(2021) 09 BOM CK 0005

Bombay High Court

Case No: Writ Petition No.6840 Of 2014

Shinde Developers Private Limited — APPELLANT

Vs

State Of Maharashtra And Ors — RESPONDENT

Date of Decision: Sept. 7, 2021

Acts Referred:

- Constitution Of India, 1950 - Article 226, 227

Hon'ble Judges: Ujjal Bhuyan, J; Madhav J. Jamdar, J

Bench: Division Bench

Advocate: Akhilesh Jaiswal, Ranjit V. Sangle, S.L.Babar

Final Decision: Dismissed

Judgement

Ujjal Bhuyan, J

1. Heard Mr.Akhilesh Jaiswal, learned counsel for the petitioner; and Mr.S.L.Babar, learned AGP for the respondents.

2. By this petition petitioner seeks to challenge the order dated 5th December, 2013 passed by the Standing Empowered Committee and further seeks

a direction to the respondents, more particularly to the State of Maharashtra, to constitute a new Standing Empowered Committee to adjudicate the

dispute between the petitioner and the respondents without being influenced by the order dated 5th December, 2013.

3. It may be mentioned that by the order dated 5th December, 2013 the Standing Empowered Committee while cancelling the order passed by the

Superintending Engineer terminating the contract given to the petitioner, however imposed penalty of 10% of the contractual amount. Besides

petitioner would not be paid any amount on account of price escalation and/or difference in cost. The impugned order further says that as the

petitioner had continued with the contractual works and completed the same even after termination of the contract without permission, the quality of

the executed work post termination would be ascertained and if found satisfactory then only final payment would be made to the petitioner.

4. Before proceeding further we would like to mention at the very outset that the present writ petition is liable to be dismissed on two counts. Firstly,

there is no mention in the entire body of the petition under what provision of law the petition has been filed. It is another matter that registry has

registered the petition as a writ petition but we find that there is no mention= either in the cause title or anywhere in the petition that it has been filed

under Articles 226 or 227 of the Constitution of India. Secondly, equally important is the fact that though the petitioner has challenged legality and

validity of the order dated 5th December, 2013 passed by the Standing Empowered Committee, the Standing Empowered Committee has not been

arrayed as a respondent in the petition. While it is stated that respondent No.4 i.e. Shri S.S.Sandhu, I.A.S., Chief Executive Officer of Maharashtra

Gramin Raste Vikas Sanstha and Principal Secretary to the Government of Maharashtra in the Rural Development and Irrigation Departments acted

as the Chairman of the Standing Empowered Committee but the fact remains that the Standing Empowered Committee as an entity is not a party to

the present proceeding. On these two counts itself the writ petition is liable to be dismissed. However, as we have heard learned counsel for the

parties, we would proceed ahead to decide the petition on the basis of the materials on record.

5. Petitioner is a private limited company incorporated under the Companies Act, 1956. It is engaged in the business of construction and maintenance

of infrastructure and roads in the State of Maharashtra.

6. Respondent No.3 issued notice inviting tender on 2nd January, 2008 for the following works:-

Ã¢â‚¬Å“Upgradation/construction of road MDR-42 to Tekpol Road by ST and BT and CD works and their maintenance, Taluka Velhe, District Pune.Ã¢â‚¬â€‹

7. Petitioner submitted its bid pursuant to the said notice inviting tender on 6th February, 2008. By order dated 23rd June, 2008, the contract was

awarded to the petitioner. Initially, the completion period was for 18 months. However, for various reasons the construction period had to be extended.

First extension was upto 22nd June, 2010; second extension was upto 31 st May, 2011 and the third extension was upto 30th April, 2012. According to

the petitioner, the work site is situated in remote and isolated place; that apart heavy and extended rainfall further delayed the construction.

Additionally, the local farmers also protested against the work and obstructed the construction activities on the ground that execution of the work

would destroy their crops standing on the agricultural fields. Because of shifting of alignment of road at several locations, new hurdles were

encountered including objection by the forest department.

