

(1993) 07 CAL CK 0017
In the Calcutta High Court
Case No : Matter of 1993

Abuzar M Hakimuddin and Another	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 28-07-1993

Acts Referred:

Arbitration Act, 1940 — Section 2
Constitution of India, 1950 — Article 14, 226, 299

Citation : (1994) 1 CALLT 138

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : S.D. Banerjee, Debal Banerjee, Debashish Kundu, R.K. Chowdhury and A.K. Chowdhury, for the Appellant; B. Debnath, for the Respondent

Judgement

Shyamal Kumar Sen, J.—The facts leading to this writ petition inter alia are that the writ petitioner firm participated in various tenders floated by Eastern Railway and quoted most reasonable prices for various types of stores and materials. Various tenders of the petitioners were accepted by the Railway and accordingly Railway placed diverse purchase orders, from time to time, on the writ petitioner firm at contracted rates.

2. Pursuant to and in terms of the purchase orders placed by Eastern Railway the petitioner sold and delivered huge stores and materials, on diverse dates at the contracted price. The Respondent duly received, inspected, approved and accepted the said stores and materials without raising any disputes or differences whatsoever. The Bills raised and submitted by the petitioner were duly received and accepted by the respondents. It will be evident therefore that the petitioner had charged only the contracted rates and that the bills were duly being received by the respondents. There is not a single letter from the respondents raising any dispute or difference in connection with the said bills or any other bills of the petitioner firm.

3. The terms and conditions incorporated in the purchase orders provides for

payment of bill within 10 days from the date of submission thereof subject to a rebate of Rs. 25/- each bill being allowed. The petitioner accordingly gave a rebate of Rs. 25/- in each bill and became entitled to receive payment within 10 days from the respective dates of bills. Such terms and conditions for payment within 10 days have not been disputed by the respondents in any manner whatsoever.

4. The respondent Eastern Railway failed and neglected to make payment of the bills of the petitioner either within the stipulated period of 10 days or any time thereafter till date. In the premises by January 1991 an aggregate sum of Rs. 26,11,361.20 became outstanding and due and payable by Eastern Railway to the petitioner firm particulars whereof have been mentioned in the writ petition.

5. The respondent Railway authorities have not denied or disputed the aforesaid particulars of bills in affidavit in opposition or otherwise.

6. In spite of repeated demands requests and reminders the respondents maintained a complete silence and for the first time the respondents in their letter dated 22/24 September, 1992 informed Mr. Sultan Ahmed in connection with the non-payment of the said dues of the petitioner firm that the matter is being examined. However, by another letter dated October 29, 1990 addressed to Shri Sultan Ahmed the respondents informed that the investigation by C.B.I, against the petitioner firm is going on and under the circumstances final decision would have to await the outcome of the C.B.I. investigation.

7. It has been contended on behalf of the petitioner that although originally in F.I.R. the address of the petitioner No. 2 was shown as 30, Strand Road, Calcutta but C.B.I, amended the same. The General Manager of Eastern Railway also in writing dated 10th September, 1992 confirmed the same besides certifying that the petitioner No. 2 featured under C.B.I, investigation. In this connection, I may take note of the letter dated 10th September, 1992 issued by the General Manager which has been annexed to the writ petition.

8. The allegations made against the petitioner firm before the C.B.I. were to the effect that certain requisitioning officers of the respondents in connivance with the petitioner firm purchased equipments beyond the actual requirement and that to at exorbitant price causing loss to the Railway. On the basis of the aforesaid allegation the Central Bureau of Investigation registered First Information Report and also started a case inter alia against the petitioner firm being No. RC. 13(A)/90 before the Learned Court of Special Judge, C.B.I., Patna.

9. The C.B.I, investigated the whole matter and found that officers of the Railway were not connected with the petitioner firm. It was also found by C.B.I, that no evidence was found during investigation to suggest that the rates charged by the petitioner firm were exorbitant.

10. On the basis of the report submitted by C.B.I. the Learned Court of Special Judge, C.B.I., Patna had been pleased to drop the said case No. 13(A)/90-Patna

as against the petitioner firm as well as the Officers of the respondents.

