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In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 13661 of 2008 and 443 of 2009

Gammon India Ltd. and Others — APPELLANT

Vs

Govt., of A.P. and Others — RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:
Constitution of India, 1950 — Article 14, 226, 32

Citation : (2009) 6 ALT 509

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

Bench : Single Bench

Advocate : P. Vinayaka Swamy, D. Prakash Reddy for Kasa Jagan Mohan Reddy, P. Pratap Reddy, P. Srinivasa Reddy, K. Rathangapani Reddy, S.V.S. Chowdary, S.R. Ashok, for S. Chakrapani and Dammalapati Srinivas, for the Appellant; G.P., for Irrigation and CAD, for the Respondent

Final Decision : Allowed

Judgement

C.V. Nagarjuna Reddy, J.—These Writ Petitions raise identical issues of fact and law. Therefore, they are heard and being disposed of by this common judgment.

2. In all these writ petitions, the petitioners have called in question the legality and propriety of the action of the respondents in seeking to apply Memo No. 5217/Reforms/06, dated 23.02.2006 pertaining to collection of EMD, retention amount and its release.

3. Barring the dates, the value and the nature of the contract works, the facts in broader sense are similar to each other in all these cases. The petitioners are engineering contractors registered with the Government of A.P. and carrying on works in various departments. Each of these petitioners was awarded with contract works through tender process. Agreements were entered into on behalf of the Government of A.P. by the respective departments, which entrusted the works to the petitioners prior to 23.02.2006, on which date the abovementioned Memo was issued by the State Government. In each of these agreements, separate provision was made for payment of EMD and retention amounts and the

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stage at and the manner in which the EMD and retention amounts shall be released. For disposal of these cases, it is not necessary to refer to these Clauses in detail, which may vary from one case to the other.

4. While some of the contracts were at the stage of execution and some others were completed, the State Government issued the aforesaid Memo dated 23.02.2006 containing terms pertaining to EMD and retention amounts and release of these amounts, at variance with the terms contained in the agreements entered into with the petitioners. These terms enable the Government to withhold higher amounts than that were envisaged in the agreements entered into with the petitioners towards EMD and retention amounts both during the execution of the works and also the defects liability period. When the petitioners raised these issues with the respective departments with which they entered into agreements by contending that the said Memo cannot be applied to the contracts already entered into by them, the State Government did not accept their stand. As a result, when the official respondents started withholding the amounts more than what is contemplated under the contract terms from the bills of the petitioners, they filed these writ petitions.

5. No counter affidavits have been filed by the respondents in any of these writ petitions. However, on the basis of the instructions, the learned Government Pleader for Irrigation and CAD advanced his arguments.

6. I have carefully heard Sri D. Prakash Reddy, learned senior counsel representing Sri Kasa Jagan Mohan Reddy, Sri S.R. Ashok, learned senior counsel representing Sri S. Chakrapani Sri P. Vinayaka Swamy, Sri P. Pratap Reddy, Sri P. Srinivasa Reddy and Sri K. Rathangapani Reddy for the petitioners and the learned Government Pleader for Irrigation and CAD for the respondents.

7. The learned Counsel for the petitioners submitted that the action of the respondents in acting contrary to the specific conditions of the contracts by seeking to force upon the petitioners Memo dated 23.02.2006 is manifestly illegal and patently arbitrary. The said Memo, contend the learned Counsel, cannot be given retrospective operation and the same does not override the terms of the concluded contracts. The learned Counsel further contended that in the face of the concluded contracts, which contain reciprocal obligations between the parties, the respondents, who are one of the parties, cannot unilaterally thrust greater obligations on the petitioners than those provided by the contracts.

8. The learned Government Pleader for Irrigation raised a preliminary objection regarding maintainability of the writ petitions. He submitted that the disputes raised by the petitioners in these writ petitions arise under non-statutory commercial contracts and therefore they are not entitled to invoke the public law remedy under Article 226 of the Constitution of India. In support of his contention, he placed reliance on the following judgments:

Reliable Power Systems Private Limited Vs. Government of India and Others, , Government of A.P. and Others Vs. Sri Rama Engineering Constructions

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(Engineers and Contractors), , MRKR-MBGEC, rep., by MRKR-MBGEC and Others Vs. Chief Administrative Officer, Construction, South Central Railway and Another, and S. Suresh Vs. Indian Oil Corporation Ltd., Southern Region and Another, .

