S. Munishamappa

Vs

B. Venkatarayappa and Others

B. Venkatarayappa

Vs

T.A. Kempagowda

Civil Appeals Nos. 2257 (NCE) and 2651 of 1979

(Syed M. Fazal Ali, A. Varadarajan, A.N. Sen JJ)

30.03.1981

JUDGMENT

A.N. SEN, J. –

1. This judgment will dispose of both the appeals which arise out of the judgment and order passed by the High Court of Karnataka on August 7, 1979 in an election petition filed by B. Venkatarayappa who was a candidate for election to the Karnataka State Legislative Assembly from Sidlaghatta Assembly Constituency in the General Elections held in 1978 and was defeated at the said election by S. Munishamappa, respondent 5 in the said petition who was declared elected. T.A. Kempegowda respondent 2, Narayanappa respondent 3 and G.Papanna respondent 4 in the election petition were the other candidates who had also contested the said election and had been defeated. In the said election petition filed by Venkatarayappa under Section 81 of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act'), the petitioner had prayed for a declaration that the election of Munishamappa was void under Section 9-A of the Act and also for a declaration under Section 100 of the Act that the petitioner had been duly elected to the Assembly from the said Constituency.

2. For reasons recorded in the judgment, the learned Judge set aside the election of Munishamappa, holding that Munishamappa had a subsisting contract with the State Government at the date of filing his nomination paper and was, therefore, disqualified under Section 9-A of the Act from contesting the said election, but the learned Judge refused to declare the petitioner Venkatarayappa duly elected to the Assembly. Munishamappa has preferred an appeal against the order of the learned Judge setting aside his election. Venkatarayappa has also preferred an appeal against the order of the learned Judge, refusing to declare him elected.

3. We propose to deal in the first instance with the appeal preferred by Munishamappa who was elected at the election and whose election has been set aside.

4. The ground on which the election of Munishamappa was challenged in the election petition was that at the date of filing the nomination paper for contesting the election, Munishamappa had a contract subsisting with the State Government and by reason thereof, he was disqualified from

contesting the said election in view of the provisions contained in Section 9-A of the Act. As we have earlier noticed, the learned Judge for reasons recorded in his judgment came to the conclusion that there was such a subsisting contract at the date of filing of the nomination paper by Munishamappa and as such he was disqualified from contesting the election and his election could not be upheld and had to be set aside.

5. The only question that falls for determination, therefore, is whether at the date of filing the nomination paper for contesting the election, Munishamappa had a contract subsisting with the State Government within the meaning of Section 9-A of the Act so as to disqualify him from contesting the election.

6. We shall now briefly indicate the facts material for the purpose of this appeal.

7. On September 10, 1975 tenders were invited by the Public Works Department of the Government of Karnataka for execution of certain works which were described as "Improvements to Dibburhalli Talakayala Batta Road". The appellant Munishamappa who was a licensed contractor of the government submitted his tender and his tender was accepted. On March 25, 1976, an agreement was entered into by and between the Government of Karnataka and the appellant for the said work. A copy of the said agreement is on the record and the material provisions of the relevant clauses of the said agreement are as follows :

> 1. (ii) The security deposit lodged by a contractor shall be refunded after the expiry of six months from the date on which the final bill is paid, or after the expiry of the date up to which the contractor has agreed to maintain the work in good order, whichever is later.

Note. - The period of maintenance shall be twelve months from the date of completion of the work.

> 2. The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date of handing over the site to the contractor, after the issue of written order to commence.
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> 3. (c) Without prejudice to government's right to recover any loss from the contractor under sub-clauses (b) and (c) of Clause 3 of the contract, to rescind the contract (of which recession notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive) and in that case, the security deposit of the contractor including whole of part of the lump sum deposited by him shall stand forfeited and be absolutely at the disposal of the government.
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> 5. If the contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiration of the period stipulated in the tender or before the expiration of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is early and the Executive Engineer or other competent authority may, if in his opinion, there are reasonably grounds for granting an extension, grant such extension as he thinks necessary or proper. The decision of such competent authority in this matter shall be final.

