ANDHRA PRADESH HIGH COURT

The State of Andhra Pradesh

Vs

Raghunadha Rao

(M.N. Rao, CJ. R Reddi, J.)

25.11.1992

JUDGMENT

M.N. Rao, J.

1. Against the judgment of a learned single Judge K. Ramaswamy, J. (as he then was) allowing Writ Petition No. 9797/83 (V. Raghunadha Rao v. State of A.P and Ors.), 1988(1) ALT 461 declaring certain Preliminary Specifications of the Andhra Pradesh Detailed Standard Specifications as unconstitutional this appeal was preferred by the State of Andhra Pradesh.

2. The sole respondent herein is a registered Class-I Contractor, formerly designated as A-Class Contractor. For all Government works of the value of more than Rupees Fifteen Lakhs only Class-I Contractors are eligible to submit tenders. Among other conditions for registration as .Class-I Contractor solvency to the extent of Rupees Two Lakhs is a necessary pre-condition. In respect of the construction work "Ogee Spillway from Chain 91.45 to Chain 110 of Taliperu Project at Pedamidisileru village, Khammam District" a notification was issued by the Government of Andhra Pradesh on 29-9-1977 inviting tenders. The tender schedules were issued on 2-11-1977 and 3-11-1977. The last date for receipt of the tenders was 8-11-1977. Detailed description of the work contained as many as 70 items. The sole respondent herein submitted his tender on 8-11-1977 stipulating certain conditions stated in the covering letter accompany his tender. He was called for negotiations and an agreement was concluded on 23-12-1977 Lumpsum Agreement No. 28/77-78 for Rs. 80,20,884-05. The site was handed over to the respondent on 19-1-1978 and the work was required to be completed within 18 months from the date of handing over of the site i.e., before 18 -7-1979.

3. The Andhra pradesh Detailed Standard Specifications are in two parts. Part-I consists of Preliminary Specifications and Part-II Standard Specifications. Both invariably form part of contracts entered into by the State for execution of works.

4. The agreement contains an arbitration clause providing for arbitration by a body of officials. The arbitration clause contained in Preliminary Specification. (PS) 73, in clear terms, excludes matters covered by PSs.20,22,27(c), 29,36,37 and 40 from the purview of arbitration. P.S.59 debars any claim for compensation on account of delays or hindrance to the work except in the manner provided therein; it contemplates only extension of time being allowed by the Executive

Engineer or competent officer for unavoidable delays beyond the control of the contractor. P.S.29 lays down that "in matters regarding materials, workmanship, removal of improper work, in terpretation of the contract drawings and contract specifications, mode of procedure, and the carrying out of the work, the Executive Engineer's decision shall be final and binding on the contractor. It also provides that, if any difference arises between the Executive Engineer and the Contractor in respect of the above matters, the contractor shall have a right of appeal to the Superintending Engineer whose decision shall be final. P.S.20 says that, all materials, articles and workmanship shall be the best of their respective kinds for the class of work described in the contract specifications, and the materials shall be obtained from the source approved by the Executive Engineer. P.S.22 relates to details regarding the measurement and mixing. P.S.27(c) confers power on the Executive Engineer to reject at any stage any work which he considers to be defective in quality of material or workmanship. P.S.36 relates to scaffolding instructions - the contractor has to instal them at his expense ensuring proper safety to the workers, and all the instructions issued by the Executive Engineer should be followed. P.S.37 incorporates temporary works to be carried out by the contractor on the instructions of the Executive Engineer and also the measures to be ensured for safety purposes. P.S.40 enjoins upon the contractor to take all steps for protection of the work and the materials against sun or rain. P.S.62 relates to payment on lumpsum basis or by final measurement or unit prices. Sub-clause (b) thereof says that in cases of over-payment or wrong payment made to the contractor because of wrong interpretation of the provisions of the contract, such unauthorised payments will be deducted in the subsequent bills or final bill of the work, or failing that, from the bills under any other contract with the Government, or from the security deposits of the contractor available with the department.

