(1996) 07 AP CK 0033

In the Andhra Pradesh High Court

Case No : Writ Appeal No''s. 576 and 582 of 1996

Gimpex Limited	APPELLANT
Vs	
Indian Barytes and Chemicals Limited and Others	RESPONDENT

Date of Decision : 11-07-1996

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1996) 4 ALT 423

Hon'ble Judges : Lingaraja Rath, J;B.S. Raikote, J

Bench : Division Bench

Advocate : Nalini Chidambaram, G. Veera Reddy and M. Sreeramulu Reddy, for the Appellant; M.V. Ramana Reddy and M. Ravindranath Reddy for Respondent No. 1 in W.A. No. 576/96, A. Sudarshan Reddy and N. Narasimha Rao, in W.A. No. 582/96, for the Respondent

Final Decision : Dismissed

Judgement

Lingaraja Rath, J.—Both the appeals preferred by the same appellant arise out of the same facts and hence are disposed of by this common judgment.

2. In both the appeals, preferred with the leave of the Court as it was not party to the Writ Petitions, the appellant assails the order of 22-3-1996 of the learned single Judge disposing of the Writ Petitions directing the respondent No. 2 to consider the representations of respondents No. 1 and 3. Though the petition for leave to appeal also raised grounds as a public interest litigation, yet during hearing of the case we have not been addressed as dealing with public interest petition and instead the learned counsel for the appellant has confined her submissions to the appellant''s individual cause of action. In substance, the challenge is to the order passed by respondent No. 2 in favour of respondent No. 1 in W.A. No. 576 of 1996, stated to be in pursuance of the direction of the learned single Judge on 22-3-1996, agreeing to supply to it 88, 889 M.Ts of Barytes within a period of 3 1/2 months, without allowing others including the appellant to compete for the same. Of the two writ petitions, the main order has.

been passed in W.P. No. 5704 of 1996 and W.P. No; 5763 of 1996 has been disposed of in the terms of the order in W.P. No. 5704 of 1996 directing that the petitioner there in viz., Trimex Industries Ltd. may join M/s. Indian Barytes and Chemicals Ltd., in filing the representation before the Andhra Pradesh Mineral Development Corporation. For the purpose of reference in this judgment, the parties are referred to as they are added in Writ Appeal No. 576 of 1996.

3. The facts disclosed by the appellant are of its being in business for the past 20 years in mining, mineral processing and export of minerals including Barytes and its operations being located in Andhra Pradesh, Tamil Nadu, Maharashtra and Gujarat. The State Government has reserved the exploitation of Barytes only by the respondent No. 2 - a fully State-owned Undertaking, and cancelled on 1-12-1993 all private sub-leases leaving the respondent No. 2 as the sole producer of Barytes. A tender was flown on 8-9-1993 by respondent No. 2 for sale of Barytes intended for export for two years at the rate of 3 lakh tonnes per year. The respondent No. 1 being the successful bidder, contract was signed with the respondent No. 1 on 17-1-1994 for supply of 3 lakh tonnes of Barytes per year for two years. The appellant has been successively soliciting the respondent No. 2 for purchase of Barytes to meet its domestic as well as outside commitments but unsuccessfully, though it had in its letter of 26-4-1994 offered a higher price of Rs. 496/- per M.T. while the prevailing market rate was only Rs. 421.30p. In the meantime, the respondent No. 3 filed a writ petition challenging the decision to award the contract in favour of the first respondent, but the matter was settled out of Court between the first and the third respondents in which the first respondent agreed to assign a quantity of 1 lakh tonnes to the third respondent which agreement was signed on 27-1-1995. On 21-4-1995, the second respondent sold 1 lakh tonnes to the third respondent without inviting tenders. That was in addition to the supply of 1 lakh tonnes under the assignment agreement of 27-1-1995. The appellant again in its letter of 23-3-1995 requested the second respondent to release 1 lakh tonnes of A grade Barytes at its own price and terms and conditions in order to enable it to meet its export commitment. The request was reiterated on 30-6-1995, but the second respondent pleaded its inability on 14-7-1995 in view of commitments on hand and that too inspite of the offer to purchase at Rs. 496/-per M.T., but the second respondent had chosen to sell 1 lakh tonnes to the third respondent on 21-4-1995 at a concessional price of Rs. 468/- per M.T. While the appellant was approaching the second respondent to release Barytes in its favour, the first respondent moved the second respondent for extension of the contract as due to litigations challenging the assignment of contract to it, it lost about 36 days in operation there being no (sic. an) interim order granted during the pendency of the Writ Appeal filed by one Ashapura Minchem Ltd. Besides, the mines were inundated with heavy rainfall for a period of 126 days during the period of November, 1994 to December, 1994 and May, 1995 and 54 days were also lost in two spells because of strike of the employees of the Mining Corporation for which there was no excavation of Barytes. Thus, in all there was about 216 days of loss

