

(2000) 07 CAL CK 0029

In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 8261 (W) of 2000

Raj Chowdhury

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-07-2000

Acts Referred:

Arbitration Act, 1940 — Section 20

Constitution of India, 1950 — Article 14, 21, 226, 299, 32

Evidence Act, 1872 — Section 115

Prasar Bharati (Broadcasting Corporation of India) Act, 1990 — Section 12

Citation : AIR 2000 Cal 232 : (2000) 3 CALLT 376 : 105 CWN 98

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mr. P.K. Roy, Mr. A.P. Ghosh, Mr. Shyamal Sarkar and Mr. Bidyut Dutt, for the Appellant; Mr. Om Prakash Dubey, Mr. Shyam Sarkar and Mrs. Bhatia, for the Respondent

Judgement

K.J. Sengupta. J.

1. The petitioner by this writ application has asked for the Judicial review under Article 226 of the Constitution of India of the decision of respondent No.3, viz., the Director, Doordorshan Kendra, Calcutta taken on its behalf by Programme Executive, Doordarshan Kendra, Calcutta being the respondent No.4 whereby the petitioner's application for extension of telecast of the mega serial "Mahaprabhu" beyond 455 episodes was rejected.

2. Briefly stated facts are produce hereunder. The petitioner applied for telecast of the mega serial under the name and style of "Mahaprabhu" to depict the life, works, teachings and preachings of Shree Chaltanya a religious leader whose advent was in Bengal in 15th century. The proposal of the petitioner to telecast the said serial was for at least 500 episodes. The petitioner contends proposal was accepted by the respondent Nos.2 and 3 in principle. Thus it was an agreement of the respondent Nos.3 and 4 to allow the petitioner to telecast of

the said serial in 500 episodes.

3. In terms of the aforesaid agreement the writ petitioner duly started production of the said mega serial by engaging artist(s), technicians and other staff. At the first instance the respondent No.3 sanctioned 65 episodes. Thereafter, time to time the respondent No.3 granted extension of episodes upto 455 numbers. The petitioner duly paid and in fact at all material times had and still has been ready and willing to pay the consideration at the prescribed rate for such telecasting. This mega serial has become extremely popular as the true and proper life story and activity of Shree Chattanya has been projected. As such a large number of viewers have been sending appreciation and also requesting the petitioner to depict life, works and sermon of Shree Chaitanya elaborately in details and even after the death of Shree Chaitanya his preachings and teachings being followed and propagated by his disciple Nityanand. Not only the viewers' satisfaction it appears the role of Shree Chaitanya was characterized so perfectly and emotionally by lead actor that he has been declared the best actor in the mega serials. So considering the perfection and excellence of the quality of the mega serial further extension of the episodes is necessary. In similar cases likewise the petitioner extension has been granted and is being granted with impunity. Some of the mega serials extension of episode of which is being granted mentioned in the petition are Janmabhumi, Roopkatha, Kanakanjali, Rajeswari and Ramkrishna. But in this case the respondent Nos.3 and 4 arbitrarily and wrongfully have not only refused to grant extension of episodes but in fact illegally and arbitrarily reduced the number of episodes from agreed 500 episodes to 455 episodes. Such illegally abrupt termination of episodes is in breach of the statutory contract and further the petitioner has legitimate expectation to have extension of episodes as in fact in past on all occasions without any departure extension has been granted. As such this act and conduct of the respondents had aroused and/or generated expectation of the petitioner.

4. The respondents' version is otherwise. They say in substance the relationship of the petitioner and respondent Nos.2, 3 and 4 are governed by a contract of private nature. There was and still is concluded contract in writing signed by both the parties. It will appear from the contract dated 25th June, 1998 that agreed number of episodes were 65, however. In terms of the agreement by mutual consent the number of episodes were extended and to that extent the terms were modified through discussion. There is no existence of the contract for 500 episodes as wrongly contended by the petitioner. At no point of time expectation was generated for granting extension of episodes at the instance and desire of the petitioner. All the times the petitioner was warned that no further extension would be granted. However, considering the necessity and appreciating the sentiment of the viewers the extension was granted from 65 episodes to 455 episodes. Further extension beyond 455 episodes cannot be granted in view of the fact that the next producer and/or sponsor is in the pipeline. Moreover the contract can be terminated at any time. Therefore, there is no question of termination of contract before 500 episodes are complete. In fact agreement was

for 455 episodes and the petitioner has been allowed to telecast all the episodes. So question of pre-mature termination does not arise. The petitioner has been Informed of the reasons for not granting further extension. The Court cannot scrutinize the reasonableness of the reasons. As such there is no merit on this writ petition.

