
(2008) 09 GAU CK 0010
In the Gauhati High Court
Case No : Writ Petition (C) No. 1528 of 2008

Media Palace

APPELLANT

Vs

Airport Authority of India and Others

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 380

Citation : (2009) 2 GLR 20 : (2009) 2 GLT 59

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : G.N. Sahewalla, Md. Aslam, D. Senapati and M. Jain, for the Appellant; K.N. Choudhury, R. Dubey and R. Deka, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—By means of this writ petition, the Petitioner has made challenge to the decision of the authority to cancel the particular contract earlier awarded to it by the Respondent-authority.

2. The Petitioner is a proprietorial concern represented by its proprietor Sri Sanjay Prasad Modi. It is stated to be the authorized sole distributor/franchiser of Hindustan Lever Ltd. ("HLL") in respect of its vending (out of Home) products namely tea/coffee vending machines for the North Eastern States.

3. In response to the NIT issued by the Respondent authority vide Annexure-II, the Petitioner responded to the same by submitting his tender. In paragraph 5 of the writ petition, the Petitioner has stated that it being the authorized distributor of HLL in respect of vending (out of Home) product and having requisite experience, was eligible to participate in the tender process. It has further been stated that one, Sri Kishan Jhunjhunwala, although intended to participate in the tender process but being not eligible to do so having not fulfilled the eligibility criteria as per the NIT approached the HLL with a request to run the counters of

their products enabling fulfillment of the eligibility criteria. However, as the Petitioner was the sole distributor of HLL, such request made by Sri Jhunjhunwala was turned down by the HLL and suggested that, it is only the Petitioner which would participate in the tender process with entitlement to sublet.

4. According to the Petitioner in pursuance of the suggestion of HLL to the above effect, said Sri Jhunjhunwala approached the Petitioner with the proposal for sub-letting and it was mutually decided that Sri Jhunjhunwala would initially bear the cost of the tender document and earnest money. Consequently, he obtained two banker's cheques both dated 19.11.2007 amounting to Rs. 8,400 and Rs. 281 being the deposits towards earnest money and tender document. Thereafter, tender was purchased and submitted by the Petitioner on 22.11.2007, which bore the signature of Sri Jhunjhunwala as the witness.

5. The technical bid in respect of the NIT was opened on 22.11.2007 and the Respondent-authority by its letter dated 13.12.2007 intimated the Petitioner that the financial bid would be opened on 18.12.2007, on which date, the Petitioner remained present in the office and came to, know that its bid was the highest. By letter dated 30.1.2008, the Petitioner was intimated about acceptance of its offer for award of licence for tea and coffee at LGBI Airport as per the NIT. The contract was for three years and the Petitioner was called upon to submit its acceptance.

6. In response to the aforesaid letter dated 30.1.2008, the Petitioner offered its acceptance vide letter dated 7.2.2008. It is the case of the Petitioner that it also started mobilizing infrastructures towards operating the tea and coffee counter at the Airport. The Petitioner also submitted security deposit and paid advance space rental on 14.2.2008. The Petitioner also duly executed the license agreement. Thereafter, the Petitioner made request to the Airport Authority to allot the space enabling it to commence business.

7. When the matter rested thus, the Airport Authority vide its letter dated 20.2.2008 returned the earnest money deposited by the Petitioner. It has been stated that since the bankers cheques towards earnest money were purchased by said Sri. Jhunjhunwala in pursuance of the initial talk for sub-contracting, the Petitioner in good faith returned the same to Sri Jhunjhunwala. By letter dated 1.3.2008, the Petitioner intimated the Respondent Authority about its readiness to take possession of the site and start operation from 1.3.2008.

8. Thereafter, the Authority allotted space to the Petitioner and the Petitioner by its letter dated 29.2.2008 informed that its operators with vending machines etc. would go to the Airport. The Authority also permitted the operators to enter the Airport. According to the Petitioner, the counter was set up for starting its operation with effect from 1.3.2008. However, the authority instead of allowing the Petitioner to run the counter issued direction to vacate the site and take back all belongings, to which the Petitioner raised objection by letter dated 4.3.2008.

