

(2010) 07 GUJ CK 0018

In the Gujarat High Court

Case No : Letters Patent Appeal No. 910 of 2009 in Special Civil Application No. 3426 of 2007 with Civil Application No. 4933 of 2009 in Letters Patent Appeal No. 910 of 2009 in Special Civil Application No. 3426 of 2007

Gujarat Water Supply and Sewerage Board and Others APPELLANT

Vs

Rachna Construction Co. Engineers and Contractors RESPONDENT

Date of Decision : 26-07-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 1 GLH 104

Hon'ble Judges : S.J. Mukhopadhaya, C.J;K. M. Thaker, J

Bench : Division Bench

Advocate : Mehul H. Rathod, for the Appellant; G. T. Dayani, for the Respondent

Judgement

MR. K.M. Thaker, J.—In view of the request by the learned Counsel of the contesting parties, the appeal is taken up for hearing and final decision today. Having regard to the rival contentions, Admit. Mr. Dayani, learned Counsel for the respondent, has waived the service of notice of admission.

2. Present Appeal, under Clause 15 of the Letters Patent, arises from the order dated 9th August, 2007 passed by the learned Single Judge in the writ petition filed by the present respondent. By the impugned order, the learned Single Judge has quashed a communication dated 28th December, 2006, treating it to be an order passed by the appellant-Gujarat Water Supply and Sewerage Board {hereinafter referred to as "the appellant-Board"}. The relevant part of the order impugned in present appeal, reads thus:-

In view of the same, the aforesaid communication, which, according to the petitioner, is an order passed by respondent No. 3 is required to be quashed and set aside and it is hereby quashed and set aside. It is, however, made clear that the order of this Court will not come in the way of the respondents in resorting to other legal remedies in respect of their claim vis-a-vis water tank in question. Similarly, if any such remedy is resorted to by the respondents, the petitioner will

have equal right to defend his interest. The petition is, therefore, allowed. Rule is made absolute with no order as to costs.

2.1 The impugned order came to be passed in Special Civil Application No. 3426 of 2007, which was filed by the respondent herein seeking below mentioned relief.

18(B) Your Lordships be pleased to issue a writ of mandamus or any other appropriate writ, direction or order in the nature of writ quashing and setting aside the impugned order dated 28/12/2006 at Annexure "A" as the same being wrong, illegal and in violation of terms and conditions of the agreement and contrary to the principles of natural justice, equity and fair play.

3. The facts involved in present proceedings, may be briefly stated, as follows:-

3.1 In September-2002, the appellant-Board, through its Executive Engineer invited bids for turnkey project for executing Hansapor Regional Water Supply Scheme. Around the same time, bids for executing other works at different stations including the project at Valsad were also invited. After the date of receipt of the bids, common pre-bid conference in respect of the different projects was convened on 21st September, 2002. Besides, the other business which was transacted during the said pre-bid conference with the bidders, the bidders were conveyed that in the bid document(s) and the subsequent contract(s) to be signed with the successful bidder(s), a provision by way of Clause-22 shall be added as a part of the bid document(s) and the subsequent contract(s) to be signed with the successful bidder(s). The said Clause-22 reads thus:-

Clause 22

GWSSB shall have undisputed and unquestionable power and authority to adjust and recover any amount recoverable from the contractor under any other contract signed and executed by the contractor with the GWSSB, from the money payable to the contractor under this contract.

3.2 After the conclusion of the prescribed formalities, the successful bidder was awarded the contract(s). The respondent herein was awarded contract to execute work at Navsari and also the contract to execute the work at Valsad.

The work orders were awarded in or around February-2003. The contract work at Navsari was to construct a water tank. The respondent-contractor constructed the water tank and upon completion of the work, as per the terms of the contract, hydraulic test was required to be conducted.

It deserves to be noted that during the hydraulic test, the water tank, constructed by the respondent herein, collapsed. In the post-collapse report, prima facie, the contractor was found at fault. The respondent-contractor was thereafter directed to reconstruct the water tank. It appears that initially, the respondent-contractor had agreed to do the reconstruction work, however, within short time, the respondent-contractor tried to wriggle out of the responsibilities

and did not carry out the direction to reconstruct the water tank. Until December-2006, the respondent-contractor did not commence the reconstruction work.

It was, at this stage, that one of the Executive Engineers of the appellant-Board addressed an inter office communication dated 28th December, 2006 to the Superintending Engineer i.e. to his superior officer.

In the said inter office communication (from Executive Engineer to his superior i.e. the Superintending Engineer) the author of the communication i.e. the Executive Engineer suggested that due to various defaults on the part of the contractor, it may be necessary to recover about Rs. 26,00,000=00 from the contractor's bills and since the respondent-contractor was also executing the contract work at Valsad, under the contract with the appellant-Board, in the event of such requirement the amount may be recovered from contractor's bills for the contract work at Valsad. The free translation of the suggestion made by the Executive Engineer in his inter office communication to the Superintending Engineer, reads thus:-

As the work of the said agency is going on at Valsad Division, it is requested to recover an amount of Rs. 26.0 lacs bill so that the construction of new tank can be completed.

