

(1994) 11 DEL CK 0037

In the Delhi High Court

Case No : Civil Writ Petition No. 4362 of 1994 and Civil Miscellaneous Appeal No. 7865 of 1994

Siddha Raj Dhadda and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-11-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1994) 4 AD 1003 : (1995) 32 DRJ 216

Hon'ble Judges : N.G. Nandi, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : G.L. Sanghvi and Shyam Moorjani, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) This petition under Article 226 of the Constitution has filed as a public interest litigation praying for a writ of certiorari or any other appropriate writ, order or direction (1) to quash the concurrence, if any, granted by the Central Electricity Authority to the scheme of seven projects of foreign firms for establishment of power plants without following the procedure as prescribed under the Electricity Supply Act, 1948 (for short the act) (2) for quashing the guarantees, if any, given by the State Governments concerned infamous of the foreign companies sponsoring the said projects in the five States being vocative of section 66 of the Act as well as being repugnant to the provision of the Constitutional; and (3) for quashing the guarantees and/or counter guarantees if already given and also praying that the respondents States and the Union of India be prohibited from giving such guarantees in respect of Power Purchase Agreements sought to be entered into by the respective State Electricity Boards with the foreign companies and particularly in respect of loans which might be raised by Enron Power Development Corporation (Enron), a U.S. based company, either from internal or from external sources, i.e., from the World Bank, Asian Development Bank or any other bilatera; source. The petitioners also seek a

direction to Union of India tap point a penal of National and International experts to examine the counter offer dated 7 June 1994 given by the Federation of Bhel Executives Association (Respondent No. 10) to the Prime Minister of India. Yet another direction sought is that a Commission comprising of eminent persons in judicial field, technocrats, financial analyst, economists and project planning be appointed to examine the financial and technical viability and all other relevant aspects of the aforesaid seven projects having been awarded to the foreign companies. Lastly, it is prayed that the term, if any, contained in the agreements entered into with foreign companies which oust the jurisdiction of the Indian courts be quashed. In this connection reference has been drawn to the agreement with Enron, a foreign company.

(2) There are three petitioners. First petitioner claims to be a social worker actively associated with the Sarvodaya Movement having taken part in the Indian freedom struggle .Second petitioner is a Professor (Maths) in Allahabad University and is stated to be the national convener of an organisation called Azadi Bachao Andolan. Third petitioner is the Rajas-than Unit of an All India Organisation called "Civil Liberties Union which is stated to having aims to promote civil liberties of the people, to secure the social, economic and political justice to all, and to fight for the withdrawal and repeal of all the repressive laws and measures. There are as many as ten respondents which includes the Union of India in the Ministries of Power, Finance and Cabinet Secretariat; the States of Maharashtra, Andhra Pradesh, Orissa, Karnataka and Tamil Nadu; the ninth respondent is the Central Electricity Authority established under the Act, and the tenth respondent is the Federation of Bhel Executive Association.

(3) Petitioners say that they are challenging the policies of respondents 1 to 9 which amount to abject surrender before foreign companies in power sector in complete violation of their constitutional and statutory obligations and duties. Then the petitioners say that they have learnt that the Central Government is stated to have received as many as 40 applications from Indian entrepreneurs and 35 from foreign investors, but that the respective Governments and Union of India, however, approved seven power projects in five States and awarded them only to the foreign investors. These projects are stated to be in the States of Maharashtra, Andhra Pradesh, Orissa, Tamil Nadu and Karnataka.

