(2014) 11 P&H CK 0015

In the Punjab And Haryana At Chandigarh

Case No : CWP Nos. 21637, 25350, 26637, 23683, 26636, 24124 of 2013 and 21772, 21995, 20820, 21885 of 2014

Gagandeep Jindal APPELLANT

Vs

State of Punjab and Others RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34 6
Constitution of India, 1950 — Article 14
Limitation Act, 1963 — Section 14

Citation : (2015) 178 PLR 275

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : Rajiv Atma Ram, Senior Advocate and Arjun Pratap Atma Ram, Advocate for the Appellant; Reeta Kohli, Additional Advocate General and Hanspal Virk, AAG, Advocate for the Respondent;

Final Decision : Dismissed

Judgement

K. Kannan, J.

1. The writ petition seeks for quashing certain clauses in the milling policy issued for the year 2013-2014 by an application of the relevant terms which we shall extract immediately. The petitioner was denied the right of allotment of paddy for milling. The petitioner, therefore, seeks also for quashing of the order denying him his alleged right. There were several other writ petitions filed on similar grounds and they were all heard together. This batch would, therefore, consider the relevant terms of the policy and whether they conflict with any of the provisions of law or arbitrarily laid down to render them invalid as contended by the petitioners. The relevant terms of the policy are took up and the facts as set forth in CWP No. 21637 of 2013 are treated as facts in the remaining cases as well. The relevant clauses put to challenge would be taken up one after another. The definition of defaulter is contained in Clause (xv):

"Defaulter" means a mill/miller who is yet to clear the entire dues of rice and/or settle the accounts of any procuring agency/agencies of the previous year (s) and as detailed in Clause 11(1)."

There is an issue which is taken in this case with reference to the allotments as having been made to collection points which are out of jurisdiction that had, according to the petitioner, caused an impossible situation and the allotments so made could not have taken as any valid allotment in the eye of law. This was sought in the context of the petitioners'' case that express orders of the Court had been deliberately flouted. The effect of this provision would also require to be considered and therefore, clause 5 defining linkage of mandis and rice mills would require to be extracted:

"5. Linkage of Mandis and Rice Mills:--

The purchase centers/mandis shall be linked with the nearest milling centre/ storage centre (s) keeping in view the availability of milling capacity at the milling/storage centre(s) at which paddy is proposed to be stored/got milled. All the procuring agencies shall make necessary arrangements of linking the proposed purchase centres/mandis with the storage points/milling centres in such a way so as to incur bare minimum expenditure on transportation. The agencies may also indicate at least one alternate storage point where paddy could be stored in case of any exigency. This should be got done by the agencies at the time of allotment of rice mills.

Similarly, storage of paddy at a particular milling centre shall depend upon the clear and specific milling capacity available at that centre."

The manner of allotment of rice mills and the disqualification arising for a defaulter to the extent to which they are relevant are reproduced hereunder:--

"11H a. If a rice mill has to deliver custom milled rice of any agency pertaining to the previous years including 2012-13.

xxxxxx xxxxxx xxxxxx

e. If a police/court case/arbitration case is pending against the miller on account of embezzlement relating to custom milling or levy rice pertaining to any crop year. However, if the miller clear the default of the concerned agency along with penal interest at the rates for the relevant year (s) as decided by the govt. from time to time he may be considered for allotment without prejudice to the outcome of the FIR/Court case/arbitration case pending against him."

2. The petitioner''s case is that he has been construed as defaulter by virtue of the fact that the stocks entrusted to him for the year 2009-10 could not be re-delivered on time on account of the poor quality of variety of paddy that was supplied. Elaborate arguments had been made by the learned Senior Counsel to impress upon a point that there had been no default on his part and the inability to supply within the time was really the outcome of several other factors like lack

of adequate space, linkage of the petitioner to the storage points which were out of jurisdiction, poor quality of the paddy supplied etc. so that the default attributed to the petitioner was not justified at all. I merely set this out for the sake of bringing forth the contentions which the learned Senior Counsel for the petitioner set out but I will not go into any of those aspects of whether there had been any deliberate default on the part of the petitioner or the respondents'' conduct itself had contributed to such a situation of admitted breach that had been occasioned to mill the paddy that had been delivered to the petitioner. All that would be necessary to consider the challenge to the clauses, especially the fact of whether the arbitration awards which have not attained finality that cast the liability on a rice miller could be used as a ground for denying the allotment This examination becomes necessary in view of the fact that a defaulter so defined shall be denied the right of entitlement to allotment if on account of such default the matter is referred to arbitration for adjudication and there is also an award passed against the miller. The petitioner''s case deals with the situation of an award as having been passed against the petitioner which, however, is not become final by the fact that he has challenged the correctness of the order before a Civil Court in an objection under Section 34 of the Arbitration and Conciliation Act. The petitioner would refer me to decisions that have dealt with me effect of stay by challenge to an order brought under Section 34 and decisions that have examined the legal effect of the stay order granted by the Court. The learned Senior Counsel referred to the decision of the Supreme Court in Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, .

