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**(2005) 09 KAR CK 0082**

**In the Karnataka High Court**

**Case No : Writ Appeal No. 2619 and 2621 of 2005**

Srimauli Builders

APPELLANT

Vs

Bangalore Water Supply and Sewerage Board and Others

RESPONDENT

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**Date of Decision : 08-09-2005**

**Acts Referred:**

Constitution of India, 1950 — Article 12, 14

**Citation :** (2006) 4 BC 199 : (2005) 6 KarLJ 216

**Hon'ble Judges :** V. Jagannathan, J;S.R. Nayak, J

**Bench :** Division Bench

**Advocate :** D.L.N. Rao, for K. Chandrashekara Achar, for the Appellant; T.R. Subbanna for S.N. Keshava Murthy, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

V. Jagannathan, J.—The common order passed by a learned Single Judge of this Court upholding the validity of the termination of contracts entrusted to M/s. Srimauli Builders (the appellant herein) by the respondent-Bangalore Water Supply and Sewerage Board ("the Board" in short) has given rise to these two appeals. As the parties to the writ petitions were one and the same and termination of contracts was on identical grounds and the questions involved being common, the learned Single Judge passed a common order in the writ petitions and we propose to do the same.

2. The facts giving rise to these two appeals can be stated in brief as under:

Bangalore Water Supply and Sewerage Board, the respondent herein, invited tenders in respect of the work relating replacement of existing trunk sewers and the laying of new trunk sewers under National River Conservation Plan (NRCP funding) in Koramangala Valley and also in Challaghatta Valley and the value of the two contracts was to the tune of Rs. 20,35,64,587.50 and Rs. 10,80,33,387.50 respectively and as the tenders offered by M/s. Srimauli Builders, the appellant herein, was the lowest in respect of the said two

contracts, the respondent accepted the offer and, accordingly, the appellant was entrusted with the above two package works and as per the agreements entered into separately in respect of the two contracts, the work orders were issued on 28-2-2003.

3. The period stipulated in the contracts for completion of the work was 18 months from the date of issue of the work order. The appellant was also required to furnish Bank guarantees towards security deposit in respect of the two contracts awarded to it. The appellant, accordingly, furnished two Bank guarantees worth Rs. 2,02,60,000/- drawn on United Western Bank, Sollapura Branch, the said amount being 6.5% of the value of the contracts. The contractual work got delayed and it was the stand of the appellant that due to various factors like problems faced by the appellant-firm from the traffic police, Corporation authorities, Bangalore Development Authority, etc., the work could not be completed within the stipulated period of time. On the other hand, the stand of the respondent is that the appellant-firm was responsible for the delay in completing the work within the stipulated time. Both parties exchanged number of letters in regard to their respective stands. In the meanwhile, the respondent also found out that the Bank guarantees furnished by the appellant were fake and correspondence ensued between the two sides even as regards the validity of the Bank guarantees furnished.

4. It is the case of the respondent-Board that the correspondence with the Bank concerned revealed that the appellant-firm had submitted fake Bank guarantees. Several meetings took place to find out as to who was at fault and at whose instance the contractual work got delayed and the respondent issued notice to the appellant for the delay in execution of the work. On the other hand, the appellant wrote letters to the respondent insisting on the amount due to it by the respondent. As, according to the respondent, the entire project was undertaken under National River Conservation Plan (NRCP funding), the respondent was constrained to bring pressure on the appellant to complete the work lest the respondent would not be getting necessary funds from the NRCP funding. It is the case of the respondent that the Adviser of the N.R.C. Directorate, Delhi, expressed displeasure over the tardy progress and even threatened to withdraw the funds. It is also the case of the respondent that the appellant-firm had only executed 69% of the work relating to Koramangala Valley Project and 40.17% of the work in relation to Challaghatta Valley Project and even to get the said amount of work done by the appellant-firm, lot of persuasion followed by number of review meetings were needed.

