

(1996) 11 GUJ CK 0001
In the Gujarat High Court

Case No : Special Civil Application No. 821 of 1995

Narmada Cement Co.

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 06-11-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1997) 2 GLR 1386

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Advocate : Manish R. Bhatt, for the Appellant; Harsha Devani, A.G.P., for the Respondent

Judgement

N.N. Mathur, J.—The petitioner-Company is engaged in manufacture of cement. Respondent No. 2-Executive Engineer, Irrigation Mechanical Division No. 3 invited tender for supply of ordinary portland cement and possolone portland cement having I.S.I. mark to the extent of 1,00,000 M.T. as per tender notice No. 4 of 1990-91. In response to the said tender notice the petitioner submitted tender which was accepted and in pursuance thereto an agreement in Form D was entered into between the petitioner and the respondent No. 2. The petitioner supplied 40,621.75 M.T. cement under the contract costing Rs. 6,76,27,702.31 against which the respondent made payment of Rs. 6,52,38,900.80 by various cheques. An amount of Rs. 23,88,801.49 has been withheld by respondent No. 2 alleging that the said amount has been adjusted on various accounts which is evident from the letter dated 8-8-1994 annexed at Annexure "B". The details of the withheld amount of Rs. 23,88,801.49 as pointed out in the aforesaid communication are as under :

----- (a) Recoveries towards short supply of cement Rs. 10,131.90 (b) Recovery towards cost of levy cement of drainage division, Navsari Rs. 9,792.71 (c) Charges of cement samples Rs. 74,082.60 (d) Amount due to be paid as interest on levy

dispatches to different irrigation divisions by the Company on different accounts of levy cement. Rs. 18,68,508.56 (e) Penalty for late supply Rs. 17,885.72 (f) Penalty for non-marking on cement bags. Rs. 4,08,000.00 ----- Total : Rs. 23,88,801.49

----- And further break-up of an amount of Rs. 18,68,508.56 has been given as under :

----- (i) Executive Engineer, Ukai Left Bank Canal Investigation Division No. 2, Waldo, towards road freight charges relating to R.O. No. 13 dated 4-11-1988 Rs. 2,920.00 (ii) Executive Engineer, Ukai Left Bank Canal Investigation Division No. 2, Waldo, towards road freight claim as per letter No. 4608 dated 27-1-1991 Rs. 8,030.00 (iii) Executive Engineer, Kakrapar Canal Division No. 2, Surat, towards levy of interest claim against amount paid in 1983 Rs. 34,352.51 (iv) Executive Engineer, Ver-II Project Division Vyara, Surat towards claim of interest and rate difference against R.O. No. 4 of 1984 to 7 of 1984. Rs. 5,78,206.05 (v) Executive Engineer, Medium Irrigation Project Division, Ankleshwar, towards interest for delay in refunding levy credit balance. Rs. 12,45,000.00 ----- Total Rs. 18,68,508.56 -----

2. It is thus evident that different amounts payable to different agencies under separate and distinct contracts of the years 1983 and 1988 are being adjust from the bills of tender agreement No. D-3 of 1990-91. It is also pointed out that Rs. 12,45,000.00 at item No. 5 was allegedly due and payable by the petitioner to the Executive Engineer, Medium Irrigation Project Division, Ankleshwar. For the recovery of the amount, the said Authority has filed Special Suit No. 351 of 1992 before the Court of Civil Judge (S.D.), Surat and the same is still pending. The petitioner has appeared in the said suit and is contesting the same. It is also stated that the amount of Rs. 12,45,000.00 pertains to an agreement entered into between the petitioner and the Executive Engineer, M.T.P. Division, Ankleshwar, who is not a party to the tender agreement No. D-3 of 1990-91. The said contract relates to the period 1983-84. With respect to item No. IV, i.e., Rs. 5,78,206.05, it is stated that the said amount pertains to a contract between the petitioner and the Executive Engineer, Ver-II, Project Division, Vyara, Surat towards the claim of interest relating to the contract of the year 1984. Similarly the deduction of Rs. 2,920/- and Rs. 8,030/- at time Nos. 1 and 2 are at the instance of the Executive Engineer, Ukai Left Bank Canal Investigation Division No. 2, Waldo and the deduction of Rs. 34,352.51 at item No. 3 is at the instance of Executive Engineer, Kakrapar Canal Division No. 2, Surat. On these facts, the petitioner seeks declaration that the action of the respondents in deducting the amount of Rs. 18,68,508.56 towards the amount due to be paid to different Irrigation Division on different accounts and deduction of Rs. 4,08,000/- towards penalty for non-marking on cement bags from the bills submitted by the petitioner in relation to Tender Agreement No. D-3 of 1990-91 is illegal, arbitrary, unjust and violative of Article 14 of the Constitution of India.