8. After the last extension upto 30th April, 2012, request for further extension of time made by the petitioner was not entertained. Petitioner has stated

that despite difficult working conditions, it had completed almost 90% of the work.

9. It is stated that though the time for completion of the contract was not extended, yet petitioner was allowed to continue with the execution of the

work by the respondents.

10. However, petitioner was served with a letter dated 16th May, 2012 issued by the respondents stating that from 1st May, 2012 liquidated damages

would be levied on the petitioner at the rate of 1% of the original contract value which comes to Rs.16,65,000/-.

11. In the circumstances, petitioner requested the respondents vide letter dated 20th July, 2012 to withdraw the imposition of liquidated damages and to

grant extension of time upto 31st December, 2012.

12. Because of the prolonged monsoon in the year 2012 petitioner faced difficulty in remobilising men and machinery since those were demobilized at

the onset of the monsoons. Petitioner was served with a letter dated 30th November, 2012 calling upon it to submit report by 10th December, 2012

failing which it was stated that the contract would be terminated. Additionally, petitioner was asked to renew the bank guarantee till 31 st December,

2016.

13. In the meanwhile, petitioner received a letter dated 17th December, 2012 issued by respondent No.3 calling upon the petitioner to remain present

at site on 29th December, 2012 at 11.00 a.m. for taking joint measurement of the executed work. Petitioner was informed that for failure to complete

the contract work awarded to the petitioner, the same was being terminated. It was also stated that respondents had deducted an amount of Rs.16.65

lakhs from the running bill of the petitioner on account of liquidated damages.

14. Petitioner vide letter dated 27th December, 2012 requested respondent Nos.3 and 4 to issue appropriate orders to revoke the termination of

contract. As that was not done, petitioner moved the Standing Empowered Committee. Ultimately, Standing Empowered Committee issued the order

dated 5th December, 2013 which has been impugned in the present proceeding.

15. Respondent Nos.1, 2 and 3 have filed a common affidavit-in-reply. Stand taken in the reply affidavit is that following the due process, work order

was issued to the petitioner on 23rd June,2008 for execution of the contract work in terms of notice inviting tender dated 2nd January, 2008. In the

work order itself it was mentioned that the period for completion of the work was eighteen months i.e. upto 22nd December, 2009 which was inclusive

of the rainy season. However, petitioner failed to complete the work within the stipulated period. Inspite of notices issued from time to time petitioner

failed to maintain progress of work. Instead, it requested and sought for extension. First extension was granted to the petitioner by respondent No.3 on

21st January, 2010 for the period upto 22nd June, 2010 but petitioner failed to complete the work by 22nd June, 2010. Thereafter upon request of the petitioner, second extension was granted by respondent No.3 on 23rd June, 2010 upto 31st May, 2011. Still petitioner failed to maintain progress of

work which could not be completed within the extended date. Therefore, vide letter dated 9th December, 2011 fine of Rs.16,65,000.00 per week was

imposed on the petitioner. At that stage, petitioner assured respondent No.1 that he would complete the work by 30th April, 2012. In the light of such

assurance, third extension was granted to the petitioner by the Chief Engineer, Pradhan Mantri Gram Sadak Yojana on 7th April, 2012 upto 30th April,

2012 and payment of liquidated damages was not insisted upon. Even thereafter petitioner failed to complete the work. Finally 1% of the contract

value i.e. Rs.16,65,000/- per week fine was imposed on the petitioner as per tender condition Nos.21(a) and 21(b). However, petitioner failed to

maintain the progress and complete the work. So finally, by letter dated 17th December, 2012 the contract awarded to the petitioner was terminated

as per clause 52 of the contract.

16. In so far complaints lodged by the farmers is concerned, it is stated that while it is true that the farmers had communicated their problems vide

letter dated 22nd June, 2010, the same pertained to a very small portion of the contract work i.e. from chainage 23/500 to 26/00 km.

