

(2011) 04 BOM CK 0145
In the Bombay High Court
Case No : Arbitration Appeal No. 01 of 2011

Srimauli Infrastructure Pvt. Ltd.

APPELLANT

Vs

State of Maharashtra, The Chief Engineer, The Superintending
Engineer and The Executive Engineer, Public Works
Department

RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2011) 5 ALLMR 177 : (2011) 2 ARBLR 424 : (2011) 3 BomCR 555 :
(2011) 113 BOMLR 1444 : (2011) 5 MhLj 274 : (2011) 6 RCR(Civil) 828

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : P.M. Shah holding for Atul Karad, for the Appellant; Pradeep
Deshmukh, Special Counsel for Respondents No. 1 to 4, for the Respondent

Judgement

R.M. Borde, J.—Heard Shri P.M. Shah, learned Senior Counsel holding for Shri A.M. Karad, appearing for the Appellant and Shri Pradeep Deshmukh, learned Special Counsel for Respondents.

2. Appeal is admitted and by consent of learned Counsel for respective parties, taken up forthwith for final disposal.

3. The appeal is directed against an order passed below Exhibit5 in Misc. Application No. 269 of 2010, decided by Principal District Judge, Latur, on 07.01.2011.

4. The Appellant presented an application u/s 9 of the Arbitration and Conciliation Act, 1996, seeking quashment of the letter dated 20.11.2010 terminating the contract awarded in favour of the Appellant. The Appellant has also claimed restraint order against the Respondents restraining them from entering into an agreement with anybody else in respect of work allotted to the applicant vide concession agreement dated 18.09.2009 in respect of four-laning of OsmanabadYedshiLaturNanded Road. The Appellant has also presented an

application seeking interim injunction in the pending Arbitration Application. The application tendered by the Appellant was taken up for consideration and same came to be rejected after considering the contentions raised by respective parties.

5. In the year 2008, a tender notice was issued by the Respondents for allotment of contract of fourlaning of Osmanabad YedshiLaturNanded road. The Appellant, being eligible to offer bid for the work and having sufficient experience, submitted the bid along with requisite documents, which came to be accepted and a communication to that effect was issued by the Respondents on 28.03.2008. The Appellant was asked to furnish security deposit towards performance guarantee for an amount of Rs. 400 lacs within 21 days of the receipt of acceptance letter and to execute an agreement with the Government. The Appellant complied with the term in respect of furnishing performance guarantee, though not within specified time. On 23rd October, 2008, work order came to be issued in favour of the Appellant for carrying out the work of fourlaning of the road in respect of total length of 202.80 Kms. on "BOT" basis. The concession period fixed under the agreement for recovery of toll was 30 years including the construction period of 36 months. A concession agreement came to be executed between Appellant and the Government on 18.09.2009. As per the concession agreement executed between the parties, Appellant was required to furnish "financial close" for an amount to the extent of 280 crores within a period of 180 days from the date of agreement. The period of 180 days comes to an end on 17.03.2010. The concession agreement also provides extension period of 120 days for submitting "financial close", however, on condition of payment of damages on daily basis amounting to Rs. 14,000/ per day. The extension of period for submitting "financial close" can be granted for an additional 120 days, which comes to an end on 17.07.2010.

6. According to the Appellant, an amount of Rs. 48 lacs has been paid towards damages on account of failure of the Appellant to submit "financial close" within the stipulated period. It is the case of the Appellant that Respondent State authorities withdrew performance guarantee on 20.04.2010 on account of alleged failure of the Appellant to maintain the road in usable condition. After the revocation of the performance guarantee, work of repairs of the road was got done by the Respondents. According to the Appellant, as a result of wrongful revocation of performance guarantee, the banks with whom the financial arrangement was made by the Appellant, refused to honour the commitment, which created difficulties in the ways of the Appellant in submitting "financial close", within stipulated period. On account of failure of the Appellant to submit the "financial close" and on some other grounds, the Respondent - State authorities proceeded to terminate the contract and the concession agreement by issuing a communication dated 20.11.2010. The Appellant herein, being aggrieved by the order terminating the contract as well as the concession agreement, approached the District Court by presenting Arbitration Application No. 269/2010 u/s 9 of the Arbitration and Conciliation Act, 1996. An application

seeking interim relief has been rejected, as such, instant appeal.

7. Shri Shah, learned Senior Counsel appearing for the Appellant, has objected to the order mainly on following grounds:

(1) That the order terminating the contract and concession agreement is not in accordance with Clause 16.2(a)(1) of the concession agreement.

