

(2022) 03 DEL CK 0060

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 79 Of 2022, I.As. No. 3783-3784 Of 2022

Shubham Hp Security Force Private Limited And Anr.

APPELLANT

Vs

Central Warehousing Corporation

RESPONDENT

Date of Decision : 11-03-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9
Specific Relief Act, 1963 — Section 14(d), 41

Citation : (2022) 03 DEL CK 0060

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Kirti Uppal, Sidharth Chopra, Riya Gulati, Aditya Awasthi, Anish Dewan, Navneet Thakrar

Final Decision : Dismissed

Judgement

Sanjeev Narula, J

1. Central Warehousing Corporation ["CWC"] is a Public Sector Undertaking engaged in the activity of operating warehouses, Inland Container Depots ["ICD"], and Container Freight Stations ["CFS"] across the country. For the purpose of handling and transporting containers, maintenance and operation of CFS Dronagiri Node, Navi Mumbai (one of the CFS owned by CWC), which caters to the export and import of cargo at the Jawaharlal Nehru Port ["JNPT"], a tender was issued and pursuant thereto, the proposal of Shubham HP Security Force Pvt. Ltd. [hereinafter "Shubham"] was accepted. A Strategic Alliance Management Agreement dated 18th April, 2020 was executed between the parties, for a term of fifteen years [hereinafter "SAMA"].

2. The aforesaid Agreement has now been terminated for the third time vide Notice dated 16th November, 2021 [hereinafter "Termination Notice #3"] by CWC. Aggrieved, Shubham has invoked Section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"] and seeks an order restraining CWC

from acting on the said termination notice.

Salient Terms and Conditions of SAMA

3. Before adverting to the previous litigation history between the parties, it would be apposite to briefly note some of the salient terms of SAMA, which are as under:-

(i) The scope of SAMA is defined in Article 2 whereby Shubham was awarded the contract for, inter alia, taking all steps for operation and maintenance of CFSs and to function under the overall control and supervision of CWC.

(ii) Article 3.1 provides for the term of the contract as fifteen years.

(iii) Article 5 provides the rights and obligations of Shubham including the obligation to bear all costs and expenses during the operation of SAMA.

(iv) Article 6.1 stipulates that the consideration be paid on a revenue-sharing basis by Shubham to CWC. The consideration comprises, inter alia, of the following components (besides an addition to the cost and expenses which are required to be borne by Shubham):

a. Fixed amount of Rs. 4,00,05,001/- p.a.

b. A variable amount of Rs. 626 per container with Minimum Guaranteed Throughput ["MGT"] of 60,000 containers p.a. (i.e., 5,000 containers p.m.)

c. Revenue Share @ 2% of the Total Turnover.

(v) Clause 6.1(h) entails the mechanism of payments, receipts, and disbursements, whereby payments made by the customers availing services of this CFS shall be collected/ received by CWC. After adjusting the amounts payable to CWC on a fortnightly pro-rata basis, the balance shall be remitted to Shubham.

(vi) Clause 6.1(h)(vi) provides for CWC to recover the short-fall towards Fixed Amount/ Variable Amount from Shubham. If Shubham fails to pay the same, the amounts could be recovered through the encashment of Bank Guarantees.

(vii) Clause 6.2 stipulates the obligation of Shubham to maintain the Bank Guarantee equivalent to annual Fixed and Minimum Guaranteed Variable amounts, at all times.

(viii) Clauses 6.2(c) and (d) provide for CWC to recover the money from Shubham through encashment of Bank Guarantee in case Shubham fails to make the payments as per SAMA.

(ix) Article 10 contains the termination clause and Article 10.2, inter alia, envisages the termination of SAMA upon breach of the terms contained therein by the Shubham HP.

(x) Article 14 stipulates the dispute resolution mechanism and specifically, Article 14.2 provides the arbitration clause between the parties.