(4) The petitioners have concentrated their attack on the Memorandum of Understanding for setting up a power generating project at Dabhoi (Maharashtra) entered into between the Enron and the Maharashtra State Electricity Board (MSEB). It is stated that the Mou was entered into through close door negotiations for the power project of 2015 M.W. and that the terms, conditions and other vital facts relating to the said deal were shrouded in complete secrecy when the project was to cost Us dollars 2650 million. Petitioners say that no global tenders were invited and that the contract was awarded to Enron on extraordinary terms and having consequences of far reaching nature, and that the terms were contrary to the provisions of the Act, and further that the terms

were such as would destroy the viability of existing companies like Bharat Heavy Electricals Limited and National Thermal Power Corporation both Government of India Companies, and that there was clear discrimination against the Indian companies, both in public and private sector. It was also submitted that the Government of India could not give a counter guarantee which was against the provisions of the Constitution. This counter guarantee, it is stated, was necessitated because of the return on the investment promised to Enron which guarantee was given by the State of Maharashtra and counter guaranteed by the Central Government.

(5) We find that a similar writ petition was filed in Bombay High Court (Writ Petition No. 1702 of 1994) questioning the wisdom of setting up the power plant at Dabhoi (Maharashtra) by Enron, the power purchase agreement between Enron and Mseb and the guarantee and the counter guarantee by the State of Maharashtra and the Central Government, respectively. This petition was dismissed by a Division Bench of that court by a detailed order on 19 August 1994. It was dismissed after hearing counsel for the petitioners there and counsel for the Union of India, State of Maharashtra, Mseb and for Dabhoi Power Company promoted by the U.S. based company Enron. What we find is that the arguments which were addressed there are the same which have been addressed before us. We find it necessary to set out all the facts all over again. The Bombay High Court ruled that the contract had been awarded after proper negotiations and in a most reasonable manner. The argument that the global tender should have invited was repelled. On the guarantee by the State of Maharashtra and counter guarantee by the Union Government the court did not find any merit in this submission. As regards the counter guarantee given by the Union of India, the court referred to the affidavit of the Union of India wherein it was stated that giving of a guarantee or counter guarantee was not something unusual and that from time to time such guarantee had been given in the past and there was nothing wrong or illegal on the part of the Government to give, in appropriate cases, such guarantees in the public interest, to induce foreign investors to come to India and invest in fields like power development. It noted that similar counter guarantees had earlier been given by the Union of India on behalf of the Air India and the Indian Airlines for the purchase of aircrafts by these Government companies. It was also noticed that giving of counter guarantee was not something unusual for the developing countries including China, Indonesia, Philipines, Turkey and Pakistan. As to what was the challenge before the Bombay High Court, we may extract the following passage from the Judgment:

"THE main challenge to the award of the contract by the Maharashtra State Electricity Board to the Dabhoi Power Company (Respondent No. 8 herein) is on the ground that it was finalised without resorting to competitive bidding by inviting global tenders. The contention of the petitioners is that the Maharashtra State Electricity Board has not followed the norms normally followed in awarding such contracts, i.e., inviting competitive bids. Finalisation of the contract by negotiations, according to the petitioners is not a permissible mode of awarding

such contracts by the States or its instrumentalities. According to the petitioners, the whole contract has been finalised in complete secrecy and is even now shrouded by secrecy. The entire negotiations in this regard haven been kept away from the gaze of the public and the decision to award the contract has been arrived at without any regard to the views expressed by Various experts in the field including the World Bank. Reference was made to the report of a fact-finding committee appointed by some voluntary organisation which had impugned deal. Our attention was also drawn to comments of some persons claiming expertise and experience in this field and some press reports published in the newspapers from time to time. The petitioners allege that the whole deal is against public interest. The petitioners have also a complaint against the guarantee and counter guarantee which is given by the State of Maharashtra and the Central Government respectively. According to the petitioners, the terms on which the agreement has been finalised are not most beneficial terms. By competitive bidding, more beneficial terms might have been available."

Not only this , the court directed the respondents to furnish it with all the facts, events, and documents leading to the finalisation of the agreement in question with Dabhoi Power Company. A copy of the power purchase agreement entered into between Mseb and the Dabhoi Power Company on 8 December 1993 was also placed before the court. Permission was granted to the petitioners to inspect the agreement to enable them to point out any clause or condition therein which according to them might justify the judicial review in the case. After the inspection had been done the court noticed that the main grievance, however, as the same, i.e., finalisation of the agreement by negotiations without competitive bidding.

