

Ebix Cash Pvt Ltd Vs State Of Maharashtra Through Chief Secretary And Others

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: July 22, 2024

Acts Referred: Constitution of India, 1950 " Article 226

Hon'ble Judges: R. G. Avachat, J; Neeraj P. Dhote, J

Bench: Division Bench

Advocate: Shrirang B. Varma, Viraj Parekh, Gautam Swaroop, A. R. Kale

Final Decision: Dismissed

Judgement

Neeraj P. Dhote, J

1. The Petitioner, a Private Limited Company, has invoked the jurisdiction of this Court under Article 226 of the Constitution of India, taking exception

to the termination notice dated 13.06.2024 by which the Contract for E-ticketing system for the city buses plied in Aurangabad city allotted to the

Petitioner Company is terminated.

2. It is submitted by learned Advocate for the Petitioner that the Petitioner was awarded the contract for the aforesaid purpose on 18.02.2020,

pursuant to tender process of 2019. The Petitioner implemented the contract as per the tender document and "Go Live Certificate" was issued

by the Respondent No.2 " Aurangabad Smart City Development Corporation Limited (ASCDCL) on 01.11.2021. The Petitioner was implementing

the contract successfully for over a period of four (4) years. ASCDCL issued a new tender on 05.02.2024 for procurement of Electronic Ticket

Issuing Machines (ETIM). On 08.02.2024 the Petitioner Company objected for allotment of the scope of the work relating to ETIM, as the same was

colliding with the scope of work covered by the Petitioner's contract.

3. It is further submitted that the scope of work in the tender process initiated in February, 2024 was overlapping the work which was being carried

out by the Petitioner Company. The tender issued in February, 2024 was not a substitute tender for the Petitioner Company's contract. The

Petitioner Company would be put to loss due to the said new tender process. The act of ASCDCL was mala fide and covered by the principles of

Ã¢â¬Ï doctrine of malice in lawÃ¢â¬Ï as the act of ASCDCL was without any lawful excuse.

4. It is further submitted that on 23.02.2024 the ASCDCL issued a show cause notice to the Petitioner Company for terminating the contract on the

following two grounds:

(a) That, there were penalties levied upon the Petitioner Company for software being down and other reasons.

(b) That, the ETIM provided by the Petitioner Company had a functionality of printing a Ã¢â¬ÏZero Value TicketÃ¢â¬Ï which caused revenue losses to

the ASCDCL.

5. It is further submitted that, the Petitioner Company responded to the show cause notice in detail on 26.02.2024. The Petitioner Company

categorically stated that the delay in any software related things was resolved within 30 (thirty) minutes and as such, there was no violation of contract

conditions and thus the penalties levied upon the Petitioner Company was illegal and clarified that the functionality of printing Ã¢â¬ÏZero Value

TicketÃ¢â¬Ï was as per the specification provided in the tender document. The ASCDCL without there being any consideration or providing any

reasons, terminated the contract allotted to the Petitioner Company by the impugned termination notice.

6. It is further submitted that in November-2023 the Petitioner had strongly objected to levy of penalties as the same were inappropriately imposed and

the Petitioner Company provided complete data as to the software issues being resolved within thirty (30) minutes of any error and the same was

being used effectively. The reason cited by the ASCDCL for terminating the contract was without any application of mind as the functionality of the

Ã¢â¬ÏZeroÃ¢â¬Ï value ticket was contemplated in the tender document itself. The Petitioner company was being punished for providing the ETIMÃ¢â¬Ïs,

which was perfectly as per tender document, and the ASCDCL never raised any complaint from 2020 to 2024.

7. It is further submitted that the ASCDCL did not adhere to the termination procedure as laid down in the tender document. Clause 15.4.1 provides

for issuance of preliminary notice to the service provider so as to rectify the defect and thereafter if the defects are not rectified, issue termination

notice. As the ASCDCL has completely disregarded the procedure laid down for termination of contract in the tender document, the impugned notice

is unsustainable and liable to be set aside.

8. It is further submitted that this Court can examine the action of the ASCDCL, which is arbitrary, unreasonable and unauthorised. Though there is

an arbitration clause in the contract, there is no bar to entertain the Writ Petition. In support of his submission, he relied on the following Judgments of

the HonÃ¢â¬Ïble Supreme Court of India :

(i) Subodh Kumar Singh Rathour Vs. The Chief Executive Officers Ors. in Civil Appeal No.6741/2024

(ii) M. P. Power Management Company Limited Jabalpur Vs. Sky Power Southeast Solar India Private Limited and Ors., (2023) 2 SCC 703

(iii) Uttar Pradesh Power Transmission Corporation Limited and Anr. Vs. CG Power and Industrial Solutions Limited and Anr., (2021) 6 SCC 15

9. Following legal principles emerges from the above referred Judgments.

(a) Relief against the State or its instrumentalities in matters related to contractual obligations can be sought under the writ jurisdiction.

(b) The power to issue writ under Article 226 being discretionary and plenary, the same should only be exercised to set right the arbitrary actions of the State or its

instrumentality in matters related to contractual obligation.

(c) Writ under Article 226 of the Constitution will also lie against a termination on a breach of a contract, wherever such action is found to either be palpably

unauthorized or arbitrary.

(d) Although the disputes rising purely out of contracts are not amenable to writ jurisdiction, when contractual power is being used for public purpose, it is certainly

amenable to judicial review.

