
(2021) 03 J&K CK 0045
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 229 Of 2021

M/S Sofi Enterprises	Vs	APPELLANT
Union Of India And Ors		RESPONDENT

Date of Decision : 15-03-2021

Acts Referred:

Indian Contract Act, 1872 — Section 39
Constitution Of India, 1950 — Article 12, 14

Citation : (2021) 03 J&K CK 0045

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : M. I. Qadri, Sheikh Manzoor, Tahir Majid Shamsi

Final Decision : Dismissed

Judgement

1. The petitioner, by medium of the instant petition, has craved the indulgence of this Court in granting it the following relief(s):

"a) A Writ of Certiorari, seeking quashment of impugned order dated 24.12.2020, issued under endorsement no. 180078/2014/174/E8, whereby the contract agreement allotted in favour of petitioner vide CA No. CESZ-16/2018-19 SPECIAL REPAIR TO DISPERSAL AREA AT SHARIEFABAD has been cancelled.

b) A Writ of Mandamus, commanding upon the respondents to consider the representation/ request of petitioner for grant of extension of time for completion of allotted contract in upcoming working season, i.e., April-May, 2021, so that the quality and standard of work is maintained.

c) A writ of prohibition, thereby prohibiting the respondents from allotting the contract in favour of any other contractor, as the petitioner has already installed the machinery and material on spot.

d) Any other writ, order or direction which this Hon'ble Court deems fit and proper in the attending circumstances of the case may also be passed in favour

of the petitioner and against the respondents."

2. The material facts giving rise to the filing of the instant petition, as stated by the petitioner in its petition, are that the petitioner claims to be a registered Contractor for the purpose of executing different kinds of construction works in the respondent organization. It is stated that the petitioner, upon successful participation in the tendering process initiated by the respondents with regard to 'Special Repairs to Dispersal Area' at Sharifabad, for an amount of Rs.1,36,25,500.00/-, was allotted the contract for the same in terms of allotment No. CESZ-16/2018-19. In terms of the contract agreement, the date of commencement of the work for Phase-I was fixed as 8th of April, 2019 with the date of completion as 7th of July, 2019. Likewise, for commencement of Phase-II work, the date was fixed as 8th of July 2019 and date of completion as 7th of October, 2019. The petitioner, however, claims that after taking over the site for commencement of work, the respondents referred various samples for 'Bitumen' testing to the National Institute of Technology (NIT), as a result whereof, the commencement of work on the spot was not possible for the petitioner. Thereafter, as stated, the petitioner, for various reasons not attributable to it, could not commence the work on spot. Accordingly, the respondents, by virtue of communication dated 15th of October, 2020, requested the National Institute of Technology, Srinagar for conducting testing of materials which was received on 29th of October, 2020. In the meanwhile, on 16th of September, 2020, the petitioner claims to have submitted a detailed representation before the respondents, thereby apprising them that since the material test reports have been submitted to the National Institute of Technology, Srinagar, but the report thereof is awaited, coupled with restrictions imposed by the Government on account of COVID-19 Pandemic, as such, extension in time may be granted to the petitioner for completion of the work allotted. It is pleaded that a legal notice was also served upon the respondents highlighting therein all the genuine and justified reasons which led to non-completion of the allotted contract/ work on spot, but same was not taken in consideration by the respondents and, instead, the respondents issued communication dated 16th of November, 2020, whereby the representation of the petitioner came to be rejected. Thereafter, the respondents are stated to have issued communication dated 5th of December, 2020, whereby the petitioner was granted last and final opportunity to accelerate the progress of work within a period of 15 days, failing which the contract agreement was threatened to be cancelled. It is contended that since the work in question relates to macadamization of Dispersal area and the temperature in December was not feasible for such macadamisation at all, still the petitioner made all his efforts to complete the allotted work, but despite that, the work of macadamisation could not be commenced. Resultantly, the petitioner, again, requested the respondents to extend the time for completion of work by, at least, 5 to 6 months or upto April-May 2021, but the said request of the petitioner is stated to have remained pending with the respondents constraining the petitioner to file Writ petition bearing WP(C) No. 79/2021 before this Court. On

2nd of February, 2021, it is stated that the counsel appearing for the respondents made a submission before the Court that in view of the cancellation of contract vide order dated 21st of December, 2020, the said Writ petition has turned infructuous and, in such circumstances, the counsel for the petitioner was left with no other option, but to seek disposal of the petition as having rendered infructuous with liberty to challenge the order of cancellation. The petitioner, faced with this position, has, now, filed this petition for the afore-stated relief(s).

3. Objections stand filed on behalf of the respondents, thereby resisting and controverting the averments made by the petitioner in its petition. The respondents have contended that there is no provision, either in the contract or in the law governing the subject, to revoke the cancellation of the contract. It is stated that the contract has been cancelled by the Accepting Officer by exercising contractual and legal powers conferred upon him under Condition 54 (a) of IAFW-2249 and under Section 39 of the Indian Contract Act 1872 in terms of letter No.180078/2014/174/E8 dated 21st of December, 2020 on account of the default of the petitioner. It is argued that once a contract has been put to an end, there is no contractual relationship between the parties, except settlement of the dispute arising out of the cancelled contract and, for resolution of disputes arising out of the cancelled contract, there is an alternate dispute resolution mechanism provided in the contract in the shape of Arbitration Agreement contained at S No.5 (b) on Page No.18 of the contract agreement. It is averred that the respondents allowed the petitioner to complete the work till December, 2020, which is more than 20 months from the original date of completion even though the contract, as a whole, was to be completed within six months only, meaning thereby that ample time was provided to the petitioner to complete the work, but the petitioner never showed any intent of undertaking the contract. In the end, the respondents have prayed that the petition of the petitioners, being devoid of any merit, deserves to be dismissed.

