(1960) 04 GAU CK 0003

In the Gauhati High Court

Case No : Civil Rule No. 162 of 1959

Parbananda Das	APPELLANT
Vs	
Executive Engineer, Relif and Rebabilitation, Engineering Division and Others	RESPONDENT

Date of Decision : 04-04-1960

Acts Referred:
- Constitution of India, 1950 — Article 10(1), 16, 16(1), 166, 226
- General Clauses Act, 1897 — Section 24
- Government of India Act, 1935 — Section 151, 49, 59, 59(3)

Citation : (1960) 04 GAU CK 0003

Hon'ble Judges : C.P. Sinha, C.J;H. Deka, J;C. Mehrotra, J

Bench : Full Bench

Advocate : J.C. Medhi and O. Pathak, for the Appellant; S.M. Lahiri, Advocate-General, O.N. Medhi, Senior Govt. Advocate and M.C. Pathak, for the Respondent

Judgement

Mehrotra, J.—This rule was issued on an application under Article 226 of the Constitution. The facts alleged in the petition which led to the filing of the present petition are that on the 2nd September, 1959 the Executive Engineer, Relief and Rehabilitation, Engineering Division, Assam, Shillong who has been impleaded as opposite party No. 1 to this petition, called for sealed tenders in his office for develop merit works of the Urban Colony at Bongaigaon in the district of Coalpara. The petitioner submitted his tender and deposited a sum of Rs. 787/- as the earnest money.

The tender of the petitioner according to him was the lowest and the Executive Engineer opposite party No. 1 who felt satisfied with the capability of the petitioner, accepted the tender of the petitioner. On 23rd October, 1959 the work order No. 61 was given to the petitioner by opposite party No. 1 and according to the petitioner a formal contract was signed by the Executive Engineer on behalf of the Government of Assam on the one side and the petitioner on behalf of himself on the other side on the 29th October, 1959. There is some controversy between the parties as regards the validity of the contract.

2. The petitioner alleges that he started work thereafter and had to spend about Rs. 2,000/- to Rs. 3,000/- for making the arrangement to start work. On the 10th December, 1959 the petitioner received a letter from opposite party No. 1 that the Government had awarded the contract to Sri Krishna Kanta Das opposite is arty No. 8 and had accordingly cancelled the formal contract which he had executed on behalf of the Government with the petitioner.

The petitioner alleges that the opposite party No. 3 filed some sort of appeal to the Government which was heard ex parte. The petitioner was given no Opportunity to be heard in opposition to the appeal. On these facts the present petition has been filed for a writ in the nature of certiorari, prohibition and mandamus and any other writ and for giving such direction as this Court may deem lit and proper to give the petitioner adequate relief.

3. The petitioner mainly contend;; that the Executive Engineer, opposite party No. 1. was authorised by the Governor to execute a contract on his behalf under Article 290 of the Constitution and therefore the contract entered into by him with the petitioner is binding on the State of Assam and the Government had no power to rescind such a contract. The order cancelling the contract is there-fore without any authority of law. The Executive Engineer opposite party No. 1 was bound in law to give effect to that contract and could not restrain the petitioner from executing the work assigned to him.

It is also contended that no appeal lay to the Government under any provisions of the sale notice and the rules made by the Governor in the exercise of his powers under Article 166 of the Constitution and the State Government thus has no power to interfere on appeal with the acceptance of tenders by the Executive Engineer. It was also urged in this connection that any order passed by the Government without hearing the petitioner was in violation of the prniciples of natural justice and cannot be upheld.

4. Dr. Medhi for the petitioner further submitted that the Government decided to award the work to Sri Krishna Kanta Das in accordance with the Government Circular No. ABM 18/50/14 dated 4th August, 1956. This circular is violative of Article 16 of the Constitution.

5. Notice;; were issued to the opposite parties and in paragraph 8 of the counter-affidavit filed by opposite party No. 3 it was slated that the opposite party No. 3 was a member of scheduled caste and was entitled to get the benefits of the directives contained in the circular dated 4th August, 1950 and had been given the work order, had signed the necessary agreement and paid the necessary earnest money and had started work. He had invested in the meantime about Rs. 3,000/-in the execution of the contract work which was progressing briskly.

6. Dr. Medhi for the petitioner, during the argument, further contended that the acceptance of the tender of opposite party No. 3 and granting him permission to execute the contract work was not (sic) accordance with the procedure provided under (sic) rules framed by the Governor in the (sic) of his powers under Articles

166 and 288 the Constitution. In this connection, it was urged that the power to execute a contact vested in the Executive Engineer alone and the Government had no power under the rules to grant any such contract. The order granting contract to opposite party No. 3 by the opposite party No. 1 was at the instance of the Government, and there was thus no exercise of powers by him as required under the-rules. The contract, therefore, given to the opposite party No. 3 was illegal and without the authority of law.

7. I shall first dispose of the following contentions raised by the pertinent:

(1) That his fundamental Tight has been infringed as he has been discriminated on the ground of caste.

(2) That the circular issued by the Government (circular No. ABM. 18/56/14, dated 4th August, 1956) was violative of Article 16 of the Constitution.

(3) That, as the opposite party No. 3 has been granted the contract in question on the basis of the aforesaid circular, which is ultra virus, the contract, given to opposite party No. 3 should be set aside.

8. The subject of the above-mentioned circular is the grant of preferential treatment in the matter of settlement of contracts, permits, fisheries ferries, toll bridges, forest malaise etc. It is stated in the said circular that under Article 46 of the Constitution, the State is under an obligation to promote, with special care, the economic interests of the weaker section of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation, and that this policy can be materially given effect to by recognizing it in the matter of distribution of contracts, permits, fisheries, ferries, toll bridges, forest malaise etc.

In effect, therefore, this circular was issued to give effect to the directive principles embodied in. Article 46 of the Constitution. Article 16(1) of the Constitution provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office-under the State. Clause (2) of Article 16 provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence on any of them, be ineligible for, or discriminated against in respect of, any employment or office-under the State.

Article 16 deals with protection against inequality in the matter of public appointments. Clauses (1) and (2) of this Article protect a citizen from inequality in the matter of public employment or appointment. It provide.; for equality of opportunity to all citizens in matters of public employment. Employment necessarily presupposes the existence of a relationship of an employer and an employee. It cannot cover the case of a grant of a contract. The granting of a contract to an individual will not amount to employment within the meaning off Article 16.

