(1977) 11 KL CK 0007

In the High Court Of Kerala

Case No : O.P. No. 3008 of 1977-G

Yusuff APPELLANT

Vs

Food Corporation of India RESPONDENT

Date of Decision : 01-11-1977

Acts Referred:
Constitution of India, 1950 — Article 14, 21, 226, 298

Citation : (1977) 11 KL CK 0007

Hon'ble Judges : Subramonian Poti, J

Bench : Single Bench

Advocate : K. Chandrasekharan, Vijayan and N.N. Sugunapalan, for the Appellant; C. Sankaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

Subramonian Poti, J.—Quite often parties complaining of civil injury resort to this Court, invoking the jurisdiction under Article 226 to obtain redress of their grievance, in preference to a civil court where the same question may be agitated by way of a civil action. It would appear that parties assume that resort to civil court, is to be the last resort. Apart from the payment of heavy court fee the time that a litigation normally takes tempts a party to approach this Court by way of a petition under Article 226 even in a case where the appropriate course would be to move the civil court by way of suit. Determination of obligations arising out of contract quite often call for decisions on questions of fact and for that reason the courts have been holding that appropriate remedy of the party aggrieved would be to litigate the matter in a civil court in a civil suit where there can be a full-fledged inquiry. But assuming that in a case no such determination of question of fact is called for in a case would it be proper for a party complaining of a breach of contract to come to this Court for redress seeking the exercise of extraordinary jurisdiction of the court. That is the question which arises in this case, a question which perhaps requires to be investigated.

2. The Respondents in this case are the Food Corporation of India represented by

its Regional Manager at Trivandrum and District Manager at Muzhappilangad in the Cannanore District. The Petitioner is a contractor engaged in the work of transporting foodgrains from the Edakkad Railway Station to the Food Corporation Godown at Muzhappilangad and alto from Cannanore Railway Station to the Food Corporation Godown at Cannanore. The terms of the contract are said to be embodied in the under form. The term in Clause 19 in the tender form provides for reference of any dispute between the parties to an arbitrator.

3. The dispute between the parties has arisen by reason of the fact that the District Manager at Cannanore the 3rd Respondent, appears to have recovered amounts from the bills submitted by the Petitioner for work done from time to time as demurrage charges said to be due to the Food Corporation. According to the Petitioner an amount of Rs. 1,43,375. 63 was withheld and so recovered purporting to not under the terms of contract. The Petitioner''s case is that no such demurrage charges are due from him and the tender conditions do not entitle such withholding of amounts as demurrage charges. It is his case that the demurrage charges have been fixed arbitrarily and illegally. The Petitioner would also contend that the cause for incurring demurrage charges was really because the Food Corporation was not affording adequate facilities to the Petitioner to clear the goods from the Railway Station. It is averred that the Petitioner requested the Regional Manager, the 2nd Respondent, to refer the dispute to arbitrator by Ext. P-2 petition and it was followed by a similar petition Ext. P-3 but these did not have any response. Further petitions similarly filed also appear to have had no effect. The Petitioner''s complaint is that the 3rd Respondent has recovered and is continuing to recover amounts from the bills of the Petitioner without giving notice to the Petitioner, without hearing him and yet claiming that such amount is due. In these circumstances the Petitioner averrs that he has no other remedy except to seek a writ of mandamus or other order restraining the Respondents from recovering any amount from him as demurrage charges and also to direct the 2nd Respondent to refer the dispute to an arbitrator.

4. The claim of the Petitioner is disputed in the counter-affidavit filed on behalf of the Respondents. In answer to the plea that the matter has not been referred to arbitrator it is contended that the Regional Manager''s decision on this question is final under the terms of clause XII of the contract. The recovery of demurrage charges is admitted but it is contended that by virtue of the provisions of the contract the third Respondent was competent to make such recoveries. It is also said that recoveries were with notice to the Petitioner. It is also submitted that a writ of mandamus in this Court would not lie and this Court''s power under Article 226 ought not to be invoked when the dispute is as to the amounts due.

5. It is on these averments of the respective parties that the question has come up for decision before me. In short, the case of the Petitioner is that the obligations under the contract are not properly performed by the Respondents in that amounts due to the Petitioner towards the contract have not been paid and recovery is being effected as if amounts are due as demurrage charges under the

terms of the contract. It is the Petitioner''s case that under the terms of the contract the Petitioner will not be liable for payment of any such demurrage charges.

