

The second relates to the power of the writ court in an undisputed contractual claim to compel a contracting party to make payment to the other contracting party, at the instance of the sub-contractor. In this process, the sub-contractor could expect payment from its principal, the other contracting party. The point regarding the territorial jurisdiction of

this court could be well answered after discussion and adjudication of the second point.

The second point is this: The general law of contract is quite plain. A contract can only be enforced by one party to it against the other. Barring some exceptional circumstances, it cannot be enforced by a third party. This is known as the law of privity of contract.

The general law of contract would not have allowed IMECO's claim for their dues arising out of this sub-contract against the appellant. In this writ application IMECO has claimed its dues by asking for a writ of mandamus to be issued commanding the appellant to release the amount due to BEML Ltd. So that by that process it would receive payment.

A writ of mandamus is issued by the writ court to compel the government or a body akin to a state under Article 12 of the Constitution of India (collectively the state) to do its duty. The person applying before the court, in other words, the writ petitioner, should have sufficient locus standi. This means that he should enjoy the right of entitlement to performance of that duty by the state. If in a contract a claim is undisputed, unquestionably a party to the contract with the state has the right of obtaining amongst other things, payment under it and the state a duty to make such payment. It is now well settled that the court will enforce such duty in its writ jurisdiction only if some public law element is involved, say for example, arbitrariness, unfairness, discrimination, malice and so on.

Now, suppose the state (first contracting party) contracts with another party (second contracting party), which in this case is a government company, an instrumentality under Article 12 of the Constitution of India. Also suppose that the second contracting party whether private or a state instrumentality has lawfully made a sub-contract with another party to perform the contract. Let us also assume that the contract between the first contracting party and the second contracting party has been fully performed through the sub-contractor. Further, a sum is due and payable

by the first contracting party to the second contracting party under the contract. Similarly, under the sub-contract a sum is payable by the second contracting party to the sub-contractor.

The question which arises is whether the sub-contractor has got sufficient locus to move the writ court to compel the first contracting party to make payment to the second contracting party. Upon such payment there is every likelihood of the sub-contractor also being paid.

In general law relating to contract since there is no privity of contract between the sub-contractor and the first contracting party, the sub-contractor has no claim against him.

If there is a sum due and owing by the state, a contracting party to the other party to the contract, it has the obligation to discharge that liability. A contracting party which is a state under Article 12 has an obligation to act honestly and fairly towards its contractors by releasing any admitted amount arising out of a contract to the other contracting party and not to hold on to payment unnecessarily. If the other contracting party has lawfully entered into a sub-contract, the first contracting party has some obligation towards the sub-contractor to the extent of making payment to the second contracting party. In this way, the sub contractor may be paid.

In my opinion a sub contractor has sufficient interest or locus standi to maintain a writ application. He enjoys a right against the state, the first contracting party, to compel him to discharge his duty to make payment to the other contracting party so that as a result, the sub contractor has the prospect of receiving payment as well.

Now, I come to the question whether this court has lack of territorial jurisdiction to entertain, try and determine the writ application.

Southern Railway, the respondent No. 2 in the writ application, the appellant before us (the appellant) in or about the years 2007-2008 arrived at a policy decision to increase the passenger carrying capacity of AC three

tier and sleeper class railway coaches by insertion of an additional berth (middle berth) between the lower and upper berths “on the longitudinal side of existing coaches”. BEML Ltd., the respondent No. 1 in the writ application and the respondent No. 2 in this appeal (BEML) is a Government of India company in which the government holds 54% of its share capital.

The appellant entered into a contract with BEML for supply and fitting of these berths. BEML in turn entered into a sub-contract with IMECO, the writ petitioner and the respondent No. 1 in this appeal (IMECO), to carry out this contract.

Admittedly, as far as the contract between the appellant and BEML was concerned, it was executed outside the jurisdiction of this court. Its performance and discharge had also no connection with the territories over which this court exercises its writ jurisdiction. However, the sub contract between BEML and IMECO was executed according to the pleading in paragraph 5 of the writ petition which is uncontroverted in the branch office of IMECO at 26, R.N. Mukherjee Road, Kolkata – 700001 within the jurisdiction of this court.

