

**(1997) 03 SIK CK 0001**  
**In the Sikkim High Court**  
**Case No : Write Petition No. 3 of 1997**

Brij Raj Oberoi

APPELLANT

Vs

State of Sikkim and Another

RESPONDENT

**Date of Decision :** 24-03-1997

**Acts Referred:**

**Citation :** AIR 1999 Sikk 21

**Hon'ble Judges :** Malay Sengupta, Acting C.J.

**Bench :** Single Bench

**Advocate :** S.K. Kapoor, G.P. Roy, A.K. Upadhyaya, R. Banerjee and S. Mukherjee, for the Appellant; S.P. Wangdi and J.B. Pradhan, Asst Govt. Advocate, for the Respondent

## Judgement

Malay Sengupta, Ag. C.J.

1. It is an application under Article 226 of the Constitution of India asking for writs in the nature of mandamus, certiorari, prohibition and also other reliefs in the form of injunctions.

2. A hotel, possibly the best of its kind within the State of Sikkim, is the subject matter of the writ petition. The hotel is styled as "Norkhil Hotel" situated within the township of Gangtok. It was constructed in 1961 by the Government on Government land and the TCI was entrusted with the management of the hotel. Since the management was far from satisfactory, the Government decided to lease out the same to a private individual on long term basis.

3. K.C. Oberoi, now deceased, was a recognised hotelier. He was picked up by the State for the aforesaid purpose. A lease deed was executed in favour of K. C. Oberoi who started to run the hotel from 1-10-1976. The lease was for a period of twenty years with provision for enhancement of rents from Rs. 50,000/- per annum to Rs. 60,000/- per annum after every 5 years" period. Unfortunately, before the expiry of the tenure of lease K. C. Oberoi expired. His son Ski B. R. Oberoi, also an experienced hotelier, was entrusted by the Government to run

the hotel. A fresh lease deed/agreement was entered into on 9-9-1986 and the hotel was leased out for a term of 10 years from 1-10-1986. Under the lease the new lessee was to pay Rs. 1.1 lakh per annum for the first five years and Rs. 1.5 lakhs per annum for the next five years. The lease was to expire on 31-9-1996.

4. Before the lease tenure expired Shri B.R. Oberoi, the new lessee approached the Government on 7-11-1995 with a prayer for renewal and extension of the lease for a further period of thirty years, mainly on the ground that he and his father laboured hard and spent enormous amount to raise the standard of the hotel and ultimately to get it categorised as Delux Four Star by the Government of India. Talks went on between the parties but the Government did not agree to the proposal straightway. The tenure of lease was extended temporarily only up to 31-3-1997 and by a letter dated 29-11-1996 it was intimated to the lessee that the Government decided to call for tender for running of the hotel for the next twenty-four years. In the said letter the lessee was advised to participate in the open tender. The lessee again approached the Government by a letter dated 16-1-1997 to reconsider his prayer and to drop the idea of calling for any tender for running of the hotel. Since the Government did not pay any heed to such representation, the instant writ petition has been filed by the lessee, Shri B.R. Oberoi on 18-2-1997.

5. Before the matter came up on the board, tender notice was issued on 22-2-1997 in all India dailies inviting offers for Norkhil Hotel with indication that the lease would be for twenty-four years. The last date for submission of tender has been fixed on 24-3-1997.

6. The main point raised on behalf of the petitioner is that under the terms of the lease/agreement it is obligatory on the part of the Government that after expiry of the present lease, the first offer of leasing out the said premises should be made to the present lessee on such terms and conditions and for such period as may be mutually agreed upon between the lessor and the lessee. In case of non-acceptance of the lessor's proposal, the lessor shall be entitled to deal with the same in any other manner and be entitled to let out the same to any other person. In the instant case without making any offer to the lessee, the lessor (State) has been attempting to lease out the same on the basis of open tender. It is contrary to the term of agreement.

7. The contention of the State is that since the petitioner wants to exercise his so-called contractual rights, this Court cannot invoke its extraordinary writ jurisdiction. It has also been pleaded that there is no mala fide on the part of the State in the matter of steps having been taken for issuance of tender. It is also the case of the State Respondent that the Writ Petition is prematured as the claim of the present lessee to get the hotel management for further period has not yet been denied. Further contention is that the petitioner could have got the matter referred to the arbitration, in terms of agreement between the parties. But without taking recourse to such alternative remedy, the present Writ Petition has been filed.

