

(1981) 03 OHC CK 0016

In the Orissa High Court

Case No : Original Jurn. Case No. 1569 of 1979

B. Rajkumar Patra

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-03-1981

Acts Referred:

Constitution of India, 1950 — Article 12
Contract Act, 1872 — Section 38, 7
Electricity Rules, 1956 — Rule 45

Citation : AIR 1981 Ori 143 : (1981) 51 CLT 437

Hon'ble Judges : R.N. Misra, C.J.;J.K. Mohanty, J

Bench : Division Bench

Advocate : R. Mohanty, A.K. Tripathy, Sanjit Mohanty and A. Mukherjee, for the Appellant; Jayant Das, Standing Counsel (Central), Jasobanta Das and Taley Hafiz, for the Respondent

Final Decision : Dismissed

Judgement

Misra, C.J.—Opposite party No. 2, Indian Rare Earths Limited, is a "Government Company" with its registered office at Bombay in which all the shares are held by the Government of India. The Orissa Sands Complex (opposite party No. 3) (hereinafter referred to as "OSCOM") is a project under the said Company operating at Chatrapur within the territorial jurisdiction of this Court, which is engaged in manufacture of radio-active sand and Thorium in terms of the provisions of the Atomic Energy Act, 1962. By notice (Annexure 1) tenders were invited from competent contractors for execution of certain electrical work for OSCOM against specification No. OSCOM/E-25, the estimated cost of the work being Rs. 2,50,900. In paragraph 2 of the notice of invitation, it was stipulated:--

"No tender will be received after 2.30 P. M. on 23-5-1979 under any circumstances whatsoever."

and tenders were to be opened at 3 P. M. that day. The tender notice contained the usual clause that without assignment of any reason, right to reject the lowest

or any tender was reserved by the employer. Petitioner who claims to be a qualified electrical engineer and carries on business as a contractor submitted his tender in accordance with the requirements of the terms along with three others. According to the writ application, the tenders were opened at the appointed hour in presence of the tenderers and they were given the impression that the tenders would be considered in due course. It is alleged in the writ application that petitioner's tender was the lowest of the four that had been received within the appointed time. No intimation was, however, sent to the petitioner or the other tenderers about acceptance or rejection of the tenders. Petitioner upon enquiry gathered that the opposite parties negotiated with a firm who had not submitted any tender within time -- M/s. Laguna Engineering (opposite party No. 5) (hereinafter referred to as "Laguna") which is a Calcutta based company. Upon enquiry, petitioner further came to learn that Laguna had not given any tender by the time appointed nor was its tender opened at 3 P. M. on the appointed date. The Chief Project Manager wrote back to petitioner in answer to petitioner's query vide Annexure 3 to the following effect:--

"Please refer to your telex of 11th September, 1979 and subsequent letter dated 12th September, 1979 regarding your tender dated 23-5-79 for OSCOM construction power distribution system against specification No. OSCOM/E-25. We looked into the details of the case and would like to assure you that the tender was decided on merits. The offer of M/s. Laguna was accepted under bona fide circumstances and in the best interests of our company. We hope, this will dispel any misapprehension you may have on the subject."

Petitioner thereafter filed this writ application challenging the action of opposite parties 2 and 3 in entrusting the work to opposite party No. 5 on various allegations.

2. At the hearing Mr. Mohanty for the petitioner confined his submissions mainly to two aspects:--

(i) Opposite Party No. 2 is an instrumentality of the State and, therefore, comes within the meaning of "State" in Article 12 of the Constitution. It was not entitled to make any discrimination between citizen and citizen and denial of equal opportunity to citizens carrying on business with it is justiciable; and

(ii) Laguna did not satisfy the requirements of Rule 45 of the Indian Electricity Rules, 1956 and, therefore, the work could not have been entrusted to it.

