*** THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO**

WRIT PETITION No.20635 of 2015

% 24.07.2015

Between:

M/s.India Traders

… Petitioner

AND

1. The Osmania University,
   Rep. by its Registrar, Hyderabad,
   and another.

…Respondents

Counsel for petitioner: Learned Senior Counsel
Sri Vedula Venkataramana
For
Sri S.Sridhar

Counsel for the Respondent : Learned Standing Counsel Sri Deepak Bhattacharjee

< Gist:

> Head Note:

? CITATIONS:

1. (2006) 10 SCC 236
2. (2014) 3 SCC 760
3. (1999) 1 SCC 492
4. (2012) 8 SCC 216
5. (2004) 4 SCC 19
6. (2004) 3 SCC 553
7. (2005) 6 SCC 657 : 2005 SCC (L&S) 881
8. (1991) 3 SCC 91
9. (2004) 4 SCC 714
10. (1997) 1 SCC 738

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* * * *

WRIT PETITION No.20635 of 2015

Between:
M/s.India Traders

....Petitioner

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   Rep. by its Registrar, Hyderabad,
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....Respondents

DATE OF JUDGMENT PRONOUNCED:24.07.2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? **Yes**/No

2. Whether the copies of judgment may be Marked to Law Reporters/Journals? **Yes**/No

3. Whether His Lordship wishes to see the fair copy of the Judgment? **Yes**/No

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION No.20635 of 2015

ORDER:

Heard Sri Vedula Venkataramana, learned Senior Counsel appearing for the petitioner, and Sri Deepak Bhattacharjee, learned Standing Counsel for the respondents.

The University wanted to dispose of its old answer scripts (used) and constituted a tender committee consisting of nine members. Pursuant to their decision, the second respondent initially issued a tender notification No.1147/Stores/ Exams/2013 dated 18.02.2013 and one M/s.M.S.Enterprises had become the highest bidder. It was supposed to lift the material within fifteen days from the receipt of the letter of acceptance and when it failed to do so, the tender was cancelled under proceedings No.289/Stores/Exams/2013 dated 18.06.2013. Thereafter, a decision was taken to issue fresh tender notice fixing the basic price at Rs.1620/- per 100 kgs. Accordingly, tender notice No.514/Stores/Exams/2013, dated 20.09.2013, was published in the daily

newspapers and ten parties submitted their tender. The last date for tenders was notified as 04.10.2013. Since none of the parties quoted the fixed minimum basic price of Rs.1620/-, it was decided to call all the bidders and give option to them to renegotiate the rate by 07.10.2013. After requoting, the petitioner became the highest bidder with Rs.1621.50 per 100 kgs against the bid of Rs.1535/- quoted by it. The second respondent issued a letter on 09.10.2013 communicating his decision to accept the bid of the petitioner and the petitioner was asked to pay an advance amount of Rs.5,00,000/- before lifting the stock. Accordingly, the petitioner paid the amount of Rs.5,00,000/-, but could not lift the stock within the said time due to intervening holidays and hence requested for extension of time by fifteen days up to 10.11.2013. The Executive Council met on 12.11.2013 and took a decision to cancel the tender notification dated 20.09.2013. Accordingly, the committee constituted for disposal of old main answer scripts (used) recommended for cancellation of tender notification dated 20.09.2013. A communication was sent to the petitioner by the second respondent on 16.01.2014 stating that the tender was cancelled and the petitioner was asked to collect the refund of EMD and advance payment amounts. Challenging the said proceedings, the petitioner filed W.P.No.2002 of 2014 and this Court, by order dated 18.02.2014, set aside the said proceedings and directed the respondents to permit the petitioner to lift the stock of the main answer scripts (used) as per the terms and conditions of the tender notification dated 20.09.2013. Against the said order, the respondents preferred a Writ Appeal in W.A.No.639 of 2014 and the same was disposed of on 10.04.2014 recording the statement made by the learned Counsel for the appellants that at that moment the University authorities had decided not to sell the stock of used answer booklets and it was further observed that if the University authorities in future decides to sell the aforesaid stock, the writ petitioner's offer should be considered. Against the said order of the Division Bench dated 10.04.2014 the petitioner herein, who was the successful tenderer,

filed SLP before the Supreme Court and the said SLP was disposed of on 19.02.2015 as follows:

> "We have heard learned counsel for the parties.
>
> Learned counsel for the appellant submits that the Division Bench has failed to consider the correctness of the view taken by the learned single Judge that the action of the University in cancelling the tender, after the bid of the appellant was accepted and it had made the requisite deposits, was arbitrary. Neither any notice was given to the appellant nor any reason was assigned in the impugned order.
>
> Faced with the above, learned counsel appearing for the respondent fairly submits that the University will take a fresh decision in the matter after duly considering the view point of the appellant.
>
> Accordingly, we dispose of this appeal, with a direction that the respondent-University will pass fresh order in the matter within one month from today, after considering the view point of the appellant. The appellant will be at liberty to put forth its view point before the University within two weeks from today. It is made clear that if the appellant is aggrieved by the fresh order passed by the University, it will be at liberty to take appropriate remedy in accordance with law."

