

(2017) 12 MAN CK 0007
In the Manipur High Court
Case No : 510 of 2017

M/s Zimomi Traders

APPELLANT

Vs

Food Corporation of India & Ors.

RESPONDENT

Date of Decision : 08-12-2017

Acts Referred:

Constitution of India, Article 226, Article 19 - Power of High Courts to Issue certain writs - Protection of certain rights regarding freedom of speech, etc
Food Corporation of India Act, 1964, Section 3, Section 35, Section 34 - Establishment of Food Corporation of India - Annual report on the working of Food Corporations - Accounts and audit

Citation : (2017) 12 MAN CK 0007

Hon'ble Judges : N.Kotiswar Singh

Bench : Single Bench

Advocate : H.S. Paonam, S. Gunabanta, A. Romenkumar, Kh. Samarjit

Judgement

1. Heard Mr. H.S.Paonam, Learned Senior Counsel assisted by Mr. S. Gunabanta, Learned Counsel for the petitioner; heard also Mr. A. Romenkumar, learned counsel for the FCI as well as Mr. Kh. Samarjit, learned counsel for respondent No. 5.

2. The present petition has been filed seeking quashing and setting aside of the NIT dated 28-06-2017 for appointment of Road Transport Contractor for transportation of rice from Salchapra, Assam to FSD Sangaiprou and FSD Koirengei (Hired), Imphal and for a direction to the respondent FCI for issuing a fresh advertisement in terms of the letter dated 15-04-2016 which highlighted the necessity for reducing cost in transportation.

3. The main grievance raised in this petition is that the aforesaid NIT dated 28-06-2017 was issued by the FCI, contrary to its own earlier decision that upon commission of the Railhead at Jiribam, which is nearer than any other railhead, the cost of transportation would be cheaper from Jiribam to Sangaiprou and

Koirengei respectively, and as such floating the tender for transportation of rice from a place beyond Jiribam Railhead would entail more expenses. Further, it has been also alleged that the said advertisement was issued to favour certain group with vested interest and which would affect the fundamental right of the petitioner to engage in trade and commerce as guaranteed under the Constitution.

4. It is the case of the petitioner that prior to filing of this writ petition, there was an e-tender issued by the FCI for appointment of Road Transport Contractor for transportation of rice from the Railhead Bihara, Assam to FSD Sangaiprou, Manipur on 03-08-2015, in which the petitioner had participated and was the lowest bidder. However, as the FCI authorities were proceeding to award the contract in favour of someone else who did not fulfill the eligibility criteria as he had submitted false experience certificate, the petitioner was compelled to approach this Court by filing a writ petition, being W.P. (C) No. 850 of 2015 challenging the said tender process, wherein, this Court was pleased to pass an interim order for not issuing the work order in respect of the aforesaid NIT dated 03-08-2015.

5. The petitioner states that during the pendency of the said petition, the FCI authority filed an affidavit before this Court apprising the Court of the decision of the FCI for cancellation of the said NIT dated 03-08-2015, on the ground, inter-alia, that consequent upon commissioning of Jiribam Railhead which is nearer than Bihara, the cost of transportation of rice from Jiribam to Sangaiprou will be considerably less than by transporting from Bihara to Sangaiprou due to shorter distance. Accordingly, the necessity of appointment of contractors from Bihara to Sangaiprou and Koirengei has diminished manifold and accordingly, the aforesaid NIT dated 03-08-2015 was cancelled.

6. The petitioner further states that the aforesaid stand of the FCI authorities is also clearly reflected in the letter dated 15-04-2016 written by the Assistant General Manager to the counsel for the FCI in which it has been mentioned, inter-alia, as follows:- "The cost of transportation at contract rate/quoted rate for Jiribam to Sangaiprou and Koirengei will be considerably cheaper than that transported from Bihara due to shorter distance (approx. 90 Km shorter). Therefore, the necessity of appointment of contract from RH Bihara to FSD Sangaiprou & FSD Koirengei has diminished manifold and it will be in the Corporation interest to scrap the said e-tender dated 03-08-2015 under litigation. As per MTF, the tender can be scrapped at anytime without assigning any reason. However, due to the Hon'ble Court embargo restraining FCI not to process vide order dated 09-10-2015 and 16-10-2015, the scrapping of the said tender dated 03-08-2015 may require leave from the Hon'ble High Court."

7. The petitioner states that the aforesaid petition, being W.P. (C) No. 850 of 2015 was disposed of as the NIT in question was cancelled by the FCI. It was closed as infructuous by the Court with liberty to the petitioner to challenge the cancellation of the tender and the issues raised in the writ petition were kept

open.

8. The petitioner contends that, however, to his surprise a fresh tender notice was issued on 28.06.2017 which is challenged herein, for appointment of a transport contractor for transportation of rice from Railhead Salchapra, Assam to FSD Sangaiprou and FSD Koirengei (hired) on 28-06-2016, which according to the petitioner is contrary to their own decision contained in the letter dated 15-04-2016 referred to above.

9. It has been contended by the petitioner that the distance between Salchapra, Assam and Jiribam, Manipur is 66 Km. The earlier tender notice dated 28-06-2017 involved transportation from Bihara, Assam and the distance between Bihara, Assam and Jiribam, Manipur is 76 Km. The earlier tender for transportation of rice from Bihara, Assam was scrapped on the ground that the cost will be lesser by transporting rice from Jiribam after commissioning of Jiribam Railhead. The petitioner contends that the same logic would apply in the present case also, as transportation cost from Salchapra, Assam will be also higher. According to the petitioner, after commission of the Jiribam Railhead, there is no need to transport rice from Salchapra, Assam as it can be done from Jiribam now. It has been also alleged that the FSD godown at Koirengei and Sangaiprou are already full and there is no place for keeping food-grains and as such issuing this tender for transportation of rice could cause unnecessary damage to the food-grains for lack of adequate storage space.

