(1996) 08 AP CK 0016

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 944 of 1996 and W.P. No. 10407 of 1996

Gimpex Limited APPELLANT

Vs

State of Andhra Pradesh and Another RESPONDENT

Date of Decision : 27-08-1996

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1996) 4 ALT 439

Hon'ble Judges : P.S. Mishra, C.J;Syed Saadatulla Hussaini, J

Bench : Division Bench

Advocate : P. Srinivas and Leo Raj, for the Appellant; A.G. and Government Pleader for Respondent No. 1 and A. Sudershan Reddy, for the Respondent

Final Decision : Allowed

Judgement

P.S. Mishra, C.J.—The petitioner-appellant Company/ it is not in dispute, is allotted 20,000 metric tonnes of Chemical ''A'' Grade Barytes under an agreement by the Andhra Pradesh Mineral Development Corporation, (hereinafter called ''the Corporation''), which is a State Government undertaking. The Corporation has- the sole prerogative to expolit the sub-soil mineral rights in the area. The above agreement, which is reflected in the letter dated 19-10-1995, however, has not been honoured by the Corporation, it is alleged, because by an order dated 19-10-1995, the supply was suspended purportedly under the instructions of the Principal Secretary to the Government, Department of Industries and Commerce. The petitioner-appellant, however, addressed a letter dated 26-10-1995 to the Secretary concerned and sought action for delivery of the Barytes, pursuant to the said agreement. The letter remained unreplied and it is alleged, while in the case of the petitioner-appellant, the Corporation has chosen to suspend the agreement without formally cancelling the same, in the case of M/s. Trimex Industries Limited and others, who are similarly situated, it has proceeded to honour the agreements.

2. The Corporation, in its counter, has admitted the agreement and also that the

same has not been given effect to. It has explained, however, that M/s. Trimex Industries Limited and others are supplied Barytes pursuant to the agreements because they are prior commitments and that the Corporation is bound to give effect to the directives issued by the Government, particularly when the Secretary, Industries and Commerce, Government of Andhra Pradesh reviewed the performance of the Corporation on 21-10-1995 and instructed the Corporation to send a special report in connection with the supply of 5,000 metric tonnes Chemical Grade ''B'' to the petitioner-Company and await Government''s instructions before giving any contract to outside parties, particularly when already the contracts were entered into with two parties i.e., M/s. Trimex Industries Limited and M/s. Indian Barytes and Chemicals Limited. Since the Government has not given clearance and the validity of the supply order had expired by 29-2-1996, the Corporation has not complied with the terms of the agreement. The Corporation has also contended that materials for supply to the petitioner-Company are not available, which fact has been seriously contested by the petitioner-appellant

3. It is conceded before us on behalf of the Corporation that its supply of Barytes to any party is linked up with excavation work and it has not given any answer to the contention that in respect of supply of 1.1 lakh metric tonnes of ''13'' grade Barytes to Trimex, it has entrusted further excavation and after extraction Barytes have been supplied. Learned Single judge, however, has held as follows:-

