

3 SCOB [2015] HCD 37**HIGH COURT DIVISION
(Special Original Jurisdiction)**

WRIT PETITION NO. 144 OF 2008

Mr. Md. Zakir Hossain
... For the petitioner**Mark Construction Limited**
Represented by the Managing Director 56,
Inner Circular Road (VIP Road) Eastern
Trade Centre
12th Floor, Room No. 1-3
Naya Paltan, Dhaka-1000Mr. A. B. Siddique
... For respondents No. 1Heard on the 12th & 18th August
AndJudgment on the 18th August, 2015

... Petitioner

Versus

Chief Engineer (Project),
Rural Electrification Board
Dhaka and others
... Respondents**Present:****Ms. Justice Zinat Ara****And****Mr. Justice A.K.M. Shahidul Huq****Constitution of Bangladesh****Article 102:**

The writ petition is not maintainable on two counts,- firstly, due to the reason that the dispute arose out of simple commercial contract and not out of statutory contract and secondly, there is no scope to avail writ jurisdiction as there is an equal efficacious alternative forum to settle the dispute through amicable settlement under clause 54.1, adjudication under clause 54.2 and arbitration under clause 54.3 of section 3 of the GCC between the parties. ... (Para 13)

Judgment**Zinat Ara, J:**

1. On an application under article 102 of the Constitution, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned letters being স্বারক নং পবিবো /তপ্র (ডি) /এনআরজি-২৩/২০০৭/৮৬৪, স্বারক নং পবিবো /তপ্র(ডি) /এনআরজি-২৫ /২০০৭ /৮৬৫ and স্বারক নং পবিবো /তপ্র(ডি) /এনআরজি-২৮ /২০০৭ /৮৬৬ all of dated 09.12.2007 (Annexures-O, O-1 and O-2 to the Writ Petition) issued by respondent No. 2, should not be declared to have been issued without lawful authority and are of no legal effect and/or pass such other or further order or orders as to this court may seem fit and proper.

2. The petitioner, Mark Construction Limited, is a company engaged in the business of construction. The Office of the Rural Electrification Board (hereinafter stated as REB) published a notice inviting tenders for construction work of 21 items including the works of constructions of office-cum-ware house building, 'D' type building and 'F-2' type building at Barabo, Sonargoan, Narayangonj. The petitioner participated in the said tenders and its tenders were accepted. Thereafter, award was given in favour of the petitioner for three separate works, namely, office-cum-ware house building, 'D' type building and 'F-2' type building. After the award, the petitioner found that the construction site was not ready for construction and even earth filling was not started. So, on 01.02.2007, the petitioner filed three separate applications to REB expressing that it would execute the 10% performance guarantees after preparation of the construction site. The Superintending Engineer (Project) of REB by letter dated 06.02.2007 requested the petitioner to execute performance guarantees for the works as per the terms and conditions of the award. In the circumstances, the petitioner on 22.02.2007 filed an application to the Executive Engineer, REB to hand over the site for construction, but without any result. Eventually, the petitioner under compelling situation had to execute performance guarantees for three works and by separate three letters, he informed the Superintending Engineer (Project), REB that he has executed three performance guarantees for the aforesaid works. Thereafter, Contract Agreements for three works were signed between the petitioner and REB with certain terms and conditions. The duration of the project was upto June, 2008 and the notification of award was issued on 28.01.2007 for three construction works. Though the petitioner executed performance guarantees and applied for handing over the site for constructions, but without any result. Under the circumstances, the petitioner could not start the construction works, as the site was not handed over to it for the purpose of constructions. Thereafter, the petitioner repeatedly requested in writing to the authority to hand over possession of the construction site and then submitted applications stating that the price of construction materials has been enhanced 30% higher since execution of the Contract Agreements and so, prayed for enhancing the rate of construction works upto 20%, otherwise it would not be possible for it to do the construction works. It also prayed for return of the performance guarantees with compensation, but REB did not take any step. The petitioner filed applications to REB for handing over possession of the construction site and for enhancement of rate of construction works repeatedly, but without action. Eventually, on 09.12.2007, Superintending Engineer (Project), REB issued a letter to the petitioner to start construction works and to take necessary steps in this regard, failing which the performance guarantees i.e. security money would be encashed and action would be taken against the petitioner from participation in any tender. REB committed breach of contract causing serious damage to the petitioner intentionally and they are going to encash the 10% performance guarantees unlawfully violating the terms and conditions of the Contract Agreement malafide.

3. In the backdrop of the aforesaid facts and circumstances, the petitioner filed this writ petition and obtained the Rule.

4. The petitioner filed a supplementary affidavit mostly re-iterating the same facts and further stating that REB on 13.11.2007, wrote a letter for construction of one-storied building and gave such proposal, but it was not possible for the petitioner to do so and the petitioner, in reply to the said letter, informed the same to REB on 13.11.2007 and requested them to return the performance guarantees. The petitioner also annexed the copy of the Contract Agreement executed between the petitioner and REB.

5. Respondent No. 1 filed an affidavit-in-opposition as well as a supplementary affidavit-in-opposition controverting the statements made in the writ petition contending, inter-alia, that the construction site was low and 14 feet earth filling was necessary before any construction and so, site could not be handed over to the petitioner within seven days from the date of execution of performance guarantees by the petitioner. The petitioner filed the writ petition without resorting to the provisions of adjudication as per clause 54.2 and arbitration as per clause 54.3 of section 3 of the General Conditions of Contract (the GCC, in brief) and without exhausting the said provisions of adjudication and arbitration, the instant writ petition is not maintainable and therefore, the Rule is liable to be discharged.