9. According to the Petitioner, since the deal for sub-letting and/or subcontracting to said Sri Jhunjhunwala in respect of the counter did not materialize, he lodged an FIR with the Bharalumukh Police Station with some false allegation forcing the Petitioner to obtain pre-arrest bail u/s 438, Code of Criminal Procedure. Be it settled here that the case was registered as Bharalumukh P.S. case No. 37/2008 u/s 380, IPC and the bail application was registered and numbered as B.A. No. 770/2008, on which the order was passed on 12.3.2008.

10. In reply to the query made by the Petitioner about the reason for asking it to vacate the premises, the Authority by its letter dated 4.3.2008 forwarded the copy of the legal notice made on behalf of said Sri Jhunjhunwala with the intimation that the handing over the possession of the site would remain in abeyance pending enquiry into the matter. In response to the said letter dated 4.3.2008, the Petitioner furnished his reply denying the allegations made in the notice. The Petitioner also served a legal notice asking the Airport Authority to hand over possession of the site. However, the Respondent No. 3 by his letter dated 17.3.2008, intimated the Petitioner about the decision of the Authority to take statements regarding allegation/counter allegation, between said Sri Jhunjhunwala and the Petitioner. The statement of the proprietor of the Petitioner was taken on 18.3.2008.

11. After the aforesaid happenings, the Respondent No. 3 by its letter dated 31.3.2008 forwarded the impugned order dated 27.3.2008 passed by the Airport Director, LGBI Airport. By the impugned order, the agreement, which was arrived at with the Petitioner towards running the tea/coffee counter at the Airport was cancelled. Hence, the writ petition. It is the case of the Petitioner that the purported agreement for sub-contracting the contract having not been materialized, the Respondent Authority could not have terminated the agreement on the ground assigned in the impugned order. Its further case is that the period of notice towards termination, of contract as provided for in the agreement having not been fulfilled, the impugned order is not tenable in law.

12. The Airport Authority in its counter affidavit has denied the contentions raised in the writ petition. It is their case that since there is bar in sub-letting and/or sub-contracting the contract, the Petitioner having entered into an agreement with said Sri Jhunjhunwala violated the general terms and conditions of contract at the very inception of the contract and consequently became liable for cancellation of the agreement. As regards the violation of the principles of natural justice and non-compliance of the notice period, it has been stated that sufficient opportunity was given to the Petitioner even to the extent of allowing the proprietor to have his say in the matter by way of making statement.

13. I have heard Mr. G.N. Sahewalla, learned senior Counsel assisted by Md. Aslam, learned Counsel for the Petitioner as well as Mr. K.N. Choudhury, learned senior Counsel assisted by Ms. R. Deka, learned Counsel representing the Airport Authority. I have also considered the materials available on record and have given my anxious consideration to the same.

14. There is no dispute that the Petitioner entered into an agreement with Sri Jhunjhunwala towards sub-letting and/or sub-contracting the contract awarded to it. In this connection apart from the statement made in the writ petition, the statement of the proprietor of the Petitioner, copy of which has been annexed to the counter affidavit, may be referred to. In the statement, which Sri Modi, i.e., the proprietor of the Petitioner made pursuant to the letter dated. 17.3.2008 addressed to the Petitioner by the Airport Authority, stated thus:

Even though, I have got an experience in operating Tea/Coffee Vending machines at various places for more than two years, I have not enclosed any Certificates in this regard alongwith my tender. If necessary, I can produce the same. I was under the impression that the award letter issued by Airports Authority of India, Calcutta International Airport in August, 2003 to M/s. Hindustan Liver Ltd., Calcutta, etc., and certificate issued by M/s. Hindustan Uniliver Ltd. to M/s. Media Palace would meet the requirements in respect of the tender regarding eligibility criteria.

We, the Hindustan Uniliver, myself on behalf of Media Palace and Mr. Jhunjhunwala have entered into an oral agreement to that effect on receipt of the award of the contract in favour of M/s. Media Palace, the same will be handed over to Mr. Jhunjhunwala for operating the same as a service provider subject to certain Terms and Conditions agreed among us. Further to this, he has made the tender cost and EMD. Further Mr. Jhunjhunwala has witnessed the Tender Document submitted by me in the name of M/s. Media Palace. It submitted that Mr. Jhunjhunwala has provided the EMD and cost of tender document, in terms of oral agreement. The allegation Of theft of aforesaid instruments is not at all true.