3.3 It is pertinent that within no time the respondent-contractor got the copy of the said inter office communication and he immediately rushed to this Court by filing the aforesaid writ petition challenging the said inter office communication from an officer of the appellant-Board to his superior. The present respondent-contractor requested, as can be seen from a glance at the para 18(B) of the petition, the Court to quash and set aside the said inter office communication dated 28th December, 2006.

In response to the notice issued by the Court, present appellant-Board (being the respondent in petition) filed reply affidavit and resisted the petition. In the reply affidavit, the appellant-Board specifically raised contention that the petition against an inter office communication would not be maintainable and ought not be entertained. The reply affidavit contains following averments:-

5. Before dealing with the memo of the petition, I say and submit that the alleged impugned order dated 28/12/2006 is not an order or decision of competent authority but the same is the report submitted by the respondent No. 3 to the respondent No. 4 with a request to initiate action and to pass appropriate order for recovery of Rs. 26.00 lakhs from the petitioner for the reasons stated in the communication dated 28.12.2006. I say and submit that said letter is an intra-department communication and is premature and not tenable under Article 226 of the Constitution of India. I say and submit that by filing said petition at premature stage, the petitioner intends to bring pressure on the officers of the board so as to prevent him from taking independent decision in the matter thus the petitioner has not approached this Hon'ble Court within

clean hands to redress genuine grievances or the violation of legal rights but the same is filed with ulterior motive and on this ground alone the present petition be rejected similarly. Hence, same is not maintainable and liable to be quashed and set aside.

3.4 In its reply affidavit, the appellant-Board also made grievance about the respondent-contractor getting a copy of the said inter office communication. In its reply affidavit, the appellant-Board ventilated its grievance in para-6 of the reply affidavit in following terms:-

6. At this stage, I pray to the Hon'ble Court to direct the petitioner to produce source of information and supplying of the copy of intra-department communication to him so that the respondents can also initiate action against the responsible officer who is acting contrary to the interest of the Board and supplying intra-department communication to the outsider without any authority of law. I say and submit that the influence of the petitioner of obtaining intra-Departmental communication from the official files of the respondents speaks voluminous about petitioner's behaviour and on this ground also, the Hon'ble Court may be pleased to reject the present petition summarily.

3.5 After taking into consideration the material on record the learned Single Judge passed the order dated 9th August, 2007 which is impugned in the present appeal.

4. Mr. M.H.Rathod, learned Advocate, has appeared for the appellant-Board and Mr. G.T.Dayani, learned Advocate, has appeared for the respondent-contractor. We have heard the learned Counsel for the contesting parties and have carefully examined the material on record.

5. Mr. Rathod, learned Advocate for the appellant-Board, has submitted that the writ petition being not maintainable against the inter office communication, ought not have been entertained. He also submitted that the water tank collapsed because of the defaults on the part of the respondent-contractor and though the respondent-contractor had agreed to carry out the reconstruction work, he however, did not discharge his obligation. He submitted that it was only a report the Executive Engineer had submitted by the said communication dated 28th December, 2006 to his superior i.e. Superintending Engineer and not addressed to the respondent-contractor. He also submitted that the respondent-contractor without disclosing source from which the respondent-contractor got in its hands the said inter office communication, approached the Court on the basis of the said inter office communication and prayed for setting aside of the said communication and such step was taken only with a view to bringing pressure on the officers of the Board so as to prevent them from taking any independent decision. He has also submitted that the respondent-contractor had, while preferring the petition, suppressed various relevant facts and had not approached the Court with clean hands. He submitted that the writ petition deserved to be dismissed and ought not have been entertained.

5.1 So as to support his submission, he relied upon the decision in the case between H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others,

