

(Smart Chip(P) Ltd. Vs. State of M.P. & Others)**16.12.2016**

Shri D.K. Singh, Advocate assisted by Shri Saurabh Agrawal, Advocate, Shri Rajesh Prajapati, Advocate and Shri Sangam Jain, Advocate for the petitioner.

Shri Vishal Mishra, Addl. Advocate General for the respondent no.1. and 2 /State.

Shri Arvind Dudawat, Advocate for the respondent no.3
Matter is heard and reserved for order.

1. The instant petition under Article 226 of the Constitution of India prays for the following reliefs:

In view of the facts and circumstances mentioned hereinabove, this Hon'ble Court may graciously be pleased to:

A. Issue an ad interim order/direction in the nature of mandamus, commanding the respondent no.3, third party agency, under the contract dated 27.09.2013 to complete the quantitative verification of pending monthly invoices raised by the petitioner and received from the office of the Transport Commissioner, for the work done, within 10 days and send the communication to the Transport Department of completion of such verification; and

B. Issue an ad interim order/direction in the nature of mandamus commanding the respondent no.3, to complete the quantitative verification of monthly invoices within 10 days after their receipt in the future so as the work under the contract, is not hampered and the public delivery system is not affected in absence of timely payment for the work done; and/or

C. To issue any other or further writ, order or direction which this Hon'ble Court may deem fit and proper on the facts and circumstances.

Learned counsel for the rival parties are heard.

2. The petitioner is a private limited company registered under the Companies Act which has been awarded the contract for computerization of Transport Department vide RFP for which agreement dated 27.09.2013 was entered into between the petitioner and the Government of Madhya Pradesh, Department of Transport.

3. The sole grievance of the petitioner as projected by the learned counsel is that the agreement in question lays down certain terms of payment in Clause 10.24 which are not being adhered to by the respondents. In this factual background, learned counsel submits that since the contract entered into between the petitioner and respondents relates to the field of public law, a writ deserves to be issued to the respondents to comply with the time schedule for payment as contained in the said clause to prevent hindrance in execution of contract by the petitioner which is in public interest.

4. Learned counsel for the petitioner has placed reliance on number of decisions of the Apex Court and also of the High Court in support of various contentions raised by the petitioner to emphasize the distinction between private and public law in the field of contract, literal construction of the terms of contract, amenability of contractual matters to writ jurisdiction and the concept of legitimate expectations and promissory estoppel in cases of ***K.N Guruswamy Vs. State of Mysore, DFO Vs. Ram Sanahi Singh, ABL International Ltd. Vs. Export Credit Guarantee Corpn of India Ltd., Joshi Technologies International Inc. Vs. Union of India, Rajasthan State Industrial***

Development & Investment Corpn. Vs. Diamond & Gem Development Corpn, DLF Universal Ltd & Anr Vs. Director, Town & Country Planning Department & Ors, Navjyoti Coop. Group Housing Society Vs. Union of India , ***Food Corpn of India Vs. Kamdhenu Cattle Feed Industries, Kasinka Trading Vs. Union of India*** reported in ***AIR 1954 SC 592, (1971) 3 SCC 864, (2004) 3 SCC 553, (2015) 7 SCC 728, (2013) 5 SCC 470, (2010) 14 SCC 1, (1992) 4 SCC 477, (1993) 1 SCC 71, (1995) 1 SCC 274.***

5. Per contra, the State in its short return filed on 29.08.2016 responding to the contentions of petitioner submits that the payment upto March/April, 2016 to the tune of Rs. 3,42,35,372 has been made vide order dated 20.07.2016 Annexure R-1. Whereas, the bill pertaining to the month of May, 2016 are pending considering and shall be cleared shortly as soon as the verification report is received from the respondent no.3. It is further disclosed in the reply that bill for the month of January, 2016 has not been submitted by the petitioner yet and it is assured by the State that as soon as bill pertaining to the month of January, 2016 is received, the same shall be cleared as expeditiously as possible after conduction of verification process.

5.1 It is lastly submitted that all out efforts are being made by the State to clear the bills which in terms of the contract can be cleared only after verification by the respondent no.3 of the work executed by the petitioner.

6. In view of the above, the bone of contention between the rival parties appear to be non adherence by the respondents to the time schedule for verification and payment of the bills put up by the petitioner in terms of the conditions contained in the contract in question.

7. This Court need not refer to each and every decision and the

law laid down by the Apex Court therein as the ratio laid down cannot be disputed. However, decision of *Joshi Technologies (supra)* is worthy of reference on the aspect of scope of interference of this Court in contractual matters while exercising writ jurisdiction. Said judgment has succinctly described and explained in para 69 of the judgment and the obligation of a State under Article 12 of the Constitution of India while entering into a contractual field detailing in para 70.

7.1. Relevant para 69 and 70 are reproduced below for ready reference and convenience:

(Para 69)

The legal position which emerges from various judgments of the Supreme Court dealing with different situations/aspects relating to contracts entered into by the State/Public authority with private parties, can be summarized as under:

(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. IF those facts are disputed and required assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to

resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality, and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary

jurisdiction.

(ix) The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, the Supreme Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case, it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectations of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual

disputes.

(Paras 70.1 to 70.11)

By applying said principles, the present case is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution, and it rightly refused to do so. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded. The contract in question was signed after the approval of the Cabinet was obtained. In the said contract, there was no clause pertaining to Section 42 of the IT Act. The appellant is presumed to have knowledge of the legal provision, namely, in the absence of such a clause, special allowances under Section 42 would be impermissible. Still it signed the contract without such a clause, with open eyes. No doubt, the appellant claimed these deductions in its income tax returns and it was even allowed these deductions by the Income Tax Authorities. Further, no doubt, on this premise, it shared the profits with the Government as well. However, this conduct of the appellant or even the respondent, was outside the scope of the contract and that by itself may not give any right to the appellant to claim a relief in the nature of mandamus to direct the Government to incorporate such a clause in the contract, in the fact of the specific provisions in the contract to the contrary particularly, Article 32 of the PSCs/ It was purely a contractual matter with no element of public law involved thereunder.

7.2. Testing the factual matrix on the anvil of law laid down by the Apex Court in case of *Joshi Technologies (supra)*, this Court is of the considered view that dispute is not essentially regarding breach of any terms of the contract, but of delayed compliance of the terms of the contract, especially pertaining to payment contained in Clause 10.24. The response of State clearly discloses that they are

ready and willing to comply with the terms and conditions regarding payment and it is only that because of procedural delays in process of verification which may or may not be within the control of the State are causing concern to the petitioner.

8. This Court is conscious of the fact that the contractual dispute raised herein relates to the field of public law and therefore this writ Court cannot turn a Nelson's eye towards the grievance of the petitioner. The grievance of non-adherence to the time schedule in the agreement does not make out a case of arbitrariness discrimination and unreasonableness to the extent of violating any of the fundamental rights thereby impelling this Court to react. The State in this case may have been negligent, procrastinative or inadvertent but not arbitrary. Thus, this Court refrains from exercising writ jurisdiction in favour of the petitioner.

8.1 On the conspectus of the above said decision, this Court does not deem it appropriate to interfere in writ jurisdiction and while declining interference in the matter, hopes and trusts that parties to the contract shall adhere to the terms and conditions contained therein in regard to the schedule of payment, failing which it is needless to emphasize that aggrieved party can always resort to the remedy available under the agreement.

No cost.

(Sheel Nagu)
Judge

(Rajeev Kumar Dubey)
Judge

sh/-