10. In order to substantiate the claim that issuance of this impugned tender would involve more expenditure and that it is contrary to FCI's own earlier decision to prevent such loss as referred to, the petitioner has referred to the report of the Comptroller and Auditor General of India in which it has been stated that continuation of transportation from Assam region including RH Salchapra after completion of RH Jiribam under Manipur has incurred avoidable expenditure of Rs. 9.94 crores and accordingly CAG in its report has recommended for inviting tender from Railhead at Jiribam to avoid incurring undue expenses.

11. Mr. HS. Paonam, learned senior counsel for the petitioner submits that by issuing the second tender for transportation of rice from Salchapra Railhead, Assam to FSD Sangaiprou and FSD Koirengei, Manipur, it will incur more expenditure. Accordingly, the same is against public interest. He submits that the requirement of the petitioner to engage in trade has been adversely affected by scrapping the earlier tender process, in which the petitioner was found the lowest bidder and floating this tender. He therefore, submits that, the tender process warrants interference by the Court. In this regard, the learned senior counsel has relied upon the decision in Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517. The Hon'ble Supreme Court in the aforesaid case of Jagdish Mandal (supra) held in para No. 22 as follows: "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the

power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interference, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; Or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

12. Mr. HS. Paonam, learned senior counsel has further relied on the decision in Hari Bansh Lal Vs. Sahodar Prasad Mahto and Ors., (2010) 9 SCC 655 in submitting that the State authorities cannot take contrary decisions. According to the learned senior counsel, if the earlier tender process was cancelled on the ground that it would entail extra expenditure, the same logic would also apply in the present tender process but unfortunately the same has been placed in the backburner on the plea of contingency. He submits that such a flip flop stand of the FCI authorities is impermissible as there is no change in the circumstance, by referring to paras No. 39, 40 of the judgment in Hari Bansh Lal (supra) which are reproduced as follows : "39. Though the appellant himself has filed a detailed counter affidavit denying all the allegations made by the writ petition and highlighted his qualifications and achievements in the State Government, more particularly, in the Electricity Board, there is no need to traverse the same in the

light of the specific stand as well as encomium by the State Government and the Electricity Board. In view of the same, we hold that it is impermissible for the State to take a different view in the absence of any change of circumstance. 40. In fact, in spite of several queries from the Bench, Mr. K.K. Rai, who represented the State was unable to apprise this Court for changing their stand than that of the one asserted before the High Court. He is not in a position to put forth any compelling circumstances to take such a stand except change of Government and persons in power. Accordingly, we reject this present stand which is contrary to their assertion before the High Court. For all these reasons, the impugned order of the High Court is liable to be set aside."

13. Mr. HS. Paonam, learned senior counsel submits that the finding in the CAG report on the basis of which the earlier tender process was cancelled cannot be ignored as it is an important constitutional authority tasked to audit the financial exercises by the State, for which he has relied the decision of *State of Kerala Vs. B. Surendra Das*, (2015) 12 SCC 101.

14. The learned senior counsel has also relied on the decision in *Reliance Energy Ltd. Vs. Maharashtra State Development Corporation Ltd.*, (2007) 8 SCC 1 and submits that "Level playing field" has to be provided to all the bidders which had not been afforded to the petitioner and State Government cannot consider those who are not eligible for award of any contract.

15. Lastly, it has been contended that the aforesaid impugned tender dated 28-06-2017 has been issued to favour certain contractor. Accordingly, it has been submitted that the impugned NIT dated 28-06- 2016 is liable to be set aside.

16. The FCI authorities have filed their affidavit-inopposition/ additional affidavit denying the allegations. The respondent No. 5 have also impleaded themselves in this writ petition contesting the writ petition on the ground that they have participated in the impugned tender and their rights may be adversely affected if any order is passed in this petition cancelling the tender as they had submitted their bid. The respondent No. 5 has also disputed the allegation made by the petitioner that the impugned tender has been issued to grant undue favour to some interested person.

17. It has been submitted by the Mr. A. Romenkumar, learned counsel for the FCI that the present petition is not maintainable, as the petition has been filed by one Kh. Raghu Meitei claiming to be the authorized agent of said firm, M/S Zimomi Traders, though he is not the authorised agent. He asserts that in fact, the authorised agent of the said firm is one Thangjam Romeo, which is evident from the letter dated 10- 08-17 (Annexure-Z1 in MC W.P. (C). No. 210 of 2017) written by the Manager (Cont) FCI, addressed to one T. Jibankumar Singh in which the information was furnished on the basis of an RTI application. In the said letter dated 28.07.2016 which was written by S. PhukutoZimo on behalf of M/s Zimomi Traders, to the Area Manager, FCI, it has been stated that S. PhukutoZimo, proprietor of M/s Zimomi Traders, has appointed Thangjam

Romeo, a resident of Nagamapalkangjableirak as his attorney supported by Notary. Therefore, it is very clear that the proprietor of the firm himself had written to FCI authorities that Thangjam Romeo is the authorized agent and as such, this petition filed by an unauthorized person is not maintainable, and liable to be dismissed. Mr. A. Romenkumar, learned counsel for the FCI has submitted that as provided under clause 3 of the Model Trade Form which has been executed by the firm, only one person can be appointed as an agent. Therefore, the said M/s Zimomi Traders having appointed Thangjam Romeo, it could not have appointed any person other than Thangjam Romeo to be the authorized agent, including present Kh. Raghu Meitei.

