

(2020) 01 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 168, 485 Of 2019, Writ Petition (C) No.1087 Of 2019, CM (2338, 2923 Of 2019 [1, 2 Of 2019], IA No. 1 Of 2019

Vijeta Projects & Industries Limited

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 14-01-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Constitution Of Jammu And Kashmir, 1956 — Section 103
Jammu and Kashmir High Court Rules, 1999 — Rule 138(3)

Citation : (2020) 01 J&K CK 0004

Hon'ble Judges : Dhiraj Singh Thakur, J

Bench : Single Bench

Advocate : P. P. Malhotra, Rupinder Singh, Gourav Sharma, Vishal Sharma

Final Decision : Disposed Of/dismissed

Judgement

1. The petitioner is aggrieved of the cancellation of its contract by the Chief Engineer, Military Engineering Services (MES) vide its order dated 18.03.2019. The order impugned is challenged primarily on the ground of arbitrariness.

Briefly stated, the material facts are as under:-

2. Pursuant to the approval accorded by the Government of India somewhere in November, 2000 a Multi-Storied Command Hospital with latest facilities was planned for construction at Udhampur. This was done with a view to provide the most modern facilities in the Northern Command Headquarters at Udhampur, considering the fact that the State was confronted with terrorism leading to casualties, which required immediate and modern medical backup and facilities. Accordingly, the work was stated to have been planned in two packages. The first package consisted of all Ancillary Buildings and External Services like provision of water supply, electric supply and also provision of a security wall to improve the security of the complex, while the second package consisted of :-

- a. Multi-Storied Command Hospital Building for 650 beds with space for Crisis Expansion for 200 beds.
- b. Married accommodation for Officers, JCOs/OR & NOS.
- c. Single living accommodation for Officers/ Nursing Officers/ JCOs/OR & Trainees.
- d. Unit accommodation for MNS Officers/JCOs Club/FWC & Religions Institute.
- e. All internal services.

3. Admittedly, the contract for second package came to be awarded to the petitioner and a contract agreement dated 27.01.2011 was executed for an amount of Rs. 185,11,70,691. According to the agreement, the contract had to be completed within a period of 27 months commencing from 10.02.2011. The project, therefore, had to be completed by 09.05.2013.

4. According to the petitioner immediately after the sight was handed over, in the month of February, 2011, construction work was initiated at the site. It is alleged that during the course of execution, numerous changes were made in the scope of work as well as in the goods that were required to be used by the petitioner, which severely hindered the pace of execution of the work at site. It is stated that in the original contract, where as the respondents had prescribed installation of a lift with gears, subsequently, the same was changed to a gearless lift and not only that there was a change made also with regard to the size of the lifts from 20 passengers to 26 passengers. It is stated that after the installation of 04 lifts, the respondents kept in abeyance the procurement of the balance 10 lifts till further orders.

5. It is stated that there was a change in the ground floor plan due to relocation of various areas within the hospital building, as also abnormal variations in quantities ranging upto more than 1000 for air conditioners, fire-fighting equipment, medical gases etc.

Change in the specifications of basement crumple, it is alleged was made on three occasions. It is also alleged that the execution of work used to be stopped on a short notice and change in the items was demanded, other than those which were to be used as per the original contract. This it is stated led to delay in the completion of the work.

6. It is further stated that even when the petitioner was assured of payment on account of the extra work, the same had not been paid leading to great financial hardship to the petitioner. Rates of those items which were changed or added at the behest of the respondents, despite request were not finalized, which they were otherwise obliged to do even before the said items were installed or work executed. It is further alleged that despite a lapse of number of years, the rates still have not been finalized.

7. It is further stated that 70 percent of the work of the main hospital building has already been completed and that the balance work would be completed by

the petitioner by 31.12.2019, if the respondents cooperated and if the payment for the work already done was released, with a view to enable the petitioner to complete the work.

8. Cause of action is stated to have accrued to the petitioner when a notice dated 21.01.2019 was issued by the respondents, threatening the petitioner with termination of work contract allotted, if the pace of execution of the work was not increased by the petitioner. This it is stated, was contrary to the previous agreement arrived at between the parties, dated 31.12.2019 which had been accepted by the respondents. This it is stated was done with malafide intentions.

9. The petitioner then responded to the notice vide communication dated 25.01.2019, indicating the reasons for non-completion of work. All the allegations made and explanations tendered by the petitioner in its communication dated 25.01.2019 were replied to by the respondents in their communication dated 25.02.2019.

