
(1986) 01 CAL CK 0023
In the Calcutta High Court
Case No : C.O. No. 14070 (W) of 1984

D.P. Kumar

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-01-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1987 Cal 39 : 90 CWN 825

Hon'ble Judges : Bhagabati Prasad Banerjee, J

Bench : Single Bench

Advocate : Noni Bhusan Sirkar and Maitreyi Ghosh, for the Appellant; A.G., Amal Baran Chatterjee and Tapan Sengupta, for the Respondent

Final Decision : Allowed

Judgement

Bhagabati Prasad Banerjee, J.—In the writ petition, the petitioner challenged the validity of the order accepting the quotation/tender submitted by the Respondent 6, Mackintosh Burn Ltd. and the consequential work order, if any, issued in that behalf. The writ petition was moved on 26-9-84 whereupon an ex parte interim order was passed restraining the respondents from giving any effect to or acting on the basis of the purported order accepting the quotation/tender submitted by the Respondent 6 M/s. Mackintosh Burn Ltd., and the consequent work order, if issued, for completion of the remaining construction of "Banga Bhaban" at No. 3, Hailey Road, New Delhi-1 and from issuing any further order till the disposal of the Rule. Thereafter in terms of the order passed by this Court, the petitioner served copies of the writ application on all the respondents including the respondent 6, M/s. Mackintosh Burn Ltd. But nobody appeared to contest the matter on behalf of the said Respondent 6. The State Respondents appeared and filed an application for vacating the interim order. The petitioner also filed application for contempt alleging violation of the order passed by this Court. The matter was heard, but thereafter because of the change of the determination, this Court could not hear the matter. At this stage at the instance of the State

Respondents, the matter was assigned by the Learned Chief Justice to this Court to hear and dispose of the matter. Initially, the State Respondents stated that they would not file any affidavit in the matter and that the application for vacating the interim order should be treated as affidavit-in-opposition in the writ application. The learned Advocate General appearing on behalf of the State submitted that the parties agreed that the matter might be finally disposed of without issuing any Rule on the basis of the petition, the application for vacating the interim order and the records of the case. Thereafter, the respondent was also given liberty to file an affidavit-in-opposition and the Respondents 1 to 5 also filed an affidavit-in-opposition.

2. The dispute in this case relates to the tender for construction of "Banga Bhaban", New Delhi. The petitioner's case is that the Superintending Engineer, Public Works Department, Presidency Circle I, Government of West Bengal issued a notice inviting tender "for construction of the 7 storied building at the existing site of Banga Bhaban, New Delhi-1". By the tender notice dt. 26-8-80 which is annexure "A" to the petition, the estimated value of the work put to tender was Rs. 35 lakhs approximately. Pursuant to such notice, the petitioner submitted tender and that it appears that the Superintending Engineer, Presidency Circle, for and on behalf of the Governor of West Bengal, informed the petitioner that the tender of the petitioner at the rate of 26.3% above the schedule of rates attached with the tender for the said work had been accepted. The petitioner was requested to submit copies of the agreements as required in this behalf with the usual conditions, the letter of acceptance non-fulfilment of this conditions, the letter of acceptance of the tender would be considered automatically cancelled. The Superintending Engineer, Presidency Circle while communicating the decision of the State Government by the Memo No. 3037/228/57-VII dt. 1-10-80 also informed that "the Govt. has decided to take up the work of the front portion in the first stage amounting to Rs. 13,42,000/- (for both structural and S & P) though it has in its mind to complete the whole project phase-wise. Under the circumstances you are requested to take up the work of front portion and accordingly deposit in advance to the Deptt. as reserved price for demolition of the structure of the said portion and its disposal. Necessary work order will be issued to you by the Executive Engineer, City Division, after the above instructions are complied with." By the letter dt. 3-10-80, the petitioner informed the Superintending Engineer, Presidency Circle, the Respondent 2 herein that the tender was called for the rear portion, i.e., 7 storied building at the site of the Banga Bhaban and accordingly, the rates were quoted and that it was alleged that the Government have subsequently decided to take up the work of the front portion which was a smaller work and that as such it would not be possible for the petitioner to take up the work for the front portion at the tendered rate. It was further stated by the petitioner that "the work worth Rs. 35 lakhs as per your schedule of rates is carried on without any stoppage and completed within the period of eighteen months." Thereafter by the letter dt. 30-10-80, the Superintending Engineer, Presidency Circle-I requested the petitioner to submit

