

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

* * * *

-
WRIT PETITION No.23590 of 2015

BETWEEN

M/s. Mirador Commercial Pvt. Ltd.

... PETITIONER

AND

Power Grid Corporation of India Ltd and others.

...RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: 20.08.2015

-
SUBMITTED FOR APPROVAL:

-

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

- | | | |
|----|--|-----|
| 1. | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes |
| 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 |

-

-

-

ORDER:

The relief sought for in this writ petition may be first noticed, which is extracted hereunder:

“For the reasons stated in the accompanying affidavit, the petitioner prayed that this Honourable Court may be pleased to issue a writ order or direction more particularly one in the nature of writ of Mandamus, (a) directing the Respondent No.1 to desist from terminating the contract agreement dated 04-08-2010 vide agreement bearing No.C-34114-L195A-1/G6/CA-I/3404 and C-34114-L195A-1/G6/CA-II/3405 (b) to declare the action of the Respondent No.1 to invoke the Bank guarantees given by the petitioner through the respondents 2 and 3 vide is numbers 2068412BG0000232, 2068412BG0000233, 2068412BG0000323, 2068412BG0000324, 2068412BG0000325, 0910314BG0000814/1303915BG0000140, 0910314BG0000815/1303915BG0000141 and 0910312BG0001166/ 63 in pursuance of the Contract Agreement dated 04-08-2010 as illegal, inequitable, bad and against the principles of natural justice and consequently restore the said Bank Guarantees, and pass such other order or orders as this Honourable Court may deem fit and proper in the circumstances of the case.”

2. When the matter was listed for admission, I had serious doubt whether such a relief can be sought under Article 226 of the Constitution of India when, admittedly, the relationship between the petitioner and the first respondent is governed by a contract dated 04.08.2010 and as to whether a Mandamus can be issued contrary to the terms of the contract. I had, therefore, requested

Mr. B.V. Subbaiah, learned senior counsel for the petitioner, to make submissions on the aspect of maintainability first, particularly, as the first respondent appearing through caveat was also represented by Mr. L. Ravichander, learned senior counsel for the first respondent. Accordingly, both the learned senior counsel have made submissions and relied upon various case laws in support of their respective contentions. In view of the said preliminary issue calling for consideration, it is not necessary to dwell in detail on the merits of the case. I shall, therefore, refer to the pleadings and documents filed by the petitioner only to the extent necessary for the

purpose of deciding the preliminary issue.

3. Petitioner, a private limited company and part of a Joint Venture with M/s. B.S. Limited, entered into a Contract Agreement dated 04.08.2010 for Tower Package D2 for 400 KV D/C (Quad) Wardha – Aurangabad T/L etc. with the first respondent. The said contract provided for scope and specifications of the work and all other details, which are listed under tender conditions and it is not in dispute that time for completion of the work was initially stipulated as 31.03.2013. Petitioner, however, states that on account of default and delay on the part of the first respondent, time for completion was extended by the first respondent initially up to 28.02.2015 and again up to 30.09.2015. Petitioner contends that it has already completed 90% of the work and only 10% of the work remains to be performed. As per the condition of the contract, various bank guarantees were furnished to the first respondent, which are alive. Petitioner states that though the time for completion was extended up to 30.09.2015, the first respondent invoked the bank guarantees and encashed the same.

However, the date and details of such invocation are not mentioned in the affidavit. Apparently, alarmed by such development, petitioner apprehends that the contract may be terminated even before the expiry of the extended time and hence, has filed the present writ petition with the aforesaid relief.

4. It would be noticed that apart from seeking a Mandamus to the first respondent to desist from terminating the contract, a further declaration is also sought that invocation of bank guarantees by the first respondent as illegal, inequitable and against principles of natural justice and consequently, restore the said bank guarantees.

5. Learned senior counsel for the petitioner refers to proceedings of the first respondent dated 02.04.2015 wherein provisional time extension for completion of the said work was granted up to 20.09.2015. The said proceedings, however, further states that the extension is subject to

conditions stipulated therein such as, extension in time being without prejudice to the rights of the first respondent and obligations of the contractor; the right to levy liquidated damages and that time continues to be essence of the contractor etc. Learned senior counsel would also draw the attention of the Court to the notice of default issued by the first respondent to the petitioner dated 28.04.2015 pointing out that the work under the contract is below the required progress to be achieved as set out in clauses 3, 4 and 5 of the said notice and ultimately, the petitioner was notified that in terms of clause 42.2 of the general conditions of contract, notice of default is issued giving final opportunity to take appropriate measures and steps to expedite the work within ten days following which the notice of termination will be given. It is stated that petitioner has replied to the said notice on 08.05.2015 denying that there is any delay on the part of the petitioner and it is stated that balance remaining work is attributable to the defaults and delays by the first respondent.

