IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2021

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.17888 of 2020
and
W.M.P. Nos.22172 & 24091 of 2020

Ranjit Buildcon Limited
Represented by its Authorised Signatory
Mr.Maheshkumar Narottamdas Patel
'Ranjit House'
Opp. Sun Residency
B/h.Bhagwat Bungalows
Rt. Side Road to Gora Maharaj Madir
Thatlej-Shilaj Road
Tatlej, Ahmedabad - 380059 .. Petitioner

Vs.

Rail Vikas Nigam Limited
Represented by its Chief Project Manager
Thirumailai Railway Station Building
Mylapore, Chennai - 600 004 .. Respondent

PRAYER : Writ Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, forbearing the respondent from awarding the de-scoped portion of work of the petitioner to any third party without following due process of law in awarding the works by issue of a public open tender in a transparent manner.

For Petitioner : Mr.Vijaynarayan, Sr.Counsel
for Mr.K.Harishankar

For Respondent : Mr.R.Sankaranarayanan
Additional Solicitor General
of India
Assisted by Mr.V.G.Suresh Kumar



ORDER

The petitioner has sought for a Writ of Mandamus, forbearing the respondent from awarding the de-scoped portion of work of the petitioner to any third party, without following due process of law in awarding the works by issue of a public open tender in a transparent manner.

2. The petitioner is the contractor, who was awarded with the contract of construction of Pamban Bridge, parallel to the existing bridge No.346 at Km.655/000 - 657/200, including vertical lift span between Mandapam and Pamban Railway stations in Madurai Division of Southern Railway.

3. The Letter of Acceptance was given on 02.08.2019. Now, the challenge is to the unilaterally de-scoped part of the works as per the Letter of Acceptance. The petitioner is a contractor, who is specialised in construction of Rail Over Bridges/Bridges/Fly-overs and road works including water supply projects.

4. The respondent had issued a Notice Inviting Tender on 02.01.2019 for the re-construction of the famous Pamban Bridge, which was originally built in the year 1914. The present bridge is a parallel one to the existing bridge. The earlier tender was in two folds, namely technical and financial and the petitioner bagged the contract work involving construction of 3.36 Km long railway bridge over Pamban river that has the Bay of Bengal on one side. On receipt of the Letter of Acceptance, a bank guarantee towards Performance Security was furnished and a contract agreement was executed on 06.03.2020. The petitioner blames the respondent for certain deficiencies from the beginning. It is alleged that the respondent did not provide the critical details for carrying out the works or had provided details misguiding the petitioner. In addition to the above allegation, the petitioner also had blamed the respondent for:

(i) Failing to clarify the date of commencement;

(ii) The petitioner was required to take up the work from both the approach ends of the project i.e. from Mandapam end and the Pamban end, as per the contract provisions;

(iii) The petitioner proceeded with the work only from Mandapam end for which the respondent declined to provide facility to cross the railway track;

(iv) The petitioner had to wait for removal of hindrance and encroachment for enabling movement of heavy and massive mechanical equipments to reach the actual work site;

(v) The geo-technical details furnished by the respondent did not match as shown in the tender documents. The respondent was also not ready with the design and drawing for the retaining wall at the Mandapam end.

(vi) The start and end points were unavailable;

(vii) The information regarding the depth of the sea is false and vague and the petitioner had to commence piling works despite there being various deviations, mismatch etc. The depth of the pile was actually different from what was indicated in the work drawing, as the pile has to rest on the rock, the petitioner had to conduct SPT test for the same pile at various depths to decide upon the pile termination. The date of commencement was also not clear and it was contrary to the bid provisions.

5. It is further stated by the petitioner that several details, such as change in the location, access to site, change in geography/depth of the sea water available etc. were at variance from what was given at the time of tender and that there was a delay in furnishing the same. In addition to the above, the nation-wide lock-down due to COVID-19, brought the work to a standstill. The petitioner had been informing the respondent about the difficulties faced by it, by various letters. Despite pointing out the above difficulties and the unforeseen circumstances like COVID-19 Pandemic situation, the respondent had issued a Notice to Correct on 08.10.2020. A reply was sent by the petitioner on 19.10.2020 reiterating the issues faced due to the respondent's lack of clarity and inertness in the tender.

6. While so, on 30.10.2020, the respondent had issued a Notice of Part Termination of the contract thereby unilaterally de-scoped the part of the works awarded as per the Letter of Acceptance dated 02.08.2019. Not stopping with that, the respondent is attempting to award the de-scoped works, to satisfy the third parties by having private negotiations with them. According to the petitioner, all those deficiencies that were pointed out by the petitioner with regard to the technical details, have now been rectified making the job easier for the third party. The petitioner still is willing to continue with the contract and expressed hope to finish the same before August 2021, the deadline given as per the contract.

7. It is also pointed out that the de-scoped work, as per petitioner's contract was only around Rs.60.00 Crores, whereas now the same has been estimated around Rs.135.00 Crores, which is more than the double the value of the work. Such high value of the work should be awarded only by public open tender and not by private negotiations. Therefore, the petitioner is seeking a mandamus forbearing the respondent from awarding the de-scoped work of the petitioner, to any third party, without following the due process.

