

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 2930 of 2019

Reserved on: 28.10.2020

Decided on: 02.11.2020

Darshan Singh & Anr.

...Petitioners

Versus

State of H.P. & Ors.

...Respondents

Coram:

Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.

Whether approved for reporting?¹

Yes.

For the Petitioners : Mr. R. K. Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. A.Gs., Ms. Seema Sharma, Mr. Bhupinder Thakur and Mr. Yudhvir Singh Thakur, Dy. A.Gs., for respondent No.1/State.

Ms. Bhavana Datta, Advocate, for respondents No. 2 and 3.

Mr. Arvind Sharma, Advocate, for respondents No. 4 and 5.

Tarlok Singh Chauhan, Judge

It was more than four decades back that the Hon'ble Supreme Court had observed that "it must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of

¹ Whether reporters of the local papers may be allowed to see the judgment? yes

largesses, 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 standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesses including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory (Refer: ***Erusian Equipment and Chemicals Ltd. vs. State of West Bengal, AIR 1975 SC 26***).

2. The instant case depicts sordid, despotic and nepotistic functioning of respondent No.1. Despite there being no advertisement or wide publicity for allotment of distribution work of cooking gas cylinders, the same was granted to respondents No. 4 and 5, after withdrawal from the petitioners, only because they were ready to do the same work at a lesser rate.

3. It is not to say that the petitioners are hollier than cow because even they too were allotted this work in a same and similar fashion.

4. The facts are not in dispute that the distribution work was earlier done by one contractor Mr. Chanan Singh, who petitioners claim to have left the work in March 2019 and thereafter the same was allotted in their favour.

5. Now the work has been allotted in favour of respondents No. 4 and 5 because they quoted Rs.2/- less than the earlier rate.

6. In this regard, the moot question is whether the officials of the H.P. State Civil Supply Corporation, which admittedly is a State within the meaning of Article 12 of the Constitution could have granted largesses in the manner as is done in the instant case.

7. Admittedly, no notice, proclamation or advertisement was issued by the respondents before allotting the work to respondents No. 4 and 5.

8. The respondents being creation of a statute are not free to act like an ordinary individual, in dealing with the public property, as it 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 some standard or norm which is not arbitrary, irrational or irrelevant. The action of the respondent must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. After all, it is the principle of reasonableness and non - arbitrariness in

governmental action that lies at the core of our entire constitutional scheme and structure.

9. It was observed by Wades Administrative Laws, 5th Edition at page 347 that “The first requirement is the recognition that all powers have legal limits, the next requirement, no less vital, is that the Court should draw this limit in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament consistently confers upon public authorities powers which on their face seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the Courts refuse to countenance. They have woven a net-work of restrictive principles which require statutory powers to be reasonable and in good faith and in accordance with the spirit and letter of the empowering Act.” At page 359, it was also observed that “Discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That amounts at least to this that the statutory body must be guided by relevant consideration and not irrelevant. If its decision is influenced by extraneous consideration which ought not have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless, the decision will be set-aside.”

10. Here, it shall be apposite to make a reference to the judgment of the Hon’ble Supreme Court in ***New India Public***

School vs. Huda (1996) 5 SCC 510, wherein it was observed that when public authority discharges its public duty, it has to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and the same cannot be acted at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration.

11. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution. Thus, Article 14 read with Article 16(1) of the Constitution accords right to an equality or an equal treatment consistent with principles of natural justice. Therefore, any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly and reasonably. Right to fair treatment is an essential inbuilt of natural justice.

12. How the State largesses are to be distributed has been the subject matter of various decision of the Hon'ble Supreme Court. In this regard, I need only refer to the one of the latest judgments of the Hon'ble Supreme Court in ***J. S. Luthra Academy and another vs. State of Jammu and Kashmir and others, AIR 2018 SC 5367***, wherein it was categorically held that the process of allotting public largesses must be just, non-arbitrary and transparent. It would be relevant to reproduce

relevant observations as contained in para-6, which reads as under:-

"6. This Court in a series of cases including *Centre for Public Interest Litigation v. Union of India*, 2012 3 SCC 1 (popularly known as the "2G case"), in *Natural Resources Allocation, In Re. Special Reference No. of 1/2012*, (2012) 10 SCC 1, *Manohar Lal Sharma v. Principal Secy.*, (2014) 9 SCC 516, *Bharti Airtel Limited v. Union Of India*, (2015) 12 SCC 1, and *Goa Foundation v. Sesa Sterlite Ltd.*, (2018) 4 SCC 218 has formulated the guidelines for allocation of natural resources by the State. In *Bharti Airtel Ltd. v. Union of India*, (2015) 12 SCC 1, this Court summed up the principles governing the allocation of natural resources by the State laid down in *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 ("the 2G case") as follows:

"41. The licensor/Union of India does not have the freedom to act whimsically. As pointed out by this Court in 2G Case [*Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1] in the aboveextracted paragraph, the authority of the Union is fettered by two constitutional limitations: firstly, that any decision of the State to grant access to natural resources, which belong to the people, must ensure that the people are adequately compensated and, secondly, the process by which such access is granted must be just, nonarbitrary and transparent, vis-à-vis private parties seeking such access." (emphasis supplied)

Referring to the observations in the 2G case, the Court also highlighted that the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest, and that it must always adopt a rational method for disposal of public property, and ensure that a nondiscriminatory method is adopted

for distribution and alienation, which would necessarily result in national/public interest.

The principles governing the distribution of natural resources by the State were also discussed in the decision of the constitutional bench of this Court in *Natural Resources Allocation, In Re, Special Reference No. 1 of 2012, (2012) 10 SCC 1*. In para 149 thereof, the Court observed as follows:

"149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution." This decision emphasised that the ultimate goal to be served was that of the public good, and all methods of distribution of natural resources that ultimately served the public good would be valid, as reflected in the following observations:

"120. ...There is no constitutional imperative in the matter of economic policies-Article 14 does not predefine any economic policy as a constitutional mandate. Even the mandate of Article 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term "distribution", suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources

through auctions is clearly not a constitutional mandate."

It would be useful to note at this juncture that in this decision, the Court assessed the position of law developed through a catena of decisions, including Netai Bag & Ors. v. State of W.B. & Ors., (2000) 8 SCC 262, 5 M & T Consultants v. S.Y. Nawab, (2003) 8 SCC 100, and Villianur Iyarkkai Padukappu Maiyam v. Union of 11 India, (2009) 7 SCC 561, wherein it has been held that non-floating of tenders or holding of auction by itself is not sufficient to hold that the exercise of power was arbitrary. It would be useful to reproduce the following observations from Netai Bag (supra), which were also relied upon by the Court in Natural Resources Allocation, In Re (supra) to highlight that the ultimate test is only that of fairness of the decision making process and compliance with Article 14 of the Constitution:

"19. ... There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor can the courts substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process."

The above principles were also reiterated in *Manohar Lal Sharma (supra)*, wherein this Court observed at para 110:

"It is not the domain of the Court to evaluate the advantages of competitive bidding vis-a-vis other methods of distribution/disposal of natural resources. However, if the allocation of subject coal blocks is inconsistent with Article 14 of the Constitution and the procedure that has been followed in such allocation is found to be unfair, unreasonable, discriminatory, nontransparent, capricious or suffers from favouritism or nepotism and violative of the mandate of Article 14 of the Constitution, the consequences of such unconstitutional or illegal allocation must follow."

In *Ajar Enterprises (P) Ltd. v. Satyanarayan Somani*, (2018) 12 SCC 756, this Court affirmed the above principles in the following terms:

"49. ...Where a public authority exercises an executive prerogative, it must nonetheless act in a manner which would subserve public interest and facilitate the distribution of scarce natural resources in a manner that would achieve public good. Where a public authority implements a policy, which is backed by a constitutionally recognised social purpose intended to achieve the welfare of the community, the considerations which would govern would be different from those when it alienates natural resources for commercial exploitation. When a public body is actuated by a constitutional purpose embodied in the Directive 13 Principles, the considerations which weigh with it in determining the mode of alienation should be such as would achieve the underlying object."

The position of law developed through these decisions was summed up in the following manner by this Court in *Goa Foundation v. Sesa Sterlite Ltd.*, (2018) 4 SCC 218, after adverting to the various decisions referred to above:

"80.1. It is not obligatory, constitutionally or otherwise, that a natural resource (other than spectrum) must be disposed of or alienated or allocated only through an auction or through competitive bidding;

80.2. Where the distribution, allocation, alienation or disposal of a natural resource is to a private party for a commercial pursuit of maximising profits, then an auction is a more preferable method of such allotment;

80.3. A decision to not auction a natural resource is liable to challenge and subject to restricted and limited judicial review under Article 14 of the Constitution;

80.4. A decision to not auction a natural resource and sacrifice maximisation of revenues might be justifiable if the decision is taken, inter alia, for the social good or the public good or the common good;

80.5. Unless the alienation or disposal of a natural resource is for the common good or a social or welfare purpose, it cannot be dissipated in favour of a private entrepreneur virtually free of cost or for a consideration not commensurate with its worth without attracting Article 14 and Article 39(b) of the Constitution." (emphasis supplied)

From the above decisions, the following principles may be culled out:

(i) Generally, when any land is intended to be transferred by the state, or any state largesse is to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. The state must ensure that it receives adequate compensation for the allotted resource. However, non-floating of tender or nonconducting of public auction would not be deemed in all cases to be an arbitrary exercise of executive power. The ultimate decision of the executive must be the result of a fair decision making process.

