Sterling Computers Ltd. v. M.N. Publishers[1]

A Review

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Introduction

The case involves a contract between Mahanagar Telephone Nigam Limited[2] (a Government of India Undertaking) and private companies (United India Periodicals Private Limited,[3] United Database India Private Limited[4] and Sterling Computers). The main question before the court related to the degree of freedom that can be afforded to such undertakings in the making of contracts. In this regard, the court considered whether Government companies could be judged on par with private companies. The broader issue whether Government polices could be questioned was also briefly examined.

Facts in Brief

A contract was entered into by MTNL and UIP for the publication of telephone directories for five years by UIP. MTNL would receive a royalty of Rs. 20.16 crores from UIP for this purpose. UIP's interest in the contract centred around the advertisements that would appear in the yellow pages of the directory. This would be regulated by UIP. The publication was to be made on or before a said date every year and time was made the essence of the contract.

The terms of the contract were blatantly violated by the UIP which failed in its obligations on all counts. The violations were with respect to both the time of publication stipulated and the time of actual publication.

For the purpose of executing the unexecuted part of the contract, a supplemental agreement was entered into between MTNL, UIP, UDI and Sterling Computers. Under the terms of this supplemental agreement, MTNL would extend the original contract for three more years. The extension would be subject to the successful completion of the unexecuted part of the contract by UIP, UDI and Sterling Computers. For the extended period, Sterling Computers had to pay royalty only for an amount of Rs. 10 Crores.

Challenging this supplemental agreement, the petitioners alleged, *inter alia*, that Sterling Computers had been awarded a fresh contract for a fresh period on fresh terms. This was done without inviting tenders or affording an opportunity to the others.[5] The petitioners asserted that, consequently, MTNL had suffered a loss of Rs. 60 crores without a corresponding benefit.

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1. 1993 (1) SCALE 36.
2. Hereinafter MTNL.
3. Hereinafter UIP.
4. Hereinafter UDI.
5. **Supra** n.1, at p.41 (para 16).

The High Court came to the conclusion that the supplemental agreement could not be held to be an extension of the original contract. According to the High Court, the supplemental agreement was tainted with malice, the object being unjust enrichment for UIP/UDI/Sterling.

The MTNL having fully supported the agreement before the High Court, filed an affidavit before the Supreme Court saying that it had decided to accept the judgment of the High Court. It also said that MTNL had started the process of inviting fresh tenders and for that purpose, an advertisement had been issued.

The decision of the Supreme Court was delivered by Justice N.P.Singh speaking for himself and Justice N.M. Kasliwal.

Judgment and Comments

There was not much dispute in relation to the fact that MTNL falls within the definition of 'State' under Article 12 of the Constitution.

The issues before the Supreme Court were, the liberty that could be granted to such public authorities while entering into contracts; the extent of the same; the circumstances where such liberty could be allowed and when restricted.

The Court, in the present case, refused to grant absolute discretion to public authorities in such contractual matters. The reasons given were:

i. Contracts are legally binding commitments (unlike policies)

ii. Public property is involved.

iii. Public interest assumes paramount importance.

iv. Public authorities are expected to exercise power only in public good.

On this basis, the Court reasoned that public authorities and private persons could not be considered to be on the same footing. In the process, the Court also made some observations relating to the extent of discretion available to the Government in the making of economic policies.

In the light of the New Economic Policy pursued by the Government and the thrust given to privatization, it would be important to examine the merits and demerits of not considering public authorities and private persons on an equal footing.

Statistics and history prove beyond dispute that private bodies have greater productivity, better efficiency and more profits than public bodies. Those in favour of public authorities argue on grounds of social welfare. The reasons pointed out for the relative inefficiency of public authorities include the bureaucracy and the limited discretion vested with the officials. The questions, therefore, which arise are whether the public authorities need to be afforded more flexibility and greater discretion? Will this, in fact benefit them?

It should be noted that one important distinction between the two forms of ownership, public and private, is the absence of profit motive of the decision makers in the former. The absence of this immediate benefit from the decisions taken often results in disregard for the benefit of the organisation as a whole. The officials therefore tend to misuse the discretion vested, to gain private benefits. Therefore, in order to ensure that private and inappropriate

considerations do not result in the misuse of discretion, causing more damage than benefit, some necessary checks need to be maintained.

