
(1978) 03 CAL CK 0029
In the Calcutta High Court
Case No : Civil Rule No. 6023 (W) of 1977

Apeejay (P) Ltd.	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 10-03-1978

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Exchange Regulation Act, 1973 — Section 29, 29(2)

Citation : AIR 1978 Cal 577 : (1979) 49 CompCas 602 : 82 CWN 712

Hon'ble Judges : Amiya Kumar Mookerji, J

Bench : Single Bench

Advocate : R.C. Deb, Balai Ch. Roy and Amal Chatterji, for the Appellant; N.C. Chakrabarti, Tarun Roy and B.K. Bachawat, (for Nos. 1 and 2), Ashoke Sen, A.C. Bhabra, Monotosh Mookerjea and Sailen Datta, (for No. 3), for the Respondent

Judgement

Amiya Kumar Mookerji, J.—This Rule is directed against an order of the Government of India dated 23rd Nov. 1977 by which the Government of India were unable to give their approval to the proposed transaction to sell to the petitioner the net assets of the Ludlow Jute Company Limited, the respondent No. 3, a non-resident Company in terms of the assets purchase Agreement dated the 8th June, 1977 between the said two parties.

2. The petitioner company on June 8, 1977 entered into an agreement for purchase of assets of M/s. Ludlow Jute Company Limited. The said Agreement provided that after March, 31, 1977 M/s. Ludlow will work as caretaker of the petitioner company. In para 9.4 of the said Agreement there is a provision for obtaining approval of the Government of India. The said para 9.4 reads as follows :

Government Approval :

Approval satisfactory to the purchaser and its council to the consumption of the transaction contemplated by this Agreement shall have been obtained from the

Government of India pursuant to the provisions of the Foreign Exchange Regulation Act, 1973 and any other applicable laws, rules or regulations of India, and such approval shall be and remain in full force and effect at all relevant times.

At para 10.4 of that Agreement similar provisions were made for obtaining Government approval satisfactory to the Seller. On 8th of June, 1977 Mr. A. B. Mason, President of Ludlow Jute Company Ltd. addressed a letter to Mr. Mohan Dharia, Minister of Commerce, Govt. of India, submitting the copy of the said Agreement and requesting him for consideration of their pending application for approval of the sale of the assets and to hold a meeting to discuss the matter at the early convenience of the Ministry. Thereafter, on or about Sept. 8, 1977 Sri Jit Paul who was acting on behalf of the petitioner company, received a letter from the Vice President of M/s. Ludlow Jute Company Ltd. to the effect that they have been acting as a caretaker of the petitioner company with effect from 1st of April, 1977. Subsequently a communication was received on or about Oct. 19, 1977 wherein it was indicated that the Government of India had discussed the questions of approval and it was expected to take a decision under the Foreign Exchange Regulation Act. Neither the petitioner nor any of its representatives was ever heard by the Central Government. The petitioner had an apprehension that the Central Government might not (sic) prove the purchase Agreement between the parties. On Nov. 15, 1977 the petitioner company wrote to the respondent No. 2, the Controller of Capital Issues, making it clear that the assets of the petitioner company was much below 20 crores. It was pointed out that the provisions of Section 20(a) of Monopolies and Restrictive Trade Practices Act, 1969 did not apply to the petitioner company. Subsequently, the petitioner company received a copy of the communication dated Nov. 23, 1977 of the Central Government to M/s. Ludlow Jute Company Ltd. informing them that the Agreement, dated 8th June, 1977 between the petitioner company and M/s. Ludlow was not approved by the Central Government. No communication was, however, sent directly by the Central Government to the petitioner company. The petitioner being aggrieved by the said decision of the Central Government disapproving the Agreement for purchase dated 8th June, 1977 entered by and between the petitioner company and M/s. Ludlow moved this Court under Article 226 of the Constitution and obtained the present Rule.

