

(2014) 06 CAL CK 0092

In the Calcutta High Court

Case No : W.P. No. 65 (W) of 2011 and CAN No. 11620 of 2012

Saheli Patra

APPELLANT

Vs

Bharat Petroleum Corporation Ltd.

RESPONDENT

Date of Decision : 27-06-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2014 Cal 222 : (2014) 3 CALLT 363 : (2015) 1 WBLR 699

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Hirak Mitra, Sr., K.K. Maity and Tapan Bhanja, Advocate for the Appellant; Amitabh Shukla, Prakash Ch. Pandey, S.N. Mookerjee, Sr. Adv., R.A. Agarwal, Nibedita Pal, Ramesh Dhara and Santanu Chatterjee, Advocate for the Respondent

Final Decision : Dismissed

Judgement

I.P. Mukerji, J.—The contest is primarily between the writ petitioner and the third respondent. It is over distributorship rights granted by the first respondent to the third respondent to market LPG cylinders in the Digha area of West Bengal. That is how the first respondent comes into the picture. That is also how this writ is sought to be maintained on the plea that public law elements are involved. The third respondent was awarded the distributorship on 20th August, 2011, for five years. The writ petitioner thinks that she ought to have been granted this distributorship. She asks for cancellation of the distributorship of the third respondent and award of the same in her favour. Before I come to the facts, the history of the proceeding is to be recounted. On 6th May, 2011, some three months prior to grant of the distributorship in favour of the third respondent, the present writ application was moved in this court with a prayer for interim order. At least, at the interim stage, the validity of the panel of candidates for distributorship prepared by the first respondent on 5th February, 2010, appears to have been challenged. At that time learned counsel for the third respondent submitted in Court that his client had already been appointed as a distributor. It

seems that the court did not want to disturb this status quo. No interim order was passed. Directions were made for filing of affidavits.

2. The writ petitioner did not accept the order. She filed an appeal before the Division Bench of this Court. It was heard on 4th April, 2012 by the bench presided over by the Hon'ble the Chief Justice. The Appellate Court observed that the third respondent had already started the business of distributorship. This prevailed upon the court so as not to disturb the refusal of interim order made by the learned trial judge. The writ was sent back to the trial Court by a judgment and order made on that day.

3. After eight months or so, towards the end of December, 2012 the writ petitioner filed an application in aid of the writ application asking for setting aside of the order dated 6th May, 2011 and for passing an interim order suspending the distributorship of the third respondent. The ground in this application was that the court had been deceived. Distributorship had not been granted in favour of the third respondent as on the day the writ application came up before the Court, on 6th May, 2011, for consideration of the interim order. It was granted much later on 20th August, 2011. What was issued in favour of the third respondent was a letter of intent dated 6th January, 2011.

4. Furthermore, there was evidence to suggest, according to the petitioner that the godown-cum-showroom of the third respondent at Thikra was not within the Digha area. On these two grounds an interim order should have been passed suspending the distributorship of the third respondent. Such order was asked for in the subsequent application.

5. The writ application was also ready after filing of affidavits. The above application in aid of the writ application and the writ application were taken up for hearing, together.

6. The first respondent Indian Oil Corporation Ltd. and Hindustan Petroleum Corporation Ltd. issued a notice in The Telegraph, Kolkata on Sunday 16th September, 2007 for appointment of LPG distributors. The locations where these distributors would be appointed were specified therein. Digha was one of such locations. The application, along with all enclosures, was to be submitted in the office of the first respondent by 23rd October, 2007 5 p.m. Clause 18 of the notice is important. It stated that a person selected for distributorship would have to execute a distributorship agreement with the oil company for a period of five years renewable every five years thereafter. The distributor was required to have the following infrastructural facilities as provided in Clause 13 of the notice:

"13. Basic Infrastructure Facilities Required for Operation of LPG Distributorship--

13.1 Godown For Storage of Filled LPG Cylinders.

Godown/land for construction of Godown will be suitable, if it is located within 15 Kms or in the area of operation (trading area) of the advertised location, freely accessible through all weather motorable approach road. The plot should be

plain, in one contiguous lot, free from overhead power transmission or telephone lines. Pipelines/Canals/Drainage/Nallahs/Public Roads should not pass through the plot.

Minimum dimension of plot: 27m X 26.15m

13.2 Showroom

Showroom as per the standard layout can be constructed in a shop/land located in the area of operation (trading area) of the advertised location for LPG distributorship and should be easily accessible to general public through a suitable approach road.

Minimum dimension of the showroom: 3m X 4.5m

13.3 Infrastructure for Home Delivery of LPG Cylinders

In addition to showroom and godown for storage of filled LPG cylinders, delivery vehicles will be required for effecting free home delivery of LPG cylinders in their area of operation. Depending upon the need, delivery system will be advised before commissioning and subsequently from time to time by the respective Marketing officer of the Oil Company."

