

A PIMPRI CHINCHWAD MUNICIPAL CORPORATION AND ORS.  
v.  
M/S GAYATRI CONSTRUCTION COMPANY AND ANR.  
(Civil Appeal No. 4912 of 2008)

AUGUST 6, 2008

B [DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM  
SHARMA, JJ.]

C *Constitution of India, 1950; Article 226/Indian Contract  
Act, 1872:*

*Writ petition in contractual matter – Maintainability of –  
Held: Not maintainable.*

D Appellant and the respondents entered into an  
agreement for construction of road. There arose some  
disputes and the contract was terminated. Fresh tenders  
were invited for construction and widening of road, which  
was the subject matter of the contract. Respondents chal-  
E llied the same by filing a writ petition, which was al-  
lowed by the High Court. Hence the present appeal.

The question which arose for determination in the  
present appeal was about the maintainability of the writ  
petition in respect of contractual disputes between ap-  
F pellant-Corporation and the respondents-Contractors.

G Appellant contended that the High Court lost sight  
of the objections raised as regards the maintainability of  
the writ petition; that the writ petition was not maintain-  
able in respect of contractual matters; that the respon-  
dents were seeking relief of enforcement of their contrac-  
H tual rights; and that several relevant and material facts  
have been suppressed.

Respondents-Contractor submitted that the Corpo-  
ration itself was guilty of not providing the requisite infra-

structure for carrying out the contractual obligations. The difficulties have been highlighted in various representations to the Corporation. But without any plausible reason and without following the principles of natural justice the fresh advertisement was issued by the Corporation.

Allowing the appeal, the Court

HELD: The High Court ought not to have entertained the writ petition. It appears that by order dated 17.1.2007 interim stay of the impugned order was granted and was continued by order dated 12.2.2007. It is pointed out by the counsel for the appellants that since the order of the High Court was stayed and there was urgency in the matter fresh tenders were called for. Three persons submitted the bids and the work has already been allotted and a considerable portion of the work has already been completed. In view of aforesaid, the impugned order of the High Court is set aside and the writ petition is dismissed. It is however open to the respondents-writ petitioners to seek such remedy, if so advised, as is available in law. (Para – 13) [991-D-F]

*National Highways Authority of India v. Ganga Enterprises (2003) 7 SCC 410; Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors. (2000) 6 SCC 293; State of Gujarat and Ors. v. Meghji Pethraj Shah Charitable Trust and Ors. (1994) 3 SCC 552; State of U.P. and Ors. v. Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22 and India Thermal Power Ltd. v. State of M.P. and Ors. (2000) 3 SCC 379 – relied on.*

Case Law Reference

(2003) 7 SCC 410	Relied on	Para – 8
(2000) 6 SCC 293	Relied on	Para – 9
(1994) 3 SCC 552	Relied on	Para – 10

A (1996) 6 SCC 22 Relied on Para – 11

(2000) 3 SCC 379 Relied on Para – 12

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 4912 of 2008

B From the Judgment and Order dated 14.12.2006 of the High Court of Judicature at Bombay in Writ Petition No. 5681 of 2006

Makarand D. Adkar and Vishwajit Singh for the Appellants.

C Shekhar Naphade, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Gaurav Goel and Amit Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

D **Dr. ARIJIT PASAYAT.** 1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Bombay High Court allowing the Writ Petition filed by the respondents.

E 3. Background facts in a nutshell are as follows:

Writ Petition was filed by respondents 1 and 2 taking the stand that respondent No.1 was awarded a contract for the work of improvement and widening of part of the Thermax-Telco-Bhosari road which was divided in three phases and contract for Phase-III (Approx. 3.7 Kms.) was given to the them, whereas the tender of Phase-II with its cost at Rs.8,61,63,048/- was awarded to another party (Approx. 3.3 Kms.) Though the tender amount was Rs.9 crores with a discount at 9.01%, the contract price was fixed at Rs.8,18,91,000/- and the letter by the Corporation to the respondents was given on 7/4/2005 and the work was to be completed within 12 months from that date. There is no dispute that the work was not completed and the corporation released an advertisement published in some of the local newspapers on 30/6/2006 inviting tenders for the improvement and widening of four roads, including the road which

was the subject matter of the contract awarded to the respondents i.e. Item No. 3-A - Telco road. The approximate costs of this road in the advertisement has been shown to be Rs.30 crores as against the original tender cost of Rs.17.6 crores. After the advertisement was released, the respondents were issued a letter dated 19/7/2006 informing the Corporation's decision to take action under clause 3(a) of the contract and the respondents were called upon to remain present for final measurement on 27/6/2006. The respondents submitted a representation on 25/7/2006 and by its letter dated 1/8/2006 the corporation reiterated its action as per the letter dated 19/7/2006. The respondents approached the High Court on 22/8/2006 after they had submitted another representation on 4/8/2006 to the Corporation and the Corporation confirmed the decision to stop work. The respondents filed writ petition challenging action of appellants in releasing the advertisement and inviting fresh tenders on 30/6/2006 for the very same work which is part of the contract awarded to the respondents i.e. Item No.3-A Improvement and Widening of remaining stretch of Telco Road and consequently the attempt to terminate the contract post facto by invoking clause 3(a) of the contract.

