(2011) 07 DEL CK 0052

Delhi High Court

Case No: Writ Petition (C) No. 4814 of 2011

Innovative B2B Logistics Solutions Ltd.		APPELLANT
	Vs	
Union of India (UOI) and Another		RESPONDENT

Date of Decision: July 20, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226
- Contract Act, 1872 - Section 5
- Electricity (Supply) Act, 1948 - Section 43, 43(1)(2), 43A, 43A(1), 43A(2)

Citation: (2012) 1 AD 409

Hon'ble Judges: Kailash Gambhir, J

Bench: Single Bench

Advocate: P.V. Kapoor and Pankaj Prakash, for the Appellant; R.V. Sinha and Satya Siddiqui, for the Respondent

Final Decision: Dismissed

Judgement

Kailash Gambhir, J.

By this petition filed under Article 226 of the Constitution of India, the Petitioner seeks to quash and set aside the letter No. 2008/TT-III/73/16 dated 21st June 2010, letter No. BB/C/364/WA/MILK/B2B11 dated 3rd May, 2011 and letter No. 2008/TT-III/73/16 dated 3rd June 2011. The Petitioner also seeks to direct the Respondent No. 2 not to take any further steps or measures in implementation of the aforesaid letters.

2. Brief facts of the case relevant for deciding the present petition are that the Petitioner company on 4.1.2007 entered into a concession agreement with the Respondent No. 2 to operate the container trains on Indian Railways Network and agreed for a rail terminal facility for the Petitioner at Kalamboli. The Respondent vide its letter dated 21.6.2010 asked the Petitioner as to how it had been running

trains in violation of the provisions of the agreement on the NCR route to which the Petitioner replied vide letter dated 28.6.2010 explaining that the trains on the NCR route were of the other private operators and they were using the terminal facilities of the Petitioner at Kalamboli. The Respondent on 3.5.11 issued an order banning movement of other container train operators from Kalamboli unless co-use permission was granted by them and by a subsequent order dated 3.6.2011, the Respondent held the Petitioner breaching the terms of agreement by violating Article 4.1.1 of the said agreement and directed the Petitioner to deposit a sum of Rs. 40 crores with the Respondent within 60 days or otherwise the agreement to be terminated by the Respondents. Feeling aggrieved with the same, the Petitioner has preferred the present petition.

3. Mr. P.V. Kapoor, learned Senior Advocate appearing for the Petitioner vehemently contended that in blatant violation of the principles of natural justice the Respondents have passed the order dated 3.6.2011, whereby they have directed the Petitioner to remit a sum of Rs. 40 crores with FA&CAO, Northern Railway within a period of 60 days of receipt of the notice failing which they would be terminating the Concession Agreement entered into between the Petitioner and the Respondent in terms of Article 17 of the Concession Agreement. The contention of the counsel for the Petitioner is that no show cause notice was issued and no opportunity of hearing has been afforded to the Petitioner before taking such a harsh decision of terminating the licence of the Petitioner on its failure to remit a sum of Rs. 40 crores. Counsel for the Petitioner further argued that the Petitioner has not violated any of the terms of the Concession Agreement and the entire premise based on which the said licence of the Petitioner is under threat of termination is unfounded and baseless by wrongly interpreting the relevant Article 4.1.1 of the Concession Agreement. The contention raised by the counsel for the Petitioner is that under Article 4.1.1 of the Concession Agreement, the Petitioner is well within its right to extend its rail terminal facilities to the other Private Container Train Operators (PCT Os) who were also duly licensed by the railway administration. Counsel also submits that in fact the Respondents have been committing an illegal act by mentioning the name of the Petitioner as consigner in respect of all the private trains of other PCT Os loading and unloading their trains at the private terminal of the Petitioner. Counsel also submits that no such practice is being followed by the Respondent in the rail terminals of other container train operators where the railway receipt is being issued by the Respondents in the name of actual container train operators and therefore the counsel submits that the said act of the Respondents to terminate the contract of the Petitioner is also arbitrary, discriminatory and mala fide.

4. On the question of maintainability of the present writ petition due to an existence of the arbitration clause in the Concession Agreement, the contention of the Petitioner is that the existence of the arbitration clause would not bar the remedy of the Petitioner to invoke the writ jurisdiction of this Court. Counsel also submits that this Court cannot refuse to entertain the present petition even if there is an

involvement of some disputed questions of facts. In support of his arguments, counsel for the Petitioner has placed reliance on the judgment of the Apex Court in Union of India (UOI) and Others Vs. Tantia Construction Pvt. Ltd., ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,

5. Mr. R.V. Sinha, learned Counsel for the Respondent strongly opposes the present petition on the ground of maintainability. Counsel submits that a show cause notice was duly served upon the Petitioner vide notice dated 21.6.2010 and the same was also replied to by the Petitioner vide its reply dated 28.6.2010 but since the Petitioner continued to violate the terms of the Concession Agreement by permitting the train operators to use their rail terminal, therefore, the decision taken by the Respondent vide their letter dated 3.6.2011 to terminate the licence agreement of the Petitioner cannot be called either illegal or in violation of principles of natural justice. Counsel also submits that the Petitioner at best can invoke the arbitration clause than invoking the plenary powers of the writ Court.

