

IN THE HIGH COURT OF KARNATAKA

November 10, 2008

[N. K. PATIL, J.]

**KIRLOSKAR BROTHERS LIMITED, PUNE VS.
KARNATAKA NIRAVARI NIGAM LIMITED,
BANGALORE AND OTHERS**

Writ Petition No. 13514 of 2008

ORDER

Petitioner in this petition is M/s. Kirloskar Brothers Limited represented by its authorised signatory. Petitioner has sought for calling the records from the first respondent pertaining to calling for, consideration and acceptance of the tenders in package II of Upper Bhadra Lift Irrigation Project upon publication of invitation of tender as per Annexure-A. Further, petitioner has sought for quashing all the proceedings accepting the tender of the third respondent by the first respondent pertaining to package II of Upper Bhadra Lift Irrigation Project as per Annexure-K, dated 30th September, 2008 and to direct the first respondent to award the contract for implementation of the package II of Upper Bhadra Lift Irrigation Project to the petitioner.

2. Facts in brief are that, the first respondent herein issued the notice inviting the tenders on ERC (TURN KEY) basis for the Upper Bhadra Lift Irrigation Scheme under two packages. Package I was relating to lifting of 15 TMC of water and package II related to lifting 21.5 TMC of water. The subject-matter involved in this petition is only in respect of package II relating to lifting of 21.5 TMC of water. Both petitioner and third respondent herein had participated in the aforesaid tender proceedings. The Accepting Authority of the Nigam-the first respondent, after evaluation of the entire material available on record and in consonance with the relevant provisions of the Karnataka Transparency in Public Procurements Act, 1999 read with its Rules, has accepted the tenders and awarded the same to the third respondent. Questioning the correctness of the said order, awarding tender to the third respondent and seeking other reliefs, petitioner is before this Court.

3. Learned Senior Counsel appearing for third respondent and learned Counsel appearing for first respondent at the outset raised a preliminary objection regarding maintainability of the writ petition. In substantiation of the said submission, they have taken me through the relevant provisions of the Karnataka Transparency in Public Procurements Act, 1999 ('Act' for short) and the Karnataka Transparency in Public Procurements Rules, 2000 ('Rules' for short) and specifically pointed out that, under Section 16 of the Act read with Rule 29 of the Rules, an appeal lies before the Appellate Authority. Therefore, they submitted that, the writ petition filed by petitioner is liable to be rejected at the threshold itself, on the ground that, petitioner has, in fact, got an alternative, inexpensive, speedy, effective and efficacious remedy of filing an appeal before the Appellate Authority as provided under the relevant provisions of the Act and Rules, as referred above.

4. Further, learned Senior Counsel appearing for third respondent, has taken me through the definition of Section 2(c) of the said Act which states that, 'Government' means the State Government, and placed reliance on the General Clauses Act wherein State Government has been specifically explained. Therefore, he submitted that, in the instant case, petitioner has got the remedy before the State Government only for the reason that, the contract awarded in favour of third respondent is, by the Competent Authority-first respondent-Niravari Nigam, after accepting its highest bid. Therefore, he submitted that, the writ petition filed by petitioner is liable to be rejected. Further, to substantiate the said submission, he placed reliance on the judgment of the Apex Court in the case of ¹[Badrinath v Government of Tamil Nadu and Others] and specifically pointed out that, when petitioner has got remedy before the Competent Appellate Authority, petitioner must approach the said authority by taking all the grounds urged in the instant writ petition. Without exhausting the said remedy, petitioner cannot invoke the extraordinary jurisdiction of this Court. Further, he placed reliance on Rule 37 of the Karnataka Government (Transaction of Business) Rules, 1977 which stipulates that, "all cases of the nature specified in the Third Schedule to these Rules

1. AIR 2000 SC 3243: (2000)8 SCC 395.

shall, before the issue of orders thereon, be submitted to the Governor". Further, he drew my attention to item No. 11 of the Third Schedule wherein it is stated "cases in which powers are exercisable by the Governor under the Constitution or any provision of law. Therefore, finally, he submitted that, the writ petition filed by petitioner is liable to be dismissed as not maintainable.

5. Learned Counsel appearing for first respondent inter alia, in addition to adopting the submission made by learned Senior Counsel appearing for third respondent, specifically pointed out that, Rule 29(b) of the Rules provides for an appeal to the State Government, wherein, it is crystal clear that, an appeal shall lie to the Government if the order is passed by a tender accepting authority which is head of the Department, or a local authority or a State Government undertaking or a Board, Body Corporation or any other authority owned or controlled by the Government.

