

(2003) 12 CAL CK 0036
In the Calcutta High Court
Case No : Writ Petition No. 16060 of 2003

Dipak Kumar Sarkar and Others	Vs	APPELLANT
State of W.B. and Others		RESPONDENT

Date of Decision : 05-12-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 299
Contract Act, 1872 — Section 10

Citation : AIR 2004 Cal 182

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Sibdas Banerjee, Chittaranjan Chakraborty and P.S. Ghose, for the Appellant; Saktinath Mukherjee, Sadananda Ganguly, P.C. Ghosh and Rina Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This writ petition is made for the purpose of issuance of Mandamus to show cause as to why the tender notice dated 1-10-2003 issued by the authority of the Malda Zilla Parishad-being Annexure "P-3" will not be cancelled and/or set aside. A writ in the nature of prohibition was also made to that effect. The other consequential prayers are also made in connection thereto. At the interim stage the petitioners have obtained interim order to the extent. "In the meantime, there is no embargo upon the District Engineer, Malda Zilla Parishad, Malda to proceed with such tender notice but no final decision will be taken in respect of item Nos. 5, 6, 9, 15, 29 and 30 without leave of the Court".

2. A plea has been taken by the petitioners claiming to be the contractors that before the election of the Panchayat Raj Institution, the tender of the petitioners in respect of the aforesaid items were accepted as lowest. But no further action was taken due to forthcoming panchayat election. It was also recorded that work order may be Issued immediately after the ensuing panchayat election. The petitioners contended that they have deposited the security money. After the

election the political scenario was changed in respect of such Zilla Parishad. The present authority has floated a new tender notice totally ignoring the acceptance of lower rate as incorporated in the note sheets of the Zilla Parishad. Therefore, the petitioners have a right to know the cause of rejection. Agazette notification was published on 3-4-2003 in the Kolkata Gazette. A clause of such Gazette Notification is as follows :

"Normally, the lowest quotation or tender as the case may be, for the work, material or service indented for shall be accepted. However, on evaluation of antecedents and past records of the organisation concerned, its experience, standard and quality of earlier Job performed, financial status of the tenderer, quality and specification of the materials or service offered and reasonability of rates quoted, even the lowest tender (or any other tender) may be rejected and the lowest along the available tenders may be accepted. However, this must necessarily be accompanied by written notes explaining in clear terms why certain tenders are rejected -- specially if the lowest one is rejected and why some other tender is accepted. Such a note must be signed by the members of the Tender Committee".

3. Subsequent to obtaining the interim order passed by the Court, the respondents sought for time to file their affidavits to contest the same. Such affidavits are filed. Incidentally, it is to be recorded hereunder that an application being CAN No. 9313/2003 was filed for addition of parties which was allowed since no objection was put forward. The parties are the contractors in respect of other items. At the time of final hearing Mr. Sibdas Banerjee, Id. Senior Counsel appearing for the petitioners contended before this Court that security deposit as received by the Zilla Parishad in respect of the earlier tender was withheld. No cause of rejection of the lowest tender was shown but a fresh tender notice was issued. The condition of wide circulation was not there at the time of calling the earlier tender. No copy of the notice was given by the Zilla Parishad concerned to the President of the Malda Zilla Parishad Contractor Welfare Association, Malda although the same was given in the earlier occasion. Therefore, there is a strong and cogent ground of legitimate expectation which not only be substantiated on the basis of the factual or legal position as indicated herein in getting success of the writ.

4. Mr. Saktinath Mukherjee, Id. Senior Counsel contended before this Court that it is an admitted position that the political scenario was changed in the Zilla Parishad. But acceptance or rejection of the tender was based upon certain reasons. The earlier tender was not widely circulated admittedly. The Zilla Parishad obtained a permission from the Government when by a letter of the Joint Secretary of the Government of West Bengal being dated 5-6-2003 it was communicated that the works may be taken up only if the tender is called for by giving publicity in the newspapers as prescribed in the new accounts rule and if other formalities as per the New Accounts Rule are observed. Therefore, when it is an admitted position even in the official note of the Zilla Parishad in respect of

the earlier tender, the same cannot be accepted without circulation. That apart, recording of note sheet cannot give any right to the petitioners to get an order from the writ Court because it has no face value unless it is communicated. Even to that extent he relied upon various judgments of the Supreme Court. In *Bachhittar Singh Vs. The State of Punjab*, a five Judges Bench of the Supreme Court held that a Minister or the Council of Ministers may express quite a different opinion than the earlier one but to make the opinion amount to a decision of the Government it must be communicated to the person concerned. It is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. Until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore till its communication the order cannot be regarded as anything more than provisional in character. Secondly, he cited *State of Bihar and Others Vs. Kripalu Shankar and Others*, . There I find that nothings in a notes file, not only of officers but even that of a Minister will not constitute an order to affect others unless it is done in accordance with Article 166(1) and (2) and communicated to the person concerned. The notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2). Thirdly, he cited *Union of India and Others Vs. Dinanath Shantaram Karekar and Others*, to establish that the Supreme Court in a disciplinary proceeding held in the similar line.

