Chakraborty urged that upon revival a contract can at best be modulated to any change in circumstances but the termination of the contract with the Respondent Company was not warranted, since the decision to terminate the contract was based on an erroneous interpretation of the contents of the letter dated 12th April, 2008, written on behalf of the Respondent Company and the termination had, therefore, been rightly quashed by the High Court.

22. The facts disclosed reveal that on the basis of the Tender floated by the Petitioners for construction of a Rail Over-Bridge at Bailey Road over the proposed Railway Alignment over the Ganga Bridge, Patna, the Respondent Company had been awarded the contract at an approximate cost of 15.42 crores and it was stipulated that the contract was to be completed within 15 months from the date of issuance of the letter of acceptance. Admittedly, on the contract being awarded to the Respondent Company, the letter of acceptance was issued on 12th/13th February, 2007, and an agreement was thereafter entered into between the East Central Railways and the Respondent Company in respect of the contract work. Admittedly, on account of the procedural delays, the work could not be completed within the stipulated period of 15 months from the date of issuance of the letter of acceptance. The procedural delay was mainly on account of the fact that the work on the approach road could commence only after the design, which was to be initially prepared by the Respondent Company, was approved by the Railways. The Respondent Company appointed the Central Road Research Institute, Delhi, as its consultant for designing the plan for execution. During the above process, it was found that each earth filled approach road could not be raised above 7 meters and, as a result, the remaining 8 meters was to be made of complete cement casting known as a Viaduct. The Railways got the matter examined by its own associate, RITES, and, thereafter, approved the plan. The consequence of the said change was that the Tender which was of 19 crores stood increased to 36 crores on account of the additional work which was to be undertaken as a result of the modified design. In fact, the Railways themselves decided to float a fresh Tender for the additional work at an estimated cost of 24.50 crores separately. As a result, the work relating to construction of the Rail Over-Bridge now consisted of two parts, one of which the Respondent Company was executing and the other to be executed by a different

contractor. However, as mentioned hereinbefore, there was hardly any response to the Tender floated. Seeing that the quantum of work under Tender No.76 of 06-07 stood reduced, the Respondent Company wrote to the Petitioners on 12th April, 2008, agreeing to undertake the varied work at the same rate and on the same terms and conditions, subject to the Price Variation Clause. The problem appears to have begun at this stage when, on the basis of the said letter dated 12th April, 2008, the Petitioners directed the Respondent Company to continue with the unfinished portion of the plan.

23. Admittedly, the work which had to be completed within 15 months from the date of issuance of the letter of acceptance, could not be completed within the said period and, on the other hand, a new element was introduced into the design of the Rail Over-Bridge. It is the case of the Respondent Company that any item of work directed to be performed could not be covered by the original contract dated 12th/13th February, 2007, and realizing the same, the Railways themselves floated a fresh Tender No.189 of 2008 for the additional work of the extended portion of the Viaduct.

24. We are of the view that the letter dated 12th April, 2008, did not cover the extended work on account of the alteration of the design and was confined to the work originally contracted for. We cannot lose sight of the fact that while the initial cost of the Tender was accepted for 19,11,01,221.84p., the costs for the extended work only was assessed at 24.50 crores and that two offers were received, which were for 34,11,16,279.39p. and 35,89,93,215.66p. respectively. This was only with regard to the extended portion of the work on account of change in design. The Respondent Company was expected to complete the entire work which comprised both the work covered under the initial Tender and the extended work covered by the second Tender. The Respondent had all along expressed its unwillingness to take up the extended work and for whatever reason, it agreed to complete the balance work of the initial contract at the same rates as quoted earlier, despite the fact that a long time had elapsed between the awarding of the contract and the actual execution thereof.

25. In our view, the Respondent Company has satisfactorily explained their position regarding their offer being confined only to the balance work of the original Tender and not to the extended work. The delay occasioned in starting the work was not on account of any fault or lapses on the part of the Respondent Company, but on account of the fact that the project design of the work to be undertaken could not be completed and ultimately involved change in the design itself. The Respondent Company appears to have agreed to complete the varied work of Tender No.76 of 06-07 which variation had been occasioned on account of the change in the design as against the entire work covering both the first and second Tenders. To proceed on the basis that the Respondent Company was willing to undertake the entire work at the old rates was an error of judgment and the termination of the contract in relation to Tender No.76 of 06- 07 on the basis of said supposition was unjustified and was rightly set aside by the learned Single Judge of the High Court, which order was affirmed by the Division Bench.

26. The submissions made on behalf of the Petitioners that in terms of Clause 23(2) of the Agreement, the Petitioners were entitled to alter and increase/decrease the scope of the

work is not attracted to the facts of this case where the entire design of the Rail Over-Bridge was altered, converting the same into a completely new project. It was not merely a case of increase or decrease in the scope of the work of the original work schedule covered under Tender No.76 of 06-07, but a case of substantial alteration of the plan itself.

27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company.

28. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits. The Special Leave Petition is, accordingly, dismissed, but without any order as to costs.

Equivalent: [2011] 5 SCR 397, (2011) 5 SCC 697, 2012 (1) JLJR 240, 2011 (2) ARBLR 115 (SC), 2012 (1) PLJR 455, 2011 (4) SCALE 745, JT 2011 (5) SC 59