Termination Notice and Litigation History

4. Shubham allegedly failed to adhere to the afore-noted obligations which led to the termination of SAMA vide Notice dated 12th November, 2020 [hereinafter "Termination Notice #1"], which was issued pursuant to a Show Cause Notice dated 06th November, 2020. The said show cause and termination notices were assailed by Shubham before the High Court of Judicature at Bombay, [W.P.(ST) No. 96013/2020 titled 'Shubham HP Security Force (I) Pvt. Ltd. & Anr. v. Union of India and Ors.'] wherein they succeeded, on the short ground that Shubham had not been afforded an opportunity of hearing prior to termination and consequently, CWC was directed to give personal hearing to Shubham. The Court therein clarified that it had not examined any other issues raised by Shubham in the said petition. Pursuant thereto, second termination dated 11th December, 2020 [hereinafter "Termination Notice #2"] was issued by CWC. This time when the said order was assailed before this Court, [W.P.(C) 10955/2020 titled 'M/s Shubham HP Security Force Pvt. LTD. and Anr. v. Union of India and Ors.'] it was again set aside and Shubham was granted leave to furnish a bank guarantee in terms of Clause 6.2 (a) of SAMA. [Vide Order dated 23rd December, 2020 in W.P. (C) 10955/2020]

5. Subsequently, Shubham furnished a Bank Guarantee for an amount of Rs. 7.75 Crores, which was encashed by CWC and the amount received thereunder, was adjusted against the amounts due and payable by Shubham. After adjustment, CWC had a surplus amount of Rs. 2,90,07,788/-.

6. CWC issued a show cause notice dated 20th August, 2021 inter alia alleging non-fulfilment of the contractual stipulations and calling upon Shubham to furnish a fresh bank guarantee of an amount of Rs. 8,22,18,902/-, failing which termination was to follow.

7. After the issuance of the said show cause notice, correspondence ensued between the parties. Since there was non-compliance of show cause notice, CWC issued Termination Notice #3.

8. The said termination was again assailed by Shubham before this Court, by way of a writ petition. [W.P.(C) 13064/2021] Taking note of the fact that there was an alternate dispute resolution mechanism agreed between the parties under Clause 14.2 of SAMA, the Court dismissed that petition. [Vide Order dated 08th December, 2021 in W.P.(C) 13604/2021.]

9. The said order was assailed before the Division Bench of this Court, [LPA 492/2021] wherein by consent, the appeal was disposed of with certain directions, reproduced below:

"4. Given this position, counsel for the parties say that the appeal can be disposed of, in terms of the following agreed directions:

(i) Since arbitration has been triggered by CWC, pursuant to the notice dated 30.11.2021, the appellants will have the liberty to file a reply to the said notice

wherein, inter alia, they could take the stand that invocation of arbitration, at this juncture, is premature, in view of the provisions contained in Article 14.1 of SAMA.

(ii) If such a stand is taken, CWC will consider the same and take a decision, as to whether or not a Joint Committee is required to be constituted, in terms of Article 14.1 of SAMA.

(iii) In case, Article 14.1 of SAMA is brought into play, then obviously, the next step with regard to the arbitration proceedings will have to be deferred.

(iv) Needless to add, the appellants will act with due expedition and file a reply, within the next ten days.

(v) Once the reply is filed, CWC will take a decision based on the response tendered by the appellants, within ten days of the receipt of the same.

4.1. It is ordered accordingly.”

10. In terms of the afore-noted directions, pursuant to the communication sent by Shubham dated 29th December, 2021, CWC issued a letter dated 13th January, 2022, inter alia, noting as follows:

“7. The reliance sought to be placed by your Client on Clause 14.1 of the Agreement is entirely misplaced, misconceived and only an impermissible afterthought. It is reiterated that your Client has admitted the contractual breach(es) committed by it and there has never been any Dispute in this regard, and for this reason, there has never been any Dispute notified by your Client for resolution under Clause 14.1 of the Agreement or any request for constitution of a Joint Committee, at any stage whatsoever.