5. Extension of time was granted on 4-1-1980 by the Executive Engineer to the respondent-contractor upto 18-7-1980 in terms of P.S.59 by Proceedings in Letter No.MPD2/DB/F.58/2736-38,subject to ratification by the Superintending Engineer. Before the panel of Arbitrators on 30-10-1982 the respondent-contractor filed a claim petition. The Arbitrators are Chief Engineer, Roads and Buildings, Government of Andhra Pradesh, Deputy Secretary to Government, Finance and Planning Department and Director of Accounts, Sriramsagar Project. Under eight different heads he claimed a total amount of Rs. 67,23,238/- besides interest as per the lending rates of the Reserve Bank of India plus 3% interest thereon from the date of the claim petition till actual payment. Claim No. 6 is for Rs. 28,04,238; it relates to claim for escalation charges. A counter was filed to the claim by the Superintending Engineer denying the claim put forth by the respondent-contractor. As regards claim No. 6 the plea taken by the Superintending Engineer was that there was no agreement between the parties for payment of escalation charges in rates and, therefore, the claim "on a non-existent payment clause" is not tenable. One more additional ground taken in this regard by the Superintending Engineer was that the contractor had admitted in his application dated 2-7-1979 seeking extension of time that he would not claim anything extra consequent on extension of time. A reply was filed by the respondent on 28-7-1983 before the Arbitrators. As regards claim No. 6 in the reply the respondent asserted that "the need for the extension of time arose out of causes for which the department alone was responsible". He pleaded that "the condition for granting extension of time even for causes attributable to the department is a compensation for the time lost with no right to claim anything extra is arbitrary". He referred to Government orders issued in G.O.Ms.No. 1067; TR & B., dated 5-11-1976 making it obligatory for provision of escalation clause in all agreements for works consisting of over Rs. 50,00,000/-, and he alleged that the Superintending Engineer deliberately omitted to incorporate this in the agreement.

6. At that stage the writ petition was filed seeking a Mandamus for a declaration that Clauses 11,29,59,62(b) and 73 of the Preliminary Specifications and the other clauses contained in the Lumpsum Agreement No. 28 in so far as they exempt the Superintending Engineer from liability to compensate the respondent for damages are illegal, and for a consequential direction to the Arbitrators to consider the claim petition without being influenced by the aforesaid exemption and liability limitation clauses. The prayer in the writ petition was amended by WPMP No. 24054/87 on 7-12-1987 for a further declaration that the appointment of three officials as Arbitrators was void and unenforceable.

7. The case of the contractor as pleaded in the writ petition was that the actions of the State are circumscribed by the constitutional limitations incorporated in Part 3 of the Constitution, in general, and Article 14, in particular, enjoins upon the State not to act arbitrarily, there is no parity of status between the individual contractors and the State, "the individual parties are either illiterate, poor or not politically conscious of their constitutional rights" and individuals entering into agreements with the State "are perforce made to agree to contractual conditions which are unfair, unjust and inequitable", sweeping discretionary and discriminatory power was conferred under the contract on officials and the State is exempted from the responsibility and liability in respect of non-performance or negligence in the performance of reciprocal contractual obligations. Such clauses are a carry-over of feudal origins and a constitutional anathema. They do not subserve any public policy but only "tend to promote inefficiency, negligence, callousness, nepotism and the like undesirable tendencies in the departmental offices." The affidavit filed in support of the writ petition also avers to certain alleged facts pointing out certain lapses on the part of the officials.

8. In the counter-affidavit filed by the Superintending Engineer the factual aspects of the pleas raised by the respondent were denied. It was asserted that the respondent signed the agreement accepting all the clauses and "tendered for the work on his free will". The respondent being a Class-I contractor "can by no stretch of imagination be taken to be ignorant of the conditions of the agreement." He signed "Tenderer's and Contractor's Certificate" to the effect that he perused in detail and examined closely all the clauses before submitting the tenders and he agreed to be bound by and comply with the clauses in the agreement. As he had already laid claim before the panel of Arbitrators invoking the arbitration clause it is open to him to pursue the matter before the Arbitrators. Being an A-Class contractor it was not open to him to contend that there was no parity in status between the parties to the contract. After denying the factual aspects raised in the affidavit of the respondent the Superintending Engineer asserted in the counter-affidavit that the clauses in the agreement are "just, rational and equitable intended to safeguard the welfare of the public at large, and that contractors as a class belong to a lucrative and profitable profession in which "95% of the contractors get better-off and richer and that too by means of the contracts concluded with the same clauses which are described as onerous and arbitrary by the petitioner".

