
(1985) 12 CAL CK 0005
In the Calcutta High Court
Case No : F.M.A.T. No. 3720 of 1985

Hindusthan Petroleum Corpn. Ltd. and Others	APPELLANT
Vs	
Shyam Sundar Ganeriwala	RESPONDENT

Date of Decision : 20-12-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 226

Citation : 91 CWN 217

Hon'ble Judges : S.K. Mookerjee, J;A.K. Sen, J

Bench : Division Bench

Advocate : Amiya Bose and Tarun Chatterjee, for the Appellant;Aninda Mitra, Bhaskar Sen and Sundarananda Paul, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Sen, J.—This is an appeal under clause 15 of the Letters Patent and it arises out of a writ proceeding which was registered as C.O. 4119(W) of 1985. The order impugned is one dated October 10,1985, disposing of the writ petitioner. The appellants before us are the Hindustan Petroleum Corporation Limited and its authorities. A short point which arises for our consideration in this appeal is as to whether a licensee under the appellants is entitled to enforce any relief in respect of a breach of an agreement in a writ application. The undisputed facts may be set out very briefly.

2. The sole respondent Shyam Sundar Ganeriwala entered into an agreement dated May 2, 1978, with the appellant Hindustan Petroleum Corporation and in terms of the said agreement obtained a licence to operate a petrol and diesel pumping station at 11/1, Diamond Harbour Road, belonging to the said Corporation. The agreement prescribed various mutual rights and obligations including a right to terminate the agreement without any notice in the event of any act or default on the part of the licensee in respect of maintaining the products free from contamination or where such act or default is considered to be prejudicial to the interest and good name of the Corporation.

3. On November, 10, 1984, the Chief Regional Manager and the Senior Sales Officer of the Corporation conducted a surprise check at the pumping station and reported the following discrepancies :-

1) Stock variations - There was an excess stock of 701 liters of petrol (Sale 55.3 kilo liters) and 1263 liters of high speed diesel (sale 319.1 kilo liters)

2) Pump delivery - Both petrol and high speed diesel dispensing units were delivering short. The short delivery in petrol was 300 milliliters in 5 liters of high speed diesel.

3) The petrol sample taken from the outlet of the licensee does not meet the standard specification.

4. As a result of such an inspection and report, the Corporation suspended the supply of petrol and high speed diesel and issued a notice on November 15, 1984, drawing the attention of the licensee to the irregularities found and asking for his explanation. The licensee submitted an explanation on November 19, 1984, substantially acknowledging the default and putting forward certain excuses which were not considered satisfactory by the Corporation. In that background on January 11, 1985, the Corporation issued a formal show cause notice calling upon its licensee to show cause why the licence should not be terminated pursuant to the terms of the agreement itself because of the lapses and defaults found on inspection held on November 10, 1984.

5. This show cause notice was the subject matter of challenge in the writ petition referred to hereinbefore which was moved on April 23, 1985. The licensee in the writ petition prayed for issue of an appropriate writ for quashing the entire proceeding culminating in the purported notice dated November 15, 1984 and January 11, 1985, and for a further writ directing the Corporation and its authorities to restore the supply of petrol, high speed diesel and other products at the pump premises at 11/1, Diamond Harbour Road, Calcutta. This application was contested by the appellants and they filed an opposition to the said petition before the learned trial Judge.

6. The writ petition, however, succeeded in part and the learned trial Judge held that the appellants had no valid authority to suspend the supply of petroleum products pending the adjudication of the show cause notice and that such suspension is not only arbitrary but affects the licensee's right to carry on trade and business guaranteed by Article 19(1)(g) of the Constitution. He, however, overruled the challenge of the writ petitioner with regard to the show cause notices and directed that although the proceeding initiated under the show cause notice should continue, the Corporation must restore the supply of petroleum products until the licence is lawfully terminated. In holding as such, the learned trial Judge overruled the objection raised on behalf of the Corporation that on the case made out by the writ petitioner, he is not entitled to any relief from this court in exercise of its writ jurisdiction which is never invoked for giving any relief based on any breach of an agreement. Such an objection was overruled

relying upon the decision of the Supreme Court in the case of Smt. Rukhamanbai Vs. Shivram and others, . Feeling aggrieved the Corporation and its authorities have preferred the present appeal.

