

State of Punjab and Others

Vs

M/s. Om Parkash Baldev Krishan

Civil Appeal No. 776 of 1988

(Sabyasachi Mukharji, L. M. Sharma JJ)

23.08.1988

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. This appeal involves a short question and the field is more or less covered by the constitutional provisions as well as the authorities of this Court. The Executive Engineer (Construction Division No. 1) PWD B & R Branch, Patiala, invited tenders for the work called "Construction of high level bridge over Tangri Nadi in Mile No. 19/5 of Patiala-Pehewa road". The respondent in response to the said invitation submitted the tender for the aforesaid work, which was opened on October 7, 1975. The Executive Engineer informed the respondent on that date, who happened to be the lowest tenderer and before the tender could be finally considered, that the drawings in triplicate be submitted to the Chief Engineer PWD B & R, Superintendent Engineer, PWD B&R and Executive Engineer Construction Division No. 1 PWD B & R Branch, Patiala. The tender, however, was recalled in February 1976 by the Executive Engineer Construction Division No. 1. The respondent again submitted tender on August 31, 1976. The Executive Engineer informed the respondent telegraphically that the tender submitted by him had been accepted and asked the respondent to take up the work in hand. This was followed by the letter dated August 31, 1976 from the Executive Engineer. It was contended that the telegram as well as the letter mentioned hereinbefore revealed that the tender of the respondent was not accepted by the Governor of Punjab, as it was mandatory under the Constitution in order to amount to a valid acceptance and to create a binding contract between the parties. The respondent, however, withdrew the offer on November 6, 1976. On November 22, 1976 the respondent-contractor in its letter made it clear that no agreement had been signed between the parties. In reply to the letter dated December 1, 1976 from the Executive Engineer, the respondent vide letter dated December 6, 1976 reiterated and repeated that legal infirmity could not be met by the considerations as made by the appellant. But on April 15, 1980, the Executive Engineer intimated the respondent that as he had failed to start the work, he became liable for action under Clause 2 of the agreement. The letter further stated that the Engineer-in-charge on behalf of the Governor of Punjab had levied a penalty of Rs. 2,55,000. The above position, however, was not accepted by the respondent and he advised the appellant to settle the matter in court. The Superintending Engineer PWD B & R Patiala, then forwarded the claim of Rs. 4,56,040 for arbitration and asked the firm to submit the reply in duplicate within 30 days from the issue of the letter. Reply was sent by the respondent to the effect stating that no valid contract in respect of the construction of high level bridge over river in Mile No. 19/5 of Patiala-Pehewa Road, ever came into existence between the parties. The arbitrator again on July 2, 1983 issued a letter after a lapse of one year and the same was replied more or less in the same manner. The respondent filed an application under Section 33 of the Arbitration Act, 1940 (hereinafter called 'the Act'). The learned Sub-Judge Ist class, Patiala, on April 4, 1986 dismissed the application of the respondent

with costs. It was contended before him that there was no valid acceptance of the offer made by the respondent herein and, therefore, there was no valid contract. It was contended that no agreement between the parties as required by law, had been brought into existence. Therefore, there was no question of breach of agreement. The learned Sub-Judge commented that no oral evidence was adduced on behalf of the respondent. The learned Sub-Judge came to the conclusion that there was a valid offer. He observed that the only point that required consideration was whether the acceptance regarding the allotment of work of construction of high level bridge over river Tangri on Patiala-Pehewa Road was issued on behalf of the Governor of Punjab or not. The learned Judge came to the conclusion after discussing various evidence that the Executive Engineer was authorised to accept tender. He referred to various clauses. The learned Judge noted that it was clearly laid down in the tender itself that the tender together with acceptance thereof would constitute a valid and binding contract between the parties. The relevant condition of the tender, that is, condition No. 4.6 read as follows :

The tender together with letter of acceptance thereof shall constitute a binding contract between the successful tenderer and the department and shall form the foundation of rights and obligation of both the parties.

2. The learned Sub-Judge recorded that the above tender form was duly signed by the respondent and the appellant. On an analysis of the evidence on record, the learned Judge came to the conclusion that there was a valid contract and accordingly the application under Section 33 of the Act was dismissed with costs. There was a revision to the High Court. The High Court after discussing the relevant evidence came to the conclusion that there was no valid contract. The learned Judge of the High Court noted that in the acceptance letter Ex.P. 7 and Ex. RW 1/14, the Executive Engineer had required the respondent at the end to sign the agreement which was under preparation within ten days. No such agreement was ever signed. That position is undisputed. Therefore, the High Court was of the view that no contract in conformity with Article 299(1) of the Constitution, which was a constitutional requirement in this case, has not (sic) been entered into and came to the conclusion that there was no contract between the parties. In that view of the matter the revision was allowed and the order passed by the trial Judge was set aside. This appeal arises from the said decision.

