

PATNA HIGH COURT

B.K. Sinha

Vs

State of Bihar

Civil Writ Jrdn. Case No. 129 of 1973

(N.L. Untwalia, C.J. and S.K. Jha, J.)

09.05.1973

JUDGMENT

N.L. Untwalia, C.J.

1. On 29-12-1971 the petitioner who was an unemployed Engineer was given a contract by the Superintending Engineer, Flood Investigation Circle, Muzaf-farpur, for earth-work in Gupta Bundh from chain 340 to 427. This was in accordance with the policy laid down by the Government contained in Annexure-1. A copy of the agreement dated 29-12-1971 is Annexure-2. Work order was issued on the same day and a copy of this order is Annexure-3. The work was to be completed by 31-1-1972. According to the petitioner's case he had completed the earthwork upto chain 382, when at the instance of some villagers an order of injunction was issued on 14-1-1972 in a title suit filed by them. The order of injunction was vacated by the trial Court on 19-2-1972 (Annexure-4). But in a miscellaneous appeal filed by the plaintiff again an order of injunction was made on 10-5-72. A copy of the appellate court's judgement is Annexure-5. A civil revision was filed in this Court, a copy of which application is Annexure-6. This civil revision (No. 1125 of 1972) was allowed by a learned Judge of this Court on 22-1-1973. The injunction order was vacated. It is not necessary to refer to the letter of the Executive Engineer dated 19-1-1972 allotting work to one Karyanand Sahu. The main grievance of the petitioner in this writ application is that during the continuance of the injunction order he could not work and as soon as the injunction order was vacated by this Court on 22-1-73 he approached the authorities on 23-1-1973 for permitting him to complete the work, but they did not do it. On the other hand, by an advertisement published in the Indian. Nation on 14-12-1972, a copy of which is Annexure-7, fresh tenders were invited including tenders in relation to Gupta Bundh. In this advertisement the earth work from chain 340 to 427 was also included. Tenders were opened on 4-1-1973 and ultimately a fresh contract was given to respondents 6 and 7. Thus the petitioner's grievance is that arbitrarily he was not allowed to perform his part of the contract and complete it. Arbitrarily and illegally his part of the work was given to respondents 6 and 7. On these allegations the prayer in the writ application is "to declare the allotment order and the agreement in respect of the work in question in favour of Respondents 6 and 7 as ultra vires, void and illegal, and be further pleased to issue a writ in the nature of a writ of mandamus commanding the Respondents Nos. 3 and 4 to grant adequate extension of time for completion of the work in

question by the petitioner and honour, implement and act on agreement between the State Government and the petitioner at Annexure-2 and restrain the respondents from implementing and acting on the impugned agreement with Respondents Nos. 6 and 7". Cause has been shown in this case on behalf of respondents 2 to 5, who are the Chief Engineer, Superintending Engineer, Executive Engineer and the S. D. O., Tubewell, by filing a counter-affidavit and by the learned Standing Counsel No. 3 at the time of the hearing of the writ application. A separate counter-affidavit has been filed by respondent 6 and his case was argued by the learned Advocate General. Mr. Basudeva Prasad appeared in support of the rule.

2. In the counter-affidavit filed on behalf of respondents 2 to 5 reasons mentioned for not allowing the petitioner to complete his contract and for giving a fresh contract to respondents 6 and 7 are to be found in paragraphs 4, 8, 9 and 13 of the said counter-affidavit. In nutshell the stand taken therein is that the petitioner had attempted to do piecemeal earthwork upto chain 382 and he had also been paid for that work, it is no doubt true that he did approach respondent 3 with an application on 23-1-1973 to allow him operation of the work under his agreement executed for the work of Flood Damage Repair to Gupta Bundh, but then that agreement was executed in pursuance of the Central grant whose fund and target period had already expired upto June 1972. Therefore the petitioner was verbally informed that his contract had already been closed on account of the expiry of the period and fund for the work. It is further stated that the old design for widening, raising and strengthening of the Bund had been dropped and fresh and different design with different specification had been drawn up which was being sought to be executed by him under a new agreement as it was essential to be so done. It is again repeated in paragraph 13 that the cost of the execution of the work entrusted to the petitioner was to be met out of the Central grant for a different work i.e. Flood Damage Repairs to Gupta Bundh, the time limit of which expired in June 1972. The work which was given to respondents 6 and 7 was of a different kind and could not be entrusted to the petitioner.

