
(2015) 07 GAU CK 0032
In the Gauhati High Court
Case No : Writ Petition (C) No. 1236 of 2015

Rajeeb Bhattacharjee

APPELLANT

Vs

Numaligarh Refinery Ltd. and Others

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226
Specific Relief Act, 1963 — Section 14, 14(1), 16

Citation : (2015) 2 GLD 597 : (2015) 4 GLT 549 : (2015) 3 GLT 633

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : S. Kakati, A.N. Chowdhury and R.M. Das, for the Appellant; K.N. Choudhury, M. Mahanta, P.P. Medhi, B.K. Kashyap, N. Deka and R.M. Deka, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Biplab Kumar Sharma, J—By means of this writ petition, the petitioner seeks enforcement of the particular Clause in the agreement that was executed between the petitioner and the respondent No. 3 and to that extent the challenge made in the writ petition is the Annexure-F letter dated 28th February, 2015. By Annexure-B, Deed of Agreement executed on 20th May, 2010 between the petitioner and the respondent No. 3, the particular Pharmacy was allowed to be run by the petitioner within the stipulated terms and conditions laid down therein. Clause-11 of the said agreement provides as follows:-

"11. On the execution of this agreement and the first party duly perform all the terms and conditions in this agreement contained on his part to be performed and observed and shall in manner aforesaid. For termination of this contract a mutually agreed upon three (3) months notice in advance from either side will be necessary. The VK-NRL authority will facilitate the exit of the out going party and induction of the new party by guiding the new party to take over the stock/infrastructure of the out going party and timely clearance of all pending bills."

2. There is no dispute that the aforesaid agreement was terminated with effect from 1st January, 2015 vide notice dated 1st October, 2014 and the said termination notice is not under challenge in this proceeding. Pursuant to such termination of the agreement, the petitioner was asked to vacate the Pharmacy premises to the hospital authority being run by the respondent No. 3 within 3 (three) days of receipt of the said notice. In the notice, it was specifically stated that inspire or termination of the agreement with effect from 1st January, 2015, the petitioner has been un-authorizedly and illegally occupying the Pharmacy premises of the hospital.

3. Referring to the above quoted Clause-11 of the agreement that was executed by and between the petitioner and the respondent No. 3, it is the case of the petitioner that before issuance of the impugned notice dated 28th February, 2015, the respondents ought to have complied with the later part of the Clause by way of facilitating the exit of the petitioner and induction of the new party and also clearing the pending bills.

4. I have heard Mr. S. Kataki, learned counsel for the petitioner. Also heard Mr. N. Deka, learned counsel representing the respondent Nos. 1 and 2, i.e. Numaligarh Refinery Limited and so also Mr. K.N. Choudhury, learned senior counsel assisted by Mr. B.K. Kashyap, learned counsel representing the respondent Nos. 3 and 4.

5. Mr. S. Kataki, learned counsel for the petitioner has argued that the respondents without first complying with the later part of the Clause-11 of the agreement could not have asked the petitioner to vacate the Pharmacy premises, as has been done by the impugned Annexure-F notice dated 28th February, 2015.

6. The respondent Nos. 3 and 4 have filed a counter affidavit raising the plea of non maintainability of the writ petition on the ground that the respondent No. 3 is not an authority within the meaning of Article 12 of the Constitution of India. In this connection, they have placed reliance on the judgment of this Court in Kumud Pathak Vs. Numaligarh Refinery Limited (A Government of India Enterprise) . In the said case, the service contract of the petitioner with the Vivekananda Kendra was terminated challenging which the writ petition was filed. As in the instant case in the said case also, it was contended that Vivekananda Kendra being an instrumentality and/or agent of the Numaligarh Refinery Limited, the writ petition was maintainable. Considering all relevant aspects of the matter, it was held that the Vivekananda Kendra is not an authority within the meaning of Article 12 of the Constitution of India and that the petitioner was guided by the terms and conditions of the appointment that was offered by the Vivekananda Kendra and accepted by the petitioner.

