

(2014) 09 SIK CK 0010

In the Sikkim High Court

Case No : Writ Petition (Civil) Nos. 18, 19 and 20 of 2014

Chungthang Hydro Power Private Limited

APPELLANT

Vs

High Powered Committee for Hydro Electric Projects

RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2014) 09 SIK CK 0010

Hon'ble Judges : Sunil Kumar Sinha, J; Sonam Phintso Wangdi, J

Bench : Division Bench

Advocate : Abhinav Vashist, A. Moulik, Senior Advocates, Gautam Jha and Kesang D. Bhutia, Advocate for the Appellant; J.B. Pradhan, Additional Advocate General, Karma Thinlay Namgyal, Senior Government Advocate, Santosh Kumar Chhetri, Pollin Rai, Assistant Government Advocates and D.K. Siwakoti, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—These Writ Petitions involve common questions of facts and law and a common order dated 12.03.2014, passed by the High Powered Committee (for short "HPC") for Hydro Electric Projects, has been challenged by the Petitioner(s), therefore, they are being disposed of by this common judgment.

Facts of the Cases:

2. The Petitioner(s) are Companies incorporated under the Companies Act, 1956. On 06.03.2006, they made applications to the Energy and Power Department, Government of Sikkim for development and setting up of Hydro Electric Power Projects (for short "HEPP") at Lachung, North Sikkim on River Lachungchu. On being satisfied about the standing and credentials of the Petitioner(s), the Energy and Power Department, Respondent No. 3, issued Letters of Intent (for short "LOIs") to the Petitioner(s) on 15.04.2006. Bop HEPP of 99 MW was intended to be given to Petitioner, M/s. Chungthang Hydro Power Limited, Lachung HEPP was intended to be given to Petitioner, M/s. Lachung Hydro Power Limited and

Bhimkyong HEPP was intended to be given to Petitioner, M/s. Teesta Hydro Power Limited. The Petitioner(s) accepted the LOIs on the terms and conditions mentioned therein, and thereafter, the Agreement(s) were signed between the parties on 18.01.2008.

3. After issuance of LOIs and their acceptance by the Petitioner(s), they began with the survey and study works from the year 2006. The Petitioner(s) had engaged the following expert agencies for the above works on different dates between 28.06.2006 to 31.01.2007 as per the following details:-

1. M/s. Himalayan Surveying Services for conducting Detailed topographical Survey vide letter dated 13.01.2007.

2. M/s. Rawel Singh & Company for conducting Geological Investigation vide letter dated 28.06.2006.

3. M/s. SNC-Lavalin, a renowned global consultancy firm, for preparation of Detailed Project Report (DPR) vide letter dated 15.07.2006.

4. M/s. WAPCOS, a Government of India enterprise, for preparation of the Environment Impact Assessment and Environment Management Plan (EIA/EMP) Report for the project vide letter dated 22.11.2006.

4. According to the terms and conditions of the Agreement(s), vide Article 4, the Petitioner(s) had to achieve the financial closure within 12 months from the date of signing of the Agreement(s). The commercial operation of the Project(s) was to be achieved within a period of 72 months from the date of the Agreement(s) and it was agreed between the parties that the Petitioner(s) shall start the construction of the Project(s) within 6 months from the date of the financial closure. It was further agreed that the Petitioner(s) shall initiate the process for obtaining Environment Clearance within one month from the approval of the Detailed Project Report (for short "DPR") by the competent authority and shall keep the Government informed of the status and progress in respect of the Environment Clearance on a monthly basis. It was further agreed that in the event of the Petitioner(s) obtaining Environment Clearance from the Ministry of Environment and Forests (for short "MoEF") within 12 months from the date of signing of the Agreement(s), but are unable to achieve the financial closure within 12 months from the date of signing of the Agreement(s) then, the time period for achieving the financial closure, shall extend up to the end of 6 months from the date of Environment Clearance including Forest Clearance. It was also agreed that in the event of delay in obtaining the Environment Clearance from the MoEF beyond 12 months from the date of signing of the Agreement(s) for reasons not attributable to the Petitioner(s), the Government shall extend the period for achieving the Financial Closure which shall have to be achieved within 6 months from the date of Environment Clearance/Forest Clearance.