In the case of C.K. Achuthan Vs. The State of Kerala and Others, , the petitioner held certain contracts for the supply of milk to the Government Hospital at Cannanore ever since 1946. In the year 1957, the contract was to be given after inviting tenders, and the tender of the petitioner was accepted on the 20th January, 1958. The petitioner was, however, informed later that the con-tract for supply of milk given to him was cancelled.

He was informed that it was the policy of Government that in the matter of supply of milk to Government medical institutions, the Co-operative Milk Supply Union was to be given contracts on the basis of prices fixed by the Revenue Department. The order cancelling the contract was challenged by means of a petition under Article 226 of the Constitution.

9. The contention that the petitioner was discriminated in the matter of grant of contract and thus Article 16 of the Constitution was violated, was rejected by the Supreme Court which observed as follows :

The main contention of the petitioner before us was thus under Article 16 (1) of the Constitution, and he claimed equal opportunity of employment Hinder the State. To begin with, a contract for the supply of goods is not a contract of employment in the sense in which that word has been used in the Article. The petitioner was not to be employ-ed as a servant to fetch milk on behalf of the institution, but was a contractor for supplying the articles on payment of price. He claimed to have been given a contract for supply of milk and did not claim to be an employee of the, State. Article 16 (1) of the Constitution, both in its terms and in the collocation of the words, indicates that it as confined to "employment" by the State, and has reference to employment in service rather than as contractors. Of course, there may be cases in which the contract may include within itself an element of service.... But it is clear that every person whose offer to perform a contract of supply is refused or whose contract for such supply is breached, cannot be said to have been denied equal opportunity of employment....

Moreover, if any direction issued by the State Government to its officers regarding matters which should be considered by them in granting contracts, is followed by them, it cannot be said that any citizen who has not been granted a contract as he does not possess those qualifications, has been discriminated; nor can it be said that any such direction is violative of Article 16 of the Constitution.

In the case of Banarsi Das and Others Vs. The State of Uttar Pradesh and Others, applications were filed under Article 32 of the Constitution on behalf of a large number of persons who were employed as patwaris under the State of Uttar Pradesh. The patwaris had organised themselves into an association, and they placed certain, demands about increase in pay and allowances and betterment of their service conditions before the Government.

The matter was under consideration of the Government, but in the meantime a number of patwaris went on a "pendown strike". The recognition of the association was, therefore, withdrawn, and in the meantime new conditions of recruitment were laid down by the Government. Protests were raised against the new rules, and a number of patwaris, in response to the resolution of the association, re-signed. The resignations were accepted and the patwaris were relieved of their duties.

The Government thereafter announced the creation of a new service. In this new cadre, old patwaris who had withdrawn their resignations were also included. The petitioners contended that they, were wrongly refused re-entry in the new service. It was urged that they were discriminated and their fundamental right guaranteed under Articles 14 and 16 of the Constitution was violated. The contention was repelled by the Supreme Court. It was observed that

Article 16 of the Constitution is an instance of the application of the general rule of equality laid down in Article 14 with special reference to the opportunity for appointment and employment under the Government. Like all other employers, Government are also entitled to pick and choose from amongst a large number of candidates offering themselves for employment under the Government.

The petitioner, therefore, can neither urge that he has been discriminated on the ground of caste or creed and his fundamental right has been in any sense affected, nor is there any force in the contention that the circular was violative of Article 16 of the Constitution.

10. The next contention is that the tender of the petitioner being the lowest, was accepted by the Executive Engineer, and an agreement was signed by the petitioner and also by the Executive Engineer. There was thus a completed contract under Article 299 of the Constitution between the petitioner and the State of Assam. The petitioner acquired a right under the contract, and the Government had no power to cancel the contract.

11. It is not necessary for the purposes of the present case, to go into the questions as to whether the Government had or had no power to cancel the contract; nor is it necessary to go into the question whether there was a proper and valid contract executed in accordance with the provisions of Article 299 of the Constitution. The petitioner, in our opinion, cannot be granted any relief under Article 226 of the Constitution on the facts alleged by him.

In effect, the petitioner is seeking to enforce his right under the contract by means of a prerogative writ under Article 226 of the Constitution, which he can do by means of a suit. The petitioner has an alternative remedy available to him. If the contract has been wrongfully cancelled, he can get an effective relief by means of a suit. The relief under Article 226 of the Constitution is a discretionary relief, and this Court will not exercise its discretion in a case where the petitioner can get an adequate relief by means of a suit.

The discretion cannot be exercised for the enforcement of a contractual right. It is not necessary, for the purposes of tin''s case, to go into the question as to whether any relief will be available to the petitioner in a case where his fundamental right or right to property is affected, though such a right is conferred under a contract. There can however, be no dispute that contracts involving personal obligations cannot be enforced otherwise than by means of a suit. In the case of AIR 1959 SC 490, referred to earlier, it was observed as follows :

The gist of the present matter is the breach, if any, of the contract said to have been given to the petitioner which has 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 Anr. , the aggrieved party cannot claim the protection of Article 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 practice any profession or to carry on any occupation, trade or business, such as is contemplated by Article 10 (1) (g). Nor has it been shown how Article 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.

Two other cases of the Supreme Court may be referred to in this connection. One is the case of Firm Chhotabhai Jethabai Patel and Co. and Others Vs. The State of Madhya Pradesh, and the other is the case of Ananda Behera and Another Vs. The State of Orissa and Another, In the first case, a number of petitions under Article 32 of the Constitution of India were filed in the Supreme Court for directions or orders or writs to enforce the fundamental rights of the petitioners to property by prohibiting'' the respondent, the State of Madhya Pradesh, from enforcing their alleged tights under the Madhya Pradesh Abolition of Proprietary Rights Act, 1950.

The petitioners had entered into contracts and agreements with the previous proprietors of certain estates and mahals in the State, under which, it was alleged, they acquired the rights to pluck, collect and carry away tends leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos. The petitions were allowed by the Supreme Court.

It was held that the contracts were in essence and effect licenses granted to the petitioners to cut, gather and carry away produce in the shape of tendu leaves, lac, timber, or wood, and the petitioners were neither proprietors nor persons having any interest in the proprietary rights through "the proprietors, and the rights of the petitioners, either as buyers or lessees or licensees, were not encumbrances within the meaning of the expression "free from encumbrances" in Section 3 (1) of the Act The Madhya Pradesh Abolition of Proprietary Rights

(Estates, Mahals, Alienated Lands) Act of 1950), and the State had, therefore, no right to interfere with the rights of the several petitioners under the contracts and agreements in their favour.

