(1983) 03 AHC CK 0003

In the Allahabad High Court

Case No : Writ Petition No. 5174 of 1982

Artee Minerals, etc. — APPELLANT

Vs

State of Uttar Pradesh and Others — RESPONDENT

Date of Decision : 16-03-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226

Citation : (1983) 03 AHC CK 0003

Hon'ble Judges : S.S. Ahmad, J;S.C. Mathur, J

Bench : Division Bench

Advocate : S.K. Kalia, for the Appellant; A.N. Verma and K.B. Sinha, for the Respondent

Judgement

S.C. Mathur, J.—The dispute in this petition pertains to grant of contract for the supply of insecticides to the Medical and Health Department of the Uttar Pradesh Government. The dispute has arisen in the circumstances hereinafter indicated.

2. On 17-5-1982 the joint Director (Stores), Central Medical Stores Depot, in the Directorate of Medical and Health Services, Lucknow, opposite party No. 3, invited tenders for the supply of 3600 metric tonnes of Banzyl Hexachloride (6.5 gamma isomer W.D.P. ISI marked conforming ISI specification No. 562 of 78 with latest amendments), hereinafter referred to as the insecticides. Several firms, including the six Petitioners and opposite parties 4 to 6, submitted their tenders. In all twenty firms submitted the tenders, out of the twenty firms who submitted the tenders, the tenders of five were found to be not in order and, therefore, these tenders were rejected. The tenders were opened on 7-6-1982. On 14-6-1982 the Central Purchase Committee decided that for firms situate outside the State of U.P., the minimum rate of supply shall be treated as Rupees 7,525/- per metric tonne and for firms in the State of U.P. it shall be treated as Rs. 7,900/- by giving them preference of 5% in rates. It was also decided that telegrams be sent to firms which had been found qualified inviting from them quotations by 21-6-1982. In these quotations the firms were required to quote

the minimum rate for the supply of the insecticides in question. In pursuance of this decision telegrams were sent on 15-6-1982 by opposite party No. 3 to the Petitioners and Respondents 4 to 6 and six other firms requiring them to quote their minimum rate for the supply of insecticides and the quantity which they were capable of supplying in the months of July and August. They were also required to quote the minimum rate for the supply of 1,400 metric tonnes which were to be purchased in February, 1983. In pursuance of the telegram, the Petitioners and opposite parties 4 to 6 gave their quotations in sealed envelopes. These sealed envelopes were opened on 21-6-1982. The Petitioners have annexed as Annexure No. 3 (sic) comparative chart of the rates tendered or quoted by each of the six Petitioners and opposite parties 4 to 6. This chart indicates that all the six Petitioners quoted Rs. 7,490/- per metric tonne while opposite party No. 4 quoted Rupees 7,600/- and opposite party No. 6 Rs. 7,850/-. The rates submitted by opposite party No. 5 varied between Rupees 7,290/- per metric tonne and Rupees 7, 450/- per metric tonne depending upon the quantity. Thus the rates submitted by opposite party No. 5 were the fewest and the next lowest rate was of the six Petitioners. The Central Purchase Committee again met on 24-6-1982 and recommended purchase of insecticide from live firms, including opposite party No. 4. The recommendations of the Central Purchase Committee were considered by the High Power Committee constituted by the State Government. In pursuance of the decision of the High Power Committee, the State Government issued its order dated 15-9-1982. In this order it is mentioned that the rate of Rs. 7,290/- per metric tonne is the lowest and, therefore, insecticide may be purchased at this rate from opposite parties 4 to 6. It may be mentioned that this was one out of the four rates quoted by opposite party No. 5. It was further mentioned that if these firms were not prepared to supply at this rate, supplies on pro rata basis may be obtained from other qualified firms if they were prepared to supply at this rate. In regard to opposite party No. 5 it was observed that at Lalitpur this firm had made supplies of substandard material and despite requests the firm did not send its representative for joint sampling. It was then mentioned that the firm had informed the department through its letter dated 9-9-1982 that it would replace the material at Lalitpur at its own cost and action for replacement may be taken through the Directorate. It appears that on coming to know of the fact opposite parties 4 to 6 have been required to supply insecticide at the rate of Rs. 7,290/- the Petitioners made a representation to the Chief Minister offering reduction in their rates and offered the reduced rate of Rupees 7,190/- per metric tonne. Applications appear to have been made by the Petitioners to the Director of Medical and Health Services and Secretary, (sic) requesting them not to take action on the file regarding purchase of insecticide. The Petitioner''s further case is that they made a request for negotiations on the same terms and conditions on which they were made with opposite party Nos. 4 to 6 but the same was not accepted.

