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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 13590/2009

Date of decision: 10th December, 2009

ABW INFRASTRUCTURE LTD AND ORS. Petitioners

Through Mr. Gopal Jain, Ms. Bina Gupta &
Mr. Gaurav Singh, Advocates.

versus

RAIL LAND DEVELOPMENT AUTHORITY AND ANR.

..... Respondents

Through Mr. Amit Kumar & Mr. Manoj Pant,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

ORDER

1. The petitioner No. 1 herein M/s ABW Infrastructure Limited, on the basis of highest tender bid of Rs. 1026 crores was awarded project for development of plot at Sarai Rohilla, Kishanganj, New Delhi vide letter of acceptance dated 19.5.2008. Rs.1026 crores was to be paid by the petitioner to the respondent Rail Development Authority (RLDA for short) in installments. The first installment of Rs.513 crores was to be paid within thirty days from 19.5.2008 i.e. the date of issue of letter of acceptance. It is an admitted position that the petitioner has not paid the first installment of Rs.513 crores till today. It is admitted that the petitioner has given a performance guarantee of Rs.10 crores and it is stated in the writ petition that the petitioner has made other payments of Rs.29 crores to the respondents towards interest and success fee.

2. Learned counsel for the petitioners submits that the respondent RLDA wanted to review the project allotted to the petitioner and back out from the letter of acceptance, therefore, the petitioners had filed W.P. (C) No. 4320/2008 in this Court, which was disposed of vide order dated 12th August, 2008 recording as under:-

“7. We have perused the records of the case and heard the counsel for the parties. In the circumstances and the submissions made hereinabove, we are of the view that the grievances of the petitioners are justified. The concluded contract had come into existence evidenced by the Letter of Acceptance issued on 19th May, 2008 to the petitioners. The said contract is also in public interest as the bid of the petitioners is about Rs.250 crores higher than the next bidder. The petitioners, after the acceptance of the contract, have committed themselves financially. Even upto date no

decision on the proposed review has been taken. The respondent No. 1 cannot be permitted to frustrate the said contract when no decision on the review has been taken.

8. We, therefore, allow this writ petition. The impugned communication dated 24.5.2008 is quashed and the respondents are directed to abide by the contract awarded to the petitioners vide letter dated 19th May, 2008. We, however, make it clear that, as also agreed by the counsel for the petitioners on instruction that the petitioner shall not claim any equity or damages against the respondents for any delay caused by the issuance of impugned communication and will abide by the terms of the Original Letter of Acceptance dated 19th May, 2008, deeming as if the same was issued with effect from today. All financial and other commitments/obligations will be completed on the basis of the said Letter of Acceptance dated 19th May, 2008. No order as to costs.”

3. Even after the order dated 12.8. 2008, the petitioners did not pay Rs. 513 Crores but approached RLDA for amendment of the tender terms. The petitioners along with the writ petition have filed letter dated 24.4 2009, which was written almost eight months after the disposal of the writ petition W.P. (C) No. 4320/2008 on 12.8. 2008. In the said letter, the petitioners had asked for several amendment and re-negotiations of the terms of the tender. This was followed by another letter dated 16.7.2009 written by the petitioners to the RLDA.

4. By their letter dated 20.8. 2009, RLDA agreed to examine the petitioners’ request for modification of the existing agreement to the extent indicated in the said letter. In paragraphs 2 to 5 of the said letter it

was stated by RLDA as under:-

“2. Above terms shall be applicable and valid if and only if renewed Joint Bidding Agreement is submitted to RLDA. The renewed Joint Bidding Agreement and SPC documents shall be submitted to RLDA within 30 days of issue of this letter.”

3. In view of the above, please communicate your willingness to go ahead with the execution of the project within 10 days of the issue of this letter.

4. The Draft Development Agreement suitably modified on the lines enumerated in para-1 above will be sent to you on compliance of action under para 2 & 3 above.

5. It may be noted that till such time the documents/compliances as mentioned under **para-2&3 above are submitted to RLDA and all other obligations including signing of Development Agreement as per above terms are met with by the developer, you continue to remain obligated to comply with the original obligations as per RLDA’s letter No. RLDA/2008/Project/Sarai Rohilla/RFP/Vol.II dated 31-01-09 and 02-02-09.**

It may also be noted that communication of the above relaxations by RLDA will neither entitle you for any claim whatsoever against RLDA nor does it restrict RLDA’s rights to seek the compliance of the terms & conditions of LOA as partially modified vide this office letter dated 31-01-09

& 02-02-09 & take appropriate consequential action and any other alternative remedy in case of your failure-

- i) to communicate your willingness as per para-3 above; or
 - ii) to submit the Joint Bidding Agreement within the stipulated time as in para-2 above; or
 - iii) to deposit the first installment of Rs.380 crores within the stipulated time as above.
- Please acknowledge receipt.”

5. The aforesaid clauses in the letter dated 20.8.2009 clearly state that the modifications suggested and pending consideration would be applicable and valid only if renewed Joint Bidding Agreement was submitted to RLDA and the agreement was signed. Till the signing of the agreement, the parties were obligated to be bound by the original obligations. It was stated that the petitioners should communicate their willingness to go ahead with the project within ten days of issuing the afore-said letter.

