

(2011) 08 MAD CK 0108

In the Madras High Court

Case No : Writ Petition (MD) No"s. 5202 and 5628 of 2008

R. Janaki

APPELLANT

Vs

The Project Director, The District Collector and The Additional
Collector, Project Co-ordinator

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2011) 08 MAD CK 0108

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : A. Thirumurthy, for the Appellant; V. Pandi, Government Advocate,
for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—The writ Petitioner is a class-I contractor. She has filed the present writ petitions for a direction to allow her to withdraw

from agreement stated to have been completed on 25.01.2008 based on her representation, dated 03.5.2008 and for a further direction against

the third Respondent to refund security deposit amount of Rs. 10,52,000/- given in the form of bank guarantee and also challenged the subsequent

order of the third Respondent, dated 11.06.2008 by which the third Respondent has terminated contract.

2. The Petitioner was given the work of building houses called Tsunami Rehabilitation House under Rajiv Gandhi Rehabilitation Programme at

Tsunami Rehabilitation Permanent Houses) at Tsunami hit areas. As per the Government scheme, the work to be done through the District

Implementation Units, namely the third Respondent. The work was allotted to

the Petitioner being the class-I contractor on the basis of the tender process and the work of construction of 192 tsunami houses at Keelamundhal village, Mariyur, Chinna Erwadi, Sadaimunianvalasal and Vallinokkam in Ramanathapuram District were allotted by the third Respondent which was to the extent of Rs. 456.96 lakhs. Based on that acceptance, the Petitioner had deposited an amount of Rs. 10,52,000/- towards EMD, as performance security by way of bank guarantee in favour of the second Respondent through the Tamil Nadu Mercantile Bank at Sayalkudi. An agreement was entered by the Petitioner along with the third Respondent on 25.01.2008 and according to the Petitioner, she has received a copy of the agreement only on 06.06.2008.

3. It is the case of the Petitioner that when pursuant to the contract she has proceeded to lay down roads, the previous land owners and nearby occupants have raised objections and that was reported by her to the third Respondent on 28.03.2008 and according to the Petitioner, in such circumstances and because of the hindrance cost of the work has increased. According to the Petitioner, the third Respondent sent a notice on 17.03.2008 stating that the Project Director, Tsunami Project Implementation Unit has programmed to visit the site on 20.03.2008 and the Petitioner should complete the work process and at the time it was replied by the Petitioner stating that there is No. question of completion of work due to the abovesaid reasons. Apprehending that the third Respondent is likely to block list the Petitioner, she has filed the present writ petition for the relief as stated above on the ground that the work site was not handed over till June 2008 even though the agreement was entered in January 2008 itself.

4. On the other hand, in the counter affidavit filed by the third Respondent, it is stated that immediately on the agreement entered on 25.01.2008, the site was handed over to the Petitioner and she was directed to proceed with the construction work and therefore, it was denied that the site was not handed over to her on 25.01.2008. It is also stated that pursuant to the agreement in fact the Petitioner has collected bricks and 40 mm metal for construction. The Junior Engineer has marked the site for 7 houses and the Petitioner has started commencing the earth work for 7 houses as acknowledged by her, in spite of it, the work has not been concluded

as per the terms of the agreement and several notices were issued including on 17.03.2008, 30.03.2008, 05.04.2008, 24.04.2008 and 09.05.2008 and in spite of it, there was No. work commenced as per the terms of the contract. As per the terms of the contract, the third Respondent is empowered to terminate the contract by forfeiting the security deposit. It is stated that the site has been handed over to the Petitioner on 25.01.2008 but she has not commenced the work even in respect of the 7 houses in which ground work has already been done. Therefore, according to the third Respondent, in spite of handing over the site, the Petitioner being the contractor has refused to carry out the work and it was in those circumstances, by an order dated 04.06.2008 which is the first Respondent has given the orders to terminate the Petitioner's agreement and the termination order has also been passed subsequently which is impugned in the other writ petition.

