HON'BLE SRI JUSTICE S.V.BHATT

W.P.No.8007 OF 2015

ORDER:

Heard Sri C.V.Mohan Reddy, learned Senior Counsel for the petitioners and Sri L.Ravi Chander, learned Senior Counsel for the respondents.

The petitioners invoked the jurisdiction of this Court
under Article 226 of the Constitution of India for a Writ of
Mandamus declaring communication No.W.CON.148/A/G/ 3994/WC.3 dated 26.02.2015 read with communication No.W.CON.148/A/G/3994/WC.3 dated 26.02.2015 of the 3rd respondent terminating agreement No.50/CAD/C/SC/2011 dated 30.08.2011 and communications No.W.CON.148/A/G/3994/ VOL.III/WC dated 05.03.2015, 17.03.2015 and 23.03.2015, insisting upon the 1st petitioner to furnish bank guarantees to a tune of Rs.2,68,31,140/- for revoking the termination of contract and entering into a subsidiary agreement with onerous conditions, without considering the representations dated 02.03.2015, 10.03.2015 and 18.03.2015 of 1st petitioner, as arbitrary, illegal, discriminatory and unconstitutional.

The petitioners through these prayers pray for setting aside the communication dated 26.02.2015 terminating the agreement dated 30.08.2011 and simultaneously complain against the conditions imposed through letter dated 05.03.2015 etc., for revocation of termination dated 26.02.2015, as arbitrary and onerous.

The petitioners filed W.P.No.729 of 2015 assailing 7 days' notice dated 30.12.2014 and 48 hours' notice dated 13.01.2015 and the threatened action of termination of agreement dated 30.08.2011 without considering the representations dated 05.01.2015 and 16.01.2015 of petitioners, as illegal and contrary to the agreed clauses in the agreement dated 30.08.2011.

This Court through order dated 23.02.2015 disposed of the writ petition as follows:

> "Having regard to the totality of circumstances and also to ensure fairness in action and adherence to consideration of material available on record, the writ petition is disposed of directing the respondents to consider the reply of petitioners dated 05.01.2015 and also the progress memo filed in the writ petition while taking a decision on the future course of action under the subject agreement and communicate the decision to petitioners. The available remedies in law are left open

to the parties aggrieved against the final decision taken in this behalf. There shall be no order as to costs."

The respondents through communication dated 26.02.2015, after considering the material available on record and by referring to the observations of this Court, concluded as follows:

4.1 The progress made by you from 01.12.2014 to 23.02.2015 is as follows which is very meagre and not in proportion of time consumed by you.

4.2 **The details of work done by you from 01.12.2014 to 23.02.2015**

Sl.No.	Item		Financial value of work done				
		Balance scope of work in value	1st slow progress to 2nd slow progress i.e., 1.12.14 to 8.12.14	2nd slow progress to 7 days notice i.e.,9.12.14 to 30.12.14	7 days notice to 48 hrs notice i.e., i.e.,31.12.14 to 13.01.5	After 48 hrs notice to 1st hearing of the court case ie., 14.1.15 to 2.2.15 i.e., the day before 1st hearing	After 1st hearing of court case to the date of Hon'ble High Court's Order dt.23.02.2015
1.	EW-COE	162.40 lakhs	NIL	NIL	NIL	NIL	NIL
2.	EW-Blanketing	229.12 lakhs	NIL	NIL	NIL	NIL	NIL
3.	Mass concrete, Excn, sand filling, pipes in bridges	877.85lakhs	3.00 lakhs	7.30 lakhs	5.40 lakhs	6.85 lakhs	5.94 lakhs
4.	RCC M30 in bridges	18.17 lakhs	NIL	NIL	NIL	NIL	NIL
5.	Stn.Blg, platforms, COP, FOB	535.32 lakhs	NIL	NIL	NIL	NIL	NIL
	Total	1822.86	3.00 lakhs	7.30 lakhs	5.40 lakhs	6.85 lakhs	5.94 lakhs

* Total Agt. Value = Rs.33,41,84,221.34 Ps

* Revised value of the Agt. = Rs.43,54,03,571.67 Ps

* Progress from acceptance lr. to 14.10.12 = Rs.24.51 crores

* Progress from Nov.2012 to May 2014 = NIL

* Progress after restart of the work i.e.,

from June ’2014 to 23.2.15 = 80.15 lakhs

Balance value of work to be done as on date = 18.228 crores

* Av.Daily progress after restart of the

work at site (June’14 to 23.2.15) = Rs.32,047/- per day.

