
(2013) 01 MP CK 0035
In the Madhya Pradesh High Court
Case No : Writ Petition No. 8758 of 2012

Shiv Singh Contractor

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Constitution of India, 1950 — Article 14
Specific Relief Act, 1963 — Section 14, 16

Citation : (2013) 2 MPLJ 300

Hon'ble Judges : S.K. Gangele, J;G.D. Saxena, J

Bench : Division Bench

Advocate : Jitendra Sharma, for the Appellant; Arvind Kumar Agrawal for Respondent Nos. 2 to 4, for the Respondent

Final Decision : Dismissed

Judgement

1. Shri Jitendra Sharma, Advocate for the petitioner. Shri Arvind Kumar Agrawal, Advocate for respondents No. 2 to 4. Heard. The petitioner has filed this petition against the order dt. 21-11-2012 (Annexure P/1), by which the Handling Transport Contract (HTC) of the petitioner has been cancelled.

2. The petitioner was awarded Handling and Transport Contract of Gwalior District for a period of two years from 9-10-2012 to 8-10-2014. In accordance with the terms of contract, the petitioner had to deposit security within 15 working days from the date of acceptance of his tender and the aforesaid time could be further extended for a period of seven working days. The tender of the petitioner was accepted and the appointment letter was issued on 16-8-2012 with directions to deposit the security amount of Rs. 8,46,000/-. The petitioner was also directed to deposit the irrevocable and unconditional bank guarantees of Rs. 16,91,000/- of State Bank of India or its Associate Banks in the prescribed form. The petitioner did not deposit the aforesaid amount. The petitioner in his letter dt. 8-10-2012 mentioned that the security deposit amount could be deposited from his EMD amount of Rs. 3,38,000/- and Rs. 85,000/- and balance

amount could be deducted from running bills. He, further submitted that he would deposit the bank guarantee upto 31-10-2012. A show cause notice was issued to the petitioner on 6-5-2011 to the effect that the petitioner did not deposit the bank guarantee. The petitioner informed the corporation vide letter dt. 12-11-2012 that due to shortage of money and other reasons he could not deposit the bank guarantee upto 12-11-2012 and requested for extension of time to deposit the bank guarantee upto 28-11-2012.

3. From the facts of the case, it is clear that the petitioner did not deposit the bank guarantee within 15 working days or even in extended period of seven working days because the contract was awarded to him and offer letter was issued on 16-8-2011, it means that upto a period of four months, the petitioner was not able to deposit the bank guarantee.

4. Learned counsel for the petitioner has contended that the delay in depositing the Bank Guarantees was due to unavoidable circumstances. Hence, termination of contract is arbitrary and illegal.

5. Contrary to this, learned counsel for the respondents has submitted that the petitioner has failed to perform its part of contract. It was obligatory on the part of the petitioner to submit Bank Guarantees within stipulated time in accordance with the terms and conditions of contract. The petitioner did not submit the same, hence, the contract has been terminated because the petitioner violated the mandatory terms and conditions. The learned counsel further submitted that the petition is not maintainable in contractual matter. The petitioner has alternative remedy and even it can claim damages. In support of his contentions, learned counsel has relied on the judgment of the Hon"ble Supreme Court in the case of Puravankara Projects Ltd. Vs. Hotel Venus International and Others,

6. The question for consideration before this Court is that in the event of violation of terms and conditions of contract i.e. not depositing the Bank Guarantees within time, whether the corporation has acted fairly in terminating the contracts of the petitioner.

7. It is an admitted fact that the petitioner did not deposit the Security Deposit and Bank Guarantee within stipulated time.

8. The aforesaid position has not been disputed by the petitioner. Clause IX (a) (i) and (ii) of Model Tender Form prescribes terms and conditions in regard to security deposit for handling transport contract and for road transport. The relevant clause is as under:--

IX. Security Deposit:

(a) The successful Tenderer shall furnish within fifteen working days of acceptance of his tender, a Security Deposit for the due, proper and complete discharge of all their obligations under the Contract. The Security Deposit will comprise of the total of the amounts specified in following clauses (i) (ii) and (iii).