3. Shri C. M. Nayar advocate for the appellant contended that there was a valid and subsisting contract. He strenuously argued that there was authority for the Executive Engineer to enter into the contract on behalf of the Governor. He drew our attention to Clause 2.76 of the Public Works Department Code which provided as follows :

2.76. No authority lower than an officer in charge of a sub-Division can accept any tender or make a contract for public works. The different classes of deeds, contracts and other instruments which may be executed by this department and the authorities empowered to execute them are detailed in Appendix I, while the financial limits up to which these authorities are authorised to determine the terms of deeds, are set forth in the Book of Financial Powers.

4. He also referred to the Appendix I (referred in paragraph 2.76) classifying the deeds, contracts and other instruments. It appears that the Executive Engineer of the buildings and roads was authorised to enter into these contracts. He, therefore, sought to submit that by virtue of that authority if any contract had been entered into then that amounted to entering into contract in accordance with Article 299(1) of the Constitution. It appears that to understand this problem, it is

necessary to deal with some other documents. Our attention was drawn to a letter from the Executive Engineer to the contractor, which stated, inter alia, as follows :

As per your modified lump sum bids received vide your letter No. CM/3-T/OPBK dated March 24, 1976 along with the conditions mentioned in the original tender received vide your letter No. CH/3-T/OPBK/3341/76 dated February 26, 1976 and also further modification of the same as mentioned in your letter No. CM/3-T/OPBK/3503/76 dated March 24, 1976 and letter No. CM/3-T/OPBK/3930/76 dated August 6, 1976, the work of construction of High Level Bridge over Tangri Nadi in Mile No. 19/5 of Patiala Pehewa Road is hereby allotted to you on lump sum basis for an amount of Rs. 25.50 lakhs (Rupees Twenty-five lakhs and fifty thousands) with a time limit of 24 months from the date of issue of this letter coupled with the following conditions :-

5. The said letter thereafter set out those conditions. It is, however, not necessary to set out these. The last two paragraphs of the said letter are relevant and read as follows :

The work may be taken in hand immediately after getting the detailed structural drawing and designs duly approved by this department.

Please attend this office within 10 days to sign your agreement which is under preparation.

6. This was signed by the Executive Engineer and the signatures appeared as follows :

# "Sd/- 30/8 Executive Engineer, Construction Division No. 1, P.W.D. B&R Br. Patiala. Endst. No. : Dated :##

Copy of above is forwarded to (1) Sub Divisional Engineer, Const. Sub Division No. 5 P.W.D. B&R Br., Patiala for information and necessary action. He is requested to get the work started immediately as per detailed terms and conditions which may be thoroughly studied.

(2) Divisional Acctt. for information & n/a.

# Sd/- Executive Engineer, Construction Division No. 1, P.W.D. B&R Br., Patiala.##

7. Dr. Chitale appearing for the respondent drew our attention to a letter signed by the Executive Engineer which reads as follows :

#Regd. A.D.Endst. No. 4466 Dated : August 24, 1976##

Copy confirmation by post is forwarded to M/s. Om Parkash Baldev Krishan, New Delhi-5 for their information and necessary action. Their tender for lump sum amount of rupees thirty-one lakhs and fifty thousands for construction of high level bridge over Markanda river crossing Patiala-Pehewa road has been accepted. Please take the work in hand immediately. Regular sanction follows separately.

# Sd/- Executive Engineer,##

8. Shri R. L. Bansal, Divisional Accountant Construction, in his deposition before the trial court

stated that there was no document concerning this contract which had been issued or made in the name of the Governor of Punjab according to the records. He also admitted in his deposition that the letter of acceptance had not been issued in the name of the Governor of Punjab. He reiterated that he was entitled to issue acceptance on behalf of the Governor.

9. It was urged on behalf of the appellants by Shri Nayar that a valid binding contract might come into existence even without a formal agreement duly signed by the parties. According to the learned advocate if one party made an offer in writing and the same was accepted by a letter to the first party, these two documents might be sufficient to spell out a contract. Assuming that it is right, it is not necessary for the purpose of this appeal in the view we have taken to decide that the tender submitted and the letter sent by the Engineer did not create in the facts of this case a binding contract. The acceptance letter, at least, must conform to the requirements of Article 299(1) of the Constitution and since this letter was indisputably not in the name of the Governor, this contention cannot be accepted. The acceptance letter nor any work letter sent to the respondent had been written by the Executive Engineer on behalf of the Governor. Therefore, it is not possible to accept the contention that there was a valid binding contract.

10. Shri Nayar further sought to urge that Article 299 was for the government's protection in order to protect it against unauthorised contracts being entered on behalf of the government. In the instant case, according to Shri Nayar, the Executive Engineer had issued the tender and had accepted the tender, authority to accept the tender on behalf of the Governor, is thus established. Shri Nayar submitted that once that authority is established and it is made clear from the evidence that the authorities have acted on that basis, then it must be presumed that the contract had been entered into in accordance with the provisions of Article 299 of the Constitution. In view of the clear position in law, it is, however, not possible to accept this submission.