7. The showroom must have a minimum dimension of 3 m X 4.5 m and should be located in the location advertised with easy access. Criteria were laid down for selection in Clause 11 as follows:

"7. Selection Process and Evaluation criteria

The LPG distributor will be selected on the basis of evaluation of all eligible applicants on the following parameters.

8. Another clause, to my mind is very important. That is Clause 14. It stated that after selection of an applicant physical verification of the godown as well as the showroom would be undertaken and if any misrepresentations were found the allotment of distributorship would stand automatically cancelled.

9. Therefore, what follows from this clause is that a candidate for distributorship would have to declare that he had a godown and showroom, at the location and that if any representation regarding them was found to be erroneous, the dealership who liable to be cancelled.

10. Therefore, any allotment or selection was conditional upon existence of a proper showroom and godown.

11. Let me try to pinpoint the dispute. Both the petitioner and the third respondent were awarded more or less the same marks during the selection process with a difference of only a few marks. Now, the petitioner says that the location of the third respondent's proposed showroom was not at Digha but at Thikra which is 5 Km. from Digha town and is not Digha at all. The proposed showroom of the petitioner was in Digha. Digha was the location specified in the

notice for appointment. The petitioner fulfilled the eligibility criterion more than" the third respondent and ought to have been awarded more marks than she and hence, the distributorship.

12. On 4th and 5th February, 2010 interviews were held. On 5th February, 2010 a panel was prepared by the first respondent. The third respondent got 92.67% whereas the petitioner got 89.50%.

13. On 6th January, 2011, the third respondent was issued a letter by the first respondent stating that they proposed to offer her the LPG distributorship at Digha on the condition that the construction of the godown and showroom should commence only after permission in writing was obtained from the first respondent. The third respondent was asked to procure a suitable plot of land (32 mtr./29 mtr.) for storing LPG cylinders. The land could be freehold or leasehold with a renewal/clause to house the godown and showroom. The godown should be as close as possible to the showroom. The construction should be so paced that the distributorship is commenced within four months from the date of the letter. If the progress was unsatisfactory, the offer was liable to be cancelled.

Paragraph 5 and 6 of the letter are important. They are in the following terms:

"(5) The Distributorship to you will, on your complying with the conditions spelt out herein above be confirmed/formalized by an Appointment Letter followed by the signing by both you and us, of our standard Distributorship Agreement.

(6) This letter is merely a Letter of Intent and is not to be construed as a "firm offer" or Distributorship to you. If we find that the progress being made by you towards the above is not to our satisfaction, this letter is liable to be withdrawn."

14. Hence, the formal contract would be the appointment letter. The Letter of intent was a conditional agreement between the parties. Upon fulfillment of the conditions therein relating to acquisition of land for construction of the godown and showroom and their construction according to the stipulations of the first respondent, a formal contract would be drawn up.

15. In compliance with a direction made by this court the first respondent produced its original file with regard to the matter. It shows that a field verification was made by the first respondent. The report is undated. The report stated in very clear terms that the site of the LPG showroom was at Ramnagar which is 6 Km. from Digha. In fact, the third respondent had made a declaration which is at page 45 of the file that in spite of best efforts she could not obtain the showroom in Digha town.

16. It appears that the first respondent had on 16th November, 2010 written to the Block Land and Land Reforms Officer, Ramnagar I at Purba Medinipur regarding the location of Thikra. On 2nd December, 2010 the officer had replied that it was "within the Digha location".

17. On 16th March, 2011, the Bloc Development Officer Ramnagar Development Block I wrote to the petitioner with regard to her application dated 8th March, 2011 that Thikra was not within Digha. It appears that the petitioner had on the same day, written to the Digha Sankarpur Development Authority for the self-same information.

18. By his letter dated 8th April, 2011 the State Public Information Officer who was the Block Development Officer informed the petitioner that Mouza Thikra was outside the Digha Sankarpur Development area and was not "under the jurisdiction of Digha and New Digha Post Office".

19. On the same day, i.e. 8th April, 2011 the first respondent wrote to the BL & RO with a copy to the Bloc Development Officer Ramnagar Dev. Block I that the latter had referred them to the former who had opined that the land was in Digha. Then how could it be said later by the same officer that it was outside the Digha area.

20. By successive letters dated 2nd November, 2011, 9th November, 2011, 08th December, 2011 and 13th January, 2012 and 16th January, 2012 the local authorities of the area, namely, Public Information Officer, Digha Sankarpur Development Authority, Block Development Officer, Land and Land Reforms Officer and the Panchayat reconfirmed the position to the petitioner that "Thikra" was not part of Digha.

