

SUPREME COURT OF INDIA

Abdul Rahiman Khan

Vs.

Sadasiva Tripathi

C.A.No.1723 of 1967

(J. C. Shah and V. Bhargava, JJ.)

15.07.1968

JUDGEMENT

SHAH, J.:-

1. At the last general elections, the respondent was declared elected to the Legislative Assembly of Orissa from the Nowrangpur General Constituency. The appellant filed an election petition before the High Court of Orissa for an order setting aside the election of the respondent, on the ground that the appellant's nomination paper was improperly rejected and he was illegally deprived of his right to contest the election. The High Court rejected the petition. The appellant has appealed to this Court under S. 116-A of the Representation of the People Act, 1951.

2. It is common ground that the appellant was carrying on the business of a building contractor and that in pursuance of a notification issued by the Government of Orissa he had submitted tenders for construction of buildings of the Rental Housing Scheme at the rates specified therein. Those tenders were accepted and the appellant had carried out a part of the construction work but had thereafter stopped the work because he suffered serious injuries which necessitated his detention in a public

hospital. The appellant claimed that at his request the contract was cancelled, and on that account at the date of the filing of his nomination there was, between him and the State of Orissa no subsisting contract for execution of works undertaken by him, and that in any event there was in law no contract between him and the State relating to the execution of works which disqualified him from standing at the election as a candidate for a seat in the State Legislative Assembly.

3. In January 1965 tenders were invited by the Government of Orissa for construction of buildings under the Rental Housing Scheme. The tenders submitted by the appellant were accepted and on March 30, 1965, the appellant and the Executive Engineer signed an agreement in Form K-2. The principal recitals in the agreements were:

"I do hereby tender to execute the undermentioned description of work by piece work, and in accordance with the conditions noted before in consideration of payment being made for the quantity of work execute at rate specified in the following scheme."

A schedule of items was appended thereto which was followed by the recital:

"Conditions as per F-2 contract which will be finalised."

4. The Executive Engineer then made an endorsement on the tenders. "Accepted by me for item 5 only," and submitted them to the Superintending Engineer for approval of "excess items. Apparently sanction was given by the Superintending Engineer but no formal contracts in Form F-2 were executed. Advance payments were however made to the appellant after execution of the agreements in Form K-2 and the appellant proceeded with the work of construction. On October 13, 1965, the appellant suffered serious injuries which necessitated his admission to a public Hospital and the construction work was stopped. On January 6, 1966, the Sub-Divisional Officer, P. W. D., Nowrangpur, addressed a letter to the appellant calling upon him to resume work on or about the January 12, 1960, failing which, he was informed, his contract will be terminated and "measurements will be recorded". On February 10, 1966, the appellant addressed a letter to the Executive Engineer P. W. D. stating that it was not possible for him to resume the work and to complete it, and he requested that the contract be cancelled without imposition of penalty. On the letter of the appellant there are two endorsements at the foot of the letter which have been marked Ext. 2 (a) and Ext. 2 (b). Exhibit 2 (a) reads:

"Submitted to the Executive Engineer, Koraput Division. The reason for terminating the contract, as mentioned by Shri A. R. Khan, contractor, is correct. His contract may be terminated without imposing penalty and permission given to take up work through job work soon." Exhibit 2 (b) dated March 18, 1966, bears the initials of the Executive Engineer, and states:

"I know of the unfortunate accident. As the applicant is still in the Vizag Hospital his work may be finally measured and closed without penalty. The balance of the work may be completed through job work."

5. The Sub-Divisional Officer, Nowrangpur, wrote a letter on March 16, 1955, requesting one Harihar Bisoi pursuant to his application dated March 5, 1966, to take up the Rental Housing Schedule building work at Nowrangpur "immediately at current schedule of rates after taking detailed instructions from the Sectional Officer, Nowrangpur. It appears that Harihar Bisoi did some construction work, but no payment was made to him and he also stopped the work.

