
(2003) 12 AP CK 0059
In the Andhra Pradesh High Court
Case No : Writ Petition No. 9683 of 2001

K.L. Hitech Security Print Ltd.

APPELLANT

Vs

Uttar Pradesh State Road Transport Corporation

RESPONDENT

Date of Decision : 24-12-2003

Acts Referred:

Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 23

Citation : (2003) 12 AP CK 0059

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : A.G. and N. Jaya Surya, for the Appellant; A.V. Sivaiah, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—The petitioner is a public limited company engaged in the business of printing. The Reserve Bank of India has authorised it to print security documents for banks and has included it in the approved list of secured printers. The petitioner claims to have undertaken the printing of cheques and demand drafts for several banks; and bonds, share certificates and lottery tickets for various organizations. Printing of tickets is also treated with the same amount of precession and security. The petitioner claims to have undertaken printing of tickets for Indian Railways and State Road Transport Corporations of various States.

2. On 17-10-1995 the Uttar Pradesh State Road Transport Corporation, respondent herein, issued a tender notice inviting tenders for printing of 80 lakh blank ticket books (for short "B.T. books") and 1,40,000 way bill pads. The tenders submitted by the petitioner for the said two works were accepted by the respondent and two separate agreements came to be signed on 17-01-1996. The value of the works under the contract is said to be Rs. 1,88,00,000/- and Rs. 30,24,000/- respectively.

3. After the agreements were executed, the petitioner had supplied the printed material. It is stated that a letter dated 01-07-1997 was addressed by the respondent to the petitioner alleging short supply of material and wrong cutting in respect of two lakh B.T. books supplied to it. The petitioner claimed that it offered to replace any defective material. It is stated that on verification of the material, 10,300 B.T. books were found to be defective and that the same were replaced on 26-07-1997. It is the case of the petitioner that an amount of Rs. 42,00,000/- remained outstanding in respect of the said contract.

4. Respondent invited similar tender in September, 1997 for 72,00,000 B.T. books and 1,05,300 way bill pads. Ultimately, the contract came to be awarded to the petitioner. Some controversies arose as to the execution of this subsequent contract. Writ Petition Nos.4006 and 20212 of 1998 came to be filed in the context of various developments in the contract. An enquiry is said to have been ordered by the Government of Uttar Pradesh in the award of this contract. Several quantities of supplies came to be made by the petitioner against this contract.

5. On 19-05-1999 the respondent addressed a letter to the petitioner intimating that enquiry regarding the B.T. books supplied under the first contract would be conducted on 23-06-1999. On account of ill-health of the Managing Director of the petitioner, a request is said to have been made seeking time. Subsequently, through a letter dated 20-09-1999 the petitioner was informed that 80 random samples, from the 8 lakh B.T. books supplied by the petitioner, were taken and on verification it was found that out of 80 samples, each representing 10,000 B.T. books, only two were found up to the mark and the remaining 78 samples did not conform to the requirements as to measurement. While correspondence in this regard was in progress, the petitioner filed three suits being O.S.Nos.572 of 2001, 8 of 2001 and 66 of 2001 in the City Civil Court, Hyderabad for recovery of certain sums from the respondent. It is alleged that having received notice in one of the suits, the respondent passed an order dated 09-04-2001 purporting to impose a penalty of Rs.1,66,92,000/- invoking Clause 11 of the agreement. The petitioner challenges the same.

6. The petitioner contends that the impugned order is violative of principles of natural justice and is the result of arbitrary exercise of power by the respondent. It is also alleged that the respondent had utilized the entire stock of 8 lakh B.T. books supplied by the petitioner and it is not open to the respondent to levy penalty. According to the petitioner, the impugned order is passed only as a counter-blast to the filing of the suits by the petitioner. The petitioner alleges that in the context of exercise of such a power by the petitioner, the relevant clause in the agreement is oppressive and cannot be enforced.

7. In the counter-affidavit filed by the respondent, an objection is taken as to the maintainability of the petition. Several grounds are raised in this regard. Firstly, it is contended that since the subject matter of the writ petition being contractual in nature, writ petition cannot be maintained. Secondly, it is urged that there

exists a clause providing for arbitration and it is pleaded that the petitioner has to exhaust that remedy. Finally, it is stated that this Court has no territorial jurisdiction.

