

IN THE HIGH COURT OF TELANGANA AT HYDERABAD

W.P.No.34806 OF 2023

Between:

M/s. Annapurna Constructions
Having its registered office at 20-130,
Dayanandnagar, Safilguda, Hyderabad,
Rep. by its Managing Partner Mr.Y.S.N.Murthy

... **Petitioner**

And

Union of India Rep. by its Principal Secretary,
Ministry of Railways, New Delhi & others

... **Respondents**

JUDGMENT PRONOUNCED ON: 15.04.2024

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

1. Whether Reporters of Local newspapers : Yes
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes
see the fair copy of the Judgment?

SUREPALLI NANDA, J

THE HON'BLE MRS JUSTICE SUREPALLI NANDA**W.P.No.34806 OF 2023****% 15.04.2024****Between:**

M/s. Annapurna Constructions
Having its registered office at 20-130,
Dayanandnagar, Safilguda, Hyderabad,
Rep. by its Managing Partner Mr.Y.S.N.Murthy

... Petitioner**And**

\$ Union of India Rep. by its Principal Secretary,
Ministry of Railways, New Delhi & others

... Respondents

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> Head Note:

! Counsel for the Petitioner : M/s.Indus Law Firm**^ Counsel for Respondents** : Mr.Gadi Praveen Kumar,
Ld.Deputy Solicitor
General of India for R1 to R4
Mr.G.Chandra Mohan, for R5.

? Cases Referred:

1. (2007) 14 SCC 517
2. (1993) 1 SCC 71

THE HON'BLE MRS. JUSTICE SUREPALLI NANDA**W.P. No.34806 OF 2023****ORDER:**

Heard Mr.N.V.Sumanth (M/s.Indus Law Firm), learned counsel appearing on behalf of the petitioner, Mr.Gadi Praveen Kumar, learned Deputy Solicitor General of India, appearing on behalf of respondent Nos.1 to 4, and Mr.G.Chandra Mohan, learned counsel appearing on behalf of respondent No.5.

2. The Petitioner approached the Court seeking prayer as under :

"...to issue a writ, order or direction more particularly one in the nature of WRIT OF MANDAMUS, declaring the action of the Respondents in disqualifying the petitioner's bid in respect of Tender No.T-202324-2-077 dated 19.10.2023 issued by the 4th respondent as illegal, arbitrary, malafide, violative of IRSGCC April, 2022 and the conditions of tender document as well as Articles 14, 19(1)(g) & 21 of the Constitution of India and to consequently direct the respondents to accept the petitioner's tender/bid as being eligible in all respects and to allot the tender work to the petitioner..."

3. The case of the Petitioner, in brief, as per the averments made in the affidavit filed in support of the present writ petition :

a) The Petitioner firm was founded in the year 1997 and is specialized mainly in building Railway Infrastructure and other related civil works. In response to the tender invitation put-forth by the 4th Respondent for the improvement/development of Station building, toilets, facade, circulating area etc., at WHM station, SW II and for providing minimum essential amenities and facilities for Divyangjan at WHM station vide Notice inviting Tender No.T-202324-2-077 the Petitioner firm submitted its tender on 09.11.2023 duly enclosing all the essential experience certificates and other documents required for satisfactorily complying with the qualification criteria as provided for under the above tender notice as well as the prevailing Indian Railway Standard General Conditions of Contract. The bids were opened on 09.11.2023 and the Petitioner was declared as "Lowest Eligible Bidder" by the 4th Respondent on the same day and the same was notified

under the heading "Tabulation Statement of Financial Bids" on Respondents Website. Despite the same, the 4th Respondent did not issue Letter of Acceptance to the Petitioner which in the normal course would have been the right thing to do.

b) It is further the case of the Petitioner that upon enquiry the Petitioner was informed that the Petitioner's bid could not be accepted as the Petitioner did not satisfy the technical eligibility criteria which is extracted as under:

"The tenderer must have successfully completed or substantially completed any of the following during last 07 (seven) years, ending last day of month previous to the one in which tender is invited: Three similar works each costing not less than the amount equal to 30% of advertised value of the tender, or Two similar works each costing not less than the amount equal to 40% of advertised value of the tender, or One similar work each costing not less than the amount equal to 60% of advertised value of the tender. (b) (i) In case of composite works (e.g. works involving more than one distinct component, such as Civil Engineering works, S&T works, Electrical works, OHE works etc. and in the case of major bridges - substructure, superstructure etc.), tenderer must have successfully completed or substantially completed

any of the following during last 07 (seven) years, ending last day of month previous to the one in which tender is invited: Three similar works each costing not less than the amount equal to 30% of advertised value of each component of tender, or Two similar works each costing not less than the amount equal to 40% of advertised value of each component of tender, or One similar work each costing not less than the amount equal to 60% of advertised value of each component of tender."

