IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4942 of 2017

==

1. M/s Sadbhav G K C Joint Venture, a Joint Venture between Sadbhav Engineering Limited with GKC Projects Ltd., the Companies incorporated under the provisions of Companies Act, 1956 having their respective offices at 'Sadhbhav House', Opp. Law Garden Police Chowki, Ellisbridge Ahmedabad 380 006 and Sy. No. 9(P), CII Green Building Lane, HITEC City, Kondapur, Hyderabad- 500084 through its Authorised Signatory, Vikramjeet Singh, Son of Avtar Singh, Resident of Plot No. 198, Jayadarshani Enclave, Kompally, Ranagareddi, Hyderabad, Telangana.

.... Petitioner/s

Versus

1. The State of Bihar, through the Secretary, Road Construction Department, Government of Bihar, Vishwesharraiya Bhawan, Bailey Road, Patna.
2. The Bihar State Road Construction Development Corporation Limited having its registered office at Road Construction Department Central Mechanical Work Shop Campus, Near Patna Airport, Sheikhpura, Patna through its Managing Director.
3. The Managing Director, The Bihar State Road Construction Development Corporation Limited having its registered office at Road Construction Department Central Mechanical Work Shop Campus, Near Patna Airport, Sheikhpura, Patna
4. The General Manager- Projects, Bihar State Road Development Corporation Near Patna Airport, Sheikhpura, Patna.
5. The State Bank of India, Constituted under State Bank of India having its Corporate Centre at Cuffee Parade, Mumbai.
6. The State Bank of India, CAG Branch, Hyderabad through its Branch Head at Hyderabad- 500082.
7. The IDBI Bank Ltd. 5-9-89/1 & 2, Chapel Road, Hyderabad (Telangana) through its Branch Head.

.... Respondent/s

==

Appearance :

For the Petitioner/s	:	Mr. S. D. Sanjay, Sr. Advocate Mr. Alok Kumar Agrawal, Advocate Mr. Priya Gupta, Advocate.
For the State	:	Mr. Raj Ballabh Pd. Yadav, AAG-11
For BSRTC	:	Mr. J.S. Arora, Sr. Advocate Mr. Vikas Kumar, Advocate.
For SBI	:	Mr. Kaushlendu Kumar Singh, Advocate.

==

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 10.7.2017

Heard the parties.

2. In the present writ petition, relief has been sought for

restraining the Bihar State Road Development Corporation Ltd. (hereinafter referred to as the Corporation) for giving direction for extension of period of Bank Guarantee beyond 22.3.2017 otherwise the Bank was directed to credit the amount of the Bank Guarantee to the account of the Corporation as having been claimed that the action of the Corporation is completely illegal, arbitrary as keeping the Bank Guarantee already served its purposes, though the petitioner even after the period beyond 22.3.2017 has extended from time to time to avoid the credit of money to the account of the Corporation. In fact the Corporation by letter nos. 612 and 613 both dated 16.3.2017 which were emailed to the petitioner on 22.3.2017 for extension of Bank Guarantee beyond 22.3.2017 thereafter, again vide letter nos. 650 and 652 both dated 21.3.2017 which were emailed to the petitioner on 22.3.2017 at 1.07 P.M. for extension of Bank Guarantee beyond 22.3.2017. The petitioner has made a prayer for quashing both letters claiming that action of the Corporation is completely illegal, not sustainable in law, against fairness reasonableness which are hallmark of the good governance.

3. Brief facts of the case is that the Corporation has come out for construction of the Bihar State Highway Projects-II and for that the Corporation has floated tender vide Invitation No.

BSHP-II/SH-90 dated 20.7.2010. The project was financed by the Asian Development Bank. The advertisement was issued the work was divided in three packages for construction of different roads under different clusters/segments. The petitioner has dropped the sealed cover tender for all the three packages but was declared successful for package no.3 of BSHP-II which was improvement/up gradation of Mohammadpur-Rajapatti-Mashrakh-Khaira-Chapra Road (SH-90) having length of 64.71 KM. Accordingly the Corporation issued Letter of Acceptance (LOA) in respect of the aforesaid package vide letter no.1594 dated 8.8.2011. In pursuance thereof the petitioner entered into agreement with the Corporation through its Chief General Manager on 7.9.2011. The agreement was consisted of Letter of Acceptance, the letter of technical bid, the letter of price bid, the general conditions, the particular conditions, copy of performance Bank Guarantee. The total value of work was Rs.201.82 crores and entire work was asked to be completed within 912 days. The first part was K.M.0-20, second part was from 21-40 KM and third part was from 40 -64.7 but later on it was interchanged as the first part became the last part and last part became the first part. The completion of work was dependent on different factors and conditions. Specific period was provided for each segment.