It was also held in this case that the goods covered by the petitions in question had a potential existence, and the petitioners, therefore, had acquired a right which could be protected by the issue of a writ under Article 32 of the Constitution and which could not be affected by the said Act. It was not a case of simple contracts.

In the second case of 1955-2 SCR 919 : (S) AIR 1956 SC 17, a somewhat similar question arose. The dispute in this case was about the fishery rights in the Chilka Lake which once formed part of the estate of the Raja of Parikud. Under the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952), this estate vested in the State of Orissa. The petitioners were carrying on the business of catching and selling fish particularly from fisheries within the said lake, and before the vesting of the estate, they had entered into contracts with the ex-proprietor and had obtained from the latter, on payment of heavy sums, licenses for catching and appropriating all the fish from the fisheries mentioned in the petition.

These licenses were refused to be recognised by the State of Orissa, which was about to re-auction the rights, when the petitions under Article 32. of the Constitution were filed before the Supreme Court. The petitions were rejected on the ground that the petitioners had acquired no right or interest in property'' by their several purchases.

It was observed that if the petitioners'' rights were no more than the right to obtain future goods under the Sale of Goods Act, then those rights were purely personal rights arising out of a contract to which the State of Orissa was not a party, and in any event, a refusal to perform the contract that gave rise to those rights, might amount to a breach of contract, but could not be regarded as a breach of any fundamental right. Applying this principle to the facts of the present case, if the act of the Government amounted to a breach of contract, the remedy of the petitioners was by means of a suit.

12. It was, however, contended in that case that what was sold to the petitioners was the right to catch and carry away fish in specific sections of the lake, and that amounted to a license to enter into the land coupled with a grant to catch and carry away the fish, that is to say, a profit a prendre. It was held that as the right amounted to immovable property, there was no valid Sale of that right in favour of the petitioners and hence they had no fundamental right.

13. The other argument submitted in that case was that the contract itself was ''property''. It was observed by, the Supreme Court that the State of Orissa had not taken away the petitioners'' contract from them or prevented them from acquiring, holding or disposing'' of the said contract. The petitioners were free to sue on the contract or to assign it if they wanted. The State merely said, as any Other person might say, "I was not a party to that contract. Neither its rights nor

its liabilities have devolved on me, and I refuse to recognise it or to assume the obligations of either contracting party.? If the State was wrong in its attitude, that might give rise to a suit against it for damages for breach.

of contract or possibly, to a right to sue for specific performance; but no question under Articles 19 (1)(f). and 31 (1) could arise because the State had not confiscated or acquired or taken possession of the contract as such.

14. A reference may be made to the case of Union Construction Co. (Private Ltd.) Vs. Chief Engineer, Eastern Command, Lucknow and Another, In this case, a petition was filed under Article 226 of the Constitution, briefly on the allegation that the petitioner had been given certain building contracts by the Chief Engineer, M. E. S. Eastern Command, Lucknow. The petitioner company had completed, according to its allegation, about 95 per cent of the work in connection with the contract described as ''A'' in the case, but the opposite party neither paid for the work already done nor permitted it to complete the remaining part of the work. The petition was rejected. It was observed in that case (that although the language of Article 226 is very wide and no limitations have been imposed on these powers, but once the origin and history of the High Prerogative Writs are remembered it is clear that the powers given to a High Court under Article 220 are to be exercised in accordance with the principles which governed the said writs. The power of the High Court to issue such a writ to any person, can only mean the power to issue such a writ to any person to whom, according to well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean for any other purpose for which any of the writs mentioned would, according to well-established principles, issue." It is well established that in England and America, Courts do not issue a writ or an order of mandamus in a case where the right which the petitioner wants to enforce by means of writ, is founded purely on a contract." We are in complete agreement with the above observation in so far as it lays down that the rights of the parties purely on contracts cannot be enforced by means of a writ. At page 229 of the book "Extraordinary Legal Remedies" by Ferris, the law has been stated in the following terms :

"Contract Rights. -- The duties enforceable by mandamus, although not necessary public duties, are those imposed by law. Mandamus will not lie therefore to enforce a right founded purely on private contract, however clear that right may be." In Halsbury''s Laws of England, Third Edition, Volume II (Simons'' Edition), at page 105, the law is laid down as follows:

Duties must be public. The order is only granted to compel the performance of duties of a public nature. It will not, accordingly, issue for a private purpose, that is to say, for the enforcement of a merely private right. The Court will not, therefore, interfere in cases of dispute between members of private corporations, even though carrying on business under a royal charter.

15. It was contended by Dr. Medhi that the language of Article 226 of the Constitution is very wide, and that the powers of this Court are of confined to issue of prerogative writs issued by English Courts. Article 226 gives power to this Court to issue directions, orders or writs, including writs of man damus, prohibition and certiorari or any of them, but it cannot be said that only writs mentioned therein could be issued by this Court. It is further, contended that the relief can be molded having regard to the nature of the wrong done to the petitioner.

It cannot be doubted that the powers of this Court under Article 226 of the Constitution are very wide, and even though a particular relief may not have been asked for, if this Court consider that the right of the petitioner has been affected and it can be remedied by the issue of a direction under Article 226, this Court will not refuse that relief to the petitioner. But the relief under Art., 226 is discretionary, and there are certain guiding principles, for the exercise of the powers under Article 228. The High Court will not issue a writ of mandamus or any direction in the nature of mandamus for the enforcement of contractual rights.

16. The petitioner, in paragraph 13 of his petition has alleged that the order of the Government being null and void, the Executive Engineer ought not to have cancelled the contract which had been accepted and executed in writing, complying with the provisions of Article 299 of the Constitution. The cancellation of the contract made by the Executive Engineer, therefore, is null and void.. The Executive Engineer is bound, under the statutory law, to give effect to the contract, and not competent to prohibit the petitioner from executing the work assigned to him." This averment clearly shows that what the petitioner is intending to enforce is his right under the contract, and what he is asking the opposite party to do is not legal duty but to carry out their contractual obligation. Such a relief the petitioner cannot get under Article 226 of the Constitution.

