SUPREME COURT OF INDIA

M/s A.S. Motors Pvt. Ltd.

Vs.

Union of India & Ors.

C.A.No.1517 of 2013

(T.S. Thakur and Gyan Sudha Misra,JJ.)

21.02.2013

JUDGMENT

T.S. Thakur, J.

1. Leave granted.

2. This appeal by special leave arises out of an order dated 8th August, 2007, passed by a Division Bench of the High Court of Madhya Pradesh at Jabalpur whereby Writ Appeal No.491 of 2007 filed by the appellant has been dismissed and the order passed by the learned Single Judge dismissing Writ Petition No.720 of 2007 affirmed. Multiple rounds of litigation between the parties have been aptly recapitulated in the order passed by the Single Judge of the High Court in Writ Petition No.720/2007 and refreshed by the Division Bench of the High Court while dismissing the writ appeal filed against the same. It is in that view unnecessary for us to recount the entire factual background in which the controversy in this appeal arises except to the extent it is absolutely necessary for us to do so for the disposal of this appeal.

3. National Highway Authority of India Ltd. (NHAI for short) invited tenders for award of a contract for collection of fee for the use of National Highways from Km. 61.00 to Km.103 on Morena-Gwalior Section of National Highway No.3. Appellant too among others made an offer which was accepted by the NHAI in terms of its letter dated 14th March, 2006 asking the appellant to submit a demand draft for a sum of Rs.2,20,00,125/- towards performance security and a bank guarantee for a similar amount to be valid for a period of 15 months for the due observance of the terms and conditions contained in the contract. Both these requirements were satisfied by the appellant with the result that a contract for collection of user fee commencing from 1st April, 2006 to 31st March, 2007 was finally allotted in its favour. It is not in dispute that pursuant to the said allotment the appellant started collecting the prescribed fee as per the terms and conditions of the agreement and also started depositing monthly instalments stipulated under the same.

4. Certain violations were in due course noticed by the NHAI including complaints to the effect that the appellant was collecting excess fee from vehicles passing through Toll Plaza. This resulted in the termination of the collection contract by the competent authority in terms of a letter dated 27th July, 2006, and forfeiture of the performance security of Rs.2,20,00,125/-. Termination ordered by the respondent triggered litigation between the parties that took several rounds before the High Court. We are not immediately concerned with the nature of those proceedings and the orders passed in the same from time to time. What is important is that the termination of the contract had once been quashed by the High Court whereupon the same was terminated for a second time after a show-cause notice and a personal hearing to the appellant in compliance with the direction issued by the High Court in its order dated 25th January, 2007.

5. Aggrieved by the fresh termination of the contract as also the forfeiture ordered by the competent authority, the appellant filed Writ Petition No.720 of 2007 before the High Court of Madhya Pradesh. By his order dated 18th June, 2007, a Single Judge of the High Court allowed the said petition in part and while upholding imposition of penalty and forfeiture of performance guarantee, quashed the revocation of the bank guarantee by the respondent, as unfair and unreasonable having regard to the fact that the respondent had already received Rs.7,33,33,750/- towards collection charges, Rs.2,20,00,125/- towards forfeiture of the performance security and a penalty amount of Rs.2,41,097/- making a total of Rs.9,55,74,970/- which was more than Rs.8,80,00,500/- the amount contracted to be paid to the respondent. The High Court held that the termination of the contract and the forfeiture of the performance security for the breaches committed by the appellant were perfectly justified in the light of the report submitted by the agency deployed by the respondent to collect material regarding overcharging of fee and other violations committed by the appellant.

6. Feeling aggrieved by the order passed by the Single Judge of the High Court the appellant preferred Writ Appeal No.491 of 2007 which was heard and dismissed by a Division Bench of the High Court by its order dated 8th August, 2007. The present appeal assails the correctness of the said order.

7. We have heard learned counsel for the parties at some length who have taken us through the record including the orders passed by the High Court from time to time.

8. It was argued on behalf of the appellant that termination of the contract between the parties was legally bad not only because the principles of natural justice requiring a fair hearing to the appellant were not complied with but also because there was no real basis for the respondent-authority to hold that the appellant had committed any breach of the terms and conditions of the contract warranting its termination. We find no merit in either one of the contentions. The reasons are not far to see. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable

opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion. We may refer to only some of the decisions on the subject which should in our opinion suffice.

