

Praveen Kumbhat and Anr Vs. State and Ors

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Court : Rajasthan Jodhpur

Decided On : Dec-07-2015

Appellant : Praveen Kumbhat and Anr

Respondent : State and Ors

Judgement :

1 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR :

ORDER

: S.B.CIVIL WRIT PETITION NO.9161/2013 Praveen Kumbhat & Anr. Vs State of Rajasthan & Ors. ::: S.B.CIVIL WRIT PETITION NO.2108/2014 Praveen Kumbhat & Anr. Vs State of Rajasthan & Ors. Date of Order ::

7. On December 2015 PRESENT HON'BLE MR.JUSTICE P.K.LOHRA Mr.K.C.Samdariya for the petitioners Mr.Bharat Dutt Sharma, Dy.Govt.Counsel for respondent Nos.1 & 3 Mr.L.K.Purohit for respondent No.2. BY THE COURT: In both these writ petitions, common questions of law and facts are involved, therefore, both are heard together and disposed of by this common order. Petitioners have filed Writ Petition No.9161/2013 for seeking directions against the respondents to make allotment of shops to the Members of Jodhpur Goods Transport Association, Jodhpur (for short 'the Association') who have applied for allotment of shops pursuant to notification/ advertisement dated 13.12.2006 issued by the second respondent. The facts necessary and germane to the matter are that second respondent published an advertisement in daily newspapers Dainik

Bhaskar, Dainik Navjyoti and Dainik Jaltedeeep on 13.12.2006 inviting applications for allotment of 60 plots for transport operators besides allotment to various other businesses to be carried out within 2 the market yard. Pursuant to advertisement, second petitioner applied for allotment on 21.12.2006 by submitting application (Annex.2). As per the averments made in the writ petition, besides the second petitioner, 95 other transport operators also applied for allotment. After submission of the application forms, second petitioner and other transport operators waited for quite some time but pursuant to advertisement, no steps were taken by the second respondent for allotment of shops to the transport operators. It is in these situations, the Goods Transport Association submitted an application through its President on 23.03.2010 which was addressed to the second respondent. Responding to the said letter, a communication (Annex.6) was addressed that allotment shall be made as per the Allotment Policy of 2005 after receiving requisite guidelines from the Director, Agriculture Marketing/State Government. Subsequently, a Member of the Association sent a letter to then Chief Minister of Rajasthan on 02.07.2012 which was further followed by a letter dated 11.07.2012 to the second respondent. When no action was taken on behalf of the respondents, a notice for demand of justice was served on all the respondents on 11.03.2013. Responding to the said notice for demand of justice, counsel for the petitioners was conveyed by the second respondent on 20.06.2013 that presently the Allotment of Immoveable Property Policy of 2005 is in vogue and under the said policy, there is no provision for allotment of plots to transport operators, therefore, no allotment can be made to the transport operators. Further, it was clarified that out of aforesaid 60 plots, some part of land of Krishi Upaj Mandi Samiti located at Bhadvasiya has been transferred to Krishi Upaj Mandi Samiti (Fruits & Vegetables) and, therefore, 24 out 3 of these 60 plots have been transferred to Krishi Upaj Mandi Samiti (Fruits & Vegetables). It is further reiterated that there is no provision for allotment of shops to the transport operators under the Allotment Policy and as such, no allotment could be made de hors the rules. The petitioners have precisely challenged action of the respondents by asserting that denial of allotment is based on absolutely fake and concocted facts. The petitioners have also asserted that Allotment Policy of 2005 is very wide which includes allotment of all types of plots for commercial purposes and emphasis is

