

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.4672 of 2017

ORDER ::

This writ petition is filed assailing the proceedings dated 30-01-2017 of the 4th respondent in terminating the contract awarded to the petitioner.

2. Facts stated are:-The petitioner is a company and it was awarded with the tender work in respect of package no.19 which involves design, investigation, estimation and construction of proposed diversion scheme across Peddavagu near Jagannathapur village, Kagaznagar mandal, Adilabad district. For that purpose, the petitioner entered into an agreement vide agreement no.29/2004-05, dated 23-02-2005 for the value of the works at Rs.118.90 crores and the period stipulated for completion of the work was 24 months from the date of the agreement. Petitioner states that the contract work could not be completed within the 24 months solely due to the reasons attributable to the acts of the respondents as there was delay in releasing the bills, delay in obtaining contractual approvals, delay in acquiring land and obtaining forest clearances. That realising this situation, as the ongoing major and medium irrigation project works involving 111

Packages, including package no.19, with which we are concerned in this writ petition, getting delayed for one reason or the other, including the cost escalation of the projects on account of delay in execution of the works, the 1st respondent seems to have held discussions with Builders Association of India and pursuant thereto issued GO Ms.No.146, dated 08-10-2015 wherein the price escalation adjustment in respect of labour, cement, fuel, steel and other incidental aspects were considered. The petitioner submitted proposals for completion of balance work by seeking extension of time upto 30-06- 2017, which was examined by the High Power Committee and time as sought was granted to the petitioner for completion of the balance work. Petitioner claims that the tender work is completed to the extent of 82.83%. It is stated that without considering the ground realities and without considering the representations made by the petitioner from time to time ventilating its grievances for speedy completion of the project, the 4th respondent issued show cause notice dated 29-12-2016 requiring it to submit explanation why action should not be taken for not completing the project and reaching the milestones set-forth. The petitioner represented by way of explanations dated 06-01-2017 and also dated 27- 01-2017 explaining that delay is being caused

on account of not acquiring the lands, wherever necessary and also due to delay in getting forest clearance approvals and making payment of bills as per GO Ms.No.146, dated 08-10-2015. It is stated that without considering the representations made by the petitioner, in the proper perspective, the 4th respondent issued the impugned termination proceedings dated 30-01-2017 terminating the contract awarded in favour of the petitioner. Hence, this writ petition.

3. Counter affidavit is filed by the 4th respondent on his behalf and also on behalf of other respondents 1 to 3. At the outset, it is stated that the relationship between the petitioner and the respondents is contractual in nature governed by the terms of the agreement entered into by the parties in relation to the execution of the tender work in question and; as such, any dispute arising out of such an agreement including the impugned order determining the contract for breach of terms of the contract, the remedy is elsewhere and this writ petition is not at all maintainable. That the petitioner has failed to complete the work within the time allotted or even within the time extended. That in the light of the petitioner's failure to adhere to the programme for completion of the work, the

respondent were made to re-think whether to extend the benefits extended under GO Ms. No.146, dated 08-10-2015 to the petitioner.

That the petitioner is eligible for benefits extended under GO Ms.No.146, dated 08-10-2015 only when the petitioner adheres to the programme furnished by him for completion of the work. That the petitioner never specifically stated the factors which are coming in his way for speedy completion of the project work. That though there was delay in according approval for extension of time, the petitioner was never asked to stop the work and it was open for the petitioner to proceed with the work as per the programme furnished by it and reach the milestones set-forth. Forest department has accorded permission to execute the work of right flank main canal from km 20.30 to km 25.20 and from km 25.80 to km 27.20 and distributor nos.11 and 12, after harvesting of the fields. That apart from execution of work in forest reaches, the petitioner has much work to do in other areas where there are no impediments of any nature whatsoever. Since the respondents planning to get the work completed before kharif season (June to December) so as to let out water to the farmers, and inasmuch as the petitioner failed to adhere to the programme and reach the milestones set-forth, the contract was terminated and fresh tenders called for completion of

the balance project work. That petitioner did not execute the contract work for many years where there is no land acquisition dispute and forest clearances required. That petitioner is still to complete the barrage civil works for which the approved drawings were given during the year 2008, but the work could not be completed within the time prescribed or extended. Therefore, it is stated that there are no merits in the writ petition and the same is liable to be dismissed.

