

* HON'BLE SRI JUSTICE R.KANTHA RAO

+ Writ Petition Nos.6562, 5905 and 8547 of 2015

% 01-5-2015

Mohammed Burahanuddin

and others

... Petitioners

Vs.

\$ The State of Telangana,

Rep. by its Prl. Secretary to the Consumer

Affairs, Food and Civil Supplies,

Secretariat Bldg., Hyderabad; and others

... Respondents

! Counsel for the Petitioners: Sri M.S.Prasad,

Senior Counsel.

Sri D.Linga Rao

Counsel for vacate stay : Sri Bankatlal Mandhani

petitioner

Counsel for Respondents: Government Pleader

For Civil Supplies

< Gist:

> Head Note:

? Cases referred:

1. (1993) 1 SCC 71
2. (1995) 1 SCC 478
3. (2007) 14 SCC 517

HON'BLE SRI JUSTICE R.KANTHA RAO

Writ Petition Nos.6562,

5905 and 8547 of 2015

-

Date: 01-5-2015

Between

Mohammed Burahanuddin

and others

... Petitioners

and

The State of Telangana,

Rep. by its Prl. Secretary to

the Consumer Affairs, Food

and Civil Supplies,

Secretariat Bldg., Hyderabad;

and others

... Respondents

HON'BLE SRI JUSTICE R.KANTHA RAO

Writ Petition Nos.6562,

5905 and 8547 of 2015

Common Order:

All these writ petitions relate to Tender Notification dated 09-02-2015 and Re-E-Tender Notification dated 05-3-2015 issued by the 2nd respondent-Andhra Pradesh State Civil Supplies Corporation Limited (hereinafter referred to as 'the Corporation') inviting tenders for appointment of Stage-I Contractor for transportation of food grains, pulses, or any other commodities from various places within and

outside the district of Nalgonda excluding the transportation to Fair Price Shop Points for the year 2015-16. W.P.No.6562 of 2015 is filed by

a Contractor, by name Mohammed Burahanuddin, whereas W.P.Nos.5905 and 8547 of 2015 are filed by M/s. Sai Nandini Transport, Nalgonda. W.V.M.P. No.1034 of 2015 in W.P.No.8547 of 2015 is filed by Manikanta Lorry Transport, Nalgonda seeking to vacate the interim order dated 30-3-2015 in W.P.No.8547 of 2015 passed by this Court.

2. The petitioners in the above writ petitions and the vacate stay petitioner participated in the tenders by filing necessary documents and each paying Earnest Money Deposit of Rs.15 lakhs by way of Demand Draft in favour of the 2nd respondent-Corporation. Among the tenderers, Mohammed Burahanuddin quoted 29% lesser price and he was evaluated as L1 Tenderer. M/s. Sai Nandini Transport quoted 23.82% lesser price and was evaluated as L2 Tenderer. Manikanta Lorry Transport quoted 29.17% lesser price and was evaluated as L3 Tenderer.

3. It is contended by Mr. Mohammed Burahanuddin (petitioner in W.P.No.6562 of 2015) that without conveying any information to him, the 2nd respondent-Corporation issued Re-E-Tender Notification on

05-3-2015 for appointment of Stage-I Contractor for Nalgonda district by issuing the Tender Schedule and fixing the date for opening the tenders as on 13-3-2015. His contention is that the 2nd respondent-Corporation having accepted his qualifications and considered him to be L1 Tenderer issued Re-E-Tender Notification which is the result of arbitrary and colourable exercise of power of the authorities. He submitted in his writ petition that had the 2nd respondent-Corporation given him

an opportunity to explain the circumstances resulted in his

disqualification, he would have explained but without affording him any such opportunity, the 2nd respondent-Corporation issued Re-E-Tender Notification. According to him, the Re-E-Tender Notification was issued with

a *mala fide* intention to support the other tenderers and therefore, he filed the writ petition to set aside the

Re-E-Tender Notification and to direct the respondents 1 to 3 to award the contract in his favour as the

2nd respondent-Corporation found him to be the L1 Tenderer.