5. It was also found out by the respondent that as the entire package awarded to the appellant-firm consisted of laying 12,950 Rmt. of pipeline in respect of Koramangala Valley Project (NRCP Contract-I), it was found that only work to the extent of 9,180 Rmt. of pipeline had been completed and thereafter, the firm had laid 40 Rmt. from September 2004 till the date of the Board meeting i.e., 12-1-2005. It is the case of the respondent that the NRCD authorities expressed

their displeasure over the tardy progress of the work and the respondent-Board was informed to complete the work in all respects by the end of December 2004, lest there will be difficulty in releasing the balance funds required for the scheme.

6. On the other hand, it was the stand of the appellant-firm that the work was hampered due to various factors like not getting necessary permission from the other authorities like Electricity Department, Telecom Department, Traffic Police, Bangalore Development Authority, and also due to non-receipt of designs and drawings from the respondent-Board at the earliest as sought for by the appellant and added to this, many bills were pending with the respondent-Board, which were not cleared, and all these were made known to the respondent-Board through several letters written by the appellant-firm.

7. Finally, the exchange of letters between the two sides culminated in the respondent-Board issuing final notice dated 9-12-2004 bringing to the notice of the appellant-firm about the nature of work entrusted and the work carried out upto the said date and there being no progress at all in the work inspite of number of meetings held in this connection, the respondent-Board felt that the appellant-firm had abandoned the work and hence, by referring to Clause (2) of the conditions of contract, which provided for rescinding the contract in case of abandonment of work, the appellant-firm was called upon to reply to the above said notice as to why the contracts should not be rescinded.

8. After receipt of the reply to the above said notice the respondent-Board, based on the Board meeting held on 18-1-2005, conveyed to the appellant-firm the decision of the Board to rescind the contracts of the appellant-firm and get the balance work done through some other agencies and to invite fresh tenders for the said balance work and also to blacklist the appellant-firm in view of the Bank guarantees furnished turning out to be fake, the Board had lost confidence in the appellant-firm. Aggrieved by the above said decision of the respondent-Board conveyed by its letter dated 27-1-2005 (Annexure-A to W.P. No. 5263 of 2005), the appellant approached this Court praying for quashing of the order dated 27-1-2005 terminating the two contracts, by filing W.P. No. 5263 of 2005 in respect of Koramangala Valley Package and W.P. No. 5264 of 2005 in respect of Challaghatta Valley Package. By his common order dated 15-4-2005, the learned Single Judge allowed the writ petitions in part insofar as blacklisting the appellant-firm is concerned and quashed the said part of the impugned order. However, the writ petitions were dismissed as against the termination of contracts is concerned.

9. Aggrieved by the said finding of the learned Single Judge, the appellant-firm has filed the present appeals. W.A. Nos. 2619 of 2005 and 2621 of 2005 arise out of the above two writ petitions. It has to be mentioned at this juncture that during the pendency of case, the Board had entrusted a small part of the unfinished work to one M/s. Jayaram Engineering and hence the appellant has impleaded the said firm for effective disposal of the appeals.

10. Heard the learned Counsels appearing for both sides.

11. Sri D.L.N. Rao, learned Counsel appearing for the appellant-firm, took us through the entire material on record and in particular, the correspondence exchanged between the parties in respect of the contractual work and also with regard to the issue relating to furnishing the fake Bank guarantees and contended as follows.--

The first contention urged before us is that the learned Single Judge, while rightly holding that, if one of the parties to the contract is a State or an instrumentality of the State, judicial review is permissible to examine the order of termination of the contracts, at the same time, has taken the view that interference against the impugned orders of termination of contracts is not called for in the instant case. While supporting the finding of the learned Single Judge that the decision to blacklist the firm cannot stand the test of Article 14 of the Constitution, since the appellant-firm was not heard on the said question, the grievance of the appellant's Counsel before us is that the learned Single Judge ought to have quashed the order terminating the contracts and by not doing so, the impugned order of the learned Single Judge cannot be sustained in law as regards the said finding in view of the material placed before the Court. It was contended that, insofar as abandonment of work is concerned, the very fact that the appellant-firm had completed nearly 70% of the work relating to Koramangala Valley Package and 40% of the work in relation to the Challaghatta Valley Package, the question of abandonment will not arise.

