

(2007) 11 GAU CK 0002
In the Gauhati High Court

A.S. Silas and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 15-11-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 2 GLT 398

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—All the aforesaid eight writ petitions are being disposed of by this common judgment and order since a common question of law based on identical facts is involved. The question of law is that whether the writ petition under Article 226 of the Constitution of India is maintainable for non-payment of admitted dues by the Government.

2. I have heard Shri M.Devananda, learned Counsel for the writ petitioners at length. The respondents were represented by Mr.A.Modhuchandra, learned Addl.Govt. Advocate, Mr. Y. Ashang, learned State Govt. Counsel and Mr. N. Ibotombi, learned Counsel.

3. Since the writ petitions are being decided on the question of maintainability, I do not deem it necessary to narrate the facts of each and every case in detail. In a nutshell, the writ petitioners were awarded different kinds of contract by the respondents. There is also no dispute that the writ petitioners have executed the works as per the contract orders. It is the case of some of the writ petitioners that despite expiry of contractual period for the maintenance of the roads, etc, the respondents have not released their security money. In other sets of writ petitions, it has been averred that despite there being no dispute or controversy about the successful execution of the contract works as well as the amounts of bills, the respondents are not releasing their dues. Hence, the writ petitions have

been filed primarily seeking a writ in the nature of Mandamus to direct the respondents to pay the admitted dues. According to Shri A. Madhuchandra, learned Addl. Govt. Advocate, in some of the writ petitions, there is dispute regarding amount of bills. However, I am proceeding to dispose of the writ petitions assuming that the dues are undisputed.

4. Identical question about the maintainability of writ petitions for non-payment of contract amounts came up for consideration before the Hon"ble Gauhati High Court and as many as four judgments by different Division Benches were placed before me. The judgments have been rendered in the case of State of Manipur v. Moirangthem Chaoba Singh and Ors. 2006 (1) J. Deep Chemicals and Fertilizers Vs. State of Tripura and Others, ; Principal Secretary to the Government of Nagaland Vs. Dimapur Contractors and Suppliers Union and Another, and Shri P. Jibon Singh v. State of Manipur and Ors. (Disposed of on 30.8.2007).

5. Now, the only question before me is whether any of the aforesaid four judgments have finally decided the question whether writ will be maintainable in the situation of undisputed liability of the State, arising out of concluded contracts. I make it clear that it is a settled proposition of law that no subordinate court or for that matter, a Bench of Single Judge has no authority to review the law laid down by a Division Bench of the High Court.... Not only this, in the interest of judicial discipline, co-ordinate Benches of a High Court should not ordinarily differ from the law laid down by co-ordinate Bench unless a judgment is per incuriam. However, if any necessity is felt, the subsequent Bench should refer the matter to a larger Bench Government of West Bengal Vs. Tarun K. Roy and Others, followed].

6. Shri M. Devananda, learned Counsel for the writ petitioners submitted that except in the case of J. Deep Chemicals (supra), other judgments have not clearly held that writ petitions will not be maintainable even if there is no dispute about the amounts payable to the writ petitioners. In other words, it was the contention of the learned Counsel for the petitioners that in the aforesaid judgment, a law has been clearly laid down in favour of maintainability of the writ petitions. Besides this judgment, the learned Counsel also referred few more judgments from the Hon"ble Supreme Court rendered in the case of the Union of India and Ors. v. M/s Anglo Afghan Agencies etc. AIR 1968 SC 718; Radhakrishna Agarwal and Others Vs. State of Bihar and Others, ; ABL International Ltd. v. Exports Credit Guarantee Corporation of India Ltd. 2004 4 SCC 553 and Nobel Resources Ltd. v. State of Orissa (2006) 10 SCC 7

. On the other hand, learned Counsel for the respondents relied upon the remaining three judgments of this Court delivered by different Benches of this Court. In addition to that, the judgments of Hon"ble Supreme Court rendered in the case of State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, and also Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, were also pressed into service.

8. It is true that in the case of J. Deep Chemicals (supra) this Court has held that writ petitions arising out of the concluded contracts and that too for undisputed dues is maintainable despite there being arbitration clause in a contract agreement. However, in this judgment, the ratio of law laid down by another Division Bench in the case of Moirangthem Chaoba Singh (supra), has not been reflected. The case of Moirangthem Chaoba Singh (supra) was decided in the month of December 2005 and it was also reported in a local journal in the month of January 2006. Despite that, the judgment of Moirangthem Chaoba Singh (supra) was not brought to the notice of the subsequent Bench.

