

Lubi Industries LLP Vs State Of Assam And Ors

Court: Gauhati High Court

Date of Decision: June 21, 2018

Acts Referred: Indian Contract Act, 1872 â€” Section 70

Sale of Goods Act, 1930 â€” Section 4

Assam Fiscal Responsibility and Budget Management Act, 2005 â€” Section 7, 7(2), 8

Assam Rules of Executive Business, 1968 â€” Rule 22

Constitution of India, 1950 â€” Article 166(1), 299

Hon'ble Judges: SUMAN SHYAM, J

Bench: Single Bench

Advocate: K N Choudhury, D Saikia

Final Decision: Dismissed

Judgement

1. Heard Mr. K.N. Choudhury, learned Sr. counsel assisted by Mr. M. Phukan, learned counsel for the petitioner. I have also heard Mr. D. Saikia,

learned Sr. Addl. Advocate General, Assam assisted by Mr. B. Gogoi, learned counsel appearing for the respondents.

2. In this writ petition, the order dated 21-11-2015 issued by the Addl. Chief Secretary to the Government of Assam, Soil Conservation Department,

rejecting the claim of the writ petitioner for payment of an amount of Rs. 6.39 Crores against the 4745 Centrifugal Pumps supplied by it, has been put

under challenge.

3. The facts giving rise to the institution of this proceeding, as projected in the writ petition, briefly stated, are these. The writ petitioner is a company

registered under the Companies Act, 1956 having its registered office at Naroda Road, Ahmedabad. The petitioner company (formerly known as M/s

Mira Industries) is engaged in the business of manufacturing various models of Centrifugal Pumps under the brand name 'Lubi'. The Ministry

of Rural Development, Govt. of India had formulated a programme in the name of 'Integrated Watershed Management Programme' (IWMP)

with the objective of restoring the ecological balance by harnessing, conserving and developing degraded natural resources such as soil, vegetative

cover and water and the State Level Nodal Agency (SLNA) had been entrusted with the responsibility of implementing the IWMP programme. On

19-02-2014, the Chief Executive Officer of the SLNA, i.e. respondent No. 5 had issued an order addressed to the Project Managers of WDC and

PIA of IWMP projects inter alia informing them that an advisory has been received from the Agriculture Department for using the "Lubi make 2

HP Centrifugal Mono Block Electrical Pump Set in the IWMP project. In the said letter it has been mentioned that M/s Mira Industries has been

advised to make the machineries available to meet the said target at the rate of one machine per hectare for non-paddy agriculture activities. A copy

of the letter was also marked to the writ petitioner with a request to make available the "Lubi make model name MDH-21, 2HP Centrifugal

Mono Block Electrical Pump Set to all the districts immediately and that payment would be made by the District Project Managers on the basis of

delivery of the products at the approved rate of Rs. 13,461/- per pump inclusive of all taxes. In the said letter it was further mentioned that the district-

wise target was to be treated as confirmed order. On receipt of a copy of the letter dated 19-02-2014, the petitioner had made supply of as many as

4745 pumps valued at Rs. 6,39,26,289/covering the five districts of Barpeta, Bongaigaon, Dhubri, Lakhimpur and Kokrajhar. As per the project outlay,

a total of 23,775 number of pumps were to be supplied in the Phase-I within the month of March, 2014 but before the remaining pumps could be

supplied, the petitioner had received a copy of the order dated 14-03-2014 issued by the respondent No. 5 by means of which the operation of the

earlier order dated 19-02-2014 was kept in abeyance with a clarification that no further action needs to be taken on the basis of the said order. In view

of the letter dated 14-03-2014, the writ petitioner could not make delivery of the remaining pumps under Phase-I. However, aggrieved by the order

dated 14-03-2014, the petitioner had submitted a representation dated 20-12-2014 before the Chairman of SLNA with a request for withdrawal of the

order dated 14-03-2014. The petitioner had also submitted another representation dated 30-01-2015 before the Departmental Minister renewing its

request for withdrawal of the order dated 14-03-2014 but when both the representations had failed to evoke any favourable response from the

authorities, the petitioner had approached this Court by filing W.P.(C) No. 1007/2015, which was disposed of by the order dated 24-06-2015 with a

direction upon the respondent No. 1 to dispose of the two representations filed by the petitioner as expeditiously as possible, preferably within 1508-

2015, which time frame was subsequently extended to 30-09-2015 by the order dated 31-08-2015 passed in I.A. No. 1327/2015 arising out of W.P.(C)

No. 1007/2015. In compliance of the order dated 24-06-2015 passed by this Court, the Addl. Chief Secretary to the Government of Assam, had issued

the impugned order dated 21-11-2015 rejecting the claim of the petitioner. Hence this writ petition.

