

(2013) 11 RAJ CK 0150

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 1862/12

Raj. Rajya Vidyut Utpadan Nigam Ltd.

APPELLANT

Vs

Manglam Cement Ltd.

RESPONDENT

Date of Decision : 18-11-2013

Acts Referred:

Citation : AIR 2014 Raj 1 : (2014) 3 RLW 2327

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : R.K. Agrawal and Mr. Arshab Sharma, for the Appellant; Sudhanshu Kasliwal and Ms. Suruchi Kasliwal, M.D. Agrawal and Mr. Anurag Agrawal and Mr. Anuroop Singhi, for the Respondent

Final Decision : Allowed

Judgement

Bela M. Trivedi, J.—With the consent of the learned counsels for the parties all the four appeals are heard finally at the admission stage. All the four appeals arise out of the common order dated 18.2.12 passed by the Addl. District Judge No. 9, Jaipur Metropolitan Court, Jaipur (hereinafter referred to as "the court below") in Applications being Civil Misc. Application (Arbitration) No. 438/11, 439/11, 440/11 and 445/11, u/s 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the said Act"), whereby the court below has allowed the said applications filed by the respective respondents-applicants in all the matters, and has restrained the appellant-non-applicant from proceeding further with the notice inviting tender (NIT for short) dated 24.8.11 and also from causing any obstruction to the respondent-companies in the supply of fly ash till the pendency of the arbitration proceedings that may be initiated between the parties.

2. The short facts giving rise to the present appeals are that the appellant company is engaged in the process of electricity generation, having its thermal power plant at Kota and the respondent-companies are the companies registered under the Companies Act, and are the manufacturers of the cement. The

appellant company generates the electricity by using the coal and during such generation, the ash which is produced as a waste, is being used by the cement companies in the production of the cement. The appellant company, therefore, had invited the respondent-companies for the disposal of the fly ash being generated in its different units. Since the respondent-companies also intended to utilise the fly ash blending for the production of cement, the appellant entered into the four separate agreements with four respondent-companies i.e. with Manglam Cement Ltd. on 14.10.04, with Shree Cement Ltd. on 2.11.04, with Ultratech Ltd. (earlier Grasim Industries Ltd.) on 15.10.04 and with ACC Cement Ltd. on 7.10.04. Pursuant to the said agreements, the said respondent companies installed the fly ash commissioning system on 31.7.07, 16.10.07, 30.3.07 and 10.07.07 respectively. The relevant clauses of the agreements in question entered into between the appellant and the respondents are reproduced herein for the sake of convenience.

2.2 KSTPS will provide the above land on lease to GIL for installing infrastructure facility on token lease money. The lease of land shall be initially for a period of 5 years only which may be extended by RRVUNL. Ownership and other rights shall remain with KSTPS.

2.8 RRVUNL agrees to supply fly ash free of cost, initially for a period of 5 years and the same may be reviewed every year on the basis of performance of the firm (GIL) and then prevailing circumstances. The agreement shall finally be reviewed on fresh terms and conditions as agreed mutually for continuation beyond the period of 5 years.

2.11 In case GIL may not be able to take delivery of fly ash from Units 4 and 5 for a period of more than a month for reasons other than unforeseen situations/ routine break downs or any other conditions beyond the control of GIL, KSTPS will reserve the right to own the system. Similarly under any other situation of non-fulfillment of AGREEMENT on the part of GIL, the permission will be withdrawn and the installed system shall be taken over by RRVUNL/KSTPS.

2.12 The system installed by GIL shall become sole property of KSTPS/RRVUNL on expiry/termination of the agreement.

2.13 GIL agrees to pay Rs. 12 lakhs per annum to RRVUNL, out of which, Rs. 10 lakhs will be reimbursement towards maintenance cost of the approach road from storage silos to Gate No. 4 and Rs. 2 lakhs for maintaining the cleanliness of the surrounding, where the transit silos and storage silos will be installed and the road used for the purpose.

2.14 The dry ash collection system to be installed by GIL will be generally in line with the proposal submitted by GIL as annexed at Appendix A, subject to technical feasibility and system requirements and the terms and conditions shall be in accordance to guidelines issued by KSTPS and accepted by GIL as annexed at Appendix B.

6. VALIDITY-This AGREEMENT will be in force for a period of 5 years from the date of commissioning of the system or six years from the date of signing of the agreement, whichever is later.

9. SETTLEMENT OF DISPUTES ETC. In the event of any question, dispute or difference arising between the parties hereto touching the construction of any clause therein contained or the rights, duties and liabilities of the parties hereto or in any way touching or arising out of these presents, the same shall be referred for determination by arbitrator to be appointed by the CMD, RRVUNL. Arbitration proceedings shall be in accordance with the provisions of the Indian Arbitration Act, 1996 or any other amendment or modification thereof for the time being in force.

