IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

WEDNESDAY, THE 18TH DAY OF MARCH 2015/27TH PHALGUNA, 1936

WP(C).No. 13864 of 2013 (G)

PETITIONER(S):

L & P RUBBER PRODUCTS,
RUBBER PARK, VALAYANCHIRANGARA P.O.,
ERNAKULAM DISTRICT, KERALA-683 555,

BY ADV. SRI.B.V.BALAKRISHNAN

RESPONDENT(S) :

1. KERALA STATE ROAD TRANSPORT CORPORATION,
   REPRESENTED BY ITS CHARIMAN-CUM-MANAGING DIRECTOR,
   TRANSPORT BHAVAN, FORT, THIRUVANANTHAPURAM-695 023.

2. M/S.EASTERN TRADERS LTD.,
   3A, 3RD FLOOR, EASTERN CORPORATION OFF NO.34/137 E,
   N H BYE PASS, KOCHI-682 024.

R1 BY ADV. SRI.BABU JOSEPH KURUVATHAZHA, S.C
R2 BY ADVS. SRI.BECHU KURIAN THOMAS
SRI.JOY THATTIL ITTOOP
SRI.A.G.ADITYA SHENOY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30-06-2014, THE COURT ON 18-03-2015 DELIVERED THE FOLLOWING:

Msd.

WP(C).No. 13864 of 2013 (G)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT-P1: TRUE COPY OF THE ASRTU RATE CONTRACT NO.ASRTU/SC(S&C)/03800/11/L0082-I/2011-2013/0208 DATED 15.06.2011 FOR THE PERIOD FROM 01.04.2011 TO 31.03.2013 ISSUED TO PETITIONER FOR THE SUPPLY OF PCTR, BG AND BVC.

EXHIBIT-P2: TRUE COPY OF THE ASRTU RATE CONTRACT NO.ASRTU/SC(S&C)/03800/1/M0274-I/2011-2013/063 DATED 12.05.2011 ISSUED TO ONE M/S.MIDAS COLD TREADS FOR THE PERIOD FROM 01.04.2011 TO 31.03.2013 FOR THE SUPPLY OF PCTR AND BG.

EXHIBIT-P3: TRUE COPY OF THE PURCHASE ORDER ISSUED TO M/S.MIDAS COLD TREADS (PO NO.SRB6/008339/10 DATED 20.08.2010) BY 1ST RESPONDENT.

EXHIBIT-P4: TRUE COPY OF THE TAX INVOICE RAISED BY M/S.MIDAS COLD TREADS (INV NO.TCT 100426 DATED 13.10.2010) TO 1ST RESPONDENT.

EXHIBIT-P5: TRUE COPY OF THE TRIAL PURCHASE ORDER NO.SRB6/008339/10 DATED 07.04.2011 ISSUED TO THE PETITIONER.

EXHIBIT-P6: TRUE COPY OF THE ASRTU RC NO.ASRTU/SC (S & C) 03800/6/E0081-I/2011-2013/0139 DATED 01.06.2011 ISSUED TO 2ND RESPONDENT.

EXHIBIT-P7: TRUE COPY OF THE CIRCULAR NO.ASRTU/SC(S&C)03800/6/E0081-II/2011-2013/0427 DATED 10.08.2011-INCLUSION OF BVC IN THE RC OF 2ND RESPONDENT.

EXHIBIT-P8: TRUE COPY OF THE CIRCULAR NO.ASRTU/SC(S&C)03800/6/E0081-IV/2011-2013/0434 DATED 15.10.2012-DELETION OF BVC FROM THE RC OF 2ND RESPONDENT.

EXHIBIT-P9: TRUE COPY OF THE DETAILED TABLE OF ASRTU SPECIFICATION FOR TYRE RETREADING MATERIALS (COLD PROCESS)-PCTR/BG/BVC.

EXHIBIT-P10: TRUE COPY OF THE LETTER BEARING NO.SRB6/024765/12 DATED 08.01.2013 ISSUED BY KSRTC TO THE PETITIONER-READINESS OF SUPPLY.

EXHIBIT-P11: TRUE COPY OF THE REPLY LETTER DATED 08.01.2013 ADDRESSED TO KSRTC BY THE PETITIONER.

RESPONDENT(S)' EXHIBITS

EXT.R2(A): TRUE COPY OF THE COVERING LETTER ALONG WITH TEST REPORT DATED 07.02.2013, SENT BY ASRTU TO THE RESPONDENT, DATED 28.02.2013.

