

(1990) 01 KAR CK 0008
In the Karnataka High Court
Case No : W.A. No. 2055 of 1989

M/s. The Indian Hume Pipe Co. Ltd. and another	APPELLANT
Vs	
Bangalore Water Supply and Sewerage Board and others	RESPONDENT

Date of Decision : 25-01-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 299, 31, 32

Citation : AIR 1990 Kar 305 : (1990) ILR (Kar) 1153

Hon'ble Judges : S. Mohan, C.J.; M. Ramakrishna, J

Bench : Division Bench

Advocate : T.R. Andyarjuna, C.N. Kamath and Smt. B. Kapadia, for the Appellant; R.N. Narasimha Murthy, C.R.V. Swamy and Smt. Nirmala Lingappa and N.K. Gupta, Govt. Advocate, for the Respondent

Judgement

S. Mohan, C.J.—The first appellant the Indian Hume Pipe Company Limited is a reputed manufacturer of prestressed concrete pipes and has been supplying the same for Water Supply and Sewerage Schemes throughout India for more than thirty years. They have supplied the said pre-stressed concrete pipes to the satisfaction of various authorities including Government of Karnataka for Karwar Water Supply Scheme and other Municipalities and Government Departments in India.

2. The first respondent, Bangalore Water Supply and Sewerage Board (hereinafter to be referred to as the Board) issued a Tender Notification on 4th of March 1989 for manufacture and supply of pre-stressed concrete pipes of 600 mm I.D. The approximate value of the supply was shown as Rs. 20,11,350/-. The tender documents were available for a non-refundable price of Rs. 1,620/-. The tender was required to be accompanied by an Earnest Money Deposit of Rs. 20,113/-.

3. The appellant company paid the sum of Rs. 1,620/- and obtained the tender documents. Thereafter it filled up the tender and submitted the same to the first respondent together with the cheque for Rs. 20,113/-being the Earnest Money

Deposit. When the tenders were opened on 28th March 1989, there were only three tenderers -- the appellant company, the second respondent and one M/s. Bhuratnam of Secunderabad. The quotations of the three parties were as follows :

Name Rate per Mtr.

1. Appellant company Rs. 690.00
2. Second respondent Rs. 670 + 60 + 4% KST = Rs. 756.80
3. Bhuratnam, Secun-derabad Rs. 777.00

From the above, it will be clearly seen that the tender of the appellant company was the lowest. On that day, for some reason or the other, the tenders were not concluded. On 31st May 1989 with reference to the letter of the second respondent, he was requested to go for a discussion with the Chief Engineer, B. W. S. S. B., whereupon, after discussion the second respondent wrote to the Chief Engineer on 2nd June 1989 stating that they were agreeable to supply 600 mm dia. pre-stressed concrete pipes including required rubber gaskets at the rate of Rs.685/- per running metre. The rate was inclusive of all taxes and duties and F. O. R. On 28-7-1989 it was informed that the revised offer of the second respondent for supply of the above material conforming to I. S. Specification tested to 2.1 working pressure including rubber gasket suitable for P. S. C. pipes for working pressure of 5kg/Cm² at the rate of Rs.685/- per running metre inclusive of all taxes, delivery at Divisional Stores, C. J. F. Malleswaram, Bangalore or at the works spot was accepted by the higher authorities.

4. Therefore, the Executive Engineer of the Central Stores Division of the Board called upon the second respondent to supply 2750 Rmt. of 600mm dia. P. S. C. pipes and they were also asked to go over to the office of the Executive Engineer on or before 4-8-1989 to execute the agreement on stamp paper of the value of Rs. 10/- only as per rule in vogue. The supply order was issued on 5-8-1989. While the matter stood thus, the appellant-company wrote to the Board on 2-8-1989, 7-8-1989 and 11th August 1989 making representations and enquiring about his tender. On 17-8-1989, the appellant-company was visited with the following reply by the Board.

"The Board in its meeting held on 4-7-1989 has accorded approval to entrust the supply of 600 mm dia. PSC pipes to M/s. Deepak Plastics Pvt. Ltd., since it is a registered Small Scale Industrial unit eligible for price preference up to 15% as per Government Order dated 20-2-86.

This is for your kind information."

It was under these circumstances the appellant preferred Writ Petition No. 15596 of 1989 praying for a declaration that the approval of the tender and entrusting the supply of 600 mm. dia. prestressed concrete pipes to the second respondent was illegal and for direction to set aside the said approval with a further direction to the first respondent and their officers to award and entrust the manufacture

and supply of these materials as per the notification dated 4th March 1989, to the appellant.

