

(2006) 2 CHN 33

Calcutta High Court

Case No: Writ Petition No. 13711 (W) of 2002

Bibekananda Biswas

APPELLANT

Vs

State of West Bengal
and Others

RESPONDENT

Date of Decision: Dec. 20, 2004

Acts Referred:

- Bengal Ferries Act, 1885 - Section 35
- Constitution of India, 1950 - Article 14, 21, 226, 298, 299

Citation: (2006) 2 CHN 33

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: A.K. Das Adhikary, U.S. Menon and Manish Doogar, for the Appellant; Pratip Kumar Chatterjee, for the respondent No. 7, Kamalesh Bhattacharyya and Kalyan Ghosh for the respondent Nos. 9 and 10 and B. Mutsuddi and Shibani Bhagat, for the Respondent

Judgement

Amitava Lala, J.

On 25th April, 2002 a quotation was offered for ferry service at Uttarasan Bridge, 16 kilometer of Ramnagar-Bazarshaw Chowrigachha Khagra Ghat Road, under Maurakshi Bridge Highway Division, of Murshidabad Highway Division II was hung up in the office of the Block Development Officer, Beldanga II. Petitioner's offer was accepted. By an office order dated 22nd May, 2002 work order was issued by the Executive Engineer, Murshidabad Highway Division II on behalf of the Governor of State of West Bengal for running the ferry service in the aforesaid area. The condition under the work order is that offer will remain valid for two years or till the completion of the proposed bridge work from the issue of the letter. Such work order was duly communicated to the Sabhadhipali of the Murshidabad Zilla Parishad, Superintending Engineer, State Highway Circle No. III, Public Works(Roads) Department, District Magistrate, Murshidabad, Purta Bibhag, Karmadhyaksha, Superintendent of Police, Murshidabad, R.T.C. Behrampore, Murshidabad, Sabhapati Beldanga II and Assistant Engineer, Maurakshi Bridge Highway

Division.

2. On 27th May, 2002 the terms and conditions were executed by or between the petitioner, Murshidabad Zilla Parishad and concerned Executive Engineer. Two clauses of such terms and conditions are very important in nature for coming to an appropriate conclusion. Clause No. 6 says that the agreement can be cancelled by a notice of 7 days without assigning any reason. Clause No. 7 says the agreement is valid for 24 months and till the completion of construction of the bridge work lie under the work order dated 22nd May, 2002. According to the petitioner, the rate which has been quoted by him for the ferry service is lower than the rates quoted by the others. On 7th July, 2002 an agreement was executed in between Sri Ashok Kumar Jain and the petitioner to hire a vehicle for such ferry service. Such terms and conditions are applicable in between two private persons and any dispute or difference will be resolved through an appointment of Arbitrator.

3. The contesting respondents are staff of West Bengal, concerned District Magistrate, concerned Superintendent of Police, concerned Executive Engineer of Highway Division II, Public Works (Roads) Department, concerned Block Development Officer, Beldanga II, concerned Officer-in-Charge in the local police station, concerned Sabhadhipati of the Murshidabad Zilla Parishad, concerned Karmadhyaksha of such Zilla Parishad, concerned Sabhapati of the Beldanga (II) Block Panchayat Samity and the Pradhan of the Kamnagar Gram Panchayat. Excepting last two persons being respondent Nos. 9 and 10 respectively no one filed any affidavit in connection with the grievance of the writ petitioner.

