In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 26622 of 2023

M/s. UCC – RLA – STA (JV) and Another
Vs.
Eastern Coalfields Limited and others

For the petitioners	:	Mr. Subhabrata Datta, Mr. Subhojit Seal, Mr. Debasish Sarkar
For the respondents	:	Mr. Jishnu Chowdhury, Mr. Syed Nurul Arefin, Mr. Syed Moyeenul Arefin
Hearing concluded on	:	06.03.2024
Judgment on	:	13.03.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioners were successful in a tender for hiring of Heavy Earth Moving Machinery and Extraction of Coal and was awarded contract accordingly. The petitioners argue that the work was completed in June, 2022 and a Job Completion Certificate was issued to the petitioners on November 19, 2022. However, thereafter the respondents are withholding not only the final bills but also the performance security and retention amounts, contrary to the terms of the contract.

2. Learned counsel for the petitioners places reliance on Clause 4.7 of the General Terms and Conditions (GTC) which provides for refund of security deposit subject to the company's right to deduct/appropriate

its dues against the contractor under the present or other contract. As per the said clause, on completion of the entire work and certified as such by the engineer-in-charge, one half of the security deposit remaining with the company shall be refunded. The other half shall be refunded to the contractor on the expiry of six months performance guarantee period from the date of completion as certified by the engineer-in-charge. However, the same is subject to certain conditions including that if any defect was detected within the defect liability period of six months, the same is to be rectified by the contractor.

3. A Chart has been annexed to the writ petition in respect of the perceived dues of the petitioners from the respondents.

4. Learned counsel for the petitioners cites *Joshi Technologies International INC. v. Union of India and others*, reported at *(2015) 7 SCC 728* and *Surya Constructions Vs. State of Uttar Pradesh and others*, reported at *(2019) 16 SCC 794* for the proposition that the high prerogative writ jurisdiction can be exercised for interference in commercial matters as well.

5. Citing *M.P. Power Management Company Limited, Jabalpur Vs. Sky Power Southeast solar India Private Limited and others*, reported at *(2023) 2 SCC 703*, the petitioners argue that the need to deal with disputed questions of fact cannot be made a smokescreen to guillotine a genuine claim of the writ petitioner, when actually the resolution of a disputed question of fact is unnecessary to grant relief. Moreover,

any instrumentality of State should not behave arbitrarily to deny the claim of the petitioners after taking advantage of the work done.

6. Learned counsel next cites *Indore Development Authority Vs. Sailendra (Dead) Through Legal Representatives and others*, reported at *(2018) 3 SCC 412*, where the Supreme Court observed that convenience cannot accrue to a party from his own wrong.

7. Learned counsel for the respondents refutes the claim of the petitioners. By placing reliance on *Orix Auto finance (India) Ltd. Vs. Jagmander Singh and Another*, reported at *(2006) 2 SCC 598* and *Orissa State Financial Corporation Vs. Narsingh Ch. Nayak and others*, reported at *(2003) 10 SCC 261*, it is contended that the court cannot rewrite the contract entered into between the parties. Clause 4.7 of the contract provides that the respondents are entitled to recover amounts not only in respect of the present contract but pertaining to other contracts as well.

8. It is argued that in a letter dated January 1, 2024, the respondents raised a claim of Rs. 7,45,68,963.47p in respect of work done by the petitioners under a different contract. The said amount, if adjusted, would exceed the claim of the petitioners in the writ petition.

9. Learned counsel for the respondents also relies on *Dr. Kunal Saha Vs. The State of West Bengal & Anr.*, reported at *2015 SCC OnLine Cal 3284*, *Gulabchand Chhotalal Parikh Vs. State of Gujarat*, reported at *AIR 1965 SC 1153* and *Adhunik Ispat Limited Vs. Triveni Infrastructure Development Co. Limited*, reported at *(2011) 2 CHN 527* in support of the proposition that if a foundation of right is raised in the pleadings,

the cause of action remains alive until the judgment or decree is passed, since cause of action merges in the decree. It is argued that even if the affidavit-in-opposition is considered to be the written statement, the respondents can apply for leave to amend the same. Thus, there is no abrogation of the respondents' cause of action to recover dues under the other contracts. In paragraph no. 9 of the affidavit-in-opposition, the foundation of such right in Clause 4.7 of the contract has been mentioned.

