

(2002) 09 AP CK 0045

In the Andhra Pradesh High Court

Case No : WA No's. 180 and 193 of 2002

Managing Director, Central Warehousing Corporation and
Others

APPELLANT

Vs

Hamali Labour Contract Co-operative Society and Another

RESPONDENT

Date of Decision : 17-09-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226

Citation : (2002) 6 ALD 75

Hon'ble Judges : S.R. Nayak, J;Dubagunta Subrahmanyam, J

Bench : Division Bench

Advocate : B. Prakash Reddy, for Raj Kumar Rudra, in WA No. 180 of 2000 and R. Subhash Reddy, in WA No. 180 of 2000, for the Appellant; B. Prakash Reddy, for Raj Kumar Rudra in WA No. 193 of 2000 and R. Subhash Reddy in WA No. 180 of 2000, for the Respondent

Final Decision : Partly Allowed

Judgement

S.R. Nayak, J.—Both the writ appeals are directed against the same order of the learned single Judge dated 24-1-2002 in WP No. 20060 of 2001. WA No. 180 of 2002 is filed by the Warehousing Corporation and its authorities, whereas WA No. 193 of 2002 is filed by the Hamali Labour Contract Co-operative Society, Medak. 4th respondent in the writ petition. The above writ petition was filed by the Hamali Labour Contract Co-operative Society, Kuchampally, the first respondent in the writ appeals, praying for the following relief.

"Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court will be pleased to issue an order or direction or writ especially writ of mandamus declaring the action of the respondents authorities in not considering the petitioner society Tender Form and awarding the contract in favour of 4th respondent in pursuance of Tender Notification No. CWC/HYD/C.III/ RAYANAPADU/2001 dated 3-3-2001 as illegal, arbitrary and also violative of Articles 14 and 19(1)(g) of the

Constitution of India and consequently set aside the awarded contract to the 4th respondent by directing the respondents 1 to 3 to consider the tender of the petitioner society being the lower and award contract to the petitioner society."

2. The background facts leading to the filing of the case be stated briefly as under: A tender notification dated 3-3-2001 was issued on 3-3-2001 inviting sealed tenders for appointment of Contractors for handling and transport of stocks of food grains, fertilizers and other notified commodities of various depositors at Warehouse, Medak and other places. The said tender notification was also published in daily newspapers both in English and Telugu. In pursuance of the said notification, six Hamali Labour Contract Co-operative Societies and one individual Contractor had submitted their tenders for handling and transport work at Medak, the details of which are furnished below:

Village name of the Hamali Labour Contract Society	Percentage quoted
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- | | |
|-------------------------------------|-----------------------------------|
| 1. Srinivasapeta | above (+) 50% to schedule of rate |
| 2. Chennaipally | above (+) 100% -do- |
| 3. Kuchanpally (petitioner-society) | below (-) 27% -do- |
| 4. Auranjabad | below (-) 9% -do- |
| 5. Shalipet | below (-) 79% -do- |
| 6. Ausulapally | below (-) 25% - do- |
| 7. Medak | above (+) 1% -do- |

The tenders were opened on 23-1-2001 by the Tender Committee in the presence of the tenderers or their representatives. The lowest tender at 79% below Schedule of Rates was submitted by one Hamali Labour Contract Co-operative Society, Shalipet. The second lowest tender was submitted by the petitioner - Society at 27% below Schedule of Rates. The third lowest tender was submitted by Hamali Labour Contract Co-operative Society, Ausulpally at 25% below Schedule of Rates and fourth lowest tender at Schedule of Rates was submitted by Sri Venkateswara Hamali Labour Contract Co-operative Society, Chennaipalli. The 4th respondent - Society, who is the appellant in WA No. 193 of 2002, had submitted the tender at 1% above Schedule of Rates. The other two tenderers had quoted rates at 9% and 50% above Schedule of Rates. The Tender Committee, for evaluating the tenderes, deputed the Senior Assistant Manager (Commercial) at Regional Office of the Corporation at Hyderabad to make joint assessment along with Warehouse Manager, Medak. Both the officers made discrete enquiries as to the financial capacities, experience and area of operation and other factors relating to the tenderers and submitted a report on 28-3-2001. In the report submitted by those two officers, dealing with the petitioner - Society, it is stated that:

M/s. Hamali Labour Contract Co-operative Society, Kulchanpalli, Medak is none

else but our regular H&T Contractor at CW, Medak for a period of 30 months from 18-3-1998.

