(2015) 08 KAR CK 0192

In the Karnataka High Court

Case No : Writ Petition No. 6942/2014 (GM-RES)

Sical Iron Ore Terminal (Managalore) Limited — APPELLANT

Vs

Board of Trustees for The New Mangalore Port Trust — RESPONDENT

Date of Decision : 18-08-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 143(b), 226

Citation : (2015) 08 KAR CK 0192

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : Udaya Holla, Senior Counsel for Namrata Kolar, for the Appellant; Ashok Haranahalli, Sr. Counsel for R. Subramanya for Haranahalli and Subramanya, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

A.S. Bopanna, J—The petitioner is before this Court seeking issue of mandamus to direct the respondent not to unilaterally terminate the concession agreement. They are further seeking a declaration that the decision, resolution or any action if already taken to terminate the agreement, the same be held as illegal, void and non est in law.

2. The petitioner a company incorporated under the provisions of the Companies Act is engaged to set up mechanized iron ore handling facility at New Mangalore Port Trust, the respondent herein. The proposal of the petitioner was accepted and a letter of intent was issued. Pursuant thereto, a Concession Agreement dated 19.10.2009 was entered into. The project was on Build, Operate and Transfer (''BOT'' for short) basis. The construction was to be completed and made operational in the manner agreed to in the agreement. The admitted position is that the same was not completed in terms thereof.

3. However, the petitioner referring to the advertisement dated 16.12.2010 made by the Government of Karnataka and the judgment passed by this Court in W.P.

No. 24103/2010 informed the respondent that the said event amounted to force majeure as indicated in Article 143(b) of the Concession Agreement. In that view, the petitioner claimed to be excused of the performance as provided under Article 14.8 of the agreement. Since the case of the petitioner was not considered by the respondent, the petitioner was before this Court in W.P. No. 27487/2012 seeking that the respondent be directed not to take any unilateral decision terminating the Concession Agreement. This Court by the order dated 26.11.2013 on taking note of the submission on behalf of the respondent that no unilateral decision would be taken, disposed of the petition with a direction not to terminate the Concession Agreement unilaterally. It was ordered therein that if action is required to be taken to terminate the said agreement, the respondent shall put the petitioner on notice in terms of the covenants contained in the agreement and then proceed further, if any, in accordance with law. Subsequent thereto, the respondents have issued a communication dated 09.01.2014 whereby they have indicated to the petitioner the force majeure as contended does not exist. Therefore, the petitioner has been requested to commence the project and submit revised programme of milestone at the earliest. It is in that view, the petitioner claiming to be aggrieved is before this Court.

4. The respondents have filed their objection statement. It has been reiterated therein that the claim of the petitioner with regard to the ban imposed by the Hon''ble Supreme Court relating to mining activities based on the report submitted by the Central Empowered Committee (''CEC'' for short) cannot be construed as political force majeure for the purpose of excuse from performance by the petitioner under the Concession Agreement. The respondent contends that the petitioner has intentionally not completed the project and the ban imposed on mining activity is only temporary and cannot be treated as a change of law for the purpose of considering it as political force majeure under the Concession Agreement. It is further contended that the land belonging to the respondent is being occupied by the petitioner without paying lease rentals which has been fixed by the Tariff Authority for major ports. It is also the contention of the respondent that the instant petition seeking similar relief to the one which was sought in the earlier petition is not maintainable and the petition is liable to be dismissed.

5. The petitioners have filed their rejoinder to the objection statement.

6. Heard Sri Udaya Holla, learned senior counsel appearing on behalf of the petitioner, Sri Ashok Haranahalli, learned senior counsel appearing on behalf of the respondent and perused the petition papers.

7. The learned senior counsel for the respondent by placing reliance on the decision in the case of Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, (2008) 4 BC 542 : (2008) 3 CLT 846 : (2008) 2 CTLJ 351 : (2008) 9 JT 1 : (2008) 11 SCALE 142 : (2008) 8 SCC 172 has contended that a writ petition in relation to a contractual matter cannot be entertained by the High Court since the parties should avail their remedies

available under the contract.

