

(1978) 04 CAL CK 0041
In the Calcutta High Court
Case No : Matter No. 204 of 1978

H.S. Kohli and Another

APPELLANT

Vs

General Manager, Chittaranjan Locomotive Works and Others

RESPONDENT

Date of Decision : 04-04-1978

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1979 Cal 75

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Judgement

Sabyasachi Mukharji, J.—This is an application challenging certain communications which have been described by the petitioners as orders. The said communications appear at pages 58 and 59 of the petition. By the communication dated 22nd Feb., 1978, which was in respect of tender for construction of 70 units type-II quarters including ancillary works at Chittaranjan, the petitioners were informed that their tender had not been accepted. On the same date by another communication appearing at page 59 of the petition in respect of tender for construction of 50 units type-I quarters including ancillary works at Chittaranjan which was opened on 18th Jan. 1978, the petitioners were informed that the said tender had not been accepted. The petitioners challenge the said two communications on the ground that the said rejections were not under Clause 15 of the conditions of tender but were made for collateral purposes and according to the petitioners the said non-acceptance was due to an order banning business with the petitioners by the Government passed on the 15th Feb. 1978 and therefore, the respondents, according to the petitioners, could not fall back on Clause 15 of the conditions of tender. It was, lastly, contended that the said conduct of the respondents was arbitrary and no reason had been given. In support of the contentions urged in this application on behalf of the petitioners reliance was placed on the observations of the Supreme Court in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, of the report it was observed as follows:--

"The Government is a government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tenders or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation.

Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness."

That, however, was a case in respect of a challenge to a blacklisting done in respect of a Government contractor. Reliance was also placed on the observations of the Supreme Court in the case of *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , in aid of the proposition that a Court would look behind such a kind of order to find out whether the order was punitive or not. Reliance was also placed on certain observations of Mr. Justice A. K. Mukherjee of this Court in the case of *Mahabir Prasad Bansal v. State of West Bengal* reported in (1976) 3 Cal HC (N) 713 at p. 726. On the other hand on behalf of the respondents it was contended that the petitioners had no right to obtain the contract as such. In this connection reliance was placed on the observations of the Supreme Court in the case of *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, where after reviewing all the decisions the Supreme Court observed that a clause in a tender for lease of distillery by which the government had reserved the right to select any tender or reject all tenders without assigning any reason therefore was not violative of Article 14 of the Constitution. The Government was not bound to accept the tender of the person who offered the highest amount.

2. Therefore, in this case in my opinion, it is true that the petitioners have no fundamental right or legal right to Obtain a particular contract nor even are they entitled to obtain a particular con-tract merely because they are the lowest tenderers and the Government is not bound to accept a tender which is lowest, but Government being a public body dealing with public funds, in rejecting a tender must act reasonably bona fide and not arbitrarily. If in a particular context

a challenge is thrown that the Government has acted mala fide or arbitrarily, then it is upon the respondents to satisfy the Court that the Government had acted bona fide as well as reasonably and not arbitrarily. This, in my opinion, follows from the decision of the Supreme Court in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, read in the background of the decision of the Supreme Court in the case of Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others, . If this is the position then keeping this principle in mind I have to examine the facts of this case. Here on behalf of the petitioners it was contended that because of the banning order the petitioners' tender had been rejected and this is not by bona fide exercise of the powers under Clause 15 of the conditions of tender. Clause 15 of the conditions is to the following effect:--

"15. Authority for acceptance of the Tender:

The authority for acceptance of the Tender will rest with the Deputy General Manager/Divisional Engineer, as the case may be, of the Chittaranjan Locomotive Works who reserves the right to divide the Tender amongst more than one Tenderer if deemed necessary and does not bind himself to accept the lowest or any tender nor does he undertake to assign any reason for declining to consider any particular tender or Tenders."

In the rules framed under the Indian Railway Code, Rule 1118 reads as follows:--

"1118. Acceptance of Tenders.-- Ordinarily the lowest tender should be accepted unless such acceptance would not be to the public interest; but the acceptance or rejection of tenders is left entirely to the discretion of the authority entrusted with this duty and no explanation can be demanded of the cause of rejection of his offer by any person making a tender. Such an explanation may, however, be called for by superior authority and should be recorded."

In para 25 of the petition the petitioners allege as follows :--

"Your petitioners state that the respondents are so bent upon to deny justice to your petitioners that the respondents are going to give tenders and/or orders of acceptance of the said tenders of the 70 unit type II quarters opened on Dec. 16, 1977 and 50 unit type I quarters opened on January 18, 1978 to other persons and not to your petitioners and even though your petitioners have been found the lowest tenderers and complied with all other rules. The respondents are stating that in view of the said impugned order dated Feb. 15, 1978, it is not possible to accept the said tender of your petitioners."