10. CONTINUITY.

Services under the AGREEMENT notwithstanding the existence of any dispute, question of recovery, shall continue during the arbitration proceedings and no payments due and payable by GIL or supply of fly ash by RRVUNL to GIL shall be withheld on account of such arbitration proceedings unless such payment or supply itself is the direct subject matter or one of the subject matters of arbitration.

3. It appears that the appellant thereafter floated a notice inviting tender, which was published in the local daily Rajasthan Patrika on 24.8.11, for the work contracts as mentioned therein. The due date for opening the tenders was 10.10.11. The respondent companies purchased the tender forms and also participated in the pre-bid meeting held on 26.9.11, however in the meantime on 23/24.9.11 they approached the court below u/s 9 of the said Act seeking interim measures. The court below on 27.9.11 passed an ad-interim order in case of Manglam Cement Ltd., Ultratech Cement Ltd. and Shree Cement Ltd. and on 19.10.11 in case of M/s. ACC Cement Ltd., restraining the appellant from cancelling the respective agreements entered into with the respondents and also from proceeding with the NIT published on 24.8.11. The court below thereafter passed the impugned common order as stated hereinabove, finally allowing the said applications of the respondents filed u/s 9 of the said Act.

4. The learned senior counsel Mr. R.K. Agrawal for the appellant-company taking the court to the various clauses of the agreement, more particularly clause 2.8, 2.12 and clause 6 submitted that the agreements in question entered into by the appellant with the respondent companies were in force for a period of 5 years from the date of commissioning of the system or 6 years from the date of signing of the agreement, whichever was later and that the commissioning of system having taken place in March-October, 2007 and the period of 5 years therefrom was to be ended in March, 2012, the appellant company had floated the NIT dated 24.8.11, as the contracts with the respondent-companies were likely to come to an end by efflux of time. He also submitted that the respondent-companies after purchasing the tender forms and participating in the pre-bid

meeting held on 26.9.11 approached the court below by way of filing application u/s 9 of the said Act and obtained the ad-interim order on 27.9.11 which continued till the final impugned order dated 18.2.12. According to him as a result of the impugned order passed by the court below, the appellant-company is suffering the loss running into crores of rupees inasmuch as the appellant has received the attractive proposals for the work contracts pursuant to the said NIT from other cement companies whereas the respondent-companies are taking away fly ash free of cost. Mr. Agrawal referring to the impugned order passed by the court below vehemently submitted that the court below had misinterpreted the clauses of the agreement in question and relied upon the proposal of one Vivek Cement Ltd., which was a unit of Grasim Cement Ltd., as contained in Appendix-A, for the purpose of allowing the applications of the other three companies, though the said Appendix-A was not the part of agreement in the other companies. Even otherwise, runs the submission of Mr. Agrawal, the respective Appendix-A was to be submitted by the respondent-companies for the purpose of technical proposal, and as per clause 2.14, the dry ash collection system was to be installed by the respondent-companies in line with the proposal contained in Appendix-A, subject to technical feasibility and system requirements. According to Mr. Agrawal the proposal of Vikram Cement contained in Appendix-A with regard to the continuation of the agreement for the period of 25 years was never accepted by the appellant-company, even in case of Vikram Cement or Grasim Cement. Relying upon the decisions of the Apex Court in case of Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, he submitted that the award would be liable to be set aside if it was passed against specific terms of contract. He also submitted that even the Arbitrator has to act within the terms of agreement and that what the Arbitrator could not have awarded finally, the court below could not have awarded by way of interim measure u/s 9 of the said Act. Mr. Agrawal has also relied upon the decision of the Apex Court in case of Food Corporation of India Vs. Chandu Construction and Another, and in case of Sime Darby Engineering SDN. BHD. Vs. Engineers India Ltd., in support of his submissions.

5. Per contra, the learned senior counsel Mr. Sudhanshu Kasliwal for the respondent-companies Manglam Cement Ltd. and Ultratech Cement Ltd. submitted that the respondent-companies had installed their system/plant after incurring huge expenditure and with the understanding that the agreement shall remain in force initially for a period of 5 years and shall be renewed on fresh terms and conditions for continuation beyond the period of 5 years, as contemplated in clause 2.8 of the agreement in question. Mr. Kasliwal relying upon the decision of the Apex Court in case of Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, submitted that the Government contracts have to satisfy the taste of reasonableness and that if there is any vagueness or subjectivity in the terms specified in the agreement, it may result into an unequal and discriminatory treatment, violating the doctrine of "level playing field". Relying upon clause 2.2,

