

GAHC010051562023



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

Case No. : WP(C)/1433/2023

ASHOK CHOUDHURY
S/O- GANESH CHOUDHURY,
RESIDENT OF VILLAGE- AHUCHAL GAON,
C.D. ROAD, WARD NO. 4,
DISTRICT- LAKHIMPUR, ASSAM,
PIN- 787001.

VERSUS

UNION OF INDIA AND 4 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF RAILWAYS, RAIL BHAVAN-1,
RAISINA ROAD, NEW DELHI- 110001.

2:THE GENERAL MANAGER
N.F. RAILWAY OFFICE
MALIGAON SHUTTLE GATE ROAD

EAST MALIGAON
MALIGAON

GUWAHATI
ASSAM
PIN- 781001.

3:THE DIVISIONAL RAILWAY MANAGER (W)
N.F. RAILWAY
TINSUKIA.

4:THE SR. DIVISIONAL ENGINEER/ C
N.F. RAILWAY
TINSUKIA.

5:THE DIVISIONAL ENGINEER/ II
N.F. RAILWAY
TINSUKIA

Advocate for the Petitioner : MR. B P BORAH

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

10.05.2024

Heard Mr. D.P. Borah, learned counsel for the petitioner. Also heard Mr. H. Gupta, learned CGC appearing for the respondent nos. 1 to 5.

2] The petitioner has put to challenge the Speaking Order dated 28.07.2022 issued by the General Manager (Works), Northeast Frontier (NF) Railways, by which the petitioner's termination of contract had been upheld.

3] The speaking order dated 28.07.2022 had been passed in compliance with the order dated 31.08.2021 passed in WP(C) No.3756/2021.

4] Learned counsel for the petitioner submits that the impugned Speaking Order dated 28.07.2022 had been issued on an incorrect basis, due to which prejudice has been caused to the petitioner, as he has been deprived of his legitimate entitlement to continue with the contract work in question. He

accordingly submits that the termination notice dated 28.12.2020, by which the petitioner's contract work had been terminated and the impugned Speaking Order dated 28.07.2022 issued by the General Manager (Works), NF Railways should be set aside.

5] Mr. H. Gupta, learned CGC appearing for all the respondents submits that as there is an arbitration clause between the parties for settlement of the dispute, the petitioner should avail the Arbitration Clause.

6] I have heard the learned counsels for the parties.

7] The petitioner's contract work with the respondents having been terminated vide the termination notice dated 28.12.2020, the same was put to challenge in WP(C) No.3756/2021. This Court vide order dated 31.08.2021 disposed of WP(C) No.3756/2021, by observing that in terms of the Clause-63 of the Standard General Conditions of Contract, the petitioner could file his representation before the General Manager, NF Railways citing all reasons for withdrawal of the termination notice dated 28.12.2020. The said representation was thereafter required to be disposed of by the General Manager, NF Railways, within a period of 120 days and if aggrieved, the petitioner had a right to refer the dispute for arbitration within a period of 60 days. This Court thus directed the General Manager, NF Railways to dispose of the petitioner's representation

against the termination notice dated 28.12.2020.

8] Paragraph nos.-2 & 3 of the order dated 31.08.2021 passed in WP(C) No.3756/2021 is reproduced below as follows:

“The petitioner is aggrieved because of issuance of the termination notice dated 28.12.2020 as against the letter of acceptance issued to the petitioner by the respondent Senior Divisional Engineer, N. F. Railway, Tinsukia. As per the said notice dated 28.12.2020 the contract stood rescinded in terms of Clause 62 of Standard General Conditions of Contract .

The petitioner in terms of Clause 63 of Standard General Condition of Contract can file his representation before the General Manager, Railways citing all reasons for withdrawal of termination notice dated 28.12.2020. The said representation is required to be disposed of by the General Manager, NF Railway within a period of 120 days and if aggrieved the petitioner has as a right to refer the dispute for arbitration within a period of 60(sixty) days .”