8. The respondent, namely Rail Vikas Nigam Limited, raised certain preliminary objections on the maintainability of the writ petition itself. The respondent is a Special Purpose Vehicle that undertakes project development for creating rail transport capacity on behalf of Ministry of Railways, Government of India. It is stated that the work was proposed on a out of turn basis considering the condition of the existing bridge, which has outlived its life. The proposed bridge also has to serve the nation for at least 100 years.

9. The work was entrusted to the petitioner under the Letter of Acceptance being the lowest among the five bidders, who participated. The period of completion of the work was 24 months i.e. the work has to be completed on or before 01.08.2021. However, no work was started for more than seven months i.e. up to March 2020 and whatever the mutual arrangements that were made also came to a grinding halt, after the spread of COVID-19 Pandemic followed by nation-wide lock down. Even after the State Government had relaxed the safety protocol, the petitioner did not show any urgency in completing the task entrusted to them. Even after the expiry of 14 months, the progress of the work entrusted to the petitioner was far from satisfactory. Hence it was decided to terminate the part of the subject contract work from the scope of the petitioner and allow the petitioner to continue with the other works. Accordingly, a "Notice to Correct" was issued on 30.10.2020.

10. As per clause 15.2 of the general conditions of the contract, the employer's election to terminate the contract, shall not prejudice any other rights of the employer, under the contract or otherwise. In accordance with the same, the respondent is taking necessary steps to engage another agency to complete the work to prevent the work from the scope of the petitioner. As the petitioner had already taken substantial time without any progress, the respondent had to take steps in finalising a new agency for executing the de-scoped work from the petitioner.

11. As the completion of the project is utmost important for running trains to Rameswaram, the bids were finalised after following the due process, as stipulated, for calling and acceptance of Special Limited Tender (SLT). Besides, when it is a alleged breach of contract, according to the petitioner, its remedy is elsewhere and not before this court invoking Article 226 of the Constitution of India. As the writ petition itself is not maintainable, the respondent has sought for dismissal of the same.

12. Heard Mr.Vijayanarayan, learned senior counsel appearing for Mr.K.Harishankar and Mr.R.Sankaranarayanan, learned Additional Solicitor General of India, assisted by Mr.V.G.Suresh Kumar. The materials available in the form of typed set, were also perused.

13. The scope of the writ petition is very limited, as the petitioner is only seeking a mandamus forbearing the respondent from awarding the de-scoped part of the work of the petitioner to any other third party. The undisputed facts are as follows:

14. Notice inviting Tender was on 02.01.2019. The letter of acceptance was given to the petitioner on 02.08.2019. The contract period was 24 months from the date of commencement of work as per clause 8.1 and the defect liability period is 180 days from the date of taking over of the whole work. The value of the agreement is Rs.220,97,51,604/- and the due date of completion is 01.08.2021 plus 180 days of defect liability period. It is an admitted fact that the work was delayed. Hence the respondent had issued Notice to Correct on 08.10.2020. Thereafter, within 20 days, Notice of part termination of the contract, was issued on 30.10.2020, wherein de-scoping part of the works awarded as per Letter of Acceptance dated 02.08.2019, was issued. Now the termination of the part of the contract done by the respondent is based on various grounds.

15. It is not out of place to mention that the said termination notice dated 30.10.2020 is not challenged by the petitioner. The petitioner is only seeking a mandamus not to award the de-scoped work to any other third party. Clause 15.2 of the general conditions of the contract provides for termination of the employer. The said condition specifically empowers the employer to terminate the contract with immediate effect and the employer's election to prevent the contract shall not prejudice any other rights of the employer under the contract or otherwise. It further provides that, after termination, the employer may complete the works and/or arrange for any other entities to do so. The employer and these entities may then use any Goods Contractor's documents and other design documents made by or on behalf of the contractor for completing the work.



16. The existing bridge is more than 100 years old and there was a dire urgency in completing the new Pile bridge parallel to the existing bridge and the same was to be raised in a time bound manner. The delay in completion of the work would be detrimental to the running of the train services. Thus the project is of national importance and the work is public oriented. Once the project is completed, it would attract tourists from within the country and also from outside. The

inordinate delay caused by the petitioner had forced the respondent to de-scope the work under the conditions of the contract mutually agreed upon and taking steps to finalise the new agency for doing the rest of the work. Though the learned senior counsel argued and pointed out several reasons for the admitted delay in the execution of the contract, the termination of the same is not challenged. Therefore, the correctness of the termination of the contract, cannot be gone into this writ petition.