(2) The submission of "financial close" is not an essential term of contract and non observance of the stipulation would not in itself authorise the Respondents to adopt an extremely harsh measure of terminating the contract and the concession agreement.

(3) The delay in submission of financial close is attributable to the Respondents - State authorities as the illegal act of revocation of performance guarantee by the Respondents on 20.04.2010 created impediment in the way of the Appellant/contractor to make financial arrangement and as such, the act attributable to the State would come within the expression of "force major event" and as per the terms of the concession agreement, the Respondents are not entitled to terminate the contract on account of failure to submit financial close by the contractor.

8. "Financial Close" is described in the concession agreement, thus:

"Financial Close" means the date on which the Financing Documents providing for funding by the Lenders have become effective and the Concessionaire has immediate access to such funding under the Financing Documents.

9. Clause 10.5.1 provides for submission of "financial close". The relevant clauses in the concession agreement are quoted below:

10. 5.1 Financial Close:

The Concessionaire hereby agrees and undertakes that it shall achieve Financial Close within 180 (one hundred and eighty) days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding (120 (one hundred and twenty)) days, subject to payment of Damages to the GOM in a sum calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day of delay; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely as a result of any default or delay by the GOM in procuring satisfaction of the Conditions Precedent specified in Clause 2.10.1 / or due to Force major.

10.5.2:

The Concessionaire shall, upon occurrence of Financial Close, notify the GOM forthwith, and shall have provided to the GOM, at least 2 (two) days prior to the

Commencement Date, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Lenders.

10.6.1:

Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 15 (Force Major), in the event that Financial Close does not occur, for any reason whatsoever within the period set forth in Clause 10.5.1, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be Deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. For the avoidance of doubt, it is agreed that in the event the Parties hereto have, by mutual consent, determined the Commencement Date to precede the Financial Close, the provisions of this Clause 10.6.1 shall not apply.

10. Force Major events and its effects are enumerated in the Concession agreement in Article 15, which reads thus:

15.1 Force Major Event:

As used in this Agreement, a Force Major Event shall mean occurrence in Maharashtra of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Article 15.2, 15.3 and 15.4 respectively which prevent the Party claiming Force Major (the "Affected Party") from performing its obligations under this Agreement and which act or event (i) is beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, and (iii) has a Material Adverse Effect on the Project.

15.2 Non Political Event:

For purposes of Article 15.1 hereinabove, Non Political Event shall mean one or more of the following acts or events:

(i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from a source external to the Project Site or beyond design specifications for the Construction Works)

(ii) radioactive contamination or ionizing radiation;

(iii) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives or attributable to any act or omission of any of them) interrupting supplies and services in the Project for a period exceeding 7 (seven) days in an Accounting Year, and not being an

indirect Political Event set forth in Article 15.3;

(iv) any judgment or order of any court of competent jurisdiction of statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by the GOM.

15.5 Effect of Force Major Events:

Upon occurrence of any Force Major Event, the following shall apply:

(a) There shall be no termination of this Agreement except as provided in Article 15.7 hereinafter:

(b) Where the Force Major Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession period shall be extended by the period for which such Force Major Event shall subsist:

(c) Where a Force Major Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to operate the Project and/or to collect Toll, but if it is unable or prevented from doing so, the Concession Period shall, having due regard to the extent of the impact thereof as determined by the Engineer in charge, be extended by the period for which collection of Toll remains affected on account thereof; and

(d) Costs arising out of or concerning such Force Major Event shall be borne in accordance with the provisions of the Article 15.6 hereinafter.

11. Article 16.2 of the concession agreement provides for termination due to event of default, which reads thus:

16.2 Termination due to Event of Default:

(a) Termination for Concessionaire Event of Default;

(1) Without prejudice to any other right or remedy which the GOM may have in respect thereof under this Agreement, upon the occurrence of a Concessionaire Event of Default, the GOM shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice, the GOM shall by a notice in writing inform the Concessionaire of its intention to issue the Termination Notice (the "Preliminary Notice"). In case the underlying breach/default is not cured within a period of 60 (sixty) days from the date of the Preliminary Notice (Cure Period) the GOM shall be entitled, to terminate this Agreement by issuing the Termination Notice. Provided further, that:

(a) if the default is not cured within 30(thirty) days of the Preliminary Notice, the GOM shall be entitled to encash the performance security.

(b) if the default is not cured within 30(thirty) days of the Encashment Notice and a fresh Performance Security is not furnished within the same period in accordance with Article 3.2, the GOM shall subject to the provisions of the Substitution Agreement be entitled to issue the Termination Notice.