6. The petitioner did not send an unconditional and unqualified acceptance but responded vide letter dated 29th August, 2009. This letter dated 29th August, 2009 has not been filed along with the writ petition and has been produced by the respondent RLDA and reads:-

“We acknowledge with thanks receipt of your letter no. RLDA/2009/Project/RFP/Sarai Rohilla/Vol.III dated 20.08.2009 on the above subject.

We hereby convey our willingness to go ahead with execution of the project as per the

terms and conditions contained in your above said letter. However, as regards payment of accrued interest on the upfront lease premium of Rs. 1026 crore for the entire period with effect from 11.09.2008 upto the date of payment of the first installment, we have already conveyed our reservations vide our various letters to you. In this regard we reserve our right to seek an amicable settlement through dispute resolution mechanism.”

7. Thus as per RLDA, there was no absolute acceptance and no new contract/agreement was entered into and there was no novation of the original contract.

8. The respondent RLDA thereafter on 18.9. 2009 circulated a draft modified development agreement asking the petitioners to offer comments on the said document clearly outlining the paragraph/clause, which was not in consonance with the decision communicated by the RLDA through their earlier letter dated 20.8. 2009. It was further clarified that the agreement sent to the petitioners for their comments was merely a draft and would be finalized only after approval of the competent authority.

9. The petitioners on 7.10. 2009 wrote to the respondent RLDA raising various objections to several clauses of the draft agreement and suggested amendments. In this letter, the petitioners gave a list of suggestion/amendments for favourable consideration and incorporation in the modified development agreement. The petitioners wanted modification of Clause 2.6.1(a) of the draft agreement and also amendment of the clause relating to the consequences in case there was

failure by the developer to make requisite payments. Paragraphs 2 and 3 of the said letter read:-

“2. The addition viz. “Failure by the Developer in making requisite payments towards two (2) consecutive Outstanding installments under this agreement by due date(s) or failure to make payment of the third installment or any other dues within the stipulated time and such failure to make payments is not remedied, to the satisfaction of RLDA, within 60 days of receipt of written notice from the RLDA specifying such breach and requiring the Developer to remedy the same” as per clause 9.1.(b) under the head ‘Developer Event of Default’ is rather very stringent and is should be modified in accordance with the clause 1.4 of RLDA’s letter dated 20.08.2009 which is reproduced below for your ready reference:

“Payment period and action on payment defaults- The overall period shall not exceed the period stipulated under para 1.1 above subject to the condition that successive default of two installments may invite termination of contract. Cure period (60 days as per default provision article 9.1(a) of the original draft development agreement of the RFP shall be permitted to make good the default.”

3. Clause 1.2 of your above said letter dated 20.08.2009 stipulates that proportionate lease and marketing rights will be available to us at 32% on the payment of Rs.380 crores, 19.5% on the payment of 200 crores and

18.5% of the total area of the land to be leased to us on payment of third installment of Rs.446 crores. You will appreciate that upon payment of the first installment, the percentage of amount payable vis a vis the land to be leased to us works out to 37.04%. As such the amount paid by us is proportionately higher to the tune of 5% than contemplated by the railways. Besides, by the time the second installment becomes due, we would have incurred expenses in obtaining the necessary approvals from the various authorities for the complete project. We would also have spent a considerable amount on the redevelopment of the area demarcated for Railways. It is in this context, we have implored upon you to amend clause 9.4.2 by providing that the entire amount paid by us would not be forfeited and the Lease Deed already executed would remain valid. We, therefore, request you that this clause may be amended accordingly.”

10. The respondent RLDA by their letter dated 9.10.2009 informed the petitioners that their response was considered and suggestions for amendments and modification could not be accepted. It was further stated that the respondents had given all reasonable opportunity for review of the contract and the onus of failure was squarely on the petitioners.

11. The petitioners thereafter wrote two more letters on 16.10. 2009 and 19.10.2009. The respondent RLDA by their letter dated 12.11.2009 informed the petitioners that the amendments suggested by the petitioners were not acceptable to them.

12. The respondent RLDA have stated that they invoked the bank

guarantee and the petitioners have now filed an amendment application to the writ petition being CM No. 15228/2009 challenging the order invoking the bank guarantee and for quashing the communications dated 1.12.2009 and 2.12.2009.

13. Learned Additional Solicitor General for the respondent RLDA has stated that bank guarantee has been encashed and the money has been received.

14. By the present writ petition, the petitioners want the Writ Court to compel and issue Mandamus to the respondent RLDA to agree to the suggestions and the amendments proposed by them to the draft agreement. It is stated that the stand of respondent RLDA is arbitrary and they should accept the amendments and suggestions proposed by the petitioners and the original contract should be modified.