18. Mr. A. Romenkumar, learned counsel further submits that the letter dated 15-04-2016, written by the Assistant General Manager (Cont) to the earlier Central Government Counsel and an empanelled lawyer of the FCI is the document on which much reliance has been placed by the petitioner from which the petitioner derives the ground for cancellation of the earlier tender from RH Bihara to FSD Sangaipurou and FSD Koirengei, which was the subject matter in W.P. (C) No. 850 of 2015. In the said letter, it has been mentioned that the cost of transportation at contract rate/quoted rate from Jiribam to Sangaiparou and Koirengei will be considerably cheaper than from Bihara, Assam due to shorter distance. It was also stated in the said letter that, therefore, the necessity of the appointment of the contractor from RH Bihara to FSD Sangaiparou and FSD Koirengei has diminished manifold and it will be in the Corporation's interest to scrap the said e-tender dated 03.08.2015. In other words, the reason for scraping the said e-tender which was challenged in said writ petition, W.P. (C) No. 850 of 2015, was to avoid any financial loss/to avoid incurring any additional cost.

19. It has been the submission of the petitioner that the reason assigned for scraping the e-tender as mentioned the said letter is the very foundation for the filing this writ petition. It is the case of the petitioner that in spite of scraping the earlier e-tender to avoid avoidable expenses, the FCI authority again issued the e-tender contrary to their own earlier decision which will now entail unnecessary expenditure, which is against public interest. As regards this contention, it has been submitted by Mr. A. Romenkumar, learned counsel for the FCI, that the said communication cannot be the basis for challenge of the e-tender in the present case, as it is merely an intra-departmental communication. He submits that even otherwise also, it cannot be acted upon unless it takes the form of an executive order. He submits that such intra or inter departmental communication cannot confer any right to anybody and be the basis for the challenge or any action in the Court of law under Article 226 of the Constitution of India.

20. Mr. A. Romenkumar, learned counsel further has expressed surprise at the fact that the said intra/inter departmental communication found place in the hand of the petitioner as the petitioner was not the recipient of the communication, which was supposed to be only in the custody of the FCI and its

authorized person. It has been further submitted by the Mr. A. Romenkumar, learned counsel for FCI that the aforesaid communication cannot provide the basis for any action in the court of law. In support of his contention that the aforesaid letter dated 15-04-2016 on which much reliance has been placed by the petitioner to file the present writ petition, cannot confer any right to file this petition, Mr. A. Romenkumar has referred to the decision in *S.B Patwardhan and Another Vs. State of Maharashtra and Others* reported in (1977) 3 SCC 399, in which the Hon"ble Supreme Court has held in para 49 as follows- "49. The Circulars dated January 12, 1961, March 15, 1963 and October 18, 1968 which the promotees want to be enforced are issued by the Finance Department and being in the nature of inter-departmental communications, they cannot confer any right on the promotees. The Bombay High Court was therefore right in not accepting this part of the promotees' case. Mr. A. Romenkumar, learned counsel for the FCI has also referred to the decision in *Ritesh Tewari and Another Vs. State of Uttar Pradesh and Others* reported in (2010) 10 SCC 677 in which the Hon"ble Supreme Court held in Para 12 as follows -

"12. We fail to understand as to how the contents of such a communication between two officers of the Department of the Government can be the subject matter of the writ petition. The appellant could not have approached the High Court for the aforesaid relief sought by them. The writ petition was certainly not maintainable."

21. It has been also submitted that an internal communication, unless it is issued in the form of a formal order, cannot be enforced. In this regard, Mr. A. Romenkumar, learned counsel has referred to decision of the Hon"ble Supreme Court in *Union of India and Another Vs. Kartick Chandra Mondal and another* reported in (2010) 2 SCC 422 in which the Hon"ble Supreme Court held in para 17 & 18 as follows- "17. The next issue that we are required to consider pertains to internal communications which are relied upon by the respondents and which were also referred to by the Tribunal as well as by the High Court. Ex facie, the aforesaid communications were exchanged between the officers at the level of board hierarchy only.

18. An order would be deemed to be a government order as and when it is issued and publicized. Internal communication while processing a matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law. In this regard, reliance may be placed on the decision of this Court in *State of Bihar V. Kripalu Shankar* wherein this Court observed in paras 16 and 17 as follows: (SCC pp. 44-45)

16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation. The notings in a notes file do not have behind them the sanction of law as an effective order. It is only an expression of a feeling by the officer concerned on the subject under review. To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression of a view in

notes file cannot be the sole basis for act in contempt. Business of a State is not done by a single officer. It involves a complicated process. In a democratic set-up, it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in notes file at different levels by officers concerned will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not being it within the vice of clause (b) of Section 2 of the Contempt of Court Act, 1971, which defines civil contempt. Expression of a view is only a part of the thinking process proceeding government action.

17. In *Bachhittar Singh Vs. State of Punjab* a constitution Bench of this Court had to consider the effect of an order passed by a Minister on a file, which order was not communicated. This Court, relying upon Article 166 (1) of the Constitution, held that the order of the Revenue Minister, PEPSU could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh as required by the said article and was then communicated to the party concerned. This is how this Court dealt with the effect of the noting by a Minister on the file."