17. Respondents have stated that vide letter dated 3rd March, 2012 petitioner had assured the respondents to complete the work by 30th April, 2012

and requested to waive of the liquidated damage. On such assurance Chief Engineer vide letter dated 7th April, 2012 granted extension upto 30th

April, 2012 by waiving of the liquidated damages. As the petitioner failed to complete the work even thereafter, as per tender condition 1% of the

contract value i.e. Rs.16,65,000/- per week was levied as liquidated damages vide letter dated 16th May, 2012.

18. Further contention of the respondents is that total amount of Rs.35.98 lakhs was recovered from the 14th running account bill of the petitioner and

kept as miscellaneous deposit as liquidated damages of Rs.16,65,000/- per week was sanctioned and decision under clause 24 was pending.

19. As the liquidated damages amount exceeded 10% of the cost of work in terms of clause 21 and clause 52, the contract was terminated. Despite

intimation vide letter dated 17th December, 2012, representative of the petitioner was not present for joint measurement on 29th December, 2012.

After the contract was terminated, petitioner was informed vide letter dated 19th January, 2013 to stop the work, in case petitioner was still executing

the work.

20. It is stated that the competent authority sanctioned termination of contract vide letter dated 15th December, 2012.

21. Petitioner wrote letter dated 21st January, 2013 seeking resolution of his grievance vis-a-vis termination of contract. Accordingly, respondent No.4

vide letter dated 11th February, 2013 requested the petitioner to appoint his technical representative which the petitioner did on 15th February, 2013.

As per clause 24, Standing Empowered Committee was formed on 21st March, 2013. First meeting of the Standing Empowered Committee was held

on 26 th April, 2013 followed by the second meeting on 30th August, 2013. It is stated that because of the hectic schedule of petitionerÃ¢â‚¬â„¢s

representative Mr.Tadvi, meetings of the Standing Empowered Committee could not be held expeditiously and frequently. In the circumstances,

respondent No.4 requested the petitioner to appoint a new representative in the meeting scheduled on 30th August, 2013. Accordingly, petitioner

appointed new representative Mr.H.Y Kolwale who attended the next meeting on 2nd September, 2013, whereafter the final decision was taken on

5th December, 2013.

22. While justifying the impugned action as just, reasonable and proper, respondents seek dismissal of the writ petition.

23. Learned counsel for the petitioner has drawn our attention to the tender documents, more particularly to the General Conditions of Contract

(section IV) as well as to the Contract Data to the General Conditions of Contract, more particularly to clause 21 thereof. Referring to clause 21(b), he submits that respondents at the most could have imposed liquidated damages for delay in completion of works at the rate of 1% of the initial

contract price. Imposition of penalty to the extent of 10% is therefore unjust and unfair. Learned counsel for the petitioner has referred to various

documents on record to highlight the various obstacles faced by the petitioner in execution of the contract which were beyond its control. Instead of

appreciating the difficulties faced by the petitioner, respondents illegally terminated the contract and imposed penalty. When the petitioner sought for

redressal of its grievance, instead of deciding the same at the level of the competent authority it was placed before the Standing Empowered

Committee at the first instance itself. His submission is that as per clause 24 of the General Conditions of Contract, more particularly clause 24.2

Standing Empowered Committee is the appellate forum. Because of the impugned decision being taken by the Standing Empowered Committee,

petitioner has lost one forum of grievance redressal i.e., the right of appeal. He therefore submits that impugned order is not only arbitrary and

unreasonable but is also without jurisdiction.

24. On the other hand, Mr.S.L. Babar, learned AGP has relied upon the averments made in the affidavit-in-reply. Referring to the averments made in

paragraph No.2 thereof, he submits that petitioner participated in the proceedings before the Standing Empowered Committee. As a matter of fact,

petitioner had nominated its representative to participate in the proceedings of Standing Empowered Committee. Therefore, it is not open to the

petitioner now to contend that Standing Empowered Committee ought not to have decided the matter at the first instance. Moreover, this objection

was not raised before the Standing Empowered Committee. Referring to the impugned order dated 5th December, 2013 learned AGP submits that the

said order is a reasonable one and infact can be said to have redressed the grievance of the petitioner to a large extent by cancelling the termination of

contract and also deciding to pay the contractual dues of the petitioner for completion of construction even after carrying out construction post termination. Contending that the impugned decision is just and proper, he submits that no case for interference is made out. There is no merit in the

writ petition which should accordingly be dismissed, he submits.

