

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 23rd March, 2012

+ **LPA No.553/2010**

% **GOVT. OF NCT OF DELHI & ORS. Appellants**

Through: Ms. Sangeeta Sondhi, Mr. Sanjeev
Narula & Mr. Ashish Virmani, Adv.

Versus

NEW VARIETY TENT HOUSE & ANR Respondents

Through: Mr. J.P. Sengh, Sr. Adv. with Mr.
Mohit Gupta, Sumit Batra & Ms.
Ankita Gupta, Advs. for R-1&2.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. This Intra-Court appeal impugns the order dated 23rd March, 2010 of the learned Single Judge allowing W.P.(C) No.7225/2007 preferred by the respondents and consequently directing the appellants to release a sum of ₹67,57,072/- to the respondents; the appellants have also been burdened with interest @ ₹10% per annum for delay in payment and with costs. Notice of this appeal was issued and the operation of the impugned order stayed. The writ record has also been requisitioned. The counsels have been heard.

2. The respondents had filed the writ petition pleading, that they were / are engaged in the business of supplying tents / tin sheds and other furniture on hire; that in the years 1998 to 2000, the Directorate of Education of the appellants had placed an order on the respondents for erection of tin shed structures in some of the government schools in Delhi; similar orders were placed on other tent houses also including one Punjabi Tent House; that during the year 1999-2000 bills for ₹4,30,943/-, ₹57,89,526/- and ₹5,30,603/- i.e. for a total sum of ₹67,57,072/- were raised by the respondents; that inspite of repeated requests and reminders of the respondents and promises to pay, the bills were not cleared and the payments withheld “due to some audit objections..... during the special audit conducted in the year 2000” ; that the appellants have however never denied their liability to the respondents; that the respondents on 6th May, 2004 had made a complaint to the Public Grievances Commission also; that though payments had been denied to the respondents but the appellant in pursuance to W.P.(C) No.5900/2003 filed by said M/s. Punjabi Tent House had paid the withheld amount; that the respondents were similarly placed as M/s. Punjabi Tent House (supra). Mandamus was thus sought for directing the appellant to release the payment of ₹67,57,072/-.

3. Though the respondents had pleaded that the work order aforesaid was placed on them pursuant to a tender enquiry but along with the writ petition filed only tender notices and nothing else to show that respondents had participated in the tender or that any order was so placed on them. Again, though the respondents claimed that an agreement in this regard had been executed but only a copy of a draft agreement was filed along with the writ petition. Though photocopies of the bills raised were filed but the same do not contain any acknowledgment even of receipt thereon. The copies of few letters claimed to have been written were filed but the same are again without any official stamp acknowledging receipt. The respondents however along with the writ petition filed a copy of the response dated 1st April, 2003 of the appellants to an RTI query but only to the effect that “the pending payment of M/s New Variety Tent House has been withheld due to some audit objections of Dte. of Audit raised during the special audit conducted in the year 2000 and the same will be considered after the settlement of Audit paras by the Dte. of Audit”. Another response dated 21st May, 2003 to the same effect to another RTI query was also filed along with the writ petition.

4. The appellant in its counter affidavit to the writ petition before the learned Single Judge pleaded that the writ petition qua the contractual claim was not maintainable; that the appropriate remedy was to file a suit for recovery of money; that the remedy of suit had got barred by limitation; that the payments claimed pertained to the period 1999-2000 claim wherefor in writ petition filed in the year 2007 was palpably barred by time. On merits, though the receipt of three bills aforesaid for ₹67,57,072/- was not denied, it was pleaded that no assurance for payment had been meted out at any time.

5. The learned Single Judge impleaded the Directorate of Audit also as respondent no.4 to the writ petition. A counter affidavit was filed by the Controller of Accounts (Audit) of the GNCTD also. It was pleaded therein that complaints had been received from various schools regarding poor quality of tents and tin sheds for students; on the basis of the said complaints a special audit was done and report thereof sent to the Department of Education under cover of letter dated 14th September, 2000; that it was for the Department of Education to see whether any lapse existed in the quality of the work done.

6. The learned Single Judge vide order dated 29th January, 2010

requisitioned the audit report and found that there were two specific objections in relation to the respondents; firstly that the work was awarded to the respondents without approval of Competent Authority and secondly that there were complaints regarding poor quality of work and which the Director of Audit had asked the Directorate of Education to consider.

