
(2005) 10 GAU CK 0010
In the Gauhati High Court
Case No : Writ Appeal No. 429 of 2005

State of Assam and Others	Vs	APPELLANT
Bhagya Kalita		RESPONDENT

Date of Decision : 04-10-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 120(B), 143, 294, 307, 353

Citation : (2006) GLT 550 Supp

Hon'ble Judges : R.B. Misra, J;D. Biswas, J

Bench : Division Bench

Advocate : K.N. Choudhury and I. Choudhury, for the Appellant; P.K. Goswami, S. Sarma, J. Deka, B. Sarma and A. Tiwari, for the Respondent

Judgement

R.B. Misra, J.—The present Writ Appeal has been preferred against the judgment and Order dated 17.3.2005 passed by learned single Judge in WP (C) No. 9487/2004, whereby, the decision as well as the decision making process of Tender Committee leading to issuance of letter dated 1.11.2004 (Annexure-C to the writ petition), the notice dated 8.11.2004 (Annexure-D to the writ petition) canceling the tender of the writ Petitioner and the Press Notice dated 14.12.2004 (Annexure-E to the writ petition) in respect of re-tendering were set aside and the authorities were directed to proceed with the tender process in respect of the tenders for three bridge projects only on the basis that the Respondent herein/ the writ Petitioner was the lowest tenderer.

2. We have heard Mr. K.N. Choudhury, learned Addl. Advocate General, Assam, assisted by Mr. I Choudhury, learned Standing Counsel for the Public Works Department and Mr. P.K. Goswami, learned Senior Counsel for the Respondent herein/writ Petitioner assisted by Mr. S. Sarma, Mr. J. Deka, Ms. B. Sarma and Mr. A. Tiwari, learned Advocates.

3. The brief facts necessary for adjudication of the present writ appeal are as

under:

(a) For Government of Assam, the Chief Engineer, PWD (ARISP/RIDF), Assam, (Appellant No. 4) on receiving a loan from the National Bank for Agriculture and Rural Development (hereinafter referred to as the "NABARD") for construction of projects, improvement of bridges on the Major District Roads and State Highways under RIDF-IX for the year 2004-2005, issued different Short Notice Inviting Tender (for short the "SNIT") for 118 Numbers of bridge projects and in response to the two "SNITs" dated 1.6.2004 and 29.6.2004 issued by the Appellant No. 4 for 10 and 13 bridge projects, respectively, the Respondent herein submitted his tender in respect of three bridge projects, namely (1) Construction of RCC Bridge No. 9/1 on Raha Kalgachia Road, (2) Construction of RCC Bridge No. 12/1 over river Pagladia on Sunkuriha Parghat Road and (3) Construction of RCC Bridge No. 19/1 on Goalpara Dudhnoi Road.

(b) Undisputedly the Respondent/writ Petitioner was the lowest tenderer/bidder. While the writ Petitioner was waiting for Work Order to be issued in his favour, without canceling the SNITs in question, Press Notice dated 14.12.2004 was issued by the Appellant No. 4, inviting fresh tenders for the above three bridge projects. Except the three bridge projects, none of 118 Numbers of bridge projects were to be re-tendered as all other bridge projects were awarded to the successful contractors. No such clause was mentioned in the original "SNIT" that if for some reason earlier original tender is required to be issued again, or in case of re-tendering or in matter of subsequent tender those who participated to the earlier tender process would get the tender documents free of cost on an application.

(c) Being aggrieved the Respondent preferred WP (C) No. 9487/2004 assailing that the Press Notice dated 14.12.2004 has impaired the rule of transparency, fairness and provided room for manipulation to give the authorities a scope of adopting pick and choose policy in awarding the contract, the Press Notice in question was issued without assigning any reason, against the established norms, procedure, without affording any opportunity of hearing to writ Petitioner, without canceling the "SNITs" dated 1.6.2004 and 29.6.2004. It was also contended before the learned single Judge that the writ Petitioner's bid was neither rejected nor any notice/intimation was ever sent to him for collecting the security deposits, the acts of the Appellant/authorities were in violation of the principles of natural justice, equity, good conscience, Jack administrative fairness, reasonableness and are in derogation to the legitimate expectations of the writ Petitioner. The Press Notice dated 14.12.2004 besides being illegal, arbitrary, was issued with an ulterior motive, discriminating the writ Petitioner in violation of the fundamental rights enshrined under Article 14 of the Constitution of India.