EXT.R2(B): TRUE COPY OF THE COVERING LETTER ALONG WITH TEST REPORT DATED 27.03.2013, SENT BY ASRTU TO THE RESPONDENT, DATED 09.04.2013.

EXT.R2(C): TRUE COPY OF THE COVERING LETTER ALONG WITH TEST REPORT DATED 05.01.2013, SENT BY ASRTU TO THE RESPONDENT, DATED 01.05.2013.

EXT.R2(D): TRUE COPY OF THE CONTRACT AWARDED TO THE RESPONDENT BY ASRTU, DATED 30.04.2013.

//TRUE COPY//

P.A.TO JUDGE.

Msd.

C.K. ABDUL REHIM, J.

W.P.(C). No. 13864 of 2013

Dated this the 5th day of October, 2013

JUDGMENT

The petitioner is an industrial unit engaged in manufacturing and supply of Precured Tread Rubber (PCTR), Bonding Gum (BG) and Vulcanising Cement/Solution (BVC) etc. The petitioner is supplying the above products to different State Road Transport Organisations within the country. The 1st respondent Corporation, being an instrumentality of the State Government, is following the procedure prescribed in the 'Purchase Manual for procurement of materials' for all purchases made. Provisions contained in the Kerala Transparency in Public Purchase Act, 2002 is applicable to the 1st respondent. One of the methods contemplated under the said Act is to purchase materials directly from suppliers who are rate contractors approved by the 'Association of State Road Transport Undertakings (ASRTU)', New Delhi. The 1st respondent Corporation is a member of ASRTU. The Corporation took decision to purchase PCTR, DG and BVC only from holders of approved rate contract from ASRTU, belonging to southern states, with a condition that purchase will be made from the supplier whose "cost per kilo meter" is the lowest.

2. The petitioner as well as the 2nd respondent are rate contract holders with ASRTU for the period from 01.04.2011 to 31.03.2013. On the basis of a purchase order issued by the 1st respondent Corporation on 7.4.2011 (Ext.P5), the 2nd respondent was awarded supply of PCTR and BG for the period from 01.04.2011 to 31.03.2013. On 10.08.2011, by virtue of Ext.P7, the rate contract approval was granted to the 2nd respondent for BVC also. But on 15.10.2012 ASRTU issued Ext.P8 order deleting the item of BVC from the rate contract approved in respect of the 2nd respondent, on the basis that there was consecutive failure on three occasions in achieving required grade test report with respect to their product of BVC. As per Clause 19 of the terms and conditions of Ext.P1, the rate contract approval issued by the ASRTU for any item will be deleted from the contract on receipt of three consecutive C-Grade test reports and an item once deleted will be eligible for restoration only on receipt of two

consecutive A Grade Test reports. The petitioner alleges that despite Ext.P8 intimation issued by the ASRTU regarding deletion of the product of BVC supplied by the 2nd respondent from the rate contract approved, the 1st respondent Corporation took a decision on 07.03.2013 to purchase PCTR, DG and BVC from the 2nd respondent.

3. The petitioner is challenging the said decision contending that the KSRTC was not entitled to consider a supplier whose rate contract has been disapproved by ASRTU. The impugned order for supply should not have been placed considering the 2nd respondent as lowest (L-I). According to the petitioner, as per the accepted norms followed by the 1st respondent Corporation all the three products PCTR, BG and BVC should have been procured from the very same supplier. Hence the petitioner being the next lowest rate contractor should have been placed with purchase order for supply of those items. Under such circumstances the petitioner is challenging decision taken by the 1st respondent to issue purchase order to the 2nd respondent for the supply of PCTR BG and BVC. Inter alia, the

petitioner is seeking direction to place purchase orders on those items to the petitioner within a reasonable time.

4. There is no dispute as to the fact that the 1st respondent Corporation is a member of ASRTU. It is also not disputed that the 1st respondent Corporation is procuring retreading materials based on the rate contract approval of ASRTU. With respect to previous purchase orders issued to the 2nd respondent there is no dispute, because the 2nd respondent was the lowest tenderer on the basis of assessment of cost per km. The dispute is only with respect to the decision taken by the 1st respondent Corporation on 7.3.2013 to place purchase orders to the 2nd respondent for supply of the products PCTR, BG and BVC. According to the petitioner, the product BVC of the 2nd respondent stood deleted from the rate contract approved of ASRTU from 15.10.2012 onwards, as revealed from Ext.P8. The 2nd respondent had not obtained A-Grade certificate consecutively on two occasions warranting re-inclusion of the deleted product, at the time when the said decision was taken on 7.3.2013. Hence the decision taken in this regard is illegal, irregular and

unsustainable, is the contention. Since policy of the 1st respondent Corporation is to purchase all the 3 items from the very same supplier, a decision should have been taken to purchase the same from the petitioner who is the next lowest competetor, is the argument.

