

(2013) 08 MP CK 0067

In the Madhya Pradesh High Court

Case No : Writ Petition No: 10122 of 2013

M/s. Tulip Telecom Limited and Another

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 9

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 21, 226

Citation : (2013) 08 MP CK 0067

Hon'ble Judges : Vimla Jain, J;Rajendra Menon, J

Bench : Division Bench

Advocate : Kuldeep Rawat and Mr. Manoj Sharma, for the Appellant; Sanjay Dwivedi, Government Advocate for Respondent No. 1, Anshuman Singh for Respondent No. 2 and James Anthony, for the Respondent

Final Decision : Dismissed

Judgement

1. Petitioners herein have challenged the order-dated 6.5.2013 - Annexure P/1, by which a contract granted to them by the MP State Electronics Development Corporation Limited, for the purpose of supplying, installing and operation of MP State Wide Area Network has been cancelled. Petitioners claim to be a company duly incorporated and registered under the Companies Act and engaged in providing telecom services, data centres, system integration and it is said that they have branches and offices throughout the country. It is said that SWAN - an infrastructure project under the National e-Governance Programme of the Government of India, is a Joint Venture Project of respondent Nos. 1 and 2. Under this Project, minimum 2 mbps connectivity is to be provided upto Block Level in the State of Madhya Pradesh and for implementing the same, respondent No. 2 - the MP State Electronics Development Corporation Limited, was appointed as Nodal Agency in the State of MP.

2. For the purpose of allotment of the work, a Notice Inviting Tender was issued and the tender was invited for a Project which was known as MP State wide Area

Network (MPSWAN), on the basis of build, operate and transfer (BOOT) basis. The petitioner/company submitted its offer and it is not in dispute that the contract was entered into after the bid of the petitioner was accepted. Documents evidencing the same are available on record. However, now a dispute has risen with regard to the act of respondent No. 2 Corporation in cancelling the contract. According to the petitioners, the cancellation has been ordered in an arbitrary and an illegal manner without giving proper opportunity to the petitioners, the decision is taken arbitrarily and without considering various factual aspects of the matter, which go to show that the petitioners have not committed any default, the impugned action is taken.

3. Shri Kuldeep Rawat, learned counsel for the petitioners, invited out attention to the terms and conditions of the contract; the show-cause notice - Annexure P/12 issued to them on 2.4.2013; the reply to the same submitted by the petitioners; the discrepancies pointed out in the show-cause notice, and tried to demonstrate before this Court that no such discrepancy or breach of the contract is established and, therefore, in an arbitrary and illegal manner, the entire action is taken. Learned counsel referred to certain documents like Annexure P/14 dated 24.4.2013, issued by the Secretary in the Information and Technology Department of the State of Madhya Pradesh, to say that all the work in connection with the contract was being properly executed by the petitioners, more than 90% of the work is already over and, therefore, the decision all of a sudden taken to terminate the contract is an arbitrary and illegal decision. Learned counsel referred to certain documents available on record, particularly the terms and conditions of the contract and the letter - Annexure P/11 dated 16.1.2013, issued by the Senior General Manager of the Project, to say that in a pre-determined manner the entire action is taken. Learned counsel took us through these documents to emphasize that the breach of contract alleged in the show-cause notice and found to be existing in the impugned order - Annexure P/1 is an imaginary and arbitrary decision taken when infact there is no breach.

4. Shri Kuldeep Rawat, learned counsel for the petitioners, submitted that when an action has been taken in a totally arbitrary manner, the objection of the respondents that the writ petition is not maintainable is not correct. He invited out attention to the following judgments: State of Andhra Pradesh Vs. P.V. Hanumantha Rao (D) thr. Lrs. and Another, ; ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, Union of India (UOI) and Others Vs. Tania Construction Pvt. Ltd., ; Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, ; and, a Judgment of the Delhi High Court in the case of Chandana Kedia Sole Proprietor, Adinath Industries Vs. Union of India (UOI) and Another to say that even in a dispute pertaining to termination of contract, when arbitration clause or an arbitration agreement is available, the jurisdiction of the writ court is not taken away. It is said that if an action is taken which is shown to be in violation of the fundamental rights available to a person and when breach of Article 14, 19 and 21 of the Constitution is established from the material available on record, the entire

