
(2014) 03 MAN CK 0001
In the Manipur High Court
Case No : Writ Petition (C) No. 364 of 2013

M/s. K. Pro Infra Works Pvt. Ltd.

APPELLANT

Vs

The State of Manipur and Others

RESPONDENT

Date of Decision : 07-03-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114

Citation : (2014) 03 MAN CK 0001

Hon'ble Judges : Laxmi Kanta Mohapatra, J

Bench : Single Bench

Advocate : H.S. Paonam, assisted by Mr. S. Gunabanta, for the Appellant; Th. Ibohal, A.G. Manipur, assisted by Mr. Viscount and Mr. A. Bimol Singh, for the Respondent

Final Decision : Dismissed

Judgement

L.K. Mohapatra, J.—The petitioner, a Company registered under Companies Act, 1956, has filed this writ application for quashing the order passed by the Loktak Development Authority, respondent No. 2, terminating the contract entered between the petitioner, Company and the respondent No. 2 dated 2.11.2009 and also for other reliefs such as - to restrain the respondents from taking any adverse action in pursuance of the termination of the contract, to restrain the respondents from forfeiting the security deposit and encashing the Bank Guarantees pending arbitration proceeding, for a direction to release the outstanding payment against the pending bills and also to maintain status quo in respect of the work. The brief facts leading to filing of the writ petition are as follows:

The Loktak lake is one of the largest fresh water lakes in North East. Considering degradation of the said lake, a Short Term Action plan was drawn up by Wet Land International-South Asia and proposal was submitted to the Planning Commission of India to bring back the lake into its original condition. The said proposal was

accepted by the Planning Commission and a sum of Rs. 373.99 crores was sanctioned in March, 2009 for the following works:

- (a) Phumdi management
- (b) Water management
- (c) Catchment conservation and management
- (d) Activities such as bio-diversity conservation, sustainable resource development and livelihood improvement together with project management.

2. A tender process was undertaken for awarding the above contract and on the basis of the recommendation of the Tender Committee, the respondent No. 2 entered into a contract/agreement with the petitioner, Company on 2.11.2009 for execution of certain works under the project. The tender value was agreed upon at 224, 39, 14.35 rupees. After execution of the contract, the petitioner, Company started the work and in course of execution of the work several correspondences were made between the petitioner, Company and the respondent No. 2 with regard to certain problems faced by the petitioner, Company in executing the work and denial of certain allegations by the respondent No. 2 made by the petitioner, Company. There was delay in completing the work though initially it was decided to complete the work within a period of 2 years 3 months. As per Clause-5 of the contract time extension was also granted to the petitioner Company to complete the work. As the petitioner could not complete the work even during the extended period, a decision was taken to terminate the contract and accordingly notice was issued to the petitioner to show cause. On consideration of the reply submitted by the petitioner, in the impugned order dated 3.5.2013, the respondent No. 2 terminated the contract and decided to get the balance work executed through another Agency.

3. Mr. H.S. Paonam, learned Sr. counsel appearing for the petitioner has assailed the order of termination basically on 3(three) grounds. The first ground of challenge is that the order of termination dated 3.5.2013 has been passed in exercise of powers under sub clause (3)(a) and 3(c) of the contract whereas there is no such clause in the contract. The second ground of challenge is that much before the termination of the contract and consideration of the reply given by the petitioner, Company to the show cause notice, a decision had already been taken by the respondent No. 2 to terminate the contract in Annexure-A/22. Therefore, issuance of notice to show cause and consideration of the reply of the petitioner, Company was just a formality. The third ground of challenge is that delay in execution of the work is mainly attributable to non-cooperation on the part of the respondent No. 2 and its officers and therefore, only on ground of delay in execution of the work, the contract could not be terminated.