8. As regards the merits of the matter, the respondent contends that the samples drawn by them from out of the stock of 8 lakh B.T. books did not conform to the prescribed standards except for a minute quality. It is also stated that the material had to be used by them in view of the inevitable circumstances and that by itself does not relieve the petitioner from liability under the penal clause.

9. Learned Advocate-General appearing for the petitioner submits that the entire exercise of drawing of samples, alleged verification of the same and passing of the impugned order, is resorted to as a counter-blast for the claim that was being made by the petitioner for recovery of the sums due to the petitioner. He submits that if there was substantial variation as to measurement of the ticket books, the respondent was under an obligation to put the petitioner on notice and require it to replace the same. He draws the attention of this Court one instance under the first contract between the petitioner and the respondent, wherein 10,300 B.T. books were replaced by the petitioner when it was brought to its notice that cutting of the said books was not up to the prescribed standard. It is his case that neither the petitioner was informed when samples were drawn nor the contract provides for drawl of samples. He also contends that if the respondent suffered from any loss or was prevented from using such material, the petitioner would certainly have replaced it. He asserts that the very fact that the respondent had utilized the entire material without suffering any disadvantage, discloses lack of fairness and transparency in the matter. It is also his case that existence of clause in the contract by itself does not justify the exercise of such an extreme power and if such a course of action is permissible, the clause itself is liable to be declared as oppressive.

10. Sri E. Manohar, learned Senior Counsel appearing for the respondent, on the other hand, submits that the writ petition itself cannot be maintained for more reasons than one. Reiterating the objections raised in the counter-affidavit as to maintainability, he contends that the petitioner has to work out its remedies either by filing a suit or by taking recourse to arbitration. He submits that the petitioner was provided adequate opportunity in the matter of verification of samples and no exception can be taken to the impugned proceedings.

11. For the first time the petitioner was awarded a contract of printing of 80 lakh B.T. ticket books and 1,40,000 way bill pads through an agreement dated 17-01-1996. A similar order was placed on it for different quantities viz., 72 lakh B.T. books and 1,05,300 way bill pads. Through a purchase order dated 05-11-1997 the contract came to be awarded in favour of the petitioner. Several proceedings ensued as regards working of this contract. Through the impugned order, the respondent invoked its power under Clause 11 of the purchase order dated 05-11-1997 and levied a penalty of Rs.1,66,92,000/-on the ground that 7,80,000 B.T. books did not conform to the standard measurements. The amount

represented ten times the cost of 7.8 lakh B.T. books.

12. A perusal of the impugned order discloses that between November and December of 1997, the petitioner supplied 8 lakh B.T. books and that for each 10,000 books a random samples were taken in the presence of the representative of petitioner. When the samples were checked, it was found that 78 samples were not up to the required standard. It also discloses that measurement of the samples was not done in the presence of the representative of petitioner, but the result of the same was intimated to it through a letter dated 20-09-1999. Several opportunities are said to have been given to the petitioner in the matter of measurement of the samples and on 19-04-2000 no representative of the petitioner turned up and several times the same type of objections were repeated. On the basis of these allegations, it was concluded that the samples did not conform to the requirements and thereby the penalty is levied in exercise of power under Clause 11 of the agreement.

13. Before dealing with the matter on merits, the objections raised by the respondent as to maintainability of the writ petition need to be considered. The first objection is to the effect that the matter is contractual in nature and the writ petition in relation to the same cannot be maintained. Through in a catena of decisions the Supreme Court and the High Courts have affirmed their view that writ petitions cannot be maintained for the purpose of enforcement of contractual obligations. The restriction so placed upon themselves by the Courts is not on account of any inherent lack of jurisdiction or on account of the Courts not being in a position to adjudicate upon them. The self-imposed restriction was on the ground that enforcement of contractual obligations needs appreciation of evidence and recording findings on disputed questions of fact. Inasmuch as such trails are not undertaken in writ proceedings, the parties are required to approach the Civil Courts, so that the disputed questions of fact can be decided on the basis of the evidence adduced by the parties. Where, however, the action of the State or its instrumentality smacks of arbitrariness even in the contractual matters, the reluctance on the part of the Courts to rescue the aggrieved party is not that vigorous. If the decision rendered by such Authorities even in relation to contractual matters suffers from the vices of arbitrariness, or does not satisfy the tests of reasonableness or proportionality, the usual reluctance is given a second thought. The basic tenet, however, for exercise of jurisdiction even in such cases is that the Court should not be required to record any findings on disputed questions of fact. To put it in other words, the adjudication shall be on the basis of the record available before it, without there being a necessity to investigate the matter further, on facts. Where the facts of the case warrant invocation of principles and concepts such as proportionality, reasonableness, etc., the judicial review which is inherent in Constitutional Courts cannot be jettisoned.

