

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 6TH DAY OF JULY 2015/15TH ASHADHA, 1937

WP(C).No. 1297 of 2010 (J)

PETITIONER :

**M/S.SAURASHTRA CEMENT LTD.,
41/172, GROUND FLOOR, B.BLOCK, KALYANI APARTMENT,
NEAR SUDHEENDRA MEDICAL MISSION HOSPITAL,
CHOTTOOR ROAD, KACHERIPADY, COCHIN-18
REP. BY ITS SENIOR VICE PRESIDENT (PROJECT)
SHRI.P.R.V.NAIR.**

**BY ADVS.SRI.JOY THATTIL ITTOOP
SRI.LIJOY P.VARGHESE**

RESPONDENTS :

- 1. STATE OF KERALA,
REP. BY ITS SECRETARY
DEPARTMENT OF FISHERIES AND PORTS,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**
- 2. THE CHIEF ENGINEER,
DEPARTMENT OF HARBOR ENGINEERING DIVISION
MANAKKADU P.O., KAMALESWARAM, THIRUVANANTHAPURAM.**
- 3. THE DIRECTOR OF PORTS,
GOVERNMENT OF KERALA, NEW CO-OP. BUILDING 5TH FLOOR,
LMS JUNCTION, THIRUVANANTHAPURAM-33.**

BY GOVERNMENT PLEADER SRI. TOM K. THOMAS

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 26-06-2015, THE COURT ON 06-07-2015 DELIVERED THE
FOLLOWING:**

bp

APPENDIX

PETITIONER'S EXHIBITS :

- P1: COPY OF THE MEMORANDUM OF THE UNDERSTANDING EXECUTED BETWEEN THE PETITIONER AND THE GOVERNMENT OF KERALA DT. 7TH AUGUST 1998.**
- P2: COPY OF THE BOT AGREEMENT DT 13/1/2000.**
- P3: COPY OF THE CORRESPONDENCE ISSUED BY THE PETITIONER DT 16/9/2008 TO THE R2.**
- P4: COPY OF THE LETTER DT 16/10/2006 ISSUED BY THE CHAIRMAN OF POLLUTION CONTROL BOARD TO THE MINISTER OF ENVIRONMENT & FOREST**
- P4(a): COPY OF THE UNDERTAKING REFERRED TO IN EXT P4.**
- P5: COPY OF THE LETTER DT 23/1/2007 ISSUED BY THE PETITIONER TO THE MINISTRY OF ENVIRONMENT & FOREST.**
- P6: COPY OF THE TECHNO -ECONOMIT FEASIBILITY REPORT PREPARED BY M/S. HOLTEC CONSULTING PVT. LTD. FOR THE PETITIONER DURING THE YEAR 2007.**
- P7: COPY OF THE DETAILS OF LAND PURCHASED BY THE PETITIONER.**
- P8: COPY OF THE PROJECT PREPARED BY THE REGIONAL RESEARCH LABORATORY.**
- P9: COPY OF THE INTERIM ORDER DT 13/7/2009 IN WPC NO. 6145/2009 PASSED BY THE HONOURABLE HIGH COURT OF KERALA.**
- P10: COPY OF THE G.O.M.S. NO. 76/09/F & PD DT 4/12/2009 PASSED BY THE R1.**

RESPONDENT'S EXHIBITS :

- EXT.R1(a): COPY OF THE PROCEEDINGS OF THE ENVIRONMENTAL PUBLIC HEARING CONDUCTED ON 24/10/2002.**
- EXT.R1(b): COPY OF THE ORDER DT 23/12/2002.**
- EXT.R1(c): COPY OF THE LETTER DT 21/1/2010 FROM THE KERALA STATE POLLUTION CONTROL BOARD.**

//TRUE COPY//

P.A. TO JUDGE

bp

K. VINOD CHANDRAN, J.

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W.P.(C) No.1297 of 2010 - J

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Dated this the 6th day of July, 2015

J U D G M E N T

The petitioner herein impugn Exhibit P10 order of the State Government, which revoked a 'Build, Operate and Transfer' [BOT] agreement entered into by the petitioner with the 1st respondent-State.