4. Sri CV Mohan Reddy, learned senior counsel appearing for the petitioner contended that the petitioner-company could not reach the milestones set-forth solely attributable due to delay in processing the bills and payments, delay in land acquisition and obtaining clearance for execution of the work in forest lands. It is stated that in fact considering the proposals of the Contractors of the projects (25 nos involving 111 packages, including the instant package no.19), the 1st respondent issued to GO Ms. No.146, for speedy completion of pending projects and also extended certain benefits. Learned senior counsel also referred to GO Ms.No.111, dated 06-11-2017, wherein the Engineer-in-Chief (Irrigation), Hyderabad as requested the Government for further extension of

time in respect of 36 packages (which includes the instant package no.19) stating that the main bottle neck for completing the projects was acquiring land for projects and also due to formation of new districts and the Government considering these aspects of the matter granted extension upto July 2018, by maintaining the benefits extended in GO Ms.No.146, and this itself is a proof that the Contractors could not proceed with completion of the projects, not only package no.19 but similar problems faced in respect of other 35 packages also. Learned senior counsel further submitted that in the light of this factual situation, the 4th respondent ought not to have terminated the contract by the impugned order by attributing delay in completing works on the petitioner- company. It is also brought to the notice of this Court that no co-ordination exists between the functionaries, as on one hand, the 4th respondent determined the contract, on the other hand, the 1st respondent extended time for one more working season not exceeding July 2018 including the instant package no. 19. It is also stated that there is absolutely no bar as to the maintainability of the writ petition even in contractual matters, the when decision lacks fairness offending Article 14 of the Constitution. It is further stated that the impugned order has to be invalidated as the

contract is terminated unfairly, unjustly and unreasonably and as such an arbitrary action violates Article 14 of the Constitution.

Reliance is placed on the case laws in ***ABL INTERNATIONAL LTD.***

vs. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA

LIMITED¹, ZONAL MANAGER, CENTRAL BANK OF INDIA vs.

DEVI ISPAT LIMITED² & FOOD CORPORATION OF INDIA vs.

M/S.SEIL LIMITED³

5. Sri J. Ramchander Rao, learned Addl. Advocate General appearing for the respondents, on the other hand, submitted that the contract awarded to the petitioner had to be terminated due to petitioner-company not proceeding with the project work as per the programme and reach milestones set-forth, more particularly, the petitioner could not complete the works where there is no requirement of land acquisition and necessity to obtain forest clearances. It is further stated that the petitioner could not complete the work even after grant of extensions from time to time, and therefore, the 4th respondent having assessed the slow pace of work and having regard to the exigency of work to be completed in

¹ 2004(3) SCC P.553

² 2010 (11) SCC P.186

³ AIR 2008 SC 1101

larger public interest, the contract awarded to the petitioner has to be terminated. Learned Addl. Advocate General further contended that inasmuch as the matter involves contractual obligations and that there is a mode of settlement of disputes provided in the contract itself, this writ petition is not maintainable, and for settlement of claims, if any, the petitioner is to be relegated to avail private law remedy. That final extension of time not exceeding July 2018 granted to 36 packages vide GO Ms.No.111, dated 06-11-2017, including the one in the writ petition (package no.19) is to keep the contract alive for taking further action. It is also stated that the Government is concerned to complete irrigation projects and let the water to the fields within a time frame and, therefore, there are no exterior reasons other than interest of the farmers, in terminating the contract of the petitioner and calling for fresh tenders to complete the balance work. . He relied on **JOSHI TECHNOLOGIES INTERNATIONAL vs. UNION OF INDIA**⁴ and other decisions in support of his contention that writ petition is not maintainable in contractual matters.

