
(1998) 09 AP CK 0070

In the Andhra Pradesh High Court

Case No : Writ Petition No. 24504 of 1998

Mahendar Tiwari

APPELLANT

Vs

Government of A.P. and Another

RESPONDENT

Date of Decision : 22-09-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1999 AP 202

Hon'ble Judges : A.S. Bhate, J

Bench : Single Bench

Advocate : Mr. K. Vinaykumar, for the Appellant; Government Pleader, for Roads and Buildings, for the Respondent

Judgement

1. The writ petition is disposed of finally on merits after hearing the learned Counsel for the petitioner and the learned Government Pleader for Roads and Buildings for respondents.

2. The petitioner seeks a direction declaring the inaction of the respondents, in particular respondent No.2 in not providing Toll Collection Booth and gate with electricity supply at K.M. 1/4 of Anakapalli By-pass at National Highway (for short "NH") No.5 and adequate protection for collection of the toll fee there. A further direction is sought that the respondents should not insist upon the payment of any quantum of lease amount from 9-8-1998 onwards till respondents construct the said toll gate and comply the other conditions referred above.

3. A Notification No.6957/EE.III/ TA.VI/AEE-12/97 dated 25-4-1998 was published by respondent No.2 for calling sealed Tenders for collection of toll amounts. Tims it was a public auction of right to collect the toll. The petitioner was one of the bidders and his Tender for an amount of Rs.7,61.61,000/-(Rs. Seven crores sixty one lakhs and sixty one thousands only) was accepted. The petitioner contends that the toll fee for a period of one year starting from 1-4-1998 to 31-3-99 was to be collected at two points. One was at Toll Gate at

KM 371/2 of Vijayawada-Visakhapatnam Section on NH 5 and the other one was at KM 1/4 of Anakapalli By-pass on NH 5. The period for which this right of toll collection was to be exercised was from 21-7-1998 to 31-3-1999. This was because the auction took place after 1-4-1998. A contract was executed accordingly on 20th of July, 1998. The proportionate bid amount of the petitioner was fixed as Rs,5,30,26,073/-(Rs.five crores, thirty lakhs, twenty six thousand seventy three only). This was to be paid in monthly instalments of Rs. 63,46,750/-(Rs.Sixty three lakhs forty six thousand seven hundred and fifty only. However, the first instalment was of Rs.22,52,073/- (Rs.twenty two lakhs fifty two thousand seventy three only). The contention of petitioner is that under Clause 25 of the lease deed, the respondents were duty bound to construct toll houses, sheds and gates and hand them over to the petitioner for facilitating the collection of the toll tax at the two gates. The Department however provided only one such constructed booth of Toll Gate at KM 371/2 of Vijayawada-Visakhapatnam Section and no booth was constructed or gates were set up at KM 1/4 of Anakapalli By-pass. The petitioner contends that he was assured by the Executive Engineer of the respondent-department that a permanent toll booth, shed and gate would be constructed at KM 1/4 of Anakapalli By-pass within a few days. On that assurance the petitioner took the possession for operating the lease. In spite of such assurance, till filing of the writ petition, no toll booth was constructed at KM 1/4 of Anakapalli By-pass. This in-action of the respondents has prevented the petitioner from effective toll collection. It is alleged that 75% of the traffic passes through the point at KM 1/4 of Anakapalli By-pass and only 25% at the other toll gate. It is alleged that unsuccessful bidders with the help of local politicians are in some way or the other obstructing the petitioner's right to collect the toll tax. The petitioner is from State of Rajasthan and his success in bidding has caused heart-burn to the local bidders. The local persons do not allow petitioner to collect the toll tax at Anakapalli By-pass. His material is either being damaged or stolen away. He was not given police help or protection. It was only after he filed a writ petition in the High Court for direction to the Superintendent of Police to provide adequate protection, that some protection was given. Be that as it may, the grievance of the petitioner as against the respondents is that they are now bent upon taking action against petitioner for not collecting toll tax at Anakapalli Bypass and are insisting for payment of the amount due from the petitioner though the respondents are at fault in not providing the facilities as per the agreement. The petitioner contends that the respondents do not wish to discharge their mandatory obligation of fulfilling the conditions in the lease and this is violative of the petitioner's right. On making out such a case the petitioner-has approached this Court.

