
(2016) 01 KAR CK 0222

In the Karnataka High Court

Case No : Writ Petition Nos. 9518-9519/2013 (GM-KEB)

Rio Energy Private Limited

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Constitution of India, 1950 — Article 12, Article 311

Citation : (2016) 3 KantLJ 699

Hon'ble Judges : Ashok B. Hinchigeri, J.

Bench : Single Bench

Advocate : M.H. Sawkar, Advocate for Sundaraswamy and Ramdas, for the Appellant; A.G. Shivanna, A.A.G. for T.L. Kiran Kumar, A.G.A., G.S. Kannur, Advocate and Ajay J.N., Advocate for Pragathi Law Chambers, for the Respondent

Final Decision : Disposed Off

Judgement

Ashok B. Hinchigeri, J.—1. The petitioner's grievance is over the withdrawal of allotment of setting up of a Mini Hydel Project across Ghataprabha Right Bank Canal at Hidkal Dam and granting permission to the respondent No. 3 to set up the project with 20 M.W.

2. Sri M.H. Sawkar, the learned counsel for the petitioner submits that the allotment Committee after carefully considering the application, project report, etc. filed by the petitioner accorded the approval for setting up of the said project by the petitioner. He brings to my notice that the respondent No. 2 is also a party to the said proceedings. He submits that the petitioner has not violated any terms and conditions of allotment as enumerated in the Government Order, dated 19.12.2009 (Annexure-F).

3. He submits that the petitioner has already invested about Rs. 50 lakhs into the project. When there are no deficiencies and lapses on the part of the petitioner, the allotment is withdrawn from the petitioner only with a view to give the same to the respondent No. 3.

4. The learned counsel brings to my notice the show cause notice issued to the petitioner as to why the allotment should not be cancelled invoking Clauses 8, 10 and 11 of the Government Order. He read out the said clauses and contended that they are not at all attracted. The said clauses are extracted hereinbelow:

5. He submits that the circumstances as enumerated in Clauses 8 and 10 have not cropped up warranting the exercise of the power under Clause 11 of the said order. He submits that no hydel power/irrigation project/drinking water project are being implemented in the area in question. He submits that the petitioner's project area is not being submerged under the Karnataka Power Corporation Limited ("KPCL" for short) schemes.

6. He submits that the show cause notice is for the alleged violation of Clauses 8 and 10. But the final order canceling the allotment goes far beyond what is stated in the show cause notice. He submits that the impugned order, dated 31.12.2012 (Annexure-V) gives the following reasons for canceling the allotment:

(a) The petitioner has not obtained any clearance.

(b) The petitioner has not started the civil construction work.

(c) Forest, Ecology and Environment Department has already granted the clearance to the third respondent's project. As the KPCL's power generating project would become functional in 18 months' time, the same is in public interest.

7. He submits that in the show cause notice none of the three issues are raised. He submits that the third respondent KPCL is a Government Company, but it cannot be construed or treated as a Government or Government Department as such for the purpose of invoking Clause 8 of the Government Order, dated 19.12.2009 (Annexure-F). In support of his submissions he relies on the Apex Court's judgment in the case of A.K. BINDAL AND ANOTHER v. UNION OF INDIA AND OTHERS reported in , AIR 2003 SC 2189. In the said case it was held that the Fertilizer Corporation of India and Hindustan Fertilizer Corporation are both Companies registered under the Companies Act with the only difference that they are Government Companies within the meaning of Section 617 of the Companies Act.

8. Nextly, he relies on the Apex Court's judgment in the case of NATIONAL TEXTILE CORPORATION LIMITED v. NARESHKUMAR BADRIKUMAR JAGAD AND OTHERS reported in , AIR 2012 SC 264, wherein it is held that the National Textile Corporation Limited is neither Government nor Government Department; it is a Government Company. It cannot be equated with the Central Government.

