

HON'BLE SRI JUSTICE P. KESHA RAO

WRIT PETITION No.11816 of 2006

ORDER:

Heard the learned counsel for the petitioner as well as the learned Assistant Solicitor General representing respondent Nos.1 to 3.

The prayer in the writ petition is as under:

“... this Hon'ble Court may be pleased to issue an appropriate writ, order or direction more particularly one in the nature of writ of mandamus declaring the action of the respondents 2 and 3 in cancelling the contract allotted to the petitioner at his risk and costs vide proceedings No.82636/108/E8 dated 23.03.2006 is illegal, arbitrary, highhanded and violative of the guidelines issued by the Army Headquarters, dated 17.06.2004, and consequently direct the respondents not to collect or recover any amounts or costs for completion of the work which was earlier allotted to the petitioner vide work order dated 21.07.2005 and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.”

The facts of the case are that the petitioner is a civil contractor enlisted with Military Engineering Service Department. The respondents have floated tenders for construction of MI Room at Guntur for Ex-Servicemen Contributory Health Scheme under GE(North), Secunderabad vide proceedings in C.A.No.CWE(S)NOR/14 of 2005-2006. Pursuant to the said tenders, the petitioner submitted his tender for Rs.15,61,356/-. At request of the respondents to discount the amount quoted, the petitioner offered a discount of 4% through his letter dated 16.06.2005 subject to the condition that the tender is accepted on or before 16.07.2005. After discount, the price quoted by the petitioner is

Rs.14,98,901=76 ps, which was accepted by the respondents and issued proceedings dated 04.07.2005 to that extent. Thereafter, the respondents have given the tender schedule vide work order No.01 8896/82/E8 dated 21.07.2005. As per the said order, the date of handing over of the site and the date of commencement of work is 22.07.2005. The date of completion is 21.12.2005 i.e., five months. When the work order was issued, the site allotted for execution of work was full of thorny bushes and grown up trees and therefore unless the trees are cut and the bushes are cleared, the work cannot be executed. The Army Headquarters, New Delhi, had issued certain guidelines under proceedings dated 17.06.2001 for clearing the trees by the department and clauses (c) and (d), which are relevant for adjudication of the issue involved in the present writ petition, are as follows:

“(c) On identification of nos & types of trees and bldgs, DEO/Stn Hqs will take prompt action in such a way so that identified trees/bldgs are disposed off before the tender action is finalized by Engineers.

(d) The engineers in no case accept or finalise the tenders unless trees/bldgs have been removed and disposed of from the site of execution of the project.”

Admittedly, there were several trees spreading over in large extent of site and it was like a thick forest. In anticipation of handing over of the site by the respondents, the petitioner procured material required for execution of the contract and sent the samples to the respondents for their approval. In fact, on 30.07.2005, the petitioner submitted a letter to the respondents requesting for clearance of the trees

and shrubs. As the same were not cleared, the petitioner issued another letter dated 17.09.2005 stating that the site was in the nature of a jungle. In response to the said letter, the 2nd respondent addressed letter dated 30.10.2005 vide reference No.82636/61/E8 stating that the matter regarding cutting of trees has been referred to HQ Andhra Sub Area and action is in hand to cut the trees and clear the site for being handed over for execution of the work. Thereafter, the 2nd respondent issued another letter dated 09.11.2005 requesting the petitioner to deposit a sum of Rs.3,040/- for cutting the trees and to co-operate with the department. In fact, the conditions of the contract or rules, procedure or practice will not stipulate or require the contractor to deposit the amount for clearing the trees and shrubs. In those circumstances, the petitioner addressed letter dated 18.11.2005 requesting respondent Nos.2 and 3 to terminate the contract without any risk and cost. The petitioner also got issued legal notice dated 26.12.2005 narrating the entire sequence of instances and requested for termination of contract. However, the respondents have addressed letter dated 06.01.2006 requesting the petitioner to complete the work. In the said letter, it is stated that extension of time will be granted by the accepting officer for the delay caused on account of handing over of the site. In this regard, the petitioner addressed letter dated 18.01.2006 to the respondents stating that since the period of contract already expired, execution of the work is

not feasible and expressed his inability to commence and execute the work apart from informing that he already got issued legal notice dated 26.12.2005 demanding to cancel the subject contract without risk and cost. In spite of the same, the 2nd respondent addressed letter dated 06.02.2006, calling upon the petitioner to execute the work or else the contract will be terminated. Thereafter, the 2nd respondent vide impugned proceedings No.82636/108/E8 dated 23.03.2006 informed the petitioner that as an accepting officer on behalf of the Government, he has cancelled the contract with effect from 24.03.2006 and the contract work shall get completed through other agency at the risk and cost of the petitioner. Questioning the same, the present writ petition is filed.

The respondents filed a counter affidavit denying the averments made in the affidavit filed in support of the writ petition and contended *inter alia* that though the site was handed over to the petitioner on 22.05.2005 for construction of MI room, the petitioner, in spite of repeated reminders, did not start the work. Therefore, the 2nd respondent was forced to cancel the contract vide letter dated 23.03.2006. It is also stated in the counter affidavit that the trees have been auctioned and removed from the site by the defence estate officer on 02.01.2006. However, the petitioner failed to execute the contract apart from stating that he failed to submit the Critical Path Method chart showing his activities including procurement of material and linked activities after

placing of work order. Further, since the trees were removed on 02.01.2006 the contractor was asked to commence the work indicating extension of time by the department. Therefore, the petitioner is not entitled for any relief. The respondents have also taken a preliminary objection with regard to maintainability of the writ petition in the light of the arbitration clause as per the agreement.