process is vitiated. Learned counsel says that if a party is unreasonably dealt with or is dealt with in an unfair manner, the requirement of Article 14 and 19(1) (g) of the Constitution are violated and in such cases the existence of alternate remedy of arbitration cannot be a ground for dismissing a writ petition. He invited our attention to the observations made by the Supreme Court in the case of Harbanslal Sahnia (*supra*) to say that even in the light of arbitration clause being available, the right of the High Court in a writ petition under Article 226 is not taken away and in an appropriate case in spite of availability of alternate remedy, High Court can interfere if the three contingencies indicated by the Supreme Court are available. Learned counsel points out that the three contingencies are:

- (a) where the writ petitioner seeks enforcement of a fundamental right;
- (b) where there is violation of the principles of natural justice; and,
- (c) where the order or proceedings are wholly without jurisdiction or when vires of an Act is challenged.

5. Learned counsel for the petitioners points out that in this case they are seeking enforcement of the fundamental right available to the petitioners under Articles 14 and 19(1)(g) of the Constitution and as there is violation of natural justice in as much as opportunity of hearing and inquiry has not been conducted. Learned counsel says that the writ jurisdiction can be invoked and the preliminary objection raised by respondent No. 2 is unsustainable. Taking us through the observations made in each of the judgments, as referred to hereinabove, and emphasizing that in a given case, even in matters of contract, jurisdiction of a writ court can be resorted, learned counsel seeks for rejecting the preliminary objection.

6. Shri Anshuman Singh, learned counsel appearing for respondent No. 2, submits that under the agreement in question, Clause 7.1.4 contemplates an arbitration clause, wherein the provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") has been made applicable. Learned counsel invites our attention to the application filed by the petitioners u/s 9 of the Act before the 9th Additional District Judge (Arbitration Court), Bhopal to say that the petitioner has invoked the arbitration clause and in paragraph 9 of the said application has admitted that the petitioners are invoking the arbitration clause in the agreement. Learned counsel further submits that after withdrawing the said application and during the pendency of this petition, another application u/s 9 of the Act has been filed, which is available as Annexure R/1 - filed alongwith I.A. No. 9965/2013. Shri Singh points out that this arbitration application u/s 9 of the Act is pending before the Court at Bhopal and, therefore, as petitioner has once taken recourse to the remedy available u/s 9, it is stated that this writ petition is not maintainable. Inviting our attention to the judgment rendered by the Supreme Court, in the case of *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, ; the principles laid down in paragraph 19 thereof; and,

another judgment of the Supreme Court in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., learned counsel argued that once there is an arbitration clause and the party concerned has invoked the arbitration clause by resorting to the remedy available u/s 9 of the Act, the writ petition is not maintainable.

7. That apart, learned counsel for respondent No. 2 took us through various provisions of the agreement; the deficiencies and defects in the work of the petitioners as is indicated in the show-cause notice, and emphasized that the work of starting the networking system was to commence within a period of 9 months, more than 56 months have passed and the petitioners did not commence the work. Learned counsel points out that show-cause notice and opportunity of personal hearing was granted and then only the impugned action is taken and in the facts and circumstances of the case the petition be dismissed.

8. Shri Kuldeep Rawat, learned counsel for the petitioners, refuted the aforesaid and in rejoinder submitted that merely because the petitioners have resorted to seek some interim relief in a proceeding initiated u/s 9 of the Act, the petition cannot be dismissed. Learned counsel says that the reason given by the respondents for terminating the contract is wholly arbitrary, unreasonable and is done only to harass and victimize the petitioners, therefore, the petition is maintainable.

