SUPREME COURT OF INDIA

State of Kerala & Ors.

Vs.

M.K.Jose

C.A.No.6086 of 2015

(Dipak Misra and Prafulla C.Pant,JJ.,)

14.08.2015

JUDGMENT

Dipak Misra,J.,

1. The present appeal, by special leave, assails the correctness of the judgment dated 24.02.2014 passed by the High Court of Kerala at Ernakulam in W.A. No. 1912/2013 whereby the Appellate Bench has reversed the decision of the learned Single Judge rendered in W.P.(C) No. 22541 of 2013 whereunder he had declined to interfere with the order of the Secretary, Public Works Department, Road and Projects of the State terminating the contract awarded to the respondent and forfeiting the security deposit placed by the contractor for the work to the state and further stating that the work had been put an end to at the cost and risk of the contractor.

2. Exposition of facts with essential details is imperative to appreciate the controversy in proper perspective and also to consider the manner in which the Appellate Bench has exercised the writ jurisdiction under Article 226 of the Constitution in respect of a matter relating to termination of contract. The respondent was awarded the work, namely, "Stimulus package-improvements to Kannavam-Idumba-Trikadaripoyil Road Km. 0/000 to 9/100 in Kannur District" and accordingly an agreement was executed between the parties on 18.12.2010. The site for the work was handed over to the respondent on 27.12.2010 and the work was to be completed within a period of 12 months. Thus, the work, as requisite, under the terms of the contract was to be completed in all respects as on 26.12.2011. The respondent could not complete the work in time and on a request being made, time was initially extended up to 30.06.2012 and thereafter further extension was granted upto 31.03.2013.

3. As is perceptible from the order of termination of the contract, despite issue of several notices and instructions, the contractor failed to complete the work even during the extended period. The Executive Engineer of the Department issued a memorandum on 14.02.2013 stopping the work. As there was some deviation of work, the revised estimate was required to be done but the same was not sanctioned by the Government. At that juncture, the

respondent preferred W.P.(C) No. 5672 of 2012 seeking appropriate direction to the Government to pass orders sanctioning the revised estimate. The High Court disposed of the writ petition directing the Principal Secretary to take a decision on the proposal of revised estimate. Thereafter, the respondent filed a contempt petition which was eventually dropped.

4. As the factual matrix would further unfurl, the respondent submitted a representation to the Government and thereafter filed W.P.(C) No. 23087 of 2012. The High Court directed the Principal Secretary, PWD to consider and pass orders on his representation. It is apt to note here that the respondent had filed series of writ petitions, namely, W.P.(C) No. 26075 of 2012 and W.P.(C) No. 5690 of 2013 and the High Court vide order dated 08.04.2013 in W.P.(C) No. 5690 of 2013, directed the Secretary, PWD to pass appropriate orders in accordance with law. Eventually, as has been stated earlier, the contract was terminated.

5. The said order of termination was assailed in WP(C) No. 22541 of 2013. The learned Single Judge noted the facts and took note of prayer no. (c) which was for issue of a writ of mandamus or any other appropriate writ, order or direction directing the respondents to take steps for measurement of the work already completed by him and making corresponding entries in the measurement book. The said prayer was acceded to by the counsel for the State of Kerala and accordingly the learned Single Judge directed measurement of the work to be completed effecting necessary entries in the measurement book before finalization of the tender proceedings, if any, in respect of balance work. The learned Single Judge had also directed that the measurements should take place after notice to the contractor.

6. The aforesaid order was assailed in the writ appeal. When the appeal was listed for admission, the Appellate Bench, on 17.12.2013, passed the following order:-

> "We heard the learned counsel for the appellant at length. Ext. P15 order shows that more than 50% of the work remains to be completed. The learned counsel for the appellant referred to paragraph 10 of the counter affidavit filed by the first respondent dated 15.3.2013 in W.P.(C) No. 5690 of 2013 (another writ petition filed by the appellant) wherein it is stated that "over all 70% of total works completed so far". The learned counsel for the appellant submitted that nearly 90% of the work was over and the work could not be completed within the extended period since the Department did not fulfil certain mandatory requirements in order to complete the work and since a stop memo was issued even before the expiration of the extended period.
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> 2. Learned counsel for the appellant submitted that the appellant is prepared to take out a commission to substantiate the contention that 90% of the work is over. Learned Government pleader sought for a short time to get instructions. Since the matter is urgent and since the courts are going to be closed on 20.12.2013, we are inclined to grant only a day's time to get instructions on the prayer made by the appellant that a commissioner may be appointed."