also given to Clause 13 of the Policy in this behalf. Castigating the respondents for misleading the transport operators, it is also alleged in the writ petition that when there was no provision for allotment of shops to transport operators, why in the advertisement, 60 plots were notified for allotment to transporters. The second respondent submitted its reply to the writ petition wherein a specific objection is raised that no cause of action has accrued to the first petitioner to file the petition. In the reply, it is also asserted that there is no provision for allotment of shops to the transporters in the policy and, therefore, it is not possible to make allotment. Alongwith reply, office order dated 24.02.2014 is also annexed whereby the security amount received from various transporters was refunded. The third respondent also submitted its reply in the same lines that there is no provision for allotment of shops to the transporters as per Policy of 2005. The petitioners submitted rejoinder to the reply of second respondent and reiterated all the facts and grounds which were urged in the writ petition. 4 After receiving reply to the writ petition on behalf of second respondent, petitioners laid second Writ Petition No.2108/2014 praying therein quashment of order dated 24.02.2014 (Annex.9). To quash the said order, petitioners have pleaded that action of the respondents is mala fide and de hors the Policy of 2005. The petitioners have also taken shelter of principles of promissory estoppel by relying on the advertisement wherein there was a provision for allotment of plots to transporters. An attempt was also made to castigate the respondents for over-reaching the process of the court by alleging that impugned order (Annex.9) was passed during the pendency of first writ petition and sought annulment of the same on that count also. The second respondent submitted its reply to the said writ petition by questioning the locus of the first petitioner to maintain the writ petition. In the reply, it is also averred that endeavour was made by the respondent to seek concurrence and approval from the Director, Agriculture Marketing for facilitating allotment of plots to the transporters but the same was declined on the pretext that there is no provision for allotment of plots to the transporters in the Policy of 2005. Reiterating the positive assertion about locus of the first petitioner, it is submitted in the reply that second respondent already conveyed to the Jodhpur Goods Transport Association its decision by letter dated 23.03.2010. The allegations of mala fides are also refuted with full emphasis. In the return, it is also clarified that as and when any policy

decision is taken at the Directorate level, the requisite exercise shall be undertaken by the second respondent for allotment of plots or shops to the transporters who are eligible by way of auction. For inviting applications from the transporters, it is averred in the reply that the same was incorporated in the advertisement in anticipation of approval of the Directorate but when approval was not received, a decision was taken to refund the amount of security received from the transporters. The ground of promissory estoppel is also seriously contested by the second respondent in its reply. The third respondent also submitted reply to the writ petition reiterating the stand of second respondent. After submission of reply by both the respondents, petitioners submitted their rejoinder and reiterated all the facts and grounds urged in the writ petition. Learned counsel for the petitioners Mr.K.C.Samdariya submits that second petitioner and all the transporters have applied for allotment of plots pursuant to the advertisement and, therefore, impugned action of the respondents in not allotting plots to the transporters and refunding their security deposit is a glaring example of colourable exercise of powers. Learned counsel would contend that the advertisement presupposes a promise by the respondents for allotment of plots to the transporters and, therefore, by not processing the applications of the transporters and rejecting their claim for allotment of plots/shops, the respondents have resiled from their promise and their such action is contrary to the principles of promissory estoppel. Learned counsel further submits that defence of the respondents that there is no provision for allotment of plots/ shops to the transporters under the Policy of 2005 is not in consonance and in conformity with the Policy of 2005 and, therefore, impugned order (Annex.9) suffers from the vice of malice-in-law and malice-in-fact. Lastly, learned counsel has urged that plea of the 6 respondents that advertisement was issued in anticipation of approval of the Directorate is a false plea which is not expected of the second respondent and cannot be countenanced on the strength of absolutely vague and cryptic assertions. Per contra, learned counsel for the respondent No.2 Mr.L.K.Purohit submits that both the petitions at the behest of first petitioner are not maintainable inasmuch as he has no locus standi to maintain the petitions. Mr.Purohit submits that there is no semblance of proof about authorisation by the Association to the first petitioner for filing these writ petitions and, therefore, at the behest of first petitioner in his individual

