(1999) 08 RAJ CK 0032

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1424 of 1996

Tilak Raj APPELLANT

Vs

State of Rajasthan and Others RESPONDENT

Date of Decision : 03-08-1999

Acts Referred:

Constitution of India, 1950 — Article 299

Citation : AIR 2000 Raj 47 : (2000) 1 WLC 521

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Advocate : Prem Asopa and Dinesh Yadav, for the Appellant; K.S. Rathore, Addl A.G., for the Respondent

Final Decision : Allowed

Judgement

J.C. Verma, J.—It was decided to levy toll tax at the place 338 Kms. on National High Way No. 12 from Jaipur to Jabalpur on the road near Jhalrapatan city. Publications were made for Inviting tenders. Auction was held Out of 19 tenders received by the respondents, the petitioner was the highest bidder of Rs. 21 lacs for the period of one year w.e.f. 1-5-1995 to 30-4-1996. He deposited 10% amount of the bid money within 24 hours of the bid as required under Collection No. 3 of the auction. The receipt in regard to 10% amount is attached as Annexure 4. As per the conditions required, amenities were to be provided by the respondents. The petitioner is said to have sent "representations for providing electric and water connections, construction of payment of Bitumin and construction of room as well as window which was the pre-requisite for collecting the toll tax. The petitioner had applied vide Annexure 5 for electric connection etc. the Executive Engineer, PWD, NHW Sub Division, Jhalawar vide Annexure 6 dated 24-4-1995 had addressed a letter to the Assistant Engineer for providing the required connections etc. so that the recovery of toll process should be established. The petitioner was informed vide letter Annexure 8 on 28-4-1995 for deposit of further instalments of toll tax i.e. 17.5% as first instalment. The petitioner vide Annexure 9 on 29-4-1995 had Informed the authorities that neither the electric connection has been provided, nor any arrangement for water supply had been made and road was in most depilated condition, he requested the respondents for doing the needful so that the post of toll lax be established. However, vide Annexure 10 on 8-6-1995 the petitioner had deposited the instalment of Rs.3,67,500/- as per the conditions.

2. It Is the case of the petitioner that this toll post was to be established near the new bridge on the bye-pass near the town Jhalrapatan from the road Jhalawar leading to Indore and Bhopal. A bye-pass had been constructed on the said river on which there was a new bridge, however, the old road to Bhopal and Indore that the old bridge continued to be In existence. It is submitted that the matter was discussed with the Government officers to make arrangement to close the old road at least, so far as heavy vehicles are concerned, as otherwise no vehicle was likely to pass from the bye pass and through the new bridge for the ostensible reasons (1) that the road on the bye pass was in a very bad condition; (2) the distance was also longer than the old road; (3) there is a tendency of the traffic to pass through the old road to save amount of toll lax.

3. It is stated, even though denied in the written statement, that number of meetings had taken place and even at the time of auction this assurance was given by the respondents to close the old road and the old bridge. The petitioner also relies on a letter Annexure 11 dated 19-6-1995 written by the Executive Engineer, National High Way, Jhalawar Division to the District Collector, Jhalawar to the effect that the bye-pass has now been completed on National High Way and has been opened for the public, it was requested that the traffic on the old road be stopped and the old road be closed so that the toll tax be collected w.e.f. 20-6-1995. The letter Annexure 11 clarifies the fact that the new road or bye-pass upon which the toll tax was to be levied near the new bridge had not been completed till the letter was issued and secondly the old road was to be closed so that the traffic be diverted to the new road. The petitioner again represented vide Annexure 12 on 20-7-1995 stating that the toll tax has not been started as yet and requests made as earlier were repeated. Request was again repeated vide Annexure 13 and again by Annexure 14. It was stated by Annexure 14 that the bye-pass has not been completed as yet. A request was made that the road be completed and charge be given to the petitioner or in case the authorities are unable to fulfil its commitments, the petitioner had prayed that his money be refunded back. The letters of the petitioner were replied by the Executive Engineer on 14-8-1995 vide Annexure 15. Demand was made from the petitioner to deposit the balance of amount, otherwise, the petitioner was told that the contract would be rescinded and any loss to the Government shall be recovered. However, the Executive Engineer had totally failed to elucidate or even reply the demand made by the petitioner in regard to providing of the facilities, amenities, completion of road and closing of old road. The Executive Engineer was again told vide letter dated 22-8-1995 vide Annexure 16 that the road at the bridge is not complete and is not in position even to carry the traffic. It was stated that

