
(2016) 07 SHI CK 0070
In the High Court Of Himachal Pradesh
Case No : CWP No. 2983 of 2015

Krishan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 4 HimLR 2256

Hon'ble Judges : Mr. Mansoor Ahmad Mir, CJ. and Mr. Tarlok Singh Chauhan, J.

Bench : Division Bench

Advocate : Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate, for the Respondent Nos. 2 and 3; Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate Ge

Final Decision : Disposed Off

Judgement

Tarlok Singh Chauhan, J. - Since common question of law and fact arises for consideration in these petitions, they were all taken up together for hearing and are being disposed of by a common judgment.

2. With the consent of parties, CWP No. 2983 of 2015 is taken as the lead case.

3. The precise grievance of the petitioner is that on account of tunneling work being carried out by the respondents for development of four lane road from Kiratpur to Ner Chowk Section of NH-21 from Km 73.200 to Km 186.500 in the State of Punjab/Himachal Pradesh, their properties (houses, orchard, agricultural land) have directly and indirectly been damaged and therefore, should be compensated for the same and have prayed for the following reliefs:-

"(i) That the respondents may be directed to take immediate steps either to acquire or to protect the property (houses, orchard and agricultural land etc.) of the petitioner.

(ii) That necessary direction may be issued to appoint some expert committee to

assess the damage caused to the property of the petitioner because of the act of the respondents.

(iii) That the respondents may be directed to compensate the petitioner for the loss he has suffered because of damage of his property due to the construction of tunnel-5.

(iv) That the respondents may be directed to produce entire record pertaining to the case and they may burden with cost."

4. The State authorities, who have been arrayed as respondents No. 4 to 6 in the petitions have placed on record various joint inspection reports and it is averred that during the spot inspection by respondent No. 6 on 16.5.2015 in the presence of petitioners, local residents and representatives of respondent No. 7 (Executing Agency), some minor cracks were seen in the houses and cowsheds of the residents, which were observed to be old and not due to blasting vibration and had been caused naturally with passage of time, as most of the houses were old. It is further submitted that respondent No. 6 i.e. Sub Divisional Collector, Sunder Nagar had constituted a committee vide letter dated 31.7.2015 for evaluating the loss/damage incurred to the houses of the petitioners, which reads thus:-

"The Executive Engineer, HPPWD, Sundernagar, Mandi, H.P. has verified and approved the loss in the shape of restoration of the damages to these built up structures as under:-

Sr. No.

Name of owner with address

Amount for restoration for the damage assessed

1.

House of Sh. Phiun Ram s/o late Sh. Jindu Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.

Rs. 25,612.00

2.

House of Sh. Basant Ram s/o Krishan resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.

Rs. 891.00

3.

Residential house of Smt. Nikki Devi D/o Durga Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.

Rs. 8216.00

4.

House of Sh. Hari Singh s/o late Sh. Shawanu Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.

Rs. NIL

5.

House of Sh. Krishan Chand s/o late Sh. Sadh Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.

Rs. 872.00

6.

House of Sh. Paras Ram s/o late Sh. Dhungal resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagarh, Distt. Mandi, H.P.

Rs. 1370.00

7.

House of Smt.Soma Devi w/o late Sh. Daggu Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.

Rs. 2049.00

5. On the other hand the Executing Agency i.e. respondent No. 7 in its reply has clearly averred that the grievance of the petitioners have already been redressed, as the work of the tunnel was stopped on 13.9.2015 and earlier to that all precautionary measures had been taken, so as to ensure that no direct or indirect damage is caused to the property of the petitioners as well as the residents of the area. It is averred that the small portion of land has sunk in tunnel alignment due to collapse of muck at tunnel face, but no other damage was noticed in the area.

