

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No. 17251 of 2017

ORDER:

1) The present writ petition came to be filed with the following relief:

“issuance of writ of mandamus, declaring the tender notification No.HAL/ HD/ CE/ M/ T/ 17-18/ 10 dated 25.04.2017 issued in respect of the same contract covered by tender notification No.HAL/ HD/ CE/ C/ T/ 15-16/ 04 dated 27.05.2016, which is subsisting, as arbitrary, illegal and contrary to the proceedings initiated in O.P.No.2595 of 2016 on the file of the XI Additional Chief Judge, City Civil Court, Hyderabad under Section 9 of the Arbitration and Conciliation Act, violative of the constitutional guarantee under Article 14, 19 (i) (g) and 300-A of the Constitution of India, contrary to the established question of law that without termination of the subsisting contract, a fresh tender cannot be issued and *set aside* the same in the interest of justice.”

2) The circumstances which lead to filing of the present writ petition are as under:

3) The respondent floated a tender dated 27.05.2016, for undertaking civil, electrical and fire fighting works with green building concept for the construction of a kalyan mandap in HAL township premises at Hyderabad with an approximate value of Rs.345.65 lakhs. After the tender was knocked down in favour of the petitioner, an earnest money of Rs.3,45,650/- and thereafter

the petitioner submitted bank guarantee for a sum of Rs.14,82,765/- along with an indemnity bond as required. A work order came to be issued on 09.11.2015, even before the contract agreement was signed but however the petitioner was not permitted to commence the work till all formalities including signing of revised (blank) agreement and work order was issued. On 09.02.2016 a revised work order was issued, which was received by the petitioner on 13.02.2016. It is stated that after receiving the work order, the petitioner mobilized men, machineries, equipments etc. and spent an amount of Rs.1.5 crores towards construction of the building. Prior to the work order, correspondence took place between the petitioner and the respondents with regard to providing water, electricity etc. After receiving the work order, the petitioner applied for labour licence before the Government of Telangana on 25.05.2016. The licence was released by the Telangana Government on 27.05.2016. While things stood thus, from the month of June to September, 2016 there was heavy rain in the city of Hyderabad which lead to water getting accumulated in the said area resulting in stoppage of work. When the same was informed to the respondent, the respondent visited the site and decided to revise the structural design of the footings on 12.09.2016. Accordingly, they directed the petitioner to submit a revised structural design. Because of the delay in getting the work completed, as per the terms of the agreement, the petitioner made a representation dated 15.09.2016 seeking extension of time for a period of four months.

It is said that on 04.10.2016, the respondent informed the petitioner to go ahead with the work promising to grant extension during the last week of October, 2016. It is said that when the work was in progress, a letter dated 07.10.2016 came to be issued complaining about the slow progress in the work. A reply came to be submitted stating that the work is in progress and if four more months time is granted, the petitioner would complete the same. Ignoring the request of the petitioner, a notice dated 22.10.2016 came to be issued proposing to terminate the contract. Since there was no order of termination of the contract, the petitioner progressed with work but ultimately on 09.11.2016 a third notice came to be issued canceling the work order. It is said that the work is at an advance stage and in the absence of any delay on the part of the petitioner, canceling the work order is improper and incorrect. It is said that the respondent visited the spot after heavy rains from the month of June to September 2016 and sought for revision of structural footing which lead to demolition of the structures, which are already raised. It is said that the delay was neither willful nor wanton and if the work order is cancelled at this stage the petitioner would be put to irreparable loss.

4) The averments in the affidavit further show that an O.P.No.2595 of 2016 came to be filed under Section 9 of the Arbitration and Conciliation Act. Along with the O.P. the petitioner filed I.A.No.1788 of 2016 to restrain M/s. Indian Bank, Sadashivpet Branch from releasing any amount or amounts under bank guarantee No.0044441G150000065 dated 05.12.2015 for a

sum of Rs.14,82,765/- to the respondent herein. The petitioner also filed another I.A.No.1787 of 2016 for appointment of advocate-commissioner to make local inspection and take photographs of the work which was completed by the petitioner. It is said that in both the applications, interim orders were granted ie. directing the Indian Bank not to release the invoked bank guarantee amount towards the respondent and also appointment of an Advocate Commissioner, to visit the site, take photographs and submit a report. The averments in the report also show that the petitioner herein requested the respondents to appoint an arbitrator in terms of the arbitration clause in the contract but till date no arbitrator was appointed. The petitioner also invoked the jurisdiction of this Court under Section 11 of the Arbitration and Conciliation Act on the ground that the respondents failed to appoint an arbitrator. Challenging the action of the respondents in issuing the fresh tender notification for the very same work, when the proceedings are pending before the civil Court, the present writ petition is filed.

