

(1980) 08 OHC CK 0006

In the Orissa High Court

Case No : Miscellaneous Appeal No. 70 of 1980

Konark Construction and Engineerings and Others

APPELLANT

Vs

Indian Rare Earths Limited and Others

RESPONDENT

Date of Decision : 20-08-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 151

Constitution of India, 1950 — Article 12

Citation : (1980) 50 CLT 555

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : Bijaya Mohanty, for the Appellant; B. Kr. Mohanty, J. Das, Y. Das and T. Hafiz, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Konark Constructions & Engineers (Plaintiff No. 1) is a registered firm of contractors of which Plaintiffs 2 to 6 are partners. Indian Rare Earths Limited (Defendant No. 1) is a Government Company having its registered office at Bombay. Initially it was a private Company but later it has been converted into a public company. The Company has a unit at Chatrapur in the district of Ganjam, known as Orissa Sands Complex (Defendant No. 2). Defendant No. 1 through Defendant No. 2 invited tenders for two separate construction works being tender No. OSCOM/C-17 and OSCOM/C-18 C-17 was for construction of administrative buildings. The closing date for receiving tenders for it was 29-10-1979. C-18 was for civil works in ancillary buildings at the factory complex at Chatrapur and the closing date was 15-10-1979. The tender given by Plaintiff No. 1 was the lowest for C-18 and that of Defendant No. 4 - another contractor - was the lowest for C-17. Notwithstanding the fact that the tender of the Plaintiff-firm was the lowest in regard to the work under tender No. C-18, Defendant No. 1 accepted the tender of Defendant No. 4 and was about to issue the work order. Plaintiffs, therefore, instituted Title Suit No. 35 of 1980 in the Court of the

Subordinate Judge. Berhampur, asking for a declaration that:

- (a) they being the lowest tenders in respect of C-18 were entitled to be awarded the work;
- (b) the tender invitations under C-17 and C-18 being completely separate and different tenders in respect of two different works, Defendants 1 and 2 had no right or authority to combine the same or to deal with the same in any manner except strictly in accordance with law and procedure and the two tenders were to be considered separately;
- (c) Defendants 1 and 2 being instrumentalities of the State were to act strictly in accordance with the rules of law and natural justice and acceptance of the tender of Defendant No. 4 violated rules of law, procedure and natural justice and, therefore, became liable to be struck down;
- (d) both the tenders of Defendant No. 4 are liable to be rejected; and
- (e) the award of the work by Defendants 1 and 2 to Defendant No. 4 was collusive and mala fide.

At the time of the institution of the suit, Plaintiffs applied under Order 39, Rules 1 and 2 Section 151 of the CPC for an interim order of injunction restraining the Defendants from giving effect to the letters of intent dated 1-2-1980 in respect of C-17 and C-18 and not to issue work orders during the pendency of the suit. Their application was registered as Miscellaneous Case No. 57 of 1980 and they were granted an interim order which was dissolved on cause being shown. Against the vacation of the interim order of injunction, the present appeal has been filed under Order 43, Rule 1(r) of the Code of Civil Procedure.

2. Mr. Bijaya Mahanty on behalf of the Appellants has mainly advanced four contentions, namely-

- (i) Defendants 1 and 2 are instrumentalities of the Central Government and are bound to act fairly, and without any valid and reasonable cause cannot show preference to Defendant No. 4 by overlooking the claim of the Plaintiffs particularly when the offer made by the Plaintiffs is the lowest in regard to the work covered by C-18.
- (ii) The offer given by the Defendant No. 4 was conditional, inasmuch as in a covering letter to its offers, it had been clearly specified that the rates offered by it were operative in case both the works covered by C-17 and C-18 were given to Defendant No. 4. The works were different and the condition indicated vitiated the offers and made them liable for rejection.
- (iii) The trial Court has gone wrong in holding that the Plaintiffs had no prima facie, case and that the balance of convenience lay in favour of the Defendants.
- (iv) It is also contended that unless injunction is granted and status quo on the date of institution of the suit is maintained, the suit itself would become

infructuous and, therefore, it was proper that the learned Trial Judge granted injunction.

These submissions have been seriously refuted by counsel appearing for the Respondents 1 and 2.

3. Appellants' counsel heavily relies upon a recent decision of the Supreme Court in the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , in support of his contention that the Defendant No. L Company is either "State" or an instrumentality of the State. From the pleadings in the suit, it is clear that one of the issues for Examination by the trial Court would be whether the Company is either "State" within the meaning of Article 12 of the Constitution, or an instrumentality of the Central Government. I do not think, it would be appropriate at this stage to go deeply into this question and reach a finding which might prejudice either party. Even if it is observed in the appellate judgment in the present matter that such a finding was intended for disposing of the question of injunction, I have my apprehensions that the trial Court might yet be persuaded by the reasonings that might be recorded.

In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the Supreme Court held that the International Airport Authority of India constituted under the International Airport Authority Act 43 of 1971, was "State" as understood by Article 12 of the Constitution. The Court also proceeded on the footing that it was an instrumentality of the State. Certain tests have been laid for determining the question by a series of Supreme Court decisions and in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, this aspect has been highlighted. I think it appropriate to leave the question for determination in the suit itself.