* Required daily progress to complete balance work before 31.3.15 = Rs.50.64 lakhs per day.

* No. of days required to complete the balance work of Rs.18.228 crores @ Rs.32,047/- progress per day = 5,688/- days.

3. The above facts and figures undoubtedly proves that you have not increased the speed of execution of balance work and trying to shift the blame on Railways by one or the other tactics.

4. You have as of now completed only 58% (approx) of the revised agreement value of Rs.43.54 crores, work till date and not 72.1% of the total work, since you have to execute the work of the revised agreement value of Rs.43.54 crores as the agreement value was revised with your consent only duly obtaining your signature in the variation statement.

5. The project needs to be completed as the incomplete part is reflecting to the larger part of the project. We do not see enough progress in the work as has been detailed above.

6. This is to further inform you that your representations dt.05.01.2015, 12.01.2015 and 16.01.2015 in reference to ‘7 days notice’ dt.30.12.2014 and ‘48 hours notice’ dt.13.01.2015 respectively are already been replied vide this office letters dt.09.01.2015, 16.01.2015 and 21.01.2015. In obedience of the orders of the Hon’ble High Court, the same are reexamined and reconsidered. In the light of the above said findings and also independently reconsidering/reexamining, there is no changed circumstances to show that there is any compliance of the instructions of this office and hence the reasons given in the earlier replies dt.09.01.2015, 16.01.2015 and 21.01.2015 stands good.

7. It is thus decided to act in furtherance of the ’7 days notice’ and ’48 hours notice’ and exercise the power of terminating the contract.”

The instant decision was followed by communication of even date rescinding the agreement dated 30.08.2011. The relevant portion reads as follows:

> "Since the period of 48 hours' notice has already expired, the above contract stands rescinded in terms of Clause 62 of Standard General Conditions of Contract and the balance work under this contract will be carried out independently without your participation. Your participation as well as participation of every member/partner in any manner as an individual or a partnership firm/JV is hereby debarred from participation in the tender for executing the balance work and your Security Deposit shall be forfeited and Performance Guarantee shall be encashed."

The petitioners through letter dated 02.03.2015 requested the respondents to appreciate the circumstances for the delay in execution of the project and expressed that the petitioners will do their best to complete the work as desired by the department, subject to granting required extension. As no response was received from the respondents, the petitioners addressed letter dated 03.03.2015 to the Chief Administrative Officer, South Central Railways, Secunderabad. Through the instant letter, the petitioners requested extension of time for performance up to March, 2016. The petitioners have enclosed the bar chart for milestone performance during the requested period of extension.

On 03.03.2015, yet another letter is addressed to the respondents to revoke the termination letter dated 26.02.2015 and extend the period for completion up to December, 2016 as per the chart enclosed along with the instant letter. The relevant portion on which an issue is made out reads as follows:

> "Further to our letter cited above, we will be submitting an additional Bank Guarantee against Performance Guarantee @ 5% of the revised contract value if termination of contract is agreed for revocation. Now we are submitting a bar chart showing the detailed action plan for execution of balance work of the revised contract value of Rs.43,54,03,572/-."

The Chief Administrative Officer (Construction), South Central Railways, Secunderabad, replying to the offers of petitioners dated 02.03.2015 and 03.03.2015 agreed to consider the request of revocation of termination dated 26.02.2015, subject to the following conditions:

> "Your request for revocation of the termination of the subject contract has been considered by the competent authority subject to the following:

1. You have to submit Bank Guarantee for a value of Rs.50,60,960/- towards difference of Performance Guarantee between the Revised and Original contract value as advised to you vide this office letter of even No.Dt.14.05.2013, with validity up to 29.02.2016.