4. From the pleadings and contentions of the Appellants herein (the Respondents of the writ petition) following aspects emerge:

(i) In their counter affidavits resisting the claim of the writ Petitioner, before learned single Judge, however, the Appellants had broadly agreed to the averments of the writ petition that the Tender Committee except three bridge projects had recommended for awarding the other successful tenderers in 118 cases. The main reason assigned for not awarding the tender/contract in favour of the writ Petitioner was that when the Tender Committee met on 15.10.2004, the writ Petitioner was absconding in connection with a pending criminal case against him.

(ii) E-tendering system was introduced for the first time by the State Government as policy decision in the Public Works Department and for that purpose, it was felt necessary to impart training to the interested contractors. Since all the contractors were not happy with the E-tendering system, therefore, on the very first day, i.e., on 6.10.2004, some untoward incident, e.g., vandalism, intimidation and physical assault took place, wherein, the writ Petitioner was also allegedly involved. In that reference an FIR, e.g., Chandmari Police Station Case No. 241/2004 under Sections 143/448/294/353/120(B)/506/307, IPC, was lodged and in that connection the writ Petitioner approached to this Court for getting protection of pre-arrest bail by filing BA No. 2569/2004 u/s 438, Code of Criminal Procedure. Such aspect of incident was widely published in the "News Papers" and was in the public knowledge, in that back drop, the Tender Committee after due deliberation, recommended for re-tendering in respect of the three bridge projects only observing that if the work in question is allotted to the writ Petitioner, then by virtue of his abscondence the work might be delayed and instead of allotting the work to the other second highest technically qualified contractor, the re-tendering was preferred. The Deputy Secretary, Government of Assam, Public Works Department, conveyed such recommendation of Tender Committee to the Chief Engineer vide his letter dated 1.11.2004, consequent upon the Chief Engineer, PWD (ARISP/RIDF), Assam, issued a notice dated 8.11.2004 canceling the "SNITs" involving three bridge projects and accordingly the Press Notice dated 14.12.2004 was issued.

(iii) The factum of praying for anticipatory bail by the writ Petitioner, itself, established that he was an absconder and thus there was nothing wrong for not awarding the contract to such a person, lest the public interest might suffer.

(iv) In order to strengthen the stand, the following decisions were referred for and on behalf of the Appellants herein before the learned single Judge, e.g., Government of Maharashtra and Others Vs. Deokar's Distillery, , G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, , Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , S.R. Bommai and others Vs. Union of India and others etc. etc., , Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , M.C. Mehta Vs. Union of India (UOI) and Others,

5. On the other hand, from the contentions and pleadings of the writ Petitioner

following aspects may prominently be noted:

(i) By way of an additional affidavit, the writ Petitioner had denied his involvement either directly or indirectly in the incidence dated 6.10.2004.

(ii) Before hand inquiry was made from the office of the Chief Engineer, PWD (ARISP/RIDF), Assam and on that basis FIR dated 8.10.2004, Chandmari PS Case was registered in reference to which the writ Petitioner moved a Bail Application No. 2569/2004 u/s 438, Code of Criminal Procedure, which was disposed of by this Court vide order dated 15.10.2004 with following observations:

From the contents of the Case Diary, till this stage of investigation, in my opinion, the ingredients of the offence of Section 307, IPC, are missing. The offence u/s 143, 448, 294 and 506 are bailable. In other words, the Case Diary at this stage does not disclose commission of any non-bailable offence.

The prosecution even requested for adding more sections of Indian Penal Code. In that connection, the writ Petitioner preferred Misc. Case No. 821(K)/2004 before learned Sessions Judge, Kamrup, which was disposed of on 25.11.2004 with following remarks:

There must be some positive materials available for the purpose or to show some nexus thereto. But here in this case after careful scrutiny of the Case Diary available, this Court finds nothing against the applicant for alleged commission of the offence under the newly added Sections.

(iii) The writ Petitioner asserted that he was never an absconder and the Tender Committee ought not to have relied upon the "News Paper Report" when the writ Petitioner himself had collected as many as five cheques on various dates during that relevant period when the alleged incidence was said to have occurred, (i.e., during the period when the Tender Committee branded him as absconder).

(iv) On being asked as to whether the Appellants herein were ready to consider the case of the writ Petitioner in the event of re-tendering, the answer was in the affirmative and the Appellants were ready to consider the case of the writ Petitioner irrespective of pendency of any criminal case against him.

