

(2012) 10 AP CK 0049

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 26321 and 26345 of 2012

M/s. Trimex Industries Limited

APPELLANT

Vs

The A.P. Mineral Development Corporation Ltd.

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2013) 2 ALD 320 : (2013) 1 ALT 393

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : Vedula Srinivas, for the Appellant; V. Subrahmanyam, for the Respondent

Final Decision : Allowed

Judgement

C.V. Nagarjuna Reddy

1. Since these two Writ Petitions raise common issues of fact and law, they are heard and being disposed of together. The short point involved in these two Writ Petitions is whether the petitioner is liable to pay the additional cost in respect of supply of Barytes agreed to be supplied by the respondent during the previous year, but supplied in the next year.

2. The facts in brief giving rise to this question are that the petitioner entered into separate agreements on 8-8-2011 with the respondent for supply of "A" and "B" Grade Barytes, as the case may be. In W.P. No. 26321/2012, the petitioner agreed to buy and the respondent agreed to sell 60 Metric Tons (M.Ts.) of "B" Grade Barytes per annum, which works out to 5000 M.Ts. per month, for a period of three years. In W.P. No. 26345/2012, the petitioner agreed to buy and the respondent agreed to sell 2,00,000 M.Ts. of "A" Grade Barytes, which works out to 16,667 M.Ts. per month, for a period of three years. It is agreed between the parties that in respect of the quantities supplied during the second and third years, the petitioner shall pay increased price @ 5% over the previous year's

prices. The first year of supplies commenced from 8-8-2011 and ended on 7-8-2012. It is not in dispute that the petitioner has paid the entire value of the Barytes to be supplied during the first year before the end of the stipulated period. However, the respondent failed to supply the agreed quantities during the said period. When the petitioner approached the respondent, the latter insisted that the former shall pay 5% of the prices over and above the prices at which the Barytes were agreed to be supplied during the first year in respect of the balance supplies meant to be supplied during that year. This action is assailed in this Writ Petition.

3. On behalf of the respondent, its Vice Chairman and the Managing Director filed a counter-affidavit wherein he sought to justify this action on two grounds, namely, that the buyers who are similarly situated as the petitioner, have paid the additional amount without any demur and that as per the terms of the agreement, the petitioner is liable to pay the prices which were prevailing at the time of supply.

4. At the hearing, Sri Vedula Srinivas, learned counsel for the petitioner, submitted that the action of the respondent is wholly arbitrary, as having failed to supply the required quantities of the "A" and "B" Grade Barytes during the first year, the respondent cannot saddle his client with the additional liability by charging the prices relating to the next year. He submitted that if the respondent has supplied the Barytes as agreed during the first year itself, the necessity of the petitioner to incur the additional expenditure would not have arisen.

5. Opposing the above submissions, Sri V. Subrahmanyam, learned counsel for the respondent, placed reliance on Clause Nos. 4(iv) and 9(iv) of the agreement, to buttress his submission that the petitioner is liable to pay the enhanced prices applicable to the period during which the Barytes are supplied. The learned counsel also placed reliance on Clause No. 22 of the agreement in support of his submission that the present Writ Petitions are not maintainable as all the questions, disputes and differences arising in connection with the agreement in question shall be adjudicated by the Civil Court within the local limits of Hyderabad.

6. I have carefully considered the respective submissions of the learned counsel for the parties. Since the facts in both the cases are identical, except to the extent of variety of the Barytes and their prices, it will suffice if the agreement Clauses in W.P. No. 26321/2012 are considered.

7. The relevant Clauses of the agreement are reproduced hereunder:

Clause 4-(i): The Corporation shall supply to the Buyer 60,000 M.Ts. (Sixty Thousand only) of "B" grade" Barytes Ore per annum and the Buyer shall purchase the said quantity as per the terms of this contract. The aforesaid obligation shall be subject to prior commitments, if any, availability of stocks and production. It is hereby clarified that the Corporation reserved 40% of the production from the Mangampeta Barytes Mine for supplies to Barium chemical

industries/local Pulverising industries.

(ii) The Corporation reserves the right to sell the surplus qualities of "B grade" Barytes Ore in any month as deemed fit. The decision of the Corporation is final and binding on the Buyer.

(iii) The Buyer agrees to buy 5000 M.Ts. (Five Thousand only) of "B grade" Barytes Ore per month to fulfill the obligation of purchase of 60,000 M.T. of "B grade" Barytes Ore per annum from the Corporation in terms of Clause 4(i) of this Contract.

(iv) In the event, as a result of a Force Majeure Event or due to the reasons specified in Clause 4(i) above, the Corporation fails to supply the "B grade" Barytes Ore in any month in terms of this Contract, the backlog will be carried forward to the succeeding month(s) within the Term or any extended period granted in terms of the Force Majeure Clause. However, the Corporation has no obligation to supply the backlog, if any, at the expiration of the Term or any extended period granted in terms of the Force Majeure Clause. However, the Corporation has no obligation to supply the backlog, if any, at the expiration of the Term or any extended period granted in terms of the Force Majeure Clause.