9. He also brings to my notice the Hon'ble Supreme Court's judgment in the case of SRIKANT v. VASANTRAO AND OTHERS reported in , AIR 2006 SC 918. The relevant portions of said judgment read out by him are as follows:

"17. Thus the very decisions relied on by the High Court make it clear

that "instrumentalities of State" are different from "State Government", though both may answer the definition of "State" under Article 12 for the limited purpose of Part-III of the Constitution..... While the term "State" may include a State Government as also statutory or other authorities for the purposes of part-III (or Part-IV) of the Constitution, the term "State Government" in its ordinary sense does not encompass in its fold either a local or statutory authority. It follows, therefore, that though GMIDC and MJP may fall within the scope of "State" for purposes of Part-III of the Constitution, they are not "State Government" for the purposes of section 9-A (read with section 7) of the Act."

10. He also sought to draw support from the Hon"ble Supreme Court's decision in the case of MOHD. HADI RAJA v. STATE OF BIHAR AND ANOTHER reported in , (1998) 5 SCC 91. Earlier part of paragraph No. 22 read out by him is as follows:

"22. For the purpose of enforcing the fundamental rights, the public undertaking which, on account of deep and pervasive control, can be held to be a State within the meaning of Article 12 has been treated on a par with the government department but in all its facets, public undertaking has not been equated with the department run directly by the government. It was on this account that the surgeon appointed in Hindustan Steel Works Ltd. has not been equated with the government servant for the purpose of applicability of Article 311 of the Constitution. In Praga Tools case even though Praga Tools was held to be an instrumentality or agency of the State, it has been indicated by this Court that Praga Tools Corporation had a separate legal existence and being a juridical person cannot be held to be a government concern run by or under the authority of the Government. Similar view was taken by the Patna High Court in Sindri Fertilizers case by indicating that even though the said concern was completely owned by the President of India who could also issue directions and the Directors were to be appointed by the President of India, in the eye of law, the Company was a separate legal entity and had a separate legal existences. Such decision of Patna High Court has been approved by this Court....."

11. He submits that the show cause notice, dated 24.11.2012 (Annexure-T) is just an empty formality, as the State Government had already decided to allot the project to the respondent No. 3. He submits that ordinarily the writ petition does not lie as against the issuance of a show cause notice. But if the show cause notice is issued with the premeditation, a writ petition would be maintainable. For making this submission he draws support from the Apex Court's judgment in the case of SIEMENS LTD. v. STATE OF MAHARASHTRA AND OTHERS reported in , (2006) 12 SCC 33.

12. He submits that the power of cancellation of allotment of the project has to be exercised in good faith to effectuate the purpose for which the power is conferred. "In good faith" essentially means "for legitimate reasons". For advancing this submission, he relies on the Hon"ble Supreme Court's decision in the case of NOIDA ENTREPRENEURS ASSOCIATION v. NOIDA AND OTHERS

reported in , (2011) 6 SCC 508.

13. He also invokes the equitable doctrine of promissory estoppel by relying on the Hon'ble Supreme Court's decision in the case of UNION OF INDIA AND OTHERS v. GODFREY PHILIPS INDIA LTD., reported in , AIR 1986 SC 806. Having considered the petitioner's application and comprehensive project report, the petitioner's legitimate expectation was aroused. The petitioner has altered his material by spending Rs. 50 lakhs on the project based on the allotment of the project made by the Government.

14. Sri A.G. Shivanna, the learned Additional Advocate General appearing on behalf of the State Government submits that it is for the State Government to decide as to whether the power project in question is to be granted to the third respondent KPCL as per its policy. He submits that Clause 8 of the Government Order, dated 19.12.2009 (Annexure-F) clearly states that if any Governmental electricity/irrigation/drinking water project comes in the area in question, it is to be given first preference and that the petitioner shall not be entitled to any compensation on account of the project implementation by the Government.

