
(2022) 08 BOM CK 0078
In the Bombay High Court
Case No : Writ Petition No. 7369 Of 2019

Kiran

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 19-08-2022

Acts Referred:

Citation : (2022) 08 BOM CK 0078

Hon'ble Judges : Mangesh S. Patil, J;Sandeep V. Marne, J

Bench : Division Bench

Advocate : V.H. Dighe, S.S. Wagh, M.A. Deshpande

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1. Rule.

2. Rule made returnable forthwith. With consent of the learned Advocates for the respective parties, heard finally at the state of admission.

3. The short issue involved in the present petition is about entitlement of proportionate refund of amount paid for the extraction of sand if the contractor is unable to extract the permissible quantity of sand within the stipulated period. Also involved is the issue whether flooding of river due to release of water from reservoir can be considered as a 'natural calamity' for the purposes of grant of such refund.

4. The facts of the case, as captured from pleadings filed before us, stated are as under :

Petitioner claims to be a Civil Contractor who had participated in e-tender process initiated by respondent No.3 and was awarded the work order dated 18.01.2014 for extraction of sand from the bed of river Tapi at Spot Nos. 3 and 4 of Gut No. 28, village Jallod, Taluka Amalner. By work order, the Petitioner was

permitted to extract 12862 brass sand by 30.09.2014. It is the case of the petitioner that by 30.09.2014, when the tenure of the work order ended, he was able to extract only 4291 brass sand. The Petitioner appears to have deposited an amount of Rs. 1,08,99,999/- for extraction of 12862 brass sand. On account of inability to extract remaining quantity, petitioner is claiming proportionate refund of the amount paid by him to the Government.

5. The claim for refund is premised on two reasons cited by petitioner for his inability to extract the permissible quantity of sand. Firstly, on account of complaints made by the villagers, the Additional Collector, Jalgaon had passed an order dated 24.06.2014 staying the contract of the petitioner. The stay was lifted only on 11.07.2014. The second reason, according to the petitioner, is the flooding of river Tapi from 22.07.2014, on account of which, he was prevented from extraction of sand till 18.09.2014. He claims to have sent an intimation to the Tahsildar, Ahmednagar on 18.09.2014 stating that he had stopped extraction activities on account of damage to the suction pumps, approach roads etc. due to floods. He seeks to blame these two reasons/factors for his inability to extract permissible quantity of sand.

6. The petitioner claims that he made several representations, seeking extension of the contract period or alternatively proportionate refund of the bid amount. Thereafter an appeal came to be filed before the Minister, Revenue Department, on 21.11.2015, praying for the extension of contract period or for proportionate refund of the bid amount. A reminder appeal was filed on 07.05.2016. Crying non-decision of appeals, he filed Writ Petition No. 9145 of 2016, which was disposed of with a direction to decide the appeal/representation. It appears that the petitioner was required to file Contempt Petition No. 13 of 2017 on account of non decision of the appeal/representation. He claims that after getting a wind of filing of Contempt Petition, Respondent No. 1 hurriedly passed order on 30.01.2017 rejecting the appeal/representation.

7. The petitioner thereafter, once again approached this Court by filing Writ Petition No. 2947/2017, challenging the order dated 30.01.2017 which was disposed of by order dated 01.03.2018 setting aside the order dated 30.01.2017 and directing re-consideration of application filed by the petitioner for refund of proportionate amount by considering the report given by the Tahsildar, after giving hearing to the petitioner. Respondent No. 1 thereafter passed order dated 05.12.2018 partly accepting the claim of the petitioner for refund, in respect of the period from 24.06.2014 to 11.07.2014 when there was stay granted to the Collector. He is held to be entitled to proportionate refund. However, his claim for refund on account of flood in the river has been rejected by relying upon paragraph No. 'C'-(22) of the Government Resolution dated 12.03.2013. It is this order dated 05.12.2018, which is the subject matter of the challenge before us in the petition.

8. Appearing for the petitioner Mr. V.H. Dighe, has assailed the order dated 05.12.2018 primarily on the ground that even though this Court directed

consideration of the case in the light of paragraph 'C'-(15) of the Government Resolution dated 12.03.2013, respondent No. 1 has ignored the said Clause and has once again rejected the prayer for refund of appropriate amount by relying on paragraph 'C'-(22) of the said Government Resolution. He further submits that despite this Court directing respondent No. 1 to take into consideration the report of Tahsildar, the same has not been considered while passing the impugned order. He further submits that Clause 'C'-(22) does not deal with the aspect of refund but deals only with the aspect of extension of time. According to him, the provision for refund is to be found in paragraph 'C'-(15) of the Government Resolution dated 12.03.2013. He further submits that deposit of water in sand spot, though may not be a valid ground for extension of contract or for replacement of sand spot under Clause 'C'-(22), the same has been recognized in the provision for refund under Clause 'C'-(15). Mr. Dighe, has laid great stress on the report of the Tahsildar, as well as a tabular chart at Exh.-'E', showing the details of release of water in river Tapi during July-2014 to September-2014.