17. In the case of K.N. Guruswamy Vs. The State of Mysore and Others, an appeal was filed before the Supreme Court against an order of the High Court passed on an application under Article 226 of the Constitution. The appellant was a bidder at the auction for the liquor shop for the City and Taluk of Bangalore. The appellant''s bid was the highest and the contract was knocked down in his favour subject to formal confirmation by the Deputy Com'' missioner.

The fourth respondent Thimmappa thereafter approached the Excise Commissioner and offered to pay a higher price. The Excise Commissioner cancelled the sale held by the Deputy Commissioner in favour of the appellant and directed the Deputy Commissioner to take further action under Rule 10 of the Rules regulating the sales of Excise Privileges and to accept the tender of the said respondent. A petition was filed by the appellant to the High Court of Mysore for a writ, of mandamus, which was rejected.

The appellant, on appeal, claimed a writ of mandamus, firstly to the effect that his right to get a license for 1953-54 should be confirmed as the auction was knocked down in his favour by the pro per authority; and secondly, to the effect that the acceptance of the tender of the respondent concern ed be quashed and the Deputy Commissioner be directed to auction the contract in accordance with the procedure provided under the Excise Act and the Rules framed thereunder.

The Supreme Court rejected the prayer of the appellant to get a mandamus confirming his right to get the license. As regards the second relief, the Supreme Court held that as the procedure followed by the Deputy Commissioner in accepting the tender of the respondent was not in accordance with the Rules framed under the Excise Act, the appellant was entitled to a ''mandamus'' directing the authorities to act according to the said rules, and as a on sequence the acceptance of the tender of the respondent No. 4 was cancelled.

The Supreme Court, however, in the circumstances of the case and as the period for the licence was about to expire, did not grant even the second relief prayed for by the appellant. The observations of the Supreme Court dealing with the question, of a writ of mandamus claimed by the appellant for the confirmation of his right to the license, are apposite and may be quoted:

It is admitted that the contract was auctioned and the appellant''s highest bid was accepted, but that was not final. The Deputy Commissioner did not give his sanction, but equally he did not exercise his discretion. But that could be treated as an irregularity in the case because even if sanction had been given, it was subject to revision by the Excise Commissioner. That fact distinguished that case from the case "Commissioner of Police, Bombay v. Gordhandas Bhanji" AIR 1952 SC 10. Now the Excise Commissioner exercised his authority a little irregularity it is true, because the matter did not reach him through the proper channel but that would not call for interference by way of a writ. The substance of the thing was there, and as the High Court was not a Court of appeal, it could not have been called upon to correct a mere technical error. The sale was cancelled and a reason was given. The cancellation was, therefore, proper, and as the appellant obtained no right to the license by the mere fact that the contract had boon knocked down in his favour, the appellant''s first relief asking for a ''mandamus'' to confirm his right to the license for 1953-54 could not be granted.

18. If the argument of the petitioner is accepted that the contract in" his favour was complete and a proper document was executed on behalf of the State, the petitioner''s remedy is to bring a suit for the enforcement of his rights under the contract. If, however, the contention of the petitioner completed, the Executive Engineer leaving accepted his under the petitioner was entitled to get the (sic) in his favour, in that case it may be said that the petitioner acquired no right by the mere acceptance of his tender which he can enforce by means of a writ under Article 226 of the Constitution, and the opposite party cannot be compelled to execute a contract in his favour.

If the contract has been wrongfully cancelled, the petitioner may have a remedy by means of a suit for damages but any obligation under the contract cannot be regarded as a statutory obligation which can be enforced by means of a writ under Article 226 of the Constitution. It should be pointed out in this connection that under clause (10) of the notice issued by the Executive Engineer, calling for tenders, the Executive Engineer did not bind himself to accept or recommend the acceptance of the lowest or any other tender.

In paragraph 256 of the Assam Financial Rules, it is clearly provided that

the acceptance or rejection of tenders is left entirely to the discretion of the officer to whom the duty is entrusted, and no explanation can be demanded of the cause of the rejection of his offer by any person making a tender. Such an explanation may be called for by superior authority, if considered necessary.

19. The next contention raised by the petitioner is that there are certain rules framed by the Governor in the exercise of his powers u/s 59 of the Government of India Act, 1935 corresponding to Article 166 of the Constitution, and Section 151 of the Government of India Act, 1935, under which an elaborate procedure has been laid down for giving work contracts involving financial obligations on the Government.

Under those rules, it was the Executive Engineer alone who was entitled to accept tenders fox-work contracts and as in the present case the tender of opposite party No. 3 was not accepted by him, but was accepted on the direction of the State Government, it was not in consonance with the provisions of the Rules. This Court, therefore, under Article 226 of the Constitution, should cancel the acceptance of the tender of opposite party No. 3 and further direct that the opposite parties concerned should act according to law.

20. Before examining the authorities on the point cited by the counsel for the petitioner in support of his contention, it should be pointed out that the petitioner has not been able to point out in what respect the opposite parties concerned have failed to follow the procedure prescribed under the rules for the grant of contracts, and further, unless the petitioner is able to point out any provision of a statute or rules framed thereunder laying down the procedure for acceptance of tenders which has been violated in the present case, he will not be entitled to get any mandamus.

The petitioner will have further to show that the opposite parties failed to follow the rules prescribed by law, and not merely administrative directions issued by the State Government for the guidance of its subordinate officers. Before a petitioner public (sic) has exercised his authority not in accordance with law, and (ii) that the rules which he is alleged to have violated have statutory force; of, in other words, he has failed to discharge his public duties.

In the present case, the petitioner is not attacking the manner of the exercise of the power by opposite party No. 1, but the validity of the contract given to opposite party No. 3. The petitioner is, in effect, asking for a declaration that the contract in favour of the opposite party No. 3 is illegal. Tin''s relief, to my mind, cannot be granted to the petitioner under Article 226 of the Constitution. It is not necessary to point out that this Court, under Article 226, will not grant a mere declaration.

Moreover, the question whether the contract in favour of the opposite party No. 3 was by a proper authority or not, will only arise when the contract has been completed in his favour and the question whether the acceptance of the contract in favour of opposite party No. 3 by opposite party No. 1 was valid or not, is a matter which can be properly disposed of in a suit.