an offer without prejudice to the earlier offer and/or negotiation and also free from any condition in a sealed cover for the construction of the 7 storied building at the existing site of Banga Bhaban. It was further stated that the work of front block only would be "amounting to Rs. 13,42,000/- with the time of completion being 9 months from the date of issue of the work order." Pursuant to the said letter dt. 30-10-80, the petitioner by the letter dt. 15th Nov.. 1980 informed the said Respondent 2 as desired in the said memo, the petitioner for the front block quoted the rate which was 40% above the schedule of rate and the rate for the work of the front block followed by the work on the rear block including the stair room would be 29.3% above the schedule of rates. Thereafter by the memo dt. 20th Jan., 1981 which is annexure "E" to the petition, the Superintending Engineer, P. W. D. Presidency Circle, informed the petitioner for and on behalf of the Governor of State of West Bengal that "Your rate at 26.3% (twenty six point three per cent) above the schedule of rates of the Presidency Circle-I (P.W.D.) for 1980-81 both for Building & Sanitary Plumbing works, for the above noted works, as offered to the Chief Engineer, P.W.D. has been accepted by me for and on behalf of the Governor of West Bengal. You are therefore requested to submit copies of agreement in quadruplicate (3 copies in West Bengal F. No. 2911 (ii) and one copy on plain paper) along with Rs. 19,500/- as reserved price for demolition of the existing buildings to this office through the Executive Engineer, City Division within 15 days from the receipt of this letter failing which this letter of acceptance of the said work will be considered automatically cancelled. Necessary work order will be issued to you by the Executive Engineer, City Division if the above instructions are complied with. This is in supersession of this Memo No. 3037 dt. 1-10-80 which is hereby cancelled. It appears that in terms of the Memo No. 112/22B/57 dt. 20-1-81 which is Annexure "E" to the petition, the petitioner complied with the necessary formalities but no work order was issued and nothing was communicated to the petitioner and no reason whatsoever was disclosed why the work order was not issued. Thereafter, all of a sudden by the Memo No. 571 dt. 11-3-83, the Respondent 2, the Superintending Engineer, Presidency Circle, informed the petitioner that regarding the construction of Banga Bhaban" I have to inform you that the Government has decided to call fresh tenders for the rear portion and as such the necessity for a fresh rate contract with you, for the rear block is noted out. The Government is however agreeable to execute the basement portion of the rear block i.e. by the roof of basement floor as per of your original agreement, but since you have already completed the major portion of the same in the meantime. I would, therefore, request you to please apply for extension of time to the Executive Engineer, City Division, for the period required by you to complete the constructional portion up to the roof of the basement floor." Thereafter, it appears that along with the petitioner, the respondent 6, M/s. Mackintosh Burn Ltd.. also submitted tender and whose offer rate was actual cost plus 20% as profit, whereas the rate quoted by the petitioner was 26.3% above the schedule of rates and that the Government decided to accept the offer of M/s. Mackintosh Burn Ltd. The respondents 1 to 5 in their affidavit-in-opposition stated that the