3. Two affidavits-in-oppositions were filed by the respondent No. 3. One is dated 20th Dec. 1977 and the other dated 9th of Jan. 1978. Both of the said affidavits were affirmed by T. J. Dineen, the Managing Director of the respondent No. 3. In 9th Jan. 1978's affidavit it is stated that under the Foreign Exchange Regulation Act, 1973 and other applicable laws and regulations, it was necessary for the petitioner and the respondent No. 3 respectively to take permission from the appropriate authorities for the petitioner to make payment and for the respondent No. 3, to transfer its business and assets in India. As advised and directed by the Reserve Bank of India, the respondent No. 3 made an application inter alia, to the Director of Investment, Department of Economic Affairs,

Government of India for clearance of the respondent No. 3's proposal to transfer its Indian business to the petitioner and pursued the same with them. The petitioner Apeejay (Pvt.) Ltd. also met the Government Authorities and represented its case and participated on or about June 28, 1977 in a point meeting with the representatives of the Government of India and of the respondent No. 3. The petitioner was also in terms of Clause 10.4 of the Agreement under the obligation to obtain all approvals as were necessary under all applicable laws and regulation for consummation of the transactions contemplated by the Agreement dated the 8th June, 1977 between the petitioner and the respondent No. 3. In view of the Government's decision the Agreement between them had become inoperative and null and void.

4. An affidavit-in-opposition has also been filed on behalf of the respondents Nos. 1 and 2 and affirmed by Joti Prasad Mukherji, Director (Investment), Ministry of Finance (Department of Economic Affairs). In that affidavit it is stated that the petitioner not being an applicant under the Foreign Exchange Regulation Act, 1973 the disapproval of the respondent No. 3 by the respondent No. 1 cannot be availed of by the petitioner, it being not a person, aggrieved by the communication dated 23rd Nov. 1977. The petitioner not having any legal right in the subject-matter, cannot maintain the instant application. After considering the proposed transaction in all its aspects, the Central Government was unable to give its approval and accordingly advised the respondent No. 3 to treat the matter as closed. The said respondent No. 3 by its letter dated 30th Nov. 1977 addressed to the Under-Secretary, Ministry of Finance accepted the Government's "decision" not to accord sanction to the proposed transaction and informed the Government that the arrangement for sale or Agreement with Apeejay (Pvt.) Ltd. may be treated as closed. To accord approval to the proposed transaction was not statutory in character and had not created or imposed any statutory right on the petitioner, who did not approach the Central Government to accord approval to the proposed transaction.

5. Mr. Deb, appearing on behalf of the petitioner in support of the Rule, contended that in terms of Clause 10.4 of the Agreement, the right and interest of the petitioner in obtaining the approval of the Central Government were admitted by the respondent No. 3 in their affidavits. The petitioner company met the Government Authorities and represented its case. They also participated on or about June 29, 1977 in a joint meeting held with the representative of the Government of India as well as with the respondent No. 3. As such the disapproval of the Government of India did cause injury to the petitioner. Moreover, on a true construction of the approval clauses in the Agreement, it will become evident that the petitioner had an independent right to negotiate with the Central Government or the Reserve Bank to obtain approval. To make payment to a non-resident Company such approval was a statutory requirement. The petitioner has a right to enforce the agreement and purchase the property of the respondent No. 3 subject to the approval of the Central Government. The Central Government acted illegally and without jurisdiction and without affording

any opportunity to the petitioner to represent its case before the Government.

6. It is further contended that the Central Government in disapproving the Agreement has not assigned any reason whatsoever. Even in the affidavit-in-opposition, the Central Government did not disclose any reason for such disapproval. In the present writ petition the petitioner does not seek to enforce any contract, but the petitioner challenges that the order of the Central Government is a nullity as it grossly violated the principles of Natural Justice and accordingly it should be quashed.

7." Mr. Chakrabarti, appearing on behalf of the Respondent Nos. 1 and 2 contended that the petitioner had no legal right. It had no right to get any opportunity of hearing as they did not submit any application. The communication of the Government of India disapproving the proposed transaction was not statutory in character and had not created or imposed any statutory right on the petitioner. Moreover, the petitioner being a private limited company and as such it could not claim any fundamental rights under Articles 19 and 31 of the Constitution. No injury of any nature has been caused to the petitioner by reason of any alleged contravention or any of the provisions of any enactment or ordinance or any order, rule, regulation and as such the present petition is not maintainable under any of the clauses of Articles 226 of the Constitution.

8. Mr. Sen, appearing on behalf of the respondent No. 3 contended that the condition precedent of the contract having not been fulfilled, the whole contract became null and void and as such the contract could not be enforced in any court of law or in a proceeding under Article 226 of the Constitution. In support of his contentions Mr. Sen relied upon a decision of the Queen's Bench Division in *Kuenigl v. Donnersmarck* (1955) 1 QB 515 and a decision of the Chancery Division in *Re Longlands Farm v. Superior Development, Ltd.* (1968) 3 All ER 552.