"The learned Counsel for the petitioner submits that the contention that material is not available for supply to the petitioner-Company cannot be correct; inasmuch as the Corporation is linking up the supply with excavation work, and in fact, it was done immediately in respect of supply of 1.1. lakh Metric Tonnes of ''B'' Grade Barytes to Trimex, The petitioner- Company has purchased dump material of about 2.25 MTs. of low Grade Oreata fairly higher consideration of Rs. 105 lakhs with the hope of getting supply of High Grade Barytes which was acknowledged by the Corporation in its letter dated 26-10-1995. The IBC and Trimex have got their period of contracts extended for supply of material to them and in the case of the petitioner-company the Corporation is contending that the period for which the contract is in force has expired which is discriminatory under Article 14 of the Constitution. The learned Counsel for the Corporation, on the other hand, submits that the Corporation is a fully owned State Government undertaking, and therefore, it is governed by the directives issued by the Government from time to time. Under Article 100(A), the Government reserved its right to call for any information, approve plans, budgets, foreign collaborations, new business and activity etc. Therefore, according to the learned Counsel for the Corporation, the Government decided not to enter into fresh contracts with third parties as two such contracts are pending execution with IBC and Trimex. Even in the letter dated 19-10-1995, the offer is hedged by several stipulations, such as 5,000 MTs will be supplied subject to production, availability of stocks, prior commitments, requirement of the Corporation to meet the supplies to IBC and Trimex under existing contracts. Therefore, the contract is not a pure and simple contract for supply of 5,000 MTs of Barytes, but the fulfilment of which depends upon several factors indicated in the said letter. That apart, the validity of the contract is also limited to 29-2-1996, and thereafter, it will not be inforce. There fore after expiry of the time fixed under the contract, the petitioner- Company cannot seek for delivery of mineral by extending the time. In fact, the contract entered into with IBC is by open tenders and not by private negotiations. As per the contract, time expires by 17-1-1996 for supply, but however, time was extended upto 29-2-1996. Both IBC and Trimex approached the High Court in Writ Petition No. 5263 of 1996 and the High Court directed both of them to make representations before the Corporation which shall be considered by 8-4-1996, and till the representations are disposed of, the Corporation shall not enter into any contract with third parties. However, the learned Counsel for the petitioner-Company submits that the discrimination as suffered by the petitioner is vis-a-vis, Trimex, inasmuch as Trimex was also accorded contract on negotiations and not by calling tenders from the public. The learned Counsel representing the Corporation submits that although Trimex was awarded a contract under private negotiations for supply of low Grade varieties, however, the contract was extended from 17-1-1996 up to 29-2-1996 keeping in view the factors like mine inundation, strike of employees, and there is a balance of 55,012 MTs to be supplied to Trimex. In fact, this contract in favour of Trimex cannot also be termed as the contract by private negotiations. Both IBC and Trimex as well as the petitioner submitted their tenders quoting the rates of Barytes. The IBC being the highest bidder was awarded the contract As Trimex has also offered the same price, but with a difference of 10 Ps. per Metric Tonne, it is felt that some quantity can be given to Trimex so that the material available can be disposed of and cash can be realised to meet the other requirements.

The contention that the petitioner-Company has purchased 2.25 lakhs MTS of low Grade Ore at a higher price with a view to secure contract for supply of Chemical High Grade Barytes, cannot be accepted as there is no tie up for the supply of chemical Grade Barytes with the purchaser of low Grade Ore. No connection whatsoever between the two transactions could be established by the petitioner-Company on the basis of any correspondence or proceed ing that passed between the parties. Therefore, purchase of 2,25 Lakhs Metric Tonnes of low Grade Barytes by the Petitioner-Company has nothing to do with the supply of Chemical Grade Barytes.

The learned Counsel for the petitioner submits that non-availability of Ore is not a relevant factor in the context of supply of Chemical Grade Barytes to the petitioner-Company as agreed by the Corporation. According to the learned Counsel, whenever material is not available there can be a matching order for excavation and such an order can be given either to the petitioner or to others. This contention pre-supposes that notwithstanding the fact that the supply is agreed subject to availability of stock, the Corporation has to explore the possibility of ways and means to raise the stock and to supply the same to the petitioner- Company. I am afraid this amounts to travelling beyond the terms of the contract. However, the contract itself is circumscribed by several conditions, and subject to, those conditions only contract can be fulfilled. Under these circumstances, I am of the view that there is no obligation on the part of the Corporation, as suggested by the learned Counsel for the petitioner, to grant a matching contract for excavation of the Ore to fulfil the contract in question.

The learned Counsel for the petitioner vehemently argued discrimination is writ large in this case. According to the learned Counsel, the petitioner-Company and Trimex stand on the same footing, both having been awarded contracts by private negotiations, and therefore, they should be treated alike, while in fact they were not treated, but discriminated. Without any basis Trimex was extended time as required; whereas, the petitioner-Company was told that the time under the contract has expired. Although this contention appears attractive at the first flush, but on deeper probe it does not stand the test of scrutiny. The Trimex as well as the petitioner participated along with IBC for supply of Barytes by submitting their tenders. IBC became the highest bidder while Trimex came second as it offered 10 Ps. less for each Metric Tonne when compared to IBC. Therefore, the Corporation thought that as the difference is negligible, Trimex also should be awarded some contract so that the available stock can be moved and cash can be realised to meet the other pressingneeds. Therefore, both the petitioner-Company and Trimex cannot be equated on the same footing. That apart, there is also a direction by this Court to consider the applications of the IBC and Trimex for extension of time. Taking into consideration the inundation of mine, strike of the employees at the project and as they were unable to quarry substantial quantity of Ore so as to fulfil their obligations, the Corporation has extended the period. This has no analogy with the contract entered into by the petitioner-Company which is purely by private negotiations. Further, the Government who fully owns the Corporation has issued directives not to enter into contracts with third parties until the existing contracts with third parties are fulfilled. The Corporation is bound to follow the said directives of the Government. It cannot be said that there is any discrimination between the petitioner-Company and Trimex as the circumstances governing both the cases are entirely different."

