

(1984) 04 RAJ CK 0035

In the Rajasthan High Court

Case No : Civil Appeal No. 665 and 718 of 1972

Redhey Shyam and Another

APPELLANT

Vs

Sohan Singh Manohar Singh and Others

RESPONDENT

Date of Decision : 16-04-1984

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1984) WLN 425

Hon'ble Judges : Kanta Bhatnagar, J; Dwarka Prasad Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kanta Bhatnagar, J.—Respondent Sohan Singh, Partner of M/s Sohan Singh Manohar Singh, PWD Contractors. B-Block, Sri Ganganagar was the petitioner in the writ petition filed under Articles 226 and 227 of the Constitution of India The writ petition was filed in grievance to the decision of the PWD and Mining Departments for recovering amount from the security deposit and the outstanding bills of the petitioner respondent to be paid to Radheyshyam, appellant in D.B. Civil Special Appeal No. 665 of 1972, by way of cost of the ballast said to have been excavated by the petitioner-respondent from the area under the mining lease of Radheyshyam. The prayer was for quashing exhibits 9 and 8 dated March 24, 1970 and November 9, 1970 respectively relating to that recovery. The learned Single Judge by his order dated September 14, 1972 allowed the writ petition and quashed the aforesaid two orders. The petitioner was allowed costs from the respondents in the writ petition.

2. Dissatisfied by the afforesaid order, Radheyshyam in whose favour the recovery was ordered by the concerned department filed the Special Appeal, The State of Rajasthan and other respondents in the Writ Petition have also felt aggrieved by the aforesaid order of the learned Single Judge and preferred D.B. Civil Special Appeal No, 718 of 1972.

3. As the two appeals arise out of the same order, we propose to dispose them of by one common judgment.

4. Tenders were invited by the Government of Rajasthan in pursuance of the decision to upgrade and construct Bikaner to Delhi Road. The respondent and other approved Contractors submitted tenders. Respondent's tenders for the two portions of the road, from miles 133 to 143 and 143 to 150, were accepted and the work for the construction was given to him. Two contracts were executed for the purpose in the year 1965. The dates for the completion of the works of the two portions were January 9, 1967 and May 5, 1967 respectively. The construction work being completed the bills for payment were passed by the Government of Rajasthan. the security amount of the respondent was lying with the Government of Rajasthan. The ballast to be used for the road construction was to be taken from the Dev Road Hills. Short term permit Ex. 1 up to September 30, 1966 was issued by the Mining Department in favour of the respondent for excavating 50,000 C. ft. ballast from Dev Road area. Vide Ex. 2 the short term permit was extended up to November 30, 1966. The respondent paid the royalty for the short term permit to the Mining Department, and obtained the clearance certificate Exs. 3 and 4 with respect to the two portions of the road to be constructed under the contracts.

5. Appellant Radheyshyam had taken a royalty collection contract for the area in which Dev Road hill fell, but for certain reasons the Government cancelled that contract. During the period respondent had taken the ballast from the Dev Road hill, the contract of Radheyshyam was not in existence. Later on Radhesham's contract was revived by the department and he raised objection before the department regarding permission to respondent contractor for excavating ballast from the area which was under his contract. As evident from the documents Exs. 8 and 9, the Government and the representatives of the PWD and Mining Departments took a decision that, from the amount to be paid to the contractor respondent under the contract, the amount payable as royalty to the State Government may be deducted and after calculating the labour charges the rest of the amount may be treated as the profit to the contractor and the same may be distributed between him and Radheyshyam @25% and 75% respectively. Letter Ex. 5 dated March 31, 1970 was sent to the respondent conveying the decision of the Government of Rajasthan regarding recovery of the amount to be paid to Radheyshyam, Mining Contractor, from the miscellaneous deposits of the respondents. It was also mentioned in the letter that for the time being only 50% of the amount shown payable to the royalty lease was being released and the residual amount will be released only after bearing the respondent and he was allowed one week's time to put in appearance. It was also mentioned in the letter that the amounts recovered on account of sales tax and royalty charges were being kept in deposits and if he has already deposited the same in full or part, the department may be intimated accordingly. By the letter Ex. 6 dated April 4, 1970, respondent was informed that the amount of Rs. 19438.84 P. was payable to the Mining Contractor by virtue of the decision of the Government to

pay 75% from the two contracts of the toad to be given to him because of the ballast being taken from the area under his lease. It was also mentioned in that letter that only Rs. 9700.84 P. were lying in Deposit Register. It was further intimated that out of the deposit, amount of Rs. 6750 16 P. has been released to Radheyshyam lease holder.