4. W.P.No.5905 of 2015 is filed by M/s. Sai Nandini Transport, Nalgonda stating that upon opening the tenders, the tender of Mr. Mohammed Burahanuddin stood at L1 and its tender stood at L2. It came to light that the vehicle bearing registration No.AP22V 6948 was caught by the Vigilance officials at Kalwakurthy Rice Mill on 28-02-2015 transporting Public Distribution System (PDS) rice to a rice mill in Kalwakurthy. Thereafter,

M/s. Sai Nandini Transport submitted a representation to the 2nd respondent-Corporation on 02-3-2015 to consider it for the contract as it is L2 Tenderer in the event of disqualifying the L1 Tenderer as per the terms and conditions of the Tender Notification. M/s. Sai Nandini Transport cited Condition No.31(a) of the Terms and Conditions which placed on record that if the L1 Tenderer is backed out, the V.C. and Managing Director of the Corporation is empowered to call the L2 Tenderer. Therefore, according to M/s. Sai Nandini Transport, the 2nd respondent-Corporation is bound to award the contract in its favour as in other districts viz., Karimnagar, Mahabubnagar, Khammam and Adilabad the contracts were awarded to the tenderers even though they quoted 3% to 4% less than the previous year, whereas M/s. Sai Nandini Transport quoted 23.82% less than previous year. The contention of M/s. Sai Nandini Transport, therefore, is that without following Condition No.31(a) of the Terms and Conditions of Tender Notification issuing Re-E-Tender

Notification dated

05-3-2015 is arbitrary, illegal and contrary to the terms and conditions contained in the Tender Notification dated 09-02-2015 and also goes against the well settled principle of doctrine of legitimate expectation. Thus, M/s. Sai Nandini Transport also in its writ petition sought to declare the Re-E-Tender Notification dated

05-3-2015 issued by the 2nd respondent-Corporation as unfair, opposed to the principle of doctrine of legitimate expectation and offending Article 14 of the Constitution of India, to set aside the Re-E-Tender Notification and issue a direction to award the contract in favour of

M/s. Sai Nandini Transport.

5. In the said writ petition (W.P.No.5905 of 2015), on 12-3-2015 this Court issued an interim direction to the respondents-Corporation to permit the petitioner to participate in the Re-E-Tender Notification basing on the EMD submitted by the petitioner earlier in response to the Tender Notification dated 09-02-2015.

6. Subsequently, the petitioner (M/s. Sai Nandini Transport) filed W.P.No.8547 of 2015 stating that despite the interim order dated 12-3-2015 passed by this Court to permit the petitioner to participate in the Re-E-Tender on the very same EMD furnished in response to the earlier tender, the 2nd respondent-Corporation without issuing any letter or intimation for participating in the fresh tender dated 05-3-2015 with an oblique motive at the instance of the 3rd respondent, by name Sri P.Kaladhar Rao, who worked as District Manager of the 2nd respondent-Corporation for Nalgonda district, finalized the tender in favour of the 4th respondent,

who is L3 Tenderer in the Tender Notification dated 09-02-2015 and appointed him as Stage-I Contractor by proceedings dated 18-3-2015. It is submitted that the Re-E-Tender Notification has been issued at the behest of L1 and L3 Tenderers with a view to frustrate the rights and claims of the L2 Tenderer. It is further

submitted that the 3rd respondent, Mr. P.Kaladhar Rao was facing several cases including an ACB case and was due to retire from service on 31-3-2015. It is further submitted that the petitioner got a legal notice issued to the respondents 2 and 3 on 23-3-2015 calling upon them to implement the interim order passed by this Court in W.P.No.5905 of 2015, dated 12-3-2015 and to desist from taking any action pursuant to the Re-E-Tender Notification dated 05-3-2015. The version of the petitioner is that the 4th respondent got the contract awarded to L3 Tenderer, who is the person of his choice and the entire exercise streaks of lack of transparency, arbitrariness and bias in favour of the 4th respondent and that there is every possibility that the previous tender details of the petitioner could have been leaked to the

4th respondent. Therefore, according to the petitioner, the respondents without exploring the possibility of awarding contract to it, by not allowing it to participate in the Re-E-Tender, straightaway issued appointment order in favour of the 4th respondent. M/s. Sai Nandini Transport, therefore, filed W.P.No.8547 of 2015 to declare the action of the 2nd respondent-Corporation in awarding contract to the 4th respondent as Stage-I Transport Contractor by order dated 18-3-2015 pursuant to

Re-E-Tender Notification dated 05-3-2015 without awarding the contract to the petitioner, who is L2 Tenderer as illegal, arbitrary and opposed to the principle of doctrine of legitimate expectation and also in violation of Article 14 of the Constitution of India and to hold that the petitioner is entitled to be appointed as Stage-I Contractor in preference to the 4th respondent for the year 2015-16.

7. In this writ petition (W.P.No.8547 of 2015), this Court taking the view that the order of this Court was not reflected in the proceeding dated 18-3-2015 *prima facie* supports the contention of the petitioner, passed an interim order dated 30-3-2015 suspending

the order dated 18-3-2015 passed by the 2nd respondent-Corporation awarding the contract in favour of the 4th respondent-Manikanta Lorry Transport, Nalgonda.

