

N.P.(C) Nos. 1105, 1106, 1107 and 1108 of 2012

In W.P.(C) No. 1105 of 2012

For petitioner - **Mr. Ashok Mohanty, Sr. Advocate**
Mr. Jagannath Pattnaik, Sr. Advocate.
M/s. Biplab Mohanty, T.K.Pattnaik,
A.Pattnaik, S.Pattnaik, and

**For opposite parties - Mr. Jayant Das, Sr. Advocate and
Dr. A.K.Rath
M/s. H.M.Dhal and B.B.swain
M/s. S. Mohanty and D.Mohanty
(for Caveator)**

For petitioner - ***Mr. Ashok Mohanty, Sr. Advocate***
Mr. Jagannath Pattnaik, Sr. Advocate.
Mr. S.K.Padhi, Sr. Advocte
M/s. Biplab Mohanty, T.K.Pattnaik,
A.Pattnaik, S.Pattnaik, and R.P.Ray

**For opposite parties - Mr. Jayant Das, Sr. Advocate
M/s. A.K.Rath, S.Mohanty and
D.Mohanty
M/s. S. Mohanty and D.Mohanty
(for Caveator)**

In W.P.(C) No. 1107 of 2012

M/s. Panda Transport	...	Petitioner
Versus		
The Deputy General Manager (Operations) and another	...	Opposite parties
<i>For petitioner</i>	-	<i>Mr. Ashok Mohanty, Sr. Advocate Mr. Jagannath Pattnaik, Sr. Advocate. M/s. Biplab Mohanty, T.K.Pattnaik, A.Pattnaik and S.Pattnaik,</i>
<i>For opposite parties</i>	-	<i>Mr. Jayant Das, Sr. Advocate and Dr. A.K.Rath M/s. S.Mohanty and D.Mohanty.</i>

In W.P.(C) No. 1108 of 2012

M/s. Binaya Transport	...	Petitioner
Versus		
The Deputy General Manager (Operations) and another	...	Opposite parties
<i>For petitioner</i>	-	<i>Mr. Ashok Mohanty, Sr. Advocate Mr. Jagannath Pattnaik, Sr. Advocate. M/s. Biplab Mohanty, T.K.Pattnaik, A.Pattnaik and S.Pattnaik,</i>
<i>For opposite parties</i>	-	<i>Mr. Jayant Das, Sr. Advocate and Dr. A.K.Rath M/s. S.Mohanty and D.Mohanty.</i>

P R E S E N T**THE HONOURABLE CHIEF JUSTICE V. GOPALA GOWDA****A N D****THE HONOURABLE MR. JUSTICE S.K.MISHRA**

<i>Date of hearing – 26.06.2012</i>	:	<i>Date of judgment - 31.07.2012</i>
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S.K.Mishra, J. In this batch of writ petitions, the petitioners, who are tenderers for contract of road transportation of bulk petroleum products from Paradeep

terminal of the Indian Oil Corporation Ltd., hereinafter called the "Corporation" for brevity, to its retail outlets and customers at various locations in the State of Odisha, have challenged difference between the unit estimated rates of road transportation of petroleum products prescribed in the tender for Paradeep terminal and that for Bhubaneswar depot as arbitrary, discriminatory and violative of the concept of level playing field.

2. It is apparent from the pleadings of the petitioners that the work to be performed upon award of contract is the same for the tenderers for Paradeep terminal and Bhubaneswar depot, and therefore, the unit rate for transportation should be the same. It is pleaded that the rates prescribed in the tender for the preceding period 2009-12 was the same for all locations and therefore, the deviation in the tender for the year 2012-15 is unreasonable. It is further pleaded that the difference in the estimated rate of transportation between Paradeep terminal and Bhubaneswar depot is against the principle of "level playing field". The petitioners alleged that they would suffer irremediable loss and injury, as a result they have prayed that the tender for Paradeep be quashed and directions be issued to the Corporation to invite fresh tenders providing uniform rates of transportation in Rs. per Kl per Km for all supply locations viz. Paradeep terminal, Bhubaneswar depot and Balasore depot. The petitioners further pray that the action of the opposite parties in fixing different estimated rates of transportation for the different locations be declared illegal.

3. From the rejoinder affidavit filed by the petitioner, it is gathered that the estimated transportation rates are unworkable, unreasonable and unrealistic. The petitioners stated that the concept of average round trip distance is misconceived and the same cannot be the basis for fixing different rates for the

different supply locations. They challenged the correctness of the cost of inputs taken for consideration by the Corporation for determining the estimated rates of transportation as set out in their counter affidavit. The petitioners contended that the estimated rate of transport in Rs. per Kl per Km from Paradeep should be Rs.2.14 paise and not Rs. 1.77 per Kl per Km. prescribed by the Corporation in the tender documents. The petitioners cited several examples to suggest that the rate of inputs considered for determination of estimated transportation rates should have been higher. Further, these petitioners alleged that the termination of the estimated rate of transportation based on round trip distance is not reasonable since there is no guarantee of minimum billing.

