
(2010) 02 MAD CK 0244

In the Madras High Court

Case No : Writ Petition (MD) . No. 13743 of 2009 and M.P. (MD) . No's. 1, 1, 1, 1, 1, 1, 1, 2, 2, 2, 2, 2 and 2 of 2009 and 1, 1, 1 and 1 of 2010

K. Bharathi

APPELLANT

Vs

Government of Tamil Nadu and Others

RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Revenue Recovery Act, 1864 — Section 52

Citation : (2010) 02 MAD CK 0244

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : S.D. Ramalingam, in W.P. MD. Nos. 13743, 13744, 13745, 13746, 13747, 13748 of 2009 and A.R.L. Sundereshan for T. Senthil kumar, in W.P. MD No. 14199 and 14287 of 2009, for the Appellant; S. Chellammal, A.A.G. for K. Balasubramaniyan, Addl. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—W.P(MD). No. 13743 of 2009 is filed for a writ of Certiorari calling for the records pertaining to the impugned order in D.O/683-1/2008, dated 04.12.2009 on the file of the District Collector/Chairman, Tsunami Project Implementation Unit Kanyakumari District, the third respondent herein and quash the same.

2. W.P.(MD). No. 13744 of 2009 is filed for a writ of Certiorari calling for the records pertaining to the impugned order in T1/259/2007, dated 27.11.2009 on the file of the District Collector/Chairman, Tsunami Project Implementation Unit Tirunelveli District, the third respondent herein and quash the same.

3. W.P.(MD). No. 13745 of 2009 Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari calling for the records pertaining to the impugned order in D.O/683-3/2008, dated 04.12.2009 on the file of the District Collector/Chairman, Tsunami Project Implementation Unit

Kanyakumari District, the third respondent herein and quash the same.

4. W.P.(MD). No. 13746 of 2009 is filed for a writ of Certiorari calling for the records pertaining to the impugned order in D.O/683-5/2008, dated 04.12.2009 on the file of the District Collector/Chairman, Tsunami Project Implementation Unit Kanyakumari District, the third respondent herein and quash the same.

5. W.P.(MD). No. 13747 of 2009 is filed for Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari calling for the records pertaining to the impugned order in D.O/683-6/2008, dated 04.12.2009 on the file of the District Collector/Chairman, Tsunami Project Implementation Unit Kanyakumari District, the third respondent herein and quash the same.

6. W.P.(MD). No. 13748 of 2009 is filed for a writ of Certiorari calling for the records pertaining to the impugned order in T1/264/2007, dated 27.11.2009 on the file of the District Collector/Chairman, Tsunami Project Implementation Unit Tirunelveli District, the third respondent herein and quash the same.

7. W.P.(MD). No. 14287 of 2009 is filed for a writ of Certiorari to call for the records relating to the impugned cancellation order of the second respondent made in T1/262/2007, dated 27.11.2009 and quash the same as illegal and unsustainable.

8. W.P.(MD). No. 14199 of 2009 is filed for a writ of Certiorari to call for the records relating to the impugned cancellation order of the second respondent made in T1/2592/2007, dated 27.11.2009 and quash the same as illegal and unsustainable.

9. Admittedly, the issue involved and the relief sought for in all these writ petitions are one and the same. Hence a common order is being passed.

10. The order impugned in all these writ petitions is termination of contract.

11. For the sake of convenience, I am referring to the facts as narrated in W.P. No. 14199 of 2009.

12. The case of the petitioner in this writ petition is as follows: The petitioner is a Civil engineering Contractor doing Government works. Tender was invited by the Government for construction of 216 houses under Rajiv Gandhi Rehabilitation Package for Tsunami affected areas viz., Georgia Nagar, Thoppuvilai, Kooduthalai, Anna Nagar and Keela Ulvari habitation in kuttam and Karaisuthu Uvari Panchayat of Tirunelveli District. Since the petitioner's bid was lowest the same was accepted and contract was awarded to the petitioner for a sum of Rs. 5,29,75,974/- and an agreement was also entered into between the petitioner and the respondents on 26.12.2007. The petitioner was finally directed to construct 189 houses. The entire construction site was handed over to the petitioner on 26.12.2007 and some of the sites were handed over only 27.01.2008. Even though the agreement period was from 26.12.2007 to 25.09.2008 due to practical difficulties of reaching the work sites without any

