

Sterling Computers Limited Etc vs M & N Publications Limited And Ors on 12 January, 1993

Equivalent citations: 1996 AIR 51, 1993 SCR (1) 81, AIR 1996 SUPREME COURT 51, 1993 AIR SCW 683, (1993) 1 SCR 81 (SC), 1993 BOMCJ 651, (1993) 1 COM LJ 221, (1993) 2 PAT LJR 12, (1993) 2 SCJ 455, (1996) 1 APLJ 29, (1993) 1 CURCC 86, (1993) 2 GUJ LH 314, 1993 (1) SCC 445, 1993 UJ(SC) 1 456, (1993) 1 JT 187 (SC)

Author: N.P Singh

Bench: N.P Singh, N.M. Kasliwal

PETITIONER:

STERLING COMPUTERS LIMITED ETC.

Vs.

RESPONDENT:

M & N PUBLICATIONS LIMITED AND ORS.

DATE OF JUDGMENT 12/01/1993

BENCH:

SINGH N.P. (J)

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SINGH N.P. (J)

KASLIWAL, N.M. (J)

CITATION:

1996 AIR 51	1993 SCR (1) 81
1993 SCC (1) 445	JT 1993 (1) 187
1993 SCALE (1) 36	

ACT:

Constitution of India : Articles 12, 14, 19, 32, 136, 226 and 298.

Government contracts--Judicial review--Court primarily concerned with infirmity in decision making process--Urgency of disposal by courts of such matters--Necessity for.

Telephone directories--Publication of--Contract termed 'supplemental contract' granted--Held amounted to grant of fresh contract in garb of 'supplemental contract'.

HEADNOTE:

The three appeals arose out of disputes relating to the publication of telephone directories of MTNL a Government of India Undertaking. The MTNL introduced a new concept of "yellow pages" in telephone directories, and these yellow pages were to contain advertisement under different headings. The contractor who was to be awarded the contract for printing such directories was to collect the revenue from the advertisements in the yellow pages as well as in the white pages of the telephone directory, supply the same free of cost to the for its subscribers, and pay royalty to the MTNL in connection with printing of such directories.

Tenders for publication of the directories for Delhi and Bombay were invited. Tender of UIP respondent No. 2 in the Writ Petition and appellant in one of the appeals (CA.No. 91 of 1993) was accepted, and an agreement dated 14th March, 1987 was executed. UDI, respondent No. 3 to the Writ Petition and appellant in one of the other appeals (CA No. 90, of 1993) was a subsidiary of UIP.

Under the original agreement UIP was to publish directories every year for a period of five years from 1987 to 1991 for Delhi and Bombay separately, pay an amount of Rs. 20.16 crores as royalty to the MTNL, supply the directories free of cost to subscribers. UIP also furnished a

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performance guarantee for a sum of Rs. one crore, and was also to supply the same number of supplementary directories which were to be published six months after the publication of the annual issue, to be published in November/December every year. UIP was given the exclusive right for procurement of the advertisements in the yellow pages as well as strips, bold the extra entries in the white pages, the rates to be fixed by the UIP for each issue of the directory, and such rates to be printed for general information. It was stipulated that if UIP committed default or breach of the agreement or failed in the due performance thereof, the MTNL shall be entitled to recover from the UIP by way of compensation or liquidated damages and amount calculated at the rate of Rs. One lakh for every day or part thereof for the delay beyond the stipulated date. The MTNL without prejudice to other rights could by notice in writing determine the contract.

UIP defaulted and committed breach of the agreement inasmuch as directories for Delhi were published only for the years 1987 and 1988 and for Bombay only for the year 1987. For the year 1987, Delhi issue was published after a delay of seven months and Bombay issue after six months, and the Delhi issue of 1988 was published only in August, 1990, a delay of two years. There was no publication of the directories for Delhi for the years 1989, 1990 and 1991, and in respect of Bombay for the years 1988, 1989, 1990 and 1991.

A supplemental agreement was entered on 26th September, 1991 between UIP, UDI, MTNL and Sterling Computers Limited

appellant in one of the appeals (CA. No. 89 of 1993). Sterling by this agreement was introduced to carry out the unexecuted portion of the agreement with UIP. By this supplemental agreement Sterling was to print and publish 13 main issues of Delhi and Bombay directories within a period of seven years including the year 1991 on payment of additional royalty of only Rs. 10 crores to the MTNL over and above the royalty stipulated in the original agreement by the UIP.

Under the agreement dated 14th March, 1987 the royalty which was payable was Rs. 20.16 crores for the period 1987 to 1991, but under the supplemental agreement Sterling was given the contract to publish 13 main issues of the Delhi and Bombay directories upto 1997 and 1998, but for the extended period it had to pay royalty only for an amount of Rs. 10

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crores.

A Writ Petition was filed questioning the validity and legality of the supplemental agreement on different grounds including the ground of mala fide. It was contended by the petitioners that under the grab of a supplemental agreement a fresh contract was awarded to Sterling for a fresh period from 1991 to 1997 on fresh terms and conditions to publish the directories every year for Delhi and Bombay without inviting tenders or affording an opportunity to others, to submit tenders so that they may be also considered for award of the said contract. It was asserted by the petitioners that in the process of entering into the supplemental agreement the MTNL, which is a public undertaking and a 'State' within the meaning of Article 12 of the constitution, had suffered a loss of more than Rs. 60 crores without any corresponding benefit accruing to the MTNL or to the public in general.