Once we received the award letter from Airports Authority of India, Mr. Jhunjhunwala has deviated from the oral understanding and started blackmailing us with various terms and conditions contrary in the understanding arrived at earlier. In fact, on 11.2.2008 Mr. Sharique Hussain of M/s. Hindustan Uniliver Ltd. Has forwarded a draft MoU to Mr. Jhunjhunwala for signature and return before 15.2.2008. He was also advised to make necessary security deposit etc. in respect of the contract awarded. As M/s. Hindustan Uniliver Ltd. and M/s. Media Palace are not agreeable to the revised terms and conditions of Mr. Jhunjhunwala, we have not received the MoU signed by Mr. Jhunjhunwala on agreed terms, we (Media Palace) have decided to make the Security Deposit, etc., by ourselves. It is also informed that in the revised terms and conditions Mr. Jhunjhunwala was insisting for sale of Coffee, Tea etc., at an exorbitant rate which is more than the rate universally implemented by M/s. Hindustan Uniliver Ltd. - which will also affect the image of the Hindustan Uniliver Ltd. Mr. Jhunjhunwala also insisted to sale products of other than Hindustan Uniliver Ltd. In the said coffee/tea counter which is not agreeable to the Hindustan Uniliver Ltd. This is the reason the understanding developed earlier has broken. Having failed to get Hindustan Uniliver Ltd. and Media Palace agreeable to the revised terms and conditions insisted by Mr. Jhunjhunwala, Mr. Jhunjhunwala started

raising various allegations against M/s. Media Palace.

It is clarified that the said oral MoU developed with Mr. Jhunjhunwala is towards a service provider not a sub-contractor. It is also clarified that even though we have entered into an oral understanding (MoU) with Jhunjhunwala, final agreement was not made in this regard. We have been contemplating to entering to final agreement with Mr. Jhunjhunwala with prior approval of AAI in this regard.

15. From the above statement made by Sri Modi, two things have emerged. Firstly, he confessed that he did not enclose, any certificate of Experience in operating tea/coffee vending machines alongwith his lender. Secondly, he admitted that he had entered into an agreement with Sri Jhunjhunwala to the effect that on receipt of the award, of the Contract, the same would be handed over to Sri Jhunjhunwala for Operating the counter as a service provider subject to certain terms and Conditions. It was also admitted that said Sri Jhunjhunwala provided the tender cost and EMD and that he also witnessed the tender documents.

16. Clause 5(a) of the general terms and conditions forming part of the contract agreement provides, thus:

The licensee shall not, unless with the written consent of the authority create a sub-contract of any description with regard to this licence or any part thereof, nor shall be without such written consent as aforesaid, assign or transfer his license or any part thereof.

17. On the other hand Clause 15 of the tender guidelines forming part of the NIT provides for 30 days advance notice for terminating the contract amongst others due breach in the terms and conditions of the license agreement. Clause 2(b) of the NIT provides for two years experience of operating tea/coffee vending machines in the prescribed places. As per the own admission of the Petitioner, he did not submit the requisite certificate of two years experience. While it is the case of the Respondents that the tender submitted by the Petitioner having not contained the requisite experience certificate, same was liable to be rejected before processing for financial bid, it is the case of the Petitioner that such ground being non-existent in the impugned action cannot be projected to be an additional ground to defend the impugned action. It is in this context, learned Counsel for the Petitioner has placed reliance on the decision of the Apex Court reported in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, in which it was emphasized that the impugned action will have to be judged on the basis of the reason available at the time of taking the impugned decision and cannot be allowed to be supplemented by fresh reason in the shape of affidavit or otherwise.

18. The learned Counsel for the Petitioner has also placed reliance on the decision of the Apex Court, reported in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, to augment the submission that the impugned order cannot be construed in the light of explanations subsequently given, because the public

orders, publicly made in exercise of a statutory authority will have to be judged objectively with reference to the language used in the order itself.