in working for which there was no supply of Barytes to the first respondent. The first (sic. second) respondent considering the facts, extended the contract from 17-1-1996 on which date the two years period expired, upto 29-2-1996. Excavation/mining contract was also extended from 26-10-1995 to 29-2-1996 in order to enable him to produce maximum quantities. During such extended period, 35,000 M.Ts were supplied to the respondent No. 1. One day before the expiry of the extended period, W.P.No. 4006 of 1996 was filed by the respondent No. 1 seeking mandamus to the respondent No. 2 to consider further extension of, contract upto 31-5-1996. That petition was disposed of on 28-2-1996 itself directing the respondent No. 2 to consider the request made on 20-2-1996 for further extension in view of the difficulties faced by the respondent No. 1. The respondent No. 2 considered the matter and passed orders on 12-3-1996 refusing to extend further time saying that even in the absence of specific provision in the contract for extension, yet extension had been granted upto 29-2-1996 so as to enable the respondent No. 1 to release the maximum quantities under the contract and for the purpose the excavation/ mining contract had also been extended. Clauses 14 and 4 of the contract, saying that in the event the Corporation fails to supply, the backlog will be carried forward in succeeding month /succeeding months within the contract period only, were referred as the reasons for which the respondent No. 2 was unable to extend the contracts of 17-1-1994 and 27-1-1995. Any amount lying to the credit of respondents was offered to be refunded. Respondents No. 1 and 3 thereafter filed W.P. Nos. 5704 and 5763 of 1996 on the very same grounds on which W.P.No. 4006 of 1996 had been filed. Order was passed in W.P.No. 5704 of 1996 by a learned Single Judge on 22-3-1996 that the ground urged before him was non-consideration by the respondent No. 2 of the question of extension in the background of Clause 18 of the contract which was a ''force majeure'' clause, but that the representation made to the respondent No. 2 by respondent No. 1 had not been mad e on such ground, the respondent No. 1 was directed to make a detailed representation on or before 26-3-1996 referring to Clause 18 of the contract and also giving reasons as to why the contract has to be extended, and that if such application is made, the respondent No. 2 is to consider the same and pass reasoned orders before 8-4-1996 keeping in view Clause 18 of the contract. He further directed that till such time the matter is considered and decided, the respondent No. 2 shall not enter into contract with third parties for the subject matter covered by the writ Petition, for the sale of Barytes. Order was passed on the same day on the other writ petition that the petitioner therein, respondent No. 3, may join the respondent No. 1 in making the representation. The representation was made on 26-3-1996, in consideration of which respondent No. 2 passed the impugned order on 15-4-1996 extending the contract for a period of 3 1/2 months to supply 88,889 M-Ts of Barytes which the respondent No. 1 shall produce, purchase and transport. A new price, Rs. 550/- per M.T. was fixed for supply but the rates of payment for removal of over burden and production of ROM was confined to the rates of the original excavation contract of 15-12-1993 at the rate of Rs. 19.48 and Rs. 23.98 per