capacity, the petitions are not tenable. Learned counsel for the respondent would contend that mere incorporation of the allotment of plots for transporters in the advertisement has not furnished any cause of action to the second petitioner in both the petitions as subsequent to that, auction was not carried out for allotment of plots to transporters. Lastly, learned counsel has urged that the advertisement was issued by the second respondent in anticipation of approval of the Directorate of Agriculture Marketing but when the said approval was not received, obviously, it was not possible to carry out the auction for allotment of plots to transporters pursuant to the Policy of 2005 which is a just action of the respondents and cannot be categorized as mala fide. Mr. Bharat Dutt Sharma, learned Dy. Government Counsel appearing for respondent Nos.1 & 3 has adopted the arguments advanced by Mr. Purohit, learned counsel appearing for the second respondent. I have heard learned counsel for the parties and perused the materials available on record threadbare. 7 Upon evaluation of factual matrix in both the petitions, a very interesting question has cropped up which is required to be unfolded. As a matter of fact, in both the petitions, some part of the pleadings and the relief clause reveal that first petitioner is espousing the cause of the Members of the Association in his alleged capacity as Secretary of the Association. The significance of this question has also become bone of contention in view of the objection of the respondents questioning the locus standi of the first petitioner. In order to thrash out the matter and unearth the truth about the locus of the first petitioner, pleadings are of utmost significance. At the threshold in both the petitions, it is averred by the petitioners that they are citizens of India and there is no whisper about the Association. True it is that in other paragraphs of the writ petitions, the so-called afflictions of the Members of the Association are pleaded but then neither the status of Association has been disclosed nor its registration number finds mention in both the writ petitions. The document (Annex.5) in Writ Petition No.9161/2013 and Annex.4 in Writ Petition No.2108/2014 although indicates that Association is registered but registration certificate has not been placed on record and under which statute it is registered is also not disclosed. Even notice for demand of justice (Annex.9) annexed with the Writ Petition No.9161/2013 is conspicuously silent about the legal status of the Association. It is in that background, it is rather difficult to comprehend that first petitioner is Secretary of the Association, but then, assuming

it that he is a Secretary, then why the resolution of the Association has not been placed on record in both the petitions to show that he has been authorised to espouse the cause of the Members of the Association and to file writ petitions. 8 In want of proof about the authorisation/resolution of the Association, it is per se not possible to infer that petitions have been filed on behalf of the Association and first petitioner is authorised to file the same. If the affidavit of the first petitioner in support of both the writ petitions is examined, then too, it would reveal that there is no whisper in both the affidavits that first petitioner is authorised by the Association to file these writ petitions. Therefore, in absence of requisite materials available on record and the affidavits of the first petitioner, I am at loss to say that both these petitions cannot be treated as petitions laid on behalf of Association and the first petitioner in his personal capacity is having no locus to maintain these petitions. As both the writ petitions are joint writ petitions and if taken to be filed by the second petitioner in her individual capacity, then in want of her affidavit in support of both the writ petitions, these writ petitions are prima facie not maintainable on her behalf. The affidavits tendered by the first petitioner in support of both the writ petitions nowhere indicate that he has been authorised by the second petitioner to sworn affidavit in support of the writ petitions is yet another relevant fact which cannot lose sight of the Court to treat both the petitions under cloud on behalf of second petitioner. Despite recording aforementioned adverse findings against the petitioners, the Court feels that petitioners may not be non-suited on mere technicalities and, therefore, afflictions of the petitioners are also thrashed out on merits vis-a-vis both the petitions. Learned counsel for the petitioners in support of his contentions has relied some of the legal precedents as referred to infra. The judgment of Supreme Court in *Hansraj H.Jain v. State of Maharashtra & Ors.*, JT1993(4) SC360 relied upon by learned 9 counsel for the petitioners relates to Land Acquisition Act, 1894. In this verdict, the Court has examined that if any action of the government or its instrumentality is lacking in bona fide and made in colourable exercise of power, the same is liable to be struck down. In *Ravi Yashwant Bhoir v. District Collector, Raigad & Ors.*, 2012 AIR SCW1877 the Court has examined the malice-in-law within four corners of Article 14 of the Constitution of India and held,- "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act

which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended."

It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law.