5. It Is appropriate to record that both the learned counsel have filed their written notes of submissions.

6. Mr. P.K. Roy, learned senior counsel appearing with Mr. A.P. Ghosh and Mr. Shyamal Sarkar, learned Advocates submits while highlighting the factual aspect as mentioned In the writ petition that it will appear from the admission in afftdavit-in-opposltton in its paragraph 6 and from the letter dated 17th June, 1998 of the respondent No.3 that there was a concluded contract for telecasting of the aforesaid mega serial in at least 500 episodes. Moreover, it is the almost Inflexible policy, practice, usage and/or customs of the respondents to grant extension of episodes of serials (even beyond the original proposal) but with 50% hike in rates, after extension of each of 130 episodes.

7. Mr Roy contends the reasons for refusal to grant extension being the next programme is in pipeline is wholly Irrational and illogical not only from the commercial point of view but also from the object and purpose of encouraging and/or espousing good quality of religious programme aiming at to promote social justice which is the avowed policy under the Prasar Bharatl (Broadcasting Corporation of India) Act, 1990. He tries to persuade the Court explaining the possibility of higher Income being fetched If this mega serial is allowed to be continued Instead of allowing a new entrant to telecast.

8. He contends the termination of this statutory contract, concluded in exercise of the powers under the aforesaid Act of 1990 was premature, and breach of such statutory contract also ultra vires object of section 12 of the aforesaid Act of 1990, and as such null and void. In this context he relies on a decision of the Supreme Court reported in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, .

9. Since the question of arbitrariness on the touchstone of Article 14 of the Constitution pf India has been raised in the writ petition judicial review is permissible under Article 226 by this Court, rather than by any other method or procedure. He argues that a purely commercial contract entered into with State is also amenable to judicial review In a writ jurisdiction, if the contract has been cancelled on any ground de hors any of the terms of the contract and is no way referable to any of the terms of the contract and the action impugned is arbitrary, unreasonable and vIolative of Article 14 of the Constitution. In this context he relies on two decisions reported in Pancham Singh Vs. The State of Bihar and Others and 1991 (1) CLJ 467.

10. Mr. Roy urges that the contract of telecast was terminated on the purported ground of next programme being In pipeline, such ground Is ultra vires section

12 of the said Act of 1990. Such ground is also dehors the said statutory contract. No notice, no opportunity of hearing was given prior to such termination and it is violative of the principle of natural Justice. In this connection he has referred to a decision of the learned single Judge of this Court rendered in the case of *Jonaki Ganguli v. Union of India* reported in 1994 (2) CLJ 320, wherein, he contends, the facts were almost similar and in that case the contract was terminated arbitrarily without any reason.

11. His next contention is that as the contractual right of the petitioner has been taken away arbitrarily and furthermore the petitioner's expectation has been frustrated without informing any reason or for that matter the purported reasons are not justified on the facts and circumstances of this case. So this Court should grant appropriate relief by directing to grant extension in exercise of high prerogative writ jurisdiction. Such course of action by this Court is permissible. In this connection he relies on a decision reported in *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, .

12. He also argues the principle of promissory estoppel or estoppel by conduct as in the past all the times extension has been granted though there was apparently ineffectual warning not to extend further. So the respondents are estopped from refusing to grant extension.

13. He also applies in this case the theory of legitimate expectation. This argument is, in alternative, if it is found by me as no enforceable right either contractual or otherwise the doctrine of legitimate expectation will be applicable. He argues that if mother cases who are similarly circumstanced extension has been granted, then there is no reason to grant extension in petitioner's case. In this connection he relies on decisions reported in *U.P. Awasthi Vikas Parishad Vs. Gyan Devi (Dead) by LRs. and another, etc. etc.*, 1984(3) All England Reports 935 and AIR 1996 Cal 361 (*Fylfot v. Union of India*).

14. Mr. Roy then says existence of the arbitration clause will not take away the writ jurisdiction in this case as question of denial of equality and further arbitrariness of the State action has been raised and this question can only be decided by the writ Court in exercise of power of judicial review not by the domestic forum or any other forum. Moreover, when the writ petition has already been admitted and direction being given at this stage such question is redundant. In this context he relies on a decision reported in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, .

