

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on February 13, 2017
Delivered on: April 03, 2017

+ W.P.(C) 6112/2011 & CM Appln. No.20516/2014

NATIONAL TEXTILE LIMITED Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate with Mr.
Sanjoy Ghose, R. Jeitly, Ms. Pratistha Vij,
Advocates.

versus

PADMAVATI BUILDTECH ANAD FARMS PCT. LTD AND
ORS Respondents
Through Mr. P. Chidambaram, Sr. Advocate and
Mr. Abhinav Vashisht, Sr. Advocate with
Mr. Cyrus, Mr. Rahul Dwarkadas, Ms.
Aayushi S. Khazanchi, Mr. Neville,
Advocates.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGMENT

INDIRA BANERJEE, J

1. In this writ petition, the petitioner has challenged the order dated 24.06.2011 passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) New Delhi, dismissing the appeal filed by the petitioner against an order

passed by the Board for Industrial and Financial Reconstruction.

2. Hira Mills, established in Ujjain in Madhya Pradesh was taken over by the Central Government under the Textile Undertaking (Taking over of Management) Act 1983 and nationalised under the Textile Undertaking (Nationalisation) Act, 1995.
3. NTC, a Government Company within the meaning of Section 617 of the Companies Act 1956, wholly owned by the Government of India, under the administrative control of the Nodal Ministry, being the Ministry of Textiles, has taken over the undertakings and assets of several textile companies including Hira Mills.
4. NTC became sick and was referred to the BIFR, which sanctioned a scheme of revival of the petitioner. As part of the revival scheme certain assets of the petitioner were to be sold by public tender under the Asset Sale Committee (ASC).
5. An advertisement was issued for sale of the land belonging to the Finlay Mills on 12.11.2008. However, the only offer was below the reserve price fixed by ASC and accordingly the ASC rejected the offer. At a meeting held on 23.12.2008, ASC ratified the decision to reject the tender and directed that the assets of the Finlay Mills be valued to ascertain the current

market rate. At its meeting on 27.1.2009, the reserve price was fixed at Rs.710 crores.

6. Second advertisement inviting tenders for sale of land belonging to Finlay Mills was issued, but no suitable offers were obtained.
7. A third notification inviting the tenders was issued in respect of the land of Finlay Mills on 16.6.2009. The tender document provided:

“1.4 EARNEST MONEY DEPOSIT

The EMD of Rs.100,00,00,000/- (Rupees one Hundred Crores Only) is required to be deposited as per clause 2.6 below by way of a Bank Draft/Pay Order or Irrevocable Bank Guarantee of Nationalised/Scheduled Commercial Banks (excluding co-operative/rural banks) notified by RBI, payable at Mumbai along with bid in respect of this land.

ii. Soon after opening the bids, Member Secretary of the ASC shall prepare a ‘Comparative Chart’ of the offer received and along with all relevant details place the same before the Chairman, ASC. In case the offer received is less than Reserve Price fixed by the Company, the Chairman, ASC reserves the right to go for fresh tender if so desired and inform the decision in the next meeting of the ASC to avoid delay in re-tendering.

iv) if the highest bid is less than the Reserve Price fixed by the Company, the Chairman, ASC reserves the right to reject the offer and return the EMD.”

8. The Bid submitted by Padmawati Pvt. Ltd. hereinafter referred to as Padmawati was the highest. However, the bid of Padmawati for Rs.657.90 crores was, below the last reserve price of Rs.710 crores set by the ASC.
9. At its meeting held on 23.07.2009, ASC decided that the petitioner should interact with the highest bidder, so that a higher offer could be obtained. Pursuant to negotiations, Padmawati offered to increase its bid to Rs.710 crores and Rs.1/-, subject to grant of extension of 60 days to make payment.
10. The Board of Directors of NTC met on 18.08.2009 and took a decision to invite fresh offers. Padmawati was intimated about the decision and its EMD of Rs.100 crores was returned to Padmawati under cover of a letter dated 19.08.2009.
11. Padmawati filed a writ petition in this Court on 14.10.2009, seeking inter alia cancellation of the order dated 19.08.2009, rejecting its bid. By an order dated 14.10.2009, this Court restrained NTC from issuing a fresh tender in respect of the property in question.

