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(2014) 10 BOM CK 0139

In the Bombay High Court

Case No : Writ Petition No. 2293 of 2013

Infoquest Infotech Pvt. Ltd. — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 29-10-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Special Economic Zones Act, 2005 — Section 15

Citation : (2015) 316 ELT 633

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J

Bench : Division Bench

Advocate : S.C. Naidu and Rupesh Mandhare instructed by Sean Wassoodew, Advocates for the Appellant; Advait M. Sethna, Manisha Balse, Ruju Thakkar and Ajay Patil, Advocates for the Respondent

Judgement

1. The Petitioner No. 1 is a Private Limited Company and registered under the Indian Companies Act, 1946. It states that it has its registered office in a zone which is entitled as Santacruz Electronic Export Processing Zone (SEEPZ). The Respondents are the Authorities who have to develop and maintain such zones so as to promote setting up of industries and consequently the industrial growth in the State and the Nation as a whole. This is a case where a litigant approaches this Court under Article 226 of the Constitution of India and without satisfying essential prerequisites for invoking that jurisdiction, namely a legal or a constitutional right prays that some inaction of an authority called the Development Commissioner, second Respondent to the Writ Petition should visit him with a direction from this Court to consider the Petitioners request so as to allow them to continue and utilize Unit No. 101, SDF-IV, SEEPZ, Andheri (East), Mumbai 400 096.

2. In the present case on the own showing of the Petitioners by virtue of an Application made before the Special Economic Zones Act, 2005 was enacted they were granted permission for setting up an industrial unit for development of computer software and services. An Application was made on 11th August 1995

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for grant of such permission and on 10th October 1995 a letter of approval was issued in favour of the Petitioners. That letter of approval itself sets out the terms and on which the Petitioners have based their case. It has been categorically stated therein that this letter is valid for a period of one year from the date of its issue for commencement of commercial production and will automatically lapse if an Application for the extension of the validity period of this letter of approval is not made before the expiry of the said period of one year. On 1st May, 1996 letter of possession in respect of this Unit ad-measuring 334 square meters was issued which is conditional upon execution of a lease agreement and levy of lease rent. The Petitioners themselves have set out in the Petition that the general bond was executed by them on 1st August 1996 and thereafter there was an agreement executed on 14th October, 1996. The agreement is styled as tenancy agreement and on the own showing of the Petitioners was valid for period of five years from the first day of the month and year of possession at annual rent of Rs. 98,530/-.

3. Thereafter, what the Petitioners have been projecting before this Court is that despite due fulfillment of the obligations and carrying on legitimate business activities with positive results the approval in their favour was not renewed. It is contended that upon the Special Economic Zones Act, 2005 coming into force, the Petitioners are not required to apply for an approval in terms of the provisions therein namely, Section 15 sub-section (1), the proviso thereof has been relied upon to urge that an existing Unit shall be deemed to have been set up in accordance with the provisions of this Act and such Units shall not require approval under the Special Economic Zones Act, 2005. It is then urged that a letter of approval under Rules 18 and 19 of the Special Economic Zones Rules, 2006 which fall under Chapter III of the Rules envisage a proposal for approval of the Unit, its consideration and eventual approval however, sub-rule (6) thereof is pointed out by Mr. Naidu, learned Counsel appearing for the Petitioners to urge that the letter of approval shall be valid for five years from the date of commencement of production or service activity and it shall be construed as license for all purposes and to authorize operations and after completion of five years from the date of commencement of production the Development Commissioner may at the request of the Unit extend validity of the letter of approval for a further period of five years at a time.