4. From the record it transpires that the Corporation has prescribed different estimated transportation rates in separate tenders and there is no discrimination as such. Further, it is made clear that a tenderer for Paradeep is free to participate in the tender for Bhubaneswar depot with the same set of tank trucks, subject to the payment of requisite earnest money deposit and avail the purported advantage being extended to the tenderers for Bhubaneswar and therefore, there is no denial of equal opportunity. The determination of estimated transportation rates for different locations is based on a settled principle of cost accounting and the principle is uniformly adopted all over the country. It is also pleaded that the estimated rate of transport have been determined by an inhouse committee of financial experts after taking into account all relevant parameters and that an independent cost accountant has certified the same. It is further pleaded that the per unit estimated transport rate is the aggregate of the unit fixed cost in Rs. per Kl per Km, the unit running cost in Rs. per Kl per Km and a 10% profit on the sum of the unit fixed cost and unit running cost.. The tenderers

were free to bid anywhere in the range of (+/-) 10% of the estimated transportation rates and therefore, there is no unreasonableness or discrimination.

5. The opposite parties further pleaded that the principle for determination of estimated rates of transportation was the same for all the locations. The reason for the difference in the rate was stated to be the difference in the round trip distance in kilometers covered by the transporters operating ex-Paradeep terminal and ex-Bhubaneswar depot. It is further pleaded that the average round trip distance in kilometers for transportation to ex-Paradeep terminal is 4757 Kms. per month while for ex-Bhubaneswar depot is 3238 Kms. per month. It is pleaded that though the cost of transportation over longer distances is more, the per unit rate of transportation viz. Rs. per Kl. Per Km is less due to the distribution of the fixed costs over the additional kilometers run. The opposite parties pleaded that for longer distance, the "per unit" fixed cost is less resulting in lower "per unit" transportation rates. The opposite parties took the stand that for the year 2009-12, the average round trip distance in kilometers was the same for each location in 2009 and, therefore, the fixed cost was uniform. The uniform fixed cost resulted in uniform estimated rates of transportation for all locations. However, under the present tender, the round trip distance covered from Paradeep is much more and, therefore, the fixed cost in Rs. Per Kl. Per Km. is less and hence, the estimated rates of transportation in Rs. per Kl per Km to ex-Paradeep terminal is less. The contention of the petitioner regarding the comparative loss incurred by the Paradeep transporters as against the Bhubaneswar transporters was also rebutted by the opposite parties. The opposite parties submitted that the estimated rates of transportation

prescribed in the price bid for Paradeep is rational, fair and non-discriminatory since a margin of 10% over and above the actual average cost is inbuilt in the estimated transportation rates and provision is further made for receipt of price bids up to 10% higher than the estimated transportation rates.

6. In their additional affidavit, the opposite party no.1 has pleaded that the terms and conditions of the tender oblige the Corporation to ensure equitable distribution of work amongst the tenderers. It is further pleaded that the average round trip distance cannot fall below the average distance reckoned for the purposes of calculation of estimated rates as per consumption of petroleum products will only increase in the following years, the contract awarded in favour of eligible persons in pursuance of the tender being for a period of three years. The Corporation, however, made it clear that there is no guarantee on minimum billing because the same depends upon exigencies such as force majeure, failure of the transporter to make tank trucks available etc., which are beyond the control of the Corporation. On these pleadings, the following questions would arise for adjudication in this case :

- 1) Whether, the decision making process in fixing different rates per Kl per Km to different destinations is irrational or unfair and discriminatory ?
- 2) Whether, the Court exercising writ jurisdiction should interfere in the tender process in this case ?

7. The Supreme Court in **Meerut Development Authority v. Assn. of Management Studies**, AIR 2009 SC 2894, held that a tender is an offer. It is something which invites and is communicated to the intending tenderers to notify their acceptance. The Supreme Court further held and broadly stated, it must be unconditional; must be in the proper form, the person by whom tender is made

must be able to and willing to perform his obligation. The term of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, the Supreme Court has further held that a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above-stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. However, no bidder is entitled, as a matter of right, to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations. The Supreme Court in paragraph 18 of the said case has further said that it is also well settled in law and needs no re-statement that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted in such process must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