4. Heard the learned counsel for the parties, perused the pleadings on record and considered the matter.

5. At the very outset, what requires to be stated herein this case is that there is no dispute to the fact that the relationship between the petitioner and the respondent Department was governed by an Agreement and, in that Agreement, it was specifically provided that the allotted contract was to be concluded by the petitioner on or before the 7th day of October, 2019, i.e., within six months' time from the date the entire site of the work was handed over to the petitioner, i.e., on 8th of April, 2019. Thereafter, keeping in view all the bottlenecks faced by the petitioner in the process of completion of the allotted work within the fixed timeframe, the respondents extended the time period granted to the petitioner for the allotted work by a further period of fourteen months, thereby making the total period granted to the petitioner for completion of the allotted work to twenty months, but despite that, the petitioner did not complete the work allotted to it. In this context, the petitioner cannot be permitted to question the

cancellation of contract on the ground that sufficient time was not granted to it for completion of the contract allotted to it. The petitioner has clearly remained remiss and callous in ensuring the completion of contract allotted to it by the respondents not only within the prescribed time period as fixed in the allotment order, but even after the grant of considerable extension in time by the respondents, therefore, in these circumstances, the competent authority in the respondent Department was well within its domain to cancel the said contract in favour of the petitioner.

6. Apart from the above, it is well settled legal position that undoubtedly the principles of 'judicial review' would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism, however, it must be clearly stated that there are inherent limitations in exercise of that power of 'judicial review'. Government is the guardian of the finances of the State and it is expected to protect the financial interests of the State. The 'right to choose' in the matters of contract is always available to the Government, but, the principles laid down in Article 14 of the Constitution of India have to be kept in view while taking such a decision. There can be no question of infringement of Article 14, if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus, they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by 'judicial review'. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations; one is the ambit of judicial intervention and the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. 'Judicial review' is concerned with reviewing not the merits of the decision in support of which the application for 'judicial review' is made, but the decision-making process itself. 'Judicial review' is concerned, not with the decision, but with the decision-making process and, unless that restriction on the power of the Court is observed, the Court will, under the guise of preventing the abuse of power, be itself guilty of usurping power. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the Courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.

7. Law on the subject is no more *res integra* as this issue has been, repeatedly, coming up for consideration before the various Courts of the country, including the Apex Court of the country. In case titled '*Tata Cellular V. Union of India*; (1994) 6 Supreme Court Cases 651', at Paragraph No.94, the Hon'ble Supreme Court, while dealing with this issue, evolved the following principles:

1. "The modern trend points to judicial restraint in administrative action;
2. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made;
3. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible;
4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts;
5. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides; and
6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."
8. In case titled 'Sterling Computers Limited V. M&N Publications Ltd.; (1993) 1 SCC 445', the Hon'ble Supreme Court, at Paragraph No.12, laid down as under:

"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. But even in such matters they have to follow the norms recognized by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive."
9. Again, the Hon'ble Apex Court, in case titled 'Directorate of Education & Ors. V. Educomp Datamatics Ltd. And Ors.; (2004) 4 SCC 19', while applying the principles enunciated in Tata Cellular's case (supra), at Paragraph No.12, laid

down as follows:

"12. It has been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wise or logical. The Courts can interfere only if the policy decision is arbitrary, discretionary or malafide."

On an appreciation of the law laid down above, what comes to limelight is that the modern trend points to judicial restraint in administrative action and that the Court does not sit as a 'Court of Appeal', but merely reviews the manner in which the decision was made. It has also been declared that Court does not have the expertise to correct the administrative decision and that if a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible. In the matter of contract, the Government must be left free. Furthermore, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and quashing administrative decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

10. It is, thus, settled that public authorities must be left with the 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 they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution of India in many cases for years. It is for this reason that the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. 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. But, even in such matters, they have to follow the norms recognized by Courts while dealing with public property. It is not possible for the Courts to question and adjudicate every decision taken by an authority because many of the Government Undertakings, which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances, a discretion has to be conceded to the authorities who have to enter into contract by giving them

liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bonafide manner, although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes that Courts, while judging the constitutional validity of executive decisions, must grant certain measure of freedom of 'play in the joints' to the executive.

Looking at the instant case in the above perspective, the petitioner has not been able to establish before the Court that the decision taken by the respondent Department in cancelling the contract awarded in its favour was/ is an arbitrary exercise of power or that the same was/ is malafide in nature. In 'Jagdish Mandal v. State of Orissa; (2007) 14 SCC 517', at Paragraph No.22, the Hon'ble Supreme Court held, thus:

"22. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

From a bare perusal of the pleadings on record as well as having regard to the submissions made by the counsel for the parties before this Court, it is more than apparent that the decision taken by the respondent Department in cancelling the contract allotted to the petitioner was certainly not irrational in any manner whatsoever or intended to favour anyone. This decision, apart from being lawful and sound, appears to have been taken by the respondents in view of the failure of the petitioner to execute the contract allotted to it even after grant of substantial extension of time in its favour by the respondents.

11. In the premise, I do not find any merit in this petition which is hereby dismissed, alongwith all pending CM(s) therewith. Interim directions, if any, subsisting as on date, shall stand vacated.

12. Parties to bear their own costs.