(2021) 11 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 2343 Of 2021, Civil Miscellaneous No. 7526 Of 2020

Ms Creations Architects, Engineers, Planners, Interior Designers — APPELLANT

Vs

Union Territory Of J&K And Others — RESPONDENT

Date of Decision : 18-11-2021

Acts Referred:
Constitution Of India, 1950 — Article 14, 19

Citation : (2021) 11 J&K CK 0043

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : G.A.Lone, M.A.Chashoo

Final Decision : Dismissed

Judgement

Vinod Chatterji Koul, J

1. Petitioner is aggrieved of and seeks quashment of NIT no.35/E-Tendering/ DGM/Srinagar/Unit/JKPCC of 2021-22 dated 3rd November 2021, issued by Deputy General Manager - respondent no.4 herein, for engagement of Architectural-cum-Structural Consultant for Construction of Office Complex for Commercial Taxes Department at Excise and Taxation Premises Solina, Srinagar, with a further direction to respondents to continue consultancy allotted to petitioner in respect of construction tendered vide impugned NIT and to pay the amount already due towards him.

2. The case set up by petitioner is that petitioner-firm is a renowned architectural cum structural consultancy, having expertise in the field and that petitioner has also been elected as fellow of Indian institute of Architects bearing Registration No. 21902. It is averred that J&K Project Construction Corporation Limited (for brevity "JKPCC") is a government owned corporation registered under the Companies Act as it is entrusted with function of effecting constructions of

government buildings in Union Territory of J&K and has also power to float tenders on behalf of the Government of J&K for getting the government buildings constructed under its control and supervision. It is stated that JKPCC was also empowered to empanel consultants for providing architectural-cum-structural designs through approved and registered architects. In terms of its decision issued vide communication No. PS/MD/7983-8005 dated 02.03.2016 JKPCC is stated to have empaneled as many as 23 architectural and structural firms for providing the consultancy about the designs and structures etceterea of the buildings intended to be constructed by it. The petitioner claims that he figured at Serial No.10 in the panel. In terms of communication no.PS/MD/ 8339-41 dated 10th March 2016, the earlier communication was superseded with a situation that the agreement required to be drawn with empaneled consultancy firms, shall be work specific only.

3. It is also maintained by petitioner in writ petition that ever since empanelment, petitioner-firm has provided consultancy for designs and structural works undertaken by the Government in erstwhile State of Jammu and Kashmir in regard to series of buildings. It is claimed by petitioner that no formal orders for providing consultancy were being issued but under the agreed arrangement at specified percentage calculated on the basis of cost of construction works was being assessed and paid but major portion of the fee fixed with petitioner remained unpaid for which petitioner reserves the right to prefer the claim at appropriate time.

4. Petitioner also avers that in respect of the work tendered vide impugned NIT, the process of consultation by JKPCC with petitioner was initiated in the year 2018. The petitioner appears to have been selected for providing the drawing and structural consultancy on the basis of his previous performance and comparative assessment of suitability among the approved consultants, who were empaneled along with petitioner. It is also contended that after thorough deliberations with JKPCC, conceptual drawings of the proposed building of office complex for Commercial Taxes Department at Excise and Taxation premises at Solina, Srinagar, was provided to JKPCC and the drawing provided by petitioner was approved and accepted by JKPCC. It is also contended that before actual construction could be started, drawing was provided by the petitioner on 30.11.2019 to the Manager Commercial Taxes as well.

5. It is also averred by petitioner in the instant writ petition that the draft allotment letter for providing consultancy services for construction in question was issued in favour of the petitioner by respondent no.4. It is also contended that JKPCC put the execution of ground work and secondary block to tender on the basis of architectural and structural consultancy designs prepared by petitioner and the construction of the ground work and secondary block has since been completed by the contractor to whom it was allotted. This execution was made on the basis of the design prepared by the petitioner and accepted earlier by JKPCC. It is asserted that petitioner insisted for payment of its fee for the

consultancy already provided which was complete in all respects except electric drawing but the same has been retained without any cause and petitioner was put to financial embarrassment as he has been unable to pay the salary to his employees and other expenses involved in providing consultancy to respondents. It is contended that petitioner was within his rights to insist for making payment of withheld dues but respondent-JKPCC did not chose to do so and failed to discharge its obligation towards petitioner and that on account of consultancy charges, JKPCC has to pay to the petitioner @ 1% of the total cost of the construction that has become due to petitioner-firm.