5. Though the eligibility of the second respondent to put forth its tender was not specifically urged in the writ petition, from the records it appears that it was raised before the learned Judge. Therefore, the first question that arose was whether the second respondent was eligible for offering its tender.

6. The second argument that was raised was since the contract in favour of the second respondent came to be awarded by clandestine negotiations with the first respondent under the veil of secrecy, about which the appellant company had no opportunity at all, the award must be held to be illegal or arbitrary. Had only the appellant company known that there were going to be negotiations, it also would have been willing to supply the material at the same rate at which the second respondent had agreed to supply. Therefore, such an opportunity should have been given to the appellant-company to participate in the negotiations in the event of the first respondent deciding to ignore the tenders already submitted. Our learned brother Shivashankar Bhat, J. was of the view that there is no dispute that no decision was taken after the tenders were opened; that it is also clear from the papers filed in support of the respective pleadings that the second respondent claimed to be a SSI unit had not registered with the concerned department on the date when it submitted its tender; but before finalisation of the contract, the second respondent had obtained the requisite registration and that it is also the assertion of the second respondent that it did commence production on 15th February 1989 and according to the learned counsel for the second respondent the status of the second respondent as a SSI unit for all practical purposes would relate back to the said date. Thus, he held that the fact that the contract was awarded only after such a registration would be enough to hold that the second respondent was eligible. Thereafter, turning to the Government Order Annexure-H dated 19th June 1986, the learned Judge took the view that it had to be liberally construed. It purports to lay down two important aspects -- one is to give price preference of 15% in respect of enumerated goods when SSI units come forward to supply the same and the other is to give preference to the SSI unit as such in respect of unremunerated goods. Looked at from that point of view, if the other things were equal, SSI units would get the contract. In this case the preference so given in favour of the second respondent which is a SSI unit would be in the interest of public rather than being contrary to the public interest. Thus, the learned Judge while upholding the award of tender in favour of the second respondent, dismissed the writ petition. Hence, the writ appeal.

7. The learned Senior Advocate for the appellant-company Sri Andhyarjuna would vehemently urge whereunder the tender notice dated 4th March 1989 clear norms had been laid down prescribing eligibility for submitting the tenders, those norms cannot be ignored. He urged that this is a case in which the second respondent claimed as a SSI unit. When the tender notification categorically lays

down that only registered small scale industries alone would be eligible to participate, it is not open to the second respondent who obtained its registration admittedly only on the 5th of May 1989 to say that such a registration would date back nor again would it be open to the second respondent to state on the date it submitted the tender it had a, provisional registration and the production also had commenced. As a matter of fact, the letter of the Joint Director which has been filed presently, clearly says such a person cannot participate in the tenders. This is a clarification obtained by the appellant company and it relies strongly on the same. He further urged that under those circumstances, it must be held that the second respondent is not eligible at all. To consider it as eligible for the award of contract is wrong. In support of this submission reliance is placed on the decision in *Yadav Medical Store, Allahabad Vs. The State of Uttar Pradesh and Others*, in which a reference has been made to the well known case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . Relying on the same it has been held that if the conditions of eligibility had not been fulfilled, the tender should have been rejected. Identical is the position here. When once it is held not eligible, no other consideration would arise, however, he would address arguments as well on the scope of the Government Notification dated 19th June 1986. The learned Judge, according to the learned counsel for the appellant, has misconstrued the scope of the notification. It merely purports to lay down the policy in relation to incentive and concession to Small Scale Industries. That is clear from the preamble because it speaks of giving a price preference. It further speaks of requiring Governmental Departments and public undertaking to produce the requirements from the tiny and SSI units. Where, therefore, that was the object adumbrated in the preamble, one of the directions alone cannot be torn out of the context and held as though it gives absolute preference to the product of tiny and SSI units of the State in all purchases and, therefore, the award of contracts to SSI units would be in public interest. In the guise of public interest inequality cannot be perpetuated. When this is construed as has been done by the learned Judge, the public tender system itself will be defeated. Certainly, to give Small Scale Industries an absolute preference is not the object of the notification dated 19th June 1986. In the guise of public interest arbitrariness cannot be perpetuated as seen from the decision in *Harminder Singh Arora Vs. Union of India (UOI) and Others*, and the passage occurring at page 1532 reads thus :

"If the terms and conditions of the tender have been incorporated in the tender notice itself and that did not indicate any preference to the Government undertakings of giving 10 per cent, price preference to Government undertaking, the authority concerned acted arbitrarily in allowing 10% price preference to respondent No. 4. The only facility provided to the Government undertakings was provided in paragraph 19 which contemplates that the Central or State Government Departments or purely Government concerns need not pay tender forms fees and earnest money. This was the only concession available to the Central/State Government or to the purely Government concerns, and no other

concession or benefit was contemplated under the terms of the tender notice. If the appellant had known that 10 per cent, price preference to Government undertaking was to be given to respondent No. 4 the appellant would have taken every precaution while submitting the tender."