16. Mr. Shyam Sarkar, learned counsel while opposing the writ petition argues that there was no agreement for telecasting 500 episodes. There was agreement originally for 65 episodes and from time to time mutually the number of episodes were extended upto 455 episodes. The parties are governed by the contractual relationship. So the terms of the contract will govern rights and obligation of the parties. In terms of the contract the petitioner was allowed to telecast 455

episodes. It was made known specifically to the petitioner that no further extension would be granted. So it cannot be said that either the agreement was terminated before the sanctioned episodes are complete or extension has been refused without any Information.

16. He reminds the Court, though the aforesaid submissions are on merit, without entering into the merit I should examine the maintainability of the writ petition on the ground that there is an arbitration agreement between the parties which is embodied in the contract itself. This agreement is commercial one. So the writ Court will not entertain the grievance of the petitioner relating to breach thereof, rather he should be relegated to other forum. At the initial stage the question of maintainability has been reserved. There is no question of waiver and/or acquiescence of the aforesaid question of demurrer. In this connection he relies on the decisions reported in A.C. Roy Co. and others Vs. Union of India and others, and State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., .

17. He contends in the agreement there was no provision expressly for extension of episodes and the same can be done upon mutual consent. He argues that in case of concluded contract there is no scope for any legitimate expectation as it has been wrongly contended. In this connection he refers to a decision of the learned single Judge of this Court reported in A.C. Roy Co. and others Vs. Union of India and others, . He further submits that in this case question of legitimate expectation does not arise at no point of time any expectation much less legitimate was generated. Moreover, the theory of legitimate expectation cannot be advanced in order to alter the expressed terms of the contract. He contends question of granting extension is a matter of discretion of the respondents and such discretion if it is exercised either way, cannot be scrutinized by the writ Court unless of course there is no arbitrariness and/or Irrationality and/or absurdity in the decision. Here the next producer and/or sponsor is waiting for his slot. If the extension is granted at the desire and wishes of the petitioner then there would be a monopoly and there would be an unholy concentration of a few producers and/or sponsors. In a welfare state such concentration of any commercial field and monopoly is not permissible.

18. Mr. Dubey, learned counsel appearing for respondent No.5 supports and adopts arguments of Mr. Roy.

19. Having heard the learned counsels for the parties and considering the materials produced before me it appears to me that there is a question as to whether the writ petition should be entertained in this case firstly in view of existence of the arbitration clause. It appears that Justice A.C. Roy Co. and others Vs. Union of India and others, has been pleased to observe that when there exists an arbitration clause, the writ petition normally does not lie. It appears from the language of the said judgment that the aforesaid principle is not inflexible. In fact his Lordship has not of course propounded such absolute and inflexible theory that the existence of the arbitration agreement will stand in the way in exercise of writ Jurisdiction. Ordinarily such course of action is not

entertained by the writ Court. In my view the existence of the arbitration agreement is nothing more than existence of alternative remedy and it does not stand in a different and separate footing also. It is settled law when the question of unequal treatment and further complaint of arbitrary, unfairness and malafide in State action has been raised such question can only be effectively decided by the High Court in exercise of power of Judicial review under Article 226 or by Supreme Court under Article 32 of the Constitution of India. In the said decision it appears that one of the parties had resorted to mechanism of arbitration agreement by filing an application u/s 20 of the Arbitration Act 1940. So factually the aforesaid case was also distinguishable. In this case I am of the view going by the averments of the petition and the submission of Mr. Roy that petitioner questioned the act and action of the respondent Nos. 2 and 3 in refusing to grant extension upto 500 episodes and/or by not allowing the petitioner to telecast upto 500 episodes in conformity with the alleged agreement as being arbitrary and malafide. The question of legitimate expectation in this case has been stated but based on practice and customs. The question of frustrating of legitimate expectation cannot be decided by the arbitration. The question absolutely remains within public law field. I have examined the arbitration agreement. It pertains to the disputes relating to the said written contract. In this case the petitioner canvasses the dispute as stated hereinabove. Therefore, I hold that writ petition is entertainable and maintainable and the arbitration agreement is no bar.

