
(2013) 07 CAL CK 0016

In the Calcutta High Court

Case No : Writ Petition No. 13175 (W) of 2013 and C.A.N. No. 5647, 5694 of 2013

Bajrul Islam

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Citation : (2013) 3 CALLT 476 : (2013) 4 CHN 468

Hon'ble Judges : S. Banerjee, J

Bench : Single Bench

Advocate : Kishore Datta, Mr. Jayanta Das, Mr. Debabrata Chakraborti in CAN 5647 of 2013, Mr. Debabrata Saha Roy and Mr. Pingal Bhattacharyya in CAN 5694 of 2013, for the Appellant; Susobhan Sengupta for the State, for the Respondent

Judgement

S. Banerjee, J.—A constitutional issue of considerable importance has arisen in this seemingly non-descript petition under Article 226 of the Constitution: whether upon a re-tender conducted by the State or any of its instrumentalities - by illegally or irregularly cancelling the original tender process - throwing up a substantially better offer, the Court may disregard the illegality or irregularity in public interest or for the greater public good. The petitioner insists that upon the issuance of the letter of acceptance to the petitioner following the successful completion of the original tender process, the State is duty bound to honour the agreement in favour of the petitioner. To boot, the petitioner asserts that the cancellation of the original tender process and the decision to invite fresh offers was not upon the State perceiving a loss to the exchequer as a result of the State's acceptance of the petitioner's offer. The petitioner contends that just as the State and its instrumentalities have to be model landlords and impeccable tenants, they are bound to honour the agreements to which they are parties and cannot wriggle out of a concluded contract by citing excuses as would be available to a defendant in a suit for specific performance of a contract.

2. The State Public Works Department invited offers for felling trees to facilitate the widening and strengthening of the Debra-Sabang road in Paschim Medinipur upon obtaining due permission therefor from the Forest Department. By a notice of April 2, 2013, the PWD invited sealed bids for the auction sale of about 295 trees. The quotations were to be opened in the presence of the bidders on April 16, 2013 and, poignantly, the executive engineer, Kharagpur Division of the PWD reserved the right to accept or reject any quotation without any reason and specified that quotations may be rejected if it were to be found that "the formation of ring (read, cartel) or mal practice have been made by the participants." No reserve price was indicated in the notice but bidders were required to furnish an earnest deposit of Rs. 2 lakh.

3. The petitioner's bid was accepted by the executive engineer by a communication of April 18, 2013 wherein it was stated that, "you would like to please to know that you are offered Rs. 23,00,000.00/- (Rupees twenty three lakhs) only equivalent to 1st higher bidder is hereby accepted on behalf of Governor of West Bengal." The petitioner was advised to deposit the bid amount by bank draft within seven days of the date of issue of the letter; or else, the earnest money tendered by the petitioner would be forfeited.

4. The petitioner claims that by April 22, 2013, the petitioner caused bank drafts of a total value of Rs. 23 lakh to be prepared in favour of the executive engineer which the petitioner attempted to deposit at the office of such official on April 23, 2013. There is no dispute that the bank drafts were not accepted on the relevant day by the office of the executive engineer and the petitioner's letter of protest issued on the same day was received by such office.

5. Curiously - and, as the petitioner says, after the horse had bolted - the chief engineer of PWD wrote to the range officer of the Debra range on April 24, 2013, informing the range officer that a highest bid of Rs. 23 lakh had been received for the 295 trees against the range officer's valuation of such trees at Rs. 16,65,043/- and seeking the opinion of the range officer "whether the rate is reasonable or not." The range officer endorsed his opinion on a copy of such letter on April 25, 2013 to the following effect:

This is to inform you that above valuation rate for highest bidder which is accepted is reasonable.

6. It appears that pending the range officer's response to the chief engineer's query, the relevant executive engineer wrote to the petitioner on April 24, 2013 that "due to some unavoidable circumstances the last date of deposition of Bid Money is extended for the period of 15 (fifteen) days from the date of issue of this letter."

7. Not only has the petitioner appended to the petition a copy of the chief engineer's letter of April 24, 2013 issued to the range officer, but the petitioner has also in his possession a copy of the range officer's valuation of the 295 trees at Rs. 16,65,043/-; and it appears as Annexure P-8 to the petition.