4. The stand of the respondents is that after execution of the contract, the petitioner has been handed over both the points, where the toll tax was to be collected, on 21-7-1998 at "0" hours in accordance with the conditions of the Lease Deed. Petitioner has started toll collection at both the points. Under the

Lease Deed the lessee has to make his own arrangement for the safety of his properties. The respondents are under no obligation to provide permanent booths and buildings at the 2nd collection point. It is denied that any assurance was given to that effect while handing over the lease property to the petitioner. The petitioner took over both the collection points without any protest. This is obvious from fact that the petitioner started immediately thereafter toll collection at both the points. The permanent fee collection booth which was to be supplied by the respondents was only at Point at KM 371/2 of Vijayawada-Visakhapatnam Section. The second collection point at KM 1/4 of Anakapalli by-pass has been set up, only to facilitate easy collection of the toll tax by the lessee. In fact establishing such point is really not necessary. All the traffic has ultimately to pass from the toll gate at KM 371/2. It is pointed out that as per report of the Deputy Executive Engineer the petitioner expressed his inability to render accounts as was required by the lease terms. The petitioner was advised by the Executive Engineer to pay the amount of first-instalment. The petitioner having taken over the collection points and having made arrangements for toll collection booths, it is not open for the petitioner to make any demand now. The petitioner's prayer that lease amount should not be insisted from him is meritless because the term of the Lease itself says that on no ground remission can be claimed by the petitioner.

5. The learned Counsel for the respondents has contended that the petitioner is not entitled to seek any relief under Article 226 of the Constitution of India. The dispute raised by the petitioner arises out of a contract and no writ petition can lie for seeking relief out of a contractual dispute. This is apart from the fact that on merits the petitioner has no case.

6. The learned Counsel for the petitioner has however contended that petitioner is entitled to relief even though he has entered into contract with the respondents and even though the dispute arises out of the terms of the contract. Sri. E. Manohar, the learned senior Counsel for the petitioner contends that much water has flown in the field of issuance of writs even in contractual disputes when "Government" or "State" is obliged to perform certain duties under the contract. Sri Manohar, the learned senior Counsel-heavily relies on the decision in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, . On the other hand the learned Government Pleader appearing on behalf of the respondents has referred to several cases for contending that invoking writ jurisdiction in contractual disputes is impermissible.

7. From the admitted factual position, one fact is clear that petitioner had entered into contract in consequence of his successful bidding. He took the possession under the terms of Contract at 00 hours of 21-7-1998. The contract was executed on 20-7-1998. Sri E. Manohar, the learned senior Counsel refers to the following portion of the lease deed:

"Where as the Lessee's bid at sealed Tenders cum public auction held on 30-5-1998 for the right to collect fees at Toll Gates at KM 371/2 of V.V. Section,

NH 5 and KM 1/4 of Anakapalli by-pass, NH 5 during the period from 21-7-1998 to 31-3-1999 has been confirmed by the Government."

And that he refers to the detailed state conditions of the collection of toll which are appended to the Lease Deed. Clause 25 of these Toll conditions, is as follows:

"The toll houses, sheds and gates shall be built by the Government. It shall be the duty of the lessee to keep them in proper condition, repair at his expense and hand them over in good condition to the Government or to successor. The lessee shall pay such rent for the toll houses, sheds, and gates as the Executive Engineer may fix. An undertaking to the effect that the lessee would abide to pay rent as fixed by the Executive Engineer for all toll house, sheds and gates etc., constructed by the department shall be given by the lessee at the time of entering into lease agreement. The lessee has to pay the water and electricity charges as per the actual consumption and all other taxes as per Government rules."

