

**(2005) 09 KAR CK 0046**  
**In the Karnataka High Court**  
**Case No : Writ Appeal No. 2612 of 2005**

Shetty's Construction Company Private Limited APPELLANT  
Vs  
Krishna Bhagya Jala Nigam Limited and Another RESPONDENT

**Date of Decision :** 20-09-2005

**Acts Referred:**

Constitution of India, 1950 — Article 12, 14

**Citation :** (2006) 4 BC 357 : (2005) 6 KarLJ 301

**Hon'ble Judges :** S.R. Nayak, J;C.R. Kumaraswamy, J

**Bench :** Division Bench

**Advocate :** A.G. Holla, for K. Shashi Kiran Shetty, for the Appellant; M.R.C. Ravi, for the Respondent

## Judgement

S.R. Nayak, J

1. The writ petitioner being aggrieved by the order of the learned Single Judge dated 15th April, 2005 passed in W.P. No. 4325 of 2005 and W.P. No. 45323 of 2004 has preferred this writ appeal. The facts of the case as set out by the appellant, in brief, are as follows.--

The appellant is a Private Limited Company registered under the provisions of the Companies Act. The appellant is carrying on the construction works and is a registered Class I (LCB) contractor. The appellant completed several major projects of various Governments as well as the first respondent. The first respondent is a Government of Karnataka undertaking established exclusively for harnessing the Krishna River Water and for construction of dams and canals for irrigation of lands. Pursuant to a tender notification, the contract of construction of Branch distributary of NRBC distributary No. 15 including lining of C.D. works from KM. 7 to 26.340 and sub-branch distributary of NRBC distributary No. 15 from KM. 0.00 to 9.690 was awarded to the appellant. An agreement No. 05 of 2000-01, dated 29-9-2000 was signed. The total cost of the work entrusted to the appellant was Rs. 819.602 lakhs. The appellant completed major portion of the work to the satisfaction of the respondent. The appellant has submitted a bill

dated 5-11-2004 for payment of Rs. 1,52,50,550/-. The said bill is still pending.

2. The second respondent issued a notice dated 22-12-2003 to the appellant alleging that the appellant has sublet the contract work to one Sri Gururaja Sharanappa Patil and Sri Prahlada Bellary and others and the said act amounts to violation of terms of agreement dated 29-9-2000 and calling upon the appellant to give reply in writing within 15 days as to why appropriate action should not be taken against the appellant for rescinding the contract, for forfeiting the security deposit and removal of the appellant's name from the selected list of contractors maintained in the Nigam etc. The appellant submitted a detailed written reply dated 3-1-2004 to the said show-cause notice.

3. When the matter stood thus, since the second respondent had threatened action against the appellant as mentioned in the show-cause notice, the appellant filed a suit in O.S. No. 268 of 2004 before the Civil Judge (Senior Division), Yadgir to declare that the notice dated 22-12-2003 is illegal, null and void and is not binding on the plaintiff and that the plaintiff is entitled to the money claimed in the pending bills and to direct payment and for permanent injunction against the defendant from terminating/rescinding the contract except in due process of law. In the said suit, the appellant filed an application for temporary injunction for restraining the second respondent from rescinding/terminating the contract. By order dated 17-2-2004 the Civil Judge rejected the application for temporary injunction. The appellant preferred an appeal M.A. No. 5 of 2004 to the Court of the Principal District Judge, Gulbarga against the order dated 17-2-2004. The learned District Judge by order dated 23-3-2004 extended the interim order of status quo until further orders. The learned District Judge heard the appeal and by order dated 9-11-2004 dismissed the said appeal. The appellant filed I.A. No. 4 on 9-11-2004 in the said appeal, M.A. No. 5 of 2004, praying to continue the status quo order for one more month. The second respondent filed its objections. After hearing, the learned District Judge by order dated 16-11-2004, directed the parties to maintain status quo for a period of 15 days. The appellant filed W.P. No. 45353 of 2004 for quashing the order dated 9-11-2004 passed by the Principal District Judge, Gulbarga in M.A. No. 5 of 2004 and the order dated 17-2-2004 passed by the Civil Judge (Senior Division) on I.A. No. 2 in O.S. No. 3 of 2004. In the said writ petition, this Court by order dated 18-11-2004 granted an interim order of status quo for 8 weeks. When the matter stood thus, the appellant, on 24-11-2004, received the order dated 10-11-2004 of the second respondent rescinding the contract. The appellant being aggrieved by the above order preferred W.P. No. 4325 of 2005 before this Court. The writ petition was contested by the respondent by filing statement of objections. The learned Single Judge clubbed W.P. No. 4325 of 2005 with W.P. No. 45323 of 2004, heard them together and by his common judgment dated 15-4-2005 dismissed both the writ petitions.

