

(2012) 11 AP CK 0013

In the Andhra Pradesh High Court

Case No : Writ Petition No. 7332 of 2003

M/s. ECI Engineering and Construction Company Limited
Chikoti Gardens, Begumpet, Hyderabad

APPELLANT

Vs

Andhra Pradesh Industrial Infrastructure Corporation Limited
and Others

RESPONDENT

Date of Decision : 30-11-2012

Acts Referred:

Citation : (2013) 2 ALD 466 : (2013) 1 ALT 634

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Single Bench

Advocate : C. Hanumantha Rao, for the Appellant; P. Roy Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Hon''ble Acting Chief Justice Shri Pinaki Chandra Ghose

1. The Petitioner company-M/s ECI Engineering & Construction Co., Ltd. dealing in manufacturing of metallurgical coke, Hyderabad filed this writ petition for a declaration that the letter No. 151/D1/RO/VSP/76 dated 31.3.2003 issued by the 4th respondent-Zonal Manager, Andhra Pradesh Industrial Infrastructure Corporation Ltd., Visakhapatnam intimating the petitioner cancelling the allotment of Ac. 9.97 of land made in it's favour in Aganampudi Industrial area of Visakhapatnam and forfeiting the sale consideration paid for purchase of the land as arbitrary and illegal and for a direction to the respondents not to interfere with the possession of the company in respect of the said land. On the application of the petitioner-company for extension of it's business land to an extent of Ac. 9.97 was allotted at the aforementioned industrial area by proceedings dated 5.12.1994 at a total cost of Rs. 15,95,200/- by Andhra Pradesh Industrial Infrastructure Corporation Ltd., Visakhapatnam (for short "APIIC") and an agreement for sale was entered into by the parties and possession of the land was handed over to the petitioner on 9.11.1998. As per

Clause 9(c) of the agreement, though the petitioner is required to implement the project within a period of two years from the date of handing over of the plot, it could not proceed with the project. Petitioner putforth various reasons for not proceeding with the project viz., that the plot being rectangular in shape is not suitable for construction of the industry, therefore, it has applied for allotment of additional land, the Pollution Control Board has not issued clearance certificate and due to fluctuations in the market for metallurgical coke. The APIIC by their letters dated 6.3.2000 and 3.8.2000 called upon the petitioner to explain the reasons for not commencing the project and ultimately by show cause notice dated 29.12.2000 was issued for non-implementation of the project to which the petitioner addressed letter dated 16.1.2001 putforthing reasons for not commencing the project and requested for extension of time for 12 more months. By letter dated 7.2.2001, the 4th respondent rejected the request of the petitioner and was asked to commence construction activity within one month of receipt of the said letter, failing which, it was intimated that the allotment will be cancelled determining the sale agreement executed and possession of land will be resumed. It appears that even after lapse of two years from the letter dated 7.2.2001, the petitioner has not commenced the project, therefore, the 4th respondent by the impugned letter dated 31.3.2003 cancelled the allotment of land made in favour of the petitioner and determined the sale agreement dated 9.11.1998 forfeiting the amounts paid by the petitioner towards use and occupation of the land and directed to surrender vacant possession of the land to APIIC.

2. This Court by order dated 2.5.2003 directed both the parties to maintain status quo. However, by a detailed order dated 24.8.2005 passed in W.V.M.P. No. 1405 of 2003 the interim order dated 2.5.2003 was vacated holding that balance of convenience is not in favour of continuing the order.

3. During the pendency of the writ petition, it appears that the petitioner made a representation dated 25.2.2008 to the respondents for allotment of alternative land of Ac. 10.00 at F-Block, Visakhapatnam in lieu of land at Aganampudi for setting up a Tower Fabrication Unit. APIIC through their letter No. 13060/AMW/D8/AGM/07 dated 3.3.2008 has agreed for the same subject to finalization of certain things viz., approval of layout plan by VUDA, formation of roads and withdrawal of the writ petition.

