

22.06.23
SI-07
Ct.32
(S.R.)

**FMA 1355 of 2017
with
CAN 1 of 2017 (Old No.CAN 7072 of 2017)
Bijan Kanti Chowdhury
v.
State of West Bengal & Ors.**

Mr. Ashok Kumar Banerjee, Sr. Adv.
Mr. Md. Yusuf Ali ... for the appellant.

Mr. Moniruzzaman Jahangir Badsha
... for the State.

The present appeal has been preferred challenging the judgement dated 11th May, 2017 passed by the learned Single Judge in a writ petition being WP No.17388 (W) of 2014.

The said writ petition was preferred challenging, *inter alia*, a memorandum dated 28th February, 2014 issued by the respondent no.2, a memorandum dated 3rd March, 2014 issued by the respondent no.3, a notification dated 24th April, 2014 issued by the respondent no.2 and a notification dated 24th April, 2014 issued by the respondent no.3.

The grievance of the writ petitioner/appellant, an enlisted Class-II contractor of the categories of roads and buildings of the Public Works Department (in short PWD) of the Government of West Bengal, was that by the impugned memoranda and notifications he had been rendered jobless and his right to livelihood had been severely affected. Without disclosing appropriate reasons

and without granting any opportunity of hearing, the enlisted contractors were suddenly discontinued and the system of awarding public work to the enlisted contractors under PWD was abolished. The impugned memoranda and notifications had been issued in an arbitrary and illegal manner and as such the same are not sustainable in law.

Mr. Banerjee, learned senior advocate appearing for the appellant submits that initially in the writ petition a direction was passed towards exchange of affidavits but no affidavit-in-opposition was filed by the State respondents and in spite of repeated opportunity granted by the learned Single Judge, none appeared on behalf of the State to contest the writ petition. The averments made in the writ petition having not been controverted by the State respondents stood admitted and as such the learned Single Judge ought not to have refused to exercise discretion in favour of the appellant and such infirmity warrants interference of this Court. In support of such contention reliance has been placed upon a judgment delivered in the case of *Smt. Nasem Bano V. State of U.P. & Ors.*, reported in AIR 1993 SC 2592.

Drawing our attention to the memoranda and the notifications impugned in the writ petition, Mr. Banerjee argues that while adopting the policy decision to abolish the system of enlistment of contractors, State did not amend the financial rules. The memorandum dated 28th

February, 2014 was issued without amending the relevant provisions of the West Bengal Financial Rules. On the date the policy decision was adopted, the existing Financial Rules did not support such policy decision. The Finance Department made amendment in the West Bengal Financial Rules (Vol-I) *vide* notification dated 24th April, 2014. Such inconsistencies and infirmities ought to have been appreciated by the learned Single Judge prior to dismissal of the writ petition.

According to Mr. Banerjee, the procedure mandated for adoption of such policy decision abolishing the system of enlistment of contractors was not followed. Such abrupt decision to discontinue the enlisted contractors affected their livelihood. Such argument though advanced at the time of hearing of the writ petition was not taken into consideration by the learned Single Judge.

Mr. Moniruzzaman, learned advocate appearing on behalf of the State respondents, however, denies and disputes such contention of the appellant. According to him, there was no jurisdictional error towards issuance of the memoranda dated 28th February, 2014 and 3rd March, 2014.

He argues that it came to the notice of the State Government that the system of enlistment of contractors was coming in the way of *e-tender* procedure, since in such cases scope of the tender gets limited only to those contractors who were enlisted in the department. The

updating of enlistment was also not done on a periodic basis depriving the new entrepreneurs from participating in any development efforts of the State Government. Thus the system of enlistment was not only defeating the transparency introduced through e-tender procedure but was also hindering the interest of new contractors/entrepreneurs. In view thereof, the policy decision was adopted to abolish the system of enlistment of contractors with an intent to bring financial propriety, fairness and transparency through open tender process.

He further argues that no legal right of the appellant has been infringed. The existence of a right and infringement thereto are the foundation of exercise of jurisdiction under Article 226 of the Constitution of India. In the instant case, no legal right of the appellant has been infringed. In view thereof, no interference is called for in the present appeal. Reliance has been placed upon two unreported judgments delivered by the Hon'ble Supreme Court in the cases of *Tata Motors Limited v. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) & Ors.* and *Orissa Administrative Tribunal Bar Association v. Union of India & Ors.*

Heard the learned advocates appearing for the respective parties and considered the materials on record.

It is not a case that the learned Single Judge had glossed over the issues of arbitrariness and infirmities, as urged on behalf of the appellant and did not return a

finding on the said issues. In the order impugned it was observed that subsequent amendments of Financial Rules *vide* memorandum dated 24th April, 2014 at the highest could have been a mere irregularity and the same would not render the decision of the Government bad. In fact, the Government decision contained in the memorandum dated 28th February, 2014 stood ratified by the amendment of the West Bengal Financial Rules and the PWD Code. It was also observed that for the public interest and to ensure fairness and transparency the policy decision was taken for abolishing the system of enlistment of contractors and allowing participation to all eligible persons.

In the case of *Nasim (supra)* a factual issue that 40% of the total number of posts had not been filled up by promotion was construed to have been admitted by the respondents since the averments made to that effect were not controverted. In the present case the legality of a policy decision adopted by the Government is under challenge. The judgment delivered in the case *Nasim (supra)* is, thus, distinguishable on facts.

The open tender procedure was adopted to ensure fairness and transparency. For good governance and administration, the policy decision was adopted. It is not a case that such decision was taken by the authorities in a perfunctory manner. No *mala fide* can be attributed to such action of the authorities. The appellant had also

failed to establish any arbitrariness or unreasonableness against the respondents.

The learned Single Judge upon dealing with all the issues arrived at specific findings and we do not find any error in the same. The impugned judgment does not suffer from any jurisdictional error or any substantial failure of justice or any manifest injustice warranting interference of this Court.

In view thereof, no interference is called for in the present appeal. The appeal and the connected application are, accordingly, dismissed.

There shall, however, be no order as to costs.

Urgent certified photocopy of this order, if applied for, be supplied as expeditiously as possible.

(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)