3. The counsel would argue that an order which is stayed is in the eye of law nonexistent and consequently no effect could be given for the same. The attempt of the petitioner was to state that the policy term that defined a defaulter as a person who had still dues marked against him as outstanding could not be invoked to disqualify the person if an award was not passed or if the award has been passed but stayed by express orders or implication. We have already extracted clauses (a) and (e). The reference to clause (a) obtains significance only in the particular custom milling policy of 2013-14 for the definition of defaulter shall be read in the context of a failure to deliver custom milled rice pertaining to the previous years including 2012-2014. The alleged period of default is admittedly for earlier years. Clause (e) deals with the specific situation of the pendency of an arbitration case and since the arbitral award had been stayed by the institution of an application under Section 34, the petitioner could not be disqualified.

4. Even without joining issue on the merit, the counsel for the State would argue that policy decisions of the State shall not be interfered with by the Court unless there is a serious issue of arbitrariness in the policy. The counsel would refer to the decision of the Supreme Court in Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and others and Industrial Development Corporation of Orissa Ltd., that dealt with renewal of mining licences and the Central Government policy relating to the determination of views of expert committees. The Court held in the said

decision that where legal issues are interwined with those involving determination of policy, Courts of law have to be wary and must exercise the jurisdiction with circumspection, for, they must not transgress into the realm of policy making unless the policy was inconsistent with the Constitution and the laws. The counsel for the respondent would state that there is no violation of any provision of statute made and hence, the policy cannot be challenged. The counsel would also refer to the decision of the Supreme Court in State of Uttar Pradesh Vs. Uttar Pradesh University Colleges Pensioners'' Association, that held that the grounds of interference would be only in two occasions when a State policy is either unreasonable or against public interest and there was hardly any issue urged for supporting the grounds admissible in law. A recent judgment in State of Haryana and Others Vs. Mahabir Vegetable Oils Pvt. Ltd., that dealt with the exclusion of judicial review in policy matters relating to withdrawal of exemption under the General Sales Tax Act when the Court said that the interference with fiscal policy, of Government, more so, when such decisions are taken in public interest, would be not permissible. Thus limit of interference in policy issue is always limited to what is against public interest or against law. In this case, the learned Senior Counsel appearing on behalf of the petitioner would argue that the provision for disqualification when an arbitral case was pending was really in the nature of a stipulation which was against the statute namely of rendering an efficacy of challenge before a Court for setting aside award under Section 34 and an order of Court that grants stay.

5. It must be immediately pointed out that there is no direct conflict in any statutory provision that the policy stipulations concern with. On the other hand, the effect of order of stay was equated to law and an argument was built to say that the policy that would treat a miller as a defaulter even when a case was pending was both unreasonable and against law.

6. I pointed out to the learned Senior Counsel appearing on behalf of the petitioner that there could be several instances where the pendency of appeal and operation of stay may have a bearing on how the order would be otherwise executed if the stay was not there but independently of the effect in the stay itself, there may arise disqualification in other proceedings. I pointed out to him the situations under the Passport Act which sets out under Section 6 the conditions when a passport could be refused. The relevant portion is reproduced as under:--

"(e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years; (f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India;"

7. The Rules that require a recommendation from the State police would include reference to a criminal case which resulted in conviction and although an appeal

is instituted and a person is on bail, he would still be disqualified by the bare application under Section 6 unless there are other circumstances justifying the issue. Similar disqualification would also exist if this example were to be rejected on the ground that it applied to decisions of criminal court and would have no bearing to civil liability even in issues relating to, say, a custody of child and the suitability of one of the competing parents to claim the child. The conduct of a spouse who had not paid maintenance when there is a decree for maintenance would always be taken as relevant even if the decree for maintenance had been stayed for some reason. A judgment of conviction that stays the sentence or the decree determining a civil liability that is stayed may not make possible incarceration of the accused or to enable the decree holder to recover the money respectively. On the other hand, they will be seen as circumstances disentitling a person to secure the benefit of the stay order.

