

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

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Date of decision: 9th October, 2015

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W.P.(C) No.9628/2015

JHANSI ORAI TOLLWAY PVT. LTD.

..... Petitioner

Through: Mr. Garvesh Kabra and Mr. A.H.
Lohiya, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Ms. Anjana Gosain and Mr. Vishu
Agarwal, Advs. for R-1/UOI.
Mr. Ravi Sikri, Sr. Adv. with Mr.
Mukesh Kumar, Ms. Meenakshi
Sood, Mr. Shantnu Awasthi and Mr.
Binay Kumar Thakur, Advs. for
R-2/ NHAI.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CMs No.22828/2015 & 22829/2015 (both for exemption)

1. Allowed, subject to just exceptions.
2. The applications are disposed of.

W.P.(C) NO.9628/2015 & CM No.22827/2015 (for stay)

3. The petition impugns the letter dated 3rd March, 2014 of the respondent No.2 National Highways Authority of India (NHAI) of termination of the Concession Agreement dated 5th February, 2013 entered

into between the petitioner and the respondent No.2 NHAI for operation and maintenance of Jhansi-Orai section stretch admeasuring 135.413 Km. of NH-25 in the State of Uttar Pradesh on Operation Management Transfer (OMT) basis.

4. The petition impugning the termination dated 3rd March, 2014 has come up for the first time today before this Court. It is the case of the petitioner that the petitioner was not aware of the said termination and has been informed of the same for the first time only on 22nd July, 2015 and the copy of the letter dated 3rd March, 2014 has been furnished to the petitioner on 11th September, 2015.

5. The counsel for the petitioner has been heard.

6. It is not in dispute that within sixty days of the execution of the said Concession Agreement, the petitioner was required to furnish a Performance Security to the respondent No.2 NHAI. Clause 9.1.2 of the Concession Agreement is as under:

“9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 60 (sixty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and

entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.”

7. It is also not in dispute that the petitioner within the said period of sixty days did not furnish the Performance Security.

8. It is the case of the petitioner that the said period of sixty days was extended to 180 days with effect from 14th May, 2013 in terms of the Circular dated 29th May, 2013 of the respondent No.2 NHAI.

9. However, the fact remains that the petitioner did not furnish the Performance Security even within the said extended period of 180 days and which resulted in the respondent No.2 NHAI issuing a termination notice dated 18th February, 2014 to the petitioner and relevant paragraphs whereof are as under:

“Whereas, in term of clause 9.1.2 of the Concession Agreement the Concessionaire viz Jhansi-Orai Tollway Pvt. Ltd. was required to provide Performance Security within a period of 60 days from 5th February, 2013.

Whereas, the due date for submission of Performance Bank Guarantees has expired on 4th April, 2013 but the Concessionaire has failed to comply with its contractual obligation despite giving additional time to submit the

Performance Bank Guarantee. The Concessionaire continues to be in breach of its contractual obligations by not submitting the Performance Bank Guarantee.

Whereas after execution of the Concession Agreement, submission of Performance Bank Guarantee was one of the essential and foremost steps to be undertaken by the Concessionaire as a mark of commitment to undertake the project work which the Concessionaire is no more interested and has no intention to undertake the project work.

Whereas upon failure of the Concessionaire to fulfil one of the Condition Precedent under Article 4.1.2, read in conjunction with Article 9.1.2, the Authority was constrained to encash the Bid Security on 30.10.2013.

Now therefore, the Authority has come to irresistible conclusion that this a fit case to invoke provision of 9.1.2 of the Concession Agreement wherein the Concessionaire is deemed to have waived its all rights, privileges, claims and entitlement under or arising of this agreement and this agreement is deemed to have been terminated by mutual agreement of the parties.

Notwithstanding above, the concessionaire is given an opportunity to explain as to why the concession agreement should not come to end with immediate effect. The explanation if any should be submitted within 15 (fifteen) days after receipt of this notice.

This is without prejudice to any other right or remedies which the Authority may have under this Agreement.”

