



GAHC010163302023

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

Case No. : WP(C)/4297/2023

SUBHASHIS CHAKRABARTY
S/O- SATIRANJAN CHAKRABORTY ,
R/O- B.T ROAD, BONGAIGAON,
P.O AND P.S- BONGAIGAON,
DIST- BONGAIGAON, ASSAM,

VERSUS

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY ITS SECRETARY, MINISTRY OF INDIAN RAILWAYS,
RAIL BHAWAN , RAISINA ROAD, NEW DELHI-01

2:THE NORTH EASTERN FRONTIER RAILWAY
REPRESENTED BY ITS GENERAL MANAGER (CONSTRUCTION) MALIGAON
GUWAHATI-12

3:THE DEPUTY CHIEF ENGINEER (CONSTRUCTION)
NORTH EASTERN FRONTIER RAILWAYS
ALIPURDUAR JUNCTION

4:THE SENIOR ACCOUNTS OFFICER (CONSTRUCTION)
NEW JALPAIGURI
NORTH EAST FRONTIER RAILWAY
WEST BENGAL
PIN-73400

Advocate for the Petitioner : MR. N N B CHOUDHURY

Advocate for the Respondent : D.Y.S.G.I.



**BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

JUDGMENT

Date : 14-03-2024

1. Heard Mr. NNB Choudhury learned counsel for the petitioner. Also heard Mr. K Gogoi learned CGC representing the Railways.

2. The present application under Article 226 of the Constitution of India is preferred by the petitioner assailing a letter dated 01.03.2023 issued by the Deputy Chief Engineer (Construction) North East Frontier Railway, whereby the petitioner was intimated that the petitioner shall not be entitled for benefit under Price Variation Clause (PVC) as the contract value of tender is less than 5 crore, to be more precise Rs.4,53,21,255.25.

3. The basic grievance of the petitioner is that as per the tender notice for execution of the work of construction of 12 numbers of double storied type II quarters at Bongaigaon and Barpeta Road etc, the tender value was fixed at Rs.5,61,10,418.74. In terms of clause 6 of the tender condition price variation clause (PVC) is not applicable for tenders having value less than 5 crores and therefore in view of such clear provision, and the tender value being over 5 crore, the petitioner is entitled for price variation clause (PVC) inasmuch as the petitioner offered his rate on the basis of such condition.

4. Mr. Choudhury learned counsel for the petitioner further contends that pursuant to the acceptance of the bid of the petitioner, a contract was executed between the petitioner and the

respondent Railways on 28.08.2020 inasmuch as the petitioner offered a value for execution of the contract for Rs. Rs.4,53,21,255.25. Clause 46 A of the contract prescribes that price variation clause (PVC) shall be applicable only in those contracts where tender conditions specifically permits.

5. Referring to such clause Mr. Choudhury contends that such clause clearly stipulates that applicability/availability of price variation is to be decided on the basis of the tender condition and value. In the case of the present tender, clause 6 of the tender condition clearly stipulates that PVC shall be applicable when tender value is more than 5 crores. Accordingly Mr. Choudhury contends that when it is clear that tender value is more than 5 crores, the price variation clause shall be applicable in the case of the petitioner, irrespective of offer of lesser value than the tender value. According to him, there is a mark distinction between the tender value and contract value, however both the condition stipulated in the tender as well as in the special condition of contract, it is prescribed that it is the tender value which shall determine the applicability of the price variation clause and therefore, the petitioner in the given facts of the case is entitled for benefit of price variation clause.

6. Mr. Choudhury further contends that even clause 46A of the General Condition of Contract of 2019 (GCC 2019) substantiate such claim. Therefore, the rejection of such claim of the petitioner for price variation on the ground of a decision made by the Railway Board in the year 2014 and subsequent order issued on 2018 cannot be a ground of such rejection in derogation of the tender condition,

conditions under special condition of contract and the conditions under GCC inasmuch the GCC 2019 was incorporated on 06.09.2019 and such condition nowhere stipulates the purported determination of the Railway Board and the subsequent communication issued in the year 2018 prescribing that it is the contract value and not the tender value which is the basis of a grant of price variation clause.

