IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA & THE STATE OF ANDHRA PRADESH
(SPECIAL ORIGINAL JURISDICTION)

WEDNESDAY, THE ELEVENTH DAY OF MARCH
TWO THOUSAND AND FIFTEEN
PRESENT

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

WRIT PETITION No.5183 of 2015

BETWEEN

M/s VLC-SCKC – JV, A Joint Venture Undertaking of M/s. Vijay Leasing Company.

... PETITIONER

AND

The State of Andhra Pradesh, Rep. by its Secretary, Mines and Geology Department, Secretariat, Hyderabad and two others.

...RESPONDENTS

Counsel for the Petitioner: MR. R.RAGHUNANDAN
For MR. D. NARENDAR NAIK

Counsel for the Respondents: ADVOCATE GENERAL (AP)
GP FOR MINES & GEOLOGY
MR. V. SUBRAHMANYAM

The Court made the following:

ORDER:

Petitioner-company seeks a Mandamus to declare the action of the second respondent in issuing the notification dated 23.02.2015 inviting sealed tenders for excavation and removal of 1.5 lakh metric tones of Byrates Ore and 2.78 lakh CBM of Overburden per month including the ancillary work for the remaining contract period of six months as illegal and also seeks consequential relief.

2. Petitioner-company holds a joint venture agreement dated 02.05.2008 with two other firms and was awarded the work described above on 04.07.2008 by the second respondent. The term of contract was initially for a period of five years and extendable by two more years. The initial five years period was over by 04.07.2013 and thereafter, the petitioner was granted extension, which is valid up to 07.08.2015. Petitioner-company, *inter alia*, refers to and relies upon the correspondence between the petitioner and the second respondent and in particular, the minutes of the meeting dated 09.06.2009, 18.10.2011 and 15.10.2012 pointing out that the petitioner is unable to perform the work of mining as well as removal of overburden in view of rain water logging and lack of availability of dumping yard space. Petitioner-company also pointed out that it has receivables of large amount of money from the second respondent and that in spite of brining the operational difficulties to the notice of the second respondent, no action was taken by the second respondent.

3. Learned senior counsel for the petitioner also made specific reference to the correspondence to point out that the removed overburden has to be stored at the dumping yard designated by the second respondent but on account of the existing dumping yard having reached full capacity, petitioner was unable to remove the overburden. Learned senior counsel also contends that none of the difficulties pointed out by the petitioner-company was addressed or resolved by the second respondent nor the monies were released and thereby,

the petitioner-company was pushed to a corner and compelled to inform the second respondent under letter dated 20.04.2011 that the company was halting the mining activity as it is unable to resume the work at site.

4. It is stated in the affidavit that the petitioner-company received a communication dated 06.02.2015 from the second respondent alleging that the petitioner has failed to adhere to the targets fixed for mining as well as removal of overburden and threatened termination of the agreement. While so, the present impugned notification was issued on 23.02.2015 seeking to allot the remaining work to a new contractor without addressing or making any effort to resolve the issues raised by the petitioner-company. The present writ petition is, therefore, filed on the ground that since the petitioner-company is a subsisting contractor till 07.08.2015 and in the absence of any order of termination of the contract, a new contractor cannot be entrusted with the remaining work as per the impugned notification.

5. Learned Advocate General, appearing for respondents 2 and 3, has filed a counter affidavit wherein the allegations of the petitioner-company are denied and strong reliance is placed upon the general and special conditions of the contract. Learned Advocate General has pointed out that the performance of the petitioner-company has been consistently found to be below the target of 70% fixed under the contract and in spite of notifying the petitioner-company about the same, no corrective action was taken by the petitioner.
Learned Advocate General submits that since the petitioner-company has never assailed the correctness of the letter dated 06.02.2015 issued by the second respondent, the contract with the petitioner-company automatically stands terminated and therefore, the action initiated by calling for tenders to allot the remaining work cannot be questioned by the petitioner.

6. As briefly indicated above, the primary contention raised by the learned senior counsel for the petitioner is that the subsisting contract of the

petitioner-company having not been terminated, the impugned notification cannot be sustained and secondly, that even though the letter dated 06.02.2015 was issued to the petitioner-company by the second respondent, it had never threatened the petitioner-company with termination of the contract as contemplated under clause 6.1.2 of the special conditions of the contract.

7. Learned Advocate General placed strong reliance upon clause 25.7 of the general conditions of contract, which requires that if the performance of the contractor in any two consecutive quarters is below 70% of the target, the corporation reserves the right to take suitable action under clause 6 part II B of the Tender Document. In addition reliance is also placed on special conditions 6.1.1 and 6.1.2,

which give liberty to the corporation to get the balance work done by making alternative arrangement. The counter affidavit also contains a tabular statement of the percentage of production of ROM in metric tones month wise and the quantity of removal of overburden and the percentage of achievement for both categories. Learned Advocate General would point out that the period from August 2013 to January 2015 would show drastic fall in extraction and removal of overburden, which is way below 70%, hence, the action taken by the second respondent cannot be questioned by the petitioner-company.