4. We have heard Sri A.G. Holla, learned Senior Counsel for the appellant and Sri M.R.C. Ravi for the respondents. Sri A.G. Holla would contend that the

respondents have passed the impugned order dated 10-11-2004 vindictively, because, the appellant had secured interim order of status quo on 9-11-2004 in M.A. No. 4 of 2004 and, therefore, their action is arbitrary, mala fide and unreasonable. It was also pointed out by Sri A.G. Holla that though the second respondent filed his objection on 12-11-2004 to the application filed by the appellant on 9-11-2004 for extension of status quo order, in the said statement of objections, the rescinding order made on 10-11-2004 is not disclosed. Further, though that I.A. of the appellant was heard by the learned District Judge on 16-11-2004, even during the course of the argument, the order made on 10-11-2004 rescinding the contract was not disclosed. Learned District Judge on 16-11-2004 extended the interim order of status quo by 15 days. In the circumstance, Sri A.G. Holla would contend that it is quite clear that the respondent passed the order on 10-11-2004 when the interim order was in operation backdating the order. The learned Senior Counsel would also contend that the assertion of the second respondent that the appellant refused to receive the order dated 10-11-2004 is factually incorrect. Sri A.G. Holla would contend that when the dispute between the parties was seized by the Courts, the second respondent acted illegally, arbitrarily and with mala fide intention to rescind the contract. Sri A. G. Holla would contend that the impugned rescinding order dated 10-11-2004 was not effective until 27-11-2004 when it was communicated to the appellant, by which time the interim order of status quo dated 16-11-2004 was in operation. It was also contended that the second respondent did not apply his mind to all the issues specifically raised by the appellant in his reply. It was also contended by the learned Senior Counsel that having regard to the complex questions involved in the case, the second respondent ought to have given a personal hearing in the matter to the appellant to explain the various matters involved in the case and, therefore, the impugned order is violative of principles of natural justice. Sri A.G. Holla would contend that the impugned order does not refer to, much less, consider any of the contentions of the appellant raised in their reply dated 3-1-2004. Lastly, Sri A.G. Holla would contend that the stakes are very heavy and the appellant has made much investment on machinery and infrastructure for the execution of the project; the appellant has already completed substantial portion of the work and rescinding of the contract at this distance of time would be totally ruinous to the appellant and that would also not serve any public purpose and interest.

5. Sri M.R.C. Ravi, per contra, while supporting the judgment of the learned Single Judge and justifying the impugned order passed by the second respondent would highlight that the appellant has admitted violation of Clause 26(a) of the contract and, therefore, it is not entitled to make any grievance against the rescinding of the contract by the second respondent. Sri M.R.C. Ravi would also contend that the dispute between the parties is purely contractual in nature and it involves interpretation of the terms of the contract and, therefore, writ petition is not maintainable to challenge the impugned act of the second respondent.

6. Having heard the learned Counsels for the parties, what arises for our

consideration and decision is whether the respondents are justified and acted legally in rescinding the contract.

7. The law relating to award of contracts by the State, instrumentalities of the State, statutory bodies and other authorities which could be treated as "State" within the meaning of Article 12 of the Constitution has been well-settled by a catena of decisions of the Supreme Court and High Courts and to mention few are the decisions in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, *Tata Cellular Vs. Union of India*, *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, and *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*. It is true that the award of a contract, whether it is by a private party or by a public body or the State, is essentially, a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny unless such terms could be condemned on the touchstone of Article 14 postulates. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though the decision taken by them is not amenable to judicial review on merit, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness and due to violation of the terms and conditions imposed by the authority itself. It is trite law that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. The judgments of the Apex Court referred to above would show that the writ petitions against the State and its instrumentalities arising out the contractual obligations are maintainable and judicial review is permissible both at the pre-contract stage and post-contract stage and the action of the State and its instrumentalities should be fair, just, reasonable and free from arbitrariness. In other words, the State and instrumentalities of the State, in the matter of awarding contract or terminating the contracts, are bound by the postulates of Article 14 of the Constitution of India, viz., reasonableness, fairness and non-arbitrariness.