Response by Union of India

10. In regard to the allegation that numerous changes were made in the scope of work which led to delay in the execution of the contract, the Garrison Engineer denied the same by alleging the delay in the slow progress of work due to poor site management and lack of resources including material, labour, T&B. The petitioner was also informed that the changes were inevitable due to technical reasons, the requirement at the site and the interest of work to meet the functional requirement of the hospital project and amenities to be provided therein. It was however clarified that the changes were minimum and pertained to change in goods and material quality necessitated on account of upgradation and technology. The availability of material as also from the point of view of aesthetics.

11. With regard to the said changes, it was stated that the petitioner stood informed that the same were within the prescribed conditions of the contract agreement for which the requisite sanctions had been obtained and communicated. In regard to deviations, it was stated that the petitioner was informed that the same were being priced in terms of the prescribed conditions.

12. It was specifically denied in the communication dated 25.02.2019 that the work was ever suspended in terms of the Condition 9 of IAFW-2249 by the department. However, it was stated that extension of time was considered and granted wherever found necessary. The respondents also took a specific stand that there was no suspension of work ordered and that the decision and the go-ahead approvals were conveyed to the contractor much prior to the work progressing to that particular stage on ground.

13. In regard to the 04 gearless lifts, the petitioner was informed that 70 percent payment as against the purchased vouchers submitted for Rs. 177.97 lacs had already been paid and the balance 30 percent was restricted till testing,

commission and finalization of star rates.

14. In regard to the work done on MS Chiller Pipeline is concerned, it was stated that based upon the purchase vouchers submitted for Rs.124.98 lacs, 70 percent of the payment had already been made and the balance amount representing 30 percent @ Rs. 36.72 lacs was retained till testing, commissioning and finalization of star rates.

15. In regard to the procured quantities permitted vide letter dated 03.01.2017, an amount of Rs. 1.17 crore is stated to have been paid. While the payment for the balance was promised to be finalized after submission of purchase vouchers and other documentary proof to ascertain the actual cost of work at site. Some of the other items highlighted by the petitioner and replied to by the respondents in their communication dated 25.02.2019 are minor items ranging from Rs. 3 lacs to Rs. 5 lacs, which have been responded to by the respondents in regard to the items as contained in paragraph Nos. 5, 6, & 7 of the Appendix-A. For items mentioned in paragraph Nos. 8, 9, & 10, according to the Appendix-A, the respondents informed the petitioner that payments had already been made as per the work done.

16. In regard to the assertion of the petitioner with regard to the decisions which were pending with the respondents, as highlighted by the petitioner in its communication dated 25.01.2019, the respondents in their reply dated 25.02.2019 attributed the same to non-production of the purchase vouchers by the petitioner for purposes of ascertaining the cost of contract at site of work. The withholding of payments in regard to some of the items, a decision was pending, therefore, held to be justified.

17. In the background of the facts above, the following issues arise for consideration:-

(i) Whether the instant petition is not maintainable, in view of the fact that disputed questions of fact are involved and that the petitioner has a remedy of arbitration as per Clause 70 of the contract in the agreement.

(ii) Whether the decision to terminate the contract vide order dated 18.03.2019 was arbitrary besides being contrary to the terms and conditions of the contract and the circulars and instructions applicable thereto.

Maintainability of the writ petition under Article 226

18. One of the issues raised by learned counsel for the respondents was with regard to the maintainability of the petition under Article 226 for purposes of enforcing contractual obligations.

19. The extent of applicability of Article 14 in contractual matters, where the State was a party, came up for consideration in the case of "M/s Radhakrishna Agarwal and ors Vs State of Bihar & ors," (1977) 3 SCC 457, wherein the Apex Court held as under:-

"10. It is thus clear that the Erusian Equipment & Chemicals Ltd.'s case (supra) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons. with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

20. Subsequently, in "Veriganto Naveen Vs Govt. of A.P. & ors,"

(2001) 8 SCC 344, the Apex Court held that if the breach of contract involved breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action even when arising out of contract, brought it within the sphere of public law. It was held in paragraph 21 as under:-

"21..... In cases where the decision making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. We may advert to three decisions of this Court in M/s Dwarkadas Marfatia & Sons vs. Board of Trustees of the Port of Bombay; Mahabir Auto Stores & Ors. vs. Indian Oil Corporation & Ors.; and Srilekha Vidyarthi vs. State of U.P.. Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings within the sphere of public law because the power exercised is apart from contract."

