

HIGH COURT OF ANDHRA PRADESH

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WRIT PETITION No.7985 of 2023

Nallacheruvu Obulesu

.....Petitioner

AND

State of Andhra Pradesh,
Department of Energy, rep. by its
Principal Secretary, Secretariat
Buildings, Amaravathi and 2
others.

.....Respondent

DATE OF ORDER PRONOUNCED:04.04.2023

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

1. *Whether Reporters of Local newspapers may be allowed to see the Judgments?* Yes/No
2. *Whether the copies of judgment may be marked to Law Reporters/Journals* Yes/No
3. *Whether Your Lordships wish to see the fair copy of the Judgment?* Yes/No

RAVI NATH TILHARI, J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**

+ WRIT PETITION No.7985 OF 2023

% 04.04.2023

Between:

Nallacheruvu Obulesu

....Petitioner

Versus

\$ State of Andhra Pradesh,
Department of Energy, rep. by its
Principal Secretary, Secretariat
Buildings, Amaravathi and 2 others.

.....Respondents

! Counsel for the Petitioner: Sri P. Sai Surya Teja

^ Counsel for the respondents: Government Pleader for Energy for
the 1st respondent

Sri V. R. Reddy Kovvuri, learned
standing counsel for the
respondents 2 and 3.

< Gist :

> Head Note:

? Cases Referred:

¹ (2012) 8 SCC 216

2. (2007) 14 SCC 517

3. (1975) 1 SCC 70

4. (2004) 4 SCC 19

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**WRIT PETITION No.7985 OF 2023****JUDGMENT:-**

Heard Sri P. Sai Surya Teja, learned counsel for the petitioner, the learned Government Pleader for Energy for the 1st respondent and Sri V. R. Reddy Kovvuri, learned standing counsel for the respondents 2 and 3.

2. The petitioner is the sole proprietor of PMR Associates which is an unregistered firm. Claiming to be qualified and willing to apply for tender, issued by the 3rd respondent-the Superintendent Engineer (SE), Kadapa Operation Circle, Andhra Pradesh State Power Distribution Corporation Limited (for short, "APSPDCL"), Kadapa pursuant to the tender invitation vide a specification REV.No.15/2022-23 of Superintending Engineer Operation/Kadapa inviting for tenders for Scanning, Printing and Serving of Spot bills in consumer premises LT Category I, Category II and Category IV (Excluding High Value, Agriculture Services) with GPRS enabled Spot Billing Machines with/without IR/IRDA Port readings wherever IRDA port compatible meters existing indifferent EROs existing in Kadapa District for the period from 01.04.2023 to 31.03.2024, the petitioner has filed this writ petition under Article 226 of the Constitution of India, for a writ of

Mandamus, for declaration that is the condition No.2 and condition No.19 in the tender invitation notice are illegal and arbitrary which deserve to be quashed.

3. Condition No.2 of the tender invitation notice is as follows:

“2. Rates: The rates shall be quoted in the price schedule in the price bid only.

b) Supervision Charges (Supervision Charges) must 0% to 6.5% only (not more than 6.50% on base rate), Minus quoted bids are not acceptable.

4. Condition No.19 of the tender invitation notice is as follows:

“The tenders shall be submitted by taking each Electricity Revenue Office (ERO) separately as a unit. Non-quoting of rates will lead to rejection of tender. The rate shall be quoted as per the specification mentioned in the schedule. The bidders will not be awarded Spot Billing work of more than one(1) Electricity Revenue Office (ERO) anywhere in APSPDCL area.”

5. Learned counsel for the petitioner submitted that the tender Condition No.2 that the participants shall quote supervision charges at 0% minimum and 6.5% maximum with further stipulation that minus quoted bids are not acceptable, would result in excessive discretion to the 3rd respondent to be acted arbitrarily and is not in the interest either of the 3rd respondent or the public at large. It violates the principle of equal treatment.

6. With respect to the tender Condition No.19, learned counsel for the petitioner submitted that by taking each Electricity Revenue Office (ERO) separately as a unit, the bidders will not be awarded a spot work of more than one ERO anywhere in APEPDCL area. The same person/agency cannot be awarded work in multiple ERO(s). Consequently, imposition of such condition is onerous which is violative of principles of fairness and equality in public procurement infringing fundamental right to practice any profession, or to carry on any occupation, trade or business, guaranteed by Article 19(1)(g) of the Constitution of India.

7. Learned counsel for the petitioner submitted that in previous tender invitations there were either no such condition or not in the same terms but this time such conditions are imposed.

8. Learned counsel for the petitioner placed reliance in **Michigan Rubber (India) Limited vs. State of Karnataka and others¹**.

9. Learned standing counsel for APSPDCL, submitted that the tender conditions are not arbitrary and do not violate the principles of equality. Every person willing to participate subject to

¹ (2012) 8 SCC 216

fulfilment of the eligibility criteria, can participate, complying with the conditions which are applicable equally, to all. He further submitted that imposition of the tender conditions fall in the domain of the administrative/executive action of the Authority, in which this Court ordinarily do not interfere in the exercise of writ jurisdiction. The present is not a case for such interference.

10. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

11. The submission of the petitioner's counsel is that in view of condition No.2, every bidder would then quote 0% supervision charges. It may be so, but when the condition permits quotation of supervision charges from 0% to 6.5%, it is for the bidder to decide what percentage of supervision charges, he would Quote. It is open to all the bidders, equally, to quote 0% supervision charges. The supervision charges are to be paid by the respondents to the successful bidder. If a bidder quotes 0% i.e that he would not charge any supervision charges, it could not be submitted by the learned counsel for the petitioner as to how it would be against the public interest or amounts to discrimination.

12. Tender Condition No.19 that the bidders will not be awarded a spot billing work of more than one ERO anywhere in APEPDCL

area, might not have been in the earlier tender invitations, and one bidder might have been eligible for award of the spot billing work of more than one ERO, but on that ground the petitioner cannot insist, the respondent to continue with the same condition. This condition may be for effective and timely spot billing work. The tender condition No.19, on the ground of challenge cannot be termed arbitrary.

13. The submission of the petitioner's counsel that the impugned conditions violate the fundamental right under Article 19(1)(g) of the Constitution of India i.e the right to practice any profession, trade or business, is also unsustainable.

14. It is well settled in law that no person can claim a fundamental right to carry on business or trade with the Government. In **Erusian Equipment and Chemicals vs. State of West Bengal**², the Hon'ble Apex Court held that the State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. In **Michigan Rubber (India) Limited** (supra) the Hon'ble Apex Court held that no person can claim a fundamental right to carry on business with the Government.

² (1975) 1 SCC 70

15. Further, formulation of tender invitation conditions i.e as to what conditions are to be incorporated falls within the administrative domain of the authority. The scope of judicial review of such conditions is limited.

16. In **Directorate of Education and others vs. Educomp Datamatics Ltd and others**³, the Hon'ble Apex Court held that the terms and conditions of the tender are prescribed by the Government bearing in mind the nature of contract and in such matters, the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the Court to say as to whether the conditions prescribed in the tender under consideration were better than the one's prescribed in the earlier tender invitations.

17. It is apt to refer paras 9 to 12 of **Directorate of Education** (supra)

“9. It is well settled now that the courts can scrutinize the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while

³ (2004) 4 SCC 19

inviting bids by issuing tenders has been examined in depth by this Court in [Tata Cellular vs. Union of India](#) [1994 (6) SCC 651]. After examining the entire case law the following principles have been deduced.

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle

of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

10. [In Air India Limited vs. Cochin International Airport Limited](#) [2000 (2) SCC 617], this Court observed:

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

11. This principle was again re-stated by this Court in [Monarch Infrastructure \(P\) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and Others](#) [2000 (5) SCC 287]. It was held that the terms and conditions in the tender are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.”

18. In **Michigan Rubber (India) Limited** (supra), the Hon’ble Apex Court held that in the matter of formulating conditions of a tender document and awarding a contract greater latitude is

required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted.

19. Paragraph 10,11,19 and 23 of **Michigan Rubber (India) Limited** (supra) are reproduced as under:

“10. This Court, in a series of decisions, considered similar conditions incorporated in the tender documents and also the scope and judicial review of administrative actions. The scope and the approach to be adopted in the process of such review have been settled by a long line of decisions of this Court. Since the principle of law is settled and well recognised by now, we may refer to some of the decisions only to recapitulate the relevant tests applicable and approach of this Court in such matters.

11. In *Tata Cellular v. Union of India* [(1994) 6 SCC 651] this Court emphasised the need to find a right balance between administrative discretion to decide the matters on the one hand, and the need to remedy any unfairness on the other, and observed: (SCC pp. 687-88, para 94)

“(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ...

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury principle* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

19. While considering the above submissions, the three-Judge Bench held as under: (*Assn. of Registration Plates case* [(2005) 1 SCC 679] , SCC pp. 698-701, paras 38-40 & 43-44)

“38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and the State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many

indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar [**Ed.**: Reference may be made to the decisions in *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617; *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.*, (1997) 1 SCC 738; *Krishnan Kakkanth v. Govt. of Kerala*, (1997) 9 SCC 495; *Ugar Sugar Works Ltd. v. Delhi Admn.*, (2001) 3 SCC 635; *Sterling Computers Ltd. v. M&N Publications Ltd.*, (1993) 1 SCC 445; *Union of India v. Dinesh Engg. Corpn.*, (2001) 8 SCC 491.] is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for.”

After observing so, this Court dismissed all the writ petitions directly filed in this Court and transferred to this Court from the High Courts.

23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

20. For the aforesaid reasons, only because previously, there were no such tender conditions as 2 and 9 or in the present form that does not deprive the authorities to impose conditions different from the earlier tender invitation conditions.

21. The impugned tender invitation conditions are not open for interference, in the present case, in the exercise of power of judicial review.

22. Thus, considered, there is no force in the writ petition, which is accordingly dismissed.

23. No order as to costs.

As a sequel thereto, miscellaneous petitions, if any pending, shall also stand closed.

RAVI NATH TILHARI,J

Date:04.04.2023

Note:

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THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

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