In the affidavit-in-opposition affirmed by one Nrisingha Prosad Ghose, who is stated to be the Deputy General Manager of Chittaranjan Locomotive Works, affirmed on 27th March, 1978, it has been stated in para 23 as follows:--

"With reference to para 25 of the writ petition I deny and dispute each and every allegation made therein. I say that mere probabilities or conjectures cannot be the basis of mala fide. I further say that the petitioner has no legal or

fundamental right to demand acceptance of the contracts for construction of 70 units of Type II and/or 50 units of Type I quarters, because of their alleged lowest tenders. The railway authorities are within their rights to decline to accept any tender without assigning any reason in terms of the conditions of the tender. I say that the petitioner had been allotted substantial contracts. I say that it is also the policy of the Railway authorities also to help in the employment and also establishing new contractor for future works."

Now, it may be mentioned that the order referred to as the order of 15th February, 1978 banning business with the petitioners' firm for 5 years has been struck down by this Court by an order passed on 28-3-1978 in Matter No. 147 of 1978 : H.S. Kohli and Another Vs. Union of India (UOI) and Others, . At the time of hearing of this application the minutes of the tender committee were produced before me. In respect of construction of 50 units Type I quarters including ancillary works so far as the tender of the petitioners were concerned in the note of the Tender Committee it was stated as follows:--

"5. The offer of M/s. H. S. Kohli is the lowest. The Railway Board have since decided to ban business dealings with M/s. H, S. Kohli for a period of 5 years with immediate effect. As such, they cannot be considered for award of any further contract at this stage and their offer although being the lowest is passed over."

One of the signatories to this minute is Mr. N. P. Ghose, the deponent of the affidavit referred to hereinbefore. Though the minutes are dated 14th Feb. 1978 the original order which was given to the petitioners bears the signature of 15th Feb. 1978. Similarly, in respect of the contract for construction of 70 units Type II Quarters at Chittaranjan under item No. 2.2 it is noted in the minutes of the Tender Committee as follows:--

"The offer of M/s. H. S. Kohli (Rs. 9,39,184.25) is the lowest. As the Railway Board have since decided to ban business dealings with them for a period of 5 years with immediate effect, they are not considered for award of any further contract and their offer is passed over."

The minutes are signed on 14th Feb., 1978 by inter alia Shri N. P. Ghose. The position is, as mentioned hereinbefore, in the meantime the order dated 15th Feb., 1978 has been struck down and the respondents have been directed to reconsider the matter afresh. It appears, therefore, that the tenders of the petitioners have not been accepted though lowest, on the ground of the banning order passed by the Government. In the meantime, the tenders of the respondents Nos. 4 and 5 in respect of 50 units have been accepted and they have started construction. So far as the tenders for 70 units are concerned, the tender of the respondent No. 6 has been accepted, according to the respondents, but according to the petitioners they have not paid the earnest money as required under the Rules. The respondents, on the other hand state that they have been given an extension of time to pay the tender money. In these

circumstances the question that falls for consideration is whether the petitioners are entitled to the reliefs that they have asked for in this application. As I have mentioned before the position in law seems to be that though the petitioners are not entitled as of legal right to insist that their tenders should be accepted, though lowest, the respondents also cannot act arbitrarily or whimsically or mala fide. In this case the respondents have purported to act on the plea that there was a banning order. It is true that the said banning order has subsequently been struck down by the Court. But can it be said that the existence of the banning order was a factor which the respondents Nos. 1, 2 and 3, who were considering the tenders of the petitioners, were not entitled to take ? In my opinion, it cannot be said that the respondents were not entitled to take that factor into consideration at the time when they acted and more so that would be a relevant factor in view of the fact that the tenders of the other parties had been accepted. If on the face of a banning order after taking into consideration the fact that the tender of the petitioners were the lowest and if in spite of that the respondents Nos. 1, 2 and 3 have proceeded on the basis that because of the existence of the banning order the tender of the petitioners could not be accepted, it cannot be said that the respondents Nos. 1, 2 and 3 have acted either whimsically or mala fide or arbitrarily. This position is more so as in this case the other tenders have already been accepted. So far as the tenders of 50 units in respect of the tenders of respondents Nos. 4 and 5 have been accepted, in my opinion, the petitioners at this stage cannot ask that such acceptance of tenders in favour of the respondents Nos. 4 and 5 should be rejected or interfered with. But so far as the respondent No. 6 is concerned, there (s some dispute as to whether they have paid the amount required to be deposited as earnest money. In this application in my opinion it is not germane or appropriate to decide whether such tender has been properly accepted or not. On the face of the fact that the tenders have been accepted and certain extension of time to deposit the earnest money has been given in favour of the respondent No. 6, the only order that can be made is that In case the said tender in favour of the respondent No. 6 does not materialise or is not proceeded with, the respondents Nos. 1, 2 and 3 will consider the tender of the petitioners ignoring the banning order dated 15th Feb., 1978 passed against the petitioners, which has subsequently been struck down. If, however, the respondent No. 6 does not start the work within four weeks from this date pursuant to the contract given to them, then the tenders of all the parties may again be examined including the tender of the petitioners ignoring the banning order.

3. With the directions aforesaid the Rule is disposed of. There will be no further order on this application. The parties will pay and bear its own costs.