8. The petition was lodged on April 30, 2013, was first taken up on May 3, 2013 and was adjourned to May 7, 2013 to enable advocate for the State to obtain instructions. When the matter was next heard on May 8, 2013; the petitioner was allowed to file a supplementary affidavit. The petitioner has claimed in such affidavit that contrary to the submission of the State when the petition was first taken up that the petitioner's was the solitary bid and, as such, it was required to be cancelled, there were three other bidders who had offered lower than the petitioner. The supplementary affidavit also refers to a second auction sale notice having been issued in respect of the same trees. By the subsequent notice of May 2, 2013, fresh bids were sought in respect of the 295 trees on the same terms and conditions as in the original notice. In the order of May 8, 2013, the Court posed a question to the State as to how the re-auction had been directed despite the price offered by the petitioner being found to be reasonable. On May 13, 2013, the State submitted that the trees were worth more than Rs. 1 crore, whereupon the Court desired to probe as to how the trees had been valued at Rs. 16,65,043/- and a throwaway offer of Rs. 23 lakh had been accepted therefor. The process of re-tender was arrested and the State was required to explain the matter in its affidavit.

9. In the affidavit affirmed on behalf of the respondent authorities by an executive engineer of the Kharagpur Division of PWD, it is claimed that after the issuance of the letter of acceptance to the petitioner "it has come to the notice that some person lodged complain that they could not participate in quotation process due to obstruction created on them on 16.4.2013." It is also stated in such affidavit that a sealed envelope was received on April 17, 2013 containing a bid of Rs. 28.05 lakh but with several unsigned corrections therein. Such bid was not considered as it was received beyond time and also "to avoid complicity in quotation process." The affidavit speaks of the cancellation of the letter of acceptance issued in favour of the petitioner being on the instructions of the chief engineer, PWD. The records reveal a letter dated April 17, 2013 by four prospective bidders alleging that they were resisted from depositing their bids on April 16, 2013 by muscleman. The letter claimed that the value of the 295 trees would be about Rs. 40 lakh. Another letter of April 22, 2013 addressed by the MIA of Ghatal to the superintending engineer, PWD, Paschim Medinipur, is available in the records by which the legislator complained of many bidders being unable to participate in the process and claimed that there were several complaints of irregularities in the tender process which had been received by the legislator. On April 22, 2013, an executive engineer of the Kharagpur Division of PWD was forwarded the complaints of several prospective bidders regarding the original tender process and, on the same day the concerned executive engineer reported to the superintending engineer that there was no impediment to bids being received at the office of the executive engineer on April 16, 2013. The executive engineer justified the acceptance of the petitioner's bid as "it is well above, the book value."

10. Pursuant to the direction of the superintending engineer issued on April 23,

2013, the relevant executive engineer prepared a note-sheet on the same day for it being placed before the chief engineer. The superintending engineer forwarded the report of the executive engineer as contained in the note-sheet to the chief engineer, whereupon the chief engineer made two apparently conflicting notes on April 29, 2013 as follows:

All the reports of EE & SE has been examined. The matter was referred to range-Officer, Debra SF range who has also given a favourable opinion (enclosed). Hence we can proceed further to dispose of the trees at once for the interest of public service and early disposal.

Discussed with E-in-C. We may try for a 2nd call with short notice for seven days with a R.P. of 23 lakhs. This may notice to leading Bengali newspapers along with local papers.

It was upon the instructions contained in the second noting of the chief engineer on April 29, 2013 that the superintending engineer sent the note-sheet down to the relevant executive engineer to take necessary steps. The executive engineer thereafter issued an office order on May 2, 2013 as follows:

This is to notify all concern that due to some unavoidable circumstances as well as administrative reason the acceptance letter issued vide this office No. -589/E Dated - 18/04/2013 against Auction Sale Notice No. - 01 of 2013-14 and this office No. - 630/E Dated - 24/04/2013 are hereby cancelled. All concern are being informed accordingly.

11. It is evident, therefore, that there was no material before the chief engineer on April 29, 2013 that any person had been found to have been prevented from submitting his bid in terms of the original notice inviting quotations. Indeed, the first noting of the chief engineer on April 29, 2013 was upon his subjective satisfaction of the price obtained for the trees on the basis of the range officer's opinion. There is nothing in the records to indicate why the chief engineer took a different view later on the same day except that he discussed the matter with the "E-in-C."