6. Learned senior counsel also pointed out clause 40.1 of the general conditions, which provide for extension of time for completion under various categories and particularly, emphasis is laid on clause (g), which provides for delays attributable to the Employer or caused by customs. Similarly, clause 42 deals with the mechanism relating to termination and learned senior counsel would lay emphasis on clause 42.2.2, which provides that employer may give notice to the contractor stating the nature of default and requiring the contractor to remedy the same and only on failure of the contractor to remedy within fourteen days the employer would have right to terminate the contract by giving notice of termination.

7. Learned senior counsel would contend that after several review meetings and after assessing the progress achieved, two extensions were granted by the first respondent and while the second extension is in force, the bank guarantees furnished by the petitioner were unilaterally invoked and encashed without notice to the petitioner, which is contrary to the terms of

the contract. Learned senior counsel would also demonstrate that the petitioner completed 90% of the work, as stated in the affidavit. However, that aspect, being disputed by the learned senior counsel for the first respondent, I do not propose to go into that aspect. Learned senior counsel, therefore, would contend that in terms of the agreement, the first respondent itself is at a default and as such, the petitioner is entitled to Mandamus as sought for, as termination of the contract would lead to serious civil consequences for the petitioner. Learned senior counsel also supported his contentions by relying upon various decisions, reference to which would be made hereunder at appropriate place.

8. Learned senior counsel for the first respondent, on the other hand, contends that apart from the nature of Mandamus sought for, the writ petition is not maintainable as petitioner has not sought any declaration and is not entitled to merely seek a Mandamus restraining the first respondent from terminating the contract. Learned senior counsel also submits that the consequential relief with respect to bank guarantees has already become infructuous, as the bank guarantees are, admittedly, invoked and encashed. Learned senior counsel submits that the first respondent has acted in terms of the contract by giving a notice of default dated 28.04.2015 and as such, clause 42.2.2 is complied with and the action of the first respondent cannot be said to be contrary to the contract. Learned senior counsel also relied upon various decisions in support of his contentions.

9. Learned senior counsel for the petitioner relied upon a decision of the Supreme Court in **CALCUTTA GAS COMPANY (PROPRIETARY) LTD. v. STATE OF WEST BENGAL**^[1], particularly, the following portion in para 5, which is extracted hereunder:

“5. ... Article [226](#) confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental right can also approach the court seeking a relief thereunder. The Article in terms does not describe the classes of

persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *The State of Orissa v. Madan Gopal* [(1952) SCR 28 : AIR 1952 Sc 12] , this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the court under Art. [226](#) of the Constitution. In *Chiranjit Lal Chowdhuri v. Union of India* [(1950) SCR 869 : AIR 1951 SC 41], it has been held by this Court that the legal right that can be enforced under Art. [32](#) must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the court for relief ...”

In the aforesaid case, the Supreme Court was called upon to decide as to whether a proprietary company whose right to manage and receive remuneration was affected by the said Act enacted can maintain a writ petition under Article 226 of the Constitution of India. Obviously, the ratio of the said decision is not relevant for the purpose of this case.

10. Learned senior counsel for the petitioner also relied upon a decision of the Supreme Court in **RAMANA DAYARAM SHETTY v. THE INTERNATIONAL AIRPORT AUTHORITY OF INDIA** [\[2\]](#) and particularly, paras 20 and 21 are emphasized to contend that the first respondent being a State owned corporation cannot be act arbitrarily. In the aforesaid decision, a tender was granted to a person, who was not qualified and who had not fulfilled the terms and conditions of tender and in that context, the Supreme Court considered the scope of Article 14 of the Constitution of India and the requirement of an instrumentality of the State to act fairly and in a non-discriminatory and non-arbitrary manner. I am unable to see how the said decision would assist the learned senior counsel for the petitioner.