8. In any event, in so far as negotiations have taken place behind the back of the appellant and the contract came to be awarded on the wrong footing that the second respondent was a SSI unit, it must be held to be arbitrary. Such negotiations if takes place behind the back, the appellant-Company had lost all the opportunity to negotiate. As a matter of fact, not only before the learned Judge but also at this stage the appellant-company took the stand that it is prepared to supply at the rate at which the negotiations in favour of the second respondent had been concluded. With reference to a similar tender for the identical produce which had arisen subsequently, the appellant-company had quoted Rs.608/- per running metre and it is prepared to supply at that rate in favour of the Board.

9. For all these reasons it is prayed that the order of the learned Judge confirming the contract awarded in favour of the second respondent be set aside and the contract be awarded in favour of the appellant-company.

10. In opposition to this argument, Mr. R. N. Narasimha Murthy, learned Senior Advocate, appearing for the second respondent, states that tender is nothing more than an invitation to supply. When he talks of registration, it must be with reference to price preference which is the subject matter of the notification of the Government dated 19th June 1986. Where, therefore, with that background tender is called for, one cannot lay assent on registration as though registration is a condition precedent, as a matter of fact, the second respondent was provisionally registered, it had commenced production and these factors were taken note of though it obtained permanent registration only on 5-5-1989. If really the object was the price preference, one cannot, take the registration alone and then say the second respondent's tender should have been rejected as ineligible. The ruling relied on in this regard namely, Yadav Medical Store, Allahabad Vs. The State of Uttar Pradesh and Others, must be confined to the facts of that particular case wherein pre-conditions relating to eligibility were involved which is not so in this case.

Even assuming without admitting for a moment that registration is essential, that alone does not enable the appellant-company to succeed so as to contend that the second respondent is ineligible because under the invitation to tender, there is yet another category namely, others who get themselves registered with Bangalore Water Supply and Sewerage Board, either before submission of tenders or before execution of agreements on - the entrustment of work to the tenderers. Certainly, the appellant-company cannot be heard to contend that the second respondent does not fall under that category. From this point of view, the second respondent must be held to be eligible.

11. The tender consists of Clause 7 and it reads :

"The officer competent to dispose of the tenders shall have the right of rejecting all or any of the tenders without assigning any reasons."

If one looks at Cl. 26 of the additional conditions of contract, Cl. 7 is reiterated. Cl. 26 reads:

"The final acceptance of the tender rate rests with the competent authority who does not bind himself to accept the lowest tender or any other tender or to assign any reason whatsoever."

These two clauses have an important bearing in deciding the question whether the negotiation stated to have been held behind the back of the appellant-company whereby the second respondent reduced the rate and ultimately the contract was awarded in its favour is arbitrary: The answer should be "no" having regard to the widest amplitude of these two clauses. Such was the situation in the decision in *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, But for these clauses perhaps something might be said in favour of the appellant-company. To say that even in the presence of such clauses the appellant-company's case also must be treated on par and negotiations must take place with it as well dilutes the rigour of these two clauses. As a proposition of law, the legal position settled in *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, has not been departed from the case in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . When this ruling came up for consideration, that position was reiterated as seen from paragraph 26 of the judgment. Therefore, the plea of arbitrariness must fail.

12. Lastly, it is submitted where public interest is subserved by the award of tender in favour of a small scale industrial unit which is the avowed object of the notification dated 19th June, 1986, certainly the Court cannot substitute its reasoning and say the award is bad. It was this view which prevailed with the learned Judge and which the learned Counsel for the second respondent would commend for acceptance.

13. Mrs. Nirmala Lingappa, learned counsel appearing for the first respondent would submit as a statutory body the Board is bound to carry out the directions issued by the Government. Therefore, while awarding the contract, it had kept before it the Government notification dated 19th June, 1986.