DISCUSSION

21. The third respondent had got the distributorship. The writ petitioner is the disappointed candidate. While the writ petitioner got 89.50% the third respondent got 92.67%. The third respondent was appointed as a distributor on 20th August, 2011. This means for nearly three years she is continuing with the business of distributorship. The duration is five years with an option of renewal.

22. The foundation of the case of the petitioner is that the first respondent had notified that the LPG showroom and godown would be at Digha. The petitioner had such a place at Digha town. The third respondent's godown and showroom situated at Thikra according to the petitioner and the available records is about 5 Km. from Digha town. Therefore, since the petitioner's location is in Digha town and the notification advertised for a showroom cum godown at Digha, she ought to have qualified by getting more marks than the third respondent. In the alternative, the third respondent ought to have been disqualified for not having a location in the Digha area. This was argued by Mr. H.K. Mitra learned Senior Counsel for the petitioner.

23. In my opinion, the first respondent had merely indicated in their public offer the location of the distributorship. Its location was neither fixed by any statute nor by any statutory instrument. It was only an administrative decision that the first respondent had taken to fix the location of the showroom cum godown in Digha. It was not specified in the notification whether the showroom cum

godown would be in Digha town or within the area covered by Digha Sankarpur Authority. Only "Digha U/R" was mentioned, U/R standing for urban/rural.

24. It seems to me on perusal of the above correspondence, that Digha is more the concept of an area than an exact town, bloc or village. It is partly urban around the sea beach and partly rural beyond that. It is the identification of an area around the sea in a rough geographical location than a geographical location by itself, which can be determined by latitude and longitude. That is why perhaps in the advertisement, the location has been described as urban/rural. The explanation in the Affidavit-in-Opposition of the first respondent that by Digha they understood an area covered by a radius of reasonable length from the sea as placed by Mr. S.N. Mookerjee, learned Senior Counsel for the third respondent is not unbelievable and in fact reasonable, in my opinion.

25. Furthermore, there is discrepancy in the information furnished by the officers of the land and land reforms department. Sometimes it was said that Thikra was within Digha. On other occasions the officers have said that it was in Ramnagar I Development Block and was not part of Digha.

26. From the above evidence I accept that Thikra is outside the area known as Digha town. But there is no dispute that Thikra is within 5 or 6 Km. from it.

27. The Bloc Land and Land Development office had at the end of 2010 confirmed to the first respondent that Thikra was part of Digha. This clarification was taken by the first respondent on the basis of the field verification report which stated that Thikra was in Ramnagar 1, Development Bloc area which is outside Digha, as submitted by Mr. Shukla for the first respondent. I do not think it was improper on the part of the first respondent to have acted on the basis of that opinion of the land officer and treated Thikra to be part of Digha, while issuing the letter of Intent on 6th January, 2011.

28. Moreover, even if Thikra is not part of Digha town, one has to take the decision of the first respondent to open an LPG showroom cum go-down in a reasonable manner.

29. When they had stated in the advertisement that it would be in Digha, they had meant the said Digha area. It was not altogether impermissible for them to select a godown and showroom which was 5 Km. from Digha town. Even if they have done so, it is not such a great infirmity so as to result in cancellation of the distributorship of the third respondent and its award in favour of the petitioner. It is true that the officers of the first respondent had doubts regarding the proposed location at Thikra. They knew well that it was doubtful on the basis of the field verification report whether Thikra was a part of Digha or not. Yet on the basis of the opinion of the land officer they went ahead which cannot be called an illegal or improper act.

30. At any rate if there was some irregularity on the part of the first respondent in awarding the contract to the third respondent, the petitioner by no means,

acquired the right to challenge the award of the contract and claim the contract in her favour. I repeat that there was no irregularity of that kind that vitiated the award of the contract.

31. What is more important is that nothing has been shown that the godown and showroom at Thikra does not serve the Digha area.

32. As in this case, in another case, Bharat Petroleum Corporation Ltd. issued an advertisement on 30th May, 2010 for award of dealership of retail outlets in Bihar. In the selection process the appellant before the Hon"ble Supreme Court was placed first with 78.04 marks and the seventh respondent got 77.75 marks and was placed second. In that case also there was field verification. The seventh respondent challenged the selection process. In that case, marks were allotted for fixed and movable assets. The said respondent filed a complaint before the corporation. The complaint was rejected. The Technical Evaluation Committee found the land offered by the appellant more suitable. Furthermore, the seventh respondent had not furnished any title deeds to substantiate his title.

