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Court : Jammu and Kashmir

Decided On : Apr-22-1998

Reported in : AIR1999J& K69

Judge : O.P. Sharma, J.

Acts : Constitution of India - Articles 14 and 104; ;Jammu and Kashmir Constitution - Section 104

Appeal No. : O.W.P. No. 141 of 1998

Appellant : Tramboo and Co.

Respondent : J. and K. Agro Industries Development Corpn., Srinagar

Advocate for Def. : I. Lone and; A. Haqani, Advs.

Advocate for Pet/Ap. : M.A. Qayoom and Z.A. Qureshi

Disposition : Petition dismissed

Judgement :

O.P. Sharma, J.

1. M/s.Tramboo and Company of which Sh. Mohd. Shafi Tramboo is the sole proprietor is engaged in the business of sale and supply of fertilizers. In response to a public notice dated 31-10-1995 issued by the 'J. and K. - Agro Industries Development Corporation the official respondent herein invited offers for the dealership for the sale of fertilizer in the State. Petitioner's offer was accepted and he was appointed dealer for the supply of fertilizers for district Baramulla for a period of two years. A formal Deed of Agreement was executed on 4-1-1996. From the pleadings it transpires that dealers were also appointed for other districts of valley also and Deed of Agreement executed on the same date.

2. While the dealership was only for two years. Clause 12 of the agreement provided for the renewal of dealership for such further period on such fresh terms as may be agreed between the parties. It is admitted case of the parties that dealership for the districts of Srinagar-Badgam. Pulwama and Anantnag was renewed in Nov. 1996 when the period of contract was to expire only in January, 1998. However, dealership of the petitioner was not renewed. As soon as he came to know about the renewal of dealership in other districts he also submitted his application on 7-11-1997 but it was not acknowledged.

3. While he was still pursuing his case for renewal of dealership in terms of clause 12, the official respondents by a public noticed dated 10-1-1998 published in Daily Aftab invited offers for appointment of dealers for district Baramulla. Petitioner challenged this action of the official respondent by filing O.W. P. No. 34/- 1998 which was disposed of on 19-1-1998 with the direction that official respondents shall consider his representation dated 13-1-1998 for renewal of dealership.

4. Petitioner's grievance is that the official respondents instead of considering his representation in terms of directions of this Court accepted the offer of M/s. Sahara Enterprises Srinagar, the private respondent herein, who has been appointed dealer for district Baramulla. He, therefore, challenges the appointment of private respondent as dealer for the sale of fertilizer for district Baramulla on the ground of class dis-crimination offending Article 14 of the Constitution. as he has been singled out for a differential' treatment. He has also prayed that public notice dated 10-1-1998 and communication dated 5-2-1998 and 19-2-1998 be quashed

and official respondents be directed to renew his dealership on the analogy of dealers of other districts.

The Official respondents have controverted all the factual pleas raised by the petitioner in eluding his performance as dealer. However, maintainability of the writ petition has been , challenged on various grounds which shall be presently noticed while considering the submissions made at the bar.

5. Mian Abdul Qayoom appearing for the petitioner argued that the order impugned is illegal and unconstitutional firstly because the respondents having assured the petitioner and other dealers that dealership shall be continued only on performance basis. The refusal to renew petitioner's dealership according to him is arbitrary and a male fide action. He also pointed out that having renewed the dealership in all the Districts in terms of clause 12 of the agreement petitioner could not have been singled out for a ; differential treatment. The appointment of private respondents as dealer for Baramulla without deciding his representation dated 13-1-1998 act cording to Mian Qayoom is not only illegal and also contemptuous being in violation of the order of this Court on OWP 34 of 1998.

Mr. Lone appearing for the official respondents vehemently argued the maintainability of the writ petition mainly because grant of extension in terms of clause 12 of the agreement would tantamount to grant of fresh contract without inviting offers from interested parties. Such course according to Mr. Lone offends Article 14 of the Constitution of India. Since no right was created by clause 12 of the agreement as no fresh terms and conditions could be incorporated without inviting offers from the public at large, the petition argued Mr. Lone is liable to be dismissed. He also vehemently argued that the performance of the petitioner being far from satisfactory it was necessary to invite fresh offers in which petitioner could have also participated.

6. In support of the first submission Mian Qayoom relied on a communication dated 22-4-1997 addressed to all the dealers by the respond ent, the concluding para of which reads :-

'In the meeting held under the Chairmanship of our Managing Director on dated 22-4-1997 it has been decided to continue dealership under Fertilizer procurement only on performance basis. We expect you to come to our expectations and kindly be informed that corporation shall be forced to cancel the dealership in terms of agreement clause in case we do not receive the requirement and advances as per fixed targets of clause 3 of the agreement. Matter most serious.'

