

PETITIONER:
LALJI KHIMJI AND ORS.

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT 29/01/1993

BENCH:
ANAND, A.S. (J)
BENCH:
ANAND, A.S. (J)
SHARMA, L.M. (CJ)

CITATION:
1993 SCR (1) 366 1993 SCC Supl. (3) 567
JT 1993 (2) 89 1993 SCALE (1) 239

ACT:
Bombay Irrigation Act, 1879 :
Sections 3(6), 17, 18 and 77 and Notification dated 27th September, 1963-Executive Engineer appointed as Canal Officer-Whether competent to enter into agreement/compromise with landlords on behalf of Government-Whether such agreement binding on Government.
Constitution of India, 1950 :
Article 299-Agreement entered into by Executive Engineer, appointed as Canal Officer, with landlords in exercise of powers vested under the Bombay Irrigation Act, 1879-Whether a contract within the meaning of the Article-Whether invalid for non-satisfaction of essential requirements of the Article.

HEADNOTE:
Under an Irrigation Scheme, the respondent-State proposed to construct a dam on a river in the State and prepared a sketch, indicating the passage of the canal from the Dam and for that purpose, proceeded to acquire land through which the canal was proposed to run. Apprehending that serious damage will be caused to their lands by the passing of the canal through their lands, the appellants-farmers filed a suit against the respondent-State, seeking to restrain it from implementing the Irrigation Scheme, as proposed. During the pendency of the suit an agreement was arrived at between the parties to the effect that the canal from the Dam would be run as per the line demarcated in red in the map appended to the deed of agreement. As a result, the suit was unconditionally withdrawn by the appellants, but subsequently, on discovering that the State Government was going back from the agreement and the alignment of the canal was being undertaken contrary to the alignment reflected in red in the map appended to the agreement, they filed a fresh suit for declaration to the effect that the agreement entered into between them and the respondents through its Executive Engineer, Irrigation Department, was binding on the parties and that the parties were bound to act according to the terms of the said agreement and for an injunction, restraining the respondent-State from going back on the

agreement.

The trial court decreed the suit and permanently restrained the State from going back from the agreement and acting otherwise than as per the terms of the same. The appeal preferred by the State was also dismissed by the District Judge.

The State filed a second appeal before the High Court contending that the alleged compromise/agreement was not binding upon the State, inasmuch as the Executive Engineer had no authority to agree on behalf of the State Government as he was not the representative of the Government. The High Court held that the agreement was a null and void document for non-compliance with the mandatory provisions of Article 299(1) of the Constitution. It also rejected the appellants' plea that under the statutory powers conferred by section 18 of the Bombay Irrigation Act, 1879 the Executive Engineer was competent to enter into a compromise and that the said compromise arrived at during the pendency of the earlier suit was binding on the Government.

In the appeal filed before this Court on behalf of the appellants farmers, it was submitted that reliance placed on Article 299 of the Constitution of India was wholly erroneous, that by a Notification, dated 27th of September 1963, published in Part IV-B of the Government Gazette, the State Government had appointed all Executive Engineers and Superintending Engineers in charge of canals in the State to be Canal Officers in respect of such canals and assigned to them all the powers and duties of the Canal Officers under the Act and, therefore, the agreement/compromise entered into by the Executive Engineer during the pendency of the suit of which he was doing 'pervi' was a validly executed compromise which was binding on the parties and respondent could not go back on it, and that after having made the appellants to withdraw their earlier suit on the basis of the agreement, it was not permissible for the respondent to dispute the act done by its officers or agents within their powers under the statute.

Allowing the appeal, this Court,

HELD : 1.1. The agreement/compromise arrived at in the previous

368

suit, could not have been equated with a contract between the State and the citizen.