. In *S.V.A.Steel Re-rolling Mills Ltd. etc. v. State of Kerala & Ors.e etc.*, 2014 AIR SCW1092 Supreme Court issued a word of caution that before framing policy, State must think about pros and cons of the policy and its capacity to give benefits and should not give any assurance. Without appreciation of relevant factors, as doing so would be in violation of principles of promissory estoppel. The Court held,-

32. Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits. Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppel but it would be unfair and immoral on the part of the State not to act as per its promise.

. In *Dipak Babaria v. State of Gujarat & Ors.*, 2014 AIR SCW1425 Supreme Court laid down the principles as to government action can be defended. The Court held,-

57. That apart it has to be examined whether the Government had given sufficient reasons for the order it passed, at the time of passing such order. The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent affidavits as laid down by this Court long back in *Commissioner of Police, Bombay vs. Gordhandas Bhanji* reported in AIR 1952 SC16 in the following words:- Public orders, publicly made, in

exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

. This proposition has been quoted with approval in paragraph 8 by a Constitution Bench in *Mohinder Singh Gill vs. Chief Election Commissioner*, reported in 1978 (1) SCC405(AIR 1978 SC851 wherein Krishna Iyer, J.

has stated as follows:-

8. The second equally relevant matter is 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 in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

. In this context it must be noted that the Revenue Ministers direction merely states that it is a private land, and the Governments letter dated 18.12.2009 speaks of the financial incapability of Indigold. Neither the letter dated 18.12.2009 from the Government to the Collector, nor the order passed by the Deputy Collector on 15.1.2010 mention anything about:

1. The mineral policy of the Government of Gujarat.
2. The time taking nature of the process of acquiring the land and re- allotting it.
3. That the second sale was under the authority of the Collector available to him under the first proviso to Section 89(1) read with condition No.(4) of the permission dated 1.5.2003 granted to Indigold to purchase the concerned lands. In the absence of any of these factors being mentioned in the previous orders, it is clear that they are being pressed into service as an after- thought. The Government cannot be allowed to improve its stand in such a manner with the aid of affidavits.

. 11 The principles enunciated in the judgments referred to supra are acceptable and there cannot be two opinions about these principles. However, in order to show colourable exercise of powers by the respondents or mala fide exercise of powers, requisite pleadings and proofs are required which are conspicuously missing in the instant case. Moreover, in both the petitions, there are no personal insinuation against any individual for his alleged mala fide action or colourable exercise of power. The question of malice-in-law has received recognition by the law courts in India but for invoking malice-in-law, the pre-requisite is infliction of injury by a person upon another person in contravention of law. Thus, malice in its legal sense means malice such as may be assumed from doing a wrongful act, intentionally but without just cause or excuse, or want of reasonable or probable cause. Well it is true from the stand of the second respondent that it has issued advertisement for auctioning of plots to the transporters but when the said approval is not received from the competent authority, it has not proceeded with the auction of plots. Therefore, in these circumstances, invocation of principle of malice-in-law is per se an ambitious plea which cannot be countenanced. The other plea of the petitioners that impugned action of the respondents is seriously questionable on the anvil of promissory estoppel per se appears to be quite alluring but not of substance. The petitioners are construing issuance of the notification for auction of plots to the transporters as a promise by the respondents, which on the face of it, is not tenable. Even if it is assumed that by mentioning auction of plots to transporters, the second respondent 12 has invited applications from the transporters for allotment of plots, how and in what manner this promise has been fructified, is a very relevant consideration to constitute a promise in true sense. Obviously when the second respondent has not auctioned any plot to the transporters within the market yard, the promise has not at all been fructified and, therefore, invoking principle of promissory estoppel is wholly untenable. The principle of promissory estoppel is stated in Halsbury's Laws of England, fourth Edition, Vol.16 in Para 1514 at page 1017 in the following terms:- When one party has, by his words or conduct made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance

cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.

