

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA & THE STATE OF ANDHRA PRADESH

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WRIT PETITION No.19738 of 2015

BETWEEN

DBM Geotechnics & Constructions Pvt. Ltd.

... PETITIONER

AND

Union of India, Rep. by its Secretary, Ministry of Shipping, Transport
Bhawan, New Delhi.

...RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: .09.2015

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

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| 1. | Whether Reporters of Local newspapers
may be allowed to see the Judgments? | No |
| 2. | Whether the copies of judgment may be
marked to Law Reporters/Journals? | Yes |
| 3. | Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? | Yes |

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ORDER:

This writ petition is filed questioning the impugned letter of the second respondent port trust dated 18.04.2015 whereunder the petitioner's contract for 'Development of West Quay-North (WQ-7 & WQ-8) berth in the inner Harbour of Visakhapatnam Port Trust' was terminated under relevant clause of the terms of the contract between the petitioner and the second respondent. The impugned letter,

inter alia, alleges that petitioner failed to furnish balance 5% of performance bank guarantee amounting to Rs.9,76,50,000/- as per clause 106 and as per memorandum (general descript) the petitioner failed to furnish balance 5% towards performance security.

Another ground, which is mentioned, is that the petitioner failed to complete the contract within the time stipulated and in spite of notices and opportunity provided, the second respondent is forced to terminate the contract at the risk and responsibility of the petitioner.

2. This writ petition was filed on 30.06.2015 and came up for admission on 01.07.2015. While supporting the writ petition,

learned counsel for the petitioner mentioned that immediately after receiving the impugned letter of termination, they have filed representation dated 27.04.2015 requesting the second respondent to reconsider the matter, in view of that while issuing notice in the writ petition, the second respondent was directed to consider the petitioner's request dated 27.04.2015 and take appropriate decision in the matter. The second respondent has, thereafter, considered and rejected the request of the petitioner under its further impugned letter dated 23.07.2015, which is also questioned by seeking amendment of the prayer in the writ petition vide WPMP.No.31584 of 2015.

The application for amendment of prayer is ordered and the entire writ petition is considered as amended. Since the second respondent has already called for fresh tenders, a request for early hearing of the matter was

made, accordingly, the second respondent filed a counter affidavit and I have heard the writ petition on 27.08.2015 and the same is being disposed of by this order.

3. Mr. K. Vivek Reddy, learned counsel for the petitioner, *inter alia*, submits that the reasons given in the impugned termination letters is clearly arbitrary. Learned counsel submits that the letter of intent was issued to the petitioner on 21.11.2013 and the contract was entered into and work order was issued on 20.12.2013 and that immediately on receipt of letter of intent, the petitioner mobilized men and machinery to carry out sub-soil investigation work and sought permission for soil investigation. The said work was commenced on 24.12.2013 and the work order dated 20.12.2013 stipulated that the work to be completed within 24 months after obtaining labour license. Learned counsel, however, placed reliance upon clause 21.1 of the work order, which contains condition of the contract, which stipulates as follows:

“21.1. The Employer shall give possession of all parts of the Site to the Contractor, free from encumbrances. If possession of a part is not given by the date stated in the Contract Data the Employer is deemed to have delayed the start of the relevant activities and this will be a Compensation Event”.

Learned counsel also placed reliance upon clause 29.1 to contend that if there is delay in handing over the site the period of completion concerned automatically stand extended by such period. The said 29.1 is also extracted hereunder:

“The Engineer in charge (Nodal Officer) or his nominee shall extend the Intended Completion Date if a Compensation Event occurs or a Variation is issued which makes it impossible for Completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work and which would cause the Contractor to incur additional cost”.

4. Learned counsel, therefore, submits that the labour license was granted to the petitioner and since the site was not handed over and access to the site was blocked, petitioner sent several letters,

Exs.P5 to P10, but only a portion of the site was handed over on 02.05.2014 i.e. after about four months after commencement date, whereby there was a delay of five months between the date of work order and handing over of the site. However, the time for completion was not extended correspondingly in spite of petitioner’s request dated 20.06.2014. Meanwhile, while the petitioner was continuing the work, correspondence ensued between the petitioner and second respondent including the demand of the second respondent for 5% of bank guarantee to which petitioner replied under letter dated 09.07.2014 pointing out the confusion with regard to the requirement of 5% further bank guarantee in terms of the conditions of the tender.