8. Without prejudice to the above, it is stated that the request of your Client to constitute a Joint Committee after the termination of the agreement is neither maintainable nor permissible in law/ under the Agreement. The provision of Clause 14.1 deals with any Dispute notified by either Party to the other for resolution through the Joint Committee during the operation / implementation of the agreement, and the said Clause has no applicability after the termination of the Agreement.

9. It is reiterated that on account of the contractual breach(es) committed by your Client, the Agreement has stood terminated on 16.11.2021. Your Client is liable to pay the outstanding amounts to CWC in terms of the Agreement dt. 18.04.2020 and also liable to compensate CWC for the damages suffered by it from the breaches committed by your Client and the termination of the contract on account of their breaches. CWC has already invoked the arbitration clause vide its notice dated 30.11.2021 and shall be taking further steps in pursuance thereof.”

11. In the afore-noted background, Shubham has approached this Court.

CONTENTIONS OF THE PARTIES

12. Mr. Kirti Uppal, Senior Counsel for Shubham contends that the sole ground for issuing Termination Notice #3 is the non-submission of the requisite bank guarantee. He submits that throughout, Shubham has conveyed to CWC, that it is in position to furnish the requisite bank guarantee for the entire sum mentioned in their communication. CWC has however consistently acted in an illegal and high-handed manner. The Court, on previous occasions, has stepped in to protect Shubham. Nonetheless, CWC has not relented and has yet again unlawfully terminated SAMA.

13. Mr. Uppal also submits that the business operations at the CFS were adversely affected due to the COVID-19 pandemic and therefore, Shubham was unable to generate business as anticipated. Now that the economic situation has improved, Shubham would be able to meet the minimum guaranteed assurance under SAMA. Nevertheless, with the furnishing of the bank guarantee, CWC's grievance would be redressed. The termination is erroneous and liable to be restrained since it does not take into consideration the communication sent by Shubham, wherein it had specifically undertaken to furnish the bank guarantee. In this regard, he places reliance upon the communication dated 04th September, 2021, wherein it has been averred as under:

"Under the circumstances we have taken necessary steps to efficiently operate our business and for which sufficient time cooperation from your end is requested. We are confident that we will come to a standard position in our financial commitment as well as operational flow within next 3 months. In the meantime kindly bear with us and kindly extend your full cooperation to tide over the difficulties brought on us due to the Covid-19 pandemic.

We confirm-that necessary compliance of BG shall be done within 25 working days by making necessary business arrangements."

14. Additionally, reliance is placed on the communications dated 03rd November, 2021, wherein Shubham informed CWC that:

"Our business partner is ready to provide us with the require working capital support and funds to replenish the bank guarantee on or before November, 30, 2021."

15. Mr. Uppal stresses that CWC was well-aware that Shubham had been successful in bringing investment into the business through the financial institution, and was ready and willing to furnish the requisite bank guarantee on or before 05th December, 2021. Yet, without considering any of the submissions advanced by Shubham, CWC terminated SAMA in an arbitrary, unjustified, illegal and mala fide manner, and issued another letter dated 18th November, 2021 asking Shubham to pay an additional amount of Rs. 81,80,651/- after appropriating the entire amount that was collected by CWC from users as well as the amount received on encashment of the bank guarantee.

16. Additionally, Mr. Uppal argues that pursuant to the Order dated 22nd December, 2021 passed by the Division Bench, Shubham sent a reply to the alleged notice invoking arbitration proceedings on 29th December, 2021. Despite that, CWC did not constitute a joint committee in terms of the Clause 14 of SAMA. Shubham then sent a reminder on 06th January, 2022, through its counsel and again informed CWC that they are ready and willing to furnish the requisite bank guarantee.