The petitioner submitted a letter on 04.03.2015 seeking permission to lift the used answer books since they have committed the goods to the paper mills and requested for cancellation of the order dated 16.01.2014.

After disposal of the SLP by the Supreme Court, the respondent University constituted a Committee and the second respondent issued a letter on 17.03.2015 asking the petitioner to appear before the committee on 18.03.2015. Accordingly, the petitioner appeared before the Committee on the said date and when no decision was communicated later, the petitioner addressed a letter on 22.04.2015 reminding the respondents the need for orders in the matter. The respondents communicated an order on 27.06.2015 stating as follows:

> "In compliance of the above direction, the University constituted a committee to go into the subject and to submit report. The committee after going through the letter submitted by your firm dated 04.03.2015 and after providing right of

hearing on 18.03.2015 submitted its report to the University.

> The report of the committee was placed before the Executive Council of the University in its 137th meeting held on 23.04.2015. The Executive Council discussed the issue and also considered the report of the committee in its proper perspective. The Executive Council was of the opinion that the process was vitiated on various grounds in respect of finalizing the tender in favour of your firm and subsequent work order which was issued. The Executive Council was therefore of the opinion that the University shall have to call fresh tenders for disposal of the material in question.
>
> The Executive Council exercised its statutory power under Section 19 of the AP Universities Act 1991 for taking the above decision and in not accepting the recommendation of the committee constituted. Therefore, it is decided that the University shall issue fresh Tenders for the sale of the used answer scripts on "as is where is condition" and the tender notice will be published in widely circulated news papers. If you so desire, you may also submit the bid in response to the Tender Notice.
>
> In view of the foregoing, you are requested to collect your E.M.D and Advance payment from this office."

Challenging the aforesaid communication, the present Writ Petition is filed.

The learned Senior Counsel for the petitioner submitted that the impugned communication of the respondents is arbitrary since it does not contain any reasons for issuing fresh tenders. When this Court pointed out the issue with regard to the maintainability of the Writ Petition, learned Senior Counsel relied on **Noble Resources Limited v. State of Orissa**[1].

Learned Standing Counsel for the respondents submitted that the Executive Council, in exercise of its statutory power under Section 19 of the Andhra Pradesh Universities Act, 1991, took a decision not to accept the recommendation of the Committee constituted and its decision is not subject to judicial review. He relied on **Maa Binda Express Carrier v. North-East Frontier Railway**[2].

In the light of the rival contentions it has to be seen whether the present communication issued on 27.06.2015 is valid or not. In this connection, it is to be pointed out that this Court called for the record of the Executive Council and noticed that the Committee constituted pursuant to the order of the Supreme Court gave a report in favour of the petitioner recommending to the second respondent to issue fresh order for lifting the stock, subject to the conditions mentioned therein. But, the Executive Council took a decision not to accept the said recommendation of the Committee. This Court wanted to see the deliberations of the Executive Council in order to find out whether any proper reason existed in taking such a decision by the Executive Council. But, the record is silent with regard to the deliberations that took place in the meeting of the Executive Council. Since, the learned Standing Counsel for the respondents relied on Section 19 of the Andhra Pradesh Universities Act, 1991, it is necessary to examine the said Section, which reads as follows:

> "**19. Powers and duties of the Executive Council:-** The Board of Management shall be the Executive Authority of the University and shall have power,-
>
> (1) ….;
>
> (2) …..;
>
> (3) to enter into, vary, carry out and cancel contracts on behalf of the University in the exercise of performance of the powers and duties assigned to it by this Act and the Statutes;"

The above provision makes it clear that it empowers the Executive Council to take a decision. Since this Court is examining the decision making process, it is concerned with the process involved in coming to such decision. The record is silent on this aspect and this Court is handicapped from examining the decision making process. In the absence of any reasons and in the absence of record of deliberations in the Executive Council meeting, it has to be held that the decision arrived at by the Executive Council is wholly arbitrary and such a process

cannot be appreciated by the Court.

The power vested in the Executive Council is coupled with a duty to consider the facts and take a decision. In the absence of reasons, whether the duty was properly exercised or not is not known to this Court or to the petitioner.