21. In "Kumari Shrilekha Vidyarthi and others Vs State of UP and others" (1991)1 SCC 212, it was held:-

"20 Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms

of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts. which cannot co-exist.

21. The Preamble of the Constitution of India resolves to secure to all its citizens Justice, social, economic and political; and equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains `Directives Principles of State Policy which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14-- non-arbitrariness which is basic to rule of law from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals."

22. In paragraph 22, the Court further proceeded to hold :-

"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party, Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also fails within the domain of contractual obligations would not relieve the State of its obligation to comply

with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

23. The issue was also considered at length in "ABL International Limited Vs Export Credit Guarantee Corporation of India Limited," (2004) 3 SCC 553 and after noticing the various judgments on the point, the following legal principles were crystallized regarding maintainability of the writ petition:-

a. In an appropriate case, a writ petition as against the State or an instrumentality of the State arising out of the contractual obligations is maintainable.

b. Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases, as a matter of rule.

c. A writ petition involving the consequential benefit of monetary claims is also maintainable.

24. The Court further proceeded to hold that in entertaining the writs under Article 226, the Court has the discretion to entertain or not to entertain the petition and with reference to "Whirlpool

Corporation Vs Registrar of Trade Marks, Mumbai & ors," 1998(8) SCC 1, it was held that the Court has imposed upon itself certain restrictions in the exercise of this power. It was further held that the prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the writ jurisdiction.

25. On the issue of the right to issue prerogative writ to the exclusion of other available remedies in "State of U.P. & ors Vs Bridge & Roof Company (India) Ltd." (1996) 6 SCC 22, the Court held:-

"16.....The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extra-ordinary jurisdiction of the High Court under Article 226....."

26. In "Joshi Technologies International Inc. Vs Union of India & ors." 2015(7) SCC 728, the Apex Court on a detailed conspectus of the ratio of the judgments rendered from the said Court from time to time crystallized the legal position in

regard to exercise of writ jurisdiction in paragraph Nos. 68 & 69. It was held thus:-

" 68. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a) the Court may not examine the issue unless the action has some public law character attached to it.

(b) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

69. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the

principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

Whether the Contract in question has any public law character

27. Following the ratio of the aforementioned judgments, it is thus clear that this Court would exercise jurisdiction under Article 226 in a contractual matter and to test the decision on the touchstone of Article 14 of the Constitution, only if it was first established that the contract in question had any public law character.

This issue was considered by a Coordinate Bench of this Court in case titled "Vethesta Constructions-Good Luck Constructions Vs State of J&K and others," 2011(1) JKJ 414. In paragraph 11, it was held as under:-

"11. It is to be kept in mind that a public law right or obligation is one, the source whereof is the Constitution or statute, or executive or administrative decision or instruction, and for enforcing a right or obligation, the source whereof is a pure ordinary non-statutory contract, a writ petition under Article 226 is not maintainable, even if one of the parties to the contract is a State within the meaning Article 12. In such case remedy, if any, of the aggrieved party is before the ordinary civil court or the forum provided by the contract.

The action has been taken only after the petitioner was given opportunity to adhere to time schedule of execution of contract and afforded an opportunity to show cause against the proposed action. In the circumstances, the impugned decision has been taken by the respondents in a non-statutory contract, in exercise of rights available under the contract and not under any Statute or any rules and regulations or instructions having flavour of statutory rules. There is thus no "public law element" involved in the decisions/orders, impugned in the petition. The matter falls within the realm of contract and appropriate option available to petitioner is to fall back upon "Dispute Redressal System" mutually agreed and laid down in the agreement dated 30th May 2009. The petitioner thus, has not a right to file a writ petition Constitution read with Article 226 Constitution of India read with Section 103 J&K Constitution or ask judicial review of the communications dated 15.05.2010, 28.5.2010 and NIT dated 26.7.2010."

28. In "K. K. Saxena Vs International Commission on Irrigation & Drainage," (2015) 4 SCC 670, the Apex court held thus:-

"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases

writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law."

