

IN THE HIGH COURT OF ORISSA : CUTTACK

W.P.(C) No. 9555 of 2012

An application under Articles 226 & 227 of the Constitution of India.

M/s. Sagar Vision Advertising Petitioner

-Versus-

Sr. Divisional Commercial Manager,
East Coast Railway, Khurda Road
Division & Another. Opp.Parties.

Advocates:

For the petitioner ... M/s. Srikanta K. Sahoo,
M. Mohapatra, S.P.Das &
B.B. Biswal.

For the opp.parties ... Mr. Dhanoj Ku. Sahoo,
S.K. Pradhan, K.K. Sahoo,
& S.N. Biswal.

P R E S E N T :

**THE HONOURABLE CHIEF JUSTICE MR. AMITAVA ROY
AND
THE HON'BLE DR JUSTICE B. R. SARANGI**

Date of hearing : 26.08.2014
Date of Order : 26.08.2014

AMITAVA ROY, C.J. Being aggrieved and vexed by the termination of its contract for installation and operation of Audio-Visual Closed Circuit Television (CCTV) System at Bhubaneswar, Cuttack, Berhampur & Sambalpur Railway Stations and at the forfeiture of the deposits made by

it by way of licence fees, security deposit, performance guarantee etc., the petitioner is before this Court seeking its remedial intervention.

2. We have heard Mr. S.K. Sahoo, learned counsel for the petitioner and Mr. D.K. Sahoo, learned counsel for the opposite party.

3. Briefly stated, the indispensable facts are that the petitioner, in response to the tender notice dated 4.11.2010 floated by the East Coast Railway, Khurda Road Division, Bhubaneswar for awarding contract for installation and operation of Audio-Visual Closed Circuit Television (CCTV) System for Cuttack, Bhubaneswar, Puri, Brahmapur, Bhadrak and Jajpur Keonjhar Road Railway Stations under Khurda Road Division, had submitted tender along with the application fees and Earnest Money Deposit (EMD). In response to the NIT dated 17.02.2010 petitioner had offered its bid as well for the same work for Sambalpur Railway Station along with the aforementioned deposits. After opening and on evaluation of the technical and financial bids of the tenderers, the offers of the petitioner were accepted and as demanded, it made deposits towards licence fees, security deposits and performance guarantee to the tune of Rs. 27,07,509/- for these Railway Stations for the work in question. According to the petitioner, together with the application fees, EMD of Rs. 18,15,896/- was also deposited and as such, its total investment summed up to Rs.45,23,405/-. It had also deposited ground rent for 1 year and agreements were executed with the East Coast Railways, Khurda Road Division. The petitioner has claimed also to have paid towards electricity connection for making the CCTV System functional eventually to commence the CCTV operation in Bhubaneswar, Cuttack and Sambalpur Stations on 5.8.2011, 12.8.2011 and 8.6.2011

respectively. In course of the said operation, it also stated to have paid the licence fees for the second six months. It is asserted that when the matter stood thus, all of a sudden, by communications dated 14.01.2012 and 16.01.2012 the contracts were terminated by the opposite party. Petitioner pleaded unsuccessfully with the opposite party-Railway on the termination and has finally sought the refuge of this Court.

4. In the counter filed by the opposite party, they while admitting the pleaded facts pertaining to the tenders as averred by the petitioner for Cuttack, Bhubaneswar, Brahmapur and Sambalpur Railway Stations have asserted that the contract was subject to the the terms and conditions as stipulated. They clarified that the scope of the work extended to providing of information and entertainment to the travelling public/passengers. Letter of acceptance was issued to the petitioner for the installation and operation of the CCTV system in the above stations and it accordingly had deposited licence fees, security deposit and performance guarantee and that agreements were also executed. Thereafter control rooms were provided to it along with electricity for making the system functional. The opposite party stated that after commencement of the telecast, it was reported to the office of the opposite party No.1 (i.e. Sr. Divisional Commercial Manager, East Coast Railway, Khurda Road Division, Bhubaneswar) that on 14.01.2012 at about 15.30 hours some passengers and railway staff had brought to the knowledge of Station Master and Chief Ticket Inspector that objectionable and obscene video clips were being shown on the audio-visual closed circuit television (CCTV) system at Bhubaneswar Railway Station and that the same had created huge public outrage and generated adverse publicity against the

