

Lalji Khimji and Others

Vs

State of Gujarat

Civil Appeal No. 47 of 1979

(CJI L.M. Sharma, Dr. A.S. Anand JJ)

29.01.1993

JUDGMENT

ANAND, J. –

1. This appeal by special leave, is directed against the judgment of the Gujarat High Court dated January 20, 1977 in Second Appeal No. 90 of 1976.

2. The plaintiffs-appellants are the Farmers of the Village Morzar under Bhanwad Taluka of Jamnagar District. Their lands are situated on the outskirts of the village. Under the Vartu Dam Irrigation Scheme, the defendant-State proposed to construct a dam on river Vartu and prepared a sketch, indicating the passage of the canal from Vartu Dam and for that purpose, it proceeded to acquire land through which the canal was proposed to run. The plaintiffs-appellants apprehended serious damage to their lands by the passing of the canal through their lands and they filed, a regular civil suit in 1966 against the defendant-State, seeking to restrain it from implementing the Irrigation Scheme, as proposed. Suit was registered and defendants were summoned. During the pendency of the suit, it appears that an agreement was arrived at between the parties and it was agreed that the canal from Vartu Dam would be run as per the line demarcated in red in the map appended to the deed of agreement Ex. 45. As a result of the said agreement the suit was unconditionally withdrawn by the plaintiffs on November 24, 1966. Somewhere in 1972, the plaintiffs-appellants discovered that the State Government was going back from the agreement, and alignment of canal was being undertaken contrary to the alignment reflected in the map appended to the agreement Ex. 45. They, therefore, filed a fresh suit for declaration to the effect that the agreement, dated November 7, 1966, entered into between them and the respondents through its Executive Engineer, Irrigation Department, Jamnagar, was binding on the parties and that the parties were bound to act according to the terms of the said agreement and for an injunction, restraining the defendant-State from going back on the agreement. This suit of the plaintiffs-appellants was contested and the following issues were framed :

(1) Whether the suit agreement dated November 7, 1966 is not binding on the defendant?

(2) If it is binding whether the plaintiffs have proved that they have complied with the terms and conditions of this agreement?

(3) Whether the suit as framed is not maintainable?

(4) Whether the suit is bad for the misjoinder of the plaintiffs and the cause of

action?

(5) Whether the suit is not maintainable as the agreement dated November 7, 1966 has not been registered or because no compromise decree had been passed in terms of this agreement?

(6) Whether the suit is not in time?

(7) Whether the plaintiffs are entitled to the declaration sought?

(8) Whether the plaintiffs are entitled to get the permanent injunction as prayed for by them?

(9) What order?

3. Issues 1 to 8 were decided in favour of the plaintiffs-appellants and against the defendant-State. The trial court decreed the suit and declared that the suit agreement dated November 7, 1966 entered between the plaintiffs and the defendants through its executive engineer, was binding on the parties and that the parties were bound to act in accordance with the terms of the said compromise. The defendant-State was permanently restrained from going back from the agreement and act otherwise than as per the terms of the same.

4. The state of Gujarat preferred an appeal in the court District Judge, Jamnagar against the judgment and decree of the trial court. During the hearing, the parties confined their arguments to the following two points :

(1) Whether the agreement dated November 7, 1966 is binding on the State of Gujarat?

(2) Whether the plaintiffs are entitled to the reliefs granted to them by the trial court?"

The appellate court answered both the questions in the affirmative and by its order dated October 20, 1975 confirmed the judgment and decree of the trial court. The appeal of the State of Gujarat was dismissed. The State filed a second appeal of the State of Gujarat was dismissed. The State filed a second appeal in the High Court. The High Court examined the agreement dated November 7, 1966, Ex. 45 which is in Gujarati and is described as Rojkam on the subject of the alignment of Vartu Canal. The High Court noticed that the Rojkam refers to the filing of the suit in the civil court and the meeting between the Executive Engineer and the occupants of land and proceeded to recite that on the aforesaid subject there was discussion of the Executive Engineer with the occupants and thereafter "both the sides have amicably settled (compromised) the dispute with regard to the alignment of the canal". The Rojkam further records that both the sides have agreed to the alignment shown in rose colour in the map. The Rojkam then records :

"The Executive Engineer Mr. B. V. Nanavati having assured of getting necessary alterations as aforesaid made, they (i. e. the plaintiffs or the occupants) have shown willingness to withdrawn unconditionally the suit filed in civil court."

The Rojkam is signed by the Executive Engineer as also by the occupants.

