



GAHC010257792014

Page No.# 1/16



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1066/2014

M/S TECHNO STEEL AND CRAFT INDUSTRIES and ANR.
HAVING ITS REGD. OFFICE AT G.N. BORDOLOI ROAD, AMBARI, GHY.
REPRESENTED BY ITS PROPRIETOR SRI PLABAN DAS

2: PLABAN DAS
S/O LT. NARAYAN DAS
H/NO.3
G.N. BORDOLOI ROAD
AMBARI
GUWAHATI
DIST- KAMRUP METRO
ASSA

VERSUS

THE UNION OF INDIA and 6 ORS
THROUGH THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF
SHIPPING, TRANSPORT BHAVAN, PARLIMENT STREET, NEW DELHI-01

2:INLAND WATERWAYS AUTHORITIES OF INDIA MINISTRY OF SHIPPING
GOVT. OF INDIA
H.O.A-13
SECTOR -I
NOIDA-201301
UTTAR PRADESH

3:THE CHAIRMAN
INLAND WATERWAYS AUTHORITIES OF INDIA MINISTRY OF SHIPPING
GOVT. OF INDIA
H.O.A-13
SECTOR -I
NOIDA-201301
UTTAR PRADESH



4:THE DIRECTOR
INLAND WATERWAYS AUTHORITIES OF INDIA MINISTRY OF SHIPPING
GOVT. OF INDIA
H.O.A-13
SECTOR -I
NOIDA-201301
UTTAR PRADESH

5:THE DY. DIRECTOR
INLAND WATERWAYS AUTHORITIES OF INDIA MINISTRY OF SHIPPING
GOVT. OF INDIA
H.O.A-13
SECTOR -I
NOIDA-201301
UTTAR PRADESH

6:THE CHIEF ENGINEER
INLAND WATERWAYS AUTHORITIES OF INDIA MINISTRY OF SHIPPING
GOVT. OF INDIA
H.O.A-13
SECTOR -I
NOIDA-201301
UTTAR PRADESH

7:THE DIRECTOR
ENGINEER IN CHARGE
INLAND WATERWAYS AUTHORITIES OF INDIA
REGIONAL OFFICE
PANDU PORT COMPLEX
PANDU
GHY-12
ASSA

For the Petitioner(s) : Mr. D. Mozumder, Sr. Advocate
: Mr. P. Borah, Advocate

For the Respondent(s) : Mr. S. Dutta, Sr. Advocate
: Ms. I. Das, Advocate
: Mr. N. Aditya, Advocate

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 03-08-2023

1. The instant writ petition has been filed by the Petitioners challenging the imposition of liquidated damages upon the Petitioners in respect to 3 (three) contracts.
2. The facts involved in the instant case is that the Inland Waterways Authority of India had in pursuance to Notice Inviting Tenders and finding the Petitioners' bid to be the lowest awarded 3 (three) contracts to the Petitioners by issuance of Letter of Acceptance as well as the work order. The said contracts in question are (i) construction and supply of 2 (two) pontoons for Tejpur of the bid value of Rs.1,49,76,000/- in respect to which a Letter of Acceptance was issued on 27.02.2008; (ii) construction and supply of 2 (two) pontoons for Neamati of the bid value of Rs.1,67,70,000/- in respect to which a Letter of Acceptance was issued on 09.07.2008 and (iii) construction and supply of 2 (two) pontoons for Dibrugarh of the bid value of Rs.1,67,70,000/- in respect to which a Letter of Acceptance was issued on 09.07.2008.
3. It further appears from the three Letters of Acceptance so issued that the time was the essence of the contract and the delivery period of the 2 (two) pontoons was to be completed within 7 months from the date of issuance of the work order as per the agreed terms and conditions. It is further relevant to take note of that pursuant to the issuance of the Letters of Acceptance as well as the work orders, the Petitioner No.1 entered into separate agreement in respect to 3 (three) works with the Respondent No.2. Although in the writ

petition, only the agreement pertaining to the construction and supply of 2 (two) pontoons for Neamati has been enclosed as Annexure-3 to the writ petition but during the course of the hearing, the learned counsels have produced before this Court the said agreements.

