(1997) 04 CAL CK 0029

In the Calcutta High Court

Case No : W. P. No. 2688 of 1996

Ronix Polymers Private Limited and another APPELLANT

Vs

State of West Bengal and others RESPONDENT

Date of Decision : 15-04-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 74

Citation : AIR 1997 Cal 321

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Judgement

1. The petitioner is this application has,inter alia, prayed for the following relief:-

"(a) a writ of or in the nature of Mandamus do issue commanding the respondents:-

(i) to rescind, cancel and/or withdraw the said purported letter of cancellation of the contract dated 12th December, 1995.

(ii) to desist from giving any effect or further effect to and/or from taking any step or further step in pursuance of the said purported letter of cancellation of the contract dated 12th December, 1995;

0(iii) to desist from floating any further tender or placing any further order or accepting any delivery of making any payment in respect of PVC pipes of 100 mm diameter before accepting and paying for the PVC pipes manufacture by the petitioner No. 1;

(iv) to command the respondent-authorities to take delivery of and pay for 32,250 meters for 100 mm diameter PVC pipes and 46,000 meters of 200 mm diameter PVC pipes manufactured by the petitioner No.1 within 30th November 1995.

(b) Declaration that letter of termination dated 12.12.1995, being Annexure `P'' hereto is wrongful, bad and illegal and the respondents are bound to take delivery of PVC pipes under the contract dated 16-1-95 which have already been inspected and approved the remaining pipes after inspection.

(c) A writ of or in the nature of certiorari do issue directing the respondents to certify and transmit to this Hon''ble Court all letters, papers and documents relating to the PVC pipes in respect of 110 mm and 200 mm diameters concerning the contract entered into with the petitioner No.1 for supply of PVC pipes and the purported cancellation thereof and other records concerning the aforesaid PVC pipes from 30th November, 1995. So that conscionable justice may be done upon considering the same."

The fact of the matter lies in a very narrow compass.The petitioner admittedly entered into a contract for manufacture and supply of galvanising pipe to the State on the terms and conditions laid down under the conditions of contract annexed to the work order dated 22-11-94 as contained in Annexure `B'' to the writ application, the relevant provision whereof reads thus:-

"The contractor is to deliver the materials on or before the dates mentioned in the tender. Failing which he shall be bond to pay or allow one per cent on the total amount of the contract for every day not exceeding ten days that the contractor shall exceed the time for delivery as and by way of liquidated damages provided, however, that the Superintending Engineer may in his discretion reduce in such cases as he may think fit, the said amount to such smaller amount as he may decide and his decision in writing in that respect shall be final.

The Contractor shall give notice to the Executive Engineer, or the Sub-Divisional Officer of his intention of making delivery of materials, and on the materials being approved a receipt shall be granted to him by the executive Engineer or the Sub-Divisional Officer, and no material will be considered as delivered until so approved."

2. The said contract further provided for the following conditions:-

" (a) Quantity : PVC pipes, 110 mm diameter-32250 Meters. 200 mm diameter-4600 Meters.

(b)Price : PVC pipes, 100 mm diameter Rs.66/- per Metre, 200 mm diameter Rs.221/- per Metre. (c) Time for deli- : Four months from the date Very of issuance of the work order.

(d) Inspection : By Director General of Supplies and Disposal. First by Director General of Supplies and Disposal and despatch to be made only thereafter.

(e) Additional In- : Committee consisting of three Executive Engineers of the directorate shall also inspect the material either at the factory or at stores/ sites.

(f) Special terms : (i) The Contractor, (mean- ing the petitioner No.1) is to deliver the materials on or before the date mentioned in the tender, failing which, he shall be bound to pay or allow one per cent of the total amount of the contract for every day not exceeding 10 days that the contractor shall exceed the time of delivery as and by way of liquidated damages. Provided, however, that the Superintendent Engineer meaning the respondent No.5)may in his discretion reduce in such case as he may thin fit the said amount to such amaller amount as he may decide and his decision in writing in that respect shall be final."