4. So far as the first ground taken by the petitioner is concerned, it is necessary to refer to the contract/Agreement which has been annexed to the writ petition

as Annexure-A/1. For convenience clause (3) of the contract/Agreement which is relevant for the purpose of deciding the above issue is quoted below:

Clause 3. The LDA may, without prejudice to its right against the Contractor in respect of any delay or inferior workmanship such as littering the road during transportation, non conformity of specification in the construction of bamboo spurs for phumdi rehabilitation, undesirable interference with stream flow during phumdi flushing as a result of oversized cut pieces of phumdi etc. or otherwise any claims for damage in respect of any breaches of this contract and without prejudice to any rights or remedies under any of the provisions of this contract or otherwise and whether the date for completion has or has not elapsed by notice in writing absolutely, determine the contract in any of the following cases.

(i) If the Contractor having been given by the LDA a notice in writing to rectify or re-execute any defective work or that the work is being performed in an inefficient or otherwise improper or unworkmanlike manner shall omit to comply with the requirement of such notice for a period of seven days thereafter.

(ii) If the Contractor being a company shall pass a resolution or the Court shall make an order that the Company shall be wound up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the Court or creditor to appoint to receiver or a manager or which entitled the Court to make a winding up order.

(iii) If the Contractor commits any acts mentioned in Clause 19 hereof and when the Contractor has made himself liable for action under any of the cases aforesaid the LDA shall have powers:--

(a) to determine or rescind the contract as aforesaid of which termination or rescission notice in writing to the Contractor under the hand of the Project Director, LDA shall be conclusive evidence. Upon such determination or rescission the security deposit of the Contractor shall be liable to be forfeited and shall be absolutely at the disposal of LDA.

(b) to employ labour paid by LDA and to supply material to carry out the works or any part of the work debiting the Contractor with the cost of the labour and the price of the materials, (of the amount of which cost and price certified by the Project Director, LDA shall be final and conclusive) against the Contractor and crediting him with the value of the work done in all respects in the same manner and the same rate as if it had been carried out by the Contractor under the terms of this contract. The certificate of the Project Director, LDA as to the value of the work done shall be final and conclusive against the Contractor, provided always that action under the sub-clause shall only be taken after giving notice in writing to the Contractor. Provided also that if the expenses incurred by the LDA are less than the amount payable to the Contractor at his agreement rates, the difference shall not be paid to the Contractor.

(c) after giving notice to the Contractor to measure up the work of the Contractor

and to take such whole or the balance or part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original Contractor if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Engineer in-charge shall be final and conclusive) shall be borne and paid by the original Contractor and may be deducted from any money due to him by the LDA under this contract or on any other account whatsoever or from his security deposit or the proceeds of sales thereof or a sufficient part thereof as the case may be.

In the event of any one or more of the above courses being adopted by the LDA, the Contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of contract. And in case action is taken under any of the provisions aforesaid, the Contractor shall not be entitled to recover or be paid, any sum for any work thereto for actually performed under this contract unless and until the LDA has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.

Provided further that if any of the recoveries to be made, while taking action as per (b) and/or (c) above, are in excess of the security deposit forfeited, these shall be limited to the amount by which the excess cost incurred by the LDA exceeds the security deposit so forfeited.

5. Referring to the above clause, Shri H.S. Paonam, learned Sr. counsel appearing for the petitioner submitted that there is no clause such as clause 3(a) or Clause 3(c) in the contract as mentioned in the order of termination. Therefore, terminating the contract under the non existing clause clearly shows non application of mind on the part of the respondent No. 2 and its officers while passing the order terminating the contract.

6. Mr. A. Bimol, the learned counsel appearing for the respondent No. 2 submitted that what is important to see is source of power and not the provision contained in the Agreement. If there is a source of power available in the Agreement for terminating the contract, mere mention of a wrong provision does not invalidate the order of termination. In this connection, referenced may be made to a decision of the Apex Court in the case of Md. Shahabuddin Vs. State of Bihar and Others, . In paragraph 206, 207 and 208 of the judgment, the Apex Court dealt with the above question and held that where a notification quotes a wrong section or reference to a wrong provision, the same cannot be held to be invalid if the validity of the same could be upheld on the basis of some other provisions. It was further held that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision, if it could be shown to be within its power under any other provision or rule and the validity of such impugned order must be judged on a

consideration of its substance and not its form. For convenience the above three paragraphs of the said judgment are quoted below:

206. I am unable to accept the aforesaid submission for the simple reason that if the notification quotes a wrong section and refers to a wrong provision, the same cannot be held to be invalid if the validity of the same could be upheld on the basis of some other provision.

