

(1998) 07 AP CK 0086

In the Andhra Pradesh High Court

Case No : Writ Petition No. 333 of 1997

Rasa Constructions, Engineers and Contractors, Karimnagar	APPELLANT
Vs	
Execution Engineer (R and B) and another	RESPONDENT

Date of Decision : 23-07-1998

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 21, 226

Citation : (1998) 5 ALD 106

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : Mr. V. Eswaraiah, for the Appellant; Government Pleader for R and B, for the Respondent

Judgement

1. The question that calls for consideration in this Writ Petition is whether the State can demand the damages purported to be arising out of a contractual obligation in the absence of such a power in the contract by adjusting the Earnest Money Deposit and Bank Guarantee and whether the aggrieved party can maintain a writ petition under Article 226 of the Constitution of India.

2. The writ petition was initially filed seeking writ of mandamus declaring the action of the respondents in not discharging the bank guarantee for Rs. 11,74,000/- of Indian Bank, Karimnagar and not refunding the deposit of Rs.9,64,000/- and also for not adjusting the refundable amount towards the Earnest Money Deposit of Rs.10.50 lakhs for submitting the tenders pursuant to the notification dated 12-12-1996 and for consequential direction. However, during the pendency of the writ petition, the Respondents issued proceedings dated 16-11-1997 directing the petitioner to remit differential amount after adjusting the above amounts. Consequently, the petitioner filed an application for amendment of the prayer in the writ petition seeking writ of mandamus declaring the action of the respondents in not discharging the bank guarantee for Rs. 11,74,000/- and not refunding the deposit amount of Rs.9,64,000/- and also the order of the Executive Engineer dated 16-11-1997 in directing the petitioner to

pay the differential amount as illegal and arbitrary and for consequential direction. The said amendment was ordered and therefore the validity of the action taken by the respondents and the order dated: 16-11-1997 is assailed in this writ petition.

3. The skeletal facts for the purpose of this case are that the petitioner was the successful bidder for the lease-hold rights for collecting the toll-gate on the highlevel bridge over river Maneru at K.M.Stone 15/6 on Hyderabad-Karimnagar Road, pursuant to the sale notification dated: 25-5-1995. The period of the contract was from 1-7-1995 to 31-3-1996 @ Rs.7,83,222/- per month amounting to Rs.54 lakhs for nine months. But, however, the toll station was handed over on 1-8-1995. But, it appears that the petitioner filed suit before the Civil Court at Karimnagar in OS No. 14/96 at the fag end of February, 1996 and obtained status-quo order. By virtue of status-quo order, the petitioner was permitted to continue collection of tollgate from 1-4-1996 to 24-6-1996. The Government also permitted the petitioner to extend the lease period beyond 31-3-1996 on an enhanced rental value of Rs.90 lakhs per year. However, the suit was dismissed as withdrawn on 26-6-1996 and consequently the tollgate was taken over by the Department from 25-6-1996 and thereafter called for the fresh tenders to run the tollgate. Questioning the said notification the petitioner filed Writ Petition No. 17953/1996 and obtained interim directions to operate the tollgate on condition of depositing Rs.12 lakhs subject to further payment of Rs.8,23,000/- from 1-10-1996 per month. However, the said tollgate was not handed over and the Government filed vacate application and the said stay was made absolute subject to condition, the petitioner pays Rs.9 lakhs per month from 1-10-1996 and that the tollgate shall be handed over to the petitioner on 22-9-1996. The petitioner complied with the said conditions and the tollgate was handed over ou 22-9-1996 after concluding necessary agreement. However, the Government filed Writ Appeal No.1835/1996 and the Division Bench by order dated 28-11-1996 set aside the orders in the interim petition and dismissed the writ petition. Accordingly, the toll-gate was taken over from the petitioner from 22-9-1996 midnight and it was being run departmentally. Thereafter the petitioner made a representation to the authorities to refund the deposit amount of Rs.9,64,000/-and also discharge the bank guarantee which he had furnished at the time of taking over the tollgate in pursuance of the directions of this Court from time to time. The respondents issued a fresh notification on 12-12-1996 calling for the tenders, wherein a condition was made that the Earnest Money Deposit of Rs.10.50 lakhs shall be paid along with the request for release of tender schedule. The petitioner requested the authorities to supply tender schedule after adjusting the refundable amounts. But, however, it appears that the authorities refused to issue the tender and directed the petitioner to furnish fresh Earnest Money Deposit. Therefore, the present writ petition was filed for not discharging the bank guarantee and not Earnest Money Deposit and in not adjusting the refund amount for submission of the application pursuant to the auction notification. As already stated, the relief was amended and the petitioner

confined his challenge to the notification dated: 16-11-1997 and for consequential direction to refund the amount.