As per the information gathered, the said firm had satisfactorily carried out the work. Regarding financial status, the Society is not having any amount/fixed assets, except a meagre amount of Rs.2,074/- in State of Hyderabad in Medak Account No.8060 as on 9-10-2000 and since then the account is inoperative. It is informed by the President that the security deposit pertaining to his contract period of March, 1999 is still with Regional Office"

Further, in the same report, dealing with the 4th respondent - Society, it is stated that:

" ... As per the information furnished by the President, the said Society worked with CWC as a regular H&T Contractor for the period from 1980 to December, 1995.

The Society President has submitted a bank account bearing No.2955 dated 26-5-1986 of SBH, Medak, where an amount of Rs.623-57 was in their credit as on 4-2-1997 and thereafter the account is inoperative. Except, this, no other assets are in their credit.

Discrete enquiry reveals that the Society is not financially sound at present and also with its" meagre strength of hamalies of 13 (thirteen) members, they will not be able to cope up with the heavy transactions during heavy procurement season unless they procure private labour. Hence, both the officers are of the opinion that the said Society is riot competent to carry out the work smoothly".

Thereafterwards the Tender Committee, which consisted of four officers, met on 4-4-2001 and considered the tenders. After considering the tenders and the report submitted by the aforementioned two officers dated 28-3-2001, the Tender Committee had accepted the tender submitted by the 4th respondent - Society as against the four lowest tenderers including the petitioner - Society. In terms of the recommendation of the Tender Committee, ultimately the contract was awarded in favour of the 4th respondent and in that regard a communication dated 2-6-2001 was sent to the 4th respondent. Subsequently on 13-7-2001 an agreement was entered into between the parties and it is claimed by the 4th respondent that he started work with effect from 26-8-2001.

3. When the matter stood thus, the writ petition was filed on 25-9-2001 contending that the action of the Corporation in refusing to award contract to the petitioner is illegal and arbitrary and violative of Article 14 of the Constitution of India and that the 4th respondent is not entitled to the award of contract. Opposing the writ petition, a detailed counter-affidavit was filed by the respondents 1 to 3. The 4th respondent, though served with notice, remained unrepresented and did not contest the writ petition. In the counter-affidavit filed by the Warehousing Corporation and its authorities, it is contended that the contract was not awarded to the petitioner - Society and other four lowest tenderers inter

alia on the ground that the area of operation of these Societies do not extend to Medak town, the lack of financial capacities and the rates offered by them are unworkable.

4. The learned single Judge on a consideration of the rival contentions and on perusal of the original records including the report of the two officers dated 28-3-2001 has come to the conclusion that the tender of the writ petitioner was arbitrarily rejected by the Warehousing Corporation and its authorities. The learned single Judge has also come to the conclusion that between the petitioner and the 4th respondent, in terms and conditions of the tender notification, the petitioner is superior in all aspects and, therefore, the contract should have been awarded to it. In the premise of these findings, the learned single Judge has passed the impugned order allowing the writ petition as prayed for. Hence these two writ appeals by the Warehousing Corporation and its authorities as well as by the 4th respondent.

5. These two writ appeals were clubbed at the stage of admission itself and this Court on 14-3-2002 in WA MP Nos.252 and 306 of 2002 granted interim order suspending the order of the learned single Judge. Consequently, it is stated, the 4th respondent - appellant in WA No. 193 of 2002 has been executing the impugned contract awarded to it till date,

6. We have heard Sri G. Ramachandra Rao, learned Standing Counsel for the Warehousing Corporation -appellants in WA No. 180 of 2002, Sri R. Subhash Reddy, learned Counsel for the appellant in WA No. 193 of 2002 and Sri B. Prakash Reddy, learned senior Counsel for the 1st respondent-writ petitioner,

