

# RAJASTHAN HIGH COURT

Alpha Engineer, M/s.

Vs.

State of Rajasthan

Civil Writ Petn. Nos. 6846, 7186, 7183 and 7180 etc. of 2002

(Shiv Kumar Sharma, J.)

23.09.2003

## ORDER

**Shiv Kumar Sharma, J**

1. Common question as to authority and power of State of Rajasthan (for short State) to make interference in the functioning of Rajasthan Housing Board, Jaipur (for short 'Board') emerges for consideration in this cluster of writ petitions. All the writ petitions, therefore, are taken together for disposal.
2. The Board floated tender notice on Dec. 19, 2001 for construction work of different categories of residential houses in *Indira Gandhi Nagar (Jagat Pura), Jaipur*. It was also notified that the tender forms will be sold from January, 22, 2002 to January 24, 2003 up to 4 pm. and tender forms duly filled in will be received on January 25, 2002 up to 1.00 pm. and opened on January 25, 2002 at 2.00 p.m. The time for submission of tender form was however extended from 2.00 pm. to 5.00 pm. The petitioners, pursuant to the NIT, submitted tenders, which were opened on January 25, 2002 at 5.00 pm.
3. As per the Board's decision negotiations were held on Feb. 27, 20002 between the parties and the Board . The petitioners thereafter lowered down the rates quoted in the tender forms and submitted fresh offers after making required modification. The offers got acceptance of the Board and the same was communicated to the petitioners.
4. However on March 2, 2002 when news item about irregularities in accepting the tenders, appeared in a daily newspaper, the State after seeking comments of the Housing Commissioner, directed the Board vide order dated April 5, 2002 to cancel acceptance of the tenders. The Board thereafter issued fresh NIT on Sept. 11, 2002 for

the work in regard to which tenders of the petitioners were earlier accepted. The petitioners in the instant writ petitions seek to set aside the order of the State. Communication of Housing Commissioner and the NIT issued on Sept. 11, 2002.

5. In some of the writ petitions the State filed return raising objection about the maintainability of the petitions. It was averred that in view of the various provisions of Rajasthan Housing Board Act, 1970 (for short '1970 Act') and Public Works Finance and Accounts Rules 1999 the questions involved in the writ petitions cannot be appropriately gone into by this Court under Article 226 of the Constitution. It was further submitted that for the disputes pertaining to contractual obligations the petitioners had alternative and efficacious remedy of civil suit. It was further pleaded that as per Section 26 of 1970 Act the Board may undertake the works in any area in which the said Act is in force for framing and execution of housing schemes but this power is subject to the control of the State Budget. The budget shall be considered and sanctioned by the Board and submitted to the State for approval and the State may approve the budget as sanctioned by the Board or return it to the Board for making modifications. It is only thereafter that the Board shall cause the housing scheme in respect of which provision is made in the budget to be published in the Official Gazette. In the instant matters the proposals were prepared for construction of 2922 houses estimated to be of Rs. 82,366 crores and the Financial Advisor of the Board, clearly noted that the matter was within the purview of the State for sanction of the budget as per Accounts and Finance Rules. The Chairman of the Board instead of referring the matter to the State, directed that the matter be placed in the next meeting of the Board for approval of the Budget. The matter was never sent to the State for its approval of the Budget of the schemes as per Section 31 of the Act and instead tenders were invited straightway. It was further pleaded that President of Rajasthan Avasan Mandal Bhawan Nirman Sangh submitted application for extending time up to 5 pm. This application was proceeded at different level and in the meantime another application was submitted by the President of Sangh to the Chairman of the Board on which the Chairman straightway ordered that the tenders submitted by the contractors be opened. The matter was prominently reported in Dainik Bhaskar dated March 4, 2002 under the caption "DIN ME DALE TENDER ADHI RAT BAAD KHULE". The Minister of Urban Development and Housing on seeing the news item immediately called for the comments from the Secretary Urban Development Department who in turn asked the Commissioner of the Board to send his comments. It was thereafter that the Housing Commissioner of the Board sent his report on August 28, 2002. In the report it was stated that initially the proposal for extension of time for four days was

approved but subsequently the tenders were invited on the same day. The entire exercise in opening of tender had taken place during the night of January 25, 2002. The Housing Commissioner was of the view that once the decision had been taken to extend the time by four days, the action in opening of the tenders on the same day vitiated the process and completely destroyed the object of transparency. Housing Commissioner wrote that since the contractors had formed a pool and therefore, even though 20-30 tender forms were sold for each item but against every work item only three tender forms were received which were necessary for completion of the tender formalities. Since the Contractor was required to submit earnest money with every tender and, therefore, receipt of three tenders only against each of the works raised doubt that the contractors had formed a pool to do so. In the opinion of the Housing Commissioner the work was awarded to contractors on more rates and the Board was deprived of the competitive rates. The State upon consideration of the entire matter issued directions on April 5, 2002 that the tenders opened on January 25, 2002 be rejected/cancelled and the Board should with the prior approval of the State, invite tenders afresh.