3. On the above facts the Petitioners'' contentions are as follows:

I. Action of the State Government is wholly arbitrary and, therefore, violative of Article 14 of the Constitution for the following reasons:

(1) The Petitioners and opposite parties 4 to 6 were similarly situated and, therefore, opportunity to reduce the rates given to them should have been afforded to the Petitioners also.

(2) Although the tender notice provided that conditional tenders will not be considered, the conditional tender of opposite party No. 5 was considered and it was accepted.

(3) Although in the guidelines of the Central Government (Annexure 6) it had been provided that firms involved in fraudulent deals or in making substandard supplies should be excluded from consideration, opposite party No. 5 which had made substandard supplies at Lalitpur in 1979 was selected for the present supply.

II. By the method adopted by the Government the Petitioners have been excluded from consideration and, therefore, they have been denied the right to carry on their trade or business; thus Article 19(1)(g) of the Constitution has been violated.

4. The petition has been contested by all the opposite parties. On behalf of the State of Uttar Pradesh, opposite party No. 1, counter-affidavit has been filed by Miss Vibha Puri, Deputy Secretary, Medical, Health and Family Welfare, and on behalf of opposite parties 2 and 3, namely, Director of Medical and Health U.P. and Joint Director (Stores) Central Medical Stores Depot, by Dr. S.K. Saxena, Joint Director (Stores) on behalf of opposite parties M/s. Plant Cure Concentrate, M/s. Prakash Pulverising Mills and M/s. Industrial Chemical and Minerals, opposite parties 4, 5 and 6 respectively, counter-affidavits have been filed by Sri K.C. Batra, Sri Gopal Krishna Agrawal and Sri U.K, Garyali.

5. To controvert the defence raised through the counter-affidavits the Petitioners have filed rejoinder-affidavits.

6. At the time of the hearing of the writ petition a preliminary objection was raised on behalf of the opposite parties. It was contended on their behalf that the dispute raised on behalf of the Petitioners related to the field of contract and, therefore, writ petition was not maintainable. In support of the preliminary objection reliance was placed upon Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, Kulchhinder Singh v. Hardayal Singh Brar AIR 1976 SC 2116; Radhakrishna Agarwal and Others Vs. State of Bihar and Others, .

7. On behalf of the Petitioners the above authorities were sought to be distinguished and reliance was placed upon the decision of their Lordships of the Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, ; and to a Division Bench decision of this Court in Sowrabh Industries v. State of

U.P.(Writ Petition No. 4920 of 1982) decided on 24-2-1983.

8. In the present case it is not the plea of the Petitioners that the contract in question was governed by statutory provisions. In Radhakrishna Agarwal and Others Vs. State of Bihar and Others, their Lordships drew distinction between State''s action prior to entry into contract and subsequent thereto and held (at p. 1500):

After the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of Violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 of the Constitution is involved here....

Proceeding further their Lordships observed in the same paragraph 11 thus:

Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, ''prerogative'' powers of the Court are invoked.

From the above observations it would be seen that in the case of non-statutory contract after the contract had been entered into a writ petition under Article 226 of the Constitution will not be maintainable for the enforcement of the obligation arising from the contract. . But before the contract has been entered into a writ petition may be maintainable on the ground of violation of fundamental rights enshrined in the Constitution. In the present case the Petitioners do not allege violation of the terms of the contract because no contract was in fact entered into between the Petitioners and the State. Their case is that in giving contract to opposite parties 4 to 6 the State has acted arbitrarily thereby violating Article 14 of the Constitution and also Article 19 (1)(g) inasmuch as the action of the State Government amounts to exclusion of the Petitioners from consideration for the contract. If the Petitioners'' plea can be sustained, they may be said to be entitled to maintain this writ petition because their case is not hit by the first category of cases dealt with by their Lordships.

