
(1984) 07 CAL CK 0036
In the Calcutta High Court
Case No : C.O. No. 250 (W) of 1984

S. Paul and Co.

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 23-07-1984

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 213

Citation : AIR 1984 Cal 378

Hon'ble Judges : Amitabha Dutta, J

Bench : Single Bench

Advocate : B.K. Bachawat, K. Dutta and K.B. Kanjilal, for the Appellant; N.N. Gupta and S.N. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Amitabha Dutta, J.—The petitioner M/s. S. Paul & Co., a registered firm was appointed sole agent for sale of Tripura State Lottery Tickets by a concluded contract of agency in the form of written agreement dt. 23rd Oct. 1982, in modification of an earlier agreement dt. 12th Nov. 1981 and the sole agency continued till the 166th draw of the lottery which was scheduled to be held on Oct. 4, 1983, after which it stood terminated by mutual agreement.

2. Clauses 8, 9 and 16 of the said agreement dt. 23rd Oct. 1982 (Annexure "A" to the writ petition) were as follows : --

"8. That in consideration of the grant of the sole agency the sole agent shall pay to the Government a sum equivalent to 60% of the value of the tickets, balance 40% being retained by the sole agent as commission including expenses on publication of result, publicity for the lottery, checking of tickets and other organisational and administrative expenses of the sole agency. That it shall be obligatory for the sole agent always to pay in advance and/or execute bank guarantee equivalent to net values payable to the Government in terms of the foregoing paragraphs in lieu of lots of tickets earmarked for each draw, to the

Government. It is agreed that the accounts in connection with a draw shall be completed squared up and/or settled by the sole agent within fifteen days from the date of each draw.

9. In order to popularise and to give an impetus to the purchasers of the tickets, the sole agent shall stand authorised to make direct payment in respect of claims from the individuals/agent/sub-agents/ sellers in prescribed form and to prize winners up to Rs. 1,000/- (Rupees One Thousand) for prize money/share of agents/ sellers commission/incentive, etc., on prizes on surrendering of the prize winning tickets counterfoils invoices and the amount so paid would be reimbursed/ adjusted by the Government. Amount paid by the sole agent towards the prize winning tickets/commission/incentives should be submitted by the sole agent so as to reach the Government within the, period prescribed in the rules.

16. That copies of invoices issued by the sole agent to the agents against sale of tickets by sole agent will be forwarded to the Government on demand for records and verification."

3. During the material period lottery tickets worth Rs. 27,00,000/- used to be earmarked for each draw and 60% of that value is Rs. 16.20 lacs. The petitioner furnished two bank guarantees for Rs. 16.20 lacs each to secure payment of the contractual money to the Government of Tripura, one of which being dt. 21-10-1982 from United Industrial Bank, Ultadanga Branch expired on October 21, 1983. The other bank guarantee was executed by the Branch Manager of the Vysya Bank, Chittaranjan Avenue, Branch, Calcutta for Rs. 16.20 lacs favouring Government of Tripura being Bank Guarantee No. 13/83 dt. 4th July 1983 for one year which has been renewed for another year during the pendency of this case. A copy of the said bank guarantee No. 13/83 is annexure "C" to the affidavit-in-reply sworn on the 2nd July 1984. Under it the bank guarantees payment of the sale money of the lottery tickets sold by the petitioner firm and "agrees to reimburse the amount of loss, if any, subject to the maximum limit of Rs. 16,20,000/- only."