⁴ (2015) 7 SCC 728

6. The only issue that arises for consideration in this writ petition is whether the impugned order terminating the contract by the 4th respondent is amenable to the writ jurisdiction under article 226 of the Constitution and; if so, in the given facts and circumstances of the case, whether the impugned order is legally unsustainable and tenable in law.

7. It is to be seen that the grievance of the petitioner- company is that it could not complete the project work (package no.19) by reason of not acquiring the land by the authorities required for the project and also not obtaining clearances in respect of forest reaches. Apart from these technicalities of work, which are within the exclusive realm of the respondents, the petitioner also complained of non-releasing of bills timely for the works done, though there is variation in figures of amounts claimed by the petitioner-company and agreed to be paid by the respondents, with which this Court is not concerned, as it is based on the actual completion of the work, but the fact remains that there is delay in payment of bills as is evident from the contents of the GO Ms.No.146, dated 08-10-2015. It is also to be seen from GO Ms.No.111, dated 06-11-2017 wherein the Government issued

orders taking comprehensive measures for early completion of the long-delayed ongoing major and medium irrigation projects, it is stated that the delay occurred is on account of land acquisition process and also due to bifurcation of districts and formation of new districts. It is worthwhile to extract paras 4 and 5 of the said GO, which reads as under:-

“4. The Engineer-in-Chief (Irrigation), Hyderabad has requested the Government for further extension of time beyond the final EOT granted in respect of 36 packages among the above 74 packages (with the balance packages proposed to be completed within the final EOT granted) with one of the main bottle necks had been delay in Land Acquisition of these works due to legal cases on GO of o123, Revenue (JA&LA) Department, dated 30- 07-2015 and thus the total process of Land Acquisition was hampered. Further due to formation of new districts there was delay in taking up land acquisition process in view of new SDC, Land acquisition authorities and for bifurcation of work load etc., The government had issued direction and the new Land Acquisition Act for processing of land acquisition and published on 17-05-2017 and LA process is just picking up.

5. Government after careful examination of the matter hereby consider the proposal for Extension of Time (EOT) beyond the final EOT granted under GO Ms.No.146 for one more working season not exceeding July 2018 for 36 packages (list appended to this order), by extending the benefits of GO Ms.No.146, I&CAD (REFORMS) Department, dated 08-10-2015 read with GO Ms.No.24, I&CAD (REFORMS) Department, dated 08-05-2017 to complete them finally”

8. From this it is clear that delay is there on the part of the respondents to carry out its part of the obligation to acquire land

for completion of the work is a breach of a solemn undertaking based on which the petitioner-company acted upon. It is equally the responsibility on the part of the respondent-authorities to facilitate the early completion of the projects by the Contractors. Simply because the party to the contract are State authorities, they cannot sit over in resolving the issues, be it acquiring the lands, obtaining clearances or making payments for the works completed.

9. In **ABL INTERNATIONAL LIMITED vs. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA's** case (1 supra), the Supreme Court referring to series of decisions on the subject matter, at para 23 held as under:-

“23.....once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation in holding that a writ Court can issue suitable directions to set right the arbitrary actions of the first respondent.”

10. In **JOSHI TECHNOLOGIES INTERNATIONAL vs. UNION OF INDIA's** case (3 supra), which also considered **ABL**

INTERNATIONAL LIMITED's case (1 supra), and relied on by learned Addl. Advocate General, the Supreme Court after surveying its various judgments dealing with different situations/aspects relating to the contracts entered into by the State/Public Authority with private parties, ruled that there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claims are raised. The Supreme Court further observed that discretion lies with the High Court which under certain circumstances, can refuse to exercise. It was enunciated the circumstances where, 'normally', the Court would not exercise such a discretion. In Para 69 & 70 it was mentioned thus:-

"69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a) the Court may not examine the issue unless the action has some public law character attached to it.

