

(2004) 02 GAU CK 0045
In the Gauhati High Court
Case No : WP (C) No. 258 of 2003

Synergy Composites Pvt. Ltd.

APPELLANT

Vs

Hindustan Paper Corporation Ltd. and Others

RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 2 GLR 406 : (2004) 2 GLT 117

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A.K. Phukan, for the Appellant; V.K. Zindal, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—Shortly stated the facts leading to the filing of the instant writ petition are as follows.

2. The respondent Corporation issued a notice inviting tenders for lifting of Bamboo dust from their Mill premises at "Kagajnagar". The tender was for lifting bamboo dust generated in the chipper house from the Mill premises of the Corporation "as is where is" basis with the specific condition that the quantity indicated in the NIT was only tentative. Further, the condition attached to the NIT was that the available quantity should be lifted within one month of the order and balance within one year "as and when generated."

3. In response to the said NIT the petitioner Company which was earlier known as New Millennium Industries submitted its tender. The tenders were opened on 28.2.2000 and the bid of the petitioner Company was found to be the highest. On 9.3.2000, the petitioner Company was invited for price negotiation and such price negotiation took place on 14.3.2000. Pursuant thereto, the petitioner Company agreed to increase the price offered on condition that the Company was allotted a longer duration and accordingly the disposal order dated 31.3.2000 for disposal of bamboo dust from Corporation plant area (Chipper

House) was issued to the petitioner for the period from 1.4.2000 to 31.3.2005. Amongst other conditions of the General Condition of Contract pertaining to the work order, conditions No. 4 and 5 are as follows :

"(4) QUANTITIES : Quantities indicated are tentative and may increase or decrease at the time of delivery. Actual quantity will be the ENTIRE QUANTITY GENERATED and made available till completion of the order. No complaints on quantum shall be entertained.

(5) CONDITION OF GOODS : The goods offered for sale/disposal are on "AS - IS - WHERE - IS" basis and no Tick and Choose" permitted. There is also no guarantee with regards to quality or grade."

4. According to the petitioner a bare perusal of the aforesaid conditions No. 4 and 5 leave no manner of doubt that the disposal order issued by the Corporation in favour of the petitioner was for the "entire quantity generated" in the plant area which at that time was estimated to be approximately 10,000 MT and was only tentative and the tender in fact, covered the entire quantity of dust "as and when generated". According to the petitioner it was on those clear terms and contracted assurance of availability of the entire quantity that would be generated, the petitioner Company made huge investment of over Rs. 1 crore in plant and machinery alone in their industrial unit to utilize the bamboo dust as a raw material for the various products. Further, the petitioner Company is required in the disposal order deposited Rs. 50,000 as initial advance payment and a further some of Rs. 1,00,000 was also deposited with the respondent Corporation as security deposit. Advance payments were also made by the petitioner Company from time to time and even on the date of filing of the writ petition an approximate amount of Rs. 1,20,000 was paid in advance to the respondent Corporation which according to the petitioner would cover the payment for supply of more than 50,000 MT of bamboo dust during the year ending of 31.3.2004.

5. It is the case of the petitioner that during the years commencing from 1.4.2000 to 31.3.2001; 1.4.2001 to 31.3.2002 and 1.4.2002 to 31.3.2003 the entire quantity of bamboo dust generated in the Corporation's plant was made available to the petitioner Company as per the disposal order and the General Conditions of Contract.

6. The cause of action for filing of the instant writ petitioner arose with the issuance of the impugned NIT dated 30.8.2003 proposing to offer 3,000 MT bamboo dust up to March, 2004 to genuine and actual consumers of the bamboo dust during the subsistence of the contract agreement by and between the petitioner Company and the respondent Corporation. Closing date of such NIT was fixed on 16.9.2003 and the opening date was also fixed on the same date. It is the legality and validity of the NIT dated 31.8.2003 which is under challenge in this writ proceeding. According to the petitioner the floating of the impugned NIT by the respondent Corporation for disposal of bamboo dust expected to be

generated upto March, 2004 during the subsistence of previous valid disposal order of contract entered into by and between the petitioner company and the respondent Corporation is absolutely illegal, arbitrary, mala fide and was issued with some extraneous consideration requiring interference with the same in exercise of extra-ordinary power conferred under Article 226 of the Constitution of India.