6. The Board in its reply supported the action of the State and averred that action of State was based on public interest.

7. The petitioners submitted rejoinder to the reply reiterating the averments of the writ petitions.

8. Mr. Bajrang Lal Sharma, learned senior Advocate canvassed that powers given to the State under Section 60 of the 1970 Act are not meant to interfere in day to day affairs of the Board. These powers could only be exercised by the State to frame the policy, guidelines or schemes undertaken by the Board. Further, powers of Section 60 could not be exercised in an arbitrary manner and without there being any fact finding enquiry. It was further contended that on April 20, 2002 the Housing Commissioner of the Board without any authority issued an order by which all the accepted tenders were cancelled. Before issuing the orders no opportunity of hearing was provided to the petitioners. Learned senior counsel criticised the order dated April 5, 2002 of the State on various grounds. It was urged by the learned counsel that there was no illegality or irregularity in the issuance of NIT dated Dec. 19, 2001 and the procedure for opening of the tenders. Tenders submitted by the petitioners were accepted by the Board and sanction for acceptance was given after negotiations were held between the petitioners and the competent authority i.e. the Chief Engineer of the Board . Negotiations Committee on examining the offer of the petitioners found the same more

favorable and lowest. The petitioners were also informed about the acceptance of the tenders and they went ahead for making suitable arrangement for the purpose of executing the allotted work and invested huge money but tenders were cancelled arbitrarily and another NIT was issued on Sept. 11, 2002. The act of the State and the Board was thus against the principles of natural justice . Learned counsel further contended that the reasons assigned in the order dated April 5, 2002 were unjust and detrimental to the public interest. There were no materials upon which the officers of the State could form the requisite opinion and without application of mind to the relevant facts, the impugned order of cancellation of tenders was issued therefore it is not sustainable in the eye of law.

9. In *Mahabir Auto Stores v. Indian Oil Corporation* <sup>1</sup> on which reliance was placed by learned counsel, the Apex Court indicated thus :

"In cases where the instrumental of the State enters the contractual field, it should be governed by the incidence of the contract. But 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 in the type of the transactions and nature of the dealings as in the present case. Every action of the State or an instrumentality of the State in exercise of its executive power must be subject to the rule of law and be informed by reason. In appropriate cases, actions unguided by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32. Though it may not be necessary to give reasons but in the field of this nature fairness must be there to the parties concerned. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings it should meet the test of Article 14. If a governmental action even in the matters of entering or not entering into contracts fails to satisfy the test of reasonableness, the same would be unreasonable. 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. However, Article 14 cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions."

10. In *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi* <sup>2</sup>the Apex Court in para 8 observed as under :-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to observations of Bose, J. in *Gordhanda Bhanji* :

'Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do . Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.'

Orders are not like old wine becoming better as they grow older."

11. *Central Board of Direct Taxes, New Delhi v. Oberoi Hotels (India) Pvt. Ltd.*, <sup>2</sup>was the case where the Apex Court indicated that when exercising power of judicial review, Courts have to see that the authority acts within the scope of its powers and, if discretion is conferred on the authority, it exercises the same in a reasonable manner keeping in view the object which the statute seeks to achieve.

12. In *Kumari Srilekha Vidyarthi v. State of U.P.*,<sup>3</sup> it was held that non arbitrariness be in a necessary commitment to the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reasons and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the states and exercise of all powers must be for public good instead of being an abuse of the power.

13. In *State of H. P. v. Raja Mahendrapal*, <sup>4</sup> it was held that :

"(1) The powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature which can be invoked for the enforcement of any fundamental right or legal right but not for mere contractual rights arising out of an agreement particularly in view of the existence of an

efficacious alternative remedy. The constitutional Court should insist upon the party to avail of the same instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the Court from granting the appropriate relief to a citizen under peculiar and special facts notwithstanding the existence of an alternative efficacious remedy. The existence of the special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said article. In the instant case, the High Court did not notice any special circumstance which could be held to have persuaded it to deviate from the settled proposition of law regarding the exercise of the writ jurisdiction under Article 226."

