

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA
PRADESH

WRIT PETITION No.35879 of 2017

Between:

M/s.Sri Seetharamanjaneya Constructions,
Rep. by its Managing Partner P.Satyanarayana Reddy.

.....Petitioner

and

The State of Andhra Pradesh,
Rep. by the Principal Secretary,
R & B Department,, Secretariat,
Velagapudi, Amaravathi, Guntur District and others

.....Respondents

Date of Judgment pronounced on : 18-04-2018

HON'BLE SRI JUSTICE M.S.RAMACHANDRA 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
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/No

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

WRIT PETITION No.35879 of 2017

%18-04-2018

M/s.Sri Seetharamanjaneya Constructions,
Rep. by its Managing Partner P.Satyanarayana Reddy Petitioner.

Versus

\$ The State of Andhra Pradesh,
Rep. by the Principal Secretary,
R & B Department,, Secretariat,
Velagapudi, Amaravathi, Guntur District and others

..... Respondents.

< **GIST:**

> **HEAD NOTE:**

!Counsel for the petitioners : Mr.G. Rama Gopal

^Counsel for the respondents : Government Pleader for Roads and Buildings

? **Cases referred**

1. Order dt. 21.12.1999 in Writ Petition No.25424 of 1999
2. Order dt.11.2.2002 in W.P.No.11704 of 2001
3. 1994 (6) SCC 651
4. Associated Provincial Picture Houses Ltd .v Wednesbury Corporation... (1948) 1 KB 223 (CA)
5. 2000(2) SCC 617
6. 2004(4) SCC 19
7. 2005(4) SCC 435
8. 2005(1) SCC 679
9. 2012(8) SCC 216
10. (2016) 12 SCC 780
11. (2005) 6 SCC 138
12. (2015) 2 SCC 796
13. (2017) 4 SCC 269

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

WRIT PETITION No.35879 of 2017

ORDER:

The petitioner, in this case, is engaged in civil contract works and is registered with the departments of the State of Andhra Pradesh for execution of various civil works. It undertakes execution of works pertaining to laying of roads, their development and widening.

2. It is not in dispute that, for laying roads, Bituminous Mixes which are created in Hot Mix Plants are used.

3. A Circular Memo No.TA1/514/94-27 dt.12.04.1994 was issued by the Chief Engineer, Panchayat Raj (R&MI) Department, Hyderabad, stipulating a condition in the tender notice itself that there ought to be *a tie up* arrangement between a bidder for a contract for laying road and a Hot Mix Plant owner, located within a distance of one hour travel from the farthest point of the work spot. This is allegedly because, when Bituminous Mix is used for laying the road, proper temperature ought to be maintained while transporting it from the Hot Mix Plant to the work spot.

4. A Circular Memo No.1/E-in-C(R)Peshi/98 dt.20.03.1998 was issued by the Engineer-in-Chief (R&B), State of Andhra Pradesh, Hyderabad, stating that proper temperatures are not being maintained for the Bituminous Mixes transported from Hot Mix Plants by the time they reach the work site, that the maximum distance of a plant from the work site should be 50 K.Ms. and that conditions must be

included in the tender schedules mandating a bidder (1) to submit proof of having B.T. Hot Mix Plant with him erected and in working condition within a distance of 50 K.Ms. from the work site while applying for the tender schedules; and (2) that the Hot Mix Plant should have a Quality Control Lab at its premises to conduct the various quality control tests which should be accessible to the Department Officers.

5. Later, Circular Memo No.9999/TA3/AEE.2/99 dt.17.08.1999 was issued by the Engineer-in-Chief (R&B) Roads, State of Andhra Pradesh. In this Memo, he noted that, the earlier instructions require that a bidder should submit proof of having Bituminous Hot Mix Plant with him erected and in a working condition within a distance of 50 K.Ms. from the worksite while applying for the tender schedules; there were some comments that *because of restriction of the distance to 50 K.Ms. monopolistic tendencies had developed*; and, therefore, the earlier instructions issued restricting the distance to 50 K.Ms. from 70 K.Ms. are cancelled and 70 K.Ms. distance would be the optimum distance.