c) It is further the case of the Petitioner that the Petitioner submitted three separate experience certificates dated 08.11.2023, 10.05.2023, 02.06.2023 which clearly indicate that the Petitioner has completed works worth Rs.3,56,44,884/-, Rs.3,01,96,854.06, Rs.1,97,35,013/- respectively. It is specifically pleaded by the Petitioner that the Petitioner satisfied the required eligibility criteria i.e., Clause 4(a) of the tender notice, which stipulates that the tenderer should have successfully completed or substantially completed, during the last 7 years one similar work costing not less than the amount equal to 60% of the advertised value of the present tender (or) two similar works each costing not less than the amount equal to 40% of the advertised value of the present tender (or) three

similar works each costing not less than the amount equal to 30% of the advertised value of the present tender. It is contended by the Petitioner that as per the above mentioned technical eligibility criteria 60% of the advertised value of the tender comes to Rs.3,07,32,785/- and the Petitioner had to successfully complete or substantially complete one such work in the past 7 years, ending last day of month previous to the one in which the present tender is invited i.e., 30.09.2023 which the Petitioner has successfully completed and has produced the experience certificate dated 08.11.2023 for the said work. It is further the case of the Petitioner that apart from the above mentioned experience certificate the Petitioner has also produced two other experience certificates dated 10.05.2023, 02.06.2023 wherein the Petitioner has completed more than 40% and 30% of the advertised value of the tender. On all accounts, the Petitioner has satisfied the required technical eligibility criteria and the General Conditions of the Contract 2022, despite which the 4th Respondent chose to disqualify the Petitioner only to give undue benefit to the 5th Respondent.

Aggrieved by the said action of 4th respondent, the Petitioner approached the Court by filing the present writ petition.

PERUSED THE RECORD

4. The counter affidavit filed on behalf of the Respondents 1 to 4, in particular, the relevant paragraphs at para 9 and para 1 and 2 at page 7 of the counter affidavit reads as follows :

“**Para 9:** In reply to para 11 of the affidavit, it is submitted that the petitioner submitted total Five (05) work done Certificates. Only two certificates are valid and considerable for similar nature of work (i.e., one certificate comes to 30% of work and another work for 40% of work for qualifying amount of similar nature of work).

Therefore, the tenderer was not qualified in this Special Technical Eligibility Criteria. Therefore petitioner firm M/s. ANNAPURNA CONSTRUCTIONS – HYDERABAD was found “Not eligible”. Hence the offer of the petitioner had not been considered for further evaluation, due to the reasons referred above.”

Para 1: The tenderer should submit the work experience certificate in which work must be completed before 30.09.2023. Present experience

certificate date of completion is dated 31.10.2023. [as per GCC 2022 clause 10.5 para 2 – ending last day of month previous to the one in which tender is invited i.e., dated 19.10.2023].

Para 2: The certificate which the petitioner submitted is completed work, which is contrary to the tender invitation date. The tender invited on dated 19.10.2023 i.e., the work should have been completed on or before dated 30.09.2023, whereas the certificate submitted by the petitioner completed date is 31.10.2023 which is after the issuance of the tender notification (i.e., tender invited dated 19.10.2023). Hence, as per clause 10.5.1 of GCC April 2022, this certificate was rejected on the technical ground and this certificate cannot be considered as substantial completed work, because substantial completed work requires the eligibility criteria of ongoing work in which payment equal or more than 90% of the present contract value (equal or more than 90% of completed work) and such a certificate has to be issued by the concerned authority duly mentioning.

As the petitioner failed to submit/enclose any certificate reflecting the substantially completed

work. Hence, the petitioner is technically disqualified.

5. The counter affidavit filed on behalf of 5th Respondent, in particular, the relevant paragraphs No.10, 11 and 12, read as follows :

Para 10 : I respectfully submit that after the verification the Respondent No.4 directed us (Respondent No.5) to pay an amount for Security Deposit of amount of Rs.26,42,000/- and same was paid to Punjab National Bank and the same was deposited to the Railway Department subsequently. I had started the work after getting the approval, the copy of the Punjab National Bank will be submitted with this counter.

Para 11 : It is submitted that as per GCC April 2022 para No.10.5.1, substantially completed work means an ongoing work in which payment equal to or more than 90% of the present contract value. The petitioner did not submit any substantially completed certificate.

Para 12 : It is submitted that the allegations made by the petitioner is that undue benefits were given to the Respondent No.5 are totally false. After that

confirmation given by the Respondent No.4, I have started the work.

DISCUSSION AND CONCLUSION

6. It is the specific case of the Petitioner that the Petitioner complied with the qualification criteria as laid down as per condition No.4 of Tender Notice T-202324-2-077 and therefore in view of the fact that the Petitioner complied with the financial eligibility criteria and technical eligibility criteria and had been declared L1 on the opening of the bids, the Petitioner ought not have been disqualified by 4th Respondent despite satisfying all the technical and financial eligibility criteria.