7. On the adjourned date, the counsel for the State submitted that the respondent had no objection for appointment of Commissioner. On the aforesaid basis, the Division Bench appointed two Advocates as joint commissioners to inspect the site and to submit the report

in respect of the disputed questions mentioned in the order dated 17.12.2013. Thereafter, the Court passed the following order:-

> "The Commissioners would be free to seek the help of a competent Engineer for the purpose of enabling them to prepare a report which would throw light on the disputed question involved in the case. The appellant as well as respondents would provide all assistance to the Commissioners for execution of their work. The Commissioners would be entitled to call for any record from the appellant as well as respondents 3 and 4 for the purpose of executing the work entrusted to them."

8. The Commission appointed by the Appellate Bench took assistance of one Retired Assistant Executive Engineer, PWD who submitted a report to the commissioners, which was annexed to the Commission's report. We need not refer to the report which has been reproduced by the impugned order. However, the Engineer who assisted the Commission, in his report under the heading 'Details of work done', has stated thus:-

> "Anyhow the contractor has executed a minimum amount of work so far up to the commission, inspection date of 3.1.2014 of Rs.2,27,90,383/- which is 72.24% of the revised estimate and 97.09% of the original work (Estimate PAC). There are some minor damages in the completed portion of BT surface and white topped portion (concrete road) and the general condition of the whole work executed by the contractor is satisfactory. A detailed item wise statement is prepared and appended herewith for perusal as Annexure A."

9. The Appellate Bench on the basis of the said report came to hold that the order of termination was founded on erroneous facts inasmuch as the competent authority had opined that more than 50% of the work remained to be done. The Division Bench opining that as there was a factual defect, which was evident from the commission's report, the order of termination of contract was liable to be quashed and accordingly axed the same. After quashing the same, the High Court directed the Superintending Engineer, PWD, (Roads and Bridges) to consider and dispose of the matter afresh after affording an opportunity to the contractor of being heard. It also directed that the Commission's report and the Engineer's report and the accounts shall be produced by the contractor before the competent authority who shall take the same into account before taking final decision in the matter. After so directing, the High Court eventually ruled that: "Since Exhibit P15 order is passed on incorrect data and since that data was found to be incorrect by appointing Joint Commissioners, we are of the view that the Government should bear the expenses of the Commissioners and expenses of the Engineer in submitting the reports. Before conducting a final hearing, a sum of Rs.40,000/- shall be paid by the first respondent to the appellant/writ petitioner. Taking into account the work done by the Engineer, we think that an additional remuneration of Rs.5,000/- should be paid to the Engineer. The appellant/writ petitioner shall pay the said amount of Rs.5,000/- to the Engineer within 15 days and proof thereof shall be produced by the appellant before this Court."

10. We have heard Mr. Ramesh Babu M.R., learned counsel for the appellants and Mr. K. Parmeshwar, learned counsel for the respondent.

11. The thrust of the matter is whether the Appellate Bench in intra- court appeal arising from a petition under Article 226 of the Constitution, should have carried out the exercise that it has done and eventually quashed the order terminating the contract by the competent authority of a Department on the ground that it was passed on erroneous facts, for the respondent contractor, as per the Commission's report, had done higher percentage of work. We would not like to comment anything on the order passed by the learned Single Judge as that was not challenged by the State before the Appellate Court in appeal. The learned Single Judge had directed measurement to be carried out prior to floating of tender for the balance work. That direction, as is evident, has been accepted by the State.

