

(1998) 03 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 1862 of 1994

Narendra Nath Chaliha

APPELLANT

Vs

Hindustan Paper Corporation Ltd.and Ors.

RESPONDENT

Date of Decision : 01-03-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1998) 2 GLJ 301 : (1998) 2 GLT 397

Hon'ble Judges : D.Biswas, J

Bench : Single Bench

Advocate : M.Hazarika , H.K.Sharma, B.D.Das, Advocates appearing for Parties

Judgement

1. Shri Narendra Nath Chaliha has preferred this writ petition for issue of a writ directing the respondents to release the security deposit and earnest money amounting to Rs.27,000/. The dispute arises out of a contract between the petitioner and the respondents for running the canteen of the respondents for a period of one year. The agreement was signed on 31.1.89 and the petitioner deposited Rs.5,000/ towards the security deposit. It was agreed that 5% of each and every bill will be deducted by way of earnest money. But before expiry of the period of one year, the petitioner vide letter dated 16.5.89 requested the respondents to release him from the contract as he was not in a position to run the canteen on health ground and old age. He also sent several reminders. Thereafter, vide Annexure 5, the respondent No.4 directed him to hand over all the materials issued to him as he had discontinued to run the canteen with effect from 28.6.89. the petitioner alleged that he had reminded the respondents to release the security deposit of Rs.5,000/ and earnest money of Rs.22,000/ vide letters at Annexures 6,7 and 8 but the respondents did not release the same although a committee was formed to settle the matter sometime in the month of February, 1993. It has been alleged that no order has been passed by the company either imposing any penalty in terms of the contract or withholding/ forfeiting the earnest money and the security deposit.

2. The respondents in their counter asserted that the petitioner failed to run the canteen smoothly as per terms of the contract. That apart, a sum of Rs. 150/- was imposed as fine for his failure to run the canteen in a proper manner as per provisions of clause 7.03 of the agreement. Further, the petitioner was also cautioned by the respondents vide letter dated 18.5.89. that the petitioner all of a sudden wrote a letter dated 16.5.89 terminating the contract although 3 months notice is required for such termination as per clause 1.09 of the agreement. According to them no committee was constituted in the month of February, 1993. The respondents further denied accrual of Rs.22,000/- as earnest money by way of deduction from running bills. The petitioner having failed to run the canteen as per terms of the contract embodied in clause 1.02 of the agreement, the respondents are authorised to withhold the money and also can claim compensation as per clause 7.02 (b). According to them, the dispute arises out of a contract and this petition invoking the writ jurisdiction of this Court is not maintainable and, that too, after expiry of the period of limitation.

3. Mr. BD Das, learned counsel for the petitioner and Smti M. Hazarika, learned counsel for the respondents made their submissions with reference to the averments in the pleadings and the documents annexed therewith.

4. Annexure 1 is the tender document and Annexure 2 is the contract agreement. Clauses 1.01 and 1.02 of the Annexure 1 read as follows:

"1.01 : An earnest money amounting to Rs.5,000/- (Rs five thousand) only for the service as stated in the Tender Notice should be deposited in cash or by crossed bank draft in favour of the Hindustan Paper Corporation Ltd, Jagiroad, payable at Jagiroad on or before the closing time and date of the tender. No tender will be complete without the receipt or crossed bank draft showing the deposit of the earnest money. A tender which is not complete in all respects is liable to be rejected. Earnest money shall be forfeited to HPC for failing to run up/ act and in case of failure to execute an agreement of enter into the contract when asked for by HPC or in case of withdrawal of tender.

1.02: The successful tenderer will have to deposit Rs.5,000/- (Rs five thousand only) in cash/demand draft in favour of HPCL on SBI, Sonaikuchi, towards initial security deposit. Thereafter, a deduction @ Rs.5% of the amount payable every month will be deducted from the monthly bill of the contractor. The full amount of security deposit will be refunded to the contractor on satisfactory completion of the contract period."