4. In the counter affidavit filed on behalf of the respondents, it is stated that the petitioner was the highest bidder for collection of toll tax and he was permitted to operate from 2-8-1995 to 31-3-1997. The petitioners instead of handing over the tollgate on 31-3-1997 filed a suit and obtained status-quo orders on 29-2-1996, In view of the status-quo, the public auction could not be held. While so, the suit was dismissed as withdrawn on 26-6-1996 and thereafter the tolls were collected departmentally. The petitioner also approached the Government for extension of the lease beyond 31-3-1996, till the disposal of the civil suit. The order extending the period of lease was challenged by the third party in WP No.29594/96 and the order of the Government was suspended. Thereafter, fresh notification was issued on 27-7-1996. The same was again challenged in WP No. 17953/96. The events that took place consequent to the filing of the above writ petition were already narrated above. Since the writ petition filed by the petitioner was dismissed by the Division Bench in writ appeal referred to above, fresh notification was issued and auction was conducted on 20-1-1997, the highest bidder quoted Rs.11,87,573/- per month. It is the case of the respondents that since the petitioner had operated the tollgate on the basis of the orders granted by the Civil Court and this Court from time to time, the Government could not get Rs. 11,87,573/- per month from 1-4-1996 and the Government is put to loss. Therefore, the petitioner is liable to pay the differential amount for having caused loss to the Government. Accordingly, letter was issued on 16-11-1997 calling upon the petitioner to pay the differential amount and such a course of action is quite valid and legal and the petitioner has no right to challenge the said action. It is also contended that the transaction arose out of a contractual obligation between the parties and the petitioner cannot challenge the same before this Court under Article 226 of the Constitution of India.

5. The learned Counsel for the petitioner submits that the action in refusing to release the Earnest Money Deposit and Bank Guarantee, is highly arbitrary and illegal. The petitioner was permitted to conduct the tollgate operations in pursuance of the directions of the Civil Court and also this Court duly observing the terms of contract and there was no violation or breach of conditions imposed by this Court. Therefore, the impugned proceedings dated 16-11-1997 calling upon the petitioner to pay the differential amount is absolutely illegal and wholly without jurisdiction. It may be open for the Government to impose penalty or recover damages if there is a breach of terms and conditions of the agreement entered between the petitioner and the Government. It is not the case of the Government that the petitioner had violated the terms and conditions of the agreement executed between the parties, and therefore in such a situation, it would not be open for the Respondent to call upon the petitioner to pay the differential amount and such the action can be challenged in writ proceedings u/s 226 of the Constitution of India. He also submits that the impugned order is in

violation of principles of natural justice. Further he contends that the impugned order is passed on the advice of the Government Pleader and it is devoid of reasons. Thus he submits that the order is arbitral}" offending Article 14 of the Constitution of India. On the other hand, the learned Government Pleader submits that the petitioner had conducted the operations under the shelter of Court orders and when ultimately the case was dismissed fresh auction took place in January, and the highest offer accepted was Rs.11,87,573/- per month, whereas the petitioner paid lesser amounts- Since the Government has lost this differential amount from 1-4-1996 he has to pay the same as damages since it is a violation of the terms and conditions of the agreement.

6. The facts which are not in dispute are that the petitioner was a contractor for tollgate collection from 2-8-1995 to 31-3-1996 @ Rs.7,83,333/- per month, as per the terms and conditions of the agreement. There was no default during this period. However, he operated the tollgate from 1-4-1996 to 24-6-1996, on the basis of status-quo orders granted by the Sub-Court, Karimnagar and thereafter it was taken over by the Government. But again subsequently, he could operate from 25-9-1996 to 29-11-1996 on payment of Rs.9 lakhs per month as per the orders of this Court. It is thus to be seen whether the respondent is entitled to demand the amount and whether the respondents have power to adjust the Earnest Money Deposit and the Bank Guarantee towards the demand for damages. It is not in dispute that the petitioner has conducted the tollgate operations initially by virtue of the agreement entered between the parties. But, however, he again conducted the operations from 1-4-1996 to 24-6-1996 and 25-9-1996 to 29-11-1996 in pursuance of the orders of the Civil Court and also this Court. Therefore, can it be said that there was violation of the terms and conditions of the agreement and if so the respondents are entitled to adjust the amount lying with them and further call up the petitioner to pay the differential amount as damages alleged to have been caused by the petitioner to the Government.

