THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.24833 of 2008

ORDER:

This writ petition initially challenged the termination of contract agreement dated 21.5.2005 made by A.P. Power Company Limited-5th respondent herein vide Ref.No.APTRIPCO/TEC-E/104/07-08/d.No.385 dated 15.10.2008 and calling of the fresh tenders for the balance of civil works vide tender notification dated 4.11.2008 as arbitrary, illegal, null and void, unconstitutional, without jurisdiction and violative of the principles of natural justice. Subsequently in view of certain developments pending the writ petition, the petitioner herein filed W.P.M.P.No.4185 of 2015, seeking amendment of the main relief portion and this Court vide separate order permitted the said amendment and now the relief sought in the main writ petition reads as under:

> "To issue a writ or direction more particularly one in the nature of Mandamus declaring the Minutes of 34th meeting held on 21.9.2010 in rejecting the committee report dated 10.8.2010 as illegal, arbitrary, against the principles of natural justice without jurisdiction, unconstitutional and consequently direct respondents to implement the report of the Committee dated 10.8.2010 by permitting the petitioner to complete the balance Civil Hydro Mechanic & 33 K.V. Power evacuation lines".

2. The brief facts leading to the filing of the writ petition are that the petitioner company entered into Agreement bearing No.3/05-06 with the 5th respondent herein for execution of Engineering, Procurement and Construction (EPC) Contract pertaining to establishment of 1.20 MW (MMPP) on Turnkey basis at Pinjarikonda village, Rampachodavaram mandal, ITDA, East Godavari District. The estimated total cost of the project as per the agreement is Rs.580 lakhs and the petitioner has to take up civil, electrical and mechanical works and erection, testing and commissioning of the project. The duration of the contract is 16 months from the date

of handing over of the site and the said agreement was entered into on 21.11.2005 and the respondents handed over possession of the site to the petitioner on 21.12.2005. During the subsistence of the period of EPC contract, the Chairman, ITDA, Rampachodavaram-4th respondent herein terminated the contract vide letter dated 17.5.2007 by invoking the A.P. Detailed Standard Specifications and General Principles of Engineering Contracts. Subsequently on the representation of the petitioner company, 4th respondent herein extended the validity of the contract upto 28.2.2008 and later till the end of June, 2008 and subsequently upto 31.10.2008. The bank guarantee and security deposits were also extended upto October, 2009 pursuant to the said extension. Subsequently, the 5th respondent vide proceedings Ref.No.APTRIPCO/TEC-E/104/07-08 dated 15.10.2008 terminated the contract. The petitioner herein made a representation to the 5th respondent on 17.10.2008, requesting for cancellation of the said termination while sending copies of the said representations to all the respondents. Thereafter, the 5th respondent herein issued a public notice in Eenadu Newspaper on 4.11.2008, calling for fresh tenders for execution of the balance civil works. At that point of time, the petitioner herein initially filed the present writ petition and this Court on 12.11.2008, while ordering notice before admission, granted interim order, directing the respondents not to finalize the tenders pursuant to short tender notice dated 4.11.2008. Pending the present writ petition, on a representation made by the petitioner herein on 18.12.2009, 5th respondent herein constituted a committee and the said committee submitted its report on 10.8.2010 in favour of the petitioner herein. In pursuance of the said report submitted by the committee, the Board of Directors of the A.P. Power Company Limited-5th respondent convened a meeting on 21.9.2010 and passed a resolution, rejecting the report submitted by the committee and consequently the request of the petitioner. In view of the said developments, the petitioner herein filed W.P.M.P.No.4185 of 2015 and this Court vide separate order permitted the said amendment.

3. A counter affidavit is filed on behalf of the 5th respondent herein, resisting the averments made in the affidavit filed in support of the writ petition and in the direction of justifying the impugned action.

4. Heard Sri G.Krishnamurthy, learned counsel for the petitioner, learned Government Pleader appearing for Respondents 1 to 3, Sri D.S.N.V.Prasad Babu, learned counsel for Respondent No.5 and Sri K.Raghavendra Rao, learned counsel for Respondent No.7, apart from perusing the material available on record.