(e) Availability of an alternative remedy does not prohibit High Court from entertaining a writ petition in an appropriate case.

(f) In the matters concerning specific modalities of the contract "such as required work, execution methods, material quality, time frame and other aspects impacting

the tenders purpose" the Court usually refrains from interference.

(g) Writ jurisdiction being discretionary, the High Court usually refrain from entertaining a writ petition which involves adjudication of disputed question of fact

which may require analysis of evidence of witnesses.

10. In the matter at hand, the parties entered into a Contract for the purpose referred above. The enclosures to the petition show, several

communications inter se ASCDCL and the Petitioner Company, dated 20.10.2020 (Sub - delay in implementation of project), 05.11.2020 (Sub -

implementation of Smart Card Project "Reg), 26.12.2020 (Sub - delay in Sign on time from Nov. 05, 2020 to Nov. 10, 2022 "Reg.), 21.12.2020

(Sub - Service Provider Event of Default-Preliminary Termination Notice), 22.12.2020 (Sub - Delayed in sign on time from 5 Nov. 2020 to 10 Nov.

2020), 04.01.2021 (Sub - Service Provider Event of Default "Preliminary termination notice "Reg.), 01.11.2021 (GO-LIVE CERTIFICATE),

02.12.2021 (Sub - Regarding Implementation of E-Ticketing Solution), 12.08.2022 (Sub - Ebix Cash objection for receipt of short payment for the

invoices processed for the period of Nov-2021 to June-2022), 23.09.2022 (Sub - Ebix Cash submission on repeated short payment received "Reg.),

30.12.2022 (Sub - Regarding Extension of E-ticketing Project), 24.11.2023 (Sub -Penalty Reimbursement Request in ASCDCL E-Ticketing Solution

Project), 09.01.2024 (Sub - Regarding Zero amount ticket issuance in ETIM Project), and 31.01.2024 (Sub - Response to letter 42 regarding zero

amount ticket issuance in ETIM project).

11. The aforesaid communications clearly indicate existence of disputed questions of facts between the parties. The above referred communications,

indicate that according to ASCDCL, there was delay in implementation of project by the Petitioner Company and Petitioner Company refuted the

same. According to Petitioner Company they implemented the contract as per the tender document and therefore, *Go Live Certificate* was

issued to them. The impugned termination notice states that the Petitioner Company was provided the details and particulars of breach by the show

cause notice and there were various technical and major issues with the functioning of EBIX. It further states that the Petitioner Company was

imposed with penalty on multiple occasions. It further states that the Petitioner Company failed to rectify its mistakes. It further states of financial loss

to the ASCDCL. It is seen from the above communications that, before issuing impugned termination notice, the ASCDCL had issued preliminary

termination notice (Exh. *Termination for Service Provider Event of Default*) from Volume II

of Request For Proposal (RFP). This indicate that the termination was within the contractual domain. RFP provides for termination of contract. The

RFP provides mechanism for dispute resolution through arbitration vide clause 16.2 in Volume II of the RFP. The dispute is arbitrable.

12. It would not be out of context to refer the relevant observations of the Hon'ble Supreme Court of India in *SBI General Insurance Co. Ltd. vs.*

Krish Spinning, Civil Appeal No. 7821 Of 2024 (Arising Out of SLP (C) No. 3792 Of 2024), 2024 Live Law (SC) 489 / MANU/SC/0719/2024

(Paragraph Nos.49 to 51) wherein the settled legal position that Arbitration clause survives after termination of Contract, is reiterated.

49. The arbitration agreement, by virtue of the presumption of separability, survives the principal contract in which it was contained. Section 16(1) of the Act,

1996 which is based on Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter, *"Model Law"*) embodies the

presumption of separability. There are two aspects to the doctrine of separability as contained in the Act, 1996: -

i. An arbitration clause forming part of a contract is treated as an agreement independent of the other terms of the contract.

ii. A decision by the arbitral tribunal declaring the contract as null and void does not, ipso facto, make the arbitration clause invalid.

50. The doctrine of separability was not part of the legislative scheme under the Arbitration Act, 1940. However, with the enactment of the Act, 1996, the doctrine was

expressly incorporated. This Court in National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd. reported in (2007) 5 SCC 692, while

interpreting Section 16 of the Act, 1996, held that even if the underlying contract comes to an end, the arbitration agreement contained in such a contract survives for

the purpose of resolution of disputes between the parties.

51. The fundamental premise governing the doctrine of separability is that the arbitration agreement is incorporated by the parties to a contract with the mutual

intention to settle any disputes that may arise under or in respect of or with regard to the underlying substantive contract, and thus by its inherent nature is

independent of the substantive contract.

The relevant observations from National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd., (2007) 5 SCC 692 referred in the

aforesaid Judgment, are in para no.6 which reads as under:-

“6. The Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms

part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to

resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the

arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide : Heymen vs. Darwins Ltd - 1942

(1) All ER 337, Union of India vs. Kishori Lal Gupta & Bros. - AIR 1959 SC 1362 AND The Naihati Jute Mills Ltd VS. Khyaliram Jagannath - AIR 1968 SC 522]. This

position is now statutorily recognized. Sub-section (1) of section 16 of the Act makes it clear that while considering any objection with respect to the existence or

validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the

contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be

rejected.

13. In the light of above discussion, no case exist to entertain this Writ Petition. Hence, the following order :

ORDER

(i) The Writ Petition is dismissed.