roads and non availability of construction materials as promised by the respondents and delay in handing over the sites by the respondents, the construction work could not be started and completed as per the schedule. However, the contract period was extended from time to time by the respondents by order dated 14.10.2008, 28.01.2009 and 01.04.2009. Major portion of the work was completed till September 2009 and only a portion was left unfinished. Totally, 1837 houses under 10 packages were to be constructed by various contractors like that of the petitioner herein. But till date, none of the contractors under any package were able to complete the project as per the schedule due to delay in handing over the work sites by the beneficiary, non availability of construction materials and labourers, other related problems put forth by the beneficiary and the delay in sanctioning the bills by the officials soon. In fact, the delay on the part of the respondents was also recorded in the minutes of the meeting held on 01.03.2008. In fact the sand was also not supplied for the construction by the P.W.D. and the contractor had to bring sand from quarries situated 150 KM away for Rs. 8000/- and Rs. 5000/- was paid for transportation alone. Even the Junior Engineer who was posted in the site was not able to make entries with regard to day to day progress in the measurement book. Sanctioning of the bills were also delayed unnecessarily causing prejudice to the petitioner.

13. While so, on 03.09.2009 the petitioner was informed by the respondent to apply for extension of time to extend the contract period. Accordingly, the petitioner sought for extension of time till 30.12.2009 and the same was under consideration. At that time, the petitioner received a notice from the respondents on 25.09.2009 stating that the work progress shown was very slow and the contractor had to increase his work force and materials to complete the work. Time was also given to the petitioner to show substantial progress. It was also informed to the petitioner in the notice dated 25.9.2009 that if the works were not carried out at the desired speed, the agreement would be terminated with the forfeiture of E.M.D. and the department would take action to complete the balance work at the petitioner's risk and cost. The petitioner prayed for extension of time upto 31.12.2009 and the respondents advised the petitioner to complete the work and further stated that extension of time sought for would be granted.

14. On 23.11.2009 a notice from the Project Co-ordinator, Tsunami Implementation Unit, Thirunelveli District was issued pointing out certain defects in the construction and the same was directed to be rectified. This would make it clear that there was deemed extension of contract upto 31.12.2009 by the respondent. While so, the impugned order has been passed on 27.11.2009 cancelling the agreement and terminating contract with forfeiture of security deposit. According to the petitioner the cancellation order is illegal and unsustainable in law and hence the present writ petitions have been filed for the aforesaid relief.

15. This Court on 6.01.2010 granted an interim order of stay in M.P. No. 1 of

2009.

16. The second respondent viz., the District Collector, Tirunelveli District has filed a counter affidavit along with a petition to vacate the order of stay granted by this Court on 06.01.2010.

17. The case of the second respondent is as follows:

At the outset, it is submitted that the petitioner has not approached this Court with clean hands as he has committed criminal misconduct in executing a bank guarantee of Rs. 9,72,000/- by forging the bank documents and the signature of the bank officials and submitted the same to the second respondent. In Tirunelveli District, re-construction of 1831 number of houses were undertaken in 10 packages. In response to the tender notification, the petitioner applied and became the successful bidder for construction of 216 number of houses. As per the agreement, the completion period is nine months commencing from 26.12.2007 to 25.09.2008. But the work progress was very slow. Therefore the first notice vide Programme Coordinator in letter No. T3/2/2008 dated 16.04.2008 was issued to the petitioner with an instruction to improve the work and show progress. But the petitioner has not shown any progress. Even after receipt of two letters sent by the respondent to show substantial progress, the petitioner did not do the needful. Even during August 2009, the progress of work was 48.26% only. The petitioner in turn represented through his letter dated 7.10.2008, 30.11.2008 and 24.03.2009, expressing his difficulties in completing the work in time and prayed for extension of time. Accordingly, the second respondent extended the time on three occasions, namely, 26.09,2008 to 31.12.2008, 01.01.2009 to 31.03.2009 and 01.04.2009 to 31.08.2009. In fact, the petitioner sought for extension of time upto 30.12.2009. Therefore a final notice was issued on 25.09.2009 to the petitioner to which the petitioner replied that the work would be completed by December 2009. But the said request was not acceded to by the respondents. Thus, the petitioner completed only 48.26% of work alone even after giving three extension of time upto 31.08.2009. Therefore, the tender was rightly cancelled and there is no infirmity nor illegality in the order passed by the respondent cancelling the work, which is impugned in the writ petition. There is no loss to the petitioner on account of the cancellation, since all the payments for the works executed have already been paid. Hence they prayed for dismissal of the writ petition.