33. I read paragraphs 16 to 19 of the judgment of the Hon"ble Supreme Court in the case of Sanjay Kumar Shukla Vs. Bharat Petroleum Corporation Ltd. and Others, cited by Mr. Shukla where this dispute was resolved:

"In Raunaq International Ltd. v. I.V.R. Construction Ltd. (paras 9, 10 and 11) this Court had held as follows: (SCC p. 500-01)

"9. The award of a contract whether it is by a private party or by a public body, or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often;
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction,

considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving large outlays of public money and delaying the availability of services, facilities or goods e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

17. In *Air India Ltd. v. Cochin International Airport Ltd.* there was a further reiteration of the said principle in the following terms: (SCC pp. 623-24, para 7)

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*, *Fertilizer Corpn. Kamgar Union v. Union of India*, *CCE v. Dunlop India Ltd.*, *Tata Cellular v. Union Of India*, *Ramniklal N. Bhutta v. State of Maharashtra* and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial

decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is, found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

(emphasis supplied)

18. A similar reiteration is to be found in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*, *Tejas Constructions and Infrastructure (P) Ltd. v. Municipal council, Sedhwa* and several other pronouncements reference to which would only be repetitive and, therefore, is best avoided.

19. We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast-changing economic/market scenario are some of the pitfalls that may occur."

34. In my opinion, any relaxation regarding location granted by the first respondent to the third respondent was not barred by the tender conditions, following the ratio in the *Air India* case (*Supra*).

35. Moreover, the third respondent has been operating the godown and showroom for a period of about three years. In my opinion at this stage it would be unjust to declare cancellation of the distributorship and to award the same in favour of the petitioner.

36. As far as the point regarding fraud is concerned, even if I accept the

argument of Mr. Hirak Kumar Mitra, Senior Advocate on the basis of the case of the S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., that an order obtained by fraud should be forthwith vacated, I would observe that this point of fraud was open to the writ petitioner before the Appellate Court to which the appeal was preferred against the refusal of the trial court to grant the interim order. This point was not taken before the Appellate Court, although all points on merits had been taken.

The Appellate Court held:

"The fact remains that the respondent No. 3 had already started the business. It will not be proper at this stage to enter into the question whether the business actually was started before November 21, 2011 or not, more so as the letter of intent was issued on January 6, 2011 and the fact remains that she was already appointed in respect of the above distributorship. The learned Judge under the circumstances had held that the balance of convenience and/or inconvenience lay in favour of rejecting the prayer for an interim order with the clarification that the appointment of the respondent No. 3 shall abide by the result of the case.

.....

We hold that in the facts of the case the interim order was rightly declined by the learned single Judge and in view of what have been discussed above we do not find anything to interfere with the impugned order. The appeal is, thus, dismissed.

Needless to mention, the petitioner shall be at liberty to bring it on record before the learned single Judge all such documents which have not been brought on record so far including those which have been obtained after the interim order was passed and the learned Judge shall consider the same at the hearing of the writ petition in order to do complete justice between the parties. In that case the respondents shall also be given an opportunity to deal with those documents.

Considering the fact that we are dismissing appeal without going into the materials obtained subsequent to the order impugned in this appeal we only request the learned single Judge to dispose of the writ petition at an early date."

37. The doctrine of res judicata applies to a plea of fraud also. It also operates at the interim stage of a litigation. If the plea was available and not taken, it could not be invoked again, in the same litigation or in any subsequent litigation, by the principles of constructive res judicata. It was not taken in the appeal, when it was fully available It cannot be entertained now. (See Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another,

38. In my opinion, the dispute between the petitioner and the private respondent is absolutely private. There is no public element involved.

39. I attach much weight to the submission of the respondents that no one from Digha has come forward to assail the grant of dealership in favour of the third

respondent.

40. It was submitted by Mr. S.N. Mookerjee and rightly so that under Clause 12 of the terms and conditions governing the tender, a person who had appeared for the interview and was aggrieved by the selection could lodge a complaint with the local officer of the first respondent. It was stipulated therein that the said respondent would make all efforts to dispose of the complaint within three months of its receipt, provided the complaint was made within one month of the declaration of the result. In that event the Letter of Intent, if issued would be kept in abeyance. The result was declared in this case of 5th February, 2010. The complaint under this clause was received by the first respondent on 31st December, 2010. Hence, the first respondent could not take any action on this complaint. The writ application was filed on 3rd January, 2011.

41. Filing of this complaint in my opinion was clearly an afterthought because had there been any genuine grievance, the complaint would have been made within one month of the declaration of result. The lodging of the complaint just a few days before instituting the writ application goes to show only a formal compliance with the rules and practice of this court relating to Article 226 of the Constitution enjoining the petitioner with the duty of giving a demand for justice to the authority concerned, before filing the writ. For all these reasons this writ application is dismissed. The application (CAN 11620 of 2012) is also dismissed. No order as to costs.

Urgent certified photocopy of this judgment/order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.