
(1980) 01 KL CK 0013
In the High Court Of Kerala
Case No : O.P. No. 69 of 1978-G

K.N. Vidhyadharan

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 24-01-1980

Acts Referred:

Constitution of India, 1950 — Article 299(1)
Kerala Forest Act, 1961 — Section 79

Citation : AIR 1980 Ker 212 : (1980) 1 ILR (Ker) 785

Hon'ble Judges : George Vadakkal, J

Bench : Single Bench

Advocate : K. Sudhakaran, K.K. Babu and V.K. Raveendran, for the Appellant;
Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

George Vadakkal, J.—The petitioner participated in the auction held on 19-12-1979 of the right to collect the residual tree growth (fire-wood and timber) from Oil Palm Plantation Coupe No. VIII B after making the necessary earnest deposit. His bid was the highest. He also complied with the condition that a bidder whose bid was knocked down should deposit Rs. 10,000/- or one-third of the bid amount by making the payment as aforesaid on 19-12-1975 itself. His bid was confirmed by the 4th respondent, Conservator of Forests, on 3-1-1976, and he was informed of that on 7-1-1976. Pursuant to the provisions governing the sale in the sale notice, the petitioner sought for extension of time for the payment of the balance amount up to 21-3-1976. According to the petitioner time was granted up to 21-3-1976 as sought for, but according to respondents time was extended only up to 20-2-1976. On 23-2-1976 there was a forest-fire in Coupe No. VIII B mentioned above and according to the petitioner, as a result thereof many trees and much of the residual growth were destroyed or damaged. Ext. P-1 is the mahazar in that regard.

2. The petitioner participated in the auction sale held by the State of Kerala, it is

expressed to be made by the Government of the State of Kerala. Under that agreement which is also executed by the petitioner herein, he undertook that he shall keep his offer firm for a minimum period of three months from the date of auction as mentioned in the Schedule attached to the said agreement, and shall not withdraw his offer. He also covenanted therein that in default of the aforesaid undertaking he agrees to have the part value remitted by him at the time of the auction forfeited to the Government, and that any loss caused to the Government by the resale of the Coupe at his risk and loss shall be recoverable from him under the provisions of the Revenue Recovery Act. Ext. R-2 agreement further says that in case the petitioner fails to execute the formal agreement incorporating the terms and conditions governing the contract, the Government shall have power and authority to recover from the petitioner any loss or damage caused to Government by such re-sale as may be determined by the Government. It is further agreed therein that all sums found due to the Government under or by virtue of Ext. R-2 agreement shall be recoverable from the petitioner and his properties under the provisions of the Revenue Recovery Act for the time being in force, as though such sums are arrears of land revenue and in such manner as the Government may deem fit.

3. It is the admitted case that the transaction did not proceed any further. According to the petitioner he submitted a representation dated 1-3-1976 referred to in Ext. P-3 reply dated 9-3-1976 stating that on account of the forest-fire he is not in a position to execute the formal contract. By Ext. P-3 reply the petitioner was informed by the Divisional Forest Officer that according to the provisions contained in Ext. R-2 agreement, the petitioner is bound to remit the balance dues and execute the agreement for the work. Ext. P-3 further says that before the execution of the agreement in accordance with the sale notice and Ext. R-2 agreement, no complaint in the matter can be entertained by his office. The petitioner appears to have submitted another representation before the Government, a copy whereof is marked herein as Ext. P-4. That representation is dated 1-3-1976. By Ext. P-5 communication the petitioner was informed that the request made in Ext. P-4 cannot be allowed. In Ext. P-4 the petitioner had requested that the auction in his favour be cancelled as he would be heavily damnified by proceeding to execute the contract by reason of the forest-fire. Ext. P-5 was sent in July, 1976.

4. It is the case of the petitioner that he received Ext. P-6 proceedings of the Divisional Forest Officer dated 26-12-1977, demanding him to pay a sum of Rs. 59,255.43. Ext. P-6 also informed the petitioner that failing to remit the aforesaid amount within fifteen days from the date of Ext. P-6 proceedings as per the countersigned chalan which appears to have also been sent along with it, proceedings would be taken under the provisions of the Revenue Recovery Act without further notice. It is at this stage that the petitioner had approached this Court on 6-1-1978 praying that Ext. P-6 demand be quashed by a writ of certiorari.

5. From the argument advanced by the learned counsel for the petitioner, it appears that the main grievance of the petitioner herein is that the endorsement on Ext. P-6 says that proceedings would be taken under the provisions of the Kerala Revenue Recovery Act, 1968, to recover the sum demanded thereby. At any rate, as regards the liability of the petitioner for the demand itself or the correctness of the amount mentioned therein, it is not possible for this Court to enter a finding. The question for consideration therefore is as to whether the sum mentioned in Ext. P-6 notice can be sought to be recovered by the respondents under the provisions of the Kerala Revenue Recovery Act, 1968.

6. It is by now well-settled that "a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority" (see *Union of India (UOI) Vs. Raman Iron Foundry*, . It is also possible that parties to a contract may constitute any one of them the adjudicatory authority as regards the adjudication of the liability relating to damages. The first question for consideration therefore is as to whether the parties herein have constituted any one of the respondents the adjudicatory authority as regards the damages arising out of the failure of the petitioner to proceed with the execution of the contract. Here it is necessary to mention that on the failure of the (sic) tioner to proceed to execute the formal contract, the Coupe in question was re-auctioned on several occasions and lastly on 29-6-1977. It is on the basis that there was a deficiency at the re-auction on 29-6-1977 and that re-auction was at the risk and loss of the petitioner that the amount mentioned in Ext. P-6 has been directed to be remitted by him.

