



W.A(MD)No.650 of 2010

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.12.2022

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
AND
THE HON'BLE MR JUSTICE SUNDER MOHAN**

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1.The Deputy General Manager (MM)
Bharath Sanchar Nigam Ltd., (BSNL)
Office of Chief General Manager,
Tamil Nadu Circle, Development Wing,
No.60, Ethiraj Salai,
Chennai-600 008.

2.Office of the General Manager,
(NWP-BB) BSNL Corporate Office,
No.12, Bharat Sanchat Bhavan,
Janpath, New Delhi-110 001.

3.EDWAS Project review Committee,
Office of Principal General Manager,
(Development)
No.60, Ethiraj Salai,
Chennai-600 008.

4.The Divisional Engineer,
Circle Telecom Depot,
Thiruppalli,
Madurai-625 014.

... Appellants

.Vs.



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MIDAS Communication Technologies (P) Ltd.,
Represented by its Company Secretary,
Mr.Suresh Krishnamurthy,
No.3/440, East Coast Road,
Neelankarai,
Chennai-600 041.

... Respondent

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent Act, to set aside the order passed in W.P(MD)No.9045 of 2010, dated 31.08.2010 and to allow the above writ appeal.

For Appellants	: Mr.M.S.Velusamy
For Respondent	: Mrs.Lakshmi Gopinathan

JUDGMENT

DR.G.JAYACHANDRAN,J.
AND
SUNDER MOHAN,J.

Midas Communication Technology, who is the respondent in this appeal, being aggrieved by the foreclosure order passed by the BSNL, has approached this Court seeking mandamus to direct the BSNL to issue acceptance certificate to the writ petitioner and receive the materials readily available with the petitioner as per the specification of the BSNL.



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WEB COPY 2. The brief facts of the case are that:-

BSNL invited tender for supply of Digital Wireless Access System with Broadband Internet Access based on the generic requirements as specified by the TELECOM Engineering Centre named as Enhanced Digital Wireless Access System (hereinafter referred to as 'EDWAS').

(ii) Midas Technology was the successful bidder when the bid was opened on 07.02.2007. Accordingly, tender was awarded to Midas Technology and the Advance Purchase Order (APO) was issued on 05.10.2007. Some of the important terms of the contract as found in the Advance Purchase Order is that the project has to be completed within 150 days and if there is any dispute between the parties, they have to approach the Arbitrator as per the terms of the contract. While so, the project could not be completed within 150 days. Time and again extension was granted by the BSNL at the request of the MIDAS. At one point of time, officials of BSNL found that there is an inordinate delay in completing the projects. Out of 57 sites, still in 23 sites work has not been completed, supply of instruments were not done and therefore, the laudable project of Broadband to the Rural India is getting delay.



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(iii) In the said circumstances, on 16.04.2009 the Deputy General Manager (MM) Office of PGM (D) TN Circle, Chennai communicated to MIDAS that at their request, time to deliver all equipment was extended twice i.e., first one was upto 31.05.2008 and the second was upto 31.12.2008. However, MIDAS has failed to supply the equipment even within the extended delivery period of 9 months and therefore, further extension of delivery period is not justifiable. Therefore, BSNL has proposed to short-close the purchase order at the risk of MIDAS and the bank guarantee will be forfeiture as per Clause 12.5 of the Purchase Order. It is appropriate to extract Clause 12.5 of the Purchase Order which reads as follows:-

“12.5. If the supplies are not completed in the extended delivery period, the Purchase Order shall ordinarily be short-closed and both the Performance securities shall be forfeited.”

(iv) After receiving this communication with unambiguous term has intimated MIDAS that any reply to the proposed short-closure of the Purchase Order should be made within 01.05.2009 and if no reply is received, then the



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Purchase Order dated 12.12.2007 will be short-closed following the consequences of forfeiture of Bank Guarantee. MIDAS, in response to the above notice, vide reply dated 24.04.2009 has stated that it has put all its efforts and energy to commence the execution of the said order. But due to the inherent delays in the process, they were not able to complete the project within the time specified under the contract and even after giving extension of time twice. The delay in validation and survey process will attribute unexpected delay in commencing the supply of equipment. A lengthy of explanation with reasoning running to 5 pages been offered by MIDAS and sought for further extension of time to complete EDWAS project.

(v) In the said circumstances, the said explanation was not convincing to BSNL, the impugned order was passed for short-closure of the tender contract.

