
(2016) 09 AHC CK 0191

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (M/B) No. 23145 of 2016.

**Sew Lsy Highwayas Ltd. Thru Authorised Representative - Petitioner
@HASH State of U.P. Thru Prin. Secy. P.W.D. Up And Others**

Date of Decision : 30-09-2016

Acts Referred:

Citation : (2016) 10 ADJ 688

Hon'ble Judges : Amreshwar Pratap Sahi and Dr. Vijay Laxmi, JJ.

Bench : Division Bench

Advocate : Asim Kumar Singh and Amit Saxena, Advocates, for the Petitioner;
C.S.C., D.K. Pathak and Vivek Raj Singh, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

The petitioner-company has come up questioning the termination of Concession Agreement dated 1.8.2011 vide communication dated 25.7.2016 by the Uttar Pradesh State Highways Authority/respondent No.2 herein thereby terminating the contract for the project of the construction and repair of a 4-lane road, namely, State Highway No.57 in the Delhi-Uttarakhand Border section. The agreement dated 1.8.2011 has been filed on record as Annexure - 3.

2. The petition has been opposed by Sri Vivek Raj Singh for the respondent No.2/ Authority, the learned Standing Counsel for the respondent No.1/State of U.P. and Sri D.K. Pathak, learned Counsel for the respondent No.3/Punjab National Bank, which is the leading Banker of the Consortium of Banks that has been funding the petitioner-company in the aforesaid project.

3. The grievance of the petitioner is that the termination of the contract has been done arbitrarily on the strength of an ex parte report of an Independent Engineer who was to submit the appraisal of the work to be executed on the basis of whereof action was to be taken by the respondents under the terms of the agreement.

4. Dr. L.P. Mishra submits that the said report was prepared without the participation of the petitioner-company and without giving any opportunity to

give a reply to the allegations that now form the basis of the passing of the impugned order. He further submits that the calculation, as reflected in the impugned communication dated 25.7.2016, particularly in Clause 9 thereof about the act of the petitioner-company being involved in overdrawing with a criminal intent of defalcation, was never intimated to the petitioner to explain the same and even otherwise the entire calculation is erroneous. Hence, the conclusion drawn being patently incorrect the action is arbitrary.

5. Dr. Misra then urged that there was ample material on record to demonstrate that the entire delay had been caused on account of the unavailability of the environmental clearance that was the obligation of the State Highways Authority and which admittedly took more than a year to communicate. The aforesaid delay in the execution of the project and otherwise all the hindrances were totally attributable to the respondent No.2 that have been completely ignored while passing the impugned order and therefore, the decision making process is clearly vitiated being arbitrary and whimsical. He has further submitted that these facts about the breach on the part of the respondent No.2 were not even brought to the notice of the High Court nor was the petitioner a party in Public Interest Litigation (PIL) No.15147 of 2015 where directions were issued for completion of the project vide judgment dated 21.4.2015. It is submitted that the information given about the meeting chaired by the Chief Secretary and the resolutions passed therein, as quoted in the said judgment, were totally incorrect information's giving an impression as if the petitioner-company had voluntarily without any justification abandoned the project. It is therefore urged that taking shelter by the respondent No.2 of the aforesaid judgment is totally unjustified and in such circumstances, in view of the judgments that have been cited at the Bar, the impugned order/communication dated 25.7.2016 is unsustainable and deserves to be quashed.

6. Controverting the aforesaid submissions, Sri Vivek Raj Singh has raised a preliminary objection with regard to the entertaining of the writ petition on the ground that any dispute arising out of the agreement dated 19.5.2011 has to be resolved as per Article 44 of the terms of agreement initially by conciliation and on failure of mediation, through arbitration. He further submits that so far as the delay part at the initial stage of environmental clearance is concerned, the same was suitably compensated by providing more time to the petitioner-company through a revised memorandum of time-schedule and therefore, no prejudice was caused on account of any such delay in obtaining environmental clearance. He further submitted that as a matter of fact, the petitioner-company voluntarily abandoned the project as a result whereof the entire project was put in jeopardy that gave rise to the filing of a PIL and then consequential action by the State Highways Authority. It is urged that the Independent Engineer had been assessing the work and on that basis, the petitioner had been intimated of completing the project within time, but having failed to do so and having found that the petitioner had overdrawn a huge amount from the consortium of banks, which was in excess of what had been actually spent, there was no option but to