rate quoted by the respondent 6, M/s. Mackintosh Burn Ltd., was according to the opinion of the Chief Engineer, P.W.D. the lowest and furthermore, the said company was under the management of the State Government and that the said decision for accepting the tender of M/s. Mackintosh Burn Ltd., had the approval of the Government and the Finance Department considered interest of the Government and also of State Government managed company. It was further stated on behalf of the said respondents that the rate quoted by the petitioner was informal and not in accordance with the notice inviting tender and that was the reason for rejecting the tender of the petitioner, D. P. Kumar. This affidavit was affirmed on behalf of the Respondents 1 to 5 by Shri Sachindra Kumar Sen, Chief Engineer, Public Works Department. It was further stated in the said affidavit that the authorities by allotting the work to the respondent 6 acted in accordance with the terms and conditions of the tender. Further, the authorities according to the terms and conditions reserved the right to reject and/or accept any tender without assigning any reason and the petitioner by submitting the tender had no right that his tender must be accepted by the authorities. Further, the State Government in accepting the tender of the respondent 6 which is a government company alleged to have considered all aspects, particularly the financial interest of the Government as well as the interest of the public. Under the circumstances, it was stated that by accepting the tender of the respondent 6, the authorities acted with reasonableness and for public interest. The xerox copies of the tenders submitted by the petitioner as well as by the respondent 6, M/s. Mackintosh Burn Ltd., have been annexed to the petition as Annexures "A" and "7" respectively. The petitioner's rate was (a) 26.3% above current schedule of rates (1983-84) (or building sanitary and plumbing works (b) 4.6% above rate not appearing in the circle in respect of non-schedule work. The respondent 6 submitted the tender only for the following works :

"Cost + 20% (Cost plus twenty per cent)"

3. In the affidavit-in-reply, the petitioner made analysis of the rates quoted by the petitioner and M/s. Mackintosh Burn Ltd. From analysis of the rate, the petitioner tried to establish that in respect of schedule works, the rate quoted by M/s. Mackintosh Burn Ltd., would be 30% above the schedule and as against 27% above schedule of the rates in respect of the petitioner. For non-schedule items, the petitioner by the said analysis tried to establish that the rate quoted by M/s. Mackintosh Burn Ltd., would be 17.5% above the schedule as against 4.5% above the rates in respect of the petitioner. In other words, on the basis of the said analysis the petitioner submitted that the statements made in the affidavit-in-opposition on behalf of the State Respondent (that the rate quoted by the respondent 6 was lower was wholly incorrect, baseless and in any event such a statement has been made only to mislead the Court. It was further submitted that the actual cost is a variable factor and with the increase of the cost of material the actual cost would increase and that it was stated in the tender notice one has to specify clearly the rate whether the same was above schedule of rate or below the schedule of rate. The quotation, cost plus 20% profit is an

indefinite figure. The cost plus 20% is an unascertained sum and that the same might altogether exceed the budget amount fixed by the State Government in this behalf and that it was further submitted on behalf of the petitioner that such acceptance of such type of rate as has been done from the respondent 6, had never been done by the Department concerned earlier.

4. Mr. Moni Bhusan Sirkar, learned advocate appearing on behalf of the petitioner, contended that in the instant case, the contract was concluded by and between the petitioner and the respondents 1 to 5 because of the acceptance of the tender by the Memo No. 112/22B/57 dt. 20-1-80 which is Annexure "E" to the petition by which the Superintending Engineer, Presidency Circle for and on behalf of the Governor of State of West Bengal accepted the rate quoted by the petitioner which was 26.3% above the schedule of rates and that as because the rate was accepted, the respondents were estopped, from awarding the same in favour of any other party. It was further submitted that the allegation that the rate of the petitioner was informal and was not in accordance with the notice inviting tender was baseless and motivated inasmuch as if the rate that quoted by the petitioner was informal and not in accordance with the notice inviting tender in that event, the respondents could not accept the tender by the notice No. 112/22B/57 dt. 20-1-81. It was further submitted by the petitioner in as far as the tender notice is concerned, there was no escalation clause meaning thereby that in case of any increase in price, the contract will not get any relief. But the State Respondent by accepting the tender of M/s. Mackintosh Burn Ltd., had as a matter of fact accepted the position that whatever may be the increase in the cost of production that would be given by the State. Mr. Sirkar, the learned Advocate appearing on behalf of the petitioner, submitted that the allegation that the tender submitted by the petitioner was informal was not correct and secondly the rate of the respondent 6 was variable and the reasons for which the said tender was accepted were not good reasons and the rate quoted by the Respondent 6, on the basis of the admission made by the Respondents 1 to 5 in the affidavit-in-opposition that "the estimated amount put to tenders was for Rs. 60,00,000.00. Tenders were invited on the basis of percentage above/below/part of specific priced schedule....." could not have been considered at all. It was further submitted by the petitioner that in the original agreement there was a clause which reads as follows : "For further work, i.e. for the ground stair case and front portion and beyond the original contract period, Government may settle the rate by negotiation so that the total project is completed "without loss of time" and that relying upon the said clause it is stated that petitioner kept his men and material for execution of the said work at New Delhi. It was further alleged that in the facts and circumstances of the case if the petitioner's rate was accepted by the Memo dt. 20-1-81, there was no bona fide reason whatsoever for calling the fresh tender by the notice dt. 11-3-1983. In any event, when the rate quoted by the petitioner was a definite rate as against the rate quoted by the respondent 6, which was indefinite and vague and contrary to tender notice, the Respondents 1 to 5 could not accept the rate quoted by the

