

Allana Cold Storage Ltd. and Another Vs. Goa Meat Complex Ltd. and Another

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Court : Mumbai

Decided On : Mar-02-1993

Reported in : [1997]90CompCas50(Bom)

Judge : E.S. Da Silva and ;H.D. Patel, JJ.

Acts : [Companies Act, 1956](#) - Sections 293(1); [Constitution of India](#) - Articals 12 and 14; Indian Contract Act - Sections 29

Appeal No. : Writ Petition No. 79 of 1993

Appellant : Allana Cold Storage Ltd. and Another

Respondent : Goa Meat Complex Ltd. and Another

Advocate for Def. : M.S. Usgaokar and ;K.S. Cooper, Senior Advs.

Advocate for Pet/Ap. : V.R. Manohar, ;S.K. Kakodkar and ;G. Vahanvati, Senior Advs.

Judgement :

H.D. Patel J.

1. By this petition under article 226 of the Constitution, the petitioner, Allana Cold Storage Ltd., a company incorporated under the provisions of the Companies Act,

prayed for the following main reliefs :

(a) to quash and set aside the purported direction given by the second respondent to the first respondent and/or the decision of the first respondent in inviting tenders for utilisation of the idle or spare capacity of Goa Meat Complex with effect from April 8, 1993

(b) to compel the respondents to forthwith comply with the obligations under the contract dated December 1, 1992, and/or forbear and desist from calling for tenders or entertaining third party in respect of the utilisation of spare capacity at the said Goa Meat Complex Ltd., with effect from April 8, 1993; and

(c) to quash letter dated February 18, 1993, of the first respondent.

2. The first petitioner, Allana Cold Storage Ltd. (hereinafter referred to as 'ACS Ltd.'), is registered with the Agricultural and Processed Food Products Export Development Authority also known as APEDA, a Government of India undertaking. The second petitioner is the shareholder of ACS Ltd., the first petitioner company. The first respondent is also a company duly registered under the Companies Act and carrying on the business of providing facilities for slaughtering of animals at their slaughter-house situated in Usgao, Goa. It is a company whose shareholding is held by the State Government and the Municipal Councils. It is not in dispute that the first respondent, hereinafter referred to as 'GMC Ltd.' is State under article 12 of the Constitution.

3. It is alleged in the petition that the petitioners are pioneers in the field of export of meat products from India and are the largest exporters of meat, forming part of the Allana group which was established in the year 1865. The Allana group are recognised as 'Star Trading House' which is the highest category of exporters.

4. It seems that it was the first respondent who approached the petitioners with a request to avail of the facilities of the only hygienic slaughterhouse in the country and in case the petitioners were interested the details would be worked out. It was only in the year 1988 that the negotiations materialised and an agreement came to be signed between ACS Ltd. and GMC Ltd. by which only the spare existing

installed capacity for slaughtering was agreed to be provided to the petitioners. The agreement stipulated that the petitioners would be required to put in large financial investments in equipment and installation of the machinery and clause 16 of the agreement recognised that the petitioners will have to face a long gestation period for making the meat processing facility in the unit financially viable. It is also the case of the petitioners that consequently clause 17 incorporated a renewal clause whereby the agreement was ordered to be renewed for a further period of five years subject to such modification as may be mutually agreed upon between the parties. Amongst other clauses, the ACS Ltd. had to guarantee a minimum slaughter of 50 animals per day in 240 working days in a year, which works out to 12,000 animals per annum. The petitioners were required to pay to GMC Ltd. a sum of Rs. 40 per animal for the minimum guaranteed 12,000 animals and for additional number of animals slaughtered during the year, the charges fixed were Rs. 35 per animal.

5. As per further averments, the petitioners immediately commenced their work of upgrading the facilities by repairing the plant and machinery at the abattoir, so as to manufacture exportable goods which will meet the exacting international standards. In that process, several international and overseas agencies were brought by the petitioners to inspect the facilities in order to certify that the facilities available conform to international standards. This could only be done because of the co-operation of GMC Ltd. By way of an instance, the correspondence which the petitioners had with the Secretary, Ministry of Agriculture, Brazil, are filed on record.

6. It is also stated in the petition that just before the expiry of the period of five years, the petitioners made serious efforts in involving even the Government of Malaysia and successfully obtaining their commitment for which huge sum of money was spent. All this was done because the petitioners were led to believe that there would be a renewal for a further period of five years. Simultaneously the petitioners could launch a major thrust in the field of export and earn valuable foreign exchange. The petitioners having discharged all their obligations under the agreement, wrote a letter dated October 19, 1992, to the chairman of GMC Ltd. to renew the agreement for use of spare facilities for a further period of five years. In

this context the petitioners also relied upon clause 17 of the agreement. In response thereto the petitioners were called for discussion with the managing director of the first respondent, the GMC Ltd. In the discussion that followed the petitioners agreed to increase the rates and accordingly concrete proposals were made in their letter dated October 29, 1992.

