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FOOD CORPORATION OF INDIA

v.

KAMDHENU CATTLE FEED INDUSTRIES

NOVEMBER 3, 1992

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[J.S. VERMA, YOGESHWAR DAYAL AND
N. VENKATACHALA, JJ.]

Constitution of India, 1950:

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Article 14—Contractual transactions of State or its instrumentality—Essential requisites—Non-arbitrariness, fairness in action and due consideration of legitimate expectation—Ignoring the highest bid—Negotiations for higher offer and acceptance thereof—Validity of.

Administrative Law :

D

Doctrine of legitimate expectation—Forms part of non-arbitrariness and Rule of Law—To be determined in the larger public interest—Open to judicial review.

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The appellant-Corporation invited tenders for sale of stocks of damaged food-grains. The respondent's bid was the highest. Since the appellant was not satisfied about the adequacy of the amount offered even in the highest tender, it invited all the tenderers to participate in the negotiations, instead of accepting the highest tender. During the course of negotiations, the respondent refused to revise the rates in its offer. On the basis of the highest bid made during the negotiations, the appellant disposed of the stocks of damaged foodgrains, rejecting the highest tenders. The respondent, whose tender was the highest, challenged the decision of the appellants by filing a Writ Petition before the High Court. It was contended that the action of the appellant was arbitrary and hence violative of Art. 14 of the Constitution. The High Court accepted the contention and allowed the Writ Petition. Being aggrieved by the High Court's decision the appellant-Corporation preferred the present appeal.

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It was contended on behalf of the appellant that there being no right in the person submitting the highest tender to claim acceptance thereof, and since all tenderers were given equal opportunity to participate in the negotiations and to revise the bid before acceptance, the action of the

appellant was not arbitrary.

The Respondent contended that since no cogent reasons were indicated for rejecting all the tenders and for deciding to dispose of the stock by negotiating with the tenderers for procuring a higher price, such a decision was arbitrary.

Allowing the appeal, this Court,

HELD: 1.1. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the *bona fides* of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review. [328-A-D]

1.2. 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 a 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

A 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. [328-E-G]

B 2.1. 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 that power 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. 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 of power for public good. [329-E-H; 330-A]

F *Shanti Vijay & Co. etc. v. Princess Fatima Fouzia & Ors. etc.*, [1980] 1 S.C.R. 459, relied on.

G *Council of Civil Service Unions and Others v. Minister for the Civil Service*, 1985 A.C. 374 (H.L.), and *In re Preston*, 1985 A.C. 835 (H.L.), referred to.

H 2.2. In the instant case, the respondent's highest tender was superseded only by a significantly higher bid made during the negotiations with all tenderers giving them equal opportunity to compete by revising their bids. The fact that it was a significantly higher bid obtained by adopting

the right course is sufficient to demonstrate that the action of the appellant satisfied the requirement of non-arbitrariness, and it was taken for the cogent reason of inadequacy of the price offered in the highest tender, which reason was evident to all tenderers invited to participate in the negotiations and to revise their bids. The High Court was in error in taking the contrary view. [330-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4731 of 1992.

From the Judgment and Order dated 21.7.92 of the C.W.N. 7419 of 1992.

Y.P. Rao for the Appellant.

Ashok Sen, H.L. Aggarwal, and K.K. Gupta (NP) for the Respondent.

The Judgment of the Court was delivered by

VERMA, J. Leave granted.

This appeal by special leave under Article 136 of the Constitution is against the judgment and order dated 21.7.92 by which the Civil Writ Petition No. 7419 of 1992 has been allowed by the Punjab & Haryana High Court directing the appellant Food Corporation of India to allot to the respondent the necessary stocks of damaged rice for which the tenders had been invited by the appellant, since the respondent was the highest bidder.

The appellant invited tenders for sale of stocks of damaged foodgrains in accordance with the terms and conditions contained in the tender notice (Annexure 'A'). The tenders were required to be submitted upto 2.45 p.m. on 18.5.92; the tenders were to be opened on 18.5.92 at 3.00 p.m.; and offers were to remain open for acceptance upto and inclusive of 17.7.92. The respondent submitted its tender for a stock of damaged rice within the time specified, but the respondent's tender was conditional and the full amount of earnest money required by the terms was also not deposited. It is, however, not necessary to mention the particulars of these two deficiencies in respondent's tender since they appear to have been waived by the appellant and are not relied on before us to support the

A appellant's action. The respondent's bid in the tender was admittedly the highest as found on opening the tenders. It appears that the appellant was not satisfied about the adequacy of the amount offered in the highest tenders for purchase of the stocks of damaged foodgrains and, therefore, instead of accepting any of the tenders submitted, the appellant invited all the tenderers to participate in the negotiation on 9.6.92. The respondent refused to revise the rates offered in its tender. It was Rs. 245 per quintal for certain lots of this stock, while the highest offer made during the negotiations was Rs. 275.72 per quintal. Similarly, as against the respondent's offer of Rs. 201 per quintal in respect of some other lots, the highest offer made during the negotiation was Rs. 271.55 per quintal. On this basis, the appellant was to receive an additional amount of Rs. 8 lakhs by accepting the highest offer made during the negotiations over the total amount offered by the respondent for the stock of damaged rice. Overall, the appellant was offered an excess amount of Rs. 20 lakhs for the entire stock of damaged foodgrains in the highest offer made during the negotiations, inasmuch as against the total amount of Rs. 90 lakhs which the appellant would have received by acceptance of the highest tenders, the appellant was to receive the amount of Rs. 1 crore 10 lakhs by accepting the highest offers made during the negotiations in which all the tenderers, including the respondent, were given equal opportunity to participate.

