

THE HON'BLE SMT JUSTICE V. SUJATHA

WRIT PETITION No.10913 of 2011

ORDER:

This Writ Petition is filed under Article 226 of the Constitution of India seeking the following relief:-

“ to issue a Writ, Order or Direction more particularly one in the nature of Writ of Mandamus declaring the G.O.Rt.No.319, Transport, Roads and Buildings (R.) Department dated 16.04.2011, Issued by the 1st respondent herein as arbitrary, illegal, violative of principles of natural justice, colourable exercise of power, non-application of mind to the relevant material available on record, violative of the Fundamental Rights guaranteed under Articles 14 and 19 of the Constitution of India apart from being violative of the conditions stipulated in the agreement and consequently set aside the same and pass...”

2. The petitioner is a company registered under the Companies Act, 1956. The main objects of the petitioner company are to carry on the business of designing, engineering, assessing, valuing, surveying, building, constructing, erecting, upgrading etc., of Build, Own, Transfer (BOT), Build, Own Operate (BOO), Build, Own, Operate and Transfer (BOOT), Build, Own, Operate and Maintain (BOOM) basis or any other basis. In pursuance of a tender notice issued by the 2nd respondent dated 26.11.2007, inviting proposals under a Single

Stage Process from bidders for qualification and prescribed the commercial terms and conditions for selection of bidder for design, construction, finance, operation and maintenance of two lane bridge across Vasista Branch of River Godavari, connecting Narsapur of West Godavari District with Sakshinetipalli of East Godavari District in Andhra Pradesh on annuity basis.

3. The petitioner has participated in the tender process and became the successful bidder. The petitioner has also furnished bid security for Rs.80 lakhs from the State Bank of India on 14.01.2008. Thereafter, the 2nd respondent has issued a Letter of Award in favour of the petitioner within the stipulated time. Accordingly, the petitioner and the 2nd respondent entered into a Concession Agreement dated 09.07.2008. As per the said agreement, the petitioner has to go for financial closure. In accordance with the agreement, the petitioner has provided two bank guarantees viz., 1) Bank Guarantee No.0195608IFG000140 dated 28.05.2008 along with amendment dated 30.06.2008 for an amount of Rs.1,33,14,000/- and 2) Bank Guarantee No.095608IFG000139, dated 28.05.2008 along with amendment dated 30.06.2008 for an amount of Rs.1,99,71,000/- respectively, in favour of the 2nd respondent

through the 3rd respondent Bank, towards performance security. The said Bank Guarantees are being extended from time to time and the same are valid till the end of 27.06.2011. As the petitioner could not achieve financial close within the stipulated time, the petitioner has requested the 2nd respondent for extension of time for financial closure and the time was extended accordingly.

4. Thereafter, due to the Satyam episode in January 2009, the petitioner was also caught in the said controversy and as such, the petitioner could not achieve the financial closure and requested the 2nd respondent for extension of time for financial closure, which was extended from time to time till 05.01.2010. Thereafter, the petitioner has again made a request to induct one more promoter in the consortium in order to strengthen the financial stability of the petitioner and that request was also considered by the 2nd respondent vide letter dated 19.09.2009. On the request of the 2nd respondent for extension of the original bank guarantees, the petitioner has been extending the bank guarantees from time to time and they are subsisting till 28.06.2011.

5. Subsequently, the parties entered into an amendment agreement dated 20.02.2009 to the Concession

Agreement dated 09.07.2008. Thereafter, the Tata Capital Limited, sanctioned the term loan for the project in favour of the petitioner, which fact was informed by the petitioner to the 2nd respondent through letter dated 17.06.2010 and which was also agreed by the 2nd respondent. The 2nd respondent has been extending the time for financial closure till 05.01.2010 by levying penalty. Thereafter, the petitioner once again requested the 2nd respondent for extension of time for financial closure, for which the 2nd respondent through letter dated 24.06.2010 informed the petitioner through the letter dated 15.02.2010, that it has requested the Government to pass necessary orders and amend the key dates such as appointed dated, commencement dated annuity payment date etc., in the concession agreement pertaining to the execution time frame, concession period and annuity payment period.