5. In the other writ petition filed by the Petitioner challenging the termination order, the Petitioner while repeating the same contention raised in the earlier writ petition that the site has not been handed over and therefore, there was No. possibility to proceed with the work and there has been certain objections raised by the Respondents and in such circumstances, threatening by the Respondents to forfeiture the EMD is illegal and therefore, the impugned order of termination is bad in law.

6. It is the contention of Mr. A. Thirumurthy, learned Counsel for the Petitioner that even though the Petitioner is conscious of the fact that the issue involved is contractual in nature the writ petition is maintainable for the reason that the factual aspects are not in dispute. He relied upon various judgments to substantiate his contention that even in respect of contractual matters, the writ jurisdiction can be extended under Article 226 of the Constitution. Particularly, he has relied upon a judgment of this Court in Green Earth Vs. The Director of Research and Chairman, Purchase and Technical Committee and The Associate Professor and Head/Program Co-ordinator, Coastal Saline Research Centre, . His contention is that when the facts are undisputed, it is not proper to direct the parties to approach appropriate forum which will only amount to drag on the matter especially when as a registered class-I contractor, the Petitioner had deposited a huge amount of money as EMD and her inability for carrying out

the work as per the terms of the contract was not due to any conduct attributable to her.

7. On the face of it, there is No. difficulty to conclude that these two writ petitions are gross abuse of process of law. The Petitioner having entered into agreement with the third Respondent for the purpose of construction of tsunami relief houses which are the rehabilitation measures by the Government under the scheme, if the Petitioner has failed to perform her functions as per the terms of contract may be due to the reason that there is a contribution on the part of the Respondents in not handing over the site, it is not known as to how the relief sought for in this writ petition is maintainable for a direction as if the contract has come to an end, not due to the conduct of the Petitioner and therefore, she is eligible for refund of the security deposit amount especially when admittedly a clause in the contract contemplates that on the failure of the contractor, the EMD has been forfeited. On the face of it, whether the third Respondent has got right to forfeit the amount or not basically depends upon the performance of obligation of the parties under the contract. If the Petitioner has performed her part of obligation as per the terms of the contract and there has been fault on the part of the Respondent which has contributed, the non compliance of the clause in terms of the contract, there is a mechanism provided therein for the purpose of obtaining relief.

8. On the other hand, if there is a fault on the part of Petitioner in not proceeding with the contract in spite of the obligation performed on the side of the Respondent even then there is a provision under the terms of contract by approaching the civil Court for arbitration. Therefore, on the factual matrix, when it is the case of the Petitioner that in spite of the contract having entered in January 2008 and a copy of the agreement was served on her only in June 2008, but on the other hand, it is the specific stand of the third Respondent that on the date of entering into the contract namely on 25.01.2008, it is the Petitioner as a contractor has been permitted to proceed with the terms of contract and in fact based on that she has proceeded to put up construction in respect of 7 houses by performing initial activities and therefore, according to the third Respondent, the site was handed over on the date of agreement itself. Certainly, when such contradictory stand taken by the parties, it is not for this Court to decide

based on the exchange of affidavits as to which version of the party is correct. That depends mainly on the appreciation of evidence. Being a

registered contractor, it is not as if the Petitioner is left in lurch. If really, by the conduct of the Respondents, she is unable to perform her function,

she may even challenge the forfeiture of EMD and that cannot be done in a writ petition.

9. Reliance placed on by the learned Counsel for the Petitioner to the judgment of this Court in *Green Earth Vs. The Director of Research and*

Chairman, Purchase and Technical Committee and The Associate Professor and Head/Program Co-ordinator, Coastal Saline Research Centre,

relates to a case where there was a discrepancy of the stand taken by the Respondent from the stage of opening of the technical bid. As it is found

by this Court in the abovesaid case that when there was evaluation made on the technical bid and that evaluation was accepted especially when

one of the contracting parties is Government at the time of negotiation of prices, it is certainly not open to the Governmental authorities to go back

to say that the technical bid was not properly evaluated. It was in those circumstances, this Court posed a question as to whether Article 226 of

the Constitution will apply or not. Considering the fact that there was gross arbitrariness in the conduct of the Government at the time of technical

bid and evaluation made and subsequently going back from the evaluation and it was in that circumstance, instead of directing the parties to the