7. This Court while entertaining the writ petition was pleased to pass an interim order directing the respondents not to finalize the contract pursuant to the impugned NIT. While passing the interim order, this Court referring to the aforesaid Clause 4 of the General Conditions of Contract recorded the prima facie satisfaction towards passing the interim order. The respondent Corporation filed an application seeking modification/alteration/cancellation of the said interim order dated 16.9.2003, and the matter was taken up on the basis of the said application registered and numbered as Misc. Case No. 208(SH)/03. The learned counsel appearing for the parties agreed to the final disposal of the writ petition and advanced their arguments on that basis. The contentions raised on behalf of the respondents in their said miscellaneous application were pressed to be treated as the contentions raised on behalf of the respondents against the grievance made in the writ petition.

8. Mr. V.K. Zindal, the learned senior counsel appearing for the petitioner, in his usual eloquence strenuously argued assailing the legality and validity of the impugned NIT issued during the subsistence of the contract agreement with the petitioner for supply of bamboo dust. Referring to Clause 4 of the General Conditions of Contract quoted above, he submitted that as per the said clause the petitioner is entitled to the entire quantity as would be generated till completion of the work order. Referring to clause 5, he further submitted that the goods offered for sale/disposal being on "as is where is" basis, the petitioner is entitled to the entire quantity of bamboo dust as would be generated during the valid period of the contract agreement. According to him the respondents were estopped from issuing the impugned NIT during the subsistence of the contract agreement with the petitioner. Advancing the argument on the concept of promissory estoppel, he submitted that no amount of public policy and that too without any reference to the petitioner could outweigh the factors available in promissory estoppel. He further submitted that the contract subsisting with the petitioner must be respected and the respondents cannot violate the terms of the said contract.

9. Mr. P. C. Deka, learned senior counsel appearing for the respondents, on the other hand in his persuasive pursuits supporting the case of the respondents towards issuance of the impugned NIT submitted that their being no interference in any manner with the subsisting contract with the petitioner, the petitioner cannot make any grievance against the impugned NIT. He further submitted that the variation in respect of the quantity to be supplied to the petitioner must be reasonable and cannot exceed to any extent but a reasonable variation of the

quantity to be supplied to the petitioner which was stated to be tentative. He submitted that in fact, the respondents were entitled to cancel the contract with the petitioner, but they did not do so and took a policy decision to issue the impugned NIT. According to him the respondents were constrained to do because of the approach made by local SSI units supported by the Government Departments. It was in response to such demands, the corporation took a decision for disposal of approximately 3,000 MT of bamboo dust upto March, 2004 which is likely to be generated beyond 10,000 MT. Referring to the impugned NIT, Mr. Deka, learned senior counsel submitted that the respondent Corporation has been offered an amount of Rs. 61 per MT, whereas the petitioner has been obtaining 10,000 MT per year @ Rs. 10 per MT. Even assuming that there was assurance to give the entire quantity of bamboo dust, the same being against the public policy, the petitioner is not entitled to any interference he submitted. Mr. Deka also argued that since there is an arbitration clause warranting reference of any dispute to a nominated arbitrator the writ petition is not maintainable.

10. Mr. S.R. Sen, learned senior counsel appearing for the respondent No. 4 and assisted by Ms. P.D. Buzor Baruah, supported the case of the respondents Corporation and adopted the argument advanced on behalf of the Corporation by Mr. P.C. Deka, the learned senior counsel. According to Mr. Sen, the respondent No. 4 has already participated in the tender process and to the best of knowledge to the said respondent, they are the highest bidder expecting to get the contract pursuant to the impugned NIT.

11. I have considered the rival submissions made on behalf of the parties. Number of decisions have been cited by the learned counsel appearing for the parties. Mr. Zindal, learned senior counsel appearing for the petitioner, submitted in his reply that the objection raised on behalf of the respondents regarding the maintainability of the writ petition itself is without any substance in as much as there is no dispute to be referred to the arbitrator. According to him the arbitration clause as reflected in the contract agreement has got nothing to do with the case in hand. Controverting the argument made by the learned counsel on behalf of the respondent Corporation, he submitted that the price itself cannot be a factor for violating the contract agreement and the binding obligation. The sanctity of the contract cannot be allowed to be lost in the manner and method as has been sought to be done by the respondent Corporation, he argued. The contract entered into by the Corporation with the petitioner being negotiated one, the respondent Corporation cannot deviate from the same and that no amount of public policy and that too undisclosed can override the express provisions of the contract agreement. He pressed into service the principles involving the promissory estoppel. To buttress the argument advanced on behalf of the petitioner Mr. Zindal, learned senior counsel, relied upon the following decisions :

