

(2012) 04 KAR CK 0039

In the Karnataka High Court

Case No : Writ Appeal No's. 4066 of 2011 alongwith 4379 of 2011

Shimnit Utsch India Private Limited

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 20-04-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Karnataka Transparency in Public Procurements Act, 1999 — Section 15, 17, 18

Citation : (2013) 1 KCCR 544

Hon'ble Judges : K. Sreedhar Rao, J;B.S. Indrakala, J

Bench : Division Bench

Advocate : Jayakumar S. Patil, for M/s. Indus Law in Writ Appeal No. 4066 of 2011 and Sri. K.M. Nataraj, A.A.G. and Sri. H.T. Narendra Prasad, High Court Government Pleader in Writ Appeal No. 4739 of 2011, for the Appellant; K.M. Nataraj, Additional Advocate General and Sri. H.T. Narendra Prasad, High Court Government Pleader for Respondent-1 to 4 in Writ Appeal No. 4066 of 2011 and Sri. Jayakumar S. Patil, for M/s. Indus Law for Respondent-1 in Writ Appeal No. 4739 of 2011, for the Respondent

Final Decision : Allowed

Judgement

K. Sreedhar Rao, J.—The respondent No. 3 issued notification inviting for bids for providing and fixation of Higher Security Registration Plates (HSRP) for all existing registered motor vehicles and new vehicles to be registered in Karnataka on a Build, Own and Operate (BOO) basis under the two cover bidding process. The appellant and other seven companies submitted tenders and the tenders of other four companies came to be rejected in the technical bid. The tenders of the appellant and other two companies were considered. The appellant had given the lowest bid amount. Therefore, the tender of the appellant was accepted. The third respondent on behalf of the first respondent executed a contract vide Annexure-H dated 31.03.2006.

2. M/s. Hind Industries Pvt., Ltd., filed an appeal challenging the order of rejectment of the tender u/s 16 of the Karnataka Transparency in Public

Procurement Act, 1999, (in short herein after referred to as KTPR Act). M/s. Pramuk Hoffman International Limited filed the Writ Petition No. 6599/2006 challenging the rejectment of their bid. This Court dismissed the writ petition with liberty to file an appeal u/s 16 of the KTPR Act. The appeal was filed with an application for condonation of delay. The Appellate Authority condoned the delay. The appellant-Company challenged the order of condonation of delay and this Court held that, the Appellate Authority has power to condone the delay and also opined that, the time spent in prosecuting the writ petition is a condonable one. The appellant-Company aggrieved by the said order, filed SLP (C) No. 10997/2010 challenging the order of this Court in upholding the condonation of delay.

3. The first respondent passed an order of cancellation of the approved tender of the appellant-Company vide Annexure-A dated 22.01.2010 and directed the Transport Commissioner to call for fresh tenders.

4. The appellant-Company submits that, on 10.3.2010, in the appeal proceedings before the Secretary to Government of Transport Department, the first respondent informed that the tender of the appellant-Company has been cancelled vide Annexure-A.

5. The appellant on coming to know of the said cancellation has filed W.P. No. 6700/2010 challenging the order of cancellation seeking following reliefs:

a) Issue a writ, order or direction declaring the Order dated 22.01.2010 issued by the Office of the Chairman (Respondent No. 4) at ANNEXURE-A, Transport Department, Government of Karnataka as arbitrary, illegal and unconstitutional and accordingly quash the Order bearing No. SARIE 324 SAEPA 2004, Bangalore Order dated 22.01.2010 issued by the Chairman (A) Transport Department, Government of Karnataka (Annexure-A).

b) Consequentially, issue a writ of mandamus or any other appropriate writ order, or direction in the nature of mandamus directing the respondents to implement the Scheme of High Security Registration Plates as per the Contract dated 31.3.2006 entered into between the petitioners and respondent No. 3 at ANNEXURE-G in a time bound manner and in any event before 31.5.2010.

c) Pass such other or further order/s as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

6. The appellant had also filed W.P. No. 25201 of 2009 seeking writ of mandamus directing the respondent-State for implementation of HSRP Scheme. Both the writ petitions have been clubbed and heard together. The Learned Single Judge partly allowed the writ petition directing the appellant herein and the respondents to negotiate with regard to price as required under Article 10.1. However, the order vide Annexure-A is not set-aside. Therefore, the appellant aggrieved by the said order has filed the appeal.