5. Before the High Court the main plea raised by the State was that the alleged compromises/agreement was not binding upon the State. It was stated that the state does not admit any agreement made by the Executive Engineer either on behalf of the State or as a representative of the State and, therefore the so-called agreement did not bind the State Government. It was asserted by the State that the Executive Engineer had no authority to agree on behalf of the State Government as he was not the representative of the Government. Similar plea had been raised before the trial court and the lower appellate court by was rejected. The High Court, however, accepted the plea of the State and found that the courts below had erred in ignoring the mandatory provisions of Article 299 of the Constitution of India which mandates that 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 a State, as the case may be, 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 a manner as he may direct or authorise. The High Court found that for non-compliance with the provisions of Article 299(1) of the Constitution of India which are mandatory in character, the agreement Ex. 45, was a null and void document. The High Court then observed :

"Apart from the question whether the Executive Engineer in the present case was directed or authorised to execute this agreement on behalf of the State Government it is clear on the face of the document Ex. 45 itself that the alleged agreement contained therein is not expressed to be made by the Governor. This position is uncontrovertible and even Mr. Shah for plaintiffs-respondents was not able to show that the document Ex. 45 contains an agreement expressed to be made by the Governor. Really speaking, on a correct interpretation of this document Ex. 45, it only basis of the compromise terms between the Executive Engineer and the occupants (who probably were plaintiffs of the earlier suit) as regards the change of alignment; and pursuant to which compromise the plaintiffs agreed to withdraw the suit. The Governor or the State Government is nowhere in the picture if we go through this agreement. Therefore, assuming that the document contains an agreement in reality it is an agreement not by the Governor or the State Government but by the Executive Engineer with the occupants who signed the same. Such an agreement which is not in compliance with the provisions of Article 299 of the Constitution is void and unenforceable against the State. It this is so, the suit filed by the respondents-plaintiffs must fail."

6. The High Court negatived the contention raised on behalf of the plaintiff-appellants to the effect that under the statutory powers conferred by Section 18 of the Bombay Irrigation Act, 1879 (hereinafter called the Act), the Executive Engineer was competent to enter into compromise and that the said compromise arrived at during the pendency of the earlier suit was binding on the Government. The High Court said :

"Then it was contended that in exercise of his powers under Section 18 of the aforesaid Act, the Executive Engineer acts for the Government; and therefore, the agreement in question is binding on the Government. There is an inherent misconception underlying this contention. While exercising statutory powers i. e. powers conferred by a statute an officer of the Government does not act for the Government. He acts not because of any authority derived from the Government but to exercise power conferred on him by the statute. This contention must also fail. "

7. As a consequence, the appeal filed by the State was allowed and the judgment decree passed by the courts below were reversed and the suit filed by the plaintiffs-appellants was dismissed with cost throughout.

8. Learned counsel for the appellants has assailed the judgment of the High Court and submitted that the agreement/compromise, Ex. 45, had been validly entered into by the Executive Engineer with the appellants in view of the statutory powers vested in the Executive Engineer under Section 18 of the Act and reliance placed on Article 299 of the Constitution of India, in the facts and circumstances of this case, was wholly erroneous. It was urged that by a Notification, dated September 27, 1963, published in Part IV-B of the Gujarat Government Gazette dated October 31, 1963, the Government of Gujarat had appointed all Executive Engineers and Superintending Engineers in charge of canals in the State of Gujarat to be Canal Officers in respect of such canals and assigned to them all the powers and duties of the Canal Officers under the Act, and, therefore, the agreement/compromise entered into by the Executive Engineer on November 7, 1966 during the pendency of the suit of which he was doing "pervi" was a validly executed compromise which was binding on the parties and the respondent could not go back on it. Having been made to withdraw their earlier suit on the basis of the agreement dated November 7, 1966, it was not permissible for the respondent to now dispute the act done by its officers or agents within their powers under the statute.

9. In the facts and circumstances of this case we find force in the submission of learned counsel for the appellants regarding the non-applicability of Articles 299 of the Constitution of India to invalidate the agreement/compromise dated November 7, 1966 arrived at during the pendency of the earlier suit filed by the appellants relying whereupon the appellants withdraw the earlier suit. The agreement/compromise Ex. 45, arrived at in the previous suit, could not have been equated with a contract between the State and the citizen. Article 299(1) which reads thus :

"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 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."

concerns itself with contracts and assurance of property and lay down how Government contracts, including assurances of property are to be made and executed. Indeed the provisions of Article 299 are mandatory in character and their non-compliance would render a contract void but where the agreement is not referable to Article 299 of the Constitution. A compromise of the nature contained in the agreement dated November 7, 1966, arrived at during the pendency of a suit, is not a contract executed between contracts which are executed in exercise of the executive power of the Union or the State, enters into an agreement within his authorised capacity. In State of Haryana v. Lal Chand, this Court considered a contract granting exclusive privilege of liquor vending, in exercise of the statutory powers referable to Punjab Excise Act, 1914 and Punjab Liquor Licence Rules, 1956, and held that the grant of the exclusive privilege gave rise to contract of a statutory nature, distinguished from the one executed under Article 299(1) and, therefore, compliance with Article 299(1) was not required in such a case.

10. The question which immediately arises for our consideration is :

Was the Executive Engineer competent to execute the agreement Ex. 45?

11. In this connection, it would be relevant to refer to some of the more relevant statutory provisions contained in the Act. Section 3(6) provides as follows :

" (6) 'Canal Officer' means any officer lawfully appointed or invested with powers under Section 4;"

12. Section 17 reads thus :

"Any person desiring to construct a new water-course, but being unable or unwilling to construct it under a private arrangement with the holder of the land required for the same, may apply in writing to any Canal Officer duly empowered to receive such applications, stating :

(1) that he is ready to defray all the expense necessary for acquiring the land and constructing such water-course;

(2) that he desires the said Canal Officer in his behalf and his cost to do all things necessary for constructing such water-course."