11. Clause (1) of Article 299 of the Constitution provides as follows :

(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 the President, or by the Governor of the State, as the case may be, and all such contracts and all assurance 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.

12. In this case, the Executive Engineer has signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. The constitutional requirement enjoined in clause (1) of Article 299 of the Constitution is based on public policy. This position has been made clear by this Court in *State of Bihar v. M/s. Karam Chand Thapar & Brothers Ltd.* ((1962) 1 SCR 827 : AIR 1962 SC 110). There a dispute between the respondent and the Government of Bihar over the bills for the amount payable to the company in respect of the construction works carried out by it for the government was referred to arbitration. Section 175(3) of the Government of India Act, 1935 provided as follows :

Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be, expressed to be made by the Governor-general, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-general or Governor by such persons and in such manner as he may direct

or authorise.

13. This Court reiterated that under that section a contract entered into by the Governor of a Province must satisfy three conditions, namely, (i) it must be expressed to be made by the Governor; (ii) it must be executed; and (iii) the execution should be by such persons and in such manner as the Governor might direct or authorise. These three conditions are required to be fulfilled. This position was reiterated by this court again in *Seth Bikhraj Jaipuria v. Union of India* ((1962) 2 SCR 880 : AIR 1962 SC 113). This Court explained that three conditions as mentioned in *State of Bihar v. M/s. Karam Chand Thapar* ((1962) 1 SCR 827 : AIR 1962 SC 110) had to be fulfilled, and further reiterated that the object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts and, hence, it was provided that the contracts must show on their faces that these were made by the Governor-General and executed on his behalf in the manner prescribed by the person authorised. It is based on public policy. No question of waiver arises in such a situation. If once that position is reached, and that position is well settled by the authorities over a long lapse of time, no question of examining the purpose of this requirement arises. In *Union of India v. A. L. Rallia Ram* ((1964) 3 SCR 164 : AIR 1963 SC 1685) this Court again reiterated that the agreement under arbitration with the government must be in accordance with Section 175(3) of the Government of India Act, 1935. These principles were again reiterated by this Court in *Timber Kashmir Pvt. Ltd. v. Conservator of Forests, Jammu* ((1977) 1 SCR 937 : (1976) 4 SCC 497). There, the court was concerned with Section 122(1) of the Jammu & Kashmir Constitution which corresponded to Article 299(1) of the Constitution of India. In that case all the three applications filed by the respondent State for a reference to an arbitrator under Section 20 of the Jammu & Kashmir Arbitration Act, were dismissed by a Single Judge of the Jammu & Kashmir Arbitration Act, were dismissed by a Single Judge of the Jammu & Kashmir High Court on the ground that the arbitration clause was, in each case, a part of an agreement which was not duly executed in accordance with the provisions of Section 122(1) of the Jammu & Kashmir Constitution which corresponded to those of Article 299(1) of the Constitution of India. But the Division Bench allowed the appeals holding that if contracts were signed by the Conservator of Forests in compliance with an order of the government, the provisions of Section 122(1) of the Jammu & Kashmir Constitution could not be said to have been infringed. This Court held that the contract could not be executed without the sanction. Nevertheless, if the sanction could be either expressly or impliedly given by or on behalf of the government, as it could, and, if some acts of the government could fasten some obligations upon the government, the lessee could also be estopped from questioning the terms of the grant of the sanction even where there is no written contract executed to bind the lessee. But, once there had been a valid execution of lessee by duly authorised officers, the documents would be the best evidence of sanction. In that case, the contracts were executed on behalf of the Government of Jammu & Kashmir. The only question with which the court was concerned in that case was whether the contracts executed by duly authorised officials had been proved or not. It was held that it was so proved.

14. In *Bihar Eastern Gangetic Fishermen Co-operative society Ltd. v. Sipahi Singh* ((1977) 4 SCC 145 : (1978) 1 SCR 375) where this Court relied on a previous decision in *Mulamchand v. State of Madhya Pradesh* ((1968) 3 SCR 214 : AIR 1968 SC 1218) and reiterated that there cannot be any question of estoppel or ratification in a case where there is contravention of the provisions of Article 299(1) of the Constitution. The reason is that the provisions of Section 175(3) of the Government of India Act and the corresponding provisions of Article 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the government against unauthorised contracts. The provisions are embodied in Section 175(3) of the Government of India Act and Article 299(1) of the Constitution on the ground of public policy - on the ground of

protection of general public .... and these formalities cannot be waived or dispensed with. This Court again reiterated the three conditions mentioned hereinbefore. The same principle was again reiterated by this Court in Union of India v. M/s. Hanuman Oil Mills Ltd. (1987 Supp SCC 84)

15. In the instant case, we have referred to the letter dated August 31, 1976 which towards the end stated that the parties were to attend the office within 10 days to sign the agreement which is under preparation. It is common ground that no such agreement was signed.

16. In the aforesaid view of the matter the High Court was right in the view it took and the submissions made on behalf of the appellants cannot be entertained. The appeal fails and is accordingly dismissed with costs.

</html