6. I have heard learned counsel for parties and considered the matter.

7. Mr G. A. Lone, learned counsel appearing for petitioner has stated that respondent-JKPCC has no right or authority to issue NIT impugned as petitioner has accomplished all the work in question and its tendering/ retendering is unjustified, making mockery of all the executions, already accomplished on the basis of consultancy provided by petitioner-firm. NIT suffers from arbitrariness and has been issued without application of mind at the huge loss of State Exchequer. He avers that consultancy contemplated to be obtained or acquired through impugned NIT is with respect to the work that is already existing on spot over which government has spent huge amount in obtaining the design from petitioner-firm and in execution of the work through a contractor who has already completed the ground work including piling etcetera and that impugned NIT suffers from total callousness emanating from arbitrary exercise of power vested in the authorities working in respondent-JKPCC.

8. It is also submission of learned counsel for petitioner that petitioner has acquired a right on the basis of Principle of Doctrine of Legitimate Expectation in respect of the consultancy provided by him. The same cannot be denied on any basis whatsoever. It is also averred by him that architectural and structural design provided by petitioner-firm and accepted by respondent-JKPCC, tending and retendering of consultancy, deprives petitioner-firm of its right guaranteed under Article 14 of the Constitution, emanating on the basis of Doctrine of Legitimate Expectation. He also contends that petitioner-firm cannot be denied or denuded from the right already acquired by it under the garb of impugned notice inasmuch as impugned NIT is an invasion on fundamental and legal rights of petitioner and that petitioner's right to trade and business is throttled by impugned NIT, whereby the respondents are guilty of violating fundament rights guaranteed under Article 19 of the Constitution to petitioner. He states that this Court can interfere in view of the impugned NIT being arbitrary, unreasonable and in gross abuse of power and also in violation of principles of natural justice inasmuch as impugned action has not been taken by respondents in public interest and resultantly the legitimate expectation applies to the case in hand. In support of his submission learned counsel for petitioner has placed reliance on Sethi Auto Service Station and another v. Delhi Development Authority and others, (2009) 1 SCC 180.

9. Per contra, learned counsel for respondents insists that public authorities must be left with same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government but it cannot be overlooked that unlike policies, contracts are legally binding commitments and that in contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons keeping an eye on the augmentation of the revenue. He has placed reliance on Abdul Samad Wani v. Union Territory of J&K, AIR 2021, J&K 174.

10. It has been contention of learned counsel for petitioner that impugned decision issuing NIT, is exercise of mala fide power, arbitrary, unreasonable and defeats rights of petitioner, apart from being violative of doctrine of legitimate expectation and that petitioner-firm had legitimate expectation that he would be allowed to continue. To this contention, learned counsel for respondents has stated that as is evident and apparent from facts of the case as enumerated by petitioner-firm in its writ petition, it is nowhere remotely inferable that any mala fide on part of respondents. He also states that no right is vested with petitioner-firm to continuation and that respondents have never communicated to petitioner-firm that contract vis-à-vis consultancy would be allotted to it. The plea of legitimate expectation of petitioner in the present case is not attracted, as such.

11. It is pertinent to mention here that once parties enter into contract, they are bound by terms and conditions of the said contract. In the present case, no such contract has been entered into. The claimed meeting(s) and negotiation(s), between respondents and petitioner-firm or any inter se communications of respondents or internal meeting(s) of respondent-JKPCC, concerning subject-matter of consultancy etcetera offered by petitioner-firm, will not per se be construed or interpreted extending any promise by respondent-JKPCC to petitioner-firm inasmuch as there was no formal allotment order issued by respondents in favour of petitioner-firm.

12. On the legitimate expectation, the Supreme Court in A.P. Transco Vs. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34, while considering the doctrine of legitimate expectation with reference to various communications extending certain incentives to producers of electricity from non-conventional energy resources, held that the parties had voluntarily signed the Power Purchase Agreements, by which they were governed and neither the doctrine of promissory estoppel nor legitimate expectation could, therefore, have any application in regard to the correspondences exchanged between the parties, whereby the Government had extended certain incentives to the producers of electricity from non-conventional energy resources.

13. The same doctrine had been considered by the Supreme Court in Bannari Amman Sugars Ltd. v. Commercial Tax Officer, (2005) 1 SCC 625; State of Himachal Pradesh v. Ganesh Wood Products, (1995) 6 SCC 363; Kasinka Trading

v. Union of India, (1995) 1 SCC 274 and Sethi Auto Service Station v. D.D.A, (2009) 1 SCC 180.