While so, the second respondent issued show cause notices dated 19.09.2014 and 12.12.2014 alleging delay on the part of the petitioner and though the petitioner gave adequate reply including that it is at no fault for furnishing 5% bank guarantee as demanded. Ultimately, the 5% bank guarantee earlier given was invoked on 17.04.2015 and the impugned termination order dated 18.04.2015 was passed.

5. Learned counsel for the petitioner states that the said termination is clearly arbitrary and opposed to the terms of the contract and since arbitrary action can be interdicted by this Court under Article 226 of the Constitution of India, this Court should interfere in the matter so as to enable the petitioner to complete the work within the extended time to which it is entitled. To justify the petitioner’s claim that it is not required to furnish further performance bank guarantee of 5%, reliance is placed by the learned counsel upon the clarification issued in the pre-bid meeting by the second respondent itself and the Memorandum (General Description) at page 20 of the tender notice provide as follows:

d)	<i>Performance Security</i>	<i>10% of Contract value to be paid immediately on award of work. DD/Bank Guarantee in approved proforma of VPT by the Nationalized/Scheduled Bank will also be accepted.</i>
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e)	Security Deposit	5% of the Contract Amount (including Earnest Money Deposit)
f)	Percentage to be deducted from bills towards Security Deposit (<i>Retention Money</i>)	<i>5% of the gross bill amount will be recovered towards S.D. from the bills till the entire amount of 5% of the contract value is reached including E.M.D. However, no S.D. contractor (s) who submit a Bank Guarantee in the approved proforma of the Port by a Nationalized/Scheduled banks towards 5% of the contract value as S.D. and in such case EMD BG will be released.</i>

6. Learned counsel for the petitioner would also submit that as per the clarification issued, 10% performance bank guarantee is covered by 5% of the bank guarantee already submitted by the petitioner and the balance 5% is recoverable from the running bills as provided above. Learned counsel submits that the petitioner having complied with the above requirement, the termination is clearly arbitrary and placed reliance upon decisions of the Supreme Court in **UNION OF INDIA v. TANTIA CONSTRUCTION (P) LTD.**^[1] and **DWARKADAS MARFATIA AND SONS v. BOMBAY PORT TRUST**^[2]. Learned counsel also submits that under Section 3 of the Conditions of Contract clauses 24 and 25 provide for settlement of disputes including reference to arbitration.

7. The second respondent filed counter affidavit denying the averments of the petitioners and placed strong reliance upon clause 21(a) of the Special Conditions, which relate to handing over of the site as per the contract. Ms. Uma Devi, learned counsel for the second respondent, placed strong reliance upon the said clause and for the sake of convenience, the said clause is extracted hereunder:

“Clause 21(A) – Handing over of the Site:
The tenderer shall note that the entire site will not be handed over to the contractor at a time and only one berth length/part of the berth length will be handed over at a time for construction. The contractor should plan accordingly and submit CPM schedule.”

It is also stated in the counter affidavit that the work front area was made available to the petitioner by the second respondent on 02.05.2014 but the petitioner failed to carry out the soil investigation, surveying, design of sub structure and super structure and mobilization of equipment, materials etc. It is stated that the second respondent was repeatedly bringing to the notice of the petitioner under various letters, annexures R3 to R10, apart from monthly review meetings constantly advising and cautioning the petitioner to speed up the work, as it was lagging behind. It is also stated that the work front area in the proposed WQ-7 berth was made available to the petitioner free from all encumbrances and hindrances without delay and only a small part on the Northern side was subject to clearance of certain coal stocks which was not a hindrance for the petitioner for launching and carrying out the work as per the contract. To the extent of 5% of the performance bank guarantee is concerned, it is stated as per the contract 10% of the bank guarantee towards performance was necessary whereas petitioner submitted only 5% bank guarantee and the remaining 5% bank guarantee was never furnished by the petitioner till now. Reliance is also placed upon the letters, Exs.R16 to R18, in support of the said condition. It is stated that initially show cause notice was issued to the petitioner on 12.12.2014 to which petitioner gave a reply dated 17.12.2014 and as the progress of work was noticed only at 1.54% as against 37.26%, the required proposal for termination was placed before the board of the second respondent.