5. It would appear from clause 1.01 that the earnest money amounting to Rs.5,000/- is subject to forfeiture for failure to "run up/act" and on other contingencies i.e. failure to execute an agreement or withdrawal offender. From clause 1.02 we find that the security deposit of Rs.5,000/- has been subjected to refund on satisfactory completion of the contract.

6. Annexure 3 is the notice dated 16.5.89 whereby the petitioner informed the respondents of his intention to terminate the contract after expiry of three

months as he was unable to run the canteen due to poor health. Again, on 28.6.89 vide Annexure 4, he had requested the respondents to release him from the contractual obligations considering his poor health and also to release the security deposit and earnest money. On 4.7.89 vide Annexure 5 the respondent No.4 directed to handover all the materials given to him since he had voluntarily discontinued the canteen service with effect from the night of 28th June, 1989 before expiry of 3 months of notice as is required as per provisions of clause 1.09 of the agreement. From letter dated 12.7.89 (Annexure 6), it would appear that the petitioner admitted to have failed to run the canteen and requested the respondents to release the amount payable to him.

7. That the learned counsel for the petitioner argued that the respondent No. 1 i.e. Hindustan Paper Corporation Ltd is a State within the meaning of Article 12 of the Constitution and it cannot act arbitrarily to withhold earnest money and security deposit without hearing the petitioner and passing appropriate orders forfeiting the same. The learned counsel for the respondents controverting the above contention argued that in view of the failure by the petitioner to abide by the terms of contract, he is not entitled to refund of security deposit and earnest money as per provisions of clause 1.01 and 1.02 of the agreement which came into operation on his failure to execute the contract rendering the claim untenable in law. The learned counsel further argued that the sum of Rs.22,000/ claimed as earnest money is a disputed figure and, as such, this Court under Article 226 of the Constitution cannot extended any relief.

8. From the documents available on record, it would appear that the petitioner issued a notice of three months terminating the contract on 16.5.89 vide Annexure 3 but before expiry of the period of three months, he had left the canteen and withdrew from the contract. Therefore, termination of the contract has not been in accordance with the provisions of clause 1.07.

9. The letter of caution issued by the respondent No.4 and the unilateral withdrawal shows that the petitioner did not discharge his contractual obligation as per agreement. The act of the petitioner in withdrawing from the contract on the midway on health ground and his repeated request to release him from the contractual obligation and to refund the security deposit and earnest money are eloquent proof of his failure to execute the contract. This has promoted the respondents to withhold the security deposit and earnest money. A plain reading of clause 1.01 and 1.02 along with the circumstances above shows that the exercise of this right by the respondents arising out of the contract is within the terms of agreement and cannot be condemned as arbitrary, capricious or impermissible.

10. The averments also show that the amount of earnest money claimed by the petitioner is disputed. This Court in its writ jurisdiction cannot undertake an exercise to ascertain the amount payable on account of earnest money as it entails scrutiny of minute details. This is purely a dispute within the domain of civil Court and ought to have been vindicated before a Court of competent

jurisdiction.

11. The next question which comes for consideration is whether the Corporation which is a State within the meaning of Article 12 of the Constitution could withhold payment without passing appropriate orders, and whether such action by way of omission on the part of the Corporation is justifiable in a writ petition under Article 226 of the Constitution.

12. Now let us refer to the decisions of the Supreme Court placed in this case. In *Kulchinder Singh & others vs. Hardayal Singh Brar & others* (AIR 1976 SC 2216) it has been held as follows :