7. With regard to the pendency of the appeal before the Appellate Authority u/s

16 of KTPR Act and the pendency of SLP(C) before the Supreme Court, it is submitted that, Supreme Court has directed that, this writ appeal should be disposed off within a period of four months from the date of receipt of the Copy of the order. In view of the said direction, it is submitted that, the pendency of the SLP before the Supreme Court will not come in the way for disposal of this writ appeal.

8. Respondent No. 1 vide Annexure-A has given the following reasons for cancellation of tender:

i) The mandatory requirement of publication of the notice inviting tender in the Indian Trade Journal as per Rule 10 of KTPR Rules is not complied. Therefore, the said lapse vitiates the tender process and is bad in law.

ii) The contract value being more than Rs. 5 crores, the acceptance of tender by respondent No. 3 without approval of the Cabinet as required under Karnataka Government (Transactions of Business) Rules, 1977 is bad in law and vitiates the contract.

iii) In both the Houses of Karnataka Legislature, there is objection with regard to price quoted by the appellant-Company as being exorbitant and would cause heavy financial burden to the vehicle owners.

iv) The price quoted and accepted is three times more than the HSRP plate fixed in the State of West Bengal and other three States.

9. The appellant-Company in writ petition has challenged the order vide Annexure-A on the ground that the order vide Annexure-A is passed in exercise of the Executive Authority. The tender after being accepted cannot have been cancelled without reasonable opportunity to the appellant-Company. In this regard, the Learned Counsel has relied upon the decision of State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, the following observations are made:

It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *M/s. Radha Krishna Agarwal & Ors. vs. State of Bihar & Ors.*, (1997) 3 SCC 457. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent-Company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive powers under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See *M/s. Radha Krishna Agarwal vs. State of Bihar* (supra) at page 462, but Article 14 of the Constitution cannot and has not been

construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent-Company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant considerations, it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution. xxxx xxxx 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 and the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

10. When once the tender is accepted and contract is concluded as per terms of the contract vide Annexure-H Article 5.1(iv), respondent No. 1 is under obligation to issue Price notification. If there is any reservation with regard to the price, the respondent No. 1 as per Article 10.1 should resort to settlement by amicable negotiation. The unilateral cancellation of the concluded contract is arbitrary and illegal.

11. The State and its authorities also aggrieved by the order of the Learned Single Judge, which directs the parties to negotiate, have filed Writ Appeal No. 4739/2011 on the ground that when the tender has been cancelled and fresh tender is called for direction for amicable negotiation is untenable.

12. Sri Jayakumar S. Patil, Learned Senior Counsel for the appellant-Company urged the following grounds to assail the order of the Government vide Annexure-A which cancelled the tender of the appellant-Company.

i) The contract vide Annexure-H is a statutory contract. The provision of the Rule 50 of the Central Motor Vehicle Rules gives all the logistic details of the method, manner and the standards of the HSR Plate to be incorporated in the terms of the contract. The question of issuance of price notification by the Government is only a formal order because under the terms of contract vide Annexure-H, Government is bound to issue price notification as per the price stated in the Appendix. In other words, price would be the bid amount of the appellant-Company as stated in the tender.

ii) The contract is entered into as per the provisions of the KTPR Act. Therefore, the contract cannot be considered as one made in exercise of Executive Power as envisaged under Article 299 of Constitution of India.

iii) The contract is a statutory contract. The Commissioner of the Transport Department is the head of the Department and he is fully empowered to call for

the tender and accept the tender. The procedure of issuance of tender notification and acceptance of tender is absolutely in accordance with the provisions of the KTPR Act. When once the tender is accepted and the contract is concluded there is no power vested in the Government to cancel the contract under KTPR Act.