6. The said Circular Memo No.9999/TA3/AEE.2/99 dt.17.08.1999 issued by the Engineer-in-Chief, (R&B) Department, State of Andhra Pradesh, was challenged in **Redya Naik V. The Engineer in Chief**¹. The said Writ Petition was dismissed on 21.12.1999 observing that the decision to increase the distance from 50 K.Ms. to 70 K.Ms. wherein

¹ Order dt. 21.12.1999 in Writ Petition No.25424 of 1999

the Bituminous Hot Mix Plant should be located is an administrative decision keeping in view the technical aspects and the Court cannot sit in judicial review over such matters. The Court rejected the contention that if the said Circular is followed, it would lead to poor quality of works resulting in damage of Bituminous roads resulting in wastage of public money.

7. Later in the year 2001, both the Circular Memos Memo No.1/E-in-C(R)Peshi/98 dt.20.03.1998 and Circular Memo No.9999/TA3/AEE.2/99 17.08.1999 issued by the Engineer-in-Chief, Roads and Buildings Department, State of Andhra Pradesh were challenged in **N. Ramachandra Reddy v. Govt. of A.P and others**². A learned Single Judge of this Court dismissed the same on 11.02.2002, following the order in **Redya Naik** (1 supra).

8. While so, the State Government issued G.O.Rt. No.46, Transport, Roads and Buildings (R.I) Department dt.17.01.2005, directing changes in the bid document to the effect that the clause providing for ownership/lease of Hot Mix Plants should be deleted in the tender condition and a clause permitting the contractor to procure the Hot Mix materials to the work site, duly maintaining the required laying temperature, as per the specifications be included.

9. However, the Builders Association of India gave a representation to the Department of Roads and Buildings requesting the Government to include the condition of owning a Hot Mix Plant

² Order dt.11.2.2002 in W.P.No.11704 of 2001

within 70 K.Ms. distance of the site of work, and to make it mandatory in tender schedules.

10. The State Government, then constituted a Committee and the Committee opined that the condition of owning the Hot Mix Plant within 70 K.Ms. distance from the site of the work should be made compulsory for all road works involving Bituminous items of work, irrespective of the cost of the work, provided the completion period stipulated is up to one year, and the said condition would mitigate the delay on account of fresh procurement of Hot Mix Plant and help in quality insistence by the Officers supervising the execution of work.

11. Thereupon, G.O.Rt. No.179, Transport, Roads and Buildings (R-I) Department, dt.06.02.2014, was issued by the State Government imposing a condition of owning Hot Mix Plant within 70 K.Ms. distance in contracts involving up to Rs.5.00 Crores Bituminous items of work and not to impose the said condition for works costing more than Rs. 5.00 Crores.

12. There was a rethink on the issue again by the State Government resulting in the issuance of G.O.Rt. No.180, Transport, Roads and Buildings, (R.I) Department, dated 19.06.2017 and in that G.O., G.O.Rt. No.179, dated 06.02.2014 was superseded and the following conditions were imposed for all R&B works involving Dense Bituminous Mixes like DBM, BC as the qualification criteria:

“i) The usage of Hot Mix plant of Batch Type of 100/120 TPH Capacity shall be made mandatory for all the Works wherever the

works involve the provisions of Dense Bituminous Mixes such as DBM and BC, with immediate effect.

ii) The Hot Mix plant shall be located within a distance of 100 Km from the Work site, in order to have control over the temperature of the Bituminous Mixes. The Contractor shall procure the Hot Mix material to the work site duly maintaining and ensuring the required laying temperature, as per the specifications.

*iii) For all the works, **irrespective of the cost**, the bidders may be permitted to either **own or lease** the said Batch type Hot Mix Plant of 100/120 TPH Capacity located within a distance of 100 Km from site of Work and produce the necessary Documents at the time of submission of bid, if the Work involves the component of DBM/BC.” (emphasis supplied)*

THE CONTENTION OF WRIT PETITIONER

13. The petitioner questions clause (iii) in Para 3 of G.O.Rt.No.180, Transport, Roads and Buildings (R.I), Department, dt.19.06.2017 to the extent the said clause required prospective bidders to produce necessary documents *at the time of submission of the bid for a work* involving components of DBM/BC that they own or have leased a Hot Mix Plant of batch type of 100/120 TPH capacity located within a distance of 100 K.Ms. from the site of the work.