6. Respondent vide letter Ex. 10 objected to the said recovery and release of amount to Radheyshyam on the ground that it was without his consent and against the terms and conditions of the agreement relating to the construction of the road As there was no response to the request of the respondent he invoked the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, with the prayer that the two orders dated November 9, 1970, and March 24, 1970 be declared null and void and the order for the recovery of the amount of Rs. 26869. 27p. said to be the share of Radhey Shyam lease of the Mining Department, be quashed. It has also been prayed that the respondent in the writ petition be restrained from realising the amount of Rs. 26104. 69P. from the petitioner.

7. Respondents in the writ petition in their reply admitted the agreement between the State Government and the respondent, P.W.D. Contractor and the completion of the road as per terms of the contract but disputed the fact of the completion of the road by May 5, 1967 and stated that it was completed on March 31, 1968 after a delay of 10 months and 26 days from tie stipulated time. That the amount of Rs. 9647. 54p has been paid 13 Radheyshyam the mining lease holder of the area as per decision of the Government dated March 24, 1970. Referring to the Clauses 30(a) and 23 of the contract agreement, plea had been taken that the all quarry fees, royalty, octroi dues and other similar charges were payable by the petitioner and therefore, the amount due to the mining lease holder Radheyshyam has rightly been held to be recoverable from the respondent. That, any dispute arising out of the contract was to be finally decided by the P.W D. authorities and was binding on the petitioner. That, the decision of the Government was conveyed to the respondent in time and he did not avail the opportunity of presenting his case to the concerned authorities.

8. In view of the material placed on record and the averments of the parties, the learned Single Judge arrived at a conclusion that the State Government has no jurisdiction to decide the issue of this nature and bind the contractor who had completed his work in accordance with the terms of the contract. The learned Single Judge, therefore, held the respondent entitled to get back the security amount from the State Government. In view of that finding, the impugned orders dated November 9, 1970 (Ex.8 and dated March 24, 1970 (Ex 9) were quashed and respondent-petitioner was allowed his costs from the respondent in the writ petition.

9. As stated earlier the mining lease holder Radheyshyam as well as the respondents in the writ petition felt dissatisfied by order of the learned Single Judge and impugned the same by preferring these appeals u/s 18 of the

Rajasthan High Court Ordinance of 1949.

10. Learned Counsel for the appellant Radheyshyam has assailed the impugned order of the learned Single Judge on the ground that proceedings taken without impleading Radheyshyam, who was a necessary party, are vitiated. According to the learned Counsel the decision of the Government was in favour of Radheyshyam and a part of the amount, he had been held entitled to having been released to him, no order could have been passed without giving him an opportunity of being heard. Reliance has been placed by the learned Counsel on the principles enunciated in the case of Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, . In that case their Lordships were pleased to clarify the position of law as to who are necessary or proper parties to a proceeding and observed as under:

A necessary party is one without whom no order can be made effectively; a Proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

11. According to their Lordships in a writ of certiorari not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the Court to aid or implead proper parties for completely settling all the questions that may be involved in the controversy either suo moto or on the application of a party to the writ or an application filed at the instance of such proper party.

12. The above referred case related to the licence fee of liquor shop. There were proceedings before the Deputy Commissioner Excise and the Board of Revenue regarding the claim of the various persons interested thereto. In the writ of certiorari their Lordships considered two aggrieved persons necessary parties in the writ proceedings on the ground that they were parties before the Commissioner as well as before the Board of Revenue. They had succeeded in the said proceedings and the orders of the said Tribunal were in their favour. For that reason their Lordships held that it was a principle of natural justice not to make, an order adverse to them behind their back; and any order so made could not be an effective one. Consequently, they were considered necessary parties before the High Court.