8. Any policy that takes note of existing realities of pendency of cases for several years and to exclude a person against whom claims are made by the State, is a manner of protecting itself from engagement with a customer who still has unresolved conflicts with the State. If there is a default that had occasioned and claim is pending, there is no statutory right which a person can claim for obtaining a State largesse. A miller that seeks for allotment of paddy for milling has no statutory legal right to demand the allotment except in a situation where he is able to show discriminatory treatment or any aspect that would fall foul of the rule of equality enshrined under Article 14 of the Constitution. A policy term that picks and chooses for its customer a candidate who owes no amount to the State or its agency cannot be taken to be arbitrary at all.

9. The flaw in the argument of the learned Senior Counsel for the petitioner is that the order of stay or award and decree that is not final must be taken to result in an inference that a person is not defaulter in the eye of law and hence, he shall be granted the allotment. If we must perceive the permissibility of challenge only through the prism of Article 14 then we can be easily visualize creating a category amongst the rice millers of persons who are not in any way liable through any decree or award and another class of persons against whom claims are made but adjudication is not complete or decrees or awards exist but they are however stayed. That itself is a reasonable classification so far as the State is concerned to consider the eligibility of person to whom the contract could be awarded. If every award or every issue of liability is brought in challenge in Courts and they are pending, the miller will have the benefit of securing of the allotments irrespective of the fact that there are actual arrears payable but they are stayed by an operation of the Court orders. It will mean gross prejudice to the State as well as the public interest in allowing for recurring award of contracts even when the issue of liability is not finally settled. In this context, I will find no error in a policy that disqualifies a miller who has defaulted in carrying out the milling for whatever reasons and a claim is made by the State although the exact amount of liability has not been finally resolved.

10. The operation of stay can only prohibit a State from filing execution and realizing the amounts if there exists no further obligation on its part. If a person against whom the State claims some amounts and that person wants a privilege to be extended by the State in awarding a contract, he cannot insist that the operation of the Stay has completely effaced the disqualification. The stay order can eclipse only the enforceability of the decree or award in the same case but will not take away the right of the State to categorize him as a different person who may not be treated at par with a person against whom there exists no current or past liability. I cannot, therefore, find any justification in a challenge brought to these proceedings.

11. In some of the writ petitions for the custom rice milling policy for the years 2014-15, the petitioners have brought also a challenge to certain classes that render ineligible a member of the family of a defaulter. For instance in CWP No. 21885 of 2014, the challenge is specifically to Clause 11H(c) in 2014-15 milling policy that reads thus:--

"11H(c). In case the owner/partner/Director of a lessee/owner rice mill becomes a defaulter of any reason whatsoever, and is an owner/partner/Director of a new lessee/owner rice mill, he shall not be considered for allotment, or if the transfer of a rice mill either through sale or through lease is found to be sham or any financial relation is established between the new and old mill, then the said mill and the mill premises in question shall also be declared as defaulter. Besides, in case of family member of a defaulter rice mill, proof of separate residence/ separate family shall not itself be sufficient to prove that his project is not being financed/promoted by his defaulter family members/blood relations. The Director/ Commissioner, Food, Civil Supplies shall examine such cases and his decision, which shall be in writing by way of reasoned order, in this regard shall be final and binding on all concerned."

12. The contention is that even if a person is not himself a defaulter, the fact that he is a partner or a director or a member of the family would not disqualify him. The family defined in clause 3(xiv) as group of people who share ties of blood, marriage or adoption which includes the husband, the wife and their dependent children and having one common ration card. Expression ''family'' however obtains an extended meaning while examining the case of a defaulter where through an independent clause in 11H(c) which we have extracted would reveal that if any member of a family of a defaulter rice mill seeks for allotment, he shall also be treated as defaulter and in such case proof of separate residence/ separate family shall not itself be sufficient to prove that his project is not being financed/promoted by his defaulter family members/blood relations.

13. Here the proof is that even apart from proof that there is a separate residence and separate ration card, it has still to be established that a person has financial independence. This again, in my view, as a matter of policy, is correct, for, the presumption in a normal Hindu family is that the family remains joint. Though mere is no presumption that a joint family owns joint family properties,

in typical situations where a particular person is disqualified from obtaining allotments by the fact that he is a defaulter, it would be possible for making a claim through another member of the family and making possible an allotment in the name of such member by either making a fresh investment of acquisition of rice mill terms or allotment in a joint family partition that could even be oral to such a member of the family to make it appear as though he is an independent person. A policy that would exclude the family by itself cannot be faulted but to the extent to which it is tempered by the fact that the financial independence will have to be established if he is a separate member there is a reasonableness in approach; A separate residence and ration card may prove that the family is not joint in mess or residence but, in law, even residence and mess need not necessarily result in division in status that would require specific proof. If, therefore, there is a requirement that would make the existence of an independent financial ability for a person claiming to be a separate member of the family to make him eligible, the State shall be bound to examine such proof and see whether he could be still awarded the contract on a plea and proof permitted by the relations enumerated under the policy. Consequently if a son, spouse or the father has been made a defaulter but an allotment is sought by a person related to him and if adequate proof is also offered that his or her own rice mill has been under his control and ownership in his own right and there is evidence of adequate resources for such holding then the disqualification will not attach to such a person. A policy that makes possible such enquiry and allows for an exception to such class of persons who can establish their financial independence is reasonable and Twill not, therefore, find such a policy term as disqualifying a member of the family but subject to certain exceptions shall also eligible.