he submitted that the appellant had provided the land on lease to the respondent-companies for installing the infrastructure facilities and that the plant having been commissioned by the respondent-companies on the said land, the said plant and machineries had also become the immoveable property, the ownership of which could not be transferred in favour of the appellant without executing a registered document as contemplated in Section 107 of the Transfer of Property Act. Mr. Kasliwal has also relied upon the decision of the Apex Court in case of *Duncans Industries Ltd. Vs. State of U.P. and Others*, in support of his submissions. He further submitted that the agreements in question having not expired, nor terminated, the respondent-companies were the owners of the system installed by them and the appellant-company could not have invited tenders for the work contracts on the properties of the respondent-companies. Referring to clause 9 and 10 of the agreements in question he submitted that till the disputes between the parties touching the construction of clauses of agreements in question were decided by the Arbitrator, the appellant-company was required to be restrained from inviting fresh tender and were required to be directed to supply fly ash to the respondent-companies. Relying upon the proposal made by the Vikram Cement Ltd., which was a unit of Grasim Cement Ltd., in Appendix-A to the agreement, he submitted that the said Appendix-A was treated as part of the agreement as per clause 2.14 and, therefore contract in question was required to be continued for a period of 25 years. He also submitted that the contract having neither been terminated nor reviewed after the expiry of 5 years of period, the respondent-companies had the right to continue with their respective contracts in question.

6. The learned counsel Mr. M.D. Agrawal appearing for the ACC Cement Ltd. had adopted the arguments advanced by the learned senior counsel Mr. Kasliwal.

7. Mr. Anuroop Singhi, learned counsel appearing for the respondent-Shree Cement Ltd., while supporting the submissions made by the learned counsel Mr. Kasliwal, further submitted that the court below had rightly passed the order u/s 9 of the said Act to preserve the property i.e. the plant installed by the respondent-companies, which was the subject matter of the disputes in arbitration, and hence this court may not interfere with the said order. Referring to clause 2.12 contained in the agreement in question entered into with Shree Cement Ltd., he submitted that the words "including extensions" appearing in the said clause implied that the contract was liable to be extended from time to time upto 25 years.

8. In the instant case it is not disputed that though the appellant-company had executed four separate agreements with the four respondent-companies, the terms and conditions of the agreements, the period during which the said agreements were executed and the period during which plants were commissioned by the said respondents were more or less same. It is also not disputed that the respondent-companies have already filed the applications for the appointment of Arbitrator u/s 11 of the said Act and the said applications are

pending in the High Court. Now though the learned counsels for the parties have argued at length on the interpretation of the clauses of the agreements in question, it is required to be noted that as per clause 9 of the said agreements, in the event of any question, dispute or difference arising between the parties touching to the construction of any clause contained in the said agreements or the rights, duties or liabilities of the parties in any way touching or arising out of the said agreements, the same were required to be referred for determination by the Arbitrator to be appointed by the CMD, RRVUNL. Hence, as such it is for the Arbitrator, who may be appointed to resolve the disputes or differences between the parties touching the construction of the clauses of the agreements, to decide the same. Since the respective respondents had filed the applications before the court below seeking interim measures u/s 9 of the said Act pending the arbitration proceedings the only question required to be considered by this court would be as to whether the impugned order passed by the court below was legally justified and within the purview of Section 9 or not? Of course, for deciding the said question, the court will have to cursorily refer to the clauses of contracts in question.

9. So far as the validity of the agreements in question is concerned, as per clause 6 thereof, the respective agreements entered into between the parties were supposed to be in force for a period of 5 years from the date of commissioning of the system, or for a period of 6 years from the date of the signing of the agreement, whichever was later. Since the agreements were signed by the parties somewhere during the period October-November 2004 and the respondent-companies had installed the fly ash system somewhere during the period March-July, 2007, the agreements could be said to be in force for a period of 5 years from the date of commissioning of the system i.e. upto March-July, 2012, as the case may be. At this juncture, it is also required to be referred to clause 2.8, according to which the appellant-company had agreed to supply fly ash to the respondent-companies free of cost initially for a period of 5 years and the same was to be reviewed every year on the basis of performance of the firm and then prevailing circumstances. The said clause also stated that the agreement shall be finally reviewed on fresh terms and conditions as agreed mutually for continuation beyond the period of 5 years. Admittedly, the period of said 5 years has already expired and the agreements in question have not been finally reviewed, nor any fresh terms and conditions as mutually agreed by the parties for continuation of the agreement beyond 5 years have been settled. Thus, the court finds substance in the submission made by the learned counsel for the appellant-company that the period of agreements in question having come to an end by efflux of time and no fresh terms and conditions having been agreed to by and between the parties to the respective agreements in question, the appellant-company was entitled to invite fresh tenders by publishing the NIT.

