

(1993) 08 CAL CK 0004

Calcutta High Court

Case No: Matter No. 2922 of 1992

Sudha Textile Traders
and Sudha Shashikant
Shroff

APPELLANT

Vs

Kalyani Spinning Mills
Ltd. and Others

RESPONDENT

Date of Decision: Aug. 6, 1993

Acts Referred:

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

Citation: 98 CWN 258

Hon'ble Judges: Prabir Kumar Majumdar, J

Bench: Single Bench

Advocate: Jayanta Mitra with Sandip Ghosh, for the Appellant; C.R Panda, Ajay Roy and T.K. Banerjee for State, for the Respondent

Judgement

Prabir Kumar Majumdar, J.

By this application under Article 226 of the Constitution, the petitioner, Sm. Sudha Shashikant Shroff, has asked for a writ in the nature of mandamus directing the respondents to forthwith cancel or rescind the advertisement published in the Statesman dated 4th September 1992, a copy of which is Annexure - D to the petition. The petitioner has also asked for a writ of mandamus directing the respondents to forthwith deliver the goods or machinery to the petitioner in accordance with the original letter of acceptance dated 7th July 1989, a copy of which is Annexure-B to the petition. The petitioner has also claimed other reliefs. Sometime in May 1989 the respondent No. 1 published an advertisement in The Indian Express for sale of obsolete textile machinery on "as-is-where-is basis". On 19th June 1989 the petitioner submitted its tender on "our machine per site basis" for a total sum of Rs. 36,97,960/- and deposited a sum of Rs. 23,000/- towards earnest money. The petitioner was ultimately found the highest bidder. But according to the petitioner, the bid of the petitioner was found to be below the reserve

price. It is the case of the petitioner that the respondents No. 1 started negotiations with all the tenderers and asked them to quote revised rates. Pursuant to the said negotiations, the petitioner on 3rd July 1989 submitted a revised tender and deposited a further sum of Rs. 1,40,500/-.

2. On 7th July 1989 the revised offers of all the tenderers were opened and the petitioner was found to be the highest bidder. The respondent No. 1 by a letter dated 7th July 1989 accepted the offer of the petitioner in respect of sixty four of machineries mentioned in the said letter, a copy of which is Annexure-B to the petition. After the said letter of acceptance was issued the petitioner on 10th July 1989 deposited a sum of Rs. 2,32,420/- by a pay-order drawn on the United Bank of India, Burrabazar Branch, towards part purchase price of the items sold i.e. the items mentioned in the said letter dated 7th July 1989.

3 Thereafter one Sankit Textile Corporation filed a writ application to this Court on 12th July 1989, challenging the said sale in favour of the petitioner. On 12th July 1989 on the said application being moved, this Court passed an ex parte ad-interim order directing that if the contract was not awarded, the said should not be awarded to any one and if the goods had not yet been delivered, the same should not be delivered till 18th July 1989. Sankit Textile Corporation (the petitioner therein) was directed to serve notice upon all the parties, including the respondent No. 4 therein (who is the petitioner in the instant application before me). It is the case of the petitioner that on 15th July 1989 the respondent No 1, Kalyani Spinning Mills Ltd., informed the petitioner about that ad-interim order passed by the Court and the respondent No. 1 expressed its inability to allow the petitioner to lift the goods or materials from the factory of the respondent no. 1 presumably in view of the said interim order. It is the further case of the petitioner, that the respondent No. 1 accordingly returned the bank-draft for Rs. 2,32,420/- paid by the petitioner on 10th July 1989 towards part purchase price.

4. Thereafter on 17th July 1989 one M/s. Mitesh Textiles filed a writ application to this Court, challenging the said sale effected in favour of the petitioner. On the same day another unsuccessful offerer, M/s. Prova Textile, made another writ application, also challenging the sale made in favour of the petitioner. The respective respondents including the respondent no. 4 (the petitioner before me) in the said three writ proceedings filed their respective affidavits.

5. On 1st September 1992, all the said three writ applications came up for final hearing before the Hon"ble Mr. A.M. Bhattacharjee, the Acting Chief Justice (as the Chief Justice then was) and by a Judgment dated 1st September 1992 all the said three writ applications were dismissed and the interim orders passed therein were vacated.

6. It is the further case of the petitioner that immediately after dismissal of the said three writ applications filed by the said Sankit Textile Corporation, Mitesh Textile and Prova Textile respectively, the respondent No. 1, Kalyani Spinning Mills Ltd., inserted an

advertisement in the Statesman inviting tenders in respect of the self same machinery for which the petitioner's offer had been accepted earlier by the respondent No. 1, treating the petitioner as the highest offerer. The said advertisement was published on 4th September 1992. The petitioner was not however, aware of such advertisement being published. On 15th September 1992 the petitioner applied to the respondent No. 1 for delivery of the machinery with an assurance that the value of the same would be deposited within fifteen days from the date of confirmation of sale in view of the fact that the said three writ applications challenging the sale in favour of the petitioner were dismissed by this Court.