5) A counter came to be filed opposing the same. The respondent denies deposit of any earnest money by the petitioner as he is exempted from making payment of the said amount as earnest money deposit while participating in the process of tender. It is also stated that the total contract value was incorrectly shown as Rs.365.65 lakhs instead of Rs.345.65 lakhs. It is said that the actual work under the contract is Rs.2,96,55,292/- with a TP of (-) 14.74% only. It is stated that as per clause-22 of

the general conditions of the contract, if the contractor fails to comply with the conditions, he is liable to pay compensation/ penalty equal to the sum as calculated, in accordance with clause No.17 of the Special Conditions of Contract. The averments in the counter also show that the site visit report dated 16.12.2016 filed before the civil Court reveals that about 51 foundations were found visibly complete and two columns were left incomplete. It was further affirmed that it is very difficult to calculate the exact quantity of excavation work done in the site since earth work, refilling work was incomplete at most of the places and the said report further affirms that no RCC columns were found to be complete. In view of the above, it is said that though the petitioner has commenced the work on 07.12.2015, he has only completed a part of foundation work. The allegation that the petitioner was forced to demolish the structures was denied. The allegation made by the petitioner that there is total non-cooperation from the respondent was also denied. Since there was total failure on the part of the petitioner in carrying out the basic work in spite of giving series of letters from April, 2016 onwards, the respondent was forced to issue the letter dated 07.10.2016, cancelling the work order. Coming to the technical aspects, it is urged that since the agreement contains an arbitration clause, the petitioner was not justified in invoking the jurisdiction of this Court under Article 226 of the Constitution of India. It is stated that as the petitioner has already invoked the jurisdiction of the civil Court under Section 9 of the Arbitration

and Conciliation Act, nothing prevented him in pursuing his remedy before the civil Court, in view of the arbitration clause, instead of approaching this Court under Article 226 of the Constitution of India. Since the prayer in the said O.P. is almost identical to one sought for in the writ petition though worded differently, it is urged that the writ petition sans merit and the same is liable to be dismissed.

6) As per clause-5 of the agreement, it is evident that in the event of any dispute arising in connection with this contract, such disputes shall be referred to the sole arbitration of an Engineer Officer to be appointed by the Managing Director of the Company. Clause-8 of the agreement shows that all disputes arising out of or in any way connected with the agreement, shall be deemed to have arisen at Bangalore and only Courts in Bangalore shall have jurisdiction to determine the same. While things stood thus, the petitioner moved the civil Court under Section 9 of the Arbitration and Conciliation Act by way of filing O.P.No.2595 of 2016 seeking various reliefs including a direction to the respondents not to appoint any other contractor for completion of the work which was entrusted to the petitioner. Though no orders are passed with regard to the relief referred to above, but in the two interlocutory applications filed, the Court appointed an advocate-commissioner to give report with regard to work executed and also directed the respondent not to encash the bank guarantee given by the petitioner. Though the proceedings are pending before the civil Court, a fresh tender notification came to

be issued on 25.04.2017 calling for tenders for the very same work which was entrusted to the petitioner, which is challenged in this writ petition.

7) By an order dated 25.05.2017, this Court passed the following orders:

“Heard Sri Deepak Bhattacharjee, learned senior counsel appearing for Sri S.Lakshmikanth, learned counsel for the petitioner and Smt. V.Uma Devi, learned Standing Counsel for the respondent.

As per the tender notification dated 25.04.2017, the last date and time of submission of tender is 26.05.2017 upto 1400 hours and the time provided for completion of period of contract is 10 months. The said tender notification was issued for the unfinished construction work undertaken by the petitioner pursuant to the contract covered by tender notification dated 27.05.2015. Admittedly, the petitioner filed O.P.No.2596 of 2016 before the XI Additional Chief Judge, City Civil Court, Hyderabad, under Section 9 of the Arbitration and Conciliation Act, 1996.

Learned counsel for the petitioner has placed on record a copy of the report dated 28.12.2016, submitted by the Advocate-Commissioner in I.A.No.1788 of 2016 in O.P.No.2596 of 2016 on the file of the XI Additional Chief Judge, City Civil Court, Hyderabad, which is of course, not signed by learned Advocate-Commissioner, noting down the physical features of the property in question along with Photostat copies of photographs depicting the stage of construction work carried out by the petitioner.

Keeping in view the construction work undertaken by the petitioner, the respondent is directed not to finalize the tender till 01.06.2017.”

8) The main objection taken by the learned counsel for the respondent is that the petitioner ought to have invoked the remedy of getting an arbitrator appointed to decide the dispute instead of approaching this Court under Article 226 of the Constitution of India. It is also urged by the learned counsel for the respondent that there are number of factual aspects which cannot be gone into in this writ petition.