14. Petitioner contends that such a condition is arbitrary and unreasonable and violative of Art 14 and Art.19(1) (g) of the Constitution of India inasmuch as every prospective bidder who wanted to bid for the R&B work *would have to erect* a Hot Mix Plant of his own or *obtain a lease* deed from any Hot Mix Plant owner within 100 K.Ms. radius by spending huge amount and then submit

his bid for the work, *without knowing whether or not he would be awarded a particular R&B work*; and it would be unreasonable to expect him to first erect a Hot Mix Plant, or to obtain a lease from the owner of a Hot Mix Plant within 100 K.Ms. radius, incurring large amount of expenditure, before the submission of the bid.

15. According to learned counsel for the petitioner, to erect a Hot Mix Plant, at least Rs.3.00 to 4.00 crores of expenditure has to be incurred and numerous permissions from various authorities are required to be obtained, and the State can achieve the object for which the above condition was imposed, by incorporating specific clauses in the agreement to be executed by the Department with the successful bidder, *after he is declared as a successful bidder*, but cannot impose it as a pre-qualification for submitting the tender.

16. He contends that if this condition is implemented, it would restrict the competition and virtually facilitate only those contractors who already own a Hot Mix Plant within a distance of 100 K.Ms. from the work site under tender and create a *cartel* of such individuals, thus defeating public interest. He contends that the said condition would prevent other persons who do not own a Hot Mix Plants from getting any road work contracts, though they have rich experience in laying roads.

17. He contends that possessing the expertise to establish, maintain and manufacture Bituminous mixes, which are used in road laying, is

one thing *and* having expertise in road laying is another thing. According to him, the situation is akin to one where a person who manufactures cement at a particular location or his nominee is directed by the State to alone do building construction work within 100 km from place of it's manufacture, though expertise for manufacture of cement *is different* from expertise in carrying out building construction work.

18. He contends that the condition is thus un-reasonable, discriminatory and has no reasonable nexus with the object sought to be achieved and was incorporated for extraneous reasons to facilitate monopoly by contractors who had already erected their Hot Mix Plants in the territorial area of State of Andhra Pradesh.

19. He therefore seeks a declaration that clause (iii) in Para 3 of G.O.Rt. No.180 dt.19.06.2017, *to the extent it required production at the time of submission of the bid* of proof of ownership or lease of a batch type Hot Mix Plant of 100/120 TPH capacity located within a distance of 100 K.Ms. from the site of the work, be struck down as arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India.

THE STAND OF THE RESPONDENTS 2 AND 3

20. In the counter-affidavit filed by Superintending Engineer (R & B) Circle, Eluru, West Godavari District on behalf of himself and the Engineer-in-Chief (R & B), State of Andhra Pradesh, Vijayawada,

Krishna district (respondent No.s 2 and 3 in Writ Petition No.35879 of 2017), the respondents refute these contentions.

21. They contend that imposition of the condition for production of proof of owning or leasing of Hot Mix Plant within 100 K.Ms. distance from the work site *at the time of submission of bid* is pursuant to the advice of the Union of India as well as a Technical Committee constituted by it.

22. According to them, the Government of India, Ministry of Road and Transport & Highways, New Delhi in its Letter No.RW-24011/02/2014-Mech, dated 11.12.2015 has circulated instructions to all the Principal Secretaries/Secretaries of all States/Uts Public Works Department dealing with National Highways, other Centrally Sponsored Schemes and State Schemes and to all the Engineers-in-Chief and the Chief Engineers of Public Works Departments of States with regard to usage of Hot Mix Plant of Bituminous construction works on National Highways, wherein it is categorically directed that Batch type Hot Mix Plant should be used for works involving bituminous design mixes which require close control over the proportioning of materials by weight, and where recycling of Bituminous pavement is not included in the scope of work, however the use of Batch type Hot Mix Plant is not mandatory for the following works:-

- i) Works in hilly areas of Jammu & Kashmir, Himachal Pradesh, Uttarakhand, West Bengal and the North Eastern States except Assam.
- ii) Works in Left Wing Extremist (LWE) Affected Areas.
- iii) Works which are in nature of maintenance like Periodic Renewal (where the sanctioned cost does not exceed Rupees Twenty Five Crores), Special Repair (where the sanctioned cost does not exceed Rupees Twenty Five Crores), Flood Damage Repair and Ordinary Repair.

In the said instructions, it is categorically stated that Hot Mix Plant, whether Batch type or continuous type, should have necessary features/components/devices, should be properly calibrated to enable control or mix quality within specified tolerance limits and should be located within the appropriate lead.

