
(1990) 04 CAL CK 0011
In the Calcutta High Court

D.M. Enterprises	Vs	APPELLANT
Coal India Ltd.		RESPONDENT

Date of Decision : 20-04-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 23

Citation : 95 CWN 173 : (1993) 2 ILR (Cal) 539

Hon'ble Judges : Kalyanoy Ganguli, J

Bench : Single Bench

Advocate : Ashok Kumar Sen, Somenath Chatterjee, Rabindra Nath Dutta, Samir Kumar Ghosh and Dinabandhu Daw, for the Appellant; N.N. Gooptu, General, Tarun Ray and Kalyan Kumar Bandopadhyay, for the Respondent

Final Decision : Dismissed

Judgement

Kalyanmoy Ganguli, J.

1 The subject-matter of challenge in the instant application under Article 226 of the Constitution of India is a telex message which is Annex. "2" to the petition whereby supplies of coal by road to the Petitioner was kept in abeyance till further advice.

2. The matter was very hotly contested by the parties and numerous decisions were cited at the Bar although the subject-matter of the points in issue does not necessitate the discussion of the plethora of cases cited at the Bar.

3. The short facts leading to the case are as follow:

Pursuant to an advertisement made by Coal India Ltd. in the year 1986 for installation of a stockyard at Barasat, 24-Parganas (North), the Petitioners were ultimately appointed as the transport contractors-cum-dump operators for Coal India Ltd. in respect of the stockyard at Barasat, 24-Parganas (North) (hereinafter referred to as the stockyard) on and from January 1, 1987. A formal contract was entered into between the parties and Clause 16 of the terms and

conditions of the said formal contract provides that any dispute or difference arising out of or in any way touching or concerning the contract shall be referred to the sole arbitrator to be nominated by the Chief of Marketing, Coal India Ltd., Calcutta. In terms of the said contract, the Petitioner No. 1 was required to transport coal from Raniganj Colliery to its Barasat stockyard both by road and by Rail, and the Petitioner No. 1 was to keep custody of the stock at the stockyard as also to load coal to the individual customers as per directions of the Regional Sales Manager of the Respondent No. 1. The coal stock at the stockyard however remained the absolute property of the Respondent No. 1 at all material times. It may further be mentioned that the tender documents culminating in the contract, inter alia, provided that the Respondent No. 1 reserved the right of cancel/terminate, reduce the period of contract by giving two months' notice without assigning reasons whatsoever and at its absolute discretion. In the tender document the Respondent No. 1 further reserved the right to recover amounts from the tenderer towards any shortage of coal/coke as may be found at the time to termination/cancellation and/or expiry of the tenure of the contract and for ascertaining such shortage the Respondent No. 1 could take measurement of the stock at the stockyard upon giving intimation to the tenderer in advance. It was further stated in the tender documents that the tender papers were not decisive to cover all aspects/related factors/related loss regulating the work and tenderer must ascertain those himself before submission of the tender. It was further provided in the tender documents that during transit the coal/coke both by Rail or by road would continue to be the property of the Respondent No. 1 and any shortage in such transit would be the responsibility of the tenderer and the same would be recovered from the tenderer's bill etc. It would further appear both from the tender document and the contract that the Respondent No. 1 did not guarantee or assure the tenderer of any minimum movement to the stockyard or any minimum volume of sale from the stockyard and the tenderer shall have no claim for compensation in the regard.

4. The main thrust of the argument of the Petitioners is on the question of arbitrariness and violation of the principles of natural justice in the matter of issuance of the order impugned in the petition. It may further be noted here that by the impugned order, supplies by road only were kept in abeyance till further advice though supplies by Rail or sale of coal by the Petitioner as per direction of the Respondent No. 1 were not kept in abeyance so that by the order impugned, the total business of the Petitioner No. 1 had not come to a standstill but were merely lessened temporarily in respect of supply by road. The Petitioners contend that before issuing the said impugned advice, the Petitioners should have been given an opportunity of hearing and that in any case the action was highhanded and arbitrary.

5. The learned Advocate-General appearing for Coal India Ltd. first contended that the petition suffered from deliberate suppression of material facts both antecedent and subsequent to the impugned action. The further submission of the learned Advocate-General is that the impugned action having been taken in a

matter which was the subject-matter of a contract no writ under Article 226 of the Constitution of India is maintainable and the writ Court should not interfere in matters arising out of contracts qua contracts. The Petitioners contend that notwithstanding the fact that an action, wrongful or otherwise, may arise from a contract, yet a public authority is not permitted to act arbitrarily. Both sides cited a number of decisions to support the respective contentions, but before that certain facts are to be discussed in order to understand the factual position.

6. In this matter the notice with a copy of the application was served on the Respondents before moving the application and the Respondents have appeared to oppose the application at the stage of motion with an affidavit-in-opposition a rare phenomenon indeed as the Respondents go. It is likely that the Petitioner could not apprehend such promptitude from the Respondents. The Petitioners overnight filed a supplementary affidavit to reinforce certain facts stated in the original writ petition. The Respondents once again promptly came up with an affidavit-in-opposition to the supplementary affidavit filed by the peitioners.

