
(2011) 05 OHC CK 0024

In the Orissa High Court

Case No : Writ Petition (C) No. 22529 of 2010

New India Assurance Co. Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-05-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : (2011) 05 OHC CK 0024

Hon'ble Judges : B.P. Das, J;B.K. Misra, J

Bench : Division Bench

Advocate : Y. Mohanty, Sr.Counsel, for intervenor, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Misra, J.—The petitioner-Insurance Company, which is a Public Sector General Insurance Company wholly owned by Government of India, carries on insurance business throughout the country including Orissa. The petitioner-Insurance Company in this writ petition has challenged the unilateral action of the opposite parties in cancelling the work order which was issued in favour of the petitioner on 26.08.2009 to undertake implementation of health insurance programme under "Rashtriya Swasthya Bima Yojana" for the families covered under the Scheme and other identified families in the districts of Khurdha, Cuttack, Sambalpur, Sundargarh, Ganjam and Rayagada vide Annexure-2.

2. Before advertng to the details of the case, we may mention here that to provide better health care facilities to 94% of the total workforce in the organized sectors in the country, the Government of India introduced "Rashtriya Swasthya Bima Yojana" throughout the country. As per the scheme, the enrollment of the beneficiaries will be undertaken by the Insurance Company selected by the State Government being approved by the Government of India on the basis of the data provided by the State Government/Nodal Agencies to enroll the beneficiaries and to issue Smart Cards. Pursuant to such guidelines under the Rashtriya Swasthya Bima Yojana in the State of Orissa, the

Government of Orissa in Labour & Employment Department floated tender inviting the Insurance Companies Licensed and registered with Insurance Regulatory Development Authority (in short, "IRDA") and other agencies (enabled by Central legislation to undertake insurance related activities) dealing with health insurance for implementation of the Rashtriya Swasthya Bima Yojana for Card-holder families and other identified families. Pursuant to such tender notice (Annexure-1), the petitioner submitted tender papers and the tender submitted by the petitioner was accepted after the tender papers were opened which was intimated to the petitioner-Company by opposite party No.1 by letter dated 26.08.2009, which was also approved by the Government of India (vide Annexure-2). Pursuant to Annexure-2, the petitioner-Company immediately appointed Third Party Administrator (in short T.P.A.) and empanelled hospitals for proper implementation of the scheme and had to spend huge sum of money. The petitioner-Company also submitted the necessary agreement as per Clause-19 of the tender document to opposite party No.1 for execution (vide Annexure-3). When the petitioner-Company found mismatch of the data provided by the State Government to Rashtriya Swasthya Bima Yojana site, the petitioner Company was advised by the Nodal Agency and by some of the Collectors to stop further enrollment. But ultimately the impasse could be resolved in a meeting held by Opposite Party No.1 on 03.12.2009 and instruction was issued to all the Collectors to extend cooperation to the petitioner. The case of the petitioner-Company is that while they were undertaking the work to achieve the goal of the scheme, the work was again stopped from 04.03.2010 till finalization and correction of the list which is to be uploaded to Rashtriya Swasthya Bima Yojana website. The petitioner-Company had to wait for nine months, but such list was never uploaded for want of required data of the families and ultimately the petitioner-Company was issued with a letter by Opposite Party No.2 vide Annexure-5 on 16.10.2010 cancelling the work order issued to the petitioner-Company in respect of six districts i.e. Khurdha, Cuttack, Ganjam, Rayagada, Sambalpur and Sundargarh. The main grievance of the petitioner-Company is that such action of the opposite parties in cancelling the tender is without any rhyme or reason and is arbitrary and discriminatory in nature and can be said to be tainted with mala fide and bias and accordingly the writ petition was presented under Articles 226 and 227 of the Constitution of India for a direction to the opposite parties to permit the petitioner to proceed with the work as per the original work order dated 26.08.2009 in Annexure-2 and to pass any other order/direction as would be deemed just and proper in the greater ends of justice.