8. The learned senior counsel for the petitioner on the other hand has relied on the following decisions on that aspect to contend that the writ petition can be entertained. The case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, (2004) 118 CompCas 213 : (2004) 1 CTLJ 1 : (2003) 10 JT 300 : (2003) 10 SCALE 81 : (2004) 3 SCC 553 wherein it is held that on a given set of facts if the State acts in an arbitrary manner, even in a matter of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution and the Court depending on the facts of the said case is empowered to grant the relief. Once the State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is a requirement of Article 14 of Constitution. The decision in the case of Sushila Chemicals Pvt. Ltd. and Another Vs. Bharat Coking Coal Ltd. and Others, (2010) 11 JT 266 : (2010) 10 SCC 388 wherein the said position is reiterated is also relied on.

9. That apart, the learned senior counsel for the petitioner has also relied on the decision in the case of Union of India (UOI) and Others Vs. Tantia Construction Pvt. Ltd., (2011) 2 ARBLR 115 : (2011) 5 JT 59 : (2011) 3 RCR(Civil) 821 : (2011) 4 SCALE 745 : (2011) 5 SCC 697 : (2011) 5 SCR 397 : (2011) 4 UJ 2210 wherein it is held that even if an arbitration clause is included in the agreement between the parties, an alternate remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court.

10. From the cumulative perusal of above decisions, it is clear that though this Court should be slow in entertaining a writ petition in contractual matters, in certain circumstance even in respect of contractual matter this Court can entertain a writ petition depending on the stage, facts and circumstances arising therein. Though such discretion is available to this Court, normally if there are seriously disputed questions which would require factual determination based on the evidence to be tendered by the parties, this Court would refrain from entertaining such petitions. In that light, if the fact situation herein is taken into consideration, the difference or dispute between the parties has not reached that stage. Though a contract has been entered into between the parties, the dispute is not relating to the nature of the extent or quality of work performed or breach thereof in those terms. For that matter the contract has not even been terminated alleging breach. It is at a stage where the petitioners are seeking to invoke the provision in the agreement to excuse the performance as according to them the situation of political force majeure has arisen and it is only at a stage as to whether or not it requires consideration and that too by the respondents themselves. When a consideration in that regard is to be made by the respondent one way or the other, whether they should be directed to consider it is all that arises for consideration in this petition at this stage. Therefore, to the said extent, I am of the opinion that an examination can be made in this petition, limited to that aspect.

11. The learned senior counsel for the respondent would however contend that such request had already been considered by this Court in W.P. No. 27487/2012, wherein a similar relief had been sought and another petition seeking the same relief cannot be entertained as it will amount to abuse of process of law. The decision in the case Udyami Evam Khadi Gramodyog Welfare Sanstha and Another Vs. State of U.P. and Others, (2008) 2 CLT 219 : (2008) 1 SCC 560 : (2007) 1 SCR 933 and in the case of State of Tamil Nadu and Others Vs. Amala Annai Higher Secondary School, (2009) 123 FLR 522 : (2009) 13 JT 78 : (2009) 12 SCALE 57 : (2009) 9 SCC 386 : (2009) 2 SCC(L&S) 608 : (2009) 14 SCR 913 : (2010) 2 SLJ 8 are relied upon to that effect.

12. The learned senior counsel for the petitioner on the other hand has relied on the decision in the case of Sri Justice S.K. Ray Vs. State of Orissa and Others, AIR 2003 SC 924 : (2003) 96 FLR 586 : (2003) 1 JT 166 : (2003) 1 SCALE 328 : (2003) 4 SCC 21 : (2003) 1 SCR 434 : (2003) AIRSCW 402 : (2003) 1 Supreme 490 and in the case of Sri Satya Narain Singh Vs. District Engineer, P.W.D. and Another, AIR 1962 SC 1161 : (1962) 3 SCR 105 Supp to contend that though the relief prayed appears similar to the prayer that was made in the earlier petition, considering the circumstance in which the petitioner is before this Court at this point, the relief could be moulded by this Court on taking note of the nature of grievance that is put forth before this Court.

13. In the background of the rival contentions on that aspect, a perusal of the papers would no doubt indicate that the prayer that is sought in this petition is worded substantially similar to the prayer that was sought by the petitioner in the earlier petition in W.P. No. 27487/2012. Though that be the position, the context in which the prayer is presently made, is after certain intervening circumstances that had occurred subsequent to the disposal of the earlier petition. This Court in the earlier petition had taken note of the submission of the respondent that no unilateral decision would be taken to terminate the Concession Agreement. In that view, while disposing of the petition, it was directed that if action is required to be taken to terminate the said agreement, the respondent shall put the petitioner on notice in terms of the covenants contained in the agreement and then proceed further. It is not the situation that merely certain representations have been made by the petitioner and the petitioner is approaching this Court once over again with a similar prayer.