9. Mr. Dighe, has placed reliance on the judgment of this Court in Shivaji J. Chavan Vs. The State of Maharashtra and Ors. - Writ Petition No. 12089 of 2013 decided on 09.07.2015.

10. Per-contra, Mrs. M.A.Deshpande, the learned Additional Government Pleader appearing for the State Government defends the impugned order by submitting that deposit of water in the sand spot or flooding in the river, having been specifically excluded for either grant of extension or for refund, Petitioner cannot claim refund under that pretext. She refers to similar provision under Clause 26 of the Work Order. She has further submitted that the petitioner was permitted to use as many as four suction pumps on his request by the Collector, as a special case so as to enable him to extract sand from deposited water. She submits that the petitioner has to blame himself for his inability to extract the permissible quantity of sand within the permissible period.

11. Before we advert to the merits of the rival contentions, it is necessary to clarify that even though the Petitioner had raised alternate demands for extension or refund in his appeals/representations, before us only the prayer for proportionate refund has been made.

12. Having heard the learned Counsels for the parties at length, we find that the entire issue revolves around the interpretation of Clauses 'C'-(15) and 'C'-(22) of the Government Resolution dated 12.03.2013. Clause 'C'-(15) provides that the contractor cannot sue the Government if the contract is terminated or he is prevented from extraction of sand from the permitted area. The Clause further provides that in the event of protest from villagers, Court orders, natural calamities, opposition from administrative machinery, if the extraction or transportation is affected or if possession of sand spot is not handed over, the proportionate refund of the bid amount is permissible in respect of period during which the contract is suspended.

13. As against this, the paragraph 'C'-(22) essentially deals with the tenure of contract and permissibility of extension thereof. It provides that the period of contract is maximum of one year and would ordinarily be between 1st October to 30th September. It further provides that irrespective of the date of tender process, the contract would come to an end on 30th September. It further provides that it would be the responsibility of the successful bidder to extract sand in permissible quantity within the tenure of the contract. The Clause further provides that the tenure of the contract shall not be extended, nor an alternate sand spot would be provided for the reasons of non-availability of expected quantity of sand, non availability of roads, deposit of water in the sand spot or for the reason of any human or natural calamity.

14. Even though, one may say that Clauses 'C'-(15) and 'C'-(22) operate in different spheres, both essentially relate to the eventualities of non extraction of permissible quantity of sand. Clause 'C'-(22) imposes an absolute ban on extension of tenure of contract or allotment of alternate sand spot for any reason whatsoever. Even for the reason of deposit of water in the sand spot. As against this, Clause 'C'-(15) permits refund if the contract is terminated on account of occurring of eventualities stated therein. Natural calamity is one such eventuality.

15. The petitioner has contended that his case for refund cannot be governed by Clause 'C'-(22) and it ought to have been considered in accordance with the provisions of Clause 'C'-(15). It is his case that the flooding of river is covered by the eventuality of 'natural calamity'. The claim for refund is thus premised on the alleged natural calamity in the form of flooding of the river.

16. Accepting the Petitioner's contention that Clause 'C'-(15) alone would govern his case, we proceed to examine his claim as per the provisions of Clause C(15). On strict interpretation of Clause C(15), refund is permissible only in respect of the period during which the contract is terminated. The eventualities for which such contract might be terminated have been enlisted in Clause 'C'-(15), which inter alia includes natural calamities. However termination of contract appears to be the sine qua non for entertaining claim for refund. On slight liberal interpretation of the Clause, 'termination' might be construed to include even 'suspension' of contract due to eventualities named therein. However in the instant case, Petitioner's contract was neither terminated nor suspended on account of alleged flooding of the river. Hence, Petitioner's claim for refund falls outside clause C(15) and for this reason alone the claim for proportionate refund is clearly untenable.

17. We find that the Respondents have correctly dealt with Petitioner's case for refund under clause C(15). His claim for proportionate refund in respect of the period from 24.06.2014 to 11.07.2014 when his contract was suspended, has been sanctioned. This is because during that period, his contract was suspended and the suspension was on account of one of the permissible eventualities viz. stay by Collector. However, since his contract was never suspended on account of alleged flooding in the river, there is no question of granting the claim for

proportionate refund.