4. Petitioner's case may be briefly stated. According to the scheme operative from the 118th draw a fixed sum of Rs. 1,18,000/- was the reimbursable sum on account of payments made by the petitioner towards agents/sellers' incentives in terms of Clause 9 of the agreement dt. 23-10-1982 and that the petitioner received adjustment of the entire sum of Rs. 1,18,000/- per draw up to 141st draw. The Government of Tripura accepted the claim for such reimbursement without asking for any supporting vouchers from the petitioner. But from the 142nd draw up to 156th draw both inclusive the said sum of Rs. 1,18,000/- for each draw has been kept unadjusted although reimbursement claims for such amount had been duly forwarded to the State Government of Tripura and received by them in time. Thus a net sum of Rs. 18,87,590/- is refundable to the petitioner by way of payments made in excess as would appear from the account of the petitioner (annexure "E" to the writ petition). The petitioner is under no

obligation to forward the invoices issued by them to their agents against sale of ticket and such invoices will be forwarded to the Government of Tripura only on demand for records and verification according to Clause 16 of the agreement dt. 23-10-82. Clause 9 of the said agreement does not require production of any supporting evidence of disbursement to claim reimbursement and in fact up to and including the 141st draw such reimbursement claims were adjusted against the dues of the said State Government without any supporting vouchers and in any case even if there be such obligation, non-submission of vouchers cannot be a ground for withholding the legitimate dues of the petitioner. The petitioner apprehends that the respondents may enforce the bank guarantee furnished by the petitioner for the purpose of recovery of imaginary claim put forward by the respondents. They are acting in a highhanded and arbitrary manner in trying to encash the bank guarantee given in their favour by the petitioner. The petitioner repeatedly wrote to the authorities concerned for refund of the excess amount paid but far from making the payment the respondents by their letter dt. Jan. 4, 1984 called upon the petitioner to submit within 15 days from the date of the said letter documents in support of the petitioner's claim for agents/sellers' incentives relating to 140th draw and onwards. Thus the respondents have withheld payment of petitioners legitimate dues and on the other hand threatened to encash the bank guarantee. The petitioner has therefore, prayed for Mandamus commanding the respondents to forbear from enforcing the bank guarantee and from demanding vouchers for incentives given to the sellers and agents by the petitioner.

5. The respondent 1 is the State of Tripura, respondent 2 is the Director, Tripura State Lottery and respondent 3 is the Deputy Director, Small Savings and State Lotteries, Government of Tripura. Respondents in their affidavit-in-opposition have stated that by Clause 9 of the agreement dt. 23-10-1982 the petitioner was authorised to make payment of prize money, agents/sellers' incentives, etc., up to Rs. 1000/-. Against such payments the petitioner always preferred reimbursement claims along with the prize winning tickets as supporting vouchers. The petitioner is required to submit all supporting documents along with the claims. In the instant case as specific complaints were received, the petitioner was requested to furnish the documents for verification. But in spite of repeated reminders, the petitioner failed to submit the vouchers and contravened the relevant clause of the agreement. Respondents have further said that until an amount of Rs. 33,10,070/-payable to respondent 1 is settled, the amount of Rs. 18,87,590/- cannot be treated as excess payment. On the other hand, if the amount of Rs. 18,87,590/-(subject to result of checking) be deducted from the total amount payable to respondent 1, still, there would remain an amount of Rs. 14,22,480/- payable to respondent 1. On receipt of duplicate claims of the third prize of Rs. 1000/-, the petitioner was requested to furnish invoice/ counter foils as per Clause 16 of the agreement on the basis of which the petitioner made payment of the incentives to agents/sellers and sought reimbursement in a consolidated way without supporting vouchers. The petitioner's claims for

reimbursement were withheld as the petitioner failed to submit relevant vouchers, invoices, etc., in support of such claims in spite of demands.

6. The first contention raised on behalf of the petitioner is that the respondents' act of threatening to encash the bank guarantee furnished by the petitioner is arbitrary and illegal as the said bank guarantee is conditional and it cannot be enforced till the loss, if any, is determined and quantified by a competent court after that trial on evidence. In this connection, reference has been made to the essential term of the bank guarantee which is annexure "C" to the affidavit-in-reply that the bank agrees to reimburse the amount of loss, if any, subject to the maximum limit of Rs. 16,20,000/- (Rupees sixteen lacs and twenty thousand) only. It is submitted that there is no term in the bank guarantee in question to the effect that the State Government of Tripura shall have the power to decide finally the amount of loss. So the bank guarantee cannot be enforced until the loss, if any, is admitted or proved. In this connection, the learned Counsel for the petitioner has relied on the Bench decision in *The Minerals and Metals Trading Corporation of India Ltd. Vs. Surajbalaram Sethi and Another*, in which the learned Judge S. K. Mukherjee, J. delivering the judgment of the Division Bench observed as follows : --