12. The petitioner is justified in his assertion that there was no basis for the chief engineer to ask for a re-tender and, in effect, cancel the original process, particularly since the letter of acceptance had already been issued and the chief engineer did not disclose any reasons at all in support of his second noting of April 29, 2013. Ordinarily, upon such position being evident from the records, the Court would be left with little alternative but to set aside the decision to invite fresh quotations and uphold the original process that culminated in the issuance of the letter of acceptance to the petitioner. There is, however, a minor matter of certain offers having been received in pursuance of the second notice inviting quotations for the sale and removal of the 295 trees, though the process has since been arrested by an order of this Court. There are at least three or four sealed offers which have not been opened and the applicants in C.A.N. 5647 of 2013 and C.A.N. 5794 of 2013 claim to have offered in excess of Rs. 46 lakh and

Rs. 56 lakh respectively, in respect of the trees. Either offer is more than double the value of the petitioner's bid; resulting in the dilemma of weighing the rights of the petitioner upon the apparent conclusion of a contract in his favour and the substantially higher offers that may benefit the exchequer being brought to the notice of the Court.

13. The petitioner refers to Articles 298 and 299 of the Constitution of India and places a judgment reported at *Sardar Sucha Singh v. Union of India*, (1987) Supp. SCC 127 for the proposition that a formal agreement between the State and another party may not be necessary for the rights under a government contract to crystallise; an acceptance in writing by the State would suffice. The appeal in that case arose from a suit for the refund of the deposit made by the plaintiff along with the tender upon the plaintiff seeking to withdraw his offer after its acceptance by the Union of India. The question that fell for consideration was whether there was a concluded contract notwithstanding it not being in conformity with Article 299(1) of the Constitution. The Supreme Court referred to a previous decision of that Court in the context of section 175(3) of the Government of India Act of 1935 and held that an acceptance in writing by an appropriate official on behalf of the President met the twin conditions required for the formation of a contract under Article 299(1) of the Constitution. The petitioner has also referred to the Constitution Bench judgment reported at *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, on the formation of an opinion as to the existence of a set of circumstances. The petitioner says that since the respondents have not been able to elucidate on why the original tender process was cancelled and the Court's reading of the records produced by the respondents does not reveal any satisfactory basis for such cancellation, the illegal cancellation of the original process has per force to be annulled; never mind the consequences that follow.

14. The petitioner has also relied on another Constitutional Bench judgment reported at *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, on section 175(3) of the Government of India Act of 1935 being in *pari materia* with Article 299(1) of the Constitution and for the dictum therein that there cannot be any implied contract between the State and any person, "the reason being that if the implied contracts between the Government and another person were allowed, they would in effect make Article 299(1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299(1) could get away by saying that an implied contract may be inferred on the facts and circumstances of a particular case." A further decision, reported at *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, has been cited by the petitioner for the proposition that upon there being a contract between the State and another person, the parties are bound by the terms of the contract "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."

15. It is unnecessary to delve into the question as to whether there was a

concluded contract between the State and the petitioner in this case, despite there being no formal agreement and the payment not having been accepted by the State. For the present purpose, it may be assumed that there was a binding contract between the State and the petitioner and the State by cancelling the original tender process has acted in breach of such contract. The real issue is whether upon the State acting in derogation of a binding contract, without recording any cogent reason for the breach, the Court may condone the State's conduct on the ground of public interest or the greater public good. The discussion on the legal question must be prefaced by a caveat that there may be other factors which would weigh with Court in considering whether or not to condone such breach; the answer to the constitutional issue in this case is limited to the circumstances arising herein, particularly as there has been no commencement of the work under the contract by the petitioner.

