Premier Explosives Ltd. Vs Chairman and Managing Director, Singareni Collieries Co. Ltd. and Others

Court: Andhra Pradesh High Court

Date of Decision: Dec. 24, 2009

Acts Referred: Constitution of India, 1950 â€" Article 12, 226
Contract Act, 1872 â€" Section 56

Citation: AIR 2010 AP 107

Hon'ble Judges: Nooty Ramamohana Rao, J

Bench: Single Bench

Advocate: M. Bhaskara Lakshmi, for the Appellant; Nandigam Krishna Rao, S.C., for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Nooty Ramamohana Rao, J.
This writ petition has been instituted by a company, which was manufacturing explosives to be used

essentially by the mining industry. The writ petitioner company was supplying explosives and accessories to Singareni Collieries Limited for over

two decades. The respondent-Singareni Collieries floated a tender enquiry on 14-12-2006 for supply of SMS explosives and accessories to its

MNC Open Cast--II project for a period of one year. The writ petitioner submitted its bid on 28-2-2007. The respondent--Singareni Collieries

has called for negotiations on 26-3-2007 with the petitioner company with regard to procurement explosives and accessories against the tender

enquiry dated 14-12-2006. The Minutes of the said meeting have been reduced to writing. The conditions, subject to which the explosive have to

be supplied, have also been spelt out in detail therein. Thereafter, a Letter of Intent was released in favour of the petitioner company on 9-4-2007

followed by a detailed purchase order on 20-4-2007. The petitioner company started making the supplies from 2-5-2007 pursuant to the Letter of

Intent and the purchase order. However, on 6-7-2007, it has submitted a representation setting out that the price of Ammonium Nitrate Melt has

increased from Rs. 10,100/- to Rs. 12,000/- per Metric Tonne, between March, 2007 to 1st May, 2007 and that the offer earlier made by the

petitioner company was based upon the calculations worked out taking the price of Ammonium Nitrate at Rs. 10.100/- and hence it has sought for

revision of rate for supply of the explosives from Rs. 7.59 to Rs. 8.255 per Cub Mt. They have enclosed to this representation a detailed work-

sheet in support of the above claim. After considering this representation, the respondent through its Chief General Manager (Purchase) has replied

that the offer made is on firm basis and hence it is not possible to extend any price variation for the supply orders. Upon receipt of this

communication dated 3-8-2007, the petitioner company has immediately responded requesting the respondent to short close the contract and to

make alternative arrangements for supply of explosives. However, considering the long association and good business relationship between the

parties, the petitioner offered to supply the explosives upto 31-8-2007. Accepting this offer, by an order passed on 9-8-2007, the respondent--

Singareni Collieries informed the petitioner that the unwillingness of the petitioner to continue to make supplies as per the rate finalized has

necessitated the respondent to float afresh a tender enquiry and hence requested the petitioner to continue the supplies as per the terms of the

conditions of the purchase order till the alternative arrangement at full scale is made. It will be appropriate at this stage to notice that on 7-8-2007 a

fresh tender enquiry has been floated by the respondent and the same was also opened on 14-9-2007. The writ petitioner has once again

participated and found to be the second lowest offeror. Therefore, it is represented again to the respondent seeking payment at the rate of L-1 for

the supplies that are being made pending finalization of the latest tender enquiry. On 26-11-2007, the petitioner has suggested that the alternative

arrangements may be made for securing supply of the explosives, as the writ petitioner would not be able to supply the material beyond December,

2007. The said representation was followed up by yet another representation on 26-12-2007 seeking for reconsideration of the price in view of

the steep escalation in the cost of Ammonium Nitrate Melt, the basic raw material for the explosives. However, through communication dated 10-

1-2008, the respondent - Singareni Collieries passed orders pointing out that pursuant to the retenders floated afresh orders have been placed on

M/s. IDEAL Industrial Explosives Ltd., for supply of SMS/SME explosives and accessories and that the said firm is ready to commence its

supplies and therefore the petitioner has been called upon to show cause as to why the contract awarded in its favour be not terminated. The writ

petitioner has filed its reply on January 11, 2008 pointing out that it had already supplied for nearly 10 months of the period of the contract and

only two more months are left over to complete the supply period and that in case if short closing without any penal clause is not possible, the writ

petitioner requested the respondent to allow them to continue to supply up to the balance order period. However, the respondent passed orders

on 12-1-2008 terminating the order placed on the petitioner with effect from 19-1-2008 by forfeiting their performance bank guarantee, duly

imposing risk purchase and other penalties as per the terms of the purchase order. It is this order of the Singareni Collieries, which is challenged, in

the above writ petition.

