

THE HIGH COURT OF SIKKIM : GANGTOK
(Constitutional Jurisdiction)

DATED : 29.08.2011

CORAM

**HON'BLE MR. JUSTICE S. P. WANGDI,
ACTING CHIEF JUSTICE.**

W.P.(C) NO. 15 OF 2011

M/s Sikkim Conductors,
Having its registered office at
Jasidih, District Deoghar,
P.O. & P.S. Jasidih,
Jharkhand-814 414.
Having its temporary Industrial Unit
at Saw Mill Compound,
P.O. & P.S. Rangpo, East Sikkim
Represented by Shri Nandlal Jajware,
S/o Shri Ram Lal Jajware,
Supervisor,
M/s Sikkim Conductors,
R/o Mohalla Jhousagarhi,
P.O. & P.S. Baidyanath,
Deoghar, Jharkand
The Constituted Attorney.

..... **Petitioner**

Versus

1. State of Sikkim,
Through the Secretary,
Department of Commerce & Industries,
Government of Sikkim,
Gangtok, East Sikkim.
2. The Secretary,
Department of Commerce & Industries,
Government of Sikkim,
Gangtok, East Sikkim.

.....**Respondents**

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For the petitioner : Mr. A.K. Upadhyaya, Sr. Advocate
with Ms. Mukul R. Parajuli,
Advocate.

For the respondents : Mr. J.B. Pradhan, Additional
Advocate General with Mr. Karma
Thinlay Namgyal, Government
Advocate and Mr. S.K. Chettri,
Asstt. Govt. Advocate for official
respondents.

JUDGMENT

Wangdi, ACJ

The petitioner in the present writ petition claims to be a proprietorship firm engaged in the business of manufacturing Aluminium Conductor and is represented by its Constituted Attorney, who is one Shri Nandlal Jajware.

2. As per the petitioner, the Government of India provided a package of incentives for the State of Sikkim and published a new Industrial Policy dated 23.12.2002, whereby, various concessions and fiscal incentives were provided to new industrial units including 100% Income Tax and Excise Duty exemption for a period of 10 (ten) years from the date of commencement of commercial production. This was published by the State of Sikkim through the

Department of Commerce and Industries, vide Notification No. G.O./2/DI/2002-2003/901 dated 17.02.2003, which has been filed as Annexure P-2 to the writ petition.

3. It was submitted that the industrial policy which extended promises and assurances to the industrialists and entrepreneurs was widely published through out the country so as to invite various industrialists and entrepreneurs to set up new industrial units in growth centres within the State of Sikkim.

4. It stated that on the basis of such promises and assurances the petitioner came to the State of Sikkim and approached the concerned officers of the State-respondents and they encouraged the petitioner to set up its industrial unit in Sikkim. But as the process of setting up of an industrial unit entailed taking policy decision, the petitioner was asked to approach the Chief Minister of Sikkim.

5. That upon the request of the petitioner, a meeting was called by the Chief Minister to consider the proposal of the petitioner, which was held on 05.06.2004, and in that meeting which was attended by the officers of various departments including the Commissioner-cum-Secretary,

Commerce and Industries Department, respondent No. 2, the petitioner was assured that it would be provided with 2 acres of land for setting up its proposed industrial unit.

6. It was further stated that the State-respondents on 25.06.2004 prepared a Memorandum of Understanding (in short 'MOU') to be executed between the petitioner and the State-respondents for allotment of land for setting up a industrial unit, which was forwarded to the petitioner for signature vide letter No. 3/Regd/G/DI/04-05/250 dated 25.06.2004.

7. The petitioner further states that the Memorandum of Understanding had been duly approved by the Government and required only to be signed by the authorized signatory of the petitioner-company, which was duly complied and forwarded to the State-respondents vide its letter dated 17.07.2004. Thus assured, the petitioner initiated the process of transportation of almost all machinery and equipments for setting up the industrial unit, a fact, which was communicated to the State-respondents. However, the petitioner states that since the official process had not been completed, the petitioner was not allotted with

the plot of land. That in order to avoid financial losses the petitioner on its own took a plot of land on lease upon which the machinery and equipments were installed.