6. Per contra, Mr. Dayani, learned Advocate for the respondent-contractor, supported the decision of the learned Single Judge and vehemently submitted that the appellant-Board has, as is apparent from the perusal of the impugned order dated 28th December, 2006, taken decision to recover a sum of Rs. 26.00 Lacs from the contractor's bills raised in connection with the contract work at Valsad i.e. in respect of altogether different contract. Referring to Clause-22, Mr. Dayani, learned Advocate for the respondent-contractor, vehemently submitted that the said provision does not authorize the appellant-Board to effect recovery from the bills pertaining to different contracts and that therefore, the learned Single Judge has rightly set aside the decision of the appellant-Board. He also submitted that the appellant-Board is not justified or right in its contention that the water tank collapsed due to the default on the part of the respondent and faults in the workmanship by the respondent-contractor. He submitted that the appellant-Board cannot be a Judge in its own cause and that the recovery of any amount in connection with the work pertaining to one contract cannot be adjusted or recovered from the amount payable in respect of other contract. He also submitted that disputed recovery cannot be made in such arbitrary manner. He also submitted that the incident occurred due to the failure on the part of the department on various counts like, wrong selection of site, not taking into account the sub-soil ground level, during the execution of the work the entire site got submerged in rain water, etc. and that any independent and impartial investigation was not undertaken before putting the blame at the doors of the respondent-contractor. In support of his submissions, Mr. Dayani, learned Advocate for the respondent-contractor has relied on the judgment in the case of Lakshmichand and Balchand Vs. State of Andhra Pradesh, State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, and H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others,

In light of the view we are inclined to take, it would not be necessary to consider and discuss the authorities relied on by the learned Counsel of the contesting parties.

7. A glance at para 18(B) of the writ petition shows that the petition was directed against the afore referred communication dated 28th December, 2006.

7.1 Even in absence of the clarification made by the appellant-Board in its reply affidavit before the learned Single Judge, even a cursory glance at the said document dated 28th December, 2006 makes it clear beyond any doubt that it was purely an inter office communication made by an Officer to his superior Officer and was never meant for and/or was not directed or addressed to the respondent-contractor. It also becomes clear from perusal of the said document that it does not contain and it also does not constitute a decision of the appellant-Board.

7.2 The respondent-contractor had no concern with the said inter office communication.

In view of the fact that the respondent-contractor unauthorisedly got the copy of the said inter office communication dated 28th December, 2006 and immediately filed the writ petition, the appellant-Board appears justified in its submission that the respondent-contractor intended to pressurize the officer of the appellant-Board and/or wanted to preempt the decision.

7.3 It is beyond doubt that the document in question i.e. communication dated 28th December, 2006 is merely inter office communication and it does not constitute decision of the appellant-Board or by the designated and competent authority. Consequently, it follows that, at that stage, the respondent-contractor did not have any cause of action to initiate any proceedings against the appellant-Board.

7.4 The writ petition at the behest of communication dated 28th December, 2006 was, absolutely premature and without cause of action and wholly unjustified.

7.5 Furthermore, even if it is assumed, only for the sake of testing the respondent-contractor's case, that the said inter office communication dated 28th December, 2006 constituted or reflected decision of the appellant- Board, then also it being a matter in the realm of contract, at the best, could have been subject matter before the Civil Court or in arbitration proceedings and in any case, a writ petition invoking extraordinary jurisdiction under Article 226 of the Constitution would not be maintainable. Actually, the respondent-contractor has, we are informed during the hearing of the present Appeal, already initiated arbitration proceeding and the same is pending.

7.6 Besides this, the controversy or the dispute, which the respondent-contractor brought before the Court by way of the writ petition being Special Civil Application No. 3426 of 2007, is a matter in the nature of money claim and that therefore also, the writ petition would not be the appropriate remedy.

7.7 There is one more reason to hold that the writ petition would not be maintainable and did not deserve to be entertained viz. the rival submissions of the contesting parties give rise to disputed questions of facts, which cannot be addressed or resolved in writ proceedings under Article 226 of the Constitution of India.

8. Lest it may adversely effect the future or the pending proceedings between the parties, we refrain from making any observations with regard to the Clause-22 of the bid document/contractor. However, for the purpose of this order, we have to atleast note that the respondent-contractor's contention that the said Clause does not authorise the appellant-Board to adjust/recover any amount or claim pertaining to one contract from the bills of the respondent-contractor pertaining to other contract is, prima facie, misconceived. It would be another matter to contend that the recovery is unjustified, but, prima facie, in face of the

Clause-22 it cannot be said that the recovery, if made, would be without authority of law or beyond the powers flowing from the contract. We again clarify that this is a prima facie view regarding the said Clause-22.

9. For the reasons aforesaid, we are of the considered view that the writ petition against the inter office communication dated 28th December, 2006 was not maintainable and did not deserve to be entertained.

9.1 The respondent-contractor rushed to the Court at an absolutely premature stage and without cause of action and more important is the fact that even after the reply affidavit of the appellant-Board was filed, it continued to prosecute the petition and then it has also resisted and opposed present appeal until now, that too after having initiated arbitration proceedings. We, therefore, are inclined, while allowing the appeal, to impose cost of Rs. 20,000/-.

As an upshot of the aforesaid discussion, the appeal succeeds and is accordingly, allowed. The impugned order dated 9th August, 2007 passed in Special Civil application No. 3426 of 2007 is hereby set aside. The Letters Patent Appeal stands disposed of accordingly.

In view of disposal of main appeal, the Civil Application also stands disposed of.