14. In reply, Mr. Andhyarjuna would point out that it is not at this stage open to the second respondent to contend that in order to get over the inconvenience of ineligibility that will fall under the third category of the tender notification, namely others, the residuary clause has been introduced. In fact that was not the claim before the authorities. Further the contract was awarded in favour of the second respondent only on the footing that it was a SSI unit. More than above this, the learned Judge also considered the case of the second respondent

only from that stand point of view as seen from paragraph 21 of his judgment. Where, therefore, the parties understood the case, took a particular stand and invited a decision, it is not open to one of the parties to resile from that stand in order to get over an inconvenient situation.

15. The next submission of the learned counsel is that the decision in Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others, cannot any longer be considered as good law. As a matter of fact, it has been so pointed out by a ruling of this Court reported in Recondo Ltd. Vs. Board of Trustees,

16. Having regard to the above arguments, we pose the following questions for determination :

- (1) Whether the second respondent was eligible to offer its tender;
- (2) Where by reason of secret negotiation the second respondent came to be awarded ultimately the contract without considering the tender of the appellant-company, would it amount to arbitrary act?
- (3) Whether the award of contract in favour of the second respondent on the ground that it is a small scale industrial unit, would subserve public purpose?

Re. Point No. (1)

17. The tender notification issued by the office of the Executive Engineer, Central Stores Division of the Board, dated 4th March 1989, states as follows :

"TENDER NOTIFICATION

Sealed Tenders in duplicate in the prescribed Form will be received by the Executive Engineer, Central Stores Division, BWSSB, 3rd Main, Margosa Road, Malleswaram, Bangalore 560012 up to 4 p.m. on 28-3-1989 from the suppliers who have registered their name in B.W.S.S.B., P.W.D., Central P.W.D. and Railways and registered Small Scale Industries and others subject to condition that they have to get themselves registered in B.W.S.S.B., before submission of tenders before execution of agreement when once the work or supplies entrusted to them, according to rules of the registration of contractors for the work mentioned below."

From a reading of the above, it is very clear that tenders would be received-- (i) from the suppliers who have registered their names with the B.W.S.S.B., P.W.D., Central P.W.D. and Railways; (ii) registered small scale industries and (iii) others subject to condition that they have to get themselves registered with the Board-- (a) before submission of tenders or (b) before execution of agreement when once the work or supplies entrusted to them according to the rules of registration of contractors. Any one of these three categories of contractors could submit their tenders, The object of restricting the incentive only to these kind of contractors is not far to seek because the Government or the Board, as the case may be, would like to have persons with some credentials. One of the conditions for determining such credentials may be by registration. The question is whether

it is a pre-condition or not. On a careful consideration of the same, we find it is a pre-condition because as we said above, the Board would like to deal only with persons having credentials which could be ascertained by means of registration. However, Mr. Narasimha Murthy would argue when he talks of registered small scale industry, it is for the the purpose of price preference which is the avowed policy under the notification of the Government of Karanataka dated 19th June 1986. We are unable to see any link between the invitation to tender and the policy decision adumbrated under the notification dated 19th June, 1986. The reason why we say so is where the Government found that there had not been sufficient encouragement to S.S.I. units of the State which had taken loan from the Karanataka Financial Corporation and other financial institutions, it has chosen to adopt the policy of the S.S.I. unit and tiny sector of the industry in the State. This encouragement was for providing a price preference. It should be remembered the question of price preference would arise only when a particular S.S.I. unit renders itself eligible for consideration. Where, therefore, on the threshold of the matter in relation to eligibility, registration is insisted upon, we are unable to see as to how an inference could be drawn between an invitation to tender and a policy decision. Therefore, looking at the plain language of the tender notification, to our mind, it is clear that it is a pre-condition. If that is a precondition, without fulfilling or satisfying that condition, can a tenderer be eligible? In this context we will refer to the decision in *Yadav Medical Store, Allahabad Vs. The State of Uttar Pradesh and Others*, which is strongly relied upon by the learned counsel Mr. Anadyarjuna. In that case, there were three conditions namely;

- (i) The tenderer in medicine must have a local medical shop.
- (ii) He must be a registered and licenced drug dealer and must produce proof of the same along with the tender of medicines.
- (iii) Only those who hold licence for all drugs including dangerous drugs should submit tender for medicines.