6. Accordingly, the petitioner has submitted all approvals and accepted for the amendments and the petitioner has also requested the 2nd respondent to furnish the draft supplementary agreements and draft supplementary concession agreement, on which, the 2nd respondent has orally informed that they will continue the process once the Government finalises the issue. And, thereafter, the 2nd respondent has not

communicated anything regarding the decision taken by the Government with regard to further course of action.

7. In the meanwhile, as the Bank Guarantee was going to expire on 27.09.2010, the petitioner has approached the 2nd respondent on 21.09.2010 to ascertain as to whether the Bank Guarantee has been extended, for which the 2nd respondent he through letter dated 20.09.2010 has informed that he has invoked the bank guarantee furnished by the 3 respondent. On receiving the said letter, the petitioner has approached the 2nd respondent and explained that the petitioner company is always ready and willing to proceed further and it is awaiting for the decision to be taken by the respondent No.1 & 2 to initiate further course of action. The petitioner further explained that for the delay caused on the part of the respondent Nos. 1 and 2, the petitioner could not be penalised by way of invoking the bank guarantee.

8. After considering the totality of the circumstances, the 2nd respondent requested the petitioner to extend the bank guarantee till the end of June, 2011 and as such, the petitioner has accepted the request and has extended the bank guarantee till 27.06.2011. The further case of the petitioner is that as per the Article 37.2 of the Agreement, either of the parties have to

invoke the arbitration clause and even before initiating the arbitrary proceedings, the 2nd respondent is unlawfully contemplating to invoke the bank guarantees issued by the 3rd respondent in favour of the petitioner company with a view to make illegal and unlawful gains.

9. While the matter being so, the 1st respondent has passed G.O.R.T. No.319, dated 16.04.2011, straightaway seeking to terminate the agreement and to invoke the bank guarantees without taking appropriate decision on the request made by the 2nd respondent without giving opportunity to the petitioner to put forward its case, which is under challenge in the present writ petition.

10. When the writ petition came up for hearing, the Hon'ble Court was pleased to pass the following order on 19.04.2011:

"No further steps shall be taken pursuant to the impugned G.O.R.L.No.319, dated 16.04.2011, till then."

Subsequently, the above interim order was made absolute on 24.06.2011.

11. The counsel for the petitioner has filed an additional affidavit enclosing certain documents vide I.A.No.1 of 2023, wherein it is stated that the NCLT, Mumbai (Special)

Bench in C.P. No. 3638/2014 in an application filed by the Union of India, Ministry of Corporate Affairs under sections 241 and 242 of the Companies Act, 2013 passed order dated 01.10.2018 reconstituting the Board. Thereafter in a Company Appeal (AT) No. 346 of 2018 filed by the very same party, along with Company Appeal (AT) No. 347 o 2018 filed by the IL&FS Ltd., the NCLAT, New Delhi passed common order dated 15.10.2018 considering the larger public interest and economy of the Nation and interest of the company and 348 group companies, granted stay preventing institution or continuation of suits or any other proceedings by any party or person etc., (iii) the acceleration, premature withdrawal or other withdrawal, invocation of any term loan, Guarantees whether in respect of the principal or interest or hedge liability or any other amount contained therein.

12. Heard the learned counsel for the petitioner and Mr. C. Sumon, learned Special Government Pleader representing learned Advocate General.

13. The counsel appearing for the respondents have filed certain documents by way of memo dated 28.04.2023 vide USR No.45567/23. The counsel appearing for the respondents have admitted the fact that the bids for the said project were

invoked in the year 2007 and the cost of the project was worked out to Rs.54,00 crores based on SSR 2007-08. Based on the prevailed market rates of materials, the estimate was recast and worked out to Rs.60.52 Crores. It was presumed that by the time financial closure is achieved, 2008-09 SSR shall prevail. Accordingly, 10% excess over the estimated cost is added which worked out to be Rs.66.57 Crores. Finally, the cost of the bridge has arrived at Rs.66.57 crores and accordingly, the Government has accorded Administrative Sanction vide G.O.Ms.No.90, R,(R&B)(R.) Dept, dated 11.04.2008 and Government has accepted the single bid of the petitioner herein for the annuity amount of Rs.19.24 crores.

