

(2008) 07 OHC CK 0026
In the Orissa High Court
Case No : OJC No. 11224 of 1996

Md. Laique Ali

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-07-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2008) CLT 652 Supp

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : B.K. Nayak and J.K. Khuntia, for the Appellant; Additional Government Advocate for Opp. Party Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This writ petition has been filed for reducing the rent of a shop duly allotted to the Petitioner by open auction from Rs. 4319/- to Rs. 400/- per month.

2. The facts and circumstances giving rise to this case are that the Respondent-authorities constructed some commercial shops and advertised the same inviting applications for allotment by open auction. The Petitioner submitted application along with others and auction was held on 26.1.1993. About ten persons participated in the auction for the said shop No. 8 in Eastern Tower Market, Unit-11, New Capital, Bhubaneswar. Petitioner had been the highest bidder for a sum of Rs. 4319/- per month, his offer was accepted and a lease was executed in his favour for a period of three years from 3.3.1993 to 2.3.1996. Petitioner took possession of the shop and started his business. Subsequently, before expiry of three years lease, he filed this petition stating that other similarly situated persons are paying rent " Rs. 400/- per month. Therefore, the rent fixed for the Petitioner was arbitrary and unreasonable and as he did not deposit the agreed rent, proceedings for eviction were initiated against him. This Court vide order dated 15.10.1996 permitted the Petitioner to occupy the shop in question

subject to the condition of paying rent " Rs. 2500/- per month. Since then, Petitioner paid the rent as per the interim order passed by this Court and continuing with his business.

3. Learned Counsel for the Petitioner has submitted that Respondents have no right to discriminate among equals and as others are paying rent " Rs. 400/- per month, the Petitioner could not be asked to pay a sum of Rs. 4319/- per month. Therefore, the Court could issue direction to the Respondents to accept the rent from the Petitioner " Rs. 400/-per month.

4. On the contrary, learned Addl. Government Advocate for the Respondent-authorities has submitted that matter relates a non-statutory contract. Petitioner had participated in the auction with his eyes open. Had he not been the highest bidder, other persons could have got the shop on rent nearly at the same rent for hardly Rs. 10/- Rs. 20/- less than the said amount. Therefore, the petition is liable to be dismissed.

5. We have considered the rival contentions made by the learned Counsel for the parties and perused the record.

6. Admittedly, for the shop in question ten persons participated in the auction. Petitioner was the highest bidder and he could not complain of any misrepresentation or fraud on the part of the Respondent-authorities at the time of making auction. Had the Petitioner not participated in the auction or not been the highest bidder, the bid of either of the other persons could have been accepted at some lesser amount which could have Rs. 10/- or Rs. 20/- less than the amount offered by the Petitioner.

7. It has been said from time and again by the Hon''ble Supreme Court that a party cannot be permitted to dispute the contractual obligations by invoking the extraordinary writ jurisdiction. In Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, , a similar contention had been raised. The Apex Court considered a catena of Judgments, particularly Radha Krishna Agarwal and Ors. v. State of Bihar and Ors. AIR 1977 SC 7496 Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others, ; and Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., , and arrived at the conclusion that where the contract entered into between the State and the persons agreed is non-statutory and purely contractual and the rights are governed only by the terms of the contract, writ petition under Article 226 of the Constitution of India is not maintainable. Similar view has been taken in State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, ; and Noida Entrepreneurs Association v. U.P. Financial Corporation and Anr., .

8. In Indore Development Authority Vs. Sadhana Agarwal (Smt) and Others, , the Hon''ble Supreme Court affirmed and approved the view taken by the Apex Court in Bareilly Development Authority (supra), but it further observed that the High Court, while exercising its extraordinary jurisdiction under Article 226 of the Constitution, may satisfy itself on the materials on record that the State has not

acted in an arbitrary or erratic manner. A similar view has been taken by the Supreme Court in *Union of India and others Vs. M/s. Graphic Industries Co. and others*, In the said Judgment, the Apex Court referred to its earlier Judgments, particularly in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, ; *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, ; and *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, , and observed that even in contractual matters, public authorities have to act fairly and if the State or its instrumentalities have failed to do so, then writ jurisdiction of the High Court under Article 226 of the Constitution can be resorted to because acting unfairly and arbitrarily amounts to flagrant violation of Article 14 of the Constitution.

