



HIGH COURT OF SIKKIM

Record of Proceedings**W.P.(C) No.23 of 2021**

M/S LINKWELL TELESYSTEMS
PVT. LTD.

PETITIONER

VERSUS

THE STATE OF SIKKIM & ORS.

RESPONDENTS

Date: 09.06.2021

CORAM:

THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

For Petitioner

Mr. Sajal Sharma, Advocate.

For Respondents

R-1 & R-2

Mr. Sudesh Joshi, Additional Advocate General.

Mr. Hissey Gyaltzen, Assistant Government Advocate.

R-3

None.

O R D E R (ORAL)

1. Learned Additional Advocate General for State-Respondents No.1 and 2 on advance Notice.

2. Heard Learned Counsel for the Petitioner at length.

3.(i) Briefly, the case of the Petitioner is that vide Agreement dated 04.05.2017, the Petitioner was awarded the Contract for the purpose of supply and maintenance of POS Devices, POS application, its installation, maintenance, integration with the TPDS Software and Automation of Fair Price Shops of the 1421 Fair Price Shops in Sikkim.

(ii) As per Clause 2 of the said Agreement, the Petitioner was to adhere to the Request for Proposal (RFP) Guidelines and the Service Level Agreement also formed a part of the Agreement.

(iii) Clauses 2 and 8 of the Agreement were to be read together to determine the rights and liabilities of the parties.



HIGH COURT OF SIKKIM

Record of Proceedings

(iv) Clause 7.9 of the RFP contained the Arbitration Agreement as defined under Section 7 of the Arbitration and Conciliation Act, 1996. The relevant portion of Clause of 7.9 of the RFP *inter alia* reads as under;

"7.9. Resolution of Disputes.

FCS&CA Department and the successful bidders shall make every effort to resolve amicably by direct informal negotiation, any disagreement or dispute, arising between them under or in connection with the contract.

Any dispute or difference whatsoever arising between the parties to this Contract out of or relating to the meaning, scope, operation or effect of this Contract or the validity of the breach thereof, which cannot be resolved, shall be referred to a sole Arbitrator to be appointed by mutual consent of both the parties herein. If the parties cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existence of such dispute, then the Arbitrator shall be nominated by the Secretary, Law Department, Government of Sikkim ("Law secretary"). The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made thereunder shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications, rules or re-enactments thereof. The arbitration proceedings will be held at Gangtok, Sikkim, India."

(v) The work was to be taken up by the Petitioner in a phased manner as per the terms and conditions specified in Order No.1804/FCS&CA, dated 29.03.2017. The Petitioner commenced the works accordingly.



HIGH COURT OF SIKKIM
Record of Proceedings

(vi) By a Letter, dated 25.05.2020 (Annexure-12), addressed to the State-Respondent No.2 by the Petitioner, the Petitioner raised a Bill of Rs.3,65,01,842.00 (Rupees three crores, sixty five lakhs, one thousand, eight hundred and forty two) only, and requested the State-Respondent No.2 to release the pending payment within seven days to enable them to run the project, besides informing them that the Petitioner may not be able to manage operations beyond 01.06.2020 unless the payments were made over to them for the Bills raised.

(vii) From the month of June, 2020, the Petitioner stopped all works granted to them vide the Contract mentioned *supra*.

(viii) That, the State-Respondent No.2 issued Show Cause (Annexure-10) bearing No.753/F&CSD, dated 11.01.2021, reminding the Petitioner that the State-Respondent No.2 had released a sum of Rs.1,44,87,880.00 (Rupees one crore, forty four lakhs, eighty seven thousand, eight hundred and eighty) only, in March, 2017, in favour of the Petitioner as mobilization advance.

(ix) The Show Cause also stated that from the month of June, 2020, without informing the State-Respondents No.1 and 2, the Petitioner stopped providing their services resulting in a complete halt in the Public Distribution System through EPOS Machine at Fair Price Shops. That, further the unilateral suspension of services is *ultra vires* the Service Level Agreement. That, the discontinuance of services by the Petitioner caused a set back to the State-Respondents No.1 and 2 for timely



HIGH COURT OF SIKKIM
Record of Proceedings

implementation of the One Nation One Ration Card Scheme, hence they were to explain as to why the Agreement entered on 04.05.2017 should not be terminated.

(x) By a Letter also of the same date i.e. 11.01.2021 (Annexure-11), the State-Respondent No.2 agreed to release payments which were due to the Petitioner in a phased manner.

(xi) It is the Petitioner's case that on 16.01.2021, the response to the Show Cause was given by them.

(xii) Despite the response to the Show Cause, the services of the Petitioner were terminated vide Letter bearing No.801/F&CSD/2021, dated 22.01.2021.

(xiii) Having thus terminated the services of the Petitioner, the Respondent No.2 on 02.02.2021, issued "Notice Inviting E-Tender" from eligible Bidders for the same works that had earlier been awarded to the Petitioner i.e. Automation of Fair Price Shops in Sikkim.