8. Manikanta Lorry Transport, Nalgonda filed W.V.M.P. No.1034 of 2015 along with a counter to vacate the interim order dated 30-3-2015 in W.P.No.8547 of 2015. It is contended by Manikanta Lorry Transport in its counter as follows:

The tenders were submitted through E-tender process and not by person. The writ petitioner did not participate in the tender process dated 05-3-2015 intentionally. No notice of the respondents 1 to 3 is contemplated to be served on the writ petitioner for participating in the re-tender process. As the writ petitioner did not avail the opportunity as per the interim order of this Court, it has no locus or right to challenge the appointment of the 4th respondent in the writ petition as L1 contractor after execution of the contractual agreement dated 24-3-2015 in favour of the 4th respondent. According to the vacate stay petitioner, it had paid a sum of Rs.36 lakhs towards security and furnished bank guarantee for Rs.36 lakhs and thereby paid a total sum of Rs.72 lakhs. It also entered into contract with 9 private lorry owners on monthly rent of Rs.55,000/- per each lorry exclusive of batta of Rs.4,500/- per month for each driver. It is further contended that the writ petitioner having filed W.P.No.5905 of 2015 cannot file W.P.No.8547 of 2015 for the same relief. It is pointed out that this Court did not incline to grant interim relief as sought for in W.P.No.5905 of 2015 and allowed the writ petitioner to participate in the Re-E-Tender process basing upon the EMD submitted by him in response to the earlier tender and thereby this Court allowed the Re-E-Tender process to be held as per Tender Notification dated 09-02-2015 and the writ petitioner is estopped from challenging the fresh tender process, in which the vacate stay petitioner was declared as L1 Tenderer and incurred huge expenditure pursuant to the

execution of the contract.

It is also contended that the writ petitioner in W.P.No.8547 of 2015 obtained the interim order by suppressing the material facts viz., that the petitioner itself failed to participate in the Re-E-Tender process is not entitled for any relief in the writ petition.

It is submitted that the writ petition does not disclose that the writ petitioner filed E-Tender and that his

E-Tender has not been considered. It is further submitted that to participate in tender process, the petitioner has to file E-Tender and no other notice is contemplated nor this Court issued any direction to inform the petitioner that he is permitted to participate in the Re-E-Tender process and therefore, the representation made by the petitioner that he was not allowed to participate in the Re-E-Tender inspite of the direction of this Court cannot be accepted.

9. I have heard Sri M.S.Prasad, learned Senior Counsel for the petitioner in W.P.No.6562 of 2015,

Sri D.Linga Rao, learned counsel appearing for the petitioner in W.P.Nos.5905 and 8547 of 2015,

Sri Bankatlal Mandhani, learned counsel appearing for the vacate stay petitioner in W.V.M.P.No.1034 of 2015 in W.P.No.8547 of 2015 and the learned Government Pleader for Civil Supplies for the State of Telangana.

10. Sri M.S.Prasad, learned Senior Counsel appearing for Mohammed Burahanuddin (petitioner in W.P.No.6562 of 2015) would contend that the petitioner is an L1 Tenderer who quoted 29% lesser price than the existing price for the year 2014-15. He has number of vehicles which he hires to several individuals, even if one of the vehicles was used for transportation of PDS rice, in the absence of his involvement he cannot be penalized. The learned Senior Counsel would further contend that no information was conveyed to the

petitioner stating that his tender was rejected and the grounds for rejection. According to the learned Senior Counsel, as the price bid as well as the financial bids were opened and as the petitioner was found to be L1 Tenderer, it is obligatory on the part of the 2nd respondent-Corporation to award contract to L1 Tenderer and issuing

Re-E-Tender Notification without communicating any order of rejection to the L1 Tenderer is highly illegal and arbitrary, and therefore the Re-E-Tender Notification dated 05-3-2015 is liable to be set aside in the writ petition filed by Mr. Mohammed Burahanuddin.

11. Sri D.Linga Rao, learned counsel appearing for M/s. Sai Nandini Transport (petitioner in W.P.Nos.5905 and 8547 of 2015) would contend that as L1 Tenderer was backed out, as per Condition No.31(a) of the Terms and Conditions of the Tender Notice, the 2nd respondent-Corporation has to necessarily consider the L2 Tenderer and without considering the said aspect, the 2nd respondent-Corporation ought not to have issued Re-E-Tender Notification dated 05-3-2015. He would further contend that despite the interim order dated 12-3-2015 passed by this Court permitting M/s. Sai Nandini Transport to participate in the Re-E-Tender process on the very same EMD furnished in response to the earlier tender, the 2nd respondent-Corporation without conveying any information to the petitioner, unilaterally and arbitrarily awarded contract to Manikanta Lorry Transport, the contract awarded in favour of Manikanta Lorry Transport-vacate stay petitioner is liable to be set aside and a direction be issued to the 2nd respondent-Corporation to execute the contract in favour of M/s. Sai Nandini Transport as it is the L2 Tenderer.

