

(2017) 08 CAL CK 0027
In the Calcutta High Court
Case No : 543 of 2017

Sikaria Divinity Private Limited

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 18-08-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 39 Rules 1](#), [Order 39 Rules 2](#) -
[Specific Relief Act, 1963](#), [Section 39](#), [S](#)

Citation : (2017) 08 CAL CK 0027

Hon'ble Judges : I.P. Mukerji

Bench : SINGLE BENCH

Advocate : Surojit Nath Mitra, Shyamal Sarkar., Arindam Mukherjee, Swarvanu Saha, Jishnu Chowdhury, Paritosh Sinha, Arindam Mondal

Final Decision : Allowed

Judgement

1. The river Hooghly, while flowing down the plains of Bengal towards the sea, has branched out, upstream of Chuchura in the Hooghly District, to form a beautiful island in the middle of the river, measuring about 75 acres. It is called "Sabuj Dweep". It has trees and plants of many kinds and recreational facilities which attract thousands of tourists over the year. The land belongs to the Department of Tourism, Government of West Bengal. This department conceived of the idea of developing the island into a eco-tourism resort. On 14th August, 2015 it entered into a contract with the petitioner which was described as a "concession agreement". The petitioner was entrusted with the construction and development of a "project",

according to the plans, designs and project report prepared by the respondent, taking all the approvals, permits etc. and by complying with the laws so as to ensure "bio-diversity". It was for 32 years to be renewed for a further period of 32 years. The petitioner was required to make an initial payment of Rs. 70 lakhs followed by an annual fee.

This application under Section 9 of the Arbitration and Conciliation Act, 1996 has been made further to an arbitration clause in the agreement.

The petition is in two volumes. All the papers that would have been necessary to dispose of the Section 9 application are included in the petition. Extensive arguments have been made. I propose to dispose of this application, on these papers without inviting affidavits. It goes without saying that the allegations made in the petition, are denied by the respondent.

2. We have to take our starting point as 8th March, 2017. On that day the Principal Secretary Tourism Department wrote to the Managing Director of the petitioner telling him that his government had invested more than Rs. 9 crores in the project. They had set up the jetty, built roads made available drinking water and power supply to the island. It blamed the petitioner for not starting the work on time and for the delay in proceeding with it. What is most important is that the Principal Secretary granted the petitioner six months' time to complete some "pin pointed few basic components" of the project, mentioned in the annexure to the letter. In this annexure the following works were specified:

"1. The entire place has to be divided into 2 segments (i) Picnic spot on the right side (ii) Cottage on the left side

2. Two/Three common wash room.

3. 20 double bedded room with a dormitory facility separately.

4. Food court for bit high end in segment-(ii) & day to day food court in segment--(i)

5. Two watch towers

6. Proper landscaping

7. Display of local hand crafts with artisans.
8. Swimming pool for segment--(ii)
9. Games for both side.
10. New vessel for carry vehicles with jetty in segment--(ii)
11. Path way.
12. Generator facility.
13. Signage on high way
14. Cultural activities area.
15. Parking place for vehicle arriving in island in segment--(ii).
15. Eco friendly vehicle for access to cottage from jetty in segment--(ii)
16. Battery operated car for joy rode.
17. CCTV."

3. The petitioner replied to this letter on 12th April, 2017 by expressing their commitment to finish the seventeen items mentioned in the above annexure by 31st August, 2017. They added that they had started the construction of double bedded wooden cottages. They also said that an item wise schedule was attached to the letter but I do not find any such schedule. On 29th May, 2017 the petitioner reported to the Secretary of the Tourism Department that the work was progressing in accordance with the schedule submitted on 12th April, 2017. This time a progress chart was attached to the letter. According to this chart construction of two jetties on the main island, improvement of 1.5 kilometres of PWD road from Somra Bazar Station, Sukhriya Ghat at Hooghly were completed. Some other works were shown to be partly completed.

4. Suddenly on 8th June, 2017 a show cause notice was issued by the Director of Tourism to the petitioner alleging the following acts of default on their part in the performance of the agreement.

