

(2012) 04 CAL CK 0035
In the Calcutta High Court
Case No : W. P. No.5568 (W) of 2012

Paramita Ghosh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2012) 04 CAL CK 0035

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Arabinda Chatterjee and Mr. Swarup Paul, for the Appellant; Ushanath Banerjee, Ms. Rashmi Ghosh and Balaram Patra, For the respondent No.7, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Justice Debasish Kar Gupta

1. This writ application is filed by the petitioner for a direction upon the respondent authority to act strictly in accordance with the terms and conditions for cooked diet tender dated August 2011 issued by the respondent no.4 in awarding the contract for supply of cooked diet to indoor patients and College of Medicine & Sagar Dutta Hospital, Kamarhati, Kolkata -500058 (hereinafter referred to as the said hospital). The respondent no.4 floated the tender under reference on August 2, 2011. The Basirhat Food Supply Moila Co. Op. Society Ltd (petitioner) and the respondent no.7 participated in the above tender process amongst other participants. The tender papers of the participants were opened on December 23, 2011. On November 23, 2011 the petitioner being the Secretary of Basirhat Food Supply Moila Co. Op. Society Ltd. Village & Post Sangrampur, Basirhat, 24 Pargana(N), wrote a letter of objection to the respondent no.4 with regard to the above tender process on the ground that though the participants had been present in the office of the respondent no.4 on that date at the time of opening of the tender under reference at 2.30 p.m., the

tender papers of the participants were not opened in the presence of the suppliers.

2. On December 29, 2011 the respondent no.4 informed the respondent no.7 issued under memo no.SDMCH/681/11 that he had been selected for supply of cooked diet to indoor patients of the said hospital @42(forty two) only per patient per day for full adult diet for the period from January 1, 2012 to December 31, 2012.

3. The petitioner submitted another letter of objection dated December 31, 2011 on behalf of the Basirhat Food Supply Mohila Co-operative Society Ltd. to the effect though the above cooperative society quoted lowest rate, i.e. 43.82 for supply of cooked diet to indoor patients of the said hospital per patient per day. The above contract was awarded to the respondent no.7 at a rate below the minimum rate as fixed under the terms and conditions for cooked diet tender dated August 20, 2011 after opening the tender papers of the participants behind the back of the participants arbitrarily and violating the rules of principles of natural justice.

4. By a communication dated January 2, 2012 the respondent no.4 directed the Basirhat Food Supply Mohila Co-operative Society Ltd. to hand over the kitchen of the said hospital to the respondent no.7 within three days. Necessary to point out here that the period of supply of cooked diet to the indoor patients of the said hospital by the above co-operative society expired on December 31, 2011.

5. At the very outset, a preliminary objection is raised by Mr. Ushanath Banerjee, learned advocate appearing for the state respondents with regard to maintainability of this writ application. According to him, it is submitted that a court sitting its writ jurisdiction under article 226 of the constitution cannot quash the decision of the expert body in awarding a contract. According to him, a writ court does not sit a court of appeal but merely reviews the manner in which the decision was made and the court does not have the expertise to correct the administrative action. It is also submitted by him that if a review of administrative decision is permitted it would be substituting its own decision without the necessary expertise which itself may be fallible.

6. Mr. Banerjee relies upon the decision of Jagdish Mandal Vs. State of Orissa and Others, and unreported decision dated April 27, 2010 delivered by the High Court of Bombay in the matter of Jamshedpur Utilities & Services Co. Ltd.(in re. W.P. No.466 of 2010) in support of his above submissions.

7. On the other hand, it is submitted by Mr. A. Chatterjee learned Counsel appearing for the petitioner that disregard of norms or standard at the instant of the authority would invalidate its action unless based on some valid principles which is neither rational or unreasonable nor discretionary. According to Mr. Chatterjee the action on the part of the respondent no.4 is arbitrary and in violation of rules of principles of natural justice denying fair play to the petitioner.

8. Mr. Chattejee relies upon the decision of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, in support of his above submission.