9. In Suresh Koshy George v. University of Kerala, AIR 1969 SC 198, this Court while examining the content and the sweep of the rules approved the view expressed in Russel v. Duke of Norfolk, [1949] 1 All ER 109 in the following words:

> "7. … … The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

> 8. In Russel v. Duke of Norfolk, [1949] 1All ER 109 at p.118, Tucker, L.J., observed:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

10. In Keshav Mills Co Ltd. v. Union of India, (1973) 1 SCC 380 this Court extracted with approval the observations of Lord Reid in Ridge v. Baldwin, (1963) 2 W.L.R. 935 and said:

> "8. … … We do not think it either feasible or even desirable to lay down any fixed or rigorous yard-stick in this manner. The concept of natural justice cannot be put into a straight-jacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially

as to act fairly. See, for instance, the observations of Lord Parker in In re H.K. (an infant), (1967) 2 QB 617. It only means that such measure of natural justice should be applied as was described by Lord Reid in Ridge v. Baldwin case (supra) as "insusceptible of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances". However, even the application of the concept of fair-play requires real flexibility. Everything will depend on the actual facts and circumstances of a case. As Tucker, L.J., observed in Russell v. Duke of Norfolk, [1949] 1 All ER 109:

"The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject- matter that is being dealt with and so forth."

11. Reference may also be made to P.D. Agrawal v. State Bank of India (2006) 8 SCC 776, where this Court approved the observations made by Mukharji, J. in *Charan Lal Sahu v.* Union of India , (Bhopal Gas Disaster) (1990) 1 SCC 613, in the following words:

"30. The principles of natural justice cannot be put in a straitjacket formula. It must be seen in circumstantial flexibility. It has separate facets. It has in recent time also undergone a sea change."

31. In Ajit Kumar Nag v. G.M. (PJ), Indian Oil Corprn. Ltd (2005) 7 SCC 764, a three-Judge Bench of this Court opined: (SCC pp.785-86, para 44) "44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from laws of men, laws of God also observe the rule of audi alterem partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden fruit. (See R. v. University of Cambridge [1723] 1 Str 557) But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: " 'To do a great right' after all, it is permissible sometimes 'to do a little wrong'." [Per Mukharji, C.J. in Charan Lal Sahu v. Union of India, (Bhopal Gas Disaster) (1990) 1 SCC 613, at 705, para 124.] While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'." xxx xxx xxx xxx xxx xxx

> 39. Decision of this Court in S.L. Jagmohan, (1980) 4 SCC 379, whereupon Mr Rao placed strong reliance to contend that non- observance of principle of natural justice itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364 andRajendra Singh v. State of M.P., (1996) 5 SCC 460 the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of audi alteram partem, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula. (See Viveka Nand Sethi v. Chairman, J&K Bank Ltd. (2005) 5 SCC 337 and State of U.P. v. Neeraj Awasthi, (2006) 1 SCC 667. See also Mohd. Sartaj v. State of U.P., (2006) 2 SCC 315) (emphasis supplied)

12. In Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi & Ors., (1991) 2 SCC 716, this Court while reiterating the legal position observed:

> "22. … … The omnipresence and the omniscience (sic) of the principle of natural justice acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order/decision on the rights of the person and attendant circumstances."

13. In Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors. (1984) 4 SCC 27, this Court reiterated the the observations made by Matthew, J. in Union of India v. Mohan Lal Kapoor, (1973) 2 SCC 836 that it was not expedient to extend the horizons of natural justice involved in the audi alteram partem rule to the twilight zone of mere expectations, however great they might be.

14. We may finally refer to the decision of this Court in Aligarh Muslim University v. Mansoor Ali Khan, (2000) 7 SCC 529, where this Court with approval quoted the following observations of Sir Willam Wade (Administrative Law, 9th Edn. pp.468-471) "… … it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent… There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth."