(ii) In every case in which the payment of allowance mentioned in Clause (2) (meaning immediately prece-d ing clause) shall have been incurred for 10 consecutive days, the Executive Engineer shall have the power either to annual the contract al together or to have the supply completed without further notice at the contractor''s risk and expenses as he may deem best suited to the interest of the Government and the contractor shall have no claim to compensation for any loss that he may incur in any way". 3. The petitioner for various reasons could not supply the aforementioned PVC pipes, within the stipulated period and thus, prayed for an extension of time for supply.Such a prayer was allowed by the respondents in terms of the letter dated 21-9-95 as contained in Annexure `J'' to the writ application subject to the conditions mentioned therein.

4. According to the petitioner, in view of the aforementioned direction they could not start manufacturing PVC pipes and only in October, 1995 they could start production.It is admitted that the petitioner was to comply with the terms and conditions referred to in the letter dated 3-1-95, the relevant clauses whereof, read thus:-

Inspection:-

"The Director General of Supplies and Disposal will act as the inspecting agency for the stores under this order.The inspection charge shall be borne by the buyer.The purchaser or its representative shall have the right to inspect and/or to test the goods to confirm their conformity to the contract specification.Nothing stated in this clause shall in way release the supplier from any warranty or other obligations under the contract.A committee consisting of three Executive Engineers of this Directorate shall also inspect the materials either at the factory or at stores/sites."

Delivery:-

"The materials shall have to be supplied as per technical specification of the tender documents as well as after fulfilment of the clauses as mentioned din the tender documents to the stores as mentioned in Annexure-I within 4 (four)months from the date of issue of work order.

A delivery schedule should be submitted immediately by the firm."

5. Prior to grant of extension of the aforementioned delivery schedule, it appears

from, a letter dated 24-2-95 that upon inspection it was found that the machines were not in operating condition and, thus they have been asked not to start production unless they hear from, the respondents.By reason of an order dated 12-12-95 as contained in Annexure `P'' to the writ application the petitioner''s contract was terminated stating:-

"In reference to order placed vide work order no. of this office stated above, please note that the above work order placed on you to supply PVC pipes against NIT 2/94-95 is hereby cancelled as you failed to supply the materials within the extended period of time allowed to you."

6. The grievance of the petitioner raised in this application is that the contract entered into by and between the petition rand the respondents is a special type of contract and the PVC pipes cannot be used by anybody else other than the Irrigation Department of the State.According toe the petitioner as it had manufacture the said PVC pipes pursuant to the said contract, it will suffer immense injury if the impugned order is allowed to stand.

7. Mr. Dutta, the learned counsel appearing on behalf of the petitioner, inter alia, submitted that despite the fact that original contract came to an end order dated 30th November,1995 and the petitioner having offered PVC pipes so manufactured for inspection and as pursuant thereto the inspection having been carried out up to 21-12-95, the impugned order has been passed on a wrong premises.

8. The learned counsel has also drawn my attention to the fact that upon receipt of a letter dated 30-11-95, the petitioner replied to the Superintending Engineer in terms of its letter dated 12-12-95 but the same had not been taken into consideration.It was further submitted that from Clause(2)of the agreement it would appear that the respondents are only entitled to impose penalty by way of liquidated damages for non-delivery of the pipes within the time schedule in terms of Section 74 of the Indian Contract Act.The learned counsel in support of his aforementioned contention has relied upon in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, ; Kalyani Spinning Mills Ltd. and others Vs. Smt. Sudha Sashikant Shroff and another, and Sterling Computers Limited and Others Vs. M and N Publications Limited and Others,

9. The learned counsel appearing on behalf of the respondents, on the other hand, submitted that the time was the essence of contract and the petitioner was forewarned that no further extension would be granted as would be evident from the letter dated 30th November, 1995. According to the learned counsel, the petitioner has also failed to fulfil the essential terms of inspection inasmuch as the Bureau of Indian Standards in terms of its letter dated 5th February, 1997 as contained in Annexure `A'' to the affidavit-in-opposition has categorically stated that the petitioners are not permitted to mark their products with ISI Mari till they get written permission.However, it is stated that the petitioner received the said letter during pendency of the writ petition.