9] As the order dated 31.08.2021 passed in WP(C) No.3756/2021 was not complied with, the petitioner filed contempt case, being Cont.Cas(C) no.398.2022. However, during the proceedings of the contempt case, the order dated 31.08.2021 passed in WP(C) No.3756/2021 was complied with by the General Manager, NF Railways, by issuing the Speaking Order dated 28.07.2022. The speaking order has upheld the termination notice dated 28.12.2020 and the contents of the same are reproduced below as follows:

“Ref.:Speaking Order as per direction of the Guwahati High Court in connection with LOA No 222/5/2/CON/GEN/P- Way-MRG/-2,dated 21/11/2018 of Sri Ashok Chouchury in Connection with P-way Ancillary works Jungle cutting/Cleaning at

elephant corridor between section Tll to DBY at km 14/0 to 21/0 both side of track under the jurisdiction of SSE/P-Way/MRG including maintenance of P-Way works-attention of curve more than 5 degree, mud pumping at km 45/0-6,37/9-38/0 and 48/4-8 through packing, overhauling of L-xing dressing, boxing distressing, pulling back, renewal of Rail"

After going through the representation dt.1 1.11.2021 of the Contractor Sri Ashok Choudhury and the perawise remarks and comments of the concerned Officers of Railway, the status of the case comes out is as given below:

LOA was awarded on 21/41/2018 with Date of Completion on 20.11.2019. The contractor had to submit a Performance Guarantee (PG) within 30 (thirty) days (without penalty) or within 90 days with interest from the date of issue of Letter of Acceptance (LOA). Penal interest of 15% per annum shall be charged for the delay beyond 30 (thirty) days, i.e. from 31s day after the date of issue of LOA.

The contractor Sri Ashok Choudhury was required to submit performance guarantee without any interest by 20.12.2018 and by 18.2.2019 with penalty Contractor has submitted Performance Guarantee without any interest of Rs.3,80,162.00/- beyond 30 days on 15.02.2019 (after 87 days) and therefore he submitted penal interest of Rs.8,600/- on 10.09.2020 for late submission of Performance Guarantee.

Contractor has failed to start and execute the work in the section even after issuing of 7 days notice and 43 hr Notice by Railway. Railway has given extra time of about 13 months to contractor beyond original DOC (i.e. 20.11.2019) before issuing of termination letter on dt.28.12.20.

From documents it is noticed that the contractor have not applied for the further extension of time. From documents & details it is gathered that the contractor had not done any work.

Sr.DEN/C/TSK has terminated the work vide letter No.' W/411/Ancillary/MRG/W-1 dt. 28.12.20 following terms and conditions of the agreement. Action taken by Sr.DEN/CITSK to terminate the contract stands valid and the Security Deposit, Earnest Money and Performance Guarantee will be forfeited as per agreement."

10] As can be seen from the order dated 31.08.2021 passed in WP(C) No.3756/2021, the petitioner can invoke the Arbitration Clause if he is aggrieved with the impugned Speaking Order dated 28.12.2020. Further, the Supreme Court in the case of *Uttar Pradesh Power Transmission Corporation Limited &*

Another vs. CG power and Industrial Solutions Limited and Another, reported in (2021) 6 SCC 15, has held that it is well settled that the availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain the writ petition, notwithstanding the availability of alternative remedy, particularly, (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is a failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge.

11] As can be seen from the facts of this case, none of the above four conditions set out by the Supreme Court is available in the present case. As there is an efficacious alternative remedy, this Court is of the view that the petitioner would have to invoke the Arbitration Clause, if he is aggrieved with the impugned Speaking Order dated 28.07.2022 passed by the General Manager (Works), NF Railways. This has also been observed in the Order dated 31.08.2021 passed in WP(C) No.3756/2021. Thus, in view of the above reasons, this Court is not inclined to exercise its discretion in the present case. The petitioner, in the view of this Court, should invoke the Arbitration Clause, if aggrieved with the Speaking Order. In the event the petitioner invokes the Arbitration Clause, the Arbitrator should consider condoning any delay in

approaching the Arbitral Tribunal as per law and keeping in view the fact that the petitioner had approached this Court earlier.

12] The writ petition, accordingly, stands dismissed.

JUDGE

Comparing Assistant