15. Coming to the case at hand we find that the termination of the contract between the parties was preceded by a show-cause notice issued to the appellant and a hearing provided to it by the competent authority. The show-cause notice issued to the appellant on 24th November, 2006 enclosed with it all relevant documents including the complaints received against the appellant from various quarters and a copy of the report submitted by the agency engaged for verifying the allegations against the appellant. The appellant had unsuccessfully challenged the show-cause notice in Writ Petition No.6338 of 2006, before the High Court. The High Court had while refusing to interfere in the matter directed the appellant to submit a reply to the notice. The appellant had accordingly appeared before the authority on 12th January, 2007, submitted its written statement and was heard in support of its case that it had not committed any default. In the reply or at the hearing, the appellant had not alleged any mala fide, bias or prejudice against the officers dealing with the matter or the agency employed by them for collecting and verifying facts. Principles of natural justice thus stood substantially complied with. The contention that the appellant should have been given an opportunity to cross-examine the persons whose statements had been recorded by the agency in the course of its inquiry and verification was rightly rejected by the High Court keeping in view the nature of the inquiry which was primarily in the realm of contract, aimed at finding out whether the appellant had committed any violation of the contractual stipulations between the parties. Issue of a show-cause notice and disclosure of material on the basis of which action was proposed to be taken against the appellant was in compliance with the requirement of fairness to the appellant who was likely to be affected by the proposed termination. Absence of any allegation of mala fides against those taking action as also the failure of the appellant to disclose any prejudice, all indicated that the procedure was fair and in substantial, if not strict, compliance with the requirements of Audi Alteram Partem. The first limb of the challenge mounted by the appellant, therefore, fails and is hereby rejected.

16. Coming then to the question whether the respondent-Authority had material enough to justify termination of the contract. The High Court has referred in detail to the report submitted by the agency deployed for collection of evidence and verification of the allegations and come to the conclusion that the respondent was perfectly justified in adopting the method and the procedure adopted by it in the instant case for collection of information and evidence regarding the alleged malpractices being committed by the appellant. The Single Judge of the High Court has while dealing with this aspect observed:

> "There is no allegations of mala fide, personal prejudice or bias against any of the members of agency which conducted the discreet inquiry. In the facts and circumstances of the case I am of the considered view that the method adopted by the National Highway Authority to detect the illegalities being committed by the petitioner is a fair and reasonable method and it has not caused any prejudice or bias to the petitioner. There is no material available on record on the basis of which the report submitted by the agency as contained in Annexure R/7 can be discarded by this Court, this report cannot be rejected merely on the ground that it is collected behind the back of the petitioner. The nature of irregularity committed by the petitioner can

be detected only if a discreet enquiry in the manner as done by the respondents have acted in a manner which is violative of the principle of natural justice. The report submitted was placed before the petitioner he was given opportunity of submitting his defence and explanation both in writing and personally. Records indicated that petitioner was unable to produce any cogent material to show that this report is unsustainable and cannot be relied upon."

17. In the appeal preferred against the above order, the appellant had made a grievance only in regard to two aspects covered by question nos. (III) and (V) , formulated by the Single Judge in the following words:

> (III) Whether the action for termination of the contract is done by the competent authority and whether cancellation of the contract is based on proof of breach committed by the petitioner?
>
> (V) Whether the provision of Section 74 of the Contract Act applies in the present case and forfeiture of the performance security and revocation of bank guarantee is arbitrary and unfair warranting interference by this Court?"

18. While dealing with question No.III above, the Division Bench held:

> "In respect of issue No. III, the learned Writ Court while relying upon various facts brought on record gave a categorical finding in paragraph 21 that the modus operandi adopted by the petitioner of charging higher rate from road was a clear breach of contract and under clause 18(a) of the Contract Agreement, the same was determined, and also entitled the national Highway Authority of India to impose and realize the penalty for such breach as stipulated therein. In our considered opinion the Writ Court did not faulter in recording the aforesaid finding."

19. There is, in our opinion, no error of law, nor is there any perversity in the appreciation of the material available before the respondents. The reports submitted by the agency employed by the respondent- Authority was damning for the appellant and clearly showed that the appellant was indulging in malpractices like charging excess fee from the owners/drivers of the vehicles using the stretch of road covered by the contract. Nothing in particular has been pointed out to us to persuade us to take a contrary view. If the report submitted by the agency against whom the appellant has no allegation of malice or other extraneous considerations to make are accepted, we see no reason why the same could not furnish a safe basis for the respondent to take action especially when the appellant was abusing its position as a contractor, putting the public at large to unnecessary harassment and exaction of money not legally recoverable from them. The material collected could and was rightly made a basis for the termination of contract by the competent authority.

20. The upshot of the findings recorded by the High Court which we have affirmed in the foregoing paragraphs is that the appellant was not entitled to claim any relief in exercise of its

extra ordinary writ jurisdiction of the High Court. The High Court could have relegated the appellant to seek redress in an appropriate civil action before a competent civil Court, whether for damages or recovery of the amount forfeited by the respondent. The High Court has not done so. It has given partial relief to the appellant to the extent of holding that the invocation of the bank guarantee was not justified in the light of the forfeiture of performance security and the amount of penalty. In any event we see no room for interfering with the order passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution of India which too is both extraordinary and discretionary in nature. We may in this connection refer to the following passage from Halsbury's Laws of England Fourth Edition Vol.-16 pages 874-876, which sums up the legal position in England as to the right of a party who has not come to the Court with perfect propriety of conduct and with clean hands, to claim an equitable relief.

