

Pimpri Chinchwad Municipal Corp.& Ors vs M/S Gayatri Construction Company & Anr on 6 August, 2008

Bench: Mukundakam Sharma, Arijit Pasayat

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4912 OF 2008
(Arising out of S.L.P. (C) No. 1129 of 2007)

Pimpri Chinchwad Municipal Corporation
And Ors.

.....Appellants

Versus

M/s Gayatri Construction Company and Anr.Respondents

JUDGMENT

Dr. ARIJIT PASAYAT.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Bombay High Court allowing the Writ Petition filed by the respondents.

3. Background facts in a nutshell are as follows:

Writ Petition was filed by respondents 1 and 2 taking the stand that respondent No.1 was awarded a contract for the work of improvement and widening of part of the Thermax-

Telco-Bhosari road which was divided in three phases and contract for Phase-III (Approx. 3.7 Kms.) was given to the them, whereas the tender of Phase-II with its cost at Rs.8,61,63,048/- was awarded to another party (Approx. 3.3 Kms.) Though the tender amount was Rs.9 crores with a discount at 9.01%, the contract price was fixed at Rs.8,18,91,000/- and the letter by the Corporation to the respondents was given on 7/4/2005 and the work was to be completed within 12 months from that date. There is no dispute that the work was not completed and the corporation

released an advertisement published in some of the local newspapers on 30/6/2006 inviting tenders for the improvement and widening of four roads, including the road which was the subject matter of the contract awarded to the respondents i.e. Item No. 3-A - Telco road. The approximate costs of this road in the advertisement has been shown to be Rs.30 crores as against the original tender cost of Rs.17.6 crores. After the advertisement was released, the respondents were issued a letter dated 19/7/2006 informing the Corporation's decision to take action under clause 3(a) of the contract and the respondents were called upon to remain present for final measurement on 27/6/2006. The respondents submitted a representation on 25/7/2006 and by its letter dated 1/8/2006 the corporation reiterated its action as per the letter dated 19/7/2006. The respondents approached the High Court on 22/8/2006 after they had submitted another representation on 4/8/2006 to the Corporation and the Corporation confirmed the decision to stop work. The respondents filed writ petition challenging action of appellants in releasing the advertisement and inviting fresh tenders on 30/6/2006 for the very same work which is part of the contract awarded to the respondents i.e. Item No.3-A Improvement and Widening of remaining stretch of Telco Road and consequently the attempt to terminate the contract post facto by invoking clause 3(a) of the contract.

The present appellants filed an affidavit in reply and raised a preliminary objection as to the maintainability of the writ petition. It was contended that the writ petitioners had an alternative remedy for enforcement of the contract. In matters flowing from the contract, a petition under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') cannot be maintained. Further, disputed questions are involved. On merits it was also contended that it was the contractor firm which was responsible for not maintaining the contractual terms and in spite of the contractual period having been over, the work could not be completed and the contractors went on insisting that the entire stretch of the road be handed over to them so as to start and complete the work. In short the contractors failed to complete the work in 12 months' time and therefore the contract was terminated.

The High Court found that though Clause 58 of the agreement provided for inhouse remedy of representation for settlement of disputes that cannot stand in the way of the writ petition being entertained. It was submitted by writ petitioners that the cost of completing the work would be much higher than what would have been payable to the writ petitioners. The High Court referred to the Minutes of the Corporation and held that the writ petitioners were justified in challenging the Corporation's action to invite fresh tenders for the work allotted to it. It also referred to the undertaking given by the writ petitioners to the effect that they were ready and willing to execute the work but were unable to do so for several reasons. The High Court, therefore, directed the Corporation not to complete the work and to maintain status quo in respect of Phase-III of Telco Road as well as the tenders received for the said work in response to the advertisement which was impugned before the High Court.

4. In support of the appeal, learned counsel for the Corporation and its functionaries submitted that the High Court lost sight of the objections raised as regards to the maintainability of the writ petition. It was submitted that there was cancellation of tender and fresh advertisement was issued. The agreement provided inhouse mechanism in relation to dispute arising out of the contract. The High Court did not consider this aspect. The High Court also did not take note of the difference between the statutory contracts and non-statutory contracts. Before the High Court the writ petition was questioned on three grounds; (i) disputed questions relates to facts were involved; (ii) to enforce the terms of contractual rights remedy under the Civil Law is available, and in any event, the writ petition was not maintainable in respect of contractual matters. It was pointed out that the writ petitioners were seeking relief of enforcement of their contractual rights, and that several relevant and material facts have been suppressed. In essence, it was submitted that the above aspects have not been considered by the High Court.