1.2. Article 299(1) of the Constitution concerns itself with contracts and assurances of property and lays down how Government contracts, including assurances of property are to be made and executed. The provisions of Article 2" are mandatory in character and their non-compliance would render a contract void, but where the agreement is not referable to Article 299 and is not a contract, as contemplated by that Article, the agreement cannot be invalidated for not satisfying the essential requirements of Articles 299 of the Constitution. [375B, D-E]

1.3. There is a marked distinction between contracts which are executed in exercise of the executive powers and agreements or orders made, which are statutory in nature. Articles 299(1) applies to a contract made in exercise of the executive power of the Union or the State and it has no application to a case where a particular statutory authority as distinguished from the Union or the State, enters into an agreement within his authorised capacity. [375F]

State of Haryana and Ors. v. Lal Chand and Ors., [1984] 3 S.C.C. 634, relied on.

1.4. A compromise of the nature contained in the agreement arrived at during the pendency of a suit, in the

instant case is not a contract executed between the parties as envisaged by Article 299. [375E]

2.1 It is clear from the record that it was the Executive Engineer who was doing 'pervi' of the case in the suit filed earlier. The agreement in question was entered into during the pendency of the said case. The State Government had appointed all Executive Engineers and Superintending Engineers in-charge of canals in the State to be Canal Officers in respect of such canals and assigned to them all the powers and duties of the Canal Officers under the Act by virtue of the Notification dated 27th September, 1963. Thus, it is manifest that the Executive Engineer, by virtue of the said Notification, had been lawfully appointed as Canal Officer within the meaning of Section 3(6) of the Bombay Irrigation Act, 1879.

[377F-H, 378A]

2.2. Section 18 of the Act vests the Canal Officers with the power to
369

hold Inquiry and direct the construction of suitable alignments for a water course and by Section 77 of the Act a Canal Officer is vested with the authority to survey, demarcate and make a map of the land which, in his opinion, is suitable for constructing an alignment for the water course.

[378A]

23. Thus, under the statute, read with the notification dated 27th September, 1963, the Canal Officer (Executive Engineer) was fully competent to decide about the particular alignment of the water course and it fell within the jurisdiction of the Canal Officer to decide and settle about the suitable demarcation of the alignment of the water course of the canal from the Dam, in question and he exercised that jurisdiction under the statute when he demarcated the water course in red, in the map attached to the agreement. It is the content of the agreement and not its form which is relevant to trace the source of power behind it and in the light of the statutory provisions, it is manifest that the document has been executed by the Executive Engineer by virtue of the statutory powers vested in him. The circumstance that the agreement came into existence during the pendency of the suit and was executed by way of an agreement does not militate against the order of alignment as reflected therein being any less statutory in character. [378B-D]

2.4. The Act itself envisages that the Canal Officer may alter and settle the alignment in consultation with the landholders through which the water course is to run. In the agreement in question, the Executive Engineer had agreed to alter the alignment of the water course in consultation with the appellants who thereupon 'unconditionally' withdrew the suit since no grievance remained to be settled. The altered alignment was, therefore, validly made by following the procedure envisaged by the Act. The High Court fell in error in ignoring the statutory powers of the Executive Engineer, vested in him under Sections 18 and 77 of the Act read with the notification of 27th September, 1963 on the true import of agreement. [378E-F]

2.5. Under these circumstances, the agreement was lawfully executed by the Executive Engineer in exercise of his statutory powers under the Act and the State was obliged to act according to the terms of the said agreements and could not give it a go by without following the procedure under the Act to again alter the alignment [378G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 47 of 1979.
From the Judgment Order dated 20.1.77 of the Gujarat High Court in Second Appeal No. 90 of 1976.

Krishan Kumar for Vimal Chandra S. Dave for the Appellants.

Ms. Meenaksh Arora for Anip Sachthey for the Respondent.

The Judgment of the Court was delivered by

ANAND, J. This appeal by special leave, is directed against the judgment of the Gujarat High Court dated 20th of January, 1977 in Second Appeal No. 90 of 1976.

