

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on January 20, 2015

Judgment delivered on January 27, 2015

+ **O.M.P. 89/2015**

SIKARIA MEGA FOOD PARK(P) LTD

..... Petitioner

Through: Mr.Sandeep Sethi, Sr. Advocate
with Mr.C.Mukund and Mr.Pankaj
Jain, Advocates

versus

UNION OF INDIA

..... Respondent

Through: Mr.Ruchir Mishra, Advocate with
Mr.Mukesh Kr. Tiwari, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. In this petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act' in short), the following reliefs are sought:-

(a) Pass interim orders restraining the respondent from, in any manner, acting in furtherance to 'Preliminary Notice', bearing F. No.6-MFPI/11-Mega FP, dated 13.11.2014.

(b) Pass interim orders restraining the respondent from, in any manner, terminating the agreement, accorded vide Final Approval by respondent, bearing No.06-MFPI/11-Mega FP, dated 30.11.2011, and/or under Article 7 of

Memorandum of Agreement dated 24.02.2012.

*(c) Pass ad-interim ex-parte orders in terms of prayers
(a) and (b) hereinabove; and*

*(d) Pass such further and other order(s) as this Court
deems fit and proper in the facts and circumstances of
the case.*

Facts

2. It is the case of the petitioner that the respondent invited tender for construction of a Mega Food Park under the Mega Food Parks Scheme (MFPS), to provide excellent infrastructural facilities for food processing along with the value chain from farm to market. A final approval to the petitioner was conveyed by the respondent on November 30, 2011, in the state of Tripura, for a total project cost of Rs.87.45 Crores including grant in aid of Rs.50 Crores. The means of finance, to be precise was to be as under:

(i) Promoter's contribution – Rs.20.45 Crores

(ii) Ministry of Food Processing, Government of India Grant–
Rs.50 Crores

(iii) Bank Loan – Rs.17 Crores

3. It is the case of the petitioner that the activities pursuant to the understanding commenced immediately on the issuance of the approval

referred above. A Memorandum of Agreement ('Agreement', in short) was executed on February 24, 2012. For the purpose of receiving the grant in aid, the petitioner entered into an agreement with Punjab National Bank, Kolkata. According to the petitioner, while receiving grant in aid of Rs.15 Crores as against Rs.50 Crores from the respondent, it through itself and its agents and contractors executed work to set up the said project and till the end of August, 2014 had spent an aggregate of Rs.28.76 Crores and its own contribution from its association was Rs.14.57 Crores. It is alleged by the petitioner, against the second instalment of the eligible grant of Rs.15 Crores, was restricted to Rs.5.79 Crores due to non availability of funds. It is also alleged that on one occasion the respondent vide its letter dated March 29, 2013 had asked the bank, not to release the amount transferred to the bank, in favour of the petitioner. The clarifications sought from the petitioner on the project were provided. A communication dated April 22, 2014, was issued by the respondent seeking certain clarification with regard to the project. A review meeting was held on June 09, 2014. Thereafter the case of the petitioner is, it was shocked to receive a show cause notice dated July 22, 2014, under paragraph 7.2(1) of the Agreement from the respondent. The petitioner's case is also, it painstakingly point by point gave an elaborate reply to the respondent on July 30, 2014 and, overlooking the reply, the

respondent had sent notice dated November 13, 2014 received on November 22, 2014, purportedly under 7.2(1) of the Agreement, calling upon the petitioner to satisfactorily address the deficiencies in implementation of the project within 60 days failing which the Ministry will terminate the agreement, to which a response was given by the petitioner on January 10, 2015; and on repeated interaction, with the officials of the respondent, they are waiting for either completion of 60 days or response from the petitioner, whereafter they would terminate the agreement. It is in the aforesaid background the petition has been filed, seeking the reliefs already referred above.

4. It may be mentioned here, that the petition was initially listed on January 19, 2015, when notice on the petition was issued to the respondent for January 20, 2015. On January 20, 2015, the respondent is represented by Mr.Ruchir Mishra, Advocate.