9. Now the authorities relied upon, by the learned Counsel for the Petitioners may be examined. In Shetty''s case AIR, 1979 SC 1628 (supra) the grievance of the Petitioner was that by the procedure adopted by the executive authority he had been excluded from consideration. Their Lordships found that the grievance was correct and the exclusion was arbitrary and, therefore, the executive action was held to be bad. In Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, the Petitioners had not been excluded from consideration. The Petitioners'' grievance in this case was that the State was not entitled to give the contract by private negotiations and that the contract could be given only by public auction. The successful contractor in this case had given his terms on which he was prepared to take the contract and the Petitioners also had given their terms and -after a consideration of the terms and conditions offered by both, the State rejected the offer of the Petitioners and accepted the offer of the successful contractor. This, therefore, was not a case where the Petitioner had been excluded from consideration. This writ petition WAS rejected. Applying the law laid down by their Lordships in the two cases mentioned hereinbefore the Division Bench Which heard the writ petition of Sowrabh Industries (supra) allowed the petition on the basis that the Petitioner was completely excluded from consideration without any reason. The Bench summoned the record from the State Government and found that the Minister concerned who directed that the allotment be made in favour of Respondent No. 4 did not indicate any reason why the Petitioner''s case be not considered either at the time of auction or at the time of private negotiations.

10. From a survey of the above authorities, two conclusions are deducible;

(1) In the case of a non-statutory contract no writ petition would be obligations arising from the contract;

(2) The right to choose the person with whom the Government would enter into contract vests in the Government but in making the choice the Government cannot act arbitrarily and if it does so, its action can be challenged under Article 226 of the Constitution.

11. The question that now arises for consideration is what is the amplitude of the power exercisable in the second category of cases? Will the Court strike down the action because the Government has accepted the tender of a firm which has quoted higher rates, in preference to the firm which has quoted lower rates? Will the Court interfere because the supply capacity of firm ''X'' is better than of the firm selected by the Government? A lower rate may result in supply of substandard material. Similarly, material may be available with a firm in large quantity but there may be mismanagement with the consequence that the supplies do not reach on time. The terms offered by a firm may be apparently attractive but the firm has not been tried earlier and, therefore, a firm which has

been tried eariler is chosen although its term are not as favourable as of the former firm. In other words a tried hand is preferred to a raw hand. A private individual takes these and similar other factors into consideration while choosing his contractor. There is no reason why the State should not be allowed to take similar factors into consideration while choosing the person with whom it would enter into contract. In our opinion in such cases the Court can exercise only a very limited jurisdiction. The decision of the executive in choosing the person from whom it would obtain supply cannot be scrutinised by the Courts in the same manner as they scrutinise the judgments and orders of judicial or quasi-judicial authorities in order to find out whether they suffer from errors apparent on the face of the record. The Courts may interfere only when the arbitrariness in the procedure adopted by the executive authority results in exclusion of the Petitioner from consideration involving thereby violation of the guarantee contained in Article 19(1)(g) of the Constitution. Where a person is excluded from consideration, his right to carry on trade or business is affected and thereby Article 19(1)(g) is violated. A private individual is not required to give opportunity to others to offer their rates but this opportunity cannot be denied by the State to its citizens. The State cannot arbitrarily choose a person from whom it will obtain supplies or to whom it would give contract in respect of any matter. Even in Shatters of contract the State has to deal with its citizens with fairness and impartiality. Therefore, when the State decides to enter into a contract, it must give equal opportunity to all to offer their terms. Giving opportunity to all to offer their terms will not be enough. To give full effect to Article 19(1)(g) these offers or tenders must get equal and fair consideration also and once this too has been done, the State action cannot be challenged by the unsuccessful tender on the ground that the terms offered by him were more favorable or he had better capacity to fulfill the requirements of the State.