"It is true that the guarantees were executed by the bank in favour of the appellant; it is equally true that the agent is not a party to either of the guarantees. The guarantees, however, have a dual aspect. They are not merely contracts between the appellant and the bank; they are also securities furnished by the agents in terms of the agreements between the agent and the appellant. In seeking to enforce the bank guarantees the appellant is in effect seeking to realise the securities furnished by the agent on the basis that it has suffered loss and the loss has been occasioned by negligence or default on the part of the agent."

The learned Judge further observed : --

""The guarantee may, however, provide that the decision of the beneficiary on the question of loss or damage suffered by them or on the question of default or negligence by reason of which the guarantee becomes enforceable will be final. A bank guarantee like any other contract is no more or no less than what the parties make it..... Conditions for payment under a bank guarantee have to be satisfied before payment can be legitimately claimed."

The aforesaid observations were made in an appeal from an interlocutory order of temporary injunction in a suit on the original side of this Court. On behalf of the petitioner reliance has also been placed on *Sudhu Ram Yadav v. Board of Trustees* (1982) 1 Cal LJ 286 in which the petitioner challenged the withholding of the release order in respect of certain lots of unserviceable goods auctioned by the Calcutta Port Trust Authorities after the petitioner as the highest bidder had paid the entire price according to the terms and conditions of sale and the sale had become complete. Repelling the contentions raised on behalf of the Calcutta

Port Trust Authorities that the constitutional remedy under Art. 226 does not lie to establish rights flowing from contract or in the event of breach of contract, by-passing the normal channels of Civil litigation, the learned Single Judge observed : --

"In my view, this contention of Mr. Dutt is no longer valid in view of the Supreme Court decision in the well-known case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . This decision of the Supreme Court is clear authority of the proposition that whether in the field of exercise of statutory power or in the discharge of its contractual obligation the State must act reasonably and not arbitrarily."

The learned Counsel for the petitioner has also relied on the *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, and invited the attention of this Court to the observation in para 11 of the judgment at page (852) "It is not in dispute that the appellant is the instrumentality of the Government and would be the other authority" under Art. 12 of the Constitution. If it be so as held by this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the rule inhibiting arbitrary action by the Government would equally apply where such corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and its action in conformity with some principles which meets the test of reason and relevance."

7. On the other hand, it has been contended by the learned Counsel appearing for the respondents that the present writ petition cannot be maintained for adjudication of dispute arising out of the concluded contract between the petitioner and the respondents" over interpretation of the clauses of the agreement and the petitioner cannot have any remedy under Art. 226 of the Constitution against allegedly threatened breach of contract because of the intention of the Government of Tripura to enforce the bank guarantee, as the petitioner cannot escape the liability to pay the dues of the State Government on account of sale of said lottery tickets as sole agent. In support of this contention reliance has been placed on several decisions of the Supreme Court, viz., *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, and *Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others*, . It has been submitted that the observation of the learned Single Judge of this Court in *Sudhu Ram Yadav's* case (1982) 1 Cal LJ 286 relied on by the learned Counsel for the petitioner has been made per incuriam as the decision in the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, invalidates unreasonable or arbitrary action or discrimination by the State in entering into contract or at the stage of entry into the contractual area and does not deal with contractual obligations in the field of performance or non-performance of the terms and conditions of a concluded contract. It is submitted that *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, is a case of application of the

doctrine of promissory estoppel to compel the corporation to perform its statutory duty to advance the loan as the agreement to advance the loan was entered into in performance of the statutory duty cast on the corporation by the statute under which it was created. It is pointed out that the expression "or entering into contracts or otherwise" in the observation of the Supreme Court in para 11 of the judgment referred to on behalf of the petitioner relates to the stage of entry into the field of contract or discharge of statutory obligation in the context of the facts of the reported case.

