
(2007) 03 DEL CK 0083

In the Delhi High Court

Case No : Writ Petition (C) 1845 of 2007 and CM No. 3394 of 2007

Kaveri Infrastructure P. Ltd.

APPELLANT

Vs

N.D.M.C. and Others

RESPONDENT

Date of Decision : 09-03-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 142 DLT 150 : (2007) 1 ILR Delhi 1080

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Chetan Sharma and Sunil Goel, for the Appellant; Sandeep Aggarwal, for DJB and Anjana Gosain, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—Learned Counsel for the petitioner and learned Counsel for the respondents appearing on advance notice agree that the

matter can be taken up for disposal.

Background facts

2. The petitioner, a private company involved in carrying out work of desalting of sewers, renovation of water rising mains seeks a mandamus to

respondent No. 1, New Delhi Municipal Council ("NDMC") and respondent No. 2 Delhi Jal Board ("DJB") to issue a letter of award/work order

in favor of the petitioner for execution of the work of ""rehabilitation of upstream stretch (falling in NDMC area) of 66"" (1650 mm) dia old Brick

Barrel from Dayal Singh College to Kilokari Pumping Station."" The alternative prayer is for a direction to the respondents to reimburse the

expenses incurred by the Petitioner in relation to this work.

3. In the year 2001, DJB invited tenders for the work of rehabilitation of 66" (1650mm) dia drain sewers (Brick Barrel) from Q point Lodhi Road

to Kilokari SPS. The upstream stretch was from Q-point Lodhi Road to Dayal Singh College and downstream portion was from Dayal Singh

College to Kilokari SPS. According to the petitioner it was issued a work order dated 1.11.2002 by the DJB in relation to the downstream work

which falls within the jurisdiction of the DJB. It is not in dispute that the upstream portion of the sewer is in the area within the jurisdiction of the

NDMC.

4. On 28.9.2004, the DJB wrote to the NDMC stating as under:

DJB has taken up Rehabilitation/Renovation of 1650 mm. dia old Kilokari sewer for Dayal Singh College to Kilokri Sewage Pumping Station

within DJB/MCD limits. This sewer rehabilitation work is likely to be completed by March, 2005.

The upstream side of this sewer i.e. from Q point to Dayal Singh College falls in the NDMC area. As such you are requested to assess the

condition of the sewer line falling in NDMC area and to take action for desalting/repair/rehabilitation in NDMC area as per requirement to achieve

optimum use of the sewerage system. This will result in smooth sewage flow to Kilokri Sewage Pumping Station and will avoid siltation of the

already desilted portion. An early action in this regard is requested as the rehabilitation work in DJB/MCD limits is likely to be completed by

March, 2005.

The layout plan showing the alignment of the sewer line in DJB limit as well as in NDMC area is attached for reference and further action.

5. This was followed by another letter dated 9.12.2004 by which the DJB reiterated its request and further required the NDMC to desilt the sewer

falling within its jurisdiction. In reply to these letters, the NDMC on 19.1.2005 informed the DJB:

I have been directed to communicate the approval of NDMC for desalting and rehabilitation of 2 Kms approx. length of trunk sewer in NDMC

area on the upstream of 66" dia old brick barrel from Dayal Singh College to Kilokri Pumping Station. The work of trunk sewer in NDMC area

may also be carried out by you on as a deposit work in continuation of work done by you.

As regards, the second trunk sewer line I wish to inform you that the old trunk sewer line had already been replaced with a new trunk sewer line.

In view of this, desalting and rehabilitation as proposed by you is not required. The plan showing the new sewer line bypassing the old sewer line is also enclosed.

6. The petitioner wrote to the DJB on 27.1.2005 stating that as regards the upstream work from Q point Lodhi Road to Dayal Singh College

which falls within the NDMC area, it was ""ready to execute this work on same rates and terms & conditions without any extra levy.

7. On 28.1.2005 the DJB offered the NDMC two options:

- i) The work may be executed by the NDMC itself.
- ii) That the DJB would get the work completed provided NDMC deposits an estimated amount of Rs. 26,19,74,681/- with the DJB.

It appears that NDMC on 3.3.2005 accepted the estimate suggested by the DJB. Thereafter the DJB wrote to the NDMC on 16.3.2005 stating:

May please refer to your letter No. 251-52/CE(C) I dated 03.03.05 wherein the acceptance of estimate amounting to Rs. 26,19,74,700/- was

conveyed to this department.

In this regard, it is mentioned that since regular tender process will take appreciable time and moreover liability/performance of the system in the event of fresh tenders cannot be fixed.

You are requested to send a request to Delhi Jal Board for getting the work including maintenance of sewer line for 10 years be carried out from

M/s. Kaveri Infrastructure Pvt. Ltd. on the same rates, terms and conditions, who is executing the downstream reach in DJB area otherwise like

the work may please be carried out at your end.

8. The petitioner has placed on record the minutes of the meeting held on 23.9.2005 of the Technical Committee of DJB held in the chamber of

Member (DR) which ""recommended the award of work in favor of M/s. Kaveri Infrastructure (P) Ltd. at their negotiated rate at a total cost of Rs.