14. In *Verigamto Naveen v. Govt. of A. P.*,<sup>5</sup> the Apex Court propounded that where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, it falls within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest.

15. In *L.I.C. of India v. Consumer Education and Research Centre*,<sup>6</sup> it was held thus:

"23. Every action of the public authority or the person acting in public interest or its acts give rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element becomes open to challenge. If it is shown that the exercise of the power is arbitrary unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter, do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations."

16. In *Rohtas Industries Ltd. v. S. D. Agarwal*,<sup>7</sup> their Lordships of the ~~Supreme Court~~ [SC](#) in para 46 propounded thus :

"If it is established that there were no materials upon which the authority could form the requisite opinion the Court may infer that the authority did not apply its mind to the relevant facts."

17. Placing reliance on the ratio propounded by the Apex Court in the aforesaid judicial pronouncement learned senior counsel vehemently canvassed that arbitrary acts of the State and Board should be interfered with.

18. Per contra Mr. M. Rafiq, learned Additional Advocate General and Dr. P. C. Jain, learned counsel for the Board supported the action of the State and urged that after obtaining comments from the Housing Commissioner and Chairman of the Board, the State came to the conclusion that there had been no transparency in granting and accepting of the tenders. The question of fact of this nature could not be gone into in the writ petitions as it requires threshing of the evidence. The power under Section 60 of 1970 Act were exercised by the State along with other provisions of the Act. Learned counsel further contended that once the time was extended up to January 28, 2002 it could not have been preponed and thus transparency in issuance of public contracts came under clouds and no option was left with the State except to cancel the tenders. It was further contended that no civil or constitutional right accrued to the petitioners in view of Column 4 of NIT bearing No. 9/2001 wherein it was indicated that "Rajasthan Avasan Mandal Ko Ek Ya Sabhi Nividaya Radd Karne Ka Adhikar Hoga" (Rajasthan Housing Board shall have authority to cancel one or all the tenders). Reliance was placed on *Orissa State Financial Corporation v. Narsingh Ch. Nayak*,<sup>8</sup> and *Sardar Singh v. MSTC Ltd.*,<sup>9</sup>

19. Before proceeding to consider the rival submissions, it is beneficial to consider the relevant provisions of the 1970 Act that was enacted to provide for measures to be taken to deal with and satisfy the need of housing accommodation in the State of Rajasthan. As per Section 5 the Board shall consist of a Chairman appointed by the State Government and other members that include (i) Financial Commissioner, (Ex-officio member), (ii) Secretary to the Government, Town Planning Department (Ex-officio member), (iii) Chief Town Planner and Architectural, Adviser, (Ex-officio member), (iv) Housing Commissioner of the Board, (Ex-officio member) and six non-official members, applied by the Government of whom one shall belong to the Scheduled Castes or Scheduled Tribes.

20. Sub-section (3) of Section 21 provides that the State may by order, depute its representatives to attend any meeting of the Board and to take part in the deliberations of the Board. According to Section 22 the Board may enter into and perform all such contracts as it may consider necessary or expedient for carrying out any of the purposes of the Act. As per proviso appended to sub-section (1) of Section 23 no contract involving an expenditure over and above such amount as may by notification

in the Official Gazette be specified by the State, shall be made without the previous sanction of the State. Sub-section (1) of Section 31 provides that every budget sanctioned by the Board under Section 30 shall be submitted to the State for approval, within two months of the receipt of the budget, the State may approve the budget as sanctioned by the Board or return it to the Board for making such modifications therein the State Government may deem fit. As per Section 33, the Board shall, after the budget is approved by the State, cause the housing schemes published in the Official Gazette. Section 47 mandates that the Board shall submit report to the State on such matters as may be prescribed, and the State cause the report submitted by the Board to be laid before the House of the State Legislature. Section 60 provides that the State Government may give the Board such directions as in the opinion are necessary or expedient for carrying out the purposes of the Act and it shall be the duty of the Board to comply with such directions.

21. Their Lordships of the Supreme Court in *Tata Cellular v. Union of India*,<sup>10</sup>, indicated that the Government is the guardian of the finances 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 Government. 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 Government 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 struck down.

22. It is therefore to be adjudged as to whether in the cases on hand the power of cancelling the tenders was exercised by the State to protect its financial interest or for any collateral purpose.