207. In *N. Mani v. Sangeetha Theatre* reported in (2004) 12 SCC 278, a three-Judge Bench of this Court succinctly observed as follows (SCC p. 280, para 9).

9. It is well settled that if any authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.

208. It is a well-established law that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other provision or rule, and the validity of such impugned order must be judged on a consideration of its substance and not its form. The principle is that we must ascribe the act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void. In such cases, this Court will always rely upon Section 114 Illustration (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the Courts will uphold such State action. (Reference in this regard may be made to the decisions of this Court in *P. Balakotaiah Vs. The Union of India (UOI) and Others*, , *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, , *B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc.*,

On reading of the judgment, it appears that it has referred to several earlier decisions of the same Court in respect of the above issue.

7. On careful reading of the clause (3) of the Agreement which deals with RESCISSION of contract, it appears power to terminate the contract was available with the respondent No. 2 and its officers under the said clause on the grounds mentioned therein. Delay in executing the work could also be one of the grounds for determining the contract. Since the respondent No. 2, through its officers, had the power to determine the contract on ground of delay in completion of the work, merely quoting a wrong clause will not invalidate order of termination on that ground alone. Therefore, I do not find any substance in the first ground taken by the learned Sr. counsel appearing for the petitioner.

8. The second ground taken by the learned Sr. counsel appearing for the petitioner is that the respondent No. 2 had already decided to terminate the

contract before consideration of the reply given by the petitioner to the show cause notice and therefore issuance of notice of show cause and consideration of the reply given by the petitioner was only a formality. Referring to Annexure-A/24 it was contended by Mr. Paonam, learned Sr. counsel for the petitioner that on 4th of April, 2013 a letter was written by the respondent No. 2 to the Project Director of the petitioner, Company requesting him to vacate the office premises occupied by the petitioner, Company within one week and also to dismantle/remove any structure erected by the petitioner company during the tenure of the contract agreement. In the said letter, the Project Director of the petitioner, Company was also requested to intimate convenient date for handing over and taking over of the office premises.

9. It was further contended by Mr. Paonam, learned Sr. counsel appearing for the petitioner that notice to show cause as to why contract should not be terminated was issued in Annexure-A/22 on 30.3.2013 giving 7 days" time to file a reply. Even before the expiry of the said period, the authority had already decided to terminate the contract before receipt of reply of the petitioner to the said show cause notice. The petitioner submitted reply on 8.4.2013. The said reply is stated to have been considered and rejected in Annexure-A/27 on 2.5.2013 and on the very next day in Annexure-A/26 the order of termination was passed on 3.5.2013.

10. Mr. A. Bimol, learned counsel appearing for the respondent No. 2, referring to Annexure - A/8, submitted that since the petitioner caused delay in executing the work, notice was issued to the petitioner in Annexure-A/8 on 21.4.2011 intimating the said facts. When there was no further development in work, another notice was issued to the petitioner, Company in Annexure-A/10 on 9.6.2011. Even after receipt of the above two notices, there was no much improvement in the work and accordingly the respondent No. 2 issued the first show cause notice in Annexure-A/18 on 20/21.3.2013. Referring to the above document it was contended by Mr. Bimol, learned counsel for the respondent No. 2 that starting from 2001 till 2013 it was brought to the notice of the petitioner, Company that it is causing unnecessary delay in executing the work and in spite of such notices, there was no improvement in execution of the work. Therefore, the contention of the petitioner that a decision had been taken to terminate the contract before consideration of the reply to the notice to show cause, is not correct.