3. Mr. R. N. Patel, Executive Engineer has filed affidavit stating that the amount of Rs. 18,68,508.56 has been recovered from the petitioners towards the outstanding dues of other Irrigation Division on different accounts for levy cement as per the provisions and terms of the contract at Clause No. 26 of Form No. "D" of the Tender Agreement. With respect to the recovery of Rs. 4,08,400/-, it is stated that the Government took the decision to take token penalty as a special case from all the cement Companies who failed to observe the terms as per Government Memo dated 1-8-1994, i.e., marking of "N & W.R.D." Government of Gujarat on each and every cement bag. It is admitted that Civil Suit has been filed to recover dues of Rs. 12,45,000/- which has been registered as Special Civil Suit No. 351 of 1992 and the same is pending in the Court of Civil Judge (S.D.), Surat. Similarly, for the recovery of Rs. 5,78,206.05, suit has been filed which has been registered as Special Civil Suit No. 464 of 1994 and the same is pending in the Court of Civil Judge (S.D.), Surat.

4. Thus, the question which has arises for consideration in this Special Civil Application is as to whether the respondent No. 2 has any right or authority to deduct the amount in question from the petitioner's bill relating to agreement No. D-3 of 1990-91 adjusting the amount due of some other earlier contracts of 1983-84 and 1988 ?

5. Ms. Harsha Devani, learned A.G.P. has raised preliminary objection that the issue raised in this Special Civil Application is in the realm of contract and as such it is not capable of being decided in the writ jurisdiction of this Court under Article 226 of the Constitution of India. She relies on a decision in the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, In the said case, the State Government had leased out some forest land to the appellants to collect and exploit sal seeds for 15 years on payment of royalty at a certain rate and when the State, under the terms of the leases, revised the rate of royalty and thereafter cancelled the leases for breach of certain conditions. The petitioners-appellants challenged the orders of the revision of rate and cancellation of leases as illegal by writ proceedings under Article 226 of the Constitution. The Supreme Court, inter alia, observed that after the State or its agents have entered into the field of ordinary contract, the relations are to longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. Considering the facts of that case, the Court found that the allegations on which violation of Article 14 could be based are neither properly made nor established. The Court further held that before any adjudication on the question of whether Article 14 could possibly be said to have been violated as between persons governed by similar contracts, they must be properly put in issue and established. In the case of Kumari Shrelekha Vidyarthi and Others Vs. State of U.P. and Others, the Apex Court considering the question of applicability of Article 14 of the Constitution in the matters of contract with a State, observed that there is difference in the contracts between private parties and the contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State

while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The Supreme Court further observed that wherever a challenge is made on the ground of violation of Article 14 alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. Thus, the position of law laid down by the Supreme Court is that even in respect of contractual obligations of the parties, the State is not relieved of its obligations of complying with the provisions of Article 14 of the Constitution, i.e. to act justly, fairly and reasonably. Applying to the facts of the present case, if it is found that the impugned act of the respondents is beyond the treatment of Clause 26 of the Agreement of 1990-91, the petition is maintainable, otherwise not.

