A.F.R.

Court No. - 1

Case :- WRIT - C No. - 25389 of 2019
Petitioner :- Sudhir Kumar Singh
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Imran Syed,Mr. Ravikant (Sr.Adv.)
Counsel for Respondent :- C.S.C.,Rajendra Singh Chauhan,Sushil Kumar Rao

Hon'ble Ramesh Sinha,J.
Hon'ble Ajit Kumar,J.

(*Per* Sinha 'J' for the Bench)

Heard Sri Imran Syed, learned counsel for the petitioner and Sri Kunal Shah, learned counsel for the respondents. Perused the record.

In this petition invoking our extra-ordinary jurisdiction under Article 226 of the Constitution of India the petitioners have sought relief in the nature of a writ of *certiorari* for quashing the order dated 26.07.2019 whereby the petitioner's agreement pursuant to a notice invoking tender dated 26.5.2018 has come to be canceled.

Briefly stated facts of the case are that petitioner who is a registered contractor with the respondents-Ware Housing Corporation applied against a notice invoking tender dated 1.6.2018 for the work to be carried out for Mirzapur, Bhawanipur-1, Bhawanipur-2 and tendu centres with respect to food grains of Food Corporation of India. The petitioner having offered the lowest rate to undertake the work to be assigned pursuant to the tender notice was selected in the L-1 category and after approval of the higher authorities the agreement came to be executed between the Corporation and the petitioner on 13.7.2018 for work at Bhawanipur-1, Mirzapur region. No sooner did the parties sign the agreement the petitioner started working as per the terms of the agreement. It appears that while others were also selected for

different region for different work some complaint got lodged by one Pramod Kumar Singh with the Special Secretary, Department of Co-operatives, Government of U.P., Lucknow, Uttar Pradesh. The Special Secretary wrote a letter to the Managing Director of the Ware Housing Corporation on 30.5.2019 to hold an enquiry on two points: one related to a firm namely, Iqbal Ahmad Ansari *qua* its registration and renewal and it being black-listed already; the other point was with regard to the cancellation of tender notice dated 16.4.2018 and 5.5.2018 without assigning any reason and then floating a new tender notice dated 16.6.2018 and accepting higher prices for the distribution of work. While this letter was written by the Special Secretary to the Managing Director, it appears that the Special Secretary also wrote a letter directly to the Commissioner of the division to hold administrative enquiry of the complaint made in the matter. The Commissioner of the Vindhyachal division obtained some report from the Ware Housing Corporation, Lucknow dated 13.7.2018 and proceeded to record a finding to the effect that the notice inviting tender was a sheer formality with some ulterior motive and the officers of the Ware Housing Corporation in a very hurried manner approved the tender application, inviting application only from the contractor registered with U.P. State Ware Housing Corporation, Vindhyachal; and the officers who were involved in the tender process forming a Committee were wrongly appointed in the sense that a contract employee was part of the tender committee. So basically complaint was that in the e-tender process only registered contractors were invited which was objectionable because had there been invitation from the open market there would have been more competition and the tender applicants would have offered an accurate price

and that the work has been allotted in the contract at a very higher cost to say to much more that 100 % of the earlier one. In its concluding part the report contained a finding to the effect that no survey was conducted for the assessment of the cost and that the recommendation was made by the officers concerned in a very hasty manner and that the Chief Regional Manager did not act very fairly in the matter. After the said report was submitted it appears that the Managing Director of the State Ware Housing Corporation himself conducted an enquiry in compliance of the order of the Special Secretary dated 30.5.2019 and submitted a report to the Chief Secretary on 14.6.2019. The report has been placed before this Court by learned counsel for the petitioner which is taken on record and the learned counsel appearing for the respondent-Corporation does not dispute the same. In the report in the ultimate conclusion the Managing Director has led a finding to the effect that the earlier notice inviting tender dated 1.4.2018 was canceled on the ground that the lowest cost was not feasible and accordingly was not accepted and thereafter a Committee was constituted and that because of some incorrect application moved by one Uday Construction pursuant to the notice inviting tender dated 1.4.2018 and for that reason it was canceled being a result of concealment of forfeiture of the security amount and that was not proper to cancel the notice inviting tender for the other region on same ground. It is on the basis of this enquiry report which the Managing Director himself got prepared and is addressed to the Chief Secretary, Government of U.P., Lucknow that the impugned order has come to be passed on 26.7.2019 canceling the entire tender process which had already been undertaken and also the consequential contract entered between the petitioner and the

respondent-corporation. With the cancellation of the agreement under the order impugned dated 26.7.2019 the respondents have proceeded to float new tender notice for the same work which the petitioner was carrying out at the time of passing of the impugned order.

Assailing the order impugned, learned counsel for the petitioner has argued following points:

a) The respondents were not justified in unilaterally canceling the written agreement with the petitioner after it had been executed duly with the approval of the higher authorities on 13.7.2019 and the stakes of the petitioner were involved it having invested huge money and incurred cost for carrying out the work under the contract;

b) Neither the enquiry report submitted by the Divisional Commissioner dated 29.6.2019 nor, that of the Managing Director dated 14.6.2019 was ever supplied to the petitioner at any point of time asking for his explanation in respect of the proposed action;

c) None of the enquiry reports indict the petitioner in any manner for any foul play in getting its tender application accepted and approved by the officers of the Ware House Corporation and ultimately the agreement with the petitioner. The petitioner being not guilty of any charge of malafides, conspiracy or otherwise also not guilty of violation of any terms and conditions of the agreement, whether the respondents were justified in canceling the agreement.

d) The respondent-Authority did not apply its independent mind to the enquiry report and moreover, the Managing Director having himself submitted the report of

enquiry was not justified in taking the decision as an element of bias would vitiate the entire action. The Authority has to apply its independent mind and on the plea that no one can be judge in his own case, the respondent-Managing Director being himself the Inquiry Authority, was not justified in taking action on the basis of the report submitted by him, and

e) The Ware Housing Corporation being an autonomous body, it is none of the business of the Secretaries of the Government to dictate terms for the working of the Corporation and its officials nor the respondent-Managing Director is justified in taking action on the dictates of the Special Secretary and hence, he submits that the order is vitiated in law and is liable to be quashed.