21. The first case referred to by the counsel for the petitioner is the case of Rambharosa Singh Vs. The Govt. of the State of Bihar and Others, This was a case where a certain ferry had been declared to be a public ferry under the Bengal Ferries Act. The tolls of the ferry had been leased to opposite party No. 5 of that petition by public auction for two years. Under the provision of Section 15, Bengal Ferries Act, the District Magistrate of Patna advertised to the public fixing some date as the date for holding a public auction.

The petitioner, when he came to bid, found that the advertisement was revoked, and that the District Magistrate had withdrawn the tolls from public auction. Thereafter the lease was given to opposite party No. 5 by a direct settlement. The petitioner then moved various authorities and ultimately he filed a petition under Article 226 of the Constitution before the High Court of Patna.

The petition was allowed. The relief granted to the petitioner in that case was that the order of the District Magistrate by which he had withdrawn the public auction, be quashed, and, as a consequence, further proceedings subsequent to the cancellation of the public auction, including settlement of the tolls of the public ferry with the opposite party No. 5, were also cancelled, and a direction was issued to the. District Magistrate commanding him to issue a, fresh notification for holding auction and to lease but the tolls of the ferry according to law.

That case, to my mind, is distinguishable. Under the provisions of the Bengal Ferries Act, the control of all public ferries vested in the Magistrate of the District. Section 9 of the Bengal Ferries Act provides that the tolls of any public ferry may, from time to time, be leased by public auction for such term as the Magistrate of the district in which such ferry is situated may, with the approval of the Commissioner, direct.

The power, therefore, to choose the method by which the control over the ferry could be exercised, vested in the District Magistrate. The District Magistrate in the instant case had exercised that power by declaring that he would lease the right to collect tolls by public auction. Under those circumstances, it was not open to the District Magistrate to give a go-by to the method prescribed by him and settle the right to collect tolls by a private treaty.

What the petitioner in that case was asking for was a mandamus directing the District Magistrate to carry out his statutory duties, namely, to lease out the tolls by a public auction, and not merely a declaration that the contract given to the opposite party No. 5 was illegal as it was given by an officer who had no authority to do so. The entire proceeding followed in the matter of settlement of the right to collect tolls was attacked as being opposed to the rules and the procedure laid down by the Act, and not only the contract given to the opposite party No. 5. The following observation in the judgment of Ramaswami, J. (as he then was) will show the ratio of that judgment:

The proposition upon which Dr. Sultan Ahmed relies is undoubtedly correct. It is well settled that an advertisement of a sale by public auction is a mere declaration of an intention and does not constitute a contract with the persons who intend to bid at the proposed auction sale. The question at issue in the present case is, however, of a different description. The question is not whether the petitioner has a legal right to enforce a contract. The case of the petitioner is not founded on any contractual right. The petitioner, on the contrary, bases his claim on the breach of statutory obligation imposed on the District Magistrate.... Upon a proper construction of the relevant provisions of the Bengal Ferries Act, the conclusion must be drawn that the District Magistrate is bound to settle the tolls of Patna-Ganges Ferry by a public auction, if the District Magistrate does not choose to hold the ferry ''khas''.... I think that, upon the facts admitted in the present case, the petitioner had a sufficient legal right which entitled him to ask the court to issue a writ under Article 226, so that the District Magistrate who is clothed with certain statutory powers, does not exceed those powers.

In the case of Ramphal Singh Vs. The Govt. of the State of Bihar and Others, a similar point came up for consideration, where the case reported in Rambharosa Singh Vs. The Govt. of the State of Bihar and Others, was followed and a mandamus was granted to the petitioner. Apart from the fact that the rules which were violated in these cases were rules framed under the provisions of the Bengal Ferries Act, and that the power which the District Magistrate failed to exercise was one which was conferred on him by Section 9 of the Act, the relief which the petitioner concerned was claiming was one of mandamus cancelling the proceedings which were not in accordance with law, and not a declaration that a certain contract made in favour of the opposite party was illegal.

22. The next case referred to is the case of The State of Assam Vs. Keeshab Prasad Singh and Another, This was an appeal from an order of this Court passed in a Revenue Appeal. The first respondent in this case had been given lease of the fishery in question which was to expire on 31-3-1951. Shortly before that a good deal of agitation was made against the grant of the lease to the said respondent The Government, therefore, decided to settle the fishery directly and issued a direction to that effect to the Deputy Commissioner on 1-2-1951. The Government directed the Deputy Commissioner to put the fishery to auction and then to submit the bid list to Government with his recommendation.

The Deputy Commissioner proceeded to auction the fishery and thereafter forwarded the bid list to the Government with a recommendation in favour of the first respondent. The Government decided in favour of respondent No. 1 and issued a direction, to the Deputy Commissioner to settle the fishery with respondent No. 1. After this order had been communicated to the respondent No. I, the Government directed the Deputy Commissioner not to give effect to its aforesaid direction till the matter had been further considered by the Government. The Government thereafter reviewed its previous order and cancelled the lease granted to the respondent No. 1 and directed the Deputy Commissioner to settle the fishery with a Society of fishermen.

23. The order of settlement was challenged on appeal before the High Court as a Revenue Tribunal, and the High Court allowed the appeal and set aside the settlement with the fishery society concerned. The order of the High Court was affirmed by the Supreme Court. A petition under Article 226 of the Constitution was also filed before the High Court, but that was not before the Supreme Court.

24. The powers of an appellate Court are different from the powers of this Court when issuing prerogative writs under Article 226 of the Constitution, and the above-mentioned case can be of no assistance in considering the question of grant of a mandamus under Article 226 of the Constitution. The settlement by the Deputy Commissioner was examinable by this Court on appeal, and if the Deputy Commissioner who was empowered to settle the fishery, cancelled the settlement on a direction by the Government and settled the fishery with a person nominated by the Government, the appellate Court could set aside the order of settlement. But the same'' considerations will not apply to the grant of a writ under Article 226 of the Constitution.

25. The next case referred to is the case of AIR 1952 SC 16. This matter came up before the Supreme Court on an appeal against an order passed by the High Court of Bombay u/s 45 of the Specific Relief Act. The respondent wanted to build a cinema house on a plot of land, and under the rules then in force, it was necessary to obtain permission from the District Magistrate of the area before a cinema house could be constructed. The necessary application was made by the respondent and permission was refused, on the ground that the public of the locality objected.