(v) On an earlier occasion also Appellants herein had awarded the contract works to the writ Petitioner irrespective of pendency of the criminal case against him, as such, the decision of the Tender Committee not to award any work on the ground that the writ Petitioner was an absconder was self contradictory as the Appellants did not wish to award the contract in question to the writ Petitioner on one hand on the ground of being an absconder, on the other hand, they are not opposed to consider the case of the writ Petitioner in re-tendering process.

(vi). There was no material before the Tender Committee to brand the writ Petitioner as an absconder that too without issuing any notice to him, as such, the role of the Tender Committee shall tantamount black listing a contractor

without providing him an opportunity of being heard, as such, the decision of the Tender Committee is said to have been passed on non-application of mind and the ground of declaring the writ Petitioner as absconder is nonest in eyes of law being based on no material or evidence.

6. The learned Counsel for the writ Petitioner has placed reliance on the following decisions of the Supreme Court in support of his stand *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, , *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, Shri Palam Das v. State of Assam and Ors.* (1993) 2 GLJ 388 , *National Buildings Construction Corporation Vs. S. Raghunathan and Others*, , *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, , *Bhut Nath Mete Vs. The State of West Bengal*, , *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], and *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, ; *Texmaco Ltd. and Another Vs. North Eastern Electric Power Corporation Ltd. and Others*, ; *Khudiram Das Vs. The State of West Bengal and Others*,

7. In *AIR India Statutory Corporation (supra)*, the Supreme Court while dealing with the power and jurisdiction of High Court under Article 226 of Constitution has emphasized that the public law remedy given by Article 226 is to issue not only the prerogative writs provided therein but also any order or direction to enforce any of the fundamental rights and "for any other purpose".

8. In *Gurbaksh Singh Sibbia (supra)*, the Supreme Court (Constitution Bench) while dealing with the principles of invoking the provision of Section 438, Code of Criminal Procedure, has observed that Section 438, Code of Criminal Procedure, is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail.

9. In *Dinesh Engineering Corporation (supra)*, the Supreme Court while making judicial review has even interfered in the policy decision of awarding the Government contracts suffering from non-application of mind, arbitrariness and without considering the relevant facts.

10. In *Kamdhenu Cattle Feed (supra)*, the Supreme Court had held that even though the highest tenderer can claim no right to have the tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily as such action shall depend upon the validity and the existent of cogent reasons. The Supreme Court also emphasized that the object of inviting tenders for disposal of a commodity is to procure the highest revenue while giving equal opportunity to all the intending bidders to compete, procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Hon'ble Supreme Court observed that the procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender

accepted unless outbid by a higher offer. In the instant case, it is an accepted position that the Petitioner became the lowest tenderer in all the three projects and thus it was his normal expectation that work orders would be issued to him. However, the tender committee recommend for re-tendering on the aforesaid non-existing ground of the writ Petitioner being an absconder.

11. In *National Building Construction* (supra), the Supreme Court while dealing with the doctrine of legitimate expectation held that the same is akin to natural justice, reasonableness and promissory estoppel. Its essence is fairplay in administrative action.

12. The case of *Sri Palam Das* (supra), was pressed into service in reference to Clause 7 of the "SNIT" in terms of which it is the Chief Engineer who has power to reject the tenders. In the said case this Court held that once the tenders are found valid, the highest tender has to be accepted and such settlement shall be effective only after its confirmation by the competent authority. In the instant case, the learned single Judge rightly observed that the Tender Committee after having found the writ Petitioner to be the lowest tenderer, recommended for re-tendering on the aforesaid ground without leaving the matter to be decided by the competent authority in conformity with the rules and the attending facts and circumstances.

13. The case of *Dwarka Nath* (supra), was referred to see the nature and scope of jurisdiction of High Court under Article 226, in reference to the argument of the Appellants herein that without challenging minutes of tender committee the consequential order was challenged, therefore, the writ petition is not maintainable. An endeavour was also made on behalf of the Appellants in reference to the decision of *GB Mahajan* (supra) to impress the Court that the decision of the Tender Committee was not lacking test of reasonableness, on these aspects, it was rightly observed by learned single Judge that decision is an authority for what it decides and not what can logically be deduced therefrom, *moreso*, when it has already been analyzed that the decision and the conclusion arrived at by the Tender Committee has failed on the test of reasonableness.