8. At the very outset both the sides fought academic duel over the jurisdiction of the Writ Court to enter into the question of public law and private law rights and remedies. The contention of the respondents is that normally the writ jurisdiction should not be invoked when the contractual relationship between the private party and a State instrumentality is involved. Respondents relied on several decisions to substantiate their point. Those are Radhakrishna Agarwal and Others Vs. State of Bihar and Others, ; Life Insurance Corporation of India Vs. Escorts Ltd. and Others, and Tata Cellular Vs. Union of India, and a few other decisions. The petitioners on the other hand contends that the law enunciated in Radha Krishna Agarwal's case has undergone drastic change by gradual process within a period of twenty years from 1977. Petitioners placed reliance on the decisions in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, .

9. In fact in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, the question whether governmental authority under Article 298 of the Constitution of India acting in contractual field is controlled by Article 14 of the Constitution of India and whether in the event of breach of such contract appropriate remedy is available under Article 226 of the Constitution of India was dealt very elaborately. In para 17 of the said decision the Court did not accept the proposition that whenever a State deals with a citizen in exercise of powers under the contract there is a dealing between the State and the citizen which involves performance of certain legal and public duties. The Court held "If we were to accept this very wide proposition every case of a breach of contract by the State or its agent or its officers would call for interference under Article 226 of the Constitution. We do not consider this to be a sound proposition at all". In para 19 the Court noted that it did not find out any precedent to the effect that "When the State or its officers purport to operate it within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Article 226 of the Constitution and not an ordinary suit." But in para 9 the Court observed "It is true that Article 14 of the Constitution imports a limitation or imposes an obligation upon the State's executive power under Article 298 of the Constitution". Thus some limitation is contemplated over the action under Article 298 of the Constitution. In Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , the observation of the Court in para 25 is "Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive authority must be subject to rule of law and must be informed by reason. So whatever be the activity of the public authority, it should meet the test of Article 14". If we look at para 12 of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, we find the Court observing in the same tune stating "Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to

judicial review on the touchstone of relevance and reasonableness, fairplay, natural justice, equality and non-discrimination in the type of transactions and nature of the dealing". If we turn to *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, with specific reference to paragraphs 21, 22, 24, 28 and 48 we get that the Supreme Court in unequivocal term hold "We, therefore, find it difficult and unrealistic to exclude the State action in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14". It may further be quoted "In our view, bringing the State activity in contractual matters also within the purview of judicial review is inevitable and is a logical corollary to the stage already reached in the decisions of this Court so far". It would be very relevant in this context to quote the decision of the Supreme Court in *LIC of India and Another Vs. Consumer Education and Research center and Others*, . Therefore it is clear that the power and authority guaranteed to the State under Article 298 of the Constitution is subject to judicial review in the light of Article 14 of the Constitution and jurisdiction of the Writ Court under Article 226 of the Constitution is very much in vogue.

10. While making judicial scrutiny of any state action in contractual matters too, the Court is to ensure the existence of arbitrariness, mala fide, nepotism or oblique motive behind the decision of the State instrumentalities. It is needless to mention that Government actions must be presumed to be reasonable. Para 28 in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, and para 14 in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, may very reasonably be quoted in its context. In *Dwarka Das Marfatia's* case it has been observed "There is always a presumption that a governmental action is reasonable and in public interest. It is for the party challenging its validity to show that the action is unreasonable, arbitrary or contrary to the professed norms or not informed by public interest, and the burden is a heavy one". In *Kasturilal's* case the Court observed "There is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting any reasonableness or is not informed with public interest. This burden is a heavy one and it is to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weight the Government in taking action and therefore the Court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest". We think it is the proper place to note that no mala fide or oblique motive on the governmental side has been alleged, what to speak of proof, by the petitioner before us. It is needless to mention that mala fide must be pleaded and proved by the complainant.