19. Both the aforesaid decisions find mention in the decision of the Apex Court reported in *Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another*, It is true that in the impugned order, by which the agreement with the Petitioner has been terminated, there is no mention of non-furnishing of the experience certificate alongwith the tender by the Petitioner. Same was never the ground towards formation of the opinion to cancel the contract with the Petitioner. The admission on the part of the Petitioner that he did not submit the experience certificate alongwith his tender was referred to by the learned Counsel for the Respondents in the context of the agreement arrived at by the Petitioner with said Sri Jhunjhunwala. It was always open for the Respondent Authority to take into account such lacuna in the tender documents even at a subsequent stage, although, was not the foundation of the impugned order. When a point which is ostensibly a point of law and is substantiated by the facts as per the own assertion of the Petitioner, which could have been a valid ground for rejection of his tender cannot be lost sight of while deciding the issue raised in the writ petition.

20. Although, it was contended by the learned Counsel for the Petitioner that in the initial tender document, the general terms and conditions were not incorporated, but it need not be emphasized that such general terms and conditions always form part of the, tender conditions. It was also contended that since Clause 5(a) of the general terms and[conditions does not altogether obliterate sub-contracting, and could be created with the written consent of the Authority, there was nothing wrong in arriving at an agreement with Sri Jhunjhunwala permitting subletting of the tea/coffee counter.

21. The above aspects of the matter will have to be considered in the background of the fact situation involved in the case. It is an admitted position that from the very beginning of responding to the NIT, the Petitioner had the mindset of sub-letting the counter to Sri Jhunjhunwala. With that mindset the Petitioner submitted tender with the banker's cheques obtained by Sri Jhunjhunwala towards payment of EMD. In the writ petition it self the Petitioner has made its intention clear that, but for the dispute and differences with Sri Jhunjhunwala, he would have operated the counter. In the statement made before the authority, Sri Modi made the above quoted statements, which is clear evidence of his intention to sub-let the counter.

22. The authority in its impugned order dated 27.3.2008 has elaborately discussed the entire matter. Clause 5(a) of the general terms and conditions has also been referred to. It was clear that even before the award of the contract, the parties involved entered into an agreement to sub-contract the contract to Sri Jhunjhunwala in case of getting the contract by the Petitioner. It was in that context it was observed in the impugned order that there was violation of the aforesaid clause of the general terms and conditions. It is true that

subcontracting and/or subletting is not altogether obliterated but at the same time same cannot be resorted to without the written consent of the Authority. The Authority may or may not be agreeable to such sub-contracting, but the Petitioner even before applying and obtaining the written consent, entered into an agreement with Sri Jhunjhunwala that in the event of getting the contract, it would be run by him only. Such agreement at the very inception and even before the tender process, was contrary to the principles underlying contracts. That being the situation, if the Authority decided not to go ahead with the contract with the Petitioner, same cannot be said to be an arbitrary exercise of power.

23. As noted above, the agreement was cancelled at the very threshold and before the actual work started. The authority was within its competence and jurisdiction to withdraw the award of contract and/or cancel the agreement having noticed the inherent infirmities in the entire process. It was not a clean and clear deal. From the very beginning the Petitioner adopted dubious method, which eventually led to lodging of FIR by Sri Jhunjhunwala. From the entire episode it came to the notice of the Airport Authority the underlying deal detrimental to their interest and public duty. In such a situation, the impugned came to be issued, which even otherwise also, without taking recourse to Clause 5(a) of the general, terms and conditions, the Authority could have taken.

24. As regards the 30 days notice, such notice is provided for as a corollary to the principles of natural justice. The matter will have to be viewed taking into account the facts and circumstances involved. It is not a case of non-furnishing of any opportunity to the Petitioner. He could make his statement before the authority as was provided for, in which he made it clear about his understanding with Sri Jhunjhunwala. When the authority came to know about the intention of the Petitioner to sub-let the counter, it took the conscious decision to cancel the agreement with the Petitioner. It is not that the Petitioner would have or could have agitated something more than what has been agitated in this proceeding, had it been given the 30 days notice. Further, since the contract did not materialize and the agreement was terminated at the very inception, on the aforesaid grounds, non-issuance 30 days notice, in my considered opinion, in the given facts and circumstances will not be fatal. After all, in such joints, it is the trust and confidence, which matter much. The Airport Authority discharging its public duty having noticed the anomalies in awarding the contract rightly cancelled the same. It cannot be said to be that kind of a decision which would warrant interference of this Court exercising its power of judicial review under Article 226 of the Constitution of India.

25. For all the aforesaid reasons, I do not find any merit in the writ petition and consequently same is dismissed. There shall be no order as to costs.