22,70,85,000/- only.

9. As far as the NDMC was concerned, it appears that at one stage by a letter dated 26.12.2005 they wrote to the DJB enclosing a draft MOU

approved by the competent authority for acceptance and signature. The

petitioner has managed to obtain and enclose with the petition a copy of the said draft MOU. On this basis, the petitioner wrote to the NDMC asking it to finalise the MOU so that work could be started at the earliest. In

response to this letter the NDMC replied to the petitioner on 7.7.2006 informing it as under:

Proposal submitted by DJB to rehabilitate the upstream portion of the said barrel has already stand accepted by NDMC and DJB has been

requested to get the barrel rehabilitated by them on behalf of NDMC as a deposit work.

NDMC has already communicated DJB to take up the work on behalf of NDMC as a deposit work and now it is their prerogative as to how the

work is to be awarded and executed.

NDMC is not in a position to negotiate with you as it has already been decided by the NDMC and communicated to DJB that work is to be

carried out by DJB on behalf of NDMC as a deposit work on competitive basis in accordance with the General Finance Rule applicable to Govt.

bodies. A draft MOU approved by the competent authority already stand submitted to DJB for their acceptance and signing the same. Response

of DJB is still awaited for which they are being pursued vigorously.

10. This was followed by letters dated 17.7.2006, 25.10.2006, 1.12.2006 by the petitioner to the DJB asking it to award the work to the

petitioner. The petitioner has placed on record a confidential letter written by the Chief Engineer DJB to the NDMC making a strong pitch for the

petitioner and stating inter alia, as under:

After the award of work the firm has already arranged material worth Rs. 16 crore which can create further litigation in the matter. Hence it shall

be desirable to get the work executed from the same agency.

11. By a letter dated 8.2.2007 the petitioner asked the DJB to award it the contract within 7 days. It was alternatively suggested by the petitioner

to the DJB ""if you are too keen to award this work to some other agency, you must first reimburse us the amount incurred by us on purchasing raw

material for this work. The said raw material is lying ready at our supplier's end and can be delivered to you at any time on your demand.

Submissions of counsel

12. Mr. Chetan Sharma, learned Senior Counsel appearing for the petitioner first submits that the draft MOU signed by the Chief Engineer DJB

and Chief Engineer NDMC read with the correspondence referred to reveal that the decision to award the work to the petitioner had already been

taken and all that remained was the ministerial act of actually signing the contract. Secondly, he submits that the Technical Committee of the DJB

had already approved the award of the contract to the petitioner and in those circumstances it was not open to either of the two agencies, the DJB

and the NDMC, to renege on such decision. Thirdly, he submitted that the correspondence on record showed that the work as originally

envisaged was in two phases. Therefore, there was no need to award two separate contracts for each of the phase. In other words, the upstream

work was "in continuation" and the downstream work which had already been successfully completed by the petitioner. Mr.Sharma relied on the

principles of "entrenched legitimate expectation", "issue estoppel", "conduct estoppel" and the yardstick of Wednesbury principles of

reasonableness to urge that the denial of the award of work to the petitioner was arbitrary and irrational. Adverting to the fact that the petitioner

had already invested a lot of money in anticipation of the award of the contract, he submitted that the petitioner should be compensated for its loss.

Finally, he submitted that the non-award of the work to the petitioner was contrary to public interest, that the upstream work by another agency

would result in heavy siltage of the sewer which might constrain the petitioner with unforeseen liability in respect of the downstream work already

completed by it.

13. On behalf of the DJB, Mr. Sandeep Aggarwal pointed out that the work in question pertains to an area within the domain of the NDMC and

Therefore the question of award of the work was not in the hands of the DJB. Appearing on behalf of the NDMC, Ms. Anjana Gosain contends

that there is no right in the petitioner to demand that the work should be awarded to it. She further submits that the NDMC could not have by-

passed the Financial Rules which require competitive bidding for the work of this kind. She further submits that it is always open to the petitioner to

participate in any open tendering process and seek award of contract on that basis.

Legitimate Expectation:

14. The first plank of the petitioner's submission is based on the doctrine of legitimate expectation, developed by the Courts in England in the

context of testing administrative action on the rubric of reasonableness. In *Re Westminster CC* [1986] AC 668, Lord Bridge explained (at p. 692):

The courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of

consultation aroused either by a promise or by an established practice of consultation.

15. The above doctrine was further developed not only in the context of consultation with different authorities as a procedural necessity but

developed into a substantive doctrine as well. Prof. Wade explains in *Administrative Law* (8th Edition) (at page 498):

Procedural expectations are protected simply by requiring that the promised procedure be followed. Substantive expectations are often protected

procedurally, i.e. by extending to the person affected an opportunity to make representations before the expectation is dashed.

16. However Prof. Wade reminds that a person "...is not entitled to rely upon his expectation of a benefit unless it is founded upon some promise

or established practice. To do this is to confuse the protection of legitimate expectations with the duty to act fairly.

