
(2014) 03 GUJ CK 0077

In the Gujarat High Court

Case No : Special Civil Application No. 16593 of 2013

Nidus Enterprises Pvt. Ltd.

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Constitution of India, 1950 — Article 12 14 19 226

Citation : (2014) 3 GLH 66

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Jay M. Thakkar, for the Appellant; Sangeeta Vishen, Ld. A.G.P. for the Respondent(s) No. 1-4 and Mr. M.S. Bhatt, Advocate for the Respondent(s) No. 5, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Anjaria, J.—The petitioner company in the present petition, has prayed to set aside the aforesaid order dated 30.10.2013 passed by respondent No. 2. It is further prayed to declare that the order of canceling the agreement and taking away the possession of the land is illegal and in violation of principles of natural justice. It is also prayed to command the respondent-authorities not to take away possession of the land in question and to permit the petitioner to further conceptualise and operate the Adventure Sports Park. An agreement dated 18th September, 2012 was executed between the petitioner herein and respondent No. 2-Collector, whereunder the petitioner-company was granted as licensee, the rights in respect of 20 Acres of land at Governor's Hill, Saputara. Under the said license agreement, the petitioner was to conceptualise, establish, operate and maintain Adventure Sports Park. It was pursuant to Resolution dated 09th August, 2013 passed by Department of Industries and Mines, State Government, which approved granting rights of user over the said land to the petitioner. The Chief Officer, Notified Area, Saputara was authorised to enter into the transactions with the company in this regard.

2. The Collector, Dang, Ahwa-respondent No. 2 by his order dated 30th October, 2013 terminated the aforesaid agreement and directed for resuming back the possession of the land. The said order produced at Annexure-A inter alia recorded that in a meeting of Saputara Development Committee held on 25th October, 2013, the activities of the petitioner agency in respect of the Adventure Park was deliberated, and it was found that the petitioner company was not observing the standards of safety, cleanliness and sanitation, and had not complied with the conditions. Notices were given by the Chief Officer, Saputara Notified Area, to the company.

2.1 By filing affidavit-in-reply dated 19th November, 2013 and 26th November, 2013 affirmed by the Chief Officer and Deputy Collector, Notified Area, Saputara on behalf of respondent No. 2 contended that case was in the realm of private law. It was contended that alternative efficacious remedy by way of arbitration was available. Highlighting the breach of conditions of the agreement, respondent No. 2 stated that on 09th November, 2013 during Diwali vacation, a child aged 12 years met with an accident resulting in serious injury and fracture on both his legs. It was contended that accident was occurred due to negligent attitude on part of the petitioner company by not providing the required safety measures for the activity of zip line.

2.2 It was contended that pursuant to a bidding process undertaken by Gujarat Tourism Opportunity Limited, which acted on behalf of Tourism Corporation of Gujarat, the petitioner company was selected. Thereupon the Government of Gujarat issued aforesaid Resolution dated 09th August, 2012 and the agreement was entered into with the petitioner. It is stated in the affidavit that as per the agreement, the petitioner company was initially obliged to start six mandatory activities, that is, (i) paragliding, (ii) zip line; (iii) climbing wall; (iv) obstacles; (v) old terrain vehicle; (vi) tracking and hiking. The petitioner however started only one activity, namely the zip line. Thereafter it started other optional activities, but within a short span of time, it discontinued activities like bouldering and zorbing. It was further stated that mandatory activity of paragliding was continued for few days only in the month of December and January and thereafter the same was discontinued. In other words, it was the say of the respondents that the petitioner company failed to start and run the activities at the Adventure Park which was mandatorily required to be commenced.

2.3 It appears that communications between the petitioner company and the competent authority were exchanged. By letter dated 26th January, 2013 the company was warned that the activities commenced were sluggish. It was pointed out that the petitioner was not interested in continuing the contract which was yet not approved by the State Government, the same could be got cancelled. Respondent No. 2-Collector issued notice dated 12th April, 2013 stating that the petitioner had started only three activities and no primary facilities were made available; neither the details of income, details of the

employees and the staff nor the plan of the architect was submitted, though required. By the said notice, the petitioner was asked to make good the deficiencies and comply with the conditions of the agreement. The say of the deponent of the affidavit was that even after period of seven months, the petitioner could not substantially start adventure park activities and hence notice dated 12th April, 2013 was issued giving an opportunity to the petitioner to provide the safety measures and to complete the requirements. It appears that petitioner sent reply to the aforesaid notice on 26th April, 2013.