4. The respondent Nos. 1 to 5 have jointly filed affidavit contesting the case of the petitioner, inter alia, contending that the program under the IWMP

are implemented at the project level on the basis of the DPR prepared by the Watershed Committee under the supervision of the Project

Implementation Agency and there was no proposal for supply of 2 HP Lubi pump sets included in the DPR. It has also been stated that there

was no scheme called "Mechanize farming intensify production and Micro enterprises by mechanize tools in watershed areas target for dry season

operation, which was ever included in the Detail Project Report (DPR) and therefore, the question of issuing the supply order dated 19-02-2014 for

supply of such pump sets under such scheme did not arise at all. It has further been stated in the affidavit that the order dated 19-02-2014 had been

issued by the respondent No. 5 i.e. the then Chief Executive Officer, SLNA in an unauthorized manner, without following the due procedure of law

and that there was no budgetary provision for procurement of the pumps sets. It is also the stand of the official respondents that no tender, as required

by the government norms, was floated before issuing the supply order 19-02-2014 and as such, the entire transaction being illegal, was not binding

upon the State Government.

5. Responding to the queries of this court, as recorded in the order dated 01-02-2017, an additional affidavit was filed by the respondent No. 2, wherein

it has been mentioned that the then incumbent in the office of Chief Executive Officer, SLNA Sri S. Thiek, ACS was involved in the process leading

to the order dated 19-02-2014. It has also been stated that he has retired from service on attaining the age of superannuation with effect from 31-03-

2016 but a departmental proceeding initiated by the Personal(A) Department is pending against the said officer.

6. By referring to the materials available on record Mr. K.N. Choudhury, learned Sr.counsel appearing for the writ petitioner has strenuously argued

that the delivery of 4745 pumps by the writ petitioner to the various District Project Managers not being in dispute and the said pump-sets having been

used by the department, the petitioner company cannot be denied of the payment in respect thereof, inasmuch as the claim of the petitioner would be

covered under Section 70 of the Indian Contract Act, 1872. Mr. Choudhury has placed heavy reliance on the decision of the Hon'ble Supreme

Court in the case of Food Corporation of India & Ors. Vs. Vikas Majdoor Kamdar Sahkari Mandli Ltd. reported in (2007) 13 SCC 544 to contend that

even if it is held that there were some procedural lapses while issuing the supply order dated 19-02-2014, even then, since the writ petitioner had

delivered the pump-sets not intending to do it gratuitously, the respondents cannot deny the cost of such pump sets to the petitioner. Mr. Choudhury

submits that even in the absence of a valid contract with the State containing specific terms and conditions, by applying the principles of quantum

merit, the price of the pump-sets already delivered must be paid to his client.

7. Relying upon another decision of the Supreme Court in the case of M/s Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P. & Ors. reported

in (1979) 2 SCC 409, Mr. Choudhury submits that since the respondent No. 5 had by his words and the written communication dated 19-02-2014,

made out a clear and unequivocal promise to make payment in respect of the pump sets as per the price mentioned in the supply order, the same

has created an legal relationship between the parties in the nature of a promise which would be binding on the respondent authorities who would not

be entitled to go back on such promise after the delivery of the pump-sets had been made.

8. By way of an alternative argument, the learned senior counsel for the petitioner has submitted that the letter dated 19-02-2014 issued by the

respondent No. 5 is an order for supply of goods and hence, the claim of his client to receive payment for the goods supplied would be protected under

Section 4 of the Sale of Goods Act, 1930. To buttress his argument Mr. Choudhury has relied upon the decision of the Supreme Court in the case of

Arihant Udyog Vs. The State of Rajasthan & Ors. reported in (2017) 8 SCC 220, to contend that there was a clear intention on the part of the

respondent No. 5 in this case to purchase the pump-sets and therefore, the title on the pump-sets had passed over to the purchaser upon delivery of

the same. As such, the respondents would be bound to make payments for and on account of such purchase.