23. It appears from the available material that despite the proposals for construction of 2022 houses estimated to Rs. 82,366 crores, the matter was never sent to the State for its approval of the Budget of the Scheme as per Section 31 of 1970 Act and the tenders were invited straightway. It is also evident that time for submission of tenders which was initially extended to a longer period, preponed subsequently. Comments from the Secretary Urban Development Department were called for who directed the Housing Commissioner (Ex-officio member of the Board) to submit his report. The Housing Commissioner was of the opinion that once the decision was arrived at to extend the time by four days the action in proponing the date of opening the tenders vitiated the entire process and destroyed the object of transparency. In the opinion of

the Housing Commissioner the work was awarded to contracts on more rates and the Board was deprived of the competitive rates. The State it appears upon consideration of entire material issued directions to cancel the tenders.

24. The main thrust of learned Senior Counsel's argument has been to the applicability of Section 60 of 1970 Act. As already noticed, Section 60 authorizes the State to issue such direction to the Board as are expedient for carrying out the purposes of the Act, 1970 Act was enacted to provide for measures to be taken to deal with and satisfy the need of housing accommodation in Rajasthan. The Board was constituted to achieve the said object. Section 5 includes Financial Commissioner, Secretary Town Planning Department and Housing Commissioner as Ex-officio members of the Board. The State is empowered to depute its representative to attend the meeting of the Board and to take part in the deliberations. Section 23 mandates that no contract shall be made without the previous sanction of the State which involve an expenditure over and above the amount specified in the Notification issued by the State. According to Section 30 every Budget sanctioned by the Board is required to be submitted for approval to the State and only after the approval of the State, the housing scheme can be published in the official gazette. It thus appears that as per scheme of 1970 Act the State is the guardian of all housing schemes drawn by the Board to satisfy the need of housing accommodation in Rajasthan and in order to carry out the purposes of 1970 Act the State can issue. directions to the Board. In this view of the matter I find myself unable to agree with the submissions advanced by learned senior counsel. I do not see any arbitrariness in the order dated April 5, 2002 of the State. The order was passed after considering the entire fact situation and in the public interest.

25. The question whether particular action is arbitrary or not, is to be answered on the facts and circumstances of each case. The Court has to examine whether the action under challenge satisfies the test of reasonableness. Fairness is expected in every action of the State. Considering the requirement of State action their Lordships of the SC in *Union of India v. International Trading Co.*, <sup>11</sup> indicated thus (Para 15):

"The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness is essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validity for a discernible reason, not whimsically for any ulterior purpose."

26. It is well settled that judicial review under Article 226 is confined only to the examination of the decision making process. Lord Harilsham in *Chief Constable of the Northwales Police v. Evans*,<sup>12</sup> said:

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the Court."

27. The Apex Court in *Apparel Export Promotion Council v. A. K. Chopra*,<sup>13</sup> held as under (Para 17):

"Judicial review, not being an appeal from a decision was arrived at, the Court, while exercising the power of judicial review, must remain conscious of the fact that if the decision has been arrived at by the administrative authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the Court cannot substitute its judgment for that of the administrative authority on a matter which fell squarely within the sphere of jurisdiction of that authority."

28. In the cases on hand as earlier seen, the date of opening tenders was postponed and entire exercise was hurriedly taken place during the wee hours of January 25, 2002. When transparency in administrative acts came under the clouds of suspicion, preliminary inquiry was initiated by the State and on receiving the comments of Housing Commissioner of the Board, the tenders were ordered to be cancelled. As the contract was not complete, necessity to issue show cause notices to the petitioners did not arise. Even otherwise the Board, in view of clause 4 of NIT, had wide powers to cancel the tenders. I do not find even an iota of unfairness in the action of the State and it satisfies the test of reasonableness.

29. For the reasons aforementioned all the writ petitions lack merit and are hereby dismissed. The NIT's issued so far in connection with construction work of different categories of (residential) houses in Indira Gandhi Nagar (Jagatpura) Jaipur stand vitiated and Board is restrained from issuing the NIT in regard to said work without obtaining the required sanction of the State. No costs.

Petitions dismissed.

Cases Referred.

1. (1990) 3 SCC 752: (AIR 1990 SC 1031)
2. (1998) 4 SCC 552: (AIR 1998 SC 1666)
3. (1991) 1 SCC 212: (AIR 1991 SC 537)
4. (1999) 4 SCC 43: (AIR 1999 SC 1786)
5. (2001) 8 SCC 344: (AIR 2001 SC 3609)
6. AIR 1995 SC 1811
7. AIR 1969 SC 707
8. (2002) 7 Supreme 535
9. 2003) 1 ILD 749 (Delhi)
10. AIR 1996 SC 11
11. (2003) 5 SCC 437: (AIR 2003 SC 3983)
12. (1982) 3 All England Reporter 151 (HL)
13. (1999) 1 SCC 759: (AIR 1999 SC 625)