iv) The Government in the objection statement filed in W.P. No. 6599/2006 had taken a categorical stand that the acceptance of tender of the appellant is fully in accordance with law and there are no legal lapses in publication of the tender notification and in acceptance of tender. Therefore it is untenable for the respondent to contend that the tender notification issued was bad in law. Therefore, it necessitated cancellation of the tender of the appellant.

v) Non-publication of the tender notification in the Indian Trade Journal is not fatal to the tender processing. The 3rd respondent who is the Procurement Authority under the KTPR Act has got published the tender in the tender bulletin as required u/s 8 and also got it published in the newspapers as required under 10(2) to 10(4) of the KTPR Rules. Therefore, there is no serious procedural lapse, which can vitiate the tender process.

vi) There has been wide publicity of the tender notification. There is no complaint from anybody in the filed of HSRP plate manufactures that they had no proper notice of the tender notification. Non-publication of the tender notification in the Indian Trade Journal is only a venial lapse.

vii) The contention that, for validating the contract, there should be a Cabinet approval is untenable. The KTPR Act envisages comprehensive procedure to be complied by the Procurement Authority, who also happens to be tender acceptance authority. There is no need of Cabinet approval for validating the contract.

viii) When once the tender is accepted and the contract is concluded, there is no scope for the Government under the KTPR Act to cancel the concluded contract.

ix) With regard to the price structure quoted by the appellant-Company, if there is any difference in opinion the appellant-Company is open to negotiations as required under Article 10. The Learned Single Judge erred in not setting aside the order at Annexure-A, without which there cannot be free and fair negotiations as required under Article 10 of the Contract.

x) The contention that, appellant has the remedy of arbitration is untenable. The arbitration is permitted when only, when there is violation of the terms of the contract and not when the Government in its executive power arbitrarily revokes the contract.

xi) The contention that, for enforcing the terms of contract, the writ petition is not untenable. When the State arbitrarily in exercise of its Executive power revokes the contract, the aggrieved party can avail the remedy under writ jurisdiction, In this regard, Learned Counsel has relied upon the decision of the

Supreme Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , the following observations are made:

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14 then we have no hesitation in holding that a Writ Court can issue suitable direction to set-right the arbitrary actions of the first respondent, in this context, we may note that though the first respondent is a Company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 read:

xxxx xxxx xxxx

To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest.

25. The Learned Counsel for the respondent then contended though the principal prayer in the writ petition is for quashing letters of repudiation by the first respondent, in fact the writ petition is one for a "money claim" which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the Learned Counsel also cannot be accepted in its absolute terms. This Court in the case of UP Pollution Control Board vs. Kanoria Industrial Limited while dealing with the question of refund of money in a writ petition after discussing the earlier case law on this subject held: (SCC pp. 556-58, paras 12& 16-17).

12. in the para extracted above, in a similar situation as arising in the present cases, relating to the very question of refund, while answering the said question of affirmatively, this Court pointed out that the Courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment etc. In these cases also the claims made for refunding the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions.

26. Therefore, this objections must also fail because in a given case it is open to

the Writ Court to give such monetary relief also.

27. From the above discussion of ours, the following legal principles emerged as to the maintainability of a writ petition:

(a) in an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely, because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

13. Learned Counsel has further relied upon the decision of the Supreme Court in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, the following observations:

20. Even apart from the premise that the "Office" or "Post" of DGCs has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil Article 14, we are also clearly of the view that this power is available even without the element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulations of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as of the requirements of Article 14 and contractual obligations are alien concepts which cannot co-exists.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import atleast the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication

of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls, within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned Act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its grab of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not nature of functions, contractual or otherwise, which is decisive of nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty

is to the people of the Country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a welfare State requiring the State to discharge its wide ranging functions even though its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

36. The meaning and true of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be who ever so high, the laws are above you. This is what men in power must remember always.

14. With regard to the pendency of the appeals of other bidders under the KTPR Act, it is submitted that, there is no interim order of stay granted against the acceptance of tender of the appellant-Company. Therefore, the pendency of the appeal will not come in the way of disposal of the appeal.

