
(2002) 05 RAJ CK 0022
In the Rajasthan High Court
Case No : Civil Special Appeal No. 222 of 1991

Kharta Ram Choudhary

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 08-05-2002

Acts Referred:

Constitution of India, 1950 — Article 226, 299

Citation : (2002) 5 WLN 699

Hon'ble Judges : N.N. Mathur, J;D.N. Joshi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

N.N. Mathur, J.—This special appeal is directed against the order of the learned Single Judge dated 3.7.1991 dismissing the writ petition in limine and relegating the petitioner to the remedy of suit being a contractual matter.

2. The brief facts giving rise to the instant special appeal are that the respondent Superintending Engineer, Circle-1. P.W.D., Jodhpur invited tenders inter alia for the improvement of horizontal profile, widening and, strengthening to Jodhpur-Pokaran Road Km. 102/0 to 123/0 by tender notice dated 3.6.1989. The petitioner who is registered as "A" class Contractor, gave tender for the work and quoted his rate at 41.42% above the "G" Schedule of rates. The tender was opened on 19.7.1989. None of the tender was accepted and 2.11.1989 was fixed for negotiation. During negotiation, the petitioner quoted his rate at 36.99% above the "G" Schedule rates. However, the rate did not carry through. The petitioner quoted fresh rate at 32% above the "G" Schedule rates with specific condition of giving 24 months for the completion of work and the another for escalation of price. The negotiations were not finalised. The second respondent Chief Engineer (Roads-II) sent a telegram dated 29.12.1989 informing the petitioner to extend the validity of offer for further period of one month. The said telegram dated 29.12.1989 is placed on the record as Annexure-5. There were some more communications between the parties. Suffices it to say, that

petitioner extended the validity of tender upto 31.3.1990 under communication dated 1.3.1990.

3. The say of the petitioner is that he did not receive any communication accepting the validity period as extended upto 31.3.1990. Thus, the case of the petitioner is that offer given by him lapsed automatically with the afflux of time. It is further averred that the petitioner received a letter dated 10.4.1990 which was delivered to him on 7.7.1990 whereby, he was asked to attend the office of Executive Engineer and sign the agreement within a period of one week. Reference is also made to letters dated 27.6.1990 and 8.10.1990. Ultimately by letter dated 16.1.1991 the respondent No. 2 Chief Engineer inflicted a penalty, as interim compensation at the rate of 1% on the tendered amount of work under Clause 2 of the contract agreement for not maintaining the prorata progress of the work as per the terms and conditions of the contract agreement despite notice. Further the Chief Engineer by order dated 27.3.1991 issued a show cause notice asking the petitioner to take immediate steps to start the work and complete the same within the stipulated period failing which the amount of compensation shall not be recovered from his and action shall to be taken against him under Clauses 2 and 3 of the contract agreement. The petitioner had challenged the said notice by way of petition under Article 226 of the Constitution of India before this Court. The learned Single Judge by order dated 3.7.1991 dismissed the writ petition in limine.

4. The Division Bench of this Court while admitting the special appeal by order dated 10.1.1992 stayed the operation of the order dated 13.12.1991 (Annexure-S/1). During the pendency of appeal, the respondents filed a reply supported by the affidavit of S.M. Bohra, Executive Engineer and Technical Assistant, P.W.D. Circle-III, Jodhpur with respect to the acceptance of the tender within the validity period i.e. upto 31.3.1990. It is averred that the same was accepted within the stipulated period by telegram (Annex. R-3) dated 31.3.1990. Said telegram has been placed on record which reads as follows:

Your negotiated tender Jodhpur-Prokran Road KM 102 to 123 sanctioned at 32 per cent above (.) Content Executive Engineer concerned to start work immediately (.)