This contract was ultimately not carried out and the obligations of the parties terminated by mutual agreement. IMECO had a claim against BEML for payment for part of the work which had been completed by them.

It is absolutely true that the entire cause of action with regard to the first contract between the appellant and BEML was outside the jurisdiction of this court. Both the appellant and BEML have their places of business well outside the territorial jurisdiction of the High Court. But, the other part of the cause of action which is certainly a large part of it, was the contract between BEML and IMECO which according to the averment in the writ petition was entered into in Calcutta within the jurisdiction of this court. This writ consists of several causes of action in a chain relating to execution of contracts and sub-contracts and their performance of the

contract, payment, discharge and so on. A part of this chain is certainly located within the jurisdiction of this court. Therefore, this court had the territorial jurisdiction to entertain the writ. So, this point is also answered against the appellants.

Now, the facts in short are these.

The appellant awarded a contract to BEML for supply and the fitment of longitude middle berths in 589 "GSCN coaches and 126 ACCN coaches". BEML ltd. had sub-contracted the work assigned to them by the contract to IMECO ltd. Mr. Chaubey, learned Advocate for the appellant showed us Clause 7 of the agreement between the parties (Page 143 of the paper book) which did not allow sub-contracting.

In this particular case sub-contracting by BEML to IMECO was approved and accepted by the appellant by their conduct. Having approved or acquiesced in this act the appellants are now estopped from contending that BEML had wrongfully sub-contracted the agreement to IMECO.

In the part of the contract pertaining to GSCN coaches, 146 coaches had been fitted with these berths by 18th February, 2009. Materials for 18 coaches were also supplied but not utilized, leaving a balance of 425 coaches in which neither the berths were fitted nor materials supplied to the appellant. As far as ACCN coaches were concerned upto 18th February, 2009, 6 had been fitted with berths and materials supplied for 34 coaches. In relation to 86 coaches neither the berths were fitted nor materials supplied.

For whatever reason the Railways thought that there was no point going ahead with the agreement. The Railway Board by its letter dated 18th February, 2009 terminated the contract. This termination seems to have been accepted by BEML. The Railway Board by its decision on 30th March, 2009 stated that payment could be made to BEML for berths already manufactured and made ready but not fitted till the issue of the

notification. BEML was asked to submit the “Rites” inspection certificate relating to the finished products manufactured prior to the cancellation of the agreement. This date was reckoned to be 24th February, 2009.

It was also stated in the communication that the material cost for one such berth in SCN coaches was Rs.1,10,070/-, the cost for 425 berths being $(1,10,070 \times 425) = \text{Rs.}4,67,79,750/-$. The cost for one berth in ACCN coaches was Rs.1,02,400/-, the cost of 86 berths being $(1,02,400 \times 86) = \text{Rs.}88,06,400/-$. “Total financial implication for settling material cost for GSCN and ACCN coaches.....equals Rs.5,55,86,150/-.” The above remarks were made by the Senior Divisional Mechanical Engineer of Southern Railway. (See Pgs. 103 -104 of the paper book.)

In that communication an additional fund of Rs.5.56 crores was requisitioned to make the above payment. Instruction was issued to the appropriate authorities to dispose of the berths. In the communication the decision of the Railway Board dated 30th March, 2009 was mentioned. It was stated therein that by that decision the Railway Board had instructed payment to the vendors whose contract has been cancelled.

