

The Executive Engineer and anr. Vs. C. Raghava Reddy

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Court : Andhra Pradesh

Decided On : Dec-16-1992

Reported in : 1993(2)ALT80

Judge : V. Sivaraman Nair and ;Immaneni Panduranga Rao, JJ.

Acts : [Constitution of India](#) - Article 226

Appeal No. : Writ Appeal No. 709 of 1988

Appellant : The Executive Engineer and anr.

Respondent : C. Raghava Reddy

Advocate for Def. : C.V. Nagarjuna Reddy, Adv.

Advocate for Pet/Ap. : Govt. Pleader for Finance and Planning

Disposition : Petition dismissed

Judgement :

V. Sivaraman Nair, J.

1. Respondents in Writ Petition No. 9614/1987 which was allowed by judgment dated 3-12-1987 are the appellants before us. The learned single judge directed the present 2nd appellant (2nd respondent in the Writ Petition) not to withhold the amounts payable to the petitioner for the works executed under the agreements

other than agreement No. 10/83. The correctness of that decision is under challenge. It is necessary to refer to a brief resume of facts to understand the controversy involved in this appeal. We will refer to parties as they appeared in the Writ Petition.

2. Petitioner is a Works Contractor. He has entered into agreement No. 10/83 with the 1st respondent on 5-9-1983 for construction of Masonry Blocks 7 to 14 of Singoor Reservoir project scheme. The Andhra Pradesh Detailed standard specifications formed part of the contract between parties and falls for consideration. The total worth of the contract was Rs. 1,21,59,459/-. That amount was arrived at by aggregating the quantity of work multiplied by the accepted rates for each item of work. The period within which the contract was to be completed was eighteen months. A time table-cum-schedule of work was built into the terms of the contract. There was a delay of over two months before the petitioner commenced work on 24-11-83. He ought to have completed the works by 23-5-1985; but there was short-fall in performance according to the programme fixed by mutual agreement between parties. By April, 1985 only 30% of the work was completed, even though it ought to have been near about 100%. Clause 71 of the Andhra Pradesh Standard Specifications which is relevant for the purpose of the present appeal is in the following terms:

'71. Recovery of money from Contractor in certain cases:

In every case in which provision is made for recovery of money from the contractor, Government shall be entitled to retain or deduct the amount thereof from any money that may be due or may become due to the contractor under these presents and/or under any other contract or contracts or any other account whatsoever.'

3. Number of letters were exchanged between parties. Petitioner pleaded for extension of time claiming circumstances beyond his control for the delay, whereas the respondents maintained that the delay was deliberate and due to defaults on the part of the contractor. We are not concerned with the details of that correspondence, except that the petitioner had requested for extension of time for four months, but he was granted such time specifically only upto 30-6-1985.

Though the contract was not immediately terminated by either side, work seems to have progressed only at a snail's pace. Petitioner requested for enhanced rates in his communication dated 26-12-1985. He also intimated that unless higher rates were sanctioned, he would withdraw from the contract from 4-1-1986. On 29-12-1985, he seems to have abandoned the contract and left the site. On 4-1-1986 a formal letter determining the contract was issued. In the meantime, petitioner was informed that part of the work yet to be completed was being withdrawn. The actual measurements of the works which were withdrawn were duly intimated. In a still later communication after withdrawing yet other items of work, petitioner was required to witness the final measurements. He deputed an agent of his who witnessed the measurements and endorsed the final measurements. On 25-3-86, the 1st respondent requested his counter-part to withhold the amounts due to the petitioner, apparently in terms of Clause 71 of the A.P. Standard Specifications, which we have extracted above. That was done after assessing the amounts due from the petitioner as Rs. 21,89,300/- with reference to the final measurements.

4. Petitioner filed O.S.No. 3/86 on 21-1-1986 in the court of the subordinate Judge, Medak, seeking appointment of an Arbitrator under Section 20 of the Arbitration Act. He filed I.A.No. 9/86 on 22-1-1986 seeking an injunction against the respondents from claiming or recovering any amount from him consequent on the alleged default in completing the work under agreement No. 10/83. By order dated 27-2-1986, the subordinate Court dismissed that application. On 16-6-1986, he filed I.A.No. 106/86 seeking injunction against stoppage of payments due to him under other contracts. The court passed an ex parte interim order to maintain status-quo. After the respondents entered appearance and hearing them at length, the court modified the order on 18-8-86 to the effect that the petitioner should not claim or withdraw an amount of Rs. 12,58,300/- which was approximately 50% of the amount which was directed to be withheld.

