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(1988) 03 PAT CK 0049

In the Patna High Court

Case No : C.W.J.C. No. 3617 of 1987

Shyam Dutt Tiwari — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 28-03-1988

Acts Referred:
Constitution of India, 1950 — Article 226, 359
Evidence Act, 1872 — Section 115

Citation : (1988) PLJR 852

Hon'ble Judges : P.S. Mishra, J

Bench : Single Bench

Advocate : Sadanand Jha, Harish Chandra Mishra and Ashim Jha, for the Appellant; Ram Nandan Prasad and Hirday Prasad Singh, for the Respondent

Judgement

P.S. Mishra, J.—Petitioner herein was invited to execute a contract. Its execution was put in abeyance because in C.W.J.C. No. 4568 of 1983 some interim order was passed by this Court. Notwithstanding, however, the contract and its being put in abeyance he was served with a notice as contained in Annexure 6 dated 1.5.1986 by which his contract was cancelled. He has accordingly moved the Court questioning the validity of the said cancellation of the contract and asking appropriate direction to restore the contract. It appears that a Central Government sponsored scheme in the 6th 5 Year Plan was taken up for Urban Development in the town of Dumka. The State Government in its appropriate department issued Notification on 1.5.1980 appointing Dumka Town Improvement Authority to function in accordance with the provisions of the Bihar Town Planning and Improvement Trusts Act 1951. Deputy Commissioner, Santhal Paraganas was appointed its Chairman. In February-March, 1983 tenders were invited on behalf of the said authority for building a Bus Stand and a Market Complex etc. on a Government land. Petitioner responded to the said tender and notice and since he was the lowest tenderer and fulfilled all the requisite conditions, he was invited to enter into an agreement on 15.3.1983. Under the said agreement the petitioner was assigned the work of construction of the Bus

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Stand and the Market complex etc. in a time bound scheme and conditions, inter alia, that the respondent shall provide him materials and fulfil their part of the contract. When the execution of the said contract was taken up, a Club known as New Club; Dumka, took exception saying that the land upon which the Bus Stand and the Market complex etc. were to be constructed was under a lease with its Secretary. Its Secretary filed C.W.J.C. No. 4568 of 1983 before this Court raising several pleas including the plea that no Bus Stand and Market Complex could be constructed upon the said land until the lease was subsisting. This Court admitted the said application to hearing and pending notice passed an order to maintain status quo. After the said order to maintain status quo was passed the petitioner of the said writ application moved this Court by filing M.J.C. No. 122 of 1984 alleging that the respondents therein had violated the interim order of the Court. The Deputy Commissioner then on 13.2.1984 informed the Officer-in-charge of the integrated development scheme of the Town Improvement Authority Dumka that the construction work in the compound of New Club Dumka was to be deferred. It appears, almost simultaneously a certain Committee of the Dumka Town Development Authority held a meeting on 11.4.1986 and besides taking decision in respect of other matters resolved that the petitioner''s contract be rescinded. The Deputy Commissioner accordingly, informed the petitioner vide Memo No. 506 dated 3.5.1986 as contained in Annexure 6 that his contract dated 15.3.83 was rescinded.

2. The case of the petitioner as stated above has not been disputed by the respondents except that the petitioner''s contract was rescinded as he failed to perform his part of the contract and that the contract gave full authority to the Deputy Commissioner to terminate the contract.

3. There is no other long or short controversy except that according to the petitioner cancellation of the contract is without jurisdiction for the Deputy Commissioner has acted on the advise of a Committee of the Town Improvement Authority, Dumka which had no jurisdiction to do so and that no reasonable opportunity of hearing was afforded to the petitioner inasmuch as be was not made aware of the reasons of rescinding the contract any time before the communication as contained in Annexure 6 was served upon him, and that, according to the respondents, the termination of the petitioner''s contract is a cause which may legitimately be adjudicated in a civil suit, but, no writ shall lie to enforce a contract and even though made on the advise of the Committee of the Dumka Town Improvement Authority the order cancelling the contract was passed by the Dy. Commissioner who being the contracting party on behalf of the State was competent person to cancel the contract. Learned counsel for the respondents has also submitted that the contract in issue was/is not a statutory contract and this Court accordingly must refrain from exercising its jurisdiction.