even the old bridge has not been closed at the place Chandrabhaga. A request was made to complete the formalities so that the toll tax process be started. Once again the office of the Superintendent Engineer, PWD Circle 11 Kota vide its letter dated 24-8-1995 (Annexure 18) asked the petitioner to deposit the instalments without replying any of the request made by the petitioner or even mentioning of the same. The petitioner again made representations, copies of which are attached as Annexures 19 and 21 and the notices were also issued vide Annexures 22 and 23. The Executive Engineer vide Annexure 24 sent reply to the notices issued by the petitioner but once again none of the authorities had mentioned or answered the grievance being made by the petitioner. The petitioner was called for discussion in the office of the Chief Engineer on 15-1-1996 vide Annexure 25 and it was for the first time that the petitioner was told vide letter Annexure 28 dated 31-1 -997 that there was no decision to close the old road and thus the request of the petitioner to close the old road was rejected and on the same date vide Annexure 29 the petitioner was directed to deposit the amount of Rs. 13,44,050/- including the interest of Rs.85,050/- and vide another order Annexure 30 he was issued a notice to the effect that the petitioner was liable to pay the amount till the new auction is held. Being aggrieved the petitioner has challenged the action of the respondents in ordering the recovery with the prayer for quashing the order Annexure 29 and/or the refund of the instalments made by the petitioner towards security and instalments along with interest. The petitioner had already deposited Rs. 5,77,500/-.

4. The petitioner challenges the impugned orders on the ground that there was no agreement entered into between the parties as required under Article 229 of the Constitution of India and also on the ground that it was the foremost duty of the respondents to have provided all infrastructures i.e. complete road, building, security checks, electric and water connections etc. to the contractor for the purpose of collection of levy. It is further contended that the respondents had not taken any steps to close the other alternative old road and in such circumstances, even though, the bid, had been accepted and money deposited, but until and unless the facilities and the conditions required to be completed were fulfilled by the respondents, it was impossible to collect any toll tax. It is submitted that the action of the respondents in not looking to or even replying to the repeated requests made by the petitioner to make available all those facilities which were mandatory in nature was totally arbitrary and the respondents without complying any of their own commitments were only bent upon collecting the money of bid which were highly unwarranted and unjustified.

5. In my opinion, the contentions of the petitioner have force and the writ petition must succeed.

6. Article 299 of the Constitution provides that all the contracts made in the exercise of executive powers of the state shall be expressed to be made by President, or by the Governor of the State and all such contracts and all

assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise. However, the Governor shall not be personally liable in respect of any such contract or assurance made or executed for the purpose of this constitution.

7. Article 299 is reproduced as under :

"299. Contracts :-- (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be made by the President, or by the Governor of the State, as the case may, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise."

8. It is not denied that as a matter of fact no agreement had been entered into between the parties. Nothing has been produced on record by the respondents. There is a specific allegation to the effect that no agreement was entered into nor signed by the parties and, therefore, even there is any breach though not admitted, it cannot be enforced.

9. In the written statement the respondent has stated that there Is no violation of the provisions of Article 299 of the Constitution of India by the respondents and rather it is stated that it was the petitioner who had violated the terms and conditions of the contract. The respondent has not produced any such contract or agreement, rather it is admitted at the time of arguments that even though there is pro forma available with the department for signing the contracts as per requirement u/s 2 of the Indian Toll Tax Act, 1951 and also u/s 2 of the Indian Toll Tax Act, 1932, the format which has been shown to the Court, is some draft agreement or pro forma between the Executive Engineer of the PWD and the contractor. However, even the respondent has not produced any agreement having been signed by any of the parties before the Court even though the counsel for the respondent was asked to produce the record. If the allegations have been levelled which have not been denied and the record having not been produced, the presumption must go against the respondent.

10. In a case reported in The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, It was held by the Hon''ble Supreme Court that the provisions of Article 299 of the Constitution of India are mandatory in character and require that a contract made in the exercise of the executive power of the Union or State must satisfy, inter alia, three conditions;

(i) It must be expressed to be made by the President or by the Governor of the State, as the case may be;

(ii) it must be executed on behalf of the President or the Governor;

(iii) its execution must be by such person and in such manner as the President or Governor may direct or authorise.

11. Failure to comply with these three conditions nullifies the contract and renders It void and unenforceable.

12. It was further held that the doctrine of promissory estoppel cannot be prepared into service as it was settled law that there cannot be any estoppel against the Govern-mentand sovereign legislative and executive functions. It was held as under :

"Re : Contention No. 1:-- It is now well settled that the provisions of Article 299 of the Constitution which are mandatory in character require that a contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz. (i) it must be expressed to be made by the President or by the Governor of the State, as the case may be; (ii) it must be executed on behalf of the President or the Governor, as the case may be and (iii) its execution must be by such person and in such manner as the President or Governor may direct or authorise. Failure to comply with these conditions nullifies the contract and renders it void and unenforceable."