8. Clause 18 of the contract provides that if at any time before the security deposit is refunded to the

contractor, it shall appear to the Executive Engineer or other competent authority or his subordinate in charge of the work, that any work has been executed with unsound, imperfect or unskillful workmanship or with materials of inferior quality, or that any materials or articles provided by him for the execution of the work are unsound or of a quality inferior to that contracted for or are otherwise not in accordance with the contract, it shall be lawful for the Executive Engineer or other competent authority to intimate this fact in writing to the contractor and then to take appropriate action against the contractor in terms of the provisions contained in the said clause.

9. Work orders were issued to the contractor on the very same day i.e. on March 25, 1976. All the works to be executed under the said contract except three items thereunder were done by November 1977. The three items of work which were not done were of the total value of Rs. 11,197.00 as per the following particulars :

1. R.C.C approach slab Rs. 8107

2. Collection of 40 mm metal for approach road Rs. 2603

3. Spreading and consolidation of the metal Rs. 487

It further appears that the bridge in question was being used for vehicular traffic in December 1977.

10. The case of Venkatarayappa, the defeated candidate who filed the election petition, was that this contract which the appellant Munishamappa had entered into with the government was subsisting at the date of Munishamappa's filing the nomination paper for contesting the assembly election. The case of Munishamappa, however, is that this contract into which he had no doubt entered, was not subsisting at the time when he filed his nomination for the election. It is the case of Munishamappa that after having completed all the works in November, he was prepared to completed other three items of work yet to be done, in terms of the agreement between the parties; but he was requested to postpone doing the aforesaid items of work till after the monsoon. It is the case of Munishamappa that he did not agree to such a proposal and he had asked the authorities concerned to have the said items of work done by other contractor and to settle his claims and finalise his bills. It is also the case of Munishamappa that he wrote a letter to the Engineer on January 25, 1978 informing him that he had completed the work and asked him for settlement of his bills. It may be noted that his letter was not produced at the trial. On January 28, 1978, the appellant Munishamappa, however, wrote another letter to the Executive Engineer which has been exhibited and marked as Ex. 17 in the proceeding before the learned trial Judge. It is necessary to set out this letter which reads as follows :

#The Hon'ble Executive Engineer,Public Works Department,Chikkaballapur Division.##

The following is the appeal application written by me S. Munishamappa P.W.D Contractor, s/o Somappa, resident of Village Aane Madugu, Hobli Billchatti, Taluk Sidlaghatta.

Sir,

The request that I am making to you is it is a fact that I have obtained licence to do contract work in your department. Because of this according to the present law in force, I cannot contest the elections to the Vidhan Sabha. Therefore, I request you to immediately cancel the work licence registered under you in my name. I request you to finalise all the works pending in my name and cancel my

licence immediately.

Yours faithfully, Sd/-##

It appears that on this letter there was an endorsement by the Executive Engineer to the following effect :

> Forwarded to the Assistant Engineer No. 2 Sidlaghatta to take immediate action to finalise the claim of the contractor as per codal rules.

It appears that on the very same date i.e. January 30, 1978 there was a further endorsement by the Assistant Engineer in the following terms :

> Please finalise the claims of the contractor for the above works.

A further endorsement directing the bills of Munishamappa contractor to be submitted immediately is also recorded in the said letter. Shri Munishamappa makes the case that before the date for filing the nomination, the contract had come to an end and there was no subsisting contract on the date on which he filed his nomination paper. Munishamappa filed his nomination on February 1, 1978. It appears that at the time of scrutiny of the nomination paper an objection was taken by Venkatarayappa, the defeated candidate who filed subsequently an election petition, to the validity of the said nomination filed by Munishamappa on the ground that he was disqualified because he had a subsisting contract with the government. This objection was, however, overruled by the Returning Officer. The election was thereafter held on February 25, 1978. When the counting was over, it transpired that Munishamappa had secured 34683 votes, Venkatarayappa had secured 27106 and three other candidates who were also respondents in the proceeding, had secured insignificant number of votes. Munishamappa was consequently declared elected to the Assembly. The election petition was filed by Venkatarayappa on March 31, 1978, challenging the validity of the said election of Munishamappa. The only ground on which the validity of the said election was challenged was that Munishamappa wad disqualified under Section 9-A of the Representation of the People Act, 1951, as he had a subsisting contract with the government on the date of filing his nomination. After the pleadings have been completed, issues were framed and the issues material for the purpose of this appeal are Issues 4, 6 and 7 which read as follows :

> 4. Had S. Munishamappa (respondent 5) any subsisting contract with the State Government on the date of the filing of the nomination paper ?
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> 6. Was S. Munishamappa (respondent 5) disqualified in terms of Section 9-A of the Representation of the People Act, 1951, from filing the nomination paper ?
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> 7. Is the election of S. Munishamappa (respondent 5) void under Section 9-A read with Section 100(1)(a) of the Representation of the people Act, 1951 ?

