Dasa Management (Anantram Toll Plaza of Etawah-Sikandara Section of Nh-2) Vs Project Director, National Highways Authority of India and Another

Civil Miscellaneous Writ Petition No. 42800 of 2010

Court: Allahabad High Court

Date of Decision: May 23, 2011

Acts Referred:
Constitution of India, 1950 â€" Article 14, 226#Contract Act, 1872 â€" Section 74

Citation: (2011) 7 ADJ 538 : (2011) 8 RCR(Civil) 562

Hon'ble Judges: Ashok Srivastava, J; Amitava Lala, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Hon''ble Amitava Lala, J.
The petitioner, which is a registered firm, entered into a contract on 10th May, 2009 with the National Highways

Authority of India (hereinafter in short called as the ""authority'') as a collecting entity for collection of user fees at Km. 351.500 (Anantram Toll

Plaza) for Km. 321.100 to Km. 393.000 on Etawah-Sikandra (Kanpur Dehat) Section of National Highway No. 2, for a period of one year or

for the extended period, if any.

2. By means of this writ petition, the petitioner wants to get an order quashing the impugned notice dated 1st July, 2010 issued by the authority,

respondent No. 1 herein, inviting tenders for collection of user fees on the aforesaid toll plaza and also prayed for a direction upon the respondent

No. 1 to release certain amount for the purpose of payment of salary/wages to the employees of the petitioner firm since January, 2010 till the

continuance of agency of the petitioner firm. By an amendment dated 13th September, 2010 the petitioner has incorporated two other prayers,

which are as follows:

(v) To declare the imposition of penalty illegal, arbitrary and unlawful

(vi) To command the Respondents to release to a sum of Rs. 78,46,857/- withheld as penalty.

3. By an interim order dated 18th February, 2011 passed by a Division Bench of this Court, the admitted amount of Rs. 18,70,852/- was directed

to be paid by the respondent authority to the petitioner and, according to the parties, it has already been paid. Now the petitioner''s contention is

that the penalty which has been imposed by the respondent authority upon it for a sum of Rs. 78,46,857/-, which according to the respondent-

authority is Rs. 72,50,795/-, is arbitrary in nature. According to the petitioner, the respondent-authority has given a chart at page 8 of its counter-

affidavit, from which it would be apparent that since certain amount of fees was not collected by the petitioner, even then penalty has been imposed

upon it. The petitioner has relied upon Section 74 of the Indian Contract Act, 1872 (hereinafter in short called as the ""Contract Act") to establish

that the penalty can be claimed, at best, double the amount of the claim, particularly in view of the Illustrations (a), (d) and (e) under such section.

Section 74 of the Contract Act with Explanations and Illustrations (a), (d) and (e) are quoted below.

74. Compensation for breach of contract where penalty stipulated for.-- When a contract has been broken, if a sum is named in the contract as the

amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is

entitled, whether or not actual damage or loss is proved to have been caused hereby, to receive from the party who has broken the contract

reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.--A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Explanation.---When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any

law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in

which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.--A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an

act in which the public are interested.

Illustrations

(a) A, contracts with B, to pay B, Rs. 1,000, if he fails to pay B, Rs. 500 on a given day. A, fails to pay B, Rs. 500 on that day. B, is entitled to

recover from A, such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(b)....

(c)....

(d) A, gives B, a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent, from the date of default. This is stipulation by way of penalty, and B, is only entitled to

recover from A, such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to re-pay him by delivering to him 10 maunds of grain on a certain date, and stipulates

that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by

way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f)....

(g)....

4. The petitioner contended that in view of the provisions of Section 74 of the Contract Act, the penalty clause, being Clause 25(i) of the contract,

is totally arbitrary in nature and the same was inserted in the contract in terrorem. Clause 25(i) of the contract is quoted hereunder

25(i) In case of missing vehicles (vehicles which have crossed the plaza without payment of prescribed user fee) detected during any checks fifty

times of number of such missing vehicles multiplied by single rate of fee of the particular vehicle will be charged as penalty.

5. We find from the contract that one of its clauses provides that the collecting entity also undertakes to get itself licensed under the provisions of

Contract Labour (Regulations & Abolition) Act, 1970 and registered with under the provisions of the Shops & Establishments Act 1954.

However, upon going through the contract, we find that there is an arbitration clause being Clause 28, which is as follows:

28 ARBITRATION:

(a) All disputes and/or difference arising between the parties out of this Contract shall be settled by Arbitration under and in accordance with the

provisions of the Arbitration and Conciliation Act, 1996. The Chairman of the Authority or his nominee shall be the sole Arbitrator. The award

made and published in pursuance of such Arbitration proceedings shall be final and binding on both the parties.

(b) The proceedings of the Arbitration shall be held in English language and shall be held at such place as may be decided by the Chairman of the

Authority or his nominee. The award of the Arbitration shall be final and binding on both the parties to the Contract

6. Mr. V.K. Singh, learned Senior Counsel appearing for the petitioner, has relied upon several judgments of the Supreme Court on two points:

firstly; alternative remedy is no bar to the jurisdiction of the Court under Article 226 of the Constitution and secondly, if the conditions are imposed

in terrorem, the Court can decide reasonable amount as provided u/s 74 of the Contract Act

7. In respect of the first point Mr. Singh has relied upon paragraph 9 of the judgment in Hindustan Petroleum Corporation Ltd. and Another Vs.