The plaintiffs-appellants are the farmers of the Village Morzar under Bhanwad Taluka of Jamnagar District. Their lands are situated on the outskirts of the village. Under the Vartu Dam Irrigation Scheme, the defendant-State proposed to construct a Dam on river Vartu and prepared a sketch, indicating the passage of the canal from Vartu Dam and for that purpose, it proceeded to acquire land through which the canal was proposed to run. The plaintiffs-appellants apprehended serious damage to their lands by the passing of the canal through their lands and they filed a Regular Civil Suit in 1966 against the defendant-State, seeking to restrain it from implementing the Irrigation Scheme, as proposed. Suit was registered and defendants were summoned. During the pendency of the suit, it appears that an agreement was arrived at between the parties and it was agreed that the canal from Vartu Dam would be run as per the line demarcated in red in the map appended to the deed of agreement Ex.45. As a result of the said agreement the suit was unconditionally withdrawn by the plaintiffs on 24.11.1966. Somewhere in 1972, the plaintiffs-appellants discovered that the State Government was going back from the agreement and alignment of the canal was being undertaken contrary to the alignment reflected in the map appended to the agreement Ex.45. They, therefore, filed a fresh suit for declaration to the effect that the agreement, dated 7.11.1966, entered into between them and the respondents through its Executive Engineer, Irrigation Department Jamnagar, was binding on the parties and that the parties were bound to act according to the terms of the said agreement and for an injunction, restraining the defendant-State from going back on the agreement. This suit of the plaintiffs-appellants was contested and the following issues were framed

371

- (1) Whether the suit agreement dated 7.11.1966 is not binding to the defendant ?
- (2) If it is binding whether the plaintiff prove that they have complied with the terms and conditions of this agreement?
- (3) Whether the suit as framed is not maintainable?
- (4) Whether the suit is bad for the mis-joinder of the plaintiffs and the cause of action?
- (5) Whether the suit is not maintainable as the agreement dated 7.11.1966 has not been registered of because no compromise decree had been passed in terms of this agreement?
- (6) Whether the suit is not in time?
- (7) Whether the plaintiffs are entitled to the declaration sought?
- (8) Whether the plaintiffs are entitled to

get the permanent injunction as prayed for by them?

(9) What order?

Issues 1 to 8 were decided in favour of the plaintiffs-appellants and against the defendant-State. The Trial Court decreed the suit and declared that the suit agreement dated 7.11.1966 entered between the plaintiffs and the defendants through its executive engineer, was binding on the parties and that the parties were bound to act in accordance with the terms of the said compromise the defendant state was permanently restrained from going back from the agreement and act otherwise than as per the terms of the same.

The State of Gujarat preferred an appeal in the Court of District Judge Jamnagar against the judgment and decree of the Trial Court. During the hearing, the parties confined their arguments to the following two points

(1) Whether the agreement dated 7.11.66 is binding to the
372

State of Gujarat?

(2) Whether the plaintiffs are entitled to the reliefs, granted to them by the trial court?

The appellate court answered both the questions in the affirmative and by its order dated October 20, 1975 confirmed the judgment and decree of the trial court. The appeal of the State of Gujarat was dismissed. The State filed a Second Appeal in the High Court. The High Court examined the agreement dated 7.11.1966, Ex. 45 which is in Gujarati and is described as Rojkam on the subject of the alignment of Vartu Canal. The High Court noticed that the Rojkam refers to the filing of the suit in the Civil Court and the meeting between the Executive Engineer and the occupants of land and proceeded to recite that on the aforesaid subject there was discussion of the Executive Engineer with the occupants and thereafter both the sides have amicably settled(compromised) the dispute with regard to the alignment of the canal. The Rojkam further records that both the sides have agreed to the alignment shown in rose colour in the map. The Rojkam then records:

"The Executive Engineer Mr. B.V. Nanavati having assured of getting necessary alterations as aforesaid made, they (i.e., the plaintiffs or the occupants) have shown willingness to withdraw unconditionally the suit filed in Civil Court."