"11. There is no doubt that some of the legal problems argued by Sri Ramamurthy deserve in an appropriate case jurisprudential study in depth, although much of it is covered by authority. But assuming, for argument's sake, that what he urges has validity, the present case meets with its instant funeral from one fatal circumstances. The writ petition, stripped of embroidery and legalistic, stands naked as a simple contract between the staff and the society, agreeing upon a certain percentage of promotions to various posts or an omnibus, embracing promise to give a quota to the existing employees. At its best, the writ petitioner seeks enforcement of a binding contract; but the neat and necessary repellent is that the remedy of Article 226 is unavailable to enforce a contract qua contract. We fail to see how a supplier of chalk to a Govt. hospital can ask for constitutional remedy under Article 226 in the event of a breach of a contract, bypassing the normal channels of civil litigation. We are not convinced that a mere contract agreeing to a quota of promotions can be exalted into a service rule or statutory duty. What is immediately relevant is not whether the respondent is State or public authority but whether what is enforced is a statutory duty or sovereign obligation or public function of a public authority. Private law may involve of a State, a statutory body, or a public body in contractual or tortious actions. But they can not be siphoned off into the writ jurisdiction."

13. In *Bihar Eastern Gangetic Fishermen Cooperative Society Ltd vs. Sipahi Singh & others*, (1977) 4) SCC 145, the principles laid down in *Kulchinder Singh* (supra) has been reiterated in the following words:

"15. This contention is also well founded and must prevail. There is abundant authority in favour of the proposition that a writ of Mandamus can 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 the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that Mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its

performance. (See *Lekhraj Satramdas Lalvani vs. Deputy Custodian cum Managing Officer, Dr. Rai Shivendra Bahadur vs. The Governing Body of the Nalanda College and Dr. Umakant Saran vs. State of Bihar*). In the instant case, it has not been shown by respondent 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent 1 was not entitled to apply for grant of a writ of Mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same."

14. In *Mahabir Auto Stores & others vs. Indian Oil Corporation & others*, (1990) 3 SCC 752, the Supreme Court on consideration of the circumstances peculiar to that case granted limited relief to the appellant firm which was carrying on distribution and sale of lubricants as distributor of Indian Oil Corporation for a consideration length of time. The supply of lubricants to the firm was suddenly stopped by the Indian Oil Corporation in view of change in the policy. Considering the duration and the nature of the transaction, the Supreme Court granted limited relief which is evident from para 20 of the aforesaid judgment. Para 20 reads as follows:

"20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the State enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work."

15. Holding as above, the Supreme Court directed the Indian Oil Corporation to take the decision afresh after hearing *Mahabir Auto Stores*. In the instant case, the petitioner entered into a contract with the Corporation for a period of one year only and he ceased to discharge his obligation in running the canteen long before the expiry of the period. Therefore, the petitioner, as per contract was only to manage the affairs of the canteen of the Corporation. The tenure of contract, nature of the duties to be performed under the contract and the disputes arising there from are distinguishable from that relating to the contract between *Mahabir Auto Stores* and the Indian Oil Corporation. The circumstances of this case do not permit the same relief as given in *Mahabir Auto Stores* (supra).

16. Before drawing the conclusion, we may take note of the decision of the Supreme Court in *Food Corporation of India & others vs. Jagannath Dutta & others* (1993 Supp (3) SCC 635). In para 5, the Supreme Court observed as

follows:

"5. We are of the view that the High Court was not justified in quashing the impugned notice especially when the terms and conditions of the contract permitted the termination of the agreement by either of the parties. The High Court should not have gone into the question of contractual obligation in its writ jurisdiction under Article 226 of the Constitution. Even otherwise the High Court misread the documents on the record and grossly erred in reaching the conclusion that no policy decision was taken by the FCI to terminate the storage agencies in the State of West Bengal."

17. From the decisions reproduced above, it would appear that the Supreme Court has been consistently laying down the law that High Court should not enter into the question of contractual obligation in its writ jurisdiction in the absence of a right arising out of a statute. According to the Supreme Court, private law may expose a State to a statutory or tortuous action; but such action cannot be siphoned off into the writ jurisdiction. This being the law, the rights of the petitioner, if any, being relatable to a contract in private law, squarely falls under the jurisdiction of civil Court and, hence this Court is not inclined to interfere with this matter in writ jurisdiction.

18. In the result, the writ petition is dismissed. The parties are to bear their respective costs.