9. In the case of Moirangthem Chaoba Singh (supra), this Court has discussed the distinction between Public Law and Private Law while deciding the legal question about the maintainability of the writ petitions arising out concluded non-statutory contracts. The answer to the question has been given in the negative in the following words:

25. It is thus clear that the parties having voluntarily entered into a non-statutory contract and having agreed to settle disputes, if any arising between them by arbitration cannot have recourse to any other remedy without invoking the remedy by way of arbitration. Public law remedy is not available in such a situation even if one of the parties to the contract is State or its instrumentality. In our considered opinion ABL International Ltd. v. Export Credit Guarantee Corporation of India and Ors. (supra) in no manner supports the contention of the respondent-writ petitioners that in contractual matters remedy under Article 226 of the Constitution of India is always available even if the contract itself provides a mode for settlement of dispute arising from out of the contract.

The submission made by the learned Counsel for the Respondent-writ petitioners that the contracts entered into by them are statutory in nature needs a mention only for its rejection. Every contract or agreement entered by the State or its departments is not a statutory contract. Statutory contracts are those whose terms and conditions are regulated by the Statute itself. The commercial contracts entered into by the Respondent-Writ petitioners with the State or its departments are ordinary contracts where the terms and conditions are regulated by the covenants. Such terms and conditions and the covenants are not traceable to any statute or statutory instruments. The submission made in this regard is totally devoid of any merit. It is accordingly rejected.

26. For the aforesaid reasons, we hold that a writ of mandamus does not issue for enforcement of private rights, nor is it available for obtaining interim relief till cross-claims between the parties are determined in arbitration where-from such a provision is made in the contract itself. It is axiomatic that relations between the parties in concluded non-statutory contract are governed by the terms and conditions thereof; and rights and obligations of parties inter se are required to be decided elsewhere. The relations are purely contractual and rights and obligations are governed only by the contract. A writ does not lie for enforcement of contractual rights. This position is clear from long line of authorities some of

which are referred to hereinabove. We do not propose to burden this judgment with other authorities or pronouncement and we have referred to the most relevant judgment from out of the catena of decisions.

10. There was no dispute at the Bar that the case of Moirangthem Chaoba Singh (supra) also stemmed out of same nature of contract agreements, which have been executed by the present set of writ petitioners.

11. The aforesaid judgment of Moirangthem Chaoba Singh (supra) was again considered in the case of Dimapur Contractors & Suppliers Union (supra). In this case also, the ratio of law laid down in the case of Moirangthem Chaoba Singh (supra) has been followed albeit keeping a narrow space for entertaining the writ petitions. In this case, their Lordships had no confusion in their minds that ordinarily writ petition should not be entertained for disputes arising out of the concluded contract. However, analyzing a gamut of judicial decisions of the Hon'ble Apex Court, their Lordships have taken a view that there cannot be absolute bar for entertaining writ applications. The relevant observations made in the aforesaid case can be fruitfully reproduced below for ready reference:

73. From the above observations made in ABL International Ltd. (supra), it becomes abundantly clear that there is no absolute bar in entertaining a writ application, under Article 226, if the writ petitioner aims at enforcing contractual obligation of the State to make payment of its unpaid dues to the writ petitioner, though it will depend, we must hasten to point out, on the cumulative effect of all the facts of a given case as to whether the High Court will or will not entertain such a writ petition and pass directions for payment of dues.

12. The last decision rendered by this Court at Imphal Bench has ruled out the scope of maintainability of writ petitions arising out of concluded contracts. In this case, i.e. Shri P. Jibon Singh (supra), I myself was a party to the judgment of the Division Bench and as such, I cannot take a different view while sitting in a Single Bench. Despite this fact, I have been called upon to give a re-look at all the judgments and find out whether any of the aforesaid judgment fits in the present situation.

13. Admittedly, there is an arbitration clause in the contract agreement. According to the learned Counsel for the petitioners, the arbitration clause has been included in the agreement for limited purpose to decide disputes relating to specifications, designs, drawing, etc and not for the purpose of adjudicating claims of undisputed amounts. To ascertain if the aforesaid submissions are based on the arbitration clause, it is necessary to look at the relevant portion of Clause 25 of the conditions of contract, which reads as below:

Clause 25: Except where otherwise provided in the contract all question and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned as to the quality of workmanship or materials used on the work or any other question, claim, right matter or thing, whatsoever, in any way arising out of or relating to the contract....