4. Conduct of the State and its agents in their executive discretion has many times given rise to the cases where the courts have been required to decide whether to read in relation to such conduct principles of natural justice or not

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and insist that the State and its agents must conform to equitable doctrines or not. State activities through its agents many times give rise to the contracts with individuals who act under such contracts and complain of arbitrary acts of State and its agents. Courts then are required to judge whether to take notice of the arbitrariness and interfere or not. One view invariably stated and in more than one cases affirmed by the Supreme Court is that so long the State''s executive powers are to be judged they have to be tested on the touchstone of reasonableness, but once it is in the field of contract and it is the contract and not the executive power regulated by the Constitution which governs the relations of the parties, the court should refrain from issuing any writ. This view found a candid expression in the case of Radha Krishna Agrawal and Others Vs. State of Bihar and Others, . This Court took the view that no writ or order could issue under Article 226 in such cases to compel the authority to remedy a breach of contract pure and simple. The Supreme Court reiterated the law (Radhakrishna Agarwal and Others Vs. State of Bihar and Others,) in the following words:--

The limitations imposed by rules of natural justice can not operate upon powers which are governed by the terms of an agreement exclusively. The only question which normally arises in such cases is whether the action complained of is or is not in consonance with the terms of the agreement. As already pointed out by us even it by some stretch of imagination some case of unequal or discriminatory treatment by the officers of the State of persons governed by similar contracts is sought to be made out, a satisfactory adjudication upon the unusual facts of such a case would necessitate proper pleadings supported by acceptable evidence. In that case, the interim stay order or injunction could not be justified at all because so long as a Presidential order, under Article 359 of the Constitution is operative, the enforcement of fundamental rights falling under Article 14 is suspended. In such cases even if a petition or suit is entertained and kept pending no stay order could be passed because that would amount to indirectly enforcing the fundamental rights conferred by Article 14 of the Constitution. It is only where a prima facie case for an injunction or stay can be made out, quite apart from a right covered by Article 14 of the Constitution or by any other fundamental right whose enforcement may have been suspended that an injunction or stay could be granted at all on suitable terms.

Thus in Radhakrishna Agrawal the Supreme Court ruled out any application of natural justice in a case where the terms of an agreement governed the relationship of the parties till it took notice of the fact that any equal or discriminatory treatment could be thrown out of consideration but, for the suspension of the fundamental rights by a Presidential proclamation. Not much different to the law stated in Radhakrishna Agrawal is the statement of law by the Supreme Court in the case of The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, . The Court has ruled that a writ of mandamus can be granted only in a case where there is statutory duty imposed upon the officer concerned and there is a failure on the part of that

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officer to discharge the statutory obligation and that breach of contract thus does not fulfil the said requirement.

5. The law as stated above proceeded on the assumption that a court of law shall not enter into the contractual relationship of the parties even if one of them is a State unless it is shown that any fundamental right was violated or that something extremely arbitrary occurred between them which needed court''s attention. In all cases of breach of contract remedy is available under the Contract Act and any actionable claim could accordingly be taken to the Civil Court for adjudication. This statement of law has its basis on a principle that estoppel is a plea of defence only and that it applied to a fact situation before a contractual relationship came to exist but not after the contract governed the relationship. The turning point, however, is the judgment of the Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, which candidly stated that estoppel is not only a plea of defence but in a given case can also be a cause of action and also that promissory estoppel described variously as requisite estoppel, quasi estoppel or new estoppel was a law of equity that governed the relationship of the parties including the State at all stages--the pre or post contract and even in a given case against the implementation of law by the State if it stood contrary to a certain promise made by it and in which case the aggrieved party satisfied the requisites of estoppel. In this sphere of the law the court extended the meaning of estoppel in section 115 of the Evidence Act to such relationship which can be described as a legal relationship and pronounced that, "The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relationship or effect a legal relationship to arise in the future. knowing or intending that it would be acted upon by the other party to whom the promise in made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be irrespective of whether there is any pre-existing relationship between the parties or not."