5. Article 6 of the Agreement(s) takes care of the Force Majeure having wide amplitude specially including earthquakes or any act of nature or God. It was

agreed that if a Force Majeure situation arises as per Article 6.1, the Petitioner(s) shall promptly inform the Government in writing of such conditions and the cause thereof. However, unless otherwise directed by the Government in writing, the company shall continue to perform its obligation under the Agreement(s) as far as is reasonably practical and, shall seek all reasonable alternative means for performance not prevented by the Force Majeure event.

6. On 08.10.2008, the MoEF imposed an embargo on the Project(s) on the basis of a report by CISMHE. Therefore the works of the ongoing projects were stopped. Thereafter, on 18.08.2009 the Respondent No. 3 gave a detailed representation to the MoEF, Government of India (for short "GOI") to reconsider the decision of imposing the embargo on the Project(s) above Chungthang area.

7. On submission of the above representation on 31.05.2010, the MoEF (GOI) asked the Petitioner(s) to submit optimization report. The Petitioner(s) submitted the optimization report(s) to MoEF (GOI) on 06.09.2010, and, thereafter, the MoEF lifted the embargo on 18.11.2010. However, the Terms of Reference was expanded to include additional specialized studies which required collection of field data over a period of 12 months and then its analysis etc. The Petitioner(s) in consequence of the above direction, engaged NIH, Roorkee, Spectro Analytical Lab, IIT Roorkee and NEHU, Shillong for the specialized studies prescribed by the MoEF (GOI) on 31.01.2011, 09.02.2011, 21.02.2011 and 08.03.2011 and the work of data collection began.

8. Thereafter, in the month of September, 2011, an earthquake occurred in entire Sikkim which was measured at 6.8 on the Richter Scale.

9. On 05.12.2011, the Petitioner(s) were served with Show Cause Notices making various allegations, calling upon them to explain why the Project(s) given to them should not be cancelled. The Petitioner(s) filed their replies to the Show Cause Notices on 12.12.2011 making clarification to the allegations made against them. Thereafter, on 17.02.2012, the then Secretary of Respondent No. 3 issued a letter to the District Collector, North Sikkim, to extend all cooperation and protection to the Petitioner(s) in resumption of the remaining survey work. However, by a Gazette Notification dated 21.06.2012, the Project(s) awarded to the Petitioner(s) were terminated by the Government.

10. The Petitioner(s) then filed Writ Petitions before this Court being Writ Petitions(C) Nos. 35, 36 and 37 of 2012, in which interim orders were passed directing the Respondents not to create any third party rights in the Project(s) during the pendency of the Writ Petitions, and, thereafter, the Writ Petitions were disposed of by an identical order dated 11.11.2013 and the order of cancellation of the Project(s) was quashed with the following directions:-

"(i) The impugned notification/order dated 21.06.2012, Annexure P-1 is quashed and set aside;

(ii) the petitioner may file fresh reply to show-cause notice or representation

within a week before respondent No. 1;

(iii) the respondents will reconsider the entire matter, without being influenced by earlier reasons assigned on the Government file or Cabinet decision, taken in this regard;

(iv) the respondents will afford an opportunity of hearing to the petitioner and will pass a reasoned order within a period of one month from today;

(v) the petitioner is directed to appear before the respondent No. 1, Chief Secretary, Govt. of Sikkim, Gangtok on 18.11.2013 in person or through counsel. It will be open for the respondent No. 1 to consider the matter herself or to assign the matter for consideration before a Committee consisting of Chief Secretary, Govt. of Sikkim and Principal Chief Engineer-cum-Secretary, Energy and Power Department, Govt. of Sikkim or the Hydro Power Committee;

(vi) it is needless to mention that in case any adverse order is passed, it will be open for the petitioner to approach this Court again and it will be open for the petitioner to raise all the contentions again in fresh writ petition, if it is needed, which have been taken in the present petition also;

(vii) the interim order passed by this Court will continue till the passing of fresh order by the respondents;

(viii) parties are directed to bear their own costs."