8. While deciding a case of this nature, the guidelines laid down by the Supreme Court in the case of **TATA CELLULAR v. UNION OF INDIA**, (1994) 6 Supreme Court Cases 651 should be kept in mind. The Hon'ble Supreme Court in the said judgment has held that the judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary

manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. The Supreme Court further held that the judicial review is concerned with reviewing not the merits of the decision in support which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. After such observations the Hon'ble Supreme Court taking into various earlier rulings held that principles deducible are;

- (a) the modern trend points to judicial restraint in administrative action,
- (b) the court does not sit as a court of appeal but merely reviews the manner in which the decision was made,
- (c) 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,
- (d) the terms of the invitation to tender cannot be opened 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,
- (e) the Government must have freedom of contract. In other words, a fair play in the joint 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 but must be free from arbitrariness not affected by bias or actuated by mala fides, and

- (f) quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Similar view has also been taken by the Supreme Court in the case of

MASTER MARINE SERVICES (P) LTD. V. METCALFE & HODGKINSON (P) LTD. AND ANOTHER: (2005) 6 Supreme Court Cases 138.

9. Thus, on the basis of the observations made in the aforesaid two cases, the Court is to examine, whether the decision making process in this case in fixing the terms and conditions itself is arbitrary and discriminatory resulting in unequal treatment of the bidders. On the other hand, the Court also should look into the question whether, the terms and conditions of the tender is so made to suit convenience of a particular person in any view to eliminate all others from participating in the bidding persons.

10. From the materials placed before this Court, it is seen that the decision making process leading to prescription of different estimated transportation rates in Rs. per Kl per Km for Bhubaneswar and Paradeep appears to be fair, rational and takes into consideration all the relevant factors. The determination of estimated transportation rates is a technical matter. The methodology of estimation of transportation rates in the unit of Rs. per Kl per Km is settled on a principle of costing accepted globally in the logistics industry. It is further seen from the records that while calculating Rs. per Kl per Km rate of transportation, the Corporation has divided the unit cost into fixed cost and

variable or running cost. Fixed costs are those costs which, the transporter is liable to incur even if he does not transport any material; for example, the salaries of the staff of the driver and the cleaner, depreciation in the value of the truck due to efflux of time, tax to be paid to the Road Transport Authorities etc; whereas the running or variable cost consists of those items of expenditure which has direct bearing with the exact use of the truck, i.e. the cost of the fuel, lubricants, and similar expenses. What the Corporation did in this case while determining the unit price Rs. per Kl per Km has taken the fixed cost as the constant and the running cost as the variable. Total of fixed evariable costs divided by distance to be covered by the truck from one point to the other and back plus 10% profit has been taken to be the unit price.

11. In other words, the Corporation has taken into consideration the economies of scale into consideration while determining the unit price. In a case where the trucks cover longer distance, the Rs. per Kl per Km fixed cost will be lesser than the trucks which cover lesser distance. For that reason, proper unit price should be fixed for two places having different distance. This being the case, this Court comes to the conclusion that the decision making process is free from unfair, irrational or discriminatory practice on the part of the Corporation.

12. Once it is decided that the decision making process is not unfair, the other question becomes academic. However, since this Court has formulated the same for decision, it is its solemn duty to answer such academic question also. It is brought to the notice of the Court that a part of cost of the transportation is to be transmitted to the customers or to the end-users, who happens to be the people, who are the consumer of the Petroleum products. A part of the transportation cost is shared by the State exchequer. Any decision

taken will shift the burden of differential transportation cost to be shared by the consumers and State will be against public policy, as it would be affecting the public in large and the exchequer by profiting an individual. In the case of **M/s. Kasturi Lal Lakshmi Reddy etc. v. The State of J and K and another**, AIR 1980 SC 1992(I), the Supreme Court has held that where any Government action fails to satisfy the test of reasonableness and public interest and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. However, the Supreme Court further held that it must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. Applying the said principle to the case in hand, if the choice is between burdening the cost of transport on the State exchequer and the consumers or burdening the same on the transportation, the best possible course is to burden it with the transporter. Thus, on the basis of such discussion, this Court comes to the conclusion that there is hardly any scope for interference in this case.

13. In the case of **Air India Ltd. v. Cochin International Airport Ltd. and others**, AIR 2000 SC 801, the Supreme Court held

“The award of 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 of 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, is corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures 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. The State, is corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.”

14. On the basis of the aforesaid discussion, this Court comes to the conclusion that fixation of different rates of transportation to different destinations having different distance from the point of transportation is not arbitrary, rather is providing a level playing field to all participants. On such observation, the Court does not find any merit in any of the writ petitions and the same are dismissed.

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S.K.Mishra, J.

CHIEF JUSTICE

I agree.

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V.Gopala Gowda, C.J.

Orissa High Court, Cuttack,
Dated, July 31, 2012/JNSahu.