11. On consideration of the materials on record, the learned Judge held that the contract entered into by Munishamappa with the State Government on March 25, 1976 was subsisting at the date of the filing of his nomination paper. In that view of the matter, the learned Judge held that Munishamappa was disqualified from contesting the election in view of the provisions contained in Section 9-A of the Act and the election of Munishamappa was set aside.

12. The correctness of the findings of the learned Judge has been questioned in this appeal. As we

have earlier indicated, the only question that falls for determination in this appeal is whether the contract which Munishamappa entered into with the State Government was subsisting at the date on which he filed his nomination.

13. Mr. Mridul, learned counsel appearing on behalf of the appellant, has submitted that in the facts and circumstances of this case, there cannot be any doubt that the contract which was admittedly entered into by the appellant ceased to exist on the date the appellant filed his nomination for his election. He contends that contract can come to an end by any of the following modes :

1. By performance;

2. By express agreement;

3. Under the doctrine of frustration; and

4. By breach.

In support of this contention Mr. Mridul has referred to Cheshire and Fitfoot's LAW of CONTRACT, 9th edition, page 522 and also to Chitty ON CONTRACT, 24th edition, Volume 1, Article 1482, page 699. It is the argument of Mr. Mridul that in the instant case the contract had been mainly performed inasmuch as the major port of the work to be done had been completed by the contractor. He argues that in respect of the three remaining items of works which were to be done under the contract, the contractor was asked to postpone the execution of the said work till after the rainy season and the contractor had refused to do so and had requested the authorities to have the said works done by other contractors and to settle the claim of the contractor treating the contract with the contractor as at an end. He submits that the facts and circumstances of this case and evidence on record clearly go to establish that this was the correct position. In this connection he referred to the evidence of Mr. B.N. Chinappa (PW 8) and the evidence of the appellant Munishamappa. Mr. Mridul submits that the other facts and circumstances also clearly go to establish that the authorities concerned had agreed to treat the contract between the government and the appellant as terminated and had agreed to get the remaining works done through other contractors. In this connection Mr. Mridul has referred to Ex. 17 and endorsements of the Engineers appearing thereon. He has further submitted the very fact that the security money of the contractor was refunded and that no action had been taken against the contractor for any breach of the contract on his part, clearly goes to show that this must have been the position and the parties must have agreed that the contract between the government and the appellant would stand terminated or cancelled. Mr. Mridul argues that as the contract between the parties stood discharged by this further agreement between the parties, the contract could not be said to be subsisting on the date the appellant filed his nomination. It is the submission of Mr. Mridul that if the contract stood terminated and discharged the entire contract with all its clauses including the clause regarding maintenance also came to an end. Mr. Mridul has further argued that there is no agreement between the parties with regard to maintenance, and the arrangement with regard to maintenance cannot be said to form an integral part of the contract. Mr. Mridul has in the alternative argued that the contract must have come to an end by breach either on the part of the government in not allowing the appellant to complete the work when he wanted to do or in any event by breach on the part of the appellant because of his refusal to complete the said work, particularly, in view of the fact that the time in the instant case was of the essence of the contract. Mr. Mridul has contended that if there had been a breach of the contract on the part of the contractor, the remedy of the aggrieved party to the contract would lie in an action for damages against the contractor, but it can never be said that

the contract remained subsisting. Mr. Mridul has in this connection referred to the decision of the House of Lords in the case of Moschi v. Lep Air Services Ltd. (1973 AC 331 : (1972) 2 All ER 393 : (1972) 2 WLR 1175) and also to the decision of the High Court of Australia in the case of Associated Newspapers Ltd. v. Bancks. ((1950-51) 83 CLR 322) Mr. Mridul has argued that the execution of the work within the stipulated time was one of the fundamental terms of the contract and any breach of the said fundamental terms would result in complete breach of the contract and the contract would come to an end leaving the party aggrieved to its claim for damages. It is the argument of Mr. Mridul that when the contract is discharged by breach, no terms of the contract can have any validity or efficacy and the entire contract including the agreement for maintenance, if any, is at an end. Mr. Mridul has taken us through the evidence on record, both oral and documentary and he has submitted that the materials on record clearly go to indicate that the appellant was fully aware of the position that the subsisting contract would debar him from contesting the election and he intended to put an end to the contract before he filed the nomination paper. He made his position clear to the authorities and the authorities also appreciated the said position and had discharged the contract and put an end to the same before the date of filing the nomination paper. Mr. Mridul has commented that the High Court went wrong in appreciation of the evidence and particularly in coming to the conclusion that the maintenance clause remained operative. He comments that the High Court failed to appreciate that once the contract was discharged, the maintenance clause fell with it.