14. On the other hand, the respondents by their communication dated 09.01.2014 (Annexure-W), though have not terminated the agreement have once again requested the petitioner to commence the project and submit revised programme of milestone and the amount as per the chart enclosed is demanded for payment. In the said communication, it has been stated that there is no political force majeure in existence. If this aspect is kept in perspective, the direction issued earlier was in relation to the procedure to be followed if the requirement to terminate the agreement had arisen. Though there is no termination indicated, the core issue for considering the termination or the

request presently made to continue and complete the project would hinge on the issue relating to the existence or otherwise of force majeure. Therefore, in that context, the letter dated 09.01.2014 does not indicate a detailed consideration in relation to the existence or otherwise of the same. If that be the position, the relief essentially to be granted is to make a detailed consideration of all aspects in mutual consultation notwithstanding the communication dated 09.01.2014. Hence, as an appropriate remedy, the same should have been prayed either with or without the relief of quashing the said communication.

15. If in that light the further contentions on behalf of the parties are taken note of, though the Concession Agreement was entered into between the parties on 19.10.2009, the fact that there is restraint with regard to mining activities and export of iron ore presently is the accepted position. The details as secured by the petitioner from the department of Mines and Geology at Annexure-X would disclose that no iron ore has been exported from the State of Karnataka after July 2010. The respondents in their objection statement though have not disputed the said factual position, but have however contended that the same cannot be considered as a change in law to qualify to be considered as force majeure. Though that be the position, the said aspect requires to be considered in the context of the project being set up wholly for mechanized iron ore handling Facilities on BOT basis.

16. The agreement provides with regard to the petitioner being granted the concession for a period of thirty years and the scope among others includes operating the project/project facilities and services. In that background, if the petitioner is required to construct the mechanized iron ore handling facility, own and operate the same for the period agreed, before transferring to the respondent, the lack of work to load for export of the iron ore due to ban of mining activities immediately subsequent to the date on the parties entering into the Concession Agreement is also an aspect which would require consideration by the respondent before a decision is taken by them either to terminate the agreement or mutual discussions or in any other manner.

17. Further, in that circumstance whether the time should be allowed to the petitioner and as to whether any concessions should be provided are all aspects which require consideration, though it is entirely in the domain of the respondent and no opinion could be expressed on that aspect by this Court at this juncture. Certainly after adverting to and bestowing attention to all those aspects on mutual discussions, if any decision is taken, which according to the petitioners may be to their prejudice, at that stage, the petitioners would have to avail their remedies in accordance with law as provided under the agreement. But, however at this point, since the communication dated 09.01.2014 does not disclose such consideration on mutual discussion and letter indicates a tinge of arbitrariness, a reconsideration of the situation would have to be made by the respondent, though as indicated above, the decision to be taken by the respondent cannot be dictated by this Court to be done in a particular manner. To the said extent, it will

also have to be noticed that the direction issued in the earlier petition to put the petitioner on notice will have to be complied and an appropriate decision be taken in the matter.

18. In that view, though there can be no quarrel with regard to the legal position enunciated in the case of Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, AIR 2000 SC 3166 : (2001) 106 CompCas 267 : (2000) 4 CTC 687 : (2000) 1 JT 317 Supp : (2000) 6 SCALE 654 : (2001) 1 SCC 663 : (2000) 3 SCR 542 Supp : (2000) AIRSCW 3639 : (2000) 6 Supreme 619 relied on by the leaned senior counsel for the respondent to contend that no order to restrain encashment of the bank guarantee could be made by the Courts, the conclusion reached above would indicate that the said situation in any event cannot be considered to have arisen at this juncture. Therefore, all actions in that regard would only arise in the situation if on such mutual consideration, a decision is arrived that the petitioner has committed breach of any of the terms and the bank guarantee is sought to be invoked in view of such breach.

19. Hence, for all the aforestated reasons, I pass the following;

(i) The petition is allowed in part with no order as to costs.

(ii) The respondent shall reconsider the representations of the petitioner on mutual discussion and thereafter pass such orders in the facts and circumstance.

(iii) Until such reconsideration is made, the matter shall not be precipitated to the detriment of the petitioner.