12. By an order dated 10.2.2010, this Court allowed the writ petition of Padmawati, holding that there was no reserve price fixed for the tender and that the ASC should re-examine the bid on the premise that no reserve price had been fixed. This Court held:-

“In our considered view, there is a basic fallacy in the decision making process. Whether it be the ASC, the NTC or the Ministry – all three have proceeded on the premises of existence of a reserve price and the highest bid being below the reserved price. If that would have been the situation, then certainly the Petitioner was out of court as a bid made below the reserved price could be rejected without assigning any further reasons as per Clause 2.7 (iv). These are, however, not the facts of the present case. It is not disputed on behalf of the respondents that there can be bids with a reserve price or without the reserve price. The ASC in its wisdom in the case of the first two bids did fix a reserve price albeit a lower reserve price in the second bid. Possibly, seeing the fate of these two bid efforts, the third time no reserve price was specified in the auction notice. The result is that it is a case of an auction without reserve price where the Petitioner is the highest bidder.”

13. This Court further held that:

“The aforesaid does not imply that ASC is bound to accept the highest bid but the rejection of the highest bid keeping in mind the past factors of two

failed bids would have to be considered in a reasoned order recorded in the file. However, this has not happened in the present case as the premise on which respondents have acted is as if it is a case of failure of the petitioner as the highest bidder to match the reserve price specified in the auction notice.

In our considered view, the ASC ought to have examined the case in terms of the aforesaid parameters and, ultimately, the decision was liable to be placed before the BIFR which would examine and take a decision on whether to confirm the bid or not, the same being done under the scheme of the BIFR.

The decision taken by the respondents predicted on a wrong premise and, thus, erroneous process having been followed, the rejection of the bid of the petitioner on the ground of it not matching the so-called reserve price cannot be sustained and is quashed.”

14. This Court directed as follows:-

“We direct the ASC to re-examine the bid of the petitioner on a premise that there is no reserve price but the petitioner is the highest bidder. There is an evaluation available in the records of the respondents at 710 crores which has been matched by the petitioner, in negotiations held as per Clause 2.7 (iii). The bid of the petitioner would, thus, be re-examined by the ASC and the due process followed as envisaged under the scheme of the BIFR.”

15. None of the parties appealed against the judgment of this Court, which attained finality. This Court held that ASC was not bound to accept the highest bid. There was no direction to accept the bid of Padmawati.
16. On 26.03.2010, the ASC decided that the bids be rejected and NTC go for rebid. Two applications being MA No. 228/2010 and MA No. 229/2010 were filed in the BIFR, seeking directions for confirmation of the sale in favour of Padmawati. NTC filed an application for appropriate orders for retendering.
17. Both the applications were taken up for BIFR on 19.04.2010, but adjourned to 18.05.2010. On 18.05.2010, BIFR approved the bid of Padmawati, disregarding the objections of the petitioner.
18. Aggrieved by the order of the BIFR dated 08.05.2010, the petitioner appealed before the AAIFR. By the order impugned, the appeal has been dismissed by AAIFR.
19. In *Divya Manufacturing Company Pvt. Ltd. Vs. Union Bank of India* reported in 2006 SCC 69, the appellant had offered Rs.37 lacs for purchasing the property in question at the initial stage. However, later, at the intervention of the Court, the price was raised to Rs.1.3 crores and ultimately it was found that the property could be sold for Rs. 2 crores. The Supreme Court

held that even after confirmation of the sale, the sale could be set aside. The ratio in Divya Manufacturing Company Pvt. Ltd. (supra) was summarised in the subsequent decision of the Supreme Court in ***Valji Kemji and Co. Vs. Official Liquidator of Hindustan Nitro Product (Gujrat) Ltd. and Others***, where the Supreme Court held that if there was fraud, then even after confirmation, the sale could be set aside, because it was well settled that fraud vitiated everything.

20. In Valji Kemji and Company Ltd. (supra), the Supreme Court held as under:

“28. When an auction sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction sale is finalized say for Rs.1 crore, and subsequently somebody turns up offering Rs. 10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a

little over the auction price, that cannot by itself suggest that any fraud has been done.”

21. In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries* reported in 1993 (1) SCC 71, the Supreme Court held that:

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

9. In *Council of Civil Service Unions and Others v. Minister for the Civil Service*, 1985 A.C. 374 (H.L.) the House of Lords indicated the extent to which the legitimate expectation interfaces with exercise of discretionary power. The impugned action was upheld as reasonable, made on due consideration of all relevant factors including the legitimate expectation of the applicant, wherein the considerations of national security were found to outweigh that which otherwise would have been the reasonable expectation of the applicant. Lord Scarman pointed out that 'the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter'. Again in *Preston*, in *re* it was stated by Lord Scarman that "the principle of fairness has an important place in the law of judicial review" and "unfairness in the purported exercise of a power can be such that it is an abuse of excess of power". These decisions of the House of Lords give a similar indication of the significance of the doctrine of legitimate expectation. Shri A.K. Sen referred to *Shanti Vijay & Co. etc. v. Princess Fatima Fouzia & Ors. etc.*, (1980) 1 S.C.R. 459, which holds that court should interfere where discretionary power is not exercised reasonably and in good faith.

