

THE HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION No.44487 OF 2018

DATED :27.12.2018

Between :

M/s. IVRCL-SEW and Prasad (JV),
A Joint Venture among-
M/s.IVRCL Infrastructure & Projects Limited,
M/s. SEW Infrastructure Ltd. & M/s Prasad,
& Company, (Project Works) Limited,
M-22-3RT, Vijayanagar Colony, Hyderabad,
Rep., by its authorised representative,
Mr.K.Uday Bhanu S/o.K.Umavara Rao,
Aged about 42 yrs, Occu : Vice President of
Ms/.SEW Infrastructure Ltd.,

...

Petitioner

And

State of Andhra Pradesh,
Rep., by its Principal Secretary,
Irrigation and Command Area Development Department,
A.P. Secretariat, Velagapudi at
Amaravathi, Guntur District 522020 & others.

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Respondents

This court made the following :

THE HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION No.44487 OF 2018

ORDER :

Petitioner is a joint venture formed for the purpose of executing contract works of Polavaram Project Right Main Canal-Package No.5-Earth work Excavation, formation of embankment, construction of Cross Masonary and Cross Drainage Works including investigation designing and estimation. The agreement was concluded on 23.10.2004. It appears, the period stipulated for completion of work was 24 months from the date of concluding agreement. It appears, Government granted last extension of time up to 30.06.2018, and further extension was sought.

2. A reading of the letter addressed by the Superintending Engineer to the Engineer-in-Chief dated 27.10.2018 would disclose that petitioner could not complete the work within the stipulated period due to the reasons mentioned therein. Citing those reasons the Superintending Engineer, proposed to the Engineer-in-Chief, to grant extension of time upto 30.06.2019, without imposing liquidation damages. While this proposal was under process, vide impugned letter dated 20.11.2018, petitioner was informed that as he failed to execute the work in exercise of power vested in Clause 60 (c) of PS to APDSS, and to meet the targets fixed by the Government to complete the project by May, 2019, it is proposed to delete the execution of above six works mentioned therein from the scope of agreement.

3. Heard Sri B.Prakash Reddy, learned Senior Counsel appearing for the petitioner and learned Government Pleader for Irrigation for the respondents.

4. Learned Senior Counsel, submits that there was no default on the part of petitioner as delineated in the letter dated 27.10.2018, and for the reasons mentioned therein the work could not be completed. The Superintending Engineer having rightly assessed the background history of the Project, requested for granting extension of time to complete the work by 30.06.2019. That being so, within few days thereafter, the very same officer could not have taken decision to delete certain works from the petitioner's purview and the same would amount to arbitrary exercise of power and authority and therefore prayed to declare the same as illegal and petitioner be allowed to execute the works.

5. In the counter affidavit, the respondents have not shown any justification for changing their stand within few days from the initial date of proposal to the subsequent decision to reduce the scope of work entrusted to the petitioner.

6. Learned Government pleader sought to rely on the averments made in Paragraphs 12 and 13 to contend that petitioner failed to meet the parameters set out in the schedule to complete the work and there is shortfall. However, the counter-affidavit is silent as to whether the justification given by the Superintending Engineer in his letter dated 27.10.2018 seeking extension is not correct and how the very same officer,

without any further material before him, took different view within few days thereafter.

7. It is useful to extract the reasons mentioned in the letter dated 27.10.2018 of the Superintending Engineer, annexed as Ex.P.7 which reads as under :

“1. Release of water in canal : As per the directions of the Government, water is released in the canal from Pattiseema lift till 25th Dec 2017 and further from 17.06.2018 onwards. During the month of Jan-2018, work could not be started since the residual water is to be dewatered & surface is to be dried up to take up the C.C lining work. Thereby crucial working period was lost.

2. Ryots Objections : In the reach from Km.129.000 to Km 129.150 of Rangannagudem Village for an extent of about 1.92 acres, the ryots objected for excavation of canal and stopped the work as the amount towards Land Acquisition is not paid to them. On negotiations, they have allowed only for excavation of canal and not for laying concrete lining.”

8. A bare reading of the reasons mentioned therein would clearly show it is an admitted fact that the contractor *per se* was not responsible for the delay in execution of work. As noted above, no other material is placed on record to show that this assumption of the Superintending Engineer was not correct and was contrary to the record.

9. It is appropriate to note that the subsequent letter written by the Superintending Engineer on 20.11.2018, impugned in this writ petition, does not whisper of his earlier letter written to the Engineer-in-Chief on 27.10.2018, proposing for extension of time. Even in the counter affidavit, deposed by the very same officer, no justification is shown.

10. Thus, the action of the respondents in reducing the scope of work as originally entrusted to the petitioner amounts to

arbitrary exercise of power and authority, though relationship is governed by the terms of contract entered into between the parties.