2.4 The authority thereafter carried out inspection. The Notified Area Authority submitted report along with Rojkam on 22nd May, 2013. The petitioner in his letter dated 30th June, 2013 stated that 14 activities were operational, whereas the same was disputed by the deponent in the reply affidavit stating that the claim of the petitioner was totally misleading and that it was continuing the activities. It appears, as stated in the affidavit-in-reply, that the Collector thereafter appointed an expert one D.S. Tourism Worx Private Limited, Ghaziabad and inspection by the said third party expert was carried out. The said agency after visiting the site and carrying out a joint inspection submitted a detailed report. The report indicated that the petitioner operator had not complied with major norms, conditions of the tender document and the agreement. It recommended that the activities of the petitioner were required to be stopped, else it would largely amount to compromising on the safety of participants. Thereafter Saputara Development Committee deliberated the issue and after weighing the pros and cons, decision was taken to end the activities of adventure sports park by the petitioner. The Committee conveyed its decision to State Government and in that background, the Collector passed the impugned order of cancelling/terminating the agreement.

3. Learned advocate for the petitioner Mr. Jay M. Thakkar took the Court to the averments and grounds raised in the petition. He submitted that no prior notice was issued and straightway the order canceling the agreement was passed. He submitted that order of cancellation of agreement suffered from non-application of mind. He submitted that in order dated 30th October, 2013, it was provided to take away possession from the petitioner immediately, which itself was arbitrary and unreasonable. He submitted that entire action was in breach of violation of principles of natural justice. He submitted that the respondents are the "State" Authorities within the meaning of Article 12 of the Constitution and it was incumbent on their part to observe the norms of fairness in their action. He submitted that the State action, even if it is in relation to the contractual obligation, has to meet with the requirements of Article 14 of the Constitution. He submitted that the impugned action was violative of petitioner's right under Articles 14 and 19 of the Constitution.

3.1 Learned advocate for the petitioner relied on decision of this Court in Pankajkumar A. Patel v. Life Insurance Corporation of India [2013 (3) GLR 2674] to contend that the impugned action of terminating the contract was illegal and

without compliance of rule of natural justice. In the said case the Apex Court was concerned with considering the question of termination of agency or forfeiture of renewal commission under relevant regulations of Life Insurance Corporation of India (Agents) Regulations, 1972. The Court held that if concealment of facts or fraud is alleged as a ground of termination, personal hearing was required to be given and mere show cause notice would not sufficient compliance with rules of natural justice.

3.2 On the other hand learned Assistant Government Pleader Ms. Sangeeta Vishen relied on various facts and contentions highlighted in affidavit-in-reply, the gist of which is narrated hereinabove. She further submitted that the entire petition of the petitioner was based on the one single ground, namely that no prior notice was issued to the petitioner. She submitted in that regard that the said ground was factually incorrect in as much as the Collector issued prior notice before taking the action. She invited attention of the Court to aforementioned notice dated 12th April, 2013 produced along with affidavit-in-reply, and further drew the attention to the correspondence which preceded the said notice. It was a submission that in raising contention that no notice was issued, the petitioner had suppressed the material fact.

3.3 Learned Assistant Government Pleader for the respondent relied on decision of the Apex Court in Rajasthan State Industrial Development and Investment Corporation v. Diamond and Gem Development Corporation Limited and submitted on that basis that in contractual dispute, writ court would not interfere.

3.4 Learned advocate Mr. M.S. Bhatt who appeared for respondent No. 5 supported the contentions canvassed by learned Assistant Government Pleader. It may be recorded that this Court while issuing notice granted ad-interim relief in terms of paragraph 12(E) of the petition. Under the said interim prayer, operation, implementation and effect of the impugned order was sought to be stayed.

4. Seeing the agreement which lies on record of the petition, it granted licence to the petitioner company, the licensee having offered to conceptualise, establish, operate and maintain the Adventure Sports Park. The operational period fixed was 15 years. The land was given on "as is where is basis". What was given were the user rights. They were non-transferable as per the condition of the agreement. In condition No. 10, it is stated that Adventure Sports Park operations would be run by the licensee but the Saputara Notified Area Officer/ Government of Gujarat would be the absolute owner of the land and the ownership of the land shall remain with them during the period of licence. Tariff were to be fixed by the licensee but with express permission of the licensor. Various other conditions in respect of maintenance of safety standards were also incorporated required to be complied with by the petitioner licensee.