6. In addition to the aforesaid, we may also make mention of CMP No. 2641 of 2016 preferred by the petitioner for placing additional particulars on record whereby report submitted by Mining Officer is sought to be placed on record, wherein he has made the following pertinent observations:-

"2. The houses of Smt. Reshmo Devi, Sh. Krishan, Sh. Basant Ram, Sh. Seema Devi, Sh. Fiun Ram, Smt. Nikki Devi and other peoples, were visited during the course of inspection. It was observed that the said houses are at the horizontal surface distance of 50 to 150 metrs. from the Tunnel alignment. Most of the Houses are single or double story structures, out of which few are new buildings but majority of them are older. Houses are constructed with stone/brick masonry with clay and cement having slates on roof. House of Sh. Fiun Ram is newly constructed pakka house with brick masonry and concrete roof structure. Cowsheds are constructed with rough stone/brick masonry with clay as jointing

material." After making the aforesaid observation, the relevant conclusion on this aspect of the matter is summed up as under:-

"However, in view of fact prevailing on the spots, it was observed that cracks developed in the houses of Smt.Reshmo Devi, Sh. Krishan and Sh. Basant Ram were old and concentric, and it appears that these cracks are not developed due to the impact of blasting but may be due to the re-settlement of foundation or some design problems.

And the cracks developed in the cowsheds of said villagers and house of Sh.Fiun Ram were found new. These cracks were extending vertical and wide. Therefore these cracks might have been developed due to blast induced ground vibrations."

We have heard the learned counsel for the parties and have also gone through the records of the case.

7. The moot question that arises for consideration in wake of replies filed by the respondents is as to whether the reliefs as claimed by the petitioners can in fact be granted in these writ petitions, in view of the seriously disputed question fact which otherwise can only be proved by leading evidence.

8. The Court herein is not dealing with simple case where the dispute between the parties can be decided on the basis of affidavits and counter affidavits, as the Court would be required to determine as to whether the properties of the petitioners have in fact been damaged and only after determining the same, the individual claims with respect to the compensation, if any, can be determined. However, these questions can only be determined after the parties are given an opportunity to lead evidence, which includes cross-examining the witnesses.

9. Though, the learned counsel for the petitioners had cited number of judgments to canvass that not only can the writ Court go into the disputed facts, but it can also award compensation. However, we find that majority of judgments as relied upon by the petitioners have already been considered by the Hon"ble Supreme Court in its decision in State of Kerala and others v. M.K. Jose (2015) 9 SCC 433, relevant paragraphs whereof read as under:-

"14. In State of Bihar v. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216 a two-Judge Bench reiterating the exercise of power under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated: (SCC p. 217, para 3) "3?..It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226." In the said case, it has been further

observed: (SCC p. 218, para 7)

"7?It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."

15. In *National Highways Authority of India v. Ganga Enterprises*, (2003) 7 SCC 410 the respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract. While dealing with the said issue, this Court opined that: (SCC p. 415, para 6)

"6?It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil*, (2000) 6 SCC 293, *State of U.P. v. Bridge & Roof Co. (India) Ltd.* (1996)6 SCC 22 and *Bareilly Development Authority v. Ajai Pal Singh*(1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr. Dave, however, relied upon the cases of *Verigamto Naveen v. Govt. of A.P.* (2001) 8 SCC 344 and *Harinder Singh Arora v. Union of India* (1986) 3 SCC 247. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed."

16. Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. In *Gunwant Kaur v. Municipal Committee, Bhatinda* (1969) 3 SCC 769, it has been held thus: (SCC p. 774, paras 14-16)

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely

because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.

(emphasis supplied)

17. In *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.* (2004) 3 SCC 553, a two-Judge Bench after referring to various judgments as well as the pronouncement in *Gunwant Kaur (supra)* and *Century Spg. And Mfg. Co. Ltd. v. Ulhasnagar Municipal Council* (1970) 1 SCC 582, has held thus: (ABL International case, SCC pp. 568-69 & 572, paras 19 & 29)

"19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

* * *

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable. While laying down the principle, the Court sounded a word of caution as under: (ABL International case, SCC p. 572, para 28) "28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks (1998) 8 SCC 1.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

18. It is appropriate to state here that in the said case, the Court granted the relief as the facts were absolutely clear from the documentary evidence brought which pertain to interpretation of certain clauses of contract of insurance. In that context, the Court opined: (ABL International Ltd. case SCC p. 578, para 51)

"51 The terms of the insurance contract which were agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions has been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is: (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee." And it eventually held: (SCC pp. 578-79, para 51)

"51 We have come to the conclusion that the amended clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid, much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case.