12. On the other hand, Sri Bankatlal Mandhani, learned counsel appearing for Manikanta Lorry Transsport (vacate stay petitioner in W.V.M.P.No.1034 of 2015 in W.P.No.8547 of 2015) would contend

that as no interim orders were passed in the earlier writ petition i.e. W.P.No.5905 of 2015, it is deemed that this Court is not inclined to interfere with the Re-E-Tender process undertaken by the 2nd respondent-Corporation.

Mr. Mohammed Burahanuddin, who was backed out on certain allegation and M/s. Sai Nandini Transport who failed to participate in the Re-E-Tender process inspite of the direction issued by this Court, have no *locus standi* to maintain their respective writ petitions and therefore, the interim orders passed by this Court have to be vacated.

13. Merely because this Court at the stage of admission did not grant any interim direction staying the Re-E-Tender Notification in W.P.No.5905 of 2015 filed by M/s. Sai Nandini Transport, it cannot be said that the relief prayed for in the writ petition itself is refused. Since the writ petition is pending before the Court, the relief prayed for in the writ petition is pending consideration by this Court at a later point of time. Therefore, I do not find any substance in the contention that as no interim order was granted and M/s. Sai Nandini Transport was permitted to participate in the Re-E-Tender process, this Court was not inclined to interfere with the Re-E-Tender Notification dated 05-3-2015. The issues raised in all the writ petitions were kept open for consideration by this Court in the respective writ petitions. Obviously, no information stating that the L1 Tenderer was backed out was communicated to any of the tenderers before issuing the Re-E-Tender Notification. The EMDs were also not returned to the tenderers before issuing the Re-E-Tender Notification.

14. To arrive at an appropriate decision as to the reliefs prayed for and objected to in the present writ petitions, it would be necessary to go into the principles laid down by the Hon'ble Supreme Court in the following judgments:

(a) In **F.C.I v. KAMDHENU CATTLE FEED INDUSTRIES**, the Supreme Court held as follows:

“7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ‘fairplay in action’. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the *bona fides* of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.”

(b) In **NEW HORIZONS LTD. v. UNION OF INDIA**, the Supreme Court took the view that the State action should be in consonance with standards or norms which should not be arbitrary, irrational or irrelevant. Terms and conditions of the tender should be construed from the standpoint of a prudent businessman. With reference to the facts before it, the Supreme Court pointed out that non-consideration of the appellant’s tender on the ground that experience of its constituents was not the same as that of the appellant and acceptance of the tender of respondent No.4 which offered a much lower amount as royalty was arbitrary and irrational.

15. Though some other judgments have been relied on by the learned counsel on either side, which laid down the same principles, I am not inclined to refer to those judgments in this common order. The issues involved in the present writ petitions have to be determined in the light of the principles laid down by the Hon’ble Supreme Court.

16. In the instant case, none of the petitioners did seek the relief to evaluate the tenders. They asserted that the action of the 2nd respondent-Corporation in issuing Re-E-Tender Notification is arbitrary and illegal.

They also attributed *mala fides* to one P.Kaladhar Rao, the then District Manager of the 2nd respondent-Corporation for Nalgonda district, the 5th respondent in W.P.No.8547 of 2015. They specifically alleged that the General Manager (PDS and Marketing) of the 2nd respondent-Corporation managed the issues so as to award the contracts relating to tenders of Nalgonda and Ranga Reddy districts to father and son and accordingly got them awarded by backing out the contractors who quoted lesser price.

17. Having gone through the submissions made by the learned counsel for the parties and perusing the material available on record including the Terms and Conditions of Tender Notification, I am of the view that not conveying any information to any of the tenderers that Mr. Mohammed Burahanuddin was backed out on account of the involvement of his vehicle in illegal transportation of PDS rice, though not specifically stipulated by any of the Terms and Conditions of the Tender Notification is a requirement having regard to the facts and circumstances of the present case since as rightly contended on behalf of the petitioner in W.P.No.6562 of 2015 that if the reasons for rejecting his tender were communicated, Mr. Mohammed Burahanuddin would have been in a position to explain the circumstances relating to the involvement of the vehicle and he would have been in a position to convince the authorities of the 2nd respondent-Corporation that he was not at all concerned with the involvement of the vehicle as he hired the same to some third parties.