12. It was then contended that the main reason for the respondent-Board to rescind the contracts is not on account of abandonment of work, but it is because of the alleged fake Bank guarantees furnished by the appellant-firm. In this regard, the correspondence between the parties was referred to submit that the respondent-Board itself had taken the stand that while the Bank guarantees furnished, at the first instance, turned out to be fake, however, the appellant-firm had made good the Bank guarantees subsequently and in view this admission of the respondent-Board, the decision to rescind the contracts and to blacklist the appellant-firm, on the score that the Bank guarantees furnished by it were not genuine, is arbitrary, unreasonable and indicates non-application of mind and, therefore, the said action on the part of the respondent-Board, which is an instrumentality of the State, cannot be sustained in law, having regard to the scope of judicial review of such action of the State or its instrumentalities.

13. To substantiate the above contention, learned Senior Counsel Sri D.L.N. Rao took us through the entire correspondence between the parties to mention that the document produced at pages 484 and 485 would clearly indicate that insofar as Koramangala Valley Package is concerned, the work executed is 100% in relation to work No. 1 and ranging from 76.19% to 100% as regards work 2 and 96.50%; in relation to work 3. As regards Challaghatta Valley Package is concerned, the table produced at page 486 to the writ appeal papers would go to indicate that insofar as laying pipes of 1200 mm, 100%) work has been executed

and it is 85.71% for 1600 mm and 94.44% for 1800 mm pipeline work. Therefore, in the face of such work turned out by the appellant firm, the question of abandonment of the work will not arise.

14. Next it was contended that the respondent-Board has sought to play hide and seek insofar as the issue relating to Bank guarantee is concerned. In other words, it was submitted that the Board had clearly indicated in its correspondence that the firm had made good the Bank guarantee by furnishing a fresh one and thereafter, the Board never raised an eyebrow as regards the issue relating to Bank guarantee and even in the final notice dated 9-12-2004 (Annexure-X), the Board has not made any reference to the issue relating to fake Bank guarantee and this stand of the Board did not change even in the letter dated 27-1-2005 (Annexure-A) terminating the contract. Therefore, to contend now before this Court that the appellant-firm had furnished fake Bank guarantee and the Board was constrained to terminate the contract, is, therefore, arbitrary and unreasonable. In support of the above contention, learned Counsel Sri D.L.N. Rao placed reliance on the decision in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, and also the judgment of this Court in *Uttar Pradesh State Bridge Construction Corporation Limited Vs. Bangalore Development Authority and Others*,

15. On the other hand, learned Counsel Sri Subbanna appearing for the respondent-Board put forward three main grounds to support the order of termination of the contracts. First it was submitted that the Bank guarantee furnished at the initial stage by the appellant-firm turned out to be a fake one and this is clear from the correspondence between the Board and the Banks concerned. Therefore, in the eye of law, there is no valid tender and hence, the tender offered by the appellant-firm automatically stands cancelled or becomes void. Secondly, it was contended that the work turned out by the appellant-firm was not satisfactory and so far as this aspect of the matter is concerned this Court cannot substitute its views. Finally, it was submitted that all that is permissible within the scope of judicial review is the examination of the decision making process and the final decision is beyond the scope of judicial review. In the course of the arguments, learned Counsel for the Board took us through the entire material to contend that the appellant-firm had stopped work for more than three months and coupled with this, the issue relating to Bank guarantee also weighed with the Board in reaching the final conclusion in termination the contracts. In support of the above submissions, learned Counsel placed reliance on judgment of the Apex Court in *Global Energy Limited and Anr. v. Adani Exports Limited and Ors.* AIR 2005 SCW 2875

16. Having thus heard the learned Counsels for the parties and after carefully examining the entire material placed before us and on a careful perusal of the judgment of the learned Single Judge, the only point that arises for consideration is whether the action of the Board in terminating the contract on the ground of abandonment of work can be said to be fair, non-arbitrary and reasonable and

satisfies the test of Article 14 of the Constitution of India.