3. There is no dispute that in the tender notice there was a categorical stipulation that after 2.30 P. M. on the appointed date, no tender would be received under any circumstances whatsoever. Admittedly, Laguna did not submit the tender within the appointed time. In fact, its tender was not opened at 3 P. M. along with the other tenders. Mr. Jayanta Das appearing for opposite party No. 3 contended that conceding that opposite party No. 2 was an instrumentality of the State, acceptance of the tender in the instant case of Laguna could not be challenged on the ground that there had been any infraction of the clause in the

tender notice. In the counter-affidavit, it has been indicated at length and counsel for opposite party No. 3 has reiterated before us the same to the effect that the representative of Laguna came from Calcutta to submit the tender along with the requisite draft for purposes of security. The train by which the representative travelled ran unusually late on the day and, therefore, within the time stipulated in the tender notice, the representative could not reach the destination and present the tender. An enquiry about the correctness of this allegation was made and on being satisfied that the delay in the circumstances was beyond the control of the representative, the tender was accepted. This reasoning does not at all appeal to us. Whatever may have been the reason, the clear stipulation was that no tender after the appointed time would be received. Since opposite party No. 3 had decided to invite tenders and the procedure usually followed in public offices had been adopted, there was no justification for the OSCOM to deviate from the normal method and take upon itself the responsibility of accepting a tender which did not satisfy the clear requirement of the notice. Delayed arrival of the train could not constitute a justification in the face of the terms of the tender notice to accept the tender furnished beyond time.

The next question for consideration is whether the Indian Rare Earths Limited is an instrumentality of the State. This question has been examined in three recent decisions of the Supreme Court, the first one being the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . That was a case where the International Airport Authority of India set up under the International Airport Authority Act, 43 of 1971, had invited tenders from registered second class hoteliers having at least five years" experience of putting up a second class restaurant and two snack bars at the International Airport at Bombay for a period of three years. The latest point of time up to which the tenders could be submitted was stipulated in the notice and tenders were to be opened half an hour after the optimum point of time set for receiving tenders. There were six tenders received in response to the tender notice. One of the conditions was five years" experience as second class hotelier. The International Airport Authority entered into correspondence with respondent No. 4 and on certain facts being disclosed accepted the tender. This acceptance was challenged by filing a writ application which was dismissed in the High Court on merit. The Supreme Court did not agree with the High Court but ultimately did not interfere in view of the delay and other equitable considerations. The Court found that the test of eligibility laid down in the tender notice was an objective test and not a subjective one and as a fact the fourth respondent did not have the requisite qualification. The Court pointed out (at p. 1642):--

"Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily

and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance."

In paragraph 32 of the judgment, the Court proceeded to examine whether the airport authority was an instrumentality of the State. The provisions of the statute under which the authority was set up were analysed. The purpose for which the authority has been constituted was examined. The Court found:--

"..... The functions of the 1st respondent are specified in Section 16 : Sub-section (1) provides that, subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the 1st, respondent to manage the airports efficiently and Sub-section (2) casts an obligation on the 1st respondent to provide at the airports such services and facilities as are necessary or desirable for the efficient operation of air transport services and certain specific functions to be performed by the 1st respondent are particularised in Sub-section (3). These functions were, until the appointed date, being carried out by the Central Government but now u/s 16 they are transferred to the 1st respondent. Section 20 provides that after making provision for reserve funds, bad and doubtful debts, depreciation in assets and all other matters which are usually provided for by companies, the 1st respondent shall pay the balance of its annual net profits to the Central Government. Section 21 requires the 1st respondent to submit for the approval of the Central Government a statement of the programme of its activities during the forthcoming financial year as well as its financial estimate in respect thereof at least three months before the commencement of each financial year and Section 24 provides that the accounts of the 1st respondent shall be audited annually by the Comptroller and Auditor General and the accounts as certified by the Comptroller and Auditor General or any other person appointed by him in this behalf, together with the audit report thereon, shall be forwarded to the Central Government and the Central Government shall cause the same to be laid before both Houses of Parliament. The 1st respondent is also required by Section 25 to prepare and submit to the Central Government, as soon as may be after the end of each financial year, a report giving an account of its activities during that financial year and this report has to be laid before both Houses of Parliament by the Central Government. The officers and employees of the 1st respondent are deemed by Section 28 to be public servants and Section 29 gives them immunity from suit, prosecution or other legal proceeding for anything in good faith done or intended to be done in pursuance of the Act or any rule or regulation made under it. Section 33 confers power on the Central Government to temporarily divest the 1st respondent from the management of any airport and to direct the 1st respondent to entrust such management to any other person. The Central Government is also empowered by Section 34 to supersede the 1st respondent under certain specified circumstances. Section 35 gives power to the Central Government to give directions in writing from time to time on questions of policy and provides that the 1st respondent shall, in the discharge of its functions and duties, be bound

by such directions. Section 36 confers rule-making power on the Central Government for carrying out the purposes of the Act and power to make regulations is conferred on the 1st respondent under Section 37. Section 39 provides that any regulation made by the 1st respondent under any of the Clauses (g) to (m) of Sub-section (2) of Section 37 may make it penal to contravene such regulation."

