
(2001) 03 RAJ CK 0012

In the Rajasthan High Court

Case No : Civil Special Appeal No. 637 of 1999 and 35 ors.

M/s Udaipur Contractors Association

APPELLANT

Vs

State of Rajasthan and others

RESPONDENT

Date of Decision : 07-03-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 265

Rajasthan Minor Mineral Concession Rules, 1986 — Rule 38

Citation : (2001) 2 RLW 999 : (2001) 3 RLW 1515 : (2001) 2 WLC 724 : (2001) 2 WLN 226

Hon'ble Judges : N.N. Mathur, J;D.N. Joshi, J

Bench : Division Bench

Advocate : S.L. Jain, B.M. Agrawal, K.N. Joshi, R.S. Saluja, S.K. Malik, V.K. Agarwal, B.C. Mehta, B.M. Bohra and Rajesh Joshi, for the Appellant; R.L. Jangid, A.A.G., M.R. Singhvi, N.M. Lodha, D.C. Sharma, S.K. Vyas, R. Bhansali, K.K. Bissa, G.L. Chaudhary, V. Gupta, S.G. Ojha, G.R. Goyal, Yashwant Mehta, Vivek Gupta, D.S. Rajvi, C.S. Kotwani and R.G. Purohit, for the Respondent

Final Decision : Allowed

Judgement

Mathur, J.

(1). This group of Special Appeals is directed against the judgment of the learned Single Judge dismissing the challenge to the Government Notifications dated 22.9.94 and 8.11.1996 issued by the Department of Mines, Government of Rajasthan, directing all the departments like Public Works, Irrigation, Public Health Engineering and other Central Government Departments/Organisations etc. to deduct 2% of the contract amount from the running bills of the contractors by way of royalty on provisional basis of assumed exploitation of minerals, if any, on the ground of it being a contractual matter, which cannot be decided in writ jurisdiction in view of the judgment of the Apex Court reported in Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, and State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., The appellants-writ petitioners have been relegated to the remedy of civil suit.

(2). The appellant-writ petitioners are the contractors carrying out the constructions awarded to them by different departments from time to time. Their say is that they are not indulged in the excavation of any mineral in any area nor they are the holders of quarry licence nor any sort of mining lease is possessed by them temporarily or permanently or casually under the provisions of Rajasthan Minor Mineral Concession Rules, hereinafter referred-to as "the MMCR", for excavation of minerals. It is also averred that none of the appellant-writ petitioners are liable for assessment under Rule 38 of the MMCR and none of them is submitting" or is required to submit annual monthly return" for assessment of royalty in Form No. 11 or monthly statutory return in Form No. 11A. It is also submitted that for the purpose of execution of works contract, building stones, grit and bajri are being purchased by them from the open market and while purchasing these materials, they also obtain invoices and revenue receipts from those tease holders/dealers. It is further submitted that building stones, ballast/grits and bajri, which is used for construction by the contractors, are being purchased from the mining areas and those areas are surrounded by royalty check posts established by the Mining Departments; of the Government of Rajasthan and without paying royalty either by the dealer or concerned truck owner or any consumer, no such minerals are being allowed to pass through those royalty check posts. It is also submitted that these royalty check posts have been given on contract to various contracts for recovery of royalty by the State Government. It is, thus, submitted that without paying royalty, no mineral can pass through the said check posts established by the Mining Departments. It is also submitted that these minerals are directly supplied by the lease holders after paying the royalty. Thus, according to the petitioners, they are nowhere concerned with the excavation of minerals or sale of minerals.

(3). In most of the writ petitions, no reply has been filed by the respondents. In some of the writ petitions, reply has been filed by the Departments, which have given contract to the writ petitioners. The stand of such departments is that they have no answer to the challenge to the impugned notifications on the ground that the same is to be replied by the State Government or by the second respondent i.e. Department of Mines. It would be convenient to extract the stand taken by them in their replies, which reads thus:

".....as far as the illegality and its validity of this Circular dated 22.9.94 i.e. Annex, R/I is concerned, is to be replied by the State Government or the respondent No.2. As Far as the answering respondent is concerned, he has to obey the order issued by the State Government or other appropriate authority empowered to declare validity of this circular."

It is further stated that-

"In reply to paras 8 & 9, it is respectfully submitted that the contents of these paras does not relate to the answering respondents because the royalty is imposed by the State Government and the answering respondent is collecting agency as per the orders issued by the State Govt. by which the answering

respondent is bound."

