

(2009) 07 KAR CK 0021

In the Karnataka High Court

Case No : Writ Petition No. 15702 of 2007

IBEX Gallagher Praviate Ltd.

APPELLANT

Vs

Dy. Conservator of Forest, Hunasur Wild Life Division and The
Chief Conservator of Forest, Wild Life

RESPONDENT

Date of Decision : 03-07-2009

Acts Referred:

Forest Act, 1927 — Section 82
Karnataka Forest Act, 1963 — Section 109

Citation : (2009) 6 KarLJ 687

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : G. Krishnamurthy, for the Appellant; A.R. Sharadhamba, A.G.A., for the Respondent

Judgement

Anand Byrareddy, J.—Heard the Counsel for the petitioner and the respondents.

2. The petitioner is a company registered under the provisions of the Companies Act, 1956. It carries on the business of manufacture and maintenance of power fencing including solar power fencing, and it is in collaboration with a company called Gallagher of New Zealand, which is well known in the business. The petitioner claims to have had wide experience in fencing for various organisations throughout the country.

The first respondent is said to have invited lenders for solar power fencing in eight ranges totalling about 80 Kilometres of various forest ranges in Karnataka, for protection of wild life as well as the villagers from the wild life. The petitioner had accordingly submitted its lender on 25.11.2002. The bid of the petitioner was accepted on 27.12.2002. The agreement between the petitioner and the first respondent was entered into in respect of seven items of work and are covered under seven agreements at Annexures F-1 to F-7, to the writ petition.

3. The second respondent had issued a work order in terms of Annexure-F dated

28.12.2002. The petitioner commenced work in all the seven sites during February 2003 and completed the works in terms of letter dated 12.10.2003 and the petitioner would admit that there was a delay in executing the work and the first respondent has imposed penalty from time to time in respect of such delays. The respondents had appointed an independent Agency, namely, M/s SGS India Limited to inspect and certify of the quality of the materials and its functioning. The Agency had inspected and had expressed their satisfaction about the quality and functioning and its maintenance and had submitted its report. The forest officials of the respondents, in turn, had also inspected the fencing and its operations. The report filed by M/s SGS India Limited is part of the record.

4. The first respondent had released the full contract value after deducting security deposit of 5%. The petitioner was also required to train forest officials free of cost in the maintenance and functioning of the solar fencing. This has also been complied with by the petitioner. The petitioner contends that in several places, the fencing that was put up was damaged by elephants and other wild animals and the same was replaced or repaired, as the case was, by the petitioner. It was also brought to the attention of the respondents that the respondents were required to take certain steps in the maintenance work, as and when damage was noticed. The respondents however had not taken any action. According to the petitioner, the petitioner was blamed for lack of maintenance. The petitioner and the respondent No. 1 exchanged correspondence in this regard and the petitioner's repeated suggestions as to the responsibility of the respondents in the proper maintenance of the fencing has gone unheeded. In any event, the petitioner contends that he has performed his part of the contract to the satisfaction of an independent agency and the same is also endorsed by the respondents themselves and the work has been completed in terms of the agreements. In spite of the same, the respondents have proceeded to forfeit the earnest money deposit on specious grounds and the action of the respondents is illegal and is not justified. The petitioner has made representations to the respondents to reconsider the decision as regards forfeiture of the amounts. However, the respondents instead of reconsidering the decision as regards forfeiture of the earnest money deposit has made a demand of Rs. 37,87,000/- and called upon it to pay the same on or before 30.6.2007.

5. This was challenged by the petitioner by way of a writ petition in WP 10092/2007. The petition was disposed of by this Court, with a direction to the respondents to consider the order passed by the respondents as a show-cause notice and the petitioner was permitted to reply to the same within three weeks. The petitioner did comply with this direction and has sought to justify his position in stating that the quality of the materials used and its function has been duly accepted by the certifying agency and it has been certified that all was in order. It is after this that the respondents had released the entire value of the work in favour of the petitioner except retention of 5% of the Security Deposit. Further, the responsibility was of the respondents to safeguard the continued existence of the fencing in a proper condition and in this regard, the petitioner had imparted

training to (he concerned personnel of the respondent.

6. However, the respondents having chosen to invoke Section 109 of the Karnataka Forest Act, 1963 and have sought to raise a dispute in respect of the contract. It is in this background that the present petition is filed.

7. The petitioner and the respondents have exchanged much correspondence pursuant to the dispute having been raised. The Counsel for the petitioner would take this Court through the material on record to demonstrate that the alleged violation of the Clauses of the agreements which are identical in content, namely, that there was violation of Clauses 11, 12, 13, 18 and 22 is not tenable, in that, these Clauses pertain to a circumstance before the completion of the work and could have been invoked before the petitioner completed and handed over the works to the satisfaction of the respondents and invocation of the same to make a claim against the petitioner in a huge sum of Rs. 37,87,000/- is wholly untenable and is without basis. On the other hand, the petitioner would submit that the retention of the earnest money deposit to the extent of Rs. 5 lakh has been illegally forfeited without any basis as the same could have been retained till the expiry of the warranty period which also had expired before the respondents chose to invoke the several Clauses of the agreements and claimed forfeiture of the earnest money deposit. It is in this vein that the Counsel for the petitioner would seek to further demonstrate the illegal action on the part of the respondents and would seek quashing of the demand raised by the petitioner and for a direction for refund of the Security Deposit withheld by the respondents.