13. Section 18 provides as follows :

"If the Canal Officer considers the construction of such water-course expedient, he may call upon the applicant to deposit any part of the expense such officer may consider necessary, and upon such deposit being made, shall cause inquiry to be made into the most suitable alignment for the said water-course, and shall mark out the land which, in his opinion, it will be necessary to occupy for the construction thereof, and shall forthwith publish a notification in every village through which the water-course is proposed to be taken, that so much of such land as is situated within such village has been so marked out, and shall send a copy of such of such notification to the Collector of every district in which such land is situated, for publication on such land.

The said notification shall also call upon any person who wishes to share in the ownership of such water-course to make his application in that respect to the Canal Officer within thirty days of the publication of such notification.

If any such applicant appears, and his application is admitted, he shall be liable to pay his share in the construction of such water-course, and in the cost of acquiring the land for the same, and shall be an owner of such water-course when constructed."

14. Powers of the Canal Officers are contained in Section 77 which reads thus :

" (1) For the purpose of the inquiries under Section 76 such Canal Officer may enter, by himself or any officer authorised by him for the purpose upon any land adjacent to any such work, and may survey, demarcate and make a map of the same.

(2) Notwithstanding anything contained in Section where no sufficient evidence forthcoming as to all or any of the matters specified in that section such Canal Officer shall, so far as may be, settle and record the aforesaid matters in such manner as he may deem fit."

15. A perusal of the record reveals that it was the Executive Engineer who was doing 'pervi' of the case in the suit filed in 1966. The agreement (Compromise) Ex. 45 was entered into during the pendency of the said case. As already noticed, the Government of Gujarat had appointed all Executive Engineers and Superintending Engineers and Superintending Engineers in charge of canals and assigned to them all the powers and duties of the Canal Officers under the Act by virtue of the Notification dated September 27, 1963. Thus, it is manifest that the Executive Engineer, by virtue of the said Notification, had been lawfully appointed as a Canal Officer within the meaning of section 18 of the Act vests the Canal Officer with the power to hold inquiry and direct the construction of suitable alignments for a water-course and by Section 77 of the Act (Supra) the Canal Officer is vested with the authority to survey, demarcate and make a map of the land which in his opinion is suitable for constructing an alignment for the water-course. Thus, under the statute, read with the Notification dated September 27, 1963, the Canal Officer (Executive Engineer) was fully competent to decide about the particular alignment of the water-course and it fell within his jurisdiction to decide and settle about the suitable demarcation of the alignment of the water course of the canal from Vartu Dam. He exercised that jurisdiction under the statute when he demarcated the water-course in red, in the map attached to Ex. 45, the agreement. It is the content of the agreement and not its form which is relevant to trace the source of power behind it and when examined in the light of the statutory provisions noticed above, it is manifest that the document Ex. 45 has been executed by the Executive Engineer by virtue of the Statutory powers vested in him. The circumstance that the agreement Ex. 45 came into existence during the pendency of the suit and was executed by way of an agreement does not militate against the order of alignment as reflected therein being any less statutory in character. As a matter of fact the Act itself envisages that the Canal Officer may alter and settle the alignment in consultation with the landholders through which the water-course is to run. In the agreement Ex. 45, the Executive Engineer had agreed to alter the alignment of the water-course in consultation with the petitioners who thereupon 'unconditionally' withdrew the suit as it appears no grievance remained to be settled. The altered alignment was, therefore, validly made by following the procedure envisaged by the Act. The High Court fell in error in ignoring this aspect of the case. It failed to appreciate the statutory powers of the Executive Engineer, vested in him under Sections 18 and 77 of the Act read with the notification of September. 27, 1963 on the true import of agreement Ex. 45. Thus, in the facts and circumstances of the case we are satisfied that the agreement dated November 7, 1966, Ex. 45 was lawfully executed by the Executive Engineer in exercise of his statutory powers under the Act and the State was obliged to act according to the terms of the said agreement and could not give it a go-by without following the procedure under the Act to again alter the alignment. It is nobody's case that for making an alteration in the alignment, the requisite exercise was undertaken, as envisaged by the Act, in 1972, when the suit out of which these proceedings have arisen was filed.

16. In view of the aforesaid discussion, the judgment and decree of the High Court deserves to be set aside and are hereby set aside. The judgment and decree passed by the trial court as confirmed by the District Judge are restored though for different reasons, as detailed above. The appeal is consequently allowed. The parties, however, shall bear their own costs throughout.

17. Before parting with the judgment, we would also like to clarify certain positions. The dispute is almost three decades old. Learned counsel for the parties were unable to state as to whether fresh alignments as envisaged by the red line in the map attached to Ex. 45 agreement, had been made for the passing of the canal or not. We would, therefore, like to clarify that if any fresh alignment for the water-course is required to be made, different than the one originally proposed or the one contained in the said map, the same may be made but only by following the procedure prescribed

under the Act and this judgment shall not be construed as any bar therefor.

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