14. Thereafter, the agreement was signed with the Concessionaire on 09.07.2008 and the original due date for achieving the financial closure as per the agreement is 04.01.2009. The time was extended upon levying a penalty for 180 days from 05.01.2009 up to 03.07.2009 for not achieving financial closure as per the conditions of the agreement. The Concessionaire further requested for extension of time limit for financial closure for a further period of 180 days i.e., upto 05.01.2010. The concessionaire requested for the following vide letter dated 17.06.2009:

i) Extension of time limit for financial close for further period of 180 days i.e., upto 05.01.2010.

ii) Reckoning of the actual date of financial close as the appointed date under clause 1 of the concession agreement.

iii) Approval of addition of one more promoter for the project, so as to enable them to ensure adequate availability of funds.

15. Government, vide G.O.Rt.No.942, dated 13.08.2009 has permitted induction of one more promoter in the consortium within the meaning of the RFP and permitted the extension of financial closure up to 05.01.2010 duly imposing agreed penalty of Rs.15,000/- per week. The Concessionaire has not achieved financial close within 360 days from the date of the Agreement in accordance with the Clause No: 22,4 of the Concession Agreement and within the extended period of another 180 days vide G.O.Rt No.942. Dated:13.08.2009. This implies that the Agreement is not in force since 6.1.2010. Therefore, technically the concession agreement is deemed to

have been terminated by the mutual agreement of the parties in accordance with the Clause No: 22.4 of the Concession Agreement and no further action can be initiated by this office on the request made by the Concessionaire.

16. The Consortium Members M/s Maytas Infra Ltd and China Railway 18th Group Corporation shall hold 52% of equity in the SPV, L.e. M/s. Maytas Vasista Varadhi Ltd as per the conditions of the Concession Agreement and the remaining 48% of equity shall be held by the M/s. Coastal Projects Ltd, who has been inducted as one more promoter in accordance with G.O.Rt No.942,T,(R&B) (R.1) dt.13.8.2009. Government was informed vide T.O Lr.Dt:24.06.2010 that the time permitted for financial closure (i.e. 05.01.2010) is already over and no extension of the appointed date is granted and necessary orders are requested, from the Government. The cost of the project worked out to Rs. 60.52 Crores with increased rates of steel and cement at the time of bid evaluation of the project during March, 2008 with 2007-08 SSR and 10% excess over the estimate cost is added presuming that 2008-09 SSR shall prevail by the time financial close is achieved, due to which, the project cost worked out to Rs.66.57 crores. Now, the project cost is updated with present rates of steel and cement and works out

to Rs.57.24 Crores approximately with draft SSR 2010-11(SSR under finalization).

17. The learned counsel for the respondents relied upon a judgment reported in **2015 SCC OnLine Del 10220: (2015) 4 Arb LR 335**, between Air India Ltd., Vs. Gati Ltd., wherein, the Hon'ble Supreme Court held as follows:

"The Court has already upheld the findings of the AT on the failures of the Air India to fulfil its obligations under the WLA The AT has discussed Section 39 of the Indian Contract Act, 1872. It gives the right to the promisee to put an end to the contract if the promisor, in this case Air India, has refused to perform, or disabled itself from performing, its promise in its entirety. In these circumstances the conclusion of the AT that Section 39 permits GATI to terminate the contract without having to comply with the requirement of Clause 12.1, which was not attracted to a case of repudiatory breach of contract is a perfectly plausible conclusion and cannot be faulted with."