9. The learned judge after elaborately discussing the philosophy pervading the preamble of the Constitution, the fundamental rights and the directive principles, expressed the view that in the matter of contracts Government acts in its sovereign capacity and that in a welfare State Government dispenses largesse on a vast scale awarding contracts and these activities bring citizens into contractual relations with the State "and Government contracts thereby serve as a source of wealth". As economic benefits are dispensed to citizens by the State, "Public policy is

implicit in Government contracts". The plea of the State that the doctrine of equitable estoppel and waiver come into play inasmuch as the respondent-contractor had voluntarily signed on the agreement was rejected by the learned Judge on the ground that a fundamental right cannot be waived. The learned Judge observed that "in a bilateral relations between the State and the citizen, the parity is inherently unequal..... Mutuality of the bargaining power between a dominant State and recipient citizen is a casualty". The learned Judge expounded the test that when a citizen complains of constitutional invalidity the court should adopt strict construction of the terms of the contract in order to ascertain whether the requirements of Article 14 have been complied with. Judging the matter in that light, the opening part of the first sub-clause of P.S.59 - "No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except as hereinafter defined" - was struck down. P.S.29 which confers right of appeal to the Superintending Engineer against the decision of the Executive Engineer in regard to the matters specified therein, according to the learned Judge, "is incorporated in the public interest and is not arbitrary". But viewing the matter from another perspective viz., the Executive Engineer and the Superintending Engineer being subordinates of the State, the learned Judge observed "their decision shall not be made final and conclusive but must be left to a decision, though may be raised at a later stage by an independent authority, viz., the Court or an independent arbitrator or panel of arbitrators. It is well settled that no one shall be a Judge of his own cause. Giving finality to a decision of the Executive Engineer or on appeal by the Superintending Engineer is obnoxious to fairplay offending Article 14 and is an unfair procedure offending Article 21 of the Constitution". In that view, while holding that P.S.29 is not arbitrary, but as the actions of the Executive Engineer and Superintending Engineer under P.Ss.20,22,27(c), 29,36,37 and 40 are excluded from the purview of arbitration by P.S.73, the learned Judge declared that the exclusion of the decision of the Executive Engineer and Superintending Engineer from "the purview of arbitration under Clause 73 is invalid offending Articles 14 and 21 and is in excess of the executive power of the State." Taking the view that in matters relating to Government contracts the fair procedure is that disputes shall be referred to an independent arbitrator or a panel of arbitrators of known integrity instead of a body of officials, the learned judge held that "the procedure provided in Clause 73 to refer to an arbitrator or a body of official arbitrators, is an unfair procedure offending Article 21 of the Constitution." The declaration of unconstitutionality was made "applicable prospectively to the contracts to be executed from hereafter". In that view the learned Judge relegated the respondent-contractor to the remedy with a direction that option should be given to him either for a solitary arbitrator or for a panel of arbitrators and the State was directed to appoint a retired Judicial Officer or a panel of judicial Officers to arbitrate the dispute.

10. The learned Advocate-General has urged before us that the learned judge's entire approach to the questions raised for resolution was not correct. The concept of social justice is not attracted even remotely in matters governing Government contracts. Affluent and knowledgeable people with vast experience and expertise alone are registered as Class-I contractors. After understanding and appreciating correctly the terms and conditions of the agreement the respondent-contractor has signed the same and, therefore, he cannot challenge the clauses of the agreement on the ground that they are arbitrary or violative of Article 21. 'There is nothing unconscionable in the agreement. The first part of P.S.59 denying claim for compensation for money is inextricably linked with the rest of the provisions of the clause; claim for compensation need not be with regard to money and it may in the form of extended time as incorporated in P.S.59, which is just and equitable. To view contractors as belonging to weaker sections in the

context of Government contracts, according to the learned Advocate-General, would be totally unrealistic and destructive of the basic philosophy of socialism. There is no presumption that under every contract there is inequality between the State and the citizen and questions for constitutional adjudication on this score should be viewed with greater caution. The Preliminary Specifications have been in vogue for a long time and as they have stood the test of time their validity should not be disturbed.