However, his is neither a letter of assurance nor is a policy decision for renewal of dealership after expiry of the period fixed under the contract. This letter was only a verbal threat to the dealers that if they failed to discharge the obligation arising under the contract clause 14 of the agreement will be invoked. This clause reads,' The party of the First part reserve the right to cancel the dealership of the party of the 2nd part at any time without assigning any reason thereof.' So unsatisfactory performance of the agreement was made a ground for cancellation of the contract in terms of this clause. It is, therefore, not correct to say that renewal of dealership was dependent upon the satisfactory performance of the agreement. The aforesaid communication was relevant only during the currency of the dealership and appears to have been issued in amplification of clause 14 of the agreement. Nothing more can be read into it. This view is also in consonance with clause 12 of the agreement which is extracted below :-

'That this AGREEMENT shall remain in force for a period of two years from the date of its execution. The AGREEMENT shall, however, be further renewed for such period as the parties agree and with some new Terms and Conditions, as agreed by the parties at the time of its renewal.'

6A. A plain reading of the clause suggests that renewal has to be mutually settled on fresh terms and conditions. However, the question for consideration is whether fresh terms and conditions could be mutually settled without inviting offers from the interested persons willing to accept dealership on more favourable terms as compared to the petitioner. In case it is found that enforcement of clause 12 will violate the mandate of Article 14 of the Constitution; of India, the same shall not bind the official respondents. An identical question fell for consideration of theirLordships of the Apex Court in Sterling Computers Ltd. v. M/s. M. & N.

Publications Ltd. AIR 1996 SC 51. While rejecting the plea that extension was granted in terms of the supplemental agreement it has been laid down (para 30):-

'We fail to understand as to how a fresh contract for a period up to 1997/1998 was awarded to UIP/UDI/Sterling in the garf of an agreement for extension of the period of the original agreement taking into account irrelevant factors as already enumerated above. If the supplemental agreement has been executed without following the procedures which are essential in view of the repeated pronouncements of this Court and taking into consideration irrelevant factors, then can it be said that 'decision making process' before the supplemental agreement was entered into was consistent with me requirement of Article 14 of the Constitution? In such a situation there is no scope for argument that any interference by Court shall amount to an intervention like a Court of appeal. Once the process through which the supplemental agreement was executed is held to be against the mandate of Article 14 of the Constitution, the supplemental agreement shall be deemed to be void.'

7. Since renewal of dealership in terms of clause 12 would be infraction of Article 14 of the Constitution of India official respondents by not enforcing the clause have ensured compliance of Article 14 of the Constitution by inviting offers from all eligible persons interested in the dealership. It was open to the petitioner to seek consideration like any other interested party instead of asking for renewal of his dealership under clause 12 which in any case was not enforceable as it offends Article 14 of the Constitution. So inviting offers from all those interested for dealership was the best course adopted by the official respondents.

8. It was next argued that refusal to renew petitioners dealership is arbitrary as he is also entitled to similar treatment. However petitioner has himself admitted in para 20(a) of the petition that renewal of dealership in favour of dealers for the Districts of Srinagar, Udgam, Pulwama and Anantnag arbitrary. The relevant portion of this sub para reads :-

'AH the dealers were governed by same terms and conditions and all of them executed agree-ments of the same kind which was executed by the petitioner with the respondents. Accordingly the petitioner and all those dealers were entitled to

the same treatment. This action of the respondents clearly demonstrate that they have abused their official power and authority and have granted extension to the dealers of Srinagar, Pulwama, Budgam and Anantnag in arbitrary and capricious exercising of power. They have denied the said treatment to the petitioner for mala fide reasons which renders the public notice dated 10-1-1998 to be set aside.'

Since the renewal of dealership in favour of the dealers of other districts even according to the petitioner is arbitrary and capricious exercise of power, this cannot be a ground to grant him the same relief because illegal/unwarranted orders cannot be made the basis of issuing a writ compelling the official respondents to repeat illegality or pass the unwarranted order. This principle has been laid down in Chandigarh Administration v. Jagjeet Singh, AIR 1995 SC 705 holding that (para 8) :-

'.....Generally speaking, the mere factthat the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law -indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law-but even if it cannot be corrected, it is difficult to see how itcan be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to

such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of, law.'

Moreover in Gursharan Singh v. New Delhi Municipal Committee, AIR 1996, SC 1175, the concept of equality before law has been held to be a positive concept which cannot be enforced in a negative manner, Elaborating the positive concept their Lordships held that: (Para 9)

'This guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or Court in a negative manner. To put it in other words, if an illegality or irregularity has been committed in favour of any individual or a group of individuals, the others cannot invoke the jurisdiction of the High Court or of this Court, that the same irregularity or illegality be committed by the State or an authority which can be held to be a State within the meaning of Article 12 of the Constitution, so far such petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same, but they cannot claim orders which are sanctioned by law in their favour on principles of equality before law. Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause in upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.'