2. When the matter was taken up for hearing, the learned counsel for the petitioner sought for time on the ground that there is a connected writ petition [W.P.(C).No.6145 of 2009] and a contempt case [Cont.Case (C).No.1181 of 2009] pending with respect to the same matter. Considering the fact that this particular writ petition had been in the hearing list for the last more than three weeks, this Court declined to adjourn the matter to hear it along with the other connected matters. Further, on a reading of the records of the present case, this Court is of the

opinion that, for disposal, it is not expedient that both the writ petitions be heard together.

3. While the instant writ petition deals with the cancellation of the BOT agreement, the earlier writ petition impugned alleged attempt of the State to reclaim land at the spot at which, the BOT agreement required the petitioner to set up a captive jetty. The jetty was intended inter alia to cater to the Cement Clinker Grinding Unit, to be set up by the petitioner, which too forms part of the BOT agreement; as an obligation of the petitioner. There was an interim order in the above writ petition, as evident from Exhibit P9, commanding the respondent-State to ensure that there is no construction activity or reclamation by the 2nd respondent or under that authority within the area covered by the BOT agreement in favour of the petitioner. The contempt case is said to have been filed for violation of that order.

4. The cancellation of the BOT agreement, which is challenged in the present writ petition, if upheld, then the earlier

writ petition would be of no consequence. However, if this court decides to set aside the cancellation, then necessarily the earlier writ petition would also have to be allowed. Either way, the contempt case would have to be considered independently, since the disposal of the writ petitions have no bearing on the allegation of contempt as against an interim order. In such circumstance, this Court is not convinced that it is expedient to hear all the cases together. This Court is not inclined to adjourn the present writ petition, being a case of the year 2010, and no submission having been made as to the connected matters when this matter was pending in the hearing list for long, before this very same bench.

5. The petitioner is said to be the Flagship Company, of one Mehta Group, established in the year 1956 at Ranavav in Porbander District of Gujarat State; running a most modern cement plant with ISO-9002 accreditation, engaged inter alia in exporting clinker and cement. In pursuance of a Scheme of the Government of India [for brevity "GoI"] and the Government of

Kerala [for brevity "GoK"] to encourage participation of private enterprise in development of Minor and Intermediate Ports, the GoK is said to have invited Private Sector Units to set up Port based Industrial Units. Exhibit P1 is the Memorandum of Understanding [MoU]; wherein it is stated that the petitioner-Company expressed its desire to establish a Cement Clinker Grinding Unit and a captive jetty with terminal facilities at Azhikode side of Kodungallur Port for handling clinker and bulk cement. It was decided to permit the petitioner to build a berth, to handle bulk cement and clinker on a BOT basis.

6. Setting up of the Unit though an obligation under the BOT agreement was an ancillary obligation of the petitioner with no transfer intended of the Unit. The necessary land for the unit had to be procured by the Company, at its own cost and the development of the captive berth alone had to be done at Azhikode side on a BOT basis. The Company, during the operation of the berth, was also entitled to offer the jetty facilities to others, on terms and conditions as provided in an

agreement between the petitioner, the third party and the GoK. Even as per the terms of Exhibit P1, MoU, the clearance with respect to environment and pollution was the obligation of the petitioner. The area in which the captive berth was to be built, was to be allotted by the GoK on lease basis. Pursuant to the MoU, Exhibit P2 BOT agreement was entered into on 13.01.2000.

7. Alleging that the space allotted to the Company for building the captive jetty is sought to be reclaimed by the State, the earlier writ petition was filed. The State, through the learned Government Pleader, on 02.03.2009 submitted that the reclamation complained of, is outside the area covered by the BOT agreement. The State admitted that there was reclamation, but, outside the area covered by the BOT agreement. Since the factual controversies could not be resolved for reason of the Government having not filed a counter affidavit, the Government was directed to place on record such counter affidavit and considering the expediency of the situation and also visualising the probable consequences that would visit the State

Government; if the issue is not resolved immediately, an interim order was also passed that no reclamation could be done in the area covered by the BOT agreement. A Contempt of the said order is said to have been committed, against which the Contempt Case is filed. In the meanwhile, the order Exhibit P9 was passed on 13.07.2009. The impugned order in the present case was passed five months hence, on 04.12.2009 [Exhibit P10]. A detailed counter affidavit has been filed by the Government in this case.