Railways. The opposite party have stated that the enquiry that followed, affirmed that the reports were correct. This was also affirmed by one Sri Asutosh Swain, the operator of the CCTV system at Bhubaneswar Railway Station in writing admitting his involvement in the episode. According to the opposite party, this action of the CCTV contractor i.e. M/s. Sagar Vision Advertising (petitioner), apart from generating serious public resentment, also offended the sense of decency and immensely hurt public sentiment, which was otherwise evident from the adverse coverage in various electronic and print media and the queries made by the members of the public in general. Due to such incident, tense situation prevailed at the station accompanied brewing strong disaffection. This episode also got flashed in both print and electronic media in other parts of the country. Further, various organizations resorted to picketing outside the Bhubaneswar Railway Station demanding immediate withdrawal of the petitioner's services, so much so, that there was imminent possibility of disruption of public order. It was clear that the public was not ready to accept such immoral telecast in public places. They have asserted that thereby the petitioner breached/violated the Clauses 1, 8, 14, 19 and 23 of the contract agreement. Consequently, the said incident was reported to the petitioner's proprietor, namely, Shri Bighnaraj Panda over his mobile No. 94399-40444 on the very same day and he was requested to come to Bhubaneswar Railway Station to offer explanation and to give him a hearing in connection with the incident.

The opposite party in categorical terms have stated that in spite of this intimation, the petitioner did not respond. The opposite party have further stated that as per the contract agreement, the contractor

was to take prior approval of the Railway Administration before telecasting any material. The approval had been granted to the contents of many other compact discs, but in none of those CDs any objectionable/obscene video contents was approved. The opposite party asserted that petitioner had used the objectionable CDs without taking prior approval from the Railways and that such screening was clearly prohibited in the contract agreement and hence there was a deplorable breach of the terms and conditions of the contract agreement and therefore, the petitioner-firm had lost its credibility and goodwill with the Railways for which eventually the impugned decision had to be taken. The opposite party dismissed the explanation/representation provided by the petitioner subsequent to the termination of the contract agreements.

5. In the rejoinder filed by the petitioner, it apart from denying its involvement or contribution or participation in the episode, pleaded unfairness in the action contending that the impugned decision was violative of the principles of natural justice in absence of any opportunity to it to represent against the same. It has averred as well that the forfeiture of its deposits in full, apart from termination of the contract agreement, was not only arbitrary, unjust and unreasonable, but also had the potential of ruining it financially.

6. Learned counsel for the petitioner has insistently argued that, even assuming without admitting that the telecast of some obscene and objectionable clippings at the Bhubaneswar Railway Station on the relevant date were made in its (petitioner) installed CCTV system, the impugned action of terminating the contract agreement and forfeiture of its deposits on all counts is ex-facie illegal, arbitrary and highhanded and

that too without affording it a reasonable opportunity of hearing prior thereto. Contending that the petitioner in its representation filed after the termination of the contract and forfeiture had pleaded violation of principles of natural justice for not having been called upon or provided with reasonable opportunity of being heard, or called upon to submit its explanation whatsoever, Mr. S.K. Sahoo has mentioned that having regard to the severe penal consequence foreseeable, the decision impugned is ab initio void and is liable to be quashed as such. He submitted further that the proprietor of the petitioner-firm had invested his life's earnings in the contract involved and with the forfeiture of his entire deposits he will be ruined. In any view of the matter, the learned counsel argued that, the forfeiture of the entire amount of deposits made by the petitioner is grossly disproportionate to the alleged violation of contract agreements and ought to be interfered with by this Court in the interest of justice.