. In view of the fact that there was no promise in legal parlance, invocation of principle of promissory estoppel is nothing but an ambitious plea of the petitioners which merits rejection. The legal position is no more *res integra* that scope of judicial review in contractual matters including government contracts and auctions is very much limited and courts are required to exercise such powers under Article 226 with great care and caution. The power of interference even upon cancellation of auction of plots by the State Government is not desirable if there is no material placed on record to show that government has not acted in furtherance of public interest. The Supreme Court in *Rajasthan Housing Board & Anr. v. G.S. Investments and Anr.*, (2007) 1 SCC 477 declined to interfere with the order of Housing Board cancelling the auction proceedings even after acceptance of the highest bid of an individual. The Court held,-

9. This being the settled legal position, the respondent acquired no right to claim that the auction be concluded in its favour and the High Court clearly erred in entertaining the writ petition and in not only issuing a direction for consideration of the representation but also issuing a further direction to the appellant to issue a demand note of the balance amount. The direction relating to issuance of the demand note for balance amount virtually amounted to confirmation of the auction in favour of the respondent which was not the function of the High Court.

10. The other question which requires consideration is what are the contours of power which the High Court would exercise in a writ petition filed under Article 226 of the Constitution where the challenge is to cancellation of an auction held by a public body where the prime consideration is fairness and generation of public revenue. This question has been examined in a catena of decisions of this Court. In a recent decision rendered in *Master Marine Services (P) Ltd. Vs. Metcalfe and Hodgkinson (P) Ltd.* where after consideration of several earlier decisions, the Bench to which one of us was a party, summarized the legal principle as under in paragraphs 11 to 15 of the said Report: (SCC pp.147-48)

"1. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three Judge Bench in *Tata Cellular v. Union of India*. It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (See para 85 of the Report, SCC para

70) 12. After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing of decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.) 13. In *Sterling Computers Ltd. v. M&N Publications Ltd.* it was held as under: (SCC p. 458, paras 18-19)

"8. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the "decision-making process.".... By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time ... the Courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot act as an Appellate Authority by substituting its opinion in respect of selection made for entering into such contract."

14. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.* it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.* and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the

making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that 15 overwhelming public interest requires interference, the court should interfere."

11. The sale of plots by the Rajasthan Housing Board by means of an auction is essentially a commercial transaction. Even if some defect was found in the ultimate decision resulting in cancellation of the auction, the Court should exercise its discretionary power under Article 226 of the Constitution with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority. In the present case there was enough material before the State Government to show that in the past plots in the area had fetched a price of Rs.10,000/- per square meter and the highest bid made by the respondent in the present case was nearly half, i.e., Rs.5750/- per square meter, which clearly indicated that the auction had not been conducted in a fair manner. If in such a case the State Government took a decision to disapprove the auction held and issued a direction for holding of a fresh auction, obviously the said decision was taken in larger public interest. In these circumstances there was absolutely no occasion for the High Court to entertain the writ petition and issue any direction in favour of the contesting respondent. The orders passed by the learned Single Judge on 4.8.2004 and the order passed by the Division Bench of the High Court on 23.9.2004 are clearly erroneous in law and are liable to be set aside.

. The afflictions of the petitioners if examined on the touchstone of Policy of 2005, then too it would reveal that there is no provision for allotment of plots to transporters. Clause 13 on which learned counsel for the petitioners has laid much emphasis, in the considered opinion of this Court, is having no nexus whatsoever for allotment of plots to transporters. It is also noteworthy that under clause 14, provision is there for allotment of land for cold storage and agricultural related industries. Similarly, for petrol pump, showrooms also, clause 15 envisages the provision. A critical examination of the scheme makes it amply clear that there is no provision for allotment of plots to transporters and as such if the second

respondent has not proceeded for auction of the plots in this behalf de hors the Policy of 2005, its action cannot be faulted. A clear stand of the respondent that no concurrence (policy decision) was received from the Directorate of Agriculture Marketing for proceeding with the auction, 16 in these circumstances, appears to be a just reason, which cannot be made subject-matter of judicial scrutiny in the instant writ petitions at the behest of petitioners. Resultantly, I find no merit in these writ petitions and consequently both these writ petitions are dismissed. A copy of this order be placed in connected Writ Petition No.2108/2014. (P.K.LOHRA),J.

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