18. This Court feels it relevant to refer to another judgment relied upon by the learned counsel for the respondents, reported in **(2018) 3 Supreme Court Cases 133: (2018) 2 Supreme Court Cases (Civ)65: 2018 SCC OnLine SC 20**, wherein the Hon'ble Supreme Court of India, has held as follows:

"55, We have already referred to these findings hereinabove. The learned Senior Counsel appearing for Respondent 2 referred to the judgment of this Court in Juggilal Kamlapat v. Pratapmal Rameshwar wherein it has been held that repudiation of a contract can be justified on the basis of any ground that existed in fact, even though not stated in the correspondence. The following passage from the said judgment needs a quote: (SCC p. 83, para 23)

23. It was also contended that the defendant not having raised the plea in their correspondence with the plaintiff that the delivery orders tendered were defective, was estopped from justifying their requisition of the contracts on that ground. As the High Court has pointed out, no case of estoppel was pleaded by the plaintiff and, therefore, it was the plaintiff who should be precluded from raising the question of estoppel. Apart from that, the law permits the defendant to justify the repudiation on any ground which existed at the time of the repudiation whether or not the ground was stated in the correspondence. (See Nune Sivayya v. Maddu Ranganayakulu)."

19. Also in **2022 SCC OnLine AP 2125: (2022) 6 ALT 694**, this Hon'ble Court has held as follows:

"39. In reply, the learned Advocate General would submit that various judgments on the principles of natural justice had stated that mere absence of a notice prior to an adverse order does not violate the principles of natural justice unless prejudice can be made out on account of non-issuance of a notice prior to the adverse order. He relies upon the following judgments.

1. M.C. Mehta V. Union of India.

2. Aligarh Muslim University V. Mansoor Ali

Khan.

3. *Canara Bank V. Debasis Das*

4. *Canara Bank V. V.K. Awasthy*

5. *K. Swarna Kumari, Subordinate Judge V. Government of Andhra Pradesh.*

6. *S. L. Kapoor V. Jagmohan*

7. *K.L. Tripathi V. State Bank of India.*

8. *State Bank of Patiala V. S.K. Sharma.*

9. *Managing Director, ECIL, Hyderabad v. B.*

Karunakar.

43. *The learned Advocate General relies upon the above judgments, relating to Principles of Natural Justice, to contend that an order or proceeding, passed in violation of principles of natural justice, including orders passed without following procedure and without notice, would not be illegal or void, unless prejudice caused on account of such violation can be shown. He contends that issuance of a notice to cure defects is only a formality which would make no difference as the time granted for financial closure and for further steps had already elapsed and the cure period would make no difference to the outcome of the issue.*

46. *The common law principle, in England, is that in the case of a repudiatory breach, the injured party is entitled to terminate the contract. In both the English Judgments, cited above, this right was also incorporated in the terms of the Contract, which also prescribed a procedure for termination. However, the contracts were terminated by the injured parties without granting the cure period to rectify the shortcomings. These terminations were challenged on the ground that they had not adhered to the procedure set out in the contracts. In both the cases the courts took the view that since the right of termination was available to the injured*

parties both under the terms of the contract and under Common law, it was permissible to the injured party to fall back on Common Law principles and terminate the contract without having to follow the procedure set out in the contract.

50. In this case, the petitioner by refusing to accept the land offered by the first respondent, in March 2017, on the ground that the petitioner is entitled to obtaining possession over the entire extent of land in one go, had refused to discharge its obligations under the terms of the concession to keep receiving the land during the concession period and take up development of the port. By failing to achieve financial closure by March 2018, the petitioner had effectively refused to perform its obligation under the Concession, and the 1st respondent while issuing G.O.MS. No. 66, dated 08.08.2019, relied upon Section 39 of the Contract Act, to terminate the Concession. The case of petitioner before this Court is that it would not take any steps for achieving financial closure or undertake any step towards the development of the Port, unless the entire extent of land is handed over as a condition precedent. By this stand, which is not in consonance with the terms of the Concession, the petitioner has effectively refused to perform its obligation under the Concession and has committed repudiatory breach of the Concession. In such a situation, non adherence to the procedure set out in the Concession would not vitiate the said termination."