15. The Additional Government Advocate Sri K. Nataraj, for respondents No. 1 to 4 and for the appellant in W.A. No. 4739/2011 submitted the following contentions in support of the cancellation of the contract of appellant vide Annexure-A.

i) The contract vide Annexure-H is dichotomy with features of statutory contract and non-statutory contract. Some of the terms of the contract have been spelt out in Rule 50 of the Central Motor Vehicle Rules. However, decision of the Government to call for tender is made in exercise of the Executive Power.

Therefore the contract is essentially a non-statutory contract.

ii) When the contract has facets of statutory contract and non-statutory contract, in respect of non-statutory aspects, Article 299 of Constitution of India would apply and that the procedure as required under Article 299 of the Constitution of India has to be invariably complied. In this regard, Learned Counsel has relied upon the decision of the Supreme Court in case of State of Haryana and Others Vs. Lal Chand and Others, the following observations were made:

10. There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Under Article 299(1), three conditions have to be satisfied before a binding contract by the Union or the State in exercise of the executive power comes into existence (1). The contract must be expressed to be made by the President or the Governor, as the case may be (2) It must be executed in writing and (3) The execution thereof should be by such person and in such manner as the President or the Governor may direct or authorize. There can be no doubt that a contract which has to be executed in accordance with Article 299(1) is nullified and becomes void of the contract is not executed in conformity with provisions of Article 299(1) and there is no question of estoppel or ratification in such cases. Nor can there be any implied contract between the Government and another person K.P. Chowdhary Vs. State of Madhya Pradesh and Others, Mulamchand Vs. State of Madhya Pradesh, State of M.P. Vs. Rattan Lal 1967 MPLJ 104 and State of Madhya Pradesh and Another Vs. Firm Gobardhan Dass Kailash Nath,

11. It is well settled that Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Article 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interest of the Union or the States is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers. In respect of forest contracts which were dealt with by this Court in KP Chowdhary's, Mulamchand's, Rattan Lal's and Firm Gobardhan Dass" cases, supra, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed there under for entering into a formal deed between the Forest Contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1) whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. It is settled law that contracts made in exercise of statutory powers are not covered by Article 299(1) and once this distinction is kept in view, it will be manifest that the principles laid down in KR Chowdhary "s, Mulamchand"s, Rattan Lal and Firm Gobardhan Doss cases are not applicable to a statutory

contract e.g., an excise contract. In such a case, the Collector acting as the Deputy Excise and Taxation Commissioner conducting the auction under Rule 36(22) and the Excise Commissioner exercising the functions of the Financial Commissioner accepting the bid under Rule 36 (22A) although they undoubtedly act for and on behalf of the State Government for raising public revenue, they have the requisite authority to do so under the Act and the rules framed thereunder and therefore such a contract which comes into being on acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution.

16. The foundational source upon which the tenders are called for and accepted is on the basis of the order of the Government in exercise of its Executive Power. Therefore, it is inviolable Constitution mandate that, there should be a specific Authorisation by the Governor. In the instant case, although the contract documents vide Annexure-H is signed by respondent No. 3 on behalf of the Hon'ble Governor of Karnataka. There is no authorisation in that regard as required under Article 299. Therefore, the contract becomes void and unenforceable.

17. The provisions of the Karnataka Government (Transactions of Business) Rules insists that, when the value of the contract is more than 5 crores, it requires cabinet approval. In the present case, the contract value is more than 5 crores. In the absence of cabinet approval, contract cannot be considered as concluded contract, despite respondent No. 3, executing Annexure-H.

18. In common law and in the law of contract, the price constitutes a consideration. The contract cannot be said to be concluded without fixation of price. The price quoted by the appellant-Company is highly excessive. In this regard, reference is made to rate of HSR plate accepted in the Himachal Pradesh as per gazette notification of the Himachal Pradesh Government. The price varies between Rs. 105/- for two wheelers and Rs. 315/- for medium and heavy vehicles, whereas the price quoted by the appellant-Company ranges between Rs. 550/- to Rs. 1,200/-. The price quoted by the appellant-Company is almost more than three times the accepted rates in the State of Himachal Pradesh.