4.1 Condition No. 31 provided with in case the licensee commits breach of any terms and conditions of the agreement or any stipulation contained therein, the

licensor shall be at liberty to give a notice in writing to the licensee, asking him to set right or rectify breaches and omissions. It is further provided that in case of non-compliance thereof on part of licensee within 30 days of the receipt of the said mentioned notice, agreement would stand terminated and would cease to operate. Condition No. 41 speaks of reference of the disputes and differences to the arbitrator.

4.2 Having regard to the nature of controversy involved in the petition, what is complained of by the petitioner is termination of contract entered into with respondent No. 2 for running Adventure Sports Park. The contractual conditions were incorporated in the license agreement afore-mentioned. Under the said contract, what was transferred to the petitioner was right of user in respect of 20 Acres of land. In that context and for the purpose of running the Park, possession of the land was handed over to the petitioner. The petitioner company was to discharge obligations under the agreement in accordance with the terms contained and agreed. According to the respondent authority, the petitioner did not comply with those terms and stipulations of the license agreement, did not start the activities and failed to maintain standards of safety, etc. The petitioner disputed it on various pleas and considerations.

5. There is no gainsaying that the dispute and relief prayed for in the petition falls primarily and essentially in the realm of contract and pertains to the enforcement of contractual obligations. It is trite position of law that jurisdiction of this Court under Article 226 which is a writ jurisdiction would not be exercisable in all ordinary circumstances in respect of contractual matters. Writ jurisdiction extends to the issues of violation of fundamental right and for protection of those rights. It would be also available where statutory right is infringed and infringement is to be remediate by enforcing the same. But contractual dispute, by their very nature, do not fall within the purview of writ jurisdiction. Whether the terms of contract between two parties are breached or not is essentially a question of fact. It would require adjudication. From this standpoint also, they are neither amenable nor fit for consideration in the writ jurisdiction. Factual adjudicatory process is outside the purview of writ powers.

5.1 In *Orissa State Financial Corporation v. Narsing C.H. Nayak* [(2010) 3 SCC 261], the Apex Court reiterated the principles that High Court can neither ignore the scope of writ petition before it nor the nature of the dispute presented therein. It held that High Court cannot enter the area of contractual obligations between the parties and issue directions in respect of the contract. In *Rajasthan State Industrial Development and Investment Corporation* (supra), the law was stated and it was held that writ court cannot be a coram to seek any relief based on terms and conditions incorporated in the agreement by the parties.

5.2 In *Indian Bank Vs. Godhara Nagrik Cooperative Credit Society Ltd. and Another*, it was held that jurisdiction of a writ court exercising power of judicial review is limited one where action of State is found to be unreasonable or arbitrary, then only High Court may exercise its jurisdiction. It was held that in

the matter of enforcement of contract, a public sector bank-the appellant before the Apex Court, was governed by the terms of the contract and in its action, unless wholly arbitrary and unreasonable, would not be amenable to writ jurisdiction of High Court.

5.3 This principle applies also to the cases where one of the party is "State" or its instrumentality. It is true that dictum is that "State" has to act in a manner fair and reasonable in all its actions, and that would not exclude the contractual realm per se. Standards of fairness in action may be stricter where the State or State agency enters into contract with a private party in its statutory capacity. The present is not a case of statutory contract. Nor the contract had an public law character or public law element.

6. The contention of learned Assistant Government Pleader that challenge to the impugned order on the solitary ground of non-issuance of prior notice was factually erroneous could be well countenanced. Along with affidavit-in-reply, as noted above, respondent authority has produced notice dated 12th April, 2013 (Annexure-IV, Page No. 51) issued to the petitioner. In that notice, it was stated that despite passage of seven months, the petitioner had only put up a temporary cabin and only three activities were commenced and several mandatory activities required to be started under the agreement were not started. It was also pointed out that various details of income, number of employees, etc., were not being furnished. The notice required the petitioner to make good deficiency and comply with the requirements of the agreement within 15 days. The said notice was in terms of clause 31 of the agreement.