23. They contend that if the contractors like the petitioner are permitted to participate in tenders without having or obtaining a lease of Hot Mix Plant within 100 K.Ms. radius and are awarded contracts, they would take 4 to 6 months time for establishing a Hot Mix Plant since they would need to acquire the land and take clearance from Pollution Control Board and other statutory bodies, which would delay the execution of the project, that in the meantime there would be

change of seasons making it difficult/impracticable to execute the works. They contend that in view of this, the State decided to impose such a precondition *vide* G.O.Rt. No.180, dated 19.06.2017. They contend that if this condition is deleted, there is a possibility of contractors backing out of the tender process by not erecting plants after they become successful tenderers resulting in tenders to be re-invited again, increase in the estimates, and leading to loss of Government revenue. It is denied that this condition is arbitrary and was made to favour few contractors.

24. Reliance is placed on the decisions in **Redya Naik** (1 supra) and **N.Ramchandra Reddy** (2 supra) referred to above and it is contended that in those cases this Court had upheld that at time of submission of bids itself proof can be directed to be produced of owning or having lease of hot mix plants, and it is contended that inclusion of the said condition is based on technical reasons and this Court ought not to interfere with the same.

EVENTS PENDING W.P.No.35879 OF 2017

25. It is pertinent to note that in W.P.M.P. No.44586 of 2017 in W.P. No.35879 of 2017, initially, this Court granted suspension of the said condition, but the said order was set-aside on the ground that at the admission stage, before filing of counter-affidavit, it was passed. The Bench remanded the matter back to the Single Judge stating that the award of the contract works would be subject to further orders in this Writ Petition. It also stated that observations made in the said

order only reflect the *prima-facie* opinion of the Division Bench and the Writ Petition should be heard on merits, without being influenced by the observations made therein.

THE CONSIDERATION BY THE COURT

26. Learned counsel for the parties reiterated their respective contentions, post remand.

27. I have noted the contentions of both sides.

28. It is important to note firstly that it is not the contention of the petitioner that the respondents are acting arbitrarily or unreasonably in insisting for usage of bituminous items of work/mixes prepared by using hot-mix plants. Secondly, it is also not his contention either that the insistence of the respondents that such hot mix plants should be located within a distance of 100 kms from the work site, is arbitrary or unreasonable.

29. His contention is the insistence by the respondents that *at the time of submission of bid by a contractor*, proof of ownership or lease of a hot mix plant should be filed where the work involves use of DBM/BC (bituminous items), is arbitrary and unreasonable. His contention is that erection of hot mix plant is itself costing Rs.3 crores or more (which is admitted by the respondents in para-22 of their counter) and insistence by respondents that a contractor, *at the time of submission of the bid*, should produce evidence that he owns or has a lease of such a hot mix plant is unreasonable, since no prudent

businessman, without knowing whether or not he would be the successful bidder, would incur such expenditure before filing his tender, more particularly, when the tender works value itself is far less. For the sake of illustration, he points out that in Ex.P-9 e-procurement tender I.D.No.147926, Ex.P-10 e-procurement tender I.D.No.147960 and Ex.P-11 e-procurement tender I.D.No.147970 in W.P.No.35879 of 2017, the value of the works is Rs.97.33 lakhs, Rs.1.02 crores and Rs.98.39 lakhs respectively for three different stretches of roads in West Godavari District, and it would be unreasonable to expect any contractor, who intends to bid only for one or two of them, to erect a hot mix plant incurring expenditure of Rs.3 crores or more. It is his further contention that obtaining lease deeds from persons having hot mix plants also entails considerable expenditure and owners of hot mix plants might set up their own nominees to bid in the contracts, creating a cartel, and decline to support bids of genuine contractors who have considerable experience in the road laying works.

30. He also contends that the technology of laying roads is different from the technology of manufacturing bituminous mixes through hot mix plants and the insistence of proof of ownership or lease *at the time of submission of bids*, would create a monopoly, enabling hot mix plant owners to dictate who should be the tenderer for every road laying contract, thereby compromising on the quality of

the road laying work, since having hot bituminous mix is not the sole important thing for laying a quality road.