(a) 1989 (2) GLR 434 Union of India v. K. K. Agarwala

(b) State of Madhya Pradesh and Others Vs. Ramswaroop Vaishya and Vinod Kumar Jain,

(c) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,

(d) Dorai Murugan Company, Madras Vs. Andhra Pradesh Small Scales Industries Development Corporation Ltd. and Another,

(e) Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

12. In the case of the Union of India v. K. K. Agarwala (supra) a Division Bench of this Court had occasion to interpret the word "approximate" and held that the word "approximate" is not to be considered as final mathematical ascertainment and that the meaning of "approximate" does not limit to the amount of the materials described. In the case of Ram Sawroop Baishya (supra) the Apex Court upholding the conclusion arrived at by the High Court of Madhya Pradesh, held that the term "lot" means the entire quantity and not estimated quantity. In that case the purchaser was bound to take the excess quantity within the notified quantity at the agreed prices. In the case of Motilal Padampad (supra), the Apex Court while dealing with the principles involved relating to the promissory estoppel held that the doctrine of promissory estoppel is an equitable doctrine and it is evolved by equity in order to prevent injustice. It can be the basis of cause of action which has been recognised and it has been pointed out that there is no reason why it should be given only a limited application by way of defence. In the case of Dorai Murugan Company (supra) a Division Bench of Andhra Pradesh High Court interfered with the cancellation of a subsisting contract. Such cancellation was made on the ground of receiving higher offers subsequently from the parties who had represented that they had not seen the tender notice earlier. In the case of Mahabir Auto (supra) the Apex Court expresses its opinion that decision of the State/Public authority under Article 298 of the Constitution of India is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. In the said decision it has been held that it would be appropriate in cases where the instrumentality of the State enters the contractual field, it should be governed by the incidence of the contract and that in the field of this nature fairness must be there to the parties concerned.

13. On the other hand P.C. Deka, the learned senior counsel appearing for the respondent Corporation referred to the following decisions :

(a) M/s. G. J. Fernandez Vs. State of Karnataka and others,

(b) (2000) 2 SCC 216 State of Bihar v. Joint Plastics

(c) Sales Tax Officer and Another Vs. Shree Durga Oil Mills and Another,

(d) State of Rajasthan and Another Vs. M/s Mahaveer Oil Industries and Others,

14. In the case of Joint Plastics (supra) the Apex Court reiterated that existence

of alternative remedy ordinarily would be a good ground in refusing the exercise of power under Article 226 of the Constitution of India. In the case of *Shree Durga Oil Mills* (supra) the Apex Court held that the public interest must override any consideration of private loss or gain. The Apex Court held that where the instrumentality of the State consistently and bona fide interpreted a particular prescription in the tender in a particular manner and acted accordingly, the Court would not interfere and substitute an interpretation which it considered to be correct. In the case of *Mahaveer Oil Industries* (supra) the Apex Court in the given fact situation held that the doctrine of promissory estoppel could not preclude the Govt. from issuing the particular notification under challenge. In that case the Supreme Court held so after referring to the scheme formulated by the Govt. which had failed to achieve its object and had rather adversely affected the oil industry. In such circumstances inclusion of oil extractions and manufacturing industry by the impugned notification, held, was issued in the public interest and hence the doctrine of promissory estoppel could not preclude the Govt. from issuing such notification.

15. After noticing the aforesaid decisions as referred to by the learned counsel for the parties, it is now for this Court to decide as to whether the impugned action on the part of the respondent Corporation towards issuance of the impugned NIT was justified or not. It has also been noticed that the petitioner was given the contract and the disposal order in respect of bamboo dust which was tentatively fixed at 10,000 MT per year. However, as per Clause 4 of the General Conditions of the Contract the quantity is only tentative with the possibility of variation by way of increase or decrease. Clause 4 of the GCC even takes into its fold the entire quantity generated and specifies that the actual quantity would be the entire quantity generated. As per the clause 5 of the GCC, the goods offered for sale/disposal are on "as is where is" basis and no "pick and choose" is permitted. The respondent Corporation while incorporating the aforesaid clause pertaining to the contract agreement with the petitioner for supply of bamboo dust for a period of period of 5 did not make any reservation regarding the quantity. It has been expressly provided in Clause 4 of the contract agreement that it is the entire quantity which would be generated to which the petitioner would be entitled to. It is in that context the variation in the quantity of bamboo dust provided with the words "may increase or decrease" will have to be understood.