6. I have heard learned Counsel for the parties at length at the preliminary stage.

7. So far the argument of the counsel for the Petitioner with regard to alleged violation of principles of natural justice is concerned, vide letter dated 21.6.2010, the Respondent brought to the notice of the Petitioner that their company had booked and moved rakes from Kalamboli to rail terminals located at Noli, Asoti and Patli and the said movements on the NCR route were not permitted under the category of licence granted in favour of the Petitioner. The Petitioner had submitted a detailed reply vide letter dated 28.6.2010 to the said communication of the Respondents taking a stand that there was no violation on the part of the Petitioner in permitting the trains of the other private operators passing through the rail terminal of the Petitioner and various destinations namely Noli, Asoti and Patli. Not being satisfied with the said reply given by the Petitioner, the Petitioner was again informed by the Respondents vide letter dated 3.5.2011 that no inward or outward movement of any trains other than that of the Petitioner is permitted at the terminal of the Petitioner unless it is approved as Private Freight Terminal (PFT) or co- use permission is given by the railways. As per the Respondents, the Petitioner unabatedly continued its illegal action of permitting the other private container train operators for loading and unloading their trains at various destinations including Noli, Asoti and Patli from the private rail terminal of the Petitioner in Kalamboli due to which the Respondent vide their order dated 3.6.2011 advised the Petitioner to remit a sum of Rs. 40 crores within a period of 60 days otherwise non payment will result in termination of the Concession Agreement in terms of the Article 17 of the agreement.

8. Undoubtedly, in the concession agreement duly executed between the parties, there is an arbitration clause stipulated for resolution of disputes but despite that the Petitioner has invoked the writ jurisdiction of this Court. It is no more res integra that there is no absolute bar to invoke the writ jurisdiction merely because there exists an arbitration clause in the agreement between the parties. However, the

crucial question to be answered by this Court is whether in a W.P.(C) No. 4814/2011 Page 6of 18 dispute involving interpretation of terms of the contract, remedy of writ can be invoked or not and also where serious disputed and intricate questions of facts are involved. In the present case one of the disputed question is whether the Petitioner was authorized to permit the other private container train operators to use the private terminal of the Petitioner at Kalamboi for loading and unloading their trains or any specific permission was required for permitting the PCT Os from the Respondents in terms of the concession Agreement. Both the parties have also raised serious dispute with regard to the interpretation of Article 4.1.1 of the concession agreement which article as per the counsel for the Petitioner permitted the Petitioner to allow the PCT Os to operate their containers from their private terminal without seeking any prior approval from the Respondent. On the other hand counsel for the Respondent has taken a stand that the said article no where gives any authority to the Petitioner to allow the other PCT Os to operate their containers from the private terminal of the Petitioner. Another and equally important question is as to under what circumstance the name of the Petitioner in the railway receipts was being mentioned as consigner even in respect of those private trains which belonged to the other PCT Os is again a debatable point and cannot be adjudicated in exercise of writ jurisdiction of this Court under Article 226 of the Constitution of India.

9. The Supreme Court in Kisan Sahkari Chini Mills Ltd. and Others Vs. Vardan Linkers and Others, clearly held that the writ court should desist from giving a finding on disputed or complicated questions of facts as to the existence of a contract and should relegate the writ Petitioner to the remedy of the civil suit. It would be pertinent to reproduce the relevant para of the said judgment here:

If the dispute was considered as purely one relating to existence of an agreement, that is, whether there was a concluded contract and whether the cancellation and consequential non-supply amounted to breach of such contract, the first Respondent ought to have approached the Civil Court for damages. On the other hand, when a writ petition was filed in regard to the said contractual dispute, the issue was whether the Secretary (Sugar), had acted arbitrarily or unreasonably, in staying the operation of the allotment letter dated 26.3.2004 or subsequently cancelling the allotment letter. In a civil suit, the emphasis is on the contractual right. In a writ petition, the focus shifts to the exercise of power by the authority, that is whether the order of cancellation dated 24.4.2004 passed by the Secretary (Sugar), was arbitrary or unreasonable. The issue whether there was a concluded contract and breach thereof becomes secondary. In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract, and relegate the Petitioner to the remedy of a civil suit. Even in cases where the High Court finds that there is a valid contract, if the impugned

administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a Civil Court. In other words, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action.