- "a. No plantation is done for soil erosion.
- b. No safety officer is there in the work site.
- c. there are no labour camps onsite with sanitation and hygiene facilities.

- d. Absence of noise level monitoring.
- e. Absence of embankment around the project.
- f. Total built up area is 24773 sqm. So it may require environment clearance
- g. Cooking facility of workers is there and it is learnt they are using wood by feeling the branches of trees.
- h. Constructions of houses are going on with eucalyptus (majority) is foundation and structure.
- i. There is one tube well for water source at the site.
- j. As per DPR total project cost for the entire project is 36924.69 lakhs and total contribution by the promoter is Rs. 10,017.51 lakhs and Rupee Loan would be cause for Rs. 18998.68 lakhs.

Sikaria Divinity (P) Ltd. proposed that project cost & investment would be funded through a mix of equity and debt out of which an amount of Rs. 18998.68 lakhs is proposed to be raised as debt.

Except copies of extract of the minutes of the Board meeting dated 13.01.2016 and extract of extra-ordinary General Meeting dated 02.02.2016 nothing else is submitted as to its financial capacity."

5. In addition it was alleged that the petitioner was damaging the environment, did not have the acceptable financial standing, failed to perform their obligation under Article 6.10 (iii) of the agreement, did not maintain a proper office and so on.

6. The notice was stated to be issued under Article 11.4 (a) (1) of the agreement asking the petitioner to rectify the alleged breach within thirty days failing which the agreement would be terminated.

On 20th June, 2017, without any reference to this show cause notice the petitioner wrote to the District Magistrate, Hooghly that the work was progressing according to the work schedule submitted by the letter dated 12th April, 2017 and that the end of August, 2017 or the first week of September, 2017 could be targeted by him as the possible time for inauguration of the project by the Hon"ble Chief Minister. On 30th June, 2017 the petitioner replied to the show cause notice dated 8th June, 2017, meeting each and every charge levelled in it. According to the petitioner most of the work alleged to have been left undone was the responsibility of

the state instrumentalities. An expert had already been appointed by them to monitor the noise level, no worker was cooking any food at the site as there was no facility to do the same. Use of eucalyptus tree was in accordance with the PWD manual.

7. On 7th July, 2017 this application was filed by the petitioner for inter alia the following reliefs:

"(a) Injunction restraining the respondent whether by itself or its men, agents, servants, assignees or otherwise howsoever from interfering with the peaceful exercise of the rights and discharge of obligation by the petitioner in accordance with the agreement.

(b) Operation of the show cause notice dated June 8, 2017 be permanently stayed."

8. Even before the application could be moved the Director of Tourism issued a notice dated 11th July, 2017 terminating the contract.

What are the reasons ascribed in the termination notice dated 11th July, 2017 have to be seen.

9. What appears from an examination of this document is that maintenance of the natural environment suddenly became a prime concern of the government. The petitioner was accused of doing activities which "endanger the environment and the eco system". They had caused "soil erosion" their labour force was "cutting trees and using the same for fire wood" there was "no solid waste management". The employees of the petitioner were accused of "destruction of environment" and damage to the "eco system of Sabuj dweep in general and flora and fauna in particular". Their work had "seriously affected the biodiversity of the island and adjoining areas". A proper hygiene standard was not adhered to and so on.

ARGUMENTS:-

10. The first point raised by Mr. Mitra for the petitioner was that this termination notice was issued when the application was awaiting consideration of this court for passing an interim order. It was issued to

make the application infructuous. It was per se bad.

11. Secondly, on 8th March, 2017, the Principal Secretary Tourism Department of the Government of West Bengal had forwarded to the petitioner by letter an agenda of the project to be completed within the next six months. How could the contract be terminated by the Director of Tourism without even referring to even one of the 17 items as not having been completed by the petitioner or not completed to the satisfaction of the government? From time to time by letter dated 12th April, 2017, 29th May, 2017, the petitioner had sent the government and particularly the Principal Secretary a status report showing which portion of the work was completed, what work was in progress and what part of it was required to be done by the government or by the state agencies. According to Learned counsel the government was fully satisfied with the progress of the work done by the petitioner. That is why they did not write a single letter controverting the progress reports submitted by the petitioner or stating that the petitioner was in breach of the contract.