31. I have considered the decisions in Redya **Naik** (1 supra) and **N. Ramachandra Reddy** (2 supra), cited by the learned Government Pleader. In my opinion, they have no relevance in this case since this Court in those cases *only* considered the question the validity of action of respondents in restricting, in the tender conditions, the distance to 50 kms from 70 kms from the work site for having a hot mix plant, is valid or not. In the instant case the distance requirement is not at all an issue. This is clear from a close reading of both the decisions.

32. In Writ Appeal No.1792 of 2017 arising out of the interim order in W.P.No.35879 of 2017, though the Division Bench in page-5 took a view that the judgments in **Redya Naik** (1 supra) and **N. Narasimha Reddy** (2 supra) appear to support the Government Pleader's contention that the State can insist *at the time of submission of the bid*, ownership or lease of a hot mix plant, with due respect to the Division Bench, the said issue did not arise for consideration in those cases.

33. However, since the Division Bench in the last paragraph of it's order therein stated "*it is also made clear that the observations in this order reflect only our prima facie opinion; and the Writ Petition shall be heard on merits without being influenced by the observations made*

therein”, I shall decide the matter independently and consider the submissions of the parties on that issue.

34. I shall now consider the decisions of the apex Court dealing with judicial review of tender conditions.

35. In **Tata Cellular Vs. Union of India**³, it was held that judicial review in matters of award of tenders is limited and this Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made; that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract; that the Government must have freedom of contract; but however, the decision must not only be tested by the application of **Wednesbury**⁴ principle of reasonableness, but must be free from arbitrariness, not affected by bias, or actuated by malafides.

36. In **Air India Limited v. Cochin International Airport Ltd.**⁵, the Supreme Court held that award of a contract by a State is essentially a commercial transaction, and in arriving at a commercial decision, considerations which are paramount are commercial considerations; that it can choose its own method to arrive at a decision and can fix its own terms of invitation to tender and that is not open to judicial scrutiny; and though its decision is not amenable to judicial review, the Court can examine the decision making process

³ 1994 (6) SCC 651

⁴ Associated Provincial Picture Houses Ltd .v Wednesbury Corporation ... (1948) 1 KB 223 (CA)

⁵ 2000(2) SCC 617

and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness.

37. In **Directorate of Education v. Educomp Datamatics Ltd.**⁶, the above principles were reiterated and it was held that the Courts would not interfere with the terms of the tender notice unless they are shown to be either arbitrary or discriminatory or actuated by malice.

38. In **Global Energy Ltd., V. Adani Exports Ltd.**⁷, **Association of Registration Plates v. Union of India and others**⁸ and **Michigan Rubber(India) Ltd. v. State of Karnataka**⁹ also these principles was reiterated.

39. *Thus, the legal position is clear that if there is arbitrariness or discrimination or malice, judicial review is permissible even of tender conditions.* In fact, the Division Bench in its order dt.29-11-2017 in W.A.No.1792 of 2017 at page-4 has also taken the same view.

40. In **State of Orissa and others Vs. Utkal Pharmaceuticals Manufacturers Association and another**¹⁰, a three Judge Bench of the Supreme Court considered the question as to whether the decision of the High Court of Orissa in allowing a Writ Petition striking down as unconstitutional a tender condition in a tender notice, is correct or not. Clause 2.1 of the tender notice in question in that case stipulated that principal manufacturing units with an annual turnover of Rs.10

⁶ 2004(4) SCC 19

⁷ 2005(4) SCC 435

⁸ 2005(1) SCC 679

⁹ 2012(8) SCC 216

¹⁰ (2016) 12 SCC 780

crores for the last three financial years *alone* shall be eligible for participating in the tender process for supply of drugs to the State of Orissa. It was contended by the Writ petitioner therein that the said condition disqualifies smaller units from empanelment for supply of drugs and was arbitrary, discriminatory and contrary to the Industrial Policy Resolution, 2007 as well as Orissa Micro, Small and Medium Enterprise Development Policy, 2009. This contention was accepted by the High Court of Orissa and it struck down clause 2.1. Before the Supreme Court, it was urged by the State Government that *on the basis of past experience*, the said clause was introduced, that it was a policy decision and there was no arbitrariness in imposing the said condition for eligibility. The Writ petitioner refuted the same and contended that no material was placed by the State before the High Court to suggest that Small Scale Industrial Units had defaulted in making the supplies of drugs as and when required to do so, to justify their exclusion from empanelment on that ground. It was contended by the Writ petitioner that the inference that Small Scale Units, just because of their size, will fail to perform their contractual obligations with the State is not correct; and that the material placed by it indicates that defaults committed by Medium and Large scale units in the matter of supply of drugs were equal in number, if not more, when compared with the defaults committed by Small Scale Industrial Units. It was also contended that reservation of as many as 269 drugs in the Medium and Large Scale Sector was much too high a number to be fair and reasonable vis-à-vis Small Scale Units who were reduced