(6) The court also noticed that in the year 1991, because of the new liberalisation policy formulated by the Government of India for development of power sector in India, the Electricity supply Act was amended by the Electricity Laws (Amendment) Act of 1991 to enable private parties to set up generating companies for the establishment, operation and maintenance of generation stations. Reference was also made to a resolution dated 22 October 1991 of the Government of India formulating a scheme for encouraging private enterprises to participate in power generation, supply and distribution in India wherein it was stated, inter alia, that generating company could enter into a contract for the sale of electricity generated by it with the State Electricity Board in any State where it owned/operated generating station/stations or in any other State it was carrying on its activities or with any other person with the consent of the competent Government. The method of fixing the tariff for the sale of electricity was also set out therein. By another resolution of the same date, the Government of India constituted a High Level Board for considering promotion of investment by private units in the electricity sector. On 31 March 1992, the Government of India issued a notification setting the factors in accordance with which the tariff shall be determined which provided that return on equity shall be computed on the paid up and subscribed capital relatable to the generating unit,

and shall be 16% of such capital. All these factors and other details have been set out in the judgment of the Bombay High Court.

(7) However, we find that the argument raised before us that giving of counter guarantee by Union of India is outside the purview of Article 293 of the Constitution has not been squarely discussed in the judgment by the Bombay High Court. But since in our view the petitioners have just lent their names in filing this petition and appeared to be acting at the behest of the tenth respondent. Federation of Bhel Executives Association we would not like to go into this question in this petition. It is not that the petitioners were unaware of the writ petition having been dismissed by the Bombay High Court as they themselves brought to our notice the aforesaid judgment of the Bombay High Court. We will not be surprised if the averments in the writ petition are the same as were in the Bombay High Court. This would amount to shopping for justice in the garb of public interest litigation which we cannot permit.

(8) We heard this matter on 31 October 1994 and adjourned the same to 2 November 1994 on the request of counsel for the petitioners. On 1 November 1994, additional affidavit was filed by one Tej Kishan claiming to be the "Parokar" of the petitioners. With this affidavit he filed a critique on current power policies in the country prepared by National Working Group on Power Sector. The members of the working group are all former bureaucrats. When we asked Mr. Sanghi learned counsel for the petitioners, if not there are experts in the Government, he said that they would not be in a position to express their view freely. We are unable to agree to such a submission. We do not know the credentials of Tej Kishan and we also fail to understand as to why a "Parokar" is needed in a public interest litigation. A "Parokar" is a person, as normally understood, who follows up the progress of the litigation on behalf of the party. In the Oxford Hindi-English Dictionary, a "Parokar, or "Pairvikar" is defined as

" FOLLOWER, supporter ;prosecutor," and "Pairvi" means "following (a course of action) attachment, adherence; endeavor to follow, to pursue; the comply with (as regulations); to prosecute (a case)".

During the course of hearing also, on 2 November 1994, another affidavit by Tej Kishan was filed bringing on record memorandum submitted to the Sub Committee on Power of the Parliamentary Standing Committee on Energy by the President of the National Confederation of Officers Association of Central Public Sector Undertakings, and Convener, National Working Group on Power Sector. All this lends support to our view that the present petition has been filed at the behest of respondent No. 10, namely. Federation of Bhel Executives Association.

(9) The Bombay High Court has also gone in detail into the jurisdiction of the court while exercising judicial review. The court felt that there was nothing wrong in entering into the Power Purchase Agreements and, thus, dismissed the petition in limine. As noted above, the court had before it the relevant file and all the documents to come to the conclusion that the agreements had been entered

into after proper examination and that there was nothing wrong in the decision making process. In this view of the matter this petition is dismissed in liming.