22. Mr. A. Romenkumar, learned counsel submits that the petitioner cannot be said to be an aggrieved person in this case as none of his rights has been adversely affected, as he has not taken part in the tender process. It cannot be said that any of his legal or fundamental rights has been infringed, which can provide a cause of action to file the writ petition. Only an aggrieved person whose right has been adversely affected can move the Court for redressal of his grievances. As to who can be an aggrieved person and can move a Court of law has been defined by the Hon"ble Supreme Court in the case of *Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra* and Ors reported in (2013) 4 SCC 465 in which the Hon"ble Supreme Court held in Para 9 & 10 thereof as follows: "9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the authorities/court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order, etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can, of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provide that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to enforce a legal right. In fact,

the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infringement of such right and approaches the Court for relief as regards the same. vide *State of Orissa v. Madam Gopal Rungta*, *Saghir Ahmad v. State of U.P.*, *Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B.*, *Rajendra Singh v. State of M.P.* and *Tamilnad Mercantile Bank Shareholders Welfare Assn (2) Vs. S.C. Sekar.*)

10. A "legal right" means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved, must therefore, necessarily be one whose right or interest has been adversely affected or jeopardized. (vide *Shanti Kumar R. Canji v. Home Insurance Co. of New York and State of Rajasthan v. Union of India.*)"

23. It has been further contended by Mr. A. Romenkumar, learned counsel that the FCI authority had to resort to e-tender again in spite of scrapping the earlier process in order to meet the present urgent requirement of food grains in the State arising out of numerous directions of the Hon'ble Supreme Court and for proper implementation of Mid Day Meal Scheme in the State. He submits that certain directions were issued by Hon'ble Supreme Court in the following cases, *PUCL (PDS Matters) Vs. Union of India*, (2013) 2 SCC 688, (2011) 14 SCC 331 which would require uninterrupted supply and abundant availability of rice in the State. It has been submitted that in view of the legal obligation of the FCI to abide by the direction of the Hon'ble Supreme Court, necessary prompt action had to be taken up by the FCI for making rice continuously available in the State. Accordingly, the aforesaid tender process order was issued. He also submits that it had not been done in a routine manner, but as a part of a contingency plan and for implementing decisions of the Supreme Court, which is in addition to the normal method of supply already adopted by FCI from Jiribam Railhead. Thus, the aforesaid tender was floated as part of the policy decision of the FCI. He submits that it is now well settled that policy decision is not to be normally interfered by the Court as held by the Hon'ble Supreme Court in *Centre for Public Interest Litigation v. Union of India*: (2016) 6 SCC 408, *JSW Infrastructure Ltd. v. Kakinada Seaports Ltd*: (2017) 4 SCC 170, etc.

24. Mr. A. Romenkumar, learned counsel for the FCI submits that the Food Corporation of India is a statutory body of the Government constituted under Section 3 of the Food Corporations Act, 1964. It has been provided under Section 35 of the said Act that at the end of each year, an annual report on the working and affairs of the Corporation is to be submitted to the Central Government. The said report is to be furnished along with the Audit report received under Section 34 of the aforesaid Act. However, the report of the FCI as well as the report prepared by the Comptroller and Auditor General of India are to be placed before both the Houses of the Parliament. He accordingly, submits that only when both

Houses of the Parliament approve such a report of the CAG and accepted by the Ministry, it can be said to have attained finality and would become binding. It has been submitted that in the present case, much reliance has been placed on the CAG report by the petitioner, stating the FCI would lose crores of rupees in case transportation of food grain from Salchapraor Bihar as the case may be, is made by trucks instead of getting from the Railhead at Jiribam. In other words, the claim of the petitioner is based on the CAG report which indicates that it would be costlier to transport rice by road from Salchapraor Bihar rather than transporting from the Rail Head at Jiribam. However, Mr. A. Romenkumar, learned counsel for the FCI submits that the said report cannot be acted upon for the purpose of issuing a writ of Mandamus or Certiorari for the reason that the said report is yet to be placed before the Parliament and yet to be approved by the Parliament, and only when the same is approved by the Parliament, it would have a binding effect. In this regard, Mr. A. Romenkumar, learned counsel has referred to the decision of the Hon'ble Supreme Court in the case of *State of M.P. and Ors v. Sanjay Nagayach and Ors*: (2013) 7 SCC 25 in which the Hon'ble Supreme Court had the occasion to deal with the status of CAG report. It has been stated that the CAG report is merely a preliminary report on the affairs of the State which is subject to scrutiny by the Parliament and Government, and the Government and Parliament can always offer their views on the report of CAG which may not necessarily be the same as that of CAG. Thus, the report of the CAG is subject to acceptance by the Parliament and the Government. Though, the report of the CAG commands respect as the same is prepared by a constitutional functionary, yet there is no gainsaying that it is still subject to examination and approval by the Parliament and Government. It has been submitted that in the present case, no such approval or acceptance has been conveyed by Parliament or the Ministry of Consumers Affairs, Government of India and hence, such a CAG report which is yet to be considered and approved by the appropriate authority cannot be the basis for filing this petition.

25. It has been further submitted that the significance of the CAG and of the view of the Government in this regard has been also dealt by the Hon'ble Supreme Court in the case of *Pathan Mohammed Suleman Rehmatkhan Vs. State of Gujarat and Others*: (2014) 4 SCC 156 in which the Hon'ble Supreme Court held in Para 10 as follows. "The CAG is a key figure in the system of parliamentary control of the finance and is empowered to delve into the economy, efficiency and effectiveness with which the departmental authorities or other bodies had used their resources in discharging their functions. The CAG is also the final audit authority and is a part of the machinery through which the legislature enforces the regulatory and economy in the administration of public finance, as has been rightly pointed out by the High Court. But we cannot lose sight of the fact that it is the Government which administers and runs the State, which is accountable to the people. The State's welfare, progress, requirements and needs of the people are better answered by the State, also as to how the resources are to be utilized for achieving various objectives. If every decision

taken by the State is tested by a microscopic and a suspicious eye, the administration will come to a standstill and the decision-makers will lose all their initiative and enthusiasm. At hindsight, it is easy to comment upon or criticize the action of the decision-maker. Sometimes, decisions taken by the State or its administrative authorities may go wrong and sometimes they may achieve the desired result. Criticisms are always welcome in a parliamentary democracy, but a decision taken in good faith, with good intentions, without any extraneous considerations, cannot be belittled, even if that decision was ultimately proved to be wrong."