3. Without examining the legality or validity of the stand taken on behalf of respondents 2 to 5 in their counter-affidavit I shall assume in favour of the petitioner that he was illegally prevented from completing his work under the contract (Annexure-2). Thus the State and its officers committed breach of the contract. I shall also assume in favour of the petitioner that he was not responsible for the delay caused in the execution of the contract. He was helpless in the matter because from time to time injunction orders were issued. When ultimately the injunction order was vacated by this Court on 22-1-1973 he rightly approached the authorities for permitting him to complete the work. In spite of assuming all these facts in favour of the petitioner I do not feel persuaded to hold in this case that the fresh contract given to respondents 6 and 7 can be quashed by grant of a writ of certiorari or a writ of mandamus can be issued against respondents 1 to 5 commanding them to allow the petitioner to complete his contract. To do so, in my opinion, would be to decree a specific performance of contract in question though the petitioner was not entitled to such a decree in a Civil Court. At best in a Civil Court he would be entitled to get a decree for damages if he proved that the contract had been illegally broken by the State and its officers. I am conscious of the fact that under certain circumstances a writ of mandamus can issue to compel the authorities concerned to do certain acts even though they related to contractual rights. But in such a situation the contractual right of a petitioner is affected not merely by breach of contract on the part of the authorities concerned but also because of their violation of statutory duties. The matter stands on a different footing if the action which is taken by the authorities concerned is in violation to their statutory duties. In the instant case, however,

it is clear on the fact and in the circumstances of this case that as between the two contracting parties to the contract, pure and simple, one of them is said to have committed a breach. As observed by the Supreme Court in *C.K. Achutan v. State of Kerala*¹, in paragraph 8 at page 492, there is hardly any difference in that regard between the breach committed by a private party and the breach of contract brought about by the Governmental authorities. It is neither possible in law nor expedient that every breach of contract committed by the Governmental authorities should be remedied by issue of a writ of mandamus. If it were to be so, then in every case of breach, of contract entered with various Departments of the Governments concerned a petitioner would be entitled to an order from this Court; which will have the force of a decree or specific performance of contract which other wise such a petitioner would not be entitled from a Civil Court. I am, therefore, definitely of the view that until and unless in the breach is involved violation of certain legal and public duties or violation of statutory duties to the remedy of which the petitioner is entitled by issuance of a writ of mandamus, mere breach of contract cannot be remedied by this Court in exercise of its powers under Article 226 of the Constitution.

4. If the petitioner is not entitled to get the breach of contract remedied by this Court it follows as a corollary that the contract given to respondents 6 and 7 which is much larger contract for execution of now works than the one given to the petitioner cannot also be quashed. The action or order of giving contract to respondents 6 and 7 cannot be set aside by grant of a writ of certiorari as there was no duty cast upon the Governmental authorities while giving the contract to respondents 6 and 7 to hear the petitioner and then to give the contract. After they took a decision that the petitioner could not be allowed to complete the work, whether this decision be correct or wrong the contract could very well be given to respondents 6 and 7. It was not the duty of respondents 6 and 7 to investigate and find out whether the contract which was being given to them was after a justifiable order of refusal made against the petitioner in not permitting him to complete his work.

5. Learned counsel for the petitioner placed reliance on *Union of India v. M/s. Anglo Afghan Agencies*², *K.N. Guruswamy v. The State of Mysore*³, *The D. F. O. South Kheri v. Ram Sanehi Singh*⁴, and *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*⁵, The case of Messrs Anglo Afghan Agencies is clearly distinguishable. The aggrieved party there on a representation of the Governmental authorities was made to export woollen goods to the tune of 5 lacs and odd. When he wanted an import license for an equal amount under certain scheme framed under certain statutes he was given the import license for a sum of rupees two lacs approximately. For the grant of the balance of the amount he approached the High Court. The High Court allowed the writ. The Union of India failed in the Supreme Court in appeal. In that connection it was observed –

"Under our constitutional set-up, no person may be deprived of his right or liberty except in due course of and by authority of law : if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law common or statute-the Courts will be competent to, and indeed would be bound to protect the rights of the aggrieved citizen."