7. The facts as emerged from the pleadings are not very savoury. The writ petition was moved from the first time on February 27, 1990. It appears from the pleadings that long before the said date, i.e. February 27, 1990, the Senior Sales Officer of the Respondent No. 1 visited the stockyard of the Petitioner No. 1 at 11.30 a.m. on a routine check on February 6, 1990 and noted some fresh inflow of stock, the quality of which did not even remotely resemble coal and visually it appeared to be crushed stone, cinders and washery middlings of 2 mm. to 5 mm. in size. Samples were collected in presence of the representative of the Petitioners and were sent to a reputed analyst. On the basis of the incident of February 6, 1990, on February 8, 1990 the impugned order was passed directing the Eastern Coalfields Ltd. to keep" in abeyance the road import to the stockyard of the Petitioner, but the Rail import has not so kept in abeyance. The Respondents had the reason to apprehend that interference was more likely in case of transport of coal by road than by Rail. It may be reiterated here that all other stockyard operations were kept in tact.

8. In the supplementary affidavit the Petitioners discussed some of the facts already discussed by the Respondents in their first affidavit-in-opposition. So it may be said that the Petitioners wanted to suppress the incident both prior to the date of the impugned order and prior to the date of moving the writ petition before this Court on February 27, 1990.

9. On February 13, 1990 the report of the analyst was received by the Respondent No. 1 from the Government approved Chemist from which it appeared to the Respondent No. 1 that the samples did not correspond to the quality of coal supposed to have been delivered-from the Ranigangj Collieries.

10. On February 13, 1990 the Officer-in-Charge of the stockyard went to the said stockyard when he found that two trucks containing inferior materials, samples of which was taken on February 6, 1990 were being unloaded at the stockyard by

some labourers. The Officer-in-Charge thereupon sealed off the main gate keeping the said trucks within the stockyard premises and locked all other gates of the said stockyard and lodged a F.I.R. being Barasat P.S. case No. 106 dated 14.2.90 at 12.45 a.m. On February 14, 1990 around 12.00 noon a team of senior officers of the Respondent No. 1 visited the said stockyard once again but could not find any trace of the said two trucks and the seal of the gate appeared to be tampered with. Another complaint was lodged with the Barasat P.S. on the same date, i.e. February 14, 1990 regarding such disappearance of the trucks. Thereafter on February 15, 1990 as per schedule the survey of the stock was made by the officers of the Coal India Ltd. and the Eastern Coalfields Ltd. and in the presence of Police personnel of the Barasat Police Station and thereafter the Police seized the entire stock lying at the said stockyard and later on handed over the same to the Regional Sales Manager of the Respondent No. 1 on imma after keeping samples.

11. These facts which happened prior to moving the writ petition on February 2, 1990 were conspicuous by their absence in the main writ petition and were only brought to light in the supplementary affidavit when the same had been already disclosed by the Respondents in their affidavit-in-opposition and it may specially be assumed in the facts and circumstances of the case that the Petitioners did not come with clear hands in seeking equitable relief. On that ground alone the writ Petitioner should be dismissed in limine, but as points of law were raised by both the parties this Court will fail in its duty if it shirks the responsibility of deciding or at least discussing the points as to whether the writ Court should interfere in the matters arising out of contracts.

12. The Petitioners relied on as many as five cases to contend that even in matters of contract the writ Court should interfere if the action of the authority concerned is arbitrary, highhanded or mala fide notwithstanding any power reserved to such authority by terms of the contract concerned. The first case cited by the Petitioners is the case of *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, In that case the facts were somewhat peculiar. The trustees of the Port of Bombay were exempted from the provisions of the Rent Control Legislation so that they could otherwise take any action against their tenants comensurate with the principle of natural justice and should not be actuated by any profit-making motive. In the aforesaid case as additional responsibility was cast upon the Port Trust Authorities because of the fact that it was the act governed by law of the land in the matter of eviction of tenants and fixation of rents. In the circumstances, it was obligatory on the authorities to act fairly, bona fide and in accordance with the principles of natural justice. Although it has been stated in the said decision that where there is arbitrariness in state action, Article 14 springs in an judicial review strikes such an action down, yet the said decision does not state that the Court can interfere in all matters arising out of contracts simpliciter. It is significant to note that although in that case, the case of *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, was cited which categorically laid down that in matters of contract the writ Court

should not interfere, was not overruled. The case of M/s. Dwarkadas Marfatia (Supra) " stands on its unique footing in the facts and circumstances of that case and is not necessarily an authority for the proposition that the writ Court should interfere in matters arising out of contract even where the term of the contract provides for an action to be taken in certain specified contingencies.