(b) whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the

said made of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(d) money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/Public authority with private parties, can be summarized as under:-

i) at the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

iii)

iv)

v)

vi)

vii).....

viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

ix)"

11. In **FOOD CORPORATION OF INDIA's** case (3 supra), the Supreme Court observed that in appropriate cases High Court in exercise its jurisdiction entitled to grant relief on facts and as well as in equity. At para 17 it was mentioned thus:-

“17. Article 14 of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by creative interpretation of the court. The law has developed in this field to a great extent.....the High Court, in an appropriate case, may grant such relief to which the writ petitioner would be entitled to in law as well as in equity.....a writ Court in exercises its power of review under Article 226 of the Constitution not only acts as a Court of law but also as a Court of equity....”

12. It is well settled that the availability of an alternative remedy is not an absolute bar for exercising the writ jurisdiction and it is only a self imposed restraint on its power. In the instant case, a combined reading of GO Ms.No.146, dated 08-10-2015 & GO Ms.111, dated 06-11-2017, it is abundantly clear that the delay is attributable on account of acquiring the land for the project and also due to formation of new districts and division of work. Normally, this Court in exercise of its jurisdiction under Article 226 would not traverse into the correctness or otherwise in contractual matters, but here is a classic case where during the pendency of the writ petition, GO Ms.No.111, dated 06-11-2017 is issued extending time owning responsibility that the main bottle necks for the delay was on account of acquiring the lands required for the project and further pell-mell was on account of formation of new districts and

allocation of mandals and this GO Ms.No.111, is issued by the Government represented by the 1st respondent, who is the final authority in taking administrative decisions.

13. Coming to the question of impugned order terminating the contract awarded to the petitioner is concerned, it is to be seen that the project work allotted to the petitioner was determined earlier vide letter dated 30-02-2014 and it could be revoked on the representation made by the petitioner-company and on furnishing a time bound programme for implementation of the project. It is stated that even thereafter, time is extended for completion of the project which the petitioner failed to utilise. The case of the petitioner-company is that GO Ms.No.146, which redressed the grievances of the Contractors of all the 36 packages, on being represented by Builders Association of India, in one of the representations made by the petitioner on 06-01-2017 to the 4th respondent, the petitioner while stating that it is fully aware of the fact that the subject project is in the list is in the priority list of the Government and the petitioner-company also understands the urgency of work, brought to his notice certain issues for early completion of the project, mainly among them were delay in

payment of arrears EOT approvals, delay in bill processing, delay in land acquisition, forest clearances and additional items/variation and it was also notified to the 4th respondent that progress of work cannot be viewed in isolation and requires reciprocal obligations to fulfil the project within a timeframe. Though in the counter filed by the 4th respondent, details of the payments made to the petitioner company are mentioned, but the petitioner states that it has completed the works upto 82.83% but not received the amounts. As is evident from the contents of GO Ms.No.111, dated 06-11-2017 as many as 36 packages which includes the (package no.19), there was delay in taking up land acquisition proceedings and also on account of formation of new districts and allocation of work to the officers of those new districts formed. A perusal of the impugned termination order, the main ground assigned for termination of the contract was that the petitioner has not followed the programme furnished by it and there has been no or slow progress of work. It is also stated that the benefits granted by the Government under GO Ms.No.146 are allowed only to such Contractors who show progress of work. But, if we look at the preamble of GO Ms.No.146, the Government in order to see that the projects complete speedily provided certain financial benefits to the Contractors, no where in

the GO Ms.No.146, it was stated that the benefits can be allowed only to Contractors who show progress of work. Further, vide letter dated 27-01-2017 the petitioner informed the 4th respondent, the status of work completed by it for consideration, but the allegation of the petitioner is that timely payments could not be received for the work done. Though it is contended that GO Ms.No.111 is issued only to keep the projects alive, such is not the purport of GO Ms.No.146 and GO Ms.No.111 and they have been issued by the Government represented by Spl. Chief Secretary to Government to complete the works under different packages including package no.19, with which we are concerned in this writ petition. In the light of the this GO, the 4th respondent ought to have allowed the petitioner-company to resume the work as 1st respondent is the final authority.