Clause 9(iv): The sale price of Rs. 3,069 per M.T. as above is valid for surplus for a period of one year from the Effective Date. The sale price shall be increased by 5% over the 1st year's price for supplies in 2nd year period of the Contract and the sale price shall be increased by 5% over the 2nd year's price for supplies during the 3rd year period of the Contract. The Buyer agrees to pay sale price with an increase of 5% over the 3rd year's price during the extended period under Force Majeure clause.

8. Sub-clause (i) of Clause No. 4 of the agreement between the parties stipulated the agreed quantity of Barytes to be supplied per annum by the respondent to the petitioner. However, this Clause is subject to the condition that the obligation of the respondent to supply the agreed quantity shall be subject to its prior commitments, if any, availability of stocks and the production thereof. Under sub-clause (iii) thereof, the petitioner agreed to buy 5000 M.Ts. of "B" Grade Barytes per month to fulfill its part of the obligation under the agreement of purchasing 60,000 M.Ts. of "B" Grade Barytes per annum from the respondent.

9. On a conjoint reading of the above reproduced clauses, it is evident that the respondent agreed to supply a specified quantity of Barytes in each of the three years in equal proportions. For the supplies to be made by the respondent in the second and third years, the petitioner agreed to pay the increased price @ 5% over the previous year's prices.

10. The short question arising for consideration is whether the respondent can collect the enhanced prices in respect of the left-over quantities meant to be supplied during the first year, but which are supplied in the next year? In my opinion, the answer should be in the negative. Undoubtedly, under Clause No.

4(iv) of the agreement, the respondent has undertaken the obligation of carrying forward the backlog supplies to the succeeding months within the term or in the extended period. However, it relieved itself of the obligation supplying the backlog supplies at the expiration of the term or during the extended period. By this clause, the petitioner may not enforce upon the respondent the obligation to supply the agreed quantity if the latter fails to adhere to the same after the completion of the term of 12 months. However, when the respondent is prepared and has chosen to supply the backlog quantities beyond the term, the said clause does not enable it to insist that the petitioner should pay the higher price for such backlog supplies. Even under Clause No. 9(iv), the petitioner's obligation to pay the enhanced prices is in respect of the supplies to be made in the second and the third years. In my opinion, this clause cannot be read in such a way as to confer undue benefit on the respondent for its failure to supply the agreed quantities of Barytes during the previous year. Such a construction of the above mentioned clause of the agreement would place a premium on the inability of the respondent to supply the agreed quantities during the previous year. The respondent being an instrumentality of the State, cannot be permitted to make unjust enrichment on account of its own failure to adhere to the supplies agreed under the contract, at the additional cost of the buyer. The law, on the actions of the State and its instrumentalities even in the contractual sphere, has now been fairly crystallized. The Supreme Court in *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553 and its subsequent Judgments held that even while acting under a concluded contract, the State and its instrumentalities shall not act arbitrarily and that the aggrieved party is entitled to approach the Constitutional Courts complaining of such arbitrary actions.

11. Having given my earnest consideration to the contractual terms in question, I am of the opinion that the respondent is not entitled to collect the higher prices from the petitioner in respect of the balance quantities of Barytes not supplied by it to the latter during the first and second years of the contract.

12. As regards the submission of the learned Standing Counsel that a Writ Petition for enforcement of contractual terms is not maintainable, much water has flown under the bridge after the Judgments of the Supreme Court in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, and *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, . In *ABL International Ltd.* (1-supra), the Supreme Court held that where the action of the State or its instrumentalities suffers from patent arbitrariness, the Constitutional Courts will interfere with such action by entertaining the Writ Petitions. In *The Superintending Engineer and Another Vs. Pioneer Builders* wherein a Division Bench of this Court, speaking through me, held at paras 12 and 13 as under:

A careful analysis of the judgments of the Supreme Court referred to above reveals that the earlier conservative view of noninterference in cases arising

under non-statutory contracts has given way to a some what liberal approach of limited interference. In effect, the Constitutional law limitations on the State actions while acting in administrative sphere are also applied even to contractual sphere.

Though ordinarily the Superior Courts relegate the parties to the common law remedies such as arbitration (wherever such a provision in the concluded contracts is made) or a civil suit, in specific situations such as term of contract being against the public policy or while enforcing a term of contract the State acts arbitrarily, unfairly or unreasonably or makes discrimination amongst the persons similarly situated, they exercise extraordinary jurisdiction under Article 226 or Article 32 of the Constitution in such particular situations.

13. For the above mentioned reasons, I do not find any merit in the submission of the learned Standing Counsel that the Writ Petitions are not maintainable.

14. On the analysis as above, the Writ Petitions are allowed. The respondent is directed to adjust the excess amount already collected from the petitioner towards supplies to be made by it to the latter in the future supplies. As a sequel, WPMP Nos. 33533 and 33569 of 2012, filed in the respective Writ Petitions are disposed of as infructuous.