15. Development of land in this case is a pure commercial contract. The petitioners had submitted their tender opting and offering the terms and conditions mentioned therein. Others had also given their offers. The offer of the petitioners was accepted. The petitioners had themselves filed a writ petition stating that by issue of acceptance dated 19.5.2008 a concluded contract had come into existence and had relied upon Clause 5 of the said letter, which has been quoted in the order dated 12th August, 2008 allowing the writ petition of the petitioner. The said clause reads:-

“Till such time that the Development agreement is executed between your consortium and RLDA, this Letter of Acceptance (LOA) will constitute the contract between us. The Letter of Acceptance shall also constitute part and parcel of the subsequent Development agreement to be entered between us.”

16. It is not possible for this Court to issue Mandamus and compel the

respondent RLDA to accept new terms and conditions proposed by the petitioners. The respondent RLDA are entitled to take care of their own commercial and economic interest. The petitioners wanted to re-negotiate the terms of the contract, which was considered by the respondent RLDA and a draft agreement was circulated. The petitioners wanted change in the draft agreement, which was not accepted by the respondent RLDA. It may be noted that renegotiations of the terms was between the petitioners and the respondent RLDA and no third party or other contractors were involved.

17. Learned counsel for the petitioners submitted that the respondent RLDA being a State, this Court can compel RLDA to accept the amendments proposed by the petitioner. He has relied upon *Mahabir Auto Stores and others versus Indian Oil Corporation and others*, AIR 1990 SC 1031 and *ABL International Limited and Another versus Export Credit Guarantee Corporation of India Limited and Others*, (2004) 3 SCC 553. In *Mahavir Auto Stores* (supra), the private party was carrying on business of sale and distribution of lubricants for 18 years under a contract with the Indian Oil Corporation. The respondent Indian Oil Corporation wanted to discontinue the supply of lubricants which compelled the petitioner therein to file a writ petition. In the facts of the said case, the Supreme Court observed that when an instrumentality of the state enters a contractual field, it would be governed by the incidence of contract but in appropriate cases, writ court can interfere when the State has acted in an arbitrary manner. In cases where State action is uninformed by reason, the arbitrary conduct can be made subject matter of proceedings under Article 226 or Article 32 of the Constitution. In the case of *ABL International Limited* (supra), the

respondent Corporation wanted to wriggle out of the insurance contract. In the facts of the said case, the Supreme Court held that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. The Court observed that Respondent Corporation was an instrumentality of the State which was approached by the insured to cover their export risk and on this basis the writ jurisdiction was exercised. The Supreme Court noticed their earlier decisions in *K.N. Guruswamy versus State of Mysore and Others*, 1955 (1) SCR 305, *the DFO, South Kheri and Others versus Ram Sanehi Singh*, AIR 1973 SC 205, *Gujarat State Financial Corporation versus Lotus Hotels Private Limited*, AIR 1983 SC 848 and *Life Insurance Corporation of India versus Escorts Limited and Others*, 1986 (8) ECC 189. In these cases, it has been observed that ordinarily a writ court would not go into contractual matters unless the action has some public law character attached to it. In a given case, when factual matrix requires, a writ court can interfere under Article 226 of the Constitution of India and the parties need not be relegated to a civil suit. Therefore facts of each individual case have to be examined. The facts of the present case do not justify exercise of extraordinary writ jurisdiction. We are concerned with a commercial contract, in which both parties have right to take care of their interests and profits. There is no contract of indemnity as in case of insurance or wrongful termination of a contract by a government company which enjoys monopoly status. The petitioners had themselves filed a writ petition and had claimed that a concluded contract had come into existence and was

binding. Now the petitioners want amendments in the original contract and that too on their own terms. As stated above payment of the first installment of Rs.513 crores had not been made till today.

18. In ***Purvankara Projects Ltd. v Hotel Venus International*** (2007) 10 SCC 33, the Supreme Court noticed the distinction between administrative and contractual law decisions. It observed that the concept of administrative law should not be mixed up with fair or unfair terms of the contract. The doctrine of fairness cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties. Reference was also made to its earlier decision ***Air India Limited versus Cochin International Airport Limited***, (2000) 2 SCC 617 in which it has been observed that the State can choose its own method to arrive at a decision and can fix its own terms of invitation to tender which are normally not to be interfered with. Reference was also made to ***Monarch Infrastructure Private Limited versus Commissioner, Ulhasnagar Municipal Corporation*** (2000) 5 SCC 287 where it was held that terms and conditions in the tender are prescribed by the Government bearing in mind the nature of the contract and in such matters the authority concerned is the best judge to prescribe the terms and conditions and it is not for the Court to prescribe conditions which they consider were better than the ones prescribed in the tender.

19. In the facts of the present case and keeping in view the nature of commercial contract, the order passed by this Court on 12th August, 2008 in the writ petition filed by the petitioners themselves and the correspondence which has been referred to in detail above, I do not think any interference is required or justified in exercise of writ jurisdiction. It is clarified that the observations made above are for the purpose of

disposal of the writ petition and will not be binding on the civil court in case the petitioner invokes ordinary civil jurisdiction. Learned ASG had submitted that the petitioner no.1 does not have locus standi to invoke the writ jurisdiction as they are a part of the joint venture consortium. This issue is not examined and is left open.

The writ petition is not entertained.

SANJIV KHANNA, J.

DECEMBER 10, 2009
VKR