
(1994) 12 CAL CK 0028
In the Calcutta High Court
Case No : Matter No. 2632 of 1994

Shree Nathji International

APPELLANT

Vs

Bharat Aluminium Co. Ltd. and Others

RESPONDENT

Date of Decision : 21-12-1994

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (1995) 1 CALLT 286

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : Hirak Mitra, for the Appellant; Tapas Kumar Banerjee and Dipak Kumar Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Satyabrata Sinha, J.—This writ application has been filed by the petitioner inter alia, for the following orders :

- (a) Issue a writ or writs, order or orders, direction or directions in the nature of mandamus commanding the respondents and/or each of them and/or agents, servants, assignees, representatives and calling upon them as to why the tender under tender specifications given, by the petitioner not be given effect to the satisfaction of the petitioner by releasing and/or disposing materials to them;
- (b) Issue a writ or writs, order or orders, direction or directions in the nature of prohibition prohibiting the respondents and/or each of them and/or agents, servants, assignee and/or representatives from taking any steps and/or further step contrary to the interest of the petitioner in respect of the specified tender ;
- (c) The respondents be directed to enforce the accepted tender of the petitioner for the purpose of disposal of the material immediately without any further delay.

2. The facts leading to the filing of this writ application are as follows :

Pursuant to a tender notice dated 20.4.93 the petitioner submitted the tender in

regard to the subject matter of this writ application on 21.6.93 by registered post as per instruction of the respondents inasmuch as the respondents refused to accept the hand delivery of the same allegedly on the ground that the petitioner was late in submitting the tender by ten minutes from the scheduled time. However, petitioner's tender was accepted by the respondents and the earnest money paid by the petitioner was received, encashed and receipt was granted by the respondents. The petitioner was declared the highest bidder.

3. The petitioner allegedly was asked to come to Delhi by the respondents for the purpose of negotiation by letter dated 20.9.93 which is contained in Annexure E to the writ application stating --

"Your representative must bring the Earnest Money Deposit @ 3% of the quoted value along with the following documents :

(a) Original documents for our verification for which photo copies have been enclosed with the offer.

(b) Banker's Certificate regarding financial soundness of your firm. A final view in the subject tender will be taken after discussions. Therefore, your accredited representative should be prepared to stay for 3 days and bring with him the letter head and rubber stamp of the firm, in case the same are required during the course of discussion."

Pursuant thereto an authorised representative petitioner went to Delhi and took part in the negotiation. According to the petitioner, it also extended the validity period as was directed to do by the respondents. However, the petitioner was informed that his tender could not be considered as the same was found to have been submitted later.

4. The respondents in their affidavit-in-opposition have inter alia stated that four tenders were received which were opened on 21.6.93 at 3.30 P.M. However, three closed covers were received by the respondents on 23.6.93 by registered post including that of the petitioner for the items IU/02 and SM.03 of the tender notice. The said tenders were opened on 6.7.1993. It is stated that the offers of the petitioner were late offers and thus the same could not be considered. It has been stated that the matter was put up before the Tender Committee which was a high power committee for taking a decision if the same could be considered. It is stated that the representative of the petitioner was called on 11.10.93 for discussion with the Tender Committee.

5. However, the Tender Committee recommended for scrapping both the packages IU/02 and SM-03 in terms of its recommendation which is contained in Annexure B to the affidavit-in-opposition and which are to the following effect :

"PACKAGE NO. IU/02. Against this package, initially 6 parties had quoted out of which two were the late offers. Offers of all the 6 parties were opened including the late offers to access the response of parties. It was noted that offers of both the 2 late tenders were I/II highest. But keeping in view, the tendering ethics,

the tender committed does not consider it proper to consider the late offers, as it may invite objection from other bidders. Also, the tender committee feels that a better price may be obtained if this package is sold at a later date through open tender.

In view of the foregoing ; the tender committee recommends that this package be scrapped and retendered with other packages."

PACKAGE NO. SM/93. In all 3 offers were received against this package out of which one of Shree Nathji International was a later offer. The late offer was also opened in order to compare the rates. Though their quoted rates were highest but it is not considered advisable to consider the late offer to avoid complaints from other bidders. Since their offer has already been opened and they also contend on this issue, the tender committee recommends that this package be scrapped and re-tendered along with other packages.""