2. The respondent has filed its counter disputing the claims of the writ petitioner.

3. I have heard Smt. Bhaskar Lakshmi, learned Counsel for the petitioner and Sri Nandigama Krishna Rao, learned Standing Counsel for

Singareni Collieries.

4. Learned Counsel for the petitioner Smt. Bhaskar Lakshmi would urge that the respondent being a public sector undertaking and thus being a

State has acted irresponsibly and arbitrarily in the matter and therefore the impugned order deserves to be interfered with. Learned Counsel would

urge that the respondents having agreed to foreclose the contract, cannot fall back upon the terms of the very contract for imposing penal

consequences on the petitioner. The learned Counsel would urge that when once a contract has been terminated by mutual acceptance of it''s

foreclosure all other obligations must come to an end in pursuance of such a contract and thereafter some of the terms contained therein cannot be

pressed into service for purposes of visiting the petitioner with penal consequences. Further, in view of the step increase in the cost components of

raw material immediately, after the purchase order is issued, rendered it impossible to supply the products at a far lesser rate. Learned Counsel

would also urge that the proposal of the petitioner for a foreclosure of the contract has been agreed to on 9-8-2007 itself and hence the order that

has been passed on 12-1-2008 is improper. It is further contended that the petitioner had been asked to continue to make the supplies in

accordance with the terms of the contract, till such time alternative arrangements are made by the respondent corporation and hence it is not

justified in invoking the performance bank guarantee and also the risk purchase clause. Lastly, learned Counsel would urge that if the petitioner had

made the necessary supplies for nearly ten months, there is no justification for the respondent to have invoked the clauses in the contract for the

purpose of encashing the bank guarantee and also the risk purchase clause particularly when the petitioner has offered to continue to supply for the

balance two months period as well. Thus, the entire action smacks of arbitrariness.

5. The learned Counsel for the respondents has contended that after holding a round of detailed and exhaustive negotiations with the petitioner, the

contract has been entered into on 9-4-2007 and it is one of the integral factors of the contract that the price quoted by the petitioner for supply of

the specified explosives and accessories is a firm price and there is therefore no scope for any increase or revision or review during the currency of

the period of the said contract. It is also pointed out that the risk purchase clause and provision for foreclosure of the contract have been

contemplated and provided for in the contract. It is further contended that as desired by the petitioner, the respondent has refloated a fresh tender

enquiry and never did it cancel the existing contract as contended by the petitioner on 9-8-2007. On the other hand, the contract came to be

terminated only on 12-1-2008. Further, there was nearly three more months'' time for expiry of the original contract period and hence the

subsequent offer of the writ petitioner to allow him to continue to make the supplies in pursuance of the contract has not been accepted, in view of

the subsequent events. The petitioner should realize that after a fresh tender enquiry has been floated and after the process of finalizing the said

tender enquiry has reached a stage of culmination, the short listed and identified supplier has got to be given the supply order and hence the present

contract with the petitioner came to be terminated. The petitioner is to blame itself and it cannot turn around and insist that the failure of the revise

the rates fixed in a contract has rendered the contract unworkable. It is necessary to point out here that the performance guarantee which has been

furnished by the writ petitioner as an assurance held out by the petitioner for due and faithful performance of the contract. A breach thereof on his

part would automatically invite the forfeiture of the performance guarantee furnished by him. Such an action is independent of the risk purchase

clause. The obligation arising out of Risk Purchase Clause is an independent concept. If the respondent company had to procure the same material

at a higher cost from any other supplier, the differential amount is bound to be made good by the defaulting party to a contract. Therefore, the

contentions of the petitioner that the performance bank guarantee could not have been encashed while simultaneously invoking the risk purchase

clause against the petitioner is wholly untenable.

6. Dealing with the contention that it is impossible to perform the contract because of the, steep increase in the costs of raw material, it will be apt

to notice that that the question relating to frustration of a contract on the score of impossibility of its performance is always a question of fact, which

has got to be decided as to who is guilty of the act or omission which rendered the contract unenforceable. Lord Radcliffe in Davis Contractors

Ltd. v. Fareham U.D.C. 1956 AC 696, at page 729, set out the principle in the following words:

....frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being

performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken

by the contract. Non haec in foe dera veni. It was not this that I promised to do.... There must be.... Such a change in the significance of the

obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

(emphasis is mine)

7. It will also be apt to notice in this context how Section 56 of the Indian Contract Act delineates the Doctrine of Frustration of a contract.

