Advanced Radio Masts Ltd. Vs Union of India (UOI) and Others

Court: Andhra Pradesh High Court

Date of Decision: Aug. 27, 2004

Acts Referred: Constitution of India, 1950 â€" Article 226

Citation: (2004) 5 ALD 680 : (2005) 1 BC 279

Hon'ble Judges: V.V.S. Rao, J

Bench: Single Bench

Advocate: Nooty Rama Mohan Rao, for the Appellant; A. Rajasekhara Reddy, Additional Central Govt. Standing Counsel for Respondent Nos. 1 to 3, Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V.V.S. Rao, J.
The petitioner is an incorporated company, which invoked the extraordinary jurisdiction of this Court under Article 226 of

the Constitution of India seeking to quash or set aside the two communications dated 12.7.1999 and 30.7.1999 sent to the petitioner. By first

impugned letter, the third respondent informed the petitioner that purchase order for supply of Optical Line Terminating Equipment (PDH) could

not be placed for the second year. By the second letter, the petitioner was advised to send Crossed Demand Draft/Pay Order for Rs. 22,65,000/-

(Rupees twenty two lakhs and sixty five thousand only) equivalent to the bank guarantee given by the petitioner when only the original bank

guarantee will be returned to the petitioner. The facts and circumstances leading to filing this writ petition seeking these reliefs in brief are noticed

below.

2. The Department of Telecommunications (DoT), the first respondent herein issued a Notice Inviting Tender (NIT) inviting tenders for supply of

Optical Fibre Line Terminating equipment (hereafter called, the material). The petitioner submitted tenders for two varieties of material mentioned

at SL.No. 3 and Serial No. 7, which were evaluated by Tender Evaluation Committee comprising of Senior Officers of DoT. By communication

dated 25.9.1995, DoT placed advance purchase order for procuring material in Package III for 195 numbers and Package VII for 282 numbers.

The petitioner manufactured the equipment and offered the same to DoT for type approval. As per NIT and tender schedule, the company''s

material is subjected to quality control in three stages. In Stage I, the Company has to submit the material for type approval test. In Stage n, the

DoT will conduct random sampling test and in Stage HI after giving Bulk Production Clearance Certificate (BPC), bulk production order is given.

These three stages follow the issue of advance purchase order.

3. It is the case of the petitioner that DoT accorded type approval on 28.2.1996 for Package VII and 30.8.1996 for Package III. As required

under tender schedules, the petitioner furnished bank guarantee for a sum of Rs. 22,65,000/- (Rupees twenty two lakhs and sixty five thousand

only) as a performance bank guarantee for due discharge of its obligation. The same is valid for three years commencing from 14.10.1995. The

DoT, thereafter, placed purchase order on 31.1.1996 for supply of 213 numbers of material in Package in and 154 numbers in Package VII and

petitioner was required to produce the material valued at Rs. 4,65,37,401.90/-(Rupees four crore sixty five lakhs thirty seven thousand four

hundred and one and paise ninety only) over a period of two years. The petitioner states that for a variety of reasons, the supplies of the materials

were delayed but the petitioner completed delivery of 158 numbers in Package VII and 213 numbers in Package III, It is also the case of the

petitioner that whenever there was a delay, the petitioner approached the DoT, who condoned the delay and extended the time for supply by

imposing liquidated damages as per the conditions in the tender schedule. Be that as it is, DoT has not placed any further procurement order for

second year after receiving the full consignment supplied by the petitioner pursuant to the purchase order dated 31.1.1996 for the first year. In

spite of the same, the petitioner alleges, DoT continuously called upon the petitioner to update the validity period of the bank guarantee and finally

issued the impugned communications informing the petitioner, the encashment of bank guarantee if the petitioner fails to pay the amount of Rs.

22,65,000/- (Rupees twenty two lakhs and sixty five thousand only), which are subject of challenge in the writ petition.

4. The Assistant General Manager (Legal) in the office of the fourth respondent filed counter-affidavit on behalf of the Respondents 1 to 3 making

the following averments. As per the advance purchase order, the petitioner was required to supply the material within the delivery schedule of five

months including two months for getting type approval of the material. However, at the time of placing the purchase order, the delivery schedule is

increased by one month to six months. The petitioner accepted the advance purchase order unconditionally and again asked for extension. On

request of the petitioner and assurance given by it, the delivery schedule of the purchase order was extended beyond 30.7.1996 to 27.4.1998 and

additional time of 21 months was given to complete the supplies and the petitioner duly extended the performance bank guarantee. As per the

conditions of tender, the petitioner would get purchase order for second year requirement after completion of supplies against the first purchase

order within the delivery schedule of six months. As the petitioner failed to complete the supplies of the first year within six months, DoT could not

place order for second year supplies. Due to this, the development work of the DoT was hampered. Though the petitioner completed the supplies

placed for the first year, as he did not do so within the delivery schedule and only completed supplies during the extended period, the performance

bank guarantee was encashed as the development programme of the respondents was hampered due to non-supply of the material, which was

ordered. The performance bank guarantee is a composite one and was against the advance purchase order and therefore the action of the DoT in

encashing bank guarantee is justified.