In *LIC of India and Another Vs. Consumer Education and Research center and Others*, , the Apex Court observed as under:

While exercising the power under Article 226, the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case...each case is to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy...If a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties.

9. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , the Apex Court has held as under:

The writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

10. Similarly in *State of Orissa and others Vs. Narain Prasad and others*, etc. etc., the Apex Court has observed as under:

A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round...and question the validity of these obligations or the validity of the Rules which constitute the terms of contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interest of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour.

11. Similarly in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, the Hon''ble Supreme Court has held that in absence of mala fides or extreme case of arbitrariness, it is not permissible for the Writ Court to have a judicial review of contract or to enforce the contractual obligation in exercise of its jurisdiction under Article 226 of the Constitution.

12. In *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, ; the Hon''ble Supreme Court, in a similar situation/observed as under:

If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observation of the High Court the contractor was seeking enforcement of a statutory contract. A contract would not become statutory merely because it is for construction of a public utility and it has been awarded by a statutory body. We are also agree with the observation of the High Court that since the obligation imposed by the contract on the contracting parties comes within the purview of the Contract Act, that would not make the contract statutory. Clearly the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature....The contract between the parties is in the rem of private law. It is not a statutory contract. The dispute relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. This is a matter for adjudication by a civil Court or in arbitration if provided for in the contract.

13. On the contrary, in Union of India (UOI) and Another Vs. State of Haryana and Another, , the Hon''ble Supreme Court clarified that where a pure question of law is raised, the issue can be considered by the Writ Court also. In the said case, the question whether provisions of telephone connections and instrument amount to sale and even so why the Union of India not exempted from payment of sales tax under the respective statute, was involved. The Hon''ble Supreme Court held that instead of relegating the parties to the statutory appellate authority, the High Court ought to have dealt with the issue.

14. In Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, , the Apex Court held that public bodies are as much bound as private individuals to carry out representations of facts and promises made by them. "The obligation arising; against an individual out of his representation amounts to a promise which may be enforced ex-contract by a person who acts upon the promise." The Court further observed that merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and exceptional process by a civil suit against a public body. The questions of fact raised by the Petitioner in this case are elementary."

15. In Life Insurance Corpn. of India and Ors. v. Smt. Asha Goel and Anr. 2001 (2) SCC 160, while dealing with the similar issue the Hon''ble Apex Court held that High Court should not ordinarily entertain a writ petition for mere enforcement of a claim under a contract of insurance. The Court has to examine the facts and circumstances of the case, the nature of the dispute raised and the nature of the enquiry necessary to be made for determination of the questions involved. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can be enforced by filing a writ petition. The Court has to examine as to whether petition has been filed merely to enforce contractual rights or case involves important questions of law and constitutional issues.

16. In *Verigamto Naveen Vs. Government of Andhra Pradesh and Others*, , the Hon''ble Supreme Court held that a writ petition involving contractual matters can be entertained by the High Court where breach of contract involves breach of a statutory obligation and order complained of has been made in exercise of statutory power by a statutory authority. In such cases though the cause of action may arise out of a contract," but the dispute of this nature falls within ambit of public law, and therefore, writ may be entertained.

17. In *State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd.*, , the Apex Court considering the same issue held that in case of a Government contract writ may not be a appropriate remedy. Where disputed questions or rival claims arising out of breach of contact are required to be investigated and determination, writ cannot be entertained.

18. In *M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another*, , the Apex Court held that in case the procedure adopted by the Authority is arbitrary or unreasonable, the case falls within the ambit of Article 14 of the Constitution and writ jurisdiction can be resorted to in such a matter.

19. In *National Highway Authority of India Vs. Ganga Enterprises and Another*, , the Hon''ble Supreme Court cautioned the High Courts that while examining the contractual matters in a writ jurisdiction, the Court is duty bound first to examine the issue of maintainability for the reason that contractual matters cannot be entertained in a routine manner.

20. In *Orissa State Financial Corporation Vs. Narsingh Ch. Nayak and Others*, , it was held that the High Court cannot enter the area of contractual obligations between the parties and issue directions annulling an existing contract and introducing a new contract in stead.

21. in *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, , it was held that the High Court was justified in not going into the dispute as it involved interpretation of terms of the contract.