17. The learned Single Judge in the light of the submissions made before him, framed two questions for consideration and the first question related to the scope of judicial review of State action in contractual matters and as regards this, after considering the proposition of law laid down by the Apex Court, the learned Single Judge summarised the parameters of judicial review in contractual matters involving the State or instrumentalities of State and has listed out ten propositions of law. We are in agreement with the above propositions of law listed by the learned Single Judge and, in our view, the said propositions are based on the law laid down by the Apex Court in various judgments referred to by the learned Single Judge. This Court also has taken similar view in the case of Uttar Pradesh State Bridge Construction Corporation Limited, that the action of the State or its instrumentalities can be assailed even in contractual matters and it is within the scope of judicial review to test the validity of termination of contract on the touchstone of Article 14 of the Constitution of India.

18. Therefore, the only point that has been answered by the learned Single Judge in the negative relates to validity of termination of the contracts by the respondent-Board and the learned Single Judge has held that no interference is called for in the instant case as regards the same. This finding of the learned Single Judge is challenged in the two writ appeals. We propose to deal with the same hereunder:

The respondent-Board has terminated the contracts mainly on the ground of "abandonment of work" by the appellant-firm. The learned Single Judge while dealing with question No. 2 raised by him has observed at one place that the appellant did not complete the work within the time framed and there was no proper planning in its approach and the firm had no experienced engineers for the type of job that was to be done and has further observed that so far as pipe jacking work is concerned, there was no co-ordination with the sub-contractor and the firm took more than four months to execute the work. The Board was put into embarrassment in the public eye because of the delay and therefore, the Board was right in coming to the conclusion that there was abandonment of work by the appellant and the said action on the part of the Board cannot be termed as unreasonable or mala fide, but it is based on good faith.

19. We have carefully examined the material placed on record. It is not disputed by the Board that the appellant had completed 70% of the work in relation to Koramangala Valley Package and 40% work in Challaghatta Valley Package and the table that is produced by the appellant along with the writ appeal papers would also go to show that in respect of certain categories of pipeline work, the appellant-firm has completed 100% of work in some cases and the work turned out varies from 76% to 100% for various description of pipes work, and this has not disputed by the respondent-Board. A close look at the correspondence between the parties would also disclose that the Board has never said in any of the correspondence that the appellant had no experienced Engineers for the job.

The issue relating to pipe jacking was never raised by the Board either in the writ petition or in the writ appeal.

20. The delay in executing the work cannot be equated with the abandonment of work. "Abandonment" means giving up the work completely once and for all. But in the instant case, the reply given by the firm to the final notice itself goes to show that the firm had no intention of abandoning the work, but on the other hand it had expressed its desire to complete the balance work at the earliest with the co-operation of the concerned agencies and the Board. The work allotted to the firm is of such nature that it required the co-ordination and co-operation of not only the Board and its officials, but even from the other agencies. Certain unforeseen events like vagaries of nature will also have to be taken into account and therefore, in works of such nature, the delay is bound to occur and it is not a work, which can be executed in the vacuum with mathematical precision. Further, it is to be noted that the learned Single Judge has also opined that it is not possible to come to any conclusion as to who is at fault and who is responsible for the delay without evidence. The said observation of the learned Single Judge runs counter to the earlier observation that the delay was on account of the appellant-firm.