18. In other writ petitions, interim order of stay was granted on 21.12.2009 and the respondents have filed a counter together with the vacate stay petitions also.

19. I have heard the learned Senior Counsel for the petitioners and the learned Additional Advocate General for the respondents. I have also gone through the documents available on record including the counter affidavits filed.

20. In all the writ petitions, the question that arises for consideration is whether the impugned order of termination in each of the writ petition is sustainable or not.

21. The learned Additional Advocate General raised a preliminary objection that the writ petitions are not maintainable under Article 226 of the Constitution of India as the dispute is in the realm of contract and even as per the agreement entered into between the parties the dispute is to be resolved either by resorting to arbitration or approaching the competent civil court. In support of her submission, the learned Additional Advocate General relied on the following judgments.

1. Judgment reported in S.N. Ramasamy Raju Vs. The State of Tamil Nadu
2. Food Corporation of India and others Vs. Jagannath Dutta and others,
3. Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another,
4. Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others,
5. Rajasthan Housing Board and Another Vs. G.S. Investments and Another,
6. Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another,

22. Since the preliminary objection was raised with regard to the maintainability of the writ petitions, let me consider the question of maintainability first.

23. Admittedly, the writ petitioner in W.P. No. 14199 of 2009 entered into a contract with the respondents on 26.12.2007 and the contract price was Rs. 5,29,75,974/-. As per the final contract 189 houses had to be built up by the petitioner under Rajiv Gandhi Rehabilitation Package for Tsunami affected areas of Tirunelveli district.

24. Even according to the petitioner the work could not be progressed due to various omissions and commissions of the respondent and therefore extension of time was granted on various dates viz., 14.10.2008, 28.01.2009 and 01.04.2009. While so, in September 2009, the petitioner was informed by the respondents to apply for further extension of time to extend the contract period. The petitioner thus sought for extension of time upto 31.12.2009. According to the petitioner by letter dated 25.09.2009, he was informed that a further extension of 21 days was granted from the date of receipt of the letter. Not satisfied with the time granted, he sought for time till 31.12.2009 as applied by him. On 23.11.2009, he received a notice from the Project Co-ordinator, Tsunami Implementation Unit, Tirunelveli District stating that some of the wooden doors shutters are sub-standard and the same has to be rectified within five days. When he was taking steps to attend to that work, the impugned order of termination was passed. It is not in dispute that the parties are governed by the terms of the agreement entered into between them and Clause 6 of the schedule "C" is very relevant for the purpose of deciding the issue involved in this case.

Schedule "C":

6. Arbitration Clause:

In case any dispute or difference between the parties to the contract either during the progress or after the completion of the works or after determination, abandonment or breach of the contract or as to any other matter or thing arising there under except as to the matters left to the sole discretion of the Executive Engineers under Clause 18, 20, 25-3, 27-1, 34, 35 and 37 of the general condition of the contractor as to the withholding by the Executive Engineer or the payment of any bill to which the contractor may claim to be entitled.

25. Clause 8 of the schedule "C" is also very relevant as only under this clause the contract was terminated by the respondents.

Schedule C:

8. Execution of Work:

If at any time the Collector shall be of the opinion that the contractor is delaying commencement of the work or violating any of the progress of work as defined by the tabular statement rate of progress in the article of agreement, the Collector shall so advise the contractor in writing and at the same time demand compliance. If the contractor neglects to comply with such demand within seven days after the receipt of such notice it shall be at any time thereafter be lawful for the Collector to determine the contract which determination shall carry with the forfeiture of the security deposit and the total of the amount withheld from the final bill together with value of such works as may have been executed and not paid for such proportion of such total sums as shall be assessed by the Collector.