9. The learned Government Pleader further submitted that it is only in the proceedings that may be initiated by the petitioners by invoking common law remedies, that the various contentions raised by them can be adjudicated by the appropriate forum.

10. The objection concerning maintainability of writ petitions for resolution of disputes arising under the concluded non-statutory contracts is often raised by the State or its instrumentalities and considered by the Apex Court and also by this Court. In a recent judgment, a Division Bench of this Court in Superintending Engineer, T.G.P. Circle, Cuddapah and Anr. v. Pioneer Builders 2009 (4) ALT 414 (DB), speaking through me, considered in some detail the judgments of the Supreme Court representing the seemingly conflicting views. I can do no better than reproducing the meat of the said judgment here under:

As regards the maintainability of a writ petition under Article 226 of the Constitution of India for adjudication of disputes arising under a concluded non-statutory contract between a private party and the State or its instrumentalities, there is virtual dichotomy in the views expressed by the Supreme Court. While the view expressed in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, followed by the judgments in State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, ; State of Jammu and Kashmir Vs. Ghulam Mohd. Dar and Another, , Binny Ltd. and Another Vs. V. Sadasivan and Others, disfavored entertainment and adjudication of such disputes by the High Courts exercising power under Article 226 of the Constitution of India, the Apex Court has taken a more liberal view in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, and interfered with the decisions taken under concluded contracts on the touchstone of Article 14 of the Constitution of India.

In ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, the Supreme Court reiterated the view reflected in the latter line of cases. In paragraphs 10 and 23, it held as under:

It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy Vs. The State of Mysore and Others, was followed subsequently by this Court in the case of D.F.O. v. Ram Sanehi Singh (1973) 3 SCC 864 wherein this Court held:

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by that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy Vs. The State of Mysore and Others, there can be no doubt that the petition was, maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power

(Emphasis supplied).

It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.

In its very recent judgment in United India Insurance Company Limited Vs. Manubhai Dharmasinhbhai Gajera and Others, the Supreme Court having referred to its observations made in Excise Commissioner v. Issac Peter (1994) 4 SCC 104 on the application of Article 14 and the doctrine of fairness or the duty to act fairly or reasonably by the State and its instrumentalities even in the contractual field, drew a distinction between the Court''s power of judicial review at the threshold of formation of a contract and the cases where the terms and conditions of the contract are to be enforced. It held that in the former case, the Court''s jurisdiction is wider and in the latter, it is not. It is apt to reproduce para 39 of the judgment hereinbelow:

Another distinction in the approach of the Court in this behalf must also be borne in mind, namely, that a court may exercise its power of judicial review at the threshold of formation of a contract as was the case in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and the cases where the terms and conditions of contract are to be enforced. Whereas in the former case, the court''s jurisdiction is wider, in the latter, it is not. We may, however, hasten to add that it does not mean that the court shall not interfere even in a case where the term of the contract is against the public polity or where in enforcing the same the State acts arbitrarily, unfairly or unreasonably or makes discrimination amongst the persons similarly situated.

(Emphasis added).

A careful analysis of the judgments of the Supreme Court referred to above reveals that the earlier conservative view of noninterference in cases arising under non-statutory contracts has given way to a some what liberal approach of

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limited interference. In effect, the Constitutional law limitations on the State actions while acting in administrative sphere are also applied even to contractual sphere.

Though ordinarily the superior Courts relegate the parties to the common law remedies such as arbitration (wherever such a provision in the concluded contracts is made) or a civil suit, in specific situations such as term of contract being against the public policy or while enforcing a term of contract the State acts arbitrarily, unfairly or unreasonably or makes discrimination amongst the persons similarly situated, they exercise extraordinary jurisdiction under Article 226 or Article 32 of the Constitution in such particular situations.

(Emphasis added)

11. The ratio that could be culled out from the above reproduced judgment if applied to the undisputed facts of the present cases, the objection raised by the learned Government Pleader regarding maintainability of the writ petitions deserves to be negatived.