9. Mr. Sen, further contended that the petitioner did not make any application for securing approvals as contemplated by Clause 10.4, of the Agreement. The right to apply for approval to the Central Government and other appropriate authorities under applicable laws and regulations including Foreign Exchange Regulation Act, 1973 vested personally in the respondent No. 3 only and not in the petitioner. The reliefs sought for, by the petitioner is in effect to enforce the contractual obligations, which was not permissible under Article 226 of the Constitution. As the petitioner had no existing contractual right against the respondent No. 3 after the disapproval of the Central Government, the present writ petition was not maintainable and ought to be dismissed.

10. It is clearly evident from the Agreement that the petitioner has an independent right under Clause 10.4 of the Agreement to obtain the approval of the Central Government under Foreign Exchange Regulation Act, 1973. To make payment to a non-resident company such permission was required under Foreign Exchange Regulation Act. It seems to expedite the matter, the President of the

Respondent No. 3 wrote a personal letter to the Minister. It is also admitted by the respondent No. 3 that the petitioner company made a representation to the Central Government, participated in the joint discussion. The petitioner was apprehensive that the Central Government might not accord approval and they wrote a letter to the Controller of Capital Issues on the 15th of Sept. 1977. As directed by the Reserve Bank of India, the respondent No. 3 forwarded the Agreement to the Ministry of Finance, Department of Economic Affairs. It is well settled that the company has got no fundamental rights under Articles 19 and 31 of the Constitution.

11. Certain restrictions have been imposed upon a person resident outside India to acquire the whole or any part of any undertaking in India to any person or company except with the general or special permission of the Reserve Bank of India, u/s 29 of the Foreign Exchange Regulation Act, 1973. There is also a proviso to Sub-section (2) (c) of Section 29 that, no application shall be rejected unless the parties who may be affected by such rejection have been given a reason-able opportunity of making a representation in that matter. So, under the Foreign Exchange Regulation Act the permission of the Reserve Bank of India was necessary. But it appears that the Reserve Bank of India directed the respondent No. 3 to forward the Agreement to the Central Government for getting approval before the permission was granted and in pursuance of the said direction, the Agreement was forwarded to the Central Government for its approval. The condition precedent of enforcing the Agreement of 8th June, 1977, is to get the approval of the Central Government which is required under the Foreign Exchange Regulation Act. Clauses 10.4 and 9.4 in the Agreement are statutory requirements imposed under the Foreign Exchange Regulation Act. It is true that the statute does not impose any obligation upon the petitioner to get the permission of the Reserve Bank u/s 29 of the Act. Section 9 of the Act imposes restriction upon the petitioner to make payment to a non-resident. So, the obligation of both the petitioner and the respondent No. 3 to obtain approval of the Central Government is contractual. But nevertheless it is a requirement of the Statute, u/s 29 of the Foreign Exchange Regulation Act, powers have been conferred upon the Reserve Bank of India to grant general or special permission. But the Reserve Bank before exercising its statutory powers, directed one of the contracting parties to get the approval of the Central Government. It appears that the condition precedent of granting permission by the Reserve Bank was to get the prior approval of the Central Government. Under these circumstances, it cannot be said that the according disapproval of the Central Government did not cause any injury to the contracting parties.

12. In *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, , the Supreme Court held that it cannot be said that merely because the source of the right which respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ.

13. In that case the impugned order passed by the D. F. O. cancelling the respondent's right to cut timber for a particular period at an auction held by the Forest Officer, was not under any statute or rules or regulations. That was an order passed by a superior authority cancelling the administrative order of a subordinate authority in carrying out the administrative works of the Forest Department. The Supreme Court held that if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested its statutory powers, a writ petition was maintainable.

14. It is no doubt that the foundation of the petitioner's right is contractual. The impugned order of the Central Government has made the contract itself void. In other words, the right which the petitioner could have acquired by virtue of the contract has been completely nullified by the order of disapproval of the Government inasmuch as such approval was the condition precedent of the contract. Thus the petitioner has been deprived of its right under the contract and its remedy. Even in a suit, the petitioner cannot challenge the decision of the Central Government. In D. F. O.'s case as referred to hereinabove, the respondents' right to sue for breach of contract and for damages was not barred. Applying the principles as laid down by the Supreme Court in *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, I hold that the petitioner has the right to maintain the present writ application challenging the action of the Central Government.

