IN THE HIGH COURT OF SINDH, AT KARACHI

C. P. No. D-4478 of 2021

Present:-
Ahmed Ali M. Shaikh CJ
& Yousuf Ali Sayeed, J

Petitioner	:	Muhammad Usman Lothio, through Ghulam Rasool Soho Advocate.
Respondent	:	Nemo
Date of hearing	:	17.09.2021

ORDER

YOUSUF ALI SAYEED, J. The Petitioner is apparently a contractor, with his case being that he had satisfactorily performed and completed certain works under various contracts with and at the behest of the Town Committee, Sujjawal, with an aggregate amount of Rs.2,529,253/- said to be due and payable thereunder, yet withheld. As such, the Petitioner has invoked the writ jurisdiction of this Court under Article 199 of the Constitution, praying that directions be issued for payment of that amount along with interest at the bank rate with the entire being predicated on the assertion that payment had not been forthcoming, despite there being no substantive dispute in that regard and notwithstanding various assurances of settlement having been made.

2. The moot point thus arising for consideration is whether the extraordinary remedy under Article 199 can legitimately be resorted to for obtaining such a direction for payment of contractual dues claimed by an 'aggrieved party' from an organ of the State (i.e. a local authority in the instant case) when the contract in question is non-statutory (i.e. not executed in exercise of a statutory power under some Act or Rules framed thereunder), but is purely contractual and the rights and obligations of the parties are governed accordingly.

3. Therefore, we had at the very outset posed a query to learned counsel for the Petitioner as to how a Petition under Article 199 was the appropriate vehicle for seeking enforcement of such a contractual claim rather than a civil proceeding in the ordinary course preferred before the hierarchy of Courts constituted for such purposes, especially as there was no case otherwise made out as to the violation of any fundamental right.

4. In response, learned counsel submitted that there was no factual dispute as to the payment being due and that if notice were to be issued in the matter, an admission of liability would be forthcoming from the relevant quarter, hence the matter was of a nature that could readily be addressed and resolved through a writ. In an endeavour to bolster such a contention, he invited attention to the photocopies of certain Completion Certificates that had been placed on record as annexures to the Memo of Petition, and sought to contend that the fundamental rights of the Petitioner stood infringed, but could not identity any such right or articulate the infringement.

5. Having considered the arguments advanced by the Counsel for the Petitioner, it merits consideration that though a disputed question of fact is not normally entertained by a High Court in its writ jurisdiction, it will not, as a corollary, follow that merely due to there being no disputed question of fact, a remedy in terms of Article 199 would be available. The mere fact that, in the present case, the claim of the Petitioner may not be disputed and may come to be admitted, cannot in itself be a ground for issuing a writ in the nature of mandamus, commanding payment of contractual dues as has been sought.

6. It is noteworthy that a writ of mandamus is essentially a public remedy, which lies when a public authority fails to perform the duty entrusted to it by law, being a public duty as opposed to a private wrong in the form of an alleged breach of a bare contractual obligation.

7. Indeed, in the seminal work on 'Administrative Law' by Sir William Wade and Christopher Forsyth (Eleventh Edition), it has been observed that:

> "A distinction which needs to be clarified is that between public duties enforceable by a mandatory order, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private laws by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by a mandatory order, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

8. Ergo, the distinction to be noted, no matter how thin or subtle, is that there is a real and definite line of demarcation between a public and private wrong, and also a public law and private law remedy. Needless to say, Article 199 is pre-eminently a public law remedy and is not, generally, available as a remedy against private wrongs, with resort thereto being available so as to provide judicial control over administrative actions and, where necessary, compel public or statutory authorities to discharge their public duties and/or to act in the realm of their public functions, within the bounds of law. The duty cast on the public body may either be statutory or otherwise and the source of such power is immaterial, but there must necessarily be a public law element in such action, whereas the grievance in the instant case is founded entirely in contract.

9. In the context of the present case, it also falls to be considered that if indeed there is no underlying dispute and denial of liability as between the Petitioner and the Town Committee, then the need for proceedings of any nature or sort for effecting recovery ought not to arise. However, even if is assumed for the sake of argument that the sum held by the Town Committee is the 'property' of the Petitioner in the sense that the word had been used in Articles 23 and 24 of the Constitution read in light of Article 260 thereof, the question that arises is whether non-payment or withholding of the sum contravenes those fundamental rights. Indeed, the nature of the property, as claimed, is that under the terms of the contract the Petitioner performed certain works for which the Town Committee allegedly became bound to pay the sum agreed, which lies in its hands as a *chose in action*, but can be held and disposed of by the Petitioner notwithstanding the state of possession. Where, as averred, the Town Committee does not deny that the monetary sum in its hands is due to the Petitioner under the terms of the contract and belongs to him, the right of the Petitioner to ownership thereof is neither denied nor taken away nor restricted nor destroyed, hence it does not *stricto sensu* deprive the Petitioner of the property in that sum.

10. Another aspect to be considered is that a writ in the nature of mandamus ought not to be issued if an equally convenient, effective and beneficial remedy is available to the petitioner, which in the context of claims for the recovery of money, is primarily a civil suit. As discussed above, the non-payment of the money due to the petitioner by the Government does not of itself amount to the infringement of a fundamental right, and the mere allegation of such a violation does not compel the Court to entertain a writ petition. Indeed, the power conferred to the High Courts in terms of Article 199 in the nature of mandamus is akin to the "high prerogative writ" developed by the Court of King's Bench in England and is

discretionary in nature, for if the High Courts were to be compelled to entertain a writ petition on a mere allegation of violation of a fundamental right notwithstanding the existence of a primary forum in the shape of a subordinate court or tribunal, the balance of pending litigation between the lower fora on the one hand and the High Courts on the other would be completely upset. As such, the Extraordinary Constitutional Jurisdiction under Article 199 is not a substitute for the ordinary jurisdiction of Civil and Criminal Courts and Civil or Criminal actions *per se* ought not to be converted into proceedings for obtainment of a writ in view of the salutary principle that extraordinary remedies are not to take the place of the ordinary means of recourse available for redressal of a grievance. As to the contention raised by learned counsel that the mere issuance of notice in the matter at hand would invite and attract an admission of liability, whereas civil proceedings in the normal course would be less efficacious, it is manifest that a clear mechanism exists under the Code of Civil Procedure for suits to be decreed on admission, if indeed such eventuality were come to pass in the matter of the Petitioner's claim, hence such contention is palpably fallacious.

11. That being said, it is also discernible that a number of the Completion Certificates on which reliance has been placed by the Counsel for the Petitioner date back to the year 2016. Although the Limitation Act does not apply to the proceedings under Article 199, in our view the question of laches is still nonetheless borne in our mind and in the normal course, we see no reason as to why a claim such as that presently sought to be advanced by the Petitioner ought to be entertained in a writ if made beyond the period of time fixed by the Limitation Act for enforcement of such right by way of a suit. That is not to say, however, that we are hereby recording any definitive finding as to limitation with regard to the Petitioner's claim or any part thereof, which remains open for determination by the appropriate forum.

12. For the foregoing reasons, we are of the view that the subject of the Petition is not being justiciable within the scope of Article 199 of the Constitution, which stands dismissed accordingly, leaving the Petitioner at liberty to avail his remedy before the ordinary courts of civil jurisdiction in accordance with law.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____