

(2004) 11 GAU CK 0033
In the Gauhati High Court
Case No : Writ Petition (C) No. 5766 of 2004

Bhagya Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-11-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2005) 2 GLT 53

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya, S. Sharma, J. Deka, B. Sharma and A. Tewari, for the Appellant; K.N. Choudhury, I. Choudhury and J. Roy, Standing Council, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The facts leading to initiation of the present writ proceeding, as could be gathered on a conjoint reading of the petition, rejoinder to the application for vacating stay (pressed as the counter affidavit of the Respondents) and the additional affidavit filed by the Petitioner are as follows:

2. A short notice inviting quotation was issued by the Chief Engineer, PWD (Roads), Assam (the Respondent No. 3) inviting sealed quotations for supply of 80/100 grade Bitumen during 2004-05 to be delivered at Senmela Store under Executive Engineer, PWD, Guwahati Road Division. The last date of receipt of quotation was fixed as 23.3.2004. As per the said NIQ the quotationers whose rates with terms and conditions are accepted shall be asked to supply Bitumen from time to time through placement of supply orders. Further condition stipulated was that payment shall be made against the supplied quantity as per specification only, subject to availability of fund at the disposal of the department.

3. The Petitioner submitted his quotation to the Respondent No. 3 on 23.3.2004. Thereafter by letter dated 9.6.2004 (Annexure-1 to the writ petition), issued by

the Chief Engineer and addressed to the Petitioner, he was requested to supply the quantity of Bitumen (80/100 Grade) as mentioned in the letter at the address indicated therein. The quantity of Bitumen was indicated as 2000 MT and the rate was specified as Rs. 19,846.72 per MT inclusive of all taxes as admissible. The designation and address of the consignee was indicated in the letter as the Executive Engineer, PWD, Guwahati Road Division. The delivery period was specified as 15 days from the date of issue of the letter. Mode of payment was indicated as "payment will be made after receipt of full ordered Qnty in good condition subject to availability of fund under the relevant head of a/c". The consignee was authorised to make the payment. The letter further stipulated for production of necessary test certificate conforming to ISI/IRC specification from RRL/Engineering College, Jalukbari, Guwahati.

4. A copy of the said letter dated 9.6.2004 was marked to the Executive Engineer, PWD, Guwahati Road Division with the request to make payment for the cost of materials after receipt of full ordered quantity of 2000 MT of Bitumen (80/100 Grade) in good condition supported with the certificate of quality from RRL/Engineering College, Guwahati after deducting all prevailing taxes. It was also specified that the payment of carriage bill for carriage of Bitumen from the supply point of the supplier to the store-yard at Senmela under his Division, should be made as per approved carriage rates.

5. The Respondent No. 3 i.e. the Chief Engineer, PWD (Roads) also addressed Annexure-2 letter to the Deputy Secretary to the Government of Assam PW (BT) Deptt. in response to his letter dated 2.6.2004 furnishing parawise replies. The contents of the letter are quoted below:

With reference to the above, I have the honour to furnish parawise replies as follows: 1(a) Total required quantity: 2000,00 MT (Divis- of packed Bitumen 80/100 Grade) require 100 Grade ment of Bitumen is furnished.(b)Rate per MT : Rs. 19,846.72 (inclusive of all taxes)(c) Name of the Firm whom: Sri Bhagya Kalita, Bitumen will be purchased. B.K Tower, Ganesguri, Guwahati-6(c) Head of a/c : "3054 R and B-03-State High Ways-337-Road Works-189-Mainten-ance and Repairs-17 Maintenance-Non-Plan-Gnl. voted" Budget Provision-Rs.2090. OOL Uptodate Fund-1890.00L position

6. Pursuant to the aforesaid Annexure-1 supply order dated 9.6.2004, the Petitioner on various dates from 29.7.2004 to 5.8.2004, supplied 1532.395 MT of packed Bitumen (80/100 Grade) purportedly purchased from Indian Oil Corporation Ltd. (AOD). According to the Petitioner, he has already made full payment to the IOC (AOD) in respect of the said quantity of Bitumen through various Banker's/Manager's Cheques. When the matter rested thus the Government of Assam in the Finance (Budget) Department by its Annexure-5 letter dated 6.8.2004 addressed to the Commissioner and Special Secretary/Secretary to the Government of Assam, PWD on the subject of "Fixation of Ceiling" conveyed the information that the ceiling against the head of account for the month of August, 2004 under Non-plan has been fixed as indicated in the

letter. A request was made by the said letter to fix head of account-wise ceiling for the DD Os under his administrative control as per procedure laid down in Finance Departments Office Memorandums indicated in the letter. The ceiling was stated to be valid upto 10.9.2004, which is presently under order of extension as per interim order of this Court. The head of account as indicated in the letter is "3054-R and B" Non-plan, Genl", and the same was indicated to be for purchase of Bitumen worth Rs. 299.88394 Lakh.

7. By Annexure-6 series bills dated 9.8.2004, the Petitioner submitted his bills for supply of aforesaid quantity of 1532.395 MT of packet Bitumen (80/100 Grade) to the Respondent No. 4 i.e. the Executive Engineer, PWD, Guwahati Roads Division. The first bill was for Rs. 3,04,13,014/- for supply of Bitumen and the second bill amounting to Rs. 5,58,084/- was the carriage bill of packed Bitumen. When the matter poised thus, the Respondent No. 2 issued the impugned Annexure-7 letter on 11.8.2004 indicating Anr. Fixation of Ceiling under the head of account "3054-R and B-03-SH-337-Road Works-189-M and R-17-Maintenance-Non-plan-Genl.voted", for the amount of Rs. 299,88394 which was the amount indicated in Annexure-5 letter dated 6.8.2004, for the month of August, 2004. By the said letter, fund was released out of the allotment made by the Finance (BT) Department and the Respondent No. 4 was informed that the amount was allotted as per the break-up indicated in the letter which are as follows:

1. Bitumen-1250mt. @ 19,055.81 per mt, including tax and discount Rs. 238.19762 (L) to HPC Ltd.
2. Bitumen Emulsion-250mt. @Rs. 13,936.38 per mt.=Rs. 34.84083 (L) to Hindustan Coals Ltd.
3. Assam entry Tax-250mt. @ Rs. 2230.00 per mt. =Rs. 5.57500 (L)
4. Carriage cost for Bitumen and Bitumen Emul-sion =Rs.21.27050 (L)

Total =Rs.299.88394(L)

8. By the said letter dated 11.8.2004, the Chief Engineer, PWD (Roads) i.e. the Respondent No. 3 was requested to issue work orders and to send division-wise distribution list of Bitumen and Bitumen Emulsion in proportionate to road length to the department for approval of the Government. According to the Petitioner the aforesaid fund is to be paid to the Petitioner for the supply of Bitumen he has already made and the same cannot be diverted to any other party. It is the case of the Petitioner that he having invested huge amount of money towards purchasing the Bitumen in question and having supplied the same to the Respondents as per the Annexure-1 work order dated 9.6.2004, the aforesaid fund is required to be released in his favour, more particularly when the work order itself indicated that payment against supply would be made subject to availability of fund under the relevant head of account. It is the further case of the Petitioner that as against the admitted position that he has already supplied

the aforesaid quantity of Bitumen, the party in whose favour the fund is sought to be released, is yet to make any supply of Bitumen and even, yet to be issued with any work order. According to the Petitioner, he will suffer irreparable loss and injury if the aforesaid amount is not released in his favour against the supply he has already made pursuant to the order dated 9.6.2004. The Petitioner sees arbitrariness, highhandedness and extraneous consideration on the part of the Respondents towards issuance of the impugned Annexure-7 letter dated 11.8.2004 allotting the fund in favour of some other party who is yet to be issued with any work order and is yet to commence supply not to speak of completion of the same. Thus the prayer made in the writ petition is for setting aside and quashing of the said Annexure-7 letter dated 11.8.2004 and for a direction to the Respondents to make payment to the Petitioner against the aforesaid supply of 1532.395 MT of packed Bitumen (80/100 Grade) pursuant to work order dated 9.6.2004 and Annexure-5 Fixation of Ceiling dated 6.8.2004.

9. This Court while entertaining the writ petition by order dated 13.8.2004 issued an interim direction not to release the amount vide Annexure-7 impugned letter dated 11.8.2004. The interim order is still in operation and on conclusion of the hearing of the case it was provided that the Fixation of Ceiling (FOC) valid upto 10.9.2004 shall stand extended until further order.

10. The Respondents No. 1,2,3 and 4 filed Misc. case No. 2493/2004 praying for vacating the interim order dated 13.8.2004 by which the amount was directed not to be released vide Annexure-7 letter dated 11.8.2004. While hearing the Misc. Case, the records were directed to be produced and by order dated 26.8.2004, the Additional Chief Secretary to the Government of Assam was directed to make an enquiry in respect of the matter and to submit a report on or before 31.8.2004, on the specific queries recorded in the order. The queries made in the said order dated 26.8.2004 are as follows:

1. The circumstances in which two separate communications bearing the same number, i.e. No. CEG/2/2000/113 dated 10.6.2003 showing two different sources of procurement of Bitumen were issued by the Chief Engineer, Public Works Department (Roads).

2. Whether both the aforesaid two communications bearing No. CEG/2/2000/113 dated 10.6.2004 were submitted to the Finance Department. If so, in what circumstances and at what point of time.

3. Whether the work order bearing No. CEG65/2002/78 dated 9.6.2004 was officially issued to the writ Petitioner, Shri Bhagya Kalita. If so, whether the work order was cancelled after issuing the second communication bearing No. CEG/2/2000/113 dated 10.6.2004 showing the Public Sector Undertakings as the source of procurement of Bitumen.

4. Whether any supplies were made and received from the Petitioner Shri Bhagya Kalita pursuant to the work order dated 9.6.2004.

5. If such supplies have been received, why the F.O.C. dated 11.8.2004 for further procurement of Bitumen from the Public Sector Undertakings was issued.

11. Pursuant to the said order dated 26.8.2004, the Additional Chief Secretary to the Government of Assam furnished a report dated 28.8.2004, relevant portion of which is quoted below:

2. As per the directions of the High Court, I have perused the relevant files of the Chief Engineer, PWD (Roads), the Secretariat of the PWD and the Finance Department. The Chief Engineer issued a supply order No. CEG.5/2002/78 dated 9.6.2004 to Shri Bhagya Kalita for 2000 tonnes of Bitumen. The material was to be delivered within 15 days. Payment was to be made after receipt of the full quantity. The Chief Engineer moved the Secretariat of the PWD on 10.6.2004 for sanction for purchase of 2000 tonnes of Bitumen, in his letter CEG.2/2002/113 dated 10.6.2004. The letter was addressed to the Deputy Secretary, PWD (Budget) not the Finance Department. The name of the supplier was mentioned as Shri Bhagya Kalita. On the advice of the Deputy Secretary, PWD (Budget), the Chief Engineer withdrew the letter and made an amendment in the purchase order. This advice was necessitated by the insistence of Finance Department to procure materials directly from the manufactures. The supplier was shown as HOC or any other PSU. This amended letter bearing the same number CEG.2/2002/113 dated 10.6.2004 was officially issued to the Secretariat of the Public Works Budget) Department-non Finance Department.

3. The PWD Secretariat processed the letter and moved the Finance Department for sanction and then for funds. The sanction of the Finance Department was communicated to PWD on 3.8.2004 for a sum of Rs. 2.99 crores for procurement of 1511 MT of Bitumen at the rate of Rs. 19846/- per MT quoted by the Indian Oil Corporation. The Finance Department released funds of Rs. 2.99 crores on 6.8.2004. The PWD communicated the fund allocation of Rs. 2.99 crores on 11.8.2004 to the Chief Engineer. The fund was to be released to Hindustan Petroleum Corporation Ltd.