14. The learned Counsel for the Appellants had endeavoured to impress the Court by submitting that when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and not merely on making out of a legal point but in furtherance of public interest. The Court should always keep in mind the larger public interest in order to decide whether interference is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere. Keeping in view the observations of the Hon'ble Supreme Court in *Air India Limited* (supra) that decision of State or its instrumentalities or authority in awarding contract is not amenable to judicial review, however, the Court may examine the decision making process and interfere if it is found the same is vitiated on the ground of malafide, unreasonableness and arbitrariness, *moreso*, when the State, or its Corporations, or instrumentalities, or agencies

having public duty are expected to be fair to all concerned, in such circumstances learned single Judge has rightly observed in the present case that the writ Petitioner was not treated fairly.

15. In reference S.R. Bommai's case (supra), when the Court's attention was invited by saying that while making judicial review in the field of administrative law and the Constitutional law, the Court is not concerned with the merits of the decision, but with the manner in which the decision was taken. The learned single Judge, however, has rightly observed that in the instant case when there was no material before the Tender Committee to arrive at a conclusion while awarding other contracts to the successful contractors in respect of other projects directed re-tendering, as an exception in the case of the writ Petitioner, but such decision making process of the Tender Committee on being challenged in the writ petition when objected in the counter affidavits of the Appellants herein, revealed that decision in question was taken solely based on the News Paper reports without making any verification, in such circumstances the verdict of S.R. Bommai (supra) was rightly held not helpful to the Appellants.

16. In Raunaq International Limited (supra), the Supreme Court in absence of any allegation of malafide or collateral motive in awarding the contract to the writ Petitioner found fault with the High Court in granting interim relief. The Raunaq International Limited (supra) was pressed into service by the Appellants herein, only to emphasize that there being no allegation of any malafide against the Tender Committee, as such, the decision arrived at, is not liable to be interfered with, however, we find that the learned single Judge has rightly observed that even an honest decision without any allegation of personal malice is liable to be interfered with, if it is found suffering from arbitrariness, unreasonableness, lack of transparency and administrative fairplay moreso, in the case in hand, the decision making process of the tender committee was found vague, fanciful and not according to rules of reason.

17. In reference to M.C. Mehta's case (supra), the submission of learned Addl. Advocate General, Assam, that the decision other than one taken by the Tender Committee was not free from illegality or perpetuate an illegality and in that view of the matter, no interference is called for. The learned single Judge has rightly observed that the judicial review is permissible if the impugned action of the Tender Committee was against the law or prescribed procedure, irrational or malafide. As the decision of the Tender Committee was based on extraneous consideration and on irrelevant materials, the same is liable to be interfered with.

18. In M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another, the Supreme Court held that withholding of tender forms from the writ Petitioner on the ground of pendency of vigilance report against him and deletion of his name amounted to blacklisting affecting reputation of the contractor as such not justifiable as the same could only be done consistent with the principles of natural justice. In the aforesaid case Hon'ble Supreme Court had accepted the

submissions for the writ Petitioner that the deletion of the name of the claimant from the list of qualified contractors, in effect, amounted blacklisting. It is well settled that before a persons reputation could be affected, he is entitled to have an opportunity of being heard. After careful consideration, we agree with the findings of learned single Judge that non-joinder of the members of the tender committee cannot be said to be fatal for the cause of writ Petitioner. The learned single Judge has observed that in the instant appeal, the decision of the Tender Committee in not awarding tender to the writ Petitioner although he being the lowest tenderer, was not on the ground that he was an absconder for his involvement in a criminal case and as per the counter affidavit such a satisfaction recorded by the Tender Committee was based on "News Paper Reports" which amounted to blacklisting the writ Petitioner but without affording him any opportunity of hearing or without ascertaining the correct position, therefore, in our respectful consideration the decision of the tender committee was not in consonance to the verdict of the Supreme Court in (1995) 1 SCC 70 (Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.).

19. In the case of Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, the Supreme Court observed that our Constitution designedly used wide language in Article 226 to enable the Courts to "reach justice wherever found necessary" and to "mould the reliefs to meet the peculiar and complicated requirements of this country". In the case of Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, the Supreme Court dealing with a contention that a Writ Court cannot issue a mandamus to direct a public authority to exercise its discretion in a particular manner has observed as follows:

20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretions conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the parties concerned, the Court "may itself pass an order or give directions which the Government or the public authority should have passed" or given had it properly and lawfully exercised its discretion.