17. On 12th January, 2022, Shubham yet again requested CWC to form a joint committee to consider reconciliation of all statements of accounts/ ledgers as per terms contained in SAMA and also to reconcile all the disputes payable/ receivable from CWC. However, CWC vide its reply dated 13th January, 2022, in complete violation of SAMA, and in an arbitrary manner, rejected the request for constituting a committee on the ground that it had already invoked arbitration. This stance, he argues, is contrary to Clause 14 of SAMA and orders of the division bench. CWC ought to have constituted a joint committee as per Clause 14 of SAMA – a condition precedent for redressal of all the disputes under SAMA. Mr. Uppal submits that aforementioned conduct of CWC is completely unjust, which is not expected of a government organisation. He further states that in matters relating to government organisations, like the instant one, since the action of termination is unconscionable, the Courts is empowered to stay the effect of a termination, and is particularly necessary considering that the contract between the parties is for a long term of 15 years.

18. Per contra, Mr. Prabhas Bajaj, counsel for CWC, at the outset, states that Shubham does not deserve any indulgence due to its continuous and admitted breach of contractual obligations, despite several opportunities granted to it to cure the same. He states that at the initial stages, Shubham failed to submit the bank guarantee as envisaged under the SAMA, thereby constraining CWC to issue notices to it. In fact, relying upon a tabulation of the month-wise volumes at CFS filed by Shubham, he states that Shubham miserably failed to discharge its obligations under SAMA and generate any substantial business at the facility, not even the minimum guaranteed amount, thereby committing a breach of its contractual obligations.

19. Due to failure on the part of Shubham to generate business for payment of the minimum guaranteed amount, a notice dated 08th July, 2021 was issued demanding payment of the outstanding amount of Rs. 3.93 Crores. On account of non-compliance, vide notice dated 04th August, 2021, CWC again informed Shubham regarding its outstanding dues and proceeded to encash the bank guarantee; after adjustment of the outstanding dues of Rs. 4.85 Crores, a balance amount of approx. Rs. 2.90 Crores was available as surplus security. In the meantime, CWC called upon Shubham to replenish the bank guarantee, however, no steps were taken. Several extensions were sought in this regard, however, it failed to comply. The balance security of Rs. 2.90 Crores was exhausted by October 2021 and thereafter, neither was any payment made to

CWC, nor any security deposit available with him. CWC was thus constrained to issue Termination Notice #3 in terms of the contractual stipulations envisaged under SAMA.

20. He further submits that Shubham adopted contradictory stands disentitling itself from seeking any indulgence from this Court. In the writ petition as well as in the LPA filed by Shubham before this Court, its stand was that the arbitration agreement envisaged under the SAMA was in violation of the settled law – now, CWC cannot be allowed to approbate and reprobate.

ANALYSIS

21. The Court has considered the submissions of the parties.

22. Clause 10 of SAMA provides for termination which reads as follows:

"10.1. The Agreement shall terminate on the following events:

- (i) By efflux of time on the expiry of the period of the Agreement.
- (ii) At the discretion of CWC for breach on the part of "SHUBHAM HP" as provided in clause 10.2 below.
- (iii) On the continuation of 'force majeure' as provided in Article-9.

10.2 "SHUBHAM HP" shall be in breach of the Agreement in the following events:

- (i) failure to pay any of the amounts due to the CWC on time as required under the agreement and if "SHUBHAM HP" fail to cure the failure within 30 days of the receipt of the notice of default from CWC;
- (ii) Failure to maintain the bank guarantee as required under the Agreement in full enabling CWC to enforce the same at any time;
- (iii) "SHUBHAM HP" is in default of performance of any of other material obligations hereunder and such default has a Material Adverse Effect on the operations of CFS and such default continues for a period of 15 (fifteen) days after receipt of notice by "SHUBHAM HP" from CWC enlisting such default and remedy for such default after end of cure period as mentioned in the notice' or
- (iv) Passing of any winding up order or appointment of a liquidator, provisional or otherwise, administrator, trustee or receiver of the whole of the undertaking of the "SHUBHAM HP" by a court of competent jurisdiction in proceedings for winding up or any other legal proceedings and such legal proceedings are not dismissed within 60 days;
- (v) "SHUBHAM HP" being disqualified under any other Applicable Law or Applicable Permits to effectively carry on the activities under the Agreement; or
- (vi) Abandoning or Unilateral withdrawal of "SHUBHAM HP" from the Agreement.