19. The Supreme Court in *Shimnit Utsch India Put., Ltd., & Another Vs. West Bengal Transport Infrastructure Development Corporation Limited & Ors.*, SLP(C) No. 11621/2006 in paras 50 and 54, the following observations are made:

50. xxx xxxx xxxx

The declaration of law by this Court in *Association of Registration Plates* is that in the matter of formulating conditions for a contract of the nature of ensuring supply of HSRP, greater latitude needs to be accorded to the State authorities. We find it difficult to hold that by virtue of that judgment the impugned conditions were frozen for all times to come and the States were obliged to persist with these conditions and could not alter them in larger interest of the public. In our view, the decision of this Court in *Association of Registration Plates*

did not create any impediment for the States to alter or modify the conditions in the NIT if the circumstances changed in material respects by lapse of time.

54. It is true that the State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and it's not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provisions. It is always open to the State to give effect to new policy which it wished to pursue keeping in view "overriding public interest" and subject to principles of Wednesbury reasonableness.

20. It is submitted that, the State invoking the doctrine of superior equity can always undo the contract in public interest. In the instant case, the general public, who are the vehicle owners in the State would be heavily burdened financially compared to the vehicle owners in the State of Himachal Pradesh. In this regard, relied upon the decision of the Supreme Court in Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others, the following observations are made:

In Shrijee Sales Corporation Vs. Union of India it was observed that once public interest is accepted as the superior equity which can override individual equity the principle would be applicable even in cases where a period has been indicated for operation of the promise. If there is a supervening public equity, the Government would be allowed to change its stand and has the power to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawals. Moreover, the Government is competent to rescind from the promise even if there is no manifest public interest involved, provided no one is put in any adverse situation which cannot be rectified. Similar view was expressed in Pawan Alloys and Casting (P) Ltd., vs. U.P SEB and in STO Vs. Shree Durga Oil Mills and it was further held that the Government could change its industrial policy if the situation so warranted and merely because the resolution was announced for a particular period, it did not mean that the Government could not amend the change the policy under any circumstances, if the party claiming application of the doctrine acted on the basis of a notification it should have known that such notification was liable to be amended or rescinded at any point of time, if the Government felt that it was necessary to do so in public interest.

21. The non-publication of the notification inviting tender in the Indian Trade Journal as required under Rule 10 of the KTPR Rules is fatal and vitiates the entire tender processing. The said lapse is made as one of the grounds for cancellation of tender vide Annexure-A.

22. The contention that the Order vide Annexure-A is an executive order and that

reasonable opportunity of hearing should be given to the appellant is untenable. The lapses like non-publication of the tender in the Indian Trade Journal and noncompliance of requirement of the cabinet approval as Karnataka Government (Transactions and Business) Rules are committed by the Tender Procurement and accepting authority. The opportunity of hearing is necessary when only a person affected has done something or omitted to do something for which, he should be able to explain. In respect of evident lapses committed by respondent No. 3, it is unthinkable that the appellant could explain and no purpose would be served by giving opportunity to the appellant-Company. In this regard, relied upon the decision of the Supreme Court in S.L. Kapoor Vs. Jagmohan and Others, the following observations are made:

24. xxxx xxxx xxxx

In our view the principles of natural justice know of no exclusionary rule dependant on whether it would have made any difference of natural justice had been observed. The nonobservance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the Judgment under appeal.

23. The decision in the case of Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, the following observations are made:

26. This brings us to the question as to whether the principles of natural justice were required to be complied with. There cannot be any doubt whatsoever that the audi alteram partem is one of the basic pillars of natural justice which means no one should be condemned unheard. However, whenever possible the principle of natural justice should be followed. Ordinarily in a case of this nature the same should be complied with. Visitor may in a given situation issue notice to the employee who would be affected by the ultimate order that may be passed. He may not be given an oral hearing, but may be allowed to make a representation in writing.

27. It is also, however, well settled that it cannot put any straitjacket formula. It may not be applied in a given case unless a prejudice is shown. It is not necessary where it would be futile exercise.