11. Thereafter, the Petitioner(s) filed a detailed reply to the Show Cause Notice(s) dated 15.11.2013 along with the supporting documents and the hearings took place before the Chief Secretary/High Powered Committee (HPC) of the Respondent State and ultimately by the impugned common order dated 12.03.2014 passed by the High Powered Committee (HPC), the Project(s) awarded to the Petitioner(s) were recommended for withdrawal from them. Hence, these Petitions.

Points raised for consideration:

12. Twofold arguments were advanced in these Writ Petitions. First, on maintainability of the Writ Petitions and second on merits of the decision taken by the High Powered Committee, claiming it to be clear manifestation of arbitrariness, non-application of mind, violation of natural justice principles, entirely unreasonable, unfair, and altogether illegal.

Maintainability of the Writ Petitions:

13. Mr. J.B. Pradhan, learned Additional Advocate General, appearing on behalf of the Respondents, has argued that there are arbitration clauses in the Agreement(s); disputed questions of facts have been raised; the matters would require evidence, the claims of the Petitioner(s) fall in the realm of contract, therefore, the Writ Petitions would not be maintainable. He mainly relied on the decisions of Bareilly Development Authority and Another Vs. Ajay Pal Singh and

Others, ; State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., and The Empire Jute Co. Ltd. and Others Vs. The Jute Corporation of India Ltd. and Another,

14. On the other hand, Mr. Abhinav Vashist, learned Senior Counsel appearing on behalf of the Petitioner(s), has argued that even in domain of contractual matters, High Court can entertain a Writ Petition when state action is arbitrary, unfair or unreasonable. He relied on ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and many other decisions which we shall quote at appropriate places.

15. In Bareilly Development Authority (supra), it was held that when State or other Authority within the meaning of Article 12 enters into ordinary contract with private persons, parties are governed by the terms of the contract and the aggrieved party would not be entitled to seek redress under Article 226 for breach of contract. This was a case relating to sale of houses by the Development Authority on installments. The contract was having escalation clause and the right to alter terms and conditions was also reserved. When there was enhancement in the costs and rate of installments and alteration in the other terms and conditions by the Authority at the time of allotment of houses/flats, Writ Petition was filed. The Hon"ble Supreme Court held that in view of the escalation clause and the right to alter terms and conditions reserved with the Authority, such incident would not be taken as arbitrary and the aggrieved party would not be entitled to seek redress under Article 226 for breach of contract.

16. In Jain Plastics (supra) it was held that seriously disputed questions or rival claims arising out of breach of contract are required to be investigated and determined on the basis of evidence laid in a civil suit.

17. In Empire Jute Company (supra) the dispute arose between the parties on the question of liability of appellant purchaser to pay carrying cost under the terms of the contract in the event of fault on the part of the appellant in taking delivery of goods (jute) within the stipulated period and whether the amount deposited by the appellant was sufficient to cover the carrying cost. It was held by the Supreme Court that in view of the arbitration clause in the agreement and that the dispute between the parties being fully covered, the writ court should not have entertained the Writ Petition and thereby proceeding to determine the question regarding liability to pay carrying cost while leaving the parties to take recourse to the arbitration agreement as disputed questions of fact and law were involved.

18. The above judgments cited by the Additional Advocate General are distinguishable on facts as also on the limited grounds raised by the Petitioner(s) in these Writ Petitions purely relating to breach of obligations under the public law domain. Firstly, we note that no disputed questions of fact have been raised in these Writ Petitions. Here the Petitioner(s) came with similar cases that the various milestones stated in the Agreement(s) could not be achieved on account

of absolute embargo imposed by the MoEF even prior to the completion of the period for achieving the financial closure, i.e., prior to 12 months period. Thereafter, when the embargo was uplifted, a further study consuming more than 12 months period was directed to be conducted, due to which the financial closure could not be achieved and then the earthquake took place, which further delayed the other steps subsequently required to be taken by the Petitioner(s) in the time schedule originally agreed by them in the Agreement(s). Therefore, non-consideration of these grounds is arbitrary, unfair and unreasonable.

19. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, it was held that the public authorities are essentially different from those 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. Taking note of the above decision and many other decisions right from *Kumari Shrileka Vidyarthi & Ors. Vs. State of U.P. & Ors*, (1991) 1 SCC 112, the Supreme Court held in *Sushila Chemicals Pvt. Ltd. and Another Vs. Bharat Coking Coal Ltd. and Others*, that Writ Petitions can be entertained even in the domain of contractual matters when impugned act of State or its instrumentality is arbitrary or unfair or in breach of obligations under public law. In *ABL International Limited (supra)* law on the subject was highlighted that a Writ Petition involving serious disputed questions of fact which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution, but there is no absolute rule that in all cases involving disputed questions of fact, the parties should be relegated to a civil suit. It has even been held [in *Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others*, that in a writ petition, if the facts require, 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.

20. The instant writ petitions, as we have already stated, do not involve serious disputed questions of fact which may require consideration of evidence which is not on record. Here all the factual issues are admitted by the parties. The HPC has recommended for withdrawal of the contracts only on account of not achieving various milestones in time. The Petitioner(s) in their representations had given reasons as to why the milestones were not achieved and have highlighted that even before completion of the normal period, by extending it through necessary implications, the show cause notices were issued and the contracts were recommended for withdrawal in arbitrary manner and without considering the grounds raised by the Petitioner(s).

21. After going through the contents of the Writ Petitions as also the counter affidavit filed on behalf of the State, we find it to be a case in which the Petitioner(s) have challenged the validity of the impugned common order dated

12.03.2014 passed by the HPC on the grounds of being arbitrary, unfair, non application of mind and in breach of obligations under public law.

22. That apart, we also find that when the earlier cancellation orders were challenged in three earlier Writ Petitions, those Writ Petitions were entertained by this Court on the similar grounds raised by the Petitioners and were admitted for hearing and then were disposed of by the above final order and at that time also this Court did not relegate the Petitioners to the remedy of arbitration. On the contrary, liberty was granted to the Petitioners to approach this Court in case any adverse order was passed and to raise all the contentions again in fresh, if they are needed, which have been taken in the said Writ Petitions.

23. For the foregoing reasons, we are of the view that these Writ Petitions are maintainable and the objections raised by the State cannot be sustained and we hold it accordingly.

Merits of the decision taken by the High Powered Committee (HPC):

24. The High Powered Committee has recommended for withdrawal of the projects mainly on the following 3 grounds contained in paragraph 5 of the impugned order:-

(a) Completion of financial closure within 12 months of the signing of the Agreements, i.e., upto 17/01/2009, which could not be achieved.

(b) Start of the construction works on the project was to be undertaken within 6 months of the financial closure which also could not be achieved.

(c) The commercial operation of the projects was to be achieved within 72 months of the signing of the Agreements, i.e., by 17/01/2014. This also could not be achieved.

25. So far as not achieving the financial closure within 12 months from 18.01.2008, i.e., till 17.01.2009 is concerned, the Petitioner(s) had contended that the MoEF had imposed a complete embargo on the projects on 08.10.2008, which was lifted on 18.11.2010, therefore, the Petitioner(s) were not in a position to achieve the above milestone. We also find from the record that on the basis of a report by CISMHE, the MoEF had imposed the said embargo two months prior to the period provided for financial closure. So far as private companies are concerned, their finance for running a project is usually achieved either from a banking institution or from any other financial institution, who firstly satisfy themselves about the viability of the project and the work satisfactorily undertaken by the company for further running the project till advancement of the finance, and the milestones relating to financial closures are generally achieved at the end of the period specified for the same. This also saves the heavy interest which the company would ultimately be required to pay to the financial organizations. In the instant cases, the Petitioner(s) had advanced the works of their projects since the year 2006 by engaging various expert agencies for conducting survey and doing research works and to prepare