26. It has been submitted by Mr. A. Romenkumar, learned counsel that the FCI being a statutory corporation constituted under the FCI Act 1964, would be entitled to take such policy decision in public interest and may not be necessarily dictated by the findings of the CAG report which is yet to attain finality. In the present case, as mentioned above, the FCI took the policy decision to float the e-tender again for the purpose of meeting the present requirement of the State and as such no fault could be found with floating of the e-tender.

27. Mr. A. Romenkumar, learned counsel submits that it is the case of the petitioner as mentioned in Para 3 of the writ petition that by proposing to allow other contractors to transport rice from Salchapra to Imphal, it would adversely affect the existing right of the petitioner to transport rice from Jiribam to Sangaipurou and Koirengai. As regards this, Mr. Romenkumar, learned counsel submits that the fundamental right to engage in the trade and commerce by the petitioner as guaranteed under Article 19(1)(g) of the Constitution is not absolute, and it is subject to reasonable restrictions and if any other person also exercises the same right, the same cannot be said to be bad unless specifically prohibited under the relevant Act or Rules. If the other person also fulfils legal requirements for carrying out his trade and commerce, his right cannot be also curtailed. In the present case, there is no such rule and regulation which prohibits carrying on the trade of transportation of rice by any other person other than the petitioner. In support of his contention, Mr. A. Romenkumar, learned counsel for the FCI has relied on decision of the Hon"ble Supreme Court in the case of Nagar Rice & Flour Mills and Others Vs. N. TeekappaGowda & Bros. and Others: (1970) 1 SCC 575, in which the Hon"ble Supreme Court held in Para 9 as follows: "9. Section 8 (3) (c) is merely regulatory, if it is not complied with the appellants may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business, because of the default, nor can the rice mill of the appellants be regarded as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under article 19(6) but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely. The appellants complied with the statutory requirements for carrying on rice milling operations in the building on the new site. Even assuming that no previous

permission was obtained, the respondents would have no locus standi for challenging the grant of the permission, because no right vested in the respondents was infringed."

Therefore, it cannot be said that the petitioner has a monopoly right of engaging in transportation of rice from Jiribam to Imphal, and also cannot have any grievance if any other authorized person is allowed to carry on business of transportation of rice from Salchapra to Imphal as it does not infringe upon the right of the petitioner to carry on his business. On the other hand, in fact, it is the petitioner who has been appointed by the FCI authorities for transportation of rice from Jiribam and as such, he is very much already engaged in the transportation of rice. Hence, any act of discrimination against the petitioner does not arise.

28. Heard also Mr. Kh. Samarjit, learned counsel for the newly impleaded Respondent No. 5, who fully endorses the submission already advanced by Mr. A. Romenkumar, learned counsel for the FCI. However, he submits that he would like to bring to the notice of the Court, a very important aspect. Mr. Kh. Samarjit, learned counsel submits that it was the allegation of the petitioner that the respondent No. 5 is hand in glove with the FCI and the Respondent No. 5 managed to implead himself as respondent in the present case. He submits that Respondent No. 5 has been engaging in the transportation of rice for a very long period of time and also he was the only Agency which had been transporting rice at the height of the prolonged economic blockade on the National Highways to ensure proper and timely supply of food grains to the State of Manipur, by drawing attention of this Court to the document annexed by the FCI in their reply affidavit filed on 08.11.2017(Annexure Z/4) which clearly indicates the quantity of rice being transported by the Respondent No. 5 during the period of economic blockade when other transporters were not willing to transport. Mr. Kh. Samarjit, therefore, submits that it is very unfortunate that the Respondent No. 5 who has been engaged in the transport of rice even during dire circumstances has been portrayed in a very bad light by the petitioner.

29. From the above, it is seen that the grounds for challenging the tender by the petitioner is fivefold. Firstly, according to the petitioner, issuance of tender from Salchapra to FSD Sangaiprou and Koirengei is virtually a repetition of the earlier tender for transportation of rice from Bihar to Sangaiprou which had been scrapped by the FCI authorities on the ground that transportation of rice from a place beyond the Jiribam Railhead would be costly. Thus, the second tender is contrary to the earlier decision of the FCI to avoid unnecessary expenditure. The earlier tender which was floated for transportation of rice from Bihar, Assam to Sangaiprou was cancelled as Bihar was beyond the Rail Head at Jiribam. Therefore, if the earlier tender was cancelled on the ground that such transportation would be costlier, there is no reason why the FCI should float this tender again for transportation of rice from a place which is beyond the Jiribam Rail Head i.e. from Salchapra, contrary to the earlier decision.