8. The MoU produced at Ext.P1 was executed on 07.08.1998. A reading of the MoU would indicate that the permission to allot the area required for building the captive berth and to operate it for eventual transfer to the State, emanated from the desire expressed by the petitioner to build a cement clinker grinding unit (for brevity 'the cement unit'). The establishment of the cement unit was a necessary pre-condition, since the jetty was intended to cater primarily to the cement manufactured in the unit. Hence, the establishment of the

cement unit and the building of the captive berth, to cater to the goods of the unit, were inextricably linked. One cannot be separated from the other and there would be no purpose served in proceeding with the one and not the other. The MoU also indicates by clause 2.1 that it was the obligation of the petitioner to obtain environmental and pollution clearance as also other clearances from the State and Central Government authorities. It is on satisfaction of such condition that the GoK agreed to allot the area required for the captive berth on lease basis for which a separate BOT agreement was to be executed.

9. The BOT agreement at Ext.P2 was executed on 13.01.2000. The GoK designated the required water front and basin area to the Company for installing facilities. The terms for which the petitioner was to own the captive jetty was a period of 25 years commencing on the first day of the commercial operations of the jetty. It was specifically provided that if no work had been commenced after two years from the date of execution, for construction of the jetty, the agreement shall be

terminated forthwith without any liability on the GoK. The clearances required for establishing such jetty and the construction of channel and other facilities, from the statutory authorities were again made the obligation of the petitioner; with the State promising necessary assistance towards that end.

10. The statutory clearances was essential and mandatory, since by the agreement itself the petitioner was permitted to reclaim lands up to three hectares behind the jetty, with proper bunding. The lease of the said reclaimed land was also provided at a concessional rate by clause 1.13 of the agreement. Clause 1.14 again stipulated that the Company shall complete the construction within 18 months from the date of final clearance and commence operations within six months of completion. The establishment of the cement unit was also a part of the agreement by clause 2.2 in Article 2 of the Constitution of India. The Company had and identify and procure the necessary land for establishing the cement unit. The construction of the Port facility and that of the cement unit was

to progress concurrently to ensure that the cement unit is commissioned first and immediately thereafter operations in the jetty commenced.

11. The petitioner contends that it was the refusal of the Pollution Control Board to grant consent that resulted in the delay of commissioning of the unit and consequently the commencement of the operations of the jetty. Admittedly even when Ext.P3 dated 16.09.2008 was issued, no progress had been made with respect to either the construction of the cement unit or the jetty. Ext.P3 expressed helplessness insofar as the petitioner being unable to get the necessary pollution clearance and asserted the said factor to be beyond the control of the petitioner. It was also stated in Ext.P3 that there was some delay in getting a proper approach road facility to the project site and the acquisition of that land consumed time. However a reading of Ext.P4 issued by the Chairman of the Kerala State Pollution Control Board would belie the contention that the delay was beyond the control of the petitioner.

12. The petitioner had sought for consent for a project for Port development and cement unit with a capacity of 6,00,000 tonnes per year with a project cost of Rs.1.3 crores. After public hearing, the proposal was rejected since the panel recommended refusal of environmental clearance. Ext.P4 also indicates that the recommendation went against the petitioner for reason of the strong opposition from the public, as also for inadequate control measures in the proposal. In an appeal filed by the petitioner, a fresh look was directed by the appellate authority. The Company then reduced the capital investment of the project to 93.7 crores and is also said to have cured the shortcomings in the project proposal.