5. The learned Counsel for the petitioner Sri Rama Mohana Rao and Sri P. Raj Sekhar contend that the impugned orders are unilateral and

arbitrary and that the impugned orders are passed in a mechanical manner and without application of mind to the relevant facts and circumstances

and that for the lapse on the part of the respondents, the petitioner is being penalised. The learned Counsel vehemently contend that as per the

terms and conditions of the contract, whenever time is extended, the contractor is liable to pay liquidated damages. DoT has collected such

liquidated damages from the petitioner for the delayed supplies and therefore the petitioner cannot again be penalised by encashing bank guarantee.

Reliance is placed on the decision of the Supreme Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and

Mohammed Gazi v. State of M.P. 2000 (5) ALD 14 (SC) : AIR 2000 SC 1806, in support of the contention that even if there is arbitration

clause, a writ petition would lie.

6. Sri A. Rajasekhara Reddy, learned Senior Central Government Standing Counsel opposed the writ petition contending that Clause 20 of the

NIT provides for ADR mechanism by way of arbitration and therefore the dispute raised by the petitioner cannot be adjudicated in this writ

petition. He has also taken this Court through the correspondence between the DoT officials and the petitioner justifying the action of the DoT.

Learned Standing Counsel placed reliance on the decision of the Supreme Court in National Highway Authority of India Vs. Ganga Enterprises

and Another, and State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., , in support of the contention that in matters of encashment of

bank guarantee, a writ petition would not lie and the petitioner has to raise the dispute before the Arbitrator.

7. In the decision relied on by the learned Counsel for the petitioner Harbanslal Sahnia v. Indian Oil Corporation Limited (supra), after referring

Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , the Supreme Court observed as under:

So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore

the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by

availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative

remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of

the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without

jurisdiction or the vires of an Act is challenged. (See Whirlpool Corporation v. Registrar of Trade Marks.) The present case attracts applicability

of the first two contingencies. Moreover, as noted, the petitioners'' dealership, which is their bread and butter, came to be terminated for an

irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead

of driving them to the need of initiating arbitration proceedings.

8. In Mohammed Gazi v. State of M.P. (supra), the Hon''ble Supreme Court directed the State to refund the security amount to the appellant. In a

recent judgment in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , the Supreme Court

considered the question whether the writ petition would be maintainable for refund of money. The Court after reviewing the earlier case-law, the

principle was laid down as under:

...It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the

money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each

case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case

of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the

date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to

the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood

that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add

that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be

refused on several grounds depending on facts and circumstances of a given case.

However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should

bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any

other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ

petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corporation Vs. Registrar of Trade

Marks, Mumbai and Others,). And this plenary right of the High Court to issue a 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 said

jurisdiction.

9. Therefore, it may be taken as well settled that the extraordinary power of this Court under Article 226 of the Constitution of India is not

curtailed by any other provision of the Constitution or rule of caution imposed upon itself by the High Court. As observed by the Supreme Court in

ABL International Limited v. Export Credit Guarantee Corporation of India Limited (supra), the availability of remedy in public law to an

aggrieved person, does not mean and should not be taken that the Court of judicial review is divested of the power of exercising discretion. It is for

the Court either to accept or reject a writ petition and grant relief. The facts and circumstances of each case have to be appreciated before

rejecting or accepting the writ petition or writ prayer. These principles are not disputed.

10. Though this Court admitted the writ petition, there was no interim order. It is brought out in the counter-affidavit filed on behalf of the

respondents that the bank guarantee furnished by the petitioner was already encashed. At this point of time, the writ petition is essentially one for

refund of bank guarantee amount, which was appropriated by the respondents for alleged breach of terms of contract. In that view of the matter,

the submission of the learned Senior Central Government Standing Counsel that a writ petition in the matter of this nature is not maintainable is well

founded. A reference to the recent judgment of the Supreme Court would support the learned Counsel for the respondents. In State of Bihar v.

Jain Plastics and Chemicals Limited (supra), the Supreme Court reiterated the law in Paragraph 3 of the judgment as under:

Settled law - writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper

proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the Court of competent jurisdiction for

appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be

required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect

the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226.

11. When a bank guarantee is encashed in terms of the guarantee, the Court under Article 226 of Constitution of India cannot interfere in the

matter. It was so held in National Highways Authority of India v. Ganga Enterprises (supra) in the following terms:

...The law regarding enforcement of an ""on-demand bank guarantee"" is very clear. If the enforcement is in terms of the guarantee, then Courts must

not interfere with the enforcement of bank guarantee. The Court can only interfere if the invocation is against the terms of the guarantee or if there is

any fraud. Courts cannot restrain invocation of an ""on-demand guarantee"" in accordance with its terms by looking at terms of the underlying

contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The

bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not

signed, the guarantee could be enforced.