15. To maintain a writ application it is not always necessary that every order passed by the public authorities or the instrumentalities of the State must be statutory in nature. A writ lies even against an executive or administrative order which involves civil consequences, abridges or takes away any right or affects prejudicially the rights of a person even when foundation of such right is based on a contract, if it is shown to the satisfaction of the court that such order is passed without applying any known principle of Rule of Law. Absence of arbitrary power is the first essential of the Rule of Law upon which our whole constitutional system is based.

16. In *Queen's Bench Division's* case referred to by Mr. Sen, there was an agreement in 1939 between plaintiff and the defendant whereby the defendant company were to terminate bankruptcy proceeding and undertook to pay to the plaintiff or on his instructions direct to its creditor 160,000 Richsmarks; that payment to be made as soon as the settlement had been rectified by the Exchange Control Office and the plaintiff had communicated that an understanding had, been reached between him and his bankruptcy creditors and one other creditor. The said Agreement was forwarded to the Exchange Control Office. But they pointed out that special permits would be required for payment to foreigners, which included the plaintiff, then resident at Sohven in Hungary. Difficulty Arose in obtaining the creditor's consent to the withdrawal of the bankruptcy proceedings. A preliminary issue was raised whether the contract made by the company was void at common Law by reason of public policy. It was

urged on behalf of the plaintiff that on the outbreak of war between Great Britain and Germany, 1939 agreement was abrogated as it was of an executory character and it involved either intercourse with persons in Germany or benefit to such persons.

17. McNair, J. observed that it was an essential part of the agreement that litigation to resolve the reserved questions should be prosecuted between the company and the plaintiff in German Courts; it was clearly impossible to perform that part of the contract without intercourse; for the company could take no part in such litigation except through its agent. It was further observed that the implementation of the agreement would have resulted in the discharge of the 1st defendant, a person at all material times resident in enemy territory and the payment of the company's erstwhile agents in Germany of 1,60,000 Richsmarks would diminish the resources of the English company. There was necessarily, then, both benefit to the enemy and detriment to the resources of the King's subject as well as intercourse and means of communication.

18. On the facts of that particular case it was found by the Court that as the conditions precedent of the agreement were not fulfilled, the contract became a nullity. The facts of the present case are quite different and in my opinion, that decision would be of no assistance to respondent No. 3.

19. In Longlands Farm's case (1968) 3 All ER 552, the plaintiff owned 57 acres of agricultural land. In 1964, he and the defendants, a property development company, executed a document in which it was stated that the defendants were agreeable to purchase the land of the plaintiff subject to the defendants' obtaining planning permission to their entire satisfaction for the development of the land in question. The plaintiff agreed and accepted those terms and acknowledged receipt of £5 in consideration of his holding the property for the defendant. A few days later the defendants registered the document as a contract under the Land Charges Act, 1925. In March, 1967 the plaintiff called on the defendants within 28 days either to apply for planning permission or to agree to the cancellation of the contract and to vacate the registration at the Land Charges Register. The defendants replied that they were prepared to apply for planning permission if the plaintiff so desired. But in view of local circumstances they regarded any application as being premature. Thereafter the application was made and it was refused. The plaintiff who considered his liability under the document of April 2, 1964, to be at an end, took out a summons seeking an order that the registration of the contract be vacated.

20. It was held by Cross, J. of the Chancery Division that the document of 1964 was not an option but was a conditional contract which would become absolute if the defendants obtained planning permission to their satisfaction and since the said document was silent as to the time in which the condition relating to planning permission was to be satisfied, it must be taken that the defendants were given a reasonable time to obtain planning permission. An order was passed in favour of the plaintiff to treat the contract as at an end and to have the

registration vacated.

21. That decision also, in my opinion, is not applicable to the facts and circumstances of the present case. In Longlands Farm's case (1968 3 All ER 552) the plaintiff brought an action against the defendants for cancelling the agreement on the ground that the condition precedent viz. the planning permission was not obtained by the defendants. In the instant case if the respondent No. 3 filed a suit against the petitioner for cancellation of the agreement of 8th June, 1977 on the ground that the condition precedent of the Agreement was not fulfilled in that suit the decision referred to above might have been helpful to the said respondent.

22. Mr. Sen next contended that apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, it could not be said that there was any general principle or any rule of natural justice that an executive or an administrative authority passing any order whatsoever should always and in every case give reasons in support of its decision, Mr. Sen relied upon a decision of the Supreme Court in *Som Datta Datta Vs. Union of India (UOI) and Others*, .