4. The answers to the issues posed by the Hon"ble High Court are as bellow:

1. The circumstances have been explained above.

2. The communication in favour of Shri Bhagya Kalita was withheld by the Chief Engineer at the instance of the Deputy Secretary, Public Works (Budget) Department and the other one was actually issued to the Deputy Secretary, Public Works (Budget) Department. The withheld copy is available in the file of Chief Engineer. It is not clear whether the original or photo-copy of the letter is available with Shri Bhagya Kalita.

3. The work order dated 9.6i2004 was officially issued to Shri Bhagya Kalita. It was not cancelled subsequently.

4. Shri Bhagya Kalita has supplied 1532 MT of Bitumen beginning from 29.7.2004 up to date. This material has been received by the office of the Chief

Engineer.

5. The Commissioner and Secretary of the PWD should have advised the Chief Engineer to cancel the supply order issued in favour of Shri Bhagya Kalita at least on 10.6.2004, when the PWD moved the Finance Department for sanction in favour of Public Sector Undertaking. The fault lies with both the Chief Engineer and the Commissioner and Special Secretary, PWD. The supply order in favour of Shri Bhagya Kalita stipulated delivery time of 15 days which expired on 24.6.2004. The actual supply commenced a month later. The supply order could have been cancelled any time after 24.6.2004 and before 29.7.2004. This was not done. Since the Finance Department concurred for release of fund only in favour of Public Sector Undertaking, the PWD was obliged to release funds in favour of Public Sector Undertaking. Alternatively, the Commissioner and Special Secretary, PWD should have gone back to the Finance Department seeking to amend the sanction in the name of Shri Bhagya Kalita.

In any case, Shri Bhagya Kalita has not completed the supply of 2000 MT. His payment is not due yet, because the supply order dated 9.6.2004 mentioned that payment would be made after receipt of full ordered quantity in good condition. Therefore, PWD is not obliged to make payment to Shri Bhagya Kalita from the present FOC.

12. After the aforesaid development, the matter was taken up for hearing and the learned Counsel for the parties agreed for hearing on the main writ petition. Accordingly the writ petition itself was taken up for hearing. During the course of hearing, learned Counsel for the Petitioner produced copy of the letter dated 19.8.2004 issued by the Respondent No. 4 i.e. the Executive Engineer, PWD, Guwahati Road Division to the Petitioner requesting him to supply the balance quantity of 467.605 MT of Bitumen out of the total quantity of 2000 MT as per Annexure-1 supply order dated 9.6.2004. Learned Counsel for the Petitioner also made it clear that the Petitioner was ready to supply the balance quantity of Bitumen and that he had to approach this Court after supply of the aforesaid quantity of 1532.395 MT out of the total quantity of 2000 MT, in view of issuance of Annexure-7 letter dated 11.8.2004 proposing to allot the fund in favour of some other party. There is no dispute about supply of the aforesaid quantity of Bitumen by the Petitioner to the Respondent No. 4 which position has also been authenticated by Mr. J. Roy, learned Standing Counsel, PWD by producing the records. It is also an admitted position that out of the aforesaid quantity of Bitumen supplied by the Petitioner, the PWD authorities have utilized 500 MT of Bitumen as recorded in the order dated 9.9.2004 passed by this Court.

13. In the additional affidavit filed by the Petitioner, he has annexed the photocopies of the cheques through which the payments were made to IOC (AOD) towards purchase of Bitumen. The Petitioner has also annexed the copy of the certificate of quality in respect of the Bitumen supplied by him as forwarded by the RRL, PWD (R and B), Guwahati by their letter dated 9.9.2004 (Annexure-15 to the additional affidavit). One of the conditions towards payment

of bill against the supply of materials was the requirement of submission of certificate of quality from RRL/Engineering College, Guwahati. Thus the Petitioner has also fulfilled the said requirement.

14. The Respondents No. 1,2,3 and 4 who have filed Misc. Case No. 2493/2004 prayed for vacating the interim order dated 13.8.2004 by which it was provided that the Respondents shall not release the amount vide Annexure-7 letter dated 11.8.2004. Various grounds have been urged towards vacating the said interim order. It was on the basis of the said Misc. Case, an enquiry was directed to be conducted by order dated 26.8.2004 and to furnish a report. As noticed above, the Additional Chief Secretary conducted the enquiry and furnished the report on 28.8.2004. The aforesaid Respondents instead of filing any separate affidavit prayed for treating the Misc. Application as the counter affidavit in the writ petition. The Respondent No. 1 has also filed an affidavit-in-opposition against the additional affidavit filed by the writ Petitioner.

15. The stand of the Respondents in their application for vacating stay is that the Petitioner cannot make any grievance against the Annexure-7 fixation of ceiling under the particular head and that in tune with the action taken in the earlier year, 2003, for payment against supply of Bitumen by the Petitioner, this time also payment to the Petitioner against the aforesaid supply of Bitumen would be subject to approval of the Cabinet for which Cabinet Memorandum is under preparation. The Respondents do not disown the supply made by Petitioner pursuant to Annexure-1 supply order dated 9.6.2004. In fact they have made a statement in their application that "The department is also going to take similar action in case of release of fund for supply of 2000 MT of Bitumen, supplied by the Petitioner as per the order of the Chief Engineer, being order No. CEG 5/2002/78 dated 9.6.2004". According to the Respondents, while placing the demand for Bitumen vide letter No. CEG.2/02/113 dated 10.6.2004, it was clearly stated that the Bitumen would be purchased from the IOC or from any other public sector undertakings and in fact ceiling of Rs. 299.88394 under the head of Account No. 3054-R and B-03-SH-337-Roads works-Maintenance-Non-plan-Genl received from the Finance Department was in response to the demand placed by the Department under the same head of account and is meant for payment to the Public Sector Undertakings from whom the materials are to be purchased. Therefore, the demand vide Annexure-7 dated 11.8.2004 in the form of Fixation of Ceiling of Rs. 299.88394 was issued and the same was meant for materials to be purchased from the IOC or any other Public Sector Undertakings. It was with that condition only, the fund was received from the Finance Department and accordingly the order of the FOC was issued.