M.T. respectively. While the respondent No. 2 was so proceeding with the respondent Nos. 1 and 3, the appellant was persisting in its request for supply of Barytes. In its letter dt. 30-3-1996, it urged that all prior commitments to respondent No. 1 ended on 17-1-1996 and that even the extension granted to respondent Nos. 1 and 3 had expired on 29-2-1996. It requested, elaborating the difficulties faced by it, for immediate supply of 35,000 M.Ts of A grade Barytes, and also pointed out that it had been compelled earlier to divert its order for 30,000 M.Ts to China for which there was loss of foreign exchange earnings to India to the extent of Rs. 6.61 crores. Since in these circumstances the extension was granted to the respondent Nos. 1 and 3 for 3 1/2 months and it was in pursuance of the direction in W.P. No. 5704 of 1996, the appeals were filed with the permission of the Court It is also the case of the appellant that in its application for leave to appeal filed on 5-4-1996 it stated the prevailing market rate of Barytes to be about Rs. 550/- per M.T. and it being prepared to purchase Barytes at that price for which reason the sale price was fixed for the respondent Nos. 1 and 3 at the rate of Rs. 550/- per M.T. in the order of 15-1-1996.

4. The appeal is contested by all the respondents. Respondent No. 2 has filed counter affidavit saying that in extending the period of contract the Corporation has taken into note that the loss of days was not due to any reason attributable to respondents Nos. 1 and 3 and that the Corporation had been unable to supply 88,000 M.Ts out of 6,00,000 M.Ts agreed to be sold. The Board of Directors of the Corporation considered the representation of respondents 1 and 3 for extension and the force majeure clause, as per the orders of the Court on 22-3-1996 which had directed the Corporation to pass reasoned orders on the representation before 8-4-1996 and not to enter into the contract with third parties till a decision is taken. The Board also noted that no tender notification could be immediately made in view of the poll notification released by the Election Commission for the 11th Lok Sabha Elections. As 209 working days had been lost, Clause 18, the force majeure clause of the contract was applicable. Respondents 1 and 3 have filed counter-affidavits questioning the maintainability of the appeal and stated that they were entitled to extension as a matter of right and no largesse was being distributed to them. Besides, stand is also taken that the appellant being a defaulter to the Corporation it was also ineligible in getting supplies of Barytes from the Corporation.

5. On behalf of the appellant, argument has been advanced by Mrs. Nalini Chidambaram that on the eve of the expiry of the extension granted to respondents 1 and 3 upto 29-2-1996, they had moved the Court for further extension on the same grounds of hardship of loss of working days and orders had been passed directing the respondent No. 2 to consider the representation and pass orders. The order of the Court having been complied with and the representation having been considered and rejected on 12-3-1996, there could not be any occasion to file a second writ petition on the same cause of action. It is also the submission that the order of the learned single Judge on 22-3-1996 in

W.P.No. 5704 of 1996 was exclusively based upon consideration of Clause 18 of the contract taking the view that under that clause the respondents 1 and 3 were entitled to extension. But however Clause 18 is not at all applicable or invokable by the respondents in granting the extension. The Corporation had rightly rejected the representation earlier in view of clauses 4 and 14 of the contract. The learned single Judge had proceeded on erroneous impression of applicability of Clause 18 and directed the respondent No. 2 to comply with the order. The order being not sustainable in law the order passed by the respondent No. 2 in pursuance of it is also liable to be quashed. The extension granted is in effect a new contract in favour of the respondents 1 and 3 for which all others in the field including the appellant had to be considered. The submissions have been repelled by Mr. Ramana Reddy, appearing for respondent No. 1, Mr. Sudarshan Reddy for respondent No. 2 and Mr. N. Narsimha Rao for respondent No. 3, urging that the appellants have no locus standi to maintain the appeal and that the extension granted to respondents 1 and 3 cannot be questioned by a business rival.