10.3 In the event of Customs revoking/suspending/cancelling the license of CWC

as "Customs Cargo Service Provider" the agreement shall stand terminated/ closed without any notice to "SHUBHAM HP". No claim shall lie against the Corporation in the eventuality of CFS operations being suspended / terminated by the Customs authority. However, if the partial denotification of the facility has been made on insistence of the "SHUBHAM HP" as per business modality / requirement, the cancellation/ termination of CFS licence will have no bearing upon the validity of the contract and it will remain in force till complete period of 15(Fifteen) Years.

10.4 EXIT:

There will be a lock in period of 5 (Five) years where both the parties are not allowed to take an exit from the agreement.

If "SHUBHAM HP" abandons the facility and withdraws from the agreement during this lock in period, they shall be liable to pay the payment due to CWC. (i.e "Fixed Amount' and other outgoings as defined in this agreement as if the agreement is running continuously.

After completion of the lock-in-period:

- i) Either party shall have the right to terminate the contract with one year notice.
- ii) CWC can terminate the agreement, if "SHUBHAM HP" is in breach of the agreement as listed out in clause 10.2
- iii) "SHUBHAM HP" can terminate the agreement by serving 01(One) year notice. It is, however, made clear that during this period i.e. the notice period to the entire operations at "Facility", shall be continued in terms of the provisions of the agreement."

[emphasis supplied]

23. Reading of the aforementioned clauses indicates that the Contract is determinable at the option of CWC in the event of breach committed by Shubham. Shubham's prayer restraining CWC from acting upon Termination Notice #3, is not sustainable in law. At this stage, granting stay of termination, would necessarily entail this Court first forming an opinion, albeit a prima facie one, that the termination effected by the Respondent was misconceived and contrary to the terms of the Agreement. Considering the nature and scope of the present proceedings, such an exercise cannot be undertaken by this Court, particularly in light of the settled position in law, repeatedly emphasised by this Court, that it is not permissible for any party to seek an injunction on the termination of an agreement. [Rajasthan Breweries Ltd. v. Stroh Brewery Company 2000(55) DRT (DB), Bharat Catering Corporation v. IRCTC, 164 (2009) DLT 530, and Inter Ads Exhibition v. Busworld International, 2020 SCC OnLine Del 351.]

24. Although, Mr. Uppal has argued that the contract is non-determinable and since CWC is a government organisation, the court can step in to stay the termination, but, in the opinion of the court, this submission cannot be

countenanced. A different yardstick cannot be applied in a commercial contract by a state actor. The is no arbitrariness or gross unreasonableness show in the action of termination. In absence of violation or non-compliance of proper procedure or demonstrable unfair action of termination that is violative of Article 14 of the Constitution of India, the exceptional ground for the court to exercise the power of judicial review, is ex-facie absent.

25. That apart, under Section 14(d) read with Section 41 of the Specific Relief Act, 1963, when a contract is determinable, and cannot be specifically enforced, no injunction against termination and enforcement of the contract can be issued. In the present petition, granting such a relief would amount to granting the relief of restoration of SAMA which in other words would amount to enforcement of the contract. The contract being prima facie determinable, grant of such a relief is impermissible in law. Besides, the Court, at this stage, cannot go into the justification of the CWC's action and the same would have to be examined in the ensuing arbitration proceedings that the parties are likely to undertake.

26. Though this petition is liable to be dismissed on the aforementioned grounds alone, nevertheless, the Court has also prima facie examined the merits and the contentions urged by Mr. Uppal.