Under those circumstances, an argument was raised as to whether respondent No. 3 who did not possess those qualifications could be considered eligible or not. In paragraph 5 of the judgment it was stated thus :

"The question, therefore, which arises for decision is as to whether the tender of respondent No. 3 was not eligible and whether the action of the respondent No. 2 in accepting such tender was arbitrary and illegal and liable to be quashed. It was not disputed that on the crucial date i.e., 20th March, 1980 which was the last date for submitting the tenders and also on which date the tenders were to be opened, the opposite party No. 3 did not possess a local shop at Allahabad and they did not even hold a licence for supply of drugs in respect of the town of Allahabad. They did hold a licence but that related to the city of Fatehpur and they actually secured the requisite licence for the city of Allahabad on 30th June, 1980. It was faintly suggested on behalf of the State that the provision in the

notice of tender (Annexure I) about having a local shop was not actually a condition of eligibility and that there would be substantial compliance of the requirements incorporated in that documents even if at the time of the commencement of the actual supply of medicines the tenderer did possess a local shop. We are unable to accede to this submission. On a careful perusal of the entire document we are convinced that Annexure I incorporates the essential conditions for receiving and accepting or rejecting the tenders. It contains what is known in legal parlance as the norms of eligibility. It would be fantastic to suggest that the supply of medicines should be entrusted to a person who does not possess a local shop in the town for which the tenders were invited. It was, therefore, a condition precedent to the submitting of a tender that the tenderer must possess a local shop. In the alternative it was argued that the condition would be satisfied even if before the final acceptance of the tender, the tenderer had obtained a local shop. This contention is untenable because the relevant point of time on which the fulfilment of the conditions had to be seen is the date of submitting the tender. A subsequent improvement in the position of a tenderer or his later endeavour to cure the disqualifications from which he suffered at the time of the presentation of his tender would not confer on him any right to submit a fresh tender afterwards or regularise his tender already submitted. This position appears to be consistent with the tenor of the numerous conditions set out in Annexure-I."

In this case, their Lordships, after referring to the decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, proceeded to hold further in paragraph 11 as follows :

"Applying the test culled from the cases to which we had referred, we are satisfied that the respondent No. 3 was not qualified to submit the tender. Since they did not satisfy two important conditions of eligibility laid down in Annexure-I of the writ petition, their tender should have been excluded from consideration. It was contended by Shri T. P. Asthana, the learned standing counsel that the facts of the instant case fully satisfied the dictum in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, inasmuch as the rate for a supply quoted by the opposite party No. 3 was nearly half of the rate quoted by the petitioner, and consequently on the touchstone of "reasonableness and public interest" the respondent No. 3 was entitled to take precedence over the petitioner. This argument is attractive but fallacious. The two cases to which we have adverted, namely, *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, cover two different fields. The former lays down that Govt. or its agencies or instrumentalities are not immune even in their administrative action from the mandate of Art. 14, and, therefore, where there is infringement of the equality clause, such action must be held to be invalid. On the other hand, *Kasturi Lal's* case deals with the situation where even though parties may be equally situate

and may both be eligible for consideration, yet one of them may be discarded on the ground of being unable to satisfy the test of reasonableness and public interest. Hence, the two principles have different areas of applicability and the latter criterion cannot replace the former. There may be cases in which both vices may be shared by a single act but a discriminatory action cannot be upheld by substituting the test of reasonableness and public interest for the imperative mandate of equality enshrined in Art. 14 of the Constitution. Thus, there is no manner of doubt that the action of respondent No. 2 in accepting the tender of the opposite party No. 3 was arbitrary, violative of the equality clause and invalid."

We are in respectful agreement with these observations. No doubt we are aware that a stipulation was imposed in that case stating that they who hold local shop's licence alone should submit the tenders. But the absence of such stipulation in the present case does not make the position better for the second respondent because of our earlier observations about the credentials. Then the question would be what is the value of the provisional registration. In this case, admittedly, the second respondent had its provisional registration on 5-12-1989. That reads as follows :

"BGL/528/BWSSB(PSC) 5-12-1989

To The Joint Director (SSI) Nrupathunga Road, BANGALORE

Dear Sir,

Reg: Provisional Registration of S.S.I.

We request you to please let us know the definition of "Provisional Registration". Also please clarify whether any firm which possesses the Provisional Registration Certificate is considered to be a S.S.I. Unit and whether by virtue of its Provisional Registration itself it can participate in Departmental Tenders and claim the benefits of incentives and concessions including the price preference a S.S.I. Unit is entitled to even before getting a permanent Registration Certificate.

Requesting the favour of an early reply and thanking in the meanwhile, we remain.