29. Reliance can also be placed on the Apex Court judgment titled "Praga Tools Corporation Vs Shri C. A. Imanual & Ors," 1969 AIR SC 1306, wherein it was held that the action challenged did not have any public element and writ of mandamus could not be issued as the action was essentially of the private category.

30. Applying the ratio of the aforementioned judgments to the facts and circumstances of the present case, it can be seen that although the contract in question had been allotted by the Union of India to the petitioner, which subsequently stands terminated by virtue of the order impugned, notwithstanding that the Union of India falls within the definition of State under Article 12 of the Constitution, yet in my opinion, since the contract in question does not have any statutory genesis, it would be difficult to hold that the contract has a public law character and for that reason in my opinion, the exercise of writ jurisdiction in such a case would not be justified.

Arbitrariness

31. Without prejudice to the above and in the alternative I propose to deal with the issue of arbitrariness in the termination of the contract in question on the touchstone of Article 14 of the Constitution. With a view to highlight the aforementioned issues, learned senior counsel for the petitioner placed an overwhelming reliance on the fact that the delay in execution of the contract was not at all attributable to the petitioner, but was attributable squarely to the official respondents. As stated earlier, learned senior counsel for the petitioner urged that even when the contract in question had to be completed within a period of 27 months from the date of execution of the contract agreement on 27.01.2011, yet the contract could not be completed on account of frequent deviations, which had been ordered in regard to various items such as lifts, air conditioners, fire fighting mechanisms, medical gases etc. A lot of emphasis was placed on the various extension orders to show that the respondents had themselves granted extensions to the execution of the contract and, therefore, extended the time period by invoking Clause 11(A) (vii). For purposes of reference, Clause 11(A) (vii) is reproduced hereunder:-

"11. Time, Delay and extension:-

(A) Time is one of the essence of the Contract and is specified in the contract documents of in each individual Works Order.

As soon as possible after the contract is let or any substantial Works Order is placed and before Work under it is begun, the G.E. and the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/ or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or section of the work, and shall be amended as may be required by agreement between the G. E. and the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed.

(i) by force majeure, or

(ii) by reason of abnormally bad weather, or

(iii) by reason of serious loss or damage by fire, or

(iv) by reason of civil commotion, location combination of workmen, strike or lockout, affecting any of the trades employed on the work, or

(v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the contractor has, in the opinion of G.E., taken all practicable steps to avoid or reduce, or

(vi) by reason of delay on the part of Contractors of tradesman engaged by Government in executing works n or forming part of the contract, or...

(vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor?s control:"

32. From the record, it can be seen that after the execution of contract in the year 2011, the respondents had granted as many as 07 extensions vide communications dated 09.05.2013, 31.07.2015, 31.12.2016, 30.06.2017, 31.12.2017, 30.09.2018 & 31.12.2018. The argument advanced was that since the respondents had granted extension in terms of Clause 11(A)(vii), which envisaged an extension for reasons beyond the control of the contractor, no part of the delay in execution of the work could have been attributed to the contractor- petitioner herein and, therefore, the termination of the contract on that ground was totally arbitrary.

33. Mr. Vishal Sharma, learned ASGI appearing on behalf of the respondents stated that the reasons why Clause 11(A)(vii) applied for purposes of granting extension was that the extension could not have been granted under any other clause contained in Clause 11(A) of the conditions of the contract reproduced hereinabove, as each of them pertained to different situations and circumstances.

34. It was further urged that merely because extension was granted by invoking

Clause 11(A)(vii) would not mean that the contractor-petitioner herein was not guilty of gross delay in execution of contract. Attention of the Court was drawn to various communications and minutes recorded of meetings held between the officers of the respondents as also the petitioner, wherein the slow progress of work was admitted from time to time.

35. A meeting appears to have been held on 20.12.2016 to assess the state of work being executed on the spot, which was attended inter alia by Mr. Pancham Singh, Chairman of the petitioner Company along with respondent No. 3. In the meeting, minutes whereof are on record, it appears that the Chief Engineer expressed his unhappiness on the slow progress of work, despite commitments made by the contractor in its earlier meeting.

36. It was noted that the progress of work, which was required to be achieved was @ 5 % per month, as against the average progress achieved for the last six months @ 0.4 % per month. The labour deployed was also recorded to be much less than the required to achieve the progress. The Chairman of the firm reportedly accepted the slow progress of work on their part and reaffirmed their commitment to complete the work by 31.10.2017. For purposes of reference, minutes of the meeting recorded on 20.12.2016 are reproduced hereinbelow:-

(a) At the outset Chief Engineer expressed his unhappiness on the slow progress of work despite commitment made in the last meeting. The progress of work @ 5% per month was required to be achieved where average progress achieved since last six months is 0.4% per month. The labour deployed was much less than required to achieve the progress.