13. In view of the above discussion, it can safely be held that there was no complete contract entered into between the parties and, therefore, there was no contract which could be enforced.

14. Can it be said that by agreeing to the terms and depositing part of the amount, the petitioner by his conduct had as a matter of fact submitted to the so-called agreement and if so whether the petitioner is bound to pay the amount so demanded. It Is true that there is no enforceable agreement between the parties and, therefore, any demand made on non-existent agreement for payment of the balance amount cannot be sustained.

15. In the format of agreement, it is provided that a toll house and its attachment is constructed to intercept the traffic and to facilitate collection of the toll. The Contractor shall maintain it in good condition, the building and other structures, attachment, barriers and other materials handed over to the contractor for the working of the toll house. The Executive Engineer had been held responsible for maintenance of such a toll house. It was further provided that the Contractor will have to hand over the building and other structures/all constructions material In good condition to the Executive Engineer and In the event of damage to the building or structure or materials thereof or of any loss of materials, the contractor shall report promptly the facts to the concerning Executive Engineering and shall also make good such loss. The relevant portion of the format of terms and conditions in this regard reads as under ;--

"A toll house and its attachment is constructed to intercept the traffic and to facilitate collection of the toll. The contractor shall maintain in good condition, the building and other structure attachment, barriers for other materials handed over to the contractor for the working of toll house. The opinion of the Executive Engineer for maintenance of the toll house etc. shall be final and binding on the contractor and the contractor shall remove such defects immediately as pointed out by the Executive Engineer failing which the Executive Engineer shall be competent to remove the same and cost Incurred in doing so shall be recovered from the contractor on the expiry of the agreement period. The contractor shall hand over the building and other structures/all construction material In good condition to the Executive Engineer. In the event of damage to the building or structure or materials thereof or of any loss of materials, the contractors shall report promptly the facts to the concerning Executive Engineer and to the Officer-in-Charge of the nearest Police Station. The contractor shall also make good such loss or damage but shall not be responsible for damages caused by natural calamities, provided that contractor have taken all reasonable precautions to prevent such loss or damages and, to same damaged material during the calamity and within a reasonable time thereafter. The amount payable for such loss or damages shall be determined by the concerning Executive Engineer."

16. The above format itself reads that there are certain duties east on the Executive Engineer of the area to provide the infrastructure for facilitating the collection of toll tax. It is clear from the record that the petitioner had been praying time and again for supply of (i) water connection which was an essential part and could only be provided by the respondent for the proper functioning, maintenance and as the amenity to the staff; (ii) electric connection without which It was not possible to work for all the twenty four hours; (iii) a good road, toll tax house on the road as-per specification by the Executive Engineer and also to make all other arrangements to see that the toll tax is not evaded. Toll tax is collected at a fixed place on the road and if there is an alternative road also In existence, which is invariably so where the bye-pass is constructed, as in the present case, the State was duty bound to see that the traffic passes through bye-pass, for that purpose effective steps are mandatory to be taken in this regard. There seems to be truth in the submission of the counsel for the petitioner that It was the paramount duty on the part of the respondents to have provided all those amenities which were essential for maintaining the booths. Most interestingly nothing has been placed on record to show that the respondent was not liable to provide any such amenities which were demanded. Not a single letter written by the petitioner for providing such amenities were replied to. The only reply the petitioner received was for a payment of instalments. If under the Toll Tax Act the respondent decides to levy the toll tax at a particular place, the respondent is duty bound to see that all facilities which could only be given by the State and which are under the control of the State for the purpose of supply and the maintenance are created in advance along with the toll booths and then and only then the respondent can have a claim to see that the recovery is to be made of the balance instalments or it can say that the contractor has defaulted.

17. The Government cannot act arbitrarily, if the State enters into a contract with

any one, it must act fairly without discrimination and without unfair procedure. The activities of the Government have a public element and there should be fairness and equality. This proposition holds good in all the cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government Is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but Its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. It was so observed in the case Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,

18. In Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, the Supreme Court observed as under:--

The scope of judicial review permissible In the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Article 14 is attracted, is sufficient to invalidate the impugned circular as Indicated later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances ofthat ticklish question do not arise for consideration in the present case.

The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterise all its actions, In whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There Is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged In similar activities, being primarily for personal gain. which may or may not promote public interest, viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of public office, irrespective of the label classifying that act, for public good. With the diversification of State activity in a Welfare State requiring the State to discharge Its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14."

19. In view of the above discussion, the action of the respondents cannot be held to be legal and in accordance with the law. The writ petition is allowed and the impugned order dated 31-1-1996 is quashed. The petitioner shall be entitled to the refund of its amount if paid within three months of the date of receipt of a certified copy of this order, otherwise the refund shall carry Interest@ 12%p.a. from the date of receipt till the date of payment. No costs.