HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.7346 OF 2019

Date: 29.04.2019

Between:

M/s. Sri Laxmi agencies, rep.by its Proprietor,
K.S. Rao, s/o. Ramaiah, Aged about 61 years,
R/o. 6-2-1/202, HGH Residency, Lakdikapool,
Hyderabad.

.....Petitioner

and

State of Telangana, rep.by its Prl.Secretary,
Minorities Department, Secretariat,
Hyderabad and another.

.....Respondents

The Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.7346 OF 2019

ORDER:

Petitioner claims to be engaged in supplying medicines and surgical items and furniture to Medical & Health Departments of the States of Andhra Pradesh and Telangana, and has been in business for more than 20 years. Petitioner claims that it has been participating in tender process for award of contract for supply of various items and has been successfully supplying the items in due compliance of the terms of the contract. Telangana Minorities Residential Educational Institutions Society is established to establish and manage Residential Educational Institutions for Minorities. The respondent-society floated three tenders. First tender was floated on 14.03.2019 calling for submission of tender to supply school uniforms and sports uniforms to the students, shoes, shocks, towels, bed sheets, carpets, pillow covers, tie, belt, ID card holders. On 16.03.2019, second tender was floated. In this notification, tenders are called to supply cosmetic kits, stationery, art and craft material, and school/college stationery, school/college bags. Third tender was floated on 20.03.2019. By these notifications, tenders are called to supply cots, desks, dining tables, security huts. The first two tender notifications were restricted to Government Agencies/Government Undertaking Agencies. Third tender is opened to all. In this Writ Petition, petitioner challenges the clause in tender notifications dated 14.03.2019 and 16.03.2019 restricting the field of consideration only to Government Agencies/Government Undertaking Agencies.

2. Heard learned counsel for petitioner Sri Vedula Srinivas, learned standing counsel for respondent-society and the learned Government Pleader.

3. According to learned counsel for petitioner, the restriction to Government Agencies amounts to offending the right to participating Government tenders flowing out of Articles 14 and 19 of the Constitution of India and, therefore, such restriction is *ex facie* illegal. None of the Government Agencies undertakes supply of items notified and they can only act as agencies, who can procure the items from various suppliers/manufacturers and supply the items to the society. Petitioner is also evolved supplying these items to the Government Agencies and Government Undertakings for the last twenty years. If an opportunity was afforded to the petitioner, he can offer competitive price and supply quality items by procuring from various manufacturers. Since the Government Agencies/Government Undertakings are not involved in manufacturing/production of items notified in the tender notifications, restricting to such Government Agencies/ Government undertakings is *ex facie* illegal and unconstitutional. It amounts to unreasonable restriction, classification without any intelligible differentia and has no nexus to the object sought to be achieved and, therefore, liable to be set aside.

4. Learned standing counsel at threshold pointed out that petitioner is primarily involved in supply of medicines and surgical equipments. The GST registration certificate also discloses that petitioner is Pharmaceutical and Surgical Agent and only on one occasion, he has supplied visitor chairs. As petitioner is not

having the manufacturing/production licence and not involved in production/manufacturing of the items required by the respondent-society, he has no locus standi to challenge the restriction of tender notification to Government Agencies/ Government Undertaking Agencies.

5. Learned standing counsel further submitted that Government has issued several orders directing the Government Departments, Government Societies, Corporations and Undertakings to procure required material only through Government Agencies/Undertakings/Corporations. Series of orders were issued in this regard. As per the orders of the Government issued from time to time, the society need not even to resorted to calling for tenders and can directly place orders on the concerned Agencies/Corporation/Society/Undertakings. However, in order to ensure better competition and response from various Government Agencies/Government undertakings, tender notification is issued. He would therefore submit that by virtue of present tender notification, no new decision is taken by the respondent-society since even otherwise society is required to procure the items required from the Government Organizations only. The society can involve private persons only if the required items are not available through the Government Organizations.

6. The issue is in narrow compass. Petitioner assails decision of the respondent-society restricting calling for tenders in the tender notifications issued on 14.03.2019 and 16.03.2019 to Government Agencies/Government Undertakings.