4. The amendment was made by the State Government vide notification dated 4.2.2010 in the Bihar Minor Mineral Concession Rules, 2010 in which Sheikhpura Mines was specifically mentioned where chips was to be lifted for the up gradation of the road. For certain period, hindrance was there for lifting the chips which was basic raw material for up gradation of the road. The dispute arose in between the parties which was referred to the Dispute Board, constituted in terms of agreement but the Dispute Board has refused to accept the same and started blaming the petitioner. The petitioner tried to resolve the dispute with regard to blame for delay, slow progress was made over the head on the petitioner rather petitioner was not at the fault in delay for up gradation of the road. The petitioner has furnished to Bank Guarantees, one for, against mobilization advance, another was for performance guarantee. As the situation deteriorated, the Corporation decided to invoke the Bank Guarantee furnished by the petitioner against mobilization advance and further coercive measures were to be taken as provided under Clause 15.1 against the petitioner. Having found no way out the petitioner took decision to terminate the contract, issued notice as provided in Clause 16.2(d) of the Contract Agreement intimating, termination

will take effect on expiry of 14 days. Afraid of contemplated threat the petitioner moved before this Court vide C.W.J.C. No.7168 of 2014 making a prayer for prohibiting the respondent in taking coercive measure for encashment of Bank Guarantees and further made a prayer for implementation of the decision of the Dispute Board and made a prayer to give direction to treat the agreement closed and terminated on expiry of 14 days from the date of issuance of letter as provided under Clause 16.2(d) of the Contract.

5. The writ Court has disposed of the matter, referred the dispute to one man, Arbitral Tribunal of Mr. Justice Uday Sinha a retired Judge of this Court as a sole Arbitrator for resolution of dispute between the parties. In the operative portion of the order this Court has also stipulated the period within which the proceeding was to be determined. At the end the Court has directed that the petitioner shall be under an obligation to extend the period of Bank Guarantee for a period as may be fixed by Hon'ble Arbitrator and also handover its original to respondent nos. 2 and 3.

6. The matter was adjudicated by Mr Justice Uday Sinha retired Judge of this Court and notified/pronounced the award on 17.3.2017. Hon'ble Arbitrator partly allowed the claim of the

petitioner giving direction for payment of Rs.36,58,71,459/- against the claim of Rs.97.48 Crores has issued direction for return of mobilization advance and held that there is no justification for invoking the performance guarantee by the Corporation. After adjusting the mobilization advance in sum total, the amount of Rs.16,37,42,658/- was to be paid by the Corporation to the present petitioner. Even after crystallization of right and liability of the party, the Corporation has issued letter on 16.3.2017 and 21.3.2017 directing for extension of period of Bank Guarantee, in failure, the Bank was advised to credit the amount to the Corporation.

7. The respondent being aggrieved with the award has filed an objection in terms of Section 34 of the Arbitration and Conciliation Act, 1996 before the Principal Civil Court Patna and it has been informed by the respondent that the present petitioner has also filed case against the award under Sections 34 and 36 of the Arbitration Act.

8. The question has been raised by the petitioner giving direction for extension of Bank Guarantee is completely per se illegal and arbitrary exercise of power as the Bank Guarantee has been extended from time to time as per direction of this Court as well as Arbitrator. The award has been pronounced, right and

liability of both sides has already been crystallized where after giving direction to the petitioner to extend the period of Bank Guarantee is just beyond the imagination and completely illegal and arbitrary exercise of power. The Corporation is a State within the meaning of Article 12 of the Constitution of India, it is incumbent upon the authority to exercise the power fairly, properly not in whim, fancy and capacious which is the mandate of Article 14 of the Constitution of India as arbitrariness which is antithesis of rule of law. The purpose of Bank Guarantee was to keeping Bank Guarantee alive till finalization of the entire proceeding and Arbitrator has given direction for payment of Rs. 16 crores and odd after adjusting the mobilization advance and thereafter loosing the battle before the Arbitrator as because Corporation has filed objection does not ipso facto entitled them to seek or invoke the Bank Guarantee which has been furnished by the petitioner which amounts to turning table in his favour and bring it win-win situation in defeated game by adopting the wrong method and as such this Court should restrain the Corporation to ask the petitioner to extend the period of Bank Guarantee from time to time.

9. In contra, respondent has submitted that as they have filed an objection under Section 34 of the Arbitration Act within the

period of limitation in terms of the provisions of un amended Arbitration Act it will be treated to have been kept in abeyance till it is finally adjudicated by the Principal Civil Court, in order to protect the interest of the Corporation in the event of success before Principal Civil Court only letter has been issued for extension of period of Bank Guarantee otherwise the Corporation will be compelled to invoke the Bank Guarantee. It has further been said that when the award has been kept in abeyance it will be treated to be no award in such circumstances both parties are standing same level. In such circumstances it is not a wrong action, will not be treated illegal, arbitrary in giving direction for extension of Bank Guarantee. He further submits that Bank Guarantee is in unequivocal term, unconditional and irrevocable, in such circumstance the Court should not interfere in invocation of Bank Guarantee only rider has been prescribed if the Bank Guarantee is affected by an act of fraud, only in such circumstance the Court can interfere or Bank should refuse to credit the amount of Bank Guarantee to the account of the Corporation. The Bank Guarantee is a separate agreement, apart from the agreement for performance contract asking for extending Bank Guarantee is nothing wrong, cannot be said to be suffered from arbitrary exercise of power but sole purpose is to protect the interest of the Corporation.