7. At the 21st annual general meeting of the shareholders held on November 19, 1992, in the Chamber of Minister for Agriculture, who is also the chairman of GMC Ltd., the subject of renewal of the lease was considered. After expressly taking into account the efforts made by the petitioners to involve even the Malaysian Government, it was resolved to renew the lease for a further period of five years on the condition that the petitioners would agree to a minimum guaranteed slaughter of 80 animals per day at the rate of Rs. 60 per animal for 22 days in a month. In this background, the agreement was duly executed between the first respondent and the petitioners for extension of the agreement dated April 8, 1988, for a further period of five years. This was done by an agreement prepared on November 27, 1992, and executed on December 1, 1992. Thus, according to the petitioners, a valid, concluded and a binding agreement between duly entered into between the petitioners and the first respondent.

8. It is then alleged in the petition that a third party directly approached the respondents and was attempting to bring about a situation whereby the petitioners' contract with the first respondent would be thwarted. By letter dated December 21, 1992, addressed to GMC Ltd., the petitioners pointed out the efforts made by the petitioners, the long-term commitments entered into by them on the basis of the said agreement and the need for abiding by the terms and conditions of the agreement. It was in the month of January, 1993, that the petitioners received the confirmation from the Malaysian Government that the abattoir with additional facilities as put up by the petitioners conformed to their required standards.

9. GMC Ltd. did not respond to the letter written by the petitioners on December 21, 1992. On enquiry being made the petitioners are alleged to have learnt that the second respondent had pressurised the first respondent to revenue on its

commitments and obligations to the petitioners and were making efforts to make available the entire spare, feasible/existing installed facility/capacities for slaughtering animals including the infrastructure to the third party in utter violation of the subsisting agreement between the parties to the petition. The purported decision of the second respondent is challenged by the petitioners as wholly capricious and arbitrary. The possibility of inviting tenders was foreseen by the petitioners. Though the first respondent resisted the pressure initially, it ultimately succumbed to the pressure by agreeing to float a tender for utilisation of spare capacity to slaughter animals without giving any opportunity of being heard. According to the petitioners, the decision was taken in utter disregard of the principles of natural justice and also in violation of the principles of propriety, fairness and reasonableness. The action of the second respondent in compelling the first respondent to resile from the agreement and the action of the first respondent, GMC Ltd. in yielding to the said compulsion and/or reneging on the contract dated December 1, 1992, with the petitioner and deciding to tender the spare capacity/facility are challenged by the petitioners as void, illegal and of no effect whatsoever and are without authority of law and/or in irregular exercise of jurisdiction on various grounds.

10. The first respondent filed a reply affidavit opposing admission and also the interim relief, raised various defences by contending that : (i) the petitioners have no enforceable right (ii) no relief by way of specific performance' is permissible and at the highest, the relief will be by way of damages (iii) the agreement dated December 1, 1992, is not in conformity with the articles of association and, therefore, not enforceable (iv) the agreement is void being contrary to well-settled principles and the mandate of article 14; and (v) the award of the contract by floating tenders is the best as per mandatory procedure prescribed in public interest.

11. The first respondent relied upon the letter dated February 2, 1993, under which the second respondent decided that necessary action be taken for rescinding the contract/agreement with ACS Ltd., since it is not in conformity with the articles of association of the company. It was also stated in the letter that short notice tenders be invited immediately giving wide publicity in the local as well as national

newspapers for leasing out the spare capacity of the slaughter-house to the highest bidder with proper observance of the rules and regulations. Accordingly, the board of directors held a meeting on February 5, 1993, and the managing director was instructed to prepare the tender notice. The tender notice was prepared for an annual upset price of Rs. 19,20,000 which was accepted by the board in the meeting held on February 22, 1993.

12. The first respondent then pleaded that by letter dated February 18, 1993, the petitioners were informed that the approval required under article 26(2) of the articles of association for leasing out the spare capacity has not been granted by the State Government and as such the respondent will not be able to act upon the agreement signed on December 1, 1992.

13. The second respondent also filed the reply-affidavit raising defences which can be catalogued as under :

(a) the agreement is void ab initio since it was entered into in utter disregard of and contrary to the articles of association;

(b) the petitioners cannot invoke article 226 of the Constitution for enforcing a claim of specific performance. Alternatively, reliance is placed on clause 21 of the agreement which specifies that in case either party fails to perform the obligation mentioned in the agreement, the other party will have a right to claim refund/damages;

(c) the first respondent could not have awarded the contract for a consideration less than the highest that can be obtained. The State has no absolute discretion and is bound to follow such practice and principle keeping in view the public interest in case it decides to grant any right or privilege. The best method recognised is to invite tenders. Otherwise the grant of such right or privilege would be in violation of article 14;

(d) the agreement dated April 8, 1988, does not provide for renewal of the agreement because clause 17 only provides that the agreement would be renewed for a further period of five years, subject to such modifications as

mutually agreed. Such a clause cannot be construed as renewal clause of the existing agreement;

(e) the respondent Government learnt for the first time that an agreement dated December 1, 1992, was signed by GMC Ltd. with ACS Ltd. only. when a letter was received offering a minimum guaranteed amount of Rs. 26 lakhs per year. Upon realising that the action of the first respondent was contrary to the articles of association and that the said agreement was unconstitutional and void, the Government directed the first respondent not to act upon the said agreement but to call for tenders with a view to fetch maximum price;

(f) the resolution to enter into the agreement dated December 1, 1992, was passed at an annual general body meeting contrary to the provisions of the Companies Act.