Per contra, the argument of learned counsel for the respondent Corporation is that the decision taken by the Managing Director in rescinding the contract, cannot be faulted with as it is based on a clear finding of facts with regard to the wrongful action in canceling the earlier notice inviting tender on the ground that the prices offered were not justified and yet all of a sudden tenders were accepted at a very exorbitant prices, inasmuch as, no survey having been conducted, the fixation of cost/price of the work was not proper. It is argued that Regional Manager of the Warehousing Corporation was found *prima facie* guilty of entire affair and the departmental inquiry has been initiated against him to fix the liability. It is argued that it is a case where huge public money is at stake and the error has got arrested, may be, after the execution of the agreement in the public interest, it should be taken to be a solemn act of the State owned Corporation and for technical reasons like non issuance of notice, show cause or for non

compliance of principles of natural justice the order should not be set aside. He submits that whenever public money is involved and it is a matter of inviting applications for work from the open market through E-tendering process, transparency and fairness are the most important factors that are to be taken care of and if anything found to be vitiated for malafides on the part of those who are in helm of affairs, such action as has been taken in the present case is quite imperative. He has argued that the principles of natural justice could not be put in a straight jacket formula to apply in every case automatically. It is submitted that in matters of contract, the principles that are attracted in testing the administrative decision making, will not be applicable. He argues that the authority has neither exercised any quasi judicial function in passing the order nor, can be said to have acted in a malafide manner. He submits that the findings have come to be recorded in both the inquiry reports and the Managing Director having rendered his due application of mind in the matter, the order cannot be said to be vitiated in law. He has relied upon several judgments of Apex Court like in Rajasthan Housing Board (2007) 1 SCC 477; ECISPIC MCM (JV v. Central Organization 2018 (5) AWC 4772; Employees State Insurance Corporation and Anr v. Jadain (2006) 6 SCC 581, M/s. Ambe Couriers v. State of U.P. & 3 Ors (Writ-C No. 45762 of 2014, decided on 09.09.2014);,

Whereas, learned counsel for the petitioner has relied upon various authorities in support of the arguments advanced and to quote: U.P. State Warehousing Corporation vs. Sunil 2013 (3) ADJ 745; Sahara India (F) Lko v. Commissioner of Income Tax & another (2008) 14 SCC 151; Securities and

Exchange Board of India v. Akshay Infrastructure Pvt. Ltd. (2014) 11 SCC 112; Dharampal Satyapal Ltd. v. Deputy Commissioner, Central Excise (2015) 8 SCC 519; United India Assurance Co. Ltd. v. Manubhai Dharmshree Bhai and others (2008) 10 SCC 404; Bharti Airtel v. Union of India (2015) 12 SCC 1.

Having heard learned counsels for the parties and their arguments advanced across the bar and having perused the records, we find that following basic questions arise for consideration by us:

(a) Whether the two enquiry reports are procedurally defective inasmuch as the findings returned thereunder based upon no material and hence perverse;

(b) Whether the respondent Managing Director was justified in canceling the written agreement with the petitioner after a lapse of a year, without putting him to notice;

(c) Whether being an autonomous body, Corporation could not have been directed to take action in particular manner and Managing Director was not justified in cancelling the agreement under an executive fiat of Special Secretary; and

(d) Whether the order passed by Managing Director is vitiated for bias as he himself had been Inquiry Officer and without inviting the petitioner to explain in his defense he himself conducted the inquiry and then on the basis of report prepared by him, he proceeded to cancel the agreement.

In so far as the first question is concerned, Mr. Kunal Shah, learned counsel for the respondent Corporation has very fairly admitted that there was no notice ever issued to the

petitioner prior to passing of the impugned order dated 26.07.2019. It is admitted to the Corporation that the agreement was duly entered by the Corporation with approval of the competent authority. The records relating to the earlier notices inviting tender dated 06.01.2018 and 31.03.2018 were well within the knowledge of the respondents. The reasons assigned for the cancellation of the same, if at all any, were well within the knowledge of the Corporation. Floating of a new tender notice dated 01.06.2018 was never put to challenge by any person at any point of time and those who had applied for the tender had duly participated and it is the petitioner who was selected for the Region Bhawanipur-I. Lowest price bid offered by the petitioner came to be considered by the higher officials and those who had been entrusted with the task to verify the records, approved the same. There is a survey report also available on record dated 19.04.2018 in respect of various centres to have necessary *prima facie* opinion of the possible rates so that the rates could be fixed after appropriate assessment while evaluating the tender bid application insofar as the present notice inviting tender is concerned.

