HON'BLE SRI JUSTICE S.V. BHATT

W.P. Nos.39432,39451,41878,41890 AND 41896 OF 2017

COMMON ORDER:

Heard Mr.A.Sudarshan Reddy, learned senior counsel, for petitioners and Mr.Aravala Rama Rao for respondents.

The circumstances leading to the filing of writ petitions, the grounds of challenge and prayers are substantially similar. Hence, the writ petitions are disposed of by this common order.

The learned counsel appearing for the parties have treated W.P. No.39432 of 2017 as the lead writ petition and have made their submissions. It is further informed that reference to the averments or parties in W.P. No.39432 of 2017 would be sufficient for disposing of the batch of writ petitions.

W.P. No.39432 of 2017:

The petitioner prays for Mandamus declaring the action of 2nd respondent in cancelling the Tender Notification No.C-2/437(05)/2017- RM: Q dated 04.07.2017 together with the e-tender dated 21.07.2017 and also cancelling the Award in favour of petitioner in APSRTC No.C2/437 (109)/17-RM:Q, APSRTC No.C2/437 (110)/17-RM:Q, APSRTC No.C2/437 (111)/17-RM:Q, APSRTC No.C2/437(112)/17-RM:Q, APSRTC No.C2/437(113)/17-RM:Q, APSRTC No.C2/437(114)/17-RM:Q, APSRTC No.C2/437(115)/17-RM:Q, APSRTC No.C2/437 (116)17-RM:Q and APSRTC No.C2/437(117)/17-RM:Q, dated 10.11.2017, as illegal, void, arbitrary, violative of principles of natural justice and unconstitutional. The petitioner prays for setting aside the cancellation orders APSRTC No.C2/437 (109)/17-RM:Q, APSRTC No.C2/437 (110)/17-RM:Q, APSRTC

No.C2/437 (111)/17-RM:Q, APSRTC No.C2/437(112)/17-RM:Q, APSRTC No.C2/437(113)/17-RM:Q, APSRTC No.C2/437(114)/17-RM:Q, APSRTC No.C2/437(115)/17-RM:Q, APSRTC No.C2/437 (116)17-RM:Q and APSRTC No.C2/437(117)/17-RM:Q, dated 10.11.2017.

The averments briefly stated are that the 1st respondent issued e-tender notification No.C-2/437(5)/2017-RMQ -30 dated 04.07.2017 inviting bids for allotment of stalls/shops in commercial complex available in Bus Stations in Kurnool Region. The instant batch of writ petitions relates to Allagadda Bus Depot. Through the subject e-tender notification, the respondents proposed to auction licence rights for 10 open spaces measuring 8'x8' each. As per the terms of the tender notification, the successful tenderer is to construct 10 small shops namely pan shop, cool drinks, snacks etc. and cater to the needs of passengers of RTC. Petitioner is one of the tenderers. The tender was opened and on 05.09.2017, the 2nd respondent intimated the petitioner that the tender of petitioner for allotment of space more precisely described as Item Cod No. ALGOS008 with open space of 8'X 8' for Shop No.1 in front of Allagadda Bus Station was accepted on payment of licence fee at Rs.2,500/- per month. The licence period is for five years, subject to enhancement of licence fee at 10% and 15% for 4th and 5th years. The petitioner further alleges that the petitioner was called upon to deposit additional amount of Rs.21,478/- towards security deposit and approach the 2nd respondent office to enter into a formal agreement within seven days from 05.09.2017. The petitioner makes a few more such allegations and finally it is stated the respondents in all Awarded 10 open spaces in favour of petitioner. The petitioner alleges that he has substantially performed the conditions imposed by the respondents pursuant to letter of acceptance dated 05.09.2017; is prepared to enter into agreement and proceed with the performance of the obligation under the licence granted to petitioner. In other words, what remains according to petitioner is the entering into agreement, which is a mere formality. While matters stood thus, on 01.11.2017, the petitioner received letter of even date cancelling subject e-tender. The cancellation of subject e-tender was displayed at conspicuous places in Depot. With the cancellation of e-tender, the 2nd respondent issued cancellation order dated 10.11.2017 recalling the allotment of shop already made in favour of petitioner.