Yours faithfully, for The Indian Hume Pipe Co. Ltd.

Sd/- Circle Engineer"

Concerning this query was raised by the appellant with the Government of Karnataka whether such a holder of provisional registration could participate in the Departmental tenders. The answer was afforded on 14th December, 1989 in the following terms :

"Provisional Registration is a temporary registration issued to take effective steps by the entrepreneur to implement the project. The PRC is valid for a period of one year in the first instance, renewable every six months up to the maximum

period of 3 years. Based on the PRC, entrepreneur can approach the KSIDC for allotment of shed, Karnataka Industrial Area Development Board for allotment of plot, financial institution for loan, purchase/import or plant and machineries and approaching Karnataka Electricity Board for sanction of power etc.

On implementing the above, the unit will be ready for trial production on procurement of the required raw material. Once the trial production is produced, the unit should take further action to approach the Department to get conversion of Provisional Registration into permanent Registration. Unless the unit gets permanent registration they cannot participate in the Departmental tenders and claim the benefit of incentive and concessions."

Therefore, prima facie, it is clear that the second respondent was ineligible to participate because as was pointed out by the Joint Director the provisional registration must be converted into permanent registration. Then alone, the participation would be possible and then alone the benefit of incentive and concessions could be obtained by it. In the result, we hold that the provisional registration is of no consequence. From this point of view, we are unable to agree with the learned Judge when he holds in paragraph 21 of his judgment that :

"There is no dispute that no decision was taken after the tenders were opened. It is also clear from the papers filed in support of the respective pleadings that the second respondent claimed to be a SSI unit had not registered with the concerned department on the date when it submitted its tender; but before finalization of the contract, the second respondent had obtained the requisite registration. It is also the assertion of the second respondent that it did commence production on 15th February, 1989 and according to the learned Counsel for the second respondent the status of the second respondent as a SSI unit for all practical purposes would relate back to the said date."

If the second respondent had not obtained the requisite registration before it offered its tender, certainly it was ineligible. This is our answer to point No. 1.

Re. POINT NO. (2)

18. In this case admittedly the Board conducted negotiations privately with the second respondent on the footing that it was a SSI unit. That is evident from the letter of the Board dated 31st May, 1989 calling the second respondent for discussion on 1st June, 1989. Thereafter the second respondent writes to the Chief Engineer on 2nd of June, 1989 agreeing to supply 600 mm. dia pre-stressed concrete pipes at the rate of Rs. 685/-. In this connection it is to be remembered that the original rate quoted by the second respondent was Rs. 670 + 60 + 4% Karnataka Sales Tax = Rs. 756.80. It was this offer at the rate of Rs. 685/- which came to be accepted on 28th July, 1989. The letter of intent was issued on 28th July, 1989. The second respondent was also directed to execute the agreement after going over to the office of the Board on or before 4th August, 1989 on a stamp paper of the value of Rs. 10/-. Then the supply order

was issued on 5th August, 1989. Here again the rate is Rs. 685/- per Rmt. inclusive of all taxes. Therefore, here is a case where there was other tender of the appellant-company for Rs. 690/-. We do not see exactly what prompted the Board to conduct negotiations only with the second respondent and that too without the knowledge of the appellant-company. Concerning this secret negotiation, the appellant-company on 16-6-1989 protested by stating that there was n possibility of preference to S.S.I. units, therefore, the offer of the appellant being the lowest and it has been serving the organisation for quite a couple of years may be borne in mind especially having regard to the registration with the Director of Industries, Government of Karnataka, and ultimately said if the tender was not decided in favour of the appellant-company, not only injustice will be done to them but also the sanctity of the tender would be lost. On 2-8-1989 it was stated, inter alia, as follows :

"But some time during the middle of June 1989, to our dismay we learnt that one of the other 2 suppliers had presented to your Board requesting the tender to be decided in their favour, on the ground that theirs was a Small Scale Unit and as such they were to be given preference. In fact we brought this development to your kind notice on the 14th June, 1989 when our Joint Managing Director, Deputy Chief Engineer and the undersigned called on your kindness. Your were kind enough to give us a patient hearing and to add that you would get the case examined."

Then again on 7-8-1989 the Board was requested to favour the appellant-company with a reply in relation to the representation made. Not finding any reply, that request was again made on 11th of August, 1989. It was under these circumstances on 17-8-1989 the order extracted above had come to be passed. Two things are very clear. The Board had accorded approval on 4-7-1989 itself to accept the tender of the second respondent on two grounds :

- (1) It is a registered Small Scale Industrial unit;
- (2) It is eligible for price preference up to 15% as per Government Order dated 20-2-1986.