4. As would appear from the judgment of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , one of the qualifications prescribed to entitle one to make an offer was "to have been registered as a second class hotelier having at least five years" experience". The fourth Respondent before the Supreme Court in whose favour the licence had been given did not satisfy that requirement. Ramana, who had not made an offer in response to the notice, contended that he had the same or similar qualifications as Respondent No. 4 and if this condition had not been prescribed, he would have also made an offer and thus brought himself into the field for consideration to be picked up as a licensee. The Airport Authority as State was bound to treat all citizens equally and Ramana should not have been kept out for being given an opportunity of being considered. In paragraph 1 of the judgment itself, the Supreme Court pointed out:

This appeal by special leave raises interesting questions of law in the area of public law. What are the constitutional obligations on the State when it takes action in exercise of its statutory or executive power? Is the State entitled to deal with its property in any manner it likes or award a contract to any person it

chooses without any constitutional limitations upon it? What are the parameters of its statutory or executive power in the matter of awarding a contract or dealing with its property? These questions fell in the sphere of both administrative law and constitutional law and they assume special significance in a modern Welfare State which is committed to egalitarian values and dedicated to the rule of law. But these questions cannot be decided in the abstract. They can be determined only against the background of facts and hence we shall proceed to state the facts giving rise to the appeal.

Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , in the ultimate analysis appears to have proceeded on the footing that the qualification prescribed went to the root of the matter and though one specific qualification had been prescribed, the Authority had deviated from following it and had awarded the licence to a person not possessing the prescribed qualifications, and thereby had discriminated not only against those who had participated but against citizens who could have participated in the matter but were kept out on account of the prescription.

There can be no dispute with the proposition that all actions of the State, whether administrative or otherwise, are expected to be fair and its dealing with its own citizens have got to be free of malice, mala fides and dishonesty. Citizens are entitled to look up to the State with a sense of certainty and expect assured conduct. The State by its very nature is impersonal in character and, therefore, its activities have to be subject to objective scrutiny. Unless State's action is regulated by known rules of law, by the very process in which State activity is conducted, the process is likely to be abused and the result, Would be an antithesis of rule of law. That is the basis for the ratio in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . There can be no two opinions about it.

5. In the instant case, the dispute is between two offers pursuant to invitation of tender - one offered by the Plaintiffs and the other by Defendant No. 4. Admittedly both the tenders related to the same establishment and had been made into different units for convenience. In case, one of the tenders while giving separate offers wanted the two to be given to it so that it could work efficiently, reduce the ratio of expenses and thereby work economically and placed that request for consideration before the principal, and the principal accepted the same, it is difficult, prima facie, to accept that there is a deviation vitiating the entire action. Being the lowest tenderer Plaintiffs did not acquire any special right. The legal position is settled that the lowest tenderer is not entitled to say that he must be assigned the work by being the lowest tender. The authorities are entitled to take into consideration the capacity of the party with whom they are dealing with for ultimately finding out whether the goods could be delivered. If that discretion was not vested in the authority and every lowest tender could be considered a right for claiming the assignment of the work, public interest would badly suffer. It may be noted that in the invitation for

tenders one of the express conditions was that the lowest tender was not bound to be accepted.

Plaintiffs have claimed award of the work on the ground that their tender was the lowest. Prima facie the relief seems to be difficult to grant. Since the trial Court is to examine the matter, I express no opinion.

6. So far as prima facie" case is concerned, the trial Court has expressed doubts and [am in no better position. I reiterate that I have the least intention to prejudice the Plaintiffs in the suit on this score. One of the usual ingredients for consideration in the matter of grant or withholding of injunction is balance of convenience. The project in question seems to be an activity of the Union Government in the planned sector and can, therefore, be taken to be time-oriented. As it is, there has already been a delay of almost one year in the commencement of execution of the works. On the basis of the doubtful claim of the Plaintiffs, to stay the implementation of the scheme may not be appropriate. If ultimately Plaintiffs succeed, their claim could end up in compensation if admissible in law, but I do not think it would be appropriate in the facts of the present case to detain the execution of the work pending adjudication of Plaintiffs" dispute. There might be cases where the question at stake would be such that the grievance laid by an individual citizen may justify stay of public action. Ordinarily, the benefit to the society at large should be preferred to that of an individual and balance of convenience should tilt in favour of the majority except, as I have already indicated, in cases where the question at stake is in regard to a fundamental matter. There may be instances where the question would touch the very foundation of society or might put one of the basic doctrines in jeopardy where the rule would be otherwise. The present one in my opinion, however, is not a case of that type where to examine the alleged infraction of Plaintiffs" right the project intended to benefit society at large should be held up.

7. Having given my anxious consideration to the matter I am not inclined to detain the execution of the work awarded to Defendant No. 4. While dismissing the appeal and leaving parties to bear their own costs here. I would direct the learned Trial Judge to expedite disposal of the suit. I reiterate that I have had no intention to express any final opinion on any aspect of the matter in dispute and the learned Trial Judge would, therefore, have no embarrassment in reaching his own conclusions on the basis of the materials placed before him at the trial independent of what I might have said.