11. So far the above issue is concerned, I find from Annexure-A/8 dated 21.4.2011 that the respondent No. 2 had informed the petitioner, Company that the progress of work is much below the target set by the petitioner and the actual achievement are still much below the target. The table indicated in the said letter shows shortfall in execution of the work. From Annexure-A/10 dated 9.6.2011 it appears that the respondent No. 2 had issued the notice to the petitioner to show cause in relation to slow progress of work. Again, under Annexure-A/18 dated 20/21.3.2013 another notice to show cause was issued to the petitioner on ground of delay in completion of the work. Therefore, at several

stages of the work, and the respondent No. 2 noticed delay in execution of the work, intimated the petitioner, Company and on some occasions also called for reply. Even before taking a final decision, a detailed notice of show cause, was issued in Annexure-A/22 in response to which the petitioner submitted its reply in Annexure-A/25. The said reply was considered and the authority did not accept the same and intimated the petitioner on 2.5.2013. After rejection of the reply submitted by the petitioner, final decision to terminate the contract was taken on 3.5.2013. On consideration of all these documents, I am in agreement with the submission of Mr. Bimol, learned counsel appearing on behalf of the respondent No. 2 that the fact that there was delay in execution of the work had already been brought to the notice of the petitioner, Company time and again and on some occasions notice to show cause was also issued for such delay in execution of the work. Therefore, on the basis of these documents, it cannot be said that a final decision had already been taken to terminate the contract before consideration of the reply of the petitioner to the notice to show cause. On this issue also, I do not find much of force in the submission of the learned counsel for the petitioner.

12. The third ground of challenge is that delay in execution of work is solely attributable to the respondent No. 2 and its officers. In this connection Mr. H.S. Paonam, learned Sr. counsel for the petitioner drew attention of the Court to several documents annexed to the writ petition, rejoinder affidavit filed by the petitioner and submitted that as and when the petitioner, Company faced any problem in executing the work, it had brought the same to the notice of the authority, but steps were not taken in time by the respondent No. 2 and its officers in order to help the petitioner in completing the work within the stipulated time. Several grounds appear to have been taken in those documents explaining the delay in execution of the work. In response to such letters written by the petitioner, Company the respondent No. 2 has also denied those allegations. Under these circumstances, the question as to whether there was delay in execution of the work on account of fault on the part of the petitioner or the respondent No. 2 and its officers, becomes disputed question of fact and in a writ jurisdiction, it will not be possible to decide such disputed questions of fact. In this regard, law is well settled. Reference may be made in this regard to a decision of the Apex Court in the case of Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, .

Moreover, admittedly, the petitioner has invoked arbitration clause as provided under clause (22) of the contract. Therefore, disputed questions of fact may be raised before the Arbitrator for adjudication.

13. Mr. H.S. Paonam, learned Sr. counsel appearing for the petitioner relied upon some decisions of the apex Court to substantiate his submission that in a writ jurisdiction the Court can decide as to whether termination of the contract was illegal, valid or not. The following are the decisions relied by the learned Sr. counsel appearing for the petitioner:

- i) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,
- ii) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,
- iii) Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others, and
- iv) Abbas Ahmad Choudhary Vs. State of Assam, .

On reading of the above four decisions, I find that under certain circumstances, it may be possible on the part of the Court to entertain a writ application and interfere with an order passed contrary to the provision of the contract or any rule or law. In the present case, however, the entire dispute relates to order of termination of the contract solely based on delay in execution of the work as held earlier since the petitioner and the respondent No. 2 have been blaming each other for such delay in execution of the work, such disputed questions of fact cannot be decided in an application under Art. 226 of the Constitution of India. The remedy lies before the Civil Court. I am, therefore, of the view that the third ground taken by the learned counsel for the petitioner also cannot be adjudicated in writ jurisdiction.

14. It was brought to the notice of the Court by the learned Advocate General appearing for the State respondent that after termination of the contract, fresh tenders were invited for execution of the balance work and after selecting the Agency, work order has already been issued. On consideration of the above submission of the learned Advocate General and the fact that the petitioner has already invoked arbitration clause contained in the Agreement, I find no justification to entertain this writ application and accordingly decline to grant the reliefs sought for. For the reasons mentioned earlier, writ application, being devoid of merit, is dismissed.