
(2010) 08 MAD CK 0486

In the Madras High Court

Case No : W.A. (MD) No's. 180 and 335 of 2010 and M.P. (MD) No. 1 of 2010

Semalaiappan, Contractor

APPELLANT

Vs

The Tamil Nadu Water Supply and Drainage Board

RESPONDENT

Date of Decision : 27-08-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2010) 08 MAD CK 0486

Hon'ble Judges : M. Duraiswamy, J;D. Murugesan, J

Bench : Division Bench

Advocate : K. Muthumani Doraisamy for Muthumani Doraisamy, for the Appellant; M. Ajmal Khan, for the Respondent

Judgement

M. Duraiswamy, J.—Writ Appeals (MD). Nos. 180 to 184 of 2010 are directed against the common order of the learned single Judge dated 23.12.2009 dismissing the writ petitions (MD). Nos. 8549, 8552, 8550, 8553 & 8551 of 2009 respectively. The writ petitioners are the appellants in the above writ appeals. The writ petitions were filed to issue a writ of Certiorarified Mandamus calling for the records of the respondents ending with the order of the first respondent in Lr. No. F.101/SDO.1/C&A/2006, Lr. No. F.235/SDO.1/C&A/2006, Lr. No. F.93/SDO.1/C&A/2006, Lr. No. F.109/SDO.1/C&A/2006 and Lr. No. F.201/SDO.1/C&A/2006 respectively dated 14.08.2009, and quash the same and directing the respondents herein to forthwith foreclose the Agreement No. DR/TWAD/No. 25/2008-2009, No. DR/TWAD/No. 23/2008-2009, No. DR/TWAD/No. 26/2008-2009, No. DR/TWAD/No. 24/2008-2009 and No. DR/TWAD/No. 23/2008-2009 respectively dated 01.09.2008.

2. Writ Appeals (MD). Nos. 332 to 336 of 2010 are directed against the common order of another learned single Judge dated 22.04.2010 made in W.P. (MD) No. 5422, 5423, 5420, 5419 & 5421 of 2010 respectively. The writ petitioners are the appellants in the above writ appeals. The writ petitions were filed to issue a Writ of Certiorarified Mandamus to call for the records of the respondents, ending with

the order of the second respondent in Lr. Nos. 230310-2/F.109 Rural Habitations/JDO 1/2010 dated 23.03.2010, Lr. Nos. 230310-4/F.93 Rural Habitations/JDO 1/2010 dated 23.03.2010, Lr. Nos. 230310-1/F.201 Rural Habitations/JDO 1/2010 dated 23.03.2010, Lr. Nos. 230310-3/F.101 Rural Habitations/JDO 1/2010 dated 23.03.2010 and Lr. Nos. 230310-2/F.235 Rural Habitations/JDO 1/2010 dated 23.03.2010 respectively and quash the same and directing the respondents herein to forthwith release the Bank Guarantee furnished by the petitioner.

3. Since the issue involved in all these writ appeals are one and the same, they are disposed of by this common judgment.

4. The brief case of the appellants are as follows;

a) According to the appellants, they are the leading Class-I Contractors with the Tamil Nadu Water Supply and Drainage Board. The appellants were awarded contracts. In pursuance of the same, work orders were given to them and agreements were entered into between the appellants and the first respondent.

b) According to the appellants, they have completed the work as per the terms of the agreement except the erection of pump sets. The said work could not be completed since the same were entrusted to the contractors. In these circumstances, the appellants made representations to the competent authority, namely the first respondent, requesting him to foreclose the original agreement and to settle the final bill. On 30.05.2008, the first respondent foreclosed the original agreement and directed the second respondent to settle the final bill.

c) Pursuant to the order of the first respondent, final bill was settled by the second respondent. Therefore agreements were entered into between the appellants and the second respondent on 01.09.2008 for the purpose of erecting pump sets and other allied works. Thereafter, the appellants completed the work.

d) While so, to the shock of the appellants, they received a communication from the second respondent wherein the second respondent unilaterally extended the period of new agreement for a further period of one year upto 31.03.2010, for which the appellants sent their reply. Thereafter, the appellants were served with orders passed by the first respondent rejecting the request of the appellants stating the orders of extension of agreement passed by the Executive Engineer is in conformity with the terms of the agreements. Subsequently, the second respondent passed orders once again extending the contract up to 30.11.2010 without any notice to the appellants. Challenging the said orders passed by the first and second respondents, the appellants have filed writ petitions.