21. It is rather inconceivable to arrive at the conclusion of the abandonment of the work without there being any concrete material forming the basis for such decision. The construction work is worth of huge amounts and admittedly major part of work has been completed by the appellant-firm. Bills to the tune of huge amounts were lying with the Board for payment to be made to the appellant-firm. The appellant had given detailed explanation to the final notice and a reading of the same would convince any person of ordinary prudence that the appellant had only expressed the difficulties faced by it in the execution of the work and no inference of abandonment of work can be drawn from the said reply furnished by the firm.

22. The learned Single Judge has also observed that the Board has no obligation to give reasons in the order of termination of contracts and the order is passed neither by a quasi-judicial authority nor by an administrative body and it is an act of one of the contracting parties who has a right to terminate the contract and the material on record fully justifies the action of the Board.

23. We, with respect, are unable to agree with the above reasoning of the learned Single Judge. In our view, the above observation of the learned Single Judge runs counter to the law laid down by the Apex Court in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, and *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, and is against the principles which have been noticed by the learned Single Judge himself while summarising the law on the point in paragraph 39 of his judgment. It is not in dispute that the respondent-Board is a "State" within the meaning of Article 12 of the Constitution and, therefore, it is bound by Article 14 postulates.

24. Furthermore, it needs to be noticed that either in the final notice or in the proceedings of the Board Meeting there is no reference to the explanation offered by the appellant-firm to the notice in its letter dated 13-12-2004. Ignoring the detailed explanation given by the appellant-firm, the Board has proceeded to issue the letter of termination dated 27-1-2005. This is clearly an instance of non-application of mind to the materials on record. Secondly, there have been no complaints whatsoever by the Board in relation to the Challaaghatta Valley Package Work. The learned Single Judge has failed to consider the materials placed by the appellant-firm in regard to the work turned out by it which is reflected in the additional statement filed by the appellant-firm.

25. The Board has decided to rescind the contract on the ground of abandonment of work. But the case that is put forward and canvassed with unwarranted vehemence before the Court is that the Bank guarantee furnished by the appellant-firm turned out to be a fake one and therefore, the Board terminated the contracts. Such an inconsistent stand taken by the Board cannot be but termed as unreasonable and arbitrary and its action cannot be sustained on the touchstone of Article 14 postulates.

26. Learned Counsel for the respondent-Board contended before us that the Bank guarantee furnished by the firm were fake ones and therefore, the very tender that is offered by the firm is invalid from the inception itself and therefore, the termination of contract cannot be assailed. In support of this, he placed reliance on the decision of the Apex Court in Global Energy Limited's case. We have carefully perused the said decision of the Apex Court. It relates to a case dealing with judicial scrutiny of the terms of invitation of tender. In the said case, one of the conditions in the tender required deposit of earnest money or pay order and the order of the writ Court permitting deposit of earnest money, three days after the actual date of the opening of the tender by furnishing Bank guarantees was held to be not proper and was set aside by the Apex Court. The case with which we are concerned altogether stands on a different footing. We are concerned with the decision making process of the Board in terminating the contracts and we are not dealing with the terms of invitation of tender.

27. Much ice has melted in the Himalayas since the date of acceptance of tender in the year 2003 by the Board and to say in the year 2005 that too after much of the work has been completed by the appellant-firm, that the tender is invalid, is like waking up when the horse has bolted out of the stable. If the tender itself was not valid, nothing prevented the Board from stopping the allotment of work to the appellant, at the initial stage itself. But, having allowed the appellant-firm to continue to do the work till the end of 2004 and that too after accepting the subsequent Bank guarantees furnished by it as proper, the Board cannot now turn around and contend before the Court that the Bank guarantee furnished is invalid and therefore, the termination of contracts is justified. As already pointed out by us supra, that is not the reason for the Board to terminate the contracts. The Board cannot approbate and reprobate.