11. The C.B.I, investigation was over by 3rd June, 1992 but the respondents went on contending that the C.B.I, investigation is still pending finalisation and also wrote a letter to the said effect on 10th September, 1992. The respondents in fact avoided their obligation to make payments, of the admitted dues of petitioners on false or frivolous grounds.

12. It is the contention of the respondents however in the affidavit affirmed on 22nd March 1993 being the affidavit in opposition filed in this proceedings that writ petitioner firm has charged exorbitant rates and that the respondents are entitled to credit, in spite of the fact that the C.B.I., on investigation, has found that the petitioner firm has not charged any exorbitant rates.

13. The respondents have also alleged that the respondents had nothing to do with the investigation made by the Central Bureau of Investigation.

14. It has also been alleged on behalf of the respondents that the Railways have other claims in respect of supply made by the petitioner and that the claims of the Railways against the second writ petitioner will far exceed the claim made in the petition. It has also been submitted on behalf of the respondent that IRS conditions formed part of the said purchase orders contained an Arbitration Clause which covers the claim of writ petitioner and the counter claims of the Railways. It has further been submitted on behalf of the respondent that in view of the Arbitration Agreement between the parties the writ petitioners are not entitled to proceed with the instant writ petition.

15. I have considered the respective submissions of the parties and the decisions cited from the Bar. It appears that the respondent for the first time in their affidavit in opposition took the plea that the bills raised by the petitioner were accepted. Such allegation is devoid of any particulars and has been made for the purpose of raising false and frivolous disputes, if possible.

16. In the case of Parameswarilall Puroshottamlall and Another Vs. Food Corporation of India and Others, taking into consideration several decisions of the Supreme Court, I have held that in case of contractual obligations, the Writ Court is entitled to interfere if the Government authority acts in an unreasonable or arbitrary manner. In this connection, reference may also be made to the judgment and decision in the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, In the aforesaid decision, the Supreme Court held that the State actions in contractual matter can also be reviewed. The Supreme Court in the aforesaid decision further observed the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo" such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is; not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the

professed ideals in the Preamble. Exclusion of Article 14 in contractual matters is not permissible in constitutional scheme. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, it can be said that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. Therefore it would be difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14. Thus the wide sweep of Article 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power irrespective of the precise nature of appointment of the Government Counsel in the districts and the other rights, contractual or statutory, which the appointees may have *Dwarkanadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, and *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, *Foil*.

17. In paragraph 31 of the said judgment at page 552 of the said report the Supreme Court observed as follows :-

"It is this aspect which has been considered at length by Sabyasachi Mukharji, J. (as the learned Chief Justice then was) in *Dwarkanadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, even though, that was a case of statutory exemption granted under the Rent Act to an instrumentality of the State and it was in that context that the exercise of power to terminate the contractual tenancy was examined. All the same, without going into the question whether the obligation of the instrumentality to act in pursuance of public purpose, was a public law purpose or private law purpose, it was held that the obligation to act in pursuance of public purpose was alone sufficient to attract Article 14. It was held that there was an implied obligation in respect of the dealings with the tenants/occupants of the authority to act in public interest/purpose. It was emphasised that every State action has to be for a public purpose and must promote public benefit. Referring to some earlier decisions, it was; reiterated that all State actions "whatever their mien" are amenable to constitutional limitations, the alternative being to permit them "to flourish as an imperium in imperio." It was pointed out! that "governmental policy would: be invalid as lacking in public interest unreasonable or contrary to the professed standards," if it suffers from this vice. It was stated that every State action must be reasonable and in public interest and an infraction of that duty is amenable to judicial review. The extent of permissible judicial review was indicated by saying that "actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose." It is sufficient to quote from the judgment of Mukharji, J. (as the Learned Chief Justice then was) the following extract (at page 1648 of AIR) :

"....Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14....." (Emphasis; supplied), Here printed in italics.

18. This decision clearly shows that no doubt was entertained about the applicability of Article 14 of the Constitution to an action of the State or its instrumentality, even where the action was taken under the terms of a contract of tenancy which alone applied by virtue of the exemption granted under the Rent Act excluding the applicability of the provisions thereof.