5. I have heard the learned counsel for the parties.

6. Mr.Sandeep Sethi, learned Senior Counsel for the petitioner apart from reiterating the stand of the petitioner in the petition has by referring to various documents filed by the petitioner would contend that pursuant to the earlier notice dated July 22, 2014 of the respondent to which reply was given by the petitioner, no action has been taken against the petitioner; the present notice dated November 13, 2014 wherein similar

allegations have been made is unsustainable. He would state that there are no allegations that the petitioner has not brought the money to the project. He would also state that till August, 2014 an amount of Rs.14 Crores has been spent by the petitioner, whereas the grant in aid from the respondent, against sanctioned amount of Rs.50 Crores, only Rs.15 Crores has been disbursed till date, which has really effected the project implementation. He would further state that against the 2nd instalment of Rs.15 Crores, restricted to Rs.5.79 Crores on March 29, 2013, was directed to be stopped on the same day by the respondent in the communication to the bank which itself would demonstrate that it was not possible for smooth implementation of the project. In this regard, he has drawn my attention to page 64 of the documents, which is an order dated November 13, 2014 of the District Judge, North 24 Parganas, West Bengal, restraining the Punjab National Bank from reverting back the sum of Rs. 5.79 Crores lying in the TRA II being A/c No. 1625002100011072, to the respondent, which the respondent had sought in terms of its letter dated October 31, 2014 (page 56 of documents).

7. Mr.Sethi, learned Senior Counsel for the petitioner has also taken me through the deficiencies, pointed out by the respondent against the petitioner in the impugned notice dated November 13, 2014, to demonstrate that the same are without any basis. He would also submit

that the respondent being a “State”, is required to act fairly and cannot even proceed to terminate the agreement, which is not a normal commercial contract, but an agreement to bring into existence an asset for the welfare of the society and farmers in particular. Alternatively he would submit, even if there are breaches, they are of minor nature, and not fundamental breaches, for the respondent to terminate the agreement.

In this regard he refers and relies upon the following judgments:

(i) Softline Media Ltd., Soft Lines and Shalimar Advertisers Vs. Delhi Transport Corp., 2002 (3) R.A.J.

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(ii) Pioneer Publicity Corporation vs. M/s Delhi Transport Corporation & Anr. 2003 II AD (Delhi) 469

(iii) Atlas Interactive (India) Pvt. Ltd. vs. Bharat Sanchar Nigam Limited & Anr. 126 (2006) DLT 504

(iv) Old World Hospitality Pvt. Ltd. vs. India Habitat Centre 73 (1997) DLT 374

8. It was also argued that the notice dated November 13, 2014 does not even refer to notice dated July 22, 2014, or its reply dated July 30, 2014. He highlighted the consequences of the termination, as laid down in para 7.3 of the agreement. In the end, he prays for the grant of relief as prayed in the petition.

9. On the other hand, Mr.Ruchir Mishra, learned counsel for the

respondent would submit that the present petition is not maintainable/ pre-mature as the respondent is yet to take a decision on the notice, which has been replied by the petitioner on January 10, 2015. He would further state that this Court would not like to injunct the respondent from terminating the agreement when such a clause exists in the agreement. He further submits that the agreement stipulates the establishment of a Mega Food Park in Agartala in the State of Tripura, by the petitioner for a total costs of Rs.87.45 Crores, out of which Rs.50 Crores was by way of grant in aid and Rs.37.45 Crores was to be brought by the petitioner by creating a SPV (Special Purpose Vehicle) with equity participation, and bank loan.

10. The period of completion was 24 months from the date of release of first tranche of 1st instalment of Rs.5 Crores, which in this case was released on December 28, 2011. He would also state that 2nd tranche of 1st instalment of Rs.10 Crores was released on August 09, 2012. A total amount of Rs.15 Crores stands released. He would state that through the communication dated July 22, 2014, the respondent had only sought the explanation of the petitioner as to why respondent should not initiate the process of cancellation of the project with reference to clause 7.2(1) of Memorandum of Agreement. According to him, such notice is contemplated in the Clause 7.2(1) of the Agreement. He states that the

notice dated July 22, 2014 is not a Termination Notice (Preliminary Notice) of 60 days contemplated in the said Clause. He would state that the notice dated November 13, 2014, is a 60 days notice, as is clear from the same.