12. It was argued that the show cause notice issued on 8th June, 2017, was extraordinary in the sense that there was no allegation of breach of the agreement by the petitioner. Peripheral issues like soil erosion, absence noise level monitory, absence of embankment, cutting of trees by the workers, financial incapacity of the writ petitioner, absence of a public relation office and complaint register in the project site etc. were raised, calling upon the petitioner to answer the accusation and close the breach failing which the contract would be terminated.

13. It was also said that this letter was replied to by the petitioner 30th June, 2017, dealing with each and every allegation specifying the items of work completed by the government or its agency and which part of the work was required to be completed by the petitioner and what portion of it had actually been accomplished.

14. Mr. Mitra submitted that under this project possession of 75 acres of land

was handed over to his client for 32 years with a renewal clause extending to another 32 years. He added that the entire island was handed over to his client under the agreement to do landscaping work, maintain it, make construction thereon, set up recreational facilities arrange for transportation from the banks of the river to the island and so on. The petitioner was required to pay the initial consideration as provided in the agreement and an annual fee. It had the right to levy charges for use of the facilities and appropriate the same, obviously to run the project site profitably. Learned counsel submitted that the work came within the purview of Section 14 (3) (c) of the Specific Relief Act, 1963 which is as follows:-

"(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases.

(C) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:

- (i) The building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;
- (ii) The plaintiff has a substantial interest in the performance of the contract and interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and
- (iii) The defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed."

15. He said that the scope of the work was specifically defined in the agreement. The petitioner had a substantial interest in the contract by reason of its duration and extent. Compensation in money would not be an adequate relief.

16. Mr. Chowdhury, Additional Government Pleader, for the respondent repeated the contents of the show cause notice and the termination notice stating that the petitioner was making large scale destruction of the

environment. Their employees were cutting down the trees. They were used for building cottages and using wood to light fire to cook their food etc. They were also accused of making the whole place dirty. The petitioner was unable to prevent soil erosion, preserve the embankment. They did not to have a financial ability to complete the rest of the project.

17. Mr. Chowdhury submitted that this was a contract which could not be ordered by the court to be specifically performed. It was by its nature determinable. In the unlikely event of the petitioner succeeding, they could be compensated by award of damages. The principles on which damages were to be awarded were specified in detail in the contract. If the court granted an order of injunction restraining the respondent from giving effect to the termination notice, it would amount to an order indirectly ordering specific performance of the contract by the respondents. He invited the court's attention to Section 14 of the Specific Relief Act, 1963 and submitted that the contract in question matched the description of the contract in sub-Section (1) (a) (b) (c) and (d) thereof, which according to the Act stipulated they could not be specifically enforced. He said that compensation in money was an adequate relief (Section 14 (1)(a)). The contract ran into so many minor details and involved performance of continuous obligations which the court could not supervise and which the court could not order to be performed specifically (Section 14 (1) (b) (c)). I shall discuss the law cited by learned counsel for the parties at the time of discussing their submissions.

DISCUSSION:

18. Let me first discuss the prima facie case of the parties. On 8th March, 2017 the Principal Secretary, Tourism Department, Government of West Bengal had given the petitioner six months time to complete the seventeen items of work mentioned in the annexure to that letter. Between 12th April, 2017 and 29th May, 2017 the parties corresponded. The effect of this was that the petitioner pledged to complete those seventeen items of work by 31st

August, 2017. They had also submitted progress charts showing the items of work which had been completed by them, those in relation to which the work was in progress and the rest that could only be completed by the government or its agencies. I have not found any letter or e-mail of the Tourism Department to the effect that they were dissatisfied with the progress of work. However, on 8th June, 2017 a show cause notice was issued to the petitioner by the Director of Tourism Department on absolutely collateral issues as mentioned above.