It is indeed in this context that the Supreme Court stated that the doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term and that it is an equitable principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defence. That the State has to confirm to the requirements of law and in no case act arbitrarily is a rule duly recognised in the constitutional guarantee of equal protection of law and equality before law in Article 14 of the Constitution of India. The principle of equity or equitable doctrine binds every State action, makes such action justiciable and takes it within the bounds of law is so well recognised that a court of law shall fail in its duty if it shall not take notice of arbitrariness in the State''s action and make suitable orders to defeat the same. Any historical examination of this rule of law

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is not necessary for the reason that in M.P. Sugar Mill''s case an indepth study has been made into it and least executive action of the State does not destroy the basic postulates of its acting fairly and not on any extraneous or irrelevant considerations, this doctrine has to be applied.

6. Even after the judgment in M.P. Sugar Mill''s case some controversy remained whether the State would be subjected to the doctrine of promissory estoppel in its actions pursuant to a law or not. Although in M.P. Sugar Mill''s case the Supreme Court has, relying upon a judgment in Robertson v. Minister of Pensions (1949) KB 227 concluded that the State cannot escape by saying that estoppel does not bind it. In some subsequent judgments this proposition was disputed. Lately, however, the Supreme Court has confirmed by reiterating more than once that, "It is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens."

Although my attention has been drawn to a large number of decisions on the subject, in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., this doctrine of promissory estoppel has been re-emphasised and it is stated:--

The doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of further executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel and "the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation by it.

7. In the instant case no cause has been shown on behalf of the respondents, except one to which I shall presently advert, to inhibit the doctrine and raise equity in favour of the respondents. In Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, the Supreme Court has said that a jurisprudential concept of comparatively modern origin which has affected the law of contracts is the theory of distributive justice. According to this doctrine distributive fairness and justice in the possession of wealth and property can be achieved not only by taxation but also by regulatory control of private and contractual transactions; even though this might involve some sacrifice of individual liberty; developing it the Supreme Court has concluded:--

The principle deducible from the above discussion on this part of the case is in consonance with right and reason intended to secure social and economic justice and conforms to the mandate of great equality clause in Art. 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power,

but it has also said:--

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This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In to day''s complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power.

I have referred to this principle to reiterate that the normal rule of contract law will not be available to the State or its instrumentalities or agencies once it is demonstrated before the court that the parties adversely affected by their actions qua contract have been denied equal protection of law and equality before law.

8. The above being the thread that this Court may use to measure and if necessary to arrest the State action, one immediately shall find highly arbitrary and uncontrolled executive action vitally affecting the petitioner''s right to execute the contract and demand from the respondents performance of its terms. True, communication as contained in Annexure-6 is a determination or termination of a contract which is a cause which can be adjudicated in a civil suit yet in the absence of any appreciable reason for such determination or termination of the contract by the respondents the writ jurisdiction can also be invoked by the petitioner.

9. Despite repeated questions learned counsel for the respondents has not been able to show any authority of law empowering the Dumka Town Improvement Authority to advice the Deputy Commissioner, Santhal Paragana (respondent No. 3) to terminate the petitioner''s contract. The Deputy Commissioner has acted just as advised by the Dumka Town Improvement Authority. There was apparently no application of mind to the facts in issue by the Deputy Commissioner himself. Even the Dumka Town Improvement Authority had gone beyond the facts available on account of the order passed by this Court in C.W.J.C. No. 4568/83. The petitioner could not, in view of the order in the said case, proceed with the execution of the contract and the respondents accordingly could not do anything but wait until the order restraining the respondents of the said case was vacated. These facts clearly show that the Town Improvement Authority, Dumka, gave no consideration to the antecedent facts and the Deputy Commissioner abdicated his jurisdiction to the Town Improvement Authority, Dumka. Even though his order is nothing more than terminating or determining a contract, it being an executive act of an officer of the State, is vitiated for the reason that he acted arbitrarily and on extraneous considerations as advised by Town Improvement Authority, Dumka. For the reasons as above the order as contained in Annexure-6 is without jurisdiction. It is accordingly quashed. Respondents are directed to allow the petitioner to proceed with the execution of the contract and to fulfil their obligations under it until the contract is determined

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in accordance with law. There shall be, however, no order as to costs.

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