to supplying a mere 20 drugs, threatening their very survival. The Supreme Court remanded the matter to the High Court to examine this issue as to whether there is any empirical data in support of the State Government's plea that the condition excluding smaller Units was introduced on the basis of some study or not. The Court observed that the High Court should also examine, whether the reservation of 269 drugs for the larger sector and reduction of number of drugs to 20 in the case of Small Scale sector, constitutes infringement of any right of the Small Scale Units.

41. In para-15 of the counter-affidavit of the respondents in the present case, a plea is raised that *"during last 9 years, it observed that this process of taking lease and buying the equipment has led to a lot of delay in completing the works and to some extent contractual obligations on the part of the Department as well as Contractors"*. No empirical data in support of the said pleading had been placed on record by the respondents.

42. The State cannot therefore say that a Contractor, who did not produce proof of ownership or having lease at the time of submission of bid, would invariably fail in executing the contract or delay the work. There is no such presumption in law. A successful contractor in the tendering process can always obtain a lease of a hot mix plant, after he secures the contract, and complete the work; and since he is the only one who can execute the tendered work, the hot mix plant owners would have no choice, but to do business with him for their

own survival. So the State can achieve the object for which the above condition was imposed, by incorporating specific clauses in the agreement to be executed by the Department with the successful bidder, *after he is declared as a successful bidder*, but cannot impose it as a pre-qualification for submitting the tender.

43. I therefore reject the plea of the State that contractors like the petitioner, if permitted to participate in tenders without having or obtaining a lease of Hot Mix Plant within 100 K.Ms. radius and awarded contracts, would invariably take 4 to 6 months time for establishing a Hot Mix Plant since they would need to acquire the land and take clearance from Pollution Control Board and other statutory bodies, which would delay the execution of the project; and that in the meantime there would be change of seasons making it difficult/impracticable to execute the works. Not a single instance of the petitioner or other person having done so, is placed before this court.

44. The State cannot also state that as per advise of Union of India and that of the Technical Committee it has introduced this condition, without producing any empirical data justifying the imposition of the condition.

45. In my opinion, the plea of Technical Advice raised by the State, is a red herring and cannot be countenanced, since *the time at which* the proof of ownership of or linkage with a hot mix plant is to

be insisted, cannot be a technical issue, though having such linkage might be a technical issue.

46. The Government Pleader for Roads and Buildings also does not deny that the technology for preparing bituminous mixes is *different* from the technology for laying roads. So, a person having the expertise to make bituminous mixes may not always have the technical expertise to lay roads. Both are different activities and experience in the former activity does not guarantee that he will be good at the latter work too.

47. The stand of the respondents is akin to saying that a manufacturer of cement alone should be given building construction works within 100 kms from the place of the manufacture of cement or persons to whom he is willing to supply cement. Since expertise to manufacture cement is different from expertise to build homes/commercial buildings, such a condition would be clearly arbitrary and unreasonable.

48. By imposing a condition that *at the time of submission of bid*, the contractor should either own or have a lease of a hot mix plant, the State is practically allowing hot mix plant owners to *dictate* who shall participate in the bidding process. Naturally such hot mix plant owners or their nominees, irrespective of their experience in road laying works, would get all these contracts. This cartelisation is a direct consequence of imposition of such a condition in the tenders

and is definitely not in public interest, since the avowed object of getting the best experienced person to execute the road laying works at the most competitive price so that quality roads are laid, is defeated.

49. I also find much force in the contention of the learned counsel for the petitioner that the corridor/length of the State of Andhra Pradesh from Srikakulam to Chittoor being about 1000 kms, contractors who form syndicates can erect a mere 8 hot mix plants through out the corridor of the State and manage all the bids for R & B works either as an owner or as a lease holder, excluding experienced contractors who don't own any hot mix plant.

50. In my opinion, the imposition of the condition is solely for the benefit of wealthy hot mix plant owners and is tailor-made for their benefit only. Since it restricts the participation in the bid process, the bidders will quote high amounts to the detriment of the State exchequer. Thus from the commercial point of view also, imposition of such condition is not in interest of the State.