We have noticed that a private complaint was lodged by one Pramod Kumar Singh who was not the applicant against the notice inviting tender but the same seemed to have been entertained by the Special Secretary and instead of simply forwarding the complaint to the Managing Director, he not only directed the Managing Director under his letter dated 30.05.2019 to hold inquiry on two points but at the same time by way of abundant precaution, for the reasons best known to him, he also ordered the Divisional Commissioner of Mirzapur Division to hold an administrative inquiry. The Managing

Director instead of applying his mind independently, seems to have mechanically acted on the order of Special Secretary and proceeded to hold inquiry himself instead of appointing any inquiry officer, while on the other hand the Divisional Commissioner also conducted an inquiry and and submitted a separate report dated 29.06.2019. It is after the report dated 14.6.2019 was submitted by the Managing Director to the Special Secretary, the Special Secretary issued an executive fiat vide letter dated 16.07.2018 directing for cancellation of the tenders already floated and also to initiate disciplinary proceedings against the erring officials and also called for a compliance report.

Perusal of two reports and the ultimate findings returned by the two officers namely the Divisional Commissioner, the following conclusion has been drawn:

> ''उपरोक्त से स्पष्ट है कि पूर्व में करायी ई–टेण्डरिंग से प्राप्त रेट्स काफी कम थे इसलिए इस सन्दर्भ में शिकायतकर्ता की शिकायत प्रथम दृष्टया सही है।
>
> उल्लेखनीय है कि पूर्व में करायी गयी विज्ञापन सं0–1.1001.23318 दिनांक 01.04.18 द्वारा करायी गयी ई–टैण्डरिंग प्रक्रिया को निरस्त इस आधार पर किया जाना कि प्राप्त न्यूनतम दर अव्यवहारिक है किसी भी दशा में स्वीकार्य योग्य नहीं है। इस सन्दर्भ मे ई–टेण्डरिंग की प्रक्रिया कराये जाने हेतु मण्डल स्तर पर गठित की गयी कमेटी द्वारा पी0ई0जी0 तेन्दू (सोनभद्र) को ही अव्यवहारिक माना था जबकि प्रधान कार्यालय द्वारा इसे समस्त केन्दों के सम्बन्ध में यथावत् स्वीकार किया। जहॉ तक उदय कन्सट्रक्शन द्व ारा धरोहर राशि जब्त किये जाने सम्बन्धी तथ्यों को छुपाने अथवा प्रस्तुत किये जाने के सन्दर्भ में प्रस्तुत प्रत्यावेदन का प्रश्न है, तो इस सन्दर्भ में विदित हो कि उदय कन्सट्रक्शन द्व ारा विज्ञापन सं0–1.1001.23318 दिनांक 01.04.18 के द्वारा मात्र पी0ई0जी0 तेन्दू के लिए आवेदन किया गया था। इसलिए इस आधार पर अन्य केन्दों हेतु प्राप्त निविदाओं को निरस्त किया जाना प्रथम दृष्टया औचित्यपरक नहीं था।
>
> आख्या आपकी सेवा मे सादर प्रेषित।''

If one goes through the conclusive findings returned by

the two inquiry officers, one inquiry officer namely Managing Director records that since relating to the rates the controversy had arisen earlier and the notice inviting tender was canceled on 01.04.2018, the notice inviting tenders in respect of other centers should not have been canceled. So the conclusion drawn is that the earlier notice inviting tender dated 01.04.2018 was wrongly canceled. The finding returned therefore, is that earlier notice inviting tender dated 01.04.2018 was wrongly canceled. The natural corollary therefore, drawn is, as it appears, that the subsequent notice inviting tender was liable to go but no where there is any finding that there was any error with the floating of new notice inviting tender nor, any error in the new tender process pursuant to NIT dated 01.06.2019, undertaken by the respondent Corporation. It is worth noticing that there is no complaint regarding the cancellation of earlier notice inviting tender. The complaint was in respect of tender in question only.

In so far as the other inquiry report is concerned, the conclusion drawn is to the effect only that no market survey was carried out and therefore, the price fixation was wrong and the concerned official of the Warehousing Corporation was therefore, guilty of the entire exercise of tender undertaken and acceptance thereof. It is also to be noticed at this stage that in the inquiry report dated 29.06.2019 the Commissioner has proceeded to consider the report of the Managing Director dated 13.07.2018 which does not discuss anything wrong with the new tender process. There is no discussion in the entire inquiry report as to how and under what circumstances such a finding has come to be returned, more so, the survey report which was prepared by the official of the Corporation dated

19.04.2018 had not been taken into account.

Insofar as the second inquiry report is concerned, it also does not reflect as to what were the materials before the Managing Director, to record a finding in respect of the earlier tender except the complaint. No independent inquiry has been conducted by the Managing Director except the fact that he has taken into account certain data which he claims to be the foundation to hold that earlier notice inviting tender was wrongly cancelled. The question is therefore, when the notice inviting tender dated 01.06.2019 was in issue, a finding ought to have been returned that the process undertaken pursuant to the notice inviting tender dated 01.06.2019 was vitiated for *malafides*, but no such finding has come to be returned.