27. On two prior occasions, the Court had granted indulgence to Shubham, however, that cannot be a ground to insist for a similar relief, yet again. On the contrary, this facet would go against Shubham, as regardless of multiple opportunities granted, it has miserably failed to comply with its contractual obligations. On 04th October, 2021, Shubham responded to the letter dated 20th August, 2021, wherein it averred as under:

"We have rejected your letter dated 20th August, 2021 which was replied pm 4th September, 2021 by asking 25 working days to complete the necessary compliance i.e. to provide further B/G to cover subsequent B/G.

Due to ongoing pitru paksha which is not the auspicious period it is getting delayed to make the necessary business arrangements. So we request you to give us the extension of additional 15 working days to fulfil the necessary compliance."

28. In the subsequent meeting held on 02nd November, 2021, Shubham contended as follows:

"The SAMO Partner has informed that Rs. 20 cr. Loan has been sanctioned by M/s. Bombay Finance India Pvt. Ltd. and legal vetting of SAMO's property and its valuation is under process."

29. Despite the aforementioned communications, Shubham failed to furnish the requisite bank guarantee. In the meantime, the balance security of approx Rs. 2.90 Crores, which was available with CWC, got exhausted during the month of October 2021, after adjusting the same with fortnightly payments that were assured to be made to CWC in terms of SAMA. Thereafter, Shubham has neither

made any payment to CWC in terms of SAMA nor has it furnished any security deposit.

30. The conduct of Shubham, as is apparent from the communications noted above, exhibits its intention to engage in litigation and to seek extension of time for compliance of its contractual obligations on one pretext or the other. Thus, by conduct also, Shubham is disentitled to seek the relief sought in the present application. In these circumstances, prima facie, it is explicit that Shubham has failed to cure the breach within a period of 30 days from the notice dated 20th August, 2021. At this stage, even if Shubham offers to furnish the bank guarantee, it is too late in the day and cannot be a ground to grant the interim relief, as prayed for.

31. That apart, CWC has terminated the contract for other material breaches of SAMA, pertinently in view of Shubham's failure to generate any substantial business – which was the dominant objective of the contract. CWC has shared the data of operations at CFS which implied that from October 2021, no business has been generated by Shubham. Therefore, there is no merit in the contentions of CWC that the material breach of SAMA is only for non-furnishing of the bank guarantee. CWC has not only the contractual basis, but also substantial material on hand, to allege breach of contract on account of evident failure on the part of Shubham to generate business. There is also prima facie merit in their allegation that such defaults have caused them loss of reputation and business prospects. These breaches have continued despite multiple opportunities granted by CWC.

32. In these circumstances, termination of SAMA cannot be faulted with as there is no prima facie evidence to the contrary. Nevertheless, as already observed above, this is a question which would have to be agitated in the ensuing arbitration proceedings after appointment of a tribunal.

33. The Court also does not find any merit in Mr. Uppal's contention regarding the communication dated 13th January, 2022 sent by CWC declining constitution of a joint committee. The order of the Division Bench only entitled Shubham to rely upon Clause 14.1 of SAMA. The said request has been rejected, as the termination of the contract has taken effect, and as per CWC, the said decision cannot be revoked by way of pre-arbitration mechanism. The court finds no fault in its stance. Certainly, the order of the Division Bench cannot be interpreted to mean that Shubham's request had to be necessarily accepted. Besides, it cannot be construed that the CWC consented to revoke or suspend the contract. Therefore, rejection of the request for constitution of a joint committee, even if it is contrary to the terms of the contract, can undoubtedly not constitute a cogent ground to seek a stay of the impugned Termination Notice.

34. Before parting, the Court must also note that on 10th February, 2022, CWC issued a fresh tender for appointment of Strategic Alliance Management Operator at Dronagiri Node, and it has reportedly received bids which are to be opened today. Shubham's insistence for stay of the impugned Termination Notice at this

juncture would completely upset the entire tender process that CWC has undertaken.

35. For the aforementioned reasons, there is no merit in the present petition. Accordingly, the same along with pending applications, is dismissed.