Secondly, it has been contended that in the first tender which was scrapped by the FCI authorities, the petitioner was found to be lowest. However, as they were proceeding to award the tender to some other contractor who did not fulfil the essential requirements, that action was challenged by the petitioner by filing a writ petition, being WP(C) No. 850 of 2015. Subsequently, during the pendency of the said writ petition, the FCI authorities cancelled the said tender purportedly on the ground that such contract for transportation of rice from a place beyond the Railhead at Jiribam would be costlier as also observed in the CAG report. Therefore, the scrapping of the first tender was merely to deprive the petitioner of his legitimate right as the lowest bidder of the aforesaid work, if similar tender has to be floated again, as has been done now.

Thirdly, if the FCI authorities had taken the decision to scrap the earlier tender on the ground that such a contract work would involve higher costs, after opening of the Jiribam Rail Head, the same logic should apply in the present case also as the tender floated for transportation of rice from Salchapra to Sangaiprou and Koirengei would also involve higher costs as it is beyond the Jiribam Rail Head.

Fourthly, it has been also contended by the petitioner that by scrapping the earlier tender process and floating a new tender with identical provisions and contrary to the recommendation of the CAG report, it has not only acted arbitrarily but has also deprived the right of the petitioner to profess and practice his trade.

Fifthly, it has been alleged by the petitioner that the impugned tender has been floated to favour certain other person/firm and hence, it is vitiated with malafide.

30. Before this Court takes up the aforesaid grounds raised by the petitioner in challenging tender process, this Court would like to deal with the objection raised by the respondents which is fundamental nature that since the petitioner has not taken part in the tender process, he has no locus standi to file this petition and challenge the tender process. It is not in dispute that the petitioner did not take part in the second tender process which is challenged in the petition. It is now well settled that a person can invoke the jurisdiction of the Court only when his right is adversely affected or apprehended to be adversely affected. Law is now well settled that only when the right of a person is affected or is apprehended to be affected, he would be entitled to move the Court to invoke its jurisdiction to protect his right. If the right of the person is not affected or is not going to be affected, there is no question of redressal of any grievance before the competent Court. In the present case, if the petitioner did not participate in the tender process, it cannot be said that his right has been threatened or adversely affected. The law in this regard is well settled and this Court does not wish to burden this judgment with the case laws. The learned counsel for the FCI has already referred to the relevant laws in this regard. Therefore, the objection raised by the respondents that the petitioner having not taken part in the tender process in terms of the impugned tender notice, does not have any right to file

this petition, cannot be said to be without substance. Accordingly, this Court would uphold the objection raised by the respondents. In that view of the matter, the petition is liable to be dismissed as the petitioner does not have locus standi to file this petition.

31. However, having decided thus, it is also to be noted that the petitioner has raised certain issues which are otherwise also fundamental in nature. In all the aforesaid four grounds of challenge advanced by the petitioner referred to above, the common theme which runs through these is that by floating the second tender, the FCI authorities would certainly incur extra expenditure which is avoidable in the light of the finding in the CAG report which is against public interest. In other words, according to the petitioner, if transportation of rice from any place or Rail Head beyond Jiribam Rail Head is to be undertaken, the exercise would entail extra expenditure which can be avoided. Therefore, to that extent, such a tender process would be against the public interest. If tender process is contrary to the public interest, the power of judicial review would lie as has been held in *Jagdish Mandal (supra)* and reiterated in *Michigan Rubber (India) Ltd. Vs. State of Karnataka*, (2012) 8 SCC 216. The aforesaid contention of the petitioner however, has been contested by the FCI respondents primarily on the ground that the CAG report having not yet attained finality and also the letter dated 15.04.2016 on which much reliance has been placed by the petitioner in challenging the tender process being an inter departmental communication, would have no binding effect till it takes the formal shape as an executive order issued by the competent authority. The objection raised by Mr. A. Romenkumar, learned counsel for the FCI authorities cannot be said to be also without substance in as much an inter departmental communication may not necessarily reflect the true policy decision of the authority nor the CAG report relied upon by the petitioner can be said to have attained finality and of binding effect as the same is yet to be considered by the Parliament. However, the fact also remains that the said inter departmental letter did reflect the decision of the FCI authority to cancel the earlier tender process on the ground of avoiding the extra expenditure. Thus, though the CAG report did not yet attain finality, it was clear that the FCI authorities decided to act upon the same for the purpose of preventing any additional expenditure on transportation of the rice from a place which located beyond Jiribam Railhead and accordingly, cancelled the earlier tender process. Therefore, the contention of the petitioner that the FCI authorities cannot blow hot and blow cold and take contrary decisions on the basis of the same report without any substantial change on the ground cannot be said to be also totally without any basis. More so, as it involves the public exchequer. The FCI authority obviously is the custodian of the public exchequer as far as the matters which have been entrusted to the FCI are concerned under the Food Corporations Act, 1964. It is also true that the Government or Government agencies are entrusted with the responsibility to manage the affairs of the State and to that extent, they are endowed with the authority to adopt such policy decision as they may deem appropriate. The State is also the trustee of the

public wealth and as such, is also expected to manage the scarce public wealth efficiently and prevent any avoidable wastage.

32. This Court is also of the view that it may not be appropriate for this Court to issue any direction how to manage the affairs of the State or the FCI. There may be situations where the State or its agencies may have to incur extra expenditure for undertaking certain tasks after weighing various parameters and after taking into consideration relevant factors and as such, it would not be appropriate for the Court to interfere with such actions of the State. The State Government must be allowed sufficient discretionary power to deal with management of the affairs of the State unless, it involves breach of statutory or constitutional provisions. However, the fact also remains that as custodians of the scarce public wealth and resources, State and its agencies are expected to discharge their functions scrupulously and efficiently to avoid undue expenditure. It is in this context that the role of the CAG comes into picture. The CAG is a constitutional authority entrusted with task of auditing the expenses of the State and to make necessary advices for proper fiscal management. Therefore, keeping in mind the high constitutional position and unique role it plays, any report or advice from the CAG deserves proper consideration by the authorities.

