

(1993) 02 KL CK 0076

High Court Of Kerala

Case No: O.P. No. 85 of 1988-I

K.P. Latheef

APPELLANT

Vs

The Superintending Engineer
and Others

RESPONDENT

Date of Decision: Feb. 17, 1993

Acts Referred:

- Constitution of India, 1950 - Article 14

Hon'ble Judges: K. Narayana Kurup, J

Bench: Single Bench

Advocate: M.A. Manhu and M.A. Fiaz, for the Appellant; P.K. Behanan, Government
Pleader, for the Respondent

Judgement

K. Narayana Kurup, J.

This original petition is filed to quash Ext. P-6 demand notice issued by the second Respondent for realisation of a sum of Rs. 5,27,509 due as damages alleged to have been suffered by the Government on re-arrangement of work which was originally awarded to the Petitioner by Ext. P-1 letter. The work in question relates to widening, improving and laying the approach road from N. H. 47 to Indian Rare Earths, Chavara.

2. First Respondent invited tenders for the above work in June, 1978. The Petitioner being the lowest bidder, the work was awarded to him by Ext. P-1 letter dated 4th January 1979 of the first Respondent, and pursuant to Ext. P-1, the necessary agreement was executed by the Petitioner on 20th July 1979. Under the terms of the agreement, the work has to be executed from the property acquired for the said purpose by the Government. The Petitioner started the work immediately after the execution of" agreement and according to the Petitioner, when he started the work, the owners of the property whose lands were acquired on both sides caused obstruction as they did not allow the construction to proceed until compensation, under the Land Acquisition Act is paid to them. The owners had made

representations to Government claiming compensation, copy of one such representation (dated nil) is Ext. P-2 and a copy of which was served on the Petitioner also. On receipt of Ext. P-2, the Petitioner also made a representation Ext. P-4(a) dated 30th July 1980 to Government. In Ext. P-4(a) the Petitioner detailed the circumstances which resulted in the Petitioner being not able to carry out the work because of the obstruction caused by the owners whose property has been acquired and submitted to the Government that he will not be able to execute the work until compensation in full is paid to the owners of land and requested the Government to relieve him from the contractual obligations and to pay him the damages he has already suffered. The Government has not so far passed any order on Ext. P-4(a), says the Petitioner. Shortly, after Ext. P-4(a), the first Respondent served Ext. P-3 notice dated 20th August 1980 on the Petitioner stating that the Petitioner has not started work so far and if he does not complete the work within 10 days, the work will be terminated and got done by other agency at the Petitioner's risk and cost. To Ext. P-3 the Petitioner sent Ext. P-4 reply dated 8th September 1980 stating that the delay was caused solely on account of the lapses on the part of the Department in not handing over the site and clearing the site by cutting of trees, removal of telephone and electric posts, pillars, slabs, demolition of buildings on the acquired land, etc. The Petitioner submits that he has not received any reply to Ext. P-4 or Ext. P-4(a) so far.

3. But, to the Petitioner's utter consternation he received a demand notice Ext. P-6 dated 10th December 1987 issued by the second Respondent Tahsildar asking the Petitioner to remit a sum of Rs. 5,27,509 being the loss suffered by the Government for re-arranging the work awarded to the, Petitioner as per Ext. P-1 letter. On receiving Ext. P-6 the Petitioner made enquiries whether the Government have passed any orders on Exts. P-4 and P-4(a) or any order terminating his work was passed by the Government. On such enquiry, the Petitioner came to know that the Government took possession of the acquired properties only in 1984 (i.e. 5 years after the award of the work) and the Petitioner was able to obtain a copy of the intimation issued by the Land Acquisition Officer to the Assistant Executive Engineer (who is connected with the work) requiring the latter to be present on 30th August 1984 to take possession of the land acquired for the purpose of widening the road. Ext. P-5 is the copy of the letter addressed from the Land Acquisition Officer to the Assistant Executive Engineer (B and R), Chavara. Ext. P-5 shows the details of the property directed to be taken possession of by the Land Acquisition Officer. Exts. P-7 P-8 and P-9 are also produced by the Petitioner which will go to show that the site remained uncleared till 1987. Ext. P-7 dated 16th October 1987 is the letter from the Assistant Executive Engineer to the Executive Engineer to take speedy steps for removal of obstruction and Ext. P-8 is again letter from Assistant Engineer to the Assistant Executive Engineer relating to improving and widening of approach road. Ext. P-9 is letter from the Manager of Indian Rare Earths Ltd. addressed to the Assistant Executive Engineer complaining that the department has not cleared the