(Emphasis mine)

14. A minute reading of Clause 25 does not indicate that it was confined to the dispute relating to design, drawing, etc. only. The words "any other question, claim" etc. sufficiently indicate that any other dispute arising out of the contract, including the claim for payment of undisputed amount is also referable to Arbitrator. It is true that neither the contract agreement nor the arbitration law has defined "dispute". As per the dictionary meaning, if there is a disagreement between two people, it will be termed as a dispute. Hence, I find no difficulty to hold that the non-payment of contractual amount be it disputed or undisputed, would also amount to a dispute. Even otherwise, the language of Clause 25 is very elastic and no restricted interpretation of Clause 25 can be given. In my considered opinion, special law viz., the Arbitration and Conciliation Act, 1996 has been enacted keeping in mind the mandates of international covenants, replacing the Arbitration Act, 1940. In my view, the very object of enacting Arbitration Act is to create an alternative disputes resolution forum for expeditious disposal of national and international trade disputes. Hence, a High Court cannot be oblivious to the objects, purpose and policy behind the creation of special law, while entertaining writ applications.

15. After going through the four judgments of this Court, rendered by different Division Benches, it appears to me that the majority view is that ordinarily writ petitions should not be entertained provided there is efficacious alternative remedy for the writ petitioners. In all the eight writ petitions before me, the petitioners have not whispered as to how they are not likely to get adequate relief in the traditional Civil Courts so as to create an exception for entertaining the writ petitions.

16. Shri Devananda, learned Counsel for the petitioners submitted that there is no bar in admitting and granting the relief invoking extraordinary jurisdiction of the court conferred under Article 226 of the Constitution of India. In support of this submission, learned Counsel placed reliance upon the judgment of Hon'ble Apex Court given in the case of Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another, . In this case, the Hon'ble Supreme Court observed that the High Court ought to have entertained the writ petition since the petitioner had fulfilled the requisite criteria for the same, like action of the respondents being illegal and without jurisdiction, violation of principles of natural justice and fundamental rights. However, in the case before me, no such allegations of violation of fundamental rights or acting without jurisdiction, etc have been leveled. A vague allegation of discrimination has been made stating that few similarly situated contractors have been paid their dues, ignoring the claims of the petitioners. However, no specific instance of any such discrimination was placed before me.

17. In the case of State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr. reported in (2005) 6 SCC 499, the Hon'ble Supreme Court has observed that issuance of various kinds of writs under Article 226 of the Constitution of India is

absolutely discretionary and High Courts may decline to use the discretion if it is satisfied that the aggrieved party has suitable alternative forum to get the needed relief. I would be wise to reproduce the apt observations of the Hon'ble Apex Court for easy reference, which are as below:

18. The Constitution Benches of this Court in *K.S. Rashid and Son v. Income Tax Investigation Commission*; *Sangram Singh v. Election Tribunal, Kotah, Union of India v. T.R. Varma*; *State of U.P v. Mohd. Nooh and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras* held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

19. Another Constitution Bench of this Court in *State of M.P. v. Bhailal Bhai* held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article-226 of the Constitution is a discretionary power. *Simi. lar* view has been reiterated in *N.T. Veluswami Thevar v. G Raja Nainar*; *Municipal Council, Khurai v. Kamal Kumar*; *Siliguri Municipality v. Amalendu Das*, *S.T. Muthusami v. K.Natarajan*; *Rajasthan S.R.T.C. v. Krishna Kant*, *Kerala SEB v. Kurien E. Kalathil*; *A. Veenkatasubbiah Naidu v. S. Chellappan*; *L.L. Sudhakar Reddy v. State of A.P.*; *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra*; *Pratap Singh v. State of Haryana and GKN Driveshafts (India) Ltd. v. ITO*.

18. Most of the judgments of the Hon'ble Apex Court cited before me by learned Counsel for both the sides have been discussed in the Division Bench judgment of this Court. Hence, I need not repeat the same. The crux of the authorities is that a distinction has to be made whether the actions or omissions of the State fall within the realm of Public Law or Private Law. Also, it has to be seen whether the writ petitioners are not likely to get adequate relief under private law. Besides this, the writ petitioners should also make out a case of violation of fundamental rights, to invoke Article 226. However, in the case before me, the dispute is confined to few individuals and public at large is not at all involved. Just because, contracts have been awarded by State departments, it would not be sufficient to hold that the petitioners are entitled to public law remedy.

19. I agree with the learned Counsel for the petitioners that this Court cannot remain mute and sit with folded hands if the State acts with impunity with the principles of fair play, equality before law, etc. However, as noted earlier, the petitioners have failed to make out a strong case of discrimination.

20. For the reasons alluded hereinabove, I hold that these writ petitions are not maintainable. Consequently, all the writ petitions stand dismissed.