8. It is further stated in the counter affidavit that, at that stage, petitioner, however, submitted contingent plan, Ex.R25, proposing to complete 69 piles by the end of December 2014 and based on that, the board of the second respondent considered the request of the petitioner and by its resolution granted opportunity to the petitioner to observe the performance up to December 2014 and authorized the Chairman to take necessary further action. It is further averred that even by December 2014 only 13 piles as

against 69 piles were found to have been erected and progress of work was found to be only 2.15% as against the required quantum of 50.25% by the end of December 2014. It is in those circumstances, once again the board of the second respondent examined the matter and on petitioner submitting the revised programme of work under letter dated 09.02.2015, the board once again considered granting one more opportunity to the petitioner to complete the work as per the programme submitted and submit the balance performance bank guarantee by 15.03.2015 and authorized the Chairman to review the progress of work. The petitioner having failed to submit 5% performance bank guarantee, show cause notice for termination was issued on 27.03.2015 and consequently, the second respondent was compelled to terminate the contract and decided to call for fresh tenders. The prayer of the petitioner is, therefore, strongly opposed by the second respondent.

9. Learned counsel for the petitioner points out that in terms of the conditions of tender, extracted above, the demand of the second respondent for furnishing 5% bank guarantee is an additional requirement imposed on the petitioner. Learned counsel also submits on the basis of the clause relating to automatic extension of contract, extracted above, that the site having been handed over to the petitioner only on 02.05.2014 and the approval for designs having been received on 15.07.2014, within nine months thereafter, the contract was terminated. Learned counsel submits that the termination is nothing but arbitrary and that the demand for additional 5% of the bank guarantee is contrary to the conditions of tender, extracted above. Hence, the termination on both the said grounds is unsustainable and deserves to be interfered with by this Court.

10. Reliance is placed by the learned counsel for the petitioner on a decision of the Supreme Court in **TANTIA CONSTRUCTION (P) LTD.'s**

case (1 supra) and particularly, para 31 thereof, which is extracted hereunder:

“31. In our view, the Respondent Company has satisfactorily explained their position regarding their offer being confined only to the balance work of the original Tender and not to the extended work. The delay occasioned in starting the work was not on account of any fault or lapses on the part of the Respondent Company, but on account of the fact that the project design of the work to be undertaken could not be completed and ultimately involved change in the design itself. The Respondent Company appears to have agreed to complete the varied work of Tender No. 76 of 06-07 which variation had been occasioned on account of the change in the design as against the entire work covering both the first and second Tenders. To proceed on the basis that the Respondent Company was willing to undertake the entire work at the old rates was an error of judgment and the termination of the contract in relation to Tender No. 76 of 06-07 on the basis of said supposition was unjustified and was rightly set aside by the learned Single Judge of the High Court, which order was affirmed by the Division Bench.”

The decision in **DWARKADAS MARFATIA AND SONS's** case (2 supra), however, is not relevant, which deals with power of judicial review against the State or its instrumentalities. In that particular case, the order of the Bombay Port Trustees was questioned.

11. Per contra, learned standing counsel for the second respondent placed strong reliance upon the various conditions of the contract in addition to the averments in the counter affidavit. Learned standing counsel pointed out that in the pre-bid meeting, clarification was issued to the bidders with regard to performance security and security deposit clarifying that the provisions in respect of performance security and security deposit of the Memorandum (General Description), extracted above, holds good and thereby contends that their performance guarantee as well as security deposit are required to be separately provided and that as against 10% performance security, petitioner has provided only 5%. Learned standing counsel also placed reliance upon the special conditions of the contract and clauses extracted in the earlier paras to show that petitioner is not entitled to handing over entire site at a time but only parts of the site was envisaged to be handed over in

stages and further relies upon the further condition 21A handing over site under the special conditions, which state that the tenderer shall know that the entire site will not be handed over to the contractor at a time but only one berth length/part of berth length will be handed over at a time for construction. The contractor should plan accordingly and submit CPM schedule. Learned standing counsel, therefore, submits that the petitioner is well aware of all these conditions of the contract and as such, cannot now contend that on account of not handing over of the entire site; he could not complete the work with the desired progress and the allegation that there was delay on the part of the second respondent is denied. Learned standing counsel also relies upon a decision of the Supreme Court in **STATE OF U.P. v. BRIDGE AND ROOF CO.**^[3] for the proposition that the awarded contract contains clause providing for settlement of disputes and the jurisdiction under Article 226 of the Constitution of India cannot be invoked. Similar principle is followed and reiterated in several subsequent decisions of the Supreme Court.