33. In the present case, there is an inspection report prepared by the audit officer of the CAG relating to transportation of rice to Manipur as available in Part - II(A) of the report, a copy of which is annexed as Annexure-A/S1 to the additional affidavit filed by the petitioner. The relevant portions of the said audit report are reproduced herein below :

"PART-II (A):

Significant Audit Findings:

BEFORE

Para-1: Review of road transportation contracts under Area Office, Imphal and deficiencies noticed thereon.

Food Corporation of India (FCI) plays a pivotal role in implementation of National Food Security Programme in the Country. It undertakes movement of food-grains through rail and road transport to evacuate stocks from surplus regions, meet the requirements of deficit regions and create buffer stocks. Rail transport being the cheaper, FCI moves nearly 90 per cent of stock of food-grains through rail only. However, road transport is mostly preferred by FCI in those parts of the Country which have no rail connections.

On review of road transport contracts at Area Office, FCI, Imphal during 2014-15 to 2016-17 (upto Jan 2017), following deficiencies were noticed.

A. Continuance of transport contractor from Assam Region (RH, Salchapara and RH, Golaghat) even after completion of gauge conversion upto RH, Jiribam, under Manipur Region has resulted in avoidable expenditure of Rs. 9.44 crore.

Manipur State has two major Food Supply Depots (FSDs) located at Sangaipurou and Koirengei under Manipur Regional Office (RO). FCI used to supply food-grains to the above depots from Jiribam and Dimapur Rail Heads (RH) through road transport. However, Northeast Frontier Railway suspended movement of racks coming to Jiribam from October 2014 due to conversion of existing narrow gauge railways tracks to broad gauge on Lumding-Badarpur-Jiribam Section which was expected to be completed by March 2016. In anticipation of the suspension of rack movements, FCI, as an alternative solution, started supplying food-grains to above two Depots from RH, Golaghat and Jagiroad (Assam Regions) by adhoc contractor with effect from July 2017. After completion of gauge conversion upto Salchapra (under Assam Region) during April 2015, FCI, R.O, Manipur started transportation of food grains from RH, Salchapra to above depots w.e.f. July 2015 apart from transportation from RH Golaghat and RH Dimapur.

The distance between Jiribam RH to Sangaipurou and Koirengei FSDs on road is 223 Km and 230 Km respectively which was used by FCI and regular road transport of foodgrains. However, the distance between Salchapra and Golaghat RHs to Sangaipurou 283 Km and 315 Km respectively. Similarly, Koirengei FSD is 291 Km away from RH, Salchapra. All these alternative routes were used by FCI during gauge conversion although the actual distance to above FSDs was 48 Km to 115 Km longer than the usual route. But the extra expenditure incurred by FCI was inevitable till resumption of rail movements from Jiribam RH after completion of expansion project by the Railways.

Audit noticed that FCI engaged (July/September/November 2015) three regular RTCs for supply of food-grains to Sangaipurou and Koirengei FSDs on the alternative routes as mentioned above for a period of two years as per prevailing practice of FCI. The contract periods were to be expired in July, September and November 2017. FCI while deploying the regular RTC on alternative routes did not consider the progress of gauge conversion work of "Lumding-Badarpur-Jiribam" Section which was expected to be completed in March 2016 so that transportation from Jiribam RH could be resumed to avoid extra transportation cost due to higher distances. In fact, the gauge conversion work was completed by Northeast Frontier Railway much before the schedule time and rack movements to Jiribam RH was resumed in February 2016.

Since, the RTCs were engaged for two years period, FCI continued to use alternative routes beyond February 2016 and during February 2016 to January 2017, it transported 87849.62 MT foodgrains to Sangaipurou and Koirengei FSDs with extra expenditure of Rs. 9.44 crore as detailed in the table.

Rail Head

Name of Depot

Qty of foodgrains inducted

Cost of Transport from RH, Salchapra and Golaghat

Cost of transportation from RH Jiribam

Can be saved if transported from RH Jiribam

1 2 3 4 5 6(4-5)

Salchapra Sangaipurou 20799.50 103362679 81448330 21914349

Koirengei 26241.83 98280096 77678426 20601670

Golaghat Sangaipurou 40808.3 1771490261 125219452 51929574

TOTAL

87849.62 378791801 284346209 94445592

It would also continue to incur extra expenditure till completion of contract terms of existing RTCs.

It was also noticed that before gauge conversion, FCI on an average was handling 336 wagons per month at Jiribam RH whereas, after post gauge conversion the maximum number of wagon handled in a month was 105 wagons. This evident that, FCI intentionally reduced the rack movements at Jiribam RH to favour the RTCs engaged on alternative routes.

Thus, appointment of contractors before resumption of rack movements from Jiribam RH without a clause of foreclosure of contracts of regular RTCs on temporary (alternative) routes, FCI sustained a loss of Rs. 9.44 crore (Annexure-I) till January 2017 towards transport of food grains from higher distance.

B. Avoidable extra payment of Rs. 1.20 crore towards Road Transport Contractor for delivery of food grains in FSDs with lesser distance other than the designated FSDs and allowing transportation of stock from higher distance Rail Head.