11. According to him, after reply was given by the petitioner to the notice dated July 22, 2014, on July 30, 2014 the matter was considered, which resulted in the Preliminary Notice dated November 13, 2014 bring out the deficiencies in the progress of the project. He states, the reply given by the petitioner would be considered and appropriate decision would be taken. He relied upon the following judgments in support of his submission:

(i) Bhushan Kumar and Brothers vs. Union of India 2003 (3) RAJ. 17 (J&K); (ii) D.R.Sondhi vs. Hella KG Hueck & Co. & Ors. 2002(2) RAJ. 28 (Del); and (iii) Thiess Minecs India Pvt. Ltd. vs. NTPC Ltd. 2014 (5) RAJ. 218 (Del) to contend that a contract cannot be enforced by grant of injunction, more so when the contract is terminable.

12. Having considered the rival submissions made on behalf of the parties, insofar as the submission of Mr.Sethi that the respondent having issued notice dated July 22, 2014, to which a reply was filed on July 30, 2014, and on which, no action was taken by the respondent and as such could not have issued the impugned notice, is concerned, suffice to state,

that Clause 7.2(1) contemplate issuance of a notice followed by a Preliminary Notice of 60 days, before effecting the termination. The notice simplicitor, and Preliminary Notice are different/separate notices contemplated in the agreement. The notice simplicitor was only to seek explanation of the petitioner on the delay in project implementation. If the explanation was satisfactory, the respondent may not have issued a preliminary notice. In any case, the submission of Mr.Sethi is liable to be rejected, as action is in consonance with the Clause 7.2(1) of the Agreement.

13. Insofar as the submission of Mr.Sethi on the deficiencies pointed out in notice dated November 13, 2014 is concerned, they relate to merits of the case, and it is for the respondent to take a decision, considering the reply filed and any other necessary input, which the respondent may consider relevant. I agree with the submission of Mr.Mishra that the present petition filed by the petitioner is not maintainable as no decision has been taken by the respondent on the Preliminary Notice dated November 13, 2014. Even otherwise, it is a settled law that a Court cannot enforce a contract, in view of Section 14(1)(a) to (d) and 41(e) of the Specific Relief Act, 1963 ('S.R Act' in short), which, specifically stipulate that injunction will be refused if certain conditions like money being adequate compensation or if the

contract which in its nature is determinable are satisfied. In fact the Supreme Court and this Court had repeatedly held so. In *Indian Oil Corporation vs. Amritsar Gas Service 1991 (1) SCC 533*, the Supreme Court has held as under:-

“12. The arbitrator recorded finding on issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under Clause 27. Thereafter, he proceeded to record the finding on issue No. 2 relating to grant of relief and held that the plaintiff-respondent No. 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the Agreement and, therefore, the plaintiff-respondent No. 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

‘This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion

arises.'

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the Agreement dated 1.4.1976, which contains the aforesaid Clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with Clauses 27 and 28 of the Agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with Clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable. In the present case, it is not necessary to refer to the other clauses of Sub-section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-

Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained.” (emphasis supplied)

14. Similarly in *State Bank of Saurashtra vs. PNB 2001(5) SCC 751*, the Supreme Court has held as under:-

“Considering the fact that there was an alternative plea for damages, on the facts of the present case it would have been appropriate for the Special Court to have computed and awarded the damages in addition to ordering refund rather than requiring the appellants to purchase the units and give the same to the respondent. In other words, a decree for specific performance in the manner in which it was passed was probably not appropriate especially when the respondent could be compensated with the return of money and award of reasonable damages.”