3. The opposite parties in their counter affidavit averred that the writ petition should be dismissed in limine as the petitioner-Company participating in the tender process after re-tendering by submitting tender paper on 12.11.2010 and attending opening of the technical bid on 23.12.2010 is estopped from challenging the action of the opposite parties. It is the specific case of the opposite parties that despite communication to the petitioner-Company with

regard to the non-performance and violation of Rashtriya Swasthya Bima Yojana guidelines in a high power meeting, it was decided to go for re-tender in the districts where Rashtriya Swasthya Bima Yojana was being implemented and to float fresh tender in respect of the six districts for which the work was entrusted to the petitioner-Company as they had not started the work though they were issued with the work order more than a year back. Such decision of the Government in inviting fresh tender was communicated to the petitioner-Company as well as the Government of India and the irregularities committed by the petitioner-Company were also communicated in a letter bearing No. 18432 dated 29.11.2010 (Annexure-A). It is also the specific case of the opposite parties that the petitioner-Company did not take up the work in the districts of Cuttack, Khurda, Ganjam, Rayagada, Sambalpur and Sundargarh and did not conduct proper Information Education and Communication (in short I.E.C.) and Behavioral Change in Communication (in short B.C.C.) activities in the districts of Nayagarh, Kalahandi, Nuapada, Jharsuguda, Deogarh and Puri and even though extension of time was granted in those districts, the performance of the petitioner was not upto mark and the petitioner failed to finish the enrollment of beneficiaries within four months as specified in clause-11.6 of the tender document and accordingly, the work order issued to the petitioner-Company was cancelled and there was no mala fide intention of the State Government and no bias can be attributed to the action of the State Government in cancelling the work order issued to the petitioner-Company vide Annexure-5.

4. The main plank of attack of the petitioner in this case is that the impugned order is vitiated for non-observance of the principles of natural justice as without affording any opportunity of being heard or showing cause, the work was cancelled unilaterally. It was also argued with vehemence by the learned counsel for the petitioner that where valuable civil rights are taken away without any authority of law or by violation of principles of natural justice, a writ court cannot fold its hands and look on as a helpless onlooker asking the party to approach the Civil Court. It was also contended that where a person has been deprived of his valuable civil rights without any justification in law, he can approach this Court under Article 226 of the Constitution of India.

5. According to the petitioner, the contention of the learned Advocate General for the State that the writ petition should be dismissed and the Court should refuse to exercise the jurisdiction under Article 226 of Constitution of India, cannot be sustained as it was a futile submission of the State.

6. Learned Advocate General in course of hearing drew our attention to Annexure-A and contended that when the petitioner-Company was intimated of the irregularities which were observed and the work of the petitioner-Company was found not to be upto mark, such fact was brought to the notice of the Insurance Company and, therefore, the petitioner-Company cannot have any grievance or point to allege that they were not communicated anything before issuance of Annexure-5 i.e. the cancellation order.

7. After hearing learned counsel appearing for the petitioner as well as the learned Advocate General and on perusing the documents relied upon by both sides, we found that the order in Annexure-5 was communicated to the Chief Regional Manager, Regional Office by the Government in Labour & Employment Department vide their memo No. 8742 dated 16.10.2010 with regard to the cancellation of work order issued on 26.08.2009 in respect of six districts i.e., Khurdha, Cuttack, Ganjam, Rayagada, Sambalpur and Sundargarh. Annexure-A, which is said to be a trump card of the opposite parties, shows that the performance of the petitioner-Company, in the opinion of the Government in respect of the districts of Nayagarh, Kalahandi, Nuapada, Jharsuguda, Deogarh and Puri, was not upto mark and eight irregularities were noted in the said letter under Annexure-A dated 29.11.2010 and the petitioner-Company was requested to explain the reasons of the irregularities mentioned during implementation of the Rashtriya Swasthya Bima Yojana Scheme. So by no stretch of imagination, the letter under Annexure-A can be taken as a document in respect of the performance of the petitioner-Company in the districts of Khurdha, Cuttack, Ganjam, Rayagada, Sambalpur and Sundargarh for which the work order was issued to the petitioner-Company vide Annexure-2.

