(2000) 03 KL CK 0047

High Court Of Kerala

Case No: O.P. No. 14115 of 1996

Build Tech. India	APPELLANT
Vs	
State of Kerala and Others	RESPONDENT

Date of Decision: March 27, 2000

Acts Referred:

- Constitution of India, 1950 - Article 14

Citation: (2000) 2 KLJ 142

Hon'ble Judges: K.V. Sankaranarayanan, J; K. Narayana Kurup, J

Bench: Division Bench

Advocate: M.M. Abdul Aziz, Babu Karukapadath and M.A. Abdul Hakkim, for the Appellant; Grashious Kuriakose, Govt. Pleader, for the Respondent

Final Decision: Allowed

Judgement

Narayana Kurup, J.

The petitioner who is a contractor entered into an agreement with the second respondent Superintending Engineer for the construction of a R.C.C. Foot bridge connecting Kothuruthy Island in Andoor Panchayat in Taliparamba Talyk with the main land as per agreement No. SE(K)39/89-90 dt.30-1-1990 which came to be terminated as per Ext.P2 dated 29-1-1992 at his risk and cost. On receipt of Ext.Pl the petitioner sent Ext:P2 disputing breach of contract on his part and alleging that the completion of the work was delayed on account of the callous indifference on the part of the officials of the department and their non co-operative attitude. In Ext.P2 the petitioner has specifically stated that on completion of about 40% of the work a bill for Rs. 2.2 lakhs was submitted in October, 1991. But the bill was not paid inspite of availability of funds so as to disable the petitioner from further proceedings with the work. Ext.P3 is the lawyer notice dt.25-10-1995 issued by the petitioner alleging that non-completion of the work was on account of the non co-operation of the department in paying part bills. In Ext.P3 it is stated that a sum of Rs. 4 lakhs is due to the petitioner'' from the department for the work done for which a demand is

made therein to make immediate payment. Ext.P3 was replied by Ext.P4 by the third respondent Executive Engineer stating that Ext.P3 has been submitted to the second respondent for further necessary action. While matters remained like that, the petitioner received Ext.P5 demand notice from the 4th respondent calling upon him to pay the amount mentioned therein, viz. a sum of Rs. 9,11,036/-. On receipt of Ext.P5 the petitioner moved this court with the present writ petition praying for the issuance of a writ of certiorari to quash Exts.Pl and P5 and for a declaration that the amount shown in Ext.P5 is not an amount recoverable under the provisions of the Revenue Recovery Act and that Ext.P1 issued by the second respondent is without jurisdiction and for other reliefs. A learned single Judge before whom the writ petition was placed for hearing, passed an order referring the matter to be heard by a Division Bench having regard to the importance of the question involved. Accordingly, the petition is placed before us for hearing. We heard both sides. The pivotal question that arises for consideration is as to whether the breach in question is admitted by the petitioner or not. The refrain of the petitioner throughout is that it is the respondents 2 and 3 who have committed breach of contract by refusing to pay part bill for 10% of the work completed even though fund was available. Even according to the second respondent, the petitioner has done 20% of the work vide para.2 of Ext.P1. According to the petitioner, he completed about 10% of the work and submitted a bill for Rs. 2.2 lakhs as early as in October, 1991. But the bill was not passed. Going by Exts.P2 and P3 we are of opinion that breach is not admitted by the petitioner. In such a situation the moot question that arises for consideration is, whether it will be open for the department to adjudicate upon the disputed question of breach as well as to assess the damages arising from the breach (in this case the damage suffered by the department on account of re-arranging the work through other agencies). As per the records, the petitioner executed the agreement on 30-1-1990 and Ext.Pl order of termination at his risk and cost was passed on 29-4-1992. However, re-arrangement was effected only on 4-7-1995 and the demand evidenced by Ext.P5 was made on 5-3-1996. On a consideration of the attendant facts and circumstances brought to our notice as stated above, we are of opinion that the petitioner cannot be said to have admitted breach of contract on his part. Even where the power of the State or its instrumentality under an agreement entered into by it with a private individual expressly provided for assessment of damages for breach of conditions" of the agreement and recovery of damages, that power can be exercised only in cases where the breaches admitted or is not disputed. It is, by now, well settled that one of the contracting parties cannot adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. As already noticed, the petitioner has alleged in Exts.P2 and P3 and also in the original petition that he has not committed breach of contract and the failure to complete the work was due to lapses on the part of the department in honouring the bill submitted by him after completing part of the work. Even assuming that clause in an agreement empowers the State to adjudicate the question of breach as well as the quantum of damages, the adjudication by an

officer of the State regarding the breach of contract and assessment of damage cannot be sustained in law because the parties to an agreement cannot be an arbiter in his own cause.. The question as to whether there is a breach of contract and if so, what is the question of damages, are all matters which are best left to be adjudicated upon by a court or a tribunal and not by one of the contracting parties. The view we are taking finds support in the decision of the Supreme Court reported in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, . There, it was contended that when the State is one of the contracting parties and seeks to recover damages for breach of that contract, the State cannot be a Judge in its own cause and cannot be its own arbiter to determine the liability and quantum of damages. Upholding the contention, the apex court held as follows:

The terms of clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in C1. 12 are and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party. On a plain reading of the words, it is clear that the fight of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording in clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for arguments sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case, the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occassioned by the breach in view of the specific terms of clause 12.

