

A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) Nos. 5689, 1309 and 1310 of 2012

In the matter of an application under Articles 226 & 227 of the Constitution of India.

In W.P.(C) No.5689 of 2012

Panchanan Sahoo, aged about 31 years,
S/o. Gopal Sahu,
Storage Agent for Cuttack Sadar Block,
Resident of Thoriapada,
P.O./P.S. Somepur, Dist: Cuttack

... Petitioner

-Versus-

State of Odisha and others

... Opp. Parties

For Petitioner : M/s. H.S. Mishra, A.K. Mishra &
T.K. Sahoo

For Opp. Parties : M/s. D.P. Nanda,
R.K. Kanungo, Mrs. S. Rath &
B.P. Panda
[For O.P.No.3]

Mr. Banamali Sahoo
[For O.P. No.4]

Mr. Santosh K.Dash
[For Intervener]

In W.P.(C) No.1309 of 2012

Anitya Ranjan Parida, aged about 35 years,
S/o. Sachidananda Parida,
At/P.O./P.S. Udala,
Dist: Mayurbhanj

... Petitioner

-Versus-

State of Odisha and others

... Opp. Parties

For Petitioner : M/s. K.N. Jena, D.K. Mohapatra,
& A.K. Sahu

For Opp. Parties : Mr. Banamali Sahoo
[For O.P.No.6]

In W.P.(C) No.1310 of 2012

Pitambar Mohapatra, aged about 56 years,
S/o. Late Goura Chandra Mohapatra,
At/P.O./P.S. Kaptipada,
Block : Kaptipada,
Dist: Mayurbhanj

... Petitioner

-Versus-

State of Odisha and others

... Opp. Parties

For Petitioner : M/s. K.N. Jena, S. Nanda,
D.K. Mohapatra, A.K. Sahu &
S.K. Nayak

For Opp. Parties : Mr. Banamali Sahoo
[For O.P.Nos.6 and 7]

P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA
AND**

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 19.10.2012

B.N.Mahapatra,J. The writ petition bearing W.P.(c) No. 5689 of 2012 has been filed with a prayer to quash Annexure-2 as well as the decision for appointment of a Transport Contractor for handling and transportation of food grains till the recommendation made by Justice Wadhwa Committee is implemented in its entirety and bringing necessary amendments to Orissa

Public Distribution System (Control) Order, 2008 by excluding the private agencies for any purpose including transportation and till then the petitioner who is continuing as a storage agent may be allowed to continue by giving necessary extension to its licence issued under Annexure-1.

2. In W.P.(C) Nos.1309 and 1310 of 2012 the petitioners have challenged the legality of the advertisement published in the daily Odia Newspaper "The Sambad" dated 14.12.2011 (Annexure-4) inviting tender for engagement of Contractor for transportation of stocks from designated Rice Receiving Centre-cum-Departmental Storage Centre (RRC-cum-DSC) to retail points on the ground that the same would adversely affect the distribution system of essential commodities and also right of the petitioners.

3. In both the connected writ petitions, i.e., W.P.(C). Nos. 1309 and 1310 of 2012, the petitioners were issued with licences in their favour to operate as wholesaler/storage agents of the commodities such as rice, wheat and sugar etc. under the Public Distribution System (for short, 'PDS') and discharge their duties to the best satisfaction of the consumers and authorities. The period of validity of their licences has been extended till 31st March, 2012 and their prayer is to extend the validity of their licences.

4. The petitioners' grievance is that the notice issued under Annexure-4 is against the interest of general public as well as the rights and interest of the petitioners along with 766 storage agents throughout the State who are earning their livelihood engaging themselves as storage

agents and continuing the same since last 3 to 4 years and about 80 thousand people directly and indirectly are dependents on the said process/work. The tender notice floated for appointment of Transport Contractors as agent has the effect of rise of the cost of the transportation of essential goods which will result in hike of the price of Control Commodities. The petitioners have invested some amount towards security deposit to carry on the business. Specific job has been assigned to the storage agents appointed under the Control Order, 2008 for transportation and/or storage of Commodities for and on behalf of the said Corporation for their eventful distribution through the PDS in terms of provisions of the Orissa Public Distribution System (Control) Order, 2008 (for short, "Order, 2008"). The petitioner in W.P.(C) No.5689 of 2012 had applied for appointment as Storage Agent for Cuttack Sadar Block against the advertisement issued by opposite party no.3 for appointment of the Storage Agents throughout the State. The petitioner being found eligible in all respect, he was appointed as Storage Agent for Sadar Block, Cuttack by opposite party No.4 vide Order No.1689 dated 10.11.2008 for the financial year 2008-09. While the petitioner smoothly discharging