14. Before embarking upon the points raised, it is necessary to find out whether the petitioners were induced to enter into the agreement dated April 8, 1988. In this connection, various correspondence is filed on record. GMC Ltd. did approach the petitioners by their letter dated April 20, 1983. By that letter the GMC Ltd. offered the facilities mentioned therein and invited the petitioners to contact them. By another letter dated July 20, 1983, the offer was repeated finding no response to the earlier communication. It appears that neither party took steps till the year 1985. No doubt the letter dated October 10, 1985, does indicate that the parties had discussed the possibility of utilising the spare capacity available at the slaughter-house for export purposes. Negotiations were also in progress with exporting agencies specially in the Middle East. The letter also indicates that GMC Ltd. did not have arrangement of slaughtering animals both by Halal and Stunning methods, which came to be provided and that explains the delay. Many other facilities were not available like freezing, cold storage facilities, etc., which the Government undertook to provide. ACS Ltd. came forward and showed their anxiousness to utilise the spare capacity exclusively for export purposes by their letter dated February 15, 1988. They however, emphasised that the abattoir must conform to E.E.C. standards. A tentative proposal specifying the rates and specific number of animals that would be slaughtered was submitted by ACS Ltd. to GMC

Ltd. vide their letter dated February 25, 1988. The proposal was formally accepted by letter of GMC Ltd. vide their letter dated February 26, 1988. A preliminary draft proposal was again submitted by ACS Ltd. on March 21, 1988, under which apart from conditions regarding payment, the ACS Ltd. undertook to install freezing, packing and other related machinery at their cost to complete further processing of slaughtered animals. It was specifically pointed out in that letter that in view of financial investments in equipment and their installation, guaranteed monetary commitments to GMC Ltd., substantial professional management inputs, a long gestation period would be required to do this pioneering meat processing project financially viable for the petitioners and to honour long-term export marketing commitments based on products produced from this plant, the petitioners proposed that they would be allowed to use exclusively the slaughtering, processing and packing facilities for export purposes for a period of five years. Such a clause is also incorporated in the agreement.

15. It is clear that GMC Ltd. were on the look out for a person who could upgrade the abattoir by making investment and simultaneously use its spare capacity and pay GMC Ltd. a specific guaranteed minimum amount. Though at the time the GMC Ltd. approached ACS Ltd. they had shown their willingness to provide necessary infrastructure by installing some of the machinery which was not there but it appears that they could not do so for want of finances. This would be clear from the letter written by GMC Ltd. to APEDA as late as on July 13, 1989, where it is stated that the most acute problem is of finance which GMC Ltd. is facing. The financial liabilities of the company do not permit GMC Ltd. to go in for improvement at additional cost. Only for this reason GMC Ltd. had to enter into an agreement with ACS Ltd. It may be appropriate to observe here that it took nearly five years for GMC Ltd. to find out a person who could invest and at the same time pay a guaranteed sum to them. It is in these circumstances that ACS Ltd. was given facility to utilise the spare capacity of the abattoir and the agreement dated April 8, 1988, came to be executed. It cannot be denied that ACS Ltd. was induced to enter into the agreement dated April 8, 1988.

16. Since clause 17 of the agreement provided for renewal of the agreement for a further period of five years the ACS Ltd. wrote two letters the first being letter

dated October 19, 1992, and the second being letter dated October 29, 1992. By these letters, ACS Ltd. sought extension for a period of five years. They also showed their willingness to increase the rates and the minimum charges. The request was considered by the GMC Ltd. at the 21st annual general body meeting that was held on November 19, 1992, and it was resolved that the request of ACS Ltd. was approved for renewal of the agreement for a further period of five years provided they agree for a minimum guarantee slaughter for 80 animals per day at the rate of Rs. 60 per animal as slaughtering charges for 22 days of the month. On December 1, 1992, an agreement came to be executed between the petitioner on the one hand and GMC Ltd. the first respondent, on the other. The salient features of the agreement were as follows :

(a) the heading of the agreement reads that it is for the 'use of facilities at GMC Ltd.';

(b) clause 'E' of the preamble makes it clear that ACS Ltd. has installed by making substantial financial investments at suitable locations in the factory meat and edible offal processing freezing, packing and other related machinery and facilities for completing further processing, freezing and packing of animal quarters and edible offals. The entire cost of purchase and installation was borne by ACS;

(c) clause 'G' again of the preamble indicates that ACS Ltd. had invited technical delegations from overseas meat importing countries for the inspection of the GMC Ltd. plant so as to commence regular exports of meat and meat products manufactured at the GMC Ltd. plant. ACS Ltd. are in the advanced stage of finalising long-term contract for export of meat to be produced at GMC Ltd.;

(d) clause 2 guarantees a minimum slaughter of 80 animals per day;

(e) clause 3 prescribes the rate of Rs. 60 per animal slaughtered for a minimum of 21,120 guaranteed animals per annum;

(f) clause 4 provides for providing further processing, packing, freezing and other related acts at the cost of ACS Ltd.;

(g) clause 16 again mentions the need for a long gestation period for making the meat processing financially viable for reasons mentioned therein;

(h) clause 21 provides that in case either party fails to perform their obligations the other party will have a right to claim refund/damages. It further stipulates that neither GMC Ltd. nor ACS Ltd. will or can terminate this agreement ex parte before the expiry of the period.