(4). In one of the writ petitions viz; S.B. Civil Writ Petition No.379/1998-"Udaipur Contractors Association vs. State of Rajasthan, reply to the writ petition has been filed by respondents No.1 and 2 supported by the affidavit of Shri H.M. Gupta, Mining Engineer (Writs), Mines & Geological Department. The Department raised a preliminary objection to the effect that as the relief sought, arises from the contract between the individual contractor and the respondent, the writ petition under An. 226 of the Constitution of India is not maintainable. It is averred that the individual writ petitioner-contractors while performing the work of contract with the concerned department are using building stones, ballast, grils and bajri for execution of the contract. It is also averred that individual contractor is required to take short term permit under Rule 63 of the MMCR. For taking away the minerals, they are required to pay the royalty on the minerals excavated by them. It is also submitted that since there was difficulty in collection of royalty on the basis of short term permit, on the representation of the contractors, a system was evolved for collection of levy at source from the running bills. It is pointed out that the initial order of making deduction of royally amount at the rate of 1% was issued on 23.11.1989. Thereafter the royalty amount was raised to 2%. Thus, according to the respondents, the collection of 2% on the running bills is not a fresh levy but only a mode of collection.

(5). We have heard Mr. Sohan Lat Jain, B.M. Agrawal, K.N. Joshi, learned counsel for the appellant writ petitioner-contractors and Mr. R.L. Jangid, Additional Advocate General, D.C. Sharma, M.R. Singhvi, K.K. Bissa, G.L. Chaudhary, S.G. Ojha and V. Gupta for the departments.

(6). It is contended by the learned counsel for the appellants that the learned Single Judge has committed error in not examining the real controversy involved and dismissing the writ petitions on the ground that no writ petition lies in contractual matters. It is submitted that the departments with whom the writ petitioners have entered into contract, have admitted in their reply that they have nothing to do with the challenge pertaining to collection of 2% of contract amount from the running bills as the same has been levied by the Stale Government. Their stand is that they are simply complying with the directions of the Stale Government and the Mining Depart- ment. It is also submitted that both the judgments of the Apex Court referred to by the learned Single Judge have no application to the facts of the case. It is further submitted that the impugned notification does not arise from the contract between the writ petitioner-contractors and the department giving the contract. It is submitted that under Article 265 of the Constitution of India a tax, fee or royalty in whatever name, can be imposed only under the authority of law and law means valid law. It is also submitted that a tax, fee or royalty cannot be charged under an administrative order. It is also submitted that existence of a mining lease temporary or permanent is a sine qua non for collection of royalty. It is also submitted that it is well settled law that a breach of Art. 265 of the Constitution

can be enforced by a citizen by way of remedy under Art. 226 of the Constitution of India.

(7). On the other hand, it is submitted by Mr. Jangid learned Additional Advocate General, that the contract between the writ petitioner-contractors and the concerned departments is a private contract and not a statutory contract. As per the contract, royalty on minerals is payable by the contractors.

(8). We have considered the rival contentions. We are of the view that these Special Appeals deserve to be allowed for the simple reason that the impugned notification directing the concerned departments to compulsorily deduction of 2% from the running bills of the contractors by way of royalty on provisional basis of assumed exploitation of minerals, is not part of the contract between the writ petitioner-contractors and the departments giving the contract. The departments and local authorities which have given the contract and deducting 2% royalty compulsorily at source have not defended the impugned notification on the ground that they have nothing to do with the said notification and they are simply acting as a "collecting agency". The State has chosen not to defend the writ petitions and appeals seriously. In spite of opportunities given, neither effective reply has been submitted nor requisite information's have been furnished. The allegations of indiscriminate recovery have not been denied. The scheme of refund in a case where the contractor is not liable to pay royalty has not been produced. Thus, the State has shown its arbitrariness and malafides in the matter of compulsory collection of royalty by its conduct.

(9). There are series of cases of the Apex Court dealing with the scope of interference of High Court while exercising its writ jurisdiction under Article 226 of the Constitution of India in contractual matters. One line of decisions is that if the contract entered between the State and the person aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Art. 226 of the Constitution of India, so as to compel the authorities to remedy a breach of contract pure and simple. Such cases may be referred as 1977 SC 1469 (1). *Premji Parmar vs. Delhi Development Authority* (2), *Divisional Forest Officer vs. Bishwanath T. Company Ltd.* (3), and *Food Corporation of India vs. Jagannath Dutta* (4). The another line of cases of the Apex Court are that the Court will entertain petition in the area of contractual rights on showing arbitrariness, absence of fair play and breach of natural justice. Reference be made to *Mahabir Auto Stores vs. Indian Oil Corporation* (5), *E.P. Royappa vs. State of Tamil Nadu* (6), *Mrs. Maneka Gandhi vs. Union of India* (7), *Ajai Hasia vs. Khalid Mujib Sehravardi* (8), *Ramana Dayaram Shelly vs. International Airport Authority of India* (9), *M/s Dwarka Das Marfatia & Sons vs. Board of Trustees of the Port of Bombay* (10), *State of Gujarat vs. Meghji Pethraj Shah Charitable Trust* (11).