9. Having heard the learned counsels appearing for the respective parties on the question of maintainability of this writ application at length and I have taken into consideration the facts and circumstances of this case on the basis of the materials on record. The issue involved in this writ application is whether the respondent authorities relaxed or deviated from the minimum price mentioned in the terms and conditions for cooked diet tender under reference and/or opened the tender papers of the participants behind the back of the participants for favouring the respondent no.7 arbitrarily violating the rules of principles of natural justice. Before entering into the merits of this case, the preliminary objection raised by the respondent is taken up for consideration to ascertain as to whether it is open for this court to examine the grievance of the petitioner in course of judicial review under article 226 of the constitution of India following the settled principles of law.

10. The self-imposed restriction under the scheme of the constitution of India was observed the Hon'ble Supreme Court in the matter of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, holding that the alternative remedy would not operate as a bar in at least three contingencies: (i) where the representations seeks enforcement of the fundamental rights: (ii) where there is violation of principles of natural justice. Or (iii) where the order or proceeding are wholly without jurisdiction or vires of an act is under challenge. The relevant portions of the above decision are quote below:

14. The power to issued prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

11. The above settled principles of law are repeated and reiterated by the Hon'ble Supreme Court in the matter of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and the relevant portions of the above decision are quoted below:

7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. V. Registrar of Trade Marks.) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration.

12. While considering similar objection raised by the respondent authority in entertaining an application under article 226 of the constitution of India this court held in its judgments delivered in the matter of Jayanta Kumar Pan Vs. Bharat Petroleum Corporation, reported in (2009) 2 WBLR (Cal) 199 observed as follows:

48. The essential principles which are to be ventured for entertaining or an application under Article 226 of the constitution in contractual field are as follows: -

a) Remedy of article 226 of the constitution are available:

i) In a case where the Government exercises its contractual powers, but judicial review is intended to prevent illegality, irrationality, arbitrariness, discrimination or procedural impropriety, subject to satisfactory adjudication upon facts of that case necessitating proper pleading supported by acceptable evidence without requiring further oral evidence or any external aid.

ii) In a case where a direction upon the State or its instrumentality to adhere to the contract is prayed for, provided dispute can be settled by looking upon the terms of the contract and without requiring consideration of any other evidence and/or external aid other than what are already on record.

iii) In a case relating to contractual matter where the administrative action of the State or its instrumentality is violative of the provisions of article 14 of the constitution of India provided there is no disputed question of fact.

iv) In a case of commercial contract where the action of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element.

v) In case where State and its instrumentalities are exempted from operation of rent control legislation provided the State or its instrumentality violates the mandates of Article 14 of the constitution.

b) Remedy of Article 226 of the constitution of India are unavailable:

i) In a case to enforce a contract in connection with a contract between the staff and the State or its instrumentality on a quota of promotion which cannot be exalted into a service rule except in extreme cases which shocks the conscience of the court or other extra ordinary situation.

ii) In a case involving disputed question of unequal or discriminatory treatment by the officers of the State of persons governed by similar contracts without proper pleading and in absence of acceptable evidence on record.

iii) Ordinarily, in a case where a breach of contract is complained of and the party complaining of such breach can sue for specific performance of the contract, if contract is capable of being specifically performed or the party can sue for damages.

13. From the facts and circumstances of the case in hand I find that arbitrariness as the violating principles of rules of natural justice and fair play are the issue for consideration before this court on the basis of the settled principles of law as discussed hereinabove this is a fit case for admission.

14. I do not find that the decision of Jagdish Mondal (supra) helps the petitioner in view of the distinguishable facts and circumstance's of this case because in the aforesaid case. The issue involved in the above case was acceptance of lowest rate quoted by one participant on the basis of the decision of scrutinising committee and the rejection of the tender of offer of another party assigning a reason which was rational. The decision of Jamshedpur Utilities and Services Com., Ltd., (supra) was on the issue of rejection of rate quoted by a participant on the basis of assessment made by the expert committee. So in view of the distinguishable facts and circumstances of this case the above decision has no manner of application in the instant case.

15. On the basis of the discussion made hereinabove, the preliminary objection with regard to the maintainability of this writ application is rejected and this writ application is admitted for adjudication on its merit.

16. Let affidavit-in-opposition be filed within three weeks, affidavit-in-reply, if any be filed within one week thereafter. Liberty is given to the parties to mention the matter before the appropriate Bench after the expiry of the above period.