IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No. 1861 of 2016
Arising out of
Civil Writ Jurisdiction Case No.14165 of 2016

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Baidyanath Singh, S/o- Late Gonour Singh, resident of Village- Gavsara, P.O.- Chadhua, P.S.- Kurhani, District- Muzaffarpur

.... Appellant/s

Versus

1. The State of Bihar, through the Chief Secretary, Government of Bihar, Patna.
2. The Home Commissioner, Home (Jail) Department, Bihar, Patna.
3. The Inspector General, Jail, Bihar, Patna.
4. The District Magistrate-cum-Chairman, District Jail Purchase Committee, Muzaffarpur.
5. The Jail Superintendent, Shahid Khudiram Bose Central Jail, Muzaffarpur.

.... Respondent/s

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Appearance :

For the Appellant : Mr. Rajendra Narayan Sinha, Sr. Advocate.
Mr. Nityanand, Advocate.

For the State : Mr. Dhurendra Kumar, A.C. to G.P.-5

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE VIKASH JAIN

C.A.V. JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)
Date: 16-12-2016

The challenge in the present Letters Patent Appeal is to an order passed by the learned Single Bench of this Court on 8th of September, 2016 in C.W.J.C. No. 14165 of 2016 whereby, the writ application seeking quashing of the order dated 23rd of April, 2016 whereby, the contract of food articles for supply in jail was recalled and it was decided to call for the fresh tender, was dismissed.

2. A tender was invited on 27th of January, 2016 by the Superintendent, Shahid Khudiram Bose Central Jail, Muzaffarpur for

supply of general food and other miscellaneous articles. The appellant submitted his tender including certificate of registration under the Food Safety and Standard Act, 2006 (hereinafter referred to as "the Act"). The tender of the appellant in respect of some items was accepted and the appellant was directed to deposit a sum of Rs. 44,65,000/- i.e. 10 per cent of the total estimated amount for the Financial Year 2016-17 as earnest money in the form of Bank Guarantee. The appellant deposited the said amount but the tender was cancelled on 23rd of April, 2016 when even after request of the appellant for grant of time to produce the licence from Food Safety and Standard Authority was not accepted.

3. The contention of the appellant is that he had assured the respondents that he would submit such licence before 28th of April, 2016 but even before that date, the decision to invite fresh tender was taken.

4. The learned Single Bench dismissed the writ application on the ground that the appellant has not immediately invoked the writ jurisdiction of this Court and has allowed the fresh tender notice to be issued and finalized. Therefore, there is no reason to entertain the writ application filed by the appellant.

5. Before this Court learned counsel for the appellant contended that the decision to cancel the contract and to issue fresh

tender is arbitrary and without any reason and, thus, this Court in the writ application should not allow such arbitrary action to stand and consequently allow the appellant to complete the contract awarded to it at an early stage.

6. A perusal of the show-cause issued to the appellant on 15th of April, 2016 shows that the appellant was informed that licence has not been produced from Food Safety and Standard Authority which is mandatory in respect of dealers who have an annual production of more than twelve lakhs rupees (condition number 6). Such condition is that the dealers have to produce licence and registration under the Act. Admittedly, the appellant has not produced such licence which was a condition in the notice notifying the tender when it submitted tender and did not supply, even when called upon to produce the same.

7. Before this Court, learned counsel for the appellant referred to the judgments in the case reported as M/s. Master Marine Services Pvt. Ltd., v. Metcalfe & Hodgkinson Pvt. Ltd. and another, AIR 2005 Supreme Court 2299, Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd. and others, (2003) 2 SCC 107, Hindustan Petroleum Corporation Limited and others Vs. Super Highway Services and another, (2010) 3 SCC 321, Modern Steel Industries Vs. State of U.P. and others, (2001) 10 SCC 491, Whirlpool Corporation

Vs. Registrar of Trade Marks, Mumbai and others, (1998) 8 SCC 1, National Sample Survey Organisation and another Vs. Champa Properties Limited and another, (2009) 14 SCC 451, Union of India and others Vs. Tantia Construction Private Limited, (2011) 5 SCC 697 and ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others, (2004) 3 SCC 553 to contend that in exercise of the writ jurisdiction, the Court can decide even disputed questions of fact to annul the arbitrary action of the State Government.

8. The reading of the judgments referred to by the learned counsel for the appellant lead to the conclusion that the powers of the Writ Court are plenary in nature and in exercise of such power, the Court can embark an inquiry into the disputed questions of facts as well, but whether such powers should be exercised or not is one of the discretion. The Power of judicial review in the matter of awarding contract conferred by Article 14 is wide, which enjoins the public authority to act fairly, reasonably by excluding irrationality and arbitrariness. But the power of judicial review in a concluded contract is limited and is not all pervasive as in the matter of awarding of contract. The Writ Court in exercise of judicial review can intervene even in respect of concluded contracts if the contract is statutory contract or there is a public law element in it.