It would be noticed that the right which was affected in that case was a right to get the import license. Here on breach of contract, by the governmental authorities, even assuming there was a

breach, the petitioner's right is to get damages. It is not his right in law always that he should be permitted to complete the work and get the money. Doctrine of estoppel was applied in the case of Anglo Afghan Agencies with reference to the exercise of the power of the authorities under the various schemes framed under the Statutes under consideration in that case. Here the position is different. In Guruswamy's case the matter under challenge was giving of excise contract to Thimmappa, although at the auction the highest bid was of Guruswamy. On a consideration of the provisions of the Mysore Excise Act, 1901, and the rules made under it, it was found as a fact that the action of the authorities concerned was not illegal. In that connection a question was posed whether Guruswamy who was the appellant before the Supreme Court could complain of the breach by the governmental authorities by way of a writ. The answer given was-"In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimmappa, who was present at the auction and who did not bid-not that it would make any difference if he had for the fact remains that he made no attempt to outbid the appellant. If he had done so it is evident that the appellant would have raised his own bid." This is a case which falls on the other side of the dividing line which though subtle is distinct in relation to contract cases. Here the petitioner's right flowed from the contract but then the grievance against the governmental authorities is not referable to breach of any statutory duty. Mr. Basudeva Prasad endeavoured to place before us governmental instructions defining the powers of the superintending and the Executive Engineers of the Public Works Department of the Government of Bihar. But, in my opinion, those instructions are mere executive instructions and are not incorporated in any statutory rule. In order to enable the State to enter into contracts with the citizens some officer of the Government has got to be authorised by an executive instruction to enter into contract laying down the manner of entering into it. It does not affect the position of the State that it is a mere contracting party through its officers. In Century Spinning and Manufacturing Company's case AIR 1971 SC 1021 the applicability of the doctrine of estoppel against the State enunciated in the case of Anglo Afghan Agencies was reiterated. The relief which the Company had sought in that case was not merely and purely based upon a contract. The Company had done something on the assurance of the authorities which was assented to by the District Municipality also but later on the Government and the Municipality wanted to back out from the assurance and levy certain amounts of octroi. The Company filed a writ application in the High Court to restrain the respondent Municipality from enforcing the provisions of the Maharashtra Municipalities Act relating to the levy of octroi. This petition was dismissed by the High Court in limine. The Company went to the Supreme Court. In that connection the principle of estoppel was reiterated in paragraphs 11 and 12 of the judgement. It was observed - "A public body is in our judgement, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice." In my opinion, invoking the doctrine of estoppel in this case is wholly misconceived. The petitioner entered into a contract with Government. He executed the contract to a certain extent but was not allowed to execute the rest. There is no question of the petitioner changing his position because of some representations of the governmental authorities. The principle decided in Century Spinning and Manufacturing Co's case cannot be invoked and applied in the present case. In Ram Sanahi's case (AIR 1973 SC 205) it would be noticed from paragraph 3 of the judgment that the High Court had held that the order made by the Divisional Forest Officer in exercise of the statutory authority was liable to be quashed. In that connection, following Guruswamy's case it was observed by Shelat, J. in paragraph 4. "There can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach

of contract, where the action challenged was of a public authority invested with statutory power." In *Haridwar Singh v. Begum Sumbrui*⁶, the question for consideration was whether Rule 10(1) of the Rules of Executive Business was violated. A coup was settled in that case firstly with the appellant before the Supreme Court but later on with the respondent. The order passed by the Minister of Forest was unsuccessfully challenged in the High Court. It was held by the Supreme Court that Rule 10(1) was mandatory and it was violated. Hence the order was set aside. The question which was decided in Haridwar Singh's case does not fall for decision in this case. In *Dr. Umakant Saran v. State of Bihar*⁷, it has been pointed, out in paragraph 10. "..... in order that mandamus may issue to compel the authorities to do something it must be shown that the statute imposes a legal duty and the aggrieved party had a legal right under the statute to enforce its performance." Here in the very nature of the contract in question the petitioner had no right to claim its specific performance. The statute did not impose any legal duty on the authorities concerned that if they thought that the petitioner should not be allowed to complete the work-even assuming they thought so wrongly-they could not stop the work. Same view has been expressed in an earlier decision of the Supreme Court in *Lekhraj Sathramdas v. N.M. Shah*⁸, In paragraph 5 it is observed :

"..... writ of mandamus may be granted only in a case where there is a statutory, duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions."

A writ of mandamus cannot issue to compel the authorities to remedy a breach of contract pure and simple. In my considered judgment, therefore, in this case the petitioner is not entitled to any relief.

6. In the result, the writ application fails and is dismissed. In the circumstances there will be no order for costs.

S.K. Jha, J.

7. I agree.

Petition dismissed.

Cases Referred.

¹(AIR 1959 SC 490)

²(AIR 1968 SC 718)

³(AIR 1954 SC 592)

⁴(AIR 1973 SC 205)

⁵(AIR 1971 SC 1021)

⁶(AIR 1972 SC 1242)

⁷(AIR 1973 SC 964)

⁸(AIR 1966 SC 334)