8. It is argued that in view of Condition No.25, the toll houses, gates, sheds have to be built by the Government. No Toll Gate has been built at Anakapalli By-pass. Thus the respondents have failed to discharge their obligation or duty and they should be directed to perform their duty. In the original Sale notification which was published on 29-4-1998 and which has been produced by the learned Government Pleader, there is reference to only one Toll Gate located at KM 371/2 of Vijayawada-Visakhapatnam Section at NH 5, There is no reference to the Toll Gate at Anakapalli By-pass. The petitioner had given the bid with open eyes with reference to this Sale notification. Though the right to collect fees at Toll Gate at KM 371/2 on NH 5 and at KM 1/4 of NH 5 has been referred to in the Lease Deed, the obligation of respondents if any was in respect of the Toll Gate referred to in the Sale Notification. Further admittedly the petitioner had taken possession on 21-7-1998 at "0" hours and had started collection of the toll tax at both the points. It is not disputed that the petitioner has continued to collect toll since quite some time. It can therefore, be said that there was waiver on part of the petitioner of the terms of the agreement if the agreement really obliged the respondents to construct the Toll Gate at Anakapalli By-pass. It is clear that the grievance which the petitioner is now making is in the nature of breach of agreement. The learned Counsel for the petitioner submits that construction of Toll Gate at By-pass was a condition precedent and therefore, the respondents were bound to comply the same. If it was a condition precedent then the remedy of petitioner was to terminate the contract for non-fulfilment of the condition precedent. Claim for damages also could have been made. However, the conduct of petitioner in taking over the points and subsequent collection of the toll gives a totally new dimension and the dispute has to be resolved in an appropriate forum and relief cannot be claimed in a writ petition. Questions of fact are also involved in the dispute raised by the petitioner. In a writ petition it is not permissible to decide contested questions of fact.

9. This brings me to the argument of Sri E.Manohar the learned senior Counsel

that notwithstanding the fact that a dispute has arisen out of a Contract, the petitioner is entitled to seek relief. The case relied upon by him (Srilekhas" case supra) really speaking is not an authority for a wide proposition that all contractual disputes, if the contract is between a private person and the State, can be raised in a writ petition. The facts of that case were unique. There was no Commercial contract involved in the said proceeding. Sri Manohar relies on certain observations made in paras 35,36,39 and 48 of the said judgment. In particular he refers to the following observation :

"It is now too well settled that every State action, in order to survive must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law."

Next he relies on the following observations in that case:

"In our view, bringing the State activity in contractual matters also within the purview of judicial review is inevitable and is a logical corollary to the stage already reached in the decisions of this Court so far."

However, these observations are torn out of context. State action in contractual matter can be subjected to judicial review only when some public element is attached to it. Certain other pertinent observations in the judgment referred to (1) by Sri Manohar makes this point very clear. It is first necessary to refer to brief facts of that case. The Government of State Uttar Pradesh had terminated by a General Order the appointments of all Government Counsel (Civil, Criminal Revalue) in all the Districts of the State of Uttar Pradesh with effect from 28-2-1990 and the Government further directed preparation of fresh panels to make appointments in place of existing incumbents. The termination of all the existing appointees irrespective of the fact whether the term of the incumbent had expired or was subsisting was the objected action. The Supreme Court pointed out that the District Government Counsel hold an "office" "or" post and public element is attached to such post. Removal enblock of all such District Government Counsel in the State even though such District Government Pleaders were appointed under Contract, was an appropriate subject for judicial review. The functions of Public Prosecutors and Government Counsel were discussed in detail. In para 17 the Supreme Court observed that the presence of public element was attached to the "office" or "post" of District Government Counsel of every category. The Court said that this was sufficient to attract Article 14 of the Constitution of India. It will thus be seen that the contractual dispute in that case involved a public element of great importance and it was just like any ordinary commercial contract. I do not think that the said case can help the contention of Sri Manohar, the learned senior Counsel. In fact Srilekha "s case (supra) has been considered and explained by the Supreme Court in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, . In this case the Supreme Court pointed out:

"Srilekha Vidyarthi v. State of Uttar Pradesh (supra) was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post, involving public element. It was a case of non-Government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned Counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State) for the purpose of altering or adding to the terms and conditions of the Contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the law relating to contracts."