site by cutting the trees and demolishing and disposing of other structures. Ext. P-10 letter dated 22nd April 1987 produced by the Petitioner shows that the tender submitted by one Viswambaran has been accepted by the first Respondent.

4. A counter affidavit has been filed on behalf of the first Respondent repudiating the averments contained in the original petition. According to the counter affidavit, the site was handed over to the Petitioner well in time and the said fact is reflected in the agreement itself and Ext. P-5 is only a formal intimation to the Petitioner which does not depict the correct position, that the Petitioner could have commenced the work at places where there was no obstruction and, at any rate, the Petitioner is liable to compensate the Government to the extent of the amount demanded under Ext. P-6 being the difference between the initial tender amount and subsequent tender amount for re-arranging the work through other agency as per Ext. P-10.

5. Heard learned Counsel for the Petitioner and the learned Government Pleader for the Respondents.

6. It is the definite case of the Petitioner that though the contract work in question was awarded to him as per Ext. P-1 letter of the first Respondent as early as 4th January 1979, the first Respondent failed to hand over the site in time after clearing obstructions like telephone and electric posts, buildings, etc., and hence the Petitioner was prevented from executing the work. The Petitioner has produced Ext. P-2 representation preferred by the residents of the locality to the Minister of Public Works claiming compensation for the property acquired. In Ext. P-2, the signatories had clearly stated that they will not allow any construction in the area till the compensation due to them is fully paid. On receipt of a copy of Ext. P-2, the Petitioner also submitted Ext. P-4(a) representation dated 30th July. 1980 to Government detailing the circumstances which resulted in the Petitioner being not able to carry out the work and stating that "till this day the departmental officials, were not able to hand over the site and thus the Petitioner's case could be treated as genuine and reasonable to have a- termination of the work with the compensation for his loss." The statement of the Petitioner contained in Ext. P-4(a) is seen confirmed by Ext. P-5 letter of the Land Acquisition Officer addressed to the Assistant Executive Engineer requiring the latter to depute an officer to take possession of the land from the Revenue Inspector, Karunagappally at 10 a.m. on 30th August 1984. Further, Exts. P-7 to P-9 will show that the site was not cleared of obstructions and no action was taken to dispose of the building ""and other structures which were in dilapidated condition. The cumulative effect of Exts. P-4(a), P-5 and P-7 to P-9 is that the first Respondent failed in his duty in handing over the site to the Petitioner after clearing all obstructions so as to enable the latter to commence the work. Under such a situation the Petitioner cannot be faulted for non-completion of work. In fact, the bona fides of the Petitioner is borne out by the fact that he commenced the work in spite of the fact that the site was not handed

over to him and it was after cutting the hard soil for a considerable distance and putting up a retention wall after dewatering the pond which is not provided for in the schedule of work. The Petitioner was resisted by the land owners stating that until the acquisition proceedings are completed and compensation is paid to them, they will not allow any work to be done in the property. According to me, the unexpected turn of events has affected the bargain which the parties have made and on account of the unexpected turn of events, the performance of the contract has become impossible for which the Petitioner cannot be saddled.