7. The learned Single Judge in the order impugned before us found that the Directorate of Education without conducting any inquiry into the complaints was not justified in withholding payments; that there was nothing to show that any such inquiry regarding the quality of work had been conducted.

8. The learned Single Judge further held that non-obtaining prior approval from the Competent Authority could not erase the entire work done by the respondents and the respondents could not be denied payment for omission on the part of appellants to take such approval.

9. Qua the plea of the appellants herein of the claim being barred by limitation, the learned Single Judge observed that the appellants in the reply dated 3rd July, 2007 to yet another RTI query by the respondents had not taken the plea of limitation. It was further held that the appellants were

unable to satisfactorily explain as to how the case of the respondents was different from the case in W.P.(C) No.6644/2007 in which payments had been directed to be made.

10. Of the three bills, seeking direction for payment of which the writ petition was filed, two are dated 27th April, 1999 and the other, 23rd July, 1999. The same are for providing tin structures in government schools from 6th July, 1998 to 31st July, 1998, 1st August, 1998 to 30th April, 1999 and from 1st May, 1999 to 30th June, 1999 respectively. In the absence of anything to show otherwise, under Article 12 of the Schedule to the Limitation Act, 1963, the limitation for recovery of the said hire charges was three years from the date when the hire became payable i.e. from the date of the bill. The said period of three years expired with respect to the first two bills on 26th April, 2002 and for the third bill on 22nd July, 2002. There is nothing to show that the date of payment was agreed to be any other. The writ petition seeking mandamus was filed only on 28th September, 2007. There is nothing to show any acknowledgment of liability within the meaning of Section 18 of the Limitation Act.

11. We have thus wondered whether money claim, suit for which had

become barred by time/limitation, can be allowed in writ jurisdiction. The answer obviously is no. The learned Single Judge has brushed aside the valid plea of the appellant of limitation by referring to the directions issued in the writ petition being W.P.(C) No.6644/2007 filed by one M/s Ramesh Kumar Brothers. We are however unable to agree with the said reasoning. Firstly merely because the time barred claim of another has been allowed does not constitute a reason for allowing another time barred claim. More important, there is no 'decision' in the said order on the aspect of limitation. Also, a reading of the order shows that the liability therein was unequivocally admitted and at least part of the amount claimed was the 'security amount'. It is not so in the present case.

12. The respondents had filed the writ petition agitating the claim stated to be at par with that of M/s Punjabi Tent House. However Punjabi Tent House had filed their petition in the year 2003 and the same was allowed on 05.08.2004. The respondents waited for more than three years thereafter also, for filing their petition. Even if it is to be held that the claim of M/s Punjabi Tent House was also barred by limitation, wrong decision and more so on the point of law, as the plea of limitation in the present case is, cannot constitute a precedent for allowing other time barred claims.

13. The counsel for the appellants has cited *State of Madhya Pradesh v. Bhailal Bhai* AIR 1964 SC 1006 to contend that though the provisions of Limitation Act do not apply to the granting of relief under Article 226 however the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. Reliance is also placed on *Binny Ltd. v. V. Sadasivan* AIR 2005 SC 3202 in support of the proposition that contractual obligations are beyond the zone of judicial review.

14. We may however notice that the judgment (supra) in *Bhailal Bhai* has been overruled on another aspect, in *Mafatlal Industries Ltd v Union of India* (1997) 5 SCC 536. We may further notice that the Supreme Court in *Tilokchand Motichand v H.B. Munshi* (1969) 1 SCC 110 has in the majority judgment held that the extraordinary remedies under the Constitution are not intended to enable the claimant to recover monies, the recovery of which by suit is barred by limitation. It was further held that where the writ remedy under Article 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the Court in its writ jurisdiction acts by analogy to the statute,

adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the same limitation on the summary remedy in writ jurisdiction.

15. The Supreme Court in *Kerala Agro Machinery Corporation Ltd V. Bijoy Kumar Roy* (2002) 3 SCC 165 held that the stage of proceeding has no relevance so far as the question of limitation is concerned. Similarly in *S.S.Balu V. State of Kerala* (2009) 2 SCC 479, it was held that relief on the ground of delay alone can be denied even though relief is granted to other person similarly situated.

16. We may also record that for extension of limitation, no reliance can be placed on response to RTI query. In the present case, the response is not found to contain any admission of liability so as to extend the period of limitation.