12. The scope of interference under Article 226 of the Constitution of India with regard to contractual matters is considered by the Supreme Court in various decisions and it is now well settled that the scope is limited and the said issue was dealt by the Supreme Court in its latest decision in **RISHI KIRAN LOGISTICS PVT. LTD. v. BOARD OF TRUSTEES OF KANDLA PORT TRUST**^[4], which was also a case of a contract awarded to the highest bidder under a tender but because of five years of time lag on account of non-receipt of the Coastal Regulatory Zone (CRZ) clearance, the Board of Trustees decided to cancel the tender and passed a resolution, which was subject matter of challenge. The Supreme Court relied upon the ratio in **TATA CELLULAR v. UNION OF INDIA** [(1994) 6 SCC 651], which has laid down principles of judicial review in case of contractual powers Governmental bodies in order to prevent arbitrariness. Relevant portion of the said decision is extracted hereunder:

“20. Lucid enunciation on the scope of judicial review of

administrative action, that too in tender matters can be found in Tata Cellular v. Union of India, 1994 (6) SCC 651), where following discussion is worthy of extraction:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the state. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. The duty of the court is to confine itself to the question of legality. Its concern should be:

- (i) Whether a decision making authority exceeded its powers?
- (ii) Committed an error of law,
- (iii) Committed a breach of rules of natural justice,
- (iv) reached a decision which no reasonable tribunal would have reached or,
- (v) Abused its powers.

...”

Para 22 of the decision is also relied upon by the learned senior counsel, which is extracted hereunder:

“22. In so far as argument of malafides is concerned, apart from bald averment, there are no pleadings and there is not even a suggestion as to how the aforesaid decision was actuated with malafides and on whose part. Even at the time of arguments Mr. Vikas Singh did not even advert to this aspect. In fact, the entire emphasis of Mr. Vikas Singh was that since there was a concluded contract between the parties, cancellation of such a contract amounted to arbitrariness. As already pointed out above that can hardly be a ground to test the validity of a decision in administrative law. For the sake of argument, even if you presume that there a concluded contract, mere

termination thereof cannot be dubbed as arbitrary. A concluded contract if terminated in a bonafide manner, that may amount to breach of contract and certain consequences may follow thereupon under the law of contract. However, on the touch stone of parameters laid down in the administrative law to adjudge a decision as are arbitrary or not, when such a decision is found to be bonafide and not actuated with arbitrariness, such a contention in administrative law is not admissible namely how and why a concluded contract is terminated.”

13. In the light of the ratio of the decisions aforesaid since only decision making process is subject to judicial review and not the decision, it is difficult to accept the contention of the learned counsel for the petitioner on both the grounds urged by the petitioner.

The terms of the contract relied upon by the learned standing counsel support the decision making process and it is also not contraverted that there was extensive correspondence between the parties on the issue of handing over of site and furnishing of 5% of performance bank guarantee and only, ultimately, resultant termination is effected.

The contract also provides mechanism for resolution of disputes under clauses 24 and 25 of the conditions of contract under Section 3 of the tender document. Hence, recording of detailed findings on the contentious issue of breach of contract would necessarily prejudice both the parties, in case, the mechanism for dispute resolution is resorted to. Even within the scope of judicial review, therefore,

I am satisfied with the order of termination impugned herein as well as rejection of the petitioner’s request for reconsideration does not suffer from any arbitrariness.

In view of the above, the writ petition is dismissed. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

VILAS V. AFZULPURKAR, J

September 11th, 2015
DSK

[\[1\]](#) (2011) 5 SCC 697

[\[2\]](#) (1989) 3SCC 293

[\[3\]](#) AIR 1996 SCC 3515

[\[4\]](#) 2014 (6) SCJ 640 = AIR 2014 SC 3358