9. Mr. D. Saikia, learned Sr. Addl. Advocate General, Assam, on the other hand, has argued that there was no requirement of 2HP Lubi pump-sets

under the project of IWMP nor is the same provided under the DPR. According to Mr. Saikia no administrative approval from the concerned

department was taken in this case before issuing the supply order dated 19-02-2014 nor was there any budgetary provision available for procurement

of pumps. That apart, submits Mr. Saikia, the provisions of "The Assam Fiscal Responsibility and Budget Management Act, 2005" (for short

FRBM Act, 2005) have also not been followed in this case and the supply order has not been issued in the name of the Governor or any

Government department. Therefore, submits Mr. Saikia, there is no contract within the meaning of Article 299 of the Constitution of India which

would bind the Government of Assam in any manner imposing a financial liability on the state exchequer. By referring to the decision of the Supreme

Court in the case of The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh Ors. reported in AIR 1977 SC 2149, Mr.

Saikia submits that a contract which does not meet the specified requirement of Article 299 of the Constitution of India would be void and therefore,

unenforceable against the State.

10. By referring to Article 166(1) of the Constitution of India Mr. Saikia has further argued that all executive actions of the State Government would

have to be expressed to have been taken in the name of the Governor and in order to take the shape of an order affecting the rights of the parties, the

provision of Article 166(1) has to be mandatorily complied with, which has not been done in the present case. In support of his aforesaid argument, the

learned Additional Advocate General has relied upon the decision in the case of State of Bihar & Ors. Vs. Kripalu Shankar & Ors. reported in (1987)

3 SCC 34.

11. I have considered the submission advanced by the learned counsel for the parties and have also gone through the materials available on record.

12. From the materials available on record, it is apparent that the respondent No. 5 had issued the order dated 19-02-2014 marking a copy to the

petitioner company to commence supply of 2HP Centrifugal Mono Block Electrical Pump Set and on the basis of the said supply order, the petitioner

has already delivered as many as 4745 pump-sets valued at Rs. 6.39 Crores (approx). However, by the order dated 14-03-2014, the order dated 19-

02-2014 was kept in abeyance. Having regard to the pleaded stand of the parties to this proceeding, as noticed above, what would be of utmost

importance in this case is the question as to whether there is any binding contract between the writ petitioner and the respondents within the meaning

of Article 299 of the Constitution of India so as to compel the State Government to make payment for the 4745 pump sets delivered by the writ

petitioner. A,

13. By the impugned order dated 21-11-2015, the State respondents have rejected the claim of the petitioner on the grounds that the order dated 19-02-

2014 was issued without obtaining the approval of the competent authorities and no funds were available in the SLNA budget for procurement of the

pump sets and non-floating of tender has also been cited as one of the grounds for rejecting the claim of the petitioner. It is also the case of the

respondents that the pump sets are lying in the godowns in an un-utilized condition since there is no requirement for the same. The respondents have,

therefore, denied any liability to make payment to the petitioner.

14. It is not in dispute that no tender was invited by the respondent No. 5 before issuing the supply order dated 19-02-2014. The petitioner has not been

able to bring any material on record to show that the DPR had provided for supply of 2HP Centrifugal pump-sets or that there was budgetary

provision for procurement of the same. In the impugned order dated 21-11-2015 it has been categorically mentioned that the Finance Department has

not agreed to make available the funds to arrange for the payments for the pump sets. The communications issued by the various Project Managers,

who have written to the respondent No. 5 informing that the petitioner has dumped the pump-sets without there being any correspondence for supply

or any indent raised by the district project heads are available on record. The writ petitioner has failed to lay any material in rebuttal of such

correspondences.

15. The records produced by the learned departmental counsel reveals that no administrative approval of the department was obtained by the

respondent No. 5 before issuing the supply order dated 19-02-2014. On the contrary, it appears from the records that the Chairman of the SLNA had

written a note dated 13-03-2014 stating that the supply order dated 19-02-2014 was contrary to his order in the matter of procurement of pump-sets

and that the said order had been issued in violation of the instructions of the Chairman. Although there is a reference to the minister's letter

dated 06-02-2014 in the supply order dated 19-02-2014, yet, I find from the record that the said note of the departmental minister does not mention

about procurement of any pump-sets but only directs the Chief Executive Officer, SLNA, to prepare a report to mobilize resource available for

attending agricultural and all watershed project areas. The advisory of the Department of Agriculture referred to in the order dated 19-02-2014 is also

not available on record.

