Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO. 15115 OF 2019

PCIL HAM BKBN Private Ltd ...Petitioner
Versus
The State of Maharashtra & Anr ...Respondents

WITH

WRIT PETITION (ST) NO. 15355 OF 2019

PCIL HAM Daund Siddhatek Pvt Ltd ...Petitioner
Versus
The State of Maharashtra & Anr ...Respondents

Mr SB Talekar, *with Madhavi Ayyapan, i/b Talekar & Associates, for the Petitioner in both matters.*
Ms Neha Bhide, *'B' Panel Counsel for State-Respondents Nos. 1 & 2 in both matters.*

CORAM: S.C. DHARMADHIKARI & G.S. PATEL, JJ
DATED: 18th June 2019

PC:- (Per GS Patel, J.)

1. As these two Writ Petitions raise common questions, they are disposed of by this common order.

2. The Petitioners in these two Writ Petitions under Article 226 of the Constitution of India challenge the termination by the Respondents of two different Concession Agreements in relation to separate State Highway improvement contracts. As the two Writ Petitions raise broadly similar issues and taken virtually identical grounds of challenge, they are disposed of by this common order.

3. We have heard Mr Talekar for the Petitioners and Ms Bhide for the Respondents. With their assistance, we have carefully considered the Petitions, their annexures and the rival submissions. The question, shortly stated, is this: where a private party to a commercial contract with the state fails to fulfil its contractual obligations (such as achieving financial closure), and the state invokes its contractual rights to terminate the contract, absent any material to show arbitrariness, caprice, perversity or illegality, is a High Court in exercise of its admittedly wide, though never unrestricted, jurisdiction under Article 226 of the Constitution of India bound to intercede to stay that termination? We do not believe that is the law. We have found no evidence of arbitrariness, perversity or illegality in the State's conduct, nor any violation of any rule of natural justice. We have rejected both petitions. Our reasons follow.

4. Writ Petition (St) No. 15115 of 2019 is filed by one PCIL HAM BKBN Private Limited. In the second Writ Petition (St) No 15355 of 2019, the Petitioner is PCIL HAM Daund Siddhatek Pvt Ltd. Both Petitioners are wholly owned subsidiaries of Patil Constitution and Infrastructure Limited (PCIL). Both were Special Purpose Vehicles specifically incorporated for the execution of two different road improvement projects. The 1st Respondent in both petitions is the State of Maharashtra. The 2nd Respondent is the Public Works Department.

5. We will take the facts in the first petition as sufficient. The facts in the second petition are broadly similar.

6. By a tender notice dated 9th April 2018, the State Government through its Public Works Department invited bids from eligible contractors for an improvement to the Morgaon-Baramati-

Kalamb-Bavda-Narsinghpur State Highway 120, District Pune. This was a stretch of the State Highway from the KM50/00 marker to the KM138/680 marker. A copy of the tender notice is annexed to this Writ Petition. Importantly, for the present purposes the tender notice itself specifies that it is an invitation to tender for what is called “Hybrid Annuity Mode” or “HAM” project. We will outline the salient distinctive features of such a mode shortly. E-tendering information, the bid documents and the bidding and tendering schedule were available online. PCIL, the petitioners’ holding company, submitted its bid on 23rd April 2018 for the first project. It also tendered an earnest money deposit by a bank guarantee of Rs. 2.37 crores. This bank guarantee was periodically extended. Technical bids were opened on 27th April 2018 and financial bids on 8th May 2018. PCIL was found to be the lowest bidder. It was called for negotiations. It offered a further reduction in the project cost and agreed to execute it for contract amount of Rs. 243 crores. There followed a letter of award dated 8th June 2018. On 19th June 2018 PCIL accepted the award of the tender by its letter of that date. PCIL incorporated the Petitioner in the first writ petition as a SPV on 5th June 2018. The Petitioner in the first Petition then entered into a Concession Agreement with the Principal Secretary, Public Works Department on 2nd August 2018.

7. The facts in the second Petition are substantially similar. There, the contract was for improvement to the Ashtavinayak Roads, District Pune, Part II, Daund to Siddhatek KM93/000 to KM111/836, Patas to Daund KM0/000 to KM11/910 and Pargaon to Daund KM61/400 to KM88/282. PCIL was also the lowest bidder and was awarded the contract. The Concession Agreement in the second contract is of the same date of 2nd August 2018 and contains virtually identical provisions. We will take the Concession Agreement in the first petition for reference.

8. The Concession Agreements have several conditions including performance security and financial closure. The Petitioners, as the concessionaires, were to fulfil conditions precedent within a stipulated time as set out in Article 4.1.3 of the agreements, which also allowed for some specified extensions. The actual timelines are of no concern, because it is not the Petitioners' case that they ever fulfilled these conditions precedent within the specified time frames or on schedule. One of these conditions precedent was that the concessionaires were to furnish a performance security in the form of a bank guarantee, and also an additional performance security if required. This performance security was to be furnished within 30 days from the date of signing of the Concession Agreement. This period was extended to 90 days by a circular or clarification dated 31st October 2018. The Petitioners admittedly did not achieve financial closure within the contractually stipulated time.