4. From a perusal of the said agreements which are para materia in content as regards the terms and conditions, it was stipulated that various documents shall form and has to be read and construed as the part of the agreement. The various documents were (a) Agreement, (b) Notice Inviting Tender, (c) Instructions to bidders, (d) General Conditions of the Contract, (e) Special Conditions of the Contract, (f) Technical specifications and drawings, (g) Form of bid, (h) Cost Schedule, (i) Letter of Acceptance.

5. It further reveals from the record that the contracts in question could not be completed within time. In respect to the contract pertaining to the construction and supply of 2 (two) pontoons for Tejpur which is the contract for Yard No.101-102, there was a delay of 117 days (17 weeks). In respect to the contract pertaining to construction and supply of 2 (two) pontoons for Neamati i.e. the contract for Yard No.105-106, there was a delay of 164 days (24 weeks) and in respect to the contract pertaining to construction and supply of 2 (two) pontoons for Dibrugarh i.e. the contract for Yard No.103-104, there was a delay of 206 days (30 weeks). Subsequent to the completion of the said contracts, the final bills of the Petitioners were released after deducting 10% of the total value of each contract in terms with Clause 14 of the Special Conditions of Contract. Under such circumstances, the Petitioners submitted a representation dated 07.04.2011 requesting for release of the amount so deducted against liquidated damages. In pursuance to the said representation



dated 07.04.2011, the Respondent No.2 issued a communication dated 25.04.2011 to provide adequate documentary proof to substantiate delay and establish that the same was beyond their control. Thereupon, the Petitioners have submitted some documents and details vide a communication dated 19.07.2011. It is however relevant to take note of that such documents do not form a part of the records.

6. Upon the said documents being submitted, the Deputy Director of the Respondent No.2 Authority issued a communication to the Director of the IWAI, Guwahati who was also Engineer-in-charge vide a communication dated 04.08.2011. The Director, IWAI issued a communication on 01.12.2011 stating inter alia that the Guwahati Office of the Respondent No.2 had calculated the delays which had occurred due to construction of floating steel pontoons due to reasons beyond the control of the contractor. It was further mentioned that severe delays had occurred due to the delay of IRS inspection of pontoons at different stages of the Construction. The detail calculation of the delays attributed due to late inspection by the IRS, procurement of imported anchors etc. were enclosed in the tabular form. It is relevant to observe that the enclosure to the communication dated 01.12.2011 is however not a part of the record. It further appears that thereafter, there were further enquiries being carried out by the Respondent No.2 Authority and what transpired in the meantime is not discernible from the records.

7. Be that as it may, on 25.04.2013, the Assistant Director of the Respondent No.2 again issued another communication to the Director, IWAI requesting to furnish definite recommendations on the delay caused on account of inspection by the IRS, launching of pontoons and supply of anchors

etc. to consider the waiver of the liquidated damages deducted. Pursuant to the said communication, the Director, IWAI issued a communication dated 17.06.2013 to the Chief Engineer (Civil) of the Respondent No.2 wherein it was mentioned that as per the contract agreements for all 3 (three) projects (Yard No.101-106), the Director, IWAI as EIC was recommending the waiver of the L.D. based on the statement submitted by the contractor for reasons stated to be beyond the control of the contractor.

8. The Petitioners on coming to learn about the said communication dated 17.06.2013, issued a communication to the Chief Engineer (Civil) of the Respondent No.2 dated 25.06.2013 for release of the said amount so deducted. It further appears that as the Respondent Authorities did not take any steps in that regard, a reminder was issued on 07.10.2013 followed by another communication dated 09.01.2014. On account of the non-payment of the deducted liquidated damages in spite of the recommendation being given by the Engineer-in-charge, the Petitioners being aggrieved have approached this Court under Article 226 of the Constitution.

9. It further appears from the records that the Respondent Nos. 2 to 7 have filed an affidavit-in-opposition on 05.08.2014. In the said affidavit-in-opposition, it has been mentioned that the requests and claims of the Petitioners were duly taken into consideration for the purpose of imposition of the liquidated damages. In that regard, the details have been furnished at paragraph No.4 of the said affidavit-in-opposition in the tabular form which for the sake of convenience is quoted hereinunder:

Yard No.	Schedule date of completion as per agreement	Actual date of completion	Total No. of delayed days (A)	Extension granted without LD (B)	Actual delay on which LD imposed (A-B)
101-102	26-09-08	12-06-10	623	127	496
103-104	08-02-09	21-01-11	711	200	511
105-106	08-02-09	21-01-11	711	200	511