6. Mr. Md. Zakir Hossain, the learned Advocate for the petitioner, takes us through the writ petition, the supplementary affidavit thereto and the connected materials on record and submits that the petitioner repeatedly asked for handing over the site for the construction works, but the respondents did not hand over the site to the petitioner within seven days from the date of signing of the Contract Agreement between the parties as per clause 21.1 of the GCC. In this connection, he has referred to clause 21.1 of the GCC (Annexure-Q to the supplementary affidavit). He submits that although the respondents did not hand over the site to the petitioner as per the GCC, but they have unlawfully asked the petitioner to construct part of the construction works only after nine months from execution of the Contract Agreement between the parties, though the petitioner informed them for enhancing the rate of construction works, as, within this period, the price of construction materials had grown up. He next submits that the respondents, without considering the petitioner's repeated representations and applications, unlawfully issued the impugned order for encashment of performance guarantees and therefore, the Rule is liable to be made absolute.

7. In reply, Mr. A. B. Siddique, the learned Advocate for respondent No. 1, contends that from the GCC, it is evident that in case of any dispute arose between the parties relating to the Contract Agreement, there is a provision of amicable adjudication as per Clause 54.2. There is also a provision of arbitration as per Clause 54.3 under section 3 of the GCC. He next contends that the petitioner had equal efficacious remedy in the forums of adjudication/arbitration as per clauses 54.2 and 54.3 of section 3 of the GCC, but the petitioner has not availed those forums and therefore, the instant writ petition is not maintainable and the Rule is, thus, liable to be discharged.

8. We have examined the writ petition, the supplementary affidavit thereto, the affidavit-in-opposition and supplementary affidavit-in-opposition thereto and the connected materials on record.

9. There is no dispute that the petitioner participated in the tender and obtained work orders for construction of office-cum-ware house building, 'D' type building and 'F-2' type building. Admittedly, the Contract Agreement was executed between the parties on 28.02.2007. There is no dispute that the petitioner repeatedly asked the respondents not to execute performance guarantees before handing over the site to it. There is also no dispute that after execution of the Contract Agreements, it was found that the site, on which the construction had to be made, needs 14 feet earth filling. Further, the respondents could not hand over possession of the site to the petitioner for construction works for nine months after execution of the Contract Agreement for no fault of the petitioner. It is also admitted that though the petitioner was awarded the construction works, but the respondents, eventually, asked it to make construction of a one-storied building and did not ask it to complete all the

construction works and that was also within a very short period. Admittedly, in the circumstances, the petitioner refused to work inasmuch as, meanwhile, the price of construction materials had grown up and the petitioner also asked for return of the security (the rest performance guarantees).

10. Under clause 21.1 of the GCC, the employer shall give possession of the site to the contractor within seven days from the date of performance security or after signing of the Contract Agreement.

11. In the instant case, though the petitioner submitted performance guarantees and signed the Contract Agreement, but violating the said clause, REB failed to hand over the possession of the site to the petitioner for the construction works. Therefore, the aforesaid action of REB cannot be said to be lawful.

12. Be that as it may, from clauses 54.1, 54.2 and 54.3 of section 3 of the GCC, it transpires that there are provisions for amicable settlement of dispute under clause 54.1 between the petitioner and REB. Similarly, there is provision of adjudication under clause 54.2 of the GCC between the petitioner and REB relating to decision taken by the Superintending Engineer of REB in writing. There is also another provision of arbitration under clause 54.3 of the GCC which reads as under:-

“54.3 Arbitration

(a) If either of the Party is dissatisfied with the decision, or if the Adjudicator fails to give a decision within twenty-eight (28) days of a dispute being referred to, then either of the Parties may, within twenty-eight (28) days of such reference, give notice to the other party, with a copy for information to the Adjudicator, of its intention to commence arbitration.

(b) The arbitration shall be conducted in accordance with the Arbitration Act (Act 1 of 2001) of Bangladesh as at present in force.”

13. Thus, it appears that the writ petition is not maintainable on two counts,- firstly, due to the reason that the dispute arose out of simple commercial contract and not out of statutory contract and secondly, there is no scope to avail writ jurisdiction as there is an equal efficacious alternative forum to settle the dispute through amicable settlement under clause 54.1, adjudication under clause 54.2 and arbitration under clause 54.3 of section 3 of the GCC between the parties. For the aforesaid reasons, there is no scope to avail writ jurisdiction.

14. Mr. Md. Zakir Hossain, the learned Advocate for the petitioner, submits that the petitioner is now willing to settle the dispute through amicable settlement/adjudication /arbitration under clauses 54.1/54.2/54.3 of section 3 of the GCC.

15. In the above facts and circumstances, we are of the view that the Rule may be disposed of without going into the merit of the case unnecessarily.

16. Accordingly, the Rule is disposed of with liberty to the petitioner to approach the respondents to settle the dispute through amicable settlement/adjudication/arbitration as per clauses 54.1/54.2/54.3 of section 3 of the GCC within thirty days from the date of receipt of the certified copy of the judgment by the petitioner.

17. The respondents are directed not to encash the performance guarantees/security within the aforesaid period of thirty days.

18. If the petitioner avails the aforesaid forums within the aforesaid period, the respondents shall not encash the performance guarantees, failing which, the respondents may proceed in the matter further in accordance with law.

19. No costs.

20. Communicate the judgment to respondent No. 1 at once.