The petitioner contends that the respondents issued acceptance letter dated 05.09.2017 to the successful bidder resulting in a concluded contract between the parties. Therefore, it was not permissible for the respondents to terminate the tender after issuing the letter of acceptance. The respondents being instrumentalities of State under Article 12 of the Constitution of India ought to act fairly, reasonable and the actions conform to the requirements of objectivity, fairness etc. The petitioner adverting to the reasons for issuing the cancellation orders submits that they are irrelevant and are not based on germane reasons, therefore, are liable to be set aside. The e-tender process meant to confer right on licencee was conducted in a fair and transparent manner. Therefore, there is no valid ground for cancelling the subject tender and recalling the allotment orders already issued to petitioner. There is no loss to public exchequer, on the other hand, the cancellation results in financial loss to petitioner. Hence the writ petition.

On 22.11.2017, this Court directed parties to maintain status quo prevailing as on that date.

The respondents filed petition to vacate the interim order dated 22.11.2017.

The case of respondents is that there is no concluded contract between the parties. According to tender conditions only after execution of agreement, rights are conferred on licencee but not before. The petitioner has no *locus standi* to file the writ petition. The writ petition is not maintainable. Condition No.5 of tender notification empowers the competent authority to cancel the tender without assigning reasons or giving notice to the bidders or allottees. The respondents further state that the 1st respondent after taking note of complaints received against the limited publicity given in the press for the subject tender and the other infirmities, decided to cancel the subject e-tender and further decided in the interest of the Corporation go for fresh tenders. Therefore, the objections against writ prayer stated briefly are that the writ petition under Article 226 of the Constitution of India is not maintainable, for the relationship between the parties, even after agreement is concluded, results in commercial contract and an alleged dispute thereunder is a simple civil dispute. Condition No.5 of tender conditions enables the respondents to cancel the tender process without assigning reasons and also without notice to all the participants. In the case on hand, the competent authority found that the Corporation will suffer loss if agreement between petitioner and Corporation is finalised. Therefore, the respondents pray for dismissing the writ petition.

Mr.A.Sudershan Reddy contends that the orders impugned in the writ petition, *prima facie* are illegal and voilative of principles of natural justice. According to him, to appreciate the obligations of petitioner as well as respondents under e-tender notification, the Court considers all the terms and conditions in the tender notification but not condition No.5 in isolation. According to him, the petitioner has complied with the condition of paying security deposit and submitted the stamp papers for execution of agreement by the respondents. At that stage, the 1st respondent could not have invoked the discretion conferred by condition No.5 of tender conditions. According to him, the cancellation of tender and also the allotment order virtually amounts to setting aside a concluded contract between the parties. The respondents being instrumentalities of State are expected to act fairly, objectively and judiciously. In the case on hand, the decision taken by respondents 1 and 2 is vitiated and liable to be set aside. He relies on Union of India v. Dinesh Engineering Corporation[1] and Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited[2] and contends that the orders cancelling allotment of petitioner is liable to be set aside and the writ petition be allowed.

Mr.Aravala Rama Rao objects to the maintainability of writ petition on the ground that there is no concluded contract between the parties to enforce a right recognised by law and in the

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[1] (2001) 8 SCC 491
[2] (2016) 10 SCC 46

absence of a concluded contract, the obligations agreed by the parties are not determined. Therefore, the agreement still inchoate and has not come into existence, if a decision taken to recall the steps taken under subject e-tender notification, could be traced to Condition No.5 of e-tender specifications. According to him, Condition No.5, viz.,

> "The Regional Manager has the right to cancel any Tenders without assigning any reason at any time."