26. Clause 3 of Schedule "C" is also very relevant as arguments were advanced by the learned Senior counsel for the petitioner by contending that this Act could not be invoked at all as proposed in the impugned order.

Schedule "C":

3. Revenue Recovery Act:

Whenever any amount has to be paid by the contractor in lieu of determination of the contract by virtue of Clause 57(4) any amount that may be due or may become due from the contractor under the presence and the contractor is not responding to the demands for the payment of said amount, then the Government shall be entitled to recover the said amount under the provision of the Revenue Recovery Act.

In the event of the work being transferred to any other office, Executive Engineer/Assistant Executive Engineer who is having jurisdiction over the work shall be competent to exercise all the powers and privileges reserved in favour of the Government.

27. In view of the above clauses and also in view of the settled law that in a contractual matter, High court should sparingly exercised its jurisdiction under Article 226 of the Constitution of India, I have no hesitation in holding that these writ petitions are not maintainable.

28. Further, according to the writ petitioner, it is the respondents who are responsible for the delay and therefore time should have been extended further instead of arbitrarily terminating the contract. This was seriously disputed by the respondents by pointing out the accused finger at the petitioner in view of the disputed fact like who is at fault for the delay, whether further extension ought to have been granted and further whether the petitioner is put to irreparable loss have to be decided only in a competent civil court by letting in evidence. Hence all these writ petitions are liable to be dismissed as not maintainable.

29. But the learned Senior counsel appearing for the petitioner submitted that atleast that portion of the impugned order wherein the second respondent stated that excess cost involved would be recovered through Revenue Recovery act should be set aside. According to him, the respondents cannot resort to provisions of the Revenue Recovery act for recovering the excess cost.

30. The learned Senior counsel very much relied on the following three judgments.

1. 1988 L.W. 383 (P.A. Aliyar Saheb and 288 Ors. v. Independent Dy. Tahsildar, Pallipattu, Chengalpattu and Ors.)

2. The National Engineering Co. Ltd. Vs. The Tahsildar and Others,

3. An unreported judgment dated 15.07.2009 in W.P. No. 13298 of 2009 (N.V. Babu v. The Divisional Engineer (H), NABARD Rural Roads, Chengalput and Anr.)

31. I am unable to accept these submissions also of the learned Senior counsel.

32. In 1988 (II) L.W. 383 (cited supra), the learned Judge of this Court has held as follows:

43. Therefore, in my opinion, the result of the above decisions is that in a case where the amount is recoverable only as "sum due to the State Government" falling within the scope of Section 52 of the Revenue Recovery Act and where a person from whom the said amount is sought to be recovered disputes either the existence of his liability or the extent of his liability, before resort to the provisions of the Revenue Recovery Act can be had, there must be an enquiry by the State in which the alleged defaulter is entitled to participate and wherein the basis of the liability as well as the amount claimed by the State must be made known to the alleged defaulter who is given an opportunity to place all the materials and circumstances which, in his opinion, go to exclude or eliminate his liability itself or to reduce the liability and a determination based on such enquiry should be arrived at with reference to the existence or the extent of the liability of the defaulter. That is exactly what Rama Prasada Rao, J. Himself meant is

made clear by two of his subsequent judgments.

46. Having regard to the above decisions of Ramaprasada Rao, J., himself, I am clearly of the opinion that the learned Judge did not intend to lay down anything other than what I have already indicated above. I may also point out that the determination and adjudication which I contemplate as a preliminary to invocation of the provisions of the Revenue Recovery act cannot take the place of an adjudication or determination in a Court of law which can be had either by the State itself filing a suit in a Civil Court instead of having recourse to the provisions of the Revenue Recovery Act or by the citizen himself instituting a suit to question the action of the State under the provisions of the Revenue Recovery Act. The determination and adjudication contemplated by me above is more or less in the nature of preliminary ascertainment of the existence or extent of the liability of a citizen, as a condition precedent to invocation provisions of the Revenue Recovery Act. To hold that such a determination and adjudication should be a substitute for an adjudication and determination by a regularly constituted civil court will be to take away the right of an aggrieved citizen to question the action of the State under the Act in a Civil Court. Equally to insist that the State should venture upon such adjudication and determination as if it were in the nature of a regular trial in a civil Court will tend to defeat the very object of the Revenue Recovery Act and set at naught the provisions of the said Act.