5. According to the respondents, the contract was terminated as per Clauses 33 and 41 of the agreement and therefore, the orders passed by the first respondent are just and proper. Further according to the respondents, as per Clause 67 of the agreement the appellants, are not entitled to invoke the writ jurisdiction under Article 226 of the Constitution of India. In the event of any

dispute arising between the parties in furtherance of the agreements, the course open to the appellants/petitioners is to approach the competent civil court having jurisdiction over the place where the contract is awarded and concluded. Therefore, according to the respondents, the writ petitions are not maintainable and the appellants/petitioners can only file a civil suit. In these circumstances, the respondents have prayed for dismissal of the writ appeals.

6. The learned single judges after taking into consideration the case of both sides, dismissed the writ petitions as not maintainable. Aggrieved over the orders passed by the learned single Judge, the writ petitioners have filed the above writ appeals.

7. Heard Mr. K. Doraisamy, the learned Senior Counsel for the appellants and Mr. M. Ajmal Khan the learned Counsel for the respondents.

8. It is not in dispute that the second respondent had passed the impugned orders dated 22.04.2009 and 23.03.2010 extending the period of agreement for a further period of one year i.e. upto 31.03.2010 and 30.11.2010 respectively without any notice to the appellants.

9. Mr. K. Doraisami, the learned Senior Counsel appearing for the appellants, contended that the impugned orders passed by the respondents are liable to be quashed for the reason that the said orders were passed without giving any opportunity to the appellants.

10. According to the learned senior Counsel, there is no disputed facts involved in the present writ petition. Therefore, this Court can entertain the writ petitions and decide the same on merits. In support of his contention, the learned Senior Counsel relied upon the following judgments;

i) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , wherein the Honourable Apex Court held that when a disputed questions of fact pertaining to the interpretation/meaning of documents or part(s) thereof are involved, the courts can very well go into the same and decide the objections if facts permit. Moreover, the Apex Court also held that merely because one of the parties wants to dispute the meaning of a document or part thereof would not make it a disputed fact.

ii) Bharat Petroleum Corpn. Ltd. Vs. Maddula Ratnavalli and Others, , wherein the Honourable Apex Court has held as follows;

Reasonableness and non-arbitrariness are the hallmarks of an action by the State. The "State" acting whether as a "landlord" or a "tenant" is required to act bona fide and not arbitrarily, when the same is likely to affect prejudicially the right of others. The Supreme Court a number of times has laid emphasis on reasonable action on the part of the State even as a landlord and in contractual matters. Judged from any angle, the action on the part of the appellant does not satisfy the test of fairness or unreasonableness. It being wholly arbitrary cannot be sustained.

iii) 2010 WLR 307 (Pas Ennore Pet. Ltd. v. Union of India and Ors.) wherein a Division Bench of this Court held as follows;

19. An analysis of the various judgment would show the following settled position of law, which are relevant for the purpose of disposal of these writ petitions:

(1) The authorities must strictly adhere to the tender conditions and must enforce them with rigidity, except some minor deviations.

(2) The Court can intervene in the decision-making process of the public authorities, only if such decision is influenced by extraneous/irrelevant consideration; arbitrariness, unfairness, favouritism, abuse of power, error of law and other reasons indicated in the aforesaid judgments.

Having laid down the law, the Apex Court has also cautioned that there must be a judicial restraint in administrative action and the power of judicial review must be exercised only if it so warranted on the give facts of the case.

11. Countering the submissions made by the learned Counsel appearing for the appellants, Mr. M. Ajmal Khan, the learned Counsel appearing for the respondents submitted that as per Clause 67 of the agreement, the competent Court to decide the dispute between the parties is only a civil Court and not by writ proceedings under Article 226 of the Constitution of India. Therefore, the learned Counsel submitted that the writ appeals as well as the writ petitions are liable to be dismissed. In support of his contention, the learned Counsel relied upon the following judgments;

i) Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , wherein the Honourable Apex Court has held as follows;

21. ...Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations....