17. Clause 20.3 of the general conditions of the contract provides for arbitration. The said clause stipulates that in case the cumulative amount of claims in the contract is not exceeding 20% of the contract price, arbitration clause will not be applicable. Therefore, where the claim, if any, that may be made by the petitioner would exceed 20% of the contract price or not, has to be decided and the arbitration clause can be invoked. Even presuming that the respondent had committed breach of contract, the part termination is not challenged by the petitioner. If the termination of the contract is arbitrary, it is open to the petitioner to take recourse under common law remedy. Therefore, when the general conditions of the contract clause 15.2 specifically provides for completion of the work through any other entity, the petitioner cannot challenge the same, much less, ask for not awarding the contract to any third party.

18. In support of his contention, the learned senior counsel appearing for the petitioner placed reliance on the decision of the Hon'ble Supreme Court in Sterling Computers Ltd. v. M&N Publications Ltd. reported in (1993) 1 SCC 445, wherein at paragraphs 12, 25 and 28, the Hon'ble Supreme Court held as follows:

> 12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the

augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

25. The cases aforesaid on which reliance was placed on behalf of the appellants, have also reiterated that once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14; the executive does not have an absolute discretion, certain precepts and principles have to be followed, the public interest being the paramount consideration. It has also been pointed out that for securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and due to compelling reasons which must stand the test on Article 14 of the Constitution, departure of the aforesaid rule can be made. This Court while upholding the contracts by negotiation in the cases referred to above has impressed as to how in the facts and circumstances of those cases the decisions taken by the State and the authorities concerned were reasonable, rational and in the public interest. The decisions taken in those cases by the authorities concerned, on judicial scrutiny

were held to be free from bias, discrimination and under the exigencies of the situation then existing to be just and proper. On the basis of those judgments it cannot be urged that this Court has left to the option of the authorities concerned whether to invite tenders or not according to their own discretion and to award contracts ignoring the procedures which are basic in nature, taking into account factors which are not only irrelevant but detrimental to the public interest.

28. Philanthropy is no part of the management of an undertaking, while dealing with a contractor entrusted with the execution of a contract. The supply of the directories to public in time, was a public service which was being affected by the liberal attitude of the MTNL and due to the condonation of delay on the part of the UIP/UDI. There was no justification on the part of the MTNL to become benevolent by entering into the supplemental agreement with no apparent benefit to the MTNL, without inviting fresh tenders from intending persons to perform the same job for the next five years. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. The contract awarded for the publication of the directories had not only a commercial object but had a public element at the same time i.e. to supply the directories to lakhs of subscribers of telephones in Delhi and Bombay, every year within the stipulated time free of cost. In such a situation MTNL could not exercise an unfettered discretion after the repeated breaches committed by UIP/UDI, by entering into a supplemental agreement with the Sterling for a fresh period of more than five years on terms which were only beneficial to UIP/UDI/Sterling with corresponding no benefit to MTNL, which they have realised only after the High Court went into the matter in detail in its judgment under appeal.

19. Per contra, the learned Additional Solicitor General of India appearing for the respondent, relied on the decision of the Hon'ble Supreme Court in Joshi Technologies International Inc. v. Union of India and others reported in (2015) 7 SCC 728. In the said judgment, the law was exhaustively considered and at paragraph Nos.69 and 70, the Hon'ble Supreme Court, held as follows:

> 69. The position thus summarised 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, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:
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> 69.1. The Court may not examine the issue unless the action has some public law character attached to it.
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> 69.2. 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 mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
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> 69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
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> 69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
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> 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.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

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.

70.8. If the contract between private party and the State/instrumentality and/or agency of the 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 Constitution of India and invoking its extraordinary jurisdiction.

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.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

20. Following the judgment in Joshi Technologies, a Full Bench of the Supreme Court in State of U.P. vs. Sudhir Kumar

Singh and others reported in (2020) 8 MLC 359(SC), at paragraph No.22 of the judgment, held as under:

> 22. In Rishi Kiran Logistics v. Board of Trustees of Kandla Port and Others reported in (2015) 13 SCC 233, this court held that a writ petition under Article 226, being a public law remedy, a "public law element" should be present on facts before Article 226 can be invoked. The law on this subject has been laid down exhaustively in Joshi Technologies Inc. v. Union of India and others reported in (2015) 7 SCC 728.

21. Judged by the touchstone of these tests, this court is of the view that the general conditions of the contract has cautiously provided for the de-scope of the work and continue the same with the new entity for the completion of the balance work. Therefore, reading the contract, as per its express terms, it is open to the respondent to award a contract to a third party to the extent the work that has been de-scoped from the petitioner. Hence the petitioner does not have any right to stop the respondent from proceeding further with the work much less when it involves a public interest.

22. In view of the discussions and the decisions quoted supra, the writ petition fails and the same is dismissed. However, there shall be no order as to costs. Consequently, the connected writ miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Asr
To

The Chief Project Manager
Rail Vikas Nigam Limited
Thirumailai Railway Station Building
Mylapore, Chennai - 600 004

+1 CC to Mr.V.G. Suresh, Advocate sr 728
+2 Ccs to Mr.K. Harishankar, Advocate sr 640.

W.P.No.17888 of 2020

NMI(CO)
SP(19/01/2021)