8. There is no controversy at all that the tender was floated in respect of 12 districts by the opposite parties for implementation of the Rashtriya Swasthya Bima Yojana in two phases and work order was issued to the petitioner-Insurance Company in respect of Khurdha, Cuttack, Ganjam, Rayagada, Sambalpur and Sundargarh districts on 26.08.2009 vide Annexure-5. There is also no dispute about the fact that the work order in respect of Khurdha, Cuttack, Ganjam, Rayagada, Sambalpur and Sundargarh districts have been tendered as the maternity benefit was not included in the said tender and the petitioner Company was the lowest bidder in that tender. From the counter affidavit filed by the opposite parties it is seen that the work order in respect of Nayagarh, Kalahandi, Nuapada, Jharsuguda, Deogarh and Puri is going on and the beneficiaries are availing the benefits of the scheme. As per the R.S.B.Y. website (Annexure-10) the State Government is to prepare data in the prescribed format conforming to the Planning Commission specifications for each project districts and send it to Government of India for internal consistency checking and the said process should have been completed before the scheme was launched. It is the State Government, who is to provide assistance to the Insurance Company in registration of the beneficiaries and issuance of smart cards to such beneficiaries. Besides, it is the paramount duty of the State to organize awareness through the district level workshops and to see that necessary infrastructure are provided to all the hospitals. According to the petitioner-Insurance Company, even though they did not receive necessary assistance from the Government in the aforesaid matters, yet they could enroll/register 67% of the beneficiaries through its own endeavour. According to the petitioner Company, since the list was not finalized, the State Government decided not to follow the list based on 2002 survey but to follow the 1997 B.P.L.

family list. Since no approved data base was available in the State and though the State Government is obliged to update the BPL beneficiaries, the petitioner-Insurance Company was asked by the opposite parties to ignore the instructions given on 14.01.2010 to take necessary steps for rectification and validation of the BPL data as per the norms finalized by the State Government before distribution of smart cards to the beneficiaries in the districts allotted to them under Annexure-12.

The main thrust of the argument of the learned counsel for the Insurance Company is that since as per the terms and conditions of the contract and as per Clause-9 of the agreement, the Government did not furnish the complete updated list of BPL householders as per 2002 BPL census in the districts of Khurdha, Cuttack, Ganjam, Rayagada, Sambalpur and Sundargarh, there was mismatch of the data but despite such shortcomings, the petitioner Insurance Company proceeded with the job entrusted to them as per the work order vide Annexure-2, but for the reasons best known to the opposite parties, without intimating anything to the petitioner-Company, the opposite parties cancelled the earlier tender vide their letter dtd. 16.10.2010 and floated the fresh tender on 18.10.2010 unilaterally and that too without hearing them.

Learned counsel for the petitioner-Insurance Company contended that the action of the opposite parties was in gross violation of the principles of natural justice. In support of such contention, reliance was placed on a decision of the Apex Court in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , wherein it was held that "if a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination". Further reliance was placed on a decision in the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , wherein the Apex Court held that "Administrative law-State actions in contractual matter can be reviewed under Article 14 of the Constitution". Learned counsel for the petitioner further relied upon the judgment of this Court in Prince International Vs. State of Orissa and Others, , in which this Court relying upon the decision of Mahavir Auto (supra) held that "basic rule of natural justice is that in case there is a violation of the principles of natural justice in terminating a contract, approach to this Court under Article 226 of the Constitution is not barred and even though the rights of citizens be in the nature of contractual rights, the same are subject to judicial review, inter alia, on the touch-stone of natural justice".

The aforesaid contention of the learned counsel for the petitioner met with stiff

resistance from the side of the opposite parties.