10. Though much emphasis was laid by the learned senior counsel Mr. Kasliwal on the proposal made by the Vikram Cement, which was a unit of Grasim Industries (now Ultratech Ltd.) which had proposed to continue the contract for a

period of 25 years, the said proposal could not be taken into consideration, firstly for the reason that such proposal was not made by the other three respondent-companies in the Appendix-A annexed to their respective agreements, and secondly for the reason that even the said proposal of Vikram Cement Ltd. was not accepted by the appellant-company. From the bare reading of the said clause 2.14 it clearly transpires that it was agreed between the parties to the respective agreements that the dry ash collection system to be installed by the respondent-companies was to be put in line with the proposal submitted by such party as Annexed at Appendix-A, subject to technical feasibility and the system requirements, and that the terms and conditions were to be in accordance with the guidelines issued by the appellant-company and accepted by the respondent-companies as annexed at Appendix-B. Hence the proposal submitted by the respondent-companies as per Appendix-A was with regard to the technical feasibility and system requirements of the dry ash collection system only, and it did not pertain to the validity period of the agreements in question. Again, what was proposed by the Vikram Cement in Appendix-A to its agreement was its opinion that the instalment of the silos at KSTPS premises would be viable if KSTPS agreed for fly ash supply of required quality and quantity for entire long period of 25 years free of cost and that the operation and maintenance of fly ash conveying system from power plant to loading silos should be under KSTPS scope. There is nothing on record to suggest that any of the suggestions made by the Vikram Cement was accepted by the appellant-company. On the contrary, it clearly transpires from the terms and conditions contained in the agreements in question that the appellant-company had agreed to supply fly ash free of cost initially for a period of 5 years, which could be continued for a period beyond 5 years only on the terms and conditions as may be mutually agreed upon by the parties as per clause 2.8. It also appears that the respondent-companies had agreed to pay Rs. 12 lakhs per annum to appellant-company, out of which Rs. 10 lakhs was to be reimbursed towards maintenance cost of the approach road and Rs. 2 lakhs for the maintenance of cleanliness and surroundings, as per clause 2.13 of the said agreements. If the opinion of Vikram Cement was accepted by the appellant, such clauses would not be there in the agreement.

11. It was also agreed between the parties that the system that may be installed by the respondent-companies would become sole property of the appellant-company on expiry/termination of the agreement, as per clause 2.12. Under the circumstances, it is difficult to accept the submissions made by the learned senior counsel Mr. Kasliwal and other counsels appearing for the respondent-companies that the agreements in question were required to be treated as in force for a period of 25 years, as proposed by the Vikram Cement and were not limited for 5 years. It is trite to say that the Contract Act does not permit the parties to a contract to ignore the specific covenants thereof, and the parties having submitted the tenders with the eyes wide open, they could not claim reliefs in the court of law on the vague plea of equity. As rightly submitted by the learned counsel for the appellant and as per the settled legal position, even the

arbitration in the arbitration proceedings could not have travelled beyond the specific terms of the contract, and granted the relief finally as has been granted by the court below at the interim stage u/s 9 of the said Act.

12. It is further required to be noted that by filing applications u/s 9 of the said Act, the respondent-companies had sought to enforce agreements in question, the nature of which ex-facie appear to be determinable, and as per Section 14(1) (c) of the Specific Relief Act, 1963, a contract which is in its nature determinable, cannot be specifically enforced. The court, therefore, is of the opinion that the court below has committed an illegality in entertaining the applications u/s 9 of the said Act by granting interim measure requiring the appellant-company to continue with the contract, which in its nature was determinable and which could not be specifically enforced. Further, even if it is presumed that the appellant-company had committed breach of the terms and conditions of the contract, then also the court below could not have granted the injunction to prevent the breach of such contract, the performance of which could not be specifically enforced, in view of Section 41(e) of the Specific Relief Act. The court, therefore, is of the opinion that the court below has exceeded its jurisdiction and committed gross illegality in granting the relief at the interim stage, which otherwise could not have been granted by the Arbitrator finally in the arbitration proceedings. There cannot be any disagreement with the ratio of the decisions of the Apex Court relied upon by the learned senior counsel Mr. Kasliwal, however they are hardly of any help to him in the facts and circumstances of the case. In that view of the matter, it is held that the impugned common order dated 18.2.12 passed by the court below being illegal, perverse and having been passed without any authority of law, deserves to be set aside and is accordingly set aside. All the four appeals filed by the appellant-company stand allowed accordingly.