16. The averments made on behalf of the petitioner that as per the promise made out to the petitioner for supply of the entire quantity of bamboo dust that would be generated it has altered its position by way of huge investment has not been denied by the respondent corporation in categorical terms except the statement that such a claim made by the petitioner is not admitted. In the same breath the respondents have stated in their miscellaneous application which has been treated as the affidavit in opposition as submitted by the learned counsel appearing for the respondents that even if such an expenditure is admitted to have been incurred by the respondent Corporation, they are not entitled to make

any grievance as they are already assured of 10,000 MT bamboo dust per annum. Thus, it is the case of the respondent Corporation that any assurance given to the petitioner for supply of more or less 10,000 MT per year does not embrace to its fold the huge variation to the extent of 3,000 MT. Further the case of the respondent Corporation is that the petitioner being assured of 10,000 MT of bamboo dust per year, it cannot question the validity of the impugned NIT which is in respect of beyond the said 10,000 MT bamboo dust.

17. Although the respondent Corporation have stated that the impugned NIT has been issued pursuant to the decision for disposal of approximately 3,000 MT of bamboo dust and such a decision was pursuant to the approach made by local SSI units, nothing has been produced to support such a claim. As per the averments made in the miscellaneous application it was only a decision pursuant to the approach made by local SSI units. However, nothing has been brought on record to suggest that such a decision was pursuant to any policy or the said decision itself is a policy decision of the respondent Corporation. Apart from making the statement that such a decision was taken in pursuance of the approach made by the local SSI units nothing has been produced by the respondent corporation to substantiate such a claim. There is no manner of doubt and as has been noticed by the Apex Court that in the case of any policy decision, same will override the consideration of private loss or gain. However, no materials have been placed on record to show as to what was the public interest warranting issuance of the impugned NIT.

18. In the decisions relined upon on behalf of the respondent Corporation the Apex Court while holding that the principle of promissory estoppel would not be applicable noticed the expressed provisions made in the contract itself for the same. However, the same is not the case here. As noticed above except a vague statement that a decision was taken for disposal of approximately 3,000 MT bamboo dust, no materials have been placed on record to justify such a decision towards making a deviation to the expressed provisions of the contract entered into with the petitioner. It would not be enough for the respondent Corporation just to say that the public interest requires that it should not be compelled to carry out the promise made with the petitioner or that the public interest would suffer if the Corporation was required to honour it. If the Corporation wants to resist the liability which they have incurred by signing the contract with the petitioner, it will be have to be disclosed to the Court what are the facts and circumstances on account of which it claims to be exempted from the liability and only then it would be for the Court to decide whether those facts and circumstances are such so as to render inequitable to interfere the liability against the Corporation. A mere claim of change of policy would not be sufficient to exonerate the Corporation from its liability. As observed above, the Corporation has not shown any reason allowing the Court to judge for itself which way the public interest lies and what the equity of the case demands. Merely on the statement made that a decision was taken for disposal of approximately 3,000 MT, it cannot be held that such a statement would satisfy

the test of overriding public interest requiring the Corporation not to be held bound by the promise made out to the petitioner. The burden was heavily on the respondent Corporation which it failed to discharge and consequently it cannot be held that it is a case where there is overriding public interest requiring to give a good bye to the sound principle of promissory estoppel revolving round the contract with the petitioner.

19. It was strenuously argued on behalf of the respondent Corporation that there being a policy decision, the same will out weigh the principle of promissory estoppel. Apart from the fact that nothing has been placed on record to substantiate the claim of the policy decision or for that matter adoption of public policy, it has also not been shown that the petitioner Company was taken into confidence and/or apprised of any such policy decision. Such an exercise of power cannot be dealt with by the State or by instrumentality of the State without informing and taking into confidence the party whose right is affected or sought to be affected, into confidence. The petitioner Company shall definitely fill aggrieved by exclusion of knowledge it being not taken into confidence. Fairness must be there to the party concerned. Admitted position is that the petitioner Company was never taken into confidence towards adoption of such a decision and no reasons have been assigned to the petitioner.