13. The next case cited by the Petitioners is the case of Nellimarla Jute Mills Co. Ltd. and Ors. v. Jute Corporation of India Ltd. and Ors. 1989 (2) C.L.J. 252. In the aforesaid case the learned single Judge took enormous pains to catalogue a large number of cases on the point both for and against the proposition that controversy between the State and citizen in relation to matters arising out of concluded contract can be the subject-matter of challenge in an application under Article 226 and that there is no absolute bar to entertain a writ petition when the action of the Government challenged pertains to the domain of concluded contracts. Yet because of the other decisions to be mentioned hereinafter it is not possible to lay down the proposition as a principle of law that in all matters of contract the writ Court can butt in. It may be that in an exceptional case this may be so, but this cannot be the general proposition of law although I have my personal doubts as to whether in the matters of concluded contracts qua contracts simpliciter the writ Court should at all interfere.

14. The next case cited by the Petitioners is the case of Central Group and Ors. v. Calcutta Metropolitan Development Authority and Ors. 1982 (2) C.H.N. 90. This was also a decision of a learned Single Judge of this Court, but it is not required to consider the ratio of that decision in view of the fact that the said case had been expressly overruled by a Division Bench of this Court in the case of Hindustan Petroleum Corporation Ltd. and Ors. v. Shyamsundar Ganeriwalla 91 C.W.N. 217 in para. 13 of the said decision. The next case referred to by the Petitioner is the case of In Re: Om Prakash Pariwal and Another, That case is not an authority for the broader proposition that the writ Court can interfere even in the matters arising out of a concluded contract, but the ratio of the- said decision seems to be that if the clause in the agreements in a contract are unreasonable and unconscionable the Court cannot declare such contract itself to be void and not binding on the parties. The said decision of the Hon"ble Mr. Justice Susanta Chatterjee is based on the decision of the Supreme Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, The said Supreme Court decision itself is based on the proposition that the terms of the contract of services in the said case were opposed to public policy and were hit by Section 23 of the Indian Contract Act, 1872. In the said case also the Supreme Court did not interfere in the matter of any action taken in terms of the provisions of the contract but declared the contract itself to be void being in contravention of the law itself. The entire contract was struck down being unconscionable but any action taken under a valid contract was not interfered with by the Supreme Court in that case. The last case cited by the Petitioners is the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, That case, inter alia, is an authority for the proposition

that when a statutory functionary makes an order on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. This case is not of much help to the Petitioners in the facts of the instant case.

15. The principal case cited by the learned Advocate-General is the case of Radhakrishna Agarwal and Ors. v. State of Bihar and Ors. (Supra). In the said case it has been categorically laid down that a proceeding under Article 226 of the Constitution of India is not a proper remedy in matters of Government actions acting in contractual field. The said case categorically lays down that if a person is aggrieved by any breach of a contract committed by an authority, the proper remedy for the aggrieved citizen is to approach the civil Court and get redressable of his grievances. Reciting the paragraphs of the said decision will amount to emphasizing the obvious as the said case shines in its own glory and is marching down to posterity with divine honours. The next case cited by the learned Advocate-General in the case of Hindustan Petroleum Corporation Ltd. and Ors. v. Shyamsundar Ganeriwala (Supra). It is a Division Bench judgment of this Court presided over by the inimitable Hon''ble Mr. Justice Anil K. Sen as his Lordship then was. Their Lordships categorically held that if a person is aggrieved by any breach of contract or any terms thereof, not only the appropriate but the only remedy lies in a suit for damages for a breach of a contract in a civil Court and the writ Court should not come to the aid of such a person. I also refrain from quoting the brilliant passages of that decision as that case is also a pioneer in its field.

16. Other cases were also cited, but in my opinion encumbering this judgment with a plethora of case laws may not be necessary as I am of the opinion that there is no direct authority of the Hon''ble Supreme Court or of this Court on the proposition that the writ Courts should interfere even in the field of concluded contracts but the catens of decisions rathor point to the contrary view and the cases holding such view have not yet been overruled, to wit, Radhakrishna Agarwal's (Supra) case has not been expressly overruled by Dwarkadas's case (Supra).

17. In the circumstances, we can say with a degree of certainty that for breach of a contract, even though a wrongfully breach, the appropriate remedy is by way of a civil proceeding, and the writ Court should not intervene in such cases.

18. In the instant case, the contract contains a clause to the effect that the Respondent No. 1 could terminate the contract itself by giving two months'' notice. It has been held in the case of Hindustan Petroleum (Supra) that the wider power of termination includes in its compass the power of temporary suspension. From the facts discussed hereinbefore it appears that there were good reasons for such temporary and partial suspension, and the question of giving an opportunity of hearing before such suspension would frustrate the very purpose of such suspension. Moreover, orders of suspension are made pending some further action when opportunities have to be given to the party concerned

before any final step is taken. The question of giving an opportunity of hearing before passing any order of suspension will not arise unless any such specific provision is made in any special law.

19. So on this ground also the application is not maintainable.

20. For reasons stated above both on the question of fact as also the question of law the writ petition fails and is rejected.

21. There will, however, be no order as to costs.

22. I shall be failing in my duty unless I record my appreciation for the invaluable assistance rendered by Mr. Ashok K. Sen, Mr. Somenath Chatterjee and last but not the least the learned Advocate-General of the State.