The present appellants filed an affidavit in reply and raised a preliminary objection as to the maintainability of the writ petition. It was contended that the writ petitioners had an alternative remedy for enforcement of the contract. In matters flowing from the contract, a petition under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') cannot be maintained. Further, disputed questions are involved. On merits it was also contended that it was the contractor firm which was responsible for not maintaining the contractual terms and in spite of the contractual period having been over, the work could not be completed and the contractors went on insisting that the entire stretch of the road be handed over to them so as to start and complete the work. In short the contractors failed to complete the work in 12 months' time and therefore the contract was terminated.

The High Court found that though Clause 58 of the agree-

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A ment provided for inhouse remedy of representation for settle-  
ment of disputes that cannot stand in the way of the writ petition  
being entertained. It was submitted by writ petitioners that the  
cost of completing the work would be much higher than what  
would have been payable to the writ petitioners. The High Court  
B referred to the Minutes of the Corporation and held that the writ  
petitioners were justified in challenging the Corporation's ac-  
tion to invite fresh tenders for the work allotted to it. It also re-  
ferred to the undertaking given by the writ petitioners to the ef-  
fect that they were ready and willing to execute the work but  
C were unable to do so for several reasons. The High Court, there-  
fore, directed the Corporation not to complete the work and to  
maintain status quo in respect of Phase-III of Telco Road as  
well as the tenders received for the said work in response to  
the advertisement which was impugned before the High Court.

D 4. In support of the appeal, learned counsel for the Corpo-  
ration and its functionaries submitted that the High Court lost  
sight of the objections raised as regards to the maintainability  
of the writ petition. It was submitted that there was cancellation  
of tender and fresh advertisement was issued. The agreement  
E provided inhouse mechanism in relation to dispute arising out  
of the contract. The High Court did not consider this aspect.  
The High Court also did not take note of the difference between  
the statutory contracts and non-statutory contracts. Before the  
High Court the writ petition was questioned on three grounds;  
F (i) disputed questions relates to facts were involved; (ii) to en-  
force the terms of contractual rights remedy under the Civil Law  
is available, and in any event, the writ petition was not maintain-  
able in respect of contractual matters. It was pointed out that  
the writ petitioners were seeking relief of enforcement of their  
G contractual rights, and that several relevant and material facts  
have been suppressed. In essence, it was submitted that the  
above aspects have not been considered by the High Court.

H 5. In response, learned counsel for the respondents-writ  
petitioners submitted that the Corporation itself was guilty of  
not providing the requisite infrastructure for carrying out the con-

tractual obligations. The difficulties have been highlighted in various representations to the Corporation. But without any plausible reason and without following the principles of natural justice the fresh advertisement was issued. It is also pointed out that subsequently there appears to be the settlement of the work at a huge cost.

6. So far as existence of the alternative remedy is concerned Clause 58 of the agreement is relevant. The same reads as under:

"Clause 58- All disputes & differences of any kind whatever arising out of or in connection with the contractor the carrying out of the work (whether during the progress of the work or after their complete & whether before or after the determination, abandonment or breach of the contract) shall be referred to & settled by the City Engineer. But, if the contractor be dissatisfied with the decision of the City Engineer or as to withholding by the City Engineer of any certificate to which the contractor may within 60 days after receiving notice of such decision give a written notice to the other party requiring that may claim to entitled then & in any such case the contractor such matter in dispute be referred to in open before a Committee as mentioned below. Such written notice shall specify the manner which are in disputes & such disputes or difference of which such notice has been given & no other shall be & is hereby referred committee consisting of the Commissioner, Pimpri Chinchwad Municipal Corporation, the city engineer and project management consultant, the decision taken by the parties will be final and binding on both the parties. Such reference except as to the withholding of any certificate to which the contractor to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the City Engineer. Provided always that the Corporation shall not withhold the payment of an Interim Certificate not the Contractor in any way delay the carrying

A out of the works by reason of any such matters, question  
or dispute being referred to the Committee but shall  
proceed with the work with all the diligence & shall, until  
the decision of the Committee abide by the decision of  
the City Engineer & no award of the Committee shall relive  
B the contractor of his obligations to adhere strictly to the  
City Engineer's instructions with regard to the actual  
carrying out of the works. The Owner & the Contractor  
hereby also agree that the said reference to the Committee  
under this clause shall be a condition precedent to any  
C right of action under the Contract."

7. In matters relating to maintainability of writ petitions in contractual matters there are catena of decisions dealing with the issue.

D 8. In *National Highways Authority of India v. Ganga Enterprises* (2003 (7) SCC 410), it was inter alia held as follows:

E "6. The respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil* (2000 (6) SCC 293), *State of U.P. v. Bridge & Roof Co. (India) Ltd.* (1996 (6) SCC 22) and *Bareilly Development Authority v. Ajai Pal Singh* 1989 (2) SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were  
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thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of *Veriganto Naveen v. Govt. of A.P.* (2001 (8 SCC 344)) and *Harminder Singh Arora v. Union of India* (1986 (3) SCC 247). These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.”