14. The protection of legitimate expectations as pointed out in De Smiths Judicial Review (Sixth Edition) (para 12-001) is at the root of the constitutional principle of the rule of law, which requires regularity predictability and certainty in governments dealings with the public. The doctrine of legitimate expectation and its impact in the administrative law has been considered by the Courts in a catena of decisions but in order to avoid verbosity all these cases are not referred here. Nonetheless, with the purpose of appreciation of the concept a few decisions are referred and discussed. Let me refer to a decision delivered by the House of Lords in Council of Civil Service Unions & others v. Minister for the Civil Service, [1984] 3 All ER 935, an authoritative and often-quoted judgement on the subject. In the said case it was for the first time that an attempt was made to give an inclusive definition to the principle of legitimate expectation. Enunciating the basic principles relating to legitimate expectation, Lord Diplock observed that for a legitimate expectation to arise the decision of the administrative authority must affect such person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either: (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon or (ii) he has received assurance from the decision-maker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn.

15. In Attorney General of Hong Kong v. Ng Yuen Shiu, (1983) 2 All.ER 346, a leading case on the subject, Lord Fraser said "when a public authority has promised to follow a certain procedure it is in the interest of good administration that it should act fairly and should implement its promise so long as the implementation does not interfere with its statutory duty".

16. Explaining the nature and scope of the doctrine of legitimate expectation a three-Judge Bench of the Supreme Court in Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71, had observed thus:

"The mere reasonable or legitimate expectation of a citizen in such a situation may not by itself be a distinct enforceable right but failure to consider and give due weight to it may render the decision arbitrary and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises it is to be determined not according to the claimants perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

17. The concept of legitimate expectation again came up for consideration in Union of India and others v. Hindustan Development Corporation and others, (1993) 3 SCC 499. Referring to a large number of foreign and Indian decisions including in Council of Civil Service Unions and Kamdhenu Cattle Feed Industries (supra) and elaborately explicating concept of legitimate expectation, it was observed:

"If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary discriminatory unfair or biased gross abuse of power or violation of principles of natural justice the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits particularly when the element of speculation and uncertainty is inherent in that very concept."

18. Taking note of the observations of the Australian High Court in Attorney General for New South Wales v. Quinn, (1990) 64 Aust LJR 327, that "to strike down the exercise of administrative power solely on the ground of avoiding disappointment of legitimate expectations of an individual would be to set the Courts adrift on a featureless sea of pragmatism", speaking for the Bench, K. Jayachandra Reddy J. said that there are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected. The caution sounded in the said Australian case that the Courts should restrain themselves and restrict such claims duly to the legal limitations, was also endorsed.

19. A three Judge Bench of the Supreme Court again in National Buildings Construction Corporation v. S. Raghunathan & Ors., (1998) 7 SCC 66, observed:

"The doctrine of legitimate expectation has its genesis in the field of administrative law. The Government and its departments in administering the affairs of the country are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of legitimate expectation was evolved which hastoday become a source of substantive as well as procedural rights. But claims based on legitimate expectation have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."

20. In Punjab Communications Ltd. v. Union of India & Ors. (1999) 4 SCC 727, the Supreme Court, after referring to a large number of authorities on the question, observed that a change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness. The decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Therefore, the choice of policy is for decision-maker and not for the Court. 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.

21. The Supreme Court in Jitendra Kumar and others v. State of Haryana and another, (2008) 2 SCC 161, has reiterated that a legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity predictability and certainty in the Governments dealings with the public and the doctrine of legitimate expectation operates both in procedural and substantive matters.

22. An examination of the afore-noted decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation, which it would be within its powers to fulfil, unless some overriding public interest comes in the way. However, a person, who bases his claim on the doctrine of legitimate expectation in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation cannot ipso facto give a right to invoke these principles. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. In Hindustan Development Corporation case (supra) it was pointed out that the court must not usurp the

discretion of the public authority, which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.

23. It is worthwhile to mention here that doctrine of legitimate expectation is not applicable in the instant case inasmuch as there is no foundation for such a claim. The communications, placed on writ petition by petitioner, cannot, by itself, be treated or termed as if it were formal allotment order qua consultancy in favour of petitioner. In Sethi Auto Service Station case (supra), the doctrine of legitimate expectation had been considered, where appellant's claim was based on an old policy and it was held that Appellant merely had an expectation for being considered for resitement. It was also held that a person, basing his claim on doctrine of legitimate expectation, has to establish that he had relied on said representation and had altered his position and that denial of such expectation worked to his detriment.

24. The Courts can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and contrary to public interest. It is also reiterated here that the concept of legitimate expectation has no role to play where the said action is a matter of public policy or in the public interest, unless, of course, the action taken amounts to an abuse of power. The Supreme Court has further emphasized that in order to establish a claim of promissory estoppel, it must be proved that there was such a definite promise and not any vague offer which could not been forced.

25. In the present case petitioner, having regard to all that has been discussed above and well settled legal position, has not been able to make a case to warrant interference in impugned NIT and as a result whereof, writ petition is liable to be dismissed.

26. For the reasons discussed above, writ petition is without any merit and is, accordingly, dismissed with connected CM(s).