As a matter of fact this is the only communication by reason of which the appellant-company came to be alive to the situation. Anyway, it appears from the records that the appellant was neither informed of the negotiation that was going on between the Board on the one hand and the second respondent on the other, nor again when there was an offer by the second respondent to reduce its rate and whether in the light of that, the appellant-company will be willing to reduce its rate. Therefore, it is beyond dispute that negotiation went on behind the back of the appellant. Mr. Narasimha Murthy would rely on clauses 7 and 26 of the tender which confer an absolute right to accept or to reject the tender and urge that the dictum laid down in *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, may be accepted having regard to the wide amplitude of these clauses. We have already extracted the two clauses. We do not think that

merely because of the presence of clause 7 of clause 26 of the conditions of contract, a secret negotiation behind the back of the appellant-company could go on. In *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, it was laid down as follows (at p. 654) :

"So far as the question is concerned about the validity of clause 7 and the grant of lease in favour of the appellant even though the tender of respondent No. 1 was for the highest amount, we find that the matter is not *res integra* and is more or less concluded by the pronouncements of this Court in *C.K. Achuthan Vs. The State of Kerala and Others*, the facts were as under. The petitioner and the third respondent, Co-operative Milk Supplies Society, Cannanore submitted tenders for the supply of milk to the Government Hospital at Cannanore for the year 1948-49. The Superintendent who scrutinised the tenders, accepted that of the petitioner and communicated the reasons for the decision to the Director of Public Health. The contract in favour of the petitioner was subsequently cancelled in pursuance of the policy of the Government that in the matter of supply to Government medical institutions the Cooperative Milk Supplies Union was to be given contract on the basis of prices Fixed by the Revenue Department. The petitioner challenged the decision of the Government in a petition under Article 32 of the Constitution on the ground, *inter alia*, that there had been discrimination against him *Vis a vis* the third respondent and, as such, there was contravention of Arts. 14, 19(1)(g) and 31 of the Constitution. Rejecting the contention the Constitution Bench of this Court speaking through Hidayatullah, J. (as he then was) observed :

The gist of the present matter is the breach, if any, of the contract said to have been given to the petitioner which had been cancelled either for good or for bad reasons. There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Art. 14, because the choice of the person to fulfil a particular contract must be left to the Government. Similarly, a contract which is held from Government stands on no different footing from a contract held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases, even specific performance, but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Article 19(1)(g). Nor has it been shown how Art. 31 of the Constitution may be invoked to prevent cancellation of a contract in exercise of powers conferred by one of the terms of the contract itself."

Thereafter, the Court proceeded to consider other cases on this aspect and held as follows :

"15. Mr. Iyengar has referred to some of the decisions of this Court, but none of them, in our opinion, is of any material assistance to respondent No. 1. In

Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, this Court observed that a public body is not exempt from the liability to carry out its obligations arising out of representation made by it when a citizen who relies upon that representation alters his position to his prejudice. No such question arises in the present case because it is not shown that respondent No. 1 has altered his position to his prejudice by relying upon any representation made by the authorities."

One particular passage to which we have to refer is paragraph 19. The observations are as follows :

"Nor has the above act been shown to be vitiated by any such arbitrariness as should call for interference by the Court. Indeed, as mentioned earlier, the matter is concluded by the decisions of this Court."

This very decision came up for consideration in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, Bhagwati, J. (as he then was) referring to this decision held as follows:

"The last decision to which reference was made on behalf of the respondents was the decision in Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others, . This decision merely reiterates the principle laid down in the earlier decisions in Trilochan Mishra, etc. Vs. State of Orissa and Others, and State of Orissa and Others Vs. Harinarayan Jaiswal and Others, (supra), and points out that a condition that the Government shall be at liberty to accept or reject any bid without assigning any reason therefore is not violative of Art. 14 and that in matters relating to contracts with the Government, the latter is not bound to accept the tender of the person who offers the highest amount". Nowhere does it say that such a condition permits the Government to act arbitrarily in accepting a tender or that under the guise or pretext of such a condition, the Government may enter into a contract with any person it likes, arbitrarily and without reason. In fact the Court pointed out at the end of the judgment that the act of the Government was not "shown to be vitiated by such arbitrariness as should call for interference by the Court", recognising clearly that if the rejection of the tender of the 1st respondent were arbitrary, the Court would have been justified in striking it down as invalid."