MTNL contested the writ petition, contending that the supplemental agreement was a result of a bona fide commercial decision free from any bias or malice, that the original contract for the years 1987 to 1991 had been awarded to UIP after inviting tenders, but UIP having gone bankrupt, no money could have been realised from it. The termination of the original contract was no remedy although repeated contraventions and breaches had been committed by the UIP inasmuch as there was no publication of directory for Bombay for the years 1988, 1989, 1990 and 1991 and for Delhi for the years 1989, 1990 and 1991. In order to salvage Rs. 20.16 crores which was payable to the MTNL under the original agreement dated 14th March, 1987 by the UIP and which had not been paid, a decision was taken by the MTNL to enter into a supplemental agreement and to allow the UIP/UNI/Sterling to publish the thirteen issues of directories, six main issues for Delhi and seven main issues for Bombay upto years 1997-98 apart from the supplementary directories.

The High Court allowed the writ petitions, and came to the conclusion that the supplemental agreement dated 26th September, 1991 cannot be held to be an extension of the original agreement dated 14th March, 1987, and that the supplemental agreement was tainted with malice the object being to provide unjust enrichment to UIP/UDI/Sterling.

In the appeals to this Court, it was contended on behalf of the

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appellants that the supplemental agreement was entered into by the MTNL taking into consideration the circumstances then existing which had been examined at the highest level and as such a Court should not examine the discretion exercised by the public authority as a court of appeal because the decision to enter into the supplemental agreement also involved a question of policy, and it was pointed out that the contract had been awarded in the year 1987 to UIP on an experimental basis on such terms and conditions on which in past directories had not ever been published, and that the real experiment was as to how the directories' could be published without incurring any cost by MTNL.

On behalf of the Writ Petitioners it was stated that they were prepared to pay to the MTNL an amount of Rs. 60 crores for the period 1991 to 1997/1998 the period covered by the supplemental agreement for which the UIP/(JDI/Sterling have undertaken to pay only Rs. 10 crores as royalty.

Dismissing the appeals, this court

HELD:1. The publication of directories by the MTNL is not just a commercial venture, the primary object is to provide service to the people. [92F]

2.The norms and procedures prescribed by Government and indicated by Courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose. [92F]

3.The action or the procedure adopted by the authorities which can be held to be a 'State' within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the state can be judged and tested in the light of Article 14 of the Constitution.

Raman Davaram Shelly v. The International Airport Authority of India,' AIR 1979 SC 1628; M/s. Kasturi Lal Lakshmi Reddy v. The State of Jammu and Kashmir, AIR 1980 SC 1992; Fertilizer Corporation Kamgar Union (Regd) Sindri v. Union of India, AIR 1981 SC 344; Ram and Shyam Company v. State of Haryana, AIR 1985 SC 1147; Haji T.M. Hasan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157; Mahabir Auto Stores v. Indian Oil Corporation, AIR 1990 SC 1031 and Kumari Shrelekha Vidyarthi v. State of U.P., AIR 1991 SC 537, referred to. [92-H-93-A]

4. Public authorities, at times It is said must have the same liberty

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as they have in framing the policies, even while entering

into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution In many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. [91G-H, 92A]

5. In contracts having commercial elements, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue But even in such matters they have to follow the norms recognised by courts while dealing with public property. [92B]

6. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purposes of taking a decision as to whom the contract is to be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the Courts, such decisions are upheld. [92C]

7. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have been taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. [102H, 103A]

8. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'. By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the state. Courts have inherent limitations on the scope of any such enquiry. But the Courts can certainly examine whether 'decision making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. [95C-E-F]

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Chief Constable of the North Wales Police v. Evans, [1982] 3 All ER 141, referred to.

9. In the facts and the circumstances of the instant case, it has to be held that the MTNL has applied the 'irrelevant considerations' doctrine while granting a fresh contract for a period of five years through the supplemental agreement dated 26th September, 1991, because it had failed to take into account considerations which were necessarily relevant i.e. following the rule of inviting tenders while granting

the contract for a further period of five years on fresh terms and conditions and had taken into account irrelevant considerations. [101H, 102A]

10. Philanthropy is no part of the management of an undertaking, while dealing with a contractor entrusted with the execution of a contract.' [102F]

11. The supply of the directories to public in time, was a public service which was being affected by the liberal attitude of the MTNL and due to the condonation of delay on the part of the UIP/UDI. There was no justification on the part of the MTNL to become benevolent by entering into the supplemental agreement with no apparent benefit to the without inviting fresh tenders from intending persons to perform the same job for the next five years. [102G]

12. The supplemental agreement is really a fresh agreement with fresh terms and, conditions which has been entered by MTNL without inviting any tender for the same. It has been entered to benefit the parties who are admittedly defaulters by not publishing directories for Bombay for the years 1988-1991, and for Delhi for the years 1989-1991 although they had collected several crores or Rupees for the advertisements for the directories to be published in the aforesaid years. [103D-E]