13. The principle enunciated in the case does not help the appellant Radheyshyam in view of the facts and circumstances of the present case. He was in no way concerned with the agreement executed between the Government and the respondent regarding the construction of road. There was no direct agreement between him and the respondent. The document on record referred to above and the implications thereto, which we would discuss in detail later on, do not suggest that the alleged decision was arrived at in the presence or with the consent of the respondent so as to bind him. The Government or the authorities of the P.W.D. or the Wining Department could not have taken a

decision to deduct any amount from the bills or security amount of the respondent to make any payment to anybody unless there was an agreement or stipulation in the contract agreement to that effect. There being no privity of contract between Radheyshyam and the respondent it is not a case in which no effective order could have been passed without impleading Radheyshyam as a party to the proceedings, if the departmental authorities take a decision which they could not have taken in the absence of the contractor respondent and benefit a third person, the writ proceedings cannot be said to be incompetent in the absence of the latter. The writ petition therefore, cannot be said to be incompetent in this court.

14. Mr. Pareekh, learned Counsel for Radheyshyam has challenged the competency of the writ petition also on the ground that the dispute between the parties had arisen out of the contractual liability and therefore, decision of the Chief Engineer of the PWD was final. It has also been contended that if any amount was ordered to be deducted, it could have been a subject matter of civil litigation but could not have been agitated in a writ petition. Clause 23 of the agreement reads as under:

Except where otherwise specified in the contract the decision of the Chief Engineer of the Government of Rajasthan for the time being shall be final conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions here in by fire mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter, or thing whatsoever in any way arising out of, or relating to, the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress as the work or after the completion or abandonment thereof, or the contract by the contractor shall be final conclusive and binding on the contractor.

15. It is pertinent to observe that the various matters mentioned therein for which the decision of the Chief Engineer Was to be final nowhere speaks about the claim of a third party which does not arise Out of the contract. The learned Counsel for the appellant in both the appeals could not convince as to how the claim of a third party could be the subject matter of the decision by the Chief Engineer so as to bind the respondent. The case of the appellant is that it was a tripartite agreement that bound the respondent for making the payment. Such averment in the special appeal has not been substantiated by any document. The only document in this concern which has been taken help of by the appellant is Ex. 9. It refers to a letter No. F4(1)(81)(Ind)(B)/66 dated June 26, 1967 addressed to the Director of Mines and Geology, Udaipur in connection with the building stone mining lease held by Radheyshyam Contractor and the copy endorsed to the Addl. Secretary to the Government, PWD (B&R) and a letter of Mining Engineer, Jaipur No. DH/ML-9/64/y-76 dated July 15, 1967 addressed to the Executive Engineer, Projects, PWD Sararshahar. The case is that it was by

those letters that the respondent was allowed to take ballast for the construction of the road under contract from the quarry under the lease of Radheyshyam Mining Lease Holder on the specific condition that the amount which was payable to the PWD Contractor at the rate prescribed in respect of this ballast will be deducted from their bills by the PWD and after paying the Mining Department its royalty and the labour charges, the balance amount shall be paid to the Mining Lessee and the PWD Contractor in the ratio of 75 : 25 as the work was not a departmental work but was being got done through the contractors who were also making profits.

16. It is important to note that the aforesaid two letters have not been brought on record by the appellant. In the absence of those letters it cannot be said as to under what circumstances the decision in dispute was taken by the concerned authorities and whether it was taken in the presence and consent of the respondent.

17. The learned Counsel for the appellants could not convince us by any material on record that the decision was taken in the presence or with the consent of the respondent so as to bind him. Had it been a decision relating to any subject matter arising out of the contract, the same would have fallen within the ambit of Clause 23, but as observed by us above the decision was in concern with some material said have been taken by the respondent from the area under the mining lease of a third person. There is also no material to justify the ratio of the profit to be divided between the mining lessee and the contractor as per decision.