14. Mr. Lekhi, learned counsel appearing on behalf of Venkatarayappa respondent 1, in the present appeal who filed the election petition, has submitted that the contract which was admittedly entered into by and between the appellant Munishamappa and the State Government on March 25, 1976 for execution of the various works under the said contract remained subsisting on the date the appellant filed his nomination for election. He submits that in the instant case, there is no doubt that there was a contract between the appellant and the government. He argues that it is also not in dispute that the three items of work under the said contract had not been done by the appellant, although according to the learned counsel, the case sought to be made by the appellant in answer to the petition was that the contract had been wholly performed. It is the argument of Mr. Lekhi that there is no proper pleading of the contract coming to an end by mutual agreement between the parties or by breach thereof by any of the parties. Mr. Lekhi has further argued that on consideration of the evidence on record, the High Court correctly came to the conclusion that there had been no such termination of the contract. Mr. Lekhi places particular reliance on the clause relating to maintenance of the work done by the contractor, and he submits that the maintenance clause must, in any event, be held to remain in force for the period of twelve months and, in any event, in view of the said provision regarding maintenance, the contract must be held to be subsisting on the date of the filing of the nomination by the appellant. Mr. Lekhi has drawn out attention to the evidence to show that the State Government did not treat the contract as cancelled and it called upon the appellant even in February to execute the remaining work to be done under the contract. Mr. Lekhi has commented that there was no letter addressed by the appellant to the authorities on January 25, 1978 and the case sought to be made that such a letter was in fact, addressed, is not true. It is his comment that no such letter was produced at the trial and the evidence on record shows that no such letter could be traced in the files of the department. Mr. Lekhi has further submitted that if any person who has a contract with the government, is permitted to contest the election on the plea that he has brought an end to the contract by committing breaches thereof, the very purpose for which Section 9-A had been incorporated would be frustrated, and intending candidates having existing contracts with the government, will be entitled to put an end to the contract by committing breach thereof to enable them to contest the election. Mr. Lekhi has finally submitted that on a proper consideration of all the

materials on record, the evidence which was produced and particularly the provision of the contract in the maintenance clause therein, the High Court has come to the conclusion that there was a contract subsisting at the date the appellant filed his nomination for election, and this Court should not interfere with the said finding of the High Court and should not entertain the appeal preferred by the appellant. According to Mr. Lekhi, there cannot be any doubt that the maintenance clause forms a part of the contract between the parties and the maintenance clause in any event was in force not only at the date the appellant filed his nomination but also on the date the election petition was filed and even thereafter. Mr. Lekhi has referred to the decision of the Supreme Court in the case of Konappa Rudrappa Nadgouda v. Vishwanath Reddy ((1969) 1 SCR 395 : AIR 1969 SC 447).

15. In the instant case, there is no doubt that the appellant had entered into a contract with the State Government for execution of the works mentioned in the said contract on March 25. It does not appear to be in dispute that excepting three items of work all the other works under the contract had been executed by the appellant by November 1977. The only question in dispute is whether the said contract remained subsisting on the date the appellant filed his nomination paper. We are unable to accept the contention of Mr. Lekhi that there has been no proper pleading in the answer filed by the appellant to the election petition that the said contract had come to an end on the date the appellant had filed his nomination paper. From paras 6 and 9 of the written statement filed by the appellant it is clear that the appellant had made the case that the contract between him and the State Government had ceased to exist on the date he filed his nomination paper. We may note that on the pleading specific issue being Issue 4 which we have earlier set out, was raised. The parties had clearly understood what the case of the appellant was and parties had led evidence to that effect.

