
(2019) 04 DEL CK 0044

In the Delhi High Court

Case No : Civil Writ Petition No. 3375 Of 2019, Civil Miscellaneous No. 15459 Of 2019

Chenab Bridge Project Undertaking

APPELLANT

Vs

Northern Railway And Anr

RESPONDENT

Date of Decision : 08-04-2019

Acts Referred:

Citation : (2019) 259 DLT 794 : (2019) 7 AD(Delhi) 295

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Mukul Rohatgi, Dayan Krishnan, Anirudh Krishnan, Balaji Srinivasan, Adarsh Subramanian, Hitesh Kumar, Garima Jain, Pallavi Sengupta, Siddhant Kohli, J.K.Singh, Madhulika Agrawal, Harsh Pandit, Kiran Bhagalia, Suchitra A. Chitrate, Pallavi Bali

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

1. The present petition has been filed by the petitioner / Chenab Bridge Project Undertaking with the following prayers:

"In view of the above, the Petitioner humbly prays that this Hon'ble Court may be pleased to issue:

i. Any writ, order or direction in the nature of mandamus and/or any writ, order or direction directing the Respondents to enforce the findings in the minutes of Meeting dated 15.05.2018 signed by the Respondent No.1;

ii. Any writ, order or direction in the nature of certiorari and/or any writ, order or direction to quash the impugned notice dated 27.03.2019 issued by the Respondent No. 3;

iii. Any writ, order or direction in the nature of mandamus and/or any writ, order or direction to the Respondent No. 3 directing it enter in to supplementary

agreements with the Petitioner and thereby act in adherence of Clause 41 of the GCC and to conclude the variations at the earliest;

iv. For such further and other orders as the nature and circumstances of the case may require and costs, if any against the Respondents for this petition."

2. Some of the relevant facts as noted from the writ petition are, pursuant to a tender process initiated by respondent no.2, Konkan Railway Corporation Limited (KRCL), the petitioner was awarded the contract for design and construction of a Special Bridge across the River Chenab at Kilometer 50/800 on the Katra - Laole Section of Udhampur-Srinagar-Baramulla Rail Link Bridge. The duration of the contract was set at 30 months with a date of completion as April 30, 2007. There is no dispute that the contract has not yet been completed.

3. It is the case of the petitioner, that on April 4, 2005, it had submitted a revised Design Based Note (DBN) complying with modifications, to DBN submitted with Tender, proposed by the Respondent No.2 and on June 2, 2005, the respondent no.2 KRCL provisionally approved the said DBN. It is also pleaded that KRCL on its own issued revised DBN on September 5, 2006. Subsequently on April 23, 2010, final DBN was issued by KRCL. As on date it is the DBN of 2010, which is valid, with correction slips to the same having been issued in 2011 and 2013.

4. It is the case of the petitioner that it must be paid for difference in quantities of structural steel between tender DBN and 2010 DBN. For the purpose of reaching a via-media in the interregnum the petitioner was willing to accept payment for the difference in quantities issued between 2005 DBN and 2010 DBN. It is the case of the petitioner that on May 15, 2018, deliberations have been held when the officer of the Northern Railway, for whom respondent no.2 is executing the project, was also present, wherein the following decision was taken:

Sl. No.

Item

Remarks / Status

2.

Commercial issues of enhanced steel quantity

It has been jointly decided that KRCL will forward the details submitted by WSP, (designer of this bridge) regarding enhanced quantity of steel over and above approved DBN of 2005 to M/s Flint & Neill, the proof checker. CBPU should arrange to provide any additional information, if asked by M/s. Flint & Neil. KRCL should organize a meeting of the designer and the proof of checker to conclude this issue expeditiously.

5. It is their case that the minutes of meeting dated May 15, 2018 needs to be

implemented. It is averred that further the KRCL on August 29, 2018 contended that the statement in the minutes of meeting dated May 15, 2018 is only advisory and on November 6, 2018 issued a letter enclosing therewith a letter of respondent no.1 negating the promise made in the minutes of meeting dated May 15, 2018. It appears, the petitioner has informed the KRCL that it was unable to proceed with the work on the ground that several modifications / variations brought about by respondent no.2 KRCL attracted Clause 41 of GCC whereby the petitioner ought not to proceed with the work until supplementary agreements are entered into by the parties for such modifications / variations.

6. It is noted that on March 27, 2019, respondent no.2 invoked clause 62 of the GCC by issuing a show-cause notice giving petitioner 7 days' time to commence the work to make good the progress failing which further action as provided under Clause 62 of the GCC, viz., terminating the contract between respondent no.2 KRCL and the petitioner and a decision to complete the work at the petitioner's risk and cost would be taken.