14. One more aspect in this case is though the contract is terminated by the impugned order dated 30-01-2017, the petitioner (package no.19) finds place in the list appended to GO Ms.No.111, dated 06-11-2017. The order of termination of contract by the 4th respondent is dated 30-01-2017, whereas GO Ms.No.111, is dated 06-11-2017. On one hand the 4th respondent terminates the contract of the petitioner and the other hand the 1st respondent as

a comprehensive measure for early completion of the long-delayed ongoing major and medium irrigation projects, has granted time for one more working season upto July 2018, not noticing the fact that the petitioner's award of contract was already terminated. It is unfortunate, that the functionaries are not working in tandem. It appears that what the field officers of Irrigation department are doing, the higher authorities are not aware, who are at the helm of affairs, which in affect, undermines the execution capabilities of the authorities and give rise to suspicions as to their bonafides to complete the works and an optimistic opinion in favour of the Contractor. It is not known how the work awarded to the petitioner-company (package no.19) terminated by 30-01-2017 could find place in GO Ms.No.111, which extended time not exceeding July 2018. It appears what one wing is doing the other wing of functionaries are not aware and they seems to working in isolation.

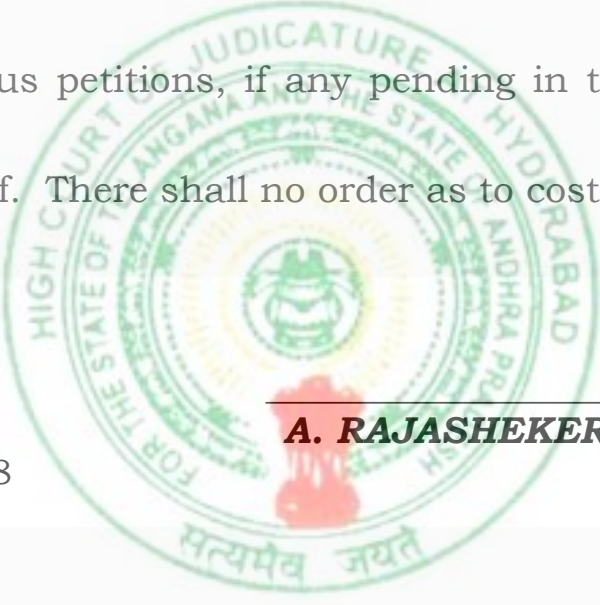
15. The 36 packages, which includes (package no.19), to which time is allowed up to July 2018 are all irrigation projects and regard shall be had to the urgency of work, importance of work and also the time constraints, besides involvement of public money and public good including societal interest. This Court normally would

not have interfered with in matters where contractual obligations are involved more particularly when the terms of the contract itself provide for the mode of settlement in case of disputes arose therefrom. But the facts in this case are distinguishable as 1st respondent itself issued GO Ms.No.111, dated 06-11-2017 extending time upto July, 2018, but respondent no.4 refusing to allow the petitioner-company to execute the work and 1st respondent having issued the GO Ms.No.111, it is not known why the writ petition is opposed.

16. On the above analysis, it is to be held that the impugned order passed by the 4th respondent is a clear manifestation of non-application of mind in taking a decision to terminate the contract when admittedly delays on various counts is also attributable to the respondents as well. In the circumstances, this Court is of the view that the order terminating the contract awarded to the petitioner is taken unjustly in a casual manner and, therefore, the impugned order is set aside.

17. In the circumstances, the writ petition is allowed directing the respondents to allow the petitioner-company to resume work in terms of GO Ms.No.111, dated 06-11-2017. In view of the fact that the petitioner could not proceed with the work, during the pendency

of the writ petition, in case the work under package no.19 could not be completed by July, 2018, for genuine reasons to be stated by the petitioner-company, the respondents to consider extension of time by two more months, beyond July, 2018. In case the petitioner-company fails to complete the contract work within the time now granted vide GO Ms. No.111, dated 06-11-2017, and also within the extended time at the discretion of the respondents, it is open for the respondents to take further steps in the matter, in accordance with law. Miscellaneous petitions, if any pending in the case shall also stand disposed of. There shall no order as to costs.



A. RAJASHEKER REDDY, J

Dated: 25-01-2018
NRG

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY



WP No.4672 of 2017

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Dated: 25-01-2018

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