DPR etc., and when their works had reached to some extent, as is clear from the documents filed by the Petitioner(s), and ultimately when the end period for achieving the financial closure was coming, a complete embargo was imposed upon the projects by a general order of MoEF on 08.10.2008. Who will finance a company for a project which was stopped by the government or its instrumentality? No banking/financial institution would like to invest money in a dead project? Moreover, why the Petitioner(s) would also try to achieve the milestone of financial closure within the scheduled time of the Agreement(s), when a complete embargo on the projects was imposed by the MoEF, which was of an absolute nature and possibility of uplifting the embargo was not definite. The HPC has not at all considered all these points while passing the impugned order. Not a single word has been said on the consequence of imposing complete embargo on the projects on 08.10.2008 which was lifted only on 18.11.2010. Ignoring all these aspects, the HPC simply said that the financial closure was not achieved within the original time schedule fixed by the Agreement(s). HPC was well aware of the imposition of embargo and its upliftment, which was completely ignored by the Committee while taking a decision for recommendation of the withdrawal of the projects, which appears to be an arbitrary and unfair decision without application of mind.

26. The issue relating to earthquake was also raised by the Petitioner(s). The earthquake occurred in the State in the month of September, 2011 which was measured at 6.8 on the Richter Scale. It was a major earthquake and quite a long time had taken for revival of the normalcy. The projects being basically of civil nature in which construction etc. have to be done, the said earthquake was a major factor. There is a clause in the Agreement(s) (Article 6) relating to Force Majeure which includes an event of earthquake or any act of nature or God. The HPC did not take notice of the above ground raised by the Petitioner(s) and it simply decided that the above milestones were not achieved by the Petitioner(s), therefore, their Project(s) were liable to be cancelled. These contracts were not between two private parties. Here the contracts were between the Government on one side and the private companies on the other side. Thus, the Government as an employer was under obligation to take note of these facts and then take a decision in a reasonable manner and not in an arbitrary manner. The HPC should have considered that when the financial closure itself was not achieved up to 17.01.2009 (12 months) on account of aforesaid reasons which were hardly attributable to the Petitioner(s), how the construction work or the commercial operation of the Project(s) could be achieved. It does not appear to be a case in which the companies sat as idle spectators and did nothing. In the instant cases, as the records would show, the companies started working on their projects even before formal Agreement(s) were executed.

27. That apart, we also note that the upliftment of the embargo by the MoEF was not simpliciter. The MoEF directed for additional specialized studies which required collection of field data over a period of 12 months and then to go for its analysis.

28. Petitioner(s) after uplifting the embargo, had taken necessary steps for specialized studies through various reputed institutions. However, during this period, on 05.12.2011, the Show Cause Notices were served calling upon them to explain why the projects given to them should not be cancelled. The HPC completely ignored all these factors and proceeded to take a decision in a straight line for not achieving the various milestones in time as per the Agreement(s) dated 18.01.2008. As held in Sterling Computers Ltd. (supra), members of the HPC while taking a decision in respect of the Petitioner's contracts which were commercial transactions should have guided themselves by the relevant considerations which they have not done.

29. Apart from the above, the HPC vide paragraph 6 of the impugned order, has itself recorded a finding that the failures on the above aspects could be attributed to a host of reasons, yet, it has given the opinion that the projects should be withdrawn. The HPC has also taken a ground that huge cost overruns now would come, which also does not appear to be reasonable. The above projects awarded to the Petitioner(s) are BOOT Projects, therefore, the financial burden was on the Project Contractors and not on the Government.

30. Article 5 of the Agreement(s) which deals with termination of and taking over of the projects is also important. As per Clause 5.1, it was agreed between the parties that in the event it is eventually confirmed as impossible or impractical to achieve financial closure or if the construction is not commenced before the expiry of 6 months from the date of achieving the financial closure as per Clause 4.7, for reasons exclusively attributable to the companies, the Government would have right to terminate the Agreement(s). In the instant cases, the overall scenario would make it clear that the reasons for not achieving financial closure as per Clause 4.7, were not exclusively attributable to the company as we have already discussed above. Therefore, in this view of the matter also, the decision does not appear to be reasonable.

Conclusion:

31. For the foregoing reasons, the Writ Petitions are allowed and the impugned order dated 12.03.2014 passed by the High Powered Committee (HPC) recommending withdrawal of the Project(s) from the Petitioner(s) is quashed. Necessary consequences shall follow and the Government would be free to come with a new time schedule.

32. There shall be no order as to cost(s).