8. It is pertinent to notice that since the guarantee of equal protection enshrined in Article 14 of the Constitution embraces the entire domain of "State Action", it would extend not only when an individual is discriminated in the matter of exercise of his rights or in the matter of imposing liabilities upon him, but also in the matter of granting privileges, e.g., granting licences for entering into any

business, inviting tenders for entering into a contract relating to Government business, or issuing quotas, giving jobs and in all these cases, the principle is that there should be no discrimination between one person and another if their position or circumstances is the same. In other words, the State's action must not be arbitrary but must be based on some valid principle which itself must not be irrational or discriminatory. It is well-established by the Indian Administrative Law that an executive or statutory authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an action taken in violation of them. It is true that every activity of the State has the public element in it and must, therefore, be informed with reason and fair-play in action and guided by public interest. It is also true if the Government awards contracts or otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The public authority cannot exercise its discretion arbitrarily in the matter of giving contracts to a party or terminating the same on its sweet will and pleasure giving a go-by to the norms and procedure imposed by it. In other words, the action of the authority in the matter of awarding contract should inspire transparency and openness and reflect justification as well as legality. The guiding dogma is the public interest, not the technicality. If time is the essence of the contract, the action of the State should ensure it and it should not defeat it.

9. Tested in the light of the above principles of law, whether the action of the second respondent in rescinding the contract can be said to be free from arbitrariness, unreasonableness and unfairness is the most important question to be addressed and answered by us. Preceding the impugned order rescinding the contract, the second respondent issued show-cause notice dated 22-12-2003 marked as Annexure-A. This show-cause notice alleges against appellant, violation of Clause 26(a) of the contract, viz., subletting the work of construction of canal to the third parties. The appellant submitted his reply dated 3-1-2004 marked as Annexure-B to the show-cause notice refuting the allegations and explaining the factual aspects of the case. The second respondent without applying his mind to the facts stated in the reply rescinded the contract. It needs to be noticed that under the contract, the appellant had to obtain lands from the landowners by itself without the help of the authorities or the Government. The appellant has paid various amounts to various landowners and took possession of the lands upto 28 kms. on which canal construction has been made upto 27 kms. The appellant's possession of the land has been admitted by the respondents, as could be seen from paragraph 6 of the statement of objections of the respondent to the application dated 27-6-2005 filed by the appellant to produce additional documents.

10. The allegation of subletting levelled against the appellant is not well-founded. The word "subletting" means transfer of an exclusive right to enjoy the property in favour of the third party. The mere occupation by a party is not

sufficient to infer either subletting or parting with possession. We are fortified by the judgment of the Supreme Court in *M/s. Delhi Stationers and Printers Vs. Rajendra Kumar*, , in opining so. It is the specific case of the appellant that under the agreement entered with the third parties, it has only employed them to do some piece works under the appellant's direct control and supervision for remuneration and it had retained full responsibility to carry out the work to the standard stipulated in the main contract and the work was carried out to the full satisfaction of the respondents. It is also stated by the appellant that the respondents were aware of the appellant entering into such agreements with the third parties to do piece works and knowing fully well of that arrangement, the respondents cleared the bills submitted by the appellant for Rs. 526 lakhs in respect of the contract work fully approving the works carried out by the appellant which included the works done through the third parties under the agreements. It is pointed out by the appellant that even after the show-cause notice was issued on 22-12-2003, the respondents on 12-3-2004 passed the pending bill dated 8-3-2004 and they made payment on 27-3-2004, as could be seen from Annexure-K produced at pages 22 to 40 of paper book II. Further, the appellant clearly stated in Annexure-B that all the third parties did not do the work as per the agreements and wherever they abandoned the works entrusted to them, the appellant-company itself completed such works under its strict supervision. It is also stated by the appellant that the respondent staff including the Executive Engineer was constantly supervising the work and the work has been approved and paid for as aforesaid. It is also stated by the appellant that they entered into agreements with the third parties only for obtaining labour, land and for smoothly working on the project as the said factors were being controlled by the local leaders who wanted to have benefits of the contract. The respondents, specifically the staff and the Executive Engineer were aware of the mode of carrying on the contract by the appellant. The letters written by the appellant dated 25-5-2004, 9-6-2004, 14-6-2004 and 15-7-2004 produced at pages 64 to 67 of paper book II would also show that the officers of the respondent-Corporation were quite aware of the appellant entering into agreements with third parties for its work. When all these above noted aspects were set out in great detail in Annexure-B, the second respondent without considering the same has arbitrarily rescinded the contract. If it is said that the second respondent is not bound to consider what is stated in the reply Annexure-B, then, issuance of a show-cause notice before cancellation of the contract would become an empty formality. The very fact that the show-cause notice was issued by the respondents to the appellant before rescinding the contract and since the appellant has submitted his reply setting out the circumstances and factors offering his explanation to the allegation, it was the duty of the second respondent to apply his mind to the contents of the reply. No convincing reasons are forthcoming from the side of the respondents to reject the explanation offered by the appellant with regard to the allegation of violation of Clause 26(a) of the contract. If what is stated in Annexure-B reply is correct and the piece works were done by third parties under the agreements under the nose of the