Now in the face of above factual background and the findings returned by the two Inquiry Officers, if we look to the letter written by the Special Secretary to the Managing Director, Warehousing Corporation it reflects how executive has dominated over the freedom of an autonomous corporation commanding the Corporation to act in such a manner as official wants. He issues not only direction to take an action but also to report back to him. The letter dated 16.07.2018 of the Special Secretary is reproduced hereunder:

‘‘ प्रेषक,
मो0 जुनीद,
विशेष सचिव,
उ0प्र0 शासन।
सेवा में,
प्रबन्ध निदेशक,
उ0प्र0राज्य भण्डारण निगम,
लखनऊ।
सहकारिता अनुभाग–1 लखनऊः दिनांकः 16 जुलाई, 2018
विषयः– उ0प्र0 राज्य भण्डारण निगम में हैण्डलिंग एवं ट्रांसपोर्ट ठेको मे

हुई अनियमितता के दृष्टिगत निगम को हुई करोड़ो की क्षति के संबंध में।

महोदय,

उपर्युक्त विषयक कृपया अपने कार्यालय पत्रांक–2043/वाणिज्य/है0ट्रा0/निविदा/2019–20 दिनांक 14.06.2019 का संदर्भ ग्रहण करने का कष्ट करे।

2– इस संबंध में अवगत कराना है कि आपके उक्त पत्र दिनांक 14.06.2019 एवं कार्यालय आदेश सं0–4108/वाणिज्य/है0ट्रा0/सामान्य/2019–20 दिनांक 15.06.2019 से स्पष्ट है कि मै0 इकबाल अहमद अंसारी प्रापराइटर शिप फर्म के रूप में निगम में पंजीकृत थी, श्री इकबाल अहमद अंसारी की दिनांक 03.12.2014 को मृत्यु के उपरान्त–पार्टनरशिप एक्ट 1932 के सेक्शन 42 में उल्लिखित प्राविधान के अनुरूप स्वतः समाप्त मानी जायेगी। इसके उपरान्त भी उल्लिखित फर्म को टेण्डर दिया जाना मूल रूप मे नियम विरूद्ध है। अतः उल्लिखित फर्म के जो टेण्डर नियम विरूद्ध किये गये है उन्हें निरस्त करते हुये संबंधित भण्डारगृहों के एच0 एण्ड0 टी0 कार्य हेतु पुनः ई–टेण्डरिंग के माध्यम से ठेकेदारों की नियुक्ति किया जाना जनहित में होगा।

आपके उक्त पत्र दिनॉक 14.06.2019 द्वारा प्रेषित जॉच आख्या में विन्ध्यांचल मण्डल में दिनॉक 16.04.2018 को टेण्डर होने के फलस्वरूप प्राप्त टेण्डर (निम्न दर) बिना कारण बताते हुये निरस्त किये जाने तथा पुनः दो माह के अन्तराल में टेण्डर कराते हुये बहुत अधिक दरों पर टेण्डर स्वीकृत करने की शिकायत की पृष्टि हुई है। इसमें क्षेत्रीय स्तर के अधिकारी (विन्ध्यांचल मण्डल) एवं स्वीकृतकर्ता अधिकारी तथा तत्कालीन प्रबन्ध निदेशक और मुख्यालय के संबंधित अधिकारियो की भूमिका भी संदिग्ध प्रतीत होती है।

3– अतः मुझे यह कहने का निदेश हुआ है कि आप अपने स्तर से प्रकरण छानबीन करके जो शासकीय धन की वित्तीय क्षति हुई है, उसका आंकलन करते संलिप्त धनराशि संबंधित ठेकेदार तथा संबंधित अधिकारीगण से वसूल करने कार्यवाही की जाये। जिस अधिकारियों/ कर्मचारियों के विरूद्ध विभागीय कार्यवाही पहले से ही प्रचलित है, उनके संबंध मे इन आरोपो को अतिरिक्त आरोप पत्र के रूप में सम्मिलित करते हुये निर्गत करने की कार्यवाही की जाये तथा प्रकरण में दोषी पाये गये जिन अधिकारियों/ कर्मचारियों के विरूद्ध कार्यवाही प्रचलित नहीं है, उनको चिन्हित करते हुये विभागीय कार्यवाही की जाये।

उल्लिखित फर्मों के जो टेण्डर नियम विरूद्ध किये गये है उन्हें निरस्त करते हुये संबंधित भण्डार गृहों के हैण्डलिंग एण्ड ट्रान्सपोर्ट कार्य हेतु पुनः ई–टेण्डरिंग माध्यम से ठेकेदारों की नियुक्ति की जाये।

उक्त कार्यवाही शीघ्रतिशीघ्र पूर्ण कराते हुये कृत कार्यवाही से शासन को अवगत भी कराने का कष्ट करें।

भवदीय
ह0 अपठनीय
(मो0 जुनीद)
विशेष सचिव''

Now, looking to the contents and language of this letter, we need to examine the import of the letter written by the Special Secretary to the Managing Director in connection with the controversy in hand, dated 16.7.2018. The language in which the concluding paragraph of the letter has been framed is quite indicative of a Government order. Paragraph 3 and the ultimate directions as contained in the letter have been highlighted in the bold letters and following is the english translation:

"Accordingly, I have been directed to ask you to calculate the loss of public money and to undertake accordingly the proceedings for recovery from the concerned contractor. The departmental enquiry that is pending against the officials and employees of the Corporation in this connection, the charges that have been found to be proved in your letter dated 14.6.2019 should be added as an additional charge and against those employees who have been found *prima facie* guilty of the charges they should also be proceeded with after they are identified.

The tender that have been accepted of the aforesaid firm should be canceled and for the purpose of carrying out the work under the contract, fresh notices inviting tender be issued.

The undersigned be informed about the actions to be taken by you promptly, as directed here-in-above."