20. Mr. Roy contends that there is an agreement between the writ petitioner and the respondent Nos. 2 and 3 for telecasting 500 episodes and it is admitted so in the affidavit-in-opposition and further from the letter dated 17th June, 1998. I am unable to accept Mr. Roy's contention that there was an agreement for telecasting 500 episodes. Of course in paragraph 6 of the affidavit-in-opposition it is averred that the proposal of the writ petitioner for telecasting 500 episodes was accepted in principle and such acceptance was communicated by a letter dated 17th June, 1998. But in my view the aforesaid admission should be construed as being negotiation. The Parties thereafter have bound themselves in a written concluded contract dated 25th June, 1998. The copy of such agreement has been annexed to the affidavit in-opposition being annexure "A". It appears from the annexure "A" both the parties have signed. So whatever may be the dealings and negotiation antecedent to this written document the same cannot have any effect at all as everything has been settled in the written contract. Now both the parties are bound to be governed by the written document being annexure "A" to the affidavit-in-opposition.

21. Significantly the aforesaid fact has been suppressed and not mentioned in the petition itself. However in the affidavit-in-reply it is sought to contend belatedly that the agreement has been performed, discharged and expired and/or lapsed long back. Such contention is wholly unacceptable because if it is accepted then the petitioner could not have any right to telecast beyond 65 episodes. So the agreement cannot be said to be performed, discharged till 455

episodes are completed.

22. It appears from the aforesaid agreement that original agreement was for 65 episodes for telecasting. It further appears that in terms of clause 25, the terms of the aforesaid agreement could be modified and Indeed the same was modified by act and conduct of the parties Inasmuch as originally in clause 2 of the said agreement there was no provision for allowing Free Commercial Time (F.C.T.). However, subsequently the aforesaid "free commercial time" was allowed for 120 seconds for each episode. Similarly the number of episode was mutually extended from time to time and at the request of the petitioner such extension was granted mutually right upto 455 episodes from 65 episodes. I am unable to accept the argument of Mr. Sarkar that this agreement Is purely a commercial and non-statutory one. It appears to me such contract is entered into by the respondent Nos.3 and 4 in exercise of power u/s 12 of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990. The text and substance of the agreement is absolutely consistent with the object and avowed policy as laid down In section 12 of the aforesaid Act. So this agreement cannot be termed to be a non-statutory one. I am unable to accept the contention of Mr. Sarkar also that the contract was entered into In exercise of power under Article 299 of the Constitution of India. The respondent No.2 is a statutory body and came Into being under Act. So it functions, and exercise powers under the statute itself not In exercise of any executive power as defined and contemplated under Article 299 of the Constitution of India. Under Article 299 of Constitution of India all contracts must be made In exercise of executive power of the Union and State. Functioning of statutory body or corporation is not in exercise of executive power of Union or State within the meaning of Article 299 of Constitution of India.

23. Accordingly. I hold though the relationship between the parties Is a statutorily contractual one, so the disputes relating thereto are amenable to writ jurisdiction. The power of writ Court can be exercised in this kind of contract as has been laid down by the Patna High Court Full Bench decision reported In AIR 1991 Patna 163 which has been followed by the Division Bench of this Court In a case reported In 1991 (1) CLJ 467.

24. In those two decisions different kinds of contract has been classified for amenability and non-amenability to writ Jurisdiction and It has also been held amongst other where the contract entered into between the person aggrieved and the state is in exercise of a statutory power under certain Act and Rules framed thereto, the petitioner alleges a breach on the part of the State, the writ lies. The nature of the contract in this case falls within the category of statutory one.

25. The decisions cited by State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., . Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, and Radhakrishna Agarwal and Others Vs. State of Bihar and Others, are not applicable herein as much as in the said decisions It was found that the parties were governed by the contract of private and commercial nature opposite

to statutory one. However, in this case the complaint also raised relating to arbitrary termination of contract, nor the breach of the terms, and further question of legitimate expectation.

26. Next question remains whether the right of the petitioner has been terminated arbitrarily, irrationally or not. As I have already observed that there is no existence of the agreement between the parties for 500 episodes, question of premature termination is out of question. The parties mutually agreed for extension of 455 episodes and such number of episodes have been allowed to telecast. So the extended right of the petitioner has duly been asserted and there is no refusal at all. I cannot accept the submission of Mr. Roy that the petitioner's contractual right has been terminated without any reason or abruptly. As such the ratio laid down in *Jonaki Ganguli's* case reported in 1994 (2) CLJ 320 is wholly inappropriate as in that case during subsistence of the agreement the petitioner's right therein were illegally taken away.