14. From a reading of the judgments of the Supreme Court in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , TATA CELLULAR VS. UOI, AIR 1966 SC 11 AND OM KUMAR VS. UOI, 2001(2) SCC 386, it is

evident that there is no total prohibition as such against entertaining writ petitions on the sole ground that it relates to contractual matters. If the action complained of, though arising out of a contract, is tainted with arbitrariness, or where public interest is involved, the party cannot be driven out of the court, on the sole ground that his grievances arises out of a contract. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the Supreme Court had emphasized the need of the State and State Agencies to act reasonably, in the matter of distribution of public largesse. It was held that arbitrariness, being anti-thesis of equality enshrined under Article 14 of the Constitution of India, can be dealt with under Article 226, not feeling restricted by technicalities. In *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, , the Supreme Court had even declared as illegal and unconstitutional, a clause of contract, which was found to be oppressive and one-sided, on the touchstone of Section 23 of the Contract Act, as well as Article 14 of the Constitution.

15. Justice Vivian Bose, in his inimitable style, has provided the contours of adjudication in such matters, way back in 1958. In *K.S. Srinivasan Vs. Union of India (UOI)*, , he observed :

"The old technically rigid conceptions of contract and equity have given place in modern times to juster appreciation of justice, and the fusion of law and equity in one jurisdiction has resulted in the emergence of a new equity in England more suited to modern ideas of human needs and human values."

16. With the new horizons of State and public activity, these observations have become more relevant and important. His Lordship referred to various institutions where the Government itself provided several safeguards to ensure fairness to the citizens and juxtaposed the same with the plea of maintainability on the ground that the subject matter of the case relates to contract and declared :--

"Here is Government straining to temper justice with mercy and we, the Courts, are out-Shylocking Shylock in demanding a pound of flesh, and why? Because "it is the writ in the bond". I will have none of it. All I can see is a man who has been wronged and I can see a plain way out. I would take it."

17. One can hardly take any exception to such an approach by the courts even at present. If at all anything, ever since 1958, the courts have emphasized on keeping aside the technicalities in the matter of rendering justice to the parties. Entertaining public interest litigation, taking up cases suo motu, etc., are pointers to the tendency.

18. Another contention advanced on behalf of the respondent is about the existence of alternative remedies. According to it, the tender notice provides for arbitration of any dispute that arises between the parties to the contract. Learned Advocate General submits that the agreement that is signed between the parties does not provide for such arbitration and, at any rate, the arbitration

under the said clause is to be by the respondent himself or by his nominee.

19. This court does not intend to pronounce upon the relevance of the clause contained in the tender notice providing for arbitration in the present context. The reason is that suits are pending between the parties and the relevance and applicability of the said clause needs to be dealt with in the suits. Any observation here is likely to have its shadow on the suits. However, even if it is assumed that there exists an arbitration clause, the fact remains that the arbitration is to an official of the respondent itself. The same cannot be treated as a remedy, alternative to a writ petition. Therefore, this court does not accept the contention of the learned Senior Counsel for the respondent that the writ petition is not maintainable.

20. Before undertaking adjudication of the matter on merits, it is to be made clear that this court does not intend to inquire into the disputed questions of fact. For all practical purposes, the facts borne out by the records, particularly the correspondence that ensued between the parties are to be taken on their face value.

21. The true translation of the clause which was invoked by the respondent, imposing penalty at 10 times of the cost of the material, reads as under:

"11.If any error is noticed in the measurement, cutting and numbering of Blank Ticket the corporation shall be empowered to recover 10 times of the specified rate of printing as penalty from the payable amount. Even after this there is no improvement the penalty may further be increased."

22. The contract in question was entered into in November 1997. The material was supplied in the month of December 1997. If the respondent was not satisfied about the quality of the material supplied to it, it was always open to it to require the petitioner to replace it. Such a course of action was in fact adopted in respect of an earlier contract. The respondent informed the petitioner that 10,300 BT books were defective in one form or the other. Petitioner replaced them on 26-7-1997. As regards the present contract, the respondent did not inform the petitioner that a particular quantity of the goods was defective in any respect, much less; it called upon the petitioner to replace the same.