8. In my view, the contentions raised on behalf of the respondents are well founded and must prevail. In this case there are rival claims and counter claims arising out of alleged non-fulfilment of contractual obligations. In *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, the writ petitions were directed against revision of rates of royalty under a lease of 1970 followed by cancellation of the lease and the ground of challenge was that such acts of the Government of Bihar and its officers were illegal and mala fide. Primarily the case of the petitioner was that of a breach of contract for which the State would be ordinarily liable to pay damages if it had broken it. The Supreme Court observed (at P. 1500) :

"But after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No. question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract (vide para 10 at page 1500)."

The Court reaffirmed the observation in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . That "a writ petition is not an appropriate remedy for impeaching contractual obligations (see para 19 at page 1502)." In *Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others*, the writ petitioners who were allottees of flats claimed refund of surcharge said to have been illegally collected in allotting flats to the petitioner by the Delhi Development Authority and the court held that writ jurisdiction cannot be invoked to get back part of the purchase price paid and benefit taken. After the State or its agents have entered into the field of ordinary contract no question arises of violation of Art. 14 or of any other constitutional provision. In the absence of any special statutory power or obligation on the State in the contractual field apart from the contract the petitioners are bound by the terms and conditions of the contract. The principles laid down in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, have been restated. I cannot accept the submissions made on behalf of the petitioner that the aforesaid cases , of the Supreme Court are distinguishable and have no application in this case because

in those cases the petitioners wanted to wriggle out of the contracts while in the present case the facts are different and that the petitioner's simple claim is that the State cannot act arbitrarily or illegally in attempting to enforce the bank guarantee contrary to its terms, without admission or proof of loss, if any, sustained by the State Government should be accepted. In my view, the petitioner has sought to claim relief against the alleged threat held out by the State Government of Tripura of breach of the contract of guarantee in the field of concluded contract and in view of the principles laid down in *Radha Krishna Agarwal*'s case restated in several decisions of the Supreme Court thereafter the present writ petition claiming such relief cannot be maintained, as the remedy against the alleged threat of breach of contract by the State lies elsewhere. The petitioner is not entitled to any remedy under Article 226 of the Constitution for threatened enforcement of the bank guarantee by the respondents. Arbitrariness or illegality of action by the State in the field of contract not governed by any statute falls within the domain of private law which is outside the realm of public law, the remedy for which is to be pursued in the civil court and not in the writ jurisdiction of the High Court. It has been alleged in ground VII of para 33 of the writ petition that the respondents have deliberately misread and misconstrued the clauses of the agreement between the parties. But dispute over interpretation of the terms of the contract cannot be resolved in the constitutional jurisdiction of this Court.

9. The second contention raised on behalf of the petitioner is that the respondents cannot demand vouchers from the petitioner, under the terms of the contract and in view of their past action of settling accounts without demanding vouchers in support of payment of incentives to agents/sellers of prize winning tickets by the petitioner on behalf of the respondents. So, it is argued that the respondents' demand for vouchers is illegal and arbitrary. Such contention must fail in this forum for the same reason namely, that it relates to alleged breach of contractual obligation on the part of the State in the field of concluded contract. That apart the petitioner as agent has duty, irrespective of any contract to that effect, to produce vouchers by which items of disbursement are supported as part of the obligation to render proper accounts to the principal on demand u/s 213, Contract Act. The principal is not estopped from enforcing it. So, there is no prima facie arguable case against the demands for vouchers on the ground of arbitrariness or illegality even if the dispute appertains to the field of concluded contract between the parties.

10. in view of the foregoing discussions I hold that the writ petition cannot be maintained and must fail. The writ petition is dismissed without any order as to costs.