11. Controverting the contentions urged by the learned Advocate-General, Sri Raghuram, learned Counsel for the respondent-contractor has urged that the State has no absolute freedom in respect of contractual obligations irrespective of the fact whether the works are small or big, and the very concept itself is alien to our constitutional jurisprudence. Power to enter into contracts is part of executive power of the State and, therefore, it is susceptible to all the limitations of judicial review. Even if a person enters into a contract with the State by signing an agreement it is open to him to question the legality of the clauses of the agreement on the ground of violation of fundamental rights. The decision of the Supreme Court in *Radhakrishna Agarwal and Ors. v. State of Bihar*[1]*R* no longer holds the field in view of later decisions of the Supreme Court in *M/s. Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay, and Kumari Shrilekha Vidyarthi* etc. v. State of U.P., A threshold argument very vigorously pressed into service by Sri Raghuram is that the judgment under appeal has been approved of by the Supreme Court in *Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress,* . Although the approval of the decision was by the same learned Judge himself in his separate but concurring decision, it must nonetheless be treated as the decision of the Supreme Court since it is law declared by the highest Court of the country and we are bound by it under Article 141 of the Constitution of India.

12. The following two questions arise for consideration:

(1) Whether we are precluded from going into the legality and correctness of the judgment under appeal since it has already been affirmed by the Supreme Court in Delhi Transport Corporation case?
(2) If the answer is in the negative whether the clauses struck down by the learned judge suffer from any legal infirmities?

13. Re.(l):-The question for consideration in the Delhi Transport Corporation case was whether Regulation 9(b) of the Delhi Transport Act, 1950 which provides for termination of services of permanent employees by giving one month's notice or pay in lieu thereof is arbitrary, illegal and unconstitutional. By a majority of four to one the Constitution Bench of the Supreme Court ruled that the impugned Regulation 9 (b) was unconstitutional being violative of Articles 14 and 16(1) of the Constitution of India. The four learned judges Ray, Sharma, Sawanth and K. Ramaswamy, JJ. who constituted the majority rendered four separate but concurring judgments. K.Ramaswamy, J in his separate judgment while discussing the question whether the State can impose unconstitutional conditions as part of a statute or rule or contract, after referring to the views expressed by certain American jurists which are to the effect that (i) the liability of the Government in respect of its ability to contract is limited unlike a private individual; (ii) in order to avoid invalidation of any alleged disabilities in the matter of contractual relations the Government must show that the conditions imposed are necessary to secure the legitimate objectives of the contract to ensure its effective use or protect the society from potential harm

which may result from the contractual relationship and (iii) alterations of Government contracts are not desirable in a free country even when they do not constitute a taking of property, specifically ruled:

"These principles are accepted and followed by the Andhra Pradesh High Court in *V. Raghunadha Rao v. State of Andhra Pradesh*[2], dealing with A.P. Standard Specification Clauses 11, 29,59, 62(b) and 73 and declared some clauses to be ultra vires of Articles 14,19 (1) (g) and 21 of the Constitution and Sections 23 and 27 of the Contract 00Act." (Para 250 at 192) The learned Advocate-General says that reference to the decision under appeal by the learned judge in his separate but concurrent judgment does not amount to declaration or law by the Supreme Court under Article 141 of the Constitution and, therefore, we cannot independently examine the merits of the judgment.

