

(2014) 09 MP CK 0146

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10478 of 2013

B.S.N. Joshiand Sons Ltd.

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 15-09-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2014) 09 MP CK 0146

Hon'ble Judges : Alok Aradhe, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Amit Khare, learned counsel, Advocate for the Appellant; R.N. Singh and A.S. Hussain, learned counsels, Advocate for the Respondent

Judgement

1. Heard counsel for the parties.

2. The reliefs claimed in this petition are as follows :-

"(i) Direct the respondents to release the bills in favour of the petitioner as admitted by them in the note-sheets (Annexure P/11) and communication dated 07.05.2013 (Annexure P/10) and as submitted by the petitioner for the months from May, 2002 to 23rd January, 2003 along with interest @ 15% p.a.

(ii) Direct the respondents to refund the security deposit to the tune of Rs.53,40,707.00/- along with the interest @ 12% p.a. from 05.02.2005 till the date of realisation.

(iii) Hold and declare that the inaction on the part of the respondents in releasing the payments and further releasing the payments in favour of the petitioner to the extent bill amounts pending for the period May, 2002 to 23rd January, 2003 and also not allowing them to participate in subsequent bids of similar work is a high handed, unilateral, arbitrary and malafide act on their part and declare the same to be illegal and bad.

(iv) Direct the respondents to permit the petitioner to participate in the

subsequent tender proceedings initiated by the respondents.

(v) Saddle cost of this petition on the respondents.

(vi) To call for the entire record if any pertaining to the case for the petitioners for kind perusal.

(vii) To grant any other relief deemed fit in the facts and circumstances of the case."

3. The petition is founded on the assertion that the respondent No.2 has admitted its liability to pay the said amount to the petitioner towards liasoning work undertaken by the petitioner on behalf of the respondent No.2. For that, the petitioner has relied on the documents Annexure P-11 and P-13. In response to the writ petition, the respondent No.2 filed reply-affidavit of Executive Engineer (Services)- II, Satpura T.P.S. MPPGCL, Sarni, Distt. Betul dated 07.11.2014. In paragraph 15 of the reply-affidavit the stand taken on behalf of respondent No.2 reads thus :-

"15. It is incorrect to say that the respondents are estopped to deny alleged dues of the petitioner. It is submitted that the dues alleged were already barred by limitation and the petitioner cannot be permitted to enliven the same and it cannot be recovered. The petitioner did not initiate proceedings in writ for recovery of the alleged dues, but failed now in this third round of litigation has filed this writ petition to recover the amount before Hon"ble Court. The High Court under the facts and circumstances of case shall be very slow in allowing barred by limitation claim. The claim of May, 2002 to Jan 2003 cannot be permitted to be raised in 2013 after the period of 10 years.

It is submitted that the authorities who are alleged to have written the notes had no authority to acknowledge the payment of the bills they made recommendation on the basis of misrepresentation made by petitioner that the judgment directs to make payment of petitioner's due and failure to do so tantamount to contempt.

That the said letter dated 07.05.2013 has been issued by the Senior Account Officer on the basis of misconceived notes and complete misunderstanding and on misrepresentation of petitioner of the judgment of the district judge. Such a communication does not give any right to the petitioner to claim the amount which had already become barred as early as in January 2006 itself and was already rejected in the judgment dated 5.08.2004 in W.P.No.2910 of 2004 passed by the Hon"ble High Court.

That the petitioner cannot be permitted to claim the amount on the basis of aforesaid letters Annexure- P/10 and the office notes Annexure-P/11."

(emphasis supplied)

4. No doubt during the pendency of this petition some interim directions have been issued, but the fact remains that the respondent No.2 on affidavit has

disputed its liability and has gone on record to assert that the documents on which reliance is placed by the petitioner have been issued by the concerned employee of the respondent No.2 who had no authority to do so and because of the misrepresentation made by the petitioner that the judgment of the District Court directs the respondent No.2 to make payment of the amount referred to in the writ petition, as amount is liable to be paid to the petitioner, failing which it will be a case of having committed contempt of Court.