The Counsel also would submit that the invocation of Section 109 of the Forest Act is wholly out of place, as the agreements are in the nature of commercial contracts between the petitioner and the respondents and could not be referable to Section 109 which relates to recovery of money due to the Government on account of the price of any forest produce or of expenses incurred in the execution of the Act in respect of the such produce. Therefore, the petitioner seeking to forfeit the security deposit and making a demand for damages for breach of contract is not referable to Section 109 and any such action on the part of the respondents would be arbitrary and high-handed, as there is no adjudication on the alleged breach of contract by the petitioner. On the other hand, the record would demonstrate, on the face of it, that the petitioner has completed his part of the contract and it is the respondents who are due to release the security deposit which has been illegally withheld and of which, the respondents have had the unjust benefit over the years and would seek to place reliance on the following:

J.A. Dalmat v. State of Mysore and Anr. AIR 1965 Mys. 109

wherein the petitioner therein had successfully tendered for some forest coupes and had failed to deposit 25% of the price and the sale in his favour was cancelled and the coupes were resold. The forest officer claimed to collect the loss suffered by the Government as if it were arrears of land revenue according

to Section 82 of the Karnataka Forest Act, 1927.

This Court on adjudication held that a case of the nature would fall u/s 54(4) of the Sale of Goods Act and after cancellation of the sale, relationship between the State and the petitioner is not of a seller and buyer. There is no existence of sale and consequently, no price was due to the latter by the former. What is claimed by the State is merely damages for the loss occasioned by breach of contract and hence, Section 82 could not be invoked. The Counsel would submit that the case on hand, is covered on all fours by the said division bench judgment of this Court.

8. He would place reliance on yet another judgment in the case of Iqbal Naseer Usmani v. Central Bank of India 2006 AIR SCW 360, wherein the appellant before the Supreme Court had obtained loan from the first respondent for the purchase of a motor vehicle under the terms of an agreement. The loan had to be discharged by payment of certain instalments. The appellant defaulted in payment. The respondent had filed a suit for recovery of the amount and the court decreed the amount. An appeal was filed in forma pauperis. The application was rejected by the appellate Court. Instead of executing the decree obtained by the appellant, the first respondent approached the Tahsildar for issuance of a Certificate of Recovery under the provisions of Section 3 of the Uttar Pradesh Public Monies (Recovery of Dues) Act, 1972. This having been questioned and the matter ultimately coming before the Supreme Court, it was held that Section 3 of the said Act does not envisage the provisions of the Act being utilised for recovery of every loan taken by the Bank. The Section permits this to be done only in respect of loans taken under a state sponsored scheme, which expression has been defined under the Act and since the loan did not fall under any such scheme, the monies could not be recovered by recourse to the machinery provided under the Act.

The Counsel for the petitioner would submit that similar is the case in the case on hand and the alleged breach of contract and the damages recoverable need to be adjudicated, if at all, before an appropriate forum and the respondents could not unilaterally declare that there was breach of contract in the face of the petitioner having demonstrated that the agreements were complete in all respects to the satisfaction of the respondents.

9. The Government Advocate would make a feeble attempt to meet the petition averments and would seek to place reliance on the above said Clauses of the agreement, to contend that there was indeed a breach of contract by the respondents and this has been brought to his attention and the admitted circumstance which the petitioner himself has candidly declared in the writ petition that there was delay on his part in executing the works is a case in point. And the poor quality of fencing has been the bone of contention and as there is wide-spread damage to the fencing which is of poor quality, the petitioner was bound by the warranty Clauses in making good the damages which has been claimed by the State Government in terms of the agreement. The respondents are entitled to recover the monies due as if it were arrears of land revenue as

agreed to by the petitioner. Hence, there is no warrant for interference by this Court when it is an agreed condition that, in the event of any claims against the respondents, the same could be recovered by recourse to the Karnataka Land Revenue Act, 1964, as if the same was arrears of land revenue and would submit that the case on hand can, therefore, be distinguished from the cases referred to in the two decisions cited by the Counsel for the petitioner. Since there is an express agreement for recovery of monies due as arrears of land revenue, there is no infirmity or alleged high-handedness in the facts and circumstances of the case.

The Government Advocate would seek to take this Court through the record to substantiate his contentions. More particularly, the Government Advocate would draw reference to Clause 11 of the several agreements which reads as follows:

If the work is not carried out satisfactorily, Deputy Conservator of Forests, is at liberty to get the work done through some other agency and the cost of such work will be recovered from the contractor as arrears of land revenue and earnest money deposit and security deposit will be forfeited to the Government.

This Clause by itself does not support the case of the respondents on the other hand, it would indicate that in a situation where the petitioner did not complete the work, it was open for the respondents to have got it done through some other agency. That situation has not arisen as the petitioner did complete the works and it was also inspected and certified by an independent agency. Hence, the contention that there was a subsisting relationship of contractual obligation on the part of the petitioner, which is being enforced, is a contention that does not readily appeal to this Court and it is not supported by the material on record or the circumstances of the case. The relationship between the petitioner and the respondents being referable to the agreements on hand and there being material available to show that the petitioner had, in fact, completed his part of the contract, the allegations of poor quality of work though after the expiry of the warranty period and the quantum of damages referable to such breach of contract would be a subject matter of adjudication.

10. In the course of these proceedings, when it was suggested that the matter be taken to arbitration by both the parties by mutual agreement, the State Government in its usual fashion stone-walled the proposal, by stating that there being no such agreement in the first place, it could not now be referred to arbitration. This unfair stand of the State Government would leave no other option, but for the State Government to prefer a suit if it is so inclined to establish the claim and recover damages.

The writ petition is allowed insofar as the prayer for quashing of Annexure-S is concerned. Annexure-S stands quashed. Insofar as the directions sought by the petitioner for refund of the earnest money deposit is concerned, this would also require an adjudication and it is open for the petitioner to recover the same by recourse to appropriate proceedings. The respondents shall recover the monies,

if any, due from the petitioner by recourse to a civil suit and not as arrears of land revenue as the claim cannot be referable to Section 109 of the Forest Act, 1963.