7. The learned Government Pleader relied on the provision in Clause 3 of Ext. R-2 agreement to contend for the position that the Government has been constituted the adjudicatory authority in this regard. Under that clause, as already indicated, on failure of the petitioner to execute the formal agreement incorporating the terms and conditions governing the contract, the Government shall have power and authority to recover from him any loss or damage caused to Government by such re-sale as may be determined by the Government. No doubt, the parties purport to have constituted the Government the adjudicatory authority as regards loss or damage caused to Government on account of re-sale of the Coupe in question. But the further question arises as to whether Ext. R-2 agreement is a contract in compliance with Article 299 of the Constitution. Under that Article, all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise. The decisions of the Supreme Court make it clear that what is required under Article 299 is not an idle formality and that on the other hand the provisions contained therein are mandatory. In *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, it has been pointed out that the earlier decisions of that Court concerning Section 175(3) of the Government of India

Act, 1935, corresponding to Article 299 of the Constitution, required three conditions to be satisfied before a binding contract against the Government could arise. The said three conditions are : "(i) the contract must be expressed to be made by the Governor or the Governor-General, (ii) it must be executed in writing and, (iii) the execution should be by such persons and in such manner as the Governor or the Governor-General might direct or authorise". The decisions referred to therein are *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd.*, , *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, , and *State of West Bengal Vs. B.K. Mondal and Sons*, These principles were approvingly referred to in *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, . Therein the Supreme Court pointed out that two consequences follow from the aforesaid decisions. The first consequence pointed out is that, "there can be no im-plied contract between the Government and another person, the reason being that if such implied contracts between the Government and another person were allowed, they would in effect make Article 299(1) useless".

The second consequence mentioned therein is that, "if the contract between Government and another person is not in full compliance with Article 299(1) it would be no contract at all and could not be enforced either by the Government or by the other person as a contract."

8. I am afraid that the second consequence mentioned above arises in this case and that Ext. R-2 agreement cannot be treated as a contract at all in so far as it cannot be said that the said contract has been in full compliance with Article 299(1) of the Constitution. Though the second part of Article 299(1) which requires that all such contracts shall be executed on behalf of the, President or the Governor by such persons and in such manner as he may direct or authorise, appears to be satisfied so far as Ext. R-2 agreement is concerned, the first part of that Article has not been complied with, in that, it is not expressed to be made by the Governor but by the "Government of the State of Kerala". If that be so, Ext. R-2 is no contract at all and cannot be enforced either by the Government or by the petitioner. The result is, the respondents cannot rely on any provision in Ext. R-2 agreement in support of the contention that the Government has been constituted the adjudicatory authority as regards the loss or damage caused to the Government on account of the resale of the Coupe in question by reason of the default of the petitioner to execute the formal agreement.

9. Paced with this difficulty, the learned Government Pleader sought to support the threatened proceedings under the Kerala Revenue Recovery Act, 1968, by relying on Section 79 of the Kerala Forest Act, 1961. Section 79 of the said Act reads as follow --

"79. Recovery of money due to Government : -- All money, other than fines, payable to the Government under this Act or any rule made thereunder, or on account of timber or forest produce or of expenses incurred in the execution of this Act in respect of timber or forest produce or under any contract relating to timber or forest produce including any sum recoverable thereunder for the

breach thereof or in consequence of its cancellation or under the terms of a notice relating to the sale of timber or forest produce by auction or by invitation of tenders, issued by or under the authority of a Divisional Forest Officer, and all compensation awarded to the Government under this Act may, if not paid when due, be recovered under the law for the time being in force, as if it were an arrear of land revenue."

The submission is that u/s 79 all money payable under the terms of a notice relating to the sale of timber or forest produce by auction or by invitation of tenders, issued by or under the authority of a Divisional Forest Officer are recoverable under the provisions of the Kerala Revenue Recovery Act, 1968. as if the same are an arrear of land revenue. According to the learned Government Pleader, Ext. R-1 sale notice dated 21-11-1975 provides that if the bidder defaults to execute the formal agreement, the bid is liable to be cancelled and the Coupe is liable to be re-auctioned at the risk and loss of the bidder. This provision, may, no doubt, enable the respondents to re-auction the Coupe and perhaps, would make the earlier bidder liable for damages caused thereby to the Government. But then the question arises as to who is to adjudicate upon the liability for and quantum of damages as regards which there is no provision in Ext. R-1 sale notice. In so far as none of the respondents have been constituted the adjudicatory authority in that behalf as per Ext. R-1 sale notice, and in so far as without such an adjudication it cannot be said that the petitioner is liable in damages, I do not think that Ext. R-1 sale notice is of any assistance to contend for the proposition that the provisions of the Kerala Revenue Recovery Act, 1968, are attracted to the instant case. As earlier pointed out the law is well settled that "a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of Court or other adjudicatory authority". Union of India (UOI) Vs. Raman Iron Foundry, . Section 79 enables the Government to have resort to the provisions of the Kerala Revenue Recovery Act, 1968 only to recover "all money payable" or in other words a sum presently due and not unliquidated damages.

10. No doubt, the petitioner has got a larger contention, namely, that the property in the firewood and timber in the coupe in question has not passed to the petitioner in so far as before execution of the formal contract the trees were destroyed by fire and also on the ground, according to him, that the substratum of the contract does not exist. As already indicated in the beginning of this judgment, it is neither possible nor feasible, to decide those questions in these proceedings under Article 226 of the Constitution. I make it clear that I have not pronounced there on.

In view of what is stated above, the only relief that the petitioner is now entitled to, is a declaration that the amount mentioned in Ext. P-6 notice is not liable to be recovered from the petitioner under the provisions of the Kerala Revenue Recovery Act, 1968. There shall be a declaration to that effect. This writ petition is allowed to the above extent. There will be no order as regards costs.