officers and the Engineer of the respondent-NIGAM, it cannot be said that the appellant violated Clause 26(a) of the contract.

11. The appellant has produced substantive materials to show that the extent of the work in aggregate already done by it is about 90%; if it is value-wise it is about 85% and if it is distance-wise it is about 90%. The total work to be carried out is about 30 kms. Paragraphs 3 and 5 of the additional statement produced in paper book II and paragraph 6 of rejoinder produced at page 194 of paper book I and other material papers produced in the case would show that the work upto 27 kms. has been completed and possession of one more KM. land has been taken. Annexure-L which is the bill dated 5-11-2004 produced at page 50 shows the amount already paid for the work done and the amount of the pending bill for sum of Rs. 1,52,50,550/-. The total work is valued at about Rs. 890 lakhs. Subsequent to Annexure-B show-cause notice, the work done by the appellant is mentioned in the letters written to the respondents and those letters are produced at pages 57 and 60 in paper book II. The appellants have also produced number of letters secured from the landowners to show that the appellants have acquired the land for the project. In that view of the matter, merely because the second respondent has not approved the bill dated 5-11-2004, it cannot be said that the appellant has not carried out any work after the show-cause notice at Annexure-B as claimed by Sri M.R.C. Ravi.

12. Having regard to the totality of the circumstances of the case on hand, we are at a loss to understand why the respondents being an instrumentality of the State, did not think of the consequences of its impugned action and its impact on the public interest. It was highlighted by Sri M.R.C. Ravi that the respondent-Company was incorporated specifically for the completion of Upper Krishna Project and that in view of the Bachawat Award and as approved by the Central Government, the Government of Karnataka had to utilize its share of water in the Krishna River as planned by 2005 A.D. itself by completing all the works pertaining to the project. The moot question for us to consider is whether the respondents have served that purpose by rescinding the contract. Our considered answer to the question is that the impugned action has defeated the very objective to be achieved. It is relevant to notice how the stoppage of work did not help the people of the area is stated by the Executive Engineer himself in his letter dated 15-4-2004 which is produced at Annexure-R3 at page 105 of paper book II. In that letter, the Executive Engineer has also specifically stated that if the stoppage of the work is lifted the remaining work would be completed within a period of 2 to 3 months by the appellant. The respondent without appreciating the factors and circumstances set out in Annexure-B reply and without appreciating how the public interest suffered due to stoppage of work proceeded to rescind the contract. It is needless to state that re-tendering of the balance work will not only consume more time but more money also. It was submitted by Sri A.G. Holla that the appellant is prepared to complete the remaining work within 6 months provided the respondents co-operate and assist the appellant in obtaining further land required and by releasing the amount due to it towards

the works already done. In the circumstance, we do not think that allowing the respondents to call for fresh tenders for the remaining works and the execution of such works would be in the public interest, particularly, when the appellant has come forward to complete the remaining work within 6 months if the stoppage of the work is lifted.

13. In conclusion and for the foregoing reasons, with respect, we cannot sustain the order of the learned Single Judge. A case is made out for our interference. We allow the writ appeal and set aside the order of the learned Single Judge dated 15th April, 2005 and allow the Writ Petition No. 4325 of 2005 and quash Annexure-G, dated 10-11-2004 of the second respondent. Status quo ante to Annexure-G, dated 10-11-2004 stands restored. It is trusted that the respondents would grant reasonable time to the appellant to complete the incomplete work. It is also trusted that the respondents will deal with the pending bills submitted by the appellant with regard to the works already done by it without delay and with a sense of promptitude. In the facts and circumstances of the case, the parties are directed to bear their respective costs.