19. In this regard, a reference to Noble Resources Ltd. v. State of Orissa and Another (2006) 10 SCC 236 would be seemly. The two-Judge Bench referred to the ABL International, Dwarkadas Marfatia & Sons v. Board of Trustees, Port of Bombay, (1989) 3 SCC 293, Mahabir Auto Stores v. Indian Oil Corp. (1990) 3 SCC 752 and Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, (2004) 3 SCC 214 and opined thus: (Nobal Resources case SCC p. 246, para 29)

"29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in ABL International Ltd. each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law element is involved, judicial review may be permissible. (See Binny Ltd. v. V. Sadasivan (2005) 6 SCC 657 and G.B. Mahajan v. Jalgaon Municipal Council, (1991) 3 SCC 91) Thereafter, the court in Noble Resources case, proceeded to analyse the facts and came to hold that certain serious disputed questions of facts have arisen for determination and such disputes ordinarily could not have been entertained by the High Court in exercise of its power of judicial review and ultimately the appeal was dismissed."

10. It would be noticed that the Hon"ble Supreme Court after taking into consideration the whole gamut of law, has thereafter made the following pertinent observations:-

"20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in ABL International was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible,

the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.

21. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination sub-serves any public interest."

11. It would be evidently clear from the aforesaid exposition of law that the writ Court may in appropriate case award compensation where the facts are not in dispute; there is established negligence in the acts and omissions of the respondent authority/authorities on the face of record and there is a consistent deprivation of a fundamental right of the petitioner or his legal representative. That apart, the Court cannot appoint an expert committee to assess the damage if any caused to the properties of the petitioners as such course would be totally impermissible as the Court cannot be used to collect evidence in favour of the petitioners.

12. It would be noticed that the respondents have disputed all the allegations as set out by the petitioners and therefore, in such circumstances, it is not safe or even prudent for this Court to rely upon any of the material placed on record, that too without affording either of the parties a chance of cross-examination.

13. Even otherwise, it is more than settled that the High Court in exercise of its writ jurisdiction under Article 226 should not interfere with the matters, which are in the realm of private laws and it can otherwise be taken to be well settled that where there is disputed question of fact, which require evidence before the same can be established, then as a matter of practise, the Court would not entertain such writ petition.

14. It is equally settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but

ordinarily that would be a good ground for refusing to exercise the discretion under Article 226.

15. These petitions involve seriously disputed questions of fact and even otherwise the rival claims of the parties are such, which can only be investigated and determined on the basis of evidence, which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

16. In view of the aforesaid discussion, we are of the considered view that all these writ petitions are not maintainable, as the proper remedy for the petitioners is to approach the civil court for redressal of their grievances. However, we make it clear that in the event of the petitioner(s) approaching the civil Court within a period of thirty days from the receipt of this judgment, not only shall the petitioner(s) be entitled to benefit of Section 80(2) of the Code of Civil Procedure, but even the period of limitation spent in pursuing these litigations shall be excluded. We further make it clear that in the event the aforesaid suit being filed within the time frame as granted by this Court, the Court where such suit(s) are instituted shall decide the same as expeditiously as possible and in no event later than 31st March, 2017.

17. Before parting, we may observe that nothing observed herein above shall be construed to be an opinion on merits of the case and in the event of the petitioners filing civil suit(s), the Court shall proceed to determine the case on merits without being persuaded or influenced by any of the observations made herein above, which essentially have been made only for the determination and disposal of these writ petitions.

18. The petitions are disposed of in the aforesaid terms. All interim orders vacated and in case any amount is paid to any of the petitioners herein pursuant to the interim orders passed by this Court the same shall be refunded by them forthwith to the authorities.