We find from the perusal of the letter of the Managing Director dated 14.6.2019 addressed to the Chief Secretary that it is in the form of an enquiry, admittedly *ex parte* one, as far as

petitioner is concerned and it is on the basis of the findings returned in the aforesaid administrative enquiry, that the Special Secretary has proceeded to pass the order on 16.7.2018, holding the tender process pursuant to the notice inviting tender dated 1.6.2018, to be bad and unsustainable and so also the consequential agreements reached between the Corporation and the private contractor. As we have already discussed in the earlier part of our order that even from the closest scrutiny of the letter dated 14.6.2019 of the Managing Director we have not been able to trace out any finding to the effect that there was any error in the tender process undertaken pursuant to the notice inviting tender dated 1.6.2018, we fail to understand as to how the Special Secretary has come to record the finding to the effect that the tender procedure followed was proved to be bad and so also the consequential agreement. All that we notice in the letter dated 16.7.2018 is that the Special Secretary has expressed that the conduct of the officials of the Corporation in the totality was doubtful. One must not forget that a doubt remains a doubt unless it becomes a fact on the basis of proof thereof through intrinsic evidence and cogent and convincing finding to that effect based on such intrinsic material. This aspect of the matter is quite lacking both in the enquiry of the Managing Director dated 14.6.2019 and the letter dated 16.7.2018 issued by the Special Secretary. Since these two documents are admitted to the parties and they have been placed before the Court, we have taken judicial notice of these two documents and in our considered opinion these documents are unsustainable and so also we find that the finding returned in the order impugned being based on the report of the Managing Director dated 14.6.2019, the first issue is answered in affirmative in favour of the petitioner. One legal question we

need to answer at this stage also is, as to whether the Managing Director was justified in taking an action on the basis of his own administrative enquiry and to pass order on the findings returned by him in his enquiry report can the order be turned as vitiated for bias.

Doctrine of fair play and fairness in action connote one thing and that is an administrative authority has to demonstrate that the procedure that it has followed is unquestionable if tested on the rule of natural justice and then the ultimate action is in accord with the principles as enshrined under Article 14 of the Constitution of India. Had the Managing Director while holding an enquiry heard the petitioner also who was working already under the agreement and then had recorded a finding that the procedure followed in the finalization of tender was bad for arbitrariness or malafides on the part of the officials of the respondent Corporation, it could have been said that the findings are not *ex parte* and, therefore, if action has been taken in pursuance thereof, this Court may not interfere and the charge of bias may not be sustainable. However in the present case the Managing Director not only held an enquiry himself without any participation of a third party and then did not hold exactly the petitioner guilty of any charge of undue influence and no finding has come to be returned that the procedure followed in the finalization of tender in question was bad for certain reasons, the Managing Director virtually acted in an arbitrary manner in accepting his own report. The letter of the Special Secretary is absolutely silent about any independent finding of fact on the basis of the material, if any, produced before him. He only issued a direction to the Managing Director to act upon his own enquiry report. In such

circumstances, therefore, issuance of a show cause notice to the petitioner of the proposed action was quite imperative as any opportunity of that kind and inviting explanation from the petitioner and consideration thereof, would have definitely removed the element of bias in the decision making process at the end of the respondent- Managing Director but since no such procedure was followed and the manner in which the Managing Director has conducted *ex parte* enquiry and then proceeded to take action on the basis of the report in which no definite finding has come to be recorded regarding undue advantage taken by the petitioner in getting his tender accepted by the authority, the impugned action is certainly vitiated for bias.

Coming to the second question as to whether the petitioner was entitled to any opportunity of hearing or not, or as to whether principles of natural justice would be attracted in the present case or not, it is required to be examined as to what kind of action has been taken and what were the considerations thereof. As we have already discussed in earlier part of this order that it was a simple complaint of a third party that the entire proceedings had been initiated and the complainant being not one of the tender applicants and so no stakes of the complainant was involved, he seems to have been taken as a whistle blower in the matter and it is on that basis that taking the issue opposed to public policy involving huge public money that the respondents have proceeded to pass an order. In this case it was not a case of a kind where a tender application is said to have been accepted for any action of *mala fides*, and a result of some conspiracy at the end of the petitioner and the officials of the Corporation. If the officials had canceled the

earlier tender notice in their wisdom and those tender notices and the cancellation of those tender notice was never questioned, merely because those earlier tender notices were cancelled/ withdrawn, a necessary presumption cannot be raised that the third notice inviting tender was for some extraneous considerations. It is true that the prices this time were taken to be very high as against the earlier ones in the process of tender in which the prices were quoted very low but that does not itself become the ground to cancel the entire tender process which had not only been finalized but even the agreement had been entered into and the party under the contract was carrying out the work making huge investment of money. Had it been a case also of the kind where the party to the contract had violated the terms and conditions of the contract, it could have been said that the tender was liable to be canceled for violation of terms and conditions of the tender agreement. But in the instant case no such finding has come to be returned. The reasons for which the tender proceedings that had already been concluded with the execution of the agreement, has been canceled without assigning any reason of wrong practice adopted by the petitioner in obtaining the agreement. Thus the petitioner cannot be said to be at fault in the matter and, therefore, in our considered opinion if the petitioner was already working under the agreement and no charge was there that he violated the terms and conditions of the agreement, the respondents were not justified in canceling the agreement *ex parte.*

There are three stages in which the entire tender proceeding is undertaken:

1. The issuance of notice inviting tender;

2. Opening Technical and financial bid; and

3. Approval of the financial bid and agreement pursuant thereto.

There is no finding returned that at the stage of submission of the application against the notice inviting tender, the petitioner was not eligible or that at the time of the opening of the technical bid and financial bid the petitioner got wrongfully qualified and that the financial bid of the petitioner was wrongly approved and that the agreement entered between the petitioner and the Corporation was *void* being against the law.