20. Coming to the question of alternative remedy by way of raising a dispute to be tried by the arbitrator, such a clause in the contract agreement is in respect of disputes or differences arisen between parties out of or relating to the disposal order requiring reference of such disputes or differences for arbitration to the nominated officer of the respondent Corporation. It was strenuously argued on behalf of the respondent Corporation that the dispute having been arisen between the parties, the petitioner should invoke the arbitration clause and writ jurisdiction is not appropriate remedy for them. The learned counsel appearing for the petitioner submitted that there is no dispute which is required to be referred to the arbitrator and that the arbitration clause in the subsisting contract has got nothing to do with the case in hand. Although there is an arbitration clause in the contract agreement requiring the parties to refer any dispute or differences to the nominated arbitrator, there is no dispute or differences by and between the parties relating to the said contract. As has already been held above the Clauses 4 and 5 of the GCC lead to irresistible conclusion that the petitioner is entitled to get the entire quantity of bamboo dust which would be generated. Further, I am also inclined to accept the proposition that once a writ petition is admitted for hearing and the parties are heard at length as in the instant case, the plea of alternative remedy gets diluted.

21. No amount of interpretation can override the true and correct meaning of the clause No. 4 which is also required to be understood in reference to Clause 5 of the GCC. The expressed provisions made in Clause 4 of the GCC and the language used is plain and attempts of one meaning and thus, the task of interpretation can hardly be said to arise. By the use of clear and unequivocal

language, the said clause leads to only one meaning and the same must be enforced though it may be harsh for the respondent Corporation. During the course of argument Mr. Deka, learned senior counsel appearing for the respondents, admitted that on a plain reading of Clause 4 of the GCC quoted above would suggest that the petitioner would be entitled to the entire quantity of bamboo dust which would be generated. However, he submitted that such a clause was the result of bad draftsmanship and that the true and correct meaning of the clause would be that the petitioner would be entitled to 10,000 MT per year with a little bit of variation here and there. Such a clause would not entitle the petitioner to a huge variation of 3,000 MT. I am afraid that such an argument cannot be accepted. It is the first and most elementary rule of construction that it is to be assumed that the words and phrases are used in their ordinary meaning and they are to be construed according to the rules of Grammar. Safer and more correct course of dealing with a question of construction is to take the words themselves and arrive at their meaning without any reference to as to what it could be and ought to have been. The plain and literal meaning of the aforesaid clause of the GCC does not lead to any manifest absurdity or repugnance. Here lies the importance of golden rule of interpretation which is virtually a modification of the literal rule. It is always advisable in the construction of statute to adhere to the ordinary meaning of the words used and to the grammatical construction.

22. As has been held above, Clause 4 of the GCC leads to only one meaning and the same is that the petitioner is entitled to the entire quantity of the bamboo dust which would be generated by the respondent Corporation in their Mill premises during the subsistence of the contract agreement. This will necessarily lead to the conclusion that the petitioner would be entitled to 3,000 MT of bamboo dust also which is now sought to be distributed with the issuance of the impugned NIT. A plain reading of the said NIT reveals that the NIT in question has been issued inviting tenders from the genuine and actual consumers of bamboo dust for the quantity mentioned in the NIT (3,000 MT) expected to be generated upto March, 2004. On the other hand, the petitioner was made out with the promise of supplying the entire quantity of bamboo dust which would be generated till completion of the order. If that be so, the 3,000 MT of bamboo dust expected to be generated upto March, 2004 will also be available and admissible to the petitioner. In my considered opinion a plain reading of Clause 4 along with clause 5 of the GCC pertaining to the contract agreement leave no matter of doubt that till completion of the contract agreement, the petitioner would be entitled to entire quantity of bamboo dust which would be generated by the respondent Corporation which naturally will include the quantity of bamboo dust expected to be generated as reflected in the impugned NIT.

23. In view of the aforementioned discussions of fact and law, I have no hesitation to hold that the impugned NIT dated 30.8.2003 is not sustainable and liable to be set aside and quashed which I accordingly do.

24. The writ petition stands allowed. There shall be no order as to cost.