17. Soon after the agreement was signed the second respondent received a letter from Mac Donald Halal Frozen Foods dated December 3, 1992, wherein they showed their willingness to take the complex on lease for a period of five years and also stipulated some of the conditions therein. In a subsequent letter dated December 5, 1992, the same party offered a minimum guaranteed amount of Rs. 26 lakhs per annum for five years. It appears from the Government files produced before this court that the comments of the managing director were called for as the second respondent found that the offer of Mac Donald Halal Frozen Foods was very lucrative. This is clear from the note sheet dated December 18, 1988, and the cover sheet where it is written 'Leasing of Meat Complex/Slaughter to Mac Donald - Proposal reg.' The managing director of GMC Ltd. emphatically opined that it is not advisable to enter into any sort of arrangement/agreement with Mac Donald Halal Frozen Foods for various reasons mentioned in the note. After the note was received that file was ordered to be closed because the matter was being processed simultaneously in another file bearing the same number. It appears from the second file that the opinion of the Law Department was sought. According to that opinion also it was advised that it may not be possible for GMC Ltd. to rescind the agreement unilaterally. However, the opinion clarifies the need for taking the approval of the State Government before the meat complex was leased out to ACS Ltd. Reliance for this purpose was placed on article 26 of the articles of association. However, a decision was taken by the then Chief Minister, Shri Ravi Naik, to invite tenders since the agreement with ACS Ltd. was not in conformity with the articles of association of the company. It is in this background that a letter dated February 2, 1993, came to be addressed to the managing director of GMC Ltd. by the second respondent to take steps for rescinding the contract with ACS Ltd. Since it was not in conformity with the articles of association. GMC Ltd. was

also directed that short notice tenders be invited immediately giving wide publicity in the local as well as national newspapers for leasing out the spare capacity of the slaughter-house of the company to the highest bidder after proper observance of the rules and regulations. On February 18, 1988, GMC Ltd. intimated ACS Ltd. that under article 26(2) of the articles of association the approval for leasing out the spare capacity of the abattoir has not been granted by the State Government. As such, GMC Ltd. will not be able to act upon the agreement signed on January 2, 1992.

18. Upon reading the communication dated February 2, 1993, addressed to GMC Ltd. by the second respondent and communication dated February 18, 1988, addressed to ACS Ltd., it is clear that the contract was rescinded by GMC Ltd. under instructions of the second respondent on the sole ground that the agreement dated December 1, 1992, was not in conformity with the articles of association. Relying upon the decision in the case of *Mohinder Singh Gill v. Chief Election Commissioner*, : [1978]2SCR272 , it was urged on behalf of the petitioners that additional purported justifications sought to be given in the affidavit filed by the respondents are nothing but afterthoughts and were not in contemplation when the contract was sought to be rescinded. The reasons cannot be supplemented in the affidavit and this raises a fundamental issue of propriety relating to the decision making process. It is observed in the Supreme Court decision that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons. Otherwise, the order bad in the beginning, may by the time it comes to court on account of challenge, get validated by additional grounds later brought out. This case was, however, explained in a later decision of the Supreme Court in the case of *Sachidanand Pandey v. State of West Bengal* : [1987]2SCR223 , by observing, 'it is important to note that unlike *Mohinder Singh Gill v. Chief Election Commissioner*, : [1978]2SCR272 , where the court was dealing with a statutory order made by a statutory functionary who could not, therefore, be allowed to supplement the grounds of this order by later explanations, the present is a case where neither a statutory function nor a statutory functionary is involved but the transaction bears a commercial though public character which can only be settled after protracted discussion, clarification

and consultation with all interested persons. The principle in *Mohinder Singh Gill v. Chief Election Commissioner*, : [1978]2SCR272 , has no application to the factual situation here'. Similar is the situation in the present case and, therefore, we cannot accept the contention that the grounds cannot be supplemented by fresh reasons in the shape of affidavit. It is hence open for the respondents to urge additional grounds.

19. We will first deal with the reason disclosed that the agreement in dispute came to be signed by the chairman in contravention of article 26 of the articles of association. If the answer is in the affirmative, the agreement according to the respondents would be void. Article 26 reads as follows :

'Without prejudice to the generality of the above provisions, the board shall reserve for decision of the State Government :

(2) Sale, lease or disposal otherwise of the whole or substantially the whole of the undertaking of the company.'

20. It is submitted on behalf of the respondents that what has been purported to be done is to lease out to the petitioners a substantial part of the undertaking without the compliance with the aforesaid article. This contention is opposed on behalf of petitioners, contending chiefly that the transaction is not a 'lease' and that too of an 'undertaking'.