13. It is a matter of common experience that whenever applications relating to awarding of contracts are entertained for judicial review of the administrative action, such applications remain pending for months and in some cases for years. Because of the interim orders passed in such applications, the very execution of the contracts, are kept in abeyance. The cost of different projects keep on escalating with passage of time apart from the fact that the completion of the project itself is deferred. This process not only affects the public exchequer but even the public in general

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who are deprived of availing the facilities under different projects. As such, it need not be impressed that while exercising the power of judicial review in connection with contractual obligations, Courts should be conscious of the urgency of the disposal of such matters, otherwise the power which is to be exercised in the interest of the public and for public good in some cases become counter-productive by causing injury to the public in general. [106AB]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 89-91 of 1993.

From the Judgment and Order dated 30.9.1992 of the Delhi High Court in W.P. No. 1872 of 1992.

K Parsaran, Kapil Sibal, L.P. Agarwalla, N.P. Agarwalla, Anil Agarwalia, Gopal Subramaniam, Fazal-ul-Quaidir, P.H. Parekh, Ms. Nina Gupta and Vineet Kumar for the Appellant. K.K. Venugopal, P. Chidambaram, Anil P. Diwan, Harish N. Salve, Vijay Narain, P.P. Tripathi and P.P. Singh for the Respondents.

R.N. Keshwani for the Intervener.

The following Judgment of the Court was delivered by N.P. SINGH. J. Leave granted.

Three appeals have been filed against the same judgment of the High Court by which the Writ Petition filed on behalf of the petitioners/respondents (hereinafter referred to as "the writ-petitioners") was allowed. The dispute relates to the publication of the telephone directories of Mahanagar Telephone Nigam Limited, a Government of India Undertaking (hereinafter referred to as "the MTNL").

A new concept of yellow pages in the telephone directories was introduced by the MTNL/Department of Telecommunications. The yellow pages were to contain advertisements under different headings. The contractor who was to be awarded the contract for printing such directories was to collect the revenue from the advertisements in the yellow pages as well as in white pages of the telephone directory. The contractor was to print the directories and supply the same free of cost to the MTNL for its subscribers and had to pay royalty to the MTNL in connection with printing of such directories.

Tenders for publication of the directories for Delhi and Bombay were invited. Tender of the United India Periodicals Pvt. Ltd. (hereinafter referred to as 'the UIP, the 2nd respondent to the Writ Petition and appellant in one of the appeals) was accepted and an agreement dated 14th March, 1987 was executed. United Database (India) Pvt. Ltd. (hereinafter referred to as 'the UDI', the 3rd respondent to the Writ Petition and appellant in one of the appeals) is a subsidiary of UIP. Under the original agreement UIP was to publish directories every year for a period of five years from 1987 to 1991 for Delhi and Bombay separately and was to payan amount of Rs. 20.16 crores as royalty to the MTNL and to supply the MTNL directories free of cost with reference to the number of subscribers. UIP also furnished a performance guarantee for a sum of Rs. one crore. UIP was also to supply the same number of supplementary directories which were to be published six months after the publication of the annual issue. The annual issue of the directory was to be published in November/December every year. UIP was given the exclusive right for procurement of the advertisements in the yellow pages as well as strips, bold and extra entries in the white pages. The rates of such advertisements were to be fixed by the UIP for each issue of the directory and such rates had to be printed for general information. It was also stipulated that if UIP committed any default or breach of the terms and conditions of the agreement or failed in the due performance thereof within the time fixed (which was the essence of the contract), the MTNL shall be entitled to recover from the UIP by way of compensation or liquidated damages an amount calculated at the rate of Rs. one lakh for every day or part thereof for the delay beyond the stipulated date in respect of the item which was not completed or finished and delivered completely to the MTNL on the stipulated date as mentioned in the contract. In view of clause 22 of the agreement, the MTNL

without prejudice to other rights could by notice in writing determine the contract.

It is an admitted position that UIP defaulted and committed breach of the terms of the agreement inasmuch as directories for Delhi were published only for the years 1987 and 1988 and for Bombay only for the year 1987. For the year 1987, Delhi issue was published after a delay of seven months and that of Bombay after six months. So far Delhi issue of the directory for the year 1988 is concerned, it was published only in August, 1990 after a delay of two years. Under the agreement UIP was to publish directories every year for Delhi and Bombay separately during the period of contract from 1987 to 1991. They were also required to publish supplementary directory each year for Delhi as well as Bombay. But there was no publication of directories for Delhi- for the years 1989, 1990 and 1991. Similarly there was no publication of directories in respect of Bombay for the years 1988, 1989, 1990 and 1991.