4. After a lapse of four and half years, the petitioner filed W.P. No. 37670 for a direction to the respondents for allotting alternative land of Ac. 10.00 at F-Block, Visakhapatnam in lieu of Ac. 9.97 land allotted at Aganampudi. Petitioner also filed W.P.M.P. No. 38618 of 2012 for amendment of the writ prayer to incorporate an alternative direction to the respondents to allot Ac. 10.00 of land at F-Block, Visakhapatnam as per the communication of the respondents dated 3.3.2008.

5. Learned counsel for the petitioner submitted that the agreement of sale dated 9.11.1998 does not permit or empower the APIIC to forfeit the total sale consideration paid to APIIC and determination of sale agreement is arbitrary and

illegal. Learned counsel placed reliance on the decisions of the Supreme Court in *Kamlakar Bhimrao Patil Vs. Maharashtra Industrial Dev. Corpn.*, *Noble Resources Ltd. Vs. State of Orissa and Another*, and *Sunil Pannalal Banthia and Others Vs. City and Industrial Development Corpn. of Maharashtra Ltd. and Another*, and Division Bench decision of this Court in *Infotech Enterprises Ltd. Rep. by Managing Director v. Bharat Sanchar Nigam Limited, Rep. by its Prl. General Manager, Hyderabad and Others* 2009 (6) ALT 600 (DB) to contend that cancellation of allotment is not justified.

6. The learned standing counsel appearing for the respondents, on the other hand, submitted that as per Clause 9(c) of the agreement, the petitioner is required to implement the project within a period of two years from the date of handing over of the possession of the allotted plot and in spite of affording opportunity to implement the project, even after the lapse of the said period, it has not utilized the same and implemented the project. Under those circumstances, the respondents have no option but to determine the agreement of sale and accordingly issued the impugned letter dated 31.3.2003 cancelling the allotment of land forfeiting the amounts paid by it towards use and occupation of the land in accordance with the terms of the agreement of sale. He, therefore, submitted that no illegality has been committed by the 4th respondent in issuing the impugned letter canceling the allotment of land made in favour of the petitioner.

7. There is no dispute that the possession of the land allotted to the petitioner was delivered on 9.11.1998. Clause 9(c) of the agreement of sale clearly stipulate that the petitioner shall implement the project within two years of being put in possession of the said land as detailed in Clause (3). Therefore, the petitioner has to implement the project before 8.11.2000, but it failed to do so. The APIIC by their letters dated 6.3.2000 and 3.8.2000 called upon the petitioner to explain the reasons for not commencing the project and ultimately issued the show cause notice dated 29.12.2000. The petitioner replying to the same addressed letter dated 16.1.2001 putforthing the reasons for not commencing the project and requested for extension of time for 12 more months. However, by letter dated 7.2.2001, the 4th respondent rejected the request of the petitioner and directed to commence the construction activity within one month from the date of receipt of the letter clearly intimating that the failure would result in cancellation of the allotment. In spite of the said communique, the petitioner has not commenced the project even after lapse of two years from 7.2.2001. Interestingly, it may be noted that the respondents have maintained silence and no action has been taken for two years and it is only by the impugned letter dated 31.3.2003, the agreement of sale was determined forfeiting the amounts paid by the petitioner towards the use and occupation of the land.

8. The facts narrated above would clearly indicate that the petitioner has failed to fulfil it's part of contract though much indulgence has been shown by the APIIC

in spite of the fact that the date and time are the essence of the contract. The various reasons put forth by the petitioner have no relevance since it is for the petitioner to sort out those difficulties. It also appears that the petitioner for a period of five years has not made any efforts to sort out the difficulties which it is encountering except making representations to the respondents. Therefore, there is a clear breach of agreement on the part of the petitioner.

9. The only contention urged by the petitioner is that the agreement of sale dated 9.11.1998 does not permit or empower the 2nd respondent to forfeit total sale consideration paid to APIIC. For better appreciation of this contention, it is necessary to refer to the relevant clauses of the agreement of sale dated 9th November, 1998 on which date the vacant possession of the allotted land was delivered to the petitioner, which read thus:

1. The party of the second part as a condition precedent to being placed in possession of the land allotted made the full payment of the cost of the land fixed at Rs. 15,95,200/- at of Rs. 1.60 lakhs per acre.