7. Let us consider whether the issue arises out of a contractual obligation and whether the writ petition is maintainable. The contract entered between the Government and the petitioner originally consequent on accepting his highest bid amount was governed by the Rules framed by the State Government by virtue of the powers conferred by Subsection (1) of Section 9 of the Indian Tolls Act, 1851 read with Section 2 of the Indian Tolls Laws (A.P. Extension and Amendment) Act, 1975 (A.P. Act No. 17 of 1975). These rules are called A.P. Roads and Buildings Toll Rules, 1975 containing the method and manner of collection and sale of Tolls and other terms and conditions etc. By virtue of the said statutory provisions the respondents called for tenders and finalised the same. Therefore, it has to be concluded that the contract entered between the parties is neither purely a commercial contract nor a non-statutory contract, but on the other hand, it is a statutory contract.

8. The limits of judicial review by the High Court in contractual field is no more

res integra. It has been now concluded by various pronouncements of the Apex Court.

9. In *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, , the Supreme Court observed that when public element is involved in the activities of Government, then there should be fairness and equality. In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, , the Supreme Court held that the Corporation must act in accordance with certain constitutional conscience and whether they have so acted must be discernible from the conduct of such Corporations. The Supreme Court further held that even in contractual relations the Court cannot ignore that the public authority must have constitutional conscience so that any interpretation put up must be to avoid arbitrary action. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the Supreme Court ruled that in a welfare State in regulating and dispensing special services including contracts, the citizen derives rights or prerogatives by entering in favourable relations with the Government and hence the Government cannot take the role of a private person. Thus, it held that the exercise of the power of discrimination to award contract must be structured by rational, relevant and non-discriminatory standards or norms. In *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, , it was held by the Supreme Court that every activity of the Government has a public element in it and it must, therefore, be informed with reason guided by public interest. In *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, , it was held:

"If the action of the State is related to contractual obligations or obligations arising out of tort, the Court may not ordinarily examine it unless the action has some public law character attached to it. It will only give the action of the State if its action pertains to public law domain. But, however the difficulty may arise in demarcating the frontier demanding public law and that question should be decided in each case with reference to each activity of the State or instrumentality of the State, while performing this action."

In *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, , the Supreme Court said that the State when acting in its executive power enters into a contractual relations with the individual, Article 14 would be applicable to the exercise of the power and the same can be checked under Article 14 and such action shall be subject to rule of law. Even if the governmental action in matters of entering or refusing to enter into contract fails to satisfy the test of reasonableness, the same should be held unreasonable, and such actions are subject to judicial review on the touch stone of Article 14 of the Constitution of India. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , the Supreme Court held that in matters of purely contractual disputes, the judicial review may be limited, but when a challenge is made on the ground of the violation of Article 14, assailing the impugned action as arbitrary, unfair and

unreasonable, even though the dispute falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirement of Article 14. To this extent the obligation was of a public character in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divert the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions. To this extent, the obligation is a public character in nature. In *Tata Cellular Vs. Union of India*, , the Supreme Court held that right to refuse the lowest tender or any other tender was always available to the Government and the question of infringement of Article 14 would not arise. Of course, if the said power is exercised for any collateral purposes, the same will be struck down offending Article 14 of the Constitution of India. In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, , the Supreme Court said:

"In contractual cases as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution which non-arbitrariness is a significant fact. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fairplay in action"."

However, some leeway in the form of "play in the joints" was given to the State while entering into the contracts having commercial element. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, the Supreme Court held that some more discretion has to be conceded to the authorities keeping the augmentation of the revenues. This discretion has to be conceded when the decision was taken bona fide. This principle of "play in the joints" was allowed to operate with limited oscillation. \n *Delhi Science Forum and others Vs. Union of India* and another, , UK Supreme Court observed that in the absence of rules, the power to grant licence may be available to the Central Government, but such power should be exercised on well settled principles and norms which can stand to the test of Article 14 of the Constitution of India. Many administrative decisions including decision relating to awarding of contracts are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body is questionable on the ground that (i) decision was taken in bad faith; (ii) decision was based on irrational or irrelevant considerations; (iii) decision was taken without following the procedure which is imperative in the nature. While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority which can be held to be "State" within the meaning of Article 12, Courts have to examine whether such a decision is vitiated on one ground or the other. The onus of demonstrating that the actions did not fall within the three categories mentioned above can be discharged by the State by satisfying the Court by placing the relevant material. In *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , the Supreme Court held, the action of the State in matter of award have to satisfy the test of reasonableness and non-discrimination under Article 14 of the Constitution of India with certain measure

of fairplay in joints. In LIC of India and Another Vs. Consumer Education and Research center and Others, , validity of the conditions laid in Table 58 of term policy was considered and it was held that the offending clause extending the benefits only to the persons in Government, Semi-Government was unconstitutional. In that process, the Supreme Court observed that in the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public clement, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into considerations and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly in part of fair procedure envisaged under Articles 14 and 21. Every activity of public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