I n **Maa Binda Express Carrier**'s case (supra), tenders were invited by a notice dated 12.07.2011 for grant of three year lease of 23 tonnes of space in a parcel van. Though the petitioner became the highest tenderer, the tender process was discharged by the Railway administration on account of technical and administrative reasons. A communication was sent to the tenderer on 06.09.2011 and the same was challenged before the High Court of Gauhati. The learned single Judge allowed the Writ Petition, but the Division Bench reversed the same by relying on **Raunaq International Ltd. v. I.V.R. Construction Ltd.**[3] When the matter was taken up, the Supreme Court, after considering the rival contentions, held as follows:

> " I n **Michigan Rubber (India) Ltd. v. State of Karnataka**[4] the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:
>
> "23. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) *fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable.* If the Government acts in conformity with certain healthy standards

and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

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

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

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

20. 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"?; and*

(ii) *Whether the public interest is affected?*

If the answers to the above questions are in negative, then there should be no interference under Article 226.

(emphasis supplied)"

The Supreme Court ultimately held that the decision to cancel the tender process was in no way discriminatory or mala fide. On the other hand, if a contract was awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process could have arisen. Accordingly, the Supreme Court dismissed the appeal with costs.

I n **Noble Resources Ltd.**'s case (supra) the Supreme Court considered the jurisdiction of the Courts in relation to the tender

matters. It was held therein as follows:

> "28. Although terms of the invitation to tender may not be open to judicial scrutiny, but the courts can scrutinize the award of contract by the Government or its agencies in exercise of their power of judicial review to prevent arbitrariness or favouritism. [See **Directorate of Education v. Educomp Datamatics Ltd.**[5]]. However, the court may refuse to exercise its jurisdiction, if it does not involve any public interest.
>
> 29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.**[6], each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise power of judicial review. In a case where a public law element is involved, judicial review may be permissible. [See **Binny Ltd. v. V.Sadasivan**[7] and **G.B. Mahajan v. Jalgaon Municipal Council**[8]].
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> 30. In **State of U.P v. Johri Mal**[9], it was held :
>
> "30. It is well settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision-makers opinion on facts is final. But while examining and scrutinising the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinising the decision-making process, it is always open to the court to review the evaluation of facts by the decision-maker."

31. Another field where judicial review is permissible would be when mala fide or ulterior motives is attributed. In **Asia Foundation and Construction Ltd. v. Trafalgar House Construction India Ltd.**[10], this Court held :

"....We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant..."

It was further held :

"10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Courts interference in the grant of contract in favour of the appellant..."

In the instant case, the order of cancellation was set aside by this Court in the earlier round of litigation. The case went to Supreme Court. The Supreme Court disposed of the appeal with liberty to the University to consider the matter afresh after considering the view point of the tenderer and pass orders. Thereafter the multimember Committee which was constituted gave a favourable report for issuance of fresh orders in favour of the petitioner. The report of the Committee was not accepted by the Executive Council on the ground that the tender process itself was vitiated in awarding the contract in favour of the petitioner. The said ground was not made out at the time of issuing the order by the second respondent on 18.06.2013. In fact the minutes of the meeting of the Committee on 17.09.2013 disclosed that the highest bidder failed to lift the material and his EMD amount of Rs.1.50 lakhs was forfeited. A re-tender was issued on 20.09.2013. Ten tenderers filed their tenders and none of them quoted the minimum price of Rs.1620/-. Therefore, all of them were called to re-quote the rate and

the petitioner agreed for the rate of Rs.1621.50 ps per 100 kgs. When the order of cancellation was passed and it was challenged in W.P.No.2002 of 2014, the respondents did not take the stand that the tender process was vitiated and the award of contract in favour of the petitioner could not have been done. In the said Writ Petition, this Court noted that the cancellation was done without assigning reasons and the same is repeated now. Though no mala fides were attributed to the Executive Council, in view of the sequence of events, the decision taken by the Executive Council is highly arbitrary and is liable to be set aside. The interest of the University will also be served if the petitioner is allowed to lift the stock as two years had already elapsed from the date of original tender to date.

In the circumstances, the Writ Petition is allowed by setting aside the order of the respondents dated 27.06.2015 and consequently the respondents are directed to allow the petitioner to lift the stock at the price agreed between the parties subject to the conditions of tender. The miscellaneous petitions pending in this Writ Petition, if any, shall stand closed. There shall be no order as to costs.

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(A.RAMALINGESWARA RAO, J)

24.07.2015
vs

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[1] (2006) 10 SCC 236
[2] (2014) 3 SCC 760
[3] (1999) 1 SCC 492
[4] (2012) 8 SCC 216
[5] (2004) 4 SCC 19
[6] (2004) 3 SCC 553
[7] (2005) 6 SCC 657 : 2005 SCC (L&S) 881
[8] (1991) 3 SCC 91
[9] (2004) 4 SCC 714
[10] (1997) 1 SCC 738