14. After a great deal of consideration we are not inclined to agree with the learned Advocate-General.

15. The words:

"These principles are accepted by the Andhra Pradesh High Court in ....." occurring in the separate judgment of the learned judge in the Delhi Transport case are referable to the principles adverted to in paragraphs 244 to 249 of the judgment wherein there is an elaborate discussion about the limitations of the State to enter into contracts with private individuals, the ambit and scope of the applicability of certain provisions of the Indian Contract Act, and the disabilities to which citizens are subjected to when they enter into contractual relations with the State or its instrumentalities. It is true that the judgment under appeal was not adverted to by the other three learned judges who constituted the majority in their separate but concurring judgments.The learned judge while declaring the law concerning the applicability of Article 14 in respect of contractual relations between the State and the citizen reiterated the view taken by him in the judgment under appeal and, therefore, it cannot be said that it was a casual reference. It constitutes an integral part of the declaration of law made by the learned judge and, therefore, we are bound by the declaration since it is a law under Article 141 of the Constitution, even though the other learned judges who constituted the majority have not adverted to the case under appeal in their separate but concurring judgments.

16. More than one hundred years ago a situation akin to the present one arose before the Queen's Bench in England. The question was whether a construction placed upon the provision of a statute by one of the Lords of the house of Lords in a separate but concurring decision in regard to which the other law Lords have not expressed any opinion in their separate but concurrent speeches was a binding precedent. Lord Coleridge, C.)., rejecting the contention to the contra held:

"..........Where in the House of Lords one of the learned Lords gives an elaborate explanation of the meaning of a statute, and some of the other learned Lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it." (See Overseers of *Manchester v. Guardians of Ormskirk Union;*[3]):If on any particular aspect an opinion was expressed by a judge of the Supreme Court even in his dissenting judgment and if there is no reference to that aspect in the majority judgment, the Kerala High Court held that it

was bound by the opinion expressed in the dissenting judgment. Vaidialingam, J (as he then was) in V. Padmanabha v. Dy. Tahsildar, Chittur, referring to the interpretation placed by Sarkar, J. (as he then was) in Jagannath Baksh Singh v. State of U.P., on Entry 49 of List II of the VII Schedule -Taxes of lands and buildings-on which there was no adjudication by the majority, held:

> "Inasmuch as there has been no adjudication by the majority on this aspect, I am bound by the decision of Mr. Justice Sarkar on this aspect and I have to hold that the contention of the petitioners regarding the competency of the legislature to enact the measure in question, if the Act is otherwise valid, has to be rejected."

The English practice throughout has been that while laying judicial dicta a judge besides stating his own views may support them by what has been done in other cases although the same is not done as a precedent. Megarry, J in Richard West and Partners v. Dick, (1969) 2 Ch.D. 424 at 431 in a summary judgment in an action brought by the vendors for specific performance of a contract relating to a property, had explained three types of dicta-Obiter Dicta, Judicial Dicta and the third one which does not bear any distinct name and hence described as "innominate":

"But there are dicta and dicta. Some authorities distinguish between obiter dicta and judicial dicta. The former are mere passing remarks of the judge, whereas the latter consist of considered enunciations of the judge's opinion of the law upon some point which does not arise for decision on the facts of the case before him, and so is not part of the ratio decidendi. But there is, I think, a third type of dictum, so far innominate. If instead of merely stating his own view of the point in question the judge supports it by stating what has been done in other cases, not reported, then his statement is one which rests not only on his own unsupported view of the law but also on the decisions of those other judges whose authority he has invoked. He is, as it were, a reporter pro tanto. Such a statement of the settled law or accustomed practice carries with it the authority not merely of the judge who makes it but also of an unseen cloud of his judicial brethren. A dictum of this type offers, as it seems to me, the highest authority that any dictum can bear; and I think that a judge would have to be very sure of himself before he refused to follow it. What Lord Cottenhan said in Exparte Pollard (Mont. & Ch.239, 251) plainly seems to fall within this category: and although Lord Selborne in Ewing v. Orr Ewing(9 App. Cas. 34,40) may have rested at least in part on the authorities to which he referred, it may be that he too relied upon his experience in the same sense."
The support derived by a judge to an opinion expressed by him in his judgment need not always be from what has been done by other judges in other cases. It may very well be from the other cases decided by the learned judge himself.