5. Petitioner filed A.A.O.No. 1137/86 contending that the order of the Subordinate Judge, Medak dated 18-8-1986 virtually amounted to dismissal of his petition for injunction. A Division Bench of this court in C. Raghava Reddy v. Superintending Engineer, Irrigation Circle, Nizamabad, : AIR 1988 AP53 by judgment dated 20-2-1987 held that the arbitration court had no jurisdiction to grant an injunction

restraining the Government from withholding the amounts due to a contractor in respect of other contracts. The court also held that:

'It is equally evident from the said decision that to enable the Government to invoke its power under Clause 71 of A.P. Standard Specifications, it is not necessary that its claim should either be admitted by the contractor, or should have been adjudicated upon by a competent court or authority. The language of Clause 71 read with Clause 61 of A.P. Standard Specifications, is, in effect, the same as that of Clause 18 considered by the Supreme Court in the above cases.'

(Union of India v. Raman Iron Foundry (1974 SC 1265) and HMK Ansari & Co. v. Union of India (1984 SC 29).

6. It was thereafter that the petitioner filed W.P. No. 9614/87 on 15-7-1987 assailing the direction to the Superintending Engineer to withhold payments due to the petitioner in other contracts and seeking the issue of a writ of mandamus declaring the action of the 2nd respondent to withhold the amounts payable for the works executed under agreements other than No. 10/83.

7. The learned single Judge directed issue of a writ of mandamus as mentioned above, based on the observations in the decision of the Supreme Court in Lakshmichand and Balchand v. State of A.P., : [1987]1SCR108 to the effect that benefit of Clause 71 could be claimed 'if the amount sought to be retained is an ascertained sum, an amount which can be readily adjusted against the amount payable under the other contract.' The court held:

'Here the amount sought to be adjusted has yet to be determined as a liability against the contractor. It has been disputed by the appellant. Accordingly, Clause 71 cannot be invoked.'

8. The learned single Judge note that even though the sum of Rs. 12,58,300/- was due as claimant by the respondents, it would not be a sum ascertained. He held that there was no determination in the present case and such determination had to await a decision by the arbitrator in view of the fact that the petitioner had claimed Rs. 33,00,000/- from the Government, and the Government, in its turn, denied the

same.

9. There was an obvious error in the judgment under appeal, since the amount of Rs. 12,58,300/- was not the actual sum which the respondent had claimed from the petitioner. The amount was Rs. 21,89,300/- and the same was quantified on the basis of measurement of quantities witnessed by the agent of the contractor and multiplication of such quantities by the agreed rates. The additional amount which had to be paid to the contractor who was chosen to complete the work was assessed as Rs. 21,89,300/-. Rs. 12,58 300/- was an amount which the Subordinate Judge, Medak, had fixed as the amount which the petitioner was prevented from claiming or withdrawing during the pendency of O.S.3/86.

10. We are told that an arbitrator was appointed by the direction of the court in O.S.3/86 and that arbitrator has found during the pendency of these proceedings that amounts were due to the petitioner. We are also informed that against the amount which the respondents claimed viz., Rs. 21,89,300/-, the amount which could be actually withheld was only Rs. 3.5 lakhs, since the petitioner had withdrawn other amounts due to him during the pendency of these proceedings.

11. The points which the Government Pleader appearing for the appellants urged before us are: 1) that the learned single Judge should not have entertained the Original Petition: 2) that in any case, he ought not to have issued a writ of mandamus which had the effect of a decree directing specific performance of the contract in proceedings under Article 226 of the [Constitution of India](#): 3) that the observation contained in the Division Bench decision in C. Raghava Reddy (1 supra) about the circumstances under which Clause 71 could be invoked was binding on the learned single judge, and that (4) he should not have assumed that ascertainment of the amount with notice to the petitioner was necessary before issue of proceedings under Clause 71.

12. We have heard counsel on both sides at length. The Government Pleader has produced before us the relevant extracts of the correspondence between parties with copies to counsel for the petitioner. Those letters are produced from the file relating to the contract which this court had called for by issue of notice in proceedings for issue of certiorari. It is true that the respondents who are the

present appellants did not advance any detailed defence with reference to the file before the learned single Judge.