10. In support of his contention the Corporation has placed reliance on the following judgments: (i) Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Corp. Ltd. and another, reported in (2007) 6 SCC 470 pagaph 18 to 25 and 28 (ii) Himmadri Chemicals Industries Ltd. V. Coal Tar Refining Co. reported in (2007) 8 SCC 110 paragraph 10 to 15 (iii) Vinitec Electronics Private Ltd. V. HCL Infosystems Ltd. reported in (2008) 1 SCC 544, paragraph 14, 19, 22 and 23 (iv) Bses Ltd.(now) Reliance Energy Ltd. v. Fenner India Ltd. and another, reported in (2006)2 SCC 728. All the judgments are on the issue, when the Bank Guarantee is unequivocal, unconditional and irrevocable, in such circumstances the Bank has no other way-out but to credit the amount of the Bank Guarantee when it does not suffer from illegality of fraud as general rule is non-intervention, the Court can restrain invocation of Bank Guarantee in special circumstance when equities lies in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur if such an injunction were not granted.

11. As the matter is pending before the Principal Civil Court Patna on the objection filed by the parties, for the present this Court, is not required or obliged to examine the correctness of

award but this Court would only examine, on pronouncement of award right of the parties have already been crystallized after proper adjudication, sum total the Arbitrator has found that the petitioner is entitled to Rs.36 Crores and odd. There is no doubt that Section 34 of Arbitration Act provides forum for filing objection on qualified ground within the period of limitation i.e. 90 days has been provided, on filing the objection, operation of the award would be treated to have been kept in abeyance. In such situation it has to be examined whether the action of the Corporation asking the petitioner to extend the period of Bank Guarantee is a reasonable and fair action or it suffers from illegality and arbitrariness. Article 14 of the Constitution of India strikes at arbitrariness in State action and ensure fairness and equality of treatment. It requires that State action must be based on valid relevant principles applicable alike to all similarly situated person and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. which is clear from E.P. Royappa v. State of Tamil Nadu, reported in AIR 1974 SC 555. If State action is not fair it would be treated to be auffering from arbitrary exercise of power and the Court should come forward and to strike to balance to prevent the authority exercising such power. Fundamental right enshrined under Article 14 of the Constitution of India has been construed as to make concept of the reasonableness non-arbitrariness prevailed in the entire constitutional scheme as golden thread running through whole fabric of constitution. Non-arbitrary exercise of power in State action even in contract matter is engrained, has been affirmed in Kumari Shrilekha Vidyarthi and others v. State of U.P. and others, reported in (1991) SCC 212. It will be relevant to quote paragraph 22 of the aforesaid judgment:

> *"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scoop of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies*

provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basis requirement of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of the non-arbitrariness at the hands of the State in any of its actions."

12. In the present case, emphasis has been given by the Corporation that as the award has been kept in abeyance on account of filing of objection within the period of limitation as provided under Sections 34 and 36 of the Arbitration Act it does not mean, the award has been wiped out. In the event of success, winning party would be at liberty to execute the award as the decree of Civil Court so in such circumstance threatening the petitioner of invoking the Bank Guarantee in the event of refusal to extend the period of Bank Guarantee cannot be said to be proper exercise in view of fact, in term of award it is the

Corporation has to pay substantial amount. It is well known principle of law that the Bank Guarantee is separate agreement than to work agreement between the parties. The purpose of Bank Guarantee to protect the interest of the Corporation, on this back ground this Court and Hon'ble Arbitrator directed the petitioner to extend the period of Bank Guarantee from time to time. After the award, the purpose of extension of Bank Guarantee has exhausted. There is difference between in staying/abeyance of order and quashing/setting aside the order. As has been held in the case of case of Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI Cinod Secretariat, Madras, reported in (1992)3 SCC 1 Para 10 where it has been held that as follows:

> *"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has*

been wiped out from existence."

13. So from that judgment it is apparently clear that award has been kept in abeyance that does not mean crystallization of right of the party decided under the award has been wiped out, it exists but it cannot be put in operation, keeping award out of operation is one thing and wiping out of the order is another thing. When the right of the party is crystallized, if the Corporation succeeds before the Principal Civil Court, Patna, out come of success would be executable as decree of Civil Court through process of law, when the award, right and liability has been crystallized, asking again, by the Corporation to the petitioner to extend the period of Bank Guarantee, in my view, is arbitrary exercise of power which violates Article 14 of the Constitution of India. Fairness requires that Corporation should honour the result of arbitration. In the event the Corporation succeeds, Corporation would recover amounts as it will be money decree. This Court is not deciding as to whether the Bank can refuse to credit the amount of Bank Guarantee but this Court is deciding the action of the Corporation after the award, insisting for extension of period of Bank Guarantee is illegal, arbitrary and not sustained in law.

14. In view of aforesaid discussions, direction of the Corporation to extend the period Bank Guarantee vide letters dated 16.3.2017 and 21.3.2017 suffer from illegality and not sustainable in law and facts. Accordingly both the letters are set aside.

15. Accordingly this writ petition is allowed.

(Shivaji Pandey, J)

Vinay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	13.7.2017
Transmission Date	NA