7. In [Smt. Sushila Devi and Another Vs. Hari Singh and Others](#), it was held (at page 1759) that "If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract." The above proposition was reiterated by the Supreme Court in a later decision in *Govindbhai v. Gulam Abbas* AIR 1977 S.C. 1010 wherein the court held as follows at page 1024:

10. The meaning of the aforesaid expression "impossible of performance" as used in the above quoted section would be clear from the following observations made by Lord Loreburn in *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 A.C. 397, 403 which is generally considered to contain a classic and terse exposition of the law relating to frustration:

The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible.

11. We find ourselves in complete accord with this view which also finds support from the decisions of this Court in [Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another](#), and [Smt. Sushila Devi and Another Vs. Hari Singh and Others](#), where it was held that the performance of a contract becomes impossible if it becomes impracticable from the point of view of the object, and the purpose which the parties had in view and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

8. Though the legal principles enunciated in the above decisions have a definite bearing on the facts of the case, I decline to enter a finding based on the same as according to me, the matter can be disposed of on a consideration of the validity of Ext. P-6 demand notice in the light of Article 14 of the Constitution of India and in the light of judicial pronouncement touching on the subject.

9. Now coming to the question of recovery of damages from the Petitioner as per Ext. P-6, I am of the view that the said proceedings cannot be legally sustained. Ext.

P-6 demand notice is seen issued lay the second Respondent treating the Petitioner as a defaulter and asking him to pay a sum of Rs. 5,27,509 being the loss suffered by Government. 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 where 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 Article 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 too 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. Viewed in this background, Ext. P-6 cannot but be dubbed as wholly arbitrary, illegal and passed without jurisdiction as it has been passed without proper adjudication.

10. The view I am taking is fortified by the decision of the Supreme Court in *State of Karnataka v. Shree Rameshwara Rice Mills* AIR 1987 S.C. 1359 wherein it has been held as follows:

The powers of the State Government under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions of the agreement and recovery of the damages is confined only to those cases where the breach of conditions is admitted or it is not disputed. The crucial words in the relevant clause of the agreement are and for any breach of conditions set forth hereinbefore, the first party (contractor) shall be liable to pay damages to the second party (State Government) as may be assessed by the second party". The terms of the clause, do not afford scope for a liberal construction being made regarding the powers of the officer of the State Government to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. On a plain reading of the words it is clear that the right of the State Government 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 of the clause would have been entirely different. A right to adjudicate upon an issue relating to a breach of conditions of" the contract cannot be said to flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to

assess damages is a subsidiary and consequential power and not the primary power. Even assuming that the terms of the relevant clause afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as the quantum of damages, the adjudication by the officer of the State Government regarding the breach of the contract cannot 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 by an independent person or body and not by the other party to the contract.

In the absence of the production of agreement by either side, I am proceeding on the assumption that the agreement does not contain a clause empowering the Government to adjudicate the disputed question of breach and even assuming that such clause existed, this Court will be loath to enforce the same as unfair and unreasonable being one entered into between parties whose bargaining power is not the same vide [Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another](#), at 1611, [Hyderabad Municipal Corporation Vs. M. Krishnaswami Mudaliar and Mudaliar and Another](#), where the Supreme Court declined to give effect to a clause in a standardised contract. *State of Karnataka v. Shree Rameshwara Rice Mills* AIR 1987 S.C. 1359, supra, was followed by this Court in *Ramdharma Raja v. Tahsildar, Thaliparamba* 1988 (1) KLT (S.N.) P. 4, wherein it was held that in a dispute between Government and a private party, the Government cannot be the arbiter of its own cause and decide the dispute. It was also held that in the absence of proper adjudication the Government cannot realise any amount from the Petitioner therein.

11. In the light of the legal principles enunciated in the above decisions, I have no hesitation in holding that Ext. P-6 as illegal and arbitrary and issued without jurisdiction besides being violative of Article 14 of the Constitution of India. Ext. P-6 is therefore quashed and the original petition is allowed. There is no order as to costs.