15. The learned Additional Advocate General submits that the KPCL is a Government organization. For all its actions, KPCL is accountable to the State Government. As the State Government is the effective controller for the KPCL, clause 8 of the Government Order, dated 19.12.2009 (Annexure-F) is rightly invoked. In support of his submissions, he relies on the Apex Court's judgment in the case of AJAY HASIA AND OTHERS v. KHALID MUJIB SEHRAVARDI AND OTHERS reported in , (1981) 1 SCC 722, wherein it is held that where a corporation is an instrumentality or agency or a surrogate of the Government, it is State within the meaning of Article 12 of the Constitution of India.

16. He submits that the KPCL is already generating 32 MW of power on the left bank. Now what is proposed is that the KPCL would utilize the existing infrastructure on the left bank and install the additional 20 MW generating units on the right bank. As what is given to the KPCL is only an extension of an existing project, the Government cancelled the project earlier allotted to the petitioner.

17. He submits that when the terms and conditions of contract permit the termination of the agreement by either party, the interference by the Court is not warranted. In support of his submissions, he relies on the Apex Court's judgment in the case of FOOD CORPORATION OF INDIA AND OTHERS v. JAGANNATH DUTTA AND OTHERS reported in , 1993 Supp (3) SCC 635.

18. He relies on the Apex Court's judgment in the case of KASINKA TRADING AND ANOTHER v. UNION OF INDIA AND ANOTHER reported in , (1995) 1 SCC 274 to advance the submission that if the Government's action is in public interest, the Court's interference is not warranted. Drawing support from the said judgment, he would contend that the doctrine of promissory estoppel must yield when the equity so demands if it can be shown that it would be inequitable

to hold the Government or the public authority to its promise, assurance or representation.

19. He also relies on the Hon''ble Supreme Court's decision in the case of PALLAVA GRANITE INDUSTRIES (INDIA) (P) LTD. v. UNION OF INDIA AND OTHERS reported in , (2007) 15 SCC 30 and submits that the executive decisions taken to promote the welfare of the people cannot be lightly questioned. In the said case, it was held that a grant of mining lease to a private party cannot hamper or fetter the power of Government to exploit the resource through its own public sector agencies.

20. He also cites the Hon''ble Supreme Court's decision in the case of INDIAN DRUGS AND PHARMACEUTICALS LTD. AND OTHERS v. PUNJAB DRUGS MANUFACTURERS ASSOCIATION AND OTHERS reported in , (1999) 6 SCC 247, wherein the policy decision of the State Government to purchase certain medicines for Government hospitals and dispensaries only from public sector companies in which the State had substantial interest was upheld.

21. Sri G.S. Kannur, the learned counsel appearing for the respondent No. 2 submits that the Government of Karnataka has not issued any policy document on small hydro projects. He submits that the respondent No. 2 could not pay full and proper attention to the acceptance of the petitioner's project in the meeting of the allotment committee held on 23.10.2009 because of the long agenda consisting of 83 items.

22. He relies on the Hon''ble Supreme Court's decision in the case of MANOHAR LAL SHARMA v. PRINCIPAL SECRETARY AND OTHERS reported in , (2014) 9 SCC 516 for advancing the submission that the Court cannot conduct a comparative study of various methods of distribution of natural resources and cannot mandate that a particular method be followed under all the circumstances.

23. Sri Ajay J. Nandalike, the learned counsel appearing for the respondent No. 3 submits that the State Government has considered all the aspects of the matter before canceling the allotment of the project in favour of the petitioner and granting the project with an enhanced capacity to the third respondent KPCL. He submits that the petitioner's prayer for a direction to the respondent No. 1 to consider its detail project report is not tenable, as such a direction transgresses into the executive domain. He submits that the Courts cannot be troubled to review, substitute or overturn an executive or administrative decision.

24. He submits that the petitioner has no vested right to retain the allotment of the power project, as it has violated a number of conditions of the Government Order, dated 19.12.2009 (Annexure-F). He submits that as the impugned decision is taken in public interest, it does not merit interference. He asserts that the present project allotted to the respondent No. 3 is only an expansion of existing power plant.