On 26th September, 1991 a supplemental agreement was entered between UIP, UDI, MTNL and Sterling Computers Ltd. (hereinafter referred to as "Sterline" appellant in one of the appeals). Sterling by this agreement was introduced to carry out the unexecuted portion of the agreement with UIP. It may be mentioned that by this date the period of the original agreement dated 14th March, 1987 between the MTNL and the UIP had expired, still the supplemental agreement states that "subject to UIP/UDI and Sterling successfully completing the unexecuted job relating to printing of Bombay and Delhi telephone directories within the stipulated time frame and other stipulations in the agreement MTNL shall extend the original contract for three more issues each for Delhi and Bombay, i.e., seven main issues of Bombay and six main issues of Delhi of the said directories to be brought out hereafter". The agreement further stipulated that all terms and conditions contained in the original agreement and the memorandum of understanding would be the integral part of the supplemental agreement and all obligations of UIP/UDI and rights and privileges and powers provided for MTNL thereunder and under the law shall be applicable and available to and binding on the parties to the supplemental agreement as if the same were the part of the supplemental agreement. It was also said that if there was any inconsistency or contradictions vis-a-vis the original agreement, the memorandum of understanding read with supplemental agreement shall prevail and would have overriding effect. By the supplemental agreement Sterling was to print and publish 13 main issues of Delhi and Bombay directories within a period of seven years including the year 1991 on payment of additional royalty of only Rs. 10 crores to the MTNL over and above the royalty stipulated in the original agreement by the UIP. As mentioned above the original royalty which was payable under the agreement dated 14th March, 1987 was Rs. 20.16 crores for the period 1987 to 1991 but under the supplemental agreement Sterling was given the contract to publish 13 main issues of the Delhi and Bombay directories upto 1997 and 1998, but for the extended period it had to pay royalty only for an amount of Rs. 10 crores. It was left to the UIP/UDI to receive all revenue earnings on account (past and future) from the advertisements and MTNL was to be only informed about the prices as fixed.

The Writ Petition aforesaid was filed questioning the validity and legality of the supplemental agreement on different grounds including on ground of mala fide. According to the writ-petitioners under the garb of a supplemental agreement a fresh contract was awarded to Sterling for a fresh period from 1991 to 1997 on fresh terms and conditions to publish the directories every year for

Delhi and Bombay without inviting tenders or affording an opportunity to others, to submit tenders so that they may be also considered for award of the said contract. It was asserted by the petitioners that in the process of entering into the supplemental agreement the MTNL, which is a public undertaking and a State within the meaning of Article 12 of the Constitution, has suffered a loss of more than Rs. 60 crores without any corresponding benefit accruing to the MTNL or to the public in general.

Before the High Court the stand of the MTNL was that the supplemental agreement was a result of a bonafide commercial decision free from any bias or malice. The original contract for years 1987 to 1991 had been awarded to UIP after inviting tenders but UIP, having gone bankrupt, no money could have been realised from it. The termination of original contract was no remedy although repeated contraventions and breaches had been committed by the UIP inasmuch as there was no publication of directory for Bombay for the years 1988, 1989, 1990 and 1991 and for Delhi for the years 1989, 1990 and 1991. It was stated on behalf of the MTNL before the High Court that in order to salvage Rs. 20.16 crores which was payable to the MTNL under the original agreement dated 14th March, 1987 by the UIP and which had not been paid, a decision was taken by the MTNL to enter into a supplemental agreement and to allow the UIP/UDI/Sterling to publish the thirteen issues of directories, six main issues for Delhi and seven main issues for Bombay upto years 1997-98 apart from the supplementary directories.

The High Court came to the conclusion that supplemental agreement dated 26th September, 1991 cannot be held to be the extension of the original agreement dated 14th March, 1987. According to the High Court the supplemental agreement was tainted with malice-the object being to provide unjust enrichment to UIP/UDI/Sterling.

The most interesting part of the controversy is that the MTNL having fully supported the supplemental agreement before the High Court has filed an affidavit before this Court saying that "MTNL has decided to accept the High Court judgment in so far as that the procedure for the grant of contract dated 26.9.1991 to the petitioner M/s Sterling Computers Ltd. Was not in keeping with the requirement of Article 14 of the Constitution and is not filing any petition for Special Leave against the said judgment. However, as far as aspersions are concerned, MTNL does not accept the same and the same are matters of investigation and enquiry by an independent Central Agency at present." It has been further stated that subsequent events have shown that the Sterling has collected Rs. 19.59 crores approximately for advertisements in yellow pages without delivering the goods. They have also uncashed the letter of credit issued by the 'MTNL' prematurely. This collection is apart from the collection of Rs. 14 crores against the yellow pages advertisements made by UDI and UIP during the years 1987-1991. It has been further stated that the Board of 'MTNL' had in fact even decided to terminate the contract for lapse in the performance of the obligations under the 26th September, 1991 agreement but as the High Court has quashed the said supplemental agreement no further step was considered necessary. Ultimately it has been said in the said affidavit that 'MTNL' has started the process for inviting fresh public tenders and for that purpose advertisement has already been issued.