9. Most of the judgments referred to by the appellant have been examined in a recent judgment reported as Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728. The Supreme Court held that there is no absolute bar to the maintainability of the writ petition even in contractual matter may be where there are disputed questions of fact or even monetary claim is raised but at the same time discretion lies with the High Court under which it can refuse to exercise the discretion. The Supreme Court has delineated certain circumstances in which normally the Court will exercise such a discretion such as Paragraphs 69.1 to 71 which reads as under:-

> "69.1. The Court may not examine the issue unless the action has some public law character attached to it.
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> 69.2 Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
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> 69.3 If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
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> 69.4, Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
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> 70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the

State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

71. Keeping in mind the aforesaid principles and after considering the arguments of the respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded."

10. A perusal of the conditions in which normally the High Court will exercise the jurisdiction is that the Court will not examine the issue unless the action has some public law character attached to it. In case of a breach of contract, the party complaining of such breach may sue for specific performance of the contract if the contract is capable of being specifically performed otherwise, the party may sue for damages. The power of judicial review conferred on this Court under Article 226 of the Constitution of India could be

invoked in contractual matters only if the public law element is present and not in respect of the contracts falling within the realm of private law. Reference is made to judgments reported as M/s Radhakrishna Agarwal and others v. State of Bihar and others, (1977) 3 SCC 457 and G.B. Mahajan and others v. Jalgaon Municipal Council and others, (1991) 3 SCC 91.

11. In Radha Krishna Agarwal's case (supra), a three-Judge Bench judgment of the Hon'ble Supreme Court dividing the contracts into three categories i.e. i) where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution; ii) where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and iii) where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

12. The first set of cases relates to the doctrine of

promissory estoppel, which is not relevant in the present case, nor the present case falls in the second set of the cases, which contemplates the contract entered by the State in exercise of the statutory powers in certain cases. The present is a case of a contract, which falls in the third set of cases i.e. non statutory contracts. The Hon'ble Supreme Court has held as under:-

> "15. It then very rightly held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of Umkant Saran v. The State of Bihar, (1973)1 SCC 485 and Lekhraj Satramdas v. Deputy Custodian-cum-Managing Officer, AIR 1966 SC 334 and B.K. Sinha v. State of Bihar, AIR 1974 Pat 230, that no writ or order can issue under Article 226 of the Constitution in such case "to compel the authorities to remedy a breach of contract pure and simple".

13. Another three-Judge Bench judgment in G.B. Mahajan's case (supra), was examining award of the contract by the Municipal Council to a developer of a real estate for the execution of a project for Administrative Building' and a Commercial Complex on a plot of land belonging to the Municipality. The Court observed as under:-

> "46. While it is true that principles of judicial review apply to the exercise by a government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked. In the

> present case the material placed before the court falls for short of what the law requires to justify interference."

14. In <u>Bareilly Development Authority's</u> case (supra), the Supreme Court, while examining the judgments in <u>Ramana Dayaram Shetti's</u> case (supra) (Three-Judge Bench Judgment) and <u>Radha Krishna Agarwal's</u> case (supra), held that the contract awarded by the Bareilly Development Authority for construction of dwelling units for the people belonging to different income groups, is a non statutory contract. The Court observed as under:-

> "21. This finding, in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty's case there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the 'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter-se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.
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> 22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is -non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article

226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple : *Radhakrishna Agarwal v. State of Bihar (1977) 3 SCR 249, Premji Bhai Parmar v. Delhi Development Authority (1980) 2 SCR 704 and D.F.O. v. Biswanath Tea Company Ltd. (1981) 3 SCR 662.*

23. In view of the authoritative judicial pronouncements of this Court in the series of cases dealing with the scope of interference of a High Court while exercising its writ jurisdiction under Article 226 of the Constitution of India in cases of non-statutory concluded contracts like the one in hand, we are constrained to hold that the High Court in the present case has gone wrong in its finding that there is arbitrariness and unreasonableness on the part of the appellants herein in increasing the cost of the houses/flats and the rate of monthly instalments and giving top, directions in the writ petitions as prayed for."

15. In Kerala State Electricity Board's case (supra), the contract, in respect of which the writ petition was filed, related to construction of a Dam for generation of electricity. The Court observed that 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. It was held that 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.

16. In the present case, the appellant did not produce the licence under the Act which was a condition in the tender itself. Therefore, even if the tender was accepted at one point of time overlooking such requirement, the same could be cancelled. The appellant did not produce the licence even after the show-cause notice was served. Therefore, the cancellation of contract awarded to the appellant is based on good and sufficient reason and is not an arbitrary action. This Court does not find any reason to exercise its writ jurisdiction against the action of the State.

17. Consequently, the Letters Patent Appeal is dismissed.

(Hemant Gupta, ACJ)

Vikash Jain, J I agree

P.K.P.

(Vikash Jain, J)

AFR/NAFR	A.F.R.
CAV DATE	02.12.2016
Uploading Date	17.12.2016
Transmission Date	