10. It was further mentioned that pursuant to the deduction so made on account of liquidated damages while releasing the final bills, the Petitioner preferred an appeal before the Respondent No.2 giving reasons for the delay. The competent authority duly examined the case and had decided to levy liquidated damages upon the Petitioners on account of there being a delay of more than 20 weeks in respect to 2 (two) contracts and 17 weeks in 1 (one) contract. It was further mentioned that the said aspect of the matter was also duly intimated to the Petitioners vide a letter dated 01.08.2014. This Court finds it relevant at this stage to note that the said letter dated 01.08.2014 is not a subject matter of challenge.

11. It is pertinent at this stage to take note of that in the said affidavit-in-opposition, a specific and categorical stand was taken that in the contract agreement, there is a specific clause for arbitration and as such, the writ petition was not maintainable. It was further mentioned that as an adequate and efficacious remedy by way of arbitration was agreed to by the parties at the time of entering into the agreements and as the issues involved herein would entail adjudication of disputed questions of facts, the writ petition therefore ought not to be entertained.

12. It further transpires that without prejudice to the said contention that the writ petition ought to be dismissed on the ground of availability of an adequate and efficacious remedy, the Respondent No.2 to 7 have also refuted the case of the Petitioners on merits. It is further seen that pursuant to the filing of the affidavit-in-opposition, the Respondent Nos. 2 to 7 had also filed an additional affidavit on 20.01.2015 and another supplementary affidavit on 01.08.2023. Although, on various aspects of the matter, the Respondent Nos. 2 to 7 have refuted the claim of the Petitioners, but this Court taking into account the decision to be rendered herein finds it relevant to take note of the specific stand of the Respondent Nos. 2 to 7 as stated in their supplementary affidavit that the Engineer-in-charge had never conveyed his recommendation or certification for the waiver of the liquidated damages to the Petitioners as has been sought to be projected by the Petitioners. It was further mentioned that the Engineer-in-charge is only a Supervisory Officer under the Authority and does not enjoy any supervening power independent of the Authority. Further to that it was mentioned that the key operative provision of Clause 14 "Engineer-in-charge on behalf of the Authority" means Engineer-in-charge is authorized to certify in writing the waiver of liquidated damages only after the approval of the Competent Authority. It was therefore the specific stand of the Respondent Authorities that the Engineer-in-charge could have certified the claim of the Petitioner firm only on behalf of the Authority i.e. the Chairman, IWAI who was the signatory to the Agreement. It was further mentioned that the interdepartmental communications that are made, aids in the process of consideration for the appropriate decision making process but not the decision itself and hence cannot be relied upon as a basis to assert any claim therefrom. Further to that, it has been mentioned that the letters dated

01.02.2011 and 17.06.2013 were mere interdepartmental correspondences between the officers concerned to the contract work and the Petitioners' assertion of his claim for waiver of 10% LD on the basis of the said interdepartmental communications are not as per law for which the writ petition should be dismissed.

13. Before further proceedings, this Court further finds it relevant taking into account Clause-3 of the agreements entered into between the Petitioners and the Respondent No.2 wherein it has been stated that the General Conditions of Contract shall form a part and parcel of the Agreements in question. Clause 21 of the General Conditions of Contract stipulates Arbitration. The said Clause is quoted hereinunder:

“21. ARBITRATION

21.1. *Except as otherwise provided herein before, all questions, disputes or difference in respect of which the decision has not been final and conclusive arising between the contractor and the authority in relating to or in connection with contract shall be referred for arbitration in the manner provided as under and to the sole arbitrator appointed as follows:*

(i) Either of the parties may give to the other notice in writing of the existence of such question dispute or difference.

(ii) Within thirty (30) days of receipts of such notice from either party the Engineer-in-charge of work at the time of such dispute shall send to the contractor a panel of three persons and three after the contractor within fifteen (15) days of receipt of such panel communicate to the Engineer-in-charge the name of one of the person from such panel and such a person shall then be appointed a sole arbitrator by the Chairman IWAI. However, the arbitrator so appointed shall not be an officer or the employee of the inland waterways authority of India.