(ii) The allocation must be guided by the consideration of the common good as per Article 39(b), and must not

be violative of Article 14. This does not necessarily entail auction of the resource; however, allocation of natural resources to private persons for commercial exploitation solely for private benefit, with no social or welfare purpose, attracts higher judicial scrutiny and may be held to be violative of Article 14 if done by noncompetitive and non-revenue maximizing means.

15 Keeping in mind the aforementioned principles formulated by this Court in the aforementioned judgments, we have considered the entire material on record. It must be determined as to whether the allocation made in favour of the Academy fell foul of the above principles. In the instant case, the allocation has evidently been done to a private educational institution by non-revenue maximizing means. Assuming that the Academy is engaged in commercial activities while engaging in its main activity of imparting education to students, two questions remain to be seen: first, whether there was any social or welfare purpose underlying the allocation, i.e., if the furtherance of the public good was the ultimate goal of the allocation so as to justify the non-auctioning of the land, and second, if the allocation is bad for lack of adequate compensation."

13. Having regard to the entire facts and circumstances, the irresistible conclusion is that fraud has reached its crescendo. Deeds as foul as these are inconceivable much less could be permitted to be perpetrated.

14. Shakespeare aptly described such sordid affairs in the following manners: *thus much of this, will make Black, white; foul, fair; Wrong, right; Base, noble; Ha, you gods: why this?* This is clearly evident from the fact that both the President and Vice President of respondent No. 1 have recently resigned from the

office purportedly because of a video widely circulated showing them accepting bribe from the Contractor.

15. As observed earlier, it is highly regrettable that the officials of respondent No. 2 have been completely oblivious to the fact that the office entrusted to them are sacred and were meant for use and not for abuse.

16. The office bearers of respondent No. 2 cannot act as despots or monarchs and are obliged to act in accordance with the principles of democracy, equity, equality and solidarity.

17. The entire scenario shocks the conscious of this Court to come across such systematic fraud committed by those who are at the helm of affairs of respondent No. 2 Corporation in dealing with its property as if it was their personal property. It has to be remembered that respondent No. 2 like anybody corporate has power to hold property and is capable to entering into contract strictly in accordance with the Rules that too in a fair and transparent manner without indulging in any favouritism or nepotism.

18. The officials of respondent No. 2 have failed to take into consideration that discretion can only be exercised if there is a power to do so and the same otherwise cannot be contrary to law. The absence of arbitrary power is the first postulate of rule of law upon which whole constitutional edifice is based. In a system governed by law, discretion when conferred upon an

executive authority must be confined within clearly defined limits. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law. Discretion mean sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority.

19. Thus, what can be taken to be well settled is that an unfettered discretion is a sworn enemy of the constitutional guarantee against discrimination. No authority, be it administrative or judicial has any power to exercise the discretion vested in it unless the same is based on justifiable grounds supported by acceptable materials and reasons thereof.

20. The concept of equality before law means that among equals the law should be equal and should be equally administered, and that like should be treated alike. There must not be discrimination among equals unless there is reasonable classification. When something is to be done within the discretion of the authorities, it must not be done according to the whims of the authorities. Article 14 of the Constitution is violated by powers and procedures which in themselves result in unfairness and arbitrariness. It must be remembered that our entire constitutional system is founded in the rule of law, and in any system so designed it is impossible to conceive of legitimate

power which is arbitrary in character and travels beyond the bounds of reason.

21. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and it therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

22. Bearing in mind the aforesaid exposition of law, the action of respondent No. 2 in allotting the distribution work of cooking gas cylinders in favour of respondents No. 4 and 5 cannot be countenanced. However, at the same time, this work cannot be simply allotted to the petitioners also.

23. Accordingly, while allowing the petition, we direct respondent No. 2 to call for tenders for distribution of cooking gas cylinders by giving wide publicity to the same and complete

the process within a period of six weeks. Till then, we permit respondents No. 4 and 5 to continue with the distribution work.

24. The instant petition is disposed of in the aforesaid terms, so also pending applications, if any. Parties are left to bear their own costs.

For compliance to come up on **16.12.2020**.

(Tarlok Singh Chauhan)
Judge

(Jyotsna Rewal Dua)
Judge

2nd November, 2020.
(sanjeev)

High Court