12. We have been led to take the above view because if a contrary view is taken great hardship may be caused not only to the State but also to its subjects. The State obtains supplies of materials for its commercial activities as well as for activities directed towards welfare of the people. It obtains medicines to be used in hospitals run by the State. There are several life saving medicines which are required to be administered to patients admitted in Government hospitals. Should supply of these medicines be allowed to be involved in litigation? If an unsuccessful tender for the supply of such a medicine files a writ petition and obtains a I stay order in respect of the supply the consequence can be well imagined. Perhaps the medicine will reach the hospital only after the patient has died. Similarly the State obtains supplies of drugs for eradication and prevention of the spread of various types of diseases. The insecticide in question is used for eradication of malaria and in preventing the spread of the disease. If supplies of such commodities get bogged on account of court proceedings, the sufferers are the patient and the people at large. The relevance of some of the materials required by the State may be for a specific period only. After the period is over, the material may not be required or the mischief may have been done already:

The law has to be uniform in respect, of all non-statutory contracts entered into by the Government. We cannot say that a citizen will not be entitled to file a writ petition when the supply relates to. medicines or drugs, or insecticides but he will be entitled to file it if it relates to, any other commodity. We have taken the case of a, life saving medicine only by way of illustration. There may be situations where the contract itself may be frustrated by the supply not reaching on time. For all these considerations we are of the opinion that in the sphere of non-statutory contracts, and the present is one such, the Courts may interfere but only to find out whether the Petitioner has been excluded from consideration. Once the Court comes to the conclusion that the Petitioner has not been excluded from consideration, the jurisdiction of the Court will end. In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and in Sowrabh Industries case (supra) the Petitioners had been excluded from consideration and, therefore, the State action was held to be bad.

13. In the light of the above legal position we have to find out whether the procedure adopted in the present case has resulted in exclusion of the Petitioners from consideration. The material on record does not establish that the Petitioners were at any stage excluded from consideration. Right UP TO the stage of selection of opposite parties 4 to 6, the Petitioners remained on the scene. When in pursuance of the State Government''s decision dated 14-6- 1982 tender were required to quote their minimum rates, the Petitioners were also given the opportunity to quote their minimum rates.

The Petitioners over their exclusion by pleading that when in pursuance of. the Government decision dated 15-9-1982, Annexure 4, opposite parties 4 to 6 were required to make supplies at the still reduced rate of Rs. 7,290/- per metric tonne, the Petitioners were not given opportunity to reduce their rates.

A perusal of the Government Order would show that the Government first decided the price at which it would purchase the insecticide. It found that one of the rates quoted by opposite party No. 5 was the lowest being Rs. 7,290/- per metric tonne. The Government decided that it would purchase at this rate only. Thereafter the Government proceeded to choose the firm from which it would obtain the supply. One of the firms chosen was the one which had tendered the lowest rate, namely, opposite party No. 5. Thereafter the Government selected opposite parties 4 and 6. It has been stated in the counter affidavit filed on behalf of the State that opposite parties 4 and 6 were selected because they had factories within the State of Uttar Pradesh. In other words opposite parties 4 and 6 were chosen, on geographical consideration. From the Government Order, therefore, it is apparent that reduction in the quoted price is not the basis for selecting opposite parties 4 to 6. They were first selected and thereafter opposite parties 4 and 6 were requested to make supplies at the rates tendered by opposite party No. 5. The order itself provides that orders may be placed on these firms if they are agreeable to supply at the reduced rate of Rs. 7,290/-. Thus the reduction follows selection and does not precede it. In our opinion, therefore the Petitioners'' grievance that they were excluded from consideration before choosing opposite parties 4 to 6 cannot be sustained.

14. In view of the above and in view of the legal position discussed herein before, it is not necessary to consider the other grounds of arbitrariness alleged by the Petitioners. However, we propose to deal with them also.

15. It is alleged on behalf of the Petitioners that the Petitioners and opposite parties 4 to 6 were similarly situated and, therefore, when opportunity was afforded to opposite parties 4 and 6 to reduce their rates, the same should have been provided to the Petitioners also. As discussed above, the State Government did not give any such opportunity to opposite parties 4 to 6. Only after selecting the lowest rate tendered by opposite party No. 5 it requested opposite parties 4 to 6 to supply at the said rates. When the Petitioners had not been selected at all there was no question of making a similar request to them.

16. It is next contended that the tender notice provided that conditional tender will not be accepted yet the conditional tender of opposite party No. 5 was accepted. As appears from Annexure No. 3, opposite party No. 5 quoted its rates as follows:

(See Annexure 3 below)

(Contd. on col. 2)

Rates offered Capacity in Remarks.