11. The principle of law is well settled that ordinarily in matters of contract and enforcement of terms of contract, the writ Court does not interfere in exercise of power of judicial review. However, as held by the Hon'ble Supreme Court in **ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. And others**¹ and **Joshi Technologies International Inc. v. Union of India**², if there was arbitrary exercise of power by a party to the contract, which is State or its creature, the Writ Petition is maintainable and writ Court may pass appropriate orders to remove the illegality noticed by the Court, which was offending Article 14 of the Constitution of India.

12. In **ABL International Ltd**, the scope of writ jurisdiction in matters where relationship of parties is governed by terms of contract and one party to the contract is State or its instrumentality was considered. On review of precedent decisions, the Supreme Court held, if action of State or its instrumentality is hit by Article 14 of the Constitution of India, the Writ Petition is maintainable. The Supreme Court held at paragraph Nos.19, 22 and 23 as under:

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a

¹ (2004) 3 SCC 553

² (2015) 7 SCC 728 : 2015 SCC Online SC 490

suit. In the above case of *Gunwant Kaur* [(1969) 3 SCC 769] this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

22. We do not think the above judgment in *VST Industries Ltd.* [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that *VST Industries Ltd.* [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions; failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty, if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was the first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract? Answer to this question, in our opinion, is found in the judgment of this Court in the case of *Kumari Shrilekha Vidyarthi v. State of U.P.* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] wherein this Court held: (SCC pp. 236-37, paras 22 & 24)

“The impact of every State action is also on public interest. ... It is really the nature of its personality as State which is significant and must characterize all its actions, in

whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.”

23. It is clear from the above observations of this Court, 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. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India.

13. On reviewing the law on the subject, the Supreme Court in **Joshi Technologies International Inc.** (*supra*) summarized the legal position in paragraph No.70 of the decision. To this extent, the relevant paragraph reads as under:

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

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

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

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.”

14. In **Air India Limited v. Cochin Industrial Airport Limited and others**³, Supreme Court held;

“7.But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned.....”

15. At this stage, learned Government Pleader submits that petitioner should give undertaking by fixing monthly time schedule for completion of work with discretion to authorities to review the work to be executed by the petitioner every month and in the event of not meeting the monthly schedule, to terminate the work contract entrusted to him.

16. Having regard to this statement of learned Government pleader, petitioner filed affidavit (I.A.SR.No.107151 of 2018). The same is taken on record. The undertaking reads as follows :

“2. It is submitted that the present writ petition is being filed challenging the action of the Respondents, particularly Respondent No.4 and Respondent No.5 in deleting part of the balance work of the Polavaram Project Right Main Canal Package No.5 from the scope of work of the Petitioner vide, Proceedings bearing Letter No.SE/PIPRMC/ELR/DB/TO/ATO/PIPRMC-Pkg-V/2703, dated 20.11.2018 (Hereinafter “Impugned Letter 1”) and Letter No.EE/PIPRMC/ELR/DB/AEE/PIPRMC/609 dated 05.11.2018 (Hereinafter “Impugned Letter 2”) respectively as being illegal, arbitrary and unconstitutional.

³ (2000) 2 SCC 617

3. It is submitted that Respondent Nos.4 and 5 deleted the following works from scope of original contract vide Impugned Letters 1 and 2 respectively:

- i. Lining from Km 123.400 to Km 124.400**
- ii. SP cum SLRB @ Km 120.600**
- iii. SP @ Km 126.480**
- iv. SP @ Km 129.000**
- v. CR @ Km 121.900**
- vi. CR @ Km 133.800 (the works mentioned at I to VI are herein after collectively referred to as "Pending Works").**

4. It is submitted that during the hearing of the present writ petition the Hon'ble Court permitted the Petitioner to file an undertaking stating that the Pending Works will be completed by 30.06.2019. Additionally, the petitioner undertakes to file monthly status reports with the department on or before 15th of every month. The Petitioner hereby undertakes to complete the Pending Works by 30.06.2019 and also undertakes to file monthly status reports with the department on or before 15th of every month."

17. Having regard to the above, the Writ Petition is allowed. Petitioner shall be allowed to execute the work without regard to the impugned proceedings dated 20.11.2018, subject of course, petitioner complying with the time line in completing the work before the deadline agreed by him. If necessary the competent authority shall pass orders on the proposal submitted by the Superintending Engineer on 27.10.2018 within two (2) weeks from the date of receipt of copy of this order, granting extension of time to the petitioner as proposed by the Superintending Engineer. Pending miscellaneous petitions shall stand closed.

P.NAVEEN RAO,J

27th December, 2018
Rds/kkm