(i) a sum equivalent to 5% of the value of the Contract in the form of Demand Draft or Pay Order issued by a scheduled bank or through Electronic Clearing System (ECS)/Other Electronic Means in favour of the General Manager, Food Corporation of India. The contractor at his option may deposit 50 (fifty) percent of this amount within fifteen working days of acceptance of his tender while the balance 50 (fifty) percent may be paid by the contractor by deductions at the rate of 10 (ten) per cent from the admitted bills. The Security Deposit shall not earn any interest.

(ii) another sum equivalent to 10% of the value of Contract, in the form of an irrevocable and unconditional Bank Guarantee issued by State Bank of India Bank or its Associate Banks or by other Public Sector Banks in the format prescribed in Appendix-IV which shall be enforceable till six months after the expiry of contract period.

9. In accordance with the aforesaid clause, it was mandatory on the petitioner to deposit 5% of the value of the Contract as Security Deposit in the form of Demand Draft and he had an option to deposit 50 (fifty) per cent within 15 working days of acceptance of his tender and balance 50 (fifty) per cent by deductions @ 10% from the admitted bills. It was also mandatory on the petitioner to deposit 10 (ten) per cent of the value of the Contract, in the form of irrevocable and unconditional Bank Guarantee issued by the State Bank of India and or by its Associate Banks or by other Public Sector Banks. It is also mentioned in sub clause (b) of Clause IX that in failure to deposit the amount within 15 working days of acceptance of tender, further extension of 7 working days could be given by GM (R) subject to levy of penalty @ 1% of Security Deposit. Admittedly, the petitioner failed to comply the aforesaid terms and conditions of the contract.

10. Sub clause (f) of Clause IX of Model Tender Form gives power to the Corporation to terminate the contract if the contractor fails to deposit security deposit by due date. The relevant clause is as under:--

(f) In the event of the Tenderer's failure, after the communication of acceptance of the tender by the Corporation, to furnish the requisite Security Deposit by the due date, his Contract shall summarily terminated besides forfeiture of the Earnest Money and the Corporation shall proceed for appointment of another contractor. Any losses or damages arising out of and incurred by the Corporation by such conduct of the contractor will be recovered from the contractor, without prejudice to any other rights and remedies of the Corporation under the Contract and Law. The contractor will also be debarred from participating in any future tenders of the Corporation for a period of five years. After the completion of prescribed period of five years, the party may be allowed to participate in the future tenders of FCI provided all the recoveries/dues have been effected by the Corporation and there is no dispute pending with the contractor/party.

11. Hon''ble Supreme Court in the case of Puravankara Projects Ltd. Vs. Hotel

Venus International and Others, has quoted the earlier decision of the Court in the case of New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, , where the Court has held as under:--

31. In New Bihar Biri Leaves Co. vs. State of Bihar it was observed at para 48 as follows: (SCC .558)

48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maximum is *qui approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots law, is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (per Scrutton, L.J., *Verschures Creameries Ltd. vs. Hull & Netherlands Steamship Co.*; see *Douglas Menzies vs. Umphelby*, AC at p.232; see also Stroud's Judicial Dictionary, Vol. I, p.169, 3rd Edn.).

12. Hon'ble Supreme Court of India further in the case of *Puravankara Projects* (supra) has held as under in regard to power of the Court to postpone the time for furnishing bank guarantee:--

29. The difference between administrative law and contractual law was succinctly stated in *Indian Oil Corpn. Ltd. vs. Amritsar Gas Service*. It was noted in paras 9,10 and 11 as follows: (SCC pp. 540-42)

9. The arguments advanced by Shri Harish Salve on behalf of the appellant Corporation to the validity of the award are these. The first contention is that the validity of the award has to be tested on the principles of private law and the law of contracts and not on the touchstone of constitutional limitations to which the Indian Oil Corporation Ltd., as an instrumentality of the State may be subject since the suit was based on breach of contract alone and the arbitrator also proceeded only on that basis to grant the reliefs. It is urged that for this reason the further questions of public law do not arise on the facts of the present case. The next contention is that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in sections 14 and 16 of the Specific Relief Act. It is urged that the contract being admittedly revocable at the instance of either party in accordance with Clause 28 of the agreement, the only relief which can be granted on the finding of breach of contract by the appellant Corporation is damages for the notice period of 30 days and no more. It was then urged that the reasons given in the award for granting the relief of restoration of the distributorship are untenable, being contrary to law. Shri Salve contended that the propositions of law indicated in the award and applied for granting the reliefs disclose an error of law apparent on the face of

the award. It was also urged that the onus of proving valid termination of the contract was wrongly placed by the arbitrator on the appellant Corporation instead of requiring the plaintiff-respondent 1 to prove that the termination was invalid. It was also contended that the failure of the arbitrator to consider and decide the appellant Corporation's counter-claim when the whole suit was referred for decision constitute legal misconduct.