9. The learned Advocate General very strenuously urged that the writ petition filed by the petitioner Insurance Company is not at all maintainable and should be dismissed with exemplary costs as the doctrine of fairness and reasonableness must be read into contracts to which the State is a party. It was also contended that a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contract or alleged breaches have to be settled by ordinary principle of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. Every act of the statutory body need not necessarily involve an exercise of statutory power. Statutory body like private parties, have power to contract or deal with property and such activities may not raise any issue of public law. In that context, reliance was placed by the learned Advocate General in the decision of the Hon''ble Apex Court as reported in *Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another*, . It was contended that in the instant case the petitioner has not shown how the contract is statutory and when the contract in question between the parties, the same cannot be termed as a contract and it remains in the realm of private law and therefore the dispute relating to interpretation of the terms and conditions of such contract could not have been agitated in a petition under Article 226 of the Constitution of India, as the same is a matter for adjudication by Civil Court or in arbitration, if provided for in the contract. We have very carefully scanned the pleadings of the parties and the citations which have been relied upon by the parties and applied our judicial conscience to the matter. We are inclined to accept the contention of the learned Advocate General that the termination of the work order is not a quasi judicial act and therefore, the question of observance of principle of natural justice does not arise at all as the matter is governed by a contract and therefore within the domain of public law remedy and the writ petition is not at all maintainable. This view of ours finds support from the judgments of the Apex Court as reported in *State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others*, , *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, . Similarly the Hon''ble Apex Court in *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, has held that fairness and reasonableness and the doctrine of natural justice cannot be invoked to a contract entered into by the State with private parties pursuant to public auction of tender and State in such contract is not obliged to guarantee profit to the contractor.

In the case of *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, , the Hon''ble Supreme Court has held that:-

Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger

public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose....

In the case of Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, , it is held in paragraph-77 that if two views are possible and no mala fides or arbitrariness is alleged or shown, there is no scope for interference with the view taken by the authorities in inviting tenders. In the case of Siemens Public Communication Networks Private Ltd. & Another v. Union of India & Others, (2008) 16 SCC 215, the apex Court observed that it cannot be held that the process adopted or decision made is so arbitrary or irrational that no responsible authority acting reasonably or in accordance with the relevant law could not have taken such a decision.

In the case at hand, it is not regarding award of contract but cancellation of work order. In our considered opinion, the same principle is available. In this case, after examining the facts and circumstances of the case, we are of the view that none of the criteria laid down in Asia Foundation as well as Siemens Public Communication (supra) has been complied with by the petitioner-company justifying interference of this Court.

10. Be that as it may, so far as the principle of natural justice is concerned, from the record we find that the petitioner has made a representation to the Hon'ble the Chief Minister of the State on 28.10.2010 for consideration of the cancellation of work order, copy of which is at Annexure-7. So it cannot be said that the petitioner has not got an opportunity of representing its case before the Government. In our considered opinion, there is an element of public interest in cancelling the work order especially in providing health care facilities, in which certain deficiencies were found even if it is not admitted by the petitioner. In the worst view of the case if the petitioner has sustained any pecuniary loss due to such cancellation, the same can be agitated and recourse is available under the common law forum.

11. Apart from that, the work order was issued in favour of the petitioner on 26.8.2009 vide Annexure-2 and it was cancelled on 16.10.2010 vide Annexure-5. Fresh tender was invited and in pursuance of that, the petitioner itself submitted the tender paper on 12.11.2010 and on 29.11.2010 the technical bid was opened and the petitioner attended the same and was qualified in the technical bid. The petitioner also attended the financial bid on 23.12.2010. But the financial bid was not opened due to the interim order of this Court. Admittedly, the petitioner has not challenged either the re-tender process or the order of cancellation, which was issued on 16.10.2010 and sitting silent participated in the bid and thereafter, the petitioner came up before this Court challenging the order of cancellation.

12. In Tata Cellular Vs. Union of India, , the Apex Court is of the view that the Court can interfere with the tender process only when there is infirmity in the same. Peculiarly enough in the instant case no infirmity has been shown in the re-tender process and the petitioner having participated in the tender process,

cannot challenge the same subsequently or the order of cancellation of the earlier tender.

Hence, for the aforesaid reasons, in our considered view, this writ petition is not at all maintainable and we are not inclined to accede to the prayer of the petitioner.

The writ petition is accordingly dismissed.