20. For better appreciation of the case, the technical committee report dated 17.02.2011 of the Chief Engineer (R&B), addressed to the Principal Secretary to Government, T, R&B Department, is extracted as under:

“(i) The Committee is of the opinion that there is immediate need for the Bridge at this location and feels the decision of the Government is rational and based on the need.

(ii) The Committee has concurred with the recommendations of Consultant, to adopt the present alignment, which is approved.

(iii) The Committee has not made any comparison of the project cost with present rates. However, as reported by APRDC, the project cost is coming to almost Rs.58.00 Crores with draft SSR 2010-11. When compared with original cost of Rs.66.57 Crores at the time of bid evaluation, virtually there may be savings.

(iv) The Committee opined that technically, the concession Agreement is deemed to have been terminated since the firm has not achieved financial close and no extension of appointed date is granted. The Department/Government have to take action as per the terms of Concession Agreement.”

21. Further, in G.O.Rt.No.319, Transport, Roads and Buildings (R.I) Department, dated 16.04.2011, it is stated as follows:

“4(a). To terminate the agreement of the Agency, as per the terms of Concession Agreement and to invoke the Bank Guarantee.”

22. On a perusal of the affidavit and the material paper placed on record, it appears that the Technical Committee has opined to terminate the concession agreement as it is deemed to be, since the firm has not achieved financial close and no

extension of appointed date is granted. As such, the Chief Engineer (R&B) has sent the letter dated 17.02.2011 to the Principal Secretary to Government, T, R&B Department requesting to take action as per the terms of Concession Agreement. For which, the Government vide G.O.Rt.No.319, dated 16.04.2011 has ordered to terminate the agreement of the agency as per the terms of Concession Agreement and to invoke the Bank Guarantee. Further, the Government has also called for fresh tenders on annuity basis, duly recasting the estimate/DFR with current SSR, in view of reduced estimated cost of the project. Basing on the letter addressed by the Chief Engineer (R&B), the Government has terminated the agreement of the agency and has called for fresh tenders for the work to be done, which is not at all bad in law.

23. The special learned Government Pleader submits that the agreement of the agency has already been terminated by the Chief Engineer (R&B)CRN & Managing Director, APRDC, vide proceedings dated 17.02.2011 and thus, the Government has issued the present impugned G.O.Rt.No.319, dated 16.04.2011, calling for fresh tenders for execution of the subject work.

24. In contra, the learned counsel for the petitioner has stated that if at all the agreement of the agency has already been terminated vide proceedings dated 17.02.2011, the question of again terminating the agreement of the agency by way of the impugned G.O.Rt.no.319 does not arise.

25. As rightly stated by the learned counsel for the petitioner, if at all the agreement of the agency has already been terminated vide proceedings dated 17.02.2011, the question of further terminating the agreement of the agency and invoking the bank guarantee vide clause (a) of the impugned G.O.Rt.No.319, dated 16.04.2011, through which the Government has called for fresh tenders for execution of the subject work, does not arise.

26. It is also an admitted fact that there is a deemed provision for termination of the agreement of the agency for not achieving the financial closure as per the clause 22.4 of the Concession Agreement, for termination of the agreement. But, however, as per the Technical report of the Chief Engineer (R&B), the technical committee has opined and requested the Government to take action as per the terms of the Concessional Agreement and accordingly, the agreement of the agency was terminated vide G.O.Rt.No.319, dated 16.04.2011, which

further calls for fresh tenders on annuity basis, duly recasting the estimate/DFR with current SSR, in view of the reduced estimated cost of the project. It is also the case of the petitioner that the bank guarantee has been extended from time to time in view of the interim order granted by this Court. In view of the observations made above, this Court feels it appropriate to allow this writ petition.

27. Accordingly, this Writ Petition is allowed, by setting aside the impugned G.O.Rt.No.319, Transport, Roads and Buildings (R.I) Department, dated 16.04.2011. There shall be no order as to costs.

Miscellaneous petitions, pending, if any, in this Writ Petition shall stand closed.

SMT. JUSTICE V. SUJATHA

GSS

THE HON'BLE SMT JUSTICE V. SUJATHA

Writ Petition No.10913 of 2011

Date:

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