7. According to the petitioner, the respondent No. 1, however, failed to deliver the goods in respect of which the petitioner was declared to be the highest offerer, the offer of the petitioner being accepted by the respondent No. 1 by the letter dated 7th July 1989.

8. When this present application before me was taken up for hearing the respondent No. 1 raised an objection as to the maintainability of this application, contending that the subject matter of the present writ application is relating to contractual relations between the parties and the petitioner by invoking the writ jurisdiction of this Court, cannot seek any relief relating to enforcement of the contract.

9. Learned Counsel for the respondent No. 1 has relied on a decision of the Supreme Court, reported in [Munindra Nath Upadhyaya Vs. State of U.P. and others](#), Relying on this decision, Learned Counsel for the respondent No. 1 has contended that even if the petitioner is declared to be the highest bidder, no mandamus can be issued directing the respondents to perform the contract as this is within the domain of the Law of Contract and the remedies in respect thereof may be sought for in a Civil Court. Learned Counsel for the respondent No. 1 has also relied on other decision of the Supreme Court, reported in 1993 AIR SCW 1425 (Food Corporation of India vs. Jagannath Dutta) where it has been held that the question of contractual obligation cannot be gone into in a writ jurisdiction.

10. The Learned Counsel for the petitioner in reply to that objection raised by the respondent as indicated above, has submitted that it is in admitted position that the petitioner was declared a highest bidder in respect of the machineries mentioned in the said letter of acceptance dated 7th July 1989 and such bid was accepted. The petitioner made necessary deposit in respect thereof. But before any delivery could be made this Court on writ applications taken out by several unsuccessful bidders, restrained the respondent company by an order of injunction from delivering the goods including the goods intended to be delivered to the petitioner to any one. In view of such interim order the respondent company could not fulfil its obligation of delivering the goods to the petitioner after acceptance of the petitioner's bid. It is submitted by the Learned Counsel for the petitioner that similar points as to contractual obligations, as now being raised by the respondent in this present petition, were agitated also in the earlier writ applications filed by the three unsuccessful bidders as indicated above. The Learned Counsel for the

petitioner has submitted that in an affidavit filed by the respondent in the said earlier writ proceedings it was stated that the contract between the petitioner (who impleaded as respondent No. 4 in the earlier writ proceedings) and the respondent company in respect of the sale of the said machineries as mentioned in the said letter of acceptance was a concluded one but the deliveries could not be made by reason of interim orders passed by this Court in the said three writ applications filed by the three unsuccessful bidders. The Learned Counsel for the petitioner submits that the respondent company in the present writ proceeding is estopped by record as also by pleading since it was a specific stand of the respondent that there was a concluded contract between the petitioner and the respondent company in respect of the sale of the said machines as mentioned in the said letter of acceptance dated 7th July 1989. It is further submitted on behalf of the petitioner that the respondent cannot back out from the said stand taken by the respondent that the contract has been concluded between, the parties by taking a point that the present application is not maintainable on the ground that the petitioner cannot take recourse to the writ jurisdiction for enforcement of the contractual obligation. The Learned Counsel for the petitioner submits that it is on the threshold and what the petitioner submits by this writ application is a direction upon the respondent to perform his obligation under a concluded contract which position has been accepted by the respondent company. The Learned Counsel for the petitioner has further submitted that even though the rights of the petitioner are in the nature of contractual rights, a decision of entering or not entering into a contract was subject to judicial review on the touch stone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination relying on the observation of the Supreme Court reported in [Mahabir Auto Stores and others Vs. Indian Oil Corporation and others](#), The Learned Counsel for the petitioner has also relied on another decision of the Supreme Court reported in [Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others](#), The Learned Counsel has drawn the attention of the Court to an observation of the Supreme Court in the said decision that it would be 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 Art. 14 of the constitution it is submitted by the Learned Counsel for the petitioner that it is not in dispute that the respondent No. 1 is an authority within the meaning of Art. 12 of the Constitution. The Learned Counsel for the petitioner has submitted that the public authority should indicate reasons before cancelling the contract if the respondent company intends to cancel the contract or has taken steps for cancellation of the contract. In support of this, the Learned Counsel has relied on another decision of the Supreme Court reported in [Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others](#), Both the respondent and the petitioner cited few other decisions both as to the question with regard to maintainability and with regard to estoppel or res judicata.

11. I have considered the respective submissions of the parties, it appears to me that the petitioner had been declared the highest bidder by negotiations in respect of the said machineries as mentioned in the said letter dated 7th July, 1989. it is also not in dispute

that the petitioner's offer was accepted and before entering negotiations with the respondent company the petitioner had deposited earnest money as also money towards part of price of the said machines. It is true that the petitioner later on got refund of a sum of Rs. 2,31,420/- paid towards price of the some of the machines. It is however the contention on behalf of the petitioner that from this it cannot be said that the petitioner was not interested in the contract as the earnest money was still there. It is the submission of the petitioner that the petitioner had to take refund of the said money as the respondent in view of the interim order made in the earlier writ proceedings was not in a position to deliver the goods. According to the petitioner it however showed its intention to pay the entire price of the goods as and when the goods are delivered by the respondent company to the petitioner.