17. The view expressed by Chinnappa Reddy, J. (as he then was) in *R. Narayana Reddy v. State of A.P*[4], as regards the obligation to publish a statutory rule was reiterated by the learned judge in the Supreme Court in B.K. Srinivasan v. State of Karnataka,

18. When multiple opinions are expressed by several judges in their separate but concurring judgments in a case, the judgment rendered by each of the judges is read by the other judges. This has been and is the practice except in cases where it is specifically established that prior to writing separate judgments, the judges had a judicial conference in which it was decided that in view of the discussion and the separate views held by each of them there is no necessity to circulate the judgments to each other. But this exception was not the case in regard to the

judgment of the Constitution Bench in Delhi Transport Corporation case. Even more than a century ago the British practice was that the judgments prepared by one judge were read by the others. We get this from Lord Esher, M.R. in Guardians of Poor of *West Derby Union v. Guardians of Poor of Atcham Union*[5],

"The House of Lords heard the cases and did not give judgment at once, but considered the matter carefully, and four of the learned judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgments of the others. If they mean to differ in their view, they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others."Non-expression of views by the other learned judges who constituted majority in regard to the judgment under appeal in the Delhi Transport Corporation case must, therefore, be construed as an expression of opinion rendered by the majority with the legal consequence that it being the law declared by the Supreme Court we are bound by it under Article 141 of the Constitution.

19. By any contrived ratiocination it is not permissible to this Court to enquire into the alleged invalidity of a declaration of law made by the Supreme Court. A Division Bench of this Court speaking through one of us (M.N.Rao, J.) in Public Vigilance v. The Govt. of A.P. observed, :

> "Under Article 375 of the Constitution of India, all courts and all authorities throughout the territory of India shall continue to exercise their respective functions subject to the provisions of the Constitution. Under Article 141 the law declared by the Supreme Court shall be binding on all Courts within the territory of India. In the hierarchical set up of the Courts in our country, as ordained by the Constitution, the High Court compared to the Supreme Court exercises jurisdiction of an inferior nature. The decree granted by a higher Court must be obeyed by the lower Court. Any attempt, either directly or indirectly, to enquire into the validity or otherwise of the decree granted by the higher court would be subversive of judicial discipline, and negation of the Rule of Law."

In *Kausalya Devi Bogra v. land Acquisition Officer*[6], the Supreme Court ruled in no unmistakable terms:

"....... in view of the provisions of Article 141 of the Constitution, all courts in India are bound to follow the decisions of this Court."Any decision rendered by any Court if in conflict with a decision of the Supreme Court:

> "would be non-est and absolutely without jurisdiction and violative of Article 141 of the Constitution of India." (vide Krishna Singh v. Mathura Ahir;).A Full Bench of this Court in a recent decision Kranthi Sangram Parishath v. Sri N. janardhan Reddy, speaking through one of us (M.N.Rao, J.) dealing with the scope of Article 141 observed:"When the Supreme Court lays down clear propositions of law, we are precluded from resorting to any interpretative process for the purpose of ascertaining whether those propositions could logically emerge from the issues that fell for consideration. There is no precedent to the effect that the Supreme Court has accorded its approval to any decision rendered by a High Court in which an enquiry of the aforesaid nature was done by the High Court.

> A smaller Bench of the Supreme Court interpreting the law laid down by a larger Bench as per incuriam, as was the case in *State of U.P. v. Synthetics and Chemicals Ltd.*[7] affords no guidance to us in this regard."

We therefore, hold that the affirmation of the judgment under appeal by the Supreme Court in Delhi Transport Corporation case constitutes a total bar for us to consider its correctness and validity. Question No. 1 is, therefore, answered against the appellant-State.

20. As question No. 1 is answered against the State, the second question does not survive for consideration.

21. In the result the writ appeal fails and accordingly it is dismissed.

Cases Referred.

1AIR 1977 SC 1496
21988 (1) A.L.T. 461
3(1890) 24 QBD 678 at 682
41969 (1) An.W.R. 77 at 84
5(1890) 24 Q.B.D. 177 at 119-120
6(1984) 2 SCC 325 at 332
7((1992)4 SCC 139)