Mr. Venugopal, appearing for the writ-petitioners before us, stated on behalf of the writ-petitioners that they are prepared to pay to the 'MTNL' an amount of Rs. 60 crores for the period 1991 to 1997/1998 the period covered by the supplemental agreement for which the UIP/UDI/ Sterling have undertaken to pay only Rs. 10 crores as royalty. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by Courts while dealing with public property. It is not possible for Courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive. But in normal course some rules must exist to regulate the selection of persons for awarding contracts. In such matters always a defence cannot be entertained that contract has been awarded without observing the well settled norms and rules prescribed, on basis of the doctrine of "executive necessity". The norms and procedures prescribed by Government and indicated by Courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose as in the present case. The publication of directories by the MTNL is not just a commercial venture; the primary object is to provide service to the people.

The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by the judgments of this court in the cases of *Raman Dayaram Shetty v. The International Airport Authority of India*, AIR 1979 SC 1628; *M/s. Kasturi Lal Lakshmi Reddy v. The State of Jammu & kashmir*, AIR 1980 SC 1992; *Fertilizer Corporation Kamagar Union (Regd.) Sindri v. Union of India*, AIR 1981 SC 344; *Ram and Shyam Company v. State of Haryana*, AIR 1985 SC 1147; *Haji T.M. Hasan Rawther v. Kerala Financial Corporation*, AIR 1988 SC 157; *Mahabir Auto Stores v. Indian Oil Corporation*, AIR 1990 SC 1031 and *Kumari Shrilekha Vidyarthi v. State of U.P.*, AIR 1991 SC

537. it has been said by this Court :-

"It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State: such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

[M/s. Kasturi Lal Lakshmi Reddy v. The State of Jammu & Kashmir.] There is nothing paradoxical in imposing legal limits on such authorities by Courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good.

According to the appellants, the supplemental agreement was entered into by the MTNL taking into consideration the circumstances then existing which had been examined at the highest level and as such a Court should not examine the discretion exercised by the public authority as a court of appeal because the decision to enter into supplemental agreement also involved a question of policy. It was pointed out that the contract had been awarded in the year 1987 to UIP on an experimental basis on such terms and conditions on which in past directories had not ever been published. The real experiment was as to how the directories could be published without incurring any cost by the MTNL. The publisher being given the right not only to reimburse itself from the advertisements published in the yellow and white pages but was also to pay royalty to the MTNL. It was further pointed out that from the resolutions of the MTNL. It shall appear that the authorities 'were concerned that the experiment aforesaid must succeed. With that object in view, another opportunity was given to UIP/UDI/Sterling through the supplemental agreement to publish the directories for Delhi and Bombay. That decision should not be examined by this Court like a court of appeal.

It is true that by way of judicial review the Court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. In the book Administrative Law, Prof. Wade has said:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 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."

But in the same book Prof. Wade has also said:-

"The powers of public authorities are therefore 'essentially different from those of private persons. A man making his will may, subject to any rights of the dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void."

While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans, [1982] 3 All ER 141, where it was said that "The purpose of judicial review-

"... is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the state. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the North Wales Police v. Evans (supra), the Courts can certainly examine whether 'decision making process' was reasonable, rational not arbitrary and violative of Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for 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 that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision. In support of the stand that it was open to the MTNL to negotiate with the UIP/UDI/Sterling for

purpose of publication of the directories for Delhi and Bombay without inviting tenders, reliance was placed on behalf of the appellants on the judgments of this Court in the cases of *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir*, [1980] 3 SCR 1338; *State of Madhya Pradesh v. Nandlal Jaiswal*, [1987] 1 SCR; *Sachidanand Pandey v. State of West Bengal*, [1987] 2 SCC 295 and *G.B. Mahajan v. Jalgaon Municipal Council*, [1991] 3 SCC 91.

From the facts of the case of *Kasturi Lal Lakshmi Reddy* (Supra) it shall appear that every year the State used to auction the blazes in different forests. Most of the contractors bidding at the auction had their factories outside Jammu & Kashmir. A decision was taken that from the year 1979-80 onwards resin extracted from its forests should not be allowed to be exported outside the territories of the State and should be utilised only by industries set up within the State. There were certain forests which were out of access on account of their distance from the roads and no contractor could be found for taking tapping contracts even on the basis of royalty. The Chief Conservator of Forests and other Forest Officers at a meeting took a decision which was also confirmed at a subsequent meeting, between the Forest Minister, the Forest Secretary and the Chief Conservator of Forests, that the blazes for such inaccessible areas should be allotted to some private party. In view of that decision the second respondent who had earlier addressed a letter to the State Government offering to set up a factory for manufacture of resin turpentine oil and other derivatives in the State and had sought for allotment of 10,000 metric tonnes of resin annu was sanctioned the allotment of 11.85 lacs blazes in the inaccessible areas for a period of 10 years on the terms and conditions set out in the order. This was challenged in the aforesaid case. This Court said that whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position and as such every activity of the Government which has a public element in it must be reasonable and not arbitrary. However, the allotment of the contract in favour of the second respondent was upheld. It was pointed out that the blazes were situated in inaccessible areas and in spite of the offers given no bidders were attracted and as such the State had no option but to allot the said contract on basis of the offer made by the second respondent.