7. M/s. G. Ramachandra Rao and R. Subhash Reddy, at the threshold, highlighted the limited scope of judicial review of the action of the Warehousing Corporation in awarding the impugned contract. According to the learned Counsel, the action of the Corporation in awarding the contract in favour of the 4th respondent - appellant in WA No. 193 of 2002 could not be condemned as arbitrary or unreasonable. The learned Counsel would maintain that the Warehousing Corporation has given convincing and weighty reasons for not awarding the contract to the petitioner -Society and awarding contract to the 4th respondent - Society. The learned Counsel would also maintain that the Warehousing Corporation in its wisdom and keeping in mind the interest of the Corporation and convenience of its customers thought it appropriate to restrict the award of contract only to those Societies who have area of operation within Medak town and that such consideration could not be regarded as something irrelevant for the decision-making. The learned Counsel would also maintain that simply because that term was not incorporated as one of the terms and conditions of tender notification, only on that ground the High Court would not be justified in interfering with the action of the Warehousing Corporation, which is otherwise valid and taken in the public interest, Sri Prakash Reddy, learned senior Counsel, on the other hand, would maintain that it is now well settled by catena of decisions of the Apex Court and this Court that even in the contractual matters

also if the Courts find that the action is tainted by arbitrariness, or in awarding the contract, the State and its authorities have taken into irrelevant considerations, it is always open for this Court under Article 226 of the Constitution of India to step in and correct an administrative action by nullifying the contracts. The learned senior Counsel contended that the grounds on which the Corporation and its authorities have chosen not to consider the tender of the petitioner are de hors the terms and conditions incorporated in the tender notification and such course is impermissible for the management of the Warehousing Corporation. On merits too, the learned senior Counsel would contend that the Tender Committee had completely lost sight of the report of the two officers appointed by itself to conduct a discrete enquiry. The learned senior Counsel would draw our attention to the report of the two officers dated 28-3-2001 wherein they have stated that the discrete enquiry made by them reveals that the 4th respondent - Society is not financially sound and it has meager strength of hamalies of only 13 members and, therefore, they will not be able to cope up with the transactions during heavy procurement season unless they procure private labour. Such substantive material is completely ignored by the Tender Committee. The learned senior Counsel lastly contended that be that as it may, the learned single Judge of this Court after due application of mind and appreciation of the materials on record has recorded the finding that the action of the Warehousing Corporation and its authorities in not awarding the contract to the petitioner is arbitrary and that the finding recorded by the learned single Judge does not call for any interference by the Division Bench. By way of reply, Sri Subhash Reddy, learned Counsel for the appellant in WA No. 193 of 2002, submitted that in the absence of any interim order during the pendency of the writ petition and by virtue of the interim order granted by the Division Bench on 14-3-2002 in WA MP Nos.252 and 366 of 2002, the 4th respondent-appellant has been executing the contract awarded to him and he has already executed the contract for more than 13 months and looking from that angle also, it is not a fit case where the High Court under Article 226 of the Constitution should interfere with the contract at this distance of time.

8. It is true, as contended by the learned Counsel for the appellants, that when a writ petition is filed challenging the award of a contract by the public authority or the State or instrumentality of the State before interfering with such contract, the Court must be satisfied that there is some element of public interest involved in entertaining a writ petition. If the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest is involved in the litigation. It is quite true that a mere difference in the prices offered by the two tenderers may not be decisive in deciding whether any public interest is involved in intervening in such commercial transaction. It is well established that prices may not always be the sole criterion for awarding a contract. The Court before it interferes with the award of the contract should satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out.

9. It is well settled that since the guarantee of equal protection enshrined in Article 14 of the Constitution embraces the entire realm of State action, it would extend not only when an individual is discriminated against in the matter of exercise of his rights or in the matter of imposing liabilities upon him, but also in the matter of granting privileges, for example, granting licences for entering into any business, inviting tenders for entering into a contract relating to Government business, etc., etc. The principle is that there should be no discrimination between one person and another if their position or circumstance is the same. In other words, the State's action must not be arbitrary but must be based on some valid principle which itself must not be irrational or discriminatory. It is quite often said and reiterated by the constitutional Courts that Executive 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 action in violation of them. Every activity of the public authority has a public element in it and must, therefore, be informed with reason and guided by public interest. If the public authorities award contract or otherwise deal with their properties or grant any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest flowing from Article 14 of the Constitution and if it fails to satisfy either test, it would be unconstitutional and invalid. This is what we could generally gather from the decisions cited by Mr. R. Subhash Reddy in *W.B. State Electricity Board v. Patel Engineering Co.* (2001) 2 SCC 451, *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others*, AIR India Ltd. v. *Cochin International Airport Ltd.* 2000 (1) Supp 351, and *Monarch Infrastructure Pvt., Ltd. v. Commissioner, Ulhasnagar, Municipal Corpn.* 2000 (4) Supp 34.