10. The respondents then argue that the writ petition ought not to be entertained, since the respondents have not yet carried out the exercise of assessment whether any amount is payable under the contract. The respondents had merely conceded that this exercise should be carried out forthwith and it has done so to the extent possible. However, the entitlement of the petitioners to the money claim and that of the respondents to claim adjustment by way of counter-claim requires an enquiry, which should be the subject-matter of a suit. The disputed issues of fact require an enquiry which ought not to be done by the writ court. Thus, the respondents also rely on *M.P. Power Management Limited (supra)*.

11. During arguments as well as in their written notes, learned counsel for the petitioners contends that to allay the dispute raised by the respondents in their affidavit-in-opposition, on instruction it is submitted that the amount of Rs. 1,69,10,607/- mentioned in paragraph no. 8 of the affidavit-in-opposition can be deducted from the sum to which the petitioner no. 1 is otherwise entitled.

12. Heard learned counsel.

13. There are two components to the claim of the petitioners – the final bills raised by the petitioners and the performance security and retention bills, which were put in by way of security deposit.

14. Insofar as the final bills are concerned, it is for the petitioners to prove the necessary documents supporting such claim and obtain a money decree from a competent civil court. First, the particulars of the premise of such claim having not been disclosed in the writ petition nor have the documents supporting the same been filed. Secondly, such documents, even if produced, would be required to be proved formally and an opportunity to be given to the respondents for controverting the same, if necessary by cross-examining the witnesses if cited by the petitioners. Such exercise ought not to be readily entered into by the writ court and as such, be best relegated to the competent civil court.

15. The second component, however, regarding the security deposits, has been admitted by the respondents. In paragraph 20 of the affidavit-in-opposition filed by the respondent nos. 1 and 2, it is stated that the contractor had submitted performance security deposit and retention money. In the same breath, however, additional performance security deposit has been denied on the ground that there is no such clause in the agreement.

16. Thus, the limited scope of the petitioners' claim which can be decided within the scope of the writ petition is the entitlement of the petitioners to be refunded the admitted performance security deposit

and retention money. Since there is no dispute regarding the said amount having been paid by the petitioners in the first place, no detailed adjudication by calling for evidence is required. What is necessary is only to interpret the provisions of the contract and come to a conclusion as to whether the respondents have arbitrarily and without any reasonable excuse withheld such components of the petitioners' claim, which can very well be done within the confines of a writ petition.

17. For such limited enquiry, Clause 4.7 of the GTC is required to be set forth below:

"4.7 ***Refund of Security Deposit :*** *The refund of Security deposit shall be subject to company's right to deduct/appropriate its dues against the contractor under this contract or under any other contract. On completion of the entire work and certified as such by the Engineer-In-Charge, one half of the security deposit remaining with the company shall be refunded. The other half shall be refunded to the contractor on the expiry of six months performance guarantee period from the date of completion as certified by the Engineer-In-Charge, subject to the following conditions:*

a) Any defect/defects in the work, if detected after issue of completion certificate is/are rectified to the satisfaction of the engineer-In-Charge within the said defect liability period of six months or on its due extension till completion of the rectification work as required.

b) In the case of building work or other work of similar nature the refund shall be made on the expiry of the said six months period or at the end of one full monsoon period i.e. June to September. Whichever is later in point of time and any defects such as leakages in roof effloresces in walls, dampness, defects in drainage etc. should be rectified to the satisfaction of the Engineer-In-Charge.

c) (i) In case of supply, installation and commissioning of equipment for electrical and mechanical works the refund shall be made on the expiry of defect liability period which will be one year from the date of commissioning of the equipment/completion of the work and/or rectification of any defect which may be detected in the individual

equipment or the whole system under the contract, whichever is later.

(ii) All types of Manufacture's guarantee/warranty wherever applicable are to be issued/revalidated in the name of the owner by the Contractual agency and will be covered with relevant counter guarantee."

18. As evident, two rights of the respondents are clear under Clause 4.7. First, the refund of security deposit shall be subject to the respondents' right to deduct/appropriate its dues. Secondly, the dues from any other contract can also be deducted, along with the present contract.

19. However, it is also clear from Clause 4.7 that one half of the security deposit remaining with the respondents shall be refunded on completion of the entire work and upon being certified by the engineer-in-charge.