11. In the case which we have been dealing with, the contention of the petitioner

is that his right of precedence over other aspiring hoteliers in the matter of getting the lease for a further tenure was guaranteed under Clause 5(ii) of the lease deed dated 9th September, 1996. The clause reads "After the expiry of the present lease, the first offer of the said premises on lease shall be made to lessee on such terms and conditions and for such period as may be mutually agreed upon between the lessor and the lessee". The only allegation brought by the petitioner is that such a right has been denied. The plea of the respondents is that time is not over to make the offer. Invitation of tender does not mean that the right of the petitioner, as contemplated under the aforesaid provisions of the lease deed, has been denied. Before making the offer the petitioner is to ascertain as to how much money the State can fetch from the property in question. The situation prevailing in the State during 1976, so far as tourism and hoteliering are concerned, has undergone drastic change by the progress of time and by the change of Government attitude over the industry of tourism. It would only be prudent on the part of the Government to make an assessment of the price which the State can get out of it. Calling for tender is considered to be one of the methods of assessing the real worth of the property and the Government took; the decision to go for tender only to protect the public interest or in other words the interest of the Government. Our attention has been drawn to para 14 of *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, where the Supreme Court observed "The Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it". In *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, at para 102 the Court observed "When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder". Therefore, it is clear that the State should give primary consideration to protect public interest even at the cost of the interest of an individual and such action taken in the interest of state exchequer should stand the scrutiny of the Court if such action does not suffer from mala fide or otherwise.

12. We have just held that the State action must get the approval when such actions are bona fide and in public interest. For such actions, reasons need not necessarily be given by the State instrumentalities. In this context we may refer to paras 20 and 22 of *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, , para 17 of *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, and para 101 of *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, . It is, however, pertinent to note that in the present

case the Government has assigned the reason for calling for tenders before making the offer to the petitioner straightway without assessing the worth of the property.

13. The Government must have some amount of freedom in dealing with such contracts where commercial elements are present. "Quashing of governmental decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure" is the observation made by the Supreme Court in para 113 in *Tata Cellular Vs. Union of India*, .

14. Thus we see that there is no element of mala fide or oblique motive or arbitrariness on the part of the Government in inviting open tender and asking the petitioner to participate in the same. We do not find mala fide in such Government action more because the Government in their affidavit, categorically stated that if the petitioner succeeds in the tender he would get the lease and even if the rate quoted by him is not the highest, offer might be given to him on the basis of the assessment made by the process of tender and finality might be arrived at by negotiations. It has been contended on behalf of the respondents that it is not obligatory on the part of the Government to accept the highest bidder. Government may exercise its discretion in the matter of accepting a tender which is not the highest, but otherwise suitable. We may refer to para 85 of *Tata Cellular Vs. Union of India*, which reads "The right to refuse the lowest or any other tender is always available to the Government. .... There can be no question of infringement of Article 14 if the Government tries to get the best quotation. The right power".

15. It has been contended on behalf of the petitioner that by way of calling for the tenders the State is complicating the issue and opening the floodgate for further litigations, because the tenderers quoting rates higher than that of the petitioner must come to the Court if the offer is not made to them. We have already stated that the State is fortified with the right to accept or reject any tender. Moreover, the doctrine of legitimate expectation does not apply in such cases. A single Bench of the Calcutta High Court in a very recent judgment reported in *D. Wren International Ltd. and another Vs. Engineers India Ltd. and others*, held that principle of legitimate expectation cannot apply in a contractual field. To counteract the argument advanced on behalf of the petitioner that the procedure adopted by the State would invite multiplicity of the litigation, learned Counsel for the State has contended that if the lease for the new term is given to the present lessee (petitioner) without tender there would also be scope for even larger number of litigations as the vigilant and conscious individuals or organisations might come up with public interest litigations with the plea that the State exchequer is being looted in the interest of a particular individual defying the public interest. There is substance in the argument.

16. There is no challenge to the claim of the petitioner that because of his endeavour, the standard of the hotel has been elevated to a desired extent But at the same time we cannot be unmindful of the fact that a guaranteed business for

long twenty years is not a matter of insignificance to a hotelier.

17. To sum up all which we have discussed above we may hold that the State has not shown any sign of mala fide, arbitrariness, nepotism or oblique motive in inviting tender before making the offer to the petitioner. No right, even if there be any, of the petitioner has been affected by such a process when the Government undertakes to make the offer to the petitioner in compliance with Clause 5(h) of the lease document dated 9th September, 1986.

18. The petitioner has, therefore, come with the writ petition prematurely. If no offer is ultimately made to him after the process of tender is over, he may, if so advised, ask the State to refer to the matter to arbitration as provided under Clause 5(v) of the lease deed. Even after taking recourse to such alternative remedy the petitioner may approach the Writ Court, obviously if there be any cogent ground. The writ petition, as it stands, cannot be entertained.

19. In view of all which have been discussed above, the writ petition is dismissed without any order as to costs. Interim order passed on 1-3-1997 will loose its force accordingly.