16. On a careful consideration of the materials on record, we have no hesitation in coming to the conclusion that the contract which the appellant had entered into with the State Government was not subsisting on the date the appellant filed his nomination paper. The evidence establishes that the appellant had completed all the items of work excepting three minor items by November 1977, and the appellant was prepared to completed the said remaining items by December 1977. The evidence on record establishes that the appellant was asked not to proceed with the remaining works till after the monsoon and the appellant had refused to do so. It is also in evidence that thereafter there was arrangement between the appellant and the State Government that the State Government would have the remaining works done by other contractors. This arrangement along with other facts and circumstances of the case clearly suggests that the contract between the appellant and the State Government had come to an end and the contract was not subsisting on the date the appellant filed his nomination paper. It may be true that the letter dated January 25, was not exhibited. The letter dated January 28, 1978 and the endorsements made thereon clearly go to establish that the contract between the parties had come to an end and had been treated as cancelled. In the said letter (Ex. 17) which has been earlier set out, the appellant makes it manifestly clear that he intended to contest the election and to enable him to do so he wanted to have the licence in his favour cancelled immediately and to have his bills settled. The said letter clearly proceeds on the basis that at that point of time there was no existing contract between him and the government and he was only asking for a settlement of his bills and for cancellation of the licence. The endorsements made on the said letter by the authorities also go to indicate that the said position is accepted by them and necessary directions for finalisation of the bills are given. The further fact that the security deposit had been refunded to the appellant and no penal action had been taken against him and the remaining works had been caused to be executed by other contractors, also go to establish that the said contract between the parties had come to an end long before the appellant filed his nomination paper. If the contract had come to an end before the date of filing the nomination paper, it cannot be said that the maintenance clause, assuming that it formed any part of the contract, still remained

subsisting.

17. In any event, if the contract had not been terminated by the parties themselves, it appears that the appellant must be held to be in clear breach of the agreement long before the date he had filed his nomination paper. Execution of the work in terms of the contract was undoubtedly one of the fundamental terms of the contract and the appellant had failed or refused to do so. Even if it be held that the appellant had committed a breach of the contract, the contract cannot be said to be subsisting thereafter. If the contract is discharged by breach on the part of the appellant, the entire contract necessarily goes and along with this the agreement, if there be any, with regard to the maintenance, must necessarily go, leaving the party aggrieved to take steps to recover damages for such breach. The contract, however cannot be said to be subsisting. In the view that we have taken, it does not, indeed, become necessary for us to consider the question whether the maintenance clause in the instant case formed a part of the contract or not. We must, therefore, hold that in the instant case, there was no subsisting contract between the appellant and the State Government at the date of his filing the nomination for election. The fact that the bills of the appellant were settled at a later date and that the security deposit was refunded later on, will not disqualify the appellant in view of the explanation to Section 9-A of the Act. We are, therefore, of the opinion that the finding of the High Court that the appellant was disqualified in view of the provisions contained in Section 9-A of the Act, is not correct. The decision of the Supreme Court in the case of Konappa Rudrappa Nadgouda ((1969) 1 SCR 395 : AIR 1969 SC 447) is of no assistance in the facts and circumstances of this case, as in the said decision the question of discharge of a contract never came up for consideration and the decision was concerned with a case where, admittedly, a contract was subsisting. The further argument of Mr. Lekhi that if any contractor is permitted to put an end to a contract by committing breaches thereof to enable him to contest the election, will frustrate the very purpose of Section 9-A of the Act, does not appeal to us. Whether a contract subsists or not, has to be determined in the light of the provisions of law relating to contract and the interpretation cannot, be any different while considering the provisions contained in Section 9-A of the Representation of the People Act, 1950.

18. As on a proper consideration of the materials on record, we are of the opinion that there was no subsisting contract on the date the appellant filed his nomination for the election, it does not indeed become necessary for us to consider the various authorities cited by Mr. Mridul. In the result the appeal is allowed. The judgment and order passed by the learned Judge are set aside, the election petition is dismissed. The appellant is declared to have been validly elected.

19. In view of our decision in the appeal filed by Munishamappa, the candidate who was duly elected and the validity of whose election we have upheld, we must dismiss the appeal filed by B. Venkatarayappa, as he cannot be declared to have been duly elected to the Assembly on the ground that the votes cast in favour of Munishamappa must be considered to be thrownaway votes. In the facts and circumstances of the case we, however, do not make any order as to costs.

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