
(2014) 12 AP CK 0033

Andhra Pradesh High Court

Case No: Writ Petition No. 25766 of 2014

Rani-Satya Sai

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision: Dec. 10, 2014

Citation: AIR 2015 AP 26 : (2015) 3 ALD 516 : (2015) 4 ALT 623 : (2015) 3 BC 55

Hon'ble Judges: C.V. Nagarjuna Reddy, J

Bench: Single Bench

Advocate: S. Rajan, Advocate for the Appellant

Judgement

@JUDGMENTTAG-ORDER

C.V. Nagarjuna Reddy, J.

This Writ Petition is filed for a mandamus to declare the action of the respondents in coercing the petitioner to furnish a no claim undertaking for closing the contract besides not returning the performance bank guarantee as illegal and arbitrary. The petitioner sought for a consequential direction to the respondents not to coerce it to furnish the no claim undertaking and to direct the respondents to release bank guarantee No. 04821GPER004309, dated 17-11-2009 furnished by the petitioner.

2. I have heard Mr. S. Rajan, learned Counsel for the petitioner and the learned Government Pleader for Irrigation (AP).

3. The petitioner averred that it was entrusted with flood protection work on both sides of Hundri river as well as construction of earth bund at certain places on the right side of Tungabhadra river at Kurnool under contract agreement No. SE/IC/KNL/48/2009-10, dated 17-11-2009. That in view of the land acquisition problems, the respondents have contemplated cement concrete works in place of earthen bunds contemplated in the agreement; that after entrusting the contract work to the petitioner, the respondents have also realized that the designs were prepared by them taking into consideration the flood data as in 2007 without taking into account the floods subsequently occurred in 2009; that for the above reasons

respondent No. 1 has decided to close the contract without payment of any damages to the petitioner; that accordingly respondent No. 1 has issued Memo No. 22749/M&MI-Respondent, dated 25-8-2012 permitting the Chief Engineer, (Projects), Irrigation, Kurnool to close the contracts in respect of packages I and II of Kurnool Flood Protection Works on certain conditions. One of the conditions includes obtaining of undertaking from the contractors that they will not put forth any claim. It is the pleaded case of the petitioner that in view of non-execution of major part of the work on account of the reasons not attributable to the petitioner, the petitioner had to incur wasteful expenditure by remaining at the site and that it is entitled to avail appropriate legal remedies for recovery of the expenditure incurred by it and not paid by the respondents. The petitioner is therefore aggrieved by the action of the respondents in insisting on submitting no claim undertaking as a condition for release of performance bank guarantee furnished by the petitioner on the threat of their encashment.

4. Respondent No. 2 filed a counter affidavit wherein he has disputed the claim of the petitioner that due to the reasons attributable to the respondents, it could not execute the work properly. Respondent No. 2 has alleged that the petitioner has stopped the work abruptly leaving the work to unsafe level. Respondent No. 2 has however averred that after approval of the construction of C.C. walls on Hundri river based on the original estimate prepared with 2007 floods, the Chief Engineer (P), Kurnool in his letter dated 25-5-2010 has requested the Chief Engineer, CDO, Hyderabad to revise the H.Ps. prepared based on 2009 (wrongly mentioned as 2007) flood levels only and that accordingly the approved H.Ps. were got revised by the Chief Engineer, CDO, vide his letter dated 9-8-2011. It is further stated that the State Level Standing Committee in its meeting dated 19-12-2011 opined that the work may be closed without paying any damages to the petitioner and that the revised administrative approval may be obtained from the Government. That the Chief Engineer vide his letter dated 11-1-2012 has communicated the opinion of the State Level Standing Committee and requested for suitable instructions in the matter. The Government in turn has issued Memo No. 22749/M&MI-R.III/A1/2011, dated 24-2-2012 requesting to evaluate each of the alternatives with reference to the conditions of the contract and other work orders and that accordingly vide letter dated 17-5-2012 the following three alternatives were recommended to the Government by the Chief Engineer (P):

- (i) Termination of the contract under Clause 61 of PS to APDSS.
- (ii) To continue the same agency and provide them cost escalation for quantities.
- (iii) Closing the contract duly settling the accounts to invite fresh bids.

5. That in response to the said communication, respondent No. 1 in Memo No. 22749/M&MI-R.III/A1/2011, dated 25-8-2012 has permitted the Chief Engineer to close the contracts subject to the following conditions:

(a) All the dues from the agency must be realized.

(b) To ensure the work done so far is brought to a particular stage, so that it would be useful in carrying further work.

(c) Applicability of Clause 58 of PS to APDSS may be reexamined, as it is applicable within 60 days of entering into agreement.

As otherwise closure of agreement has to be by mutual consent.