After some time, that area became part of Greater Bombay, and the jurisdiction to giant or refuse 8 license was transferred to the Commissioner of Police, Bombay. A second application was then made by the respondent to the Commissioner of Police, Bombay, which was rejected, and later on the respondent again applied to the Commissioner of Police for re-opening of his case. After some time the Commissioner accorded the necessary permission to the respondent.

Thereafter some representations were made to the Government, and the Commissioner wrote to the respondent directing him not to proceed with the construction of the cinema pending Government orders. Shortly thereafter the Commissioner wrote to the respondent that he was directed by the Government to inform him that the permission to erect a cinema at the site in question granted to him was cancelled. The High Court was moved u/s 45 of the Specific Relief Act, which allowed the petition of the respondent who had asked for a direction to be issued to the Police Commissioner of Bombay not to give effect to the order cancelling the license granted to him.

26. The relief?s were claimed, namely, (1) an order directing the Commissioner to withdraw the cancellation, and (2) an order directing him to grant permission for the erection of a cinema. The second relief claimed could not be granted as there was no valid order of cancellation. The first relief was not granted in the form in which it was prayed for, as the rules vested the Commissioner with an absolute discretion to cancel at any time a license once granted, and there was no law which could compel him to forbear from cancelling a license once granted, and further, there was no law which could compel him to withdraw the cancellation already effected.

The relief of mandamus was granted in this case directing the Commissioner to exercise his discretion. It was held by their Lordships of the Supreme Court that the Commissioner did not in fact exercise his discretion and did not cancel the license which he had granted. Ho merely forwarded to the respondent an order of cancellation passed by the State Government. The Commissioner had before him certain objections which called for the exercise of the discretion regarding cancellation, which he was bound to exercise.

A direction was, therefore, issued to the Commissioner to consider the objections and to decide for himself whether the license should or should not be cancelled. Under the provisions of the rules, the Commissioner alone had the power to cancel the license, and he was directed to exercise his power by considering the objections raised against the grant of the license. That was the only relief which could have been granted to the petitioner in view of the finding that the Commissioner had not exercised his discretion at all in the matter. This case, therefore has no application to the facts of the present case.

27. In the case of Ganesh Ram Sharma v. Secretary to the Government of Assam, Supply Department AIR 1956 GAU 158, it was held by a Bench of this Court that the Government, as an ordinary party, could not be forced to sell its goods to anybody in particular, because it had unfettered discretion in the matter, nor could the Court issue a writ directing it to sell its goods in terms of the notification issued by it when neither the notifications nor the rules advertised were framed under any statutory provisions or provisions coming under any Act.

28. The next contention to be examined is whether there is any statutory provision which has been violated in the present case. Section 49 of the Government of India Act, 1935, provides that the executive authority of a

Province shall be exercised by the Governor, either directly or through officers subordinate to him. Clause (1) of Section 59 of the Act lays down that all executive action of the Government of a province shall be expressed to be taken in the name of the Governor.

Clause (3) of Section 59 provides that the Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion. This section corresponds to Article 166 of the present Constitution. Dr. Medhi contends that u/s 59 of the Act, Rule 11, at page 3 of "The Book of Financial Powers, Assam", Second Edition, has been enacted. Rule 11 runs as follows:

No department shall, without previous consultation with the Finance Department, authorise any orders (other than orders pursuant to any general delegations made by the Finance Department) which, either immediately or by their repercussions, will affect the finances of the province....

He contends that this rule prohibits any other department to pass any order involving financial implications without previous consultation with the Finance Department, except orders which the department could pass under a general delegation made by the Finance Department. He then refers to the appendix to these rules printed at page 99 of the Book of Financial Powers, Assam wherein it is mentioned that the Executive Engineer, in charge of divisions could accept tenders up to Rs. 20,000, which has now been raised to Rs. 50,000.

His contention, in substance, therefore is that the appendix shows that there was a general delegation by the Finance Department in favour of the Executive Engineer to accept tenders up to Rs. 50,000, and that as there was a general delegation to that effect, the prohibition to pass any order with regard to such tenders, without previous consultation with the Finance Department as provided for under Rule 11 referred to above, is not operative. From this, he argues that the tender of works up to Rs., 50,000/-could, therefore, be accepted by the. Executive Engineer only, and the Government had no power, as such, to grant a contract in respect of works valued up to Rs. 50,000/-.

As in the present case, the tender of opposite party No. 3 was accepted by the Government, it was done in violation of Rule 11 read along with the appendix. This argument presupposes that the appendix is also a part of the rules framed by the Governor in the exercise of his powers u/s 59 of the Government of India Act, 1935. The second assumption involved in the argument is that the appendix contains the general delegation referred to in Rule 11. There is no warrant for these assumptions made by Dr. Medhi.

Nothing has been pointed out to show that the general delegation referred to in Rule 11, is nothing but the powers mentioned in the appendix. Moreover, if there is a general delegation to sanction tenders up to Rs.. 50,000, the effect of Rule

11 is only that no previous consultation with the Finance Department may be necessary to accept such tenders; but the rule, by itself, does not confer any power on the Executive Engineer to give works contracts. The granting of a contract is an executive action, and it is the Governor who exercises the executive function of the State.

The document of contract is also to be expressed in the name of the Governor. The Governor functions through the Ministers, and Section 59 of the Act gives power to the Governor to frame rules for the allocation of business to the Ministers in charge of various Departments, and if the Departments issue instructions that particular orders are to be passed by heads of departments, it does not mean that the heads of the departments alone get power to give works contracts.

The Patna cases relied upon by the counsel for the petitioner were cases where the statute itself conferred powers on the District Magistrate to control ferries. The rules of executive business in force from October 6, 1951, framed by the Governor in the exercise of his powers under Article 166 of the Constitution, contain Rule 10, which is in, the same terms as Rule 11 referred to above, but there is no, appendix attached to these rules, and there is nothing in these rules to show that there was any general delegation by the Finance Department to the effect that tenders of less than Rs. 50,000 should be accepted by the Executive Engineer in the exercise of his powers under Rule 10.

Reference was then made to Rule 254 onward printed at page 76 of the Assam Financial Rules, Second Edition. It does not appear that these rules have been framed under any provision of the statute. Reference was also made to See., 151 of the Government of India Act, 1935, as the source of these rules. I have already quoted Section 151, and I do not think that these rules were in fact made or could have been made under the provisions of Section 151.