6. *Per contra*, learned Senior Counsel appearing for petitioner, vehemently submitted that, the objection raised by learned Senior Counsel appearing for third respondent regarding maintainability of the writ petition, cannot be accepted nor is he justified in raising the same, for the reason that, petitioner has invoked the extraordinary jurisdiction of this Court only in view of violation of the statutory provisions as envisaged under the Act and Rules. To substantiate the submission regarding maintainability of the writ petition, he placed reliance on the judgment of the Supreme Court in the case of ¹[*Ram and Shyam Company v State of Haryana and Others*] and specifically pointed out that, writ is maintainable, if petitioner has no effective, alternative and efficacious remedy before the authority and the jurisdiction of this Court is not ousted. Therefore, petitioner is very much entitled to redress its grievance also in view of the principles laid down by the Apex Court in the case of ²[*M/s. Popcorn Entertainment and Another v City Industrial Development Corporation and Another*]. Further, he submitted that, there is no total bar for this Court to entertain the writ petition and drew my specific attention to paragraphs 15 and 16 of the said judgment, wherein the Apex

1. AIR 1985 SC 1147: (1985)3 SCC 267.

2. (2007)9 SCC 593: 2007 AIR SCW 2010

Court has held that, the writ petition filed by petitioner would be maintainable even in a contractual matter under three clear-cut circumstances, firstly, if the action of the respondent is illegal and without jurisdiction; secondly, if the principles of natural justice have been violated; and thirdly, if the appellants' fundamental rights have been violated. In the instant case, all the aforesaid three requirements are not being strictly adhered to by the Competent Authority before accepting and awarding the tender in favour of third respondent. Therefore, he submitted that, the instant writ petition is maintainable and petitioner is entitled to invoke the extraordinary jurisdiction as envisaged under Articles 226 and 227 of the Constitution of India.

7. Having heard learned Senior Counsel appearing for petitioner and third respondent and learned Counsel appearing for first respondent and after going through the judgments relied upon by all the Counsel appearing for the parties before this Court, I am of the considered view that, there is no dispute or quarrel or second opinion regarding the well-settled law laid down by the Apex Court and this Court in catena of judgments, referred above.

8. Learned Counsel appearing for first respondent has placed reliance on the order passed by this Court, wherein first respondent is also a party, regarding awarding of contract in respect of construction of Upper Tunga Project, Main Canal at Km 112, in the case of ¹[S.V. Bhandi v State of Karnataka and Others], wherein this Court has held that, the subject-matter involved is an appealable one under the provisions of the Karnataka Transparency in Public Procurements Act, 1999 and the Karnataka Transparency in Public Procurements Rules, 2000 made thereunder. Therefore he submitted that, since petitioner has got an alternative and effective remedy of filing an appeal provided under the said Act and Rules, this Court cannot entertain the writ petition and permit the petitioner to invoke the extraordinary jurisdiction of this Court.

9. It is significant to note, as rightly pointed out by learned Senior Counsel appearing for third respondent, as referred

1. W.P. No. 14272 of 2005, DD: 24-05-2005.

above that, there is a statutory provision under Section 16 of the Act read with Rule 29(b) of the Rules to prefer an appeal before the Appellate Authority. It is worthwhile to extract the said provisions of the Act and Rules which reads thus:

“16. Appeal.—(1) Any tenderer aggrieved by an order passed by the Tender Accepting Authority other than the Government under Section 13 may appeal to the prescribed authority within thirty days from the date of receipt of the order:

.....

(2) The prescribed authority may after giving opportunity of being heard to both the parties pass such order thereon as it deems fit and such order shall be final.

(3) The prescribed authority shall as far as possible dispose of the appeal within thirty days from the date of filing thereof.

Rule 29. Appeal.— An appeal under Section 16 shall lie.—

.....

(b) to the Government if the order is passed by a Tender Accepting Authority which is Head of the Department, or a local authority or a State Government Undertaking or a Board, Body, Corporation or any other authority owned or controlled by the Government”.

(emphasis supplied)

Therefore, when petitioner has got a speedy effective and inexpensive remedy of redressal of its grievances before the Appellate Authority, as prescribed under the relevant provisions of the statute and that too, when the subject-matter in the instant case is purely question of fact, I am of the considered view that, the matter is required to be gone into by the Appellate Authority itself, after appreciation of facts and after obtaining the opinion from the experts who deal with such matters. Therefore, this Court cannot decide the question of fact, by permitting the petitioner to redress its grievance invoking the extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, in view of the well-settled law laid down by the Apex Court and this Court in host of judgments. Therefore, the writ petition filed by petitioner is liable to be dismissed as not maintainable, without expressing any opinion

on merits or demerits of the case, the grounds urged by petitioner and the stand taken by the respondents. Accordingly, it is dismissed. However, liberty is reserved to petitioner to redress its grievance before the appropriate Competent Appellate Authority as provided under the relevant provisions of the statute, if it is so advised or need arise. Ordered accordingly.