12. On the admitted factual matrix of j these cases, it is evident that the State and its officers are acting contrary to the specific terms of the contracts and such an action undoubtedly constitutes patent arbitrariness. The State and its officers cannot perpetrate such arbitrariness on their subjects by taking shelter under the plea of acting under a non-statutory contract. Where such an action is assailed in a writ petition, it can no longer be thrown away on the ground of maintainability in the face of the law declared by the Supreme Court in ABL International Ltd., (supra) and United India Insurance Co. Limited v. Manubhai Dharmasinhbhai Gajera and Ors. (supra). These cases, therefore, represent the class which constitutes an exception to the general rule that disputes raised by the parties to a concluded contract are ordinarily relegated to the common law remedies such as arbitration or a civil suit. It is noteworthy that in his judgment dated 23.07.2008, a learned Single Judge of this Court in Sushee Hitech Constructions Ltd., and Ors. v. State of A.P. rep., by the Superintending Engineer, Handi Nivas Sujala Sravanthi (HNSS) Circle, Anantapur and Ors. W.P. No. 12979 of 2008, dt.23-07-2008 unequivocally rejected an identical objection raised on behalf of the Government and its officers on the maintainability of the writ petitions.

13. A perusal of the said judgment reveals that disputes of similar nature were raised in the writ petitions filed by certain contractors. Their grievance was that contrary to Clause 47 of the Conditions of Contract, under which the department was entitled to retain 5% in each of the running bills towards ensuring the obligation of the petitioners therein under the defects liability Clauses, additional amounts are retained under certain memos issued by the respondents therein. While rejecting the objections raised regarding the maintainability of the writ petitions, the learned Judge had this to say:

Where the State is a party to a contract, the mere fact that the State enters into a contractual relationship with private institutions or individuals, under the rubric

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of a contractual instrument, does not wholly relieve the State from its constitutional and public law obligations. It does not appear to be the principle that when the State acts in its executive capacity it is obliged to conform to constitutional and Public law obligations but when it acts through a contractual instrument, it enjoys absolute and untrammeled immunity and is wholly liberated from constitutional and public law limitations. True it is that in the sphere of contracts including commercial contracts, a substantial play in the joints is available to the State, to negotiate the terms of its relationship with contracting parties including private contracting parties in a manner that in the State''s assessment would best subserve the commercial interest of the State. When a State enters into a contractual relationship and the interpretation is as to the terms of such contract; where the contract is a non-statutory contract and the lis is at the post threshold stage, normally the Court relegated the disputing parties to an alternative, available remedy, be it arbitral or to the Civil Court of competent jurisdiction since fundamentally no public law issues present themselves for consideration and also since disputed questions of fact require to be resolved. Where however the complaint is as to a threshold discriminatory treatment by the State in the matter of entering into a contract, or with regard to farming out of State largesse or in circumstances, where the parties'' reciprocal obligations are governed by statutory terms, public law scrutiny is available. These principles are well established and are impregnated into our administrative law vide Radhakrishna Agarwal and Others Vs. State of Bihar and Others, .

14. The learned Judge while distinguishing the judgments on which reliance was placed by the learned Government Pleader referred to and relied on ABL International Ltd., (supra) and in particular paragraph 53, wherein it was held:

When an instrumentality of the State acts contrary to the public good and public interest unfairly, unjustly and unreasonably in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution

On the above said premise, the learned Judge held that the action of the State was amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. Having held that the writ petitions were maintainable, the learned Judge allowed the writ petitions on merits by holding that there is no contractual term enabling the respondents to withhold any amount in excess of or in addition to the amounts covered by Clause 47 of the Conditions of Contract and that therefore the respondents therein were not entitled to retain any amounts from the running bills of the contractor except warranted by and in terms of Clause 47 of the Conditions of Contract and deduction of 2% amount towards maintenance charges over and beyond the 5% (referable to Clause 47) cannot be retained.

15. The present cases are evenly situated where by purporting to place reliance on executive instructions contained in Memo dated 23.02.2006, the respondents

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are seeking to withhold additional amounts in excess of those envisaged under the concluded contracts. Such an action apart from being without sanction of law is anathema to Article 14 of the Constitution.

16. On the premises as above, all the writ petitions are allowed. The respondents are restrained from withholding any amounts towards EMD and retention amounts contrary to the terms envisaged in the contracts entered into with the petitioners. The excess amounts, if any, withheld shall be released to the petitioners within a reasonable period which shall not be later than three months from today.

17. As a sequel to disposal of the writ petitions in the manner indicated above, the respective miscellaneous applications pending in this batch of cases stand disposed of.

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