5. In response, learned counsel for the respondents-writ petitioners submitted that the Corporation itself was guilty of not providing the requisite infrastructure for carrying out the contractual obligations. The difficulties have been highlighted in various representations to the Corporation. But without any plausible reason and without following the principles of natural justice the fresh advertisement was issued. It is also pointed out that subsequently there appears to be the settlement of the work at a huge cost.

6. So far as existence of the alternative remedy is concerned Clause 58 of the agreement is relevant. The same reads as under:

"Clause 58- All disputes & differences of any kind whatever arising out of or in connection with the contractor the carrying out of the work (whether during the progress of the work or after their complete & whether before or after the determination, abandonment or breach of the contract) shall be referred to & settled by the City Engineer. But, if the contractor be dissatisfied with the decision of the City Engineer or as to withholding by the City Engineer of any certificate to which the contractor may within 60 days after receiving notice of such decision give a written notice to the other party requiring that may claim to entitled then & in any such case the contractor such matter in dispute be referred to in open before a Committee as mentioned below. Such written notice shall specify the manner which are in disputes & such disputes or difference of which such notice has been given & no other shall be & is hereby referred committee consisting of the Commissioner, Pimpri Chinchwad Municipal Corporation, the city engineer and project management consultant, the decision taken by the parties will be final and binding on both the parties. Such reference except as to the withholding of any certificate to which the contractor to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the City Engineer. Provided always that the Corporation shall not withhold the payment of an Interim Certificate not the Contractor in any way delay the carrying out of the works by reason of any such matters, question or dispute being referred to the Committee but shall proceed with the work with all the diligence & shall, until the decision of the

Committee abide by the decision of the City Engineer & no award of the Committee shall relive the contractor of his obligations to adhere strictly to the City Engineer's instructions with regard to the actual carrying out of the works. The Owner & the Contractor hereby also agree that the said reference to the Committee under this clause shall be a condition precedent to any right of action under the Contract."

7. In matters relating to maintainability of writ petitions in contractual matters there are catena of decisions dealing with the issue.

8. In *National Highways Authority of India v. Ganga Enterprises* (2003 (7) SCC 410), it was *inter alia* held as follows:

"6. The respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz.: (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 a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. 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* (2000 (6) SCC

293), *State of U.P. v. Bridge & Roof Co. (India) Ltd.* (1996 (6) SCC 22) and *Bareilly Development Authority v. Ajai Pal Singh* 1989 (2) SCC 116. 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 *Veriganto Naveen v. Govt. of A.P.* (2001 (8 SCC 344)) and *Harminder Singh Arora v. Union of India* (1986 (3) SCC 247). 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."

9. In *Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors.* (2000 (6) SCC 293), this Court dealt with the question of maintainability of petition under Article 226 of the Constitution and the desirability of exhaustion of remedies and availability of alternative remedies, as also difference between statutory contracts and non-statutory contracts. In paras 10 and 11 of the judgment it was noted as follows:

"10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages

actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory.

Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."

10. Reference can also be made to State of Gujarat and Ors.

v. Meghji Pethraj Shah Charitable Trust and Ors. (1994 (3) SCC 552). In para 22 it was observed as follows:

"22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (*audi alteram partem*) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was -- as has been repeatedly urged by Shri Ramaswamy -- a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further."

11. Again in *State of U.P. and Ors. v. Bridge & Roof Company (India) Ltd.* (1996 (6) SCC 22), this Court dealt with the issue in paras 15 and 16 in the following manner:

"15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer."

12. At para 11 of *India Thermal Power Ltd. v. State of M.P. and Ors.* (2000 (3) SCC 379), it was observed as follows:

"11. It was contended by Mr. Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same.

Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the

Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory".

13. Therefore, the High Court ought not to have entertained the writ petition. Additionally, it appears that by order dated 17.1.2007 interim stay of the impugned order was granted and was continued by order dated 12.2.2007. It is pointed out by learned counsel for the appellants that since the order of the High Court was stayed and there was urgency in the matter fresh tenders were called for. Three persons submitted the bids and the work has already been allotted and a considerable portion of the work has already been completed.

In view of aforesaid, we set aside the impugned order of the High Court and direct dismissal of the writ petition. It is however open to the respondents-writ petitioners to seek such remedy, if so advised, as is available in law. We do not express any opinion in that regard.

14. The appeal is allowed. There shall be no order as to costs.

.....J. (Dr. ARIJIT PASAYAT)J. (Dr. MUKUNDAKAM SHARMA) New Delhi, August 6, 2008