4. The argument is that though this letter of approval by itself or its renewal for extension does not create any legal right in the immovable property and that requires execution of a valid tenancy agreement still, a clause in the tenancy agreement executed in favour of the Petitioners in October 1996 is relied upon. That clause in terms of the settled provision enabling renewal of lease gives an option to the Petitioners to seek extension of the tenancy agreement. Mr. Naidu would submit that a tenancy agreement draft and duly signed by the authorized representative of the Petitioners was forwarded but no action has been taken on the request of the Petitioners and as contained in the communications commencing from as early as October 2001. In the meanwhile, the argument is

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that appraisal or progress reports have been duly forwarded which show that the Petitioners continued their business operations and particularly of export of software/information technology. The business therein is not dwindling or can by no stretch of imagination be termed as unsatisfactory performance. In these circumstances, our attention is invited to a letter dated 24th April, 2006, copy of which is at page 137 of the paper book. Conceding that in terms of this letter the Petitioners applied on 8th May, 2006 to the Development Commissioner and requested him to approve the projections and even execute a tenancy agreement, it is the inaction of the Authorities and threats of dispossession which according to the Petitioners enable them to approach this Court in writ jurisdiction. The argument therefore is that the Petitioners cannot be dispossessed or evicted when the Authorities have not taken any decision on their pending Applications, if the inaction of the authorities for all these years has resulted in the Petitioners continuing to occupy the premises and using it for their legitimate business activities then, the least that this Court should do is to direct the Authorities to take a decision on the pending request promptly and expeditiously. Until then the request is not to disturb the Petitioners occupation use and possession of the premises.

5. Reliance is placed upon a judgment of the Hon''ble Supreme Court in the case of Bharat Steel Tubes Ltd. and Another Vs. State of Haryana and Another, . That is to urge that whenever Applications of the present nature are made they ought to be dealt with and decided within a reasonable time. The reasonableness however would depend on circumstances in each case. Mr. Naidu has invited our attention to the Annexures to Affidavit-in-Reply of the Deputy Development Commissioner to show that the appraisal reports styled as annual performance reports from 2001-2002 till 2011-2012 have indeed been received in the office of the Development Commissioner but their status is not shown as rejected. Their being disposed of does not mean that they are rejected. For all these reasons it is submitted that the Writ Petition be allowed.

6. Mr. Advait Sethna appearing on behalf of the Respondents on the other hand would urge that the approval for commencement of production is from 1st October 1996 and that was valid for a period of five years. The validity expired and there is no renewal of the letter of approval thereafter. The Application for renewal is being made for the first time in 2013 and by Exhibit "RR" page 169, if that is how the Petitioners have approached the matter, then, they are aware of the fact that the continuance in possession and occupation confers them no legal rights. In the case of a public property any unilateral exercise cannot be countenanced is the submission. It is for the authorities to take an informed decision in accordance with law. The Petitioners cannot come to this Court and pray that any writ much less a prerogative one be issued in their favour. For all these reasons it is submitted the Writ Petition be dismissed.

7. With the assistance of the Counsel appearing for parties, we have perused the Writ Petition and all relevant Annexures thereto. We have perused the Affidavits-

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in-Reply, Rejoinder and Sur-Rejoinder. At the outset we must emphasize that this case is of a public property and vesting in the authorities for being held by them as Trustees of the Public. They cannot at their sweet will, whims and fancy take a decision to allot a property of this nature nor distribute or hand over it to anybody of their choice. Public property must be dealt with and disposed of in an open and transparent manner. That is by public participation. That is inviting all industries existing or proposed or those interested in setting up a Unit in the Industrial Zone to apply for an approval or permission in terms of the Special Economic Zones Act, 2005. Needless therefore to say that the ignorance of or inaction regarding continued occupation of a party like the Petitioners, by public officials or authorities can never be countenanced and upheld. If anybody gets an impression that by inaction of these authorities any rights are created in their favour in public properties and lands then, that impression must immediately be removed. None can continue much less squat on public properties in this manner either by taking advantage of any inaction of the public bodies or statutory authorities or by colluding with them. We cannot defeat the mandate of Article 14 of the Constitution of India and the Constitution itself by upholding the request of the Petitioners and parties like them.

8. It is too settled a legal position but requires reiteration now a days because of the ignorance of litigants and those advising them that writ jurisdiction is not to be invoked by dropping an application in the High Court and treating the High Court as drop box. The High Court cannot pass an order directing any statutory Authority or the State to consider some representation or pending application/ letter of the litigant invoking the writ jurisdiction unless that party establishes such a legal right. In the case of C. Jacob Vs. Director of Geology and Mining Indus. Est. and Another, this tendency of the High Courts has been strongly deprecated by the Hon''ble Supreme Court by observing thus :

"6. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters. Taking advantage of this position, the ex-employee files an application/writ petition before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any ''decision'' on

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rights and obligations of parties. Little do they realize the consequences of such a direction to ''consider''. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to ''consider''. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/ petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.