7. Per contra Mr. K Gogoi learned counsel submits that though a question has been raised as regards interpretation of the condition of contract as well as tender value in terms of the GCC, SCC and tender condition, the petitioner is having an alternative remedy of arbitration and therefore this writ court may not like to exercise its extra ordinary jurisdiction to decide an issue relating to private law remedy and not to public law remedy.

8. On merit of the claim, Mr. Gogoi contends that the value of the contract is the important condition for grant of benefit of PVC and not the tender condition for the reason that such stand has been clarified by the Railway Board way back in the year 2014 and such decision of the Railway Board was reiterated by an office notification dated 08.02.2018.

9. Mr. Gogoi, referring to the affidavit in opposition filed by the railways further contends that the amount of applicability of PVC has been increased above 5 crores by a policy dated 08.02.2018 issued by the railways. The said policy has been issued in terms of the clarification given by the Railway Board and prescribed that contract value should be the basis of entitlement of PVC and not the tender value and such clarification was made on 15.10.2014 by the Board.



Therefore, the Contract should be read with the decision of the Railway Board dated 15.10.2014 and the petitioner being a prudent businessman having contract with the railway ought to have been aware of such condition and would have offered his rate. The petitioner being a contractor under railways must be aware that it is the contract value and not the tender value on the basis of which the PVC shall be made applicable inasmuch as such clarification was issued on 15.10.2014 by the Railway Board itself i.e, prior to the issuance of the tender in the year 2019. Accordingly, Mr. Gogoi submits that this writ petition is liable to be dismissed.

10. Countering such argument of Mr. Gogoi, Mr. NNB Choudhury argues that in absence of incorporation of the purported policy of the railways dated 15.10.2014 in the GCC 2019, the same cannot have a binding effect upon the petitioner inasmuch as even in the SCC there was no clarification as regards the policy decision dated 15.10.2014 or dated 08.02.2018. That being the position such hidden criteria cannot bind the petitioner. In support of such contention Mr. Choudhury relies on the decision of this Court in ***Educomp Solutions Ltd and Others Vs. State of Assam and Others*** reported in **2006 (2) GLT 775**.

11. I have given my anxious consideration to the submissions advanced by the learned counsel for the parties.

12. Let this court first answer the issue that has been raised by the learned counsel for the railways as regards the scope of judicial review against the impugned action.

13. The hon'ble Apex Court in ***ABL International Ltd vs.***

Export Credit Guarantee Corporation of India Ltd reported in **(2004) 3 SCC 553**, dealing with a issue of interpretation of an Insurance claim, after elaborately discussing earlier decisions of the Apex Court, laid down the certain principles as regards exercise of power of judicial review in matters relating to contract. Such principles can be culled out as follows:-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

(d) However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power.

(e) This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for

other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

14. The hon'ble Apex Court in ***Bareilly Development Authority and another Vs. Ajai Pal Singh and others*** reported in ***(1989) 2 SCC 116*** and in ***Radhakrishna Agarwal and ors Vs. State of Bihar and Ors*** reported in ***(1977) 3 SCC 457*** held that in case of a non statutory contract, the rights are governed only by the terms of the contract. Dealing with the aforesaid two opinions i.e., rendered in **ABL** (supra) and **Bareilly Development** (supra) and other cases where Bareilly development has been followed, the Hon'ble Apex Court in the case of ***M.P. Power Management Company Limited Vs. M/S Sky Power Southeast Solar India*** reported in ***(2023) 2 SCC 70***, held that in view of ratio laid down in **ABL** (supra), the principle laid down in Bareilly Development Authority (supra) and the decisions followed on such principle including Radhakrishna (supra) may not continue to hold good.