21. Before entering into the controversy it is interesting to note that what has been given to petitioners is a right to use the slaughter-house whilst it is idle because slaughtering of animals for local consumption within the State of Goa is also carried out at the same place by the licensed meat traders of the municipalities. This right in the agreement dated April 8, 1988, is described as 'the use of facilities' at GMC Ltd. Even in the subsequent agreement dated December 1, 1992, the same words are used. The word 'lease' was never in the picture till Mac Donald Halal Frozen Foods steps in the picture. In their letter dated December 3, 1992, the word 'lease' has been used and since then the words 'use of facilities' were converted to 'lease' because that would facilitate the respondents in bringing their defence under article 26. By no stretch of imagination could a right of partial

user of the facilities be described as a 'lease'. There is no transfer of interest in the property and that too exclusively. The attempt on the part of the respondents to describe the use of facilities as 'lease' is totally misconceived.

22. At the stage of arguments, it was suggested that the petitioners were given the right to run the whole of the undertaking. Even this is incorrect inasmuch as the petitioners are using the idle capacity of the slaughterhouse to carry on their own business and for such use of the abattoir, payment as agreed was being made. Such a user can never come within the sweep of sale, lease or disposal otherwise as sought to be contended. These words only envisage a complete and exclusive transfer of an undertaking by GMC Ltd. to a third party and the transferee derives the right to hold, possess and control that undertaking. A mere user of facilities and that too partially, would not attract the provisions of article 26(2) of the articles of association.

23. The word 'undertaking', is defined in various statutes including the Indian Companies Act. The Bench comprising of eleven judges had an occasion to consider the meaning of the word 'undertaking' in the case of *Rustom Cavasjee Cooper v. Union of India* [1970] 40 Comp Cas 325 (SC). By the word 'undertaking', it was meant the entire organisation. It indicates that the company whether it has plant or whether it has an organisation is considered as one whole unit and the entire business of the going concern is embraced within the word 'undertaking'. In the case of *P.S. Offshore Inter Land Services Pvt. Ltd. v. Bombay Offshore Suppliers and Services Ltd.* [1992] 75 Comp Cas 583, this court also had an occasion to deal with the meaning of the word 'undertaking' as used in section 293(1)(a) of the Companies Act. It means a business or an enterprise. It must include all the assets of the undertaking so as to leave nothing of the business of a running concern in the business sense of the term after the asset intended to be disposed of is disposed of. Therefore, the right to use the spare capacity of the slaughter-house cannot by any imagination amount to a transfer either by lease or disposal otherwise of the whole of undertaking or substantially the whole of undertaking. In our view, the article is not attracted at all.

24. The next question that arises is whether GMC Ltd. ever sought the approval of the second respondent and it was refused. In this connection it would be worthwhile to peruse the minutes of the meeting of the board of directors held on February 5, 1992. In that meeting, the disputed agreement was deliberated upon. It is stated there that a letter has been received from the second respondent declining its approval or consent. Even the resolution that was adopted on the point clearly stipulates that the agreement is not to be acted upon since the State Government has declined its approval/consent. We have not come across any such letter on record. No attempt was also made on behalf of the respondents to point out such a letter. The only communication received by GMC Ltd. from the second respondent was a letter dated February 18, 1993, which also does not speak about the approval/consent. The minutes of the meeting are clearly misleading because they purport to convey that approval was applied for and it was declined by the second respondent. As a matter of fact, no approval or consent was sought by GMC Ltd. either before or after the signing of the agreement. We may venture to observe that in the absence of any letter declining the approval/consent, the mention of it in the minutes is either false or the letter in question has been suppressed by the respondents.

25. It is now a settled proposition that in contractual matters the State Government is bound by the rule of fairness and arbitrariness. It was urged on behalf of the petitioners that the action of the respondents is pregnant with mala fides, unfairness and arbitrariness. The contention is based on the two files produced by the State Government at the instance of the petitioners. The records do reveal that in one of the files which was opened earlier on receipt of the letter from MacDonald Frozen Foods dated December 3, it is written on the cover sheet 'Leasing of Goa Meat Complex to MacDonald - Proposal reg.'. The order sheet reveals that the comments of the managing director were called for on the letter of MacDonald addressed to the Chief Minister directly. The managing director submitted his notes pointing out various reasons including the efforts made by ACS Ltd. in upgrading the complex and inviting foreign agencies for procuring export of the products manufactured there and as to why it was not advisable to enter into any sort of arrangement/agreement with this MacDonald Halal Frozen Foods. In other words, the managing director desired that the existing

arrangement/agreement with ACS Ltd. should be continued. This file, however, came to be closed since the matter is being examined in another file which was simultaneously opened. The heading on the second file was 'lease of spare capacity of slaughter-house of the Goa Meat Complex Ltd. (GMCL) at Usgaon'. This file indicates that the opinion from Legal Department was sought. In that opinion a doubt was thrown that the first respondent by signing an agreement of lease with ACS Ltd. had acted contrary to article 26(2) of the articles of association. Despite such observations, the Minister for Agriculture endorsed on the file that it would not be proper to deal with MacDonald Halal Frozen Foods at this stage and the decision of the company should be ratified. The Chief Minister, however, did not agree and came to the conclusion that the transaction suffered from legal infirmity and therefore, it should not be given effect to. Instead tenders be invited for leasing the house to the highest bidder.