10. Admittedly the tender notification dated 3-3-2001 does not contain any condition or term that the tenderers should have area of operation in Medak. Further, the tender notification does not specify what are the workable rates. These two grounds are pressed into service by the Warehousing Corporation authorities to reject the tender of the petitioner. Therefore, the first question raised by Sri Prakash Reddy, learned senior Counsel, is that it was impermissible for the Warehousing Corporation to reject the tender on a condition which is dehors the conditions stipulated in the tender notification. We are of the considered opinion that the learned senior Counsel was well justified in raising this contention on the basis of the ratio of the judgment in *Dutta Associates Pvt., Ltd.* (supra). In that case, the Commissioner of Excise, Assam had called for tenders for wholesale supply rectified spirit (Grade I) to the Excise Warehouse at Tinsukia for the period 16-5-1994 to 15-5-1996. The tender was floated on 28-5-1993. As many as seventeen tenders were received quoting the rate ranging from Rs.9.20 ps to Rs. 16.55 ps. Out of seventeen tenders received, tenders of M/s Himangsu Enterprises and Shri Jitendra Nath Saikia were found ineligible and, therefore, excluded from consideration. M/s. Dutta Associates Pvt. Ltd., one of the tenderers, was the lowest tenderer. But the Commissioner did not accept its tender. In not accepting the lowest tender, according to the Commissioner, the

Commissioner and the Government entered upon an exercise of determining, what they call "viability range" and in this exercise, they determined the viability range between Rs.14.72 to Rs.15.71 per LPL. When this method adopted by the Commissioner was assailed and the question whether such method could be adopted de hors the terms and conditions of the tender notification incorporated in the tender notification arose for decision, the Supreme Court held thus:

".....After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant's tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the "viability range" nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/ Government would first determine the "viability range" and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender. They did nothing of that sort. Secondly, we have not been able to understand the very concept of "viability range" though Shri Kapil Sibal, learned Counsel for the appellant, and the learned Counsel for the State of Assam tried to explain it to us. The learned Counsel stated that because of the de-control of molasses, the price of rectified spirit fluctuates from time to time in the market and that therefore, the viability range was determined keeping in view (1) distillery cost price; (2) export pass fees; (3) Central sales tax; (4) transportation charges; (5) transit wastage @ 1%; and (6) warehouse operational wastage @ 1 1/2% - vide the counter-affidavit filed by the Secretary to Excise Department, Government of Assam pursuant to this Court's orders Shri Sibal further explained that because of the possibility of the fluctuation, the tender notice contains clause (16) which reserves to the Government the power to reduce or increase the contract rate depending upon the escalation or deceleration of the market price in the exporting States. We are still not able to understand. Clause (16) deals with post-contract situation, i.e., the situation during the currency of the contract and not with a situation at the inception of the contract. The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at Rs. 11.14 per LPL or so, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher viability range. Not only the rate obtaining during the period when the tenders were called was Rs. 11.05 per LPL, the more significant feature is that during the period of about more than two years pending the writ petition and writ appeal, the appellant has been supplying rectified spirit @ Rs. 9.20 per LPL. If it was not possible for anyone to supply rectified spirit at a rate lower than Rs. 14.72 (the lower figure of the viability range), how could the appellant has been supplying the same at such a low rate as Rs. 9.20 for such a long period. It may