Consequently, the whole process involves striking the right balance between the required degree of flexibility and discretion on the one hand and the checks to be exercised on the other. On this balance depends the success of the institution.

That the Court has recognised the importance of these factors and has tried to maintain flexibility and discretion is reflected from the following observations:

> ...the Court can certainly examine whether the "decision making process" was reasonable and not arbitrary and violative of Article 14 of the Constitution[6]

The Golden Mean

"If a contract has been entered into without ignoring the procedure" that can be said to be "basic in nature" and if the contract is entered into "after an objective consideration of the options available, taking into account the interest of the State and the public, then the court cannot act as an appellate authority by substituting its opinion in respect of the selection made for entering into such contract." However, "once the procedure adopted by an authority for the purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Courts cannot ignore such action saying the authorities must have some latitude or liberty in contractual matters". In such cases, it cannot be said that "interference by the Court amounts to an encroachment of the exclusive right of the executive to take such a decision."[7]

On this basis, the Court upheld the decision of the High Court.

In the process of examining the extent of application of Article 14 in relation to such contracts, the Court took note of cases[8] where contracts entered into between the Government and private parties were in question. In fact, in some of these cases, the contract was entered into without even inviting tenders from the public. The Court, after careful consideration, pointed out how in each of these cases, Article 14 was required to be satisfied and was in fact satisfied.

Thus, in all contracts with the Government or authorities which come within the meaning of Article 12 of the Constitution, Article 14 needs to be satisfied. However, where an issue would "essentially be a matter of economic policy, the court would hesitate to intervene and strike down what the Government has done, unless it appears to be plainly arbitrary, irrational or malafide."[9] However, "with the question whether a particular policy is wise or foolish, the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."[10]

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6. **Id.**
7. **Ibid** (Para 17).
8. **Kasturilal Lakshmi Reddy v. J & K.**, (1980) 3 SCR 1338; **M.P. v. Nandlal Jaizwal**, (1987) 1 SCR1; **Sachidanand Pandey v. W.B**, (1987) 2 SCC 295; **G.B. Mahajan v. Jalgaon Municipal Council** (1991) 3 SCC 91.
9. **M.P. v. Nandal Jaizwal** (1987) 1 SCR 1; quoted in **Supra** n.1 at p.42.
10. Prof. Wade; quoted in **Supra** n.1, at p.41.

Thus, "once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14; the executive does not have absolute discretion; certain precepts and principles have to be followed, public interest being the paramount consideration."[11]

These observations of the Court directly lead to the broader question involved with reference to the testing of Government policies against Article 14.

The decision makes it explicit that in so far as the formulation of the policies is concerned, the Government enjoys absolute freedom. However, when it involves the granting of rights and privileges to individuals, the satisfaction of Article 14 becomes mandatory. Therefore, in the view of the Court, while the Government in the formulation of policy, enjoys complete freedom, in the implementation of the same, the rigour of Article 14 cannot be deviated from. Hence, it can be seen that Government policies too are, to a limited extent, subject to review by the Courts as against Article 14, the limitation being that these are not reviewable as policies, but as affecting the rights of the individual.

Conclusion

This decision is not a substantially new proposition as it is an affirmation of the principles laid down in *Kumari Shrilekha Vidyarthi v. U.P.*[12] However, considering that this decision has been made at a stage when implementation of the New Economic Policy is underway; it assumes considerable significance. By this decision, the Court has indicated that even the validity of the policies of the Government may be tested against the Constitution.

The consequence is that every time an industry is ordered to be closed down, or privatised, or any action of the like nature is taken in pursuance of the policies of the Government, the Government may have to justify the same, as being in accordance with Article 14. By this process, even the policies of the Government require to be justified as against Article 14.

Reading this pronouncement with the composite code theory,[13] every policy of the Government prior to its application may be open to test against the Constitution as a whole.

This proposition can be seen to open new vistas for litigation and judicial activism. It may even create great practical difficulties in the implementation of the present Governmental policies. However, any criticism on this basis would proceed on the extremely tenuous and dangerous ground that practical problems should override conformity with the constitutional principles and philosophies.

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11. **Supra** n.1, at p.44.
12. AIR 1991 SC 537.
13. **See, Maneka Gandhi v. Union of India,** AIR 1978 SC 579