25. Submissions made by learned counsel for the parties have received the due consideration of the court.

26. Before proceeding further we are of the view that it would be appropriate to briefly examine the relevant clauses of the General Conditions of

Contract.

27. Clause 24 deals with Dispute Redressal System. As per sub-clause (1), if any dispute or difference arises in connection with or out of the contract

or termination etc. at the first instance it shall be referred for settlement to the competent authority who shall convey his decision to the contractor in

writing within a period of 45 days. As per sub-clause (2) if any of the party is aggrieved by the decision of the competent authority, it shall have the

right of appeal against such decision to the Standing Empowered Committee. Clause 24.3 deals with composition of Standing Empowered Committee.

The Standing Empowered Committee shall comprise of one official member not below the rank of Additional Secretary to the State Government who

shall be the Chairman of the Standing Empowered Committee; one official member not below the rank of Chief Engineer; and, one non-official

member who shall be the technical expert of Chief EngineerÃ¢â‚¬â„¢s level selected by the contractor from a panel of three persons given to him by the

employer. The procedure to be followed by the Standing Empowered Committee is laid down in sub-clause (4) of clause 24. As per clause 24.5 while

the decision of the Standing Empowered Committee is binding on the employer, on the other hand, discretion is on the contractor to accept it or not. If

he accepts it then it would be in full and final settlement of all claims. If he does not, then it is open to him to approach the court. However, arbitration

is ruled out in terms of clause 25.

28. Payment of liquidated damages is dealt with in clause 44. Sub-clause (1) thereof says that the contractor shall pay liquidated damages to the

employer at the rate per week or part thereof as stated in the contract data for the period that the completion date is later than the intended completion

date.

29. Clause 52 deals with termination of contract. As per sub-clause (1) the employer may terminate the contract if the contractor causes a

fundamental breach of the contract. What are the fundamental breaches of contract are mentioned in sub-clause (2). Some of the fundamental

breaches of contract are as follows :-

52.2 (a): the contractor stops work for 28 days when such stoppage is not authorized.

52.2(c): when the Engineer gives notice to the contractor that failure to correct a particular defect is a fundamental breach of contract and yet the

contractor fails to correct the same within the period stipulated.

52.2(e): when the contractor delays completion of the work by the number of days for which the maximum amount of liquidated damages can be paid,

as defined in clause 44.1.

29.1 Clause 52.4 makes it abundantly clear that if the contract is terminated, the contractor shall stop work immediately, make the site safe and secure

and leave the site as soon as reasonably possible.

30. Competent authority as mentioned in clause 24.1 are those which are mentioned in clause 16 of the Contract Data to General Conditions of

Contract. Competent authorities are Superintending Engineer, Pradhan Mantri Gram Sadak Yojana and Chief Engineer, Pradhan Mantri Gram Sadak

Yojana.

31. While clause 21(a) of the Contract Data to General Conditions of Contract mentions about milestones to be achieved during the contract period,

clause 21(b) mentions about the amount of liquidated damages for delay in completion of works.

As per clause 21(b) such liquidated damages should be 1% of the initial contract price for the whole of work but clause 21(c) prescribes that the maximum limit of liquidated damages for delay in completion of work is 10% of the initial contract price.

32. We have already seen that petitioner was granted three extensions for completion of work. Infact, at one stage liquidated damages were imposed

but on assurance given by the petitioner last extension was granted and liquidated damages were not insisted upon. When the petitioner defaulted even

thereafter the contract was terminated vide order dated 17th December, 2012 issued by the Superintending Engineer. Ultimately, when the petitioner

sought redressal of its grievance vis-a-vis termination of contract, the same was placed before the Standing Empowered Committee. We find from the

order dated 5th December, 2013 that petitioner had nominated Mr.R.H.Tadvi as the non-official technical member of the Standing Empowered