The Advocate General who appears for the respondents, has pointed out that there is a set of Treasury Rules framed by the Governor under Sec 151 of the Government of India Act; but the rules referred to by the petitioner are not the rules framed in the exercise of the powers u/s 151 of the Act. Reference was then made to Rule 285 printed at page 81 of the Public Works Department Code, Government of Assam. These rules also do not appear to have any statutory force.

As has been pointed out earlier, these rules could neither have been made nor were, in fact, made, in the exercise of the powers by the Governor u/s 59 or Section 151 of the Government of India Act, 1935. It is true that it was not proper for the Government, after once having sanctioned the contract, to direct that it should be can-celled, but unless tire petitioner is able to point out any breach or non-observance of the rules framed under some statute, it cannot be said that there has been any failure to observe any public duty which could be enforced by means of a writ of mandamus by this Court, under Article 226 of the

Constitution.

In my opinion, therefore, the petitioner is not entitled to any relief by way of confirmation of his contract or a direction prohibiting the opposite parties from cancelling his contract, as the proper remedy of the petitioner is to bring a full for the enforcement of his contractual rights He can also not get any mandamus directing the opposite parties not to give effect to the contract given to the opposite party No. 3, as there is no statutory duty which has not been carried out by the opposite parties. If the contract in favour of the opposite party No. 3 is illegal inasmuch as it has been executed by one without authority, such a contract may be cancelled in a proper suit, but no relief can be granted to the petitioner under Article 226 of the Constitution.

29. Reference was also made to the notice issued inviting lenders for the works contract. The notice referred to can have no statutory force. It was only in the nature of an offer made to the intending Contractors. The rules themselves are headed as Tender Rules and Directions for the Guidance of Contractors.

30. It has been also contended by the opposite party No. 3 that the contract has been completed in his favour; ho has started work under the contract, and consequently no mandamus can be issued against him. It is denied by the petitioner that the contract has been completed in favour of opposite party No. 3., It is also not accepted that the opposite party No. 3 has commenced any work under the contract. This Court, however, will not go into these controversial questions of fact, and in the view which I have taken, it is not necessary to consider this matter any further.

31. In the result, therefore, there is no force in this petition and it is rejected the Rule is discharged.

DEKA, J.

32. The material facts in connection with this application under Article 226 of The Constitution are that the Executive Engineer, Relief and Rehabilitation Engineering Division, Assam, Shillong (opposite party No. 1) called for sealed tenders at his office in Shillong for development of works in the urban colony at Bourguignon in the district of Goalpara, and, various tenders had been submitted including the one submitted by the petitioner, who had also deposited a sum of Rs. 757/-as earnest money.

Opposite Party No. 1 accepted the tender of the petitioner and issued in his favour the work order No. 61 dated 23rd October, 1959 and a formal contract was signed by the Executive Engineer on behalf of the Government and the petitioner on behalf of himself on 29th October, 1959, and, as a result of the work order, the latter started working and invested some money; but, on 10th December, 1959 the petitioner received a letter from the Executive Engineer (opposite party No. 1) intimating that the State Government has awarded the contract to the opposite party No. 3, Anr. tendered whose tender was not accepted by the Executive Engineer, and as a result of the Government''s order, opposite party No. 1 indicated that the Contract given to the petitioner should be treated as cancelled and he should desist from proceeding with the work.

The petitioner challenged the validity of this order or direction of the Executive Engineer dated 10th December, 1959 and questioned the power of the State Government to supersede the contract once given by the Executive Engineer who was competent to do it. The petitioner further challenged the validity of the order in favour of opposite party No. 3 on the ground of discrimination.

33. The State Government opposed the petition on the ground that the petitioner has asked for enforcing a contractual right which he was not competent to do by an application under Article 228 of the Constitution and that his remedy lay by regular suit. It further contended that the Government made no discrimination in favour of opposite party No. 3 and even though it did that was allowable under the law.

The further contention was that the order was purely administrative and there being no violation of any statutory rules or principles of law, this Court could not interfere. There were other contentions as well on behalf of opposite party No. 3, one of the contentions being that the work being already started by opposite party No. 3, there was no scope now for interference by any writ by this Court and, as such, no writ should be issued.

34. My learned brother Mehrotra, J. has dealt with all the aspects of the case in detail and I have had the privilege of reading the judgment prepared by his Lordship. I see no reason to differ from the conclusion he has arrived at; but, I have Some difference as to the ground on which the petition should be disallowed. I agree that the work being already commenced by opposite party No. 3, it would not be fair for this Court to interfere; nor do I think that there was any discrimination which would come under Article 16 of the Constitution of India as contended by the learned Counsel on behalf of the petitioner.

The only point where I take a different view is as to the power of the Government to interfere with the order passed by the Executive Engineer, Relief and Rehabilitation Department, on the basis of which the work started. It is not denied on behalf of the State Government that the tender of the petitioner was accepted by the Executive Engineer concerned and the work order was given, nor is it seriously challenged that there was no right of appeal to the State Government on the terms and conditions incorporated in the notice by which tenders were invited or by any rule framed under any of the Acts or rules framed thereunder.

The State Government challenges that opposite party No. 1, the Executive Engineer (Relief and Rehabilitation Department) had no power to enter into a contract on behalf of the State Government) as he was not duly authorised to sign the contract which other Executive Engineers of the Public Works Department were; The State Government does not admit that the Financial Rules arc statutory rules but avers that they were mere executive instructions, which contention I find hard to accept and do over-rule.

35. We might straightway refer to the Public Works Department Code which contains both Assam Financial Rules as well as executive instructions. Rule 285 of the Public Works Department Code corresponds to Assam Financial Rule No. 254. ID speaks that sealed tenders should invariably be invited in the most open and public manner possible, by advertisement in the Government Gazette or the Press, or by public notice in English and the Vernacular; the notice should (indicate?) among other things, with whom or with what authority the acceptance of the tender will rest. Rule 295 of this Code which corresponds to Assam Financial Rule 262, mentions about the officers empowered to execute classes of deeds, contracts and other instruments, as detailed in Appendix IV to the Book of Financial Powers, which, as quoted verbatim, runs as follows:

No authority lower than the officer in charge of a sub-division can accept any tender or make a contract for public work. The officers legally empowered to execute on behalf of the Governor of Assam the different classes of deeds, contracts and other instruments are detailed in Appendix IV to the Book of Financial Powers. This power is, in each case, subject to the rules laying down the powers of officers to enter into contracts, vide serial No. 20 under "F--other expenditure" of Appendix III to the Book of Financial Powers, Assam.