14. It is also pointed out by the counsel that the policy term that relieves a person that discharges the claims under a decree or award from disqualification makes irreversible the payment and hence unjustified. Doctrine of restitution is a well entrenched concept in all situations where an award is modified or reversed that will clothe a person, who has paid any amount in purported attempt to become eligible to allotment to claim refund of the amount by a reversal of the decision. There could be no estoppel against a miller to demand the amount or cast a forfeiture of his right to prosecute the claim in judicial proceedings that notwithstanding the payment made to earn the allotment, no amount is payable at ail.

15. Even while holding that the policy terms are not arbitrary for interference, I must examine the factual situation brought out in CWP No. 21885 of 2014 where the petitioner contends that the liability of the father for certain arrears cannot disqualify him. The petitioner files in support documents such as receipts of money for sale of paddy opted on saving accounts and VAT registration as proof of his separate source of money. The documents filed before the Court are hardly sufficient or at least in the writ petition, I cannot see them as formidable documents to make a definite assessment that the petitioner has independent

sources. For instance, the petitioner''s documents relating to receipts are for the year commencing 2012-2014 when his own father had been declared a defaulter for the year 2011-2012. All the documents relate to periods subsequent to the time when the father was a defaulter and consequently, there is no surprise that the petitioner has had all his dealings subsequently in his own individual name. The only document which is far ahead of the time when his father was made a defaulter was a VAT registration made in the year 2006. The copy of the IT return is produced only in the year ending with 30.03.2013 that is at a period when the father was already a defaulter. None of the documents filed by the petitioner in CWP No. 21885 of 2014 is sufficient to infer that he had any independent financial ability or resources to own the rice mill and carry on the operations independently.

16. In some of the writ petitions, the challenge is to the policy on the consideration that the liability has not been fully determined yet. The quantum of liability or whether there is still a case pending is not really material, for, so long as there is a claim made at the instance of the State for certain transactions for previous years, the classes of persons against whom claims are made where adjudications are still pending would constitute a class that is separately identifiable and disqualification that is attached in a case after decree or award is passed could well be applied to the class against whom the amount is not determined but all the same there is a claim made. Here again it must be noticed that there shall be specifically no entitlement for the State to secure the amount even when an amount is not determined but if a person against whom a demand is made wants a favour from the State for being allotted with paddy, then the State has right to impose a condition that if the amount is not paid, he will have no such benefit of grant of largesse.

17. To reiterate, it is not as if the amount which is paid is lost in favour of the State for all times. Any decree that is modified or varied is always subject to restitution and if a miller seeks for an allotment, he has to pay the amount and claim the refund with interest in the manner contemplated by law if there is a variation later. No miller can dictate to the State that it will have litigation pending in various forums where the liability inter se is not fully decided but they shall still have the State''s favour to their benefit. Such a contention is grossly unfair to the interest of the State and I will find no reason to accommodate the prayers in any of the writ petitions.

18. There are applications for contempt filed to complaint that the State had not made their allotments in spite of orders of the Court. It is not as if the State did not make the allotment but the petitioners had a case to contend that the allotments had been from various storage points which were not within the jurisdiction. I will not find this to be contemptuous conduct on the part of the State to visit them with actions for contempt. It would also require evidence to be examined whether there was a deliberate violation of the Court order. I would not find such evidence as available and if the petitioner has been put to loss by

deliberate withdrawal of supplies even when the supplies could have been effected pursuant to the Court''s order, I will allow the petitioner a liberty of filing a suit for damages and in such a suit, the petitioner will be competent to adduce evidence that there were sufficient stocks available in the storage points to which the petitioner mill had linkage and supplies had not been deliberately made on account of the pendency of the Court case between the parties. If such a suit were to be filed, the period during which the contempt petition was filed to the present date will be considered for exclusion if an appropriate application is filed under Section 14 of the Limitation Act. All the applications for contempt are also dismissed but with liberty to pursue alternative remedy in the manner enumerated above. All the writ petitions are dismissed.