(b) The Chairman of the firm accepted the slow progress of work in their part and reaffirmed their commitment to complete the work by 31 Oct 17. Further he brought out the reasons of slow progress is mainly due to cash flow problem of firm, incorrect quoting etc. He mentioned that the situation now got more difficult due to demonetization as only Rs. 50,000/- per week can be withdrawn from current account, which is insufficient for labour payment. CE suggested the firm to get opened the accounts of labourers to overcome the problem of cash or else appoint labour mate between a group of labourers who can be paid in cheque, to which the Chairman agreed."

37. Subsequently, yet another meeting held on 23.10.2017, wherein the progress of the work of the petitioner's firm was discussed.

What was recorded in the minutes for purposes of reference is reproduced hereunder:-

(b) At the outset Chief Engineer expressed his unhappiness as the commitment made by the Chairman in the last and previous meetings has not been adhered. The actual labours deployed are much less than the commitment made resulting in slow progress of work and also huge criticism from the User?s. The actual labourer strength today is 175 Nos in Main Hosp bldg and 75 Nos in OTM bldgs.

(c) The Chairman of the firm accepted the slow progress of work on their part and reaffirmed the commitment to complete the whole work by 30 Sep 2018. He brought out that stores worth Rs. 2.46/- crores (Appendix ?A?) for which orders has already been placed will be delivered on site by 15th Dec 2017. Aslo stores worth Rs. 2.25 crores (Appendix ?B?) is under procurement and likely to be delivered on site by 25th Dec 2017. The Chairman had once again assured that the strength of labour deployment though less now, will improve from 15th Dec 2017. Also the work for medical gas pipeline, ACs and Fire Fighting will commence from 06 Dec 2017 and further once against committee that work for Hosp bldg along with 50% OTM bldg will be completed by

30 Jun 2018 and the balance work will be completed by Sep 2018. It was further reassured by the Chairman that he will monitor the progress weakly and ensure that there will be no setbacks in the progress of work and commitments made."

38. This meeting was a sequel to the earlier meeting held on 23.10.2017, wherein the Chairman had made the following commitments:-

Deployment of Labour Gangs as under:-

Ser

Description

of

No. of labour to be

No.

work

deployed

(i)

Main Hospital Bldg

225 Nos from 15 Nov 2017

and 300 Nos from 20 Dec

2017 onwards per month

(ii)

OTM Bldg

75 Nos from 15 Nov 2017

and 100 Nos from 20 Dec

2017 onwards per month

On deviation, being in excess of 10%

39. The petitioner next contended that the contract could not have been cancelled and that an extension was due and required for permitting the petitioner to complete the contract especially in view of the fact that the deviations had exceeded far beyond the permissible 10 % limit as was envisaged in terms of Clause 11(A) (vii) of the Contract IAFW-2249 read with tender page 338(R) para5(b) of the special conditions of the contract.

40. In the present case, two things are required to be ascertained. First is what was the deviation limit prescribed by the contract in question and whether the said limit was exceeded. Insofar as, deviation limit is concerned, learned counsel for the parties agreed that it was 10 %. However, in regard to the second issue, whether the said limit had been exceeded, whereas the learned senior counsel for the petitioner stated that the deviation had exceeded to 14.75%. Learned counsel for the respondents stated that deviations were amounting only at 1520 lacs which constituted a ratio of only 8.25% of the contract value. The petitioner ought to have placed on record cogent material, which could have proved that the deviation was to the tune of 14.75%, which it has failed to establish in the present case.

41. However, assuming that the limit had been exceeded, the issue that arises for consideration is what were the remedies available to the petitioner.