5. Submissions/contentions of the learned counsel for the petitioner:

(1) The 5th respondent herein resorted to impugned action of termination of contract without any show cause notice and opportunity of being heard to the petitioner.

(2) The delay in execution of the work, if any, is not solely attributable to the petitioner and the respondents 5 and 6 partly approved the designs and specifications, as such, the petitioner herein cannot be made a scape-goat.

(3) The committee constituted by the 5th respondent submitted its report on 10.8.2010 after taking into consideration of all the issues and after visualizing every nook and cranny, as such, the 5th respondent herein ought to have respected the said report of the committee.

(4) The rejection of the report by the Board of Directors of the 5th respondent company in its 34th meeting held on 21.9.2010 is highly illegal, arbitrary and against the principles of natural justice, besides being unconstitutional.

(5) Since the rejection of the report of the committee by the Board of Directors is not supported by any reasons, the petitioner herein is entitled for the relief in the present writ petition. In support of his submissions/ contentions, the learned counsel for the petitioner places reliance on the judgments in **Ramachandra Narayan Nayak v. Karnataka Neeravari Nigam Limited and others, Food Corporation of India and another v. SEIL Ltd. and others** and **ABL International Ltd. and another v. Export Credit Guarantee Corporation of India and others.**

6. Submissions/contentions of the learned counsel for Respondent No.5

(1) Since the subject matter of the writ petition touches the contractual transactions and as there is a clause for arbitration in the agreement, the present writ petition is not maintainable under Article 226 of the Constitution of India.

(2) The report of the committee cannot be the basis for the petitioner herein to claim any relief from this Court under Article 226 of the Constitution of India as the Board in its meeting held on 21.9.2010 rejected the said report.

7. In the above background, now the issues which this Court is called upon to deal with and answer in the present writ petition are;

(1) Whether the present writ petition filed under Article 226 of the Constitution of India is maintainable?

(2) Whether the 5th respondent herein is justified in terminating the contract and whether the same is in accordance with law?

(3) Whether the Board of Directors of the 5th respondent company is justified in discarding the report of the committee?; and

(4) Whether the petitioner is entitled for any relief from this Court?

8. Since there is strong and emphatic opposition on the aspect of maintainability of the writ petition, this Court deems it appropriate and apt to deal with the said aspect first.

9. It is the case of the petitioner herein that the 5th respondent herein, by completely giving a go-bye to the mandatory requirements of Standard Specification No.60 and Condition No.10 of General Conditions of contract, terminated the contract. In order to appreciate the said contention, it may be appropriate to refer to clause 60 (a) of A.P. Detailed Standard Specifications, which reads as under:

> “Time shall be considered as of the essence of the contract. If, at any time the

> Executive Engineer shall be of the opinion that contractor is delaying commencement of the work or violating any of the provisions of the contract or is neglecting or delaying the progress of the work as defined by the tabular statement "Rates of Progress" in the "Articles of Agreement" he shall so advise the contractor in writing and at the same time, demand compliance. If the contractor neglects to comply with such demand within seven days after receipt of such notice, it shall then, or 'at any time' thereafter, be lawful for the Executive Engineer to determine the contract, which determination shall carry with it the forfeiture of the security deposit and the total of the amount withheld under Clause 68 below, together with the value of such work as may have been executed and not paid for, or such proportion, of such total sums, as shall be assessed by the Executive Engineer".

10. The above standard specification, in clear and unequivocal terms mandates the authorities to issue (7) days notice to the contractor before resorting to the determination of contract. In the instant case, even though earlier the 5th respondent extended the agreement period upto October, 2008 in the meeting held on 1.7.2008, the 5th respondent herein resorted to impugned action of termination even before expiry of the said period. There is absolutely no valid reason, forthcoming as to why the respondent authorities did not adhere to clause 60 of the Detailed Standard Specifications and did not issue any notice of (7) days as mandated therein and as to why no opportunity of being heard was afforded to the petitioner herein. Absolutely, there is no justification on the part of the respondent authorities in resorting to such high-handed action.