18. Even if Clause 'C'-(15) was to be further liberally interpreted by not applying the test of 'termination' or 'suspension' of contract, in our opinion the case of the petitioner would not fall within the eventuality of 'natural calamity'. Release of water from a reservoir is a natural phenomenon occurring every monsoon and the contractors bidding for sand extraction from river beds are expected to factor in this eventuality while submitting the bid. A prudent contractor would schedule the total available period for extraction in such a way that the eventuality of release of water from reservoir is factored in. In the present case, the contract was awarded to the petitioner on 18.01.2014 and the which was valid upto 30.09.2014. It is impossible to believe that he expected that extraction would be possible on every single day during the contract period or that water would not be released from the reservoir.

19. In this context, the conduct of the petitioner is also relevant. The contract was roughly for nine months. The first eventuality of stay occurred on 24.06.2014 i.e. after a period of five long months from the date of award of contract. The stay was vacated within 17 days on 11.07.2014. However, the petitioner was able to extract only 4291 brass sand till then. He was expected to have factored in the upcoming monsoon after June for arranging his schedule of extraction during 9 months. The conditions for extraction during first 6 months were far suitable than the last 3 months. However during this favorable period of 6 months he appears to have extracted only 1/3rd of the permissible quantity. It is unbelievable that he was expecting to extract reamaining 2/3rd quantity in unfavorable monsoon period of 3 months.

20. Even though, paragraph 'C'-(22) does not deal with entitlement to refund, same may be of some relevance for dealing with this aspect. There is a specific stipulation in Clause 'C'-(22) that irrespective of the date of award of contract, the tenure of the contract must come to an end by 30th September. Therefore, contractors were required to take into consideration the available tenure for extraction of the permissible quantity of sand on the basis of the date of award of the contract. Since the petitioner knew that he was being awarded the contract in January, 2014, he must have submitted his bid considering the fact that he was not getting the entire year for extraction of 12862 brass of sand.

21. Paragraph 'C'-(22) further stipulates that it is the responsibility of the contractor to extract permissible quantity of sand within the permissible tenure. The petitioner, thus, knew that within a period of less than nine months, he was expected to extract 12862 brass of sand and accordingly submitted his bid. Mrs. Deshpande has submitted before us that the petitioner was permitted to use four suction pumps for extraction of sand from the area where the water was deposited as a special case. Despite this, he was grossly deficient so far as quantity of extract was concerned. It therefore appears to us that stay granted by Collector and release of water from reservoir came as ready excuses for Petitioner to claim refund for unextracted quantity which he was otherwise not in

a position to extract. While he was found entitled to get refund on the former pretext (as it was fitting into the criteria of Clause C-15), the Government has rightly rejected the claim on the latter pretext.

22. Mr. Dighe, has placed reliance on the judgment of this Court in Shivaji Chavan (*supra*). However we find that the facts of that case were entirely different. Petitioner therein was initially allotted a particular sand spot and the allotment was cancelled by the District Collector as there was threat of damage to a monument. Instead of refunding the amount, he was allotted another sand spot for different quantity of sand. Even in respect of alternate sand spot, there was already a resolution of Gram Sabha objecting to allotment of said spot.

It is in the light of these factual background that this Court held in paragraph Nos.18 and 19 of the judgment as under :

"18. Thus, the scenario which emerges from the aforesaid discussion based on undisputed facts is that there was an error on the part of the Government of conducting an auction of Shevare spot No. 2, as later on, it was realized that excavation of sand at the spot will adversely affect an ancient monument. The auction of the said spot was therefore cancelled by the Collector when the petitioner had excavated quantity of only 840 brass out of the permitted quantity of 9600. Instead of refunding the amount of royalty paid by the petitioner on pro-rate basis, the Collector allotted another spot to him under order dated 11th May, 2011. In respect of the said spot allotted, the Gram Sabha had already raised an objection in January 2011 by passing a specific Resolution. As stated in the affidavit of Shri Dolas, the petitioner could excavate only 1614 brass of sand from the spot and the quantity of 7146 brass out of the permitted quantity could not be excavated. Shri Dolas has corrected the earlier statement made in the affidavit that the petitioner has excavated more than 8056 brass of land.

19. It is not even the case made out in both the affidavits or in the order dated 11th May, 2011 that any effort was made to ascertain whether there was likelihood of resistance by the villagers as far as the spot No. 2 in village Chandaj is concerned. It is obvious that as there was no auction of the said spot allotted by the order dated 11th May, 2011, the procedure which is required to be followed under the G.R. dated 25th October, 2010 was not followed. It is not the case of the State Government that before passing the order dated 11th May, 2011, any local inquiry was made to ascertain whether the petitioner will be able to excavate sand without any resistance. Perhaps, the allotment was made to avoid refund of the royalty amount."

Thus we find that the factual background in which the claim for proportionate refund was granted by this Court was entirely different than one involved in the present case. Therefore, the said decision is clearly distinguishable.

23. In the result, we do not find any merit in the petition and the same is dismissed without any orders as to costs.