Sri Y.V. Ravi Prasad, learned senior counsel appearing for the counsel for the petitioner, would contend that the preliminary objection raised by the respondents with regard to the maintainability of the writ petition cannot be sustained, as the arbitration clause is not a bar for invocation of writ jurisdiction when injustice is caused and the rule of law is violated. In this regard, he submitted that by the time, the petitioner was asked to execute the contract by extension of time, the contract itself was lapsed by efflux of time and in those circumstances, it is not open for the respondents to insist either for execution of a contract or issue the impugned proceedings. To substantiate his contention, he relied on the decision of the Supreme Court in **Union of India and others v. Tania Construction Private Limited**¹. The relevant paragraphs are as under:

“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

¹ (2011) 5 SCC 697

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 an alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits.”

Even on merits, the learned senior counsel would contend that though the work order dated 21.07.2005 stipulates that the work has to be completed within five months i.e., by 21.12.2005, the trees and shrubs were cleared only on 02.01.2006 that is much after the expiration of the period of contract. Therefore, the contract is lapsed by efflux of time and it is not open for the respondents to insist upon the petitioner to execute the contract by extension of time unilaterally more so when the petitioner has already expressed his willingness to cancel the contract by his letter dated 18.11.2005 without any risk and cost as well as through legal notice dated 26.12.2005. It is also contended that as far as clearing of the work site by cutting the trees and removing the shrubs is concerned, it is the job of the 2nd respondent, but not the petitioner. Therefore, the respondents cannot ask the petitioner to credit a sum of Rs.3,040/- for cutting of trees for construction of the building. It is also contended that when an agreement is not

entered into, clause 54 of the general conditions of contract cannot be invoked.

On the other hand, the learned Assistant Solicitor General, relying on the counter affidavit, supported the impugned proceedings on the ground that on 22.05.2005 itself the site was handed over to the petitioner for construction of MI room, but the petitioner, in spite of the repeated reminders, did not start the work. Therefore, the 2nd respondent was forced to cancel the contract vide letter dated 23.03.2006 at the cost and risk of the petitioner.

From a perusal of the record, the undisputed facts are that the petitioner's tender for execution of the contract for construction of MI room at Guntur for Ex-Servicemen Contributory Health Scheme under GE (North), Secunderabad, was accepted and as per the work order the date of handing over of the site is 22.07.2005, the date of commencement of the work is 22.07.2005 and the date of completion is 21.12.2005. Though in the counter affidavit it is stated that the site has been handed over to the petitioner on 22.05.2005 itself, letters dated 30.10.2005, 09.11.2005 and 06.02.2006 belie the said assertion and goes to show that the site was not handed over on 22.05.2005, but the site was cleared by cutting the trees and shrubs only on 02.01.2006. If that is the fact with regard to handing over of the site for commencement of the construction, the time for execution of the contract and completion of the construction is itself

lapsed in the light of the work order dated 21.07.2005. Therefore, when the contract is lapsed by efflux of time, it is not open for the accepting officer to address letter dated 06.01.2006 requesting the petitioner to commence the work immediately by extending the time unilaterally. This act of the respondents cannot be countenanced, as there is delay and lapse on their part in handing over the site to the petitioner for commencement of the work. In fact, the petitioner has addressed letters dated 30.07.2005 and 17.09.2005 requesting the respondents to remove the trees and shrubs and hand over the vacant site enabling him to carry out the tender work. However, no action was initiated and site was not handed over to the petitioner till 06.01.2006 by which time the contract period itself has expired. That apart, as per the guidelines issued by the army headquarters vide D/01247/Pol(Wks Procedure) dated 17.06.2004, it is the Defence Estate Officer (DEO)/Station Headquarters has to take proper action for identification of numbers and types of trees and buildings to be disposed of before the tender action is finalized by the engineers and the engineers in no case accept or finalize the tenders unless the trees/buildings have been removed and disposed of from the site of execution of the project. Clauses (c) and (d) of the said guidelines extracted supra indicate that unless the trees/buildings are disposed of, the engineers cannot accept or finalize the tenders. In such a case, when the site itself was made ready

after expiration of the contract period, the respondents have no authority in law to insist upon the petitioner to execute the contract. In the case on hand, as there was an inordinate delay in clearing the site by cutting the trees and removing the shrubs, it is not open for the respondents to issue the impugned proceedings cancelling the contract on the ground of default of the petitioner with effect from 24.03.2006 at his cost and risk. Therefore, the impugned proceedings cannot be sustained on the ground of efflux of time.

As far as the maintainability of the writ petition is concerned, the facts and circumstances under which the impugned proceedings are issued itself indicate the highhandedness of the respondents in making a false statement with regard to handing over of the site on 22.05.2005. Though the question of invoking the arbitration clause itself is in dispute for not entering into an agreement, still on the question of maintainability of the writ petition it is well settled that an alternative remedy is not an absolute bar to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India in a writ petition when injustice is caused and rule of law is violated. The facts demonstrated in the present case is a glaring example of the highhandedness and arbitrary action exercised by the respondents in issuing the impugned proceedings when admittedly the delay and lapses are on their part. Therefore, the powers vested in this Court cannot be doubted by any

alternative remedy available to the authorities. In these circumstances, this Court is of the opinion that the impugned proceedings issued are unsustainable in law and the same are liable to be set aside.

Accordingly, the writ petition is allowed thereby setting aside the impugned proceedings dated 23.03.2006. However, it is open for the respondents to pursue the remedies available to them as per law, if the arbitration clause is available. No order as to costs.

Miscellaneous petitions, if any, shall stand closed.

Date:19.04.2018.
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P. KESHAVA RAO, J