2. You have to submit Bank Guarantee for a value of Rs.2,17,70,180/- towards Additional Performance Guarantee @ 5% on the Revised Contract value of Rs.43,54,03,571.67 with validity up to 29.02.2016, as agreed by you vide your letter dt.03.03.2015 (Ref.No.02 above).

3. As the Revocation of Termination is purely on your request, Price Variation benefit, if any, shall be limited to the extended Date of Completion under Clause 17 A of the General Conditions of Contract, prior to termination of the contract i.e., 31.03.2015.

4. All the other terms and conditions of the subject agreement No.50/CAO/C/SC/2011 dated 30.08.2011 remains unchanged."

On 10.03.2015, the petitioners objected to the conditions imposed in the letter dated 05.03.2015 and explained various circumstances in support of their case either for waiver of condition or modification of the same. The Chief Administrative officer through letter dated 17.03.2015 rejected the request of petitioners and insisted upon accepting the conditions communicated through letter dated 05.03.2015 for revocation of the termination letter dated 26.02.2015. To the same effect is the communication dated 23.03.2015.

The petitioners and the respondents entered into agreement No.50/CAO/C/SC/2011 dated 30.08.2011 for execution/construction of new BG line from Nandyal to Yerraguntla (Reach–41). The total value of the work covered by the agreement dated 30.08.2011 was Rs.33,41,84,221-34 Ps. The work was required to be completed within 10 months. The revised agreement value is Rs.43,54,03,571-67 Ps. The respondents extended time for completion and according to the last extension granted, date of completion is 31.03.2015. When the last extension granted by the respondents was in progress, the respondents issued slow progress notices dated 30.12.2014 and 13.01.2015 and called upon the petitioners to take required steps for expeditious completion of project on time. Having regard to the nature of disposal of writ petition, I am not referring to the circumstances leading to the issuance of slow progress notices and the consequential threatened action of termination of contract by respondent. Further, this Court through order dated 23.02.2015 in W.P.No.729 of 2015 directed the respondents to consider the material available on record and communicate appropriate decision. The allegations against respondents are that communication of slow progress notices is unwarranted and not contextual, inasmuch as even before the expiry of date of last extension of time up to 31.03.2015, the respondents cannot issue notices or initiate action for termination. From the material available on record it appears that the respondents issued slow progress notices, as the petitioners either have slowed down the work or substantially stopped work during a few spells. In this background, the department in exercise of the options available under the agreement dated 30.08.2011 considered the representations of petitioners and terminated the agreement dated 30.08.2011. On the request or representations of petitioners, the respondents agreed to consider revocation subject to the conditions referred to above.

As the consideration for revocation of termination of agreement dated 30.08.2011 is allegedly with onerous conditions, the petitioners assail termination of agreement as well as the conditions imposed through letter dated 05.03.2015 etc., as illegal and arbitrary by filing the writ petition.

Sri C.V.Mohan Reddy, learned Senior Counsel, appearing for the petitioners vehemently contends that the reasons recorded in the communications dated 26.02.2015 or the termination through the even letter are arbitrary, contrary to the agreed terms of the contract, discriminatory and unconstitutional. Even though the agreement dated 30.08.2011 is a non-statutory contract, the learned Senior Counsel would contend that the jurisdiction of this Court under Article 226 of the Constitution of India is not a bar, for the termination is vitiated by patent arbitrariness and discrimination. Further, the conditions imposed by the respondents are onerous and having regard to the financial implications on the petitioners, these conditions are just impossible for performance and the respondents cannot incorporate such conditions in an arbitrary manner and further cannot state that it is for petitioners to take it or leave it. Refusing to revoke the termination on the ground that the conditions are not accepted, is illegal. The learned counsel by relying upon the explanation of petitioners against the contents in letter dated 03.03.2015 contends that the letter dated 03.03.2015 has not been given out of free will, but was given at the instance of the Chief Engineer who threatened to invoke the bank guarantees if the conditions suggested by him are not accepted . Therefore, by referring to the said letter, firstly no condition can be imposed and secondly imposition of onerous condition viz., calling upon the petitioners to execute the balance work without price variation benefit, is irrational and illegal. The learned counsel prays for setting aside the termination letter dated 26.02.2015 and the conditions imposed through letter dated 05.03.2015.