10. According to the learned counsel the petitioner filed a writ application earlier before this Court being W.P.No.2079 of 1996 wherein validity and/or the legality of the aforementioned letter dated 12-12-95 was not questioned and by an order dated 9th October, 1996 R.Pal, J., dismissed the said writ application holding:-

"The writ petitioners'' grievance with regard to the non-acceptance of the goods under his contract with the respondents at such a late stage cannot be accept under Article 226 of the Constitution of India.It may be noted that in the writ petition the Notice of Cancellation has not been challenged. The remedy of the writ petitioners relating to the non-acceptance of goods lies in different forum.

The writ petition is, accordingly,dismissed."

11. When an appeal was taken by the petitioner from the said order, the appellate Court granted liberty o the petitioner to file a fresh writ application pursuant where to this writ application has been filed.According to the learned counsel, in view of the time gap and in view of the fact that the respondents had already taken recourse to invite fresh tender which had been accepted, the question of reconsidering the case of the petitioner does not arise.

12. Admittedly, the matter arise out of contract qua contract.It is well known in view of several decisions of Supreme Court of India that the power of judicial review cannot be availed in a case governed by a contract-qua-contract.The question as to whether the respondents are guilty of any breach of contract or not cannot be decided by this Court inasmuch as it appears that in terms of the letter dated 30th November, 1995 the petitioner was categorically informed that they had not supplied any pipe and , thus they would not be granted any further extension.The inspecting authority is absolutely a separate and distinct unit and if the petitioner had offered inspection to the said authorities, the respondents cannot be said to have committed in illegality in its decision-making process in issuing the impugned order. Furthermore, from the petitioner''s letter dated 21-12-95 it appears that it has accepted the fact that it was guilty of delay in despatching but according to it the said delay in despatch was owing to unavoidable circumstances. The petitioner in terms of its letter dated 31-12-95 as contained in Annexure `Q'' to the writ application,inter alia, stated:-

"Sir, the inspection of 110 mm PVC pipe is already completed and found to be satisfactory. As soon as we get the inspection report, we will inform you accordingly for your departmental inspection.In the meantime the inspection agency is going to take inspection of 200 mm.pipes.

Sir, our is a small unit, we request you not to take any harsh measure as the survival of our unit depends on supply of pipes already manufactured.The delay in despatch is due to unavoidable circumstances.It is our humble request to allow us time for despatch of material till the inspection is over.

We sincerely regret for the delay."

13. Thus, in the said letter, the petitioner did not question the legality of the

action of the respondents in terminating the contract.It is not within the province of this Court to step into the shoes of the respondents and take a fresh decision in the matter.

14. In that view of the matter there cannot be any doubt that the petitioner was not in a position to supply the pies within the stipulated period. It stands admitted that the products of the petitioner was found to be unsatisfactory on earlier occasion also.It also now stands admitted that in view of the letter of the Bureau of Indian Standard that the products of the petitioner is unsatisfactory.It matters little as to whether the said order was received by the petitioner during pendency of the writ application inasmuch as even by reason of s subsequent event the petitioner now cannot fulfil their part of the contract,even if the writ application is allowed. It is now well known that this Court does not issue any futile writ.

15. Furthermore, Clause (10) of the Indian Standard Specification for Unplasticized PVC pipes for Potable Water Supplies read thus:-

"10.1 Each pipe shall be clearly and indelibly marked at intervals of not more than 3 metres in colour as indicated in 10.1.1. or 10.1.2. The marketing shall show the following;-

(a) Manufacture''s name or trade-mark,

(b) Outside diameter,

(c) Class of pipe and pressure rating,

(d) Batch number, and

(e) The word `plumbing'' in the case of plumbing pipes."

16. In that view of the matter, no Writ of Mandamus can be issued upon the respondents to accept the products of the petitioner at this stage. It is now well known that Writ of Mandamus will not issue to enforce a private contract.