5. Next submission he made that in respect of not to give effect of fresh tender this writ petition was made. But no prayer has been made in respect of acceptance of earlier tender. He has also faintly taken the point of non-joinder of necessary party, i.e., the concerned Zilla Parishad by saying that it might have been a bona fide mistake. Lastly, he submitted that no work order has been issued in respect of the tender. Therefore, question of legitimate expectation cannot arise.

6. In reply Mr. Banerjee has contended that whether there was an official note in respect of getting clarification by the earlier Zilla Parishad is not known to them. Mere statement in the affidavit-in-opposition cannot be accepted as an explanation unless such document is annexed or crave leave to rely upon the same. The rule of wide publication, if any, cannot have any retrospective effect. The earlier tender notice was issued prior to the communication of the Government in respect of wide publication. Lastly, he stated that the present tender has not been properly communicated to the President of the concerned contractor welfare association.

According to me, unless and until a contract exists, no right can be claimed by the participants in the tender. If any right in such circumstances arises, that will be governed by the civil laws. Therefore, where is the scope of intervention of the writ Court? The writ Court is only concerned in respect of the legitimate

expectation or, at best, in a case of promissory estoppel. This is not a case of promissory estoppel. Therefore, it is necessary to know whether any legitimate expectation arises in this circumstances to get an affirmative order finally in the writ petition or not. Admittedly, when no work order has been issued, no such right can be accrued or can be attached to any right of contractual obligation. Admittedly, the internal note sheet cannot have any face value. This Court is astonished how the contractors can have such note sheets in their custody. It clearly indicates that how far they can go to get the contract. Apart from the question of legality or validity of such note sheets in the eye of law, such document itself says that the lowest rate may be accepted and work order may be issued. Such "may" cannot be held to be "shall". Therefore even if such note sheets have any face value, the recordings cannot help the cause of the petitioners. The other important part is that in the earlier tender a clause had been incorporated being Malda Zilla Parishad reserved the right to reject or accept any or all tenders without assigning any reason thereof." Therefore, there is no such reason to be shown to the tenderers for their non-acceptance. Even then if the Zilla Parishad proceed on a much more transparent way to make the publicity in the newspaper irrespective of issuance of any circular by the Government, nobody can stop it. On the contrary, it has to be appreciated, Annexures of notings and supply of a copy to the President of a contractor welfare association in the earlier cannot give a clean image of the earlier members of the Zilla Parishad. In such circumstances, I do not believe that refusal, if any, is not backed by any reasons. Giving of reasons or having reasons are distinct and different. Having reasons may be incorporated in the internal notes making it confidential or may be reflected from the discussion as made above. Therefore, I do not find that there can be any embargo in respect of issuance of fresh tender. Last but not the least, the petitioners have participated in the fresh tender. Leaving aside item Nos. 5, 6, 9, 15, 29 and 30, the others who have added as party as party respondent they might have been participated in respect of some other items. But the same is not known to this Court as I do not find anyone appeared and made any submission. But when there is a participation in respect of the fresh tender, the objection, if any, in respect of the earlier tender must have to be treated as waived. It is inappropriate to conclude that the present tender will be available only in respect of certain items and earlier tender will be available in respect of some other items. Particularly a prayer has been made for the purpose of cancellation and/or setting aside the tender dated 1-10-03 order.

7. Thus, taking into totality of the matter, I am of the view that no relief can be granted in favour of the petitioners. The writ petition is, thus, dismissed.

8. Interim order stands vacated.

9. Security deposit, if any, of any tenderer in respect of the earlier tender is to be returned as expeditiously as possible.

10. However, this order will not put an embargo upon any tenderer to participate

in the tender if the time permits.

11. There will be no order as to costs.

12. Let urgent xeroxed certified copy of this order, if applied for, be given to the Id. Counsel for the parties within fortnight from the date of putting the requisites.