The preposition squarely applies to the facts of the case because clause 12 of the agreement is arbitrary as renewal of dealership without inviting offers from interested persons will offendArticle 14 of the Constitution. The clause is thus illegal and not enforceable. If that be so, as it really is, the renewal of dealership for other districts by the official respondent is illegal and arbitrary in view of the law laid down by the Apex Court in Erusian - Equipment and Chemicals Ltd. v. State of

W. B., AIR 1975 SC 266, which reads : (Para 17)

'When the Government is trading with the public, 'the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions'. The activities of the Government that a public element and, therefore, there should be fairness and equality. 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.'

The Official respondent is admittedly an instrumentality of the State. But it acted in mostarbitrary manner in granting renewal under Clause12 of the agreement. It had thus acted illegallyand in an arbitrary manner without inviting offers from interested persons. To grant relief to thepetitioner would tentamount to enforce conceptof equality in a negative manner which is notpermissible as noticed above. Further Article 14cannot be attracted where wrong orders are issued in favour of others as held in M/s. Faridabad CT. Scan Centre v. D. G. Health Services, AIR1997 SC 3801 (Para 3):

'We fail to see how Article 14 can be attracted in cases where wrong orders are issued in favour of others. Wrong orders cannot be perpetuated with the help of Article 14 on the basis that such wrong orders were earlier passed in favour of some other persons and, therefore, there will be discrimination against others if correct orders are passed against them. In fact, in the case of Union of India (Railway Board) v. J. V. Subhaiah, (1996) 2 SCC 258 : 1996 AIR SCW 705, the same learned Judge in his judgment has observed in Para 21 that the principle of equality enshrined under Article 14 does not apply when the order relied upon is unsustainable in law and is illegal. Such an order cannot form the basis for holding that other employees are discriminated against under Article 14; The benefit of the exemption notification, in the present case, cannot, therefore, be extended to the petitioner on ground that such benefit has been wrongly extended toothers. With respect, the decision in Mediwell Hospital (supra) docs not lay down the correct law on this point.'

So petitioner, cannot complain of discrimination.

9. The third contention is equally devoid of substance because while deciding O.W.P. 34 of 1997 this Court did not quash the public notice dated 10-1-98. The operative portion of the order dated 19-1-1998 reads as under :-

'Respondents are directed to accord consideration to the representation of the petitioner within a weeks time and till then no orders in respect of dealership be issued, however, this order Shall not debar the respondents from entertaining the offers for which the last date specified is 20-1-1998. It is further provided that in case -the outcome of consideration is not favourable to the petitioner in such eventuality they can invoke the legal remedy, if so advised.'

10. The next question involved is whether petitioner's representation dated 13-1-1998 has been considered In the communication dated 5-1-1998 official respondents have stated that con-sidering the complaints with regard to the availability and distribution of fertilisers in District Baramulla, it was decided not to renew his dealership. After referring to the correspondence regarding the performance of the petitioner, the official respondents concluded as follows :-

'The Corporation in the light of ground reality as such could not issue the renewal letter in year favour beyond the stipulated agreement period in the light of above complaints in our records, your non participation in our notice inviting offers and without any formal letter in advance for renewal:'

So the representation of the petitioner has been considered and rejected. The conclusion no doubt is contested by the petitioner, but the comparison is illogical and unrealistic firstly because there was no complaint from the Districts about the non-availability of fertilizers; and secondly there is no evidence about the actual requirements of the each District and the short fall in the storage and supply, if any. However, all this apart, the fact about the claim of the petitioner about his excellent performance is seriously disputed relying mainly on the official documents originating from the officials of District administration monitoring supply and stor-age of fertilizer. Such disputed questions of fact cannot be adjudicated in exercise of extra-ordinary jurisdiction. But assuming that these may be in exceptional cases, this is not an exceptional case because performance of the petitioner as a dealer was relevant only for invoking clause 14 under which the

petitioner's dealership could be cancelled during the currency of the agreement and not for renewal of his dealership, as no such condition can be read into Clause 12 of the agreement.

11. The official respondents having invited offers by issuing public notice, the petitioner could have offered his terms for the dealership. But he did not do so and instead sought exclusions of other interested persons from offering their terms for dealership by relying on a clause which, as already observed, could not be enforced before contrary to the public notice dated 31-10-1995. So his performance as a dealer could not be determinative of his right to seek renewal and, therefore, failure to decide his representation will not advance his case. Moreover, his representation having been decided on the basis of material which is not irrelevant it does not suffer from lack of application of mind and therefore, cannot be challenged because this is not a Court of appeal.

12. However, clause 12 of the agreement is a self serving provision meant for those who may like to exploit it against public interest which undoubtedly has grievously suffered with renewal of dealer ship for other Districts without inviting offers and that too more than a year before the expiry of the agreement. How such conduct of a public servant could be justified and why this atrocious conduct has been condoned or ignored is a matter of concern and anguish. But since the renewal have not been challenged and those who have been benefitted by the arbitrary and diabolical action are not party to these proceedings, the Court cannot undo the wrong. However, it will be better if omnibus provision like clause 12 is not incorporated in such agreements, unless it is provided in the public notice inviting offers.

13. In view of the above, this writ petition is liable to be dismissed and it is accordingly dismissed.

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