4. The petitioner's grievance is that in spite of participation in the tender and in spite of acceptance of offer and in spite of issuance of formal work order and in spite of deposit of required security money and in spite of spending huge amount for installation of jetty, hiring of boats and in spite of making all arrangements on 19th July, 2002 Pradhan of the Kamnagar Gram Panchayat and the police officer attached to Saktipur Police Station came to the ferry ghat, refused to look into any work order and dismantled the ferry service arrangement made by the petitioner. Petitioner made representations to the respondent No. 4 and respondent No. 7 i.e. the concerned Executive Engineer, Highway Division II, Public Works (Roads) Department and Murshidabad Zilla Parishad through their respective authorities. In reply thereto, the concerned Executive Engineer, Highway Division II and Murshidabad Zilla Parishad contended under the Memorandum dated 3rd September, 2002 that the agreement was cancelled on and from 4th September, 2002. It was specifically contended that the serial No. 6 of the terms and conditions was followed to cancel such agreement. On enquiry this Court has come to know that in spite of the clause that cancellation of the agreement it can be made by 7 days notice without assigning any reason no such notice was given. Being aggrieved thereby and dissatisfied with the high-handedness of such executive authority the petitioner invoked the writ jurisdiction of this Court to get an appropriate order in connection thereto.

5. In the prayer of the writ petition, the petitioner prayed for a writ of mandamus in nature and/or order in nature commanding the respondents to cancel and/or rescind and/or withdraw the impugned Memorandum dated 3rd September, 2002 by the respondent No. 4 and not to give effect or further effect of the same and to compensate for the entire loss of Rs. 4,32,391/- as mentioned in Annexure "P/3" with statutory interest and also issuance of fresh order for operating the ferry service in the writ in question and to act in accordance with law. Secondly, the petitioner prayed for issuance of certiorari directing the respondents to certify and transmit the records and quashing the impugned memorandum. The petitioner filed a supplementary affidavit annexing a letter of the Executive Engineer, Murshidabad Highway Division II dated 20th August, 2002 addressing the Sabhadhipati of the Murshidabad Zilla Parishad. It seems that the said Executive Engineer wanted to give an explanation about stoppage of the work of the petitioner under work order to the Zilla Parishad. Therefrom it appears that the petitioner could not start the ferry service due to toll charges etc. which were reduced by more or less 50% which the agency i.e. the petitioner was to collect. The petitioner was instructed to keep the arrangement upto 23rd August, 2002 with an intimation that on 24th August, 2002 the ferry service arrangement would be taken up by Beldanga II Panchayat Samity. It is referred that a decision was taken in Zilla Parishad on 19th August, 2002 and the validity of the work order was going to be terminated with effect from 24th August, 2002 and for settling up the period from 19th July, 2002 to 24th August, 2002 as idle.

6. It appears to this Court that the entire episode from issuance of the work order upto the cancellation was commenced in between 22nd May, 2002 and 3rd September, 2002. According to the petitioner, the allegation of higher rate of toll charges is absolutely vague in nature. Now, the concerned Panchayat Samity, which is running the ferry service, is charging much higher rate than the petitioner used to charge. The chart has been annexed with the supplementary affidavit to confront the allegations made by the authority. Although discussions were held to compensate but the petitioner is not at all agreeable with any decision whatsoever. The bridge is yet to be completed as per the terms and conditions. The agreement will be in force for a period of two years or 24 months or till the completion of the construction of the bridge. Therefore, when the bridge is not constructed the petitioner is entitled to run the ferry service at least for a period of 24 months. Forcible removal of the petitioner without any notice is beyond the scope of the agreement. Therefore, writ lies as an extreme case in the aforesaid circumstances irrespective of existence or no existence of the contract in between the parties herein.

7. From the affidavit-in-opposition of the respondent No. 9 it appears that on 26th December, 2002 Executive Officer of the Beldanga II Panchayat Samity informed the Pradhan of Kamnagar Gram Panchayat that the Panchayat Samity has adopted a resolution to this effect that the Pradhan of such Gram Panchayat will b2 make arrangement for ferry service with effect from 18th November, 2002. By a supplementary affidavit to such affidavit-in-opposition a memorandum dated 7th March, 1979 is annexed by the contesting respondent to show that as Panchayat Samity is entitled for the renewal

of settlement etc. in respect of vested tanks, hats, bazars, ferries and the same will be formally handed over to the respective Panchayat Samities. But when a ferry is covering more than one Panchayat Samity further lease of settlement is to be made by the Zilla Parishad. The petitioner by filing a supplementary to such supplementary affidavit contended that the Uttarasan Ferry Ghat and the tanks connected with the river fall under three Panchayat Samities viz. Beldanga II, Bharatpur I and Behrampore Panchayat Samities and two Sub-Divisions viz. Kandi and Behrampore Sadar. Therefore, Beldanga II. Panchayat Samity is not the authority to control and manage the affairs of the ferry ghat. Illegality of the Executive Engineer, Murshidabad Highway Division II of the Public Works (Roads) Department was also criticized therein. Respondent No. 10 almost dittoed the statements made by respondent No. 9.