7. Mr. Mukul Rohatgi and Mr. Dayan Krishnan, learned Sr. Counsels appearing for the petitioner submitted that they are conscious that an arbitration clause exists in the agreement executed between the petitioner and the KRCL, but as this petition has been filed seeking a direction to the Northern Railway to implement the Minutes of the Meeting dated May 15, 2018, the present petition is maintainable. It is their submission that the project being of national importance, respondent no.1 was actively involved in the project monitoring / execution of the project even though they are not signatory to the contract with the petitioner. In other words, the most crucial decisions in respect to the project have always been taken pursuant to the approval of the respondent no.1. So, the appropriate remedy is to invoke the writ jurisdiction of this court for a direction to the respondent no.1 to ensure the implementation of the minutes of the meeting dated May 15, 2018. It was submitted by them that on July 6, 2018 the parties acted in furtherance of the decision dated May 15, 2018, inasmuch as the required documents have been submitted to the proof-checker and in fact CAO instructed the KRCL to ask the proof-checker to expedite the proceedings. They stated that the stand of the respondent KRCL in the letter dated August 29, 2018 is that the minutes of the meeting dated May 15, 2018 are only advisory is untenable. Even the letter dated November 02, 2018 of respondent no.1 has been issued by completely ignoring the Minutes of Meeting dated May 15, 2018. According to them, the increase in structural steel quantities have to be decided due to changes in DBN. It is their submission that DBN 2006 was neither approved nor implemented at any point of time. In fact, final DBN of 2005 incorporated the suggestions given by the petitioner. It was their submission that based on DBN 2005, the petitioner had altered its position by executing works based on the said approved DBN, therefore the respondents are estopped from going back on their promise. So, in substance, their submission was, as the increase in structural steel is relatable to variations / modifications in the work, clause 41 of the GCC gets attracted and the parties mandatorily have to enter

into a supplementary agreement incorporating the agreed terms and conditions before the work continues. They stated that despite requests to the respondents to enter into supplementary agreement on agreed terms and conditions so that the work can be resumed, the same has not been acceded to. Mr. Rohatgi and Mr. Krishnan had relied upon the following judgments of the Supreme Court and this Court in support of their submissions about the maintainability of the writ petition despite an arbitration clause which according to them shall not be applicable as the writ petition has been filed seeking a direction against the Northern Railway to implement the minutes of meeting dated May 15, 2018.

1. Union of India and Ors. v. Tania Construction Pvt. Ltd. 2011 5 SCC 697

2. Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd. 1983 2 SCC 379

3. LPA 57/2019 NTPC Ltd. and Anr. V. M/s BGR Mining and Infra Ltd.

8. On the other hand, Ms. Kiran Bhagalia, learned counsel for the respondent no.2 / KRCL had challenged the maintainability of the petition on three grounds; (i) the plea of the petitioner that for the limited relief sought for, i.e., implementing the minutes of meeting dated May 15, 2018 by the Northern Railway, the writ petition is the only remedy, is untenable as the contract for the design and construction of a special bridge across the river Chenab has been executed by the petitioner with the respondent no.2 and the issue in question about the increase in the structural steel is a related issue with contract and the petition under the garb of seeking a direction against the Northern Railway is not maintainable; (ii) there is an arbitration clause in the agreement executed between the petitioner and the respondent no.2 and any dispute between the parties needs to be decided through the arbitration; (iii) there are disputed question of facts and the writ petition is not an appropriate remedy.

9. On merit it was her submission that the 2005 DBN was provisional and this fact had not been contested by the petitioner at any point of time. It was in the year 2006 that DBN was approved and the same should be the basis for calculating the increase in steel till 2010. It was her submission that the only stand of the petitioner throughout, had been that it is entitled to extra cost because of the increase in the steel. It did not at any point of time sought modification of contract. In fact, according to her, the petitioner had been raising bills, which were being duly paid. Ms. Bhagalia during her submissions had drawn a distinction between clauses 39 and 41 of the contract to contend that the contract being for lumpsum amount, the increase in quantities required no modification. She also stated that clause 41 says, if the parties think that the contract needs to be modified, then only it can be modified. She admitted that respondent no.2 is required to pay the petitioner for the extra material used in the execution of the work. She also stated no supplementary agreement can be executed without quantities and rates being determined. In other words, if the quantities and rates are fixed, the supplementary agreement can be executed.

She justifies the show-cause notice dated March 27, 2019 issued by invoking clause 62 of the GCC. She stated that a Mandamus cannot be sought by the petitioner against the respondent no.2, not to exercise the right under the contract. It was her plea that the filing of the writ petition by the petitioner is not bona fide and liable to be dismissed. She relied upon the following judgments of the Supreme Court in support of her submissions:

1. Rajasthan State Industrial Development and Investment Corporation and Anr. V. Diamond and Gem Development Corporation Limited and Anr. 2013 5 SCC 470.

2. State of Jammu and Kashmir v. Ghulam Mohd. Dar and Anr. 2004 12 SCC 327

3. Pimpri Chinchwad Municipal Corporation and Ors. v. Gyatri Construction Company and Anr. 2008 8 SCC 172

4. State of Bihar and Ors. v. Jain Plastics and Chemicals Ltd. 2002 1 SCC 216

5. Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd. 2004 4 SCC 671

10. Mr. J.K. Singh, Adv. who appeared for the respondent /Northern Railway had submitted that the project, even though of Northern Railway, the same is being executed through the aegis of respondent No.2 / KRCL which had issued the tender and awarded the contract. According to him, there is no agreement between the Northern Railway and the petitioner and the agreement is between the petitioner and the respondent no.2 and all financial and commercial terms have to be looked into by respondent no.2 based on the contractual stipulations.