24. In view of the peculiar facts of the case and in light of the proposition of law laid down by the Supreme Court, it is submitted no purpose would be served by giving opportunity to the appellant-Company before passing the order vide "Annexure-A".

25. On the question whether the contract in question is statutory contract or non-statutory contract, it is to be seen that the provisions of Rule 50 of the Central Motor Vehicle Rules comprehensively prescribe standards and nature of high security registration plates. The Rule further insists that either Registering Authority itself has to fix registration plates or get the plates fixed by the approved licensed manufacturer. The licensed manufacturer should be one approved by the Central Road Research Institute, New Delhi or any other authorised agencies notified by the Central Government. The fixation of HSRP plate is a statutory mandate. The provisions of "KTPR" Act empowers the Head of Motor Vehicle Department to call for tenders and to accept the same. Therefore, in the context of provisions of Central Motor Vehicle Rules and provisions of KTPR Act, 1999 it cannot be said the contract is a non-statutory contract. The fact that the Government authorised the Commissioner for Transport who is the Procurement Authority to call for tenders does not make the contract as the non-statutory contract, because the decision of the Government to authorise the Transport Commissioner also is impelled by the provisions of the Central Motor Vehicle Rules. In that view of the matter, the contention that the contract is a non-statutory contract and there should have been compliance of Article 229 of the Constitution of India, appears to be an untenable argument.

26. The contention of the appellant-Company that the contract is concluded and that the role of the Government is only formal one to issue price notification in accordance with the terms of the contract, is an untenable contention. In the realm of contract, the price constitutes consideration and it is the soul of the contract. The contention that when once the tender is accepted which stipulates the price is binding on the employer. The Government has to issue formal notification in accordance with the terms of the contract, may not appear to be an acceptable proposition, when considered in the light of the provisions of the KTPR Act.

27. The provisions of Sections 15, 17, and 18 of the KTPR Act are extracted for convenient reference:

15. Power to give directions.-It shall be competent for the Government to give appropriate directions to the Procurement Entity or the Authorities under the Act in order to secure and maintain transparency at any stage of the process of procurement, and it shall be duty of the Procurement Entity or such authority to comply with the directions.

17. Power to obtain information,-Notwithstanding anything contained in this Act or in any other law for the time being in force, the Government may with a view to ensuring transparency call for and obtain, from any authority under the Act, any information relating to any matter in the process of procurement.

18. Power to call for records.-The Government may at any time, with a view to ensuring transparency in the procurement process call upon any authority under the Act--

- (i) to produce records relating to invitation, processing and acceptance of tenders;
- (ii) to furnish the tender document, estimates/statements/ accounts or statistics relating to such tenders; and
- (iii) to furnish report on any specific point incidental to the procurement.

28. Sri Jayakumar S. Patil, Learned Senior Counsel submits that the power of the Government to give direction u/s 15 stops when once tender is accepted. The Government will have no power to cancel the tender nor has power to give direction to respondent No. 3 to cancel the tender when the tender is accepted the contract is concluded. In that regard, he laid stress on the words "at any stage of tender procurement" would mean only the Stage till the tender is accepted and not after.

29. The words "at any stage of procurement" should necessarily receive uninhibited and natural meaning. The stage of process of procurement should necessarily mean and including the stage of rendering service and during the currency of service as per the terms of contract. The contention that the power of Government to issue direction u/s 15 stops when once after the tender is accepted is untenable. If such interpretation is accepted, it would lead to mischievous consequence of denuding the Government of its executive supervisory authority to interfere with illegal actions. The arbitrary actions of the bureaucracy would go unchecked if such argument is accepted.

30. The provisions of Sections 17 and 18 only enable the Government to obtain information and call for records. There is nothing stated in the Section about the power of the Government to interfere with the contract. However, u/s 15, the Government can give appropriate direction to the procurement entity or the authorities under the Act in order to secure and maintain transparency at any stage of the process of procurement. The arrangement of Sections 15, 16, 17 and 18 in the Act appears to be mis-sequence in editing and does not appear to be in chronological order. The Government after getting information u/s 17 and after verification of record u/s 18 feels necessary empowers to have issue directions u/s 15. Therefore the chronological order of said sections should be that Section 17 should precede first followed by 18 and 15.