7. Referring to the aforesaid decision, both Mr. N. Deka, learned counsel representing the respondent Nos. 1 and 2 and Mr. K.N. Choudhury, learned senior counsel representing the respondent Nos. 3 and 4 submit that the enforcement of Clause-11, referred to above, which has been sought for by the petitioner being within the realm of private contract, is not enforceable by means

of a writ petition under Article 226 of the Constitution of India. Mr. Choudhury has also submitted that the petitioner having accepted the termination of the agreement cannot question the consequential action. He has also referred to the provisions of the Specific Relief Act, 1963, so as to contend that the contract in question being in its nature determinable, the claim in question is not enforceable. He has also placed reliance on 2 (two) decisions of the Apex Court in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, (1990) 4 JT 601 : (1990) 2 SCALE 1056 : (1991) 1 SCC 533 : (1990) 3 SCR 196 Supp : (1991) 1 UJ 96 and *Amarjeet Singh and Others Vs. Devi Ratan and Others*, AIR 2010 SC 3676 : (2010) 124 FLR 286 : (2009) 15 JT 110 : (2009) 14 SCALE 149 : (2010) 1 SCC 417 : (2010) 1 SCC(L&S) 1108 : (2009) 15 SCR 1010 : (2010) 6 SLR 383 : (2010) AIRSCW 856 .

8. Mr. S. Kataki, learned counsel for the petitioner, however, submits that the respondent Nos. 3 and 4 being agents of the respondent No. 1 cannot absolve itself from its liability towards enforcement of Clause-11 of the agreement, referred to above. According to him, the respondents while implementing Clause-11 cannot ignore the later part of the said Clause. He submits that the respondents are duty bound to enforce the second part of Clause-11 before asking the petitioner to vacate the Pharmacy premises irrespective of termination of the agreement with effect from 1st January, 2015 vide notice dated 1st October, 2014. In this connection, he has placed reliance on 3 (three) decisions in *The Aggarwal Chamber of Commerce, Ltd. Vs. Ganpat Rai Hira Lal*, AIR 1958 SC 269 : (1958) 33 ITR 245 : (1958) 1 SCR 938 ; *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, AIR 1981 SC 679 : (1981) 1 SCALE 1 : (1981) 1 SCC 538 : (1981) 1 SCC 537 : (1981) 2 SCR 417 and *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvama Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, AIR 1989 SC 1607 : (1989) JT 129 Supp : (1989) 2 LLJ 324 : (1989) 1 SCALE 1116 : (1989) 2 SCC 691 : (1989) 2 SCR 697 : (1989) 2 UJ 130 .

9. As noted above, this Court in *Kumud Pathak (Dr.) (supra)*, in which as in the instant case, *Numaligarh Refinery Limited* and *Vivekananda Kendra* were the party respondents, held that the writ petition was not maintainable, *Vivekananda Kendra* being not an authority under Article 12 of the Constitution of India. It has also been noticed that the parent order terminating the agreement vide notice dated 1st October, 2014 and effective from 1st January, 2015 is also not under challenge and the same has attained finality. Annexure-F communication dated 28th February, 2015 is a consequential action undertaken by the respondent No. 3 pursuant to such termination of contract. It is in this context, Mr. K.N. Choudhury, learned senior counsel representing the respondent Nos. 3 and 4 has placed reliance on the decision in *Amarjeet Singh (supra)*. In the said case, the Apex Court was concerned with a seniority dispute consequent upon the promotion that was given to some of the employees. In absence of any challenge to the order of promotion, it was held that the petitioners were not entitled to challenge the consequential seniority determined on the basis of the promotion

that was never put to challenge.

10. In *Amritsar Gas Service (supra)* dealing with the contention that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in Sections 14 and 16 of the Specific Relief Act, the Apex Court referring to Section 14(1) of the Specific Relief Act, held that granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant Corporation was contrary to the mandate in Section 14(1) of the Specific Relief Act and that there was an error of law apparent on the face of the award.

11. Mr. S. Kataki, learned counsel for the petitioner, however, submits that the above decisions are not applicable to the case in hand inasmuch as what the petitioner has prayed for is the enforcement of the later part of Clause-11. It is in this context he has placed reliance on the decision in *M/s. New Bihar Biri Leaves Company (supra)*, in which it was held by the Apex Court that a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest.

12. In *V.R. Rudani (supra)*, on which Mr. S. Kataki, learned counsel for the petitioner has placed reliance, the Apex Court dealing with the scope, ambit and power of the writ Court held that the mandamus cannot be denied on the ground that the duty to be enforced is not imposed by statute and that technicalities should not come in the way of granting relief under Article 226 of the Constitution of India. In *Aggarwal Chamber of Commerce Limited (supra)*, which has also been pressed into service by Mr. Kataki so as to contend that although the agreement in question was executed between the petitioner and the respondent No. 3, but the respondent No. 1 being the parent body cannot absolve itself from the liability to enforce Clause-11 of the agreement irrespective of whether it was party to the said agreement or not.