The Rojkam is signed by the Executive Engineer as also by the occupants.

Before the High Court, the main plea raised by the State was that the alleged compromise/agreement was not binding upon the State. It was stated that the State does not admit any agreement made by the Executive Engineer either on behalf of the State or as a representative of the State and, therefore, the so called agreement did not bind the State Government. It was asserted by the State that the Executive Engineer had no authority to agree on behalf of the State Government as he was not the representative of the Government. Similar plea had been raised before the trial court and the lower appellate court but was rejected. The High Court, however, accepted the plea of the State and found that the courts below had erred in ignoring the mandatory provisions of Article 299 of the Constitution of India which mandates that all contracts made in the exer-

373

cise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of a State, as the case may be, and all such contracts and

all assurances of property made in the exercise of that power shall executed on behalf of the President or the Governor by such persons and in such a manner as he may direct or authorise. The High Court found that for non-compliance with the provisions of Article 299(1) of the Constitution of India which are mandatory in character, the agreement Ex. 45, was a null and void document. The High Court then observed :

"Apart from the question whether the Executive Engineer in the present case was directed or authorised to execute this agreement on behalf of the State Government, it is clear on the face of the document Ex.45 itself that the alleged agreement contained therein is not expressed to be made by the Governor. This position is incontrovertible and even Mr. Shah for plaintiffs-respondents was not able to show that the document Exh.45 contains an agreement expressed to be made by the Governor. Really speaking, on a correct interpretation of this document Exh.45, it only contains basis of the compromise terms between the Executive Engineer and the occupants (who probably were plaintiffs of the earlier suit) as regards the change of alignment; and pursuant to which compromise the plaintiffs agreed to withdraw the suit. The Governor or the State Government is nowhere in the picture if we go through this agreement. Therefore, assuming that the document contains an agreement in reality it is an agreement not by the Governor or the state Government but by the Executive Engineer with the occupants who signed the same. Such an agreement which is not in compliance with the provisions of Article 299 of the Constitution is void and unenforceable against the State. If this is so, the suit filed by the respondents-plaintiffs must fail."

The High court negated the contention raised on behalf of the plaintiffs-appellants to the effect that under the statutory powers conferred by Section 18 of the Bombay Irrigation Act, 1879 (hereinafter called the Act), the Executive Engineer was competent to enter into compromise and

374

that the said compromise arrived at during the pendency of the earlier suit was binding on the Government. The High Court said :

"Then it was contended that in exercise of his powers under section 18 of the aforesaid Act, the Executive Engineer acts for the Government; and, therefore, the agreement in question is binding on the Government. There is an inherent misconception underlying this contention. While exercising statutory powers i.e. powers conferred by a statute an officer of the Government does not act for the Government. He acts not because of any authority derived from the Government to exercise power conferred on him by the Statute. This contention must also fail."

As a consequence, the appeal filed by the State was allowed and the judgment and decree passed by the courts below were reversed and the suit filed by the plaintiffs-appellants was

dismissed with costs throughout.

Learned counsel for the appellants has assailed the judgment of the High Court and submitted that the agreement/compromise, Ex.45, had been validly entered into by the Executive Engineer with the appellants in view of the statutory powers vested in the Executive Engineer under Section 18 of the Act and reliance placed on Article 299 of the Constitution of India, in the facts and circumstances of this case, was wholly erroneous. It was urged that by a Notification, dated 27th of September 1963, published in Part IV-B of the Gujarat Government Gazette dated 31st of October, 1963, the Government of Gujarat had appointed all Executive Engineers and superintending Engineers in-charge of canals in the State of Gujarat to be Canal Officers in respect of such canals and assigned to them all the powers and duties of the Canal Officers under the Act, and, therefore, the agreement/compromise entered into by the Executive Engineer on 7.11.1966 during the pendency of the suit of which he was doing "pervi" was a validly executed compromise which was binding on the parties and the respondent could not go back on it. Having been made to withdraw their earlier suit on the basis of the agreement, dated 7.11.1966, it was not permissible for the respondent to now dispute the act done by its officers or agents within their powers under the statute.