6.1 In the petition, the petitioner did not disclose, rather concealed, the factum of the said notice dated 12th April, 2013. The petitioner had not only received the said notice, but replied the same on 26th April, 2013. Thereafter the Deputy Collector addressed a communication dated 22nd May, 2013 to the Collector regarding status of activities at the adventure park. Another communication dated 18th July, 2013 (Annexure-VIII, Page No. 56) placed on record, showed that the petitioner was once again pointed out the steps required to be taken on various aspects of fulfillment of conditions of contract. The petitioner was put to notice that if the activities of the park were not started before 03rd August, 2013, contract would be cancelled and the deposit would be forfeited. Similar notices/communications followed once again by the Collector on 01st August, 2013 (Page No. 57). The petitioner was guilty of suppressio veri and suggestio falsi in not disclosing the notice dated 12th April, 2013 and the subsequent notices mentioned above. Instead, he ventured to raise the contention that no notice was issued, basing his petition and the prayer on the said ground. That the petition was liable to be dismissed on this ground alone was not a contention which could have been lightly brushed aside.

6.2 The aforesaid notices issued were in terms of requirement of conditions of the agreement and they constituted sufficient opportunity given to the petitioner. Not only that, it appears that even thereafter the respondent got the site

inspected by an independent agency to cause report through Gujarat Tourism Opportunity Limited. The report fortified that the operator was not complying with major norms and conditions contained in the agreement. It recommended stoppage of operations of the adventure park. The impugned order terminating the contract followed at last. In the aforesaid view and facts on record, there is hardly room for the petitioner to complain about breach of natural justice or arbitrariness. Thus considering all these, even if it is viewed that the party to contract was "State" it could hardly be said that it did not act in just, fair and reasonable manner before terminating the contract. Once the contract was terminated as per order dated 30th October, 2013 of the Collector, possession of the land with the petitioner render unauthorised.

7. It was the case of the deponent stated in affidavit that after passing of order dated 30th October, 2013 by the Collector, possession of the land was taken over. This Court passed order on 31st October, 2013 issuing notice and granting interim relief. It was accordingly contended that possession was already taken when interim order was passed staying the effect of order dated 30th October, 2013. It was stated that the Collector while passing order dated 30th October, 2013 also issued necessary instructions to the Sub-Divisional Magistrate to take possession. Maintenance Surveyor, City Survey Office was asked to take possession and report back. It is stated that on the evening of 30th October, 2013 in presence of three Panchas, Surveyor took possession drawing the panchnama. The panchnama is produced along with affidavit which recorded that representative of the petitioner company was present but refused to hand over possession and put signature. The possession was however taken after drawing panchnama by the Surveyor in presence of Panchas, it was stated. Drawing of panchnama in presence of Panchas was a valid mode of taking possession of land in eye of law.

8. There is yet another ground on which the writ petition would not be entertained. The agreement dated 18th September, 2012 contained in it an arbitration clause. Clause No. 41 provided that in case of disputes and differences in connection with the terms of agreement, the said dispute shall be first refer to the Collector, Dang for conciliation. It is further provided that in the event of failure in conciliation, dispute shall be referred to sole arbitrator to be appointed by the licensor under the provisions of the Arbitration and Conciliation Act. It could be rightly contended that petitioner ought to have resorted to the said remedy instead of invoking the writ jurisdiction. Learned Assistant Government Pleader relied on oral order dated 22nd October, 2013 in *Shreno Limited v. Gail (India) Limited* being Special Civil Application No. 11549 of 2013.

8.1 In *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, the dispute related to the terms of contract between the appellant-State Government and respondent-public limited corporation. The contract contained provision for arbitration. The Apex Court, on the maintainability of petition under Article 226, held that in dispute related to the terms of private contract, writ petition would

not be proper course. Following observations may be pertinently reproduced:

Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to the arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, parties should follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. The prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived.

8.2 Also in *The Empire Jute Co. Ltd. and Others Vs. The Jute Corporation of India Ltd. and Another*, the Apex Court held that power of juridical review vested in the superior Courts undoubtedly has wide amplitude but when there exists an arbitration clause, the writ court ordinarily would not exercise its discretionary jurisdiction to enter into the dispute. It quoted the observations from its own decision in *Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd.*, 12. The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious. Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefore the parties are required to lead evidence both oral and documentary which can be determined by a domestic forum chosen by the parties, the Court may not entertain a writ application. (See *Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another*,

For the discussion and reasons recorded above, prayers in this petition could not be entertained. No case is made out for interference in exercise of writ jurisdiction of this Court under Article 226 of the Constitution. The petition is liable to be dismissed. Accordingly the same is dismissed. Notice is discharged. Interim relief stands vacated. FURTHER ORDER

At this stage learned advocate for the petitioner requests for extension of interim relief for some time. The said request was objected by learned Assistant Government Pleader.

For the reasons recorded in the judgment, interim relief cannot be extended. Hence, the request is refused.