27. As far as question of legitimate expectation is concerned I fully agree with Mr. Sarkar's contention that in this case question of legitimate expectation does not arise as the parties are governed by the contractual agreement, and in terms of the contract as well as modification thereof as to the number of episodes parties mutually agree to 455 episodes. It is for either of the parties to extend or not and neither of them can be enforced to grant extension. So question of legitimate expectation does not arise. I am unable to accept the submission of Mr. Roy since the extension was granted all the times though there was a warning of limit of extension, expectation which is legitimate one, was generated in the mind of the petitioner that such extension would be granted.

28. Instead of monotonous repetition of doctrine of legitimate expectation I choose to speak that there shall be expectation and that too would be legitimate one. While analysing etymological meaning of the term "expectation" the apex court in one of its judgments reported in *Union of India and others Vs. Hindustan Development Corpn. and others*, has enunciated as follows:--

"Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the

conventional sense."

29. The doctrine of legitimate expectation is neither guaranteed nor crystallized right, rather it is merely a right of having fair treatment or a chance of being told beforehand with Just reasons before legitimate expectation is frustrated. This right is crystallized when one is unfairly treated and expectation is denied without any Informed reason of overriding public interest This is the precise substance of paragraphs 33 and 34 of above Judgment of apex Court.

30. In this case the petitioner entertained sincere hope of having further extensions of episode out of a contract. This hope or desire, whatever may be termed, however pious or confident by themselves cannot amount to an assertable expectation.

31. In my view in this case parties are governed by the contractual field so refusal for extension is done in terms thereof. Justice S.B. Sinha of our Court held in His Lordship's Judgment reported in A.C. Roy Co. and others Vs. Union of India and others, amongst other that it was difficult to comprehend as to how the doctrine of legitimate expectation can be Invoked in contractual field.

32. Mr. Sarkar's reference to Supreme Court's Judgment reported in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, assists me to conclude that the doctrine of legitimate expectation cannot be invoked to modify or vary expressed terms of the contract In this case I do not find expressed terms of contract in relation to right and obligation of granting extension of episodes.

33. In this case legitimate expectation would have arisen had there been refusal of extension without giving a chance or without informing any reason particularly when extension was granted from 65 episodes to 455 episodes as and when occasion arose. So it was and is quite natural that before refusal of extension petitioner at least would be heard or be Informed with reasons. In this case the petitioner was communicated beforehand that no further extension would be granted beyond 455 episodes and the petitioner was to mind up its serial and in fact even thereafter on the representation of the petitioner's the respondent has duly reiterated its stand not to extend any more episode and the reasons therefore was communicated. In my view the reasons given thereunder are not apparently illogical and Irrational on the facts and circumstances of this case and in reference to the object of section 12 of the said Act. All the eligible serial producers should be given chance and there cannot be any monopoly. In the event the petitioner is allowed to telecast for Indefinite period or at his wishes then the other producers who are waiting for their turn would not get any chance and that would rather result in arbitrary exercise of power.

34.1 am unable to accept the contention of Mr. Roy as because In some other cases the extension having been granted and thereby the petitioners have been meted out with hostile discrimination. In this case granting of extension is a discretionary power not the duty in terms of contractual terms and it is not the

enforceable right. To get the favourable order of discretionary power is not a matter of right. So in case of a discretionary power the hostile discrimination is not applicable particularly In this case. It is not a case that the petitioner was never granted any extension but the case is that the extension was not granted according to the satisfaction of the petitioner. It has been explained in the affidavit-in-op position under what circumstances in other cases the extension has been granted. It Is the decision of the statutory in its functioning and this explanation cannot be questioned or scrutinized by the writ Court as to whether the same are valid or not. I, therefore, rejected the contention of the petitioner that any discrimination has been meted out.

35. On the facts and in the circumstances, I hold that the decision taken by the respondents not granting extension beyond 455 episodes in favour of the petitioner does not suffer from any Illegality or unconstitutionality.

Accordingly the writ petition is dismissed. There will be no order as to costs.

Later:

Mr. Ghosh, appearing for the petitioner prays for stay of operation of the Judgment Mr. Sarkar opposes such prayer. I feel that substantial question of law is involved in this matter. So, stay Is granted for a period of seven days from date.

Urgent Xerox Certified Copy of this Judgment, if applied for, be supplied to the applicant, expeditiously, preferably within seven days from the date of making such application.

36. Petition dismissed