13. In C. Raghava Reddy (1 supra) a Division Bench had held that Clause 71 of the A.P.Detailed Standard Specifications would be available to the State, even if it was neither admitted by the contractor nor adjudicated by a competent court or authority. That finding was entered with specific reference to Union of India v. Raman Iron Foundry, : [1974]3SCR556 and HMK Ansari & Co. v. Union of India, AIR 1980 SC 29. The decision in M/S. LakshmiChand (2 supra) was rendered by a bench of two judges, and without specific reference, echoed the very same principle as in Raman Iron Foundry, : [1974]3SCR556 . But HMK Austin, AIR 1980 SC 29 was rendered by a bench of three judges. That decision had explained away Raman Iron Foundry³ regarding the applicability of Clause 18 of the standard form of contract which was in same terms as Clause 71 of the A.P. Detailed Standard Specifications. In Raman Iron Foundry, : [1974]3SCR556 the bench of two judges read Clause 18 providing that a 'claim for payment of a sum of money arising out of or under the contract' to mean 'a sum of money due and payable.' It was on that assumption that the court held that Clause 18 was not a mode of recovery in cases where a claim for 'money due and payable' was disputed or is not determined by court or arbitrator.

14. In the later decision in HMK Ansari, AIR 1980 SC 29 a bench of three judges held that 'whenever any claim for payment of a sum of money arises' it was not necessary that there should be 'a sum of money due and payable', but it was enough if there was a mere claim for payment of money irrespective of the fact whether such money was presently due and payable or not. The larger bench expressly disagreed with Raman Iron Foundry, : [1974]3SCR556 and explained away the rule in that case. It was with reference to the above two decisions that the division bench of this court in C. Raghava Reddy (1 supra) held as in paragraph-5 above. We are of the opinion that the learned single judge should have followed the above bench decision and declined jurisdiction.

15. We find that the learned single Judge rested his decision entirely on the observations contained in M/s. LakshmiChand (2 supra) and did not have occasion

to examine the facts of the present case in detail. We are of the opinion that in the nature of the contentions which the appellants have raised before us, the facts to which we have referred to are relevant. Before we go in to that aspect, we shall clear the ground in respect of reasons 3 and 4 which the Government Pleader Sri Eswaraiah urged before us in support of the appeal.

16. The observations in Lakshmichand (2 supra) which the learned single Judge followed run directly contrary to the decision of the larger bench in HMK Ansari & Co. (4 supra), which, for some curious reason, was not even referred to by the bench in Lakshmichand (2 supra). It is elementary that the decision of the larger bench on a point has to be preferred to that of a bench consisting of lesser number of judges, even if the latter was rendered later. It is obvious that HMK Ansari (4 supra) was not brought to the notice of the learned single Judge. We are sure that had that decision been noticed, the learned single judge would not have granted the relief.

17. The works contract of the nature with which we are concerned here is worked out on the basis of the quantities multiplied by rates. The schedule of programme of work itself contained provision as to what percentage of work had to be completed on specified dates. Where there was a short fall in the target, the exact quantity can be ascertained on measurement. On applying the prescribed rates to the short fall in targetted quantity, the actual liability either way could be ascertained. We find from the files which were produced for our perusal that the respondents were insisting on the contractor making up the short-fall which was persisting all through the contract period. By letters dated 5-6-85 and 11-6-85, Block Nos. 13 and 14 and 11 and 12 respectively were taken away from the petitioner under Clause 66 of the agreement to be entrusted to some other contractor for completing the work. On 16-1-86 the actual measurements were taken with due notice to the petitioner and in the presence of the agent duly authorised by the petitioner. It was by application of the agreed rates to the quantities measured that the respondents assessed the claim for money against petitioner as Rs. 21,89,300/-. That was an ascertained sum which was determined by measurement of the work multiplied by the relevant rates. It was that amount which was so determined and ascertained that was sought to be recovered. It was

in respect of that amount that proceedings were taken under Clause 71 to realise as much as possible by requiring other offices of the Government by directing retention or deduction from monies that were due to the contractor. It is true that the petitioner had disputed that amount and the matter had been taken up in arbitration. In the light of the decision in HMK Ansari(4 supra), it was not necessary that the amount must have been 'presently due and payable' or must have been either admitted or determined by the court or Arbitrator. The only requirement was that there was a 'claim for payment of money arising out of the contract' to justify action under Clause 71 for recovery as was found by the Division Bench in C. Raghava Reddy (1 supra).

18. We are of the opinion that the decision of the division bench on the effect of Clause 71 of the A.P. Detailed Standard Specifications in C. Raghava Reddy (1 supra) operated as res judicate against the petitioner and he should not have been granted relief in spite of that. For that reason also, the judgment of the learned single judge has to be set aside.