If in all the above three stages the petitioner cannot be held to be guilty in any manner for manipulating the things and obtaining the tender by hatching any conspiracy in connivance with the officials of the Corporation, cancellation of the agreement suddenly by the Managing Director holding that the entire Notice Inviting Tender was bad, certainly required a notice and opportunity of hearing to be afforded to the petitioner prior to passing of such an order. It is a settled principle of law that in administrative exercise of power, the authority exercising power has to not only render due application of mind but also to follow the procedure which would not render the entire action arbitrary. It is settled legal principle that whatever is arbitrary, is hit by Article 14 of the Constitution of India and in the present case we find that only the procedure that was followed by the respondents in taking impugned action was not only quite *ex parte* but also under the executive fiats of the Special Secretary of the Government which was quite uncalled for. Merely because the orders have come from the higher echelons of the Government

functionaries, a Corporation which is an autonomous body would not mechanically act in compliance thereof and then administrative authority, therefore, is required to render due application of mind. The words and expression due application of mind means what a reasonable person holding a responsible position would consider an appropriate step to be taken in a situation where a process has already undergone and a consequential actions have been taken, to question the process already undergone and to annul the action already undertaken as a consequence thereof. Thus any action by a responsible administrative officer calls for not only reasonable approach in conducting a proceeding but also giving opportunity to the person whose interest and rights are going to be prejudiced by the proposed action. The rights and obligations that flow from a contract pure and simple, no doubt calls for an action in common law and no writ will ordinarily be issued to protect the interest of either of the parties but where a party has been put to prejudice not for any obligations not being discharged under the agreement at his end but for certain administrative reasons, then it cannot be said to be an action flowing from a contract pure and simple and, therefore, even in such matters the rule of principles of natural justice will be attracted. The cases cited by the learned counsel for the contesting respondents are distinguishable on facts.

In the case of Rajasthan Housing Board vs. G.S. Investments and another (*Supra*) the auction notice had been published on 19.2.2002, the auction was conducted on 20.2.2002 and the bid offered was much below the market rate. On 22.2.2002, the records were summoned by the State Government and on 20.3.2002 the action was taken against the

erring officials of the Rajasthan Housing Board by the Government. So factually in that case situation was different because the auction proceedings held never came to be finalized and no auction bid was finally approved by the authority, under such circumstances no right as such had accrued in favor of the auction bidder and under the circumstances the Court was justified while refusing to interfere in the matter.

In the Case of ECI-SPIC-SMO-MCML(JV) vs Central Organisation for Railway Electrification and another, the Court refused to interfere with the order of the competent authority in the matter because there was a breach of the terms and conditions of the agreement on the part of the petitioner and resultantly the Chief Project Director issued the order of termination with the approval of the General Manager. That was a case indeed where the violation of terms of agreement had taken place and the authorities were well within their rights to rescind the contract. So factually this case was also distinguishable and Court rightly refused to interfere with the order terminating the contract. Insofar as the case of Employees State Insurance Corporation and others vs. Jardine Henderson Staff Association (*Supra*) is concerned, in the said case, the Court had observed vide paragraph-61 that both law as well as the facts in the said case were in favor of the respondents and the High Court had correctly appreciated the tremendous hardship that would be caused by the respondents staff association in case if the arrears were sought to be paid and no body stood to gain either the employer or the employee. The Court had declined to interfere in the matter by observing that *"Even assuming that the law is in the favour of the ESI,*

keeping in view the special facts and circumstances of the case, relief cannot be denied under Article 226 of the Constitution of India" Thus it is in that background of facts of that case that the Court refused to interfere with the impugned judgment even if it was found to be erroneous, in order to do substantial justice in the matter.

The Court observed that a relief can be denied *inter alia*, when it would be opposed to public policy or where quashing of an illegal order may revive another illegal one. This above principle of law is not attracted in the setting of facts of the present case because here nothing was found illegal with the tender proceedings that ultimately resulted in the agreement with the petitioner by the Corporation. Fixation of price as a cost to carry out the work, has been after the market survey was carried out by the official of the Corporation itself on 19.4.2018 and merely because the Corporation in its wisdom decided to accept the bid with its approval by the higher authority, it cannot be said that the entire tender proceeding stood vitiated in law as being result of some extraneous consideration. Moreover, in this case, the petitioner has not been found guilty of any charge of undue influence or conspiracy. The petitioner has worked for over a year under the agreement and any annulment whereof mid-term at this stage and floating of a tender afresh for the same work will again entail a detailed lengthy exercise involving public money and on the mathematical principle of average such a stand would be opposed to public policy.

Yet another judgment relied upon by learned counsel for the petitioner is M/s. Ambe Carrier v. State of U.P. & 3 Ors (*Supra*). This case is also distinguishable on facts because in

the said case the agreement had already come to an end in the financial year 2013-14 and the period of the contract was extended by administrative order until 31.3.2014 and there were certain breaches committed by the Contractor that had resulted into serious irregularities leading the authority to terminate the agreement. It is in the above background that the Court rejected the argument raised in that case that the order terminating the contract must be held to be invalid, as no opportunity of hearing was provided. The Court had rightly observed that in matters arising out of contractual obligations did not involve the strict compliance of the rule of natural justice. The remedy for such termination of contract on breaches of the conditions and failure to carry out the obligation under the agreement are subject matter of either arbitration or the common law remedy. In the present case there is no such complaint against the petitioner nor, the petitioner is guilty of any fault at his end in carrying out the agreement.