16. Further stand of the Respondents in their application is that the Annexure-7 FOC dated 11.8.2004 was issued in favour of Public Sector undertakings (PSU) who are the manufactures of the materials from whom the materials were proposed to be purchased. The entire process of placing the demands of funds to the Finance Department, in the instant case was based on the fact that Bitumen

cannot be purchased from PSUs without paying the entire costs in advance. Therefore, it was but natural that FOC had to be issued from the Government to the Executive Engineer, PWD, Guwahati Roads Division in favour of the concerned PSUs enabling the Chief Engineer, PWD (Roads) to place his order with the PSUs on the strength of the said FOC issued by the Government. Thus the Respondents do not see any illegality in their action towards issuance of the Annexure-7 FOC and according to them the same was issued bonafide.

17. The further stand in the application is that the Annexure-2 letter dated 10.6.2004 on the basis of which the Petitioner has made his claim for payment of the amount in question in his favour only, was subsequently rectified and Anr. proposal was submitted to the Respondent No. 2 on the same date for purchase of Bitumen from IOC or any other PSUS. According to the Respondents, the said amount has got nothing to do with the claim of the Petitioner and the same is urgently required for carrying out works pertained to repairing of road damaged by heavy rain and the recent flood and that the Petitioner cannot stack claim over the sanctioned amount.

18. From the above narration of facts, the centre of controversy is in respect of the aforesaid amount of Rs. 299.88394, which according to the Petitioner, he is entitled, for supply of Bitumen pursuant to the work order dated 9.6.2004 and in terms of the Annexure-5 Fixation of Ceiling dated 6.8.2004. On the other hand it is the case of the Respondents that the said amount is meant for IOC or other PSUs from whom only Bitumen can be obtained directly on payment of the amount in advance. The controversy is also in respect of issuance of two letters dated 10.6.2004 containing the same number, one of which is annexed as Annexure-2 to the writ petition. According to the Respondents the Annexure-2 letter dated 10.6.2004 was rectified and Anr. proposal was submitted on the same date. During the course of hearing learned Standing Counsel, PWD produced a letter dated 19.8.2004 addressed to him by the Respondent No. 3 purportedly clarifying the position relating to issuance of Annexure-2 letter dated 10.6.2004. As per the said letter, although initially the Annexure-2 letter dated 10.6.2004 was issued mentioning the name of the supplier as the Petitioner, but later on having come to know that the Finance Department would not agree to purchase of Bitumen from a private party, the position was rectified by making Anr. proposal for purchasing Bitumen from PSUs like IOC, but due to official errors in the lower level, the letter number and date of both the letter i.e. the earlier and the later proposal remained the same. As per the said letter dated 19.8.2004 the mistake cropped up due to oversight and was unintentional and that the Annexure-2 letter dated 10.6.2004 was a mere proposal and cannot be treated as final and a proposal may change in the process.

19. In the above backdrop it will be relevant to refer to the aforesaid order dated 26.8.2004 passed by this Court in Misc. Case No. 2493/2004 directing the Additional Chief Secretary to make an enquiry in the matter on the basis of the queries enumerated in the order and the report thereof submitted by the

Additional Chief Secretary on 28.8.2004. As per the said report, the Annexure-2 letter dated 10.6.2004 and as explicit from the letter itself, was addressed to the Deputy Secretary, PW (Budget) and not the Finance Department. The said letter was withdrawn by the Chief Engineer on the advise of the Deputy Secretary, PW (Budget). Such advice was necessitated by the insistence of the Finance Department to procure materials directly from the manufactures. In the revised letter, the supplier was shown as IOC or any other PSU. The amended letter bearing the same number and date i.e. No. CEG.2/2002/113 dated 10.6.2004 was officially issued to the Secretariat of the Public Works (Budget) Department and not to Finance Department. The PWD Secretariat processed the said letter and moved the Finance Department for sanction and then for funds. The sanction of the Finance Department was communicated to PWD on 3.8.2004 for a sum of Rs. 2.99 crores for procurement of 1511 MT of Bitumen @ Rs. 19846 per MT quoted by the IOC. The Finance Department released funds of Rs. 2.99 crores on 6.8.2004 and the PWD communicated the fund allocation of Rs. 2.99 crores on 11.8.2004 to the Chief Engineer. The fund was to be released to Hindustan Petroleum Corporation Ltd.

20. The aforesaid report further reveals that the communication made in favour of the Petitioner in terms of Annexure-2 letter dated 10.6.2004 was withheld by the Chief Engineer at the instance of the Deputy Secretary, Public Works (Budget) and it was the other letter bearing the same number and date was in fact issued to the Deputy Secretary, PW (Budget) Department. The report further reveals that the withheld copy (Annexure-2 letter) is available in the file of the Chief Engineer. The report says that it is not clear whether the original or photocopy of the said letter is available with the Petitioner.