7. Employer is entitled to procure the items required for him from any person. If such employer is Government, or Government established society, it is required to follow prescribed standards/ norms to ensure that the public money is properly spent and in a transparent manner the items required are procured. Therefore, system of calling for tenders is evolved. Calling of tenders/ evaluation of tenders are regulated by the procedure evolved by the Government. All this intend to ensure transparency in procuring the items required and proper utilization of public funds.

8. In matters of formulating tender conditions, employer has wider latitude and scope of judicial review is minimal. At the threshold, Court cannot interject the tender process on the ground that some of the terms of invitation to tender are not palatable to a person who is not fitting into the parameters. It is within the domain of employer to prescribe tender conditions. Court may interfere, in exercise of power of judicial review, to assess the terms of tender notification, within the limited parameters of judicial review, if such conditions are palpably and demonstrably illegal, irrational, tailor made to suit a contractor, mala fide, against public interest and no reasonable man could have stipulated such conditions.

9. The wholesome rule for judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, Courts should keep off the same [Paragraph 18, **Federation of Rly. Officers Assn. v. Union of India** (2003) 4 SCC 289].

Legality of policy and not the wisdom or soundness of the policy is the subject of judicial review Paragraph 16, [**Directorate of Film Festivals v. Gauraw Ashwin Jain**, (2007) 4 SCC 737]. On the scope of judicial review against the decisions of executive, more particularly decisions involving technical matters, in **Union of India v. J.O., Suryavamshi** (2011) 13 SCC 167, Supreme Court warned the Courts to resist the temptation to usurp the power of executive.

10. The parameters of judicial review on tender conditions and awarding of contracts are well laid and needs no elaborate discussion. A brief recapitulation of the law on judicial review on contracts and particularly on tender conditions is as under.

10A. In **Michigan Rubber (India) Ltd. v. State of Karnataka** (2012) 8 SCC 216, Supreme Court held:

> "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 the 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 the 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 a fundamental right to carry on business with the Government.

(Emphasis supplied)

10B. In **Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.,** (1997) 1 SCC 738, while referring to guidelines laid down in **Tata Cellular v. Union of India** (1994) 6 SCC 651, Supreme Court held as under:

" 9. ....The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. 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. In Tata Cellular v. Union of India (supra), this Court has held that:

"The duty of the Court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,

2. committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable Tribunal would have reached or,

5. abused its powers.

Therefore, ***it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative***

> ***action is subject to control by judicial review can be classified as under.***
>
> ***(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;***
>
> ***(ii) Irrationality, namely, Wednesbury unreasonableness.***
>
> ***(iii) Procedural impropriety.***
>
> ***The above are only the broad grounds but it does not rule out addition of further grounds in course of time."***
>
> (Emphasis supplied)

10C. In **Reliance Airport Developers (P) Ltd. v. Airports Authority of India** (2006) 10 SCC 1, Supreme Court elaborated on these three parameters. Supreme Court observed:

> "***65. In other words, to characterise a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future***." *(Emphasis supplied)*

10D. In **Directorate of Education and others v. Educomp Datamatics Ltd. and others**, AIR 2004 SC 1962, Supreme Court held as under:

> "9. It is well-settled now that the Courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India (supra). After examining the entire case-law the following principles have been deduced: (SCC Pp. 687-88, Para 94)
>
> "94. The principles deducible from the above are:
>
> ***(1) The modern trend points to judicial restraint in administrative action.***

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, ***a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.*** However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(Emphasis supplied)

10. In Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617, this Court observed: (SCC P. 623, Para 7)

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. ***It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.*** It can enter-into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest

> or the lowest. But the State, its Corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

11. This principle was again restated by this Court in Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation (2000) 5 SCC 287. It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the Courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide. (Emphasis supplied)

11. On review of precedent decisions, in paragraph 21 of the **Krishna Constructions, Vijayawada v. State of Andhra Pradesh**

and others[1], this Court culled out principles. Paragraph-21 reads as under:

> "21. The principles that emerge from the precedents are,
>
> (i) the writ court has limited jurisdiction in matters concerning contracts and invitation to bid for contract;
>
> (ii) Court must adopt restraint in contract matters;
>
> (iii) the Court does not sit as a Court of appeal in such matters;
>
> (iv) the State/its instrumentalities have to be given greater latitude in formulating tender conditions and awarding of contracts;
>
> (v) In matters concerning financial implications it should be left to the concerned authority to decide the conditions of eligibility and the price at which contract can be awarded;
>
> (vi) Courts cannot interfere in terms of invitation to tender;
>
> (vii) No one has a right to insist that the contract to be awarded to him;
>
> (viii) Courts can interfere only if actions of tendering authority is found to be malicious or misused statutory powers;
>
> (ix) That the process adopted and decision made is so arbitrary and irrational that no authority acting reasonably and in accordance with relevant law could have reached; and
>
> (x) public interest is affected.

12. Guided by the above enunciation of law, it is seen that as per the orders of the Government issued from time to time, the respondent-society should procure the items required by the society from the Government Agencies/Undertakings/ Corporations/Societies etc. G.O.Ms.No.1 Industries & Commerce (FP&MSME) Department, dated 03.01.2015 is one such Government Order. By this G.O., Government directed all the

---

[1] 2016 (1) ALD 219

Departments of the Government, State Undertakings, Government Companies, Zilla Parishads, Panchayat Samithis, Municipalities and Panchayats, obtain their requirements of Leather products only from the Leather Industries Development Corporation. To encourage Micro and Small Enterprises, Government issued orders in G.O.Rt.No.59 Industries & Commerce (FP& MSME) Department dated 15.02.2016 including the National Small Industries Corporation Limited as one of the supply agencies for supply of products manufactured by the Micro and Small Enterprises. Several other orders issued by the Government are placed on record by the respondent-society. It is apparent from the reading of these orders, Government intend to encourage specialized societies/undertakings, which are established to promote respective avocations and to uplift the downtrodden people of the society and, therefore, mandated the Government Organizations to purchase required items from them. If society is required to purchase the items, which are manufactured/produced by those Government Organizations, there is no need to float tenders and straightaway purchase orders can be placed on them. Having regard to these orders of the Government, through these tender notifications, respondent-society intend to procure various items required for residential schools/ colleges only through government agencies/ organizations/undertakings/societies.

13. Having regard to the larger public interest, the object involved in procuring items from the Government Agencies/ organizations/Undertakings/societies, prescribing conditions in the tender notifications restricting the participation in the tenders only to the Government Agencies/Undertakings/societies/

organizations cannot be said as offending Article 14 of the Constitution of India nor can it be said as imposing unreasonable restriction/restraint on a person in carrying on his business. It is appropriate to note that no *mala fides* are attributed to the respondent society in restricting such consideration to government agencies/organizations/societies/undertakings. On the contrary, its decision only empowers the government agencies/ organizations/societies/undertakings to augment its resources and utilize the proceeds for upliftment of downtrodden. Further, there is no one agency which makes all the items notified. They must procure the items from agencies/entities/persons who manufacture/make them and supply to the respondent society. Petitioner is also not involved in manufacturing activity of any of the products. Apparently, its main activity is to procure and supply medicines and surgical items to Medical & Health Departments of the States of Andhra Pradesh and Telangana and on one occasion procured and supplied furniture to Medical & Health Department. *Prima facie,* when petitioner is not involved in manufacturing of items required to respondent society it cannot be said that by not allowing private agencies grave injustice is caused to him.

14. Further, when the respondent society opts to source its requirements from other government agencies/organizations/ undertakings/societies it would serve three purposes, 1) it is assured of more accountability as compared to a private agency; 2) such agencies/organizations/undertakings/societies would normally secure the required items from cottage industry, which again is established, nurtured and monitored by government establishments; and 3) more importantly, money earned in this

manner by these agencies/ organizations/ undertakings/societies is utilized for other development works for which they are established. Thus, it is in the larger public interest to source the items required by the respondent society from government agencies/ organizations/ undertakings/societies.

15. Having regard to these aspects and the parameters of judicial review on tender conditions, I do not see any error in the decision of respondent society in restricting the participation in the tender process to source its requirements from Government established agencies/organizations/societies/undertakings and no interference is called. Writ petition is dismissed. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 29.04.2019
kkm

HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.7346 OF 2019

Date: 29.04.2019

kkm