20. The Job Completion Certificate annexed at page 165 of the writ petition is signed by the Chief Manager (M) agent of the concerned colliery where the petitioners did their work, the Manager of the said colliery and the surveyor thereof. It clearly stipulates that the work had been executed and completed as per the concerned work order during the work period between June 2, 2015 and June 1, 2022. The said document also certifies that the petitioner no. 1 satisfactorily completed the job on June 1, 2022 as per the work order.

21. Thus, there is no dispute as to the petitioners having completed the work-in-question. Hence, in terms of Clause 4.7, half of the security deposit was to be immediately refunded to the petitioners on completion of the entire work. Although the certification in the Job

Completion Certificate is apparently not by the engineer-in-charge, there could not be any plausible reason for withholding such certificate.

22. The entitlement of the petitioners to the other half of the security deposit was on expiry of six months' performance guarantee period from the date of completion.

23. Thus, the respondents are mandated, since the term "shall be refunded" has been used, to refund the entire security deposit, half immediately on completion of the work and the other half within six months therefrom. The right of the respondents to deduct/appropriate its dues has to be read not in isolation but in the context of Clause 4.7 as a whole. So construed, such deduction or appropriation had to be done within the outer limit of six months. However, in the present case, no claim was raised by the respondents, admittedly, within the said six months.

24. The work was concluded on June 1, 2022 and the Job Completion Certificate was issued on November 19, 2022. Even if it is assumed that the entitlement of the petitioners to get back the security deposit starts on the certification, the date of the issuance of the Job Completion Certificate is the relevant date and, hence, half of the security deposit had to be paid immediately after November 19, 2022 and the other half, with or without deductions, within a further six months.

25. Clause 4.1 stipulates that security deposit shall consist of two parts –

a) Performance security to be submitted at award of work; and

b) Retention money to be recovered from running bills.

Both the said components have been admitted in paragraph 20 of the affidavit-in-opposition.

26. Here, certain issues raised by the parties are required to be resolved.

27. The respondents have challenged the entertainability of the writ petition on the ground that disputes of fact are involved, which require detailed enquiry upon trial. Both parties place reliance on *M.P. Power Management (supra)*. Going by the ratio laid down in the said judgment, the principle that in the case of a non-statutory contract the rights are governed only by the terms of the contract may not continue to hold good. The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent State in a case by itself to ward off scrutiny of its action or inaction under the contract. If the complaining party is able to establish that the action/inaction is, *per se*, arbitrary, the State can, indeed, be called upon to honour its obligations of making payments unless it be that there is a serious and genuine dispute raised regarding the liability of the State to make the payment.

28. Applying the said principle to the present case insofar as the final bills are concerned, the writ court ought to restrain its hands, since the claims have not yet been substantiated by particulars and are disputed. However, only insofar as the performance security and the retention amounts are concerned, the deposit of those is admitted and it is only for the writ court to interpret the clauses of the contract and

ascertain whether the withholding of the refund of the same by the respondents is arbitrary and unjustified. Thus, there is no reason why the writ petition should not be decided on such component of the petitioners' claim.

29. The respondents assert a huge claim of Rs. 7,45,68,963.47p on a different contract. However, such claim does not find place in the affidavit-in-opposition, which contains the pleadings of the respondents, but has been disclosed only in the written notes of arguments. At the oral hearing of the writ petition, the claim was hinted at but, all the same, never found place in the affidavit-in-opposition which was exchanged long before the commencement of hearing. That apart, the said claim, even as per the respondents, was raised only on January 1, 2024, that is, after filing of the writ petition.

30. Taking a cue from the respondents' arguments drawing an analogy between a written statement and their affidavit-in-opposition, such claim is barred on application of the principles of Order VIII Rule 6A of the Code of Civil Procedure. The Writ Rules of our Court provide that where there is a gap in the Rules, the principles of the Code of Civil Procedure should apply.

31. Under Order VIII Rule 6A of the Code of Civil Procedure, the counter claim is to be made before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. In the present case, the counter-claim was not made on or before the filing of the affidavit-in-opposition. In fact, the same has not been

pleaded at all, thereby leaving no scope of permitting the respondents to set up the bogey of a claim on a different contract for the first time at the time of hearing.