6. Mr. Hirak Mitra, learned Counsel appearing on behalf of the petitioner, inter alia, submitted that keeping in view the fact that not only the petitioner was advised to send its tender under registered cover, its representative was also called, to Delhi for final discussion in the matter, the tender submitted by it could not have been rejected only on the ground that other parties might take objection in relation thereto. It was submitted that in view the representation of the respondents, the petitioner had a legitimate expectation of its tender being accepted as the same was highest. The learned Counsel submitted that the reasons assigned for rejecting the tender are wholly irrelevant and thus the action on the part of the respondents which is a State within the meaning of Art. 12 of the Constitution of India, cannot be said to be reasonable. On the basis of the decision of the Supreme Court in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , it was submitted that procuring of the highest price for the commodity was in public interest. It was submitted that in any event the cancellation of the tender without any notice must be held to be unreasonable. The learned Counsel further pointed out that on earlier occasions also the respondent authority never followed the formalities rigidly and thus, mere irregularity, if any, cannot vitiate the entire transaction as such irregularities were regularised. The learned Counsel placed reliance upon M/s. Jyothi Krishna Engineers Vs. State Bank of Hyderabad, .

7. It was strenuously contended that acceptance of earnest money, declaration of the petitioner as highest bidder, acceptance of confirmation and the assurance given for disposal of the materials would amount to a promise made to the petitioner by the respondents and in that view of the matter the doctrine of promissory estoppel is applicable in this case. Reliance in this connection has been placed upon Union of India and others Vs. Hindustan Development Corpn. and others, Surendra Prasad Misra Vs. Oil and Natural Gas Commission, Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., and Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, Mr. Mitra contended that this Court should interfere with the impugned order passed by the

respondent authorities as the same suffers from arbitrariness, discrimination and is also against the rules of fair play and natural justice. Strong reliance in this behalf has been placed upon Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

8. Dr. Tapas Banerjee, learned Counsel appearing on behalf of the respondents, on the other hand, submitted that when the tender was originally opened, the petitioner's tender having not been received thence, the same was liable to be rejected at that time. According to the learned Counsel, the tender committee wanted evaluation of the tender goods wherefor the authorised representative of the petitioner was asked to come to Delhi. The learned Counsel submitted that there was another committee" namely, tender receiving committee which opened the tenders. They merely forward all the tenders received by them to the tender committee for evaluation and thus no right has been conferred upon the petitioner upon submission of tender alone. The learned Counsel submitted that even assuming the tender of the petitioner was a valid tender, thereby he merely became an eligible candidate for consideration. Dr. Banerjee drew my attention to the clause in the tender in terms whereof the respondents had reserved the right to reject or accept all or any of the tenders. It was submitted that the said clause is a valid one and reliance in this connection has been placed on Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others,

9. It was further submitted that the State has the right to reject the tender of a highest bidder and in support of the said contention reliance has been placed on Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others,

10. It was further submitted that in a matter of contract qua-contract the doctrine of legitimate expectation has no role to play. Reliance has been placed on Union of India and others Vs. Hindustan Development Corpn. and others,

11. There cannot be any doubt that the respondents being a State within the meaning of Article 12 of the Constitution of India even in the matter of grant of contract or distribution of largess are expected to act fairly and reasonably. However, the respondents are also bound by the terms of the notice inviting tender. It may be true that the public interest demands that highest price should not be rejected without assigning reasons therefor. It is, however, also true that it is not necessary for the respondents to accept only the highest offer.

12. In Trilochan Mishra, etc. Vs. State of Orissa and Others, the Supreme Court held as follows -

"With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise their bids to the highest offer before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well

known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration to be preferred to the higher tenderer."

13. Similar view has been taken by the Supreme Court in *Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others*,

14. In *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, , the Apex Court has held :

"It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed liberally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary of subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. In *M/s. G. J. Fernandez Vs. State of Karnataka and others*, the Supreme Court has held :

"Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the Court will decline relief."

16. The Apex Court further observed :

"The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it. known that the rule was likely to be relaxed."

17. This aspect of the matter has recently been considered by the Supreme

Court in Tata Cellular Vs. Union of India, wherein it has been held :

"The principles deducible from the above are :

- (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 administration 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 opened 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 fairplay 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.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

18. It is true that in the case of Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, the Supreme Court has held :

"In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A Public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fairplay in action"."

19. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, it has been held that there is an obligation to communicate the reasons.

20. In this case, however, reasons have been assigned. The reasons assigned by the respondents, in my opinion, cannot either be said to be arbitrary or irrational. It may be true that strict compliance with ancillary or subsidiary condition of tender may not be desired but submission of tender with the prescribed period cannot either be said to be ancillary or subsidiary condition.

21. Moreover, in this case no tender has been accepted. The respondents have a right to reject all the tenders in the hope that they expect higher price. Such an approach on the part of the respondents can neither be said to be arbitrary or

irrational so as to attract the wrath of Article 14 of the Constitution of India.

22. In *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, the Supreme Court has held :

"An invitation to tender is a mere attempt to ascertain whether an offer can be obtained within such margin as the building owner or employer is willing to adopt, or, in other words, is an offer to negotiate, an offer to receive offers, an offer to chaffer (see Halsbury's Laws of England, Third Edition, page 422). There is, in our opinion, difference between auction and invitation for tenders. As there was no auction but only invitation for tenders in the present case, it cannot be said that the lease of the distillery was governed by Article 9 of the Legislative Diploma."