terminate the agreement. He further submits that there is a provision for substitution of the contractor by negotiations through the consortium of the funding agency, but that too entails a condition that the amount of funds already withdrawn and loan taken by the contractor will be taken over as a liability by the substituted company for which no one is coming forward to undertake the said burden. The offer of the consortium is not supported by any offer of the petitioner in relation to the introduction of new partners and the same being not viable the only option left was to terminate the agreement. He therefore submits that the only resolution dispute mechanism left now available to the petitioner is by way of arbitration and none of the grounds raised in the writ petition is available so as to establish even a prima facie case for finding a fault in the decision making process. Consequently, the writ petition is not maintainable and deserves to be dismissed.

7. We may at the very outset quote the provisions for the resolution of disputes between the parties, namely, Article 44 of the Agreement that is extracted hereunder:-

"Article 44

44 Dispute Resolution

44.1 Dispute resolution

44.1.1 Any dispute, difference, or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Secretary, PWD and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not

resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Lucknow, and the language of arbitration proceedings shall be English.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

44.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law."

8. Dr. Misra has cited the following decisions to contend that if there is an element of arbitrariness in the decision making process, then the remedy of

arbitration need not be resorted to and this Court in the exercise of powers under Article 226 of the Constitution of India can invoke and correct the error with a direction to take an appropriate decision:-

(1) Union of India v. Tania Constructions [(2011) 5 SCC 697 Paras 31, 33 and 34]

(2) Manoj Agarwal v. Union of India [(2016) 115 ALR 610 Paras 15-17]

(3) Navin Filling Station v. Indian Oil Corporation, 2008 (6) ADJ 319.

(4) ABL International Ltd. v. Export Credit Guarantee Corporation of India [(2004) 3 SCC 553 paras 19 and 27]

(5) M/s Surya International Pvt. Ltd. v. Union of India [2014 (103) ALR 349, Paras 52-59]

(6) Soma Isolux NH One Tollway Ltd. v. Harish Kumar Puri [(2011) 5 SCC 697]

(7) Uttar Pradesh State Bridge Construction Corporation Limited v. Bangalore Development Authority.

(8) State of Kerala v. K. A. Yoosaf.

(9) McNally Bharat Engineering Company v. Bihar State Electricity Board.

(10) State of A.P. v. Goverdhanlal Pitti [(2003) 4 SCC 739 paras 12 and 14]

(11) Ratnagiri Gas Ltd. v. RDS Projects Ltd. [(2013) 1 SCC 534 Paras 30 and 32]

Sri Vivek Raj Singh has cited the following decision to counter the aforesaid submissions:-

Sasan Power Limited v. North American Coal Corporation India Private Limited [2016 SCC Online SC 855]

9. On an assessment of the facts, it appears that the delay in execution of the project had commenced way back in 2012 itself when the State Highways Authority had itself been communicating with the Ministry of Environment, Government of India seeking clearance for felling of trees and removal of such obstructions for completion of the project. This is evident from the letter of the Government of India dated 28.5.2014 addressed to the Principal Secretary (Forests), Government of Uttar Pradesh, Lucknow, a copy whereof is Annexure - 28 to the writ petition. Dr. Misra has also invited the attention of the Court to Annexure - 37 to the writ petition, which is the letter dated 27.7.2015 to the lead bank of the consortium where also the letter dispatched to the Ministry of Finance, Department of Economic Affairs (PPP Cell), Government of India dated 19.6.2015 by the State Highways Authority was appended. The said letter also informs that almost all the trees have been cut and a large front is available for construction of the road work. It also mentions the delay that had occurred in the forest clearance which took almost two years and had also resulted in the

increased cost of the project.

10. The petitioner-company had withdrawn the sums that were released to it but on account of the escalation of the cost of the project, the petitioner did not commence the work at the site and also complained of financial constraints.