Therefore, we are unable to accept the argument of Mr. Narasimha Murthy that because of the presence of clauses 7 and 26 of conditions of contract, there was no obligation on the part of the authorities to conduct negotiations. If this argument were to be accepted, it would perpetuate injustice and will enable the authorities to act arbitrarily when the law with regard to this has advanced so much as seen from the later decisions including the decision in Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others,

In Ram and Shyam Company Vs. State of Haryana and Others, it has been held as follows:

"12. The law is now well settled that the Government need not deal with anyone, but if it does so, it must do so fairly and without discretion and without unfair procedure. Let it be made distinctly clear that respondent No. 4 was not selected for any special purpose or to satisfy any Directive Principles of State Policy. He surreptitiously ingratiated himself by a back-door entry giving a minor raise in the bid and in the process usurped the most undeserved benefit which was exposed to the hilt in the Court. Only a blind can refuse to perceive it.

13. Approaching the matter from this angle can there be any doubt that the appellant whose highest bid was rejected by the Government should have no opportunity to improve upon his bid more so when his bid was rejected on the ground that it did not represent adequate market consideration for the concession to extract minor mineral. A unilateral offer, secretly made, not correlated to any reserved price made by the fourth respondent after making false statement in the letter was accepted without giving any opportunity to the appellant either to raise the bid or to point out the falsity of the allegations made by the fourth respondent in the letter as also the inadequacy of his bid. The appellant suffered an unfair treatment by the State in discharging its administrative functions thereby violating the fundamental principle of fair play in action. When he gave the highest bid, he could not have been expected to raise his own bid in the absence of a competitor. Any expectation to the contrary betrays a woeful lack of knowledge of auction process. And then some one surreptitiously by a secret offer scored a march over him. No opportunity was given to him either to raise the bid or to controvert and correct the erroneous statement."

Where, therefore, by unilateral action fair-play has not been observed, we hold that the action of the first respondent is arbitrary and illegal.

19. In this connection, we would also record the submission of Mr. Andhyarjuna who stated that his client is prepared to supply at the rate of Rs. 608/- per running metre as has been offered under a later tender in favour of the Board with reference to the same pre-stressed concrete pipes. This is besides the offer made before the learned Judge as well as before us because the complaint of the appellant-company was, had it only been put on notice about the negotiations, it could have also successfully negotiated. The deprivation of the valuable opportunity to the appellant-company clandestinely leads to one and the only conclusion namely, arbitrariness. This finding is rendered on the footing whether the second respondent is a SSI unit, which certainly is not, as we held under point No. (1).

Re. POINT No. (3)

20. Where, therefore, the award smacks of arbitrariness, certainly for achieving the so-called public interest, it cannot be validated. From this point of view we are unable to agree with the learned Judge when he holds that when a governmental policy is binding on the State and its instrumentalities require

preference to be given to SSI units, awarding of a contract for the supply of materials to a SSI unit when the said SSI unit reduces its rate further, cannot be held to be unreasonable or arbitrary and that having regard to the aforesaid governmental policy, awarding of such contract would be in the interest of public, rather than being contrary to the public interest. With great respect, we hold there is no public interest involved under these circumstances. This is our answer to point No. (3).

21. Therefore, having regard to the above findings, what exactly is the relief to be afforded to the appellant-company? In view of our earlier findings, the second respondent being ineligible to tender, it goes out of consideration. In so far as Bhuratnam's case is concerned, he is no longer in the field because we are informed across the Bar that he had taken back his earnest money. The result is tender of the appellant-company alone requires to be considered. Though a valiant plea was made by Mr. Andyarjuna that the Court must direct the award of contract in its favour, we refrain from doing so because of the solitary principle that this Court, though in exceptional cases has done so, cannot make it a precedent for all times. However, we direct that the tender of the appellant-company be considered only in the light of the tender notification dated 4th March, 1989. If it fulfills all the qualifications thereunder, it shall be awarded the contract. Accordingly, the writ of appeal will stand allowed with costs. Counsel fee Rs. 1,000/- to be borne equally by respondents 1 and 2.

22. After we pronounced the judgment in the open Court, an oral application was made for grant of leave to appeal to the Supreme Court. We do not consider this to be a fit case for grant of leave since the decision purely turns on facts. The oral application is rejected.

23. Should the contract be awarded in favour of the appellant-company, the execution of the same shall stand suspended for a period of four weeks.

24. Appeal allowed.