It is a matter of great surprise how inspite of the above decision of the Railway Board as sought to be enforced by the appellant, one Baja Pillai Venugoptal, a senior Divisional Mechanical Engineer working for the same Southern Railway administration has in his affidavit affirmed on 23rd March, 2012 in the writ application made the following assertion in Paragraph 13 thereof:-

“13. With reference to the statements and/or allegations contained in paragraph no. 20 of the said petition, save what are matters of records, the same are denied and disputed. I further state that Railway is not party to the contract between M/s. BEML and its partners and hence it is not aware of any dispute. Railways have not admitted the claim of M/s. BEML who is respondent no.1 herein for the sums claimed on the basis of manufacture before the cut off date. Railways have not been furnished

with the raw materials certificates which are to be given before the manufacture is done, nor has respondent no.1 M/s. BEML submitted proof of purchase of raw materials. M/s. BEML, who is respondent no.1 herein has also not raised any dispute under Arbitration Clause of the said contract, as per provision of 9 and 10 of the contract even though 2 years and 11 months have lapsed from the date of contract closure.”

It is difficult to comprehend how a Railway officer at a later point of time can resile from an admission made at an earlier point of time by another senior officer.

Nevertheless, the averments made in paragraph 13 of the said affidavit of the Railways have to be considered.

The appellant should immediately act in terms of the circular of the Railway Board dated 30th March, 2009 and to make payment to BEML considering the note of the Senior Divisional Mechanical Engineer at Pgs.103-104 of the paper book and upon verification of the records regarding the quality and quantity of supply by IMECO to take care of the averments in paragraph 13 of the affidavit-in-opposition quoted above.

The appellant should make payment of the bills of BEML within two months of communication of this letter. BEML in turn will make payment to IMECO within a further period of one month.

I see no reason to interfere with the impugned judgment and order. It is affirmed. This appeal is dismissed affirming the judgment and order of the learned trial judge with the additional orders made above.

(I. P. MUKERJI, J.)

Biswaroop Chowdhury, J.

I have perused the judgment delivered by my learned brother and agree to the grounds mentioned therein. However I add the following grounds.

The Writ Petition in which the impugned order was passed was instituted by the respondent no – 1 M/S. IMECO Ltd against the appellant seeking a direction upon the appellant to release the dues of BEML ltd for the purpose of payment to respondent no – 1. It is true that under general law of contract there is no enforceable right of respondent no – 1, M/S IMECO Ltd against the appellant but where respondent no – 2 which is a government undertaking and “State” within meaning of Article 12 of the Constitution of India is unable to discharge its obligation regarding payment of dues to the respondent no – 1 for non-payment of dues by the Appellant to the respondent no – 1, the respondent no – 1 has a right under Article 226 of the constitution of India.

In the modern era of welfare state when there is governmental action on a vast scale a procedure to obtain speedy and effective redress against an illegal exercise of power by the Executive is extremely desirable. Through writs the High Courts are able to control to some extent the administrative authorities in the modern administrative age. The writ system provides an expeditious and less expensive remedy than any other remedy available through the normal Court-Process. In the case of secretary ONGC Limited V VU Warriar reported in AIR – 2005 S.C it is observed that power under Article 226 can be exercised by the High Court to reach injustice wherever it is found.

Government Authority has a duty to act fairly, reasonably, and impartially to any person or organisation whether in contractual capacity or otherwise. It has an obligation to honour the debt of a contracting party when it is due and payable unless the claim is rejected by a reasoned order upon following principles of natural justice. When due to non-release of statutory fund or payment of contractual debt, by Government Authority to any Government undertaking the said undertaking is unable to pay the workers, creditors or sub-contractors, the parties who do not receive the payment and suffer hardship may make a representation to the Government Authority and

move the High Court under Article 226 of the Constitution of India. The Court in such a situation may not refer the parties to a regular civil Court to enforce the right under contract but direct the Government Authority to release the debts in accordance with law. Such a direction would be just and reasonable and mitigate hardships, and prevent multiplicity of litigation. When a government undertaking does not dispute the payment due to a sub-contractor nor is there intentional delay or mala fide in making payment but ground of non-payment is on account of non-receipt of fund from Government Authority no fruitful purpose would be served by referring the contracting parties to Civil Court as after suffering decree also the Government Undertaking will be unable to pay debt due to non-availability of fund. Thus the writ petition is maintainable. I do not find any error of the impugned order of the trial court. The order of trial court is affirmed.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAROOP CHOWDHURY, J.)