It has further been argued by the learned counsel for the petitioner that though the contract agreements contain a clause for Arbitration, the petition ought to be nonsuited on the ground of availability of alternative remedy as the challenge laid has been founded on the infringement of its right of fairness inaction on the part of a public authority. To buttress his arguments, Mr. S.K. Sahoo, has placed reliance on the decisions of the Hon'ble apex Court in the case of M/s. Nagarjuna Construction Co. Ltd. Vs. Govt. of Andhra Pradesh and Ors., (2008) 16 SCC 276; Union of India & Ors. Vs. Tania Construction Private Ltd., (2011) 5 SCC 697; and Satwati Deswal Vs. State of Haryana & Ors., (2010) 1 SCC 126; and also a decision of the Madras High Court in W.P.

No. 17905 of 2009 (M/s. K.M. Batcha & Company Vs. the Chief Regional Manager, Hindustan Petroleum Corporation Ltd..

7. Per contra, the learned counsel for the opposite party has argued that admittedly on the concerned day, obscene and vulgar video clippings had been displayed in the CCTV system, maintained and operated by the petitioner, at the Bhubaneswar Railway Station and the public upsurge and condemnation generated thereby prejudicially impacted on the image of the Railways creating an environment of a law and order situation and therefore, the impugned action cannot be faulted with, more particularly, as the act/commission on the part of the petitioner did amount to gross breach of terms and conditions of contract agreements, which contemplates such a consequence. He urged that as the petitioner, in spite of intimation given to its proprietor prior to the decision impugned, did not respond thereto, the cavil of violation of principles of natural justice is wholly unfounded.

8. The pleaded facts and documents on record have been duly examined. The competing arguments have also been analysed. The fact that on the relevant date i.e. 14.01.2012, the CCTV system functional at the Bhubaneswar Railway Station was being operated by the petitioner's firm is admitted. It is also clearly demonstrable that on that day obscene, objectionable and vulgar video clippings were telecast through that system for public view. Understandably the display of such indecent, immoral and obscene contents had the immeasurable potential of causing unimaginable embarrassment and discomfort to the members of the public present at the Railway Station. The outburst of mass indignation and condemnation as well as the public vilification of the

Railways and the prevailing surcharged environment in and around the Railway Station is quite conceivable. The pleadings of the petitioner do not convincingly deny the assertion of the opposite party on solemn affirmation that it gave no response to the intimation to it on the very same day to explain the reasons for such inexcusable lapse and violation of contract agreements. The admission of Mr. Asutosh Swain, the person in-charge of the operation of CCTV system on behalf of the petitioner is dismissive of its (petitioner's) plea of not being involved or associated with the offending telecast. Though the petitioner in its post-decisional representation did contend that it had been denied a reasonable opportunity of being heard, it having failed to demonstrate with certainty that it had not been intimated by the opposite party of the above episode on the very same day calling for its explanation, we are left unpersuaded to denounce the impugned action to be in violation of principles of natural justice.

9. It had been held by the Hon'ble apex Court in *Chairman, Board of Mining Examination & Anr. Vs. Ramjee*, AIR 1977 SC 965 that natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. Their Lordships propounded that unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. Their Lordships further held that Courts cannot look at law in the abstract or natural justice as a mere artifact nor they ought to fit into a rigid mould, the concept of reasonable opportunity. It was enunciated that if fairness is shown by the decision-maker to the man proceeded against, the form features and the

fundamentals of such essential processual propriety are governed by the facts and circumstances of each situation.

10. Tested on this touchstone of the notion of fairness hallowed by time, we are of the unhesitant opinion that the impugned decision does not warrant for any interference on the ground of want of fairness in action.

11. Adverting to the contract agreements, the following sub-clauses at Clause-8, Clauses 10 & 23 being relevant are extracted herein below:

“8. Sharing of Telecast Timings and Screening of Railway Messages & Contractor’s Commercial Advertisement.

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B. A minimum of 8 ½ hrs shall be utilized for screening of Railway messages, announcements and flashes of the Railway administration, Publicity of national themes free of cost in co-ordination with the announcement made through the existing Railways public address system at the concerned Railway Station.

C. The CCTV contractor must accept for telecasting the display material and the CD/Video cassettes supplied by Railway Administration on Railway subjects or on social/national themes.