20. In Texmaco Limited and Anr. v. North Eastern Electric Power Corporation and

Ors. 2004 (1) GLJ 672 , this High Court, by one of us (Hon"ble Justice D. Biswas, J) has in the facts and circumstances, directed the Respondent Corporation to open price bids and take a decision in a case with due application of mind. In Texmaco Limited (supra) this Court has referred and relied upon several other decisions of the Supreme Court, e.g., Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, where the decision of authorities were said to have been arrived at not diligently after addressing the important aspects involved in the decision making process and this omission on their part warranted interference of the Court. The observation of the Supreme Court in Dinesh Engineering Corporation (supra) was noted as below:

...Any decision, be it simple administrative decision or a policy decision, if taken without consideration the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution.

The observations made in para-7 of Tata Cellular Vs. Union of India, was noted in para-17 of Texmaco Limited (supra) as below:

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Govt. bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Govt. is the guardian of the finance of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Govt. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Govt. tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

The High Court also noted observations of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, in paragraph 19 of Texmaco Limited (supra) as below:

(i) The Govt. is free to enter into any contract with citizens but the Court may interfere where its acts arbitrarily or contrary to public interest.

(ii) The Govt. cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Govt. to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

21. In the case of Khudiram Das (supra), the Supreme Court while dealing with the order of detention of the writ Petitioner on the ground of subjective satisfaction of the detaining authority has observed that - "the authority has

come to a conclusion so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere". In such a case, a legitimate inference may fairly be drawn either that the authority "did not honestly form that view or that in forming it, he could not have applied his mind to the relevant fact". It is on this ground that the order of preventive detention made by the District Magistrate in *Debu Mahato Vs. The State of West Bengal*, was struck down by this Court.

22. In the case of *Bhut Nath Mate (supra)*, while dealing with the prejudicial activities of the detainee, the Hon''ble Supreme Court has observed that absence of bonafides in the context does not mean proof of malice, for an order can be malafide although the officer is innocent. The important point is that the satisfaction of the public functionary, though subjective, must be real and rational, not colourable, fanciful, mechanical or unrelated to the objects.

23. In the case of *Dwarkadas Marfatia (supra)*, the Hon''ble Supreme Court held that all actions of statutory authority including dealing with the contractual matters are subject to judicial review. The Court can see if such body has followed the statutory purpose and acted in public interest and not in malafide or arbitrary or for a collateral purpose. The actions of the authority must be reasonable and taken upon lawful and relevant grounds of public interest.

24. In testing the scope of judicial review in contractual matters, the Supreme Court has observed in *Verigamto Naveen Vs. Government of Andhra Pradesh and Others*, that in cases where the decision making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, the Court has interceded even after the contract was entered into between the parties and the Government and its agencies. The Hon''ble Supreme Court further held that the Court has the power of judicial review over every administrative action of the State including actions taken in contractual matters and can interfere with such action if the same does not fall or withstand tests under Article 14. In *Kumari Shrelekha Vidyarthi and Others Vs. State of U.P. and Others*, the Supreme Court has succinctly laid down as below:

22. ...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.

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 persons.

(Emphasis supplied)

25. The Hon'ble Supreme Court has considered the decisions, e.g. K.N. Guruswamy Vs. The State of Mysore and Others, : DFO v. Ram Sanahi Singh (1973) 3 SCC 864 : Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., : Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and has distinguished the decision of Life Insurance Corporation of India Vs. Escorts Ltd. and Others, : State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , and has observed that it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution, therefore once the State or an instrumentality of the State is a party, it has an obligation in law to act fairly, justly and reasonably to a contract which is the requirement of Article 14 of the Constitution.

26. After dealing with the contentions of the writ Petitioner and rival contentions of the Appellants herein and after analyzing the applicability of different decisions referred to above, learned single Judge has observed in different paragraphs as below:

...because, merely by moving an application u/s 438, Code of Criminal Procedure, one does not become an absconder. Needless to say that to pray for anticipatory bail u/s 438, Code of Criminal Procedure, is a right conferred on a person by law and for that he need not be an absconder. (Para 23)

...Thus on both counts, the decision of the Tender Committee that the Petitioner on the date when the Tender Committee met on 15.10.2004 was an absconder is not sustainable. (Para 24)

(Emphasis supplied)