11. Condition No.10 of the General Conditions of Contract also mandates opportunity to the contractor, but the respondent authorities did not adhere to the said mandatory requirement. It is obligatory on the part of the respondent authorities to adhere to the above mentioned clauses having framed the same. This is highly arbitrary, illegal, besides being preposterous and iniquitous. At this juncture, it may be appropriate to refer to the judgments cited by the learned counsel for the petitioner.

12. In *Ramachandra Narayan Nayak v. Karnataka Neeravari Nigam Limited* (1 supra), the Hon'ble Supreme Court at paragraphs 50 to 53, held as under:

"**50.** We find the above findings of the High Court in reversing the finding of the trial court on Issues 4, 5 and 7 are wholly untenable both on facts and in law and we have to hold that the rescinding of the contract by Defendant 3 is illegal, and penalty imposed upon the plaintiff and forfeiture of earnest money, security deposit and withholding of bill amount after rescinding the contract is not legal and valid as the plaintiff himself has requested the defendants to conclude the contract without any penalty or the risk and cost amount.

51. Defendant 3 passed the order of rescinding the contract without issuing any show-cause notice or holding an enquiry, as required under Clause 3(*d*) of the contract and therefore the learned trial Judge has rightly recorded the findings on the aforesaid contentious issues in favour of the plaintiff and rightly held that the rescinding of the contract was not justified. The unilateral rescission of the contract with the plaintiff by Defendant 3 is arbitrary and unreasonable. The action of Defendant 3 in rescinding the contract has resulted in serious civil consequences of imposition of penalty and forfeiture of the earnest money deposit amount, security deposit and withholding the bill amount in relation to the execution of the work by the plaintiff. Therefore, Defendant 3 before rescinding the contract, by invoking his power under Clause 3(*d*) of the agreement, should have complied with the conditions mentioned in the said clause as the same are mandatory.

52. The rescinding of the contract is also bad in law for one more reason that the State Government has accorded permission to Defendant 3, the Chief Engineer, Irrigation (North), Belgaum to rescind the contract as per terms and conditions of the agreement vide Letter dated 29-8-1994, which document is marked as Ext. D-40. The Chief Engineer directed the Superintending Engineer, MRBC Circle, Dharwad to levy penalty and rescinded the contract vide letter dated 12-10-1994, which document is marked as Ext. D-41, the relevant portions of this letter are extracted below:

"(*ii*) to rescind the contract and to take up the balance work at the risk and cost of the contract as per Clause 3 of the agreement.

In addition to the above, the expenditure incurred towards the work-charged establishment, if any, beyond the tender period till the date of rescinding the agreement may be recovered, duly observing all the formalities of the agreement. The Superintending Engineer is requested to call for tenders for the balance works."

We have to infer from the last unnumbered paragraph of the said letter, that the contract of the plaintiff is rescinded. Thus, we have to hold that Defendant 3 rescinded the contract, which order is communicated by Defendant 4 vide letter 24-10-1994 which document is marked as Ext. D-42. The reliance placed by

Defendant 3 and the Superintending Engineer upon the approval of the Government in its Letter Ext. D-40 for rescinding of the contract with the plaintiff is fallacious, as the Government has very clearly stated in its letter referred to supra, that the contract of the plaintiff has to be rescinded and penalty be imposed as per the conditions of the agreement. Therefore, the finding recorded by the High Court on this contentious point in the impugned judgment[1] is liable to be set aside. Accordingly, we set aside the same by answering Point (*iii*) (*see* para 24.3) in favour of the plaintiff.

53. For the foregoing reasons, we are of the view that the findings and reasons recorded by the High Court on the contentious points framed by it are totally erroneous both on facts and in law and therefore the same are required to be interfered with by this Court and hence the appeals must succeed. In view of the findings and reasons recorded by this Court on Points (*i*), (*ii*) and (*iii*) in favour of the plaintiff, Point (*iv*) is accordingly answered in favour of the plaintiff. Hence, we set aside the impugned judgment and decrees dated 12-6-2003 passed by the High Court of Karnataka in *Karnataka Neeravari Nigam Ltd.* v. *Ramachandra Narayan Nayak*[1] and we restore the common judgment and decrees of the trial court in the original suits, except modification with regard to rate of interest from 18% to 9%."