15. The Apex Court in MP Power Management company (supra) after elaborate discussion of previous judgments of the hon'ble Apex Court laid down certain principles which are culled out in the following manner:

I. The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent-State in a case by itself to ward-off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/ inaction is, per se, arbitrary.

II. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to contract with the State, to seek relief by filing a Writ Petition.

III. The existence of an alternate remedy is undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner to be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought for.

IV. The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.

V. In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible.

VI. However, it must be clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved

in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle.

16. It is also clear that the Railway who is an instrumentality of State placing reliance on a Railway Board decision relating to GCC 2014 has denied grant PVC benefit, which is available in the tender Condition, GCC 2019 and the Contract between the petitioner and the railways. Merely because the Railway wants to implement a policy of Railway Board relating to PVC clause of GCC 2014 in the contract in question without same being incorporated in the GCC 2019, it does not become a disputed question of fact or becomes a complex issue relating to the contract. In the considered opinion of this court in the backdrop of the given facts the issue to be determined and as discussed hereinabove whether the Railways action to bring the policy of the Railway Board relating to GCC 2014 to the GCC 2019 in derogation of the availability of PVC clause under GCC 2019 is an arbitrary action.

17. Now therefore this Court is to consider the present case in the touchstone of the aforesaid principles of law, more particularly, whether the action of the respondent state in issuing the impugned order is vitiated by arbitrariness resulting in infringement of the petitioners right under article 14 of the Constitution of India so as to enable this court to exercise its power of judicial review in a case when the contract in question is admittedly non statutory contract and there is availability of alternative remedy of arbitration.

18. When a decision making process and a decision are based on irrelevant facts while ignoring relevant considerations such

actions reflects arbitrariness.

19. Once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, while passing the impugned decision, if the respondent as instrumentality of the State has acted in contravention of the said requirement of Article 14, this Court will have no hesitation to hold that that this court can issue suitable directions to set right the arbitrary actions of the railways.

20. Coming to the facts, the dispute between the party is whether the price variation clause incorporated in the GCC 2019 and SCC has become redundant for the reason of the decision of the Railway Board taken in the year 2014 and clarified on 08.02.2018 and whether in absence of such policy not being incorporated in the GCC of 2019 and SCC, the decision of the Railway Board not to grant the benefit of the clause of contract shall amount to an arbitrary action infringing the right of the petitioner under Article 14 of the Constitution of India.

21. The fact of issuance of notification dated 08.02.2018 and non inclusion of such policy in the GCC 2019 and SCC remains undisputed. The relevant paragraph 8 of the communication dated 08.02.2018 on the basis of which the claim of the petitioner has been rejected is quoted hereinbelow:

“Price variation Clause (PVC) in Works contract is dealt with in accordance with provisions of item 46A of GCC-July 2014.

In order to simplify and enhanced the pace of works, it has been decided to remove the PVC clause in all works contract tenders having value less than 5 crores.”

22. Thus it is clear that such decision relates to the GCC-July 2014. The decision of the Railway Board dated 15.10.2014 which is also brought on record which reads as follows:

46.A.1: Applicability

Price variation clause (PVC) shall be applicable only for contract of value as prescribed by the Ministry of Railways through instructions/circulars issued from time to time and irrespective of the contract completion period. Variation in quantities shall not be taken into account for applicability of PVC in the contract.

Materials supplied free of cost by Railway to the contractors shall fall outside the purview of Price Variation Clause. If in any case accepted offer includes some specific payment to be made to consultants or some materials supplied by Railways free or as fixed rate, such payment shall be excluded from the gross value of the work for the purpose of payment/recovery of price variation.

23. From the aforesaid determination it is not discernible whether there is any correlation between the decision as regards applicability of 46A.1 which is an addendum to GCC July 2014 and the paragraph 8.0 of communication dated 08.02.2018.