12. As the factual narration would reveal, the respondent has been invoking the jurisdiction of the High Court under Article 226 of the Constitution on various occasions challenging every action which pertain to extension of time, denial of revised estimate by the State Government and many other facets of that nature and the High Court, we must say, has been generously passing orders for consideration by the appropriate authority, for grant of opportunity of being heard to the contractor and to consider his representation in accordance with law. This kind of orders in a contractual matter, in our considered view, is ill-conceived. They not only convert the controversy to a disturbing labyrinth, but encourage frivolous litigation. The competent authority might have mentioned that more than 50% work remained to be done but that should not have prompted the Appellate Bench hearing the intra-court appeal to appoint a Commission of two Advocates and granting them liberty to take assistance of a competent Engineer. As the report would show, the Commission of two Advocates have taken assistance of a retired Assistant Executive Engineer and submitted the report. Though, learned counsel for the State had not objected to the same, yet we really fail to fathom how a writ jurisdiction can be extended to cause a roving enquiry through a Commission and rely on the facts collected without granting opportunity to the State to file objections to the same and in the ultimate eventuate, cancel the order of termination of contract. What precisely was the quantum of work done and whether there had been a breach by the owner or the contractor, are required to be gone into by the appropriate legal forum.

13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved. *In State of Bihar v. Jain Plastics and Chemicals Ltd.*[1], a two-Judge Bench reiterating the exercise of power under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated:- "It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be

a good ground in refusing to exercise the discretion under Article 226." In the said case, it has been further observed:-

> "It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."

14. *In National Highways Authority of India v. Ganga Enterprises*[2] the respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract. While dealing with the said issue, this Court opined that:-

> "It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil*[3], *State of U.P. v. Bridge & Roof Co. (India) Ltd.*[4] *and Bareilly Development Authority v. Ajai Pal Singh*[5] This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of *Verigamto Naveen v. Govt. of A.P.*[6] *and Harminder Singh Arora v. Union of India*[7]. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed".

15. Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. *In Gunwant Kaur v. Municipal Committee, Bhatinda*[8], it has been held thus:-

> "14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition underArticle 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of

fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons."

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in- reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

[Emphasis added]

16. *In ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*[9], a two-Judge Bench after referring to various judgments as well as the pronouncement in Gunwant Kaur (supra) and *Century Spg. And Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*[10], has held thus:-

"19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

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27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.
While laying down the principle, the Court sounded a word of caution as under:-

"However, while entertaining an objection as to the maintainability of a writ petition underArticle 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (*See Whirlpool Corpn. v. Registrar of Trade Marks*[11] And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction".

17. It is appropriate to state here that in the said case, the Court granted the relief as the facts were absolutely clear from the documentary evidence brought which pertain to interpretation of certain clauses of contract of insurance. In that context, the Court opined:- "

.... The terms of the insurance contract which were agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions has been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is:

(i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and

(ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee".

And it eventually held:-

> "..... We have come to the conclusion that the amended clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid, much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case".

18. In this regard, a reference to *Noble Resources Ltd. v. State of Orissa and Another*[12] would be seemly. The two-Judge Bench referred to the ABL International (supra*), Dwarkadas Marfatia & Sons v. Board of Trustees, Port of Bombay*[13]*, Mahabir Auto Stores v. Indian Oil Corp.*[14] *andJamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*[15] and opined thus:-

> "Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in ABL International Ltd. each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law element is involved, judicial review may be permissible. (*See Binny Ltd. v. V. Sadasivan*[16] *and G.B. Mahajan v. Jalgaon Municipal Council*[17]*.*)"

19. Thereafter, the court proceeded to analyse the facts and came to hold that certain serious disputed questions of facts have arisen for determination and such disputes ordinarily could not have been entertained by the High Court in exercise of its power of judicial review and ultimately the appeal was dismissed.

20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in ABL International (supra) was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to

exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest.

21. Consequently, the appeal is allowed and the judgment and order passed by the Appellate Bench is set aside. However, in the facts and circumstances of the case, we refrain from imposing costs.

[1]*(2002) 1 SCC 0216*
[2]*(2003) 7 SCC 0410*
[3]*(2000) 6 SCC 0293*
[4] *(1996) 6 SCC 0022*
[5]*(1989) 2 SCC 0116*
[6]*(2001) 8 SCC 0344*
[7]*(1986) 3 SCC 0247*
[8]*(1969) 3 SCC 0769*
[9]*(2004) 3 SCC 0553*
[10]*(1970) 1 SCC 0582*
[11]*(1998) 8 SCC 0001*
[12]*(2006) 10 SCC 0236*
[13]*(1989) 3 SCC 0293*
[14]*(1990) 3 SCC 0752*
[15]*(2004) 3 SCC 0214*
[16]*(2005) 6 SCC 0657*
[17]*(1991) 3 SCC 0091*