enables the respondents to cancel the tender notification without assigning reasons. In the case on hand, the subject tender notification has been cancelled and the resultant allotment orders issued were also recalled, and no exception in law or fact could be taken by petitioner. By referring to the original record which is also produced for inspection of the Court, he contends that this Court under Article 226 of the Constitution of India ought not to entertain prayers challenging cancellation of allotment orders, for a decision to cancel the tender is taken for valid reasons by C & MD. Therefore, this Court ought not to sit in judgment on the reasons of 1st respondent as a Court of appeal and expand the scope of judicial review. He places reliance on Joshi Technologies International Inc v. Union of India and others[3] and order in W.P. No.39117 of 2016 on the maintainability of writ petition. On the merits, he contends that 2nd and 3rd respondents before entering into agreement with the petitioner forwarded the file for circulation and ratification of 1st respondent on the steps so far taken by 2nd respondent. The 1st respondent on 03.10.2017 declined the request

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[3] (2015) 7 SCC 728

for confirmation of allotment in favour of petitioner. Further on 03.11.2012 a decision was taken to go for fresh auction and cancel the subject e-tender. According to Mr.Rama Rao, the tender is to formalise a simple commercial contract without an element of statutory flaws. No decision reported either by this Court or the Supreme Court lays down that the instrumentality of State or the respondents herein are precluded from acting in their best interest as the circumstances warrant, before a formal agreement for licence is entered into. According to him, till agreement is entered between parties, the condition applicable to the facts of the case is condition No.5. In other circumstances viz., when the agreement with buyer is concluded, the Corporation has power under condition No.21. He prays for dismissing the writ petition.

I have perused the record and taken note of respective submissions of counsel appearing for the parties.

Now, the point for consideration is whether the recalling of tender by respondents as well as cancellation orders dated 10.11.2017 are legal, valid and within the competence of respondents or not?

The case of the petitioner briefly restated is in a limited sphere. According to petitioner, the petitioner participated in the e-tender and was the successful tenderer. Therefore, accepting the tender, the allotment order dated 05.09.2017 was issued. At a subsequent point in time, the petitioner was called upon to comply with the formalities for entering into and executing agreement of license in favour of petitioner. A concluded contract exists between the parties. Therefore, canceling e-tender Notification

No.C-2/437/(05)/2017-RMQ-30 dated 04.07.2017 is illegal, arbitrary and without jurisdiction. The petitioner relies on decisions referred to above for the proposition that the Corporation since satisfies the requirements of Article 12 of Constitution of India is expected to act fairly, objectively and reasonably. The action of respondents since is not objective suffers from arbitrariness and is beyond the discretion conferred by clauses of e-tender. The cancellation orders impugned in the writ petition hence are liable to be set aside.

Per contra, the case of the Corporation is that, the writ petition prayer relates to contractual obligation and the prayer against cancellation is not maintainable. The petitioner by agreeing to the tender conditions, participated in the tender process and cannot now complain, if a decision within the meaning of clause 5 of tender conditions is taken by the respondents. According to respondents, the license is granted with the execution of agreement by the Corporation. At any stage before a binding agreement is executed clause 5 of the tender conditions is applicable. In other words, according to respondents, the reciprocal obligations between the parties arise with the conclusion of agreement between parties and not before that stage. Further, at the stage of tender, a party can have a grievance, if such party is otherwise eligible and he is not allowed to participate in the tender process or arbitrarily excluded from consideration then a grievance can be made against the respondents. In the case on hand, according to respondents, the eligible tenderers were considered, accepting the tender was informed to all the tenderers and when it comes to cancelling the subject e-tender, all the tenderers of Allagadda Bus Depot are treated alike. The cancellation of tender firstly need not be supported by reasons and the Corporation in its best interest refrain from unacceptable reciprocal obligation. The respondents rely on Joshi Technologies case (3 supra) to contend that firstly the writ petition is not maintainable, there are reasons for cancelling e-tender and thirdly, this Court ought not to sit as Court of Appeal and re-examine the priorities of commercial interests of the respondent Corporation.

Before taking up for consideration the rival submissions, this Court finds it useful to excerpt a few of the conditions of e-tender dated 21.07.2017 and also few of the remarks made by the respondents in the note file for taking the decision impugned in the writ petition.