6. The appellant strongly relies upon the endorsements made on the letter dated February 10, 1966, the letter Ext. 3, and the evidence of Ram Mohan Patnaik- the Executive Engineer. Ram Mohan Patnaik stated that he by his endorsement Ext. 2 (b) on the application dated February 10, 1966, had clearly directed that the work of the contractor (appellant) would be finally measured and his contract would be treated as closed and no penalty would be charged from him that the question of accounting had nothing to do with the closing of the contract; and that on March 18, 1966, he had pasted an order Ext. 2 (b) that the contract was closed. According to the witness closure of the contract was not contingent upon the measurement of the work done by the appellant, and that by his order dated March 18, 1966 Ext. 2 (b) the appellant was excused from liability to complete the work as the contract was rescinded and by implication Ext. 2 (b) meant that the Sub-Divisional Officer would give intimation to the contractor about the cancellation of his contract. The witness could not say whether the Sub-Divisional Officer did give intimation to the contractor. He asserted that it was not his intention that job work should be entrusted to job workers only after the final bill of the appellant was submitted; his clear intention was that after measurement was taken, the work may be entrusted to job workers. According to the witness by Ext. 2 (b) he accepted the incomplete work of the appellant "as a complete satisfaction of his contract."

7. This evidence prima facie supports the case of the appellant that it was the intention of the Executive Engineer to terminate the contract. But there is a mass of evidence on the record which shows that no steps were taken to intimate to the appellant about the determination of the contracts and both the parties treated the contract as subsisting. To that evidence we may advert. On April 15, 1966, the appellant wrote a letter in reply to a letter dated April 13, 1966 from the Sub-Divisional Officer that he "had completed upto slab level the construction of Rental Housing Scheme" and that thereafter he was lying injured in a hospital and that as he had no authorised agents to look after further work, early action may be taken to make final measurement upto slab level and for payment of the amount due to him. On December 20, 1966, the appellant wrote a letter to the Superintending Engineer stating that he had recovered and was in a position to leave the Hospital and to attend to his normal avocation and that he had learnt that the Department wanted to cancel his contract and call for new tenders and had taken some action towards that end. He requested the Superintending Engineer to desist from such a course and to favourably consider his request for extension of time to complete the work. He stated that he had advanced large sums of money to the labourers and for the

supply of materials, and there were large quantities of building materials belonging to him which had been lying at the site of the work and if his contracts "were to be cancelled he would sustain irreparable loss"; that he had always been a very efficient and good contractor and was executing the works in time and diligently and well; and that he could not complete the work due to the unfortunate accident. He then stated:

"I, therefore, request you to kindly grant me time upto end of March 1967 and I shall resume the work by about 15th January 1967 and will finish it by 31st March, 1967.

* * * * *

The cancellation of my contract at this stage when nearly 75% of the work was already done by me and the roofing alone remains to be completed and the stoppage of the work was due to circumstances over which I had no control due to more or less vis major will be most inequitable if not unjust. I, therefore, earnestly appeal to you to sympathetically consider this representation of mine and grant me time till end of March 1967 an order withdrawal or cancellation of the fresh tenders that might have been called for by the Executive Engineer Koraput."

At the foot of the letter there is a notation that tenders had been called for the balance of the work "as per instructions of the Executive Engineer Koraput, and that the contract may be rescinded as instructed by the Executive Engineer, Koraput." There is another notation: "It is an old case wherein Executive Engineer has already ordered to close the contract and do by job (illegible) order its without penalty (illegible)." There is one more notation dated January 4, 1967 - "Submitted for favour of orders. What penalty is to be imposed in rescinding the contract." Exhibit 13 is a letter dated January 22, 1967, from the Assistant Engineer P. W. D. Nowrangpur to the Returning Officer which sets out the circumstances in which the work entrusted to the appellant was stopped. The letter states that "the balance work which was suggested to take up on job-work basis would not affect the accounts of Sri A. R. Khan for his work portion. The final bills for his above two works of the aforesaid contractor have been submitted to Division Office, vide this office letter Nos. 120 and 121 dated 18-1-67 and I have been intimated vide Divisional Letter No. 902 dated 20-1-67 that the said contractor has to return 435 bags of cement and 7.954 quintals of rods to the undersigned to finalise his accounts. But no material has been returned by the contractor yet and as such it ensures that his accounts have not yet been finalised." Exhibit 14 is a letter dated January 22, 1967 addressed to the appellant which also indicates that the P. W. D. authorities had not treated the contract as cancelled and had not intimated to him the order made by the Executive Engineer.