22. In *Indu Kakkar Vs. Haryana State Industrial Development Corporation Ltd. and Another*, , the Hon''ble Supreme Court has held that parties are bound by the terms incorporated in the agreement and in case of violation of any of the conditions, the allotment is bound to be cancelled. In the instant case, the licence itself has a large number of conditions which were binding on the Petitioner also. As per the terms of Clause 4(e), the construction had to start by the Petitioner within a period of six months from the date of grant of licence and had to commence the manufacturing and production within a period of twelve months. As per Clause 9 of the said licence, it was provided that the lease would be executed by the licensee within thirty days of the receipt of the intimation in this regard from the Grantor and in case of default, the Grantor shall have the right and power to re-enter upon and resume possession of the said land and every thing thereon and thereupon this agreement shall cease and terminate the agreement itself. In view of the provisions of Clause 13, a licence would

automatically stand revoked in case of any change in the constitution of licensee, partnership firm or private limited company as on the date of execution of the agreement without prior approval in writing of the Grantor.

23. It has also been submitted by the Respondent authorities that in a tenancy matter, the Court has no right to interfere and in order to fortify his submission he has reliance upon the Judgment of the Supreme Court in the case of Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, , wherein the Apex Court deprecated the practice in entertaining such matters.

24. Thus, there seems to be no law of universal application regarding the issue of maintainability of the writ petition in contractual matters, rather it would depend upon the facts and circumstances of an individual case.

25. In view of the above, the Court could interfere in exceptional circumstances when it come to the conclusion that the order passed by the authority is arbitrary and unreasonable.

26. In the instant case, learned Counsel for the Petitioner miserably failed to explain as to under what circumstances he could be treated equally with others who are paying lesser rent. The other shop keepers allegedly paying lesser rent ought to have got the tenancy rights much earlier and the location of their shops may not be advantageous as compared with the shop allotted to the Petitioner. Therefore, the Petitioner cannot be entitled for any reliefs sought by him as he has not even made an attempt to lay down any factual foundation for establishing the case of discrimination. In such an eventuality, no relief can be granted to the Petitioner.

27. It is settled proposition of law that a party has to plead the case and produce/ adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. In Bharat Singh and Others Vs. State of Haryana and Others, the Hon"ble Supreme Court has observed as under:

In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ Petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the Respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the CPC and a writ petition or a counter-affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

28. Similar view has been reiterated in M/s. Larsen and Toubro Ltd. Vs. State of Gujarat and Others, ; National Buildings Construction Corporation Vs. S.

Raghunathan and Others, ; Ram Narain Arora Vs. Asha Rani and Others, ; Smt. Chitra Kumari etc. Vs. Union of India and Others, ; and State of U.P. and Others Vs. Chandra Prakash Pandey and Others Etc., .

29. In M/s. Atul Castings Ltd. Vs. Bawa Gurvachan Singh, , the Hon"ble Apex Court observed as under:

The findings in the absence of necessary pleadings and supporting evidence cannot be sustained in law.

30. Similar view has been reiterated in Vithal N. Shetti and Anr. v. Prakash N. Rudrakar and Ors. (2003) 1 SCC 78; Devasahayam (D) by LR's. Vs. P. Savithramma and Others, ; and Sait Nagjee Purushotham and Co. Ltd. Vs. Vimalabai Prabhulal and Others, .

31. At this juncture, learned Counsel for the Respondent-authorities has submitted that the Petitioner had been paying rent at a much lower rate under the interim order of the Court than the agreed amount, the interim order is liable to be vacated and the effect of the interim order must be neutralized.

32. The submissions made by the learned Counsel for the Respondent-authorities has some substance as the interim order merges into final order and in case the petition is dismissed, it becomes clear that the petition has been devoid of any merit. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "Act us Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any underserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. Vide Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others, ; Ram Krishna Verma and Others Vs. State of U.P. and Others, ; A.R. Sircar (Dr) v. State of U.P., 1993 Supp.(2) SCC 734; Shiv Shankar and Others Vs. Board of Directors, U.P.S.R.T.C. and Another, ; the Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another, ; M/S. GTC Industries Limited Vs. Union of India and Others, ; and Jaipur Municipal Corporation Vs. C.L. Mishra,).

33. In view of the above, the petition lacks merit and the same is accordingly dismissed. Interim order stands vacated.

The Respondent-authorities are at liberty to make the deficiency good as they

had suffered for the interim order passed by this Court.

B.N. Mahapatra, J.

34. I agree.