19. There was not a single line in this show-cause accusing the petitioner of breach of their obligations under the letter dated 8th March, 2017.

Therefore, I take it that the respondent was satisfied with the petitioner's performance of the agreement.

20. Meanwhile, the petitioner on 20th June, 2017 wrote to the District Magistrate, Hooghly that by the end of August, 2017 or the first week of September, 2017 the Hon''ble Chief Minister could be requested to inaugurate the project. On 30th June, 2017 the petitioner replied to the show cause notice as stated above.

21. It does seem quite extraordinary to this court that when there was no earlier allegation against the petitioner that it was damaging the environment, such an allegation could suddenly be raised from June, 2017. Equally, unbelievable appears to be the accusation against them that they were so unfriendly to the environment that the agreement had to be terminated. No documents have been brought on record to show that there was destruction of flora or fauna or the ecology by the petitioner. Furthermore, when on 8th March, 2017 six month's time had been given to the petitioner to complete the list of work mentioned in the annexure to that letter, the Director of Tourism could not have terminated that agreement. Particularly, when there was no allegation against them that they were unable to proceed with or complete the seventeen items of work specified by the Principal Secretary. In my opinion, the aspersion on the

petitioner that they were damaging or destroying the environment, disturbing the ecological balance, bio-diversity etc. is suspicious. Prima facie the court does not find any evidence in support of it or believe it. Hence, in my prima facie opinion, the petitioner is not and the respondent is in breach of the contract. Prima facie the termination of the contract is wrongful.

22. Is it a case where an injunction should be granted setting aside the notice, terminating the contract, issued by the respondent?

The principles governing the grant of an order of injunction are contained in Order 39 Rules 1 & 2 of the Code of Civil Procedure and sections 37, 38, 39, 40 & 41 of the Specific Relief Act, 1963.

23. In order to merit consideration for grant of an injunction the prima facie case of the petitioner has to be established. To a very large extent the strength and weaknesses of the case of the parties have to be assessed by the court on the available evidence to come to a provisional conclusion as to whether the petitioner, on a balance of probabilities, has a better case than that of the respondent. Once the petitioner has been able to establish a prima facie case the court proceeds to consider the balance of convenience and the irretrievable injury factor. This means that the balance of convenience must be in favour of an order being passed in favour of the petitioner and that irretrievable injury will be caused to him if the order is denied.

27. More often than not, it is not possible for the court to adjudge the prima facie case immediately. In that event the petitioner has to satisfy the court that he has raised a fair question or a substantial question to be tried. In those circumstances, the court will pass an order of injunction so as to hold the scales even pending trial of the case.(see *Fellows v. Fisher* reported in (1975) 2 AllER 829 and 834 and *American Cyanamid v. Ethicon* reported in (1975) 1 AllER 504 and *Hubberd v. Pitt* reported in (1975) 3 AllER 1 (CA)).

25. It is settled law that in case where damages provide the remedy an interim order of injunction cannot be granted. Conversely in contractual matters only in a suit for specific performance of an agreement could the court grant an order of injunction. This common law principle is well spelt out in Section 41 (e) of the Specific Relief Act, 1963. It is also trite that the court will not grant an order of injunction in a contract which is, by its nature determinable, and for breach of which damages are an adequate relief, or in a contract performance of which entails constant supervision by the court or one which runs into minute details. This is so because the court will not order specific performance of such a contract (see Sections 14 (1) (a) (b) (c) and (d) of the Specific Relief Act, 1963).

Now, consider the following facts.

26. The duration of the contract was stated to be 32 years, renewable for another 32 years. The contract specifically stated that the petitioner would enjoy exclusive possession of the project site with blanket rights of developing the island and making construction thereon and "operating and managing the project". Article 3 (4) (see page 120 of the petition) even went to the extent of saying that the petitioner would get possession of the island free from all encumbrances, charges etc immediately on execution of the agreement. Such was to be the extent of control of the petitioner that they could "demand collect and appropriate charges from the users of the project" (see Article 2 (2) (d)). It was like an unfettered charter granted to the petitioner, on the island. All these rights the petitioner acquired on payment of an initial amount of Rs. 70 lakhs. They were required to pay an annual concession fee to operate in the island which would increase by 5 % every year. In spite of my best efforts I have not been able to find the annual concession fee payable by the petitioner to the respondent in any conspicuous place of the agreement.