36. Let us first consider whether the Assam Financial Rules are statutory rules, and, if they are, the Government is bound by the same. On a reference to the Public Works Department Code it will be clear that this Code or Manual contains many other provisions which are not adopted from the Assam Financial Rules are mere executive instructions. As it stands, Rule 288 states that it is the definite policy of Government to encourage the natives of the Province (including those domiciled in Assam) to take up contract work etc. These are not adopted from Assam Financial Rules but are mere executive instructions. Therefore, all that the Code contains are not executive instructions but they contain provisions from Assam Financial Rules as well.

37. We have, therefore, to consider how far tile Assam Financial Rules are statutory rules and are binding against the State Government. The introduction to the Assam Financial Rules published by the State Government states in Chapter I, paragraph 6 that the rules contained in the Assam Financial Rules are intended to be applicable to provincial transactions only, but where they indicate specifically that they relate to any Central subjects with which this Government deal as Agent of the Central Government, they should be regarded as the rules of that Government.

Therefore, it is an admitted fact that these rules by the State Government are applicable to all provincial transactions where money of the public exchequer is involved. In Chapter II where definitions are given, the words "contract and contractor" are also defined and it is practically admitted that in the present case, a contract, as contemplated under those rules, had taken place which was within the competence of the Public Works Department as provided under the Book of Financial Powers, Assam.

38. The Book of Financial Powers, Assam, clearly indicates that the rules quoted therein are extracts from the Business Rules of the Government of Assam framed by the Governor u/s 59(3) of the Government of India Act, 11935, which have subsequently been adopted after the passing of the Indian Constitution and the operation thereof is continued by virtue of Article 372 of the Constitution read with Section 24 of the General Clauses Act.

Rule 11 (Part II), as reproduced in the Book of Financial Powers, Assam, indicates that

no department shall without previous consultation with the Finance Department authorise any orders (other than orders pursuant to any general delegations made by the Finance Department) which, either immediately or by their repercussions, will affect the finances of the province.

The other portion is not essential. These rules-contain several appendices. Appendix II deals with the financial powers of the Government of Assam including those of the Public Works Department and shows -- nature of power, department, extent to which the assent of the Finance Department, may be assumed. It shows under item No. 5 the-authority of the Public Works Department and enumerates some of the items. But, the head "contract" on the basis of tender comes under Appendix III. Appendix III deals with financial powers of the Heads of Departments and other subordinate authorities and it runs under several heads.

The sub-head "F" relates to "Other Expenditure", presumably not mentioned in Appendix II, and item No. 20 (c), refers to the power of acceptance of tenders and the authority of the Executive Engineers in charge of divisions, and, the financial limit goes up to Rs. 20,000/- which is ultimately said to be raised up to Rs. 50,000/-. Therefore, under sub-head, as indicated above, coupled with the Assam Financial Rule 262, to which I have already referred, it is the Executive Engineer, in charge of a division who can accept lenders up to Rs. 50,000/-.

Under the Financial Rules, no residuary power is left with the State Government either for revision or interference in appeal. Therefore, in my opinion, the cancellation of the order of the Executive Engineer of the Public Works Department in favour of the petitioner was without any legal sanction and in violation of the Financial Rules which are binding against the State Government.

39. The learned Advocate-General has contended that this particular Executive Engineer of the Relief and Rehabilitation Department did not have the power of entering into a contract or signing the same on behalf of the State Government. But, in my view, that contention is not very much substantiated inasmuch as it is contended that the self-same officer executed the contract in favour of opposite

party No. 3, which, however, was not produced in court even though requested. I, therefore, do not have much reliance on this contention, and, in the normal course, it is presumed that he enjoyed the same powers as other Executive Engineers of the Public Works Department in charge of a division. Even if he was not entitled to sign the contract, his power of acceptance of the tender is not affected thereby.

40. With a view to ascertain the validity of the rules framed u/s 59 (3) of the Government of India Act, 1935, it is better to reproduce the pertinent section and it runs as follows:

59 (3). The Governor shall make rules for the more convenient transaction of the business of the Provincial Government and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

41. It appears from the wording of the section quoted above that the rules framed thereunder are statutory rules and the Government for its conduct of business had not only framed but adopted the same for carrying on the business of the Provincial Government. In my opinion, therefore, the Financial Rules are statutory rules and binding against the State Government. The Financial Rules have further the support of Section 151 of the Government of India Act, 1935, which have been later on adopted and that has been made clear in the "Financial Rules" itself.

42. In the above view that I hold about the Financial Rules, the terms in the notification inviting the tender had the statutory sanction and un-less there be something contrary to indicate that the Executive Engineer had no power to accept the tender, his order in accepting the same is binding against the Government. Even assuming that he did not follow the circular, to which reference was made, the government could only pull him up and could not for that reason override the order passed by him or stop him in the matter of discharging his function and even if the Government did, that was beyond the jurisdiction of the Provincial Government. Accordingly, in my opinion, the Government''s order directing the opposite party to cancel the work order in favour of the petitioner was vitiated and was ineffective in the eye of law, and, accordingly, a writ of mandamus could issue accord-tag to the accepted principles of law.

43. In view, however, of the circumstances of the case that the work has already proceeded, we do not think of interfering at this stage or of giving any relief to the petitioner on the basis of his application under Article 226 of the Constitution.

44. I might incidentally mention that the petitioner has not applied for enforcing the terms of the contract as such but has challenged the validity of the Government''s order which he was quite entitled to. I agree with my learned brother that the petitioner will be entitled to sue for refund of the money invested by him or for any damage that he sustained by virtue of the order of

cancellation of the contract, the validity of which he has challenged.

45. In the circumstances, the rule may be discharged without costs.

CIVIL RULE NO. 162 OF 1959.

46. Sinha, C. J. : I have had the privilege of going through the judgments prepared by Mehrotra and Deka, JJ. I agree with the conclusion that this application should be dismissed on the ground that the Court exercises discretionary powers under Art 226 of the Constitution and that on the facts in the present case, namely, that respondent No. 3 with whom the contract has been made, subsequent to the contract with the petitioner, has started his work and is going on with it, it will not be a proper exercise of discretion to allow the application.