11. Learned senior counsel for the petitioner also relied upon a decision of the Supreme Court in **THE D.F.O., SOUTH KHERI v. RAM SANEHI SINGH** [\[3\]](#) , which holds that merely because the source of right arises from a contract, the respondent can still maintain a writ petition for obtaining relief against any arbitrary or unlawful action on the part of the public authority. Learned senior counsel would submit that it is on the basis of this ratio that

the arbitrary action of the first respondent is required to be examined by this Court. Learned senior counsel further relied upon a decision of the Supreme Court in **WHIRLPOOL CORPORATION v. REGISTRAR OF TRADE MARKS**^[4] where the maintainability of writ petition against administrative action for enforcement of any of the Fundamental Rights or where there is violation of principles of natural justice or where the order is wholly without jurisdiction was held to be maintainable under Article 226 of the Constitution of India and the maintainability is not effected by alternative remedy. Learned senior counsel would submit that in view of the ratio of the said decision also there is not impediment in entertaining the writ petition ignoring the remedies available to the parties under the contract itself. Learned senior counsel also relied upon the decisions of the Supreme Court in **POPCORN ENTERTAINMENT v. CITY INDUSTRIAL DEVELOPMENT CORPORATION**^[5] and **FOOD CORPORATION OF INDIA v. SEIL LTD.**^[6] where the ratio of the decision in **WHIRLPOOL CORPORATION's** case (4 supra) is reiterated and another decision of the Supreme Court in **ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD.** [(2004) 3 SCC 553] was also noticed and relied upon. Learned senior counsel submits that the ratio of the aforesaid decisions, therefore, authoritatively hold that any arbitrary action of the State or an instrumentality of the State is amenable to the jurisdiction of this Court under Article 226 of the Constitution of India.

12. Learned senior counsel for the first respondent, on the other hand, has placed strong reliance upon a decision of the Supreme Court in **RISHI KIRAN LOGISTICS PVT. LTD. v. BOARD OF TRUSTEES OF KANDLA PORT TRUST**^[7], 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. Learned senior counsel for the first respondent also placed reliance upon a decision of the Supreme Court in **MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATAKA**^[8], particularly, para 24, which is extracted hereunder:

“20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say:

“the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in negative, then there should be no interference under Article 226.”

Reliance is also placed upon a decision of the Supreme Court in **PIMPRI CHINCHWAD MUNICIPAL CORPORATION v. GAYATRI CONSTRUCTION COMPANY**^[9] wherein para 11 of the earlier decision of the Supreme Court in **KERALA SEB v. KURIEN E. KALATHIL** [(2000) 6 SCC 293] was relied upon and for the sake of convenience, the said para 11

is extracted hereunder:

“11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article [226](#) of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.”

Two other decisions of the Supreme Court in **ASST. EXCISE COMMISSIONER v. ISSAC PETER** [\[10\]](#) and **NOBLE RESOURCES LTD. v. STATE OF ORISSA** [\[11\]](#) are also relied upon reiterating the said principle.

14. The question, which requires to be decided, therefore, is whether the petitioner can seek a Mandamus of the nature sought for.

In my view, the said relief would perpetually desist the first respondent from terminating the contract dated 04.08.2010. Secondly, the said Mandamus would be contrary to the terms of the contract, which specifically provide for all the contingencies including the manner in which the contract can be terminated. Thus, a legally enforceable contract between the parties cannot be interdicted by issuance of a Mandamus of such nature. It is also to be noted that no declaratory relief is sought for by the petitioner and mere preventive Mandamus is sought for. The jurisdiction of this Court under Article 226 of the Constitution of India in matter of commercial contracts entered into by parties is limited and rights and obligations of the parties

under the contract are required to be worked out within the terms of the contract and cannot be interdicted by a Mandamus as sought for.

15. The ratio of the decisions, discussed above, therefore, hold that when actions of the State or its instrumentality are arbitrary, Article 14 of the Constitution of India springs into action and this Court would exercise powers of judicial review. On the facts of the present case, however, the question is whether the action of the first respondent is demonstrated to be arbitrary. It has to be noted that in the affidavit of the petitioner there is no averment alleging any arbitrariness on the part of the first respondent and secondly, as on this date,

except giving notice of default, the first respondent has not taken any further action and petitioner's period of contract, in fact, continues up to 30.09.2015.

In the absence of any such averment, in my view,

para 22 of the decision of the Supreme Court in **RISHI KIRAN LOGISTICS PVT. LTD.'s** case (7 supra), extracted above, would clearly apply and this Court would not be justified in exercising its power of judicial review. The question posed is accordingly answered against the petitioner.

Consequently, 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

August 20, 2015
DSK

[1] AIR 1962 ASC 1044

[2] ARI 1979 SC 1628

[3] 1971 (3) SCC 864

[4] (1998) 8 SCC 1

[5] (2007) 9 SCC 593

[6] (2008) 3 SCC 440

[\[7\]](#) 2014 (6) SCJ 640 = AIR 2014 SC 3358

[\[8\]](#) (2012) 8 SCC 216

[\[9\]](#) (2008) 8 SCC 172

[\[10\]](#) (1994) 4 SCC 104

[\[11\]](#) (2006) 10 SCC 236