In view of Clause 11(A) (vii), a mechanism was prescribed whereby any objection of the contractor to any matter concerning the deviation order was to be notified by him in writing to Garrison Engineer within 15 days from the date of receipt of such order. However, it was an agreed condition of the contract that under no circumstances, the progress of the work would stop owing to differences or controversies that would arise from such an objection. For purposes of reference, the extract of Clause 7 of the contract is reproduced hereinbelow:-

"All additions and deductions will be priced as per condition 62 hereof and added to or deducted from the Contract Sum. Whenever the Accepting Officers intends to exercise such right his intention shall be communicated to the Contractor by the G.E., whose order in writing shall specify the deviations which are to be made, the lump sum assessment or the proposed basis of payment, the change, if any, in the date or completion of the relevant phase and/ or the entire Contract. Any objection by the Contractor to any matter concerning the deviation order, shall be notified by him in writing to the G.E. within 15 days from the date of receipt of such order, but under no circumstances shall the progress of the Works be stopped (unless so ordered by the G.E.) owing to differences or controversies that may arise from such objection. In default of such notification, the Contractor will be deemed to have accepted the order and the conditions stated therein without in any way affecting the right of the parties to rectify any mistake on the basis of payment only to the extent it differs from Condition 62. In the event of the Contractor failing to agree with the G.E. regarding the proposed alteration of time, the objection shall be referred to the Accepting

Officer or, in the case of Contracts (other than Term Contracts) accepted by the G.E. to the C.W.E., whose decision shall be final and binding."

42. On reading of the aforementioned clause, it thus becomes clear that even if there was any deviation exceeding the limit, the progress of the work was not to be affected at all and the same had to be completed anyways within the extensions already granted. The entire effort of the learned senior counsel appearing for the petitioner to highlight the issue with regard to the deviations was that more time was required for purposes of completing the project for which extension ought to have been given instead of terminating the contract. The argument that only because the deviation limited had exceeded, would justify an extension every time at the mere asking by the contractor is an argument, which is legally untenable. In fact, there is material on record to show that the delay was attributable to the petitioner, which had even been admitted and recorded in the minutes of various meetings, which had been held between the respondent No.3 and other officers with none less than the Chairman of the petitioner's Company.

43. From the record, however, it is clear that as many as 7 extensions had already been granted exceeding the period of the contract by as many as eight years for completing the contract, details whereof have already been given in the preceding paragraphs.

44. Learned counsel for the petitioner next placed reliance upon the communication dated 07.01.2009, issued by the Jt. DG(Contracts) to show that the cancellation of contract could be resorted to only after furnishing a reply to all pending points of the contractor including request for extension of time, if any, and releasing all undisputed payments. The relevant clause is reproduced hereinbelow for facility of reference:-

"Cancellation of Contract:- The cancellation of contract should be resorted to only after furnishing reply to all pending points of the contractor including request for extension of time, if any, releasing all undisputed payments and distribution of DOs."

45. On a perusal of the communication dated 07.01.2009, it can clearly be seen that the said communication was only in the shape of instructions issued by the Jt. DG (Contracts) and was never intended to form a part of the general conditions of the contract agreed to between the parties. In fact, the communication dated 07.01.2009 itself treats the said communication as instructions and perhaps were never to be treated as general conditions of contract governing the rights and liabilities of the parties to the contract. In this regard, it becomes necessary to refer to Clauses 54 of the General Conditions of Contract IAFW-2249, which is reproduced hereinbelow for facility of reference:-

"54. Cancellation of Contract in part or in full for Contractor's Default:- If the Contractor -

(a) makes default in commencing the Works within a reasonable time from the date of the handing over the site, and continues in that state after a reasonable notice from G.E.

or

(b) in the opinion of the G.E. at any time, whether before or after the date or extended date for completion, makes default in proceedings with the Works, with due diligence and continues in that state after a reasonable notice from G.E.

or

(c) fails to comply with any of the terms and conditions of the contract, or after reasonable notice in writing with orders properly issued thereunder,

Or

(d) fails to complete the Works. Work order and items of Works, with individual dates for completion and clear the Site on or before the date of completion."

46. Even otherwise, the official respondents vide their communication dated 25.02.2019 appear to have submitted a comprehensive reply to the allegations and explanations tendered by the petitioner in its communication dated 25.01.2019. Hence, in my opinion, there was substantial compliance even to the instructions dated 07.01.2009.

47. In the backdrop of the aforementioned facts and circumstances of the case, it can be seen that there was undoubtedly a delay of approximately 08 years in the completion of the contract. The petitioner has failed to bring on record material, which would suggest that the delay was attributable to the respondents. While the respondents did admit of some deviations having been ordered, however the same appear to have been ordered to meet the functional requirements of the hospital project and the amenities to be provided therein. The said changes were also held to be inevitable due to technical reasons as also necessitated on account of upgradation of technology. What is important to note is the fact that all the deviations ordered did not at all relate to any major alteration in the structural or architectural design of the hospital or the other buildings envisaged as per the contract. The deviations were minor in nature pertaining to lifts, ancillary fitments etc.