25. He submits that the respondent No. 3 satisfies the test of Article 12 as an

instrumentality of the State. He relies on the Apex Court's judgment in the case of NATURAL RESOURCES ALLOCATION, IN RE, SPECIAL REFERENCE No. 1 OF 2012 reported in , (2012) 10 SCC 1 to advance the submission that it is the discretion of the State to allocate the natural resources and that such an allocation must be for public purpose and not for private purpose. He relies on the Apex Court's judgment in the case of GHAZIABAD DEVELOPMENT AUTHORITY v. DELHI AUTO AND GENERAL FINANCE PVT. LTD. AND OTHERS reported in , (1994) 4 SCC 42 and contends that the requirements of public interest can outweigh the legitimate expectation of private persons.

26. The submissions of the learned counsel have received my thoughtful consideration. The first question that falls for my consideration is whether the order, dated 31.12.2012 cancelling the allotment of the project to the petitioner is supportable and sustainable. The Government Order, dated 19.12.2009 (Annexure-F) contains the clause which reserves the power to the Government to cancel the allotment. The said order contains so many terms and conditions, but it does not enumerate the circumstances or the factors for canceling the allotment.

27. The author of the show cause notice, dated 24.11.2012 (Annexure-T) invokes Clauses 8, 10 and 11. The said Clauses are already extracted supra. Clause 8 states that if any Governmental electricity/irrigation/drinking water project come in the project area, it would get the first preference. The said clause further states that if the petitioner's project is affected by the Governmental projects, the petitioner is not entitled to any compensation. The perusal of the said clause does not reveal anything against the coexistence of the private projects and the Governmental projects. If the Governmental projects come in the way of the implementation of the petitioner's project, the petitioner can have no qualms over that. When all the parts of the said clause are read together, they do not confer absolute power on the Government to check in the respondent No. 3 and check out the petitioner. This being the position, the question as to whether the third respondent's project is Governmental or not need not be answered.

28. Clause 10 of the Government Order, dated 19.12.2009 states that if the petitioner's project is submerged under the project of the third respondent KPCL, the petitioner alone would be responsible for its losses. If the petitioner proposes to implement its project at its own risk and cost, it cannot be prevented from doing so only because KPCL is given the project. Thus, I am not finding any relevance, much less justification for invoking Clauses 8 and 10 of the Government Order, dated 19.12.2009. When the show cause notice itself is deficient in so many respects, the final order would also not be free from infirmities. Calling upon a party to show cause to untenable questions would only lead to his giving all kinds of answers and would finally culminate in the passing of the unsupportable final order.

29. In this regard, it is profitable to refer to what the Apex Court has said in the

case of S.N. CHANDRASHEKAR AND ANOTHER v. STATE OF KARNATAKA AND OTHERS reported in , (2006) 3 SCC 208. Paragraph Nos. 34 and 35 of the said judgment are extracted hereinbelow:

"34. The Authority, therefore, posed unto itself a wrong question. What, therefore, was necessary to be considered by BDA was whether the ingredients contained in Section 14-A of the Act were fulfilled and whether the requirements of the proviso appended thereto are satisfied. If the same had not been satisfied, the requirements of the law must be held to have not been satisfied. If there had been no proper application of mind as regard the requirements of law, the State and the Planning Authority must be held to have misdirected themselves in law which would vitiate the impugned judgment.

35. In Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chennai this Court referring to Cholan Roadways Ltd. v. G. Thirugnanasambandam held:

"14. Even a judicial review on facts in certain situations may be available. In Cholan Roadways Ltd. v. G. Thirugnanasambandam, this Court observed:

"34. It is now well settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of *res ipsa loquitur* which was relevant for the purpose of this case and, thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not germane for determining the issue, namely, that the passengers of the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the correct standard of proof in relation to a domestic enquiry, which is "preponderance of probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out."