8. According to the contesting respondents, the authority has every right to cancel the contract. If a party is aggrieved he can, at best, ask for compensation for such cancellation of contract. For this reason the petitioner herein claimed a compensatory amount. The prayers as made in the writ petition do not qualify for interference of the Writ Court. There is no difficulty in handing over the ferry to a Panchayat Samity for the purpose of running the same in accordance with law. Running of ferry service is not covering more than one Panchayat Samity. Precisely it is covering one Gram Panchayat. If there is any problem with regard to recovery of the claim by the petitioner he could have approached the District Magistrate of the concerned district.

9. In reply thereto, the petitioner contended that the submission as regards ferry service covering one Panchayat or Panchayat Samity is factually incorrect. District Magistrate has no role to play in this regard. It is entirely Panchayat oriented problem which has to be adjudicated by the appropriate authority of the Zilla Parishad. Cancellation of the earlier agreement and handing over the charge to a Panchayat Samity and subsequently to a Gram Panchayat under such Panchayat Samity clearly speaks that the subject may relate to Panchayat business. On the other hand, it can be said that this is not a usual ferry service which is to be governed by the West Bengal Panchayat Act but temporary measure to continue with the service till the bridge is constructed. For the said reason involvement of other authorities was necessitated as because a crucial role has been played by the authority of the Zilla Parishad including termination. Such authority is empowered to take all possible steps in this matter. Learned Counsel appearing for the State appeared to be disinterested. Learned Counsel appearing for the Zilla Parishad seems to be little interested. But their submissions are without any foundation i.e. affidavit on that score. Therefore, Court has to come to a finding on the basis of the arguments advanced by the contesting parties and the question of law available hereunder.

10. It is true to say that whenever we consider any matter regarding tender, contract etc. in the writ jurisdiction we follow the principles laid down by the Supreme Court in [Mahabir Auto Stores and others Vs. Indian Oil Corporation and others](#), . The emphasis supplied as follows :

The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercise of power. Therefore, the action of State organ can be checked under Art. 14. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination. It is well-settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

11. In the backdrop of such principle Supreme Court says that in private law field there was no scope for applying the doctrine of arbitrariness or mala fides. A plea of arbitrariness mala fides as being so gross cannot shift a matter falling in private law field to public law field. To permit otherwise would result in anomalous situation that whenever State is involved it would always be public law field, this would mean all redress against the State would fall in the writ jurisdiction and not in suits before Civil Courts. Whether public law or private law rights are involved, in a case, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any strait-jacket formula. It has to be examined in each particular case.

12. In the present case, the mandamus is not for the money claim simpliciter on cancellation of agreement. It is much more than the same for which public law element is squarely applied. Necessary ingredients of dismantling of the ferry service is available in paragraph 6 of the affidavit-in-opposition of the respondent No. 10 i.e. the Pradhan of the Gram Panchayat itself.

13. In [ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others](#), Supreme Court held that 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 the above said requirement of Article 14, then we have no hesitation in holding that a Writ Court can issue suitable directions to set right the arbitrary actions of the respondent.

14. Therefore the following principles emerge :

- a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable;
- b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule;
- c) A writ petition involving a consequential relief of monetary claim is also maintainable.