(xiv) Pursuant to the E-Tender, the Respondent No.3 was awarded the Contract and Work Order issued on 09.03.2021.

(xv) On 24.04.2021, the Petitioner was before the Learned Commercial Court, East Sikkim at Gangtok, seeking reliefs under Section 9 of the Arbitration and Conciliation Act, 1996, the prayers being;

"i. Kindly issue an ad interim ex-parte injunction order to restrain the Respondent from accepting any bid in relation to the Notice Inviting E-Tender dated 02.02.2021.

ii. Kindly issue an order of injunction to restrain the Respondent from accepting any bid in relation to the Notice Inviting E-Tender dated 02.02.2021 until the



HIGH COURT OF SIKKIM

Record of Proceedings

conclusion of the determination of the controversy between the parties by an Arbitrator.

iii. Kindly pass an order quashing the Show Cause Notice bearing No.753/F&CSD dated 11.01.2021.

iv. Kindly pass an order quashing Notice of Termination of Service issued by the Secretary, Food and Civil Supplies Department bearing No.801/F&CSD/2021 dated 22.01.2021.

v. Any other order/orders that this Hon'ble Court deems fit to pass in the interests of justice."

The reliefs so claimed *supra* are similar to the prayers made before this Court.

(xvi) Vide an *ex-parte* ad interim Order, dated 27.04.2021, the Learned Commercial Court restrained the State-Respondent No.2 herein, the Secretary, Food and Civil Supplies Department, who was the Respondent therein, from accepting any Bid in connection with the E-Tender floated by them on 02.02.2021.

(xvii) Later, after hearing both parties, by a subsequent Order, dated 27.05.2021, the Learned Commercial Court vacated its earlier *ex-parte* ad interim Order, dated 27.04.2021.

(xviii) Learned Counsel for the Petitioner submits that subsequent to the Order dated 27.05.2021, the Petitioner invoked the Arbitration Clause of the Agreement, dated 04.05.2017 and sought for appointment of an Arbitrator. The suggested Arbitrator was not agreeable to the State-Respondent No.2 and hence further steps in this context are being taken and the process is underway.

4.(i) Having heard and considered the facts placed before this Court, admittedly the Petitioner did not impugn the Letter dated 22.01.2021 terminating the Contract. It is also



HIGH COURT OF SIKKIM
Record of Proceedings

admitted that the Petitioner, of their own accord, stopped the works awarded to them vide the Agreement dated 04.05.2017 from the month of June, 2020. Pursuant to the Petitioner having stopped the works, the Show Cause Notice, dated 11.01.2021, was issued following which the Contract between the Petitioner and the State-Respondent No.2 stood terminated on 22.01.2021. Learned Counsel for the Petitioner canvassed the contention that the E-Tender, dated 02.02.2021, was not assailed as the Petitioner had already written a Letter dated 30.01.2021, to the State-Respondent No.2 expressing their willingness to restart the project by mobilizing funds from other projects and internal fund adjustments but sought an assurance from the State-Respondent No.2 that pending payments would be cleared.

(ii) In the interim, the Contract came to the awarded to a third party.

(iii) The Petitioner approached the Learned Commercial Court on 24.04.2021 and is before this Court by way of filing the instant Writ Petition on 31.05.2021 with prayers which are, in sum and substance, similar in both Courts.

5. It may relevantly be stated here that this Court is aware that the existence of an Arbitration Clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution, neither is the exercise of Writ jurisdiction under Article 226 in a contractual matter ruled out. However, this jurisdiction is invoked when there is no efficacious alternative remedy for the Petitioner.



HIGH COURT OF SIKKIM

Record of Proceedings

6. The Hon'ble Supreme Court, recently in ***Bhaven Construction through Authorised Signatory Premjibhai K. Shah vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Another***¹ referred to the ratio in ***Nivedita Sharma v. Cellular Operators Association of India***² and *inter alia* observed as follows;

"17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In *Nivedita Sharma v. Cellular Operators Association of India*, (2011) 14 SCC 337, this Court referred to several judgments and held:

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261. **However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy.** Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(emphasis supplied)

18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."

7. In light of the detailed discussions that have emanated *supra*, and in view of the obtaining facts and

¹ 2021 SCC OnLine SC 8

² (2011) 14 SCC 337



HIGH COURT OF SIKKIM
Record of Proceedings

circumstances in the instant matter as reflected hereinabove, I am of the considered opinion that the Petitioner has failed to put forth any exceptional circumstances for invoking the Writ jurisdiction of this Court under Article 226 of the Constitution.

8. The Writ Petition is accordingly dismissed and disposed of.

9. Applications filed along with the Writ Petition, if any, also stand disposed of.

Judge
09.06.2021

ml/ds

Approved for reporting : **Yes**