9. In paragraphs 13, 14 and 15 of the Petition, the Petitioners purport to furnish reasons for this contractual failure. They say:

> 13. The Petitioner took immediate steps in searching for lenders so as to achieve the financial close in accordance with the Concession Agreement immediately after issuance of letter of acceptance.
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> 14. The Government of Maharahstra used to execute its project more particularly relating to construction of roads as per "Engineering Procurement and Construction mode" (i.e. EPC mode) for which Government used to provide 100% funding. However, the

> Government of Maharashtra switched over to Hybrid Annuity Mode (i.e. HAM) for which Government is providing 60% funds during the construction period, whereas the remaining 40% of the project cost is to be paid over a period of 10 years in the form of half yearly annuity into Escrow account of the bank in the early 2018. The concept of HAM is new to the developers, Public Works Department and to the banks.
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> 15. HAM has resulted to confusion among the developers, officials of PWD so also among the Bank officials. It is recently in September, 2018 that the State Bank of India has formulated new lending policy for financing such projects on HAM basis.

10. The Petition then recites that there was a delay on the part of the State Bank of India, the lender chosen by the Petitioners, and that it was not till 3rd January 2019 that the SBI ultimately sanctioned the funding facilities.

11. We have perused the annexures to the agreements. It is clear from the tender notice as also from the Concession Agreement that all bidders were aware that these contracts were to be on the basis of the Hybrid Annuity Mode. The averment of the Petitioners that this is a new and unfamiliar concept does not appear to be at all substantiated. The entire basis of the Petitions is the suggestion that the HAM model was so new, nascent and unfamiliar that none knew how it was to be operated. We cannot accept this submission. The contract itself contains specific provisions requiring financial closure. The tender and the contract documents specify the HAM mode clearly and from the very inception. It was not introduced by a modification. The government must be presumed to know of the implications and requirements of the specified HAM mode. More pertinently, every bidder must be deemed in law to be aware not only of the terms of the tender, viz., that it is on the HAM mode, but also of all surrounding circumstances and the requirements of financial closure, raising equity, etc. There can be no doubt that the Concession Agreement is a complete contract. There is no amendment as regards the governing HAM mode or model.

12. We also note that the contracts have a full-fledged dispute resolution mechanism (page 185, Article 38 in the first writ petition). This Article inter alia provides for conciliation and arbitration.

13. Mr Talekar's arguments are two-fold. He first alleges that the termination notice (Exhibit "Y" at page 465 of the first Petition) though dated 28th May 2019 was received on 31st May 2019, and that the notice intimating the Petitioner of the Respondents' intent to terminate was received only after the period was specified. Hence he submits that there was a breach of the principles of natural justice. Secondly, it is his contention that the admitted delay in the Petitioners achieving financial closure was for reasons beyond their control, and principally because the State Bank of India delayed the disbursement of the finance and the issuance of the performance bank guarantee.

14. We note that as late as 2nd February 2019 the Petitioner in the first writ petition was still telling the 2nd Respondent that it had not yet achieved financial closure. The Petitioner requested an extension of time for a few more days. Then on 27th February 2019, the Petitioner requested time until 28th March 2019. It still did not achieve the necessary financial closure. On 16th March 2019, the Petitioner had still not achieved financial closure and was seeking yet more time. Indeed, by this time the Petitioners had began to invoke the force majeure clause alleging that the delay in financial closure was for reasons beyond their control. Thus the non-fulfilment of the contractual condition precedent is admitted.

15. The essence of Mr Talekar's submission is that we must accept as undisputed the Petitioners' case that a force majeure condition applies, and that the Petitioners were helpless in achieving financial closure. We disagree. These are disputed questions of fact. They will need evidence. We cannot examine these in our writ jurisdiction. Besides, the Petitioners have their remedies open in law and are free to pursue those.

16. Mr Talekar relies on several decisions, noted below, in support of his proposition that mere fact that the relationship with the Government is contractual will not bar this Court from exercising its writ jurisdiction.

(a) *Lakshmiratan Cotton Mills Co Ltd v Its Workmen*;[1]

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1 (1975) 2 SCC 761.

(b) *Harbanslal Sahnia & Anr v Indian Oil Corpn Ltd & Ors.*[2]

(c) *ABL International Ltd & Anr v Export Credit Guarantee Corporation of India Ltd & Ors*;[3]

(d) *Union Bank of India & Ors v Tantia Construction Private Ltd*;[4]

(e) *Ramchandra Narayan Nayak v Karnataka Neeravari Nigam Limited & Ors*;[5]

We are unable to accept his submissions. *Lakshmiratan Cotton Mills* was in the context of a Standing Order that required a show cause notice to be given to a workman before his proposed dismissal. This decision will, therefore, not assist Mr Talekar. In *Harbanslal Saini*, it was found that sample taken and used as the cause for cancellation of a license was itself conducted in violation of instructions in government orders. That is wholly distinct from the case at hand. The decision in *ABL International*, in the context of an insurance contract, is actually against Mr Talekar for it clearly says that a petition which requires consideration of evidence not on record will not normally be entertained under Article 226. Indeed, we are not,

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2 (2003) 2 SCC 107.