(iii) *Provided that if the contractor fails to communicate the selection of a name out of the panel so forwarded to him the Engineer-in-charge than after the expiry at the aforesaid stipulated period the Chairman IWAI shall without delay select one person from the aforesaid panel and appoint him as the sole arbitrator.*

21.2 *The arbitrator to whom the mater is originally referred being transferred or vacating his office or being unable to act for any reason, then the chairman shall appoint another person to act as sole arbitrator, such person shall be entitled to proceed with the reference from the stage at which the predecessor left it.*

21.3 *The award of the arbitrator shall be final and binding the arbitrator shall decide in what proportion the arbitrator's fees, as well as the cost of Arbitration proceeding shall be borne by either party.*

21.4 *The arbitrator with the consent of the parties can enlarge the time, from time to time to make and publish his award.*

21.5 *A notice of the existence in question dispute or difference in connection with the contract unless served by either party within 30 days of the expiry of the defects liability period, failing which all rights and claim under this contract shall be deemed to have been waived and thus forfeited and absolutely barred.*

21.6 *Where the amount of claim is Rs. 1,00,000 (Rs. ONE LAKH ONLY) and above the arbitrator shall give reasons for the award for each item of Rs. 75000 & more.*

21.7 *The work under this contract shall continue during arbitration proceedings and no valid payments due from or payment by the authority shall be withheld on account of such proceedings except to the extent, which may be in dispute.*

21.8 *The Arbitration and Conciliation Act, 1996 together with any statutory modifications or re-enactment thereof and the rules made there under for being in force shall apply to the arbitration proceeding under this clause.*

NOTE: *In case of contract with another public sector undertaking the clause 21.1 to 21.8 shall stand deleted and the following arbitration clause shall apply:*

“Except as otherwise provided in case of a contract with a Public Sector Undertaking if at any time any question dispute or difference whatsoever arises between the parties upon or in relation to, or in connection with this agreement, the same shall be settled by arbitration in term of the Ministry of Industry, department of Public/enterprises O.M. No. 3/5/93-PMA dt. 30.06.93 or any modification/amendments thereof.”

The Arbitrator shall have the power to enlarge the term to rate the award with the consent of the parties provided always that the commencement or continuation of the arbitration proceeding shall not result in cessation or suspension of any of other rights and obligations of the parties of any payments due to them hereunder.

The venue of the arbitration proceedings shall be at Noida. It is further clarified that both the parties to this agreement hereby undertake not to have recourse to civil court to solve any of their dispute whatsoever, arising out of this agreement except through arbitration.”

14. From the above quoted Clause more particularly Clause 21.1, it has been stipulated as what disputes can be referred to arbitration. Mr. D. Mozumder, the learned Senior counsel appearing on behalf of the Petitioners though submitted that the imposition of the liquidated damages have already attained finality and as such the arbitration clause cannot be adequate and effective remedy. This submission however has been refuted by Mr. S. Dutta, the learned Senior counsel appearing on behalf of the Respondent Nos. 2 to 7. This Court have given due consideration to the respective submissions. A perusal of Clause 21.1 stipulates that except as otherwise provided, all questions, disputes or difference in respect of which the decision had not been final and conclusive arising between the contractor and the authority in relation to or in connection

with the contract shall be referred for arbitration in the manner provided and the sole arbitrator to be appointed as stipulated in sub-clauses (i), (ii) and (iii). The use of word "final and conclusive" would only mean and has to be construed as such questions, disputes or difference which have attained finality on account of acceptance of the decision or have attained finality on the basis of the terms and conditions agreed upon by the parties. In the opinion of this Court, the decision as regards the imposition of liquidated damages was taken on 01.08.2014 i.e. much after the filing of the writ petition. The continuation of the litigation by way of the instant proceedings pursuant to the order dated 01.08.2014 further shows that the Petitioners have not accepted the order dated 01.08.2014 and as such, the dispute as to whether the imposition of liquidated damages upon the Petitioners in respect to the 3 (three) contracts in question was as per the terms and conditions of the contract continues to be alive and as such, the submission so made by Mr. D. Mozumder, the learned Senior counsel appearing on behalf of the Petitioners to the effect that the arbitration clause cannot be made applicable in the opinion of this Court is misconceived.