Respondent 6, M/s. Mackintosh Burn Ltd. Mr. Sirkar, learned Advocate appearing on behalf of the petitioner, relied upon the decision of the Supreme Court in the case of Hindustan Sugar Mills Vs. State of Rajasthan and Others, in support of his contention that even in case of contractual obligation, the Government cannot take any stand for relegating the parties to the suit and it is the duty of the State to do which is just and fair to the citizens and the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude and should do what fairness and justice demands. Mr. Sirkar also relied on the decision of the Supreme Court in Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, wherein it was held by the Supreme Court that while the Government in dealing with the public, whether by way of giving jobs or entering into contracts, or granting other forms of largess, the Government cannot act arbitrarily at its sweet will unlike a private individual; the State cannot act as it pleases in the matter of giving largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. Mr. Sirkar also relied on the decision of the Supreme Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, for the proposition. It was contended that it was the policy of the Government to grant the work of constructions of Banga Bhaban on open public tender on the basis of competitive rates which would be lowest amongst the tenderers." Therefore, the lowest tender rate is the main determining factor for acceptance of tender in terms of the notice inviting tender. That being the position the Government cannot accept the tender of M/s. Mackintosh Burn Ltd., which did not fulfil the requisite requirements of the lowest tender. It was considered that the tender of the petitioner D. P. Kumar was the lowest. Reliance was also placed on the case of S. P. Das v. State of West Bengal, reported in (1980) 2 CHN 480 para 11 wherein it was held that writ lies for enforcing contractual rights. The Executive cannot act arbitrarily in administrative function and the rules of natural justice have to be observed. The Government acting in exercise of its statutory power and the over expanding field of Government action in awarding contracts and licenses, both under the Constitutional guarantee of Article 14 and also as a rule of administrative law cannot act arbitrarily or at its sweet will. The Government cannot act with an evil eye. The action of the State Government in the matter must be held to be arbitrary and capricious and without any rhyme or reason. It is immaterial whether the right of a party flows from a statute or under a contract. Reliance was also placed upon the decision of the Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, wherein it was held by the Supreme Court that the State is bound by the principles of promissory estoppel. In the instant case, the State promised to the petitioner to have the work done by entering into a solemn contract as per the letter dt. 20th Jan., 1981 which is Annexure "E" to the petition for construction of entire Banga Bhaban and that the State Government's action in refusing the grant of work of the construction of the work of Banga Bhaban, which was already constructed by the petitioner, is on the face of it unjust and the respondents are bound by the

principle of promissory estoppel to award the rest of the contract. Reliance was also placed on the decision of the Supreme Court in the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, wherein it was held that the principles of reasonableness, which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 of the Constitution. Relying upon the said decision it was submitted by the learned Advocate appearing on behalf of the petitioner. Mr. Moni Bhusan Sirkar, that the decision of the State Government to award the contract for construction of the Banga Bhaban half of which had already been constructed by the petitioner was not just, right and wholly arbitrary.