26. It appears that the second respondent was much impressed by the high offer made by MacDonald Halal Frozen Foods and naturally so because the respondents would receive a substantial amount which could not be anticipated earlier. With this impression, it may have been the initial intention of the State Government to see that the complex is leased out to MacDonald Halal Frozen Foods, if circumstances permit. This explains the title on the cover sheet of the first file. We find nothing unusual in the intention of the State Government because it is always the endeavour of the State to increase its income through all available sources. However, this enthusiasm did not last long in face of the subsisting agreement with ACS Ltd. The possibility of challenge to such an action also could not be overruled. This led the State Government to find out the legality and validity of the disputed agreement. On finding out that the agreement suffers from an infirmity inasmuch as it does not conform to the articles of association, it directed GMC Ltd. not to act upon the agreement and invite tenders for leasing out the complex and thereby procure the maximum amount. We do not find any reason to hold that the State Government acted in a manner which could be described as mala fide, unfair or arbitrary. At that time they were led to believe that the agreement with ACS Ltd. was non est for a particular reason. May be that the said reason was not ultimately found to be correct. It is hence difficult for us to accept that the agreement stands vitiated on this ground.

27. We now take up the vital point in controversy whether the disputed agreement offends article 14 of the Constitution and for that reason it is void and unenforceable. We may mention here that this question is raised by the second respondent - the State Government. On behalf of the petitioners the following contentions were raised :

(1) It is not right for the Government to say that the contract is void for the reason that the agreement offends article 14 of the Constitution;

(2) That the disputed agreement is a continuation of an old contract by virtue of exercise of an option to renew and hence the second respondent cannot challenge the existing agreement on the ground that it suffers from the vice of article 14 of the Constitution.

28. We shall deal with the aforesaid submissions one by one.

29. It would be appropriate first to deal with the point relating to renewal of the agreement. It is necessary to find out whether the agreement dated December 1, 1992, is a continuation of the old agreement or the said agreement is a new one. It is so because the consequences could be different. The challenge of the second respondent on the ground that agreement infringes article 14 can only be available if the agreement dated December 1, 1992, is held to be a new one. Otherwise, delay and laches may come in their way.

30. Clause 17 of the agreement dated April 8, 1988, reads as under :

'This agreement will be valid and binding on both parties from the date above written. The agreement could be renewed for a further period of five years subject to such modifications as mutually agreed in the terms and conditions.'

31. Reading the aforesaid clause it is quite obvious that no option is given to either of the parties. It also does not provide for any procedure for exercising any such alleged option and it does not even stipulate that the agreement has to be renewed. It simply mentions the possibility that it could be renewed. The clause is nothing but a pious hope because all agreements can be renewed, if the parties so desire and agree. Apart from this aspect, the terms and conditions of renewal are

not even vaguely indicated. Such a clause is nothing more than 'an agreement to agree'.

32. It is a settled proposition of law that no agreement is a contract and, therefore, enforceable unless the terms of such agreement are certain and capable of being certain. The clause as extracted above discloses that the renewal, if any, would be 'subject to such modifications as mutually agreed in the terms and conditions'. Therefore, it is not certain what modifications are anticipated or which of the terms would be changed. Such an agreement would be void under section 29 of the Contract Act. In this connection, it would be appropriate to rely upon the decision in the case of *Hitkarini Sabha v. Corporation of the City of Jabalpur*, : AIR 1961 MP324 . In that case, the clause of renewal was more specific than the one in the present case. In that clause the lessee was given the right that he shall be entitled to have the lease renewed 'on such terms and conditions as may be agreed to between the parties'. Such a clause was held to be not enforceable because no terms on which it can be granted have been fixed between the parties although a renewal is contemplated.

33. Reliance was heavily placed on behalf of the petitioners on the decision of the Supreme Court in the case of *Damodhar Tukaram Mangalmurti v. State of Bombay*, : AIR 1959 SC639 , and it was contended that where the fixation of rent was left to the lessor, the court could determine the proper amount of rent on which the renewal could be granted. The condition contained in the lease deed in that case was that the renewal would be 'subject to such fair and equitable enhancement as the lessor shall determine'. It was held that although the matter was left to the determination of the lessor, the amount had to be 'fair and equitable', in fact and the matter thus became justiciable in court. Such is not the position in the present case.

34. Another case relied upon by the petitioners was the *Secretary of State for India v. Volkart Bros.* : AIR1927 Mad513 . In that case, a contract to grant renewal of lease 'on such terms and conditions as shall be adjudged reasonable', at the time of such renewal was held to be capable of specific performance and not void on the ground of uncertainty. Even this case cannot help the petitioners firstly

because the terms in the present case do not speak about the terms being fair, proper and reasonable and secondly, because it is not possible for us to assume that the terms and conditions would be reasonable only because GMC Ltd. is a State owned company.

35. It is, therefore, clear that the agreement sued upon in this petition is not a mere continuation of the old agreement by virtue of an exercise of an option contained in the original agreement, but it is a new agreement or better still, a fresh agreement.