12. It is not disputed that on entering into Concession Agreement dated 18.09.2009, the Appellant contractor has failed to obtain "financial close" within 180 days as well as extended period of 120 days. It is also not controverted that delay damages of Rs. 48 lacs were paid by the contractor. As provided under Article 10.6.1 of the concession agreement, subject to Article 15 (Force Major), in the event that "Financial Close" does not occur, for any reason whatsoever, within the period set forth in Clause 10.5.1, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived and the concession agreement shall be deemed to have been terminated by mutual agreement of the parties. Thus, it is clear that on account of failure to submit "financial close", the concession agreement shall be deemed to have been terminated by mutual agreement of the parties.

13. In the instant matter, admittedly there is failure on the part of the contractor to comply with the requirement in respect of "financial close". Clause 10.6.1 provides that for whatsoever reason if there is default in achieving "financial close", except in case of force major events, the agreement shall stand terminated. According to the Appellant, the action of the Respondents in revoking performance guarantee is an act within meaning of "force major event", which created impediment in the way of the contractor to secure financial support from the banks. According to the Appellant, as per Article 15.1, the act or event is beyond reasonable control and not arising out of the fault of the affected party i.e. the contractor; and that the affected party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care and as such, the failure in achieving financial close, on the part of the contractor, is attributable to force major events.

14. It is contended that the Respondents unilaterally revoked the performance guarantee on 20.04.2010 i.e. before completion of expiry period of 120 days, which comes to an end on 17.07.,2010. On account of revocation of the bank guarantee by the Respondents, the Appellant has to approach the Court for ventilating his grievance and ultimately the matter has reached this Court and an appeal is presented to this Court, which is admitted and pending for disposal.

15. It is also contended by the Appellant that although the default was attributable to the Appellant in respect of incurring expenses to the tune of Rs. 1,06,97,491/ towards charges for maintenance and repairing, ultimately, it was found that the liability was far less i.e. approximately Rs. 60 lacs. On account of demand for an amount of Rs. 1,06,97,491/, performance guarantee furnished by the Appellant contractor was revoked and the contractor was compelled to approach the Court by presenting an Arbitration Application for protecting his interest. It is, thus, contended that on account of revocation of performance

guarantee, the financial institution, with whom the Appellant contractor has made arrangement for providing finance for the project, became cautious and did not honour the commitment. According to the Appellant, the act of revocation of bank guarantee by the Respondents is within the meaning of Clause 15.1 i.e. force major events, which has prohibited the Appellant - contractor from performing his obligations under the agreement. According to the Appellant, the event i.e. revocation of the bank guarantee and the resultant impact, as stated above, is beyond reasonable control and not arising out of the fault of the affected party i.e. contractor and as such comes within the meaning of force major events. It is also submitted that effect of force major events, as noted in clause 15.5 (a) is that there shall not be termination of agreement, except as provided in Article 15.7. It is, thus, contended that failure of the Appellant to achieve financial close is an act attributable to the Respondents herein alone for which the Appellant cannot be held responsible and it would not be a ground available for the Respondents to terminate the agreement.

16. Learned Counsel appearing for the Respondents has controverted the contentions contending that the circumstances leading to revocation of the performance guarantee by the Respondents is an act attributable to the Appellant alone. It is contended that there was a failure on the part of the contractor to carry out his obligations under the contract, which has resulted into revocation of the performance guarantee. Although the demand has been scaled down to approximately Rs. 50 lacs, it, however, does not exclude the Appellant from the lapse or failure attributable to him. It is contended that the Appellant cannot be permitted to take benefit of his own wrong and claim shelter under Clause 15.5 of the concession agreement.

17. It is to be noted that the work order was issued to the Appellant - contractor on 23.10.2008 and the revised work order was issued on 25.12.2008. The concession agreement was executed on 18.09.2009 and under the agreement, as per clause 15.5.1, the contractor - Appellant herein was required to achieve "financial close" within 180 days. The period of 180 days expired on 17.07.2010. During the period of first six months i.e. for 180 days, there was no excuse available to the Appellant, however, he failed to achieve "financial close". In spite of paying damages on account of delay, the contractor could not submit the "financial close" till 17.07.2010. The event, which the contractor - Appellant is trying to attribute to the Respondent State i.e. revocation of performance guarantee is an act attributable to the contractor himself. It is on account of failure of the contractor - Appellant in performing his obligations under the contract, the Respondents were required to take step of revocation of performance guarantee.