32. One other important aspect is required to be considered. As per the language of Clause 4.7, the respondents have a right to deduct/appropriate its dues under the present or any other contract from the security deposit and not the final bill claims. Since Clause 4.7 itself provides that the entire security deposit has to be refunded within the outer limit of six months' performance guarantee period from the date of completion as certified, no such deduction/appropriation can be made after the said period.

33. The proposition laid down in *Indore Development Authority (supra)* is relevant in the context. The said judgment lays stress on the doctrine of *commodum ex injuria sua nemo habere debet,* meaning that convenience cannot accrue to a party from his own wrong; in other words, no person ought to have advantage of his own wrong. Applying such principle, the respondents cannot sustain their right to deduct/appropriate claims from the security deposit indefinitely, beyond the outer time-limit for refund of security deposit, by their own inaction in not refunding the amount to the contractor within the said limit. In the present case, it was for the respondents to return the security deposit within six months from the date of completion as certified to the petitioners and to deduct/appropriate any claims within the said period. Having not done so, the respondents cannot now make such a claim.

34. Also, Clause 4.7 refers to claims on any "other contract". On a plain interpretation of Clause 4.7, the said contractual dues have to be raised within six months from the completion of the work as certified, for the simple reason that the security deposit itself is to be refunded within that period. Thus, if any amount is to be adjusted/appropriated/deducted from the refund amount, the deduction has to be made within six months. As a necessary corollary to such proposition, the claim had to have existed within the said six months. Construing otherwise would lead to the absurd proposition that the respondents could deduct/appropriate dues from the security deposit which has already been refunded.

35. In the present case, the Job Completion Certificate was issued on November 19, 2022 and the period of six months thereafter has elapsed long back. The counter-claim sought to be set up by the respondents was raised only on January 1, 2024, much after the expiry of the six months from the job completion and even after filing of the writ petition. Hence, the said claim did not see the light of day within the stipulated six months up to which such claim could be deducted from the security deposit to be refunded. Hence, it is too late in the day to deduct such amount. The delay after the stipulated period was solely due to non-payment by the respondents, for which the petitioners cannot suffer.

36. Clause 4.7 makes the refund subject to certain conditions. Sub-clause (a) provides that if any defect/defects in the work are detected after issuance of completion certificate, the same are to be rectified to

the satisfaction of the engineer-in-charge within the defect liability period of six months or on its due extension till completion of the rectification as required. In the present case, no such defect was even intimated to the petitioners or has been averred in the opposition of the respondents to entitle the respondents to insist upon the rectification of the same.

37. Since the contractual work done by the petitioners was of supplying heavy machinery and extracting coal, it cannot come within the purview of sub-clause (b) which speaks about building work or other work of similar nature. Sub-clause (c) is also not applicable since the work was not confined to supply, installation and commissioning of equipment for electrical and mechanical work. The supply of heavy machinery for transport of coal and extraction of coal, thus, is not covered either by sub-clauses (b) and (c).

38. Another aspect is required to be looked into. There is a rider in Clause 4.1, which defines security deposit, to the effect that the security deposit shall bear no interest.

39. Since the petitioners also claim interest on their dues, a question may arise as to whether they are entitled to the same. Although not specifically raised by the respondents, such issue is also to be looked into, as the same hits at the very root of the petitioners' entitlement to get interest.

40. Such rider in Clause 4.1 is to be read in its proper perspective. The security is to be deposited at the inception of the work and refunded within six months after completion of work. The reference to interest,

thus, covers the period in-between. Since the terms of the GTC contemplate the security deposit to be refunded, with or without deductions, within six months from completion of the work, the contemplation of the clause must pertain to such period only. Interest, if any, directed by the court for any default on the part of the employer cannot be the subject-matter of the terms of the GTC and, thus, the bar in Clause 4.1 does not cover such court-awarded interest.

41. Clause 4.7 mandates half of the security deposit to be repaid immediately. Regarding the other half, the respondents have to refund the same within six months' performance guarantee period from the date of completion as certified. In the present case, if the security deposit was paid in time, no interest could be levied thereon. The rider in Clause 4.1 which we are discussing, evidently, indicates that the security deposit shall bear no interest from the date when it was deposited till the date it was refunded, which is quite rational keeping in view the fact that it is by definition a refundable 'security deposit'.