17. The Hon^{ble} Supreme Court has explained the evolution of the doctrine in our country by its authoritative pronouncement in *Punjab*

Communications Ltd. Vs. Union of India and Others, . The Court also considered the doctrine in the context of the principle of reasonableness first

enunciated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223, now generally known as *Wednesbury*

principles. The Court then proceeded to explain as under (SCC p. 747):

37. The above survey of cases shows that the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and

that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or

past conduct unless some overriding public interest comes in the way. The judgment in *Raghunathan's* case requires that reliance must have been

placed on the said representation and the representee must have thereby

suffered detriment.

38. The more important aspect, in our opinion, is whether the decision maker can sustain the change in policy by resort to Wednesbury principles

of rationality or whether the Court can go into the question whether decision maker has properly balanced the legitimate expectation as against the

need for a change? In the latter case the Court would obviously be able to go into the proportionality of the change in the policy.

18. Ultimately the Court concluded that in the context of a change in policy (page 749 SCC):

The legitimate substantive expectation merely permits the Court to find out if the change in policy, which is the cause for defeating the legitimate

expectation is irrational or perverse or one which no reasonable person could have made.

The above law was further explained in the decisions of the Hon"ble Supreme Court in Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer

and Others, and Kuldeep Singh Vs. Govt. of NCT of Delhi,

19. We now turn to the facts of the present case to examine if these principles make out a case for interference in this matter at the instance of the

petitioner. The narration of facts indicate that although at one stage the DJB and NDMC had agreed on a draft MOU, there was in fact no

concluded understanding or agreement between the two agencies that the work would be executed by the petitioner. Protracted behind-the-room

negotiations cannot create a legitimate expectation in the petitioner much less an ""entrenched legitimate expectation"".

20. The Court is unable to accept the contentions of the learned Counsel for the petitioner that the signing of the draft MOU by the Chief Engineer

of DJB and NDMC, which document interestingly does not bear any date, created an enforceable right in the petitioner. There can be no manner

of doubt that the said draft MOU does not signify a concluded contract at all. Likewise the similar fact that the Technical Committee recommended

the award of work in favor of the petitioner cannot create any legitimate expectation particularly when the award of work by said agency is

governed by Government Financial Rules. In fact the letter dated 16.3.2005 written by the DJB to the NDMC indicates that the hurry to award

the tender to the petitioner was actuated by the DJB's perception that the

""regular tender process will take appreciable time and moreover

liability/performance of the system in the event of fresh tenders can not be fixed."" If the NDMC has taken a decision that the Government Financial

Rules which require award of such tender only through a competitive process, it can hardly be said that such decision is either arbitrary or

irrational. The Court is unable to accept the contention that the decision of going in for a competitive bidding process is irrational on the application

of Wednesbury principles.

21. As long as there is no concluded contract, it would be futile for the petitioner to seek to rely on correspondence between the two agencies, to

which the petitioner is not a party, in support of its plea that any enforceable right has accrued in its favor. In these circumstances, the question of

the Court issuing a mandamus to award the work in question to the petitioner, does not arise.

Promissory estoppel:

22. As regards the plea ""issue estoppel"" and ""conduct estoppel"" this Court is not prepared to entertain such a plea in the facts and circumstances of

the case. If the petitioner was seeking to rely on these principles, then it should have laid a factual foundation to demonstrate how these get

attracted on the facts of the present case. This, however, has not been done. If on the other hand, the petitioner is relying on the broader concept

of promissory estoppel in that event the petitioner would have to demonstrate that there was a definite representation by the State agency, that the

petitioner altered its position by acting on such representation and suffered detriment (see *Bakul Cashew Co. and Others Vs. Sales Tax Officer*

Quilon and Another, . That by itself would not suffice as explained in the *Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra*

Pradesh and Others, A promise that would require the state agency to deviate from an established procedure cannot be sought to be enforced. It

was explained (SCC p. 203):

24. It is equally settled law that the promissory estoppel cannot be used compelling the Government or a public authority to carry out a

representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public

authority to make. Doctrine of promissory estoppel being an equitable doctrine,

it must yield place to the equity, if larger public interest so requires,
and if it can be shown by the Government or public authority for having regard to the facts as they have transpired that it would be inequitable to hold the Government or public authority to the promise or representation made by it. The Court on satisfaction would not, in those circumstances raise the equity in favor of the persons to whom a promise or representation is made and enforce the promise or representation against Government or the public authority.

23. If the petitioner wrote as it did on 5.10.2005, to its supplier in the United Kingdom claiming that DJB had already awarded it the contract, it was a unilateral act, entirely at the risk of the petitioner. In any event till such time there was actually a communication to the petitioner that the work in question had been awarded to it, the petitioner could not have proceeded on that footing in anticipation. In the facts of the present case, this Court is of the view that there is no question of applicability of the principles of promissory estoppel that necessitates a mandamus being issued to the respondents to award the contract in favor of the petitioner.

24. If the petitioner, as it claims, invested resources in anticipation of the award of contract to it, it is always open to the petitioner to seek a proper remedy in the civil court, if so permitted in accordance with the law. A writ petition under Article 226 of the Constitution is not a proper remedy for such a grievance.

25. For all of the above reasons, this Court finds no merit in this writ petition and is dismissed with no order as to costs. Consequently, the application is dismissed.