9. In *Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors.* (2000 (6) SCC 293), this Court dealt with the question of maintainability of petition under Article 226 of the Constitution and the desirability of exhaustion of remedies and availability of alternative remedies, as also difference between statutory contracts and non-statutory contracts. In paras 10 and 11 of the judgment it was noted as follows:

“10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

A 11. A statute may expressly or impliedly confer power on  
a statutory body to enter into contracts in order to enable  
it to discharge its functions. Dispute arising out of the  
terms of such contracts or alleged breaches have to be  
settled by the ordinary principles of law of contract. The  
B fact that one of the parties to the agreement is a statutory  
or public body will not by itself affect the principles to be  
applied. The disputes about the meaning of a covenant in  
a contract or its enforceability have to be determined  
according to the usual principles of the Contract Act. Every  
C act of a statutory body need not necessarily involve an  
exercise of statutory power. Statutory bodies, like private  
parties, have power to contract or deal with property. Such  
activities may not raise any issue of public law. In the  
present case, it has not been shown how the contract is  
D statutory. The contract between the parties is in the realm  
of private law. It is not a statutory contract. The disputes  
relating to interpretation of the terms and conditions of  
such a contract could not have been agitated in a petition  
under Article 226 of the Constitution of India. That is a  
matter for adjudication by a civil court or in arbitration if  
E provided for in the contract. Whether any amount is due  
and if so, how much and refusal of the appellant to pay it  
is justified or not, are not the matters which could have  
been agitated and decided in a writ petition. The contractor  
should have relegated to other remedies.”

F 10. Reference can also be made to *State of Gujarat and  
Ors. v. Meghji Pethraj Shah Charitable Trust and Ors.* (1994  
(3) SCC 552). In para 22 it was observed as follows:

G “22. We are unable to see any substance in the argument  
that the termination of arrangement without observing the  
principle of natural justice (*audi alteram partem*) is void.  
The termination is not a quasi-judicial act by any stretch of  
imagination; hence it was not necessary to observe the  
principles of natural justice. It is not also an executive or  
H administrative act to attract the duty to act fairly. It was —

as has been repeatedly urged by Shri Ramaswamy — a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further.”

11. Again in *State of U.P. and Ors. v. Bridge & Roof Company (India) Ltd.* (1996 (6) SCC 22), this Court dealt with the issue in paras 15 and 16 in the following manner:

“15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner’s bill(s) was not a prayer which could be

A granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.”

12. At para 11 of *India Thermal Power Ltd. v. State of M.P. and Ors.* (2000 (3) SCC 379), it was observed as follows:

B “11. It was contended by Mr. Cooper, learned Senior  
Counsel appearing for appellant GBL and also by some  
C counsel appearing for other appellants that the appellant/  
IPPs had entered into PPAs under Sections 43 and 43-  
A of the Electricity Supply Act and as such they are statutory  
contracts and, therefore, MPEB had no power or authority  
D to alter their terms and conditions. This contention has  
been upheld by the High Court. In our opinion the said  
contention is not correct and the High Court was wrong in  
accepting the same. Section 43 empowers the Electricity  
Board to enter into an arrangement for purchase of  
electricity on such terms as may be agreed. Section 43-  
A(1) provides that a generating company may enter into  
a contract for the sale of electricity generated by it with the  
Electricity Board. As regards the determination of tariff for  
E the sale of electricity by a generating company to the Board,  
Section 43(1)(2) provides that the tariff shall be determined  
in accordance with the norms regarding operation and  
plant-load factor as may be laid down by the authority and  
in accordance with the rates of depreciation and  
reasonable return and such other factors as may be  
F determined from time to time by the Central Government  
by a notification in the Official Gazette. These provisions  
clearly indicate that the agreement can be on such terms  
as may be agreed by the parties except that the tariff is to  
be determined in accordance with the provision contained  
G in Section 43-A(2) and notifications issued thereunder.  
Merely because a contract is entered into in exercise of  
an enabling power conferred by a statute that by itself  
cannot render the contract a statutory contract. If entering  
H into a contract containing the prescribed terms and  
conditions is a must under the statute then that contract

becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory".

13. Therefore, the High Court ought not to have entertained the writ petition. Additionally, it appears that by order dated 17.1.2007 interim stay of the impugned order was granted and was continued by order dated 12.2.2007. It is pointed out by learned counsel for the appellants that since the order of the High Court was stayed and there was urgency in the matter fresh tenders were called for. Three persons submitted the bids and the work has already been allotted and a considerable portion of the work has already been completed. In view of aforesaid, we set aside the impugned order of the High Court and direct dismissal of the writ petition. It is however open to the respondents-writ petitioners to seek such remedy, if so advised, as is available in law. We do not express any opinion in that regard.

14. The appeal is allowed. There shall be no order as to costs.

S.K.S.

Appeal allowed.