6. Thus, turning to the facts of the case, Mr. M. R. Bhatt, learned Advocate for the petitioner submits that Clause 26 of the Agreement in question is identical to the standard form of the general conditions of contract of the Central Government. Clause 18 of the said condition of contract has been interpreted in identical circumstances by the Supreme Court in *Union of India (UOI) Vs. Raman Iron Foundry*, The Supreme Court held that Clause 18 does no more than merely provide additional mode of recovery to the purchaser and the purchaser is entitled to exercise right conferred under that clause only where there is claim for a sum which is presently due and payable by the Contractor. The Court held that under Clause 18 the purchaser is not entitled to recover the amount of its claim for damages by appropriating the amount due to the contractor under the claim for damages is adjudicated upon and culminates in a decree. Mr. Bhatt, however, with his usual fairness has brought to my notice the latter decision of the Supreme Court in the case *H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others*, wherein the three Judges Bench of the Apex Court, considering the same Clause 18 held that the clause gives wide power to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter may become due to the contractor under other contracts.

7. In order to better appreciate the controversy, it will be fruitful to have a comparative study of Clause 18 of the standard contract and Clause 26 of the Agreement in question.

8. It is evident that both the clauses are under different headings. While Clause 18 is under the heading "Recovery of sum due", Clause 26 is under the heading "Set off of money". Apparent distinction between Clause 18 of the standard form and Clause 26 of the Agreement in question is that while Clause 18 is attracted where there is any claim for payment of sum of money arising out of or under the contract against the Contractor, Clause 26 is attracted in a case where any sum of money is due and payable to the Contractor. Where there is claim for payment of sum of money arising out of or under the contract, it is not necessary

that sum of money must be due and payable to the purchaser. It is enough if there is claim even for damages. In such events, under Clause 18, the purchaser is entitled to recover the sum by appropriating the sum due or which at any time thereafter may become due to the Contractor under the contract or under any other contract. It is significant to notice that Clause 26 of the Agreement is under the heading "set off of money" due and payable. The sum can be said to be due and payable only where a claim is either admitted or in a case of dispute settled by resorting to the judicial process. Thus, where the claim is adjudicated upon by a Civil Court or an Arbitrator and the breach of the contract is established and the amount of damages ascertained and decreed that a debt due payable comes into existence, till then it is nothing more than a mere right to sue for damages and it does not fall within the words "due and payable". This position has been made clear even in the latter decision of the Apex Court, i.e. in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, the Supreme Court noticed the earlier standard form which is differently worded, as it reads "whenever under this contract any sum of money is recoverable from any payable by the Contractor". The Court found that the clause has been substituted by using the word "whenever any claim for payment of sum of money arises". The Supreme Court considering the change in phraseology found that in order to attract the present Clause 18, it was not necessary that there should be a sum of money due and payable by the Contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money by the contractor irrespective of the fact that whether such sum of money was presently due and payable or not. Thus, the Apex Court made clear distinction between the earlier form of the contract and the substituted one. Clause 26 of the subject agreement is more close to the Clause 18 of the old standard form of agreement where the words used were "recoverable from and payable by the contractor".

9. Thus, I am clearly of the view that in the present case, Clause 26 of the Agreement cannot be attracted by the respondent to recover the amount by way of set off from the bills of agreement of 1990-91. The amount said to be due under other contracts of 1983-84 and 1988 and the same has been seriously disputed by the respondents. Thus, the amount disputed has not been crystallised. It is only after the amount is crystallised by settlement or by judicial process, instead of going for execution, that the amount can be adjusted by invoking Clause 26 of the agreement. The respondents, in adjusting the amount of Rs. 18,68,508.56 which is said to be due from the earlier different contract than the agreement No. D-3 of 1990-91 have acted unjustly and unreasonably and in disregard of the provisions of Article 14 of the Constitution of India. However, so far as the prayer with respect to Rs. 4,08,000/- against penalty for non-marking on cement bags is concerned, that arises out of the contract between the parties and as such the petition is not maintainable to that extent.

10. In view of the aforesaid, this Special Civil Application is partly allowed and it is directed that the respondents should release the amount of Rs. 18,68,508.56

which has been deducted and retained by respondent No. 2 towards the amount due to be paid to different Irrigation Division on different accounts. The prayer with respect to release of Rs. 4,08,000/- is concerned, the same is rejected. The petitioner will also be entitled to interest at the rate of 18% on the aforesaid amount of Rs. 18,68,508.56.

Rule made partly absolute to the aforesaid extent with no order as to costs.

11. Petition partly allowed.