31. In the instant case, the Rule 10 of KTPR Rules mandates that the tender inviting authority shall have the notice inviting tenders published in the Indian Trade Journal, in all cases where the value of procurement exceeds rupees ten crores. In the instant case, the tender amount involved is more than Rs. 10 crores. The provisions of Section 8 of KTPR Rules insists publication of tender in the District Tender Bulletin. The provisions of Section 12(1)(C) declares that it shall be the duty of every tender authority to cause publication of notice inviting tenders in the prescribed manner. The said provision makes it abundantly clear that apart from the legal requirement of publication of tender in the bulletin as per Section 8, the further formalities of issuing notice as required under Rule 10

shall also be complied with. It may be that the tender notice has been circulated in the newspaper and might have been affixed in the offices as envisaged. But there is no publication of tender in the Indian Trade Journal,

32. The publication of tender in the Indian Trade Journal is mandatory under Rule 10(1) of KTPR Rules. The Indian Trade Journal is published by the Directorate General of Commercial Intelligence and Statistics, Govt. of India. The said publication has world wide circulation. The object of publication in the Indian Trade Journal is to see that leading companies who deal in manufacture of HSRP plates with wide international experience shall have notice of such contract to enable them to participate in the tender.

33. The Supreme Court in the case of Association of Registration of Plates Vs. Union of India & Others, W.P. No. 41 of 2003, in page 29, the following observations are made:

In the course of hearing, it could not be seriously disputed by the parties that technical know-how for the high security registration plates is outside the country. It is true that many indigenous manufacturers are in a position to supply the plates on the basis of technical assistance available in and outside the country. There are many tenderer who possess Type Approval Certificates (TACs) but to ensure major quantity of supply in initial two years and periodical supply for new vehicles for a long period, only a manufacturer who is sound both technically and financially, is required. Learned Brother G.P. Mathur. J, in his elaborate opinion expressed by him (see Association of Registration Plates Vs. Union of India (UOI) and Others, found a serious vice in the tender conditions that they necessarily intend to promote such companies which have foreign collaborations and exclude indigenous manufacturers.

It is not controverted that the technical "know-how" for the manufacture of high security registration plates presently is available outside India. Technically and financially, competent indigenous manufacturers are mostly those who are in collaboration with foreign companies engaged in such manufacturing activities. The scheme contemplated under Rule 50 of registration plates is a new experiment for India. In the initial stages of its implementation, tender conditions encouraging such manufacturers who are in foreign collaborations cannot be held to be discriminatory to indigenous manufacturers. Keeping in view the nature of the contract and job involved particularly its magnitude and the huge investment for infrastructure required, attempt to select such manufacturer-may be having collaboration with foreign companies and experience in foreign countries cannot be held to be a deliberate attempt on the part of the State authorities to eliminate indigenous manufacturers.

34. The Supreme Court in the case of Shimnit Utsch India Pvt. Ltd., & Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd., & Others (supra), in para 52 has made the following observations:-

52. It is important to notice that the bids pursuant to the second NIT have been

evaluated by WBTIDCL and we have been informed that the lowest bid per HSRP unit for a vehicle is Rs. 469/- while the offer made by Shimnit (appellant) is of about. Rs. 1200/-. Such a huge difference in the rate per HSRP unit shows that the action of the State Government in doing away with the conditions of experience in foreign countries and prescribed turnover from such business has been in larger public interest without compromising on safety, security and quality or sustainable capacity.

35. It becomes obvious from the above observations that HSRP plate to be fixed to the vehicle should be of "highest quality of international standards". Therefore, in the said context, it cannot be said that non-publication of tender in the Indian Trade Journal is only a venial irregularity and does not vitiate the tender process. In fact non-compliance vitiates the tender process.