42. However, for withholding such payment after the due period, there cannot be any scope of the said rider being operative. The entitlement of the petitioners to interest would be on the premise that if the amount was refunded in time, the same would have fetched interest at existing bank rates. Thus, Clause 4.1 does not preclude interest being awarded to the petitioners by the court. In all fairness, the said argument has also not been advanced by the respondents but the

clause is taken into consideration in order to lend finality and closure to the issues involved.

43. Since no deficiency or defect in the work of the petitioners was informed to them within the six months' performance guarantee period, there could not be any justifiable reason to withhold the security refund from the petitioners.

44. The present consideration would be incomplete without dealing with the proposition advanced by the respondents that cause of action of the respondents remains alive until the writ petition is disposed of. The said argument is entirely beside the point, since in the cited judgments, the merger of cause of action principle was laid down on the premise of the cause of action of the suit itself.

45. The said principle was not in the context of the defendant. It would be absurd to claim that a "cause of action" of the defendant can arise on the basis of the plaint. The respondents' claim of Rs. 7,45,68,963.47p on alleged dues regarding a different contract was never made in the affidavit-in-opposition at all. Thus, there was no counter-claim worth the name for it to remain alive.

46. *Adhunik Ispat Limited (supra)* was on the principles governing judgments on admission under Order XII Rule 6 and not in respect of Order VIII Rule 6A of the Code of Civil Procedure.

47. The respondents have also cited *Orix Auto finance (India) Ltd. (supra)* and *Orissa State Financial Corporation (supra)* for the proposition that the court cannot rewrite a contract. The entire exercise above was on the interpretation of Clause 4.7 in conjunction with the facts of the

case. There does not arise any question of rewriting the contract between the parties; rather, it is the very terms of the GTC which is the plinth of the present adjudication.

48. Thus, in the absence of any claim being made by the respondents during the six months' performance guarantee period, the petitioners are entitled to refund of the entire amount of security deposit. However, since a dispute has been raised by the respondents regarding deposit of additional performance security, the said component cannot be adjudicated within the scope of the writ petition and has to be ascertained on facts by taking evidence from both sides. Also, the payment of the additional charges and interest beyond the project as enumerated in the chart annexed at page 168 of the writ petition cannot be awarded without taking evidence.

49. Hence, the petitioners are entitled only to the amounts of security deposit and retention money which were admittedly deposited by the petitioners. Taking such components into account on the basis of the Chart annexed at page 167 and deducting the 'additional performance security' component of Rs. 3,03,600/-, the sum due and payable to the petitioners comes to Rs. 4,66,05,225/-. However, in view of the concession given by the petitioners in respect of the respondents' claim of Rs. 1,69,10,607/- in their affidavit-in-opposition, the said amount is also to be deducted. Accordingly, the amount due and payable to the petitioners immediately comes to Rs. (4,66,05,225 - 1,69,10,607) = 2,96,94,618/-.

50. The petitioners are also entitled to get interest on the said sum at the rate of 8% per annum till repayment, since it was the fault of the respondents that the amount was withheld for so long. Insofar as half of the amount is concerned, keeping in tune with Clause 4.7 of the GTC, the interest shall be payable from the date of completion of the work as certified, that is, from November 20, 2022. Insofar as the balance half is concerned, as per Clause 4.7, the respondents had six further months to repay the same. Thus, the entitlement of the petitioners to get such amount starts after the expiry of six months thereafter that is on and from May 30, 2023.

51. Accordingly, WPA No. 26622 of 2023 is allowed in part on contest, thereby directing the respondents to pay to the petitioners the amount of Rs. 2,96,94,618/- within April 12, 2024. The respondents shall also pay to the petitioners interest at the rate of 8% per annum on half of the above amount that is on Rs. 1,48,47,309/- from November 30, 2022 till payment. Interest at the same rate shall also be paid on the balance Rs. 1,48,47,309/- from May 30, 2023 till the date of payment. Insofar as the rest of the claims of the petitioners with regard to the contract-in-question are concerned, including final bills and the purported additional performance security as well as other components, the petitioners will be at liberty to make such claim by instituting a civil suit before the competent court having jurisdiction. If so instituted, the same shall be decided on its own merits in accordance with law by the said court.

52. There will be no order as to costs.

53. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)