8. It is further stated that on the basis of promises and assurances held out by the State-respondents, the petitioner invested substantial amount in the process of installing the machinery and equipments upon the lease-hold land and also got it temporarily registered as Small Scale Industries under a Provisional Registration No. SKM/E/00595/PR/SSI dated 01.07.2004 in the Department of Industries, Government of Sikkim, under the Central Sales Tax (Registration & Turnover) Rules, 1957 vide Registration No. 167/04-05/CT/RPO dated 30.07.2004 and under Sikkim Sales Tax Rules, 1983 vide Registration No. 170/04-05/CT/RPC dated 30.07.2004. The petitioner also took an electric power connection against a valid connection code on deposit of requisite connection charges on 09.11.2005.

9. That however, the State-respondents failed to live upto its promises and despite having approached them several times, land as promised by them was not allotted

making the petitioner to suffer irreparably. The land which had been identified by the petitioner was also refused on the ground that the Department of Industries did not own it. The action of the State-respondents acting contrary to the promises held out caused the petitioner-company irreparable injury, damage and loss, which cannot be compensated in terms of money.

10. That the conduct of the State-respondents has defeated the object of the Central Government policy as well as the policy of the State of Sikkim for industrial growth.

11. That a notice demanding justice dated 08.09.2010 was issued through its counsel upon the State-respondents, but by a reply dated 14.10.2010 they denied any responsibility to provide for the land as claimed by the petitioner.

12. Under such circumstances the petitioner has, inter alia, prayed for appropriate writ/order or direction commanding upon the State-respondents to allot a plot of land measuring 2 acres in a suitable place for setting up the industry by the petitioner.

13. Upon notice being issued, the State-respondents have filed their counter-affidavit, wherein all material allegations have been denied. It has been denied that there was any assurance or promise held out by State-respondents to the petitioner for allotment of land as claimed by it. The Memorandum of Understanding that had been prepared was only a draft which had not been executed as required under law and, therefore, not binding upon the State-respondents. That the machinery and equipments for setting up the industry were transported by the petitioner on its own for which the respondents could not be held liable.

14. That the draft Memorandum of Understanding does not contain any clauses which specifies that the land would be allotted by the Government to the petitioner. It is stated that in order to streamline and regulate the investment in industrial sector including the power development, by Notification No. 8/SGHO/260/CI/09-10/174 dated 30.06.2010, the State Government has published a draft Memorandum of Understanding to be executed by the investor to invest in the State of Sikkim and this draft

Memorandum of Understanding now governs the field for setting up of any industrial unit in the State of Sikkim.

15. That there was no binding agreement between the petitioner and the State-respondents and that the doctrine of legitimate expectation cannot be invoked as claimed by the petitioner as the allotment of land is not being claimed on the basis of the industrial policy of the State Government, but upon a draft Memorandum of Understanding which has no validity in the eyes of law.

16. Mr. A.K. Upadhyaya, Sr. Advocate, learned counsel for the petitioner, referred to an official note in which the meeting held on 05.06.2004 has been recorded and submitted that amongst the points discussed was also the one with regard to the Industries Department providing 2 acres of land on lease to the petitioner and, that it had been agreed that the petitioner would be allotted 2 acres of land on lease. Mr. Upadhyaya urged that by a letter dated 25.06.2004, marked as Annexure P-6, the Under Secretary-II, Department of Commerce and Industries, Government of Sikkim, had forwarded a copy of Memorandum of Understanding as approved by the Government requiring it

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to be signed by the Government and the petitioner and accordingly, the petitioner was requested to affix signature in the space provided in the Memorandum of Understanding and return it at the earliest. As per him, ARTICLE-II at Sl. No. 1 and 2 thereunder clearly stipulate the obligation on the part of the State-respondents to provide the petitioner with the land. That there was a concluded contract between the parties and that the State-respondents now could not resile therefrom.

17. That the act of the State-respondents is, therefore, unfair and unreasonable. That the State was now bound by the principle of promissory estoppel and that there was no overwhelming public interest, which permitted the withdrawal of such promises. In support of the submission, Mr. Upadhyaya, learned Sr. Advocate relied upon the decision of ***U.P. Power Corporation Ltd. and Another vs. Sant Steels and Alloys (P) Ltd. & others: (2008) 2 SCC 777***, particularly paragraphs 27, 33 and 35.