Civil Court to decide the subsequent attempt of the Government regarding the technical bid as to whether it was correct or not rule nisi was issued

for the purpose of re-dressal of grievance. It was while giving such relief which in my considered view correctly, the learned Judge has relied upon

catena of judgments of the Hon''ble Supreme Court wherein the Hon''ble Supreme Court in clear terms has held that even in contractual matters,

the High Court has got jurisdiction under Article 226 of the Constitution of India. But it has to be noted that it is not an absolute rule. The

invocation of Article 226 is possible in rarest of rare cases where the conduct of the Government in respect of performance of contract. But in

cases where while performing the contract default is committed by one of the contracting parties out of whom one may be the Government or its

agencies, certainly it is not open to the High Court under Article 226 of the Constitution of India to give its own version as to who is correct in

respect of the performance of contract especially when it requires appreciation of evidence.

10. Law is well settled that while exercising powers under Article 226 of the Constitution of India it is not the decision but decision making process

that alone could be the subject matter of jurisdiction for the High Court. This Court cannot substitute its own view in respect of the decision arrived

at by the authorities concerned. It is only in cases where for the purpose of arriving at such a decision, if the process has not been followed in the

manner known to law, the jurisdiction of this Court under Article 226 of the Constitution comes in and not otherwise. It was only taking that into

consideration, in various judgments the Hon"ble Supreme court has held that in contractual obligations also the High Court has got jurisdiction

under Articles 226 of the Constitution of India to interfere with the same.

11. The reliance placed on by the learned Counsel for the Petitioner a Division Bench judgment of the Orissa High Court rendered in Sri Padma

Charan Patra Vs. State of Orissa and Others, to show that in cases of arbitrariness in performance of contract, it was amounting to violation of

Article 14 of the Constitution of India, relates to the terms of contract wherein the contract is to be performed based on the specific design and

acquisition of lands for the purpose of construction of bridge by the State Government. When there was a delay in preparing the design and

acquisition of land for the purpose of construction of bridge and in spite of which the Government took action in forfeiting the advance of amount of

EMD paid by the contractor, the Orissa High Court has held that such forfeiture is not valid in law observing that any undue delay on the part of

the Government in not acquiring a place for the purpose of construction of a bridge which is the subject matter of contract. Certainly for the

delayed period, the contractor is entitled to claim the escalated amount of cost. That is not the issue before this Court on the facts of the present

case.

12. On the facts of the present case, there is a disputed question of fact as to whether the site subject matter of contract has been handed over or

not. As I stated above, while it is the stand of the Petitioner that the site has not been handed over on 25.01.2008 but on the other hand, it is the

concrete case of the Respondents that the site was handed over on 25.01.2008

and a copy of the agreement subsequently is served on June 2008

is only a technical act, these are not the facts which are to be decided by appreciation of evidence and not by this Court under Article 226 of the Constitution of India.

13. In such view of the matter, looking at any angle, the Petitioner is not entitled for the relief claimed in these writ petitions. Accordingly, the writ

petitions fails and the same are dismissed. It is needless to state that if the Petitioner as per the terms of contract is entitled to invoke the other relief

including arbitration, it is for her to work out her remedy provided as per the terms of contract. If such reference is made by the arbitrator or any

other authority as per the terms of contract, such authority shall decide the dispute independently on merit and in accordance with law without

being influenced by any remark made by this Court. It is also made clear that if the Petitioner has any right under the agreement, she shall approach

the Arbitrator within a period four weeks from the date of receipt of a copy of this order. The EMD, which is in the form of bank guarantee, shall

be kept in existence if it is alive, till the Petitioner invokes the arbitration proceedings. No. costs. Consequently, connected miscellaneous petitions

are closed.