17. In Dr. Umakant Saran Vs. State of Bihar and Others, it has been held that in a matter of private contract, the public law remedy is not available.Reference in this connection may also be made to Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., This aspect of the matter has also been considered in State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, It is now well settled that in the matter of termination of contract, the Court is not concerned as to the merit of the decision.Reference in this connection may be made to Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others,

18.In Food Corporation of India and others Vs. Jagannath Dutta and others, the Apex Court has clearly held that termination of contract simpliciter cannot be a subject-matter of a writ application.Yet recently in Assistant Excise Commissioner v.Issac Peter, reported in (1994 AIR SCW 2616), the Apex Court distinguished the decision in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and

Others, and Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and stated the law thus:-

"In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statuary insome cases) and the laws relating to contracts.It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation.There is no compulsion on any one to enter into these contracts.It is voluntary on both sides.There can be no question of the Estate power being involved in such contracts.It bears repetition to say that the States does not guarantee profit to the licensees in such contracts.There is no warranty against incurring losses.It is a business for the licensees.Whether they make profit or incur loss is no concern of the State.In law,it is entitled to its money under the contract. Is not as if the licensees are going to pay more to the State in case they make substantial profits.We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation.It not necessary to say more than this for the purpose of these cases.What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

19. This aspect of the matter has also been considered by a Division Bench of Patna High Court in Industrial Fuel Company Private Ltd. Vs. Heavy Engineering Corporation Ltd. and Others

20.Yet recently the Supreme Court in State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., held:-

"16.Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract.It is covered by the provision of the Contract Act or may be, also by certain provision so for 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, i writ petition.That is matter either for arbitration as provide 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, it 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 writ petition.The prayer in the writ petition, VIZ., to restrain the Government from deducing 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. Secondly, whether there has been a reduction in the statuary liability on account of a change in law within the meaning of sub-clause (4) of Clause(70) of the Contract is again not a matter to be agitated in the writ petition.That is again a matter relating to interpretation of a term of the contract and should be

agitated before the arbitrator or the Civil Court,as the case may be.If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the Civil Court, as the case may be, according to law.Similarly if the Government says that any overpayment has been made to the respondent, its remedy also is the same.

18. Accordingly it must be held that the writ petition filed by the respondent for the issuance of a writ of Mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, as wholly misconceived and was not maintainable in law. (See the decision of this Court in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, , where the law on the subject has been discussed fully.)The writ petition ought to have been dismissed on this ground alone."

21. This Court has also taken similar view in Hindustan Petroleum Corporation Ltd. v. Shyam Sunder Baneriwala, reported in (1988) 2 CHN 233, Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, cannot be said to have any application in the facts of this case.In that case the Apex Court was dealing with a matter relating to appointment of additional public prosecutors who were appointed upon satisfaction of all the conditions and for a fixed period.

22. In Kalyani Spinning Mills Ltd. and others Vs. Smt. Sudha Sashikant Shroff and another, , the Division Bench itself has referred to various decisions to show that a writ is not maintainable in case arising out of a contract qua contract.

23.The Division Bench did not consider the matter from the point of view as has been done in this case.

24. Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, has also no application in the facts and circumstances of this case. It is now well known that a decision has to be read keeping in view the question raised therein.

25. As in the instant case the contract is neither a statutory one nor the alleged termination of contract attracts Article 14 of the Constitution of India, the question of issuing any writ does not arise.The cases in which the Court can exercise its power of judicial review has been discussed in detail in D.Wren D. Wren International Ltd. and another Vs. Engineers India Ltd. and others, wherein apart from the three categories of cases mentioned in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , it had been pointed out in view of a Full Bench decision of Patna High Court and several decisions of this Court the power of this Court can be invoked only when the determination of contract is one a ground debtors the contract or where the same attracts Article 14 of the Constitution of India.

26. As in the instant case the contract has not been terminated either on a ground dehors the contract or the action on the part of the respondent can be said to be arbitrary, no relief can be granted for the petitioner in this case.

27. This application is, therefore dismissed but in the facts and circumstances of the case there will be no order as to costs.The petitioners may, however, avail alternative remedy available to them, if any, in law.

28. Application dismissed.