24. In terms of tender notice dated 13.12.2019 the value of tender was Rs.56110418.74. The clause 6 of the tender notice declares that Price variation clause (PVC) is not applicable for tender having value less than 5 crores.

25. Chapter III of the special condition of contract which deals with price variation and arbitration, under clause 46.A.1 declares that PVC shall be applicable in contracts where the tender condition specifically permits. The GCC 2019 also declares pari-materia clause as that of clause 46.A.1 of special condition of contract. Thus, when it is not in dispute that the value of tender was more than 5 crores, therefore, in terms of GCC 2019 PVC shall be applicable in the case in hand.

26. In terms of the letter No.2017/TRANS/01 dated 08.02.2018 under paragraph 8.0, as quoted hereinabove, it was decided to remove the PVC clause in all work tender having value less than 5 crores. Such communication was issued in terms of a Railway Board decision relating to GCC 2014.

27. On the basis of such a decision dtd.08.02.2018, the claim of the petitioner for PVC was rejected. As discussed hereinabove, it is crystal clear that in the terms of the Tender Notice dated 13.12.2019, the GCC 2019 and the Contract agreement dated 28.08.2020, the PVC is applicable inasmuch as the PVC is dependent on the tender value and not on the contract value.

28. In the case at hand, the tender value was Rs. 5,61,10,418.74 and the contract value was Rs.4,53,21,255.25. The notification dated 08.02.2018 was issued on the basis of a policy



decision taken by the Railway Board in the year 2014 relating to an addendum to GCC 2019. There is no doubt that the Railway Board has the power to take such a policy decision. However, even in the given facts of the present case and from the annexure (1) annexed to the affidavit in opposition filed by the railways, it is clear that the price variation clause under para 8.0 of the communication dated 08.02.2018 deals with the Clause 46 of GCC of 2014 only and it is an admitted position that after 2014 many GCC's were notified and incorporated and the contract entered into between the petitioner and the railways is based on the GCC 2019 and neither the Policy relating to GCC 2014 was incorporated in GCC 2019 nor any policy of the Railway Board has been brought on record whereby any modification was issued to the GCC 2019 so far relating to applicability of PVC.

29. It is an admitted fact that the determination and the decision made by the Railway Board in the year 2014 by suggesting removal of PVC clauses in GCC 2014 relating to contract value of less than five crores has not been incorporated in the subsequent GCC or the special condition of contract. Therefore it cannot be presumed that in absence of such condition or declaration either in GCC 2019, Tender Conditions and the Contract, the policy taken by the Railway Board in the year 2014 shall continue until and unless it is not withdrawn, more particularly, for the reasons that such policy is not incorporated in the GCC 2019 and the SCC as well as in the tender document, inasmuch as such policy itself relates to GCC 2014.

30. In the aforesaid factual backdrop, this court is of the unhesitant view that the nature of relief sought by the petitioner and



the determination that is required to be made do not involve any disputed questions of fact and what is required is the applicability of the decision of the Railway Board dated 15.10.2014 and the resultant applicability of paragraph 8.0 of the communication dated 08.02.2018.

31. In view of the discussions made hereinabove, the denial of PVC on the basis of the communication dated 08.02.2018 and Railway Board's decision taken on 15.10.2014 ignoring the admitted position of having PVC clause under the tender and the contract, in the considered opinion of this court is a palpably unreasonable action on the part of the respondents resulting in arbitrariness and miscarriage of justice. Such action in the considered opinion of this court is a result of total non application of mind.

32. Accordingly this Court shall be within its power of judicial review to interfere with the action of the railway authority, which resulted in violation of the valuable right under article 14 of the Constitution of India. Accordingly this writ petition stands allowed.

33. The impugned order dated 01.03.2023 stands set aside and quashed. The competent authority, more particularly the respondent Nos.3 and 4 shall now determine the claim of the petitioner as per law and in terms of the contract taking note of the determination made in this writ petition.

JUDGE

Comparing Assistant