Sri L.Ravi Chander, learned Senior Counsel, appearing for the respondent opposes the writ petition by contending that the agreement dated 30.08.2011 contains an arbitration clause and against all the disputes including termination the remedy is as per the agreed clause i.e., arbitration but not the remedy under
Article 226 of the Constitution of India. It is contended that the respondents in the course of inspection noticed slow or no progress and the respondents are entitled even during the currency of latest extension granted to the petitioners to issue slow progress notice and if there is no proper and convincing reply from the petitioners, the respondents are entitled to terminate the agreement under the agreed clauses. The progress or performance by petitioners is a matter of inspection and examination and from the reasons stated in the communication dated 26.02.2015, it is abundantly clear that the petitioners are not in a position to complete the work within the time extended to them. The respondents, who are interested in the completion of work, are certainly well within their jurisdiction to terminate the agreement dated 30.08.2011 and further take up the balance works as provided by the agreement clauses at the expense and cost of petitioners.

The learned Senior Counsel further contends that the writ petition is not maintainable as several disputed questions of fact in an alleged issue on slow progress arise for consideration and that there is an arbitration clause for resolution after considering the evidence. Therefore, he contends that the termination simplicitor is not within the scope of judicial review of this Court under Article 226 of the Constitution of India. In reply to the submission of learned counsel for petitioners on the unreasonable conditions imposed by the respondents and also the objections taken by the petitioners
to their own letter dated 03.03.2015, the learned Senior Counsel contends that there are two stages in the matter. The first stage is completed with the issuance of termination letter dated 26.02.2015 and the other stage is receipt of representation dated 03.03.2015 and re-consideration of termination. The conditions are incorporated in the letter dated 05.03.2015 allegedly basing upon the content of

letter of the petitioners on 03.03.2015, which was not given out of free will, but was under compulsion. The learned counsel replies that if the petitioners do not want to admit the letter dated 03.03.2015, the petitioners can as well ignore the conditions imposed through letter dated 05.03.2015, for the respondents with a view to giving an opportunity and also ensuring timely completion of the project by accepting the offered conditions, in a *bona fide way*, issued the letter dated 05.03.2015. It is stated that the conditions for revocation of termination are exclusively within the jurisdiction of the respondents and the same is not justiciable. The learned counsel prays for dismissal of the writ petition.

From the above pleadings and contentions, the points for consideration are as follows:

(i) Whether the writ is maintainable against the letter dated 26.02.2015 terminating the agreement dated 30.08.2011;

(ii) Whether the arbitration clause in the agreement dated 30.08.2011 is a bar to consider the legality of termination dated 26.02.2015; and

(iii) Whether this Court has jurisdiction to consider the reasonableness or onerous nature of conditions imposed in the letter dated 05.03.2015 for revocation of termination dated 26.02.2015?

POINT Nos.i and ii:

The parties entered into agreement dated 30.08.2011 for execution/construction of new BG line from Nandyal to Yerraguntla. The time for performance is 10 months. The value of contract was revised from Rs.33,41,84,221-34 Ps to Rs.43,54,03,571-67 Ps. Admittedly, the respondents granted extensions for performance of contractual obligations by the petitioners. The latest extended date of completion is 31.03.2015. The said extension was granted through letter dated 02.09.2014 without penalty under Clause 17-A ii of the GCC. The other conditions, stipulations etc., are made applicable for the extended period. The agreement provides for issuing slow progress notice to the contractor with appropriate instructions for expeditious completion of the work. The respondents have issued the slow progress notices referred to above for the reasons stated in the respective letters. The petitioners approached this Court by filing W.P.No.729 of 2015 apprehending non-consideration of representations dated 05.01.2015 and 16.01.2015. As already noted, the writ petition was disposed of directing the respondents to consider the representation, material available on record and to take appropriate decision. Through communication dated 26.02.2015, a few reasons are stated for re-affirming the allegation of slow progress against the petitioners and the same is followed by termination letter dated 26.02.2015. The petitioners have raised several factual objections against the observations in the letter dated 26.02.2015.