18. Though one of the Terms and Conditions of Tender Notification provides for rejection of any tender without assigning any reasons, it does not mean that any tender can be rejected even on insufficient grounds and on invalid reasons. The crucial aspect in the instant case is that there was no communication to any of the tenderers that Mr. Mohammed Burahanuddin was backed out. The EMDs were also not returned to the respective tenderers before issuing Re-E-Tender Notification. Though it is a coincidence, the

undeniable fact is that the contracts of Nalgonda and Ranga Reddy district were awarded to father and son respectively.

19. Condition No.31(a) of Terms and Conditions of the Tender Notification provides as under:

“In case, the L1 tenderer is backed out, the V.C. & Managing Director, APSCSCL reserves the right to call the L2 tenderer. The decision of V.C. & Managing Director in this regard is final and binding on the tenderers and it cannot be called into question by any tenderer.”

20. Though the above condition vests the V.C. and Managing Director of the 2nd respondent-Corporation with a right to call the L2 Tenderer when the L1 Tenderer is backed out, the said discretion has to be exercised in proper way. When the V.C. and Managing Director of the 2nd respondent-Corporation opts not to exercise the said discretion it must be for sufficient reasons.

21. From the facts and circumstances of the case, there seems to be no reason as to why the L2 Tenderer was not called when the L1 Tenderer was backed out. Absolutely, the 2nd respondent-Corporation did not convey any communication to the tenderers the facts viz., rejecting the tender of L1 Tenderer and not considering the L2 Tenderer. Though this Court directed to allow the L2 Tenderer to participate in the Re-E-Tender Notification, the impugned order dated 18-3-2015 passed by the 2nd respondent-Corporation does not refer to the participation of L2 Tenderer. Since no reference of the interim order dated 12-3-2015 passed by this Court is made in the impugned order dated 18-3-2015, it has to be necessarily understood that straightaway, the contract was awarded to the 4th respondent pursuant to the

Re-E-Tender Notification dated 05-3-2015.

22. In **KAMDHENU CATTLE FEED INDUSTRIES**

(1 *supra*), the Supreme Court pointed out that every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. According to the Supreme Court, if the expectation of the claimant is reasonable or legitimate, the same has to be necessarily considered.

23. In the instant case, I am of the view that

Mr. Mohammed Burahanuddin, the petitioner in W.P.No.6562 of 2015, in normal course, would legitimately expect that as the price bid and financial bids were opened and found to be in order, the 2nd respondent-Corporation would communicate to him in the event of rejection of his tender for any reason.

But the 2nd respondent-Corporation did not pass any orders on tenders dated 09-02-2015 before issuing

Re-E-Tender Notification. Similarly, if the L1 Tenderer is backed out, the L2 Tenderer would have certainly

a legitimate expectation that in the normal circumstances, being the next lowest, his tender would be considered without issuing the Re-E-Tender Notification. There is no convincing answer from the

2nd respondent-Corporation as to why it opted for issuing Re-E-Tender Notification.

24. In **JAGDISH MANDAL v. STATE OF ORISSA**, the Supreme Court pointed out the following 3 instances wherein the interference in tender or contractual matters in exercise of power of judicial review is permissible:

(i) the process adopted or decision made is *mala fide* or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or

(iii) it affected the public interest.

25. In the present case, the contention of the petitioners is that in the entire episode, the prices quoted by the petitioners were revealed to the 4th respondent by the authorities so as to enable him to quote the lesser price. There is no proper answer from the 2nd respondent-Corporation as to why it had opted to issue the Re-E-Tender Notification. The contention put forth by the petitioners that the Re-E-Tender Notification was issued to award contract in favour of the L3 Tenderer cannot be said to be without any basis.

26. On proper assessment of the entire material available on record and taking into consideration the contentions put forth on behalf of all the parties, this Court is of the considered view that issuing the Re-E-Tender Notification dated 05-3-2015 is prompted by *mala fides* and with an intention to favour the L3 Tenderer. Consequently, the Tender Notification dated 09-02-2015 and the Re-E-Tender Notification dated 05-3-2015 are set set aside. The 2nd respondent-Corporation is directed to issue Tender Notification afresh after returning the EMDs and advances, if any, paid by the parties to them and award the contract in accordance with law.

27. With the above direction, the writ petitions are, therefore, disposed of. The miscellaneous petitions, if any, pending in these writ petitions are closed.
No costs.

R.KANTHA RAO, J.

01st May, 2015.

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Note:-

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HON'BLE SRI JUSTICE R.KANTHA RAO

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