...It is not a case of not awarding the contract to the Petitioner on ground of pendency of criminal case but on imaginary ground of the Tender Committee that the Petitioner was an absconder and the sole basis of such a ground for a decision to go for re-tendering was the alleged newspaper reports. I am of the considered opinion that if this decision of the Tender Committee is to be accepted, same will lead to gross injustice and will be violative of natural justice, transparency and administrative fairness. (Para 25)

...The decision of the Tender Committee so far as it indicated the Petitioner to be an absconder was not only extraneous, but also perverse and based on non-existent ground. (Para 27)

In the instant case, the discretion vested on the Tender Committee was exercised in such a manner which cannot be said to be based on relevant findings as a reasonable man may accept adequate to support the conclusion. The solitary ground on which the tender committee reached its subjective satisfaction is such that any reasonable person could not have possibly arrived at. The conclusion arrived at is unreasonable. Even if the discretion applied and the opinion formed

by the Tender Committee is said to be honestly formed, such discretion suffered from unrealistic approach depicting total non-application of mind.... (Para 33)

(Emphasis supplied)

27. The question whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party is no more *res integra* and is settled by large number of judicial pronouncement of the Supreme Court. On a given set of facts if "the State" acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief in the light of observations made by the Supreme Court in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*,

28. Fairness is apparently lacking in the decision of the Tender Committee. Fairness as a rule was to be ensured by it and its power was to be exercised properly rather than to abuse it. In this respect, it is necessary to refer the observations of Hon"ble Supreme Court made in *Management of M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar and Others*, as follows:

In the modern administration set up what is important is the fairness of procedure with elimination of element of arbitrariness. The State functionaries must act fairly and reasonably. That is, however, not the same thing to state that they must act judicially or quasi-judicially. The terms "fairness of procedure", "fair play in action", "duty to act fairly" are perhaps used as alternatives to "natural justice" without drawing any distinction. But "such phrases may some times be used to refer not to the obligation to observe the principles of natural justice but, on the contrary, to refer to a standard of behaviour which, increasingly, the courts required to be followed even in circumstances where the duty to observe natural justice is inapplicable." Fairness is a rule to ensure that the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness is also a principle to ensure that statutory authority arrives at a just decision either in promoting the interest or affecting the rights of persons. To use the time hallowed phrase "that justice should not only be done but be seen to be done" is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procedure. It depends upon the facts of each case. Fairness does not necessarily require a plurality of hearings or representations and counter-representations. It cannot have too much elaboration of procedure since the wheels of administration must move quickly.

29. We have heard learned Counsel for the parties and also have noted that the decision of the Tender Committee in question based on the ground that the writ

Petitioner was absconding in view of the pendency of criminal case and that in the event of allotting the works to him there might be delay in execution of the works and in the event of allotting the works to any other tenderer, there might be litigation. We are in agreement with the view taken by the learned single Judge that the writ Petitioner had moved the High Court for pre-arrest bail in connection with some alleged criminal case for that only the writ Petitioner could not have been branded as absconder. Under the provisions of law to pray for pre-arrest bail is a right conferred on a person, therefore the decision of the Tender Committee in not allotting contract in question on the ground that the writ Petitioner was an absconder is not legally sustainable as has rightly been held by the learned single Judge. Treating the writ Petitioner as absconder on the sole ground of alleged "News Paper Report" was also in violation of the principles of natural justice, administrative fair play, transparency, perverse and based on non-existent ground. The decision making process of the Tender Committee was mechanical based on non-application of mind and against the object sought to be achieved, irrational, fanciful and the decision in question is taken by the tender committee in such a manner which even a reasonable man could not have been arrived at.

In the facts and circumstances, we are of the opinion that the decision of the Tender Committee is by way of official arbitrariness which is more perilous than statutory arbitrariness as observed by Hon"ble Supreme Court in State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, as below:

Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately.

30. In the facts and circumstances of the case, we do not find any legal force in the arguments of the Appellants, on the other hand we affirm the judgment dated 17.3.2005 passed in WP (C) No. 9487/2005 and the view taken by the learned single Judge, whereby, the Press note dated 14.12.2004 and the Notice dated 1.11.2004 were rightly set aside and directions were issued to the Respondents (Appellants herein) to proceed with the tender submitted by the writ Petitioner in respect of three bridge projects on the basis that the writ Petitioner was the lowest tenderer unguided by the sole ground of rejection of his tenders as indicated in the minutes of the Tender Committee dated 15.10.2004. In view of the above observations, writ appeal is dismissed.