18. Mr. Pareekh vehemently contended that if the deduction of the money from the bills and the security amount and decision of the Government to that effect caused grievance to the respondent, the proper course to be followed was to get the matter decided by filing a civil suit instead of invoking the writ jurisdiction. In order to substantiate his case Mr. Harekh placed reliance on the principles enunciated in the cases of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , State of Punjab and Others Vs. Mulkh Raj and Co. and Others, and The State of Punjab v. Balbir Singh and Ors. AIR. SC 1717. As we would presently discuss none of the authorities is of any help to the appellants.

19. The case of Har Shanker and Ors. (supra) related to an auction sale of the liquor shop to the licenses. There were specific conditions for the sale. The contractors impeached the validity of the contractual obligations. Their Lordships analysing the situation were pleased to observe that a concluded contract must be held to have come into existence between the parties. That, the appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition was not an appropriate remedy for impeaching contractual obligations.

20. The point involved in the case of State of Punjab and Ors. v. Mulkh Raj & Co. (supra) was regarding cancellation of the liquor licence for non-payment of licence fee for the relevant year. The contention of the writ petitioners was that

no show cause notice was issued. Their Lordships were of the opinion that even if the respondent ought to be given a hearing before canceling the licence, that would not dispense with his liability to deposit the amount of the balance of the licence fee or invalidate the notice of demand for it. Indeed after the lapse of the year for which the licence for liquor vend was granted, there was no point in quashing a licence which had expired. Their Lordships further concluded that the respondent, if aggrieved, should have been left to assert his alleged rights in an ordinary civil court and in that view of the matter the appeals were allowed and the judgments and orders of the Punjab and Haryana High Court were set aside and the writ petitions were dismissed.

21. The case of State of Punjab v. Bilbir Singh and Ors. (supra) also related to a case for country liquory vend. The petitioner was the highest bidder and his bid was accepted and licence was issued but when the petitioner committed breach of conditions of licence, Demand for payment of still head duty was made. The High Court allowed the writ petition. When the matter was before the Supreme Court, their Lordships were pleased to hold that the High Court was wrong in allowing the writ petition by quashing the demand, as the same was made in enforcement of liabilities arising out of mutually agreed conditions of auction.

22. The material available on the record clearly indicates that there was no tripartite contract between the respondent and the appellants. Clause 30(a) of the agreement relied on by the appellants reads as under:

Clause 30(a)

All quarry fees, royalties, octroi dues and other similar charges shall be paid by the contractor, except where otherwise specially mentioned.

23. We have also referred to it and also other clauses of the agreement between the PWD and the respondent relating to the contract for construction of the road. None of those clauses speak about any liability under that agreement to make payment to a third person claiming the cost of the material taken out from the area under his lease from the mining department.

24. Radheyshyam has claimed the cost not as per terms of the PWD Contract in favour of the respondent but on the basis of assurance from the Government that the PWD Contractor would compensate him for the material removed from the area under his mining lease. As stated earlier there is no material to convince the Court that it was in the presence and with the consent of the respondent that the ratio of 75% out of the net profit of the PAD Contractor, i.e., the respondent was decided to be paid by the Government.

25. Mr. Pareekh has tried to strengthen his case by referring to the condition mentioned at the bottom of the mining lease Ex. 1 for excavating ballast granted to the respondent for excavating 50000 c. ft. ballast from Deo Road hill. The condition is that the licensee will compensate any claim to third party against the State and would himself settle such claim as and when it may arise. It is not the

case of Radheyshyam and the State that the dispute relates to the area covered by the aforesaid licence Ex. I. It is no body's case that the ballast referred to in Ex 1 was excavated from the lease area under the mining lease of Radheyshyam. The case rather is that during the period the licence of Radheyshyam remained cancelled the PWO Contractor excavated ballast from his area. The mining lease of Radheyshyam were cancelled on June 10, 1966 which after the appellate order passed in his favour was restored on May 29, 1967. Admittedly therefore, during the period the respondent was to construct the road as per terms of the PWD Contract in his favour Radheyshyam had no valid licence with him. The case of Radheyshyam that the work of respondent was not completed during that period and continued till 1968 is not supported by any material. Assuming for the sake of argument that it was so, still there is nothing to show that ballast was excavated after the period stipulated in contract for construction of the road. Be it as it may, the position is quite clear that Ex. 1 had nothing to do with the area under the lease of some third person and as such a condition appended at the bottom of the mining lease in favour of the respondent could not bind him for any alleged excavation from the area of any third person. In this view of the matter, it cannot be said that the grievance of the petitioner could not be sought to be redressed by filing the writ petition in this Court.