(d) Obtaining undertaking from the agency that they will not put forth any claim.

6. It is further averred that the Executive Engineer, P.W. Division, Kurnool in his letter dated 10-9-2012 requested the petitioner to give an undertaking that it will not put forth any claim as directed by the Government and that respondent No. 2 vide his letter dated 24-9-2012 has requested the petitioner to give an undertaking letter for closure of the contract. The counter affidavit further averred that the said insistence was made as a part of the procedure to settle the issue without causing any damage to the agency within the framework of the agreement conditions and in line with the Government Memo dated 25-8-2012.

7. The learned Counsel for the petitioner submitted that the agreement does not envisage execution of no claim undertaking by the petitioner as a condition for return of the performance bank guarantee. He has also further submitted that as the contract was not closed due to any defaults on the part of the petitioner, the respondents have no justification in insisting on execution of no claim undertaking.

8. The learned Government Pleader for Irrigation while stating that the petitioner has executed only 1.60% of the total work, has relied upon Clause 13.6 of the agreement conditions, which reads as under:

The successful Bidder should however pay the EMD calculated @ 2.5% of bid amount at the time of signing the contract in the shape of demand draft or unconditional and irrevocable Bank Guarantee on the standard format enclosed to the Bid schedule valid up to for a total period not less than the stipulated period of the completion of the work in question, plus the defect liability period of 24 months plus 28 days from the completion certificate.

9. There is not much dispute about the fact that due to certain technical problems realized after entering into the agreement, the respondents have decided to close the contract based on the recommendations of the State Level Committee. Though the respondents have sought to deny the claim of the petitioner that due to the holding up of the work for the reasons attributable to the respondents, it has incurred heavy expenditure, this difference between the parties has no relevance for adjudication of this Writ Petition. The fact remains that due to technical problems, the Government has decided to close the contract on certain conditions. One such condition is the execution of undertaking by the petitioner that it will not put forth

any claim against the Government.

10. In a bilateral contract where the parties have mutual obligations to perform, if a party fails to perform such an obligation, the other party is entitled to take action as per the terms of the agreement. Neither the counter affidavit nor the material on record raised any whisper that the decision of respondent No. 1 to close the contract was taken due to the failure of the petitioner to execute the work. The questions whether the petitioner has incurred extra expenditure, and if so, whether the same is reimbursable by the respondents or not, are not germane for consideration at this point of time. However, to prevent any such claim being put forth by the petitioner, the respondents have been insisting that the petitioner shall execute the undertaking that it will not put forth any such claim. Neither the counter affidavit nor the learned Government Pleader is able to throw any light on the power of the respondents to insist on the execution of such undertaking by the petitioner. The unilateral decision of respondent No. 1 incorporating condition (d) in its Memo dated 25-8-2012 directing obtaining of undertaking from the petitioner that it will not put forth any claim does not bind the petitioner as such an unilateral condition is alien to a bilateral contract. Therefore, the freedom of the petitioner to make a claim for recovery of the expenditure, if any, incurred by him and for payment of damages, if any, suffered by him, cannot be curtailed by the respondents in the absence of any clause in the agreement to that effect.

11. Reliance on condition No. 13.6 placed by the learned Government Pleader of the agreement condition, is wholly misconceived, for, the said clause envisages payment of the EMD either through demand draft or by furnishing unconditional and irrevocable bank guarantee on the standard format enclosed for a period of not less than the stipulated period of the work in question, plus the defect liability of 24 months plus 28 days from the date of completion certificate. As respondent No. 1 itself has closed the contract, there is no obligation on the petitioner to keep the bank guarantee furnished by him alive for the period which is envisaged in the said clause. In the context of the dispute raised by the petitioner, namely, whether it is liability to execute no claim undertaking, this clause has no relevance whatsoever.

12. From the discussion undertaken above, it is clear that the contract was not terminated on account of any default on the part of the petitioner but the same was closed by the respondents on their own volition. Therefore, I am of the considered opinion that the respondents are not justified in insisting on execution of no claim undertaking by the petitioner and withholding the performance bank guarantee furnished by the petitioner on the ground of non-execution of the said undertaking. Whether the petitioners proposed claim against the respondents is sustainable or not, needs to be adjudicated in appropriate proceedings in the event such dispute is raised by the petitioner.

13. On the analysis as above, the Writ Petition is allowed by declaring that the petitioner is not liable to furnish no claim undertaking to the respondents. The

respondents are directed to forthwith release bank guarantee No. 04821GPER004309, dated 17-11-2009 to the petitioner.

14. As a sequel to the disposal of the Writ Petition, WPMP No. 32200 of 2014 and WVMP No. 2894 of 2014 are disposed of as infructuous.