5. Learned Advocate General appearing on behalf of the State Respondents contended in the first place that the petitioner by participating in the fresh tender had waived and/or relinquished its right, if any. accrued in the agreement by virtue of the acceptance of the offer given by the petitioner in this behalf. This stand does not appear to be correct in view of the fact that by the Memo dt. 30-10-1980 the petitioner was requested to submit an offer without prejudice to the earlier offer. So it does not appear that the principle of waiver and/or acquiescence could be pleaded by the respondent against the petitioner in the matter. The second submission on behalf of the State Respondents that the rate submitted by the petitioner was informal cannot also be accepted in view of the fact that if the rate quoted by the petitioner as disclosed in this affidavit is said to be informal, in that event, the rate quoted by M/s. Mackintosh Burn Ltd., the respondent 6 herein also appears to be informal and both the parties stand at par with regard to the form in which they had submitted the tenders. So I am unable to hold that the rate quoted by the petitioner was informal and not according to the tender agreement in view of the fact that both the tenders suffer from the same infirmity, if any. in the matter that on that ground the tender of the petitioner could not have been rejected.

6. The learned Advocate appearing on behalf of the State Respondents relied upon a decision of the Supreme Court of India in the case of *C.K. Achuthan Vs. The State of Kerala and Others*, wherein it was held by the Supreme Court that no fundamental right was involved and at best it was a right to take the matter to Civil Court and to claim damages for breach of contract, if any, in the matter like this. Reliance was also placed on the case of the Supreme Court of India in the case of *State of Uttar Pradesh and Others Vs. Vijay Bahadur Singh and Others*, wherein it was held that conditions of auction of forest lots provided that Government was not under an obligation to accept the higher bids and no rights accrued to the bidder merely because his bid happened to be the highest and that the acceptance of bid at the time of auction was entirely provisional and the same was subject to ratification by the competent authority, namely, the State Government. The Government's power to refuse to accept the highest bid could not be confined to inadequacy of bid only there may be valid, good and sufficient reason free from inadequacy of bid which may impel the Government not to accept the highest bid and that the Government has the right to change its policy

from time to time according to the demand of time and situation in the public interest. Even though there was no express policy decision of the Government recorded after the date of the auction. It was further submitted on behalf of the respondents that the only remedy of the petitioner in the facts and circumstances of the case is to file a suit for damages.

7. Considering the facts and circumstances of the case, I think it is not necessary for this Court to discuss the case laws cited by the petitioner in details as the State Government is the appropriate authority to take decision in the matter of accepting and/or rejecting the tender and the Court should not ordinarily interfere in such a matter. But in the instant case, the respondents have disclosed the ground for rejection of the tender submitted by the petitioner and same was that the tender submitted by the petitioner was informal and not in accordance with the notice inviting tender. From the xerox copies of the tender submitted by the parties it appears that the tender submitted by the M/s. Mackintosh Burn Ltd.. was also informal and also in a very cryptic manner. Further cost plus 20% over and above the cost is in my view indefinite, vague and uncertain and contrary to the notice inviting tender and that it is difficult for this Court to go into the question whether the cost plus 20% is below or above the rate quoted by the petitioner. No material was placed before this Court by the respondents and nothing was disclosed in the affidavit in-opposition how the respondents could accept the tender of the respondent 6 being the lowest excepting by saying that "According to the Chief Engineer, P.W.D. the officer of M/s. Mackintosh Burn Ltd., was the lowest and furthermore the company was under the management of the State Government". It appears that it was a mere opinion of the Chief Engineer, Public Works Department that the rate of the respondent 6 was the lowest than that of the petitioner and that in spite of specific challenge being thrown by the petitioner that the rate quoted by the petitioner was the lowest, the respondents had not disclosed any material before this Court for repelling the said contention. In Halsbury's Laws of England (4th Edition) Vol. 1 at page 67 para 60 it is stated that "The exercise of statutory power is invalid unless the repository of the power has acted honestly and in good faith. The deliberate promotion of a purpose being public or private alien to that for which the power was conferred to be regarded as an act of bad faith..... where prima facie case of misuse of power has been made, it is open to the Court to draw an inference that unauthorised purposes have been persuaded if competent authority failed to adduce any ground supporting the authority of its conduct." It was also observed in Wades Administrative Laws, 5th Edition at page 347 that "The first requirement is the recognition that all powers have legal limits, the next requirement, no less vital, is that the Court should draw this limit in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament consistently confers upon public authorities powers which on their face seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the Courts refuse to countenance. They have woven a net-work of restrictive principles which require statutory powers to