10. The Supreme Court in Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, after drawing a distinction between the statutory contracts and the private contracts awarded by the statutory bodies and after placing reliance on the various earlier judgments of the Supreme Court held in following paras as under:

7. In matters relating to maintainability of writ petitions in contractual matters there are catena of decisions dealing with the issue.

8. In National Highway Authority of India Vs. Ganga Enterprises and Another, , it was inter alia held as follows:

6. The Respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, ; State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., and Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Verigamto Naveen Vs. Government of Andhra Pradesh and Others, and Harminder Singh Arora Vs. Union of India (UOI) and Others, . These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.

9. In Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , this Court dealt with the question of of petition under Article 226 of the Constitution and the desirability of exhaustion of remedies and availability of alternative remedies, as also difference between statutory contracts and non-statutory contracts. In paras 10 and 11 of the judgment it was noted as follows:

10. We find that there is a merit in the first contention of Mr Raval. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. 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. In the present case, it has not been shown how the contract is statutory. 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. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the Appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.

10. Reference can also be made to State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, In para 22 it was observed as follows:

22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram

partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was --as has been repeatedly urged by Shri Ramaswamy --a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further.

11. Again in State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , this Court dealt with the issue in paras 15 and 16 in the following manner:

15. In our opinion, the very remedy adopted by the Respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the Respondent from the Appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ Petitioner''s bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

12. At para 11 of India Thermal Power Ltd. Vs. State of M.P. and Others, , it was observed as follows:

11. It was contended by Mr. Cooper, learned Senior Counsel appearing for Appellant GBL and also by some counsel appearing for other Appellants that the Appellant/IP Ps had entered into PP As under Sections 43 and 43A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter

into an arrangement for purchase of electricity on such terms as may be agreed. Section 43A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PP As can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PP As contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.

13. Therefore, the High Court ought not to have entertained the writ petition. Additionally, it appears that by order dated 17.1.2007 interim stay of the impugned order was granted and was continued by order dated 12.2.2007. It is pointed out by learned Counsel for the Appellants that since the order of the High Court was stayed and there was urgency in the matter fresh tenders were called for. Three persons submitted the bids and the work has already been allotted and a considerable portion of the work has already been completed. In view of aforesaid, we set aside the impugned order of the High Court and direct dismissal of the writ petition. It is however open to the Respondents-writ Petitioners to seek such remedy, if so advised, as is available in law. We do not express any opinion in that regard.

11. Applying the aforesaid principles to the facts of the present case, it would be quite evident that the present case also involves interpretation of the terms of the contract and, therefore, the disputes involving interpretation of the terms of the contract cannot be agitated by invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India. It is also evident that the dispute does not merely involve the interpretation of the terms of the contract, but there are other serious disputed questions of facts which too cannot be adjudicated upon by the

writ Court. So far the contention raised by counsel for the Petitioner that the existence of an alternative remedy provided in the Concession agreement through the forum of arbitrator will not debar the remedy of the Petitioner to invoke the writ jurisdiction is concerned, this Court does not dispute this legal position as it is well established that when the State or instrumentality of the State acts contrary to the public good and public interest unfairly, unjustly and unreasonably in its discharge of constitutional or statutory obligations then in the given facts of the case the existence of an alternative remedy will not be an absolute bar to the invocation of the writ jurisdiction of the Court, but the controversy before this Court relates to the interpretation of the terms of the contract for which the public law remedy of the writ Court cannot be invoked.

12. So far the argument of the counsel for the Petitioner that the principles of natural justice were not followed by the Respondent, this Court does not find any merit in the argument of the counsel for the Petitioner. Notice dated 21.6.2010 was duly served upon the Petitioner and the reply dated 28.6.2010 thereto was also submitted by the Petitioner and in such circumstances the Petitioner cannot complain that it was not put to notice by the Respondent for committing breach or violating the terms of the concession agreement. In the aforesaid background of facts involved in the present case and the legal position discussed above, the two judgments cited by the counsel for the Petitioner would not be applicable.

13. In the light of the above discussion, this Court does not find any merit in the present petition and the same is accordingly dismissed. However, while taking the aforesaid view since 60 days period in terms of the order of the Respondent dated 3.6.2011 for terminating the contract in terms of Article 17 of the concession contract is yet to expire, therefore to subserve the ends of justice, the Respondent No. 2 is directed to decide the representation of the Petitioner dated 15.6.2011 before the expiry of the said 60 days period after giving due opportunity of hearing to the Petitioner.

14. It is ordered accordingly.