18. Mr. J.B. Pradhan, learned Additional Advocate General on the other hand submitted that at no point of time the petitioner was given any assurance or promise of

allotment of land on lease as claimed by it. The industrial policy referred to by on behalf of the petitioner was a matter of record and that the petitioner certainly would be entitled to the concessions provided thereunder. Further, the policy nowhere contains any provision by which the State-respondent was obliged to provide land for setting up the industrial unit and reiterated what had been stated in the counter-affidavit. It has been stated that the Memorandum of Understanding, being relied upon by the petitioner, was only a draft agreement requiring execution in accordance with the law. The fact that it was signed by the petitioner alone would not in law make it a binding agreement and, therefore, there was no obligation on the part of the State-respondents to give effect to such Memorandum of Understanding. It was submitted that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the State and that there is a failure on the part of the State to discharge that statutory obligation.

19. The case of **Lekhraj Sathramdas Lalvani vs. N.M. Shah, Deputy Custodian-cum-Managing Officer, Bombay & others: AIR 1966 SC 334**, was referred to.

The relevant portion of which is reproduced below:

"5. The reason is that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by status and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdiction. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Art. 226 of the Constitution."

20. He also referred to a decision of **Kulchhinder Singh and others vs. Hardayal Singh Brar and others: AIR 1976 SC 2216**, where it has been held as follows:

"11. At its best, the writ petition seeks enforcement of a binding contract but the neat and necessary repellant is that the remedy of Article 226 is unavailable to enforce a contract qua contract. We fail to see how a supplier of chalk to a government school or cheese to a government hospital can ask for a constitutional remedy under Art. 226 in the event of a breach of a contract, by-passing the normal channels of civil litigation. We are not convinced that a mere contract agreeing to a quota of promotions can be exalted into a service rule or statutory duty. What is immediately relevant is not whether the respondent is State or public authority but whether what is sovereign obligation or public function of a public authority. Private law may involve a State, a statutory body, or a public body in contractual or tortious actions. But they cannot be siphoned off into the writ jurisdiction.

12. The controversy before us in substance will turn on the construction and scope of the agreement when the claim to a quota as founded cannot be decided in writ jurisdiction without going back on well-settled guidelines and even subverting the normal processual law – except perhaps in extreme cases which shock the conscience of the Court or other extraordinary situation, an aspect we are not called upon to explore here. We are aware of the

wide amplitude of Art. 226 and its potent use to correct manifest injustice but cannot agree that contractual obligations in the ordinary course, without even statutory complexion, can be enforced by this short, though, wrong cut."

21. As per Mr. Pradhan even assuming that the Memorandum of Understanding was as a consequence of an agreement having been entered between the petitioner and the State-respondents, clauses 1 and 2 under ARTICLE-II, referred to by the petitioner, do not at all reflect any categorical promises by the State-respondents that land would be provided to the petitioner as claimed by it. The offer contained in the clauses was purely conditional and not categorical.

22. I have considered the rival contentions, pleadings and the materials on record. The only question for determination in the present writ petition is as to whether there was any promise held out to the petitioner by the State-respondents that land measuring 2 acres would be leased out to it for setting up an industrial unit. In order to arrive at a conclusion on this, it is necessary to examine the various documents referred to and relied upon by the petitioner.

23. The first document heavily relied upon by the petitioner is Annexure P-6 i.e. the letter dated 25.06.2004 written by the Under Secretary-II of the Department of Commerce and Industries, Government of Sikkim, to Shri G.P. Dalmia forwarding a Memorandum of Understanding. For the convenience, we may reproduce the contents of the letter, which reads as hereunder:

"Ref. No. 3/Regd/9/DI/04-05/230 Date: 25/06/04

To

Shri G.P.Dalmia
Dalmia House
Jasidih-814142, Dist. Deoghar
Jharkhand.

Sub: Memorandum of Understanding

Sir,

I am directed to enclose herewith a copy of MOU (Memorandum of Understanding) as approved by the Govt. which requires to be signed between the Govt. and your goodself. Hence, I am directed to request you to kindly affix your signature in the space provided in the MOU and return the same to this office at earliest.

Yours faithfully,

Sd/-
Under Secretary-II
Commerce & Industries"

24. When we consider the words used in the letter there can be no manner of doubt that the Memorandum of Understanding, is one which was approved by the

Government, requiring signature by both the State Government and the petitioner and that the petitioner had been asked to affix his signature in the space provided therein and return the same to the office (meaning the Department of Commerce and Industries) at the earliest. To that extent there can be no dispute contrary to what Mr. J.B. Pradhan has urged.