1305. He who comes into equity must come with clean hands. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim "he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.

The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff's demerits."

21. Judged in the light of the above, the appellant had breached the contractual stipulations, harassed innocent citizens to cough up more than what they were in law required to pay and thus undeservedly enriched itself before it turned to the Court to claim relief in the extraordinary writ jurisdiction of the High Court on equitable considerations. Such an attempt could and ought to have been frustrated by the High Court, as indeed has been done, no matter only partially.

22. That brings us to the only other ground of challenge relating to invocation of the Bank Guarantee by the National Highway Authority of India which according to the appellant was arbitrary and unfair in the facts and circumstances of the case. The High Court has taken the

view that apart from a penalty of Rs.2,41,097/-, National Highway Authority had already recovered a sum of Rs.2,20,00,125/- out of the bank drafts furnished by the appellant towards performance security. The total amount, thus, received by the authority was more than the amount payable to it under the contract if the same had been performed diligently till the end of the contract period. Invocation of the bank guarantee for recovery of any further amount was in that view held to be unjustified by the High Court.

23. There is no appeal by the Authority against that part of the judgment, although it was argued on behalf of the Authority that in terms of clause 18(b) of the contract, the Authority had the right to estimate the excess of collection by the appellant-contractor and recover the same from it. Clause 18 may be extracted in extenso at this stage:

> "18. Penalty for charging excess fee :
>
> a) In case, it is observed and/or established to the satisfaction of the Authority that the Contractor has charged fee in excess of the prescribed rate, the Authority may terminate the contract forthwith and/or may impose a penalty of Rs. One lakh or an amount equivalent of one day's fee receivable by the Authority, which ever is higher and may provide the Contractor another opportunity of continuing the Fee Collection. However, in no case, the authority shall afford more than one opportunity to the Contractor.
>
> b) The Authority also, reserves the right to estimate the excess collection of fee made by the Contractor and recover the same, which will be over and above the penalty imposed and to be recovered from the Contractor.
>
> c) The termination under this clause shall make the Contractor liable for unconditional forfeiture of the Performance Security."

24. It is evident from a simple reading of the above that the Authority was competent to terminate the contract if the appellant was found charging in excess of the prescribed rate of fee. Apart from termination of the contract any violation in the nature of excess fees being charged could result in imposition of a penalty in terms of clause 18(a) (supra). What is significant is that in terms of clause 18 (b) besides termination of the contract and levy of penalty the Authority was also entitled to estimate the excess collection made by the appellant and recover the same from it. There is nothing on record before us whether any such estimation was made by the Authority and if so the basis on which that was done. The failure of the Authority to estimate accurately could jeopardise its claim for recovery by a simple invocation of the bank guarantee. It may have been a different matter if the Authority had estimated the excess amount accurately and sought to recover the same by invocation of the bank guarantee but without a proper estimation of the excess received by the appellant, it was not open to the respondent to invoke the bank guarantee and recover the entire amount of Rs.2,20,00,125/- covered by the same. The High Court was, in that view, correct in holding that invocation of bank guarantee was not justified having regard to the fact that the

Authority had already recovered the penalty levied by it and also forfeited the performance security amount of Rs.2,20,00,125/- in the form of bank drafts furnished by the appellant.

25. Insofar as the recovery of the performance security of Rs.2,20,00,125/- from out of the bank drafts furnished by the appellant is concerned, we have no difficulty in holding that such a forfeiture was available to the respondent-Authority under the terms of the contract and the provisions of Section 74 of the Contract Act did not forbid the same. The scope of Section 74 has been the subject matter of several pronouncements of this Court including the Constitution Bench decisions in Fateh Chand v. Balkishan Das AIR 1963 SC 1405, Union of India v. Ramam Iron Foundry (1974) 2 SCC 231 and SAIL v. Gupta Brother Steel Tubes (2009) 10 SCC 63. The common thread that runs through all these pronouncements is that an aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach and that the Court has, subject to the outer limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to the circumstances of the case. This would essentially be a mixed question of law and fact that a Writ Court could not possibly decide. The appellant could and indeed ought to have sought its remedies in a proper civil action if it questioned the reasonableness of the amount recoverable by the appellant in terms of the contractual stipulations.

26. In the result this appeal fails and is dismissed but in the facts and circumstances, without any order as to costs.