12. In the said decision, the Supreme Court also observed that when encashment of bank guarantee by the one party to the contract encashed, the

Court must first address the question whether a writ petition would be maintainable.

Clauses 15 and 16 of NIT, which are binding on the parties read as under:

15. Delays in the Supplier''s Performance:

15.1. Delivery of the Goods and performance of services shall be made by the Supplier in accordance with the time schedule specified by the

purchaser in its Purchase Order. In case the supply is not completed in the stipulated delivery period, as indicated in the Purchase Order,

purchaser reserves the right either to short close/cancel this purchase order and/or recover liquidated damage charges. The cancellation/short

closing of the order shall be at the risk and responsibility of the supplier and purchaser reserves the right to purchase balance unsupplied item at the

risk and cost of the defaulting vendors.

15.2. Delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable to any or all of the following sanctions,

forfeiture of its performance security, imposition of liquidated damages and/or termination of the contract for default.

15.3. If at any time during performance of the Contract, the Supplier or Sub-Contractor(s) encounters conditions impeding timely delivery of the

goods and performance of service, the Supplier shall promptly, notify the Purchaser in writing of the fact of the delay, its likely duration and its

causes(s). As soon as practicable after receipt of the Supplier''s notice, the Purchaser shall evaluate the situation and may at its discretion extend

the period for performance of the contract after mutual discussion with the supplier.

16. Liquidated Damages

16.1. The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be the essence of the contract and delivery

must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however,

deliveries be made after expiry of the contract delivery period, without prior concurrence of the Purchaser, and be accepted by the consignee,

such deliveries will not deprive the Purchaser of his right to recover liquidated damages under Clause 16.2 below. However, when supply is made

within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provision of Clause 16.2 will

not apply.

16.2. Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery the Purchaser shall be

entitled to recover 1/2% of the value of the delayed supply for each week of delay or part thereof subject to maximum of 5% of the value of the

delayed supply; provided that delayed portion of the supply does not in any way hamper the commissioning of the other systems. Where the

delayed portion of the supply materially hampers installation and commissioning of the other systems, L/D charges shall be levied as above on the

total value of the Purchase Order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the

supplier.

13. A plain reading of the above would not suggest that in event of granting or extending time for supplying material by imposing liquidated

damages, the lapse remains condoned. There is nothing to read such condonation of the delay and awarding of contract for the next year. Further,

the attention of this Court is invited to various letters under which time was extended by imposing liquidated damages. These letters also would not

suggest that the respondents acquiesced in the matter and remain bounded to respect to the contract. As the petitioner admittedly failed to make

supplies under Package III and VII within the time stipulated, the respondents informed the petitioner that purchase order for the second year

cannot be placed. The petitioner has no enforceable right to seek the relief as prayed for, under Article 226 of Constitution of India

Clause 20 of the NIT provides for arbitration and reads as under:

20. Arbitration :

20.1 In the event of any question, dispute or difference arising under this agreement or in connection therewith except as to matter the decision of

which is specifically provided under this agreement, the same shall be referred to sole arbitration of the Director General, Department of

Telecommunications or in case his designation is changed or his office is abolished then in such case to the sole arbitration of the officer for the time

being entrusted whether in addition to the functions of the Director General, Department of Telecommunications or by whatever designation such

officers may be called (hereinafter referred to as the said officer) and if the Director General or the said officer is unable or unwilling to act as such

to the sole arbitration or some other person appointed by the Director General or the said officer.

There will be no objection to any such appointment that the arbitrator is Government Servant or that he has to deal with the matter to which the

agreement relates or that in the course of his duties as Government Servant he has expressed views on all or any of the matter under dispute. The

award of the arbitrator shall be final and binding on the parties. In the event of such arbitrator to whom the matter is originally referred, being

transferred or vacating his office or being unable to act for any reasons whatsoever such Director General or the said officer shall appoint another

person to act as arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at

which it was left out by his predecessors.

20.2 The arbitrator may from time to time with the consent of parties enlarge the time for making and publishing the award. Subject to aforesaid

Indian Arbitration Act, 1940 and the Rules made thereunder, any modification thereof for the time being in force shall be deemed to apply to the

arbitration proceeding under this clause.

20.3 The venue of the arbitration proceeding shall be the Office of Director General, Department of Telecommunications at New Delhi or such

other places as the arbitrator may decide.

14. It is the submission of the learned Counsel that as the respondents imposed liquidated damages and extended time for delivery schedule, it is a

decision taken under the agreement and therefore there is no arbitrable dispute. I am afraid I cannot agree with the submission. Whether the

dispute is arbitrable or not is itself a question before the arbitrable Tribunal and this Court cannot decide the matter. (See Food Corporation of

India Vs. Indian Council of Arbitration and Others etc. etc., .) The petitioner could as well invoke the arbitration clause for redressal. Be it noted

that the observations if any made in this judgment are prima facie observations and the arbitrable Tribunal shall have to decide the matter without

being influenced by the observations made hereinabove.

15. The writ petition, for the above reasons, is dismissed subject to the above observations.