Section 56 reads as under:

56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful - A contract to do an act which, after the contract is made, becomes impossible,

or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non performance of act known to be impossible or unlawful - Where one person has promised to do something

which he knews, or, with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, such

promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

8. In Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, , the Supreme Court was called upon to set out the contours of the

doctrine of frustration in the perspective of the Indian Contract Act. It has been expounded as under:

7. The first argument advanced by the learned Attorney General raises a somewhat debatable point regarding the true scope and effect of Section

56 of the Indian Contract Act and to what extent, if any, it incorporates the English rule of frustration of contracts.

...The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to

be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from

the general words used in the enactment.

...We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening

impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be

incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable,

recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract

Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law dehors these

statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England

have decided cases under circumstances similar to those which have come before our Courts.

11. ...The law of frustration in England developed, as is well known, under the guise of reading implied terms into contracts.

12. ...The English law passed through various stages of development since then and the principles enunciated in the various decided authorities

cannot be said to be in any way uniform. In many of the pronouncements of the highest Courts in England the doctrine of frustration was held ""to

be a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

15. ...These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian

Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in

Section 56 of the Contract Act, taking the word ""impossible"" in its practical and not literal sense. It must be borne in mind, however, that Section

56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

16. ...When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the

contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine the

contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on

which the Court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its

underlying object vide Morgan v. Manser 1947 2 All ER 666 (L). This may be called a rule of construction by English Judges but it is certainly not

a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such

comes within the purview of Section 56 of the Indian Contract Act.

9. In Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), , the Supreme Court clarified that the Courts have no powers to absolve a party

from liability to perform a contract merely because the performance becomes onerous; the expressed covenants in a contract cannot be ignored

only on account of unexpected and uncontemplated turn of events after the contract.

10. From a study of these principles, what emerges is the Doctrine of frustration is truly an aspect forming part of the law of discharge of contract

by reason of supervening impossibility or illegality of the act agreed to be done and therefore is covered by the sweep of Section 56 of the Indian

Contract Act. This concept and doctrine of frustration has therefore to be applied within very narrow limits. As was noticed supra, the factors

which truly render the contract impossible of performance have all been spelt out in great detail. The prospects of dwindling profits from the

contract all due to inflation of the procurement price of the raw materials clearly therefore is not a factor which falls within the purview of Section

56. The disappointed expectations of one of the parties to a contract who was required to supply the material to the other, do not, hence, lead to

the frustration of the contract. A contract cannot be declared to have been frustrated all because its performance has become more onerous on

account of unforeseen circumstances. In fact, this principle has been recognized by the Andhra Pradesh High Court in Merla Suramma v. Kakileti

Sitaramaswamy AIR 1957 AP 71 and the Supreme Court in The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, .

11. In view of the pleadings and the contentions set up by the parties on either side, the questions that arise for consideration are (1) the scope and

jurisdictional limits of this Court in matters involving contractual obligations between the parties, one of which may be ""State"" for purposes of

Article 12 of Constitution of India, (2) whether a contract which has provided for an option to foreclose the contract, renders it incapable for one

of the parties to the contract to take any further action in terms thereof (3) whether a performance bank guarantee which has been furnished for the

due performance of the contract can be prevented from being invoked at all.

12. It will be relevant to notice at this stage that pursuant to the tender enquiry floated by the respondent, the petitioner has given its firm offer.

Negotiations have been held between the parties on 26-3-2007. One of the important areas focused by both sides during the course of those

negotiations has centered around the price of the contract. The writ petitioner has made it absolutely clear that it had quoted a most competitive

price and hence it does not allow any further reductions thereof. Hence, the parties have gone about knowing full well that the price to be paid by

the respondent for the supplies to be effected by the petitioner, is a firm price. There is no scope for its variation or revision. The contract has not

provided for any escalation or upward or downward review of the price of the contract. It should be absolutely clear, therefore, that the parties

have gone about the issue of the price for the supplies to be made to be treated as ""firm price"" and it does not admit of any variation under any

circumstances during the currency of the contract. According to the petitioner, the rate of Ammonium Nitrate per Metric Tonne has increased from