15. This Court further finds it relevant to take note of that from the respective stands taken by both the parties, the dispute which arises is as regards the interpretation of Clause 14 of the Special Conditions of Contract which empowers the Respondent No.2 to impose liquidated damages on fulfilling certain conditions stipulated therein. Mr. D. Mozumder, the learned Senior counsel appearing on behalf of the Petitioners submitted that the recommendation so given by the Director of IWAI, Guwahati who was the Engineer-in-charge vide the communications dated 01.12.2011 and 17.06.2013 are certifications given by the Engineer-in-charge that the delay was

occasioned due to reasons beyond the control of the contractor i.e. the Petitioners and as such, the imposition of liquidated damages on the basis of Clause 14 is liable to be interfered with.

16. On the other hand, Mr. S. Dutta, the learned Senior counsel has submitted that the Engineer-in-charge acts on behalf of the Authority and as such, he does not have any independent supervening power to give any certification without taking the approval of the Competent Authority. He therefore submits that a perusal of the communications dated 01.12.2011 and 17.06.2013 would clearly show that the Engineer-in-charge had not certified and had only recommended. Further to that, Mr. S. Dutta, the learned Senior counsel for the Respondent Nos. 2 to 7 submitted that a perusal of Clause 14 would also show that for the purpose of invoking the Force Majeure clause, there is a requirement on the part of the contractor to notify within 15 days of the alleged beginning and ending thereof giving full particulars and satisfactory evidence in support of such cause. He submits that this recommendation has been made pursuant to the completion of the contract and as such the exception for not invoking the liquidated damages as stipulated in Clause 14 shall not apply.

17. From the above submissions so made by the learned counsels for the parties and from a perusal of the pleadings and documents available on record, it transpires that the dispute involved herein not only touches on the interpretation of Clause 14 of the Special Conditions of Contract but would also require various documents to be taken note of as to whether the Force Majeure clause could have been invoked after the completion of the contract or there are documents to the effect that during the period of the contract, steps

were being taken by the contractor i.e. the Petitioners for the purpose of invoking the Force Majeure clause.

18. Now coming to the Arbitration Clause i.e. Clause 21.1, it would show that all questions, disputes or differences in respect of which a decision had not been final and conclusive arising between the contractor and the authority in relating to or in connection with the contract has to be referred for arbitration. This Court cannot also be unmindful of Section 5 of the Arbitration and Conciliation Act, 1996 which stipulates that in respect of all matters governed by Part-1 i.e. domestic arbitration, no judicial authority shall intervene except where so provided in the said Part. Taking into account that the disputes involved herein pertain to interpretation of Clause-14 of the Special Conditions of Contract which touches on as to whether a recommendation so made by the Engineer-in-charge after completion of the contract can be construed to be a certification in terms with Clause-14 of the said Special Conditions of the Contract and also taking into account that various factual determinations have to be made, it is the opinion of this Court that the interest of justice would be met if the parties are referred to under Section 8 of the Arbitration and Conciliation Act, 1996 by this Court rather than adjudicating the dispute before this Court. This conclusion so arrived is based upon the reasons that the determination required to be made would entail adjudication of disputed questions of facts and law and further the materials before this Court would not be sufficient to adjudicate such questions.

19. At this stage, this Court further finds it relevant to refer to a judgment of the Supreme Court in the case of ***State of Goa Vs. Praveen Enterprises reported in (2012) 12 SCC 581*** and more particularly paragraph No.13 which connotes

what does the reference to arbitration mean. The said paragraph is reproduced hereinunder:

“13. “Reference to arbitration” can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While Section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide sub-section (6)], Section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject-matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application under Section 11 of the Act for appointment of an arbitrator. The judicial authority “referring the parties to arbitration” under Section 8 of the Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.”

20. Taking into account the above paragraph of the judgment in the case of **Praveen Enterprise (supra)**, this Court therefore refers the parties herein to arbitration and leaving the parties to take recourse to their remedies by way of arbitration. It is further made clear that the parties before this Court may either agree upon an arbitrator and refer their disputes to him/her or failing agreement would be at liberty to take recourse to the provision of the Arbitration and Conciliation Act, 1996.



21. Before parting with the records, this Court finds it relevant to observe that the observations made herein shall not affect the claims and counter claims of the parties, if they resort to Arbitration for resolving the disputes involved.

22. With above observations and directions, the instant writ petition stands disposed of.

JUDGE

Comparing Assistant