19. As we have stated above, the learned single judge has relied heavily upon the observations contained in M/s. Lakshmichand and Balchand (2 supra). That decision was rendered in a Civil appeal arising from a judgment of this court in an execution appeal. The question whether a court exercising jurisdiction under Article 226 of the [Constitution of India](#) may grant relief in relation to the terms of a contract did not directly arise for consideration in that decision. In addition to that as is evident from the portion of the judgment in M/s Lakshmichand and Balchand (2 supra) which the learned single judge has extracted, the Supreme Court proceeded on the basis that the amount due to the contractor and sought to be retained, not being an ascertained sum which could be readily adjusted against the amount payable under other contracts, Clause 71 of Andhra Pradesh Detailed Standard specifications could not be relied upon. No contention seems to have been urged before the Supreme Court that the amount claimed under a works contract is ascertainable by measuring the quantity and multiplying the same by the prescribed rates as is urged in this case by the Government Pleader appearing for the respondents/appellants. Had that contention been urged, we are reasonably sure that the learned single judge would not have allowed the Writ

Petition. We are therefore of the opinion that the observations contained in M/s. Lakshmichand and Balchand (2 supra) did not apply to the facts of the present case where the amount claimed was duly ascertained by the process known to the parties in working out the amount due to either side under a works contract by ascertaining the quantity by measurement and multiplying the same by the agreed rates for each item of work.

20. If the decision in M/s Lakshmichand and Balchand (2 supra) is out of the way as it appears to us, the questions which we have to consider are whether it was open to the petitioner to approach this court to wriggle out of the terms of the contract which he had voluntarily entered into by resorting to proceedings under Article 226 of the [Constitution of India](#) and whether a writ of mandamus would have issued in respect of contractual rights or obligations

21. We should note that a writ of mandamus does not issue for enforcement of a private right, nor is it available for obtaining interim reliefs till cross-claims between parties are determined in arbitration. It is axiomatic that relations between parties in a concluded contract are governed by the terms thereof; and rights and obligations of parties inter se have to be decided elsewhere. Such concluded contractual relations are no longer governed by constitutional provisions. In cases where the contract is non-statutory the relations are purely contractual and the rights are governed only by the terms of the contract. No writ or order can issue to compel the authorities to remedy a breach of the contract; nor can a mandamus issue for enforcement of contractual rights. This position is clear from a long line of authorities. Reference need be made only to a few of them:-

Banchhanidhi Rath v. State of Orissa, AIR 1972 SC 842, Dhanyalakshmi Rice Mills etc. v. The Commissioner of Civil Supplies, 0065/1976 : [1976]3SCR387 , Radhakrishna Agarwal v. State of Bihar, AIR 1977 SC 1496 Premji Bhai Parmar v. Delhi Development Authority, : [1980]2SCR704 , The Divisional Forest Officer v. Bishwanath Tea Co. Ltd., AIR 1981 SC 1378, Bareilly Development Authority v. Ajay Pal Singh, : [1989]1SCR743 , Geetha Timbers, Chalakudy v. State of Kerala, 0065/1991 : AIR1991 Ker350 and Pancham Singh v. State of Bihar, : AIR1991 Pat168 . In Writ Appeals Nos. 762 and 763 of 1992 dated 3-8-1992 a division

bench consisting one of us (Sivaraman Nair, J.) had held that a writ cannot issue in relation to matters arising out of a non-statutory contract.

22. A writ of mandamus issues to a public servant or authority only to enforce a statutory obligation or a public duty. Obligations arising from a contract which is non-statutory cannot create a statutory duty enforceable by issue of a writ of mandamus.

23. It was held by the Judicial Committee as far back as in 1936 in *Commissioner of Income Tax, Bombay Presidency v. Bombay Trust Corporation Ltd.*, AIR 1936 P.C 269 as follows:

'Before Mandamus can issue to a public servant, it must therefore, be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the crown, his principle.'

24. In *Lekhraj Sathramdas Lalvani v. N.M. Shah, Deputy Custodian-Cum-Managing Officer, Bombay*, : [1966]1SCR120 it was held:

'The Chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and Any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution.'

25. We are therefore of the opinion that the learned single Judge erred in issuing a writ of mandamus interdicting the respondents who are the appellants before us from enforcing the terms of Clause 71 of the A.P. Detailed Standard Specifications which was part of agreement No. 10/83 dated 5-9-83 which the petitioner had entered into with the State, represented by the respondents.

26. We therefore allow this appeal with costs, and set aside the judgment of the learned Single Judge. As a result, the writ petition stands dismissed.