36. With regard to the contention that the contract requires Cabinet approval as per the Karnataka Government (Transaction of Business) Rules, 1977. In this regard, it is pertinent to note the provisions of Section 26 of the KTPR Act, 1999 which reads as follows:

26. Savings.-All rules, regulations, orders, notifications departmental codes, manuals, bye-laws, official memoranda, circulars or any other order made or issued before the commencement of this Act and in force on the date of such commencement providing for or relating to any of the above matters for the furtherance of which this Act is enacted shall continue to be in force and effective as if they are made under the corresponding provisions of this Act, to the extent they are not inconsistent with the provisions of the Act and unless and until superseded by anything done or any action taken or rule, notification or order, is made under this Act.

37. The saving provision makes it explicit that all rules, regulations, orders, notifications departmental codes, manuals, bye-laws, official memoranda, circulars or any other order made or issued before the commencement of this Act and in force on the date of such commencement providing for or relating to any of the above matters for the furtherance of which this Act is enacted shall continue to be in force as if made under the corresponding provisions of the Act. The close reading of Section 26 discloses that any of the rule or regulation or circular etc., which was in force prior to the commencement of KTPR Act, which is consistent with the provisions of KTPR Act to provide transparency shall continue to be in force and should be read as part and parcel of KTPR Act. The need of cabinet approval for a contract involving more than 5 crores as per the Government (Transaction of Business Rules) is necessarily one of the fascists of transparency. Therefore, it is necessary that acceptance of tender by the tendering authority should require cabinet approval before concluding the formalities of effecting the valid contract.

38. The contention that the terms of contract disclose that there is concluded contract is an untenable contention. Even if the term stated are to the said

effect, it would be bad in law since it is made not in compliance of the Government Business Transaction Rules, which insists cabinet approval.

39. The contention that the order at Annexure-A is a executive order and that reasonable opportunity should have been provided to the appellant-Company, does not appears to be sound and proper argument. In view of the decision of the Supreme Court in the case of Ashok Kumar Sunkar Vs Union of India and Others (Supra) and in the case of S.L. Kapoor Vs. Jagmohan and Others (Supra), the contract entered into by the third respondent is in gross violation of the provisions of Section 10 of KTPR Act and contract having not been approved by the cabinet as required by the Government Business Transaction Rules, would be a void contract. No purpose would be served by giving opportunity to the appellant-Company because the appellant-Company can have no explanation to the series of legal lapses committed by the third respondent. When the contract itself is bad, the question of negotiating on the price would not arise as required under Article 10 of the contract.

40. Before parting with the case, we are impelled to observe that the provisions of KTPR Act are not properly drafted. The object of the KTPR Act is to provide transparency in the Government contracts. The creation of entities like procurement entity to call for tenders, the procedures to be followed for publication of the notice inviting tender have been provided. The powers of the Government to interfere with the contracts concluded under the KTPR Act, for valid reasons requires to be explicitly to be stated in the textual law in order to obviate confusion in understanding the provisions of the Act vis-a-vis the powers of the Government. The provisions of Sections 15, 17 and 18 have to be properly amended. The requisites needed for bringing about valid concluded contract should be expressly stated in the statute law. The needed amendments to the KTPR Act should be of such a nature that at the tender procurement and acceptance level, there should be greater transparency. With respect to the price of the product/service, it is necessary that the marginal cost has to be evaluated by the tender inviting authority for finalization of the price to find out the profit margin of the tenderer. In the instant case, we are astounded that before accepting the tender, the authority has not gone into the question of the marginal cost of the product before accepting the rate quoted by the Appellant-Company. The needed amendment to the KTPR Act should not give arbitrary powers to the Government to foil a valid contract by withholding Cabinet approval for extraneous reasons. At the same time, the actions of the tender procurement/accepting authority should be under close scanner by the Government by invoking Sections 15, 17 and 18.

In view of the reasons and discussions made above, W.A. No. 4066 of 2011 filed by the appellant Company - Shimnit Utsch India Pvt., Ltd., is dismissed. W.A. No. 4739/2011 filed by the State of Karnataka is allowed.

The Registry is directed to send the copy of the judgment to the Chief Secretary, Government of Karnataka to bring to the notice of the Government for taking

note of observations made in the judgment.