8. In February 1966 the appellant requested cancellation of the contract. The Executive Engineer was willing to accept the offer of cancellation and made an endorsement in that behalf, but nothing was done thereafter. Harihar Bisoi was apparently asked to take up the work "at the current schedule of rates", but even thereafter the contract with the appellant was not treated as cancelled.

9. It is true that by virtue of the Explanation to S. 9-A of the Representation of the People Act, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact, that the Government has not performed its part of the contract either wholly or in part. In the present case the contract was not wholly performed by the appellant, and unless he had completed the contract or showed that there was determination by mutual assent of the contract, the appellant cannot claim that there was no subsisting contract at the date of the filing of the nomination paper. By letter written by the appellant on July 22, 1966, Ext. C, the appellant made a request for extension of time by six months to enable him to complete the work and by his letter Ext. D dated December 20, 1966 he requested the Superintending Engineer not to cancel the contract or call for new tenders. This conduct of the appellant clearly suggests that he did not treat the contract as cancelled, nor is there any clear evidence to show that the authorities had treated the contract as cancelled. The High Court was, therefore, right in holding that the case did not fall within the explanation to S. 9-A of the Representation of the People Act and there was no evidence of determination of the contract by mutual agreement.

10. Counsel for the appellant contended that the contract for execution of works was between the State and the appellant and Art. 299 of the Constitution applied thereto, and since the contract was not shown to be executed in the name of the Governor, and by an authority competent to execute the contract on behalf of the Governor, the disqualification under S. 9-A did not apply. By Cl. (1) of Article 299 all contracts made in the exercise of the executive power of the State must be expressed to be made by the Governor of the State, and all such contracts made in the exercise of that power must be executed on behalf of the Governor by such persons and in such manner as he may direct or authorise. It is true that agreements were executed by the Executive Engineer in Form K-2 but no final contracts were executed in Form F-2. The appellant proceeded on the footing that there was a binding contract under which he had undertaken the work of construction for the State, and the State allowed work and had offered to pay him for the work done at the rates set out in Form K-2. The appellant could not by virtue of Art. 299 sue in a civil court on the agreement in Form K-2 for compensation for breach of contract. But we are unable to hold that the appellant was not disqualified under S. 9-A of the Representation of the People Act merely because the contracts were not enforceable against the State because of Art. 299 (1) of the Constitution. In *Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram*, 1954 SCR 817 = (AIR 1954 SC 236) Bose J., in dealing with a case of disqualification under the Representation of the People Act 1951, resulting from a contract with the State which is not executed in the form and manner prescribed by Art. 299, observed:

"It, may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government. * * * * * We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of Article 299 (1)."

Undoubtedly for breach of the terms of a contract not executed in the manner prescribed by Article 299 (1) a suit for relief in a civil court will not lie, but on that account it cannot be said that a contract for execution of works undertaken by a person though not executed in manner prescribed by Article 299, but which is treated by both the parties thereto as binding will not operate as a disqualification. In a recent judgment of this Court in Laliteshwar Prasad Sahi v. Bateshwar Prasad, (1966) 2 SCR 63 = (AIR 1966 SC 580), this Court held that where an agreement for execution of work had been entered into between the State Government and a private person by correspondence and the State Government has ratified the agreement and has treated the relation between the parties as contractual and has accepted liability arising under the terms of the agreement as if it were a pending contract, a disqualification under the relevant provisions of the Representation of the People Act results.

11. As already pointed out, the appellant had commenced execution of the work but had not completed it. Payment for the work done was not made to the appellant. The contract was not determined by mutual agreement nor was it abandoned.

12. The contract resulting from the acceptance of his tender though not enforceable by suit against the State Government, because it did not comply with Article 299, must still be regarded as disqualifying the appellant under the Representation of the People Act from standing as a candidate for election to the State Legislature.

13. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.