23. It is now well known that the scope of judicial review of this Court in terms of Article 226 of the Constitution of India is very limited. This Court while exercising its power of judicial review does not sit in appeal over the decision of the respondents; but its power of judicial review is only confined to the decision making process.

24. The submission of Mr. Mitra to the effect that on earlier occasions the respondents did not adhere to the strict terms of the tender, cannot be accepted. Even assuming that the respondent No. 1 on earlier occasion did not strictly adhere to the requirement of ancillary or subsidiary conditions of the tender, it is entitled to take its own decision in a given matter. The respondent is also entitled to rectify its mistake by not allowing it to be perpetuated. Reference in this connection may be made on AIR 1994 SCW 218.

25. The submission of the learned Counsel that the petitioner had a legitimate expectation is also not well founded. In *Navjyoti Coo-Group Housing Society etc. Vs. Union of India and Others*, . the Supreme Court held :-

"Doctrine of legitimate expectation therefore is confined to the rule of law. No relief can be sought for only on the basis of doctrine of legitimate expectation. Reference in this connection may be made to *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, .

26. In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, it has been held as follows :

"Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic but provides for control of its exercise by judicial review."

(2) The Apex Court observed :

"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 principles 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 claimant's perception but in larger public interest wherein other more important consideration far 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."

28. In *Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others*, it has been held :

"We accept the position that the power of discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licenses, etc. must be confirmed and structured by rational, relevant and non-discriminatory standard or norm and if the Government departed from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it could be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, irrelevant, unreasonable or discriminatory."

In *Sudip Kumar Saha v. State of West Bengal and Ors.*, reported in 1994(1) Cal CHN 199, a Division Bench of this Court observed :

"As has been pointed out by the Supreme Court in *Union of India and others Vs. Hindustan Development Corpn. and others*, the concept of legitimate expectation is the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action ; but that principle has got to be invoked and applied with great care and caution. Otherwise a resourceful litigant having vested interest in contracts, licences, etc. can successfully indulge in getting welfare activities thwarted to further his own interest. Relying on *Attorney General for New South Wales v. Quin* (1990 64 Aus LJR 327), it has been held that to strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the Courts adrift on a featureless sea of pragmatism and that notion of legitimate expectation, not amounting to a legal right, is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. Only when the denial of legitimate expectation in a given case amounts to denial of guaranteed right or is arbitrary, discriminatory, unfair or biased, then same can be questioned on the well-known grounds attracting Article 14 of the Constitution. But otherwise, a claim based solely on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. In the case at hand there is no denial of any guaranteed legal right. And the case not being that others similarly situated have been granted Ijaras for longer period, the question of arbitrariness, discrimination, unfairness or bias cannot be

said to have been made out."

29. In *Industiral Fuel Company Private Ltd. v. Heavy Engineering Corporation Ltd. and Ors.*, reported in 1993 (2) ELJR 1308 I have held :

"So far as the submission of Mr. Gododia on the doctrine of legitimate expectation is concerned, the same has no application in relation to a dispute arising out of a contract qua contract. The said doctrine is applicable in the cases of "State Action".

30. However, the Supreme Court recently in *Union of India and others Vs. Hindustan Development Corpn. and others*, has clearly held that no enforceable right is created in terms of the doctrine of legitimate expectation, but the same only checks arbitrariness on the part of the State.

31. Recently the Supreme Court in *Madras City Wine Merchants' Association and Another Vs. State of T.N. and Another*, held :

From the above it is clear that legitimate expectation may arise-

- (a) if there is an express promise given by a public authority; or
- (b) because of the existence of a regular practice which the claimant can reasonably expect to continue.
- (c) Such an expectation must be reasonable.

However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise."

32. In the aforementioned case the earlier decision of the Supreme Court in *Union of India and others Vs. Hindustan Development Corpn. and others*, upon which reliance has been placed by Mr. Mitra has been considered. The petitioner in view of the aforementioned decision of the Supreme Court cannot succeed in this writ petition. Nothing has been placed on record to show that any express promise was made by any officer of the respondent No. 1 to the petitioner.

33. For the self-same reason, in my opinion, the doctrine of promissory estoppel in this case has also no application. There is no express promise on the part of the respondents to award contract in favour of the petitioner. The petitioner has merely a right to be considered so far as his offer is concerned. Only because the petitioner's authorised representative was asked to come to Delhi, the same by itself does not mean that a promise has been made on the part of the respondents that a contract would be granted.

For the reasons aforementioned the application is dismissed.

All parties are to act on a signed copy of the operative part of this Judgment on the usual undertaking.