The Apex Court in the decisions reported in **BAREILLY DEVELOPMENT AUTHORITY & ANR. v. AJAY PAL SINGH AND OTHERS**, **KERALA STATE ELECTRICITY BOARD AND ANOTHER v. KURIEN E. KALATHIL AND ORS**, **RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION v. DIAMOND AND GEM DEVELOPMENT CORPORATION LIMITED.**, and **SANJAY KUMAR SHUKLA v. BHARAT PETROLEUM CORPORATION LIMITED AND OTHERS** considered the scope of judicial review in pure and simple contractual disputes.

The relevant portions of the reported decisions are as follows:

In **BAREILLY DEVELOPMENT AUTHORITY**'s case (1 supra), the Apex Court held as follows:

> "when the contract entered into by the State is non-statutory and purely contractual the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they could only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the Authority in the said contractual field. It is also settled that no writ or order can be issued under Art.226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple".

In **KERALA STATE ELECTRICITY BOARD**'s case (2 supra), the Apex Court held as follows:

> "……….The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations

imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

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 of 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 been relegated to other remedies."

In **RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION**'s case (3 supra), the Apex Court held as follows:

"There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties."

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……It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation."

In **SANJAY KUMAR SHUKLA's case** (4 supra), the Apex Court held as follows:

"We cannot help observing that in the present case exercise of the extraordinary jurisdiction vested in the High Court by Article 226 of the Constitution has been with a somewhat free hand oblivious of the note of caution struck by this Court with regard to such exercise, particularly, in contractual matters.

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> We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail.

The issue considered from any perspective arises under a non-statutory contract and the impasse is on account of slow progress noticed by respondents, which resulted in termination of agreement dated 30.08.2011. The petitioners to justify the delay in performance refer to several circumstances. On the other hand, the respondents from the totality of circumstances justify termination of agreement and the reasons are as well recorded in the letter dated 26.02.2015. Either way, the point for decision involves issues of facts between the parties. The writ remedy is not efficacious and proper.

Further, admittedly, there is an arbitration clause in the agreement dated 30.08.2011. In the circumstances stated by the petitioners themselves, the issues for decisions on the alleged termination would be whether the slow progress notices issued by the respondents are justified and whether the explanation offered by the petitioners disentitles the respondents from terminating the contract etc., cannot conveniently be considered under Article
226 of the Constitution of India. The parties have admittedly agreed to resolve these differences through arbitration and it is up to the aggrieved party to avail the available remedy within the framework of agreed terms and conditions in the agreement dated 30.08.2011. The available arbitration clause is yet another ground to refuse the writ petition. Accordingly, points (i) and (ii) are answered in favour of respondents and against the petitioners.

POINT No.iii:

The learned counsel for petitioners contends that the respondents issued communication dated 05.03.2015 by referring to the alleged letter dated 03.03.2015 stated to have been addressed by the petitioners. The objections against these conditions are two fold – firstly that the conditions in letter dated 03.03.2015 have been incorporated not out of free will and secondly the conditions imposed are onerous. These contentions are referred to only to be rejected, for the petitioners have any reason to complain against the letter dated 03.03.2015, the petitioners are not under compulsion to accept the conditions imposed based upon the letter dated 03.03.2015. The respondents in the overall circumstances of the case and having regard to the material available are of the view that conditions necessary for timely completion are imposed. This Court cannot under its judicial review examine whether the impugned conditions are onerous or not, much less record a finding or direct the respondents to re-consider these conditions. Accordingly, this point is answered against the petitioners and in favour of respondents.

With the above findings, the writ petition is dismissed as not maintainable. It is made clear that this Court is not expressing its view on any of the facts in issue between the parties on any of the issues arising either under the agreement dated 30.08.2011 or the termination dated 26.02.2015. It is for the appropriate forums to consider, in a properly instituted case or proceeding. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

S.V.BHATT, J

26th March, 2015

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