7. **A bare perusal of the technical eligibility criteria as per condition No.4 of Tender No.T-202324-2-077 and Clause 10 of Indian Railway Standard General conditions of Contract, April 2022 which deals with Eligibility Criteria and relevant Clause 10.1 lays down the Technical Eligibility Criteria and the same clearly indicates as under :**

10.1 – Technical Eligibility Criteria:

“(a) The tenderer must have successfully completed or substantially completed any of the following during last 07 (seven) years, ending last day of month previous to the one in which tender is invited : (i) Three similar works each costing not less than the amount equal to 30% of advertised value of the tender, or (ii) Two similar works each costing not less than the amount equal to 40% of advertised value of the tender, or (iii) One similar work each costing not less than the amount equal to 60% of advertised value of the tender. (b) (i) In case of composite works (e.g. works involving more than one distinct component, such as Civil Engineering Works, S&T works, Electrical works, OHE works etc., and in the case of major bridges – substructure, superstructure etc.) tenderer must have successfully completed or substantially completed anyone of the following categories of work(s) during last 07 (seven) years, ending last day of month previous to the one in which tender is invited: (i) Three similar works each costing not less than the amount equal to 30% of advertised value of each component of tender, or (ii) Two similar works each costing not less than the amount equal to 40% of advertised value of each component of tender, or (iii) One similar work each costing not less than the amount

equal to 60% of advertised value of each component of tender.”

8. This Court opines that clause 10.1(a) of the prevailing Indian Railway Standard General Conditions of Contracts i.e., GCC April 2022, clearly stipulates the eligibility criteria with words ‘Successfully completed or Substantially completed’ (referred to and extracted above), however ignoring the above referred clause on the ground that the Petitioner failed to submit/enclose any certificate reflecting the substantially completed work on or before 30.09.2023 when admittedly as borne on record the Petitioner completed the subject work in total and also evidenced the same by certificate dated 31.10.2023, it cannot be said that the Petitioner did not enclose any certificate reflecting the substantially completed work and denying relief to the Petitioner as prayed for in the present writ petition is totally arbitrary, malafide and unjustified. It is not the case even as per the counter affidavit that is filed on behalf of the Respondents No.1 to 4, the Petitioner was called upon by the Respondents to

enclose a certificate reflecting the substantially completed work and Petitioner failed to do so.

9. The Apex Court in the Judgment “Erusian Equipment and Chemicals Limited vs. State of West Bengal”, reported in (1975) 1 SCC Page 70, in particular, the relevant portion at paragraph Nos. 17 to 19, has the following observations :

17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but **they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure.**

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. **The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.**

19. **Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others.** A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession..."

10. The Apex Court in Sterling Computers Limited v. M/s. M & N Publications Limited & Others reported in (1993) 1

SCC 445 dated 12.01.1993, at paras 14, 15 and 28 observed as under :

"14. The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by...

15. **There is nothing paradoxical in imposing legal limits on such authorities by courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good.**

28. **... Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias..."**

11. In the Apex Court judgment dated 11.12.2006 passed in Jagdish Mandal vs. State of Orissa reported in (2007) 14 SCC 517, it is observed as under:

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision is relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural

violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousand and millions and may increase the project cost manifold. 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

(i) 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";

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

Putting the above questions to itself this Court finds that the answer is positive and this Court further opines that the decision made by the Authority is malafide and intended to favour the 5th Respondent and hence the case

warrants interference by this Court under Article 226 of the Constitution of India, since the Petitioner was declared as lowest Eligible Bidder by the 4th Respondent on 09.11.2023 when the bids were opened and the said fact was notified under the heading "Tabulation Statement of Financial Bids" on Respondents website.

12. The Apex Court in Food Corporation of India vs. Kamdhenu Cattle Feed Industries reported in (1993) 1 SCC 71, and in particular at para 7 observed as under :

"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to [Article 14](#) of the Constitution of which non arbitrariness is a significant facet. There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions. To satisfy

this requirement of non-arbitrariness in a State action, it is therefore, necessary to consider and give due weight to the reasonable-or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."

12. Taking into consideration the above said facts and circumstances of the case and in the light of discussion and reasoning as arrived at as above and duly considering the law laid down by the Apex Court in the judgments in (i) Erusian Equipment and Chemicals Limited vs. State of West Bengal reported in (1975) 1 SCC Page 70, (ii) Sterling Computers Limited v. M/s. M & n Publications Limited & Others reported in (1993) 1 SCC 445, (iii) Jagdish Mandal vs. State of Orissa reported in (2007) 14 SCC 517, (iv) Food Corporation of India vs. Kamadhenu Cattle Food Industries reported in (1993) 1 SCC 71

referred to and extracted above, and duly considering that the petitioner complied with the financial and Technical, Eligibility Criteria as per Condition No.4 which deals with the Eligibility conditions of the subject Tender Notice dated 19.10.2023 and clause 10.1 of Indian Railways Standard General conditions of Contract, April 2022, the writ petition is allowed as prayed for. However there shall be no order as to costs.

Miscellaneous petitions, if any pending, in this writ petition shall stand closed.

SUREPALLI NANDA, J

Date: 15.04.2024

Note : L.R. Copy to be marked.
B/o. *Yvkr*