2. The date and time are the essence of this contract.

3. Only on the party of the second part implementing the scheme in the allotted land the sale deed will be executed and registered. Implementation means: The Entrepreneur/Allottee should have implemented the project in full as envisaged. Where for bona fide reasons there is some delay in implementation he shall have at least completed it substantially.

Substantial implementation means: the entrepreneurs shall have completed civil works and completed erection of most of the plant and machinery (At least 80% of the project cost).

Or

In case of very large projects with gestation period, where civil works component is very large, the Entrepreneur shall have invested on ground and completed civil works to an extent of at least double the prevailing market land value of land allotted. Works like compound wall, fencing, filling up of the earth and other measures to protect the property shall be excluded while computing the value of works implemented. The prevailing market value in such cases will be price of the allotment of APIIC Ltd. in the industrial area at the time of verification/cancellation as the case may be.

The party of the second part agrees and assure that they will not request for execution of the sale deed until project is implemented as detailed above. The party of the second part expressly agree upon intimation of its eligibility for sale deed by the party of the first part, to take the sale deed and take steps for registration of the same within one month of such intimation by the party of the first part. The party of the second part expressly agree to pay penalties at 0.5% of the value of the land prevailing as on the date of intimation for the first six months of intimation and at 1% thereafter for every completed month, incase of

failure to take the sale deed within one month of such intimation.

XX XX XX

9. The party of the second part shall bear, pay and discharge all existing and further amounts, duties, imposing and outgoing of whatsoever, taxes imposed or charges upon the premises or upon the occupier in respect thereof from the date.

And whereas the party of the second part having agreed to hold the land allotted to them on the terms and conditions hereinafter mentioned:

a) That the party of the second part shall use the land for setting up of a factory for the manufacture of metallurgical coke. The party of the second part agree that they shall not put up any structure or building other than factory building or buildings without the prior permission in writing of the party of the first part.

b) The party of the second part expressly agree and undertake that the said land shall be utilized exclusively for the purpose set forth in the allotment proposal and that no change shall be made without the written sanction of the party of the first part.

c) The party of the second part shall implement the project within two years of being put in possession of the said land as detailed at clause 3 above.

d) That as and when the said land is no longer required by the party of the second part for the aforesaid purpose the party of the second part shall forthwith relinquish and restore the land in favour of the party of the first part provided such surrender of the property by the party of the second part is made before cancellation of the allotment by the party of the first part for breach of any of the covenants of this agreement. In the event of surrender refund of the cost of land paid by him shall be made after making deductions as under.

xxx xxx xxx

m) Till such time as the ownership of the property is transferred to the party of the second part in the manner mentioned above, the property shall continue to remain the property of the party of the first part without prejudice to the rights of the financing agency as under clause 4(a).

o) That if the party of the second part commits breach of any of the covenants herein contained the allotment stands cancelled and this agreement shall stand determined without any notice thereupon the party of the second part will be treated as an encroacher and a trespasser who will have no right whatsoever in the schedule property under these present and it shall be lawful for the party of the first part to re-enter upon the said land and resume possession thereof and also of the buildings standing thereon, the transfer made in favour of the party of the second part under these present shall become null and void and all rights of the party of the second part in the schedule property under this agreement and any building thereon shall at once cease and determined. Prior notice of the re-entry to the Financial Institutions if necessary will be given by the party of the

first part. In such event of cancellation/resumption of the property allotted the payments made by the party of the second part shall remain forfeited towards use and occupation of the premises. However, the party of the first part may at its option consider refund of the amounts paid by the party of the second part towards the cost of the property subject to the following conditions.

i) EMD will be forfeited.

ii) The amounts paid will be refunded depending on the period of occupation as per the following schedule:

In case the amounts paid by the allottee is less than the deductions to be made, no claim for further payment shall be made.

No interest will be paid to the party of the second part in this respect.....