36. There is no doubt that article 14 of the Constitution is in the nature of a command to the State and normally it is the actions of the State which are open to challenge on the ground of infringement of article 14. In the case before us, it is the State who questions the legality and the validity of the agreement which is signed by GMC Ltd. with ACS Ltd., on the ground of infringement of article 14. It is not in dispute that GMC Ltd. is also a State within the meaning of article 12 of the Constitution. It is also not in dispute that the second respondent - the State Government - is a major shareholder of the company, and therefore, vitally interested in its administration and the affairs. The second respondent in its capacity as a shareholder of the company has every right to interfere, where interference is necessary, because whatever it does, it should be in the interest of the public at large. It is the public interest which is of paramount importance to the State Government. It can question any of the acts of the company if the State Government is of opinion that the company has strayed away on the wrong path and that includes even a challenge to the agreement in question. We see no bar for the State Government to raise the defence of violation of article 14 upon coming to the conclusion that the agreement in question is void right at the threshold. The situation would have been different had the second respondent raised a contention that the contract discriminates against the respondents and thereby the agreement is vitiated under article 14. The State cannot plead discrimination against itself. The contention as raised is that the contract is contrary to the well-settled norms laid down by the Supreme Court inasmuch as it is a nullity and the second respondent can set up such a plea of nullity as a shield to the petitioners' action which, in essence, is nothing but an action for specific performance. In such an action, it is open for this court to determine whether the

action is valid at law and also enforceable. In these circumstances, the second respondent is not precluded from raising a defence that the agreement is violative of article 14.

37. As stated above, the first respondent is an authority under article 12 of the Constitution. That such an authority does not have complete freedom to contract, as private individuals do have, has been repeatedly laid down in the various decisions of the Supreme Court. This is made clear in the judgment of the Supreme Court in *Ramana Dayaram Shetty v. International Airports Authority of India*, : (1979)ILLJ217SC . In this decision, it is clearly pointed out that the Government is still the Government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as private individuals. It is also held in the aforesaid judgment that 'the State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition would hold good in all cases of dealings by the Government with the public where interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with public, whether by way of giving jobs, entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standard norm which is not arbitrary, irrational or irrelevant. The court also expressly ruled that companies are under constraints and their actions must be in conformity with some principle which meets the test of reason and relevance. It was also further stressed that the principle of equality enshrined in article 14 was that if the State enters into relationship with anyone, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which stands the test of reasonableness and non-discrimination and any such departure from standard or principle would be invalid unless it is supported or justified on some rational and non-discriminatory ground.

38. In a catena of decisions, the Supreme Court has laid down that contracts entered into by the State under article 12, must be by public tender or auction,

thereby securing the highest revenue for the State in public interest. The latest pronouncement of the Supreme Court is *Sterling Computers Ltd. v. M and N Publications Ltd.* : AIR 1996 SC51 . The facts in this case are almost in *pari materia* with the facts in the case before us. MTNL had entered into a contract with United India Periodicals Pvt. Ltd. on March 14, 1987, for publication of telephone directories for a five-year period from 1987 to 1991. This contract was pursuant to public tenders. United India Periodicals Pvt. Ltd. defaulted, and on September 26, 1991, a supplemental agreement was entered into by MTNL whereunder the unexecuted job relating to printing of directories was also conferred. The agreement also stipulated that all the terms and conditions in the original agreement would be an integral part of the supplemental agreement. The supplemental agreement was challenged before the court on the ground that the said agreement was entered into without going through the tendering process. The Supreme Court after referring to the various decisions sounded a tocsin and cautioned that its earlier rulings whereby contracts of private negotiations were held should not be construed as granting an option to the authorities within the meaning of article 12 to enter into contractual relationship by public tender or by private negotiations at their discretion. This is clearly spelt out in para 26 of the report which is extracted below :

'The cases aforesaid on which reliance was placed on behalf of the appellants, have also reiterated that once the State decides to grant any right or privilege to others, then there is no escape from the rigour of article 14; the executive does not have an absolute discretion, certain precepts and principles have to be followed, the public interest being the paramount consideration. It has also been pointed out that for securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and due to compelling reasons which must stand the test of article 14 of the Constitution, departure from the aforesaid rule can be made. This court while upholding the contracts by negotiation in the cases referred to above has impressed as to how in the facts and circumstances of those cases the decisions taken by the State and the authorities concerned were reasonable, rational and in the public interest. The decisions taken in those cases by the authorities

concerned, on judicial scrutiny were held to be free from bias, discrimination and under the exigencies of the situation then existing to be just and proper. On the basis of those judgments it cannot be urged that this court has left it to the option of the authorities concerned whether to invite tenders or not according to their own discretion and to award contracts ignoring the procedures which are basic in nature, taking into account factors which are not only irrelevant but detrimental to the public interest.'

39. The Supreme Court further reiterated that if while entering into a contract the decision making process was erroneous, that is, because it failed to take into account relevant considerations or has taken into account irrelevant considerations, the court would interfere and strike down the contract. The relevant consideration would be following the rule of inviting tenders and irrelevant considerations would be obstacles which may intervene in retendering.