21. No dispute has been raised in the report as regards the issuance of the Annexure-1 work order dated 9.6.2004 to the Petitioner, rather the report certifies that the same was issued officially to the Petitioner and was not cancelled subsequently. As regards the supply of 1532 MT of Bitumen beginning from 29.7.2004 upto the date of preparation of the report i.e. 28.8.2004, the report certifies receipt of the materials by the Respondents. As per the said report, the Commissioner and Special Secretary, PWD should have advised the Chief Engineer to cancel the supply order in favour of the Petitioner, atleast on 10.6.2004, when the PWD moved the Finance Department for sanction in favour of the PSU. According to the report, fault lies with both the Chief Engineer and the Commissioner and Special Secretary, PWD. The report further highlights as to how the supply order in favour of the Petitioner stipulated delivery time of 15 days which expired on 24.6.2004 and also as to how the actual supply commenced a month later. According to the report, the supply order could have been cancelled any time after 24.6.2004 and before 29.7.2004, but the same was not done. The report also reveals that the Finance Department concurred for release of fund only in favour of PSU and thus the PWD was obliged to release fund only in favour of PSU. Alternatively, the Commissioner and Special Secretary should have gone back to the Finance Department seeking to amend

the sanction in favour of the Petitioner. Referring to the condition of payment of bill incorporated in the Annexure-1 supply order dated 9.6.2004, the Additional Chief Secretary, in his report has finally indicated that the Petitioner having not completed the supply of 2000 MT of Bitumen, the PWD is not obliged to make payment to the Petitioner from the FOC in question.

22. Mr. A.K. Bhattacharyya, learned Sr. Counsel for the Petitioner assisted by Mr. S. Sarma, learned Advocate, referring to the aforementioned factual as well as the position which has now emerged strenuously argued that the FOC is only meant for the Petitioner and not for Ors. . Questioning the validity and legality of the action of the Respondents towards issuance of Annexure-7 FOC dated 11.8.2004 on the face of Annexure-1 work order dated 9.6.2004 and Annexure-5 FOC dated 6.8.2004, Mr. Bhattacharyya argued that the writ petition deserves to be allowed granting the prayers made. On the other hand Mr. K.N. Choudhury, learned Sr. Counsel assisted by Mr. I. Choudhury, learned Advocate, representing the Respondent No. 1 and Mr. J. Roy, learned Standing Counsel PWD representing the other Respondents refuted the claim of the Petitioner and submitted that as per the policy decision of the Government Bitumen can be had only from PSUs and not from private individuals. According to them the very procurement was illegal. However, since the Bitumen was already supplied pursuant to Annexure-1 work order dated 9.6.2004, placed Contrary to the policy decision of the Government, a Cabinet Memorandum was suggested to be prepared by the Finance Department towards legalizing and regularizing the supply order placed with the Petitioner as was done for the earlier year facilitating payment of the bill amount against such supply made by the Petitioner. Referring to the records produced by the learned Standing Counsel, PWD, learned Counsel for the Respondents argued that the impugned Annexure-7 FOC was the result of the process initiated by the department and the fund in question is only meant Mine PSU and not for the Petitioner. Mr. Choudhury, placed reliance on the decision of the Apex Court as reported in Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others,

23. Reacting to the aforesaid arguments made on behalf of the Respondents, Mr. Bhattacharjee, learned Sr. Counsel strongly contended that the Respondents having not questioned the NIQ in response to which the Petitioner made his offer and they having issued the Annexure-1 work order dated 9.6.2004 and the Petitioner also having acted on the same by making supply of the aforesaid quantity of Bitumen as per the specifications, supported by the required quality certificate, they cannot resile back from their own promise so as to take a different stand as per their whims and caprices. He placed reliance of the Decision of the Apex Court as reported in AIR 1970 SC 57 (State of Assam v. Raghava Rajgopalachari). He finally submitted that the Respondents cannot act collaterally and play hot and cold.

24. I have considered the entire materials on records including the report, dated 28.8.2004 submitted by the Additional Chief Secretary, Government of Assam. I

have also carefully considered the submissions advanced by the learned Counsel for the parties. The facts, which have emerged from the respective pleadings of the parties and as narrated above, are not in dispute, rather admitted by the parties. The Respondents have also not disowned the Annexure-1 supply order dated 9.6.2004. They have also not disputed the supply made by the Petitioner pursuant to the said work order. It is on record that the Respondents have already utilized 500 MT of Bitumen out of the total quantity of Bitumen supplied by the Petitioner. In their application for vacating stay also, the Respondents have made categorical statement in paragraph 5 that the department would take similar action as was taken in the earlier year towards payment of the bills against the supply made by the Petitioner pursuant to Annexure-1 supply order dated 9.6.2004 placed on him by the Chief Engineer. Thus the Respondents have not disputed the supply order dated 9.6.2004. The Respondents have also not questioned anything about non-fulfilment of any of the conditions of supply by the Petitioner. It is also on record that the Respondent No. 4 made a request to the Petitioner by letter dated 19.8.2004 to supply the balance quantity of Bitumen against the total quantity of 2000 MT.

25. The Petitioner has produced the necessary certificate certifying the materials to be of the required Grade. During the course of hearing, learned Counsel for the Petitioner also made it clear that subject to the order to be passed by this Court, the Petitioner is ready to supply the balance quantity as and when called for. As regards the non-supply of the balance quantity by the time when the writ petition was filed, it is the stand of the Petitioner as was made known by the learned Counsel that the writ petition had to be filed in view of issuance of Annexure-7 FOC dated 11.8.2004 and thereafter when the matter remained subjudice before this Court, the Petitioner thought it prudent not to make any further supply without any leave of the Court. At the same time learned Counsel for the Petitioner also made it clear that the Petitioner was ready to supply the balance quantity of Bitumen.

26. Pursuant to the aforesaid NIQ, the Petitioner was placed with the supply order dated 9.6.2004. Even on 10.6.2004, when the Annexure-2 letter was issued, the Respondent No. 3 wanted the amount in question to be sanctioned in favour of the Petitioner. However, he had to withdraw the letter on being pointed out that purchase of Bitumen could only be made from PSUs. Thereafter, Anr. letter bearing the same number and date was issued replacing the earlier letter indicating the name of the Firm from whom the Bitumen would be purchased as IOC or any other PSU. According to the stand of the Respondents, no work order could have been placed with the Petitioner, he being a private individual in view of the policy decision of the Government to purchase Bitumen directly from the manufacturer like IOC or other PSU. The impugned FOC dated 11.8.2004 was issued upon consideration of the latter proposal of the Chief Engineer dated 10.6.2004 indicating the name of the Firm as IOC or any other PSU. Thus, really speaking, the Annexure-7 FOC dated 11.8.2004 was meant for PS Us and not for the Petitioner, which position has also been reflected in the report dated

28.8.2004 furnished by the Additional Chief Secretary. It is in this context, he in his report also suggested for approaching the Finance Department in the alternative to get the FOC amended making the sanction in favour of the Petitioner.