Rs. 12,100/- to Rs. 15,500/- whereas it has been stated by the petitioner himself that by the time the negotiations took place, the price of

Ammonium Nitrate per Metric Tonne had started escalating from Rs. 12,100/- to Rs. 14,000/-. Therefore, by the time the negotiations have been

held by and between the parties, the petitioner is conscious of the inflationary trend and escalation in the price of the Ammonium Nitrate. Hence, it

would be safe to assume that the price quoted by him has taken care to cushion the possible escalation of the price of Ammonium Nitrate. At any

rate, these are not questions, which are capable of being determined with any sense of assuredness in a writ proceeding, as lot of evidence is

needed to be gathered in that regard. Power under Article 226 cannot be exercised for determining the value of the contracts for supplies to be

made, unless elements of public interest or public law questions do crop up.

13. The State and its instrumentalities have the power to enter into contracts. A fortiori they have the power to negotiate and fix the price or

consideration for such contracts. Sans consideration no contract can be valid. Whether the consideration that has formed part of the contract is

valid or not can only be tested from the public interest stand point of view and where there is no I element of public interest involved, it is clearly

outside the scope of consideration under Article 226. The present dispute has not been based upon any elements of public interest nor was any

public law domain involved in the process. It is a simple and pure commercial contractual obligation brought about mutually by and between the

parties. Therefore, the Court exercising the jurisdiction under Article 226 is hardly equipped to focus its attention on such aspects of the matter at

all.

14. It is well settled principle of law that the judicial review exercise of the Court is only concerned itself with the decision making process, but

does not concerned with the decision taken by a public authority which has got the competence. In exercise of power under Article 226, Courts

can only examine and look for appropriateness of the procedure adopted, and the standards evolved for adjudicating the claims/bids and that they

are totally fair in matters of awarding of contracts. So long as a proper procedure, which is transparent, non discriminatory and fair to all, is

adopted and the decision has been arrived at duly taking into account and consideration all relevant factors and carefully eschewing irrelevant

factors and considerations, then the ultimate decision arrived at is not liable to be interfered with. It will be apt to notice the principle set out by the

Supreme Court, in this regard, in Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, .

10. We find that there is a merit in the first contention of Mr. Raval. Learned Counsel has rightly questioned the maintainability of the writ petition.

The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition.... If a term of a contract is violated,

ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the

contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a

public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the

obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract

statutory....

11. ...Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The

fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the

meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a

statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal

with property. Such activities may not raise any issue of public law.... The contract between the parties is in the realm of private law. It is not a

statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition

under Article 226 of the Constitution of India.... Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or

not, are not the matters which could have been agitated and decided in a writ petition....

15. I therefore repel the contention of the learned Counsel for the petitioner that the terms of the contract can be looked into for purpose of giving

effect to the contract in question.

16. It is further relevant, at this stage, to notice that the petitioner has volunteered for foreclosure of the contract. The respondent has agreed for

the same and thereafter the respondent floated afresh a tender enquiry. The writ petitioner has again participated therein. He was declared as the

second lowest bidder. Hence, the action of the respondents in foreclosing the contract cannot be disputed or called in question in a writ petition. It

was purely by giving effect to a term in the contract that such a situation was brought about. The consequences of a foreclosure of a contract can

be manifold. The contract itself can provide for ways and means of mitigating the damage by compensating the opposite parties. In the instant case,

the contract has already provided for such remedies. It required the performance bank guarantee to be encashed by forfeiting it, wherever the

contract is prematurely terminated, all due to the action of the petitioner, in breaching the contract. The contract had also contemplated for

compensating the respondent for the likely loss they would suffer and hence the risk purchase clause has been provided therein. Therefore, the

respondent is justified to forfeit the performance bank guarantee in terms of the contract and also simultaneously invoke the risk purchase clause.

The petitioner cannot now turn around and ask for any of the terms of the contract either to be given effect to or be refrained from being given

effect to. That is not available for a writ Court, in the absence of any elements of public interest or in the absence of violation of any fundamental or

statutory rights in favour of the petitioner. The parties are free to work out their respective remedies. Hence, I am not in a position to uphold the

plea that when once risk purchase clause is invoked, the performance bank guarantee furnished by the petitioner should not be encashed.

17. Hence, there are no merits in the writ petition. The relief solicited cannot be granted in this writ petition. I therefore dismiss this writ petition.

No costs.