40. It may be relevant at this juncture to note that the only exceptions recognised by the Supreme Court to the rule of tender are : (1) matters of economic policy where industry is to be set up; and (2) liquor trade which is inherently hazardous and in respect of which no individual can claim any fundamental right.

41. In the case of *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir*, : [1980]3SCR1338 , the Government which used to grant tapping contracts, made a policy decision that the resin so tapped should be utilised in the State and, therefore, the processing industry should be set up in the State. The contracts were awarded by negotiations, since earlier attempts to award it by auction did not materialise as offers were not forthcoming. The Supreme Court upheld such contracts for the simple reason that the court should not interfere in the economic policy. It expressly ruled that securing the highest revenue was the prime consideration for awarding the contract.

42. We again find a similar proposition laid down in the case of *State of Madhya Pradesh v. Nandlal Jaiswal* : [1987]1SCR1 . The production and distribution of liquor was entirely controlled by the State of Madhya Pradesh. Even the distilleries were owned by the State but run by entrepreneurs under licences awarded in auction. Over the course of time the distillery had become dilapidated, the

machineries therein were replaced by entrepreneurs there being pollution problem. Therefore, the State decided to shift the distilleries and businessmen be invited to set up and run the distilleries. Only to those businessmen who were prepared to incur expenses to establish distilleries the licences for sale and distribution were to be given. The respondents in those cases showed interest. By the time the writ petitions were filed each distiller had invested huge sums extending up to rupees two crores. The Supreme Court relying upon the ratio laid down in *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir*, : [1980]3SCR1338 , at length discussed the pernicious nature of the trade and reiterated that in economic policy the courts should not interfere.

43. Many more cases were cited at the Bar on the point, but we do not feel it necessary to refer to them since the law laid down is almost the same. There are cases even approving contracts given to private individuals by negotiations but those were cases where the circumstances were different and the situation so demanded. As for instance the grant of the very right of spare capacity by GMC Ltd. to ACS Ltd. under the original agreement when there were no takers and ACS Ltd. were induced to take over and also incur expenses for upgrading the machinery and spend for new ones. There was, however, no justification for the first respondent/GMC Ltd. to enter into the disputed agreement with ACS Ltd. without giving opportunity to others to compete with ACS Ltd. and also deprive the State of higher revenue which they are entitled to get. Clearly enough the agreement of December 1, 1992, is contrary to the mandate of article 14 of the Constitution and is, therefore, void.

44. The defence of article 14 was also sought to be rebutted on behalf of the petitioners by pointing out the following averments made in affidavit-in-rejoinder to the affidavits filed by the second respondent. The relevant part reads as under :

'I say that in the year 1991, pursuant to the request of respondent No. 1, the all India Meat and Livestock Exporters Association had called upon all its members to utilise the facilities of respondent No. 1. However, there was no response to the said appeal even though everyone in the industry has an opportunity to come forward with the offers. I deny that the said agreement dated December 1, 1992, is

opposed to public interest.'

45. We make it clear that the circular in question was not filed along with this affidavit. An attempt was made to show a xerox copy of the same at the last stage while making winding up submissions. We have declined to look into it. In any event, the submissions made have no force whatsoever and deserve rejection for reasons stated below :

(1) the membership list is not filed by the petitioners in order to show that each and every member received the circular;

(2) it is doubtful that MacDonald Halal Frozen Foods, a partnership firm which came into being much later did receive the communication alleged to have been circulated by the association. It may be relevant to observe that the firm of MacDonald Halal Frozen Foods was registered only for the purpose of making an offer to the first respondent at the time when the first agreement with ACS Ltd. was about to expire; and

(3) admittedly, the alleged opportunity was given in the year 1991 when the utilisation of spare capacity of the abattoir was with ACS Ltd. and the production was in progress. No offer can be expected from any one knowing the subsistence of the agreement between the GMC Ltd. and ACS Ltd. which was to last for about two years more.

46. Therefore, there is no substance in the contention that the disputed agreement is not opposed to public interest.

47. One more contention is raised on behalf of the petitioners that they have a vested right under the agreement and those civil rights were sought to be violated without complying with the principles of natural justice. The unilateral termination was in contravention of clause 21 of the agreement which prohibits either party from terminating the agreement ex parte. We are unable to persuade ourselves to accept the contention because the agreement in question is void at the threshold since it offends article 14 of the Constitution. No useful purpose would be served by giving opportunity to the petitioners. We may also usefully refer to the decision

of Radhakrishna Agarwal v. State of Bihar, : [1977]3SCR249 , where it is laid down that Rules of natural justice are attached to the performance of certain functions regulated by statutes or rules made thereunder involving decisions affecting rights of parties. For these reasons we hold that the petitioners do not deserve any opportunity.

48. Several other contentions were raised like violation of the provisions of the Companies Act, the maintainability of the petition and the grant of relief under article 226 of the Constitution, besides others, but we do not propose to decide those points since the petition is liable to be rejected in view of the findings given above. Deciding the remaining points would only be an exercise in futility.

49. In the result, the petition is devoid of any merit and is accordingly rejected, but in the circumstances, without any order as to costs. The first respondent may open the tenders after expiry of one month from today.

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