In the facts and circumstances of this case, we find force in the submission of learned counsel for the appellants regarding the non-ap-

375

placability of Article 299 of the Constitution of India to invalidate the agreement/compromise dated 7.11.1966 arrived at during the pendency of the earlier suit filed by the appellants relying whereupon the appellants withdrew the earlier suit. The agreement/compromise Ex.45, arrived at in the previous suit, could not have been equated with a contract between the State and the citizen. Article 299 (1) which reads thus :

"All contracts made in the exercise of the executive power of the Union or of a 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 assurances 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 authorise."

concerns itself with contracts and assurances of property and lays down how Government contracts, including assurances of property are to be made and executed. Indeed, the provisions of Article 299 are mandatory in character and their non-compliance would render a contract void but where the agreement is not referable to Article 299 and is not a contract, as contemplated by that Article, the agreement cannot be invalidated for not satisfying the essential requirements of Article 299 of the Constitution. A compromise of the nature contained in the agreement dated 7.11.1966, arrived at during the pendency of a suit, is not a contract executed between the parties as envisaged by Article 299. There is a marked distinction between contracts which are executed in exercise of the executive powers and agreements or orders made which are statutory in nature. Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State and it has no application to a case where a particular

statutory authority, as distinguished from the Union or the State, enters into an agreement within his authorised capacity. In *State of Haryana & Ors. v. Lal Chand & Ors.*, [1984] 3 SCC 634 this Court considered a contract granting exclusive privilege of liquor vending, in exercise of the statutory powers referable to Punjab Excise Act, 1914 and Punjab Liquor Licence Rules, 1956, and held that the grant of the exclusive privilege gave rise to a contract of a statutory nature, distinguished from the one executed under Article 299(1) and, therefore, compliance with Article 299(1) was not required in such a case.

376

The question which immediately arises for our consideration is :

Was the Executive Engineer competent to execute the agreement Ex.45?

In this connection, it would be relevant to refer to some of the more relevant statutory provisions contained in the Act.

Section 3(6) provides as follows :

(6) "Canal Officer" means any officer lawfully appointed or invested with powers under section 4;

Section 17 reads thus;

"Any persons desiring to construct a new water-course, but being unable or unwilling to construct it under a private arrangement with the holder of the land required for the same, may apply in writing to any Canal Officer duly empowered to receive such applications, stating;

(1) that he is ready to defray all the expense necessary for acquiring the land and constructing such water-course;

(2) that he desires the said Canal Officer in his behalf and his cost to do all things necessary for constructing such water-course."

Section 18 provides as follows

"If the Canal Officer considers the construction of such water-course expedient, he may call upon the applicant to deposit any part of the expense to such officer may consider necessary, and upon such deposit being made, shall cause inquiry to be made into the most suitable alignment for the said water-course, and shall mark out the land which, in his opinion, it will be necessary to occupy for the construction thereof, and shall forthwith publish a notification in every village through which the water'-course is proposed to be taken, that so much of such land as is situated within such

377

village has been so marked out, and shall send a copy of such notification to the Collector of every district in which such land is situated, for publication on such land.

The said notification shall also call upon any person who wishes to share in the ownership of such water-course to make his application in that respect to the Canal Officer within thirty days of the publication of such

notification.

If any such applicant appears, and his application is admitted, he shall be liable to pay his share in the construction of such water-course, and in the cost of acquiring the land for the same, and shall be an owner of such water-course when constructed."

Powers of the canal officers are contained in Section 77 reads thus

"(1) For the purpose of the inquiries under section 76 such Canal Officer may enter, by himself or any officer authorised by him for the purpose, upon any land adjacent to any such work, and may survey, demarcate and make a map of the same.