9. We have bestowed our anxious consideration to the question involved with regard to the preliminary objection raised.

10. It is no doubt true that on a complete reading of the judgments relied upon by Shri Rawat it is clear that even if an alternate remedy of resorting to arbitration is available and even if there is an arbitration agreement between the parties, as a thumb rule in all cases a writ petition cannot be dismissed only because an arbitration clause is available. The consistent view of the Supreme Court, on a close scrutiny of all the judgments, goes to show that inspite of availability of remedy of arbitration, the rule of discretion has to be applied and a decision taken. It has been held that existence of alternate remedy is not a rule of compulsion, but it is a rule of discretion and in an appropriate case inspite of availability of such a remedy a writ petition is maintainable. Some of the contingency indicated for exercising discretionary jurisdiction are enforcement of fundamental rights; failure to follow the principles of natural justice; and, the impugned action being taken in an arbitrary and illegal manner or when constitutional validity or vires of the Act is challenged.

11. In the present case, petitioners have mainly come out with two grievances. His first contention is that the decision is arbitrary and unreasonable; and, second that the action has been taken without grant of proper opportunity. It was also tried to be emphasized that there is no disputed question of facts and the default or defects pointed out do not exist.

12. We have gone through the material available on record and we find that

before taking the impugned action show cause notice and communications were made between the parties and even personal hearing was granted to the petitioners. There are serious disputes between the parties with regard to who has committed the default. Overwhelming documents filed by the parties does show that on various factual aspects of the matter there are serious dispute between them and it is not a case where based on the affidavits filed by the parties, this Court can come to the conclusion as to who is right in making the allegation or counter-allegation with regard to violation of the terms and conditions or the breach. This in our considered view is a serious disputed question of fact, highly technical in nature, and it is not appropriate for this Court to enter into an area of fact finding inquiry. That apart, from a complete reading of the judgment of the Supreme Court with regard to exercise of discretionary jurisdiction, it is clear that only in cases where violation of the principles of natural justice or unreasonableness or arbitrariness is apparent from the face of the record, interference can be made.

13. In the present case, the following three factors have to be taken note of. In the matter of following the principles of natural justice or opportunity of hearing is concerned, various notices, show-cause notice and personal hearing have been granted and after giving opportunity of reply and hearing, the impugned action is taken. That being so, it cannot be said that on the face of it, the principle of natural justice are violated.

14. As far as arbitrariness or unreasonableness in taking the decision by the respondents is concerned, petitioners terms the decision to be arbitrary or unreasonable on the ground that their reply and justification have not been properly considered or the finding recorded after such consideration is not correct and perverse. Petitioners have tried to demonstrate before this Court that they have not committed any breach and if the work was not completed in 56 weeks, the fault is on respondent No. 2 also, and the petitioners cannot be blamed for the same. It is a case where the question as to who is at fault or who is to be blamed for the default is itself in dispute between the parties and this is a dispute on various factual aspects, which not only requires inquiry on facts, but also highly technical question are required to be considered and a decision taken, as the work in question is also highly technical in nature. That being so, there are factual aspects of the matter having certain technical angle also, which is to be looked into and when material contradictory in nature are produced by the parties, it cannot be said that the decision taken or the action or the procedure followed on the face of it, is arbitrary or unreasonable. That apart, one of the most import aspect of the matter is that being aware of the remedy of arbitration available, petitioner has already invoked the arbitration clause and has taken recourse to the remedy of approaching the arbitration court in a proceeding u/s 9, of the Arbitration and Conciliation Act, 1996 and the matter is still pending before the court of competent jurisdiction.

15. In paragraph 19 of the judgment rendered by the Supreme Court in the case

of Firm Ashok Traders (supra), the following principles are laid down:

19. When a party applies u/s 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application u/s 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application u/s 9 is filed, the proceedings have not commenced u/s 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application u/s 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal. But a situation may so demand that a party may choose to apply u/s 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders u/s 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction u/s 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application u/s 9 merely because no notice has been issued u/s 21 of the 1996 Act.

(Emphasis supplied)

16. From the aforesaid, it is clear that once the jurisdiction of the arbitration clause has been invoked and the petitioners themselves admit of existence of remedy of arbitration, then they have to take recourse to the remedy already available and resorted to and in such a case it is not proper for this Court to interfere.

17. Accordingly, finding the preliminary objection raised by respondent No. 2 to be tenable, the same is allowed. The petition is dismissed with liberty to the petitioners to take recourse to the remedy available of arbitration, as indicated hereinabove. Accordingly, the writ petition stands dismissed. No order as to costs.