7. Mr. Bose appearing in support of this appeal has strongly contended that when parties to the agreement were acting within the realm thereof, this court should not in exercise of its power under Article 226 of the Constitution, entertain any application for enforcement of any alleged right arising and based on such an agreement. Relying upon other authorities it has been contended by Mr. Bose that in matters of contractual relationship the State or any its instrumentalities does not stand on any position different from a private individual where breach of such an agreement is the subject matter of complaint. According to Mr. Bose, the party aggrieved cannot complain that there has been any deprivation of any fundamental right in support of any claim for relief under Article 226 of the Constitution. Mr. Bose has next contended that the learned trial Judge materially misread the agreement in holding that its terms do not authorise the Corporation to suspend the supply pending the adjudication proceeding initiated on the show cause notice. Thirdly, relying strongly on an arbitration clause, being clause 66 of the agreement, it has been contended by Mr. Bose that the dispute raised should have been relegated to adjudication by the arbitrator as agreed between the parties and this court should not have interfered in exercise of its powers under Article 226 of the Constitution when such an alternative remedy was agreed to be the appropriate forum for adjudication by the parties.

8. All the points thus raised by Mr. Bose have been strongly controverted by Mr. Mitter. According to Mr. Mitter, which one of the parties to the agreement is the State or its instrumentality they were required to act reasonably and within their powers so that any arbitrary act though committed in the realm of contract is liable to be challenged in exercise of powers under article 226 of the Constitution. According to Mr. Mitter, the recent decisions of the Supreme Court clearly support such a principle. Mr. Mitter has strongly supported the view taken by the learned trial Judge that the Corporation and its authorities had no power to effect suspension of supply and such a suspension being do hoarse the agreement itself can well be challenged as an unauthorised act on the part of the instrumentality of the State. Necessary, it has been contended by Mr. Mitter that the arbitration clause in the agreement would hardly stand in the way of an adjudication of a claim based on the plea that the act of a suspension of supply was de horse the agreement.

9. We have carefully considered the rival contentions which have been put forward before us. In our view the principal issue raised with regard to the maintainability of the writ petition is no longer res integra. As early as in the case of C.K. Achuthan Vs. The State of Kerala and Others, , the Supreme Court clearly ruled that Article 226 of the Constitution is not the appropriate proceeding for enforcing any remedy for breach of a contract. It was observed : "A contract which is held from the Government stands on no different footing from a contract

held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases even specific performance but he cannot complain that there has been a deprivation of the right to practice any profession or carry on any occupation, trade or business such as is contemplated by Article 19(1)(g)". The Supreme Court has consistently upheld and followed this view and our attention has not been drawn to any subsequent decision of the Supreme Court where the said court can be said to have expressed its doubt or alter the principle so enunciated. In the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , the Supreme Court further clarified the position and re-affirmed the same principle when it held : "After the State or its agents have entered into the field of ordinary contract the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. No question where the State or its agents purporting to act within this field performs any act." In this case, the Supreme Court further laid down that no order can issue under Article 226 of the Constitution to compel the authorities to remedy a breach of contract pure and simple. Same view was re-affirmed by the Supreme Court in the cases of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, and Divisional Forest Officer v. Biswanath Tea Company Limited AIR 1981 S.C. 1378.

10. Here, in the present case even assuming that the appellant Corporation is an instrumentality of the State, the case at its highest made out by the writ petitioner is that the Corporation acted beyond its powers under the agreement in directing suspension of supply of its products for sale through the writ petitioner. It is not the case of the writ petitioner that such an instrumentality of the State issued that direction in exercise of any statutory power or in exercise of any sovereign power of the State delegated to it. It is an act quay licenser and, as such, in purported exercise of its powers under the agreement or at least in exercise of powers reserved unto itself as a party to the agreement. It is wholly irrelevant as to whether the impugned act is an arbitrary act or an act in exercise of the powers under the agreement so long it remains an act in the realm of the contract between the parties. Since the relief claimed emanates from the realm of contract, a proceeding under Article 226 of the Constitution is hardly an appropriate remedy.

11. It has been contended by Mr. Mitra that the earlier view as expressed by the Supreme Court in the decisions above referred to must be deemed to stand modified by the subsequent decisions of the same court where the distinctive position of the State and its instrumentalities having been noted the Supreme Court has pointed out that the rule of law which governs all acts of the State enjoins it to be just and fair in all its dealings with the citizen. On a careful review of such subsequent decisions we are, however, unable to accept the contention of Mr. Mitra. In order to appreciate the true implication of the subsequent decisions one is required to bear in mind certain distinctive features. A right derived from an agreement or a contract may be infringed by breach

