
(2009) 11 AHC CK 0221
In the Allahabad High Court

Dasmesh Communication and Others	APPELLANT
Vs	
Bharat Sanchar Nigam Ltd. and Others	RESPONDENT

Date of Decision : 18-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7

Citation : (2010) 1 AWC 663

Hon'ble Judges : Ashok Srivastava, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—These three writ petitions have been filed by the aspirant franchisees participated in a process of selection convened by Bharat Sanchar Nigam Limited (for short "B.S.N.L.") after appropriate advertisement. Out of the candidates who participated in such process of selection, 5 candidates became eligible and of them, 3 have invoked writ jurisdiction of this Court challenging the recommendation of the concerned committee dated 17th January, 2008 and as a consequential effect thereof recommendation for fresh selection. The recommendation of the committee is as follows:

Recommendation.--Although Tender Evaluation Committee (T.E.C.) found that all the above five bidders are eligible for acceptance of their Expression of Interests (E.O.Is.) according to gradation marks as above, but as per requirement of better marking aspects, more bidders having electrical and electronic, F.M.C.G. experience may become beneficial for the enhancement of the B.S.N.L. marketing network. Hence, it is recommended that the option for fresh tender may also be considered for the purpose.

The petitioners contended before this Court that the action of respondents in ignoring eligibility of the petitioners for selection is bad in law and, therefore, the B.S.N.L. be directed to enter into agreement with them for the franchisees in question.

2. From the above recommendation, 5 bidders seem to be eligible for acceptance and the requirement appears to be of better marking aspects from more bidders, therefore, whether such action was beyond the competence of the authority concerned is to be considered by this Court.

3. Learned Counsel appearing for the respondents Mr. Udit Chandra led by Mr. Subodh Kumar, learned standing counsel for the B.S.N.L. contended against the argument of Mr. Vikas Budhwar led by Mr. R.K. Jain, Sr. advocate that the power and authority to accept or reject whole or any part of any Expression of Interests (E.O.Is.) without assigning any reason whatsoever is reserved with the General Manager Telecom district Mirzapur. This is part of the notice inviting expression of interest. Similarly from the communication of the Chief General Manager (Admn.) Telecom U.P. (East) Circle, Lucknow dated 8th April, 2008 it appears that Tender Evaluation Committee (T.E.C.) is empowered to choose good bidders who can be able to enhance marketing network irrespective of the choice of the committee as aforesaid. This information was given to the petitioners under the Right to Information Act, 2005. Apart therefrom, in such communication it has been recorded that Chief General Manager Telecom U.P. (East) Circle, Lucknow is the appellate authority to consider the appeal, if one feels aggrieved. That apart, he contended that there is an arbitration clause in the agreement and any dispute with regard thereto can be decided by the arbitrator. However, such submission is rightly objected by Mr. Budhwar by saying that Section 7 of Arbitration and Conciliation Act, 1996 clearly says that there should be a written agreement for the purpose of invocation of arbitration clause and since no agreement at all was executed till now, no question of invocation of arbitration clause as a matter of course, does arise. We accept such submission of Mr. Budhwar and discard the submissions of Mr. Udit Chandra to that extent.

4. In any event so far as other issues are concerned, they cannot be given up. When the authority is able to consider the issue in appeal, why such appeal has not been preferred, is unknown to this Court. The petitioners could have approached the appellate authority, if they are aggrieved. However, the appeal seems to be non-statutory appeal, therefore, the Court cannot ignore the merit of the matter for the purpose of adjudication. The issue involved herein is, as contended by Mr. Budhwar at the initial stage that though no legal right is apparently available in this regard but legitimate expectation survives and now-a-days legitimate expectation in many occasions encroaches the field of promissory estoppel. Mr. Jain, learned senior advocate added that there is no basis of decision, therefore, it is arbitrary in nature. State largess, therefore, cannot act as private party. We are not very much convinced with the argument as advanced by Mr. Budhwar to the extent that it is a case of promissory estoppel. In a case of tender or auction selector's selection cannot be interfered with unless it is apparently arbitrary or illegal in nature and no legal right is attached to any highest bidder or accepted candidate specially when no agreement is executed. In the famous case law as cited before us being Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , it was held that if a

Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. 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, fair play, natural justice, equality and nondiscrimination. It is well-settled that there can be "malice in law." Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

5. On the other hand Mr. Udit Chandra has cited very recent decisions. In *Jagdtsh Mandal v. State of Orissa and Ors.* (2007) 14 SCC 517, scope of judicial review of award of contract has been considered by the Court. Relevant paragraphs 21.1 and 21.2 of such judgment are quoted below:

21.1. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, this Court observed: (SCC p. 458, para 18)

18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process" the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

21.2. In *Tata Cellular Vs. Union of India*, this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.... More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of

reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

(Emphasis in original)

This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.

6. In Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, again Supreme Court, as per the reference of National Highway Authority of India Vs. Ganga Enterprises and Another, held that it is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , it is held as follows:

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 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 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 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 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.

Ultimately it has been submitted relying on the decision in B.S.N.L. Ltd. and Another Vs. Bhupender Minhas and Others, where under several judgments have been followed including Tata Cellular's case (supra) that it has clearly been held in those decisions as referred therein that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The

Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.

7. According to us, had it been a case of choice of one amongst other eligible candidate leaving aside the logical ground to arrive at a conclusion, there could have been whisper of biasness or arbitrariness but here the authority did not do so. The authority principally held that though the 5 bidders seem to be eligible according to gradation marks but with better marking aspects, more bidders having experience may become beneficial for the enhancement of the B.S.N.L. marketing network, hence, it has recommended for fresh tenders. Such decision is not made to one as aforesaid but to all. The decision is taken by 5 members of the committee exclusive of Chairman. Plurality should be respected. It is very difficult to accept the submission of the petitioner that 5 members at a time have done an arbitrary action against all eligible candidates. Before acceptance of their bid or expression of interest, no question, of discrimination is available amongst the candidates. Therefore, a preferential right at the time of fresh selection, if others are similarly situated, can only be the best of legitimate expectations but nothing more and nothing less than that.

8. Having so, we do not find any reason to pass any affirmative order in favour of the petitioners. All the three writ petitions are accordingly dismissed. Interim orders, if any, stand vacated.

9. No order is passed as to cost.

10. However, passing of this order will in no way affect the right of petitioners to participate in the fresh selection and in case they participate and raise their preferential right in view of their earlier eligibility, the same can be taken care of by the competent authority of selection, if other candidates are similarly situated.

Ashok Srivastava, J.

11. I agree.