Committee who participated in the first meeting of the Standing Empowered Committee. On account of his busy work schedule Mr.Tadvi resigned

and he was replaced by the petitioner with Mr.H.Y Kolwale as the non-official technical member. From a perusal of the impugned order dated 5th

December, 2013, we find that due opportunity to state its case was given to the petitioner. PetitionerÃ¢â‚¬â„¢s representative Mr. Nimbalkar appeared

and made submissions. He also explained the reasons for the delay and also regarding continuation of the work post termination. In the proceedings

held on 2nd September, 2013 petitionerÃ¢â‚¬â„¢s representative stated that the work was completed as per old rates and the constructed road was made

available to the villagers before the onset of monsoons in the year 2013. It was his submissions that in the circumstances termination of contract

should be revoked and if necessary reasonable penalty for the delay may be imposed. His further submission was that for the work done by the

petitioner it should be paid. Even the Superintending Engineer opined during the hearing that after termination of contract though fresh tender was

floated on 6th March, 2013 for the remaining work, there was no response. He admitted that the contractor had completed the work at the rates of

2006-07. Besides the road was made available to the villagers before the onset of monsoons in 2013. In the circumstances, the Standing Empowered

Committee took the decision that though the petitioner had breached terms and conditions of the contract which justified the termination, however

considering the submissions of the non-official technical member and representative of the petitioner that the work was completed before onset of

monsoon in the year 2013, termination of contract should be revoked. But for the delay in completion of work after expiry of the last extension of time

upto the date of completion, view was taken by the Standing Empowered Committee that petitioner was liable to pay penalty in terms of clause 44.1 of

the General Conditions of Contract and as per clause 21(c) of the Contract Data to the General Conditions of Contract, which stipulates that the

maximum limit of liquidated damages for delay in completion of work should be 10% of the initial contract price. Regarding the work carried out by

the petitioner completing the work post termination, it was decided by the Standing Empowered Committee that the quality of the work would have to

be ascertained by the appropriate authority whereafter final payment would be made to the petitioner.

33. In the facts and circumstances of the case, we do not find any error or infirmity in the decision making by the Standing Empowered Committee.

Due opportunity was granted to the petitioner who participated in the proceedings of the Standing Empowered Committee. The impugned decision

arrived at after due deliberation is neither arbitrary nor unreasonable. Infact, the Standing Empowered Committee had taken a rather lenient view and

granted substantial relief to the petitioner.

34. Though learned counsel for the petitioner placed reliance on clause 21(b) of the Contract Data to General Conditions of Contract to contend that

only 1% of the initial contract price could be imposed as liquidated damages for delay in completion of work, we find that under clause 21(c) the

maximum limit of such liquidated damages can be 10% of the initial contract price which has been imposed by the Standing Empowered Committee.

35. In so far submission of learned counsel for the petitioner that by referring the dispute raised by the petitioner to the Standing Empowered

Committee one forum of dispute redressal at the stage of competent authority was denied to the petitioner in as much as the Standing Empowered

Committee is the appellate forum, we are not inclined to entertain such a contention. This is because petitioner had participated in the proceedings of

the Standing Empowered Committee by nominating its non-official technical member and by its representative making submissions on behalf of the

petitioner. We do not find that any objection was raised by the petitionerÃ¢â‚¬â„¢s representative to the hearing of the dispute by the Standing Empowered

Committee at the first instance instead of by the competent authority. That apart, as per prayer clauses (b) and (c) petitioner has rather sought for a

direction to respondent No.1 for constitution of a new Standing Empowered Committee and for remanding the matter to the new Standing Empowered

Committee for a fresh decision and not before the competent authority. That being the position, this argument of the petitioner does not hold good and

is hereby rejected.

36. We have already held that the decision of the Standing Empowered Committee is just and reasonable and calls for no interference. Together with

the initial findings recorded by us regarding the defect in filing the petition i.e. under what provision of law it has been filed and for non-joinder of

necessary party i.e. Standing Empowered Committee, no case for entertaining the writ petition has been made out.

37. Writ petition is accordingly dismissed. However, we leave the parties to bear their own costs.