17. The counsel for the respondents has referred to:-

a. *Shankara Co-op. Housing Society Ltd. v. M. Prabhakar* AIR 2011 SC 2161 – but which is not found to be applicable;

- b. *Union of India v. Tania Construction Pvt. Ltd.* 2011 (4) SCALE 745 laying down that the alternative remedy of arbitration is not an absolute bar to the invocation of writ jurisdiction;
- c. *Zonal Manager, Central Bank of India v. Devi Ispat Ltd.* (2010) 11 SCC 186 to the same effect;
- d. *Food Corporation of India v. SEIL Ltd.* (2008) 3 SCC 440 – on the scope of interference in writ jurisdiction in contractual matters;
- e. *Noble Resources Ltd. v. State of Orissa* (2006) 10 SCC 236 also laying down that contractual matters are not totally beyond the scope of judicial review;
- f. *A. Angoubi Singh v. State of Manipur* AIR 2005 Gauhati 92 – where direction for discharging contractual obligations was issued in writ jurisdiction;
- g. *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* 2003 (10) SCALE 815 – on the disputed questions of fact capable of being gone into in writ jurisdiction;

- h. ***Ganga Retreat & Towers Ltd. v. State of Rajasthan*** (2003) 12 SCC 91 also found to be not applicable;
- i. ***Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*** (2003) 2 SCC 107 – also on the rule of alternative remedy being a rule of discretion;
- j. ***Smt. Gunwant Kaur v. Municipal Committee, Bhatinda*** (1969) 3 SCC 769 laying down that the High Court in exercise of powers under Article 226 has jurisdiction to determine questions of fact even if they are in dispute.

We are afraid none of the aforesaid judgments come to the rescue of the respondents on the aspect of limitation.

18. We may notice that the Apex Court recently in ***Godavari Sugar Mills Ltd. Vs. State of Maharashtra*** (2011) 2 SCC 439 after a consideration of the entire case law including ***Suganmal Vs. State of Madhya Pradesh*** AIR 1965 SC 1741, ***U.P. Pollution Control Board Vs. Kanoria Industrial Ltd.*** (2001) 2 SCC 549 and ***ABL International Ltd.*** (supra) , made the legal proposition clear as under:-

- (i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers;
- (ii) If a right has been infringed—whether a fundamental right or a statutory right and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law;
- (iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The

aggrieved party seeking refund has to approach the Civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of powers conferred under Article 226 for payment of money;

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the tax collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition;

(v) It is one thing to say that the High Court has no power under Article 226 to issue a writ of mandamus for making refund of

the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without authority of law, there is no good reason to deny a relief of refund to the citizens;

- (vi) Where the *lis* has a public law character or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy will not be denied.

19. In our view the present case does not fall in any of the categories enumerated above. As far as reliance on *ABL International Ltd.* is concerned, a reading of the said judgment shows that the Court on a perusal of the facts therein found no question which required any oral evidence and found the dispute in that case to be only as to the interpretation of the various clauses of the policy subject matter of that petition. However that is no so here.

20. The Supreme Court in *Jagdish Mandal Vs. State of Orissa* (2007) 14

SCC 517 held that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. It was also held that a writ petition in the contractual matters would be entertained only if there is an element of public interest in the litigation. No such element of public interest is found in the present case.

21. Recently, the Apex Court in ***Kisan Sahkari Chini Mills Ltd. Vs. Vardan Linkers*** AIR 2008 SC 2160 also reiterated that public law remedy under Article 226 of the Constitution of India is not available to seek damages for breach of contract or specific performance of contract unless the contractual dispute has a public law element. Reference may also be made to ***Binny Ltd. Vs. V. Sadasivan*** (2005) 6 SCC 657 where the Apex Court held that even in the matter of termination of employment, no public law element is involved and the remedy of the employees is under the civil or labour law only. It was further held that the powers under Article 226 are to be exercised by applying the Constitutional provisions and judicial guidelines and violation, if any of the fundamental rights and the Court would be reluctant to exercise the power of judicial review in rights on the basis of contracts. It was further held that a contract would not become statutory simply because it has been awarded by a statutory body.

22. Applying the aforesaid principles, the writ petition to enforce the contractual claim was not maintainable and more so when the claim was barred by time.

23. We accordingly allow this appeal and set aside the order dated 23rd March, 2010 impugned herein; axiomatically the writ petition filed by the respondents is dismissed. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 23, 2012

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