23. 80 samples are said to have been taken from 8 lakhs BT books, each sample representing 10,000 books. It is stated that 78 samples were found to be defective, in the matter of measurement of the books. On this ground, the respondent proceeded further and ultimately passed the impugned order.

24. Drawl of samples is a matter, which was to have been provided for under statutory provisions or in the contract itself. Before fastening the liability on one party to the contract, the other party cannot adopt its own mechanism unilaterally. This court, in DECCAN LIMESTONE MINING CO.(P) LTD. VS. ASSISTANT DIRECTOROF MINES AND GEOLOGY, KURNOOL (7), had an occasion to deal with the significance of sampling and the necessity of its being formulated

before it can be resorted to. In that case, the Mines Department of Government of Andhra Pradesh had drawn samples of a mineral and charged differential amount of royalty on the basis of analysis of the samples so drawn. The relevant provisions of law did not provide for such a course of action. In that context, it was observed by this court as under:

"Sampling by itself is a systematic and scientific activity. Since its consequences visit the lessees or licencees with financial liabilities, such an activity can be undertaken, if only it is permitted under the Act or the Rules. Even where such sampling is permitted under the rules, it varies from material to material. For example, the Fertilizer Control Order, issued under the Essential Commodities Act, provides for drawl of samples of fertilizers. It specifies the number of samples to be drawn, depending on the quantity of fertilizer, which is the subject matter of inspection. It mandates the arrangement of bags in such a way, as to ensure that the sampling would represent, by and large, the entire quantity. Similar provisions are made in respect of other commodities also. The rule making authority is required to take into account, the various intricacies involved in the matter and ensure that indiscriminate steps are not taken by the agencies.

The Parliament, which enacted the Act, and the Government of Andhra Pradesh, which framed the Rules, did not provide for such an exercise for minerals in general, and major minerals in particular. In the absence of any provision, specifically empowering them, the respondents are not entitled to draw the samples, much less, to revise the royalty on the basis of the result of the analysis thereof."

25. Similar situation exists in this case. The respondent is not able to state as to the manner in which the samples were drawn. For the respondent to contend that each sample drawn by it represents 10,000 such units, it requires either a statutory provision or a clause in the agreement, or the consent of the petitioner. In the absence of any of them, the whole exercise stands vitiated. None of them exist.

26. The respondent does not state, either in the impugned order or in any of the proceedings, which preceded it, or in the counter affidavit, as to what were the standard measurements and what were the defects and discrepancies, that the material suffered from. Admittedly the respondent has used the entire eight lakhs books. It was nowhere stated, either in the proceedings or in the pleadings, that it has suffered any loss in any form, on account of the alleged discrepancies. It is settled principle of law that existence of power by itself is not a justification for the exercise of it. Whether it is a State authority or private individuals, they have to justify the action resorted to by them on the basis of a clause in the contract. It hardly needs any emphasis that clause 11 was incorporated only to ensure that the respondent is not put to any monetary loss or inconvenience on account of the defect in the material. When the respondent does not even allege that it has sustained any loss on account of the so-called discrepancies, the impugned action deserves to be branded as nothing but

arbitrary.

27. The respondent has used the material and had the benefit of it. Through the impugned action, it had not only proposed to deny the cost of the material to the petitioner, but also sought to recover 10 times of the cost from the petitioner. It shakes the conscience of any one. In a country governed by Rule of Law, no one can be permitted to say that even if he had enjoyed the benefit of the service of goods or service provided for or supplied by another, it can not only refuse to pay for such goods or services, but can recover penalty. Such acts are oppressive and opposed to even public policy. They are not only unreasonable from the point of view of Wednesbury's reasonableness, but also offend the concept of proportionality.

28. In Om Kumar case (3 supra), proportionality was held to mean the query -

"whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be."

29. Having regard to the discussion undertaken above, this court finds that there never existed any basis for the respondent to invoke Clause 11 of the contract and to pass the impugned order and that the action of the respondent is arbitrary, unreasonable and opposed to the concept of proportionality. The writ petition is accordingly allowed and the impugned order is set aside. No costs.

30. Observations made herein shall not be treated as finding on any of the issues that fall for consideration in the suits pending between the petitioner and the respondent.