The case of *State of Madhya Pradesh v. Nandlal Jaiswal* (supra) related to grant of liquor licences. The procedure adopted for such grant were being challenged as being violative of Article 14 of the Constitution. It was said by this Court:-

"But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and sale of liquor would essentially be a matter of economic policy where the court would hesitate to intervene and strike down what the State Government has done, unless it appears to be plainly arbitrary, irrational or mala fide."

But even in that case it was said:-

No one can claim as against the state the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege or manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor."

The execution of the supplemental agreement cannot be considered at par with the grant of a liquor licence, which related to any economic policy.

So far the case of Sachidanand Pandey v. State of West Bengal (supra) is concerned, in a public interest litigation the grant of lease in favour of Taj Group of Hotels for establishment of a Five Star Hotel at Calcutta had been challenged. It was said:-

"It is to be seen that in the present case no one has come forward alleging that he has been discriminated against and his fundamental right to carry on business had been affected. The very nature of the construction and establishment of a Five Star Hotel is indicative of a requirement of expertise and sound financial position on the part of those who might offer to construct and establish them. The decision taken by the All India Tourism Council was an open decision well known to everyone in the hotel business. Yet no one except the ITDC and the Taj Group of Hotels had come forward with any proposal. We have it in the record that the Oberoi Group of Hotels already had a Five Star Hotel in Calcutta while the Welcome Group of Hotels were making their own private negotiations and arrangements for establishing a Five Star Hotel. In the circumstances, particularly in the absence of any leading hoteliers coming forward, the Government of West Bengal was perfectly justified in entering into negotiation with the ITDC and the Taj Group of Hotels instead of inviting tenders."

But at the same time it was said:-

"On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established : Stateowned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public action or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

In the case of G.B. Mahajan v. Jalgaon Municipal Council, (supra), a piece of land had been received by the Town Municipal Council, Jalgaon, by way of gift. Initially it had been put to the use

Agricultural Produce Market Committee, as a cotton and wholesale fruit and vegetable market. in terms of the gift, in order to put the land in a better and more profitable use the Municipal Council contemplated a project comprising, inter alia, erection of a commercial complex They also persuaded for change in the terms of the deed of gift subject to condition that heirs should be given five shops free of cost in the commercial complex The scheme contemplated that a developer would execute the entire project at his own cost and would make allotments to the shopkeepers to whom the Municipal Council had given assurances of alternative accommodation at fixed rates. The developer was also to provide the 17 floors of the administrative building free. of cost to the municipality. The choice of the respondent No. 6 as developer for the project aforesaid was questioned. This Court arrived at the following conclusion:-

"In regard to the allegation that the project scheme was tailored to suit respondent 6 alone or that the project as put to tender did not admit of tenders on fixed comparable parameters, we find no merit. Sri K.K. Singhvi submitted that the tender papers were prepared by reputed architects and the precise points on which comparative quotations were invited were specifically incorporated in the tender papers. The point again is that no other tenderer expressed any grievance. The tenders were such that the tenderer could identify the terms which form the basis of comparative evaluation. The charge of arbitrariness cannot be upheld. Tests to be applied in a given case may be influenced by the extent to which a decision is supported by a democratic unanimity` which evidences the decision granted, of course, the power.' From the facts of the aforesaid case it shall appear that Municipal Council had invited competitive proposals as to the ways in which the potentiality of the land could commercially be exploited and had also competitive plans and designs and ultimately respondent No. 6 was entrusted with the execution of the said scheme.

The cases aforesaid on which reliance was placed on behalf of the appellants, have also reiterated that 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 an absolute discretion, certain precepts and principles have to be followed, the public interest being the paramount consideration. It has also been pointed out that for securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and due to. compelling reasons which must stand the test on Article 14 of the Constitution, departure of the aforesaid rule can be made. This Court while upholding the contracts by negotiation in the cases referred to above has impressed as to how in the facts and circumstances of those cases the decisions taken by the State and the authorities concerned were reasonable, rational and in the public interest. The decisions taken in those cases by the authorities concerned, on judicial scrutiny were held to be free from bias, discrimination and under the exigencies of the situation then existing to be just and proper. On the basis of those judgments it cannot be urged that this court has left to the option of the authorities concerned whether to invite tenders or not according-to their own discretion and to award contracts ignoring the procedures

which are basic in nature, taking into account factors which are not only irrelevant but detrimental to the public interest.

From the statements made in the affidavit filed on behalf of the MTNL before that High Court and from the relevant minutes of the Board of the MTNL which were produced before the High Court during the course of the hearing and copies thereof have also been produced by one of the appellants before this Court, it appears that the Board in its 28th meeting held on 28.12.1990 considered the default made by UIP in not publishing the directories in terms of the agreement every year. The Board took note of the fact that UIP had run into financial difficulties and cash flow problem. The banks who had advanced loans to them have not yet received back the payments. The paper mills were not willing to supply paper on credit. The printing presses were also not prepared to print the directories without getting advance payments. In this background the Board considered the three options (1) to invoke the penalty clause and print the Directory by the MTNL at the risk and cost of the UIP. (ii) provide the necessary loan secured or unsecured to print the directories, (iii) to terminate the contract and award the work to some other contractor. The matter was again considered in the 29th meeting of the Board held on 29th March, 1991 where a note was put up saying that if the contract with the UIP was terminated and a decision was taken to go in for a fresh tender the following problems may arise (i) UIP/UDI may put legal obstacles in retendering,