6. Article 298 of the Constitution of India confers power on the executive of the Union and each State to carry on any trade or business and to acquire, hold and dispose of property and make contracts for any purpose. This power conferred upon the Union or on any State is subject to the provisions of Part III of the Constitution as any exercise of the executive power of the State is. Therefore in any matter relating to exercise of power under Article 298 there can be a plea of infringement of or violation of the fundamental rights and it is open to a citizen of India to come to this Court under Article 226 of the Constitution complaining of such violation or infringement. It cannot be contended that exercise of executive power under Article 298 is not amenable to the limitations set forth in Part III of the Constitution of India and therefore any act done in the exercise of such power can be examined by this Court with a view to see whether there is any infringement of the fundamental rights. The consequence is that even when the Union is exercising its power in relation to the activities of trade or business it is bound to observe constitutional proprieties and to see that it does not conduct itself in a manner violating the fundamental rights of citizens. It is for this reason that the State cannot keep out any of its citizens from the right to deal with the State even when it is entering into contract or is carrying on trade or business. Thus if a State invites tenders for supply of goods or tenders for construction or such other matters it cannot keep out any citizen without lawful excuse on the ground that the State is free to contract with a person of its choice. But when once it has entered into a contract just as any other contracting party the State is bound only by the terms of the contract. In other words thereafter the rights of the parties are governed by the terms of the contract. Supposing a State enters into contract independently with two contractors in regard to construction of buildings and the contracts embody terms for imposition of penalties for default it cannot be said that since as against one contractor it has not exercised the right to impose penalty in the case of the other contractors also no penalty ought to be imposed. There is no scope for a plea of discrimination. If there is a plea of the violation of the obligation of the parties under the contract that has to be considered in the light of the terms of the contract and that only. The only exception to this rule is where besides obligations arising and the terms of the contract other obligations are superimposed on the State as a contracting party by reason of statutory provisions. In such circumstances even when the Government enters into contract regulations by a statute are superimposed in the case of the Abkari Act. But where the State does not exercise any statutory power but is merely a contracting party if there be any dispute as to the breach of the contract or about the rights of the parties arising by reason of the breach the determination is purely in the realms of contract and the remedy must be in a civil court. In fact there may be other situations which could be envisaged but it may not be

necessary for the purpose of this case and therefore I am not considering it. I am only mentioning this to state that if the case be one where the obligations of the parties arise under a contract and contract only any party complaining of a breach or any party challenging the conduct of the other in regard to its obligation must seek its redress before a civil court for it would then be purely and simply a question for determination of civil rights arising out of the contract. The exercise of the right of this Court is called for when there is a further plea of violation of fundamental rights. There is no scope for such a plea in this case.

7. What I have stated here is the essence, as I understand it of the decision of the Supreme Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, . The learned Counsel Sri Chandrasekharan relied on the decision of the Supreme Court in D.F.O. South Kheri v. Ram Sanchi AIR 1973 S.C. 105. The above decision has been noticed and has been explained. That decision follows the decision of the Supreme Court in K.N. Guruswamy Vs. The State of Mysore and Others, . In that case the contracting party had, besides the obligation to abide by the terms of the contract, to function in the exercise of the statutory power too. That, the Supreme Court said, makes all the difference. Reference may be made to paragraph 18 of the judgment where their Lordships said:

Learned Counsel for the Appellants cited certain authorities in an attempt to support his submission that the State and its officers are clothed with special constitutional obligations, including those under Article 14 of the Constitution, in all their dialings with the public even when a contract is there to regulate such dealings. The authorities cited were The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh, where all that was decided, relying upon K.N. Guruswamy Vs. The State of Mysore and Others, was that, where the source of a right was contractual but the action come plained of was the purported exercise of a statutory power, relief could be claimed under Article 226; and The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, where the real question considered was whether the Petitioner had a locus standi to question the validity of an enactment: Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, at pp. 161-162 which has nothing to do with any breach of contract but only lays down that "Article 14 protects us from both legislative and administrative tyranny of discrimination": State of Madhya Pradesh and Another Vs. Thakur Bharat Singh, which lays that even executive action must not be exercised arbitrarily but must have the authority of law to support it; Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others, which repeats requirements of action which satisfy Articles 14 and 21 of the Constitution where compliance with these provisions is obligatory.

8. In the case before me the complaint is about recovery of demurrage charges and that is a matter on which there is dispute. The case of the Petitioner is that such a case for demurrage charges cannot be determined unilaterally by the third Respondent without hearing the Petitioner in any manner. There is no

exercise of statutory power by the third Respondent in the matter. The learned Counsel for the Petitioner argues that the Food Corporation of India has been constituted under an Act and therefore the third Respondent, an officer of the Food Corporation is a statutory authority and for that reason the court is empowered to examine the case. The Food Corporation is no doubt a statutory Corporation but all its officers are not statutory authorities. A statutory authority is an authority constituted by a statute with certain powers of adjudication and if any such exercise of power results in grievance to a party it can very well be said that he is aggrieved by the statutory act of the authority. Apart from the fact that the third Respondent is not a statutory authority there is no question of statutory exercise of power by the third Respondent under challenge. In these circumstances I am afraid this Court is not in a position to give any relief to the Petitioner, assuming that he has good cause for grievance.

9. The second prayer concerns the plea regarding the reference of the dispute to the arbitrator. The Arbitration Act is a self-contained enactment and it deals with situations where if one of the parties to an arbitration agreement is unwilling to refer the dispute to arbitration, how reference can be compelled. This court is not to exercise power to compel reference to an arbitrator. In these circumstances I am not able to grant any relief to the Petitioner. The Original Petition is dismissed. In the circumstances I direct the parties to suffer costs.