10. In reply, Shri Sehgal on behalf of Respondent 1 contended that there is a presumption of validity of award and the objections not taken specifically must be ignored. This argument of Shri Sehgal relates to the grievance of the appellant relating to placing the onus on the appellant Corporation of proving validity of the termination. This contention of Shri Sehgal must be upheld since no such specific ground is taken in the objections of the appellant. Moreover, there being a clear finding by the arbitrator of breach of contract by invalid termination, the question of onus is really of no significance. The other arguments of Shri Sehgal are that the termination of distributorship casts stigma on the partners of the firm; counter-claim of the appellant Corporation was rightly not considered since it was not made before the order of the reference; the reference made being of all disputes in the suit, the nature of relief to be granted was also within the arbitrator's jurisdiction; and interest also must be awarded to the respondent.

11. We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant Corporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in *Dwarkanadas Marfatia and Sons vs. Board of Trustees of the Port of Bombay*, *Mahabir Auto Stores vs. Indian Oil Corpn.* and *Shriekha Vidyarthi vs. State of U.P.* This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is, therefore, right in contending that the further questions of public law based on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us.

In essence, it was held that tender terms are contractual and it is the privilege of the Government which invites its tenders and Courts did not have jurisdiction to judge as to how the tender terms would have to be framed.

30. By observing that there was implied term which is not there in the tender, and postponing the time by which the bank guarantee has to be furnished, in essence the High Court directed modification of a vital term of the contract.

13. Queen's Bench Division in the case of *Bunge Corpn. vs. Trandax SA*,

reported in (1981) 2 All ER 513 has held as under in regard to breach of stipulation of time:--

The buyers' appeal would be dismissed for the following reasons --

(a) Stipulations as to time in mercantile contracts were generally to be treated as conditions (breach of which, no matter how minor, entitles the innocent party to treat the contract as at an end) and not as intermediate or innominate terms, because the reason for such a clause was to enable each party to organise his affairs to meet obligations arising in the future under the contract and not merely to determine, with the benefit of hindsight, the appropriate remedy when a breach occurred. Furthermore, the need for certainty, especially when there was a string of contracts involved, requires such a clause to be strictly adhered to (see p 540 j, p 541 f to j, p. 542 a b d to j, p.543 j to p 544 c and j to p 545 b and g to p 546 e, p 549 h to p 550 e, p 551 d to g and p 554 d, post); dictum of Diplock LJ in *Hong Kong Fir Shipping Co. Ltd. vs. Kawasaki Kisen Kaisha Ltd.*, (1962) 1 All ER at 485=489 distinguished.

14. Hon'ble Supreme Court of India in the case of *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, has held as under in regard to powers of the Court to interfere in contractual matters:--

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness is essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the Courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity within certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business within the Government.

15. In the present case, it is clear from the facts that the petitioner failed to comply the terms and conditions of the contract. It did not deposit the Bank Guarantee within time as required under the terms and conditions of the contract.

16. Hon"ble Supreme Court of India in the case of Puravankara Projects (supra), quoted above, clearly observed that the High Court could not modify the vital terms and conditions of the contract by postponing the time by which the bank guarantee had to be furnished. Apart from this, it has clearly been observed that time limit has to be interpreted strictly so that the contracted party could not get undue advantage. It is in consonance with the public policy. The respondent corporation had given sufficient time to the petitioner to deposit the bank guarantee. Letters were issued to the petitioner but the petitioner failed to comply the terms of the contract. In such circumstances, in our opinion, the action of the authority is not malicious or misuse of its power rather it is fair and in accordance with law. It appears from the facts of the case that the petitioner had no capacity to submit the bank guarantee within time and it wanted to buy the time. Hence, we do not find any merit in this petition. It is hereby dismissed. No order as to costs.