(ii) the response for printing and delivering the directories free of cost and also paying royalty may be poor from the parties, considering the failure of the present experiment and prohibitive increase in the cost of paper and printing, (iii) the concept of the yellow pages may suffer a big set back and may make it unattractive to the advertisers because of the loss of confidence. The Board in its 29th meeting discussed the aforesaid agenda and took a decision that MTNL has no option but to grant loan to UIP/UDI to help them to print out the directories. The Board also felt that grant of the loan to UIP/UDI was quite risky but the said distress measure had to be taken to avoid any stalemate and was in the large interest of the MTNL. The matter was further discussed in the 31st meeting of the Board held on 6th August, 1991. The agenda note for this meeting after stating the aforesaid circumstances said that UIP had approached MTNL once again with a package of proposals in supersession of their all requests/proposals made earlier, so that they may be bailed out of their financial problems and assuring uninterrupted supply of directories for the revised period of contract. The note recorded that proposal had also been received from Sterling through UDI to print and publish the directories of the MTNL with their financial support. A decision was taken in order to enable the MTNL to salvage the contract and get the job executed without further delay and to avoid consequent inconvenience to the customers, to negotiate on revised terms with UIP/UDI/Sterling. There is no dispute that the Board in its 32nd meeting held on 19th August, 1991 approved the new terms and conditions, and took a decision that an extension of the contract be given to UIP/UDI and Sterling for printing the 13

issues of directories for Delhi and Bombay.

On basis of that decision the impugned supplemental agreement was executed on 26th September, 1991. In the facts and the circumstances of the present case it has to be held that the MTNL has applied the "irrelevant considerations" doctrine while granting a fresh contract for a period of five years through the supplemental agreement dated 26th September, 1991, because it has failed to take into account considerations which were necessarily relevant i.e. following the rule of inviting tenders while granting the contract for a further period of five years on fresh terms and conditions and has taken into account irrelevant considerations that (i) if the contract is terminated and a decision is taken for a fresh tender, the UIP/UDI may put legal obstacles in retendering, (ii) the response for printing free of cost and also paying the royalty may be poor (iii) the concept of the yellow pages may suffer a big set back and may make it unattractive to the advertisers because of the loss of confidence. MTNL should have been conscious of the fact that admittedly the UIP/UDI had miserably failed in performing their part of the contract for a period of five years, inasmuch as they were required to publish between the period 1987-1991 one issue of the main directory every year for Delhi and Bombay apart from supplementary. Instead of that they published for the year 1987 directories for Delhi and Bombay after a delay of seven months and six months respectively. The Delhi issue of directory for the year 1988 was published only in August, 1990. So far Bombay is concerned there was no publication for the years 1988, 1989, 1990 and 1991. The MTNL also overlooked the fact that the period of contract had already expired and as such the MTNL was in error in treating the supplemental agreement as only an extension of the original agreement. Learned counsel appearing for the appellants did not dispute and contest that by the supplemental agreement the period of contract which had expired in 1991 was extended upto 1997/1998 for printing the directories for Delhi and Bombay, and that the terms and conditions were different. For the period 1991-1997 additional royalty which had been agreed to be paid by the UDI/UIP/Sterling was only Rs. 10 crores whereas for the period 1987-1991 it was Rs. 20.16 crores.

Philanthropy is no part of the management of an undertaking, while dealing with a contractor entrusted with the execution of a contract. The supply of the directories to public in time, was a public service which was being affected by the liberal attitude of the MTNL and due to the condonation of delay on the part of the UIP/UDI. There was no justification on the part of the MTNL to become benevolent by entering into the supplemental agreement with no apparent benefit to the MTNL, without inviting fresh tenders from intending persons to perform the same job for the next five years. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. The contract awarded for the publication of the directories had not only a commercial object but had a public element at the same time i.e. to supply the directories to lakhs of subscribers of telephones in Delhi and Bombay, every year within the stipulated time free of cost. In such a situation MTNL could not exercise an unfettered discretion after the repeated breaches committed by UIP/UDI, by entering into a supplemental agreement with the sterling for a fresh period of more than five years on terms which were only beneficial to UIP/UDI/Sterling with corresponding no benefit to MTNL, which they