(2) Notwithstanding anything contained in section 76 where no sufficient evidence is forthcoming as to all or any of the matters specified in that section such Canal Officer shall, so far as may be, settle and record the aforesaid matters in such manner as he may deem fit."

A perusal of the record reveal that it was the Executive Engineer who was doing "pervi" of the case in the suit filed. in 1966. The agreement (compromise) Ex.45 was entered into during the pendency of the said case. As already noticed the Government of Gujarat had appointed all Executive Engineers and Superintending Engineers in-charge of Canals in the State of Gujarat to be Canal Officers in respect of such canals and assigned to them all the powers and duties of the Canal Officers under the Act by virtue of the Notification dated 27th September, 1963. Thus, it is manifest that the Executive Engineer, by virtue of the said Notification, had been lawfully appointed as Canal Officer within the meaning of Section 378

3(6) of the Act. Section 18 of the Act vests the Canal Officer with the power to hold inquiry and direct the construction of suitable alignments for a water-course and by Section 77 of the Act (supra) the Canal Officer is vested with the authority to survey, demarcate and make a map of the land which in his opinion is suitable for constructing an alignment for the water-course. Thus, under the statute,, read with the Notification dated 27th September 1963, the Canal Officer (Executive Engineer) was fully competent to decide about the particular alignment of the water course and it fell within his jurisdiction to decide and settle about the suitable demarcation of the alignment of the water course of the canal from Vartu Dam. He exercised that jurisdiction under the statute when he demarcated the water course in red, in the map attached to Ex.45, the agreement. It is the content of the agreement and not its form which is relevant to trace the source of power behind it and when examined in the light of the statutory provisions noticed above, it is manifest that the document Ex.45 has been executed by the Executive Engineer by virtue of the statutory powers vested in him. The circumstance that the agreement Ex.45 came into existence during the pendency of the suit and was executed by way of an agreement does not militate against the order of alignment as reflected therein being any less statutory in character. As a matter of fact the Act itself envisages that the Canal Officer may alter and settle the alignment in consultation with the landholders through which the water course is to run. In the agreement Ex.45, the Executive Engineer had

agreed to alter the alignment of the water course in consultation with the petitioners who thereupon, unconditionally' withdrew the suit as it appears no grievance remained to be settled. The altered alignment was, therefore, validly made by following the procedure envisaged by the Act. The High Court fell in error in ignoring this aspect of the case. It failed to appreciate the statutory powers of the Executive Engineer, vested in him under Sections 18 and 77 of the Act read with the notification of 27th September, 1.963 on the true import of agreement Ex.45. Thus, in the facts and circumstances of the case we are satisfied that the agreement dated 7.11.1966, Ex. 45 was lawfully executed by the Executive Engineer in exercise of his statutory powers under the Act and the State was obliged to act according to the terms of the said agreement and could not give it a go bye without following the procedure under the Act to again alter the alignment. It is nobody's case that for making an alteration in the alignment, the requisite exercise was undertaken, as envisaged by the Act, in 1972, when the suit out of which

379

these proceedings have arisen was filed.

In view of the aforesaid discussion, the judgment and decree of the High Court deserves to be set aside and are hereby set aside. The judgment and decree passed by the Trial Court as confirmed by the District Judge are restored though for different reasons, as detailed above. The appeal is consequently allowed. The parties, however, shall bear their own costs throughout.

Before parting with the judgment, we would also like to clarify certain position. The dispute is almost three decades old. Learned counsel for the parties were unable to state as to whether fresh alignments as envisaged by the red line in the map attached to Ex.45, agreement, had been made for the passing of the canal or not. We would, therefore, like to clarify that if any fresh alignment for the water course is required to be made, different than the one originally proposed or the one contained in the said Map, the same may be made but only by following the procedure prescribed under the Act and this judgment shall not be construed as any bar therefore.

N.P.V.

Appeal allowed.

380