27. As has been revealed in the report, the supply order dated 9.6.2004 has not been cancelled till date. There is also no dispute that the Petitioner in response to the supply order dated 9.6.2004 has made the supply to the tune of 1532.395 MT. There is also no dispute that the necessary quality certificate has been furnished by the Petitioner towards payment of bills. It is also an admitted position that the Respondents have already made use of 500 MT of Bitumen out of the total quantity of Bitumen supplied by the Petitioner. Thus for all practical purposes it is the Petitioner whose services have been utilized by the Respondents. As to what transpired after issuance of the Annexure-2 letter dated 10.6.2004 was not intimated to the Petitioner. It is during the course of hearing of the writ petition and in pursuance to the order of this Court passed on 26.8.2004 and consequential furnishing of report by the Additional Chief Secretary, the real state of affair has come to light. The question for determination is, whether the Petitioner should be penalized for the action/inaction of the Respondents, which was also behind the back of the Petitioner. The question also arises as to whether the Petitioner could place reliance on the Annexure-2 letter dated 10.6.2004, a copy of which was not endorsed to him and as per the stand of the Respondents, the said letter was not issued to anybody and was a mere proposal furnished to the Deputy Secretary to the Government of Assam in the PW (Budget) Department.

28. As observed above, the Petitioner was not made aware of the subsequent development in the matter till issuance of the impugned Annexure-7 FOC dated 11.8.2004. In the meantime, pursuant to the Annexure-1 work order dated 9.6.204, the Petitioner supplied the aforesaid quantity of Bitumen during the period from 29.7.2004 to 5.8.2004. He has also completed all the formalities towards payment of the bills in respect of the said supply. It is true that as per the supply order dated 9.6.2004, the date of delivery of the materials was specified as 15 days from the date of issue of the order. It is also true that the work order specified the mode of payment that the payment would be made after receipt of full ordered quantity and that the Petitioner is yet to supply the balance quantity of 467.605 MT of Bitumen in respect of which the explanation furnished by the Petitioner has been noted above. It is also equally true that the mode of payment was also specified to be subject to availability of fund under the relevant head of account. The Respondents have not found any fault with the Petitioner in not delivering the materials within 15 days of the work order dated 9.6.2004, rather they have accepted the materials with the issuance of further letter dated 19.8.2004 (Annexure-16 to the additional affidavit) requesting the Petitioner to supply the balance quantity of the Bitumen. It is also on record that the Respondents have utilized 500 MT of Bitumen out of the supplied quantity. It is nobody's case that the payment of bills has been withheld on account of non-

fulfilment of any of the conditions of supply. In such a situation, with the own admission of the Respondents in their application that the Petitioner is entitled to the payment of bills against the supply of 2000 MT of Bitumen, the only controversy, which is now required to be resolved, is in respect of the mode of payment against the work order.

29. According to the Respondents as per the replacement made to the Annexure-2 letter dated 10.6.2004 with the issuance of Anr. letter bearing the same number and date, the FOC in question is meant for only PSUs and not for the Petitioner. They have also highlighted as to how the Bitumen could not have been obtained from private individual as per the policy decision of the Government. According to them the Bitumen can only be obtained directly from the manufacturer like IOC and other PSUs. The condition precedent for obtaining such supply of Bitumen is to make advance payment to such PSUs for procurement of Bitumen. As against such a procedure, the Petitioner, as per the order placed with him vide Annexure-1 order dated 9.6.2004, has supplied the materials without any advance payment.

30. The Respondents have raised the controversy regarding payment pointing out the alleged policy decision and the irregularities committed in placing the work order with a private individual like the Petitioner, only after the Petitioner made the supply. At the same time, the Respondents have also not cancelled the work order and rather accepted the materials supplied by the Petitioner pursuant to the said work order and have utilized a part of the materials supplied. However, when the Petitioner has raised the question of payment against such supply, the plea of the Respondents is that there was irregularity in placing the order with the Petitioner mat for making payment against such irregularly placed work order, the approval of the Cabinet is required. With that perceived notion of the matter, the Respondents have projected a position in which they accept the work order to be valid, although some what irregular and accept the materials supplied with partial use of it, but when the demand for payment is made, they take the plea that Such payment can only be made under a different procedure like preparation of Cabinet Memorandum and approval thereof etc.

31. So far as the impugned FOC dated 11.8.2004 is concerned, their plea is that the same was pursuant to the proposal for purchasing the materials only from PSUs. Ironically enough, the impugned FOC dated 11.8.2004 pertaining to PSU is in respect of the same quantity of 2000 MT Bitumen as will be evident from the letter dated 10.6.2004 available in records which was issued to the replacement of the Annexure-2 letter dated 10.6.2004. The only difference is in respect of the name of the party. In Annexure-2 letter dated 10.6.2004, the Petitioner was shown as the party whereas in the second letter the name of the party was shown as IOC or PSU. Thus the name of the party indicated in both the letter made the whole difference, although the other things upto the stage of supply of the materials remained the same, of course, with the glaring Anr. difference that the chosen PSU is yet to be placed with any work order nor any supply has been

made by the said PSU, unlike the Petitioner who has already made the supply and fulfilled all the conditions precedent towards payment of the bills except the supply of the balance quantity for which the Respondent No. 4 has already issued the Annexure-16 letter to the additional affidavit dated 19.8.2004.