16. To be fair to the petitioner, it must be recognized that the petitioner has accepted that in certain situations the annulment of a concluded contract has to be viewed differently in public law; but the petitioner insists that unless the contract has been cancelled at the earliest stage upon the State citing cogent grounds therefor which the Court could uphold, merely because it is accidentally discovered that the cancellation results in some benefit to the State, the cancellation cannot be accepted. The petitioner has referred to a recent decision reported at ITC Ltd. Vs. State of Uttar Pradesh and Others, where the State had cancelled allotment of plots without imputing any mala fides or misrepresentation or fraud or suppression of facts or collusion or undue influence or any other illegal act or improper conduct to the allottees. The discussion at paragraphs 105 to 108 of the report is instructive:

105. If after affecting a transfer, the transferor finds that he had stipulated a lesser consideration (sale price or lease premium) for the transfer, due to a mistake of fact or wrong understanding or misreading of any law (and such mistake was not caused on account of any fraud, coercion or misrepresentation by the transferee) what is the remedy of the transferor? In private law, the transferor may have no remedy, as completed transactions of transfers cannot be reopened or cancelled.

106. A "transfer" of property is an executed contract. Section 4 of the Transfer of Property Act, 1882 provides that the chapters and sections of that Act relating to contracts, shall be taken as part of the Contract Act, 1872. Section 20 of the Contract Act provides that:

20. Agreement void where both parties are under mistake as to matter of fact.--Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

But the Explanation thereto provides that:

Explanation.--An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter

of fact.

Section 21 of the Contract Act provides that a contract is not voidable because it was caused by a mistake as to any law in force in India. Therefore, having regard to the provisions of the Transfer of Property Act and the Contract Act, a transfer cannot be cancelled on the ground that parties were mistaken about the consideration.

107. The position is, however, different in public law. Breach of statutory provisions, procedural irregularities, arbitrariness and mala fides on the part of the Authority (transferor) will furnish grounds to cancel or annul the transfer. But before a completed transfer is interfered on the ground of violation of the regulations, it will be necessary to consider two questions. The first question is whether the transferee had any role to play (fraud, misrepresentation, undue influence, etc.) in such violation of the regulations, in which event cancellation of the transfer is inevitable.

107.1. If the transferee had acted bona fide and was blameless, it may be possible to save the transfer but that again would depend upon the answer to the further question as to whether public interest has suffered or will suffer as a consequence of the violation of the regulations:

(i) If public interest has neither suffered, nor is likely to suffer, on account of the violation, then the transfer may be allowed to stand as then the violation will be a mere technical procedural irregularity without adverse effects.

(ii) On the other hand, if the violation of the regulations leaves or is likely to leave an everlasting adverse effect or impact on public interest (as for example when it results in environmental degradation or results in a loss which is not reimbursable), public interest should prevail and the transfer should be rescinded or cancelled.

(iii) But where the consequence of the violation is merely a short-recovery of the consideration, the transfer may be saved by giving the transferee an opportunity to make good the shortfall in consideration.

107.2. The aforesaid exercise may seem to be cumbersome, but is absolutely necessary to protect the sanctity of contracts and transfers. If the Government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and international community in the functioning of the Government will be shaken. To save the credibility of the Government and its instrumentalities, an effort should always be made to save the concluded transactions/transfers wherever possible, provided (i) that it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation.

107.3. If the concluded transfer cannot be saved and has to be cancelled, the innocent and blameless transferee should be reimbursed all the payments made

by him and all expenditure incurred by him in regard to the transfer with appropriate interest. If some other relief can be granted on grounds of equity without harming public interest and public exchequer, grant of such equitable relief should also be considered.

108. We may give an example from service jurisprudence, where a principle of equity is frequently invoked to give relief to an employee in somewhat similar circumstances. Where the pay or other emoluments due to an employee is determined and paid by the employer, and subsequently the employer finds, (usually on audit verification) that on account of wrong understanding of the applicable rules by the officers implementing the rules, excess payment is made, Courts have recognized the need to give limited relief in regard to recovery of past excess payments, to reduce hardship to the innocent employees, who benefited from such wrong interpretation.

17. If the very object of law is to ensure greater public good and if it is recognized that more funds available with the State will help it implement the constitutional goals, it must follow that if the State has entered into a contract on substantially less favourable terms to the State than what was possible, the State would have the authority to rescind the contract by adequately compensating the other party thereto. The principle ought to be extended to a constitutional Court to condone any illegality or irregularity on the part of the State in annulling a concluded contract on the ground that substantial benefit may result to the State by the annulment, though the State may not have taken such matter into account in cancelling the contract. As a corollary, it would follow that even if the State has annulled a concluded contract on extraneous considerations, if it comes to light upon the annulment that the State would stand to considerably benefit therefrom, a constitutional Court would not be myopic in merely considering the manner of, or the reasons for, the cancellation by turning a Nelson's eye to the beneficial consequence thereof to the State. The proposition may even hold good for any Court, but it is irrelevant in the context to render any conclusive opinion on such aspect.