10. The petitioner claims that the aforesaid notice was received by it on 25th February, 2014 and it submitted reply thereof on 8th March, 2014. It is

further the case of the petitioner that it did not hear anything further from the respondent No.2 NHAI and the petitioner after waiting for one year and three months, on 26th June, 2015 made a request to the respondent No.2 NHAI for issuance of Commercial Operation Date (COD) followed by a representation dated 21st July, 2015 for permission to submit Performance Security within reasonable time and grant of work and that though it was called for a meeting on 25th July, 2015 but was vide letter dated 22nd July, 2015 of the respondent No.2 NHAI informed that the contract already stood terminated vide letter dated 3rd March, 2014. The petitioner further claims that since it had not received the letter dated 3rd March, 2014, it requested the respondent No.2 NHAI to supply the copy of the said letter dated 3rd March, 2014 and which was supplied on 11th September, 2015.

11. The principal argument of the counsel for the petitioner is that since the show cause notice dated 18th February, 2014 gave fifteen days time to the petitioner from receipt thereof to reply thereto, the respondent No.2 NHAI could not have before the expiry of the said period of fifteen days terminated the agreement. It is contended that the said period of fifteen days from 25th February, 2014 expired on 11th March, 2014 and thus the termination dated 3rd March, 2014 is *ex-facie* illegal. Reliance is placed on

Harbanslal Sahnia Vs. Indian Oil Corpn. Ltd. (2003) 2 SCC 107, *Union of India Vs. Tania Construction Private Limited* (2011) 5 SCC 697, *Hindustan Petroleum Corporation Limited Vs. Super Highway Services* (2010) 3 SCC 321, *ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553, *Modern Steel Industries Vs. State of U.P.* (2001) 10 SCC 491, *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1 and *Surya International Pvt. Ltd. Vs. Union of India* 2014 (4) All.LJ 402 to contend that the rule of exclusion of writ jurisdiction by availability of alternative remedy is not a rule of compulsion but of discretion and it is argued that since the termination has been effected before the expiry of time given to show cause, no disputed questions of fact are to be adjudicated.

12. It is further the case of the petitioner that the respondent No.2 NHAI besides issuing the termination notice dated 18th February, 2014 supra had also sought to invoke the Bid Security furnished by the petitioner along with its bid and in pursuance whereof the Concession Agreement aforesaid was executed. The said invocation of the bid security in the form of a Bank Guarantee (BG) was also on the same ground, of the petitioner having not furnished the Performance Security. The petitioner instituted a suit in the

Court of Civil Judge-First Class, Durg in that regard. Though the petitioner has chosen not to file the plaint in that suit before this Court but the counsel for the petitioner states that various reliefs were claimed in that suit. It is further the case of the petitioner that by an interim order in the said suit, the encashment of the BG furnished by way of bid security was stayed. The respondent No.2 NHAI filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 in that suit and which was allowed and the suit was disposed of by referring the parties to arbitration in accordance with the arbitration clause in the Concession Agreement. Aggrieved therefrom, the petitioner filed a civil revision petition in the High Court of Chhattisgarh and which is still pending and in which also there is stated to be an interim order against the encashment of the BG. The counsel for the petitioner states that the civil revision petition has been referred to a Larger Bench.

13. It is the case of the petitioner that the respondent No.2 NHAI in the aforesaid proceedings also did not disclose the factum of having terminated the Concession Agreement.

14. The petitioner first sought to impugn the termination letter dated 3rd March, 2014 as impugned in this petition, also by filing a writ petition

before the High Court of Chhattisgarh at Bilaspur but the respondent No.2 NHAI took objection to the territorial jurisdiction of that High Court to entertain the writ petition in view of the clause in the Concession Agreement restricting the jurisdiction to the Courts at Delhi and which objection found favour with the Chhattisgarh High Court which vide order dated 1st October, 2015 has disposed of that writ petition with liberty to the petitioner to approach the competent court.

15. It is thereafter that this petition has been filed.

16. On enquiry, the counsels are *ad idem* that the said section of NH-25 has already been constructed and the work of collection of toll therefrom is at present being undertaken by the respondent No.2 NHAI.