32. The decision on which Mr. Choudhury, learned Sr. Counsel for the Respondent No. 1 placed reliance i.e. Gursharan Singh (supra) is in respect of the scope of Article 14 of the Constitution of India which guarantees of equality before law to all citizens. This guarantee of equality before law is a positive concept and a citizen or a court cannot enforce it in a negative manner. The Apex Court emphasised that if an illegality and irregularity has been committed in favour of any individual or a group of individuals, Ors. cannot invoke the jurisdiction of the High Court or of the Apex Court claiming the same irregularity or illegality to be repeated by the State. In that case, the Petitioners sought for extension of certain benefits extended to Ors. although in an irregular or an illegal manner. It was in that context, the Apex Court held that the Petitioners while can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same, but they cannot claim orders which are not sanctioned by law in their favour on principle of equality before law. The Apex Court held that neither Article 14 of the Constitution conceived within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim equality before law. The Apex Court further observed that if such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to Ors. . The Apex Court further observed that before a claim based on equality clause is upheld, it must be established by the Petitioner that his claim being just and legal, has been denied to him, while it has been extended to Ors. and in this process there has been discrimination.

33. The aforesaid judgment of the Apex Court is altogether in a different context. The Petitioners in that case alleged violation of equality clause enshrined in the Constitution and claimed similar benefits like that of others in respect of allotment of shops. The petitioners claimed similar concessions as were extended to some other stall holders. The Apex Court found that the Petitioners agreed to the terms of allotment and thus held that they cannot legitimately claim that they should also be treated in the same manner. The petitioners questioned the validity of the allotment of 98 shops on concessional rates without any trade zoning restriction in favour of the stall holders. However, they were primarily interested that same concessions in respect of license fee and relaxation in trade zoning restrictions, be also extended to them. It was in that context the Apex Court held that any such claim on their behalf cannot be entertained on the basis of concept of equality before law as enshrined in Article 14 of the Constitution.

34. Above is not the position in the instant case. As discussion above, the Respondents have not disowned their liability towards making the payment for

supply of Bitumen by the Petitioner. They have also not disowned the Annexure-1 work order dated 9.6.2004. In the application for vacating stay pursuant to which Misc. Case No. 2493/2004 has been registered, the Respondents No. 1 to 4 are the applicants which include the Chief Engineer who is the author of the work order and the Executive Engineer who subsequently issued the aforesaid Annexure-16 letter dated 19.8.2004. After having placed the work with the Petitioner pursuant to the NIQ which also did not debar participation of private individual and the Petitioner having accepted the same and making supply of the materials and the Respondents also making use of part of it, cannot take the plea of the kind of irregularity as was perceived in the aforesaid decision of the Apex Court so as to project the concept of equality in a negative sense. It does not behove of the Respondents to put blame on the Petitioner after keeping him all along in dark about the subsequent development after the Annexure-2 letter dated 10.6.2004. They cannot approbate and reprobate according to the demand of the situation. It was in this context, learned Sr. Counsel Mr. Bhattacharyya argued on behalf of the Petitioner placing reliance on the decision of the Apex Court in Rajagopalachari's case (supra) that the Respondents cannot play hot and cold and rightly so. In that case, the Apex Court observed that the Respondent to a writ petition cannot be allowed to attack its own orders as a Respondent.

35. In the report dated 28.8.2004, which was submitted by the Additional Chief Secretary pursuant to the order of this Court, it was pointed out that the fault lay with the Chief Engineer and the Commissioner and Special Secretary, PWD. This is precisely the reason while the Additional Chief Secretary in his report pointed out the available alternative for the Commissioner and Special Secretary, PWD by way of approaching the Finance Department seeking to amend the sanction in favour of the Petitioner in lieu of the PSU. During the course of argument, when this aspect of the matter was pointed out, Mr. Choudhury, learned Sr. Counsel for the Respondent No. 1 submitted in reference to the records that the Commissioner and Special Secretary was not aware of the development and it was only on 27.8.2004, he was apprised of the work order dated 9.6.2004. However, no such stand has been taken in the application for vacating stay. All the Respondents i.e. Respondents No. 1 to 4 on whose behalf the application for vacating stay was filed stated in unequivocal terms about the validity of the work order dated 9.6.2004 without there being any whisper about the alleged non-appraisal of the Respondent No. 1 about the said order. As noticed above, the only plea raised in the application is in respect of the mode of payment against the supply made by the Petitioner and the replacement of Annexure-2 letter dated 10.6.2004 by Anr. letter on the same date with the change of name of the party as PSU in place of the Petitioner. However, merely because the name of the party as indicated in Annexure-2 letter dated 10.6.2004 was later on changed on the same date by way of issuance of Anr. letter under same number, the position which has emerged as on date pursuant to the Annexure-1 work order dated 9.6.2004 cannot be altered. The Respondents cannot resile back from that

position on the basis of the purported developments with the replacement of the Annexure-2 letter dated 10.6.2004 which culminated to the issuance of Annexure-7 impugned FOC dated 11.8.2004 without intimating anything to the Petitioner. Not only that, in between, the Respondents even accepted the materials supplied by the Petitioner and made use of part of the same.

36. In the judgment in Gursharan Singh (supra), the Apex Court while dealing with the scope of Article 14 of the Constitution of India emphasised that the Petitioner in that case having agreed to the terms of allotment cannot legitimately Claim that they should also be treated in the same manner as that of the other stall holders who were extended with certain concessions. Thus the emphasis was on the terms of allotment. In the instant case also, the Petitioner agreed to the terms of work order and supplied the materials. Thus, it was a Concluded contract with offer and acceptance and the Respondents cannot resile back from that position only in respect of mode of payment which will amount to adopting a policy of approbate and reprobate according to the demand of the situation. In the case of Robertson v. Minister of Pensions, as reported in 1948 (2) All England Law Reports 767 Lord Denning dealing with the question, whether the assurance of the war office without consulting the crown would be binding on the Crown, observed that the crown cannot escape by saying that estoppels do not bind the crown. It was further observed that"..... if a Government department in its dealings with a subject takes it on itself to assume authority on a matter with which he is concerned, he is entitled to rely on it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the crown also, and as the Crown is bound, so are the other departments, for they also are but agents of the Crown."