11. Having heard the learned counsel for the parties, the issue which arises for consideration is whether a direction can be issued to respondents including the Northern Railway to implement the minutes of the meeting dated May 15, 2018.

12. There is no dispute that the Project in question falls under the Northern Railway Zone of Indian Railways. The Northern Railway decided to get the same executed through respondent no.2 KRCL. It is the KRCL which issued the tender. It also issued the Letter of Acceptance to the petitioner, on being found successful in the tendering process. The contract incorporates all technical and commercial terms relatable to the project. The contract has also an arbitration clause in terms of the arbitration agreement executed between the parties on February 28, 2012.

13. The plea of Mr. Rohatgi and Mr. Krishnan was, since the proceedings dated May 15, 2018 were held under the aegis of Northern Railway, whose project is being executed by the KRCL, the Northern Railway should ensure that the minutes of meeting dated May 15, 2018, more specifically item no.2 thereof is implemented and a supplementary agreement is executed on the basis of the said decision. The plea of the counsel for the respondent Northern Railway is that any financial / commercial terms has to be decided by KRCL based on the contract stipulations. In other words, the issue of increase in structural steel, whether based on DBN 2005 or DBN 2006 needs to be looked into by the KRCL

in terms of the stipulations in the contract. If that be so, the petition against Northern Railway is not maintainable as the issue raised, which is noted above is an issue connected with the contract executed between the petitioner and the KRCL and not Northern Railway. If a need is felt by the petitioner, at a later point of time to establish the purport of the minutes of the meeting dated May 15, 2018 to mean that extra steel has to be calculated on the basis of DBN 2005, the petitioner can summon the officer present for the Northern Railway in such proceedings, that are initiated finally including Arbitration Proceedings.

14. That apart, I find after the meeting of May 15, 2018, the parties, i.e., the petitioner and the respondent no.2 KRCL have moved much forward, as can be seen from the various communications / documents annexed from Page 252 onwards of the writ petition, a perusal of the same does reveal that there is a dispute which has arisen between the petitioner and the KRCL and the same necessarily has to be decided by the Arbitral Tribunal, on the same lines of previous 19 claims filed by the petitioner, as submitted by Ms. Bhagalia during her submissions. Moreover, the arbitration is the appropriate remedy when disputed questions of fact arise, as can be inferred from the above, which cannot be decided on the basis of affidavits (Ref. State of Jammu and Kashmir v. Ghulam Mohd. Dar and Anr. (Supra))

15. What is glaring in this case is that filing of the present petition has got triggered because of the issuance of the show-cause notice dated March 27, 2019 as is clear from the proximity between the date of show-cause notice, i.e., March 27, 2019 and filing of the writ petition on April 1, 2019. So, the show-cause notice is only a ploy for the petitioner to approach this court (after at least 10 months) on the pretext of seeking an implementation of the minutes of meeting dated May 15, 2018, as I note the petitioner has also challenged the show-cause notice dated March 27, 2019.

16. It is a settled position of law by the Supreme Court in the case of Union of India v. Kunisetty Satyanarayana 2006 12 SCC 28, wherein the court has deprecated the practice of entertaining writ petitions questioning the legality of the show-cause notice, stalling the enquiries as proposed and retarding investigation into facts, except it is a case of absolute want of jurisdiction of the authority to investigate into the facts, the writ petition will not be entertained on the mere asking and as a matter of routine. The said position of law squarely applicable in the facts of this case as I have been informed that the petitioner has responded to the show-cause notice by filing a reply to the same on March 31, 2018 and a decision is yet to be taken by the competent authority on the said show-cause notice. It goes without saying that an order to be passed by the authority concerned shall be subject to arbitration proceedings as agreed to between the parties to the contract.

17. In so far as the judgments relied upon by Mr. Rohatgi and Mr. Krishanan in the case of Tania Construction Pvt. Ltd. (supra) and Joshi Technologies (supra) on the proposition of law that arbitration clause is not a bar to invoke the writ

jurisdiction when injustice is caused and rule of law is violated is concerned, there is no dispute on the said proposition, but it must be noted, as stated during submissions that the petitioner herein has made 19 claims against the respondents before the Arbitral Tribunal. There is no reason why deviation should be made, only on the ground that the petition is directed against Northern Railway, which plea is without merit, being not maintainable, in facts. Suffice it to state the Judgments are distinguishable on facts.

18. Similarly, in so far as the Judgment relied upon by Mr. Rohatgi and Mr. Krishnan in the case of Gujarat State Financial Corporation (*supra*) is concerned, the same would not be relevant to the facts of this case.

19. In view of my discussion above, this court is of the view that the present petition is not maintainable and is liable to be dismissed. Ordered accordingly.

CM. No. 15459/2019 (for Stay)

Dismissed as infructuous.