13. In *Food Corporation of India v. SEIL Ltd.* (2 supra), the Hon'ble Supreme Court at paragraphs 24 and 25, held as under:

"**24.** The High Court, in an appropriate case, may grant such relief to which the writ petitioner would be entitled to in law as well as in equity.

25. We do not, thus, find any substance in the contention of Mr Sharan that while exercising its review jurisdiction, no interest on the principal sum could have been directed to be granted by the High Court. A writ court exercises its power of review under Article 226 of the Constitution of India itself. While exercising the said jurisdiction, it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim on its part would be subject to review; amongst others on the principle of *actus curiae neminem gravabit* (an act of the court shall prejudice none). We appreciate the manner in which the learned Judge accepted his mistake and granted relief to the respondents."

14. In *ABL International Ltd. and another v. Export Credit Guarantee Corporation of India* (3 supra), the Hon'ble Supreme Court at paragraph 10, held as under:

"**10.** It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that

> on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in *K.N. Guruswamy* v. *State of Mysore*[1] was followed subsequently by this Court in the case of *D.F.O.* v. *Ram Sanehi Singh*[2] wherein this Court held: (SCC p. 865, para 4)
>
> "By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims *was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ*. In view of the judgment of this Court in *K.N. Guruswamy case*[1] there can be no doubt that the petition was maintainable, even *if the right to relief arose out of an alleged breach of contract*, where the action challenged was of a public authority invested with statutory power."

15. A reading of the principles laid down in the above referred judgments makes it very much manifest that it is incumbent and obligatory on the part of the respondent authorities to act fairly, justly and reasonably in the matters of contract also, otherwise, the action would be in utter derogation of Article 14 of the Constitution of India and in order to correct the same, a writ is maintainable.

16. In fact, the Hon'ble Apex Court in *ABL International Ltd.'s* case (3 supra) categorically held that in the contractual matters also when the State acts in an arbitrary manner, the aggrieved person can invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. Another contention advanced by the learned counsel for Respondent No.5 with regard to availability of arbitration clause also falls to the ground in view of the reason that only the claims upto Rs.50,000/- are arbitrable under the agreement. In view of the above reasons and the principles laid down by the Apex Court in the above referred judgements, it can now be safely concluded that the present writ petition is maintainable and the contention contra advanced by the learned counsel for the respondents is not tenable.

17. Since the 5th respondent herein did not adhere to clause 60 of the Detailed Standard Specifications and did not issue any notice and did not afford any

opportunity to the contractor as stipulated therein, the impugned action, which culminated in the termination of contract, cannot stand for judicial scrutiny. It is significant to note that even though the agreement period was extended till the end of October, 2008, the 5th respondent herein terminated the agreement on 15.10.2008. This is another vital factor which renders the impugned action illegal, high-handed and arbitrary. Therefore, the above issues 1 and 2 are answered in favour of the petitioner and against the respondents herein.

18. Coming to the issue No.3, it is note-worthy that pending the present writ petition, on a representation made by the petitioner herein, the 5th respondent herein constituted a committee consisting of the following individuals:

> "1. Executive Director (FAC) APTRIPCO Member Convenor
>
> 2. Chief Project Manager, APTRIPCO Member
>
> 3. SE/Hydel Designs-II, APGENCO Member
>
> 4. SE/Technical to Director (Technical), Member
>
> APGENCO"

The said committee, as evident from the material available before this Court visited the subject site and after elaborately analyzing various issues submitted a report on 10.8.2010 recommending as follows:

> "(1)To award the work of "Execution of balance civil works, Hydro-mechanical works and 33 KV power evacuation line works at Pinjarikonda, MHPP" to M/s Manihamsa Power and Mineral Benefications Ltd., duly cancelling the termination orders dated 15.10.2008 and reviving the Agreement No.3/2005-06 for a value of Rs.332.67 lakhs as per SSR 2009-10 as detailed at para 24 with the terms and conditions discussed at para 26 and 27.
>
> 2. Waival of the following amounts as requested by the contractors.