Scrutiny of relevant records of Area Office, FCI Imphal revealed that there is two FSDs namely Sangaipurou (own) and Koirengei (hired) to cater the needs of seven revenue district of Manipur. Since both the depots are road fed depots, foodgrains were moved through inter as well as intra region road movement. The distance from RH/FSD Dimapur and RH/FSD Golaghat to FSD, Koirengei in Imphal is lesser distance of 6 Km than the transport form RH/FSD Dimapur and RH/FSD Golaghat to FSD, Sangaipurou. On analysis of road transport contract from Dimapur and Golaghat to Sangaipurou it was noticed that in several occasion 79265 MT of foodgrains were delivered but the payment were made at the rate of RTC to Sangaipurou. Due to payment at higher of 6 Km distance for the delivery of stock at Koirengei instead of delivery at Sangaipurou, FCI extended undue benefit of Rs. 96.85 lakh (Annexure-II) to the contractor.

Similarly, RO, FCI, Manipur appointed (June 2016) M/s BK Enterprises for transport of food grains from RH/Jiribam to FSD, Senapati which is situated at a

distance of 273 Km. But the fact is that FSD, Senapati is nearer to the RH/Dimapur with distance of 169 KM. During July 2016 to September 2016 the contractor was allowed to transport 1334 MT of rice from Jiribam to FSD Senapati. By allowing transportation of higher lead of 104 KM than the nearest RH/Dimapur Corporation sustain a loss of Rs.22.74 Lakh.

C. Avoidable extra expenditure of Rs. 71.56 Lakh towards double handling and transport at RH/FSD Jiribam

To reduce the transportation and distribution cost, the approval for the inter and intra region movement by the RO/ZO stipulates to move stocks directly from the Rail Heads (RH) to the depots not connected by rail. If the stock is temporarily parked in the nearby depots of the RHs and then again transported to the depots not connected by railways then double handling cost as well as transportation cost from RH to nearest depots are incurred. So as far as possible temporary parking of the foodgrains should be avoided. Scrutiny of details of transportation to the depots not connected by Rail in Areas Office, Imphal under the Regional Office, Manipur revealed that, after placing of rakes at RH/Jiribam some stocks were transferred directly to the designated depots and balance stocks were transferred to FSD/Jiribam for temporary parking for transfer to other depots later on. Since requirement for TPDS and other welfare schemes are very negligible from FSD/Jiribam, balance stocks were transferred to other depots incurring double handling and transportation cost to bring the stock from RH to FSD/Jiribam. During April 2014 to January 2017, 620420 bags of 29988 MT Rice and 72599 bags of 2863 MT wheat were transferred to FSD/Jiribam and again transferred to other depots incurring extra expenditure of Rs. 71.56 Lakh (Annexure -III) towards double handling and transportation.

Further, as per the clause of Model Tender form (MTF), contractor has to provide sufficient number of trucks per day indented by the corporation, in case of failure the contractor will be liable to pay the corporation liquidated damage @ Rs. 300/- with maximum of Rs. 1000/- per truck per day. It was noticed that in several occasion contractors failed to provide sufficient number of truck for which no action was taken by the management to recover toward LD as per the terms of the contract. Instead of recovery of LD from the RTC, FCI shifted the stocks to FSD/Jiribam incurring extra handling and transportation cost."

34. According to the respondents, the said report is yet to be approved by the competent authority. It is yet to be placed before the Parliament. However, in view of the fact that inspite of the same not yet being approved, the aforesaid report was relied on and acted upon while taking decision to cancel the first tender dated 03.08.2015 purportedly to avoid incurring extra expenditures. Since it involves an important public issue relating to conservation of scarce public financial resources, this Court would expect the authorities to re-examine the e-tender floated on 28.6.2017 by taking into consideration the relevant factors.

35. The FCI authorities have submitted before this Court that the aforesaid

second tender was floated in order to meet urgent requirements in the State of Manipur and also to fulfil certain directions of the Hon''ble Supreme Court. Accordingly, it has been submitted that since the second tender process was floated as part of a policy decision of the FCI authorities to meet certain urgent requirements and as a contingency plan, no interference is warranted more so, as it does not involve any malafide or violation of any statutory or constitutional norms. This Court, accordingly, has exercised extreme caution innot directly interfering with the second tender process. However, in view of the importantissue of public interest raised by the petitioner, though this Court has already taken the decision that the petitioner has no locus standito file this petition, once such an important public issue has been brought to the notice of the Court, it may not be appropriate for this Court to turn its backto such an important issue raised.

36. Accordingly, this Court rather than directly interfere with the tender process on the basis of the aforesaid CAG report, would call upon the FCI authority to re-examine the whole issue themselves. The authorities have to re-examine the aforesaid second tender dated 28.6.2017 challenged in this petition in the light of the finding of the CAG and decision taken earlier by the FCI to cancel the earlier tender process initiated on 03.08.2015, and also keeping into consideration the exigency of the work as put forward by the respondent FCI authorities in their affidavit-in-opposition to this petition, and the authority may thereafter, take a fresh decision as to whether to continue with the impugned tender process or to revise the same and take appropriate steps. This Court accordingly, directsthat the matter be placed before the respondent No. 1, Chairman and Managing Director (CMD) of the FCI or such competent authority under the Act and Rules, may take an appropriate reasoned decision as regards the continuance or otherwise of the second tender processinitiated vide e-tender dated 28.6.2017 after taking into consideration all the relevant factors, as directed above.

37. It is also expected that any such reasoned decision of the CMD/competent authority in this regard, will be placed in public domain by publishing in the official website of the FCI. Accordingly, it is directed that the second tender process would be proceeded in accordance with the said decision taken by the CMD/competent authority, as directed above.

38. With the above observations and directions, the present writ petition stands disposed of. Earlier interim order, if any, shall stand merged with this final order.