(10). The Apex Court in *M/s Dwarka Dass Marfatia vs. Board of Trustees* (supra), held that where the act of statutory authority is arbitrary or malafide or not justified by public interest, the writ will be maintainable even in contractual

matters. This principle has been elaborated in the landmark judgment of the Apex Court in *Shrilekha Vidyarthi vs. State of Uttar Pradesh* (12), the Court observed thus:

"Bringing the State activity in contractual matters also within the purview of judicial review is inevitable and is a logical corollary to the State already reached in the decisions of the Supreme Court so far. Having fortunately reached this point, the Court should not now turn back or take a turn in a different direction or merely stop there. Two recent decisions in *Dwarkadas Mafatia and Sons* and *Mahabir Auto Stores* also lead in the same direction without saying so in clear terms. This appears to be also the trend of the recent English decisions. It is in consonance with the Court's commitment to openness which implies scrutiny of every State action to provide an effective check against arbitrariness and abuse of power. The Court would must rather be wrong in saying so rather than be wrong in not saying so. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power."

(11). In *Mahabir Auto Stores vs. Indian Oil Corporation* (13), the court observed as follows:

"Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non- discrimination in the type of the transactions and nature of the dealing."

(12). in *Hindustan Petroleum Corporation Ltd. vs. Dolly Das* (14), the Apex Court held that where interpretation of a contract arises in relation to immovable property and in working such contract or relief thereof or any other fall out thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. However the Court further clarified that if the facts pleaded before the court are of such nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could exercise writ jurisdiction under. Article 226 of the Constitution in such matters.

(13). Recently, the Apex Court in the *Chairman, Railway Board vs. Mrs. Chandrima Das* (15), has held, that the writ jurisdiction of the High Court is amenable even in contractual matters. The Court observed thus-

"Though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by Subsequent decisions and it was noticed "hat even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ

jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort."

(14). The learned Single Judge has relied upon the decision of the Apex Court in Bareilly Development Authority vs. Ajay Pal Singh (16). In the said case, a direction was sought to re-determine the cost of the flats and the instalments payable by the writ petitioners after hearing their grievances. The writ "petitioners registered their names for MIG, HIG, LIG and EWS flats with the Bareilly Development Authority and they also made initial deposit. Thereafter, the Bareilly Development Authority revised the cost of the house/flats of the MIG Group as well as the; amount of monthly instalments. It was contended that the Bareilly Development Authority was estopped from changing the conditions on which applications were registered and initial deposits were made. The Bareilly Development Authority took the stand that under the agreement entered between the parties under Clauses 12 and 13 of the contract, it was clearly agreed that Bareilly Development Authority has reserved its right to change, enhance or amend any of the terms and conditions as and when felt necessary. The High Court found that re-fixation of the instalment at a higher rate was arbitrary and unreasonable. The Apex Court held that the parties can only claim rights conferred upon them by the contract in the absence of any statutory obligation on the part of the authority in the said contractual field. In that context, the Court held that no writ or order can be issued under Art. 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple. Thus, it was a case of interpretation of one of the clauses of the contract and its breach. This case has no application to the facts of the cases in hand.

(15). The second case is State of U.P. vs. Bridge & Roof Company Ltd. (17). In the said case, the writ petitioner-Public Sector Corporation i.e. Bridge & Roof Co. (India) Limited entered into a work contract with the Government of Uttar Pradesh. A dispute was raised about certain payments, which the writ petitioner claimed as due to it. According to the terms of the contract, the rates quoted by the contractor were deemed to be inclusive of sales tax, if any, on the constructional plant, material and supplies required for the purpose of contract. One of the conditions of the contract provided that "Nothing in the contract shall relieve the contractor from the responsibility to pay any Trade Tax that may be levied under the U.P. Trade Tax Act, 1948 as amended from time to time in performance of this contract." Section 8-D of the U.P. Sales Tax Act, 1948, provides for deduction of tax from the amount payable to works contractors. Thus, under the terms of contract, the amount quoted by the writ petitioners included the sales tax. The Government was under statutory obligation to deduct the said 4% and remit the same to the Sales Tax Department. The Apex Court found that the contract between the parties was a contract in the realm of private law. It was not a statutory contract. It was governed by the provisions of the Contract Act, or may be, also by certain provisions of the Sales Tax Act. Any dispute relating to interpretation of the terms and conditions of such a Contract