thereof. In all such cases the remedy available is the usual remedy under the laws, namely specific performance or damages. Irrespective of whether the party committing the breach is a private individual or the state and/or its instrumentalities, in all such cases the parties to the agreement or contract having entered into a contractual relationship they would be governed exclusively by the laws relating to contract. But at the same time a right derived from an agreement with the State may as well be infringed by the State by way of breach thereof but by some administrative action taken exercise of any statutory power or in exercise of its sovereign power. Simple illustration in our opinion would explain the position. A lease or interest derived under the lease obtained from the State may itself be the subject matter of acquisition or requisition by the State and such acquisition or requisition would certainly infringe the leaseholder's right under the lease. Similarly with ever increasing statutory control over the economic processes it is often to be found that statutory control over the economic process it is often to be found that statutory prescriptions are often so far imposed on the terms of an agreement or a contract between the parties, particularly wherein the State or its instrumentality is a party thereto and in such cases the right derived from an agreement may be infringed in exercise of powers under the agreement but subject to the statutory limitations. The best illustrations in this regard are various control legislations like mines and minerals regulations. In this latter group of cases where the right of a citizen is infringed a writ proceeding would be available if it can be established that such infringement is in breach of the law notwithstanding the fact that the right emanates from the agreement. The fundamental distinction in all these cases is that the right to the relief arises not for any breach of the agreement pure and simple but for breach of law.

12. Bearing the aforesaid distinction in mind when we refer to the decision of the Supreme Court in the case of Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., , we find that in that case what the Supreme Court was enforcing was a right based on promissory estoppel. It was not a case of breach of a contract pure and simple. Again, in the case of Babu Sukhram Singh Vs. Ram Dular Singh and Others, , we find that the subject matter of challenge was an order made by a superior authority in exercise of its statutory authority. Here again, there was no case of breach of an agreement pure and simple. In the case of Hindustan Sugar v. The State of Rajasthan (supra), the Supreme Court was dealing with the question of reimbursement of sales tax. In the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the Supreme Court was not called upon to go into an issue now under consideration by us. All observations made in this judgment are with regard to the obligations of the State and its instrumentalities with regard to their conduct at the stage prior to the contract well described in another decision as at the stage of the threshold to the contract.

13. Reliance has been placed by Mr. Mitter upon two decisions of this Court, one in the case of Serajuddin and Co. Vs. State of Orissa and Others, and the other

in the case of Central Group v. Calcutta Metropolitan Development Authority and Ors. 1982 (2) CHC 90. While the former is a Bench decision of this Court the latter is the decision of a learned single Judge. The decision in Sirajuddin's case is clearly distinguishable because there, there was no concluded contract. The subject matter of challenge was revocation of a grant and the ground pleaded was that such revocation was not in accordance with the provisions of the statute. It was, therefore, not a case of enforcement of any remedy against breach of a contract in the writ jurisdiction. The single Bench decision relied upon by Mr. Mitter no doubt materially support his contention. It was held by the learned single Judge that if one seeks to enforce a purely contractual term the court normally does not entertain an application for such purpose under Article 226 of the Constitution but when one of the contracting parties is the State and the challenge is thrown by the petitioner alleging that the action is arbitrary an attack to such an action under Article 14 of the Constitution is fully available. Unfortunately, the view expressed by the learned Single Judge clearly runs counter to the decision of the Supreme Court in Radha Krishna Aggarwal's case (supra). Though the learned single Judge has relief upon subsequent decisions of the Supreme Court which have been referred to an explained by us hereinbefore in support of his conclusion, with great respect to the learned Judge, we are unable to agree with him that any of these decisions can be read as an authority for the proposition laid down by the learned Judge. That being the position, we must uphold the contention of Mr. Bose that on the case made out in the writ application, such an application is not maintainable. In view of our conclusion as above, the other two points raised by Mr. Bose need not be finally decided by us. We must, however, make it clear that it left to us for decision, we would not have agreed with the learned trial Judge that the terms of the agreement between the parties does not authorize the Corporation to suspend the supply as suspended in the present case. There could be no dispute that under the terms of the agreement the corporation had every authority to terminate the agreement forthwith and also issue such directions as are needed from time to time. It is well settled that the wider power of termination incorporates by necessary implication the lesser power of temporary termination by way of suspension as directed.

14. So far as the third objection raised by Mr. Bose is concerned, since the writ petition is not maintainable and since the dispute raised is fully covered by the arbitration clause incorporated in the agreement itself, the parties including the writ petitioner are bound to avail of the forum mutually settled for redress of the grievance and such a forum must have precedence over others. A proceeding before the High Court under Article 226 of the Constitution cannot derogate from this position as indicated by the Supreme Court in the case of Indian Aluminium Company Vs. Kerala State Electricity Board, and Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another, .

In the result, the appeal succeeds and is allowed. The impugned order being set aside, the writ petition is dismissed. The interim application filed becomes

infructuous after disposal of the appeal and is disposed of accordingly.

S.K. Mookerjee, J.

15. I Agree.

Appeal allowed.