18. It is to be noted that although failure of the contractor in achieving "financial close" is not attributable to the Respondents, there is certainly failure on the part of contractor - Appellant in adhering to the terms of concession agreement. Even till this date, the contractor - Appellant herein is not in a position to achieve

financial close for an amount of Rs. 280 crores. Although the Courts are not invested with the powers to rewrite the terms of contract, by an interim order dated 07.02.2011, while entertaining instant appeal, on the request made by the Appellant, time was granted to the Appellant to make arrangements for "financial close" to the extent of Rs. 150 crores before 7th March, 2011. The contractor - Appellant herein could not make arrangement even for lesser amount till 7th March, 2011 and sought time till 17th March, 2011. Even until adjourned date, the Appellant could not make arrangement for achieving "financial close" even for a lesser amount of Rs. 150 crores. This itself shows that Appellant - contractor has no financial capacity to meet the obligations prescribed under the agreement. It is, thus, clear that even till the date of hearing of the appeal, the contractor is not in a position to achieve "financial close" for an amount mandated as per the terms of the agreement. An application has been tendered by the Appellant for granting him further indulgence and for extension of time up to 10th April, 2011. It is noted in the application that the Appellant has received sanction letters from the financial institution to the tune of Rs. 147.5 crores and he has hope and undertakes that he will make arrangement for furnishing "financial close" till 10th April, 2011. The application cannot be considered for the reason that the Appellant is bound by the terms of the concession agreement which provide for achieving the financial close within 180 days or extended period of 120 days from the date of entering into concession agreement. It is not for this Court to permit relaxation in the conditions or modify the same. There is a stipulation Mentioned in the agreement that in the event of failure of the Appellant/contractor to achieve "financial close" within the specified time, the concession agreement shall stand terminated. Entertaining any request, which would tend to violate the terms of concession agreement, would not be permissible and it would amount to rewriting terms of the agreement, which, I am afraid, the Courts cannot undertake.

19. The communication, terminating the concession agreement and the contract, issued by the Respondents on 20.11.2010 contain two parts. The concession agreement is terminated on account of failure of the contractor / Appellant herein in achieving "financial close" for the project within 180 days from the date of execution of concession agreement and also within additional 120 days granted on the condition of payment of delay damages to the department. The second ground noted in the termination letter relates to non fulfillment of obligations / defaults committed by the contractor.

20. It is contended by the Counsel appearing for the Appellant that in terms of Clause 16.2, it is not permissible for the Respondents to terminate the agreement without issuing a notice in writing of its intention to issue the termination notice (preliminary notice). It was also incumbent upon the Respondents to permit the contractor a 60 days" period for curing the deficiencies from the date of preliminary notice (cure period). It is contended that the Respondents proceeded to take action of termination of agreement without issuing a preliminary notice and without providing for cure period of 120

days, as provided in Clause 16.2 of the agreement. As such, action of termination of agreement, taken by the Respondents, is illegal.

21. On perusal of the letter of termination dated 20.11.2010, it can be divided in two parts. The first part refers to failure of the contractor in achieving the "financial" close and second part deals with non fulfillment of obligations / default. The action of termination of contract, if can be held valid on any one count, it cannot be invalidated on account of non observance of the procedure for bringing home second charge which is separable .The letter of termination on account of non fulfillment of obligations and defaults committed by the contractor is separable and the non observance of the procedure prescribed in Clause 16.2 in the concession agreement while terminating the contract in itself will render the action invalid. The action of the Respondent department is still valid and cannot be faulted for the reason that the Appellant - contractor has failed to achieve "financial close" within the period stipulated in Clause 10.5.1. The failure of adherence to the requirement contained in Clause 10.5.1 i.e. making arrangement for submission of financial close results in deemed termination of the concession agreement in view of clause 10.6.1 of the concession agreement. It cannot be controverted that there is a failure on the part of Appellant contractor to achieve "financial" close within the time stipulated and as such, in terms of Clause 10.6.1, the concession agreement shall be deemed to have been terminated. The order of termination of contract issued by the Respondents on 20.11.2010 is valid and good on one ground, although the second ground set out in the order may require observance of a different procedure.

22. It is the contention of the Appellant that submission of "financial close" is not an essential term of the contract, non fulfillment of which, may result in invalidating the agreement itself. Reliance is placed by the Appellant on a judgment in the matter of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, . It is contended that the requirements in a tender notice can be classified in two categories, those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. It is contended that in the instant matter, submission of financial close cannot be considered as a essential condition and same will have to be construed as ancillary or subsidiary with the main object to be achieved by the condition.