6. Argument has been tenaciously advanced that the appellant cannot be a ''person aggrieved'' for the extension granted to the respondents 1 and 3 and that it is only a business rival at whose instance the Court could not invoke its extra- ordinary jurisdiction. The appellant is undoubtedly a person highly interested in the sale of Barytes by the respondent No. 2 and as the narration of facts reveal, was not only a participant and competing bidder to the assignment culminating in favour of respondent No. 1 on 17-1-1994 but also has been successively trying throughout to get quantities of Barytes allotted to it and has even gone to the extent of purchasing the material outside the country to meet its commitments. It hence cannot be described as an interloper frivolously trying to abuse the process of the Court. It has a vital interest in the success of the appeal since in the event it succeeds, its candidature before the respondent No. 1 would remain available to be considered for sale of Barytes. The question is not of a business rival taking to litigation and urging technicalities to keep another party out of the field, but is one of making grievance before the Court of the denial of fundamental right of equal consideration to it in the matter of allotment of Barytes where it finds itself being excluded from the field. Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others, , on which reliance has been placed by Mr. Ramana Reddy was one where the rival in the field was invoking certiorari jurisdiction to quash the no objection certificate granted under Rule 6 of the Bombay Cinema Rules, 1954. The Court held him to be not a person aggrieved as the Bombay Cinema Regulation Act and the Rules did not confer any substantive justiciable right on a rival, apart from the right he had in common with the rest of the public, to lodge objection in response to the notice under Rule 4. The very test evolved in the case to distinguish between ''persons aggrieved'' and ''strangers'', of whether the applicant is one whose legal right has been infringed and whether he has suffered a legal wrong or injury, cannot be said to be not applicable to the appellant as it is now well settled that in the

matter of grant of a public contract by the State, either a person who was refused to be considered or others where the grant has been made in non-consideration of their cases who were otherwise eligible to be considered, have right fully grievance to urge of the equality clause to have been infringed as such persons have suffered legal injury or wrong. The Nagar Rice and Flour Mills and Others Vs. N. Teekappa Gowda and Bros. and Others, was considered in the case. Rajappa Kawati Vs. G. Hanumantha Rao and Others, is also a case of objection raised by a business rival to grant of permit to another under the Motor Vehicles Act and was rightly decided on the principles of J.M. Desaiv. Roshan Kumar''s easel but would have no application to the case on hand. Another case cited, Adi Pherozshah Gandhi Vs. H.M. Seervai, Advocate General of Maharashtra, Bombay, explaining the scope of the words ''person aggrieved'' is only a reiteration of the same principle. The other decisions brought to our notice Dr. Satyanarayana Sinha Vs. S. Lal and Company (P) Ltd., ; Bar Council of Maharashtra Vs. M.V. Dabholkar and Others, and K. Narayana v. Govt. of A.P., 1988 (1) ALT 739 also do not lay down any different proposition. In the well known case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, it was observed, considering the argument as to whether a person who had not at all submitted a tender:

"It was contended on behalf of the 1st and the 4th respondents that the appellant had no locus standi to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, what did it matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondent was wrongly accepted. A person whose tender was rejected might very well complain that the tender of someone else was wrongly accepted, but, it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint? This argument, in our opinion, is misconceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondent, but that he was differentially treated and denied equality of opportunity with the 4th respondent in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondent were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible."

Expounding the new approach and the role of the Government in the modern day as regulator and dispenser of special services and provider of a large number of benefits including jobs, contracts, licences, quotas, mineral rights etc., it was said :

"Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/ structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will."

I must hence hold the appellant as not disentitled to maintain the appeal on the plea of disability as is advanced.