27. Therefore, Mr. Mitra appearing for the petitioner was right when he said that the contract in question came within the exception to the principles

laid down in Section 14, provided in sub- section 3 (c) thereof. Indeed, the petitioner has a substantial interest in the land as well as in the project. What difference in status is there between the petitioner and a lessee of a land? A lease is a transfer of a right to enjoy the property for a certain length of time in consideration of money paid or promised to be paid periodically (see Section 105 of the Transfer of Property Act, 1882). The petitioner is in exclusive possession of the island free from any encumbrances under the agreement. The petitioner under that instrument is to be in possession for 32 years and can expect to have a further period of 32 years on payment of an annual fee. It has all the incidents of a lease. The only problem is that a lease over one year is supposed to be registered whereas this document is not. Therefore, the interest of the petitioner is quite substantial. Furthermore, they were entrusted with the execution of works on the land which are clearly definable.

28. In my prima facie opinion compensation in money is not an adequate relief if the respondent is found to be in breach of the contract. This is so because it is not at all very easy to estimate the profit that the petitioner would earn out of the project in the next 32 years and the 32 years following it. I prima facie hold that this contract is capable of being performed specifically.

29. The above principles of law are very well-known and have been laid down and reiterated by the Supreme Court and the High Courts from time to time. It is only the difference in facts which have resulted in divergent final orders being passed by the court.

30. Let me now deal with the cases cited by Mr. Chowdhury. In *Indian Oil Corporation Ltd. v. Amritsar Gas Service and Others* reported in (1991) 1 SCC 533, the court was involved with an LPG distributorship agreement granted by Indian Oil Corporation to the respondents. It held that the contract was determinable by nature. A contract is determinable when either party has an option of terminating it giving limited notice to the

other party. (See also Rajasthan Breweries Ltd. v. The Stroh Brewery Company reported in 2000 (3) ARBLR 509 (Delhi) cited by Mr. Chowdhury). In those circumstances, the court held that the award made by the arbitrator granting restoration of the distributorship was erroneous in law. The respondents could best be entitled to compensation for loss of earning for the period of notice. Hindustan Petroleum Corporation Limited And Others v. Super Highway Services And Another reported in (2010) 3 SCC 321 arose out of a writ application under Article 226 of the Constitution of India. In that case the court held that termination of the dealership agreement by the appellant was wrongful. As we all know in a writ application the court adjudges whether any public law has been violated by the respondent. It passes its orders accordingly. In that case the court held that the action of the appellant was arbitrary, illegal and in violation of the principles of natural justice. Similar was the decision of the Supreme Court in the public law domain in Bharat Petroleum Corporation v. Jagannath and Company and Ors . reported in (2013) 12 SCC 278. This case has no application here as the petitioner has availed of a remedy obtainable on infringement of private law and not public law by approaching this court under Section 9 of the Arbitration and Conciliation Act, 1996.

31. As I have said before, different facts result in different decisions. In Magma Leasing Limited v. Credit Rating Information Services of India Limited reported in (2001) 3 CHN 654, this court held that a contract for credit rating could not be ordered to be performed specifically and that the agency aggrieved by the termination of the contract had its remedy in damages.