5. During the course of argument on 11.08.2014, it was contended on behalf of respondent No.2 that the act of commission and omission of the concerned employee of the respondent No.2 was nothing short of fraud committed on the respondent No.2. In the light of that submission, the Court directed the Managing Director of the respondent No.2 to clearly state on affidavit the stand of respondent No.2 and also whether the company has already initiated any action against the concerned officer who was party to the conspiracy, at the stage of proceedings referred to in the writ petition.

6. In response, the Managing Director has filed reply- affidavit dated 15.09.2014. Copy whereof has been served on the counsel for the petitioner only today at 2:30 PM. Counsel for the petitioner prays for time to respond to the said reply-affidavit.

7. After having considered the rival contentions, in our opinion, the factual aspect mentioned in the affidavit of the Managing Director is only an incidental issue and need not detain us from considering the matter for admission. For, the core question to be answered in the present writ petition is whether the remedy resorted to by the petitioner under Article 226 of the Constitution of India for recovery of the outstanding dues can be permitted to be taken forward, if the respondent No.2 were to dispute the liability or the claim put forth by the petitioner. Indeed, on indisputable facts it may be possible for this Court to issue writ of mandamus to the respondent No.2 being the State within the meaning of Article 12 of the Constitution. However, as aforesaid, in the reply-affidavit filed by respondent No.2 on 07.11.2013 in particular paragraph 15, it has been clearly averred that the claim of the petitioner was time barred and the employee of the respondent No.2 was not authorised to send such reply and that it was the product of misrepresentation by the petitioner. As a result of which, the disputed documents have been issued under the signature of the employee of the respondent No.2. The fact that the amount became payable in the year 2003 is not disputed. In that sense, the respondent no.2 is entitled to pursue its defence that the claim of the petitioner has become time barred and more so for the nature of the stand taken by respondent No.2 in paragraph 15 of the reply-affidavit, the inevitable conclusion is that the claim of the petitioner, is a disputed one and for which reason, question of issuing writ of mandamus, on such claim does not arise. The petitioner should instead be relegated to the remedy of suit for recovery of amount, if so advised. In those proceedings, it would be open for respondent No.2 to take the defence which has been taken in the present writ

petition and to substantiate the same.

8. In our opinion, after deep consideration of the matter, it is appropriate to dispose of this petition with liberty to the petitioner to pursue remedy of suit for recovery of amount, if so advised.

9. We may place on record the submission of the petitioner, advanced through counsel, across the Bar, that the claim of the petitioner atleast for a period of five months between May 2002 to 23rd January, 2003 is an admitted claim. As aforesaid, even this aspect will have to be decided in the proposed proceedings which will be substantive proceedings for recovery of the outstanding dues. We express no opinion in that behalf.

10. We once again make it clear that the observation in this petition may not be construed as any opinion either way on the merits of the controversy or for that matter on the issue of petitioner's claim being barred by limitation. That will have to be decided by the appropriate Court in the proposed proceedings.

11. Counsel for respondent no.2 submits that since the writ petition is disposed of, the respondent no.2 be permitted to withdraw the amount deposited pursuant to the order dated 25.11.2013. In response, counsel for the petitioner submits that the amount be retained in this Court for a period of 30 days to enable the petitioner to file substantive proceedings by way of civil suit and to seek direction from the concerned Court against the respondent No.2 for deposit of the said amount by the respondent No.2 in the said proceedings. This submission commends to us. At the same time, the question whether such direction can be issued to the respondent No.2 will have to be decided by the concerned Court on its own merits.

12. We, however, direct the Registrar to retain the amount for a period of 30 days from today. If no order is produced by the petitioner within 30 days from today passed by the appropriate Court, it will be open to the respondent No.2 to apply for withdrawal of the amount on which application appropriate order can be passed.

13. If interim application is filed by the petitioner in the proposed suit, we have no manner of doubt that suitable orders will be passed on that application expeditiously preferably before the expiry of 30 days as mentioned hitherto. If the petitioner succeeds in persuading the Civil Court to direct the respondent no.2 to deposit any amount, in that event the amount lying in this Court can be transferred to the suit account commensurate with the amount mentioned in the order passed by the Civil Court and the surplus, if any, can be withdrawn by the respondent No.2.

14. Cc as per rules.