23. The argument cannot be accepted for the reason that the Respondents are justified in insisting upon adherence to the term contained in the agreement in respect of financial ability of the contracting party. The work allotted is involving high stakes and is estimated at Rs. 441 Crores. The work is to be executed on "BOT" basis and the Respondent authorities, while awarding the contract of such a magnitude, are justified in insisting upon adherence to the terms relating to financing mode of the project. Unless the contractor assures the Respondent State that he has a capability to perform the work of such a magnitude, he cannot be permitted to continue with the work. The authorities are, in these

circumstances, justified in insisting upon adherence to the terms relating to financing of the project. The term ensuring financing of the project, which is awarded on "BOT" basis, cannot be said to be a subsidiary or ancillary, but it is relating to the eligibility of the contractor.

24. Another test for determining, as to whether it is essential or non essential term, is to be found out on construing the terms of the agreement. The failure in adherence to clause 10.5.1 in respect of achieving financial close results in deemed termination of agreement as provided under Clause 10.6.1. Thus, the argument of the Appellant that the condition in respect of providing financial close or financial guarantee for a sum of Rs. 280 Crores cannot be construed as an essential term, is not acceptable. The consequences for non observance of condition are noted in concession agreement itself and as noted above, in the event of failure to achieve "financial close" within prescribed period, the concession agreement is liable for termination automatically.

24. Reliance is also placed on the judgment in the matter of *Vinayak Desai v. State of Goa and Ors.* reported in 1995 (2) Mh. L.J. 905. The facts leading to the decision in the reported judgment are totally different and as such, ratio laid down in the said judgment, cannot be made applicable to the instant case.

25. Placing reliance on the judgment in the matter of *Hindustan Petroleum Corporation Limited and Ors. v. Super Highway Services and Anr.* reported in (2010) 3 SCC 321, it is contended that cancellation of agreement is a serious business and cannot be taken lightly. Para 31 of the judgment reads thus:

The cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. In order to justify the action taken to terminate such an agreement, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose. The non service of notice to the aggrieved person before the termination of his dealership agreement also offends the well established principle that no person should be condemned unheard. It was the duty of the Petitioner to ensure that Respondent 1 was given a hearing or at least serious attempts were made to serve him with notice of the proceedings before terminating his agreement.

26. There cannot be dual opinion in respect of the proposition that cancellation of the agreement is a serious business and while taking action of termination, the authorities must act fairly. In the instant matter, in spite of execution of the concession agreement on 19.09.2009, the Appellant contractor could not achieve "financial close" for an amount of Rs. 280 crores until issuance of termination letter i.e. in the month of November 2010. The period allowable in the terms of agreement was six months plus three months which expired in the month of July 2010 itself. As has been stated in the above noted paragraph, adherence to the terms relating to making provision for executing the contract, which is awarded on "BOT" basis to the Appellant, is an essential term of the agreement and the consequence of non adherence to the term has been stipulated in the agreement

itself. The action of the Respondents in directing termination of the contract and cancellation of concession agreement, therefore, cannot be faulted.

27. Learned Counsel appearing for the Respondents has invited my attention to the report of the independent Engineer appointed under the terms of the agreement to supervise the work. It is reported by the independent Engineer that although the contractor was expected to achieve total target progress to the extent of 49.55% till the quarter ending June 2010, he has achieved the target only to the extent of 0.98%. It is contended that although the work order is issued on 23.10.2008, after completion of 20 months, the contractor has completed work only to the extent of 0.98%. In these circumstances, there was no other alternative except to take action of termination of contract and cancellation of the concession agreement. The argument advanced by the Counsel for Respondents, touching the aspect of progress of work, need not be taken into consideration. If the argument is to be considered and a finding is to be recorded, the Contractor would be justified in insisting upon adherence to Clause 16.2(a)(1) of the concession agreement. Therefore, I do not deem it appropriate to deal with the argument relating to progress of the work advanced by the Respondent State.

28. For the reasons stated above, I do not find any merit in the appeal. Appeal, therefore, stands dismissed. In the facts and circumstances of this case, there shall be no order as to costs. Pending Civil Applications, if any, stand disposed of.

29. Counsel for the Appellant seeks continuation of interim relief for further period to enable the Appellant to avail of the remedies for raising challenge to the judgment and order passed in this appeal.

30. Heard learned Counsel for respective parties.

31. For the reasons recorded in the judgment, I am of the opinion that considering facts and circumstances of the case, no further indulgence be shown to the Appellant. Oral request made by Counsel for the Appellant stands rejected.