In the case of Ramana Dayaram Shetty (*Supra*), the Court vide Paragraph-10 has held thus:

> *“.... It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in* ***Viteralli*** *v.* ***Saton*** *where the learned Judge said:*
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> > *"An executive agency must be rigorously held to the standards by which it professes its action to be judged . . . . Accordingly, if dismissal from employment is based on a define(l procedure, even though generous beyond the requirement that bind such agency, that procedure must be scrupulously observed . . . . This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.*
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> *This Court accepted the rule as valid and applicable in India*

> *in **A. S. Ahuwalia v. Punjab** and in subsequent decision given in **Sukhdev v. Bhagatram**, Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's "Administrative Law", 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law.....*

In view of the above, therefore, we are of the considered opinion that in the facts and circumstances of the present case, the petitioner was certainly entitled to an opportunity of hearing before the order impugned was passed and so on that count also since the petitioner has not been issued any show cause notice, order impugned cannot sustained in law and is liable to be quashed.

Coming to the third point as to when the respondents-Warehousing Corporation is an autonomous body, could it be administratively directed by the authorities to conduct the affairs in a particular manner and can it be further directed by Administrative Authorities through executive fiats to cancel an agreement holding that the tender proceedings conducted were bad in law. In other words, the argument is that whether an autonomous body is bound to follow the dictates of the Secretaries of the Government.

In the case of **State of Punjab & Ors v. Raja Ram & Ors in AIR 1981 SC 1694** Apex Court vide paragraph no.5 has

held thus:

> *"Learned counsel for the appellant then urged that the Corporation is a Government department. We are unable to accept this submission also. A Government department has to be an organization which is not only completely controlled and financed by the Government but has also no identity of its own. The money earned by such a department goes to the exchequer of the government and losses incurred by the department are losses of the government. The Corporation, on the other hand, is an autonomous body capable of acquiring, holding and disposing of property and having the power to contract. It may also sue or besued by its own name and the government does not figure in any litigation to which it is a party. It is true that its original share capital is provided by the Central Government (S. 5 of the F.C. Act) and that 11 out of 12 members of its Board of Directors are appointed by that Government (S. 7 of the F.C. Act) but then these factors may at the most lead to the conclusion (about which we express no final opinion) that the Corporation is an agency or instrumentality of the Central Government. In this connection we may cite with advantage the following observations of this Court in Ramana Dayaram Shetty v. The International Authority of India, 1979 (3) SCR 1014: (AIR 1979 SC 1628 at p.1639):*
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> *"A Corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a Corporation incorporated under law is managed by a Board of Directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so what should be the nature of such control? Should the functions which the Corporation is charged to carry out possess any particular characteristics or feature or is the nature of the*

functions immaterial? Now, one thing is clear that if the entire share capital of the Corporation is held by Government it would be a long way towards indicating that the Corporation is an instrumentality or agency of Government. But, as is quite often the case the Corporation established by statute may have no share or shareholders in which case it would be a relevant factor to consider whether the administration is in the hands of a Board of Directors appointed by Government though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions."

Even the conclusion, however, that the Corporation is an agency or instrumentality of the Central Government does not lead to the further inference that the Corporation is a Government department. The reason is that the F.C. Act has given the Corporation an individuality apart from that of the Government. In any case the Corporation cannot be divested of its character as a 'Company' within the meaning of the definition in clause (e) of section 3 of the L.A. Act, for it completely fulfils the requirements of that clause, as held by us above."

In the case of **U.P. State Warehousing v. Sunil Kumar Srivastava and another 2013(3) ADJ 745** a Division Bench of this Court vide paragraph no.28 and 43 has observed thus:

"28. Keeping in view the definition of corporation and statutory provisions(supra), there appears to be no room of doubt that the appellant corporation possess autonomy and its business is regulated in pursuance to statutory power conferred by the Act and Regulations framed thereunder. It also possess autonomy to make appointment and deal with the service conditions of its employees (Section 23). The decision with regard to commercial mattes or with regard to services of employees may not be subject-matter for approval or disapproval for the State Government. Of course, in case the Government takes a policy decision and circulate the same subject to rider contained in sub-section (5) of Section 20, the corporation shall be abide by such policy decision. The corporation owes its origin and birth to the Act and not established in compliance of certain orders or decision taken by the State Government through its Cabinet. The corporation has right to discharge its statutory obligations through its authorities created under the Act. The State Government lacks jurisdiction to interfere with the individual decision taken by the corporation through its Board of Directors to manage its affairs or its day to day working in

business interest.

.....

43. Keeping in view the aforesaid judgments right from Rajasthan Electricity Board, Jaipur v. Mohan Lal and Others (Supra) including the case of Neeraj Awasthi (Supra), it has been consistent view of Hon'ble Supreme Court that while establishing corporation under the statutory provisions the sovereign power of the State is delegated to respective Boards and the Board has been conferred power to discharge its statutory obligations to run its business. The government has been conferred power to play down policy decisions which means the decision, order or circular in Rem and not in personem. Any other interpretation shall be subversive to autonomy and statutory function of the Board / Corporation and shall create mal-administration and corrupt the system because of day to day interference by the Government on one or other grounds. "

In view of the above, therefore in ordinary circumstances, we are of the opinion that the State Government cannot interfere through its administrative officers in day to day affairs and functioning of the Corporation which is an autonomous body.