18. There is no doubt that the State as a contracting party does not have the freedom like any other contracting party to arbitrarily act in breach of the contract to which it is a party. Unlike an ordinary party to a contract, the State cannot be heard to say that the other party to the contract is free to pursue a claim in damages upon the State acting in derogation of a contract to which it is a party. An ordinary party to a contract is free to act in breach thereof and be subjected to the consequences therefor. The State cannot be seen to enjoy such luxury for the consequence thereof would be against public interest and opposed to public policy; as public money may be frittered away by reason of the State's arbitrary conduct. This principle in public law that would not permit a State or its instrumentalities to present a defence available to an ordinary contracting party as in a suit, say, for specific performance of the contract, also gives the State the latitude that an ordinary contracting party does not enjoy: to come out of a

concluded contract if it is in public interest to do so, subject to the other party to the contract being suitably compensated therefor. In private law a contracting party may not be heard to say that it had not obtained adequate consideration under a contract unless it attributes any illegal act or improper conduct to the other party to the contract. In public law, the position would be somewhat different and public interest or the greater public good would be a relevant consideration in assessing the propriety of the State or any of its instrumentalities seeking to undo a concluded contract; or even a constitutional Court facilitating the same. Indeed, it would be the obligation of the constitutional Court to act in public interest and for the greater public good.

19. Since the records in this case do not speak of what impelled the chief engineer to change his mind as evident from his second noting of April 29, 2013, the rationale for the decision to seek a re-tender will remain foggy. But if the chief engineer was prompted to change his mind following his discussion with the "E-in-C" and the realization that appreciably better offers could be obtained, the chief engineer ought to have been bold enough to record that the better offers on record had prompted his decision. In the absence of the transparency in the decision making process that the records ought to have revealed, a doubt lingers as to whether the legislator's unwarranted intervention may have been the undesirable extraneous consideration for the change of heart.

20. At any rate, since substantially better offers for the trees are on record, the opinion of the range officer as to the valuation of the trees and the executive engineer's eagerness to conclude the transaction despite being aware of better offers should be probed into by the relevant superior officers and appropriate action taken.

21. Since CAN 5647 of 2013 and CAN 5694 of 2013 are applications for addition as parties by persons who offer substantially more for the trees than the petitioner, such applications are allowed by adding the applicants as parties to the present petition.

22. To ensure that the higher bidders do not merely help scuttle the petitioner's contract and not ultimately pay more for the trees, the applicants in CAN 5647 of 2013 and CAN 5694 of 2013 were required to deposit sums of Rs. 10 lakh each to demonstrate their commitment to bid substantially more than the petitioner for the trees. Only the applicant in CAN 5694 of 2013 has furnished a further sum of Rs. 10 lakh in addition to the earnest deposit of Rs. 2 lakh already made with a commitment to bid at least Rs. 56 lakh for the trees if fresh offers therefor are invited. The relevant bank drafts have been made over to the executive engineer in Court. The executive engineer will not refund such amount of Rs. 10 lakh or the earnest deposit of Rs. 2 lakh made by the applicant in CAN 5694 of 2013 unless such applicant's bid at the new tender process is bettered by any other and the money in respect of such higher bid is received by the respondents.

23. W.P. No. 13175(W) of 2013 is disposed of by directing the respondent

authorities to invite fresh offers for the 295 trees within a fortnight from date and forfeit the earnest deposit put in by the applicant in CAN 5647 of 2013 and the sum of Rs. 12 lakh deposited by the applicant in CAN 5694 of 2013 unless such parties bid to the tune of their previous offers and honour their commitments if found to be the best. In default of the applicant in CAN 5647 of 2013 and CAN 5694 of 2013 matching their previous offers and honouring the same if found best, the money deposited by them will stand forfeited. Since the petitioner did not undertake any work under the contract and the State did not enjoy the petitioner's money, the petitioner will not be entitled to any compensation. There will be no order as to costs.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.