be reasonable and in good faith and in accordance with the spirit and letter of the empowering Act." At page 359 it was also observed that "Discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That amounts at least (to) this that the statutory body must be guided by relevant consideration and not irrelevant. If its decision is influenced by extraneous consideration which ought not have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless, the decision will be set aside." In the instant case, it appears that the two tenders were submitted one by the petitioner and the other by the respondent 6 in the same manner. Of course, in case of the petitioner, the rate was specific and certain, and whereas the rate quoted by the respondent 6 was unascertained and variable one. Under such circumstances, in my view, the respondents have acted illegally in rejecting the tender of the petitioner on the ground that the same was informal and not according to the notice inviting tender. If the petitioner's tender had to be rejected on the ground that the same was informal, in that event, the tender submitted by the respondent 6 suffers from the said infirmity and the same is liable to be rejected. But that has not been done. Secondly, in spite of the challenge being thrown by the petitioner that the rate quoted by the respondent 6 was higher than that of the petitioner and that the rate quoted by the respondent 6, if accepted, will help the respondent 6 to draw any amount of money from the public exchequer and the same would also be contrary to the notice inviting tender inasmuch as in the notice inviting tender, there was no escalation clause. Cost Plus 20% profit would mean escalation in respect of each and every item which was not provided in the notice inviting tender. From the material disclosed before this Court, it appears that the said respondents have accepted the tender of the respondent 6 without any application of mind and without considering the relevant facts which the respondents were bound to take into consideration. The purpose of inviting tender is to complete the work on competitive basis and to select the competent person to execute the work and of course in such matter, though the State is not bound to accept the lowest tender, but while rejecting the lowest tender, the State is bound to disclose reason for rejecting the said tender inasmuch as it is now well established principle that the State while entering into contract cannot act arbitrarily at its sweet will unlike a private individual and as held by the Supreme Court in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, that there are two limitations imposed by law. The first is in regard to the term on which it is granted and the other with regard to the person who may be the recipient of such benefits and that the State cannot choose persons as it pleases in its absolute and unfettered discretion. It was further held that every activity of the Government has a public element in it and it must therefore be informed with reasons and guided by public interest. If the Government wants to award a contract or lease out or otherwise deal with its property or grant any other largess, it would be liable to be tested for its validity on the touch stone of reasonableness and public interest and if it fails to satisfy the either test, it would

be unconstitutional and invalid. Further whether on the ground that in a contractual matter, the writ Court should interfere in this case, I am reminded of the observation made by the Supreme Court in the case of Hindustan Sugar Mills Vs. State of Rajasthan and Others, wherein in connection with the obligation arising out of the contract, the Supreme Court observed "We respectfully except that the Central Government will not strike its legal obligation by resorting to any legal technicalities, for we maintain that in a democratic society governed by the Rule of law, it is the duty of the State to do what is fair and just to the citizen and the State should not seek to defeat the legitimate claim of the citizen by adopting the legalistic attitude but should do what fairness and justice demand." Considering the principles laid down by the Supreme Court and the law on the subject, I am of the view that the State Government had rejected the tender of the petitioner on irrelevant and extraneous ground and the tender of the petitioner was not considered in its proper perspective and the respondents have failed to disclose any material to show or to suggest that the tender submitted by the respondent No. 6 was the lowest excepting by saying that it was so because of the opinion of the Chief Engineer. In the result, the writ petition succeeds. The order accepting the quotation and tender of the respondent 6, Mackintosh Burn Ltd., is set aside and the respondents are directed to consider both the tenders of the respondent No. 6 as well as the petitioner afresh in accordance with law in the light of the observations made in the judgment and to take appropriate decision in the matter,

8. There will be no order as to costs.

9. In view of the fact that the main writ application is disposed of, no order is passed on the application for vacating the interim order and the contempt application which shall be deemed to have been disposed of.