30. It is difficult to find any nexus between the show cause notice, dated 24.11.2012 (Annexure-T) and the impugned final order, dated 31.12.2012 (Annexure-V). In the final order, the reasons for canceling the allotment are: (a) The petitioner has not obtained the clearances. (b) The petitioner has not started the civil construction work. (c) Forest, Ecology and Environment Department has already given the environmental clearance to the third respondent KPCL (d) The implementation of the power generating project by the KPCL is in public interest.

31. None of these reasons are mentioned in the show cause notice. The impugned order, dated 31.12.2012 thus goes far beyond what the petitioner was called upon to show the cause. I find the impugned order to be not well-considered and well-reasoned. It does not even refer to the investment made by the petitioner. That the Government has the power to cancel the allotment of the project does not mean such a power can be exercised unjustly to cause avoidable loss and prejudice to the petitioner.

32. In the result, I quash the impugned order, dated 31.12.2012 (Annexure-V). As far as the petitioner's prayer for the declaration that the petitioner is legally entitled to develop the hydel project is concerned, I do not find any need to give such a declaration. Whether the petitioner has obtained all the clearances as stipulated by Clause 2(C) of the order, dated 19.12.2009 and the progress made by it in the implementation of the project are to be ascertained by the concerned authorities.

33. Similarly, I am also not inclined to give a direction to increase the allotted capacity from 4 MW to 14 MW. The same falls in the executive domain. It is trite that no one can ask for a mandamus without a judicially enforceable right as well as a legally protected right. In saying so, I am fortified by the Apex Court's judgment in the case of MANI SUBRAT JAIN AND OTHERS v. STATE OF HARYANA AND OTHERS reported in , (1977) 1 SCC 486.

34. As held by the Apex Court in the cases of CHINGLEPUT BOTTLERS v. MAJESTIC BOTTLING COMPANY reported in , (1984) 3 SCC 258 and ORIENTAL BANK OF COMMERCE v. SUNDER LAL JAIN AND ANOTHER reported in , (2008) 2 SCC 280 mandamus will not lie where the duty is clearly discretionary. Even when there can be no positive direction to the respondents to approve the DPR and to increase the power generating capacity, there is no reason as to why the respondent No. 1 should not consider the petitioner's representation in that regard in accordance with law.

35. The petitioner has also called into question the first respondent's order, dated 21.1.2013 (Annexure-W) allotting the project to the respondent No. 3. I do not propose to quash the same. The ends of justice would be met by my directing the respondent No. 1 to demarcate the project areas to ensure that there is no over-lapping. The respondent No. 3 can implement its project in the area, which is outside the area allotted to the petitioner. If the over-lapping cannot be avoided at all, then it is for the petitioner to decide as to whether it should implement its project at its risk. In exercise of power conferred by Clause 11 of the Government Order, dated 19.12.2009, the Government may modify the earlier allotment orders to ensure that two projects of the petitioner and the respondent No. 3 do not overlap each other.

36. The writ petition in so far as it seeks the quashing of the tender notification, dated 29.5.2013 (Annexure-X) is concerned, this petition has become infructuous, as the respondent No. 3 has already withdrawn it which is reflected in the order sheet, dated 17.1.2014.

37. At this juncture, Sri Sawkar, the learned counsel for the petitioner submits that because of the passing of the order canceling the allotment of project, obtaining the stipulated clearances has got delayed/postponed. He prays for an observation that the time for obtaining the clearances may kindly be extended.

38. Considering the submissions of Sri Sawkar, I deem it necessary to reserve the liberty to the petitioner to make appropriate representation to the

respondent No. 1 seeking extension of time for obtaining the clearances and for implementing the project. The respondent No. 1 shall consider the same appreciating the intervening developments of canceling the allotment of project and the quashing of the said order in these proceedings.