10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to

procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise power for public good.”

22. In *FCS Software Solutions Ltd. Vs. L.A. Medical Devices Ltd. and Others*, reported in AIR 2008 SC 3137, the Supreme Court upheld the order of the Company Court setting aside an auction.

23. In ***NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another*** reported in (2005) 8 SCC 219, the Supreme Court held that the provisions of the Sick Industrial Companies (Special Provisions) Act 1985 (SICA), would prevail over the provisions of the Companies Act, the jurisdiction of the Company Court in matters relating to winding up sick companies would arise only when the Board for Industrial and Financial Reconstruction (BIFR) or Appellate Authority for Industrial Financial Reconstruction (AAIFR) have recommended winding up of the company upon arrival of a finding that there did not exist any chance of revival of the Company. The Supreme Court further observed that Section 536 (2) of the Companies Act did not ipso facto confer jurisdiction upon the Company Court to direct the sale of the assets of the sick company. The power had to be exercised subject to the provisions of the SICA. In terms of Section 20(4) of the SICA, BIFR is authorised to sell the assets of the sick companies in such a manner, as it might deem fit, leave of the Company Court is not required.
24. In ***Ram and Shyam Company Vs. State of Haryana*** reported in 1985 (3) SCC 267, the Supreme Court held that the disposal the public property partakes the character of a trust. So disposal of the State property in Public Interest must be by such method as would grant an opportunity to the public at large to participate

in it, the State reserving to itself the right to dispose if of as best subserve the public weal.

26. The proposition of law, which emerges from the judgments cited above is that the highest bidder has a right to consideration of his bid. However, the highest bid need not be accepted. The tenderer has the right to reject the highest bid if the bid is inadequate. The proposition that the highest bid need not be accepted finds support from the judgments of the Supreme Court reported in (1996) 4 SCC 208 (211) and (2016) 4 SCC 716.
27. The appellants have rightly argued that public properties should be sold at the best available price. The decision of NTC to retender the Finlay Mills with a view to get higher offer should not have been interfered with. Counsel for the petitioner submits that the financial health of the petitioner has improved.
28. In our view, BIFR erred in passing the impugned order approving the bid of Padmawati, disregarding the objection of the petitioner. AAIFR erred in discussing the appeal of the petitioner.
29. Mr. Sethi appearing on behalf of the petitioner submitted that the value of the property has increased. In fact the petitioner is no longer interested in selling Finlay Mills. The financial health of Finlay Mills has improved considerably.

30. Admittedly, Padamavati was the highest offerer and the offer of Padmavati was accepted by BIFR. In the expectation that Finlay mills that might be sold to Padmavati if the bid of Padmavati succeeded, Padmavati put in Earnest Deposit of Rs.100 crores. If, for any reason, the petitioner was not interested in selling Finlay Mills to Padmavati, the petitioner was certainly obliged to refund the Earnest Deposit.
31. In the course of arguments Mr. Chidambaram submitted that Padmawati is willing to give up its claim to purchase of the property, subject to the condition of refund of earnest deposit with interest thereon.
32. Since the petitioner is not inclined to sell Finlays Mills to Padmawati, Padmawati is entitled to refund of the Earnest Deposit paid to the petitioner.
33. The question is whether Padmawati would also be entitled to interest on the earnest deposit. Mr. Sethi strenuously argued that having refunded the EMD way back in 19.08.2009, the petitioner was not liable to interest.
34. It is true as argued by Mr. Sethi that the petitioner had returned the Earnest Deposit of Rs.100 crores under cover of a letter dated 19.08.2009. The Earnest Money was re-deposited. The question is whether the petitioner is not liable to any interest at all. Admittedly the petitioner held the Earnest Deposit. Padmavati was deprived of the use of Rs.100 crores which it

deposited by way of Earnest Deposit. The petitioner is bound to compensate Padmavati by paying interest.

35. In our view the petitioner is not only liable to refund the EMD but with interest at the rate of 8% per annum from the date of approval of its bid by BIFR, that is 18.05.2010, till the date of refund. The earnest deposit shall be refunded expeditiously, preferably within 30 working days.
36. The writ petition is disposed of.

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

April 03, 2017/ n