19. The Supreme Court also observed of paragraph 32 of the said judgment at page 553 as follows :-

"In another recent decision in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, it was held that Article 14 was attracted even where the aggrieved person did not have the benefit of either a contractual or a statutory right. The grievance in that case was made by a person who was not a dealer of the Indian Oil Corporation but merely claimed to have been treated as, one by a long course of conduct. It was held by the Learned Chief Justice that the impugned act of the Indian Oil Corporation was an administrative decision and could be impeached on the ground that it was arbitrary or violative of Article 14 of the Constitution. It was emphasised that the Indian Oil Corporation being an instrumentality of the State was bound to act fairly; and that "fairness in such actions should be perceptible, if not transparent. If Article 14 was applied even without the benefit of a contract of dealership, the position cannot be worse with the added benefit of a contract. With respect, we concur with the view about the impact of Article 14 of the Constitution on every State action as indicated by the learned Chief Justice in these two recent decisions."

20. It is well settled that a matter can only be referred to arbitration in respect of a dispute raised by the parties. In the instant case, no dispute has been raised by the Railway authorities with regard to the claim of the petitioner prior to the filing of the writ petition and under such circumstances respondent is estopped from contending that the dispute should be referred to arbitration in terms of the arbitration clause.

21. In this connection, the judgment and decision in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, and Surendra Prasad Misra Vs. Oil and Natural Gas Commission, relied upon by the learned Advocate for the petitioner may be taken note of. In the case of Surendra Prasad Mishra v. Oil & Natural Gas Commission reported in 1987 Calcutta, Page 1 it was held by U.C. Banerjee (J) of this Court, the Writ Court would be within its jurisdiction to enforce the equity as found to be existing and can compel the Government or the Governmental agency to perform its part of the bargain. If an Act of the Govt. or the Governmental agency is apparently not

in accordance with the rule of law, equity and fair play it would be a plain exercise of judicial power for the Writ Court to intervene.

22. When there is; manifest injustice and after coming to a finding that equity exists in the favour of the petitioner, the Writ Court can mould the relief in order to do justice between the parties. The concept of justice cannot be restricted on to a strait jacket formula, but is very wide and the law Courts exist to do justice and came in aid of a person who seeks justice against an administrative caprice and its ipse dixit.

23. The Supreme Court while dealing with the powers of the High Court under Article 226 observed inter alia in paragraph 73 of the said judgment in the case of Gujarat Steel Tubes Ltd., etc. v. Gujarat Steel Tubes Mazdoor Sabha and Ors. (supra) at page 1916 as follows :-

"While the remedy under Article 226 is extraordinary and is of Anglo Saxon Vintage, it is not a carbon copy English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy held back the Court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service of the lowly numbers in their grievances if the subject belongs; to the Court's province and the remedy is appropriate to the judicial process. There is a native hue about Article 226 without being anglophilic or anglophobic in attitude. Viewed from this jurisprudential perspective, we have to be cautious both in not over-stepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in."

24. In the case of Hindustan Sugar Mills v. The State of Rajasthan and Ors., reported in AIR 1981 SC 1981 it was held that the Central Government should honour its legal obligation arising out of contract and not drive the citizen concerned to file a suit for recovery of the amount. In a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen, and the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness and justice demand.

25. It is well-settled as I have already indicated that the writ Court is entitled to interfere in contractual obligation where the State action appears to be arbitrary. In my view the Railways have without any reason withheld payment and they should refund the amount to the petitioner with interest. The Supreme Court in several decisions passed such direction for payment of interest.

26. It has been alleged that the Railway authorities charged interest at the rate of 24% in commercial transaction. I, am not, however, inclined to grant interest at such high rate. In my view, the petitioner will be entitled to interest at the rate of 11%.

27. Accordingly, the petitioner is entitled to succeed in this writ petition. There will be direction upon the respondent Railways to pay Rs. 26,31,361.20p. together with interest at the rate of 11% from the respective two dates of the bills within 30th September, 1993.

The writ petition is accordingly disposed of. There will be no order as to costs.

All parties are to act on the signed copy of the operative portion of the judgment on usual undertaking.