37. In the instant case, it is nobody's case that the Respondent No. 3 i.e. the Chief Engineer was not authorised to issue the NIQ and the work order. He having issued the work order and the Petitioner having acted upon it, he cannot be deprived of payment thereof on a controversy subsequently raised by the Respondents regarding the mode of payment. As noticed above, the Respondents are not opposed to make payment to the Petitioner, but they are opposed to make such payment pursuant to Annexure-5 FOC dated 6.8.2004. Their further stand is that the impugned FOC dated 11.8.2004 is in respect of PSU and the payment for 2000 MT Bitumen is for the PSU. There is no dispute that the impugned FOC dated 11.8.2004 is in respect of same very quantity of Bitumen major part of which has already been supplied by the Petitioner. It is not the case of the Respondents that the impugned FOC dated 11.8.2004 is in respect of additional quantity of 2000 MT of Bitumen. If that be so, I see no reason as to why the amount should not be paid to the Petitioner for the supply he has already made, more particularly, when the work order itself specified payment of bill on availability of fund and when the fund is now available. If there is any impediment towards making the payment of the bills in absence of supply of the balance quantity of Bitumen for which the Respondent No. 4 has issued An-

nexure-16 letter dated 19.8.2004, as submitted by Mr. Bhattacharyya, learned Sr. Counsel for the Petitioner, the Petitioner is ready to do so. It will be entirely upto the Respondents either to make payment of the bills without the balance quantity or to make the full payment on supply of the balance quantity.

38. For the foregoing reasons, there is no escape from allowing the writ petition granting the prayers made therein. However, if the procedural niceties demand amendment to the sanction in the name of the Petitioner in lieu of the PSU or regularization of the transaction through Cabinet Memorandum, same shall be done immediately. The entire exercise, be it payment of the bills to the Petitioner on the basis of Annexure-5 FOC dated 6.8.2004 or through any amendment to the sanction in Annexure-7 impugned FOC dated 11.8.2004 or through any Cabinet Memorandum shall be carried out by the Respondents within two months from today. The impugned FOC dated 11.8.2004 which is already under order of stay of this Court shall not be implemented and shall remain inoperative till the above exercise is carried out and the Petitioner is paid his dues against the Annexure-6 series bills and any subsequent bills which might be submitted by him on supply of the balance quantity of Bitumen towards full and complete supply of the same in terms of the Annexure-1 work order dated 9.6.2004.

39. Having answered the writ petition in the above manner, the question, which arises for consideration is as to whether the matter should be left in that manner only. As per the stand of the Respondents, which include the Commissioner and the Special Secretary to the Government of Assam, PWD; the Chief Engineer, PWD and the Executive Engineer, PWD, the policy decision of the Government debars them from placing orders for supply of Bitumen with private individual. Such supply can only be procured directly from the manufacturer (PSU) by making advance payment. If that be so, the question arises as to how the same very Respondents could become a party to place work order with a private individual, the Petitioner. At the first instance, the Chief Engineer, PWD could not have issued the NIQ without specifying that no private individual is entitled to offer quotation and at the second instance could not have issued the Annexure-1 work order dated 9.6.2004. The matter did not rest thus. The same very Respondents not only accepted the materials supplied by the Petitioner but the Respondent No. 4 also issued Annexure-16 letter dated 19.8. 2004 just one day ahead of filing the application for vacating stay on 20.8.2004 requesting the Petitioner to supply the balance quantity of Bitumen. It was in that context, the Additional Chief Secretary high lighted in his report dated 28.8.2004 that the said Respondents could have cancelled the work order atleast on 10.6.2004. He has also high lighted in the report as to how as against the stipulated delivery period of 15 days from the date of the order dated 9.6.2004, the actual supply commenced a month later and that the supply order could have been cancelled any time on expiry of the stipulated period of 15 days i.e. after 24.6.2004 and before 29.7.2004 when the delivery of Bitumen commenced.

40. The Respondents, more particularly the Respondent No. 3, the Chief

Engineer, PWD who was instrumental and rather the author towards issuance of the Annexure-1 work order dated 9.6.2004 and was fully aware of the development that took place on 10.6.2004 and thereafter, did not do anything in the matter either by way of apprising the Petitioner of the said development or by way of canceling the work order which was the simple and most logical consequence to be perceived by an officer of the stature of the Chief Engineer. However, nothing happened and the work order was executed by the Petitioner. The application for vacating stay in which the Respondent No. 4 i.e. the Executive Engineer, PWD is also an applicant, even after knowing fully well about the development, continued to receive the materials supplied by the Petitioner and being not content with the same, even went to the extent of issuing the Annexure-16 letter dated 19.8.2004 making a request to the Petitioner for supply of balance quantity of the materials.

41. All the above circumstances lead to the irresistible conclusion that the said Respondents did not act in the matter as was required of them giving rise to the present controversy. In such a situation, this Court is left with no option than to recommend to the Chief Secretary, Government of Assam to take appropriate action against each one of them for the mess in which they have put the matter. They cannot absolve themselves of their liability, more particularly, having themselves urged the ground of policy decision of the Government not to obtain Bitumen from any private individual, but to procure it directly from the manufacturer on advance payment and having referred to the earlier instance of 2003 in which also the matter had to be processed by way of submitting Cabinet Memorandum for obtaining Bitumen from the Petitioner instead of PSUs. Thus, being fully aware of the procedure of obtaining Bitumen, they could not have flouted with the said procedure and perpetuated the same.

42. Writ petition stands allowed to the extent indicated above with the aforesaid recommendations for appropriate actions against the said officers. There shall be no order as to costs. The registry shall forward a copy of this judgment and order to the Chief Secretary to the Government of Assam for his necessary follow up action.