7. The question is whether the order of the learned single Judge dt. 22-3-1996 was on an erroneous appreciation of Clause 18 of the contract. Admittedly, respondent No. 1 had approached the Court earlier in W.P.No. 4006 of 1996 seeking directions to the respondent No. 2 for further extension of the contract and the Court had passed orders directing the latter to consider the representation. The order of the Court was carried out, but after considering the respondent No. 2 intimated the respondents 1 and 3 that no further extension can be granted. That decision was based upon consideration of Clauses 4 and 14 of the contract. Thereafter, the respondents 1 and 3 again approached the Court by filing fresh petitions and during the arguments advanced the plea of the benefit of Clause 18 of the contract to have not been allowed to them. The learned Judge accepted such plea but said that in the representation such plea had not been taken and hence they must make a fresh representation taking such stand and the respondent No. 2 was to decide their case keeping in view the provisions of Clause 18. It was further directed that till such decision is taken the respondent No. 2 was prohibited from entering into contract with others. Hence the entire back ground of the order of the learned single Judge was Clause 18 of the contract. It is however tine submission of Mrs. Nalini Chidambaram that Clause 18 is not a beneficial provision for the contractors and only vests authority in the Corporation to suspend the contract and eventually to cancel it. No corresponding obligation is created on the Corporation in the matter. Clause 4(a) of the contract provides that in the event of the respondent No. 2 failing to supply, the backlog is to be carried forward to the succeeding month/succeeding months but within the contract period only, and such backlog supplies are to be supplied at the prevailing market rate at the time of the supply. Hence, the suspension of the contract under Clause 18 can be maximum upto the expiry of the contract unless earlier cancelled by the Corporation and that by the period the contract expires, suspension also lapses. To appreciate the submission, Clause 18 of the contract may be extracted:

"18 FORCE - MAJEURE:

In the event of either party being rendered physically unable by Force Majeure to perform any obligation required to be performed by them under the contract, the relative obligation of the party affected by such Force Majeure shall be suspended for the period during which such cause actually lasts. The term "Force Majeure" shall mean acts of God, War, Civil riots/movements, fire directly affecting contract, flood, earthquakes, hurricane, lock-outs, strike, civil war, compliance with any statute or regulation of the Government. Upon the occurrence of such cause and upon its termination, the party alleging that it has been rendered unable as aforesaid thereby, shall notify the other party in writing within a week of the alleged beginning and ending thereof giving full particulars and satisfactory evidence in support of its claim. If deliveries are suspended by Force Majeure conditions lasting for more than three months, the seller shall have the option of cancelling the contract in whole or part at its discretion without any liability on its part."

8. An analysisof Clause 18 show it is to consist of three parts: (1) If either party is rendered unable by force majeure circumstances to perform its obligation, the performance of the obligation shall remain suspended during the period the situation continues; (2) An explanation as to what would consist the Force Majeure; and (3) If deliveries are suspended because of force majeure conditions for more than three months, the Corporation shall have the option to cancel the contract in whole or in part. There is of course also the condition that to enable the party to the contract to the plea of force majeure, it has to give notice to the other party within a week of both the beginning and end of the event with satisfactory evidence in support of the claim. The purpose of the notice is. obviously to enable the other party to verify the genuineness of the claim and abide by the suspension of the contract. But, as is well known, notice is for the benefit of other party to whom it is to be given and it is always within its competence to waive the notice. If it does not insist upon the notice and accept the fact that there is actually force majeure situation disabling the affected party to carry out its obligation, the commencement of the suspension and its continuance cannot be arrested and that too at the instance of outsiders. Hence if the contract remains suspended, it continues to be effective for the entire period of the disabling circumstance unless of course the contract is cancelled earlier. There is no compulsion in the agreement for the Corporation to cancel the contract in all eases. Only an option has been given to it to exercise the power at its discretion. A petition would not lie in the Court by an outsider to compel the Corporation to cancel the contract because the force mejeure circumstances have lasted beyond three months. The power is given to the Corporation to cancel so that in a given situation it can assess the realities and decide as to the bona fides and genuineness of the claim as also its own interest and take decision, whether to cancel the contract or allow the suspension to continue until the situation ends. Clause 4 of tine contract would have no play in the interpretation of Clause 18. That is a clause which in general deals with the situation of failure of the Corporation to supply saying that the backlog is to be carried forward to the succeeding month or months but only within the period of the contract. Since Clause 18 is a specific provision relating to force majeure circumstances it has to be understood as excluding the applicability of Clause 4 to it which is of general nature of failure of supply by the Corporation, on the principle of generalia specialibus non derogant. Even otherwise/ strictly speaking, a force majeure