We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it

is not disputed.

Following the aforesaid decision, a Full Bench of this court in Abdul Rahiman v. Divisional Forest Officer, (1988 (2) KLT 290 (EB) held as follows:--

When a contract is broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby. This principle of Sec.73 of the Contract Act equally applies where one of the contesting parties is the Government. It is the breach of the contract that gives rise to the cause for damages. The primary duty therefore is to fix the liability for the breach, Assessment of damages is only an incidental or subsidiary function. The liability to pay damages is thus fastened where there is breach of contract.

However, when a dispute arises as to whether the contract has been broken or not, that dispute cannot be settled by one of the parties to the contract, for, he cannot be an arbiter in his own cause. The dispute may have to be referred to an arbitrator or the matter has to be settled in a court of law. This principle applies to the Government also as a party to the contract.

Where the breach of the contract is admitted ie. where there is no dispute that the contract has been broken by one of the parties, the Government as the party entitled to claim compensation for the breach need not wait for a determination by any outside agency as to whether there was any breach of contract. In that event, the question of damages alone remains to be considered. A sum can be named in the contract as the amount to be paid in case of breach, an amount in liquidation of the claim for compensation. The contract can thus provide for liquidated damages in the event of breach and the Government claiming that amount as compensation for the admitted breach committed by the other party to the contract, need not seek the aid of court or any outside agency for the fixation of the quantum of damages. Similarly, if the contract itself provides that "that one party shall be liable to pay damages to the second party as may be assessed by the second party", the assessment by the second party, in case the breach is admitted, is binding on the first party and there is no more any necessity for a further quantification of the damages by any outside agency. The party assessing the damage can straight away seek to recover the amount and if that party is the Government, it can have recourse to the remedy available under the Kerala Revenue Recovery Act.

2. The cumulative effect of the aforesaid decisions is that when breach is not admitted, one of the contracting parties cannot arrogate to itself the power to claim compensation for the breach from the other party without there being any adjudication by an outside agency as to whether there was any breach of contract. In the case on hand, going by the pleadings as already noticed, it cannot be held that the petitioner has admitted the breach. Therefore the respondents have no jurisdiction to quantify the damage or loss alleged to have sustained by it on

account of the alleged breach..

3. The impugned orders and proceedings are bad when approached from another angle also viz, in the context of Art.14 of the Constitution of India. Dealing with a similar situation, one of us (Narayana Kurup, I.) in Latheef v. Superintending Engineer (ILR 1993 (2) Ker. 426) had occasion to observe as follows:-.

It is settled law that an order entailing civil consequences to an individual shall be passed strictly in accordance with the principles of natural justice. The State shall not spring orders of this nature like a magician pulling rabbits out of his hat. A citizen cannot be suddenly confronted with a demand notice < without there being a prior adjudication by a competent authority in accordance with the principles of natural justice and fair play both of which are intrinsic in the concept of equality before the law enshrined under Art. 14 of the Constitution of India. To satisfy the fundamentals of fair play in action the individual concerned should be given an opportunity of presenting his case before he is made liable and the adjudication in question has to be at the hands of an independent authority totally unconnected with the bargain. The question whether there is a breach of contract and if so, what is the quantum of damages, etc. are all matters which are left to be adjudicated upon by a court or tribunal and not by one of the contracting parties. Adjudication of liability by one of the contracting parties as against the other contracting party and that top without proper notice and hearing resulting in heavy pecuniary liability to the latter is abhorrent to all notions of fair play and justice and has been frowned upon by courts.

4. In this connection it is pertinent to recall that the agreement was executed in the year 1990 and Ext.P1 order of termination was passed on 29-4-1992. Thereafter, there was a long spell of silence and it was only on 4-7-1995 that the department thought it fit to rearrange the work through other agency. The delay in this regard is not explained. The department having remained silent for more than three years may not be justified in suddenly raking up and issuing Ext.P5 demand notice without the petitioner being put on notice which conduct of the department is, in our view, against all cannons of fair play and is a colourable exercise of power. In the light of the aforesaid discussion, we have no hesitation in holding that Exts.Pl and P5 cannot be legally sustained. Accordingly, we quash Exts.Pl and P5 as illegal and arbitrary and against the law laid down by the Supreme Court and this court in the decisions cited supra. Once the breach is not admitted, there should be a fullfledged adjudication by an independent agency or tribunal before initiating coercive proceedings. The reference stands answered as above.

Original Petition is allowed as above.