In view of these special features the Court ultimately came to hold that the airport authority was an instrumentality of the State. So far as the present Company is concerned it is not set up by a special statute. It does not have the special features which have been highlighted in paragraph 32 extracted above.

The next case is that of *Som Prakash Rekhi v. Union of India*, where the question for consideration was whether the Bharat Petroleum Corporation Limited was "State" within the meaning of Article 12 of the Constitution. The majority of the learned Judges took the view that it was and they held that it was not necessary that the legal person must be a statutory Corporation and must have power to make laws and must be created by and not under a statute. In the majority judgment, it was indicated (at p. 229):--

"A study of *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, (a Constitution Bench decision of this Court) yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are

- (1) financial resources of the State being the chief finding source.
- (2) functional character being governmental in essence,
- (3) plenary control residing in Government,
- (4) prior history of the same activity having been carried on by Government and made over to the new body and
- (5) some element of authority or command.

....."

All these features are not present in the case of the Company in question. There can be no doubt that the sum total effect led the learned Judges to the view that *Burmah Shell* was an instrumentality of the State and not some of the features by themselves would be adequate.

The last of the cases is that of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . This decision is of the Constitution Bench and the question that fell for determination was whether one of the Regional Engineering Colleges located at Srinagar being one of the fifteen such Colleges in the country sponsored by the Government of India, was an instrumentality of the State. The College was

being managed by a Society registered under the Jammu & Kashmir Registration of Societies Act, 1898. The Court pointed out that where a Corporation is an instrumentality or agency of the Government, it must be held to be an "authority" within the meaning of Article 12 of the Constitution and hence subject to the same basic obligation to obey the Fundamental Rights as the Government. Then came the question as to whether this was an instrumentality of the State. Sumptuous reference was made to the ratio of the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . In paragraph 9 of the judgment, the tests for determining when a Corporation can be said to be an instrumentality or agency of Government were gathered thus:--

"(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor..... whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence or "deep and pervasive State Control" may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government". The Court then proceeded to observe:--

"If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the *International Airport Authority's* case, be an authority and, therefore, State within the meaning of the expression in Article 12,"

In paragraph 11 of the judgment, the Court pointed out that it was immaterial whether the corporation is created by a statute or under a statute. The test was whether it was an instrumentality or agency of the Government and not as to how it was created.

We are inclined to think that no particular test has a predominant role to play. The cumulative effect has to be looked into. Where the functions are closely related to governmental functions and where a department of Government is transferred to a corporation or where rule-making or regulation-making power has been given which when made would regulate the conduct of the people at

large are clear features in support of treating the institution as an instrumentality or agency of Government. Where, however, Government while embarking upon a commercial activity putting the entire money, exercise direct or indirect control and receive the profits--these by themselves may not be adequate to hold the institution to be an agency or instrumentality of Government. In our view the present one is of that limited type and on the facts disclosed, the Company cannot be held to be an instrumentality of Government. That being the position, petitioner cannot succeed on the allegation of contravention of the equality clause.

4. Coming now to the other argument of Mr. Mohanty, we are inclined to think that there is force in the stand taken by the opposite parties. Admittedly, Laguna does not have the requisite certificate in terms of Rule 45. There is, however, no restriction upon a contractor getting its work done through a sub-agency satisfying the requirements of Rule 45. From the pleadings we find that parties are alive to it and no breach of the statutory rule is contemplated in executing the contract. In such circumstances, we do not think, Rule 45 of the Indian Electricity Rules is invocable by the petitioner.

5. Even if we have not interfered in the matter, we must sound a word of caution to opposite parties 2 and 3, that they must conduct themselves in a way above suspicion and in future the present infraction may not be repeated.

6. The writ application fails and is dismissed but without any order for costs.

J.K. Mohanty, J.

7. I agree.