5. In the counter affidavit filed on behalf of the 1st respondent Corporation it is mentioned that ASRTU had issued fresh rate contract approval for the 2nd respondent for the period from 1.4.2013 to 31.3.2015, with respect to all the three products and the purchase order for retreading materials was issued only for meeting the requirements for the year 2013-14. Such a decision was taken by the Corporation after considering quotations of all the rate contract holders approved by ASRTU, including the petitioner and the 2nd respondent. A subsequent statement was filed by the Chief Law Officer of the 1st respondent Corporation mentioning that the 2nd respondent was considered for purchase after 15.10.2012 (after the date of Ext.P8) because they possessed valid ASRTU rate contract for PCTR and BG and that they were able to supply vulcanising solution also.

According to the 1st respondent, this was the accepted policy of the Corporation and hence there was no illegality or irregularity in placing purchase order for BVC at that time. Basis of the policy, as contended, is to consider ASRTU rate contract holders possessing valid rate contract for PCTR and BG also for the purpose of supply of BVC.

6. Along with the counter affidavit of the 2nd respondent Ext.R2(a) to Ext.R2(c) test reports were produced in order to show that the deleted item of BVC had been qualified later, on the basis of the A Grade test reports obtained. Ext.R2(d) is the rate contract issued by ASRTU with respect to the 2nd respondent for the period from 1.4.2013 to 31.3.2015. Therefore the purchase orders issued by the 1st respondent Corporation in favour of the 2nd respondent was perfectly valid and justified, is the contention.

7. But in the reply affidavit filed by the petitioner it is pointed out that, the rate contract approval with respect to the period from 2013 to 2015 was issued only on a later date of 30.4.2013, and the decision to place the purchase order with the

2nd respondent was taken not on the basis of Ext.R2(d) rate contract approval. It is also contended that the 2nd respondent had not obtained 2 consecutive A Grade test reports with respect to the product of BVC at the time when the 1st respondent Corporation had taken decision to place the orders. Hence it is contended that during the time when the impugned decision was taken by the 1st respondent the 2nd respondent was not a qualified rate contractor for supply of BVC. Hence the decision taken in this regard is liable to be set aside, is the contention.

8. Learned senior counsel appearing for the petitioner had placed reliance on various decisions of the Hon'ble Supreme Court. According to him, when an order suffers from malice in law the court need not insist upon requirement of strict proof or any averment as such to interfere, such order being illegal and wholly unsustainable, as held in **Swaran Singh Chand vs. Punjab State Electricity Board and others (2009 (13) SCC 758).** Much reliance is placed on the decision in **Raviyashwant Bhoir vs. District Collector, Raigad and others (2012 (4) SCC 407)** in order to contend that the State

is under an obligation to act fairly without ill will or malice on facts or in law. Legal malice or malice in law is something done without lawful excuse. It is a deliberate disregard to the rights of others. It is an act done wrongfully and wilfully without reasonable or probable cause and not necessarily an act done from ill feeling and spite. Conscious violation of the law to the prejudice of another or a deprived inclination on the part of the authority to disregard the rights of others are instances where intent is manifested by its injurious acts. In such cases judicial review and interference by the court is warranted. It is also contended that the basic requirement in the process of tender is fairness in action by the State and non arbitrariness is the essence and substance of fair play. These are amenable to judicial review to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. When the process adopted or decision made by the authority is malafide or intended to favour someone, or when the process adopted or decision made is so arbitrary and irrational that the court can say such decision would not have been taken by a responsible authority acting reasonably and in accordance with the relevant law, it warrants interference. The decision of the Hon'ble Supreme Court in **Michigan Rubber India Ltd. vs. State of Karnataka and others (2012 (8) SC 216)** is also relied on in support of the above proposition.