28. It is not expected of the Board, which is an instrumentality of the State, to take such inconsistent and diametrically opposite stand in the matter of termination of the contracts, value of which runs into crores of rupees. The Board itself is not sure as to what prompted it to rescind the contract. If it is due to abandonment of work, there is no material to support the said decision, but on the other hand, there is overwhelming material placed by the appellant-firm to show that it has completed substantial portions of the work and it is eager to complete rest of the work also. If the impugned decision is taken on account of furnishing of fake Bank guarantees, then, it cannot stand the test of judicial scrutiny, because, the Board itself has agreed subsequently that the appellant has furnished the proper Bank guarantees. Moreover, nowhere in the final notice dated 12-7-2004 or in the proceedings of the Board Meeting held on 18-1-2005 or in the letter of termination of contract dated 27-1-2005, is there any reference to the Bank guarantee that is furnished being not a proper one.

29. Learned Counsel for the respondent-Board contended that this Court cannot review the decision taken by the Board in terminating the contracts and all that is permissible for judicial review is the decision making process and not the final decision. We have carefully examined the material placed before us in the light of the above submission. If the decision making process itself is found to be vitiated for non-consideration of relevant materials or if it discloses non-application of mind to relevant materials or violates Article 14 postulates, the final decision of a public authority can be declared as invalid being tainted by the vice of arbitrariness and unreasonableness. In other words, if the decision to rescind the contracts is an outcome of an arbitrary and unreasonable decision making process, the same cannot be upheld as valid in law in the light of the principles enunciated by the Apex Court in ABL International Limited's case.

30. In the instant case, we have already noticed that the Board has failed to consider the detailed explanation given by the appellant-firm to the final notice and no mention has been made about the explanation given, in the proceedings of the Board Meeting or in the final notice or in the notice of termination of the contracts. Non-consideration of relevant materials and going ahead to terminate the contracts smacks of arbitrariness and unreasonableness on the part of the respondent-Board.

31. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". But at the same time the Courts can certainly examine whether "decision making process" was reasonable rational, not arbitrary and violative of Article 14 of the Constitution. Once the procedure adopted by an authority to terminate a contract is found to be against the mandate of Article 14 of the Constitution, "the Court cannot uphold such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by Court amounts to encroachment on the exclusive right of the executive to take such decision",

as laid down by the Apex Court in Sterling Computers Limited's case. In the instant case, the decision making process itself stands vitiated and, therefore, the final decision taken by the Board to rescind the contracts cannot be sustained in law.

(emphasis supplied)

32. Hence, we are of the considered opinion that the finding of the learned Single Judge that no interference is called for as against the impugned orders of termination of contract is erroneous and cannot be sustained. A close look at the entire materials placed before the Court would show that there has been no intention of abandonment of work on the part of the appellant-firm, although there has been some delay in the execution of the work for valid and unforeseen reasons. Hence, the termination of the contract on the ground of abandonment of work, we hold, is arbitrary, unreasonable and violative of Article 14 postulates. Hence, we have no hesitation in answering the question raised for consideration in the negative.

33. Now, it is the question of relief. Learned Counsel, Sri D.L.N. Rao submitted in the course of the arguments that insofar as a part of the unfinished work having been entrusted by the Board to M/s. Jayaram Engineering is concerned, the appellant-firm has no objection for the said work being carried out by the impleaded respondent, M/s. Jayaram Engineering.

34. In the result and for the foregoing reasons, we pass the following.--

#### ORDER

(a) The Writ appeals are allowed;

(b) The common order passed by the learned Single Judge in W.P. Nos. 5363 of 2005 and 5364 of 2005 is set aside;

(c) The orders of termination of the contracts dated 27-1-2005 relating to Koramangala Valley Package and Challaghatta Valley Package issued by the respondent-Board are quashed;

(d) Status quo ante position that obtained before the orders dated 27-1-2005 is restored, except insofar as the work allotted to the impleaded respondent-M/s. Jayaram Engineering is concerned;

(e) The respondents, in consultation with the appellant and taking into account the cause shown by the appellant in its letter dated 12-7-2004 marked as Annexure-Q for the delay, are directed to grant reasonable time to the appellant to complete the unfinished work;

(f) The parties shall bear their respective costs.