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(i) TV serials, features, etc. telecast by Doordarshan or entertainment channels or any other film sequences shall not be shown on CCTV as such display attracts crowd on the platforms obstructing free movement of the travelling public.

(ii) The contractor must submit the text of advertisement and materials to be displayed such as slides, films, video clips, etc. to the Railway Administration (DRM/Sr.DCM/DCM of the division) well in advance for approval before public screening.

(iii)

(iv) Advertisements pertaining to cigarettes, tobacco, wines, alcoholic drinks, prohibited drugs, other modes of transport,

propagation of any religion or religious belief, pictorial representation of any national leader and martyr for trade and business purposes, scenes erotic in character, private insurance companies offering policies against railway accidents, obscenity, vulgarity, any other aspect that may offend the sense of decency of the viewing public and such other aspects that may show the Railways in adverse light and any other subject/items, considered objectionable under various Acts and laws of the government shall not be permitted. The licensee will be fully liable for any contravention to the various state and statutory laws relating to telecast of advertisement in CCTV and shall be liable for action under the laws for the land. The licensee is also liable to pay other local bodies/Sate Govt. Taxes/fees as in force or modified from time to time. The Licensee shall obtain permission from the local authority if any for telecast of advertisement in CCTV and it may not cause inconvenience to the public/passengers.

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10. The licensee shall have to ensure that all the short films/Audio Visual brought by them for display on CCTV are duly certified by competent film censor Board. They should also obtain license required for the purpose and shall comply with the terms and conditions of such permission. The Licensee shall be responsible for all consequences arising on account of rules/Laws in connection with screening of Audio Visual Films etc. In no case Railway Administration shall be responsible for any such violation of rules/regulations by the contractor.

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23. In case of breach of any of the conditions mentioned herein, this agreement shall be liable to be terminated summarily without assigning any reason and the decision of the Railway Administration in this regard will be final and binding on the licensee. In that event, the security deposit of the licensee shall be forfeited. This is, however, subject to force measure

and reasons beyond the control of the licensee and only upon giving proper opportunity of being heard.”

12. Though it has been contended on behalf of the petitioner that for any instance of licensee himself/his agent or staff, if found in drunken condition/indulging in bad conduct or involved in activities amounting to moral turpitude in Railway premises, the Contractor may be penalized up to Rs. 5,000/- as per clause -19 of the Contract agreement, we are of the view that Clause-23 referred to hereinabove is of supervening import authorizing the Railway to terminate the contract agreement in case of breach of any of the condition embodied therein and effect forfeiture of the deposits as contemplated.

13. True it is that invocation of power under Clause 23 has to be proceeded by an opportunity of being heard. But, as held hereinabove, such an opportunity had been granted to the petitioner on the very same day of the incident to which petitioner did not respond. Further, the explanation furnished by it, in its subsequent representation, has been rejected by the opposite party being construed as inadequate and unconvincing. In the face of such highly irresponsible and casual disposition of the petitioner, the view taken by the opposite party is a plausible one and thus in the exercise of power of judicial review, we do not find any persuasive reason to interference even on merits.

14. The decision cited at the Bar to repel the challenge to the maintainability of the writ petition on the ground of availability of alternative remedy need no dilation as the assailment of the impugned decision has been rejected on merits.

15. This notwithstanding, we are of the view that the forfeiture of the entire amount of deposits of the petitioner is noticeably disproportionate to the breach of contract agreement. To reiterate, it had been argued that the proprietor of the petitioner-firm had invested his life's earning in the contract and that with the forfeiture of his deposits he is facing imminent ruination. In this view of the matter, balancing all aspects, we feel that it would be in the ends of justice to sustain the decision of termination of the contract agreement and modify the impugned order with regard to forfeiture to the extent of 50% of the deposits made by the petitioner. The balance amount would be refunded by the opp. party to the petitioner. Ordered accordingly.

However, it is made clear that neither the petitioner nor any person claiming under it would be entitled to any interest on the refundable amount.

The petition stands disposed on the above terms.

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CHIEF JUSTICE

Dr. B.R. Sarangi, J. I agree.

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JUDGE