26. We are, therefore, inclined to conclude that there being no privity of contract between the respondent and Radheyshyam appellant, no decision could have been taken without the consent of the former for adjusting the amount from his bills and the security amount lying with the P.W.D.

27. Mr. Pareekb, learned Counsel for the appellant contended that the respondent had benefited by taking the ballast from the area under the lease of Radheyshyam and therefore, the State Government has rightly taken the decision to compensate the third party.

28. Mr. Deedwania on the other hand submitted that if there was any assurance to Radheyshyam that he will be paid out of the profit of the P.W.D. Contractor, he may seek remedy against the Government. If the P.W.D. Contractor had taken ballast from the area under the lease of third party, he may be liable to make payment for the same. However, the alleged act of the P.W.D, Contractor not being covered by the terms of the agreement, the amount, cannot be deducted and adjusted from the amount of the bills and the security amount of the respondent lying with the Department, without his consent. There appears to be some force in the contention of the learned Counsel for the respondent that the respondent could not be forced to pay the royalty as well as compensation to a third party for excavating ballast from the particular area. Exs. 3 and 4 are the no due certificates issued by the mining department for Road Miles No. 138 to 143 and 143 to 150 respectively.

29. The two letters dated July 15, 1967 and June 26, 1967 referred to in Ex. 9 letter have not been produced by the concerned Government Department to throw light on the point as to under what circumstances the decision for

deduction was taken and the ratio for the profits to be distributed was fixed. This being the position, there was no justification for the concerned authorities to order for the deduction of the amount from the bills and security deposits of the respondent to make payment to Radheyshyam.

30. Mr. Pareekh *inter alia* argued that even if the Court comes to the conclusion that there was no privity of contract between the parties, still equity is in favour of Radheyshyam and he is entitled to get the payment from the respondent and retain the amount already released to him. The reasoning given by Mr. Pareekh is that a party should not be allowed to unjust enrichment by an illegal act. It has been urged that if the step taken by the concerned authorities for the deduction of the amount from the bills and the security deposits is set aside and the amount paid to appellant Radheyshyam is ordered to be refunded, it would amount to allow the benefit to a party which it does not deserve. Reference has been made to the case of *Gani Mohammed v. The State Transport Appellate Tribunal* 1976 RLW 2014. The appeal preferred by the respondent before the Tribunal was barred by time and on this ground the judgment of the Tribunal was sought to be set aside. This Court did not think it proper to set aside the order of the appellate Tribunal because that would have led to the restoration of an erroneous order. It was considered proper to direct the R.T.A. to consider afresh within reasonable time all the applications including that of the petitioner for grant of permits on the route.

31. The case of *Jagan Singh v. S.T.A.T. Rajasthan and Anr.* AIR 1980 Raj 1 was also referred to by Mr. Pareekh. That case also related to an order passed in appeal by the S.T.A.T., challenged in the writ proceedings on the ground of want of jurisdiction. This Court refused to interfere as there was no failure of justice.

32. The case on hand is altogether on different footing. This is not a case in which a party had made any attempt for unjust enrichment by doing an illegal act. The writ petition has been filed to seek relief by challenging the improper order passed by the concerned authorities in the absence of the respondent petitioner. Thus there was no alternative efficacious remedy available to him. Learned Single Judge did not hold that the respondent could not be made liable for payment if he had taken the ballast from some one else's area. All that has been deprecated is the way in which the concerned authorities have proceeded to recover the amount by deductions made out of the bills and the security deposit of the respondent, and made payment to Radheyshyam out of that amount without any lawful authority to do so.

33. In this view of matter, the order of the learned Single Judge does not suffer from any infirmity so as to call for any interference in there Special Appeals.

34. Consequently both the appeals are dismissed. Costs are made easy.