It will be seen from the aforesaid passage in Issac Peter's case (supra) that even if there are certain other Statutory terms in the contracts and even if Government is one of the parties to the Contract, the mutual rights and liabilities arising out of the terms of contract have to be sorted out not in a writ petition but in appropriate proceeding. It cannot be disputed that the subject-matter of the present writ petition purely is a commercial contract and no public element is involved. Sri Manohar, the learned senior Counsel has made some effort to contend that in fact the work of collecting Toll Tax is that of Government and petitioner is only discharging functions on behalf of the Government. It is argued that if Government itself were to operate the Toll Gate departmentally it would have taken measures for collecting taxes by construction of a pucca booth. The same should be extended to the petitioner. The suggestion in the argument is that petitioner is performing the duty of Government and therefore, it is a public duty. This contention is without merit.

10. There is ample authority for the proposition that when a party feels "aggrieved due to breaches of obligation committed by the other party to the contract, it does not furnish a ground for approaching the High Court under Article 226 of the Constitution. In *Burmah Construction Co. Vs. The State of Orissa and Others*, it was pointed out:

"The High Court normally does not entertain a petition under Article 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort.."

It was further observed:

"Where the petition under Article 226 is for enforcement of the liability of the Collector imposed by Section 14 of the Orissa Sales Tax Act it can only be allowed subject to the restrictions which have been imposed by the proviso. It is not open to the claimant to rely upon the statutory right and to ignore the restrictions subject to which the right is made enforceable.

11. In *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer*

and Others, it was observed:

"A writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution," (underlined to supply emphasis)

Thus obligation arising out of breach of a contract even if it was entered into by a public servant cannot be enforced by resorting to a writ proceeding. Similar was the law laid down in *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*, . The decision in *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, makes the same thing clear again.

12. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, the Supreme Court reiterated the proposition made in *Lekhraj*'s case (*supra*).

13. In *Radhakrishna Agarwal v. State of Bihar*, AIR 1977 SC 1496, the Law was declared as follows:

"At the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all, the State, no doubt, acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But after the State or its agents have entered into the field of ordinary contract the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision which the State or its agents, purporting to act within this field, perform any act."

14. In *State of Punjab v. Balbir Singh*, AIR 1977 SC 1717, the Court pointed out that High Court has no jurisdiction to enforce the liabilities arising out of mutually agreed conditions of action, in a writ proceeding under Article 226 of the Constitution of India.

15. In *Food Corporation of India and others Vs. Jagannath Dutta and others*, , it was held that question of contractual obligations cannot be gone into in a writ jurisdiction.

16. It may be pointed out that this Court has recently occasion to discuss the ambit of Article 226 in contractual disputes. In *M/s. Padmavathi Constructions v. A.P. Industrial Infrastructures Corporation Limited*, AIR 1997 AP 1, the learned single Judge held that disputes arising out of General Law of contract do not

involve any question of violation of fundamental or statutory rights and appropriate forum for seeking relief is the Civil Court and not the writ Court.

17. In J. Siva Sankara Rao Vs. Prl. Secretary to Govt., Transport, Roads and Buildings (Road-II-I) Dept., Hyderabad and Others, which is a Division Bench case of this Court there is discussion of all relevant law on the point.

18. Having regard to all this legal position and in view of the fact that Contract in the instant case was already executed and the petitioner is making a grievance of non-performance of certain conditions by the respondents, High Court will not exercise its power under Article 226 of the Constitution of India. The writ really sought is as if for specific performance of the terms of the agreement. For all these reasons, the writ petition has to be dismissed.