have realised only after the High Court went into the matter in detail in its judgment under appeal. The supplemental agreement is really a fresh agreement with fresh terms and conditions which has been entered by MTNL without inviting any tender for the same. The supplemental agreement has been entered to benefit the parties who are admittedly defaulters by not publishing directories for Bombay for the years 1988, 1989, 1990 and 1991 and for Delhi for the years 1989, 1990 and 1991 although they had collected several crores of rupees for the advertisements for the directories to be published in the aforesaid years. We fail to understand as to how a fresh contract for a period upto 1997/1998 was awarded to UIP/UDI/Sterling in the garb of an agreement for extension of the period of the original agreement taking into account irrelevant factors as already enumerated above. If the supplemental agreement has been executed without following the procedures which are essential in view of the repeated pronouncements of this Court and taking into consideration irrelevant factors, then can it be said that "decision making process" before the supplemental agreement was entered into was consistent with the requirement of Article 14 of the Constitution? In such a situation there is no scope for argument that any interference by Court shall amount to an intervention like a court of appeal. Once the process through which the supplemental agreement was executed is held to be against the mandate of Article 14 of the Constitution, the supplemental agreement shall be deemed to be void. The appellants also took an objection to the maintainability of the writ application, on the ground of delay and laches. It was pointed out that supplemental agreement was entered into on 26th September, 1991 whereas the Writ Petition was filed before the High Court on 19th May, 1992, although during this period the petitioners had full knowledge about the supplemental agreement. According to the petitioners, the supplemental agreement was kept as a guarded secret by the MTNL as well as UIP/UDI/Sterling and it is only in April 1992 the petitioners could know some details of the supplemental agreement. In this connection our attention was drawn to an advertisement published on 27th September, 1991 saying that official Bombay directory was being released in December, 1991 and Delhi telephone directory in January, 1992. That advertisement was given on behalf of the UDI only. In the body of the advertisement it was mentioned that UDI and Sterling have made all necessary arrangements to ensure that every subscriber receives up-to-date directory in Delhi and Bombay in time. It was urged on behalf of the writ-petitioners that under the supplemental agreement it was the Sterling who had been given the right to publish the directories and as such in normal course the advertisement should have been given in the paper on behalf of the Sterling but only with an ulterior motive the advertisement was published on behalf of the UDI. Our attention was also drawn to several communications addressed by the Department of Telecommunications, Madras, to the different authorities of the MTNL making enquiries as to whether the Sterling had been entrusted with the printing of directories for Delhi and Bombay, as tenders for printing and supply of main telephone directories with yellow pages on turnkey basis were under consideration at Madras. The aforesaid queries were made in the month of December, 1991. The office of the Chief General Manager, MTNL, on 2nd January replied to the Divisional Engineer, Madras Telephones, saying "perhaps, MTNL, Corporate Office have entrusted some job of printing of telephone directories to M/s Sterling Computers Ltd. In this connection, you are therefore requested to contact Chairman-cum-Managing Director, MTNL". A letter dated 30.12.1991 was addressed by Sterling to the Divisional Engineer, Madras Telephones, in reply to the query whether they had been entrusted with the printing and supply of telephone directories, saying "Much as we would like to provide you a copy of the order of Mahanagar Telephone Nigam Ltd. we are unable to do so due to certain circumstances beyond our control."

Reference was made to yet another communication dated 30.12.1991 addressed by MTNL to Deputy General Manager, Madras Telephones, saying that so far the Sterling Computers were concerned "they have been allowed a sub-contract by M/s UDI for printing the directories for Delhi and Bombay", without giving the details of any such contract. It was pointed out on behalf of the writ-petitioners that an affidavit, was filed on behalf of the Sterling, before the Madras High Court in connection with another Writ Petition on 19.4.1992, in which the details of the supplemental agreement were disclosed. The Writ Petition in the Delhi High Court was filed on 19.5.1992. Under the circumstances mentioned above it is difficult to reject the Writ Petition on the ground of delay and laches.

As already mentioned above, Mr. Venugopal, the learned counsel appearing for the writ-petitioners, offered an amount of Rs. 60 crores on behalf of the writ-petitioners as royalty to the MTNL for printing the directories for Delhi and Bombay for the period of the supplemental agreement, if the said job is entrusted to them on the same terms and conditions. For that period the UIP/UDI/Sterling have offered only Rs. 10 crores as additional royalty. This Court could have considered the desirability of directing the MTNL to consider the said offer of Rs. 60 crores on behalf of the writ-petitioners by according to us, if any such direction is given and on basis of such direction the job of printing the directories for the period in question is given to the writ-petitioners, the procedure so adopted shall suffer from the same vice. The MTNL will enter into an agreement with the writ-petitioners without inviting tenders and without offering opportunities to others who may be interested in the printing of the directories for Delhi and Bombay. As such while affirming the judgement of the High Court, we direct that all steps should be taken by MTNL as early as possible for publishing the directories for Delhi and Bombay so that public in general should not suffer any more. The appeals are accordingly dismissed but in the facts and circumstances of the case there shall be no order as to costs.

Before we part with the judgment we shall like to strike a note of caution. It is a matter of common experience that whenever applications relating to awarding of contracts are entertained for judicial review of the administrative action, such applications remain pending for months and in some cases for years. Because of the interim orders passed in such applications, the very execution of the contracts, are kept in abeyance. The cost of different projects keep on escalating with passage of time apart from the fact that the completion of the project itself is deferred. This process not only affects the public exchequer but even the public in general who are deprived of availing the facilities under different projects. As such it need not be impressed that while exercising the power of judicial review in connection with contractual obligations. Courts should be conscious of the urgency of the disposal of such matters, otherwise the power which is to be exercised in the interest of the public and for public good in some cases becomes counter-productive by causing injury to the public in general.

N.V.K.

Appeals dismissed.