be relevant to note at this stage the circumstances in which the appellant volunteered to supply at the said rate. Indo Merchantiles, the respondent herein, filed the writ petition and asked for an interim order. The learned single Judge directed (vide Order dated 2-6-1994) that while Dutta Associates (appellant herein) shall not be given the contract, he "shall be allowed to execute the contract at the lowest quoted rate which is stated to be Rs.9.20 by the writ petitioner. Respondent 3 (Dutta Associates) states that the lowest quoted rate is Rs.11.14. If the lowest quoted rate is Rs.9.20, it is that rate at which the contract shall be given to Respondent 3". It is pursuant to the said order that the appellant - Dutta Associates has been supplying rectified spirit @ Rs.9.20 per LPL since June, 1994 till October, 1996. The said order did not compel the appellant (Respondent 3 in the writ petition) to supply at the rate of Rs.9.20 ps. If that rate was to be feasible or economic, he could well have said, "sorry". He did not say so but agreed to and has been supplying at that rate till October, 1996. It is equally significant to note that pursuant to the interim orders of this Court (which directed the Government to implement the orders of the Guwahati High Court with respect to interim arrangement) negotiations were held with both the appellant and the first respondent herein; both offered to supply at Rs.9.20 ps. The Commissioner, of course, chose the first respondent, Indo Merchantiles, over the appellant, for reason given by him in his order, dated 14-10-1996. The rate, however, remains Rs.9.20 ps and the appellant's Counsel has been making a grievance of the Commissioner not accepting the appellant's offer. All these facts make the so-called "viability range" and the very concept of "viability range" looks rather ridiculous - and we are not very far from the end of the three year period for which the tenders were called for. Neither the interlocutory order of the learned single Judge dated 2-6-1994 aforesaid nor does the order of the Commissioner dated 14-10-1996 passed pursuant to the interim orders of this Court provide for any fluctuation in the rate of supply depending upon the fluctuation in the market rate in the exporting States, as provided by clause (16) of the tender conditions, which too appears rather unusual. The order of the learned single Judge aforesaid does not also say that the rate specified therein is tentative and that it shall be subject to revision at the final hearing of the writ petition. As a matter of fact, no such revision was made either by the learned single Judge or by the Division Bench. It is in these circumstances that, we said, we have not been able to understand or appreciate the concept of "viability range", its necessity and/or its real purpose. Thirdly, the Division Bench states repeatedly in its judgment that having determined the "viability range", the Government called upon only the appellant -Dutta Associates (third respondent in the writ petition/writ appeal) to make a counteroffer to come within the "viability range" and that his revised offer at the higher limit of the "viability range" (Rs. 15.71) was accepted. The Division Bench has stressed that no such opportunity to make a counteroffer was given to any other tenderer including the first respondent. As the Division Bench has rightly pointed out, this is equally a vitiating factor.

It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam accepting the tender of Dutta Associates (appellant herein) is unfair and opposed to the norms which the Government should follow in such matters, viz., openness, transparency and fair dealing. The grounds 1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal".

11. The situation obtaining in the present case also substantially similar to the one decided by the Supreme Court. Although in the tender notification no stipulations relating to area of operation of the Societies and workable rates were incorporated, after opening up of the tenders, a strange procedure was adopted by the Warehousing Corporation authorities and its Tender Committee, that too, behind the back of the tenderers including the petitioner. Secondly, in our considered opinion, the finding recorded by the learned single Judge that between the petitioner and the 4th respondent, the petitioner cannot be regarded as inferior tenderer in any of the respects which are germane to the decision-making is not well-founded. It is very pertinent to notice that two officers deputed by the Tender Committee itself, after conducting a discrete enquiry, have recorded the specific finding in their report that the 4th respondent - Society is not financially sound at present and it has meager strength of members of only 13 members and with those 13 members, they will not be able to cope up with the transactions during heavy procurement season. Secondly, although we tend to agree with the submission of Sri R. Subhash Reddy, learned Counsel for the 4th respondent, that the money of Rs. 2,074.00 or an amount of Rs.623.57 lying in the bank accounts of the petitioner - Society and the 4th respondent - Society may not be of any significance and relevance in the decision-making, undoubtedly the findings recorded by the officers regarding the financial soundness of the 4th respondent - Society and its incapacity to have necessary strength of members, are undoubtedly very much relevant for consideration in the decision making and the Tender Committee has blindly brushed aside that report.

12. Despite the above finding of ours, it would not be justified in awarding the contract straightaway to the writ petitioner. The ends of justice would be met by setting aside the contract awarded to the 4th respondent and directing the Warehousing Corporation and its authorities to take de novo steps to award the contract in accordance with law and in the light of this judgment. It is permissible for the Warehousing Corporation and its authorities to incorporate new terms and conditions in the tender notification to be issued calling for tenders for award of the contract in addition or modification to the earlier terms and conditions.

13. In the result, we allow the writ appeals in part and set aside the order of the learned single Judge impugned in the writ appeals and direct the Warehousing Corporation and its authorities to take de novo steps to call for tenders for appointment of Contractors for handling and transport of stocks of food grains,

fertilizers and other notified commodities of various depositors at Warehouse, Medak and other places by issuing fresh tender notification. It is open for the Warehousing Corporation and its authorities to modify, delete or add the terms and conditions of the notification to meet their needs and exigencies of service. No order as to costs.