51. So the action of the State in imposing this condition is clearly arbitrary and violative of Article 14 of the Constitution of India.

52. Also, the erection of hot mix plant is itself costing Rs.3 crores or more (which is admitted by the respondents in para-22 of their counter). So insisting that a contractor own it at the time of submission of the bid is unreasonable since no prudent businessman, without knowing whether or not he would be the successful bidder,

would incur such expenditure before filing his tender, more particularly, when the tender works value itself is far less. In this very case, it may be noted that in Ex.P-9 e-procurement tender I.D.No.147926, Ex.P-10 e-procurement tender I.D.No.147960 and Ex.P-11 e-procurement tender I.D.No.147970 in W.P.No.35879 of 2017, the value of the works is Rs.97.33 lakhs, Rs.1.02 crores and Rs.98.39 lakhs each for three different stretches of roads in West Godavari District. It would be unreasonable to expect any contractor who intends to bid only for one or two of such works to erect a hot mix plant incurring expenditure of Rs.3 crores or more. Therefore, imposition of the said condition by the State is unreasonable and in that sense also violates Article 14 of the Constitution of India.

53. It also violates the fundamental rights guaranteed to the petitioner and others like him of carrying on business activity of road laying works guaranteed by Article 19(1)(g) of the Constitution of India and it cannot be said to be a reasonable restriction under clause (6) of the said Article.

54. The adoption of the said condition cannot also be defended by the State on the basis that it is a policy decision since even the policy decision has to be in conformity with **Wednesbury** reasonableness and free from arbitrariness (**Master Marine Services (P) Ltd. Vs. Mecalfe & Hodgkinson (P) Ltd**¹¹, **Census Commissioner Vs. R.**

¹¹ (2005) 6 SCC 138

Krishna Murthy¹² and Reliance Telecom Limited and another Vs. Union of India and another¹³).

55. So I hold that imposition of the condition by the respondents through G.O.Rt.No.180 Transport, Roads and Buildings (R1) Department dt.19.06.2017, *of producing proof of ownership or lease of a hot mix plant at time submission of bid*, is arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

56. However since the contracts pursuant to Ex.P-9 e-procurement tender I.D.No.147926, Ex.P-10 e-procurement tender I.D.No.147960 and Ex.P-11 e-procurement tender I.D.No.147970 by the respondents, are to be executed within 6 months from 31.10.2017, and since the successful bidders under the said tender notices might have already completed most of the work, in my opinion, it would not be proper to set aside the award of contracts pursuant to the said tender notices, at this point of time.

57. In the result,

- (i) the Writ Petition is partly allowed;
- (ii) the condition that contractors who intend to bid for R & B works involving dense bituminous mixes/items *should produce evidence at the time of submission of the bid*, that they either own or have lease of batch type hot mix plant of 100/120 T.P.H. capacity located within a distance of 100 kms from the site of work, contained in sub-clause

¹² (2015) 2 SCC 796

¹³ (2017) 4 SCC 269

(iii) of clause-3 in G.O.Rt.No.180, Transport, Roads and Buildings (R1) Department dt.19-06-2017, is declared as illegal and arbitrary and violative of Article 14 and 19(1)(g) of the Constitution of India;

(iii) sub-clause (iii) of Clause-3 of the said G.O.Rt. shall read:

“(iii) for all the works, irrespective of the cost, the bidders may be permitted to either own or lease the said Batch type Hot Mix plant of 100/120 TPH capacity located within a distance of 100 Km from site of work, if the work involves the component of DBM/BC”

and to the above extent it shall be valid;

(iv) the relief sought by petitioner to set aside awards of contracts pursuant to Ex.P-9 e-procurement tender I.D.No.147926, Ex.P-10 e-procurement tender I.D.No.147960 and Ex.P-11 e-procurement tender I.D.No.147970 is rejected; and

(v) the 1st respondent shall also pay costs of Rs.5,000/- (Rupees Five Thousand only) to the petitioner.

58. As a sequel, miscellaneous petitions, if any pending, shall stand closed.

M.S.RAMACHANDRA RAO, J

Date: 18.04.2018
Dsh/Gra/Vsv

Note :- L.R. Copy to be marked.

B/o.
VSV