3. The learned Single Judge was considered the matter at length, has found that the delay in completing the contract is wholly attributed to the attitude of the BSNL and not attributable to MIDAS. Regarding the Arbitration Clause, the learned Single Judge has held that when there is injustice to one of the parties to



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the contract then there is no legal impediment for the High Court to exercise its power under Article 226 of the Constitution of India. For the said purpose, the learned Single Judge has relied upon the judgment of the Hon'ble Supreme Court in *ABL International Limited vs. Export Credit Guarantee Corporation of India Limited and others* reported in (2004) 3 SCC 553. The learned Single Judge has concluded that BSNL has to issue acceptance certificate to MIDAS to enable the MIDAS to supply the materials as per the Purchase Order bearing No.PO/EDWAS/2007-08-01, dated 12.12.2007.

4. The said judgment of the learned Single Judge is challenged on the following grounds:-

(i) The learned Single Judge erred in entertaining the writ petition despite specific clause and agreement by the contracting parties to refer the dispute for arbitration.

(ii) The learned Single Judge erred in considering the disputed facts regarding the delay in supply and performing the part of contract and the reason attributed to fix the liability on BSNL are un-found and contrary to the records.



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5. The learned counsel appearing for the appellants/BSNL would submit that the writ petitioner taking advantage of the constitution of the Validation Committee, after issuance of short-closure order by misinterpreting the circumstances under which the committee was constituted. In fact, after passing show cause notice, on 16.04.2009 and on receiving the explanation, the impugned short-closure order was passed on 20.05.2009. Thereafter, an appeal was preferred to the authorities to reconsider the short-closure order. A fair opportunity was given to consider whether the short-closure order can be sustained or not. BSNL appointed the Validation Committee and looked into the matter in a holistic manner, unbiased and arrived at a conclusion that there is no reason to review the short-closure order and recommended the action already taken by Chief General Manager for the short-closure with the forfeiture of Performance of Bank Guarantee is in order. This order was passed after obtaining the approval from the Chief General Manager. Therefore, there is no malafide on the part of the BSNL.

6. Learned counsel appearing for the respondent/MIDAS would submit that even otherwise forfeiture of the Bank Guarantee to the tune of Rs.2,37,21,650/- is



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contrary to the terms of the contract and having made ready the equipment worth more than 30 crores, the respondent/writ petitioner cannot be deprived of its lawful entitlement to complete the contract.

7. This Court, on considering the rival submissions and the materials placed by the appellants and the respondent and the observations made by the learned Single Judge in the impugned order, finds that the March of Law regarding invoking the extraordinary remedy of writ petition under Article 226 or under Article 32 of the Constitution of India in contractual matters have seen a change after judgment of *ABL International Limited vs. Export Credit Guarantee Corporation of India Limited and others* reported in (2004) 3 SCC 553.

8. In *Joshi Technologies International Inc. vs. Union of India* reported in 2015(7) SCC 728, wherein, the Hon'ble Supreme Court has observed as follows:-

“55. Law in this aspect has developed through a catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters the extraordinary



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remedy of writ under Article 226 of Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that it is a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simpliciter under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

59. On the basis of these facts, this Court observed that the aforesaid observations of the High Court relying upon Ramana Dayaram Shetty case were not correct. Thus observed the Court that

“21. This finding in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty case, there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in “other authority” for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the “authority” or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim



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rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (I.e., BDA in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple- Radhakrishna Agarwal v. State of Bihar Premji Bhai Parmar v. DDA and Divl. Forest Officer v. Bishwanath Tea Co., ltd.,

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;

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2 Whenever a particular mode of settlement of dispute is



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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.

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

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.”

9. This principles has been again reiterated by the Hon'ble Supreme Court in the recent judgment of ***Union of India and others vs. Puna Hinda*** reported in ***(2021) 10 SCC 690***.

10. The four parameters reaffirmed by the judgment of ***Union of India and others vs. Puna Hinda*** reported in ***(2021) 10 SCC 690***, when telescoped to the fact of the present case, this Court finds that though there is no absolute bar to the maintainability of the writ petition even in contractual matters or there are disputed questions of fact to invoke the extraordinary jurisdiction, the issue must have some public law character attached to it.



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11. In this case, after throwing upon the telecommunication sector to private players, there is no public law character involved and further, one of the principles postulated by the High Court is that when the settlement through the means of arbitration, the Court should refuse to exercise its discretion under Article 226 and relegate the parties to resort the mode of settlement as agreed by them under the terms of the contract. In this case, unfortunately, the learned Single Judge has gone into several disputed facts and has arrived at a conclusion, which ought to have been arrived at by the Civil Court after recording the evidence done by the Arbitrator as per the terms of the contract.

12. For the said reasons, this Court finds that the order of the learned Single Judge is apparently contrary to the law and the terms of the contract and the order has been passed by exercising extraordinary jurisdiction, which does not warrant. Hence, the appeal is allowed and the order of the learned Single Judge is hereby set aside. No costs.

Index : Yes / No
Internet : Yes / No
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[G.J.,J.] [S.M.,J.]
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