Condition Nos.5, 15 and 21 of Andhra Pradesh State Road Transport Corporation read thus:

> "**(5).** The Regional Manager have the right to cancel any Tenders without assigning any reason at any time.
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> **(15).** The Dy.CTM concerned shall enter into an agreement with the successful Tenderer. No other person is authorized to enter into agreement on behalf of the Divisional Manager. The agreement shall be entered on a non-judicial stamp paper worth of Rs.100/- which has to be procured by the Tenderer at his cost.
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> **(21). <u>TERMINATION:</u>**
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> The License is liable for termination on the following grounds.
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> i) If the license defaults in payment of License fee for three months consecutively or three times in a calendar year
>
> ii) If the Licensee fails to do business in the stall for a continuous period of ninety days

iii) If the license is found encroached on the platforms other business other than the movement of any other stall/shop

iv) If the Licensee sells other items or performs other business other than the specified in notification or as recorded in the deed.

v) The Corporation shall have the right to terminate the license if in its opinion, the quality of goods is not satisfactory and Corporation decision in this regard shall be final

vi) If any license is found doing the business in the stall other than the stipulated in the deed of license, the license is liable for termination duly forfeiting the security deposit.

vii) If the license is found selling unauthorized items or found selling at prices higher than the approved prices or commits any breach of terms and conditions of the agreement and if license repeats the offence thrice, his/her license is liable for termination with a month's notice.

viii) If the Licensee is habituated for encroachment, license is liable for termination with by serving a notice.

ix) If the Licensee sub-lets the stall to others or engage hawkers.

x) For breach of terms and conditions of the deed of license.

The 2nd respondent on 03.10.2012 moved the file for orders and the note file reads thus:

"**<u>21.09.2017:</u>**

Now some complaints were received from contractors of Allagadda, Sri B.V.Naganjaneyulu, Contractor, Sri Maheswer Reddy, Contractor and Sri Sanjeeva Reddy, Contractor that the Tender Notification were published in Newspaper with very small size Advertisement and some contractors were not known regarding the Tenders and now requested to kindly cancel the Tender and re-invite tenders, so that all the contractors will get chance to participate in the Tenders and **the income of APSRTC will be increased**. (emphasis added).

Therefore, the Executive Director, Kadapa is requested to recommend the case to the competent authority to give further Directive, whether to cancel tenders pertains to Allagadda Bus Depot or to proceed further in this regard please.

23.09.2017

Recommended Please ED/KDP

Please process in view of recommendations of ED/KDP (ED(C & P)/VJA).

25.09.2017

ED (C&P) moved the file with the following recommendation.

"In the meantime, the Regional Manager, Kurnool has received some complaints from the intended bidders of Allagada requesting to cancel the tenders and to invite fresh tenders with a contention that due to publishing of tender notification in news papers is of small size and some of the intended bidders are not aware of the notification and also stated that if the present tenders are cancelled and re-invited more bids will be received with higher quoted amount. The representations are filed alongside at folio No.70 to 72.

Regional Manager, Kurnool processed case seeking a directive whether to cancel all the tenders or to cancel the tenders pertaining to Allagadda Bus Station only and to proceed further ED/KDP Zone recommended the case.

In this connection this is to submit that as per the terms and conditions of the tender document during the process of tender, the tenders may be cancelled. But in the instance case, the successful bidders are given allotment letters and they have also paid the security deposit and stamp duty to enter into agreement with APSRTC. At this stage cancellation of allotment letters may lead to litigation. It is not advisable to cancel allotment orders at this stage.

Submitted for perusal please."

03.10.2017:

VC & MD has written thus:

"It is a clear case, wherein 51 new proposals are made with a present quote raising from 1500 to 2500/- except for ALG 05005. The rate seems to be very low.

The orders were issues to tenders.

w/o going though the prevailing market rates.

Moreover complaints are received that some of the tenderers have not participated. There is scope for getting better offers. If we go for fresh tenders giving wide publicity.

Hence it is proposed to cancel the offers please and to go for fresh tenders please.

VC/MD to discuss."

On 05.10.2017, a decision to cancel the e-tender of Allagadda was approved.