3 (2004) 3 SCC 553.

4 (2011) 5 SCC 697.

5 (2013) 15 SCC 140.

in this order, espousing any rigid principle which Mr Talekar is called upon to counter. *Tantia Construction* is also not an authority for the proposition Mr Talekar canvasses, for it says that where the rule of law is violated, the mere existence of an alternative remedy or an arbitration clause will not bar a writ court from exercising its jurisdiction. But this presupposes that there is a demonstrated illegality or a violation of the rule of law. *Ramchandra Narayan Nayak* is incorrectly invoked, for in that case, the Supreme Court said that a termination could not be done other than in the manner stipulated by the contract. It did not specify some extra-contractual notice period as is sought to be suggested.

17. Indeed we are mindful of the recent pronouncements of the Supreme Court and to which there is no reference. To begin with, in *Surya Constructions v State of UP*,[6] the Supreme Court held that wherever there is demonstrated arbitrariness, even in the realm of contract, a High Court can interfere under Article 226 of the Constitution of India. But this demonstration of arbitrariness is a pre-requisite. In the facts of the present two cases, we find no such

6 Civil Appeal No. 2610 of 2019, decided on 8th March 2019.

arbitrariness. The State Government waited well beyond the contractually mandated period before terminating the two contracts. Even up to the time of the termination, the Petitioners had failed to fulfil their contractual obligations and meet the conditions precedent. We believe that in cases of tenders, we are required to exercise greater circumspection. In other words, the burden is always heavily on the petitioner seeking a high prerogative remedy to establish manifest arbitrariness, i.e. arbitrariness that is writ large and requires no great examination of evidence. In *Caretel Infotech v Hindustan Petroleum Corporation Ltd & Ors*,[7] the Supreme Court held that normally parties would be governed by the contracts and tender terms and really no writ would be maintainable under Article 226 of the Constitution of India. Interference is permissible only if the decision-making process is shown to be arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. Further, Constitutional courts are expected to exercise restraint, and in matters of contract, the author of the document is best placed to

7 Civil Appeal No 3588 of 2019 decided on 9th April 2019.

understand and appreciate its requirements. A difference in interpretation would be insufficient to warrant interference. Finally, in an order dated 6th June 2019 (*Ramesh G Karani & Ors v Slum Rehabilitation Authority & Ors*),[8] the Supreme Court said that interference is not warranted in writ proceedings with important public projects. A project of public importance ought not to be stalled.

18. What the Petitioners seek, as is clear from a plain reading of the prayers, is a judicial order modifying the terms of the Concession Agreements by quashing the Respondents' termination thereof and therefore continuing the contract. The Petitioners secondly also seek a purely civil remedy, viz., an injunction against encashing the State Government from encashing the bank guarantees. We fail to see how we can grant either of these reliefs in exercise of our writ jurisdiction in these circumstances.

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8 SLP (C) No 12332 of 2019. The Special Leave Petition was directed against an order dated 26th April 2019 of a Division Bench of this Court, a Bench presided over by of us, SC Dharmadhikari J, sitting with BP Colabawalla J.

19. We are particularly mindful that both these contracts relate to improvements on State Highways with heavy traffic, and which, for a very long time, have been in desperate need of improvement and upgrading. The Petitioners cannot claim some sort of monopoly on these public works and highway improvement projects. The relief the Petitioners seek will undoubtedly adversely affect the wider public interest. It is also not as if the Petitioners have fulfilled all the contractual obligations and the Respondents' termination was mala fide or arbitrary. Admittedly, the Petitioners have not achieved financial closure within the contractually specified time. They may have reasons for being unable to do so, but this is very different from saying that the Respondents terminated the contract without any reason or acted arbitrarily or without just cause. We cannot examine the sufficiency of those reasons. We are only concerned with the decision-making process. We are not prepared to accept that the larger public interest ought to be sacrificed to the narrower interests of private enterprise pursuing profit.

20. As to the question of breach of the principles of natural justice, in our view this simply does not arise. No such breach is demonstrated. The allegation that the termination notice was itself received late is not a breach of any principle of natural justice. The termination invoked a contractual clause. No hearing before termination was mandated. The Petitioners had ample time to cure the defects and failures in fulfilling their contractual obligations and they were fully aware of their contractual obligations and time schedule, as also of their own failure to fulfil these obligations. Having failed to do so, they cannot now complain of some nebulous or generally stated breach of a principle of natural justice. As we have noted, other than invoking externalities and force majeure, and seeking even further extensions (at the cost of the public interest), the Petitioners had nothing at all to say. Indeed, it is unclear what principle of natural justice it is precisely that is being invoked. By terminating the agreements, the Respondents invoked their contractual rights. They did not in any sense carry out or perform any 'adjudication' requiring a personal hearing. There is no unfairness in the Respondents' conduct. If at all, they have been far too indulgent towards the Petitioners.

21. The Petitions are without merit. They are dismissed. The Petitioners may pursue their remedies under the Agreements, and all contentions are left open on both sides. No costs.

(S.C. DHARMADHIKARI, J)

(G. S. PATEL, J)