11. It is in between these communications that the Public Interest Litigation Petition No.15147 (MB) of 2015 was filed in the High Court at Allahabad and a direction was issued on 21.4.2015 to conclude the project clearly noting therein the absence of the petitioner as a party and leaving that issue open to be dealt with separately.

12. The letters also however indicate that very little physical progress had been made to the extent of 13.33% only. It is the case of the petitioner that the lead bank dispatched a letter on 6.6.2015 to the U.P. State Highways Authority indicating that the petitioner-company had made a proposal that was discussed in the meeting of all the stakeholders on 19.5.2015 where it was agreed to favourably examine the request of the petitioner for diluting the existing sponsor stake by 74% in favour of prospective investors and also extension of the completion of the project upto 31.3.2017. The letter of the Punjab National Bank was sent to the State Highways Authority but according to the learned counsel for the Bank, no further information was received from the State Highways Authority in this regard.

13. It appears that the respondent-State Highways Authority according to the terms of the agreement called upon a report from the Independent Engineer who under the terms of the agreement was to supervise and report about the work progress and who dispatched his report on 25.1.2016. A copy of the said report is on record.

14. Sri Vivek Raj Singh has however countered the submissions about no action having been taken on the offers made and about the default on the part of the petitioner. He has placed before the Court a letter of the State Highways Authority dated 27.5.2016 addressed to all the Banks of the consortium intimating them about the intention to terminate the agreement of the petitioner as the time period for completion of the work as extended was coming to a close on 16.7.2016. He also submits that the petitioner had already withdrawn itself way back in 2014 with no intention to execute the work after having excessively withdrawn the funds from the funding agencies. For this, he has urged that as against 13.33% of work actually performed, the amount of withdrawals against the cost project was many-fold without any work having been performed and therefore this clearly amounted to a defrauding practise adopted by the petitioner-company of having withdrawn the funds without utilising it for the project. This disproportionate withdrawal as against a very minimal performance of the work, therefore, led to the termination about which the petitioner had full knowledge.

15. We have considered all these submissions and what we find is that the

impugned decision to terminate the contract proceeds on the fact of the withdrawal of the petitioner-company, the fact relating to the delay caused in the commencement of the work, the actual physical completion of work to the tune of 13.33% and the allegations of excessive withdrawal of the funds from the lending agency by the petitioner-company without proportionately spending it against the estimated cost of project. Thus, there is a clear dispute between the parties, namely, the petitioner-company and the U.P. State Highways Authority that resulted in the delay in the project and it's non-performance. The liability, the responsibility and the accountability of the parties on this score therefore is dependent on all the aforesaid factors that can be assessed on the strength of the various contentions that have been raised in this regard.

16. Consequently, we are of the opinion that where such complicated questions are required to be assessed and cannot be assumed on the basis of the allegations on their face value, it would be appropriate that the remedy of arbitration is invoked. We also find that conciliation had been attempted, but in the absence of any agreement having been arrived at, the U.P. State Highways Authority proceeded to terminate the agreement which apart from the issue of excessive withdrawal is also based on the allegation of the petitioner-company having abandoned the work in 2014 itself. The issue of delay in the commencement of the project due to non-clearance by the Environmental Ministry is not the sole factor to govern the assessment of the act of the parties, inasmuch as the U.P. State Highways Authority has taken a stand that ample extension of period was given, but in spite of that, the petitioner-company failed to live up to it's commitments. Thus, in these circumstances, this would be a fit case for arbitration.

17. In the background aforesaid, we uphold the preliminary objections raised by Sri Vivek Raj Singh and decline to exercise our jurisdiction under Article 226 of the Constitution of India for the above mentioned reasons. Whether the decision making process was whimsical and the consequential action of termination of the agreement was arbitrary would depend on the establishment of the allegations with material to substantiate the same. This would require an intense exercise of fact finding and cannot be assumed on the basis of mere allegations and counter-allegations in the exercise of writ jurisdiction.

18. In view of the above, we are not inclined to interfere in the matter and the writ petition is accordingly dismissed with liberty to the parties to invoke the arbitration clause under the agreement.