

Zee Entertainment Enterprises Ltd & Anr vs Railtel Corporation Of India Ltd & Anr on 30 November, 2021

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

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IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P.(I) (COMM.) 366/2021

ZEE ENTERTAINMENT ENTERPRISES

LTD & ANR.

..... Petitioners

Through: Mr Gopal Jain, Senior Advocate with
Mr Kunal Tandon, Mr Shashank
Shekhar and Ms Niti Jain, Advocates

versus

RAILTEL CORPORATION OF INDIA

LTD & ANR.

..... Respondent

Through: Mr Chetan Sharma, ASG with Mr
J.K. Singh, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 30.11.2021

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), inter alia, praying that the operation and effect of the Termination Letter dated 11.11.2021 be stayed.

2. The petitioner has also sought interim prayers restraining respondent no.1 (RailTel) from invoking its Bank Guarantee. The aforesaid prayers were considered and rejected by this Court by an order dated 16.11.2021. In the circumstances, the limited question to be examined is the petitioner's prayer to restrain respondent no.1 from giving effect to the Letter of Termination dated 11.11.2021.

3. Respondent no.1 (RailTel) had issued a Request for Proposal (RFP) for "Selection of Digital Entertainment Service Provider (DESP) for delivering Content on Demand (COD) Services on Build Own Operate (BOO) for Indian Railways".

4. Petitioner no.2 (hereafter 'Margo') was successful in securing the said Contract and on 14.01.2020, RailTel issued a Letter of Award awarding the contract to Margo.

5. In terms of the RFP, Margo was required to provide COD services for a term of 10 years. The contract was on revenue sharing basis whereby the revenue from COD services were to be shared

between the parties. In addition, Margo had also guaranteed a minimum payment (Annual Minimum Guarantee - MG). The Annual MG for the first year was agreed at 63 crores. It is RailTel's case, Margo has defaulted in payment of the MG amounts.

6. Margo does not dispute that was a delay in the payment of MG amount. On the contrary, there are ample materials on record to indicate that Margo had sought deferment of the said payment. To some extent, the same was granted. It is Margo's case that it was excused from the performance of the contract on account of force majeure event being the outbreak of covid- 19 pandemic.

7. Mr. Jain, learned senior counsel appearing for the petitioner submits that in terms of the Clauses 3.25 (e) and (f) of the RFP, the delay in payment of MG would not constitute a default or breach of the contract on the part of Margo.

8. This Court had briefly considered the aforesaid contention and found that prima facie, the payment obligations of Margo were not excused on account of the force majeure event as the parties had expressly agreed in terms of the proviso (c) and (d) of Clause 3.26 of the RFP that a force majeure event would not excuse the performance of payment obligations of Margo.

9. In view of the above, this Court is unable to, prima facie, accept the contention that there is no default on the part of Margo.

10. Mr Jain also referred to the Termination Letter dated 11.11.2021 and submitted that the said letter proceeds on the premise that Margo has defaulted in making MG payments for over two years. He states that this is factually incorrect as MG payment for the first year was paid along with interest, albeit after some delay.

11. While it does appear that RailTel has mentioned a default in respect of first year's MG in its Letter of Termination dated 11.11.2021, it is apparent that the contract in question was terminated on account of failure on the part of Margo to pay the MG amounts for the second year along with interest. The copy of the Termination Letter placed on record indicates that the said reason has been highlighted in bold. The relevant extract of the said Termination Letter is reproduced below:

"The following actions are part of the termination process of the COD contract

1. Forfeiture of Performance Bank Guarantee (PBG) and Earnest Money deposit (EMD).
2. You will not be allowed to participate in the event of re-tendering of COD by RailTel
3. As part of the termination of the contract, the following clauses alongwith related clauses of RFP and LOA for Termination, are to be strictly followed by your organisation:

I. "3.30. Consequences of Termination

3.The Bidder/ DESP hereby irrevocably and unconditionally agrees and undertakes that in the event that the Authority terminates the Agreement, then the Bidder/ DESP shall, at its own cost, remove the Digital Asset(s) within 60 (Sixty) days or such period as may be specified by the Authority without any protest or demur and remove all of the Bidder! DESP's Advertising content from such Digital Asset(s), failing which the Authority may, at the expense and risk of the Bidder/ DESP:

a. take over such Digital Asset(s) and remove and sell the same at such price as deemed appropriate;

b. may hold (at its sole discretion) the said property for the Bidder/ DESP and/or the Client, where relevant;

c. may place the said property in a public garage or warehouse or dispose of the same by whatever manner the Authority deems fit without being liable for any loss that may have been suffered by the Bidder/ DESP. The Bidder/ DESP shall also be liable to indemnify the Authority in respect of any costs, expenses, damage or claims in connection with such removal and storage and shall reimburse the Authority for expenses incurred by the Authority."

12. As is apparent from the above, the Termination Letter also mentions the consequences that follow on the termination of the contract. The first such consequence is forfeiture of the performance bank guarantee and earnest money. It also follows that Margo would have to take necessary steps for returning certain documents, information and data as more particularly specified in Clause 3.30 of the RFP as set out in the Termination Letter. In addition to the above, it is also provided that Margo will not be permitted to participate in the event of re-tendering of COD by RailTel.

13. Mr Jain submits that the operation and the said consequences be stayed as it amounts to blacklisting Margo.

14. Mr Sharma, learned ASG appearing for RailTel submits that the Clause under the RFP does not necessarily require that the petitioners be blacklisted. At this stage, they are simply precluded from participating in re- tendering of the contract to provide COD.

15. Insofar as blacklisting the petitioners is concerned, the law in regard to blacklisting a contractor is well settled. Whilst the authority is not precluded from blacklisting any contractor, the same has to be done for cogent reasons and after giving full opportunity to the contractor to be heard. [See: Gorkha Security Services v. Govt. (NCT of Delhi) and Ors.: (2014) 9 SCC 105 and Kulja Industries Ltd. v. Chief General Manager, BSNL: AIR 2014 SC 9].

16. It is clear that in the event, RailTel takes any steps to blacklist the petitioner, it would be required to be in compliance with the settled law on the subject. Insofar as excluding Margo from re-tendering of COD is concerned, clearly RailTel cannot be expected to once again enter into a contract with Margo which it has terminated on account of Margo's default.

In view of this Court's, *prima facie*, finding that Margo has defaulted in performance of its obligations, the petitioner's prayer that it be permitted to participate in the re-tendering of the contract in question, cannot be acceded to.

17. This Court is also of the view that the contract in question is a determinable contract and therefore, in any event it would not be apposite for this Court to direct specific performance of the same. The stay of the Termination Letter would in effect amount to passing an order in aid of specific performance of the contract in question.

18. In so far as adverse publicity is concerned, RailTel should refrain for issuing any adverse public statements against the petitioners.

19. In view of the above, the petition is dismissed.

20. It is clarified that all observations made in this order are, *prima facie*, observations and solely for the purposes of deciding the present petition. The Arbitral Tribunal as and when constituted shall decide the dispute between the parties uninfluenced by any observations made herein.

VIBHU BAKHRU, J NOVEMBER 30, 2021 RK [Click here to check corrigendum](#), if any