9) In *Union of India and others v. Tania Construction Private Limited*¹ the Apex Court held as under:

“27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities.”

10) In view of the judgment of the Apex Court referred to above, arbitration clause is not a bar to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

¹ (2011) 5 SCC 697

11) However, the record discloses that the petitioner herein approached the civil Court seeking various reliefs and was successful in getting a part of the relief in two I.As. ie. I.A.Nos.1787 and 1788 of 2016 and the proceedings are pending before the civil Court. Insofar appointment of arbitrator is concerned, the petitioner addressed a letter in the month of January, 2017 but there was no reply from the respondent. Hence, he moved an application before this Court for appointment of an arbitrator to decide the dispute in terms of Section 11 of the Arbitration and Conciliation Act on the ground that the respondent failed to appoint an arbitrator in spite of addressing letter on 06.01.2017. Therefore, it cannot be said that the petitioner herein failed to avail the remedies which are available to him by virtue of the agreement.

12) But the fact remains that though the proceedings are pending before the civil Court and the respondent being aware about the proceedings in the civil Court, wherein the relief which is sought for herein and also sought therein are different, issued a fresh tender notification. If the said tender is accorded to third person nothing would be left to decide either in the O.P. or in writ petition. On the other hand, the petitioner would be put to loss, if it is ultimately found that there was no delay on the part of the petitioner in getting the work executed.

13) One fact which remains undisputed is that during the month of June to September, 2016 there was heavy rain which lead to

floods in that area, as a result of which the respondent visited the site on 12.09.2016 and proposed a change in the size and dimensions of the footings. Though there is no material that the petitioner has removed the structures which are already raised therein but definitely it would have taken some time for him to lay the revised footings. It is the plea of the petitioner that if couple of month time is given, the petitioner would definitely complete the work, failing which he is liable to face any action. At the same time it is also to be noted here that the civil Court is ceased of the matter. The main prayer in the O.P. is as under:

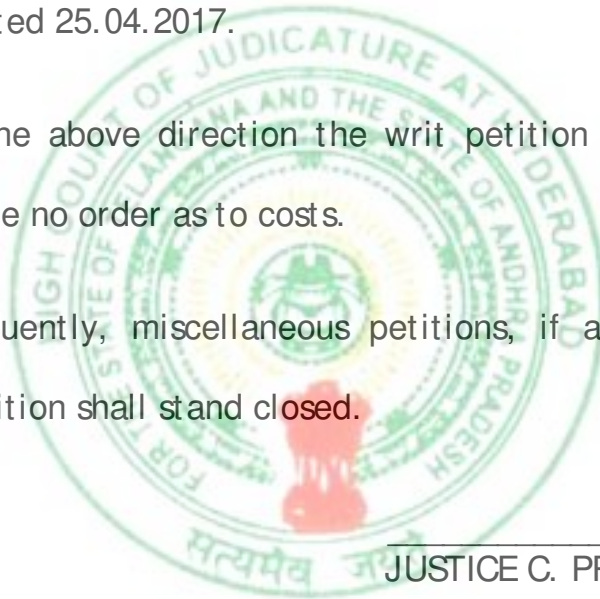
“a) granting perpetual injunction restraining the respondent No.1 from engaging any other contractor or create any third party interest by assignment of the work of undertaking civil, electrical and fire fighting works with green building concept for construction of Kalyan Mandap in HAL township premises under contract No.HAL/ HD/ CE/ 07/ 2015-16 to any other person or firm or institution.”

14) Though no order has been passed with regard to the main prayer, but the civil Court appointed an advocate-commissioner to verify the nature and extent of work done by the petitioner. Pursuant to which the advocate-commissioner also submitted a report along with photographs. Such being the position and as the matter is ceased by a competent civil Court, it would be just and proper to direct the civil Court to dispose of the O.P. wherein the petitioner sought for injunction restraining the respondent No.1 therein from appointing a new contractor for executing the work,

as early as possible, preferably, within a period of three to six months, having regard to the urgency and need involved in the matter. Further, it is always open to the petitioner to make an application seeking interim relief with regard to allotment of work to third parties pursuant to tender dated 25.04.2017 within a period of ten days from today, in which event the concerned civil Court shall deal with the same, in accordance with law, within a period of three weeks thereon. Till such time (three weeks) *status quo* obtaining as on today shall be maintained with regard to tender dated 25.04.2017.

15) With the above direction the writ petition is disposed of. There shall be no order as to costs.

16) Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.



JUSTICE C. PRAVEEN KUMAR

23.06.2017
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