By communication dated 10.4.1990 the Executive Engineer again called upon the petitioner to sign the agreement. The notice was sent by the registered post but it was received back on 21.5.1990 with the endorsement that the party does not reside at the place of address. It was also averred that Shri K.C. Mathur, Junior Engineer, P.W.D. was also sent for personal delivery of the communication but the contractor was not available. Some more correspondences have been on the record to show that offer given by the petitioner was accepted but the petitioner did not start the work and completed the same within the stipulated period.

5. It is contended by Shri Dinesh Maheshwari, learned Counsel appearing for the appellant that learned Single Judge has committed error in dismissing the writ

petition on the ground that it involves contractual matter. It is submitted that the agreement never came into existence between the parties. The learned Counsel has referred to various letters to show that even according to the respondents, the petitioner was repeatedly asked to sign the contract but he did not turn up. Thus is no dispute that no agreement was executed between the parties much less in accordance with the provisions of Article 299 of the Constitution of India. It is further submitted by Mr. Dinesh Maheswari that even according to the Annexure R-3 there is nothing with respect to the other conditions i.e., period of completing the work and escalation of price. Therefore, unless the offer was accepted in toto, the acceptance of offer vide Annexure R-3 is not valid.

6. On the other hand, learned Additional Government Advocate supported the order of the learned Single Judge. It is also submitted that the writ petition involves disputed question of fact which cannot be adjudicated conveniently in a writ petition under Article 226 of the Constitution of India.

7. Having considered the rival contentions, we are of the view that it was not a matter which the learned Single Judge should have dismissed in limine. Even from the averments made in the writ petition, it cannot be said that contract was executed between the parties. Therefore, it cannot be said that it was a contractual matter. It is now well settled by the catena of decisions that even in contractual matters, writ petitions are maintainable. After survey of number of decisions of Supreme Court on the question of maintainability of writ petition in contractual matter, we have taken a view in *Udaipur Contractors Association v. State of Rajasthan and Ors.* reported in RLW 2001 (3) 1515 which reads as under:

16. Thus, even if the petition pertains to contractual matters, the petition will lie under Article 226 of the Constitution, where the public functionaries are involved and the matter relates to violation of fundamental rights or the enforcement of the public duties. While exercising the powers the Court will be circumspect to adjudicate the dispute arising out of contract, depending upon the nature and rights involved in a given case. The distinction between the public law and private law remedy is now narrowed down. Every action of the State or an instrumentality of the State in exercise of its executive powers, must be subject to rule of law and be informed by reasons. Rules of fair play and natural justice are part of the rule of law. The jurisdiction of the High Court under Article 226 of the Constitution is an extra ordinary jurisdiction vested not for the purpose of declaring the private rights of the parties but for the purpose of ensuring that the law of the land is implicitly obeyed and that various public authorities are kept within the limit of their jurisdiction. It is of course true that the High Court in exercise of judicial discretion declines to exercise its extra ordinary jurisdiction under Article 226 where the petition is frivolous, vexatious or prima facie unjust or may not be appropriately tried in extra ordinary jurisdiction but if from the material placed before the Court and the allegations made in the petition, prima facie appears that the impugned action of the public authority is without

authority of law, highhanded, it is improper to dismiss a petition in limine. Even if some questions of fact are raised, it would be inappropriate to ask the party to seek relief by some what lengthy dilatory, expensive process by a civil suit against a public body. Reference is made to Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, and Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

8. In the instant case, the Chief Engineer has inflicted the levy of compensation at the rate of 1% on the tendered amount. It was not open for him to impose such a penalty without adjudication of the dispute after hearing the affected party and proof of actual damages. Therefore, in our view, the levy of compensation at the rate of 1% is illegal. So far as the show cause notice for taking action under Sub-clauses 2 and 3 is concerned, we do not propose to go into the issue. The petitioner is at the liberty to give appropriate reply.

9. Consequently, we allow the writ petition and the special appeal and quash the levy of compensation at the rate of 1% on the tendered amount. The petitioner may submit reply to the show cause notice Annexure-14 and Annexure-15. The respondents may proceed in accordance with law.