could not be agitated in the writ jurisdiction. The Court in the facts of the case held that "whether any amount is due from the appellant under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified or not, are all matters, which cannot be agitated in or adjudicated upon in the writ jurisdiction." in these circumstances, the court held that the prayer in the writ jurisdiction viz; to restrain the Government from deducting the particular amount from the writ pensioners, was not a prayer which could be granted by the High Court under Art. 226 of the Constitution. Thus, this case is also with respect to interpretation of one of the conditions of the contract and has no application to the facts of the case.

(16). Thus, even if the petition pertains to contractual matters, the petition will lie under Article 226 of the Constitution, where the public functionaries are involved and the matter relates to violation of fundamental rights or the enforcement of the public duties. While exercising the powers under Article 226 of the Constitution, the court will be circumspect to adjudicate the dispute arising out of contract, depending upon the nature and rights involved in a given case. The distinction between the public law and private law remedy is now narrowed down. Every action of the State or an instrumentality of the State in exercise of its executive powers, must be subject to rule of law and be informed by reasons. Rules of fair play and natural justice are part of the rule of law. The jurisdiction of the High Court under Art. 226 of the Constitution is an extra ordinary jurisdiction vested not for the purpose of declaring the private rights of the parties but for the purpose of ensuring that the law of the land is implicitly obeyed and that various public authorities are kept within the limit of their jurisdiction. It is of course true that the High Court in exercise of judicial discretion declines to exercise its extra ordinary jurisdiction under Art. 226 where the petition is frivolous, vexatious or prima facie unjust or may not be appropriately tried in extra ordinary jurisdiction but if from the material placed before the court and the allegations made in the petition, prima facie appears that the impugned action of the public authority is without authority of law, high-handed, it is improper to dismiss a petition in limine. Even if some questions of fact are raised, it would be inappropriate to ask the party to seek relief by somewhat lengthy dilatory, expensive process by a civil suit against a public body. Reference is made to *Century Spinning & Manufacturing Co. Ltd.* (18) and *Mahabir Auto Stores vs. Indian Oil Corporation* (supra).

(17). in the instant case, the petitioners have not merely attempted to enforce their contractual rights but important constitutional issues have been raised on their behalf. The writ petitioners have not asked for interpretation of any of the conditions of the contract. It is not the case of the departments collecting the revenue that they are doing so under any of the clause of the Contract. The contention of the writ petitioners is that the impugned notification is hit by Article 265 of the Constitution, inasmuch as the direction to deduct 2% of the contract amount from the running bills of the contractor is without authority of law. Reliance has been placed on a decision of the Apex Court in *Ahmedabad Urban*

Development Authority vs. Sharad Kumar Jayanti Kumar Pasawalla (19). in the said case, the levy of development fee by the Ahmedabad Development Authority was challenged on the ground that it was not authorised by the statute. The said levy was struck down by the High Court. The Apex Court held that under the Gujarat Town Planning and Urban Development Act, 1976, there is no specific reference of power to levy any fee with respect to any matter for development charges. The Court relying on number of earlier decisions of the Apex Court, held that it has been consistently held by the Court that whenever, there is any compulsory exaction of any money from a citizen, (here should be specific provision for the same and there is no room for any intendment. Nothing is to be read and nothing is to be implied and one should look fairly at the language used.

(18). We are not expressing any opinion with respect to validity of the impugned notification. Suffice it to say that the challenge in the writ petitions does not arise from the contract entered into between the writ petitioners and the concerned departments. Thus, we are of the view that the learned Single Judge has committed error in dismissing the writ petitions summarily on the ground that no writ lies in the contractual matters. The matter requires elaborate discussion as to the validity of the impugned notification. Each of the writ petitions deserves to be admitted and requires a full hearing.

(19). Consequently, this Appeal and all the Special Appeals as shown in the Schedule appended to this order, are allowed. The judgment of the learned Single Judge in each of the writ petitions dismissing them, is quashed and set aside. All the writ petitions are admitted. It is directed that the group of writ petitions be placed before the learned Single Judge for decision on merit. The interim relief granted by the Division Bench shall continue upto 15th April, 2001. Prayer for continuance, modification or vacation of the interim relief shall be made before the learned Single Judge, if so advised. Such a prayer can be made even before 15.4.2001. Cost easy.