16. The FRBM Act, 2005 was enacted by the State Legislature to provide for fixing responsibility of the State Government to ensure fiscal stability,

sustainability and to improve the efficiency and transparency in management of the public finances of the State and also to enhance the availability of

resource by achieving sufficient revenue surplus, reduce fiscal deficit and to remove the impediment to effective conduct of fiscal policy and prudent

debt management for improving social and physical infrastructure and human development. The act was notified in the official Gazette on 13-05-2005.

Section 7(2) of the Act provides that before awarding any work or starting a construction work or awarding an order of supply of goods and services

which create liability on the consolidated fund of the State, the State Government or the authorities exercising delegated financial powers are required

to first issue administrative approval or financial sanction for the work or the order of supply, as the case may be.

17. Section 8 of the Act of 2005 provides that violation of one or more of the provisions of Section 7 shall be treated as an offence which shall be

punishable with rigorous imprisonment for a term which may extend upto 03 years. From a careful examination of the section of the FRBM Act of

2005, it is clear that stringent statutory norms have been laid down for the administrative departments to follow before according approval in the

matter of awarding contract or issuing supply order etc and the consequences for violation of the said provision has also been clearly spelt out in the

Act. Therefore, the provisions laid down in Section 7 of the Act of 2005 would have to be treated as mandatory, meaning thereby that any supply

order issued in violation of the provision of this Act, besides inviting criminal liability, would also be rendered null and void in the eye of law.

18. Article 299 of the Constitution of India defines contracts and provides that all contracts made in the exercise of executive power of the Union or all

State shall be expressed to be made by the President or by the Governor of the State as the case may be, and all such contracts and all assurance of

property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he

may direct or authorize.

19. Article 166 of the Constitution deals with the conduct of Government business and as per Article 166(1) all executive action of the Government of

a State shall be expressed to be taken in the name of the Governor. As per Rule 22 of the Assam Rules of Executive Business, 1968 it is the

Departmental Minister who would be the competent authority to dispose of departmental business and copies of such orders would have to be sent to

the Governor and the Chief Minister.

20. From a conjoint reading of Article 299 and 166(1) it would thus become apparent that for a government contract to be valid and having binding

effect upon the State, the same must not only be expressly be made in the name of the Governor but would also have to be executed by such person

and in such manner as may be authorized by the Governor.

21. In the case of Karamshi Jethabhai Somayya Vs. State of Bombay reported in AIR 1964 SC 1714 the Supreme Court has held that provisions of

Article 299 of the Constitution are mandatory and a contract not abiding by the conditions laid down therein would be void.

22. Dealing with an issue of similar nature the Supreme Court has made the following observations in the case of the Bihar Eastern Gangetic

Fishermen Co-operative Society Ltd. (Supra) in paragraph 8 and 9 which are quoted herein in below for ready reference:-

(8) Re : Contention No. 1 :- It is now well settled that the provisions of Article 299 of the Constitution which are mandatory in character require that a

contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz. (i) it must be expressed to be made

by the President or by the Governor of the State, as the case may be; (ii) it must be executed on behalf of the President or the Governor, as the case

may be and (iii) its execution must be by such person and in such manner as the President or Governor may direct or authorise. Failure to comply with

these conditions nullifies the contract and renders it void and unenforceable.

(9) It will also be useful to refer to the Judgment of this Court in *Mulamchand Vs. State of Madhya Pradesh* where while reiterating the principles laid

down in the aforesaid decisions, it was observed ""There is no question of estoppel or ratification in a case where there is contravention of the

provisions of Article 299(1) of the Constitution. The reason is that the provisions of Section 175(3) of the Government of India Act and the

corresponding provisions of Article 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for

safeguarding the Government, against unauthorised contracts. The provisions are embodied in Section 175(3) of the Government of India Act and

Article 299(1) of the Constitution on the ground of public policy--on the ground of protection of general public ...and these formalities cannot be

waived or dispensed with.

23. In the case of *Kripalu Shankar & Ors.* (Supra) the Hon'ble Supreme Court had interpreted Article 166(1) wherein the following observations

were made in paragraph 15:

(15). "Articles 166(1) requires that all executive action of the State Government shall be expressed to be taken in the name of the Governor. This

clause relates to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which

an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this Article nor even noting by a

Minister. Every executive decision need not be as laid down under Article 166(1) but when it takes the form of an order it has to comply with Article

166(1). Article 166(2) states that orders and other instruments made and executed under Article 166(1), shall be authenticated in the manner

prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be authenticated and clause

(3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the government. A study of this article,

therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the

department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2).