13. Ext.P4 dated 16.10.2006 specifically recommended that the proceedings for environmental clearance may be closed, since the present project does not require such a clearance. It is not clear as to what transpired between Ext.P4 dated 16.10.2006 and 16.09.2008 (Ext.P3). In any event, even at the time of issuance of Ext.P3, there had been no consent obtained from the

Pollution Control Board, which eventually led to Ext.P10 proceedings being issued by the Government cancelling the agreement as also the MoU. The petitioner's contention is that they have been left high and dry by such cancellation, when they had sufficiently progressed with the project with the acquisition of the land for the cement unit. The Government on the other hand by their counter affidavit seeks to sustain the cancellation, on the ground of the gross delay which according to the Government would render the agreement nugatory, by virtue of the clause in the agreement that the project having not been complied within the time stipulated, the Government would be entitled to cancel the same without any liability on the Government.

14. As was noticed earlier, the agreement contained a specific clause that if work is not commenced within two years from the date of the agreement, even for any reason beyond the control of the petitioner, the agreement would stand terminated. The construction of the cement unit and the jetty had to be

carried on simultaneously with the agreement contemplating commissioning of the cement unit, just prior to the operations commencing in the jetty. Neither of the two constructions have been commenced even now. The Government has placed on record the refusal of consent to establish, issued by the Pollution Control Board dated 23.12.2002 as Ext.R1(b). Even after the appellate order remanding the issue for fresh consideration, the Board had not proceeded with it, since State Board lacked experience in dealing with a project of that dimension. Ext.R1(a) indicates that the State Board had sought the guidance of the Centre Pollution Control Board in the matter. Ext.R1(a) is a specific communication issued to the Secretary to Government Fisheries and Ports Department by the Chairman of the Pollution Control Board.

15. Definitely the said fact would have been noticed the petitioner also and there is nothing produced on record in the above writ petition to indicate that any move was made by the petitioner to facilitate grant of consent to the cement unit,

the reclamation of land as also the construction of the jetty. At the risk of repetition, it has to be stated that the entire responsibility for getting such consent rested on the shoulders of the petitioner Company as had been agreed in the MoU and the BOT agreement. The writ petition also, but for the investment made in purchase of lands does not indicate any construction of either the cement unit or the jetty having been commenced. The earlier writ petition was filed presumably on some reclamation being carried out allegedly, in the area set apart for the construction of the clinker jetty. The petitioner is said to have enquired about such reclamation and was informed that the same is for setting up a fishing harbor landing centre. The petitioner's contention is that the same is a ruse to avoid implementation of Ext.P2 agreement and is with political motive. However, the petitioner seeks to ignore the fact that despite the agreement having been executed in the year 2000 till the year 2010, when the above writ petition was filed, neither was consent obtained for the project from the statutory authorities nor had

any work commenced. In such circumstance, this Court does not find any infirmity in Ext.P10 order having been issued by the State. The petitioner has already failed in its obligation to furnish a feasible proposal for setting up the clinker unit and the jetty to facilitate a proper consent on environmental and ecological aspects.

16. There are admission of mistakes, having been crept in the order at Ext.P10, by the State in its counter affidavit raise serious questions as to the levity with which Ext.P10 order has been passed. The order at Ext.P10 specifically indicates that the construction of the wharf by the Fisheries Department as "exactly in the land earmarked for construction of captive jetty by M/s. Saurashtra Cements as per the MoU and BOT agreement executed by the Port Department" and that as per the interim order, the Harbor Engineering Division had stopped all construction activities/requirements being carried out. That would in fact go against the submission recorded by the learned single Judge when an interim order was passed in the earlier writ

petition. In any event, that is not an issue which has to be considered herein. The COC as was stated at the out set, would have to be considered independently.

17. Going by the specific terms of the agreement of the MoU and the agreement and the facts disclosed as to neither the construction and commencement of operation of either the cement jetty or the clinker unit having not been effectuated even 15 years after the BOT of the year 2000, restrains this Court from making any interference to the order at Ext.P10.

The writ petition would stand dismissed, parties are left to suffer their respective costs.

**Sd/-
K. VINOD CHANDRAN,
JUDGE**

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P.A to Judge.