It further held:

"The arms of the High Court are not shackled with technical rules or of procedure. The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of controversy. The distinction between public law and private law remedy is now narrowed down. The action of the appellants bear public character with an imprint of public interest element in their offers with terms and conditions" mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure and simple private law dispute without any insignia of public clement. Therefore, we have no hesitation to hold that the writ petition is maintainable to test the validity of the condition laid in Table 58 term policy and the party need not be relegated to a civil action,"

I have also dealt with the power of judicial review in respect of the contracts including matters of tenders in K. Vedanand v. Regional Manager, A.P.S.R.T.C., 1997 (2) ICC 454 and held that a condition forfeiting a sum of Rs. 1,00,000/- for violation of clause 5 of terms and conditions of tender notification was held to be arbitrary. Various decisions both English and Indian were referred to in the said case including those which are referred to herein.

10. Thus it is seen that even in the sphere of contracts between the State and the private individuals, where the public law element is present, the State or instrumentalities of State are bound to act fairly and reasonably. Their actions

are subject to scrutiny of Article 14 of the Constitution. Even in case of stipulating terms in a Life Insurance Policy by virtue of powers conferred under L.I.C. Act it was held that the condition shall conform to the requirements under Article 14 and the conditions offending Article 14 were declared illegal.

11. It is no doubt true that acting under Article 226 the Courts in India are not shackled by the technicalities governing the issuance of writ of mandamus or other prerogative writs. But, however, this plenary power is required to be exercised within certain well defined norms. It is now well settled proposition that a writ petition is not the appropriate remedy for enforcing contractual rights, or in respect of disputes arising from a contract, unless, of course, the contract is statutory. Further even if the contract is non-statutory or if the contract is entered by virtue of an administrative order, the actions of the State can be assailed on the anvil of Article 14 of the Constitution of India.

12. In the instant case, the pivotal issue is whether the Respondents have power to adjust the Earnest Money Deposit and recall the bank guarantee on the ground that the Government suffered loss on account of the cases filed by the petitioner. But, this action has to conform not only to the terms of the contract which are statutory in nature but also answer to call of Article 14 of the Constitution. It is not the case of the respondents that the petitioner had violated the terms of the agreement. I have perused the agreements entered between the petitioner and the respondents. I find no clause in the agreement empowering the authority to adjust this amount for the alleged loss caused to the Government. Moreover, it is a statutory contract and the terms of the contract have to be strictly construed. When such power is not available under the contract, it has to be necessarily held that the action is ultra vires the contract and consequently it has to be declared illegal and without jurisdiction. Accordingly, I do so unhesitatingly. It is urged by the learned Counsel for the petitioner that the very demand itself is arbitrary and illegal and does not sustain in the eye of law. Inasmuch as the petitioner had carried on the business under the orders of the Court and even if any damage is sustained by the Government on account of the orders issued by the Courts and thereby permitting the petitioner to operate the business that would not give right to the Government to claim damages even outside the sphere of the statutory contract. The learned Counsel for petitioner tries to seek the umbrage of maxim *Actus Curiae Neminem Gravabit* (An act of Court shall not prejudice no man), I am not inclined to go into this contention, inasmuch as claiming damages by any person even by the Government is a common law remedy, which can be exercised by the aggrieved party subject to his rights. Moreover it is not appropriate for this Court to decide hypothetical issues. But, however, the impugned demand cannot be raised by respondents by adjusting and settling of the amounts already deposited by the petitioner in pursuance of a valid contract entered between the parties and also in pursuance of the orders of this Court. Such a power is ought to be specifically conferred on the respondents either under the contract or under any statute. I do not find vesting of this power with the respondents. Therefore, I have to

necessarily hold that the impugned action of the respondent in adjusting the amount of Earnest Money Deposit and also the bank guarantee as illegal and arbitrary and consequently the order in so far as it has the effect of forfeiting or adjusting the amounts is wholly without jurisdiction and is unsustainable in law.

13. The Writ Petition is allowed to the extent indicated above. Consequently, respondents shall be mandamussed to refund the Earnest Money Deposit and return the Bank Guarantee furnished by the petitioner in pursuance of the contract. No costs.