12. I have also considered carefully the contention raised on behalf of the respondent that incontractual matters, the parties may not seek" appropriate remedies by invoking the writ jurisdiction of the Court. But if it is found by the Court that a decision of the party in entering into or not entering into a contract is arbitrary, unreasonable or against the fair play of equality, then the Court can certainly interfere even in the writ jurisdiction because such action of the State or the authority within the meaning of Art. 12 of the constitution should be tested on the anvil of Art 14 of the Constitution.

13. The Supreme Court in Mahavir Auto Stores (supra) has observed that action of the State or an instrumentality of the State within the meaning of Art. 12 of the Constitution can be challenged and every such action is subject to a rule of law and must be informed by reason. If the action of the government even in the matter of entering or not entering into a contract fails to satisfy the test of reasonableness, the same would be unreasonable. The Supreme Court in the said decision of Mahavir Auto Stores observed as follows:-

...It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural Justice, equality and non-discrimination in the type of the transaction and nature of the dealing as in the present case.

14. The Supreme Court has also observed that the existence of the power of judicial review however depends upon the nature of and the right involved in the facts and circumstances of the particular case. The Supreme Court has also observed, which I have quoted above, that even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination.

15. In the instant case I find that the respondent no. I has taken an unreasonable stand in refusing to deliver the goods in respect of which the petitioner's offer was accepted. It also appears, as I have indicated above that it was throughout the stand of the respondent company up till the present proceeding that there has been a concluded contract between the parties in respect of the said machines and respondent company was ready to make delivery of the goods pursuant to the said contract to the petitioner but could not do so in view of the interim order passed by this Court restraining the respondent company from delivering the goods to any one. Now, may be on subsequent events, the respondent No. I cannot be allowed to change its stand. The contract was concluded and was about to be performed but could not be performed in view of the intervention of the court by an order of injunction. Such order of injunction had been removed and all the three aforesaid writ applications were dismissed. Therefore, there was no impediment on the respondent no. I from making delivery of the goods to the petitioner pursuant to the earlier contract. The petitioner has placed some reliance on another decision of the Supreme Court reported in [Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others](#), where it has been held that the State's action even in contractual matters, after the contract has been made, are subject to judicial review and should be tested and the validity of the actions of the State in respect of the contractual matters should also be tested on the anvil of Art. 14 of the Constitution.

16. The respondent company has also relied on clause 7 of the Terms and Conditions of the contract which inter alia, provides that successful tenderers would be required to make full payments within 15 days from the date of acceptance of the Tender. The respondent claims that by the said letter of acceptance dated 7th July, 1989 the petitioner was directed to deposit full value of the said machineries within 15 days from the date of acceptance. It is submitted by the respondent that the petitioner failed to make the said deposit of full value and there was no order of injunction of any court restraining the petitioner from making said deposit of full value. According to the respondent, the petitioner committed a breach of its contractual obligation. I do not see any substance in this argument of the respondent. As it appears, the petitioner on 10th July, 1989 deposited Rs. 2,32,420 and was supposed to pay the balance by 23rd July, 1989. But the petitioner could not do so because by letter dated 15th July, 1989 addressed to the petitioner, the respondent company expressed its inability to allow the petitioner to lift the materials in view of the said order of injunction restraining the respondent company from delivering any materials. Therefore, it can not be said that the petitioner committed any breach of the terms and conditions of the contract. This is my opinion, is an unreasonable and arbitrary stand taken by the respondent company.

17. As stated by Supreme Court, in contractual sphere as in all other state actions, the State and all its instrumentalities have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant fact. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is fair play in action. Due observance of this obligation as a part of good administration

raises a reasonable or legitimate expectation in every citizen to be treated fairly in its interaction with the state and its instrumentalities. See [Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries](#),

18 It appears to me that the respondent No. I has taken an unreasonable and arbitrary stand and the petitioner is justified in asking for an order directing the respondent to deliver the goods pursuant to the contractual obligations in terms of the concluded contract entered into between the parties.

19. This writ application, therefore, succeeds. The respondent No. I is directed to rescind and not to give any effect to the advertisement published in the Statesman dated 4th September, 1992 in terms of prayer (a) of the petition. There will be a further direction upon the respondent No. I to forthwith deliver the goods or machinery in favour of the petitioner in terms of prayer (b) of the petition. Such delivery of the goods, that is, 64 items being the subject matter of the contract concluded between the parties, should be made as early as possible upon payment of entire balance price of the said machineries, being the subject matter of the contract, subject to adjustment with the deposit in the form of earnest money already made by the petitioner. There will be no order as to costs.

20. Learned Counsel appearing for the respondent prays for stay of operation of this judgment and order. In the facts and circumstances of the case such prayer is allowed. There will be a stay of operation of the judgment and order for a period of three weeks from date. All parties are to act on a signed copy of the minutes of the operative portion of this judgment and order on the usual undertaking.