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Court : Kolkata

Decided On : Dec-04-2006

Reported in : 2007(3)CHN807

Judge : Bhaskar Bhattacharya and ;Prabuddha Sankar Banerjee, JJ.

Acts : Companies Act; ;Constitution of India - Articles 12, 14, 226 and 298

Appeal No. : M.A.T. No 2961 of 2006 and CAN No. 5783 of 2006

Appellant : Maple Technologies

Respondent : State of West Bengal and ors.

Advocate for Def. : Biswadeb Roychowdhury and ;Sourav Chowdhury, Advs. for Respondent Nos. 2 to 4

Advocate for Pet/Ap. : Amitava Mukherjee, ;Mun Mun Dubey and ;Sanjay Chakraborty, Advs.

Disposition : Appeal dismissed

Judgement :

Bhaskar Bhattacharya, J.

1. This mandamus appeal is at the instance of a writ petitioner and is directed against the order passed by the learned Single Judge by which His Lordship

refused to entertain the writ application filed by the appellant on the ground that the appropriate remedy of the appellant lay before the Civil Court.

2. The appellant before us became the lowest bidder in a tender issued by the University of Animal and Fishery Sciences for supply of the computers and other necessary appliancces and consequently, supplied the required number of the computers and other items. According to the appellant, in spite of supply of the goods, the University authority refused to make payment of the goods supplied wthout disclosing any reason.

3. Being dissatisfied, the writ petitioner has come up with the present mandamus appeal.

4. Mr. Mukherjee, the learned Advocate appearing on behalf of the appellant, strenuously contended before us that the learned Single Judge refused to exercise jurisdiction vested in His Lordship by holding that the appropriate remedy of the appellant lay before the Civil Court. According to Mr. Mukherj ee, in this case, there was no dispute that the appellant supplied the required number of computers and other goods ordered by the University and that the respondent authority did not dispute the quality of those items supplied. In such a situation, Mr. Mukherjee contends, there was no justification of not making payment of the price for the goods delivered. Mr. Mukherjee submits that the present case being one where there is no disputed question of fact involved, the learned Single Judge ought to have entertained the writ application and granted the relief claimed herein. Mr. Mukherjee contends that the respondent Nos. 2 to 4, being the 'State' within the meaning of Article 12 of the Constitution of India, were bound to act fairly and reasonably and there was no justification of refusing payment. He, therefore, prays for setting aside the order passed by the learned Single Judge and passing a direction upon the respondent Nos. 2 to 4 for immediate payment of the price of the goods. In support of his contention, Mr. Mukherjee relies upon the following decisions of the Supreme Court:

(a) Mahabir Auto Stores v. Indian Oil Corporation : [1990]1SCR818 ;

(b) ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. : (2004)3SCC553 ;

(c) Directorate of Education v. Educomp Datamatics Ltd. : AIR 2004 SC1962 ;

(d) Binny Ltd. v. V. Sadasivam : (2005)IIILLJ738SC .

5. The learned Advocate appearing on behalf of the respondents, on the other hand, has opposed the aforesaid contention of Mr. Mukherjee and has contended that in the fact of the present case, the learned Single Judge rightly refused to entertain the writ application for enforcement of a right arising out of a non-statutory contract. He further submits that he has definite instruction that those computers supplied by the appellant have been burnt into ashes and an enquiry is going on for finding out the reason for such accident.

6. Therefore, the only question that arises for determination in this mandamus appeal is whether the learned Single Judge was justified in refusing to entertain the writ application on the ground of existence of alternative remedy by way of civil suit available to the appellant.

7. After hearing the learned Counsel for the parties and after going through the materials on record, we are of the opinion that in this case the learned Single Judge was quite justified in refusing to entertain the writ application.

8. The jurisdiction of the Writ Court to entertain an application under Article 226 of the Constitution of India for enforcing a non-statutory contract is now well-settled. As pointed out by the Supreme Court in various decisions, in the matter of entering into a contract in exercise of executive power under Article 298 of the Constitution, the State must act reasonably and if there is any violation of Constitutional provisions or statutory provisions governing such contract, an aggrieved person can in a suitable case approach a High Court under Article 226 of the Constitution of India complaining violation of his statutory or fundamental right. The same principle is applicable in case of contract with the instrumentality of a State if those contracts involve public law elements or the right and obligation under the contract are governed by any statute. But in case of contracts which have not been entered

into in exercise of the executing power under Article 298 of the Constitution of India or in terms of any other statutory provisions, and at the same time, there is no public-law-element in such contract, the aggrieved party cannot come up with an application under Article 226 of the Constitution of India for his grievance and in those situations, the dissatisfied party should enforce that contract in accordance with the ordinary law of the land. In the case before us, the respondents are, no doubt, instrumentality of the State and they placed order to the present writ petitioner for supply of goods. In such agreement for supply of goods, there is neither any public-law-element nor was this contract made in exercise of power conferred under Article 298 of the Constitution nor under any other statutory provisions and was in the realm of private law although when tender was called from the public for supply of the goods, it had some public-law-elements and in selecting the successful bidder, the respondent was bound to follow the principles mentioned in Article 14 of the Constitution of India. But once the contract is entered into and the person to whom the contract has been given alleges violation of the terms of the contract regarding non-payment of money, there is no public law element in such dispute and for enforcing the right arising out of such contract, the aggrieved party must approach the forum prescribed by the law of the land for enforcing an ordinary contract subject to the law of limitation. In this connection, it will not be out of place to refer to a decision of a Bench consisting of three Judges, of the Apex Court in the case of Radhakrishna Agarwal v. State of Bihar reported in : [1977]3SCR249 , where at paragraph 10 of the judgment the Supreme Court made the following observations:

It is thus clear that the Erusian Equipment and Chemicals Ltd's case AIR 1975 SC 226 (supra) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State Act purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its Constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the Constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other Constitutional

provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

(Emphasis supplied)

9. Therefore, it is clear that in the case before us, the contract for supply of computers given to the appellant was not in exercise of power under Article 298 of the Constitution of India nor was the same governed by any statutory provision and thus, in the matter of performing its obligation under the contract, the University was not bound by any statutory obligation and, thus, the principle laid down in the case of Radhakrishna Agarwal (supra) is clearly attracted.

10. We now propose to deal with the decisions relied upon by Mr. Mukherjee.

11. In the case of Mahabir Auto Stores (supra), the Indian Oil Corporation, a statutory body incorporated under the Companies Act was carrying on monopoly upon the business in lubricants, etc., and had appointed the appellant as its distributor. The appellant had been supplying large quantity of lubricants for the last 18 years but suddenly, without showing any reason or without giving any opportunity of being heard, the respondent authority discontinued the supply. The appellant challenged such action of the Indian Oil Corporation as unreasonable infringing its fundamental right guaranteed under Article 14 of the Constitution of India. In such a case, the defence taken was that the Indian Oil Corporation being a company was not a State with the meaning of Article 12 of the Constitution of India and therefore, the action cannot be challenged by filing a writ application under Article 226 of the Constitution of India. In such a case, the Supreme Court held that where the instrumentality of the State was carrying on monopoly or semi-monopoly business continued transaction of supply of large quantity of materials for clearly a long time to a private party as its distributor even without entering into any form of contract, abrupt discontinuance of supply on the ground of change of Government policy without informing and taking into consideration the affected person was bad. At paragraph 12 of the said decision, the Supreme Court,

however, itself pointed out that 'Article 14 of the Constitution cannot and has not been construed as the charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its action in its manifold activities by stating reasons for such actions.'

(Emphasis supplied)

12. Therefore, the aforesaid decision cited by Mr. Mukherjee does not help his client for enforcing any legal obligation arising out of the contact after the same has been entered into and rather, goes against his client.

13. In the case of ABL International (supra), the following observations of the Supreme Court at paragraphs 23 and 24 of the judgment will make it clear that the principle laid down in that decision cannot have any application to the fact of the present case inasmuch as in that case the respondent was performing its duty as an agent of the Government and the same was in the realm of public law:

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of Article 14, then we have no hesitation in holding that the Writ Court can issue suitable direction to set right the arbitrary action of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of his company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and the Officers on Special Duty, Ministry of Commerce and Industry respectively. The object enumerated in the Memorandum of Association of the first respondent at para 10 read:

To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the

purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export.Para 11 of the said the object reads thus:

To act as an egent of the Government, or with the sanction of the Government on its own account, to give the guarantee, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest.It is clear from the above two objects of the company that apart from the fact that the company is wholly a Government-owned company, it discharges the function of the Government and acts as an agent of the Government even when it gives guarantee and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in that the petition do not have a touch of public function or discharge of the public duty. Therefore, this argument of the first respondent must also fail.

14. Therefore, the principle laid down in the said decision cannot have any application to the fact of the present case where the status of the respondent cannot be compared with that of the first respondent in the above reported case.

15. In the case of Directorate of Education (supra), the Supreme Court was dealing with the case of tender of a Government-contract in terms of Article 298 of the Constitution of India and in that context, held that the act of the Government in that connection was subject to judicial review under Article 226 of the Constitution of India. We have already pointed out that in the matter of entering into agreement in terms of Article 298 of the Constitution of India, a Government must act fairly, justly and reasonably and its action may be scrutinized in the touchstone of Article 14 of the Constitution of India. In the case before us, we are not dealing with such a situation and, therefore, the said decision cannot have any application to the fact of the present case.

16. In the case of Binny Ltd. (supra), a writ application was filed challenging the termination of service of an employee of a private company. The High Court allowed such application holding that such termination was against the public policy. On an appeal to Supreme Court, the said Court set aside the order passed

by the High Court and held that such writ application was not maintainable. In that context, the Supreme Court observed that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action.

17. We fail to appreciate how the said decision can be of any help to Mr. Mukherjee in the fact of the present case when the Supreme Court upheld the contention of the company that the act of dismissal of their employee cannot be the subject-matter of a writ application.

18. We, therefore, find that the decisions cited by Mr. Mukherjee are of no assistance to his client and accordingly, we do not find any reason to interfere with the order passed by the learned Single Judge refusing to entertain the writ application. The appeal is, thus, dismissed. In the facts and circumstances there will be, however, no order as to costs.

19. We make it clear that we have not gone into the merit of the dispute involved in the writ application and the rejection of the writ application will not stand in the way of the appellant in seeking appropriate remedy before the appropriate forum in accordance with law.

Prabuddha Sankar Banerjee, J.

20. I agree.

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