(emphasis supplied)

15. Similarly in *Rajasthan Breweries Ltd. vs. Stroh Brewery Company AIR 2000 Delhi 452*, the Division Bench of this Court has held as under:-

“16. Learned counsel for the appellant contended that the word "determinable" used in clause (c) to Sub-section (1) of Section 14 means that which can be put an end to. Determination is putting of a thing to an end.

The clause enacts that a contract cannot be specifically enforced if it is, in its nature, determinable not by the parties but only by the defendant. Although clause does not add the word "by the parties or by the defendant" yet that is the sense in which it ought to be understood. Therefore, all revocable deeds and voidable contracts may fall within "determinable" contracts and the principle on which specific performance of such an agreement would not be granted is that the Court will not go through the idle ceremony of ordering the execution of a deed or instrument, which is revocable at the will of the executant. Specific performance cannot be granted of a terminable contract.

17. We are unable to persuade ourselves to accept the submissions put forth on behalf of the appellant that when a contract is determinable by the parties, the same cannot be treated as such a contract as is referred to in clause (c) to sub-section (1) of Section 14 in a contract, which in its nature is determinable."

16. Insofar as the submission of Mr.Sethi that the respondent being a State/a Government body, it cannot act arbitrarily and terminate the agreement without justifiable reasons is concerned, even this submission is liable to be rejected inasmuch as it is pre-mature for the petitioner to state that the respondent had actually terminated the contract when no

such decision has been taken. Justifiability of the decision, if any, shall be tested at the appropriate time and by appropriate forum. Insofar the judgments referred to by Mr.Sethi are concerned, the same holds the freedom which exists under the realm of private contract in respect of the performance of contractual obligation does not apply in the same measure where the government is a party. Every action of the government has to pass the rigour of fair play, lack of arbitrariness and its being founded on good and sound reasons. The judgments so relied also hold that unless there is a fundamental breach of the provisions of the agreement, the State cannot terminate the same.

17. The position of law in that regard has been well settled by the Supreme Court in the case of *Assistant Excise Commissioner vs. Issac Peter* 1994 (4) SCC 104, wherein it has been held as under:-

“26. Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory -

at least to the extent of previous year's supplies - by applying the said doctrine. It is submitted that if this is not done, the licencees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness of the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be

construed reasonably having regard to its language. But this is not what the licencees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licencees to lift all that stocks. The licencees will undertake no obligation to lift all those stocks even if the State suffers- loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned, counsel for the licencees do not support their proposition. In Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay : [1989] 2 SCC 293 , it was held that where a public authority is exempted from the operation of a Statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 was a case of mass termination of District Government Counsel in the State of U.P. It was a

case of termination from a post involving public element. It was a case non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned Counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does no guarantee profit to the licencees in such contracts. There is no warranty against incurring losses. It is a businesses for the licencees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its

money under the Contract. It is not as if the licencees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.”

18. The aforesaid view has been reiterated by the Supreme Court in the case of ***S.K. Jain vs. State of Haryana & Anr. 2009 (4) SCC 357.***

19. The aforesaid two judgments upholds the view that in case of contracts freely entered into with the State, there is no rule for invoking the doctrine of fairness and reasonableness against one party to the contract i.e. the State/Government body. Even in such contracts, the rights and liabilities must necessarily be determined by the terms of contract. In the present case, the contract has been entered into by the petitioner without any compulsion. In view of the position of law as determined by the Supreme Court, the submission of Mr.Sethi by relying upon the judgments which are referred and dealt with above need to be

rejected.

20. It is not a case of the petitioner that there is a negative covenant in the agreement which shall not preclude the Court from granting injunction to perform the negative covenant. Section 42 is thus an exception to Section 41 of the S.R Act. If there is a negative covenant, the Court has no discretion to exercise. In such eventualities, a restraint order is in effect an order of specific performance. It is not the case here. In view of the above, I am of the opinion that keeping in view the bar contained in Section 14(1)(a) to (d) read with Section 41(e) of the S.R Act, no relief can be granted in the present petition. The same is dismissed with no order as to costs.

(V.KAMESWAR RAO)
JUDGE

JANUARY 27, 2015

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