8. I have heard the learned senior counsel for the petitioner and the learned Advocate General.

9. Admittedly, there is no termination of the contract of the petitioner-company in express terms by the second respondent but it is the contention of respondents 2 and 3 that the petitioner-company having committed default in not meeting the mandatory target of 70% over a consistent period of time, it automatically entails action by the second respondent, as contemplated in special conditions 6.1.1 and 6.1.2. The issue, therefore, revolves round the

interpretation to be placed in the said two clauses, which are extracted hereunder:

> "**6.1.1** Notwithstanding any other condition, the Corporation reserves the right to terminate the contract where the average performance of the tenderer in any two consecutive quarters is below 70% of the target by serving one months notice and also forfeiting the security deposit amount and invoking the performance bank guarantee, in addition to levy of penalties as at Clause 25 of Part II A.
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> **6.1.2** The Corporation shall be at liberty to get the balance quantity of work done by making alternative arrangements at the risk and cost of the contractor in case the production falls below 70% of the target in two consecutive quarters."

Clause 25.7 dealing with overall performance of the contractor, referred to above, is also necessary to be extracted.

> "**25.7** In case the average performance of the contractor in any two consecutive quarters is below 70% of the target of the Corporation reserves the right to take suitable action under clause 6, part II B of the Tender Document pertaining to failure & termination."

10. A bare reading of the above clauses, therefore, show that the petitioner was well aware of the said clauses, as he has been working on the said contract since 2008 and it is not as if the petitioner was not aware of the consequences, which flow out of non-performance to the extent of meeting the minimum target fixed under the contract.

I am, therefore, unable to appreciate the contention of the learned senior counsel for the petitioner that the action taken by the second respondent is arbitrary or unreasoned. More particularly, it is required to be noted that the second respondent had notified the petitioner-company under its two communications viz. for the first time under the communication dated 23.01.2015 when the shortfall recorded by the petitioner-company below target was pointed out including the consequences, which may follow under clause 6, referred to above including the termination of the contract. The aforesaid communication is further reiterated in the later communication of the second respondent dated 06.02.2015 wherein the petitioner's stand that the dump yard was not available was refuted and it was asserted that space for dumping the ore burden is available at the project site.

Even in this letter also the petitioner-company was notified that on its failure to meet the production target, the consequences under clause 6.1.1 would be imposed by the second respondent. On the record,

as produced, evidently, the petitioner-company has not contraverted either of the said two communications. Para 11 of the counter affidavit of the second respondent, extracted hereunder, is necessary to be noted in this context:

> "**11**. The petitioner having received the communication dated 6.2.2015 on the same day, wherein it was made clear that in the event if the work is not completed at the earliest in terms of the contract, automatically clauses 6.1.1 and 6.1.2 would come into effect. Even before the communication dated 6.2.2015, a communication dated 23.1.2015 was addressed to the petitioner. In both the communications, the petitioner was informed to invocation of clauses 6.1.1 and 6.1.2 is automatic. Since the petitioner received the letter dated 6.2.2015 on the same day i.e. 6.2.2015, 30 days thereafter i.e.,
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> on dt:08-03-2015, the contract automatically gets terminated. In view of that the petitioner cannot maintain the writ petition. The petitioner never assailed the correctness of the order informing him about the invocation of termination clause and having choose not to do so, he cannot maintain the writ petition and the relief sought for in the writ petition is totally misconceived."

11. Evidently, therefore, the petitioner-company having not contraverted the said two communications of the second respondent,

it is difficult to accept the contention of the petitioner-company that it is not at fault in not being able to meet the minimum targets of the contract. It may be that the petitioner-company has not been paid its dues by the second respondent but, in my view, that cannot be a reason to violate the terms of the contract and to contend that the petitioner-company will work on the contract till its period of expiry. The consequences arising out of the non-compliance with clause 25.7 read with clauses 6.1.1 and 6.1.2, therefore, clearly point out that the corporation was justified in issuing the impugned notification calling for tenders for completion of the remaining work. The termination of the contract of the petitioner-company being automatic by a harmonious reading of the aforesaid clauses, I do not find any justification to interdict the action taken by the second respondent as per the impugned notification. I, therefore, do not find any material to grant the relief as sought for by the petitioner-company.

12. During the hearing, learned Advocate General also submitted that the petitioner-company is also at liberty to submit its offer in response to the impugned notification and without prejudice to its contentions, the said offer can always be considered by the second respondent along with other tenderers.

In that view of the matter, the writ petition is liable to be dismissed and is accordingly dismissed. However, the petitioner-company is at liberty to submit its offer in response to the impugned notification and if the petitioner-company submits its offer, accordingly, respondents 2 and 3 shall consider the same on competitive basis along with all other offers. As a sequel,

the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

VILAS V. AFZULPURKAR, J

March 11, 2015
DSK