22. ...The writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred. That, however will not estop the appellants from contending that the amended Rules are not applicable as their licences were renewed before the amendments were made.

ii) State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, , the Honourable Apex Court held that if the matter is governed by a contract, the writ petition is not maintainable since it is a Public law remedy and it is not available in private law field and the case of contract is governed by a non statutory contract.

iii) Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , the Honourable Apex Court held that interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Further the

Apex Court also held that a contract would not become statutory, simply because it is for construction of a public utility and it has been awarded by a statutory body.

iv) Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, the honourable Apex Court held that a contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

12. Since the main issue involved in the writ appeals and the writ petitions is with regard to the maintainability of the writ petitions, it is pertinent to extract Clause 67 of the agreement which reads as follows;

In the event of any dispute arising between the parties hereto in respect of any matter comprised in the contract, the same shall be settled by a competent Court having jurisdiction over the place where the contract is awarded and agreement is concluded and by no other Court.

13. On a careful consideration of the submissions made by both the counsels and the judgments relied upon by them, it could be seen that the main issue is with regard to the interpretation of Clause 67 (i.e) whether "competent court" referred to in Clause 67 of the agreement is by way of writ petition under Article 226 of the Constitution of India or a civil suit before a competent civil Court. That apart the issue with regard to the power of the respondent to extend the period is also a disputed question.

14. It is a settled principle of law that a writ is not a remedy for enforcing contractual obligation. A writ under Article 226 of the Constitution of India is not a proper proceeding for adjudicating such dispute under the law. It is open to the parties to approach the Court of competent jurisdiction for proper relief and for breach of contract. When an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of this Court. The dispute relating to the contracts cannot be agitated under Article 226 of the Constitution of India. Therefore, the dispute with regard to interpretation of the terms of the agreement could not be agitated in a writ petition under Article 226 of the Constitution of India

15. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The dispute with regard to the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principle of

Contract Act. Further, a contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body.

16. In the present case, the agreement cannot be termed as a statutory agreement. Therefore, a dispute relating to the interpretation of the terms and conditions of such a contract could not be agitated in a writ petition under Article 226 and the dispute is a matter for adjudication only by a civil Court or in arbitration proceedings, if provided in the contract. In the case on hand, in Clause 67 of the agreement, "competent court" means only a competent civil court. That being the case, when an alternative remedy is open to the litigant, he should be required to pursue that remedy and not invoke writ jurisdiction. Even though, the power under Article 226 of the Constitution of India are wide it cannot be said that such power could be invoked even in cases where disputed questions of fact arise for consideration and when contractual obligations and breaches thereof are involved. When there are disputed questions of fact, the competent court to decide the issues is only a civil court. Therefore, the issue with regard to the question of fact cannot be decided in a writ petition. The learned single judges rightly dismissed the writ petition as not maintainable.

17. In these circumstances, without going into the merits of the matter, we are of the considered view that the writ petitions filed by the appellants are not maintainable in view of Clause 67 of the agreement. Therefore, W.A. (MD) Nos. 180 to 184 of 2010 and W.A. (MD) Nos. 332 to 333 of 2010 are liable to be dismissed.

18. We find no ground to interfere with the orders of the learned single Judges. Therefore, the writ appeals are dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

19. Insofar as W.P. (MD) Nos. 9699 and 9700 of 2010 are concerned, the said writ petitions are preferred against the orders passed by the first respondent dated 18.09.2009, The Chief Engineer, the Tamil Nadu Water Supply and Drainage Board terminating the contracts awarded to the petitioners. At the request of the learned Counsel for the respondents, the said writ petitions were tagged along with the above writ appeals. However, on a perusal of the affidavit filed in support of the above writ petitions, it could be seen that the writ petitions are filed by the main contractor and the issue involved in these writ petitions are different from the issues involved in the writ appeals. Therefore, these writ petitions are delinked from the above writ appeals and the Registry is directed to list the writ petitions before the concerned single Judge for hearing.