7. Every representation to the government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the department, the reply may be only to inform that the matter did not concern the department or to inform the appropriate department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim.

8. When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of ''acknowledgment of a jural relationship'' to give rise to a fresh cause of action."

9. In the present case, the argument is not that no permissions for approvals are required or that the initial permission or approval granted prior to enactment of Special Economic Zones Act, 2005 confers any absolute right. It is a conceded position that both the letter of approval and the tenancy agreement were valid for a specified period. Thereafter, the letter of approval has to be renewed and the renewal is a discretion in the Development Commissioner or the competent Authority. He is not obliged to renew the approval initially granted. That can never be the mandate of such a law nor is the Parliament intending that the authority which has such a discretion cannot scrutinize and verify the relevant applications or take into consideration the factors such as the performance of the Unit its economic and financial standing and viability etc. In the present circumstances and when it is conceded that after five years there is neither a valid letter of approval nor a valid and binding tenancy agreement then, we do not see any legal right in the Petitioners. Their continued occupation and use of the premises will not enable us to exercise our plenary powers and issue

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prerogative writs. The jurisdiction of this Court under Article 226 of the Constitution of India is extraordinary, discretionary and equitable. In these circumstances, we do not find any basis for the request made by the Petitioners. The Hon''ble Supreme Court in the case of The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, has summarized the legal principles particularly on issuance of a writ of mandamus in the following words :

"14................The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justitiae). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

15. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for the issuance of the said writ is, whether or not substantial justice will be promoted............."

10. It has been explained in the Affidavit-in-Reply by the Respondents as to how the Petitioners are disentitled to any discretionary and equitable relief. It has been pointed out in the Affidavits that the issuance or extension of the letter of approval is to be considered by the approval committee which is a statutory authority constituted under the Special Economic Zones Act, 2005 and is performance linked. The Unit is not eligible for extension of letter of approval based only on their performance but on satisfaction of the other relevant factors such as encouragement to varied industries or Units, the requirement of space so as to accommodate different or distinct nature of activities, making the Zone broad based and truly representative in character by not allowing certain type of Units to set up their business.

11. The Petitioners use and occupation has been termed as unauthorised and illegal.

12. There is an Affidavit-in-Rejoinder and in which the Petitioners assert to the contrary. They rely upon the performance and submit that if the performance has been improving, though initially there were some hurdles and obstacles, then, the authorities cannot make any capital of the same. There is an attempt to point out as to how the performance annually and compiled in the reports goes to

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show that the premises have not been misutilised but used for legitimate export business.

13. We need not enter into this controversy simply because the Petitioners reliance on the pending Applications and based on their annual performance report by itself does not create any legal right in their favour. The authorities have then explained this position and to get over the alleged inaction pointed out that the show-cause notices were issued to the Petitioners relating to non submission of annual performance reports and nonpayment of rent etc. but they were under a legal misconception. Even if such notices have been received and some annual performance reports were forwarded prior thereto or thereafter or rent was paid and receipts were collected that does not mean that the Petitioners are possessing any right to continue in the premises. We see some basis for this because it is conceded as noted above that so long as there is no valid tenancy agreement and in respect of the premises then all such pleas and requests for either grant or continuation of the letter of approval by themselves will not mean that the Petitioners have a lease in their favour to occupy and use the premises. In such circumstances and when this is the conceded position we need not advert to these contentions of the Petitioners or the Respondents in that regard. Further, we are of the view that whether the Petitioners failed to achieve the minimum export obligation or target during the initial five years block and later on is a dispute which cannot be resolved by us in writ jurisdiction. It is a factual aspect and we cannot go into the same. More so, when we have been shown a letter from the Petitioners themselves and at page 57 of the Petition paper book Annexure ''F'' which states that they are submitting their revised import/export production for the five year block commencing from 2001-2002 to 2005-2006. The letter is self explanatory because the Petitioners do not make a bold statement about their performance as has now been made. They start in a guarded manner by saying that the projected export target was not achieved because a group named LG with whom the Petitioners tied up pulled out of the arrangement and set up their own center in Bangalore. The Petitioners were looking out for fresh initiatives in U.S.A. and they are hopeful of achieving the projected export in future. They may have had such business opportunities but we are on a more vital and fundamental issue namely the use and occupation of the premises. Those have to be allotted to deserving industrial units. Those Applicants and who are interested in establishing the Unit have to in terms of Rule 17 of the Special Economic Zones Rules, 2006 forward a proposal and in a specified form containing the relevant particulars. Thereafter these proposals have to be considered by an approval committee. If there is a decision taken to issue letter of approval that has to be in terms of Rules 17, 18 and 19. In such circumstances it is not as if the Units which are existing prior to the Act being enacted have any absolute right nor is it the claim. The definition of the terms in the Act and to which our attention has been invited does not carry the case any further because existing Unit which has been set up on or before commencement of this Act is a term defined in the Act so as to enable it to then subject itself to