23. In *Som Datta's* case it was urged on behalf of the petitioner that the order of the Chief of the Army Staff confirming the proceedings of the Court-Martial u/s 164 of the Army Act was illegal since no reason, has been given in support of the order by the Chief of the Army Staff. It was further urged that the Central Government has also not given any reasons while dismissing the appeal of the petitioner u/s 165 of the Army Act and that the order of the Central Government was illegal and ultra vires and should be quashed by a writ of certiorari.

24. The Supreme Court In that case held that there was no express obligation imposed by Section 164 or by Section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court-Martial.

25. The Supreme Court considered Rules 61 and 62 of the Army Rules which prescribed the standard form of recording the opinion of the Court-Martial on each charge and of an announcement of that finding. These Rules omit all mention of the evidence or the reasoning by which the finding is reached by the Court-Martial.

26. Rules 61 and 62 are to the following effect:--

"61. Consideration of finding:-- (1) The Court shall deliberate on its finding in closed Court in the presence of the judge-advocate.

(2) The opinion of each member of" the Court as to the finding shall be given by word of mouth on each charge separately.

"62. From record and announcement of finding : (1) The finding of every charge upon which the accused is arraigned shall be recorded and, except as provided in

these rules, shall be recorded simply as a finding of "Guilty" or "Not Guilty".

27. Rules 61 and 62 of the Army Rules provide that the finding shall be recorded simply as a finding of "guilty" and of "not guilty". So, in that context the Supreme Court observed in *Som Datta's* case, that it was not necessary either for the Central Government or the Chief of the Army Staff to record reasons in support of the rules in view of the aforesaid Army Rules. Where a particular Rule forbids recording of reasons, in that case it is not at all necessary to record reasons in support of an order. The Supreme Court has not laid down a general principle that an executive or administrative order which affects prejudicially the right of an individual, it is not necessary to record reasons in support of such an order.

28. The order without any reason cannot be tested even on the ground of mala fide, as in the absence of reasons it is difficult to ascertain whether the authority acted arbitrarily or with malice or not.

29. In *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, the Supreme Court said that the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirements of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. Thus rules of natural justice can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.

30. In *The Siemens Engineering and Manufacturing Co. of India Ltd. Vs. The Union of India (UOI) and Another*, , the Supreme Court observed that it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.

31. Where the fulfilment of condition precedent of a contract does not depend upon the act of the contracting parties but depends upon the approval of the Central Government and such conditions are the requirement of a statute, in that case either of the contracting parties has a right to challenge the decision of disapproval of the Government on the ground that in the impugned decision no reasons are recorded, or reasons so recorded are irrelevant or they have no rational nexus to the object or such reasons are coloured by policy or

expediency, in such a case the Court is competent to set aside such a decision in a writ proceeding.

32. In the instant case I have already said that the proviso to Sub-section (2) (c) of Section 29 of the Foreign Exchange Regulation Act provides that before any permission is accorded by the Reserve Bank an opportunity of hearing should be given. In the instant case the Reserve Bank has failed to exercise its powers u/s 29 of the Act and referred the parties to approach the Central Government for its approval. From the facts and circumstances of the case it is clearly evident that unless the Central Government accords approval, the Reserve Bank shall not grant permission to the Agreement. So, the Central Government in all practical purposes usurped the powers similar to those u/s 29 of the Foreign Exchange Regulation Act. It is not merely the subjective satisfaction of the Central Government either to accord approval or disapproval of an Agreement but it requires objective consideration taking into account all the aspects of the case. So, in my opinion, that "decision" of the Central Government, which is a condition precedent of granting permission of the Reserve Bank of India u/s 29 of the Foreign Exchange Regulation Act, must be supported by reasons and before the authorities arrived at such a decision, opportunities must be given to both the parties to present their respective cases before such authority.

33. In the instant case the so called "decision" dated 23rd Nov., 1977 of the Under-Secretary to the Government of India, Ministry of Finance, Department of Economic Affairs was passed without any reason in support of his order and no opportunity was given either of the contracting parties to present their cases before such authority. In the affidavit-in-opposition also no reasons for disapproval have been disclosed.

34. Accordingly, this Rule is made absolute. The impugned order of the Central Government dated 23rd of Nov., 1977 is quashed. Consequently the Agreement dated 8th June, 1976 subsists subject to the approval of the Central Government. This order, however, shall not prevent the respondent No. 3 to enter into a fresh Agreement with a third party at its own risk and peril.

35. Let a Writ of Mandamus be issued commanding the respondents 1 and 2 not to give effect to the said impugned order.

36. There will be no order for costs.

37. Let operation of the order be stayed for a period of a fortnight from date, as prayed for.