48. The deviations were not such as would stall or hamper the execution of the works in question in its entirety. On the other hand, learned counsel for the respondents has submitted a chart in the objections showing abysmally low year-wise progress of the work by the petitioner, which is as under:-

FY 2012-13

-

7.56%

13.99 Cr
FY 2013-14
-
9.72%
17.99 Cr
FY 2014-15
-
15.67%
29.00 Cr
FY 2015-16
-
13.45%
24.89 Cr
FY 2016-17
-
8.35%
15.40 Cr
FY 2017-18
-
6.91%
12.79 Cr
FY 2018-19
-
3.13%
05.79 Cr

It is clear from the above table that for the last three years very little progress was achieved in completion of such a prestigious mega project of high value.

49. Not only this, there is material on record, which would suggest that the petitioner had from time to time undertaken to deploy more men and resources for achieving the timelines prescribed by the respondents, which commitment it failed to honour. The argument that 7 extensions were granted only because

there was delay on account of deviations, not attributable to the petitioner, therefore, does not appear to be in sync with the material and data on record.

50. The Apex Court in *Tata Cellular vs. Union of India*, (1994) 6 SCC 651 held that while the principles of judicial review would apply to the exercise of contractual powers, the same were accompanied with inherent limitations and that a right balance had to be struck between the administrative discretion to decide matters and the need to remedy any unfairness or arbitrariness by judicial review. In paragraph 94 of the said judgment, the following principles were deduced:

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4)

(5)

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

51. In *M/s Master Marine Services Pvt. Ltd vs. Metcalfe &Hodgkinson Pvt. Ltd and ors*, (2005) 6 SCC 138 and *JagdishMandal vs. State of Orissa and ors*, (2007) 14 SCC 517, the Apex Court crystallized the following tests for judicial review in administrative action.

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'.....

Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected."

52. In *Tejas Construction and Infrastructure Pvt. Ltd vs. Municipal Council, Sendhwa and anr*, (2012) 6 SCC 464, the position of law as stated hereinabove was reiterated.

53. Testing the facts of the present case on the touch stone of the judgments referred to herein above, it can be said that the decision to terminate the contract cannot be said to be one, which can be interfered with on the *Wednesbury* principle, as it cannot be said that the decision taken in the light of the pleadings and the material on record was such, which no responsible authority acting reasonably and in accordance with law could have reached. This Court while considering the entire issue is only to see that the decision is made lawfully and not to check whether the method of arriving at the decision is sound. It is not denied that according to the terms and conditions of the contract and in particular Clause 54, the power lay with the respondents to cancel the contract in a case, *inter alia* on the failure of the contractor to complete the works in time.

54. Since the respondents without doubt would be interested in the early completion of the project, considering its relevance and importance and since the project in question has already taken more than 08 years and is yet far from completion, the step taken by the respondents in terminating the contract in question cannot be said to be in any manner arbitrary, which would warrant the exercise of extraordinary jurisdiction in setting aside the same.

55. I, however, wish to clarify that the conclusion drawn regarding absence of any arbitrariness has been arrived at, based upon the material and the pleadings on record and in light of the limited scope of writ jurisdiction in contractual matters, as held by various pronouncements of the Apex Court referred hereinabove. Anything said or observed in the preceding paragraphs, however, would not be taken as an expression of opinion on the merits of the petitioner's claim, if any, raised before the appropriate proceedings, which the parties might contemplate to initiate against each other, in accordance with the remedies available to them under the contract.

56. Be that as it may, the petition is devoid of any merit and is, accordingly, dismissed along with connected CMs.

OWP No. 168/2019

The instant petition has been filed by the petitioner against the initial notice dated 21.01.2019, issued by the respondent No. 2. However, it appears that after filing the instant writ petition, the reply was also submitted by the petitioner, pursuant to which the official respondents passed the order of termination dated 18.03.2019.

In view of the fact that the final order of termination has already been challenged by the petitioner by way of OWP No. 485/2019, which now stands dismissed, this petition is rendered infructuous and is accordingly, disposed of along with

connected IA.