25. In my view, this is the only document which clearly shows that a Memorandum of Understanding had been entered between the petitioner and the State-respondents and, therefore, a contract, if at all a "Memorandum of Understanding" can be treated as one, was concluded between them. Assuming that this is a concluded contract, the extent of the covenant that binds the Government material for the purpose of this case, is provided under clauses 1 and 2 under ARTICLE-II, which we may reproduce below for the convenience:

"

ARTICLE-II

1. The Government will provide Two Acre land to the Company in the Proposed Growth Centre at Samlik-Marchak or any other place as and when the Government of India releases the fund and the requisite infrastructure is developed in these growth centres.

2. If not, alternative land will be made available as per the policy frame work approved by the Government."

26. On a plain reading of the above two clauses, it cannot be said that there was a categorical promise on the part of State-respondents for providing for land in the manner as it is claimed by the petitioner. Clause 1 prescribes that the Government would provide 2 acres of land when the Government of India releases the fund and infrastructure is developed in these growth centres. It is not the case of the petitioner that despite the Government of India having released the fund and the requisite infrastructure having been developed in the growth centres, the State Government has refused to provide for the land as promised. It is rather the case of the petitioner that the clause unequivocally obliges the State-respondents to provide for land. This, in my view, does not appear to be the correct and acceptable. Clause 2 also does not reflect any unconditional or unqualified obligation on the part of the State-respondents to provide for land, as has been claimed by the petitioner. We find that in clause 2 there is an alternative provision to clause 1 and, by it the State-respondents have undertaken to make land available as per

the policy frame work approved by the Government. The Memorandum of Understanding also does not specify any time frame for giving effect to the Memorandum of Understanding.

27. In consonance to clause 2 of ARTICLE-II, the State Government, by Notification No. 8/SGO/260/CI/09-10/174 dated 30.06.2010, marked as Annexure A-1, appears to have prescribed a Memorandum of Understanding to be executed by the investors before making investment in the State of Sikkim which has been duly published in an official Gazette in order to streamline and regulate investments in the industrial sector including power development.

28. On perusal of the prescribed Memorandum of Understanding, we find that there are detailed clauses covering different aspects like compliance of rules and regulations and laws relating to the workers under clause 1 and, land matters in the clause 4 and these two clauses are relevant for the purpose of the present case. Clause 1(i)(a) of the prescribed Memorandum of Understanding stipulates that -

"1. COMPLIANCE WITH RULES AND REGULATIONS AND LAWS IN FORCE RELATING TO THE WORKERS.

(1) The investor while carrying out the authorized activities shall abide by the Law, Policies/Notifications enforced/notified by the Government of Sikkim and Government of India specially relating to:

- (a) Landed properties
- (b)

The relevant portion of clause 4 reads as follows: -

"4. LAND MATTERS:

- (1) The Investor shall ensure that the land required for such industries shall be procured on lease basis only and not by outright purchase.
- (2) While acquiring land the dealing with the unauthorized persons and agents shall be strictly avoided.
- (3) The Investor shall ensure to have direct negotiations with the actual owners of land for the proper benefits of the land owners and villagers.
- (4) That the lease deed shall be registered properly with the concerned District Registrars and with proper demarcation so as to avoid future disputes."

29. The prescribed Memorandum of Understanding published in the official Gazette clearly reflects the policy decision of the Government that now governs the field.

30. Mr. J.B. Pradhan, learned Additional Advocate General submits that the petitioner would now be obliged to comply with the policy decision of the State Government.

31. I find substance in the submission of Mr. Pradhan. Stipulation in the prescribed Memorandum of Understanding clearly reflect the policy decision of the State Government and, therefore, would fall within the purview of the clause 2 of ARTICLE-II of the Memorandum of Understanding (Annexure P-6) signed by the petitioner.

32. The plea of the petitioner that it has acted on the promise extended and assurance given by the State-respondents and invested substantial amount of money by transporting the machinery and equipments and installing the unit on a lease-hold land stands clearly belied by the contents of letter dated 16.08.2004, marked as Annexure P-5, submitted to the Director of Industries on behalf of the petitioner-company. For proper appreciation, the letter is reproduced below:

"Ref. No. Sikkim Cond/719/14/2004 Date: 16th August 2004

Sri D.R. Kharel,
Director of Industries,
Govt. of Sikkim,
Kazi Road, Gangtok,
SIKKIM.