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the Act by a deeming fiction. The Proviso below sub section 1 of section 15 clarifies that an existing Unit is deemed to have been set up in accordance with the provisions of the Special Economic Zones Act, 2005. Such Units may not require approval under the Act but after the initial period is over they would have to subject themselves to the authority of the Development Commissioner. That is how the harmonious reading of these provisions would reflect the legislative intent. Therefore, in the absence of a tenancy agreement the Petitioners cannot seek any relief from this Court. Further, there being no action or decision taken on the Applications does not mean that this Court should exercise its jurisdiction in favour of the Petitioners and that too belatedly. The initial letter of approval expired by its own force in 2001. Thereafter, beyond some correspondence there is nothing emanating from the authorities which would enable the Petitioners to argue and successfully that a letter of approval has been issued in their favour and the lease agreement must therefore follow. In such circumstances, we cannot utilize writ jurisdiction to force the authorities to pass any orders on the representation made by the Petitioners and to extend the letter of approval or to grant any fresh approval. In the given facts and circumstances we cannot also direct the authorities to execute a tenancy agreement in favour of the Petitioners. The Authorities must deal with the immovable property in accordance with the Special Economic Zones Act, 2005 and the constitutional mandate emerging from the Hon''ble Supreme Court judgment in the case of Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others, held as under :

"25. In Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, , Bhagwatl J. speaking for the Court observed : (Para 14 of AIR):

"Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that 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, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and

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it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that 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 in reasonableness or is not informed with public interest. This burden is a heavy one and it has 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 weigh with 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. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of Jaw. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

(emphasis supplied)

31. What needs to be emphasized is that the State and/or its agencies/ instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/ decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

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32. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favoritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

33. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution.

34. The allotment of land by the State or its agencies/instrumentalities to a body/ organization/institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organisations/institutions on political considerations or by way of favoritism and/or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible."

14. That the authorities have not taken any decision on the pending Applications does not mean that the Petitioners can invoke the principle in Bharat Steel Tubes Ltd. either. There the issue was of assessment under Sales Tax Act namely the Punjab General Sales Tax Act, 1948. The returns were filed by the Assessee and those were not processed or assessed and that is how the Supreme Court held that in the absence of any prescribed period of limitation the assessment has to be completed within a reasonable period. This principle cannot be invoked or applied in the present case.

15. As a result of the above discussion, the Writ Petition fails and it is dismissed.

16. At this stage, Mr. Naidu prays that the ad interim order passed by this Court on 27th August 2013 be continued for a period of eight weeks as to enable the

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Petitioners to either approach higher Court or to take an appropriate decision. This request is opposed by Mr. Sethna. Having found that the Petitioners have absolutely no right, legal or constitutional, to approach this Court and invoke writ jurisdiction to perpetuate an illegal stay, we cannot permit the continuation of the ad-interim order. The request in that behalf is refused. Petition dismissed. No costs.

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