24. From a careful analysis of the law laid down by the Hon'ble Supreme Court, as noticed above, what crystallizes is that the provision

contained in Article 299 are mandatory and any contract which is in violation of the said provision would be void and hence, not binding upon the

Government.

25. In the present case, the materials produced before this Court un-equivocally goes to show that the supply order dated 19-02-2014 was issued by the

then incumbent in the office of Chief Executive Officer, SLNA, in violation of the procedural norms and also without obtaining the approval of the

competent authorities. The mandatory requirements of Article 299 of the Constitution of India have also clearly been given a go by in this case. As

such, there is no valid contract between the writ petitioner and the State respondents here-in that can be enforced by issuing a writ of mandamus. The

grounds on which the impugned order dated 21-11-2015 have been issued by the respondent No 1 are also found to be valid in the facts and

circumstances of this case.

26. Law is well settled that for invoking the doctrine of promissory estoppel, there must be a valid promise made by a person competent to do so based

on which, the party concerned must have acted to its prejudice. But in this case there was no such promise made by the State or its officer who was

authorized to do so. Therefore, the doctrine of promissory estoppel would not come into play in the facts of the case.Ã, Although the writ petitioner

has relied upon the order dated 19-02-2013 passed by this Court in W.P.(C) No. 348/2013 [Birendra Nath Bhuyan Vs. State of Assam and Ors.]

seeking a similar order in this case as well, but after going through theÃ, order dated 19-02-2013, I find that it was a case where the writ petitioner

was asked by the department to carry out some repair work under the PWD and in view of the urgency involved in the matter, the contractor had

executed the work even before the administrative sanction was received. On completion of the work, work completion certificate was issued to the

petitioner and there was no dispute regarding proper execution of the work but the bills were rejected merely on the grounds of non-availability of

sanction and a proper work order although the estimate for the work was prepared by the respondents. Taking note of the facts of that case, this court

had directed the respondents to make payment of the bills. Therefore, it is apparent that the order dated 19-02-2013 was rendered in the facts of that

case and the said order does not lay down any general principle of universal application that can be relied upon by the writ petitioner in this case.Ã, Ã,

27. Coming to the next issue raised by Mr. Choudhury claiming right under Section 70 of the Contract Act, 1872, I find from the record that there was

no indent from the Project Manager for supply of the pump-sets as per the DPR nor have the respondents used the pump-sets till date. On the

contrary, materials on record go to show that the pump-sets are still lying intact in unused condition and the learned departmental counsel has made a

categorical submission that the writ petitioner is free to take back those pump sets which are lying idle. Therefore, it is not a case where the

respondents have enjoyed the benefits of the pump sets in any manner and hence, the principles underlying Section 70 of the Contract Act, 1872

would not have any application in the facts of this case.

28. As regards the claim of the petitioner under Section 4 of the Sale of Goods Act, 1930 it may be correct to say that in the absence of any allegation

of complicity on its part, the petitioner cannot be deprived of the price of the goods bonafide supplied by it on the basis of the order dated 19-02-2014.

But as has been held above, such claim of the petitioner can only be enforced against the person(s) responsible for placing the order. For the reasons

stated above, the claim of the petitioner cannot be enforced against the State of Assam or its instrumentalities nor can any charge be created on the

consolidated fund of the State. Since the concerned official has not been added as a party in this writ proceeding in his individual capacity and

considering the fact that there is a departmental proceeding pending against the said officer, this Court refrains from making any further comments in

the matter so as to avoid any prejudice being caused to the parties.

29. For the reasons stated hereinabove, I am of the considered opinion that the writ petitioner does not have any right that can be enforced in this writ

proceeding. Consequently, this writ petition is held to be devoid of any merit and is hereby dismissed.

Ã, Ã, Ã, Ã, Ã, Ã, Before parting with the record, this Court deems it necessary to clarify here-in that if the petitioner intends to take back the pump-

sets already supplied by it, the same may be returned to the petitioner within 30 days from the date of receipt of a written request made to that effect

by the petitioner, addressed to the Additional Chief Secretary to the Government of Assam, Soil Conservation Department. It is further clarified that

notwithstanding this order and the return of the pump-sets, it would still be open to the writ petitioner to institute appropriate legal proceeding for

damages and compensation on account of any loss or injury suffered by it due to the wrongful action of such person(s) responsible for the same.

The parties to bear their own cost.

Records be returned back.