However, since the Corporation is a public sector corporation, it is an instrumentality within the meaning of Article 12 of the Constitution of India. The Government has framed rules and regulations governing contractual matters and, therefore, in principle it cannot be ruled out that Corporation while dealing with such matter has to follow those rules and regulations and, therefore, if any flaw is detected by the State Government because of some wrongful action at the end of the officials of the Corporation, we do not find anything wrong if the State Government wants to set right the things but in every State action it has to be seen as to whether the rule of law has been followed or not. The State Government may have a deep pervasive control in the affairs of a Corporation but the very

purpose of making a Corporation an autonomous body would fail if it is not given freedom in the affairs of its working. The overall general control in the day to day affairs of the Corporation cannot be appreciated, however, where the Government finds that the officials of the Corporation have acted against the public policy and the State's interest is geopardised on one hand and the public interest is put on stake on the other hand, it can always interfere but for such interference the Government has to follow the procedure, either it may lay down the guidelines for the said purpose or it shall follow the common rule of law but by no executive fiats or orders it can dictate the officials of the Corporation to act in a particular manner. The legal principle as has come to be enunciated in catena of decisions by the Apex Court and this Court do not warrant such action at the end of the Government official/authorities.

In so far as 4th issue is concerned, in this matter we have found that the Special Secretary had virtually got swayed away by the complaint and taking the complaint to be a genuine one *prima facie* he directed in a very hurried manner to the Divisional Commissioner to hold an enquiry and also to the Managing Director to conduct an enquiry. He did not appreciate the enquiry reports and proceeded thereafter to hold that the respondent- Corporation was at fault in issuing the tender dated 1.6.2018. He also failed to appreciate that the stage of acceptance of tender application of the petitioner and approval thereof as a lowest bidder and then entering into the agreement where all the stages that had already been undertaken and there is no finding of arbitrariness. The manner in which the order-cum-letter dated 16.7.2018 has been issued,

it does not indicate due application of mind and therefore the letter cum order dated 16.7.2018 deserves to be quashed. The Managing Director's report is also not very happily drawn. Moreso, no conclusion has been drawn regarding involvement of the petitioner by way of manipulation or conspiracy in getting his tender accepted and then approval thereof and the consequential agreement, so this enquiry report also is not sustainable on that count. The findings are not cogent and convincing to hold that the notice inviting tender dated 1.6.2018 was bad in any manner and, therefore, the enquiry report to that extent also cannot be sustained in law.

Besides manafides and favouritism, illegality, irrationality and procedural impropriety in State action also are the reasons for judicial review thereof. In the case of **Manohar Lal Sharma v. Narendra Damodar Das Modi (2019) 3 SCC 25**, speaking for the Bench the Chief Justice in paragraph 7 to 11 has observed thus:

> *"7. Parameters of judicial review of administrative decisions with regard to award of tenders and contracts has really developed from the increased participation of the State in commercial and economic activity. In Jagdish Mandal vs. State of Orissa, this Court, conscious of the limitations in commercial transactions, confined its scrutiny to the decision making process and on the parameters of unreasonableness and mala fides. In fact, the Court held that it was not to exercise the power of judicial review even if a procedural error is committed to the prejudice of the tenderer since private interests cannot be protected while exercising such judicial review. The award of contract, being essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailormade to benefit any particular tenderer or a class of tenderers. (See Maa Binda Express Carrier & Anr. Vs. NorthEast Frontier Railway)*
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> *8. Various Judicial pronouncements commencing from Tata*

Cellular vs. Union of India, all emphasise the aspect that scrutiny should be limited to the Wednesbury Principle of Reasonableness and absence of mala fides or favouritism.

9. We also cannot lose sight of the tender in issue. The tender is not for construction of roads, bridges, etc. It is a defence tender for procurement of aircrafts. The parameter of scrutiny would give far more leeway to the Government, keeping in mind the nature of the procurement itself. This aspect was even emphasized in Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India. The triple ground on which such judicial scrutiny is permissible has been consistently held to be "illegality", "irrationality" and "procedural impropriety".

10. In Reliance Airport Developers (P) Ltd. vs. Airports Authority of India the policy of privatization of strategic national assets qua two airports came under scrutiny. A reference was made in the said case (at SCC p.49, para 57) to the commentary by Grahame Aldous and John Alder in their book 'Applications for Judicial Review, Law and Practice':

"57. ... There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of nonjusticiable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions Vs. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili (sic.) appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, nonjusticiable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another nonjusticiable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

[emphasis supplied]

Order impugned is basically based on the enquiry report prepared by the Managing Director himself and that the enquiry was conducted in the *ex parte* manner and the Managing Director failed to offer any opportunity of hearing to the petitioner before passing the order impugned which has the effect of terminating the agreement for no justifiable reason to hold that the petitioner was at fault at any point of time. Element of *bias* therefore, under the circumstances at the end of Managing Director, cannot be ruled out. The order impugned, therefore, terminating the agreement dated 26.7.2019 cannot be sustained in law.

Thus, for the forgoing discussions writ petition succeeds and is allowed. The order dated 26.7.2019 (Annexure-13) to the writ petition and the enquiry report dated 14.6.2019 submitted by the Managing Director as well as the order passed by the Special Secretary dated 16.7.2019 are also hereby quashed.

The consequential action if taken pursuant to the impugned order is also quashed. The consequences to follow, however, there will be no order as to costs.

(Ajit Kumar, J.) (Ramesh Sinha, J.)

Order Date :- 11.12.2019

Deepika