clause is not failure of the Corporation to supply but is one because of which supply becomes impossible. "Failure to supply" would rather indicate a voluntary act or even of a non-voluntary act but not because of the reasons which have been explained as force majeure,

9. With this understanding of the scope of the operation of Clause 18 of the contract, the correctness of the order passed by the learned single judge and the consequential order passed on 15-4-1996 has to be appreciated. Since objection that Clause 18 of the contract is non-invokable is not correct, exception to the direction of the learned single Judge is not legally sound. All that was directed was that the respondents 1 and 3 would be permitted to plead the force majeure clause and that the respondent No. 2 had to take decision in the matter. There is no denying of the fact that in actuality force majeure circumstances existed which has been adverted in the counter-affidavit of the respondent No. 2 saying that the mine was inundated since May, 1995 and there was also strike both of which factors affected supplies and that the total loss of working days was 209 days. Such fact is not controverted by the appellant and indeed no argument has been advanced challenging the fact. Since notice is not insisted and force majeure is admitted the con tract was bound to be suspended. The facts of the case show that apparently lack of notice has been waived. Hence the contract was liable to have been suspended for 209 days. Out of the 209 days the contract had been extended from 18-1-1996 to 29-2-1996 i.e., a period of 43 days and the balance period comes to 3 1/2 months. By order of 15-4-1996 the contract has been extended for such period only. It was, of course, open to the respondent No. 2 to decide while considering the matter in pursuance of the direction of the learned single Judge, that the benefit of Clause 18 was not available because of notice having not been given as required under the clause. But it is equally true that notice might not have been insisted upon as has been done, and hence the suspension would be an accepted fact.

10. It is also not correct that the appellant would have a legal say in the matter. The situation is one which arises out of the contract and is provided for, for its solution, in the contract itself. Since the parties are acting within the contract, it is not open to the appellant to challenge the same in a petition under Article 226 of the Constitution. Thus, though there is no incompetence in the appellant on the pleas advanced by the respondents to maintain the appeal, as earlier discussed, yet inasmuch as the impugned decision arises out of the contract between the parties, there cannot be locus standi for the appellant to challenge the order.

11. In taking the view I am aware of the decision in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, cited before us on behalf of the appellant, on the principle that in the pretext of a supplemental agreement a fresh agreement cannot be entered into. A reading of the case shows that the facts in that case to be wholly different. There, in effect a fresh agreement was entered into for a period of seven years. The supplemental

agreement had been entered into for the benefit of the parties who were admittedly defaulters consecutively for four years so far as Bombay was concerned and for three years so far as Delhi was concerned. Facts in the instant case are completely different.

12. An affidavit has also been filed by the appellant pleading mala fides in the decision taken on 15-4-1996 saying that the Managing Director of the respondent No. 1 Sri K. Rajamohana Reddy joined the ruling Telugu Desam party on 20-3-1996 and it is on such consideration that the order was passed in favour of respondent No. 1. A counter affidavit has been filed denying such facts. The matter has also not been seriously argued before us. I hence reject the plea. The respondents have also submitted of the appellant being a defaulter to respondent No. 2 and hence not entitled to any supply by it for which it has no locus standi to come in appeal. The fact has been denied by the appellant filing affidavit to show that as against the demand raised against it, a stay order has been passed in its favour. I hence do not entertain the plea.

13. In the result, both the appeals are dismissed with costs. Hearing fee is Rs. 1000/- in each case.