4. It is not in dispute that the Corporation has the sole authority and that it is free to sell the mineral to any person. Since it has entered into the sale agreement with the petitioner-appellant, Corporation has an obligation to honour the contract. It has, however, not done so the immediate cause being the interference by the Principal Secretary to the Government of the State in the department concerned, who wanted suspension of the contract until cleared by - the Government. No order has been issued by the Government in this behalf and thus it is not known whether there was any good reason for the Government to suspend the contract. Learned Additional Advocate General,'' who has appeared for the Corporation, has however, not been able to bring to our notice any provision of law under which the Government can exercise such a control that an agreement of sale already entered into by the Corporation can be cancelled or

suspended by the Government. One of the settled principles of law is that a contract of purchase is one which includes not only the writing of but execution of the contract work resulting in supply of the material sold. A contract entered into by the Corporation with the petitioner-appellant is a thing done and as it is well understood, it shall include the legal consequence or effect of it which naturally is the supply of goods sold. In Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports and Others, the Supreme Court has read in the words "things done" in French Establishments'' (Application of Laws) Order, 1954. Paragraph 6 to be comprehensive enough to take in a transaction effected before the merger of the French territory of Pondicherry with the Indian Republic to include the transactions including giving effect to the contract and all legal consequences under the laws applicable to imports and exports before the merger and not under Imports and Exports Trade (Control) Act, 1947 and the Sea Customs Act. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, the Supreme Court has pointed out that where instrumentality of a State carries on monopoly or semi-business it attracts the application of the fairness and to that extent is in the public law field- The Supreme Court has said:

"In cases where the instrumentality of ''he State enters the contractual field, it should he governed by the incidence of the contract. But even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering in to a contract, are subject to judicial review on the touch stone of relevance and reasonableness, fair play, natural justice, equality and non- discrimination in the type of the transactions and nature of the dealings."

Going by the above principles of law, it is clear that the Corporation has denied to the petitioner-appellant the legal consequences of the contract unfairly and unreasonably. Corporation has acted under the instruction of the Principal Secretary of the Government, who apparently has/had no authority to interfere in discharge of the contractual obligations of the Corporation. The letter by him, to withhold the supply of Barytes to the petitioner-appellant, is undue interference and Corporation has acted upon the same, obviously by a mistake which has resulted in vitiating its conduct by malice in law.

5. Other grounds, including the ground that it does not have the required grade of Barytes to honour the contract raised on behalf of the Corporation, are only half-hearted and appear to be designed for the purpose of meeting the challenge on behalf of the petitioner-appellant in the Court. We do not propose to go into any detailed discussion on these aspects of the plea of the Corporation for the simple reason that if it desired to honour the contract with the petitioner-appellant, it could do so in the same manner as it has done in the case of other parties and renegotiate the schedule ay it has done in other cases. It is a fit case, in our opinion, to hold that Corporation has acted arbitrarily and unreasonably and in this regard violated Article 14 of the Constitution of India.

We have, however, noticed that delays in the execution of the contract have in the meanwhile introduced quite a few other considerations including rise in the price of Barytes in the International market. If the Corporation has to sell Barytes at the rate fixed under the agreement aforementioned, the public interest of revenue shall suffer. To save the same, one cannot, but report that a fresh negotiation in respect of the price to keep the same at the prevailing market rate is necessary. Petitioner-appellant has filed an affidavit stating that it is ready to increase the rate by Rs. 100/- per metric tonne and learned counsel appearing for the petitioner-appellant has stated in the Court that it shall have no regrets in agreeing to the prevailing market rate of sale of Barytes i.e., such reasonable rate which the Mineral Development Corporation shall determine for it.

6. In view of the above, we have more reasons to interfere with the impugned judgment. The same is accordingly set aside. The Writ Appeal is allowed. The Writ Petition is also allowed and the respondent-Corporation is directed to fulfil its obligation under the aforementioned agreement undeterred by the interference of the Principal Secretary to the Government and for the said purpose re-negotiate the time schedule and the rate of sale of Barytes with the petitioner-appellant within a reasonable time, preferably within two months and accordingly resume supply of Barytes on the same terms and conditions except modifications in the time schedule and rates as in the agreement aforementioned. On the facts and circumstances of the case, there shall be no order as to costs.