E The respondent filed the above Writ Petition in the High Court challenging the appellant's refusal to accept the highest tender submitted by it for the stock of damaged rice claiming that the appellant having chosen to invite tenders, it could not thereafter dispose of the stocks of damaged foodgrains by subsequent negotiations rejecting the highest tenders on the ground that a higher bid was obtained by negotiations. This action of the appellant, was alleged to be arbitrary and, therefore, in substance, violative of Article 14 of the Constitution. The High Court by its impugned order accepted this contention of the respondent and allowed the Writ Petition. Hence, this appeal.

G It is not disputed that according to the terms and conditions on which the appellant had invited tenders, the appellant had reserved the right to reject all the tenders and, therefore, the highest tender was not bound to be accepted. Learned counsel for the appellant submitted that there being no right in the person submitting the highest tender to claim acceptance of the tender, in a case like the present, where all the tenderers including

the respondent, were invited for negotiation and given equal opportunity to participate and to revise the bid before acceptance of the highest bid offered during negotiation which resulted in obtaining an additional amount of Rs. 8 lakhs for the stock relating to respondent's tender and an overall gain of Rs. 20 lakhs in disposal of the entire stock of damaged foodgrains, the action of the appellant could not be termed arbitrary. In reply, Shri A.K. Sen, learned counsel for the respondent contended that even though the appellant had the right to reject any tender, including the highest tender, and thereafter negotiate with all the tenderers to procure the highest price for the commodity, yet this right has to be exercised reasonably and not arbitrarily, otherwise, the credibility of the procedure of sale by inviting tenders would be lost. Shri Sen submitted that the decision not to accept any tender and to negotiate thereafter for obtaining a higher price than that quoted in the highest bid, cannot be taken on the whim and caprice of the concerned authority and can be only for cogent reasons indicated while taking the decision, or else, the decision would be arbitrary. On this basis, Shri Sen further submitted that in the present case, no cogent reasons were indicated for rejecting all the tenders and deciding to dispose of the commodity by negotiation with the tenderers for procuring a higher price. He also added that the mere fact that a higher price was obtained by negotiation would not justify the decision if it was not taken in the manner permissible. This was the only submission of Shri Sen to support the decision of the High Court.

In our view, Shri A.K. Sen is right in the first part of his submission. However, in the present case, the respondent does not get any benefit therefrom. The High Court's decision is based on the only ground that once tenders have been invited and the highest bidder has come forward to comply with the conditions stipulated in the tender notice, it is not permissible to switch over to negotiation with all the tenderers and thereby reject the highest tender. According to the High Court, such a procedure is not countenanced by the rule of law. This is not the same, as the submission of Shri Sen which is limited to permissibility of such a course only on cogent grounds indicated while deciding to switch over to the procedure of negotiation after receiving the tenders to satisfy the requirement of non-arbitrariness, a necessary concomitant of the rule of law. The proposition enunciated by the High Court which forms the sole basis of its decision is too wide to be acceptable and has to be limited in the manner indicated hereafter.

- A In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This impose the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of
- B good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider
- C and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the *bona fides* of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness.
- D Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

- E 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 a 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
- F 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
- G operates in our legal system in this manner and to this extent.

- H 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 *In re Preston*, 1985 A.C. 835 (H.L.) 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.

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 require-

- A ment. 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 of power for public good.
- B In the present case, the last date upto which the offer made in the tender was to remain open for acceptance was 17.7.92. After opening the tenders on 18.5.92, the appellant decided to negotiate with all the tenderers on 9.6.92 when significantly higher amount, as indicated earlier, was offered above the amount quoted in the highest tender. In such a situation, if the negotiations did not yield the desirable result of obtaining a significantly higher price, the appellant had the option to accept the highest tender before the last date, viz., 17.7.92 upto which the offer made therein was to remain open for acceptance. In this manner, the respondent's higher tender was superseded only by a significantly higher bid made during the negotiations with all tenderers giving them equal opportunity to compete by revising their bids. The fact that it was a significantly higher bid obtained by adopting this course is sufficient in the facts of the present case to demonstrate that the action of the appellant satisfied the requirement of non-arbitrariness, and it was taken for the cogent reason of inadequacy of the price offered in the highest tender, which reason was evident to all tenderers invited to participate in the negotiations and to revise their bids.
- D The High Court was in error in taking the contrary view.
- E

Consequently, this appeal is allowed. The impugned judgment of the High Court is set aside, resulting in dismissal of the respondent's writ petition, No costs.

G.N.

Appeal allowed.