15. However, having plenary jurisdiction of the High Court under Article 226 in its wisdom follow the principles of [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others](#),

16. In [LIC of India and Another Vs. Consumer Education and Research center and Others](#), ([Mahabir Auto Stores and others Vs. Indian Oil Corporation and others](#) , amongst others was referred. It was also held therein that the distinction between the public law remedy and private law remedy cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of activity and scope and nature of the controversy. The distinction between public law remedy and private law remedy is now narrowed down. In [Dwarkanadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay](#), a three-Judges" Bench of the Supreme Court held that being a public body even in respect of dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction. In [Dharamvir Kataria \(Col.\) Vs. Union of India and Others](#), the Court held that grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21 is an exercise of the Courts under the public law jurisdiction for penalizing the wrongdoer and fixing the liability of the public wrong on the State which failed in discharge of its public duty to protect the fundamental rights of the citizens. In [Manmatha Nath Kayal Vs. District Manager, 24 Parganas, Food Corporation of India and others](#), ([Dwarkanadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay](#), is followed in respect of liability arising out of contract in payment of rent. In [Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others](#), the Supreme Court held that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, promisee, acting in reliance on it alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of formal contract as required by Article 299 of the Constitution. In [State of Orissa Vs. Dr. \(Miss\) Binapani Dei and Others](#), it was held that an administrative order which involves civil consequences, must be made consistent with the rules of natural justice after informing the party or parties and after giving opportunity of hearing.

17. According to the respondent, the relief is in the nature of specific performance of contract. However, it is impossible to be performed. Therefore, the compensation is the only remedy which cannot be granted in the Writ Court. The petitioner can, at best, approach the Magistrate for the same. u/s 35 of the Bengal Ferries Act, 1885, the claim of the petitioner is redundant in nature which cannot be adjudicated in this writ petition.

18. According to me, arbitrary action of the State authorities cannot be ruled out in the facts and circumstances of this case. The law is well-settled by now in this regard irrespective of the fact whether the same is contractual or not. If public law element subsists, the Court under Article 226 of the Constitution of India, has every right to set at naught such illegal or arbitrary action on the part of the State irrespective of the fact that under the Bengal Ferries Act a Board will function as a Magistrate or not. However, I cannot see any reason to believe that the Magistrate is the authority concerned to decide the issue in respect of the happening arose at the instance of the authority of the Zilla Parishad. Zilla Parishad is the appropriate functionary to consider all issues available hereunder and finalise for the benefit of the petitioner. It is the appropriate authority for considering the same particularly when cancellation of the contract is made by the ex officio executive on their part. Therefore, taking into account all aspects of the matter I am of the considered opinion that there is no scope of ignoring the prayer of the petitioner in view of the facts and circumstances of this case. The appropriate Board of Zilla Parishad will enquire into the matter regarding the basis of the impugned memorandum and monetary benefit, operation of the ferry service by the petitioner in future, and all other aspects of the matter which are relevant in connection thereto. Such consideration will be made upon giving fullest opportunity of hearing and by passing a reasoned order thereon. The entire consideration will be made within a period of three months from the date of communication of this order. Till the communication of the order no third party interest will be created. If already created that will be abiding by the result of the decision to be taken by the Zilla Parishad, The authority will also be entitled to enquire the cause of dismantling the ferry and if it appears that the persons who are alleged herein are responsible for the same in that case the loss will be recovered from them by the Zilla Parishad, if necessary, by attachment of respective salaries, bank account of the persons concerned having been identified. The compensatory amount will be recovered from them along with interest @ 18 % per annum being the usual banking interest of nationalized banks in commercial transactions. If it appears to the Zilla Parishad that there is a role of any Panchayat Samity or Panchayat for their own interest in that case appropriate steps, in accordance with law, can also be taken against such person or persons. In all entire matter is left open for the due disposal of the Zilla Parishad.

19. The running of ferry service by the Panchayat is injuncted hereunder subject to the decision to be taken by the appropriate Zilla Parishad. For the interim period, the Zilla Parishad will make appropriate arrangement for running the ferry service. Both the directions will be carried out simultaneously so that the passengers should not be suffered.

20. Thus, the writ petition stands disposed of.

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

22. Let an urgent xeroxed certified copy of this judgement, if applied for, be given to the learned Advocates for the parties within two weeks from the date of putting the requisition.