1. Rs. 7,450.00 1400 MTS for 1 MTS to 500 MTS

2. Rs. 7,390.00 - for 501 MTS to 750 MTS

3. Rs. 7 340.00 - for 751 MTS to 1000 MTS

4. Rs. 7,290.00 - For 1001 MTS to 1400 MTS

The submission of the learned Counsel is that the rates quoted are dependent upon the quantity ordered and, therefore, the tender is conditional. In our opinion the argument is misconceived. The rates have been quoted on slab basis but that does not make the tender conditional as it was nowhere provided by opposite party No. 5 that it would make supplies only if a particular quantity was ordered. There was no prohibition in the tender notice against tendering on slab basis. Such a mode of tender is not unknown to commercial world. In the circumstances the Petitioners'' grievance that the tender of opposite party No. 5 was conditional cannot be sustained.

17. The next item of arbitrariness is alleged to be the selection of opposite party No. 5 who had practised fraud upon the Government by supplying substandard material and was, therefore, disqualified to get the contract under the guidelines of the Central Government (Annexure 6). It the State Government''s order dated 15-9-1982, Annexure 4, and also in the affidavit filed on its behalf it has been stated that opposite party No. 5 supplied substandard material in 1979 at

Lalitpur. The position with regard to the supplies made by this firm has been explained in paragraph 24 of the counter-affidavit filed on behalf of opposite parties 2 and 3. It has been stated in this counter- affidavit that in 1979 the firm supplied BHC 50% at 9 places in Uttar Pradesh including Lalitpur and joint sampling was made at eight out of nine places and the samples were found to be standard. At the 9th place, namely, Lalitpur, joint sampling could not be done within the life period of the material and it was only after the expiry of the period that the firm was asked for joint sampling. The firm wrote back that joint sampling could not be done at that late stage but it would replace the material. The learned Counsel for the Petitioners could not counter the argument of Sri Jagdish Swaroop, learned Counsel for one of the Respondents, that an important component of the insecticide is Gamma isomer which disintegrates within two years and therefore, a survey made after that period is of no avail. It is not the case of the Petitioners that the material was found substandard at joint sampling or on analysis. Thus there remained only an allegation of substandard supply without any proof thereof. On these undisputed facts it cannot be said that opposite party No. 5 had in fact supplied substandard material. The fact that when sampling was done at eight out of nine places, the samples were found to be standard can also not be lost sight of.

18. No arbitrariness can be said to have been practised in choosing the rate of Rs. 7,290/- per metric tonne. This is not an untendered rate. Out of the four rates tendered by opposite party No. 5 this was the lowest and it was the lowest as compared to the other tenders also including the Petitioners''. When this rate was tendered by opposite party No. 5 the Petitioners also had the opportunity to reduce their rates.

19. On behalf of the opposite parties the selection of opposite party No. 5 has been justified on the basis that its rates were the lowest and of opposite parties 4 and 6 on the ground that they were firms having their factories in the State of Uttar Pradesh to which preferential treatment could be given in order to boost up State Industry. The provisions of the Financial Handbook were also relied upon to re-inforce the argument that preferential treatment could be given to State industry. Learned Counsel for the Petitioners did not dispute the proposition that discrimination could be practised on geographical ground but his argument was that even while practising discrimination on geographical ground there has to be reasonable nexus with the object sought to be achieved. The obvious purpose of giving preferential treatment to State industry is to boost up the financial position of the State and this is a reasonable ground for practising discrimination.

20. In view of the above the petition fails and is hereby dismissed with cost to the opposite parties. Opposite parties 1 to 3 are represented by the Chief Standing Counsel and they will together receive one set of costs from the Petitioners. Opposite parties 4, 5 and 6 were represented by separate counsel and each of them will, therefore, receive a separate set of costs. Stay order, if any, shall stand discharged.

21. After the above judgment had been pronounced the learned Counsel for the Petitioners prayed for a certificate of fitness to file appeal before their Lordships of the Supreme Court. The view that we have taken is not directly covered by any decision of their Lordships of the Supreme Court. We are, therefore, of the opinion that the question raised in the petition is a substantial one and is one of general importance which needs to be decided by their Lordships of the Supreme Court. The leave prayed for is, therefore, granted.