32. In the case filed by Cox & Kings concerning the contract given by IRCTC to them to run Maharaja Express jointly with the railways, the court held that the contract could not be specifically performed and refused to set aside the termination of the contract by the railways (see Indian Railways

Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd . reported in (2012) 1 Arb LR 184. Similar was the view of the Delhi High Court with regard to termination of an agreement for construction of bus shelters in the case of Green Delhi BQS Ltd. v. Delhi Transport Corporation reported in 2010 SCC OnLine Del 1360. In Jindal Steel and Power Limited v. SAP India Pvt. Ltd . reported in (2015) 221 DLT 708 the facts of the case which involved software licences. The court held that it was a determinable contract and refused to pass an order of injunction. Mr. Chowdhury relied on the definition of a works contract in Larsen And Toubro Limited And Another v. State of Karnataka And Another reported in (2014) 1 SCC 708. He submitted that the word "work on land" in Section 14 (3) (c) of the Specific Relief Act, 1963 is to be given the same meaning. I do not think his analogy is correct. The phrase has to be given a very wide meaning so as to include construction work, landscaping work, beautification work, excavation and so on.

SUMMARY OF FINDINGS:

33. Hence, the summary of my findings is as follows:-

- a) Prima facie, the petitioner is in firm possession. This possession has been granted to them for 32 years, renewable for another 32 years. The petitioner has already started substantial construction work in the island free from all encumbrances. The petitioner's earning was assured by the agreement that they would be able to retain a percentage of the turnover. Therefore, the petitioner was performing works on land and construction of building within the scope of Section 14 (iii) (c) of the Specific Relief Act, 1963.
- b) In the letter of the Principal Secretary Tourism Department dated 8th March, 2017 there was no hint that the respondent was contemplating terminating the contract. Time was extended upto 7th September, 2017 for the petitioner to complete the seventeen items of work mentioned in the annexure to the letter.

- c) Thereafter, from time to time the petitioner kept the respondent apprised of the progress of the work. By the progress report the petitioner had even expressed the hope that by the end of the August or the first week of September this year the project could be inaugurated by the Hon"ble Chief Minister. There is not a single letter of the respondent disagreeing with the progress report furnished by the petitioner.
- d) There was no whisper from the respondent upto the beginning of June, 2017 that the petitioner was damaging the environment.
- e) It was only by the show cause notice dated 8th June, 2016 that the petitioner was charged with causing damage to the environment.
- f) The petitioner explained in detail by their letter dated 30th June, 2017 that they had not damaged the environment. Still, on 11th July, 2017 the contract was terminated alleging damage to the environment by the petitioner. Ironically, no allegation was made that the petitioner was otherwise in breach of the contract.
- g) Although the Director of the Tourism Department as the concessioning authority had the power to terminate the contract, he ought not to have done it without the concurrence of the Principal Secretary. Furthermore, since the Principal Secretary Tourism Department had granted the petitioner six month"s time to complete the contract upto 7th September, 2017, at least, time upto 7th September, 2017 ought to have been given to the petitioner to complete the work.
- h) Prima facie the allegation against the petitioner that they were destroying or damaging the environment appears to be without any evidence.
- i) Prima facie the petitioner has been performing the work in accordance with the pace expected under the letter dated 8th March, 2017.
- j) Prima facie the contract is not determinable by nature.
- k) Prima facie an award of damages is not the proper remedy for breach of

this contract by the respondent.

l) The contract is definable and capable of being specifically performed under the supervision of the court.

m) Prima facie the respondent is and the petitioner is not in breach of the contract.

n) This application is pending in this court from 7th July, 2017. Because of pendency of this application little or no progress could be made by the petitioner in performing the work.

o) I do not say that the respondent has lost the right to terminate the contract. But I do say that the termination of the contract on 11th July, 2017 was wrongful and illegal.

34. In those circumstances, I pass the following order:

The termination notice dated 11th July, 2017 is set aside. Ordinarily, the petitioner ought to have been granted time upto 7th September, 2017 to complete the work. Since, this application has been pending in this court for nearly 45 days, the petitioner will get advantage of this period. The respondent is restrained by an order of injunction from terminating the contract till 7th September, 2017 and for a further period of 45 days thereafter.

35. After this period the contract can only be terminated for any alleged breach of the petitioner after the date of this order. The petitioner will be entitled to resume the work forthwith.

36. The respondent is directed to co-operate with the petitioner.

The Principal Secretary Tourism Department is directed to ensure that the officers under him do not misuse their power in dealing with this contract.

37. This application is accordingly allowed.

38. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.