Dear Sir,

Sub: Preparation of proceeding of the meeting taken by HCM on 05-06-2004.

We have been told, your goodself is to prepare proceeding of the meeting taken by Hon'ble Chief Minister

with me, Sri Sanjay Dalmia, Sri R.S. Basnet, IAS, Principal Secretary to HCM, Sri A.K. Srivastava IAS, Industries Commissioner & your goodself.

In anticipation of the same, we have already installed the factory at Rangpo. Trial production has already been taken.

We will be thankful, if the proceedings are prepared at an early date.

Thanking you,

Yours faithfully,
for Sikkim Conductors

Sd/-
(G.P. Dalmia)"

(emphasis supplied)

33. Paragraph 2 of the letter duly highlighted clearly indicate that the factory was installed by the petitioner company at Rangpo "in anticipation" and that "trial production" had already been taken. Although, it has not been spelt out as to what the anticipation was, but assuming it to be in anticipation of allotment of land on lease, the petitioner appears clearly to have proceeded with the installation of unit on its own option on a land which he assumed would be allotted to him. This is in clear conflict and contradiction to the pleadings contained in the writ petition that the machinery and equipments have been kept on in a lease-hold land which is not suitable for establishing

the unit. We may reproduce the relevant pleadings contained in the writ petition, which reads as hereunder:

"11. That the Petitioner being rest assured with the promises of the State Respondents, initiated the process of transportation of almost all machinery equipment for setting up its manufacturing unit in the State of Sikkim, which was also intimated to the State Respondents. That when the said machinery equipment reached the state of Sikkim, the official proceeding of the State Respondent having not completed, the Petitioner was not allotted with the plot of land. Therefore, the Petitioner was left with no option, but to find a temporary place to accommodate the said machinery equipments. That under such circumstances, to avoid financial loss, the Petitioner on its wisdom, decided to take a plot of land on lease wherein the said machinery equipments could be installed. Thereafter, the Petitioner approached one Smt. Bishnu Maya Karki who owned some landed property at Rangpo, and accordingly, a plot of land situated at Rangpo, bearing Plot No. 2024, measuring an area of 30' x 40' Sq.ft. was leased out to the Petitioner for a period of two years by the said Bishnu Maya Karki. That in this regard a formal lease deed dated 27.07.2004 was also executed between Smt. Bishnu Maya Karki as Lessor and the Petitioner as Lessee. The monthly lease amount was amicably agreed @ Rs.5,000/- per month. The Petitioner also paid an amount of Rs.20,000/- as advance money for the said land.

It must be stated herein that the said machinery equipments were installed by the Petitioner on purely temporary basis and the same is/was not at all viable to permanently run manufacturing unit. On the other hand, Smt. Bishnu Maya Karki (Lessor) is demanding back the said plot of land, wherein the Petitioner has temporarily installed its machinery equipments, since the agreement of lease was only for a period of two years."

(underlining supplied)

34. Even otherwise the action of the petitioner-company is in clear conflict with the clauses 1 and 2 of

ARTICLE-II to the Memorandum of Understanding, already dealt with above, which was forwarded to him on 25.06.2004 i.e., almost 2 months preceding the letter of the petitioner-company dated 16.08.2004 at Annexure P-5, reflected above.

35. In the facts and circumstances, the writ petition does not appear to be preferred on an honest foundation. The petitioner has sought to mislead the Court by giving an impression that the petitioner was now in a disadvantageous position due to the State-respondents resiling from its promises and withdrawing the benefits extended to him in the Memorandum of Understanding, when the letter dated 16.08.2004 (Annexure P-5) undoubtedly reflects that, in the first instance the action taken by the petitioner-company was on his own free will and volition and, secondly the assertion that it is in a disadvantageous position because land was not provided as assured by the State-respondents is falsified by the fact that the industrial unit had already been set up by the petitioner-company and was in operation, trial production having been taken as far back as a period before 16.08.2004.

36. Thus, apart from there being no merit in the writ petition, the petitioner has also not approached this Court with clean hands, thereby disentitling him from the discretionary relief under Article 226 of the Constitution of India.

37. In the result, the writ petition is dismissed with costs. Costs assessed at Rs.25,000/- (Rupees twenty-five thousand) only .


Acting Chief Justice
29.08.2011

Index: Yes/No
Internet: Yes/No

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