Dolly Das, to show that in such judgment the Supreme Court has held that where interpretation of a contract arises in relation to immovable

property and in working such contract or relief thereof or any other fall out thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit But if the facts pleaded before the Court are of such nature which do not involve any

complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Article 226 of

the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its powers under

Article 226 of the Constitution, we cannot say that the discretion exercised in entertaining the petition is wrong. Relying upon paragraph 7 of

Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, he wanted to establish that suffice it to observe that the rule of exclusion of

writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of

availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition

seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings

are wholly without jurisdiction or the vires of an Act is challenged. [See Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and

Others, He also relied upon paragraph 53 of the judgment in ABL International Ltd. and another v. Export Credit Guarantee Corporation of India

Limited and others, JT 2003 (10) SCC 300, to establish that when an instrumentality of the State acts contrary to public good and public interest,

unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee

found in Article 14 of the Constitution. Ratio of Harbanslal Sahnia (supra) has also been followed by a Division Bench of this Court in paragraph

15 of the judgment M/s. B.R Sharma & Company. Bharat Petroleum Corporation Ltd. and another, 2009 (7) ADJ 509 (DB), which has been

relied upon by Mr. Singh.

8. So far as second point is concerned, Mr. Singh has relied upon the judgments of the Supreme Court in Fateh Chand Vs. Balkishan Das, Maula

Bux Vs. Union of India (UOI), and K.R Subbarama Sastri and others v. K.S. Raghavan and others, AIR 1987 SC 1257 (paragraph 5). Upon

going through all such judgments we find that those are not arising out of the writ jurisdiction but from the regular civil appeals arose out of the

respective suits. On merit, all three judgments speak about reasonable compensation u/s 74 of the Contract Act.

9. So far as contesting respondent (sic) authority is concerned, Mr. Shashi Nandan, learned Senior Counsel appearing for it, has relied upon

Clause 23 (d) of the contract to establish that the collecting entity shall be responsible for payment of fee not recovered from any user, for

whatsoever reasons, otherwise liable to pay.

10. According to us, it is not a matter between employer and employee when both the parties stand on an unequal bargaining position in executing

the contract. Solvency of a party is required to be considered to engage it for the purpose of collecting toll etc. as collecting entity. Therefore,

when a party keeping its eyes open entered into a contract and enjoyed the usufruct out of it, such party cannot turn around and complain about

the conditions of the contract later on. In the instant case, the contract contains a clause, which provides that in case of missing vehicles (vehicles

which have crossed the plaza without payment of prescribed user fee) detected during any checks, fifty times of number of such missing vehicles

multiplied by single rate of fee of the particular vehicle will be charged as penalty. Now the petitioner has come with a case by giving several figures

as to how much fees it has not collected, and disputed the figure of penalty imposed by the respondent authority upon it. However, we find that the

contract is available before us and on the basis of the penalty clause of such contract, the penalty has been imposed upon the petitioner, therefore,

the imposition of penalty under such clause cannot be said to be arbitrary in nature. The dispute, if any, is with regard to quantum i.e. (a) whether

the quantum as figured out by the respondent-authority is arithmetically correct; (b) whether the figures under the imposed penalty are correct; (c)

whether the penalty clause has been inserted in the contract dehors the provisions of Section 74 of the Contract Act; and (d) in such case which

amount is to be treated as reasonable for the purpose of imposition of penalty. All such questions are within the domain of an arbitrator to be

appointed upon being called. The judgments cited on the second point appear to have determined the quantum of penalty only by way of suit or

proceeding before the arbitrator. Therefore, though it is correct to say that alternative remedy is a rule of discretion and not of compulsion yet such

type of disputes are required to be adjudicated upon by the appropriate civil Court or forum to come to a definite finding. Writ Court cannot

assess reasonable quantum on the assertion of facts. When the arbitrator is the sole authority to adjudicate the issue, the matter is required to be

laid before the arbitrator to adjudicate the matter on the basis of the facts and on the strength of law. Presently, under the Arbitration and

Conciliation Act, 1996 power of an arbitrator is exhaustive. It has power to decide not only with regard to the facts but also the question of law

even upto the extent of its own jurisdiction.

11. Against this background, we do not find any reason not to send the matter to the arbitrator for the purpose of entertaining the reference on

merit and for adjudicating the same by passing an appropriate order as early as possible.

12. By and large, the writ Court does not interfere with the disputed amount of claim but when the claim is admitted, it passes an order for the

purpose of payment thereof to avoid unnecessary litigations and in this case such type of order has already been passed at an interim stage on 18th

February, 2011. Such amount has already been paid by the respondent authority and the petitioner has received the same. Therefore, by sending the matter to the arbitrator, the payment of such amount cannot be re-agitated, particularly when the claim is restricted only with regard to penalty.

Hence, the interim order passed by this Court for such payment is hereby confirmed.

13. Thus, the writ petition is disposed of finally with a direction upon the petitioner to invoke the arbitration clause as early as possible preferably

within a period of 15 days from the date of getting certified copy of this order for adjudication of the cause. Except the same no other relief can be

granted to the petitioner.

14. However, no order is passed as to costs.