9. Based on the above legal principles it is contended that the impugned decision is manifestly in violation of law and is a malice in law. Hence it was canvassed that interference by way of judicial review is highly essential. Despite the averments made in the writ petition that the 1st respondent Corporation had taken a decision to place orders on the 2nd respondent on 7.3.2013, no materials or documents have been produced with respect to such decision. No materials are also produced evidencing placing of purchase orders with the 2nd respondent for the period in question as alleged. Under such circumstances this court directed the Standing Counsel appearing for the 1st respondent Corporation to make available the relevant office records which led to the impugned decision. The files relating to the decision taken by the 1st respondent Corporation in this

regard were produced for my perusal. On perusal of the records it is revealed that in the 371st meeting of the Board of Directors of the 1st respondent Corporation held on 7.3.2013, the Executive Director had explained that the PCTR and allied materials has to be procured from single source in order to ensure compatibility of the components and in this regard deviations from the store purchase manual is permitted by the Government. The Board observed that the reason to depend upon ASRTU rate contract holders is to ensure quality of the materials and such policy was continued since 2006 onwards. It was asserted by the Executive Director that there is no deviation from the general formalities in procuring allied materials from the single source. Therefore the Board approved that in order to avoid disputes and deviations, tender has to be invited from ASRTU rate contract holders for allied products.

10. But as already observed, when the 1st respondent Corporation had taken a decision to place orders to the 2nd respondent on 7.3.2013, the product of BVC supplied by the 2nd respondent stood deleted from the rate contract approved by the

ASRTU, as revealed from Ext.P8, with effect from 15.10.2010. Contention of the 1st respondent that the 2nd respondent had submitted fresh contract for approval for the period from 1.4.2013 to 31.3.2013 cannot be taken as a ground to justify the order placed on 7.3.2013, which is evidently before submission of the new rate contract and approval of the same. Hence it is evident that at the time when order dated 7.3.2013 was placed for supply of BVC, the product of the 2nd respondent stood as not approved by the ASRTU. Contention raised by the 1st respondent based on the policy that when a supplier possessed valid ASRTU rate contract for PCTR and BG such supplier is given orders for supply of volcanising solutions also, in order to avoid disputes, cannot be accepted. It is to be noticed that the 1st respondent Corporation is an organisation of the Government to which provisions of the Kerala Transparency in Public Purchase Act 2002 is applicable. It is not in dispute that the 1st respondent is bound to purchase materials directly from suppliers who are rate contract holders approved by ASRTU. Eventhough the 1st respondent Corporation is referring to deviations permitted by the State Government from provisions contained in the stock purchase manual, that by itself will not entitle the 1st respondent to purchase any item coming within the contract submitted by the rate contract holders for which the ASRTU approval does not remain valid. Hence this court is inclined to accept the contentions raised on behalf of the petitioners that the purchase order placed in favour of the 2nd respondent dated 7.3.2013 suffers from illegality and impropriety and the supply order placed was not in order.

11. However, this court takes note of the fact that the impugned purchase order was placed based on the rate contract of the 2nd respondent approved for the period from 1.4.2011 to 31.3.2013. It was brought to notice of this court that a fresh rate contract approval had taken place for the period from 1.4.2013 to 31.3.2015. Therefore it is evident that, supply if any made based on the impugned order placed on 7.3.2013 pertains only with respect to the period of the earlier rate contract approval. Naturally, placing of further orders of supply will depend upon the approval of rate contract for the subsequent

period from 1.4.2013 to 31.3.2013. Hence this court is of the considered opinion that no specific relief could be granted to the petitioner based on the finding that the order placed in favour of the 2nd respondent on 7.3.2013 was not proper and unsustainable. It is noticed that even assuming that the impugned order placed for supply of BVC was not proper and sustainable, it cannot be held that by that alone the petitioner is entitled to get orders for supply of all the three products, he being the second lowest. This is especially because the alleged policy of the 1st respondent Corporation to place orders for all the three items together cannot be given a stamp of this court taking note of the legal obligations to place orders only with respect to approved rate contractors recognised by ASRTU. Since the period is over this court is not in a position to grant any specific relief based on the finding with respect to the impugned supply order placed. It is however made clear that if the petitioner had suffered any damages based on the illegal acts on the part of the 1st respondent Corporation in placing the impugned order to the 2nd respondent Corporation. It is left open to the petitioner to seek appropriate remedy available under common law.

Under the above mentioned circumstances the writ petition is disposed of subject to the above observations.

C.K.ABDUL REHIM, JUDGE

pmn/skv