13. *Aggarwal Chamber of Commerce Limited (supra)* was not concerned with the maintainability of the writ petition as in the instant case. In the said case, the Apex Court was concerned with the jural relationship of the particular firm with the respondent. It was found that the firm was employed by the appellant for forward transaction business of the respondent, who has accepted the transactions entered into as also the amount of the profit accruing on those transactions and was only disputing the amount of income tax deducted, retained and paid on those profits. It was in such circumstances, the Apex Court held that the firm would be an agent of the respondent for that part of the business of the agency as was entrusted to it and "privity of contract arises between the principal and the substitute".

14. In the instant case, nothing has been brought on record to show that there is any jural relationship between the respondent No. 1 and the respondent No. 3 in respect of the assignment that was entrusted to the petitioner vide the agreement referred to above. There is no quarrel with the proposition as laid

down in *M/s. New Bihar Biri Leaves Company (supra)* that a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. However, before invoking the said proposition, it will also have to be ascertained as to whether the particular agreement is in the realm of public contract or private contract so as to issue mandamus exercising the writ jurisdiction under Article 226 of the Constitution of India. In *V.R. Rudani (supra)*, the power of the writ Court to issue mandamus was recognized while it was found that the particular body was performing a public duty. Needless to say that the ratio of any decision will have to be understood in the background of the facts and circumstances of each case.

15. From the above discussions, what has emerged is as follows:--

(i) The agreement in question is in the realm of private contract.

(ii) The agreement stood terminated with effect from 1st January, 2015 and the impugned notice was only consequential action.

(iii) The respondent No. 3 being not an authority within the meaning of Article 12 of the Constitution of India and even otherwise also cannot be directed to implement Clause-11, referred to above, exercising writ jurisdiction.

16. In *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, (1996) 6 AD 621 : AIR 1996 SC 3515 : (1996) 7 JT 395 : (1996) 6 SCALE 168 : (1996) 6 SCC 22 : (1996) 4 SCR 762 Supp : (1997) 104 STC 78 , the Apex Court was concerned with a dispute relating to terms of private contract. It was held that in such a situation, proper course would be to reference to arbitration or institution of suit and not writ petition. In the said case under terms of contract between the appellant State Government and respondent public limited corporation, the rate quoted by respondent was inclusive of sales tax and methodology to deduct the same. It was held that the High Court was justified in not going into the dispute as it involved interpretation of terms of the contract. Mere fact that it also involved interpretation of the order issued under statutory provision would not convert it into public law issue. In paragraph-16 of the judgment, the Apex Court observed thus:

"16. Firstly, the contract between the parties is a contract in the realm of private law. It is governed by the provisions of the contract Act or may be, also by certain provisions of the sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil court as the case may be whether any amount is due to the respondent from the appellant-Government 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 a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted

by the High court under Article 226. Indeed, the High Court has not granted the said prayer."

17. In Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, AIR 1989 SC 1076 : (1989) 1 JT 368 : (1989) 1 SCALE 439 : (1989) 2 SCC 116 : (1989) 1 SCR 743 : (1989) 1 UJ 523 , the Apex Court observed that there are catena of decisions, in which the Apex has discouraged the use of Article 226 for resolution of the issue arising from contract between the State on one side and the private individual on the other and particularly when such contracts are non-statutory contract having no public law element in them.

18. In ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, (2004) 118 CompCas 213 : (2004) 1 CTLJ 1 : (2003) 10 JT 300 : (2003) 10 SCALE 81 : (2004) 3 SCC 553 , the Apex Court considering the issue as to whether a writ petition under Article 226 of the Constitution is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party, referring to its earlier decisions, held that when an authority has perform a public function for public duty, if there is a failure, a writ petition is maintainable. In the instant case, the dispute between the parties does not involve any public function or a public duty. In paragraph-27 and 28 of the judgment, it was observed thus:

"27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, AIR 1999 SC 22 : (1998) 7 JT 243 : (1998) 5 SCALE 655 : (1998) 8 SCC 1 : (1998) 2 SCR 359 Supp : (1998) AIRSCW 3345 : (1998) 8 Supreme 176 . And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the

constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

For all the aforesaid reasons, the writ petition is held to be not maintainable. Consequently, it is dismissed, without, however, any order as to costs.