S.No.	Description	Amount in Rs.
1.	10% supervision charges for erection of 33 KV power evacuation line from Pinjarikonda MHPP to 4-pole structure at Addateegala sub-station, paid by AP TRIPCO to EPDCL on behalf of EPC contractors.	2,56,373.00
2.	10% interest on balance advance of Rs.4,20,000/- retained by the contractors out of Rs.51,00,000/- payable to M/s Boving Fouress Limited.	71,064.00
3.	10% interest on balance advance amount of Rs.40,75,135.00 after recovery of advance in the 5 invoices of M/s Boving Fouress Limited for supply of Part E&M equipments.	4,76,070.00
4.	Liquidated damages on the delayed/incompleted portion of work as per EPC contract.	37,11,749.00
	Total	**45,15,256.00**

3. To recover the following amount from the contractors, after the work is resumed, out of Bank Guarantee invoked amount of Rs.51.00 lakhs. To meet the cash flow of the contractors, the refund of the 50% of remaining amount of Rs.43,87,856/- in the RA bills can be considered after satisfactory completion of 50% of the awarded work. The balance 50% of the remaining amount can be released to the contractors after COD.

S.No.	Description	Amount in Rs.
a)	Difference in payment made by AP TRIPCO to EPC contractors and amount paid to M/s Boving Fouress Limited by the contractors for part supply of E&M equipments.	1,78,647.00
b)	5% retention + 10% interest on the advance + taxes and duties + TDS for 3 Nos invoices not paid to M/s Boving Fouress Limited by the contractors.	4,60,183.00
c)	10% interest on the balance advance amount of Rs.4,20,000/- retained by the contractors out of Rs.51.00 lakhs paid by AP TRIPCO.	51,436.00
d)	10% interest on the balance advance amount of Rs.40,75,135/- after deducting the advance in 5 Nos. invoices.	21,878.00
	Total	**7,12,144.00**

19. In pursuance of the said report submitted by the committee, the Board of Directors of the 5th respondent company in its 34th meeting held on 21.9.2010, resolved to reject the request of the contractor and also the Commissioner's Report along with its recommendation to award the balance civil works, Hydro-mechanical works and 33 KV power evacuation line works at Pinjarikonda, MHPP" to the petitioner herein. The copies of the report of the committee dated 10.8.2010 and the

minutes of the Board of Directors held on 21.9.2010 in its 34th meeting are placed on record. A perusal of the report of the committee manifestly discloses that the committee appointed by the 5th respondent company took into consideration all the aspects and made recommendations in favour of the petitioner company. A perusal of the proceedings of the meeting of the Board of Directors dated 21.9.2010 abundantly and amply discloses that the Board of Directors, by completely discarding various reasons assigned by the committee and its recommendations, passed resolution, rejecting the committee's report and consequently the request of the petitioner. A perusal of the said order of rejection dated 21.9.2010 vividly reveals that the Board of Directors acted in a mechanical, casual, routine and cavalier manner while dealing with an action which has civil consequences. This, in the considered opinion of this Court, cannot be approved. Having appointed a committee and having received a report from the said committee, there is absolutely no justification on the part of the respondent authorities in ignoring and completely discarding the recommendations of the committee so appointed. This arbitrary action undoubtedly is in violation of Article 14 of the Constitution of India and the basic structure of our Constitution.

20. For the aforesaid reasons and having regard to the principles laid down in the judgments referred to supra, the writ petition is allowed, declaring the Minutes of 34th meeting held on 21.9.2010 in rejecting the committee report dated 10.8.2010 as illegal, arbitrary, against the principles of natural justice without jurisdiction, unconstitutional and consequently the respondents are directed to implement the report of the Committee dated 10.8.2010 by permitting the petitioner to complete the balance Civil Hydro Mechanic & 33 K.V. Power evacuation lines. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:20.4.2015

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THE HON'BLE SRI JUSTICE A.V.SESHA SAI

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W.P.No.24833 of 2008

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20.4.2015

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THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.24833 of 2008

Date: 20.4.2015

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Between:

M/s Manihamsa Power and Mineral

Beneficiations Limited, rep. by its

Executive Director.

… Petitioner

and

State of Andhra Pradesh, rep. by its

Chief Secretary, Government of A.P.,

Secretariat Buildings, Hyderabad & others.

… Respondents