10. From a perusal of the above clauses, it is manifest that the date and time are the essence of the contract and it is only on implementing the project in the allotted land the sale deed will be executed and registered. Full payment of the cost of land was paid only as a condition precedent to being placed the petitioner in possession of the land allotted. "Implementation" and "substantial implementation" of the project have clearly been defined in the agreement. Until the project is implemented as detailed in clause 3, petitioner is not entitled for execution of the sale deed. Under Clause 9(m) till such time the ownership of the property is transferred to the petitioner, the property shall continue to remain the property of the APIIC. Clause 9(o) of the agreement clearly provides that if there is any breach of the covenants on the part of the petitioner the allotment stands cancelled and the agreement stand determined and the petitioner will be treated as an encroacher and he will have no right whatsoever in the schedule property and the APIIC can make re-entry into the land and resume possession thereof. In the event of cancellation/resumption of the property allotted, the payments made by the petitioner shall remain forfeited towards use and occupation of the premises. However, the APIIC at its option may consider refund of the amounts paid by the petitioner towards cost of the property subject to certain conditions. This discretion on the part of the APIIC is not absolute. The APIIC was given only option to consider such cases in it's discretion. Therefore, the contention of the petitioner that the agreement of sale does not permit the APIIC to forfeit the sale consideration has no merit. The determination of the agreement of sale made by APIIC by the impugned letter dated 3.13.2003 is in accordance with the terms and conditions of the agreement. The agreement clearly provides that it is only after due implementation of the project, a sale deed will be executed in favour of the petitioner transferring the ownership of the property and until the same is done, the property continue to vest in APIIC only.

11. The decisions relied upon by the learned counsel for the petitioner have no application to the facts on hand. In *Sunil Pannalal Banthia v. City and Industrial Development Corporation of Maharashtra Ltd* allotment was cancelled on the ground that it was in violation of a public policy. Supreme Court held that on the

facts of the case it is not proper to cancel the allotment. Noble Resources Ltd. V. State of Orissa and Another is a case dealing with the power of judicial review of the Courts in contractual matters. In Kamlakar Bhimrao Patil v. Maharashtra Industrial Development Corporation, the High Court of Bombay on a misconstruction of the prayer in the writ petition that the prayer was for enforcement of specific performance of a contract dismissed the writ petition. The Supreme Court noticing that the subject matter of challenge relates to repudiation of a contract held that the writ petition is maintainable. The decision of this Court in Infotech Enterprises Ltd. v. Bharat Sanchar Nigam Limited is helpful to the respondents rather than the petitioner, wherein this Court held that having regard to the serious lapses on the part of the writ petitioner therein in not adhering to the terms of the contract, the writ petition does not lie.

12. For the reasons aforesaid, I am of the view that the impugned letter of 4th respondent canceling the allotment of land made in favour of the petitioner is perfectly in order and cannot be interfered with. Whether the petitioner is entitled for any refund of the amounts paid by it and to what extent are the matters for the APIIC to consider at it's option in accordance with the terms and conditions of the agreement for sale.

13. It appears that on the representation made by the petitioner-company, the APIIC by it's letter dated 3.3.2008 has agreed for allotment of alternative land measuring 10.00 acres at F-Block, Visakhapatnam in lieu of land in dispute, however, subject to certain conditions. On this basis, the petitioner filed W.P.M.P. No. 37670 of 2012 for a direction to the respondents for allotment of alternative land of Ac. 10.00 at F-Block, Visakhapatnam and W.P.M.P. No. 38618 of 2012 for amendment of the writ prayer to incorporate the above alternative direction. It may be noticed that this letter was issued in the year 2008 and much water had flown thereafter. No material has been placed before the Court as to the present position. In the absence of the same, it is not possible for this Court to issue any directions in that regard. It is for the petitioner to pursue his case for allotment of alternative land in lieu of the disputed one before the respondent-authorities. In the result, the Writ Petition is misconceived and is accordingly dismissed. W.P.M.P. Nos. 37670 of 2012 and 38618 of 2012 also shall stand dismissed. There shall be no order as to costs.