On 03.11.2017, the 2nd respondent agreed the recommendation made in the file note dated 03.11.2017 for cancellation of the orders already granted in favour of the petitioner.

Condition No.5 enables the 2nd respondent to cancel the tenders without assigning any reason at any time. There is no argument on the jurisdiction or authority of 2nd respondent to invoke Condition No.5 of e-tender dated 21.07.2017. But the argument is that there exists a concluded contract and the respondents cannot arbitrarily exercise the power or discretion vested in them by Condition No.15. To answer this contention, the Court refers to Condition No.15 of the tender conditions which deals with deed of license, how and when it is executed. In the case on hand, though the petitioner was called upon to comply with the requirements of Condition No.15, still in spite of completion of these conditions by the petitioner, a binding agreement between the parties is not entered into or executed by the respondents. Therefore, what remains on record is communication of acceptance of tender of the petitioner. Condition No.21 deals with termination of licence by the Corporation, a comparison of words used in Condition No.5 and Condition No.21 clearly demonstrates the circumstances under which cancellation of tender and a licence. In the case on hand, the respondent has not entered into an agreement or issued licence to petitioner. Therefore, the case is substantially governed by Condition No.5. The next circumstance this Court considers is whether the exercise of option of Condition No.5 satisfies the limited scope of judicial review of this Court or not. The 1st respondent is competent authority who is required to give final administrative approval for entering into agreement or issuing licence to tenderer. The 2nd respondent notices a few deficiencies in the tender process initiated by the Corporation, the resultant denial of fair participation by Contractors interested in the tender and consequential financial loss by limited participation of tenderers. As early as on 03.10.2017, the 1st respondent was convinced so far as the e-tender of Allagadda Depot is concerned and it is required to be cancelled. The reason stated by 1st respondent supports the view expressed by 2nd respondent. The respondent Corporation invited tenders for granting licence in respect of commercial space available within the Depot. Apart from providing space for various activities, one of the ideas of conferring licence to vendors is to augment the revenue of respondent Corporation. The respondent Corporation before binding itself to the obligations under an agreement and thereafter search for ways and means including the options available under Condition No.21 of the Tender condition, decided to examine the issue from the perspective of power conferred on respondents by clause 5 of the Tender conditions and accordingly recalled the e-tender. The procedure referred to above, in the considered view of this Court does not amount to arbitrary exercise of power or illegal rejection of request of petitioner. Had it been a case where the parties have travelled beyond the condition No.15 of Tender Conditions, then the grounds for cancellation of agreement are required to be examined and terminating the licence can be made. So the requirement of terminating the tender is different and cancelling the licence. This Court is of the view that the element of subjective satisfaction in the over all interest of Corporation in canceling the tender is appreciated without further probe into the matter or expanding the scope of judicial review in contractual matters. The licence is granted for substantial period of five years. The respondents before taking a decision have in principle decided to terminate the tender process. As already noticed, the reasons weighed with the respondents ought not to be the matters for review of this Court. May be that by communicating the acceptance of tenders, the 2nd respondent has called upon the petitioner to complete obligations of Condition No.15 of e-tender. From that communication, itself it cannot be said that the power to recall or cancel the tender process conferred by tender condition No.5 is not available to respondents. Further, as 0the subject matter relates to a simple commercial contract where a decision if is shown as taken in the interest of

Corporation and within the powers retained by respondents, this Court ought not to subject the decision to judicial review.

For the above reasons, the point is answered in favour of respondents and against the petitioner. The petition fails and W.P.No.39432 of 2017 is dismissed accordingly. No order as to costs.

Having regard to the above reasons and circumstances, W.P.Nos.39451, 41878, 41890 & 41896 of 2017 are also dismissed. No order as to costs.

The respondents are directed to return the amounts deposited by the petitioners in all the writ petitions within seven (07) days from today.

The Standing counsel is directed to inform the direction to respondents for due compliance.

Miscellaneous petitions, if any, pending, shall stand closed.

S. V. BHATT, J

Date: 29.03.2018
Stp/dv