65. Consequently, all these writ petitions are allowed. In each one of them, there will be a direction to the respondents not to proceed with the recovery of the amounts alleged to be due from the petitioners under the provisions of the Revenue Recovery Act, 1864, without first holding an enquiry, after communicating to the petitioners concerned the particulars of the amount claimed from them and how the same is arrived at and giving them an opportunity to place all the materials in their possession to substantiate their case, if they dispute either their liability or the extent of their liability and considering the materials so placed and ascertaining the amount due from them on the basis of such enquiry. There will be no order as to costs.

33. Similarly, in *The National Engineering Co. Ltd. Vs. The Tahsildar and Others*, , the learned Single Judge of this Court has held that there must be a concluded contract and a written agreement. In the absence of consensus between the department and the party as regard to the value of shortages, the Government cannot invoke the provisions of the Revenue Recovery Act. He further added that there must be consensus AD IDEM between the State and the defaulter as regards nature and the quantum of default if the State intends to set the provisions of the Revenue Recovery Act into motion for recovery of such arrears found and payable by the defaulters. Therefore, the learned Judge in the conclusion held that there must be an enquiry by the State in which the alleged defaulter is entitled to participate and wherein the basis of the liability as well as the amount claimed by the State must be made known to the alleged defaulter.

34. From the above, it is very clear that when a person from whom amounts are

sought to be recovered disputes either existence of his liability or extent of his liability before resorting to the provisions of the Revenue Recovery Act. There must be an enquiry by the State in which defaulter is entitled to participate and place all the materials. Revenue Recovery Act could not be invoked if there is no mention about the Act in the agreement but the same could be invoked if there is a clause in the agreement stipulating the recovery of the excess amount through Revenue Recovery Act. But the learned Judges held that any such invocation of the provisions of the Revenue Recovery Act could not be made unilaterally and the amount should be determined only after an enquiry is conducted and after giving an opportunity to the other side/defaulters. Therefore, it cannot be said that the Revenue Recovery Act could not be invoked at all as Clause 3 of the schedule "C" of the agreement enables the respondents to invoke the Revenue Recovery Act.

35. The learned Senior counsel relying on an unreported judgment of the learned Single Judge dated 15.7.2009 made in W.P. No. 13298 of 2009 (cited supra), submitted that a similar order could be passed in this case also.

36. I am unable to accept this submission also.

37. In the unreported judgment (cited supra), after terminating the contract an amount was arrived at and the contractor was asked to pay the sum or else to face Revenue Recovery proceedings. Only in that context, the learned Judge set aside the demand and remanded the matter back to the respondents with a direction to pass orders after providing reasonable opportunity and also to furnish particulars as to how the amount was arrived at.

38. That stage is not at all arrived at in this case. What is stated in the impugned order is that the balance work would be got executed by other agency at the petitioner's/Contractor's risk and cost and the excess cost involved will be recovered from the petitioner through Revenue Recovery Act as per Clause 3 of the agreement.

39. Therefore, only when the amount is arrived at, the question of recovering the sum under the Revenue Recovery Act would arise. At this stage, the petitioner cannot speculate that the respondents would not follow the principles of natural justice before seeking to recover the amount under Revenue Recovery Act. It is a trite law that the writ petition cannot be maintained on mere apprehension and suspicion and this Court also cannot pass orders in this regard.

40. Therefore, in view of the aforesaid reasons, all the writ petitions are dismissed. No costs. Consequently, all the connected miscellaneous petitions are also dismissed. Miscellaneous petitions filed to vacate the order of interim order stand allowed.