

(2021) 09 J&K CK 0040

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 1330 Of 2021, Contempt Petition (S) No. 356 Of 2021

Firdous Kamran Shora

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 24-09-2021

Acts Referred:

Constitution Of India, 1950 — Article 12, 226

Citation : (2021) 09 J&K CK 0040

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ali Mohammad Magrey, J

1. In the instant Petition, the Petitioner is aggrieved of Notice No. 6 (6) 58 EE/DIV/SGR/350 dated 5th of July, 2021 as well as the impugned tender Notice bearing NIT No.12/EE/DIV/SGR/2021-22 dated 7th of July, 2021 issued by the Respondent No.3.

2. Mr A. H. Naik, the learned Senior Counsel representing the Petitioner, submitted that the action and inaction on the part of the Respondents in determining the contract between the parties and changing the site, that too, without negotiating with the Petitioner amounts to arbitrary exercise of power, aimed at giving undue benefit to some other blue-eyed contractor(s). It is submitted that there was no agreement executed between the parties, therefore, there was no question of invoking any clause of the agreement which was not in existence.

3. Objections stand filed on behalf of Respondents 2 and 3. It is stated that the BSNL, Civil wing, was assigned the responsibility of execution of NFS project by the Department of Telecommunication (Government of India). The Project, as stated, is meant for enhancing the communication system of the Army and is of

national importance as the project site is located at a highly sensitive strategic area of LOC. It is pleaded that the Petitioner was awarded the contract for timely execution, but he, despite repeated reminders, did not execute the same on time, constraining the Respondents to take the impugned action against the Petitioner and re-tender the work, therefore, no interference is warranted in the said process from this Court.

4. Heard the learned counsel for the parties, perused the pleadings on record and considered the matter. I have also gone through the relevant records made available by the learned Senior Counsel representing the Respondents 2 and 3.

5. At the very outset, what requires to be stated is that the Courts are expected to exercise judicial restraint in interfering with the administrative action, particularly in the matter of tender or contract. Ordinarily, the soundness of the decision taken by the tender issuing authority ought not to be questioned, but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned, firstly, if the decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached or; second, if the process adopted or decision made by the authority is malafide or intended to favour someone or; third, if the public interest is affected. In the case on hand, when the Petitioner-firm did not fulfil all the terms and conditions prescribed by the Respondents with regard to completion of the project on time, despite repeated reminders, in such eventuality, the decision of the Respondents in issuing the impugned communication and putting the work to fresh tender cannot be said to be one where they have acted in a manner in which no responsible authority acting reasonably and in accordance with the relevant law would have acted. Furthermore, a bare perusal of the pleadings on record, does not indicate that the decision made by the authority is malafide or intended to favour someone. In fact, the decision of the Respondents was the result of non-completion of the Contract on time on part of the Petitioner, more so when the entire project was located at a highly sensitive and strategic area of LOC. Likewise, the third ground of public interest is also not affected in the present case because while it may be in public interest to have greater competition, it is also in public interest that all the tender conditions are complied with as prescribed by the tender issuing authority and that there is no uncertainty in that area.

6. Law on the subject of scope of judicial review in the matters of Contract is no more *res integra*.

7. In case titled 'Tata Cellular V. Union of India: (1994) 6 Supreme Court Cases 651', at Paragraph No.94, Hon'ble the Supreme Court of the country, while dealing with the issue similar to the one subject matter of the instant Petitions, evolved the following principles:

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 decision. 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. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. 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 facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides; and

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

8. In case titled 'Sterling Computers Limited V. M&N Publications Ltd: (1993) 1 SCC 445', the Apex Court, at Paragraph No.12, has laid down as under:

"In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognized by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive."

9. Again, the Apex Court, in case titled 'Directorate of Education & Ors. V. Educomp Datamatics Ltd. And Ors: (2004) 4 SCC 19', while applying the principles enunciated in Tata Cellular's case (supra), at Paragraph No.12, observed, thus:

"12. It has been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That 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, malafide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wise or logical. The Courts can interfere only if the policy decision is arbitrary, discretionary or malafide."

On an appreciation of the law laid down above, what comes to limelight is that the modern trend points to judicial restraint in administrative action and that the Court does not sit as a 'Court of Appeal', but merely reviews the manner in which the decision was made. It has also been declared that Court does not have the expertise to correct the administrative decision and that 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. Furthermore, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and quashing administrative decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

10. It is, thus settled that public authorities must be left with the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution of India in many cases for years. It is for this reason that the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons keeping an eye on the augmentation of the revenue. But, even in such matters, they have to follow the norms recognized by Courts while dealing with public property. It is not possible for the Courts to question and adjudicate every decision taken by an authority because many of the Government Undertakings, which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances, a discretion has to be conceded to the authorities who have to enter into contract by giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bonafide manner, although not strictly following the norms laid down by the

Courts, such decisions are upheld on the principle laid down by Justice Holmes that Courts, while judging the constitutional validity of executive decisions, must grant certain measure of freedom of 'play in the joints' to the executive.

Looking at the instant case in the above perspective, the Petitioner has not been able to establish before the Court that the decision taken by the Respondents putting the works in question to fresh tenders is an arbitrary exercise of power or that the same was/ is mala fide in nature. In 'Jagdish Mandal v. State of Orissa: (2007) 14 SCC 517', at Paragraph No.22, the Hon'ble Supreme Court held, thus:

"22. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

From a bare perusal of the pleadings placed on record as well as after going through the relevant records placed before the Court by the Respondents, it is more than apparent that the decision taken by the Respondents in putting the work in question to fresh tenders was certainly not irrational in any manner whatsoever or intended to favour anyone. This decision, apart from being lawful and sound, appears to have been taken by the Respondents in view of non-acceptance of all the terms and conditions of contract on part of the Petitioner.

11. For all that has been said and done hereinabove, I do not find any merit in this Petition. It entails dismissal and is, accordingly, dismissed. Interim direction(s), if any, subsisting as on date, shall stand vacated.

12. Pending miscellaneous applications, if any, shall also stand disposed of, accordingly.

13. No order as to costs.

14. The relevant record as produced by Mr Beig, the learned Senior Counsel representing the Respondents 2 and 3, is returned to him in the open Court.

CCP(S) No. 356/2021:

15. This Contempt Petition is filed alleging violation of ad-interim Order dated 14th of July, 2021 passed in WP(C) No. 1330/2021.

16. In view of the dismissal of the Writ Petition wherein the interim Order was passed, as above, the Contempt Petition has turned infructuous which shall stand closed as such.

17. Registry to place a copy of this Judgment on each file.