17. On enquiry, as to why the Performance Security was not furnished within sixty days from the Concession Agreement dated 5th February, 2013 or 180 days, even if applicable and was not furnished till 3rd March, 2014, the counsel for the petitioner states that the Performance Security of the petitioner in the form of a BG of the Bank of Baroda was ready on 20th August, 2013 but could not be furnished to the respondent No.2 NHAI since the Bank of Baroda raised an objection that the respondent No.2 NHAI had not carried out the works, which it was required to carry out on the NH-25

under Clause 6.2 of the Concession Agreement and that till the said works were carried out, it was not willing to issue the BG which was to be furnished by the petitioner as Performance Security. Clause 6.2 of the Concession Agreement is as under:

“6.2 Maintenance obligations prior to COD

Prior to COD, the Authority shall maintain the Project Highway, at its own cost and expense, so that its traffic worthiness and safety are at no time materially inferior as compared to its condition 7 (seven) days prior to the last date for submission of the Bid, and in the event of any material deterioration or damage other than normal wear and tear, undertake repair thereof, or pay to the Concessionaire the cost and expense, as determined by the Independent Engineer, for undertaking such repair after COD. For the avoidance of doubt, the Authority shall undertake only routine maintenance prior to COD, and it shall undertake special repairs only for ensuring safe operation of the Project Highway, or in the event of excessive deterioration or damage cause due to unforeseen events such as floods or torrential rain.”

18. I have enquired from the counsel for the petitioner, under which clause of the Concession Agreement was the furnishing of Performance Security by the petitioner under Clause 9.1.2 was dependent upon the performance by the respondent No.2 NHAI of its obligations under Clause 6.2.

19. Though the counsel for the petitioner is unable to show anything in the Concession Agreement in this regard but states that “the petitioner had entered into correspondence with the respondent No.2 NHAI in this regard”.

20. On enquiry, it is further told that COD is an abbreviation for ‘Commercial Operation Date’ and which was to be after the furnishing of Performance Security.

21. It is thus evident that the reason for which the petitioner claims to have not furnished the Performance Security is not made out from the contract between the parties. Once that is found to be the position, the entire challenge to the termination falls, inasmuch as the interference by this Court with the said termination of the Concession Agreement by the respondent no.2 NHAI would be in the realm of specific performance of the Concession Agreement and which relief of specific performance under the law applicable thereto enshrined in the Specific Relief Act, 1963, cannot be granted when the person claiming that relief is not found to have been ready and willing to perform his part of the contract. The petitioner, by not furnishing the Performance Security within the time stipulated therefor and in spite of the termination notice aforesaid, has clearly demonstrated that it was not ready and willing to perform its part of the Concession Agreement.

The respondent No.2 NHAI which is entrusted with the responsibility of the highways, crucial to the development of the country, cannot be expected to wait endlessly for the petitioner to furnish the Performance Security.

22. As far as the argument of the counsel for the petitioner, of respondent No.2 NHAI having terminated the agreement prior to the time given in the show cause notice dated 18th February, 2014 is concerned, though I am of the opinion that once the petitioner is found to be not entitled to the relief of specific performance, the same is irrelevant, but may also add that as per Clause 9.1.2 supra which had been admittedly invoked by the respondent No.2 NHAI and as also intimated in the termination notice, the Concession Agreement was deemed to have been terminated and giving of an opportunity by way of show cause notice by the respondent No.2 NHAI would not revive an agreement, which under the terms of the Concession Agreement, was deemed to have stood terminated.

23. The counsel for the petitioner has contended that the deeming provision contained in Clause 9.1.2 supra would not come into operation because the appropriation of the bid security had not taken place till then as the encashment of BG by way of bid security has been stayed by the Court

of the Civil Judge, Durg and which stay has been continued by the High Court of Chhatisgarh in the Civil Revision filed by the petitioner.

24. I am unable to agree. A commercial reading of Clause 9.1.2 supra shows that the respondent No.2 NHAI had reserved the option to encash the bid security for non furnishing of Performance Security and whereupon the petitioner was to be deemed to have waived all its' rights, privileges, claims and entitlements under or arising out of the Concession Agreement and the agreement was to be deemed to have been terminated by mutual consent. It is not in dispute that the respondent No.2 NHAI did exercise the said option and invoked the BG furnished by way of Bid Security. The fact that the petitioner challenged the invocation of BG and the payment under BG was stayed by an order of a Court would not tantamount to the deeming provision having not come into force. If the petitioner wanted the said deeming provision to not come into effect, the petitioner ought to have sought stay from the Court thereof. The petitioner admittedly did not do so.

25. I am also of the view that the petitioner, from the invocation by the respondent No.2 NHAI of the bid security was abundantly warned of the intent of the respondent No.2 NHAI. The petitioner inspite thereof did not seek any interim relief in the suit against the relief of termination. Though

from a reading of the memorandum of the civil revision petition preferred by the petitioner before the Chhattisgarh High Court and from the interim order therein it appears that the scope of the suit filed by the petitioner was very large but the petitioner as aforesaid has chosen not to file the copies of the proceedings in that suit and has chosen only to file the copy of the civil revision petition and the order therein.

26. With respect to the judgments cited by the counsel for the petitioner, reference may only be made to the recent dicta of the Supreme Court in *Joshi Technologies International Inc. Vs. Union of India* (2015) 7 SCC 728 where on a review of the earlier judgments it has been held that in contractual matters writ petitions are not to be entertained and the parties have to be relegated, if have provided for the remedy of arbitration, to arbitration or to the ordinary remedy available under the civil law.

27. I may in this regard notice that the respondent no.2 NHAI, neither contractually nor in law was required to give any show cause notice or opportunity of hearing to the petitioner before terminating the agreement. Rather, as aforesaid, the agreement was to be deemed to have been mutually terminated on the petitioner not furnishing the Performance Security and the respondent no.2 NHAI encashing the Bid Security and which the respondent

no.2 NHAI admittedly did by invoking the BG furnished by way of Bid Security. The mere fact that the respondent no.2 NHAI, while reminding / informing the petitioner so, also gave an opportunity to the petitioner to explain and then, before the expiry of period given to explain, expressly terminated the agreement, would not annul the deemed termination by mutual consent if otherwise the same is found to be in order and if the petitioner is to be not found entitled to specific performance of the agreement, as is the case here. Supreme Court in ***M.C. Mehta Vs. Union of India*** (1999) 6 SCC 237 held that if on the admitted or indisputable factual position only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of principles of natural justice. A number of judgments, holding that notwithstanding the breach of natural justice, relief can be refused if the Court thinks that the case of the applicant is not one of "real substance" or that there is no substantial possibility of success or that the result will not be different, even if natural justice is followed, were noticed, though no final opinion expressed thereon. However earlier, in ***S.L. Kapoor Vs. Jagmohan*** (1980) 4 SCC 379 it was held that where only one conclusion is possible, the Court may not issue writ to compel observance of natural justice, not because it approves the non-

observance of natural justice but because Courts do not issue futile writs. Though the Supreme Court in *M.C. Mehta* supra had hesitated from giving a conclusive view on the matter but subsequently in *Aligarh Muslim University Vs. Mansoor Ali Khan* (2000) 7 SCC 529 and in *Karnataka State Road Transport Corporation Vs. S.G. Kotturappa* (2005) 3 SCC 409 held that the useless formality theory can be applied, depending upon the facts of the case. I am of the view that the present is a fit case for invoking the useless formality doctrine as reiterated in *Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board* (2010) 13 SCC 216. The High Court of Madras in *Chennai Medical College & Hospital & Research Centre, Trichy Vs. Government of India* MANU/TN/2263/2014 has applied the said empty formality principle to the proviso to Section 10A(4) of the MCI Act.

28. In the present case, the failure of the petitioner to perform his part of the agreement is writ large, disentitling the petitioner from challenging termination by the respondent no.2 NHAI thereof, in as much as the petitioner is not entitled to specific performance thereof.

29. Thus from whichever angle / side one looks at the matter, the petitioner has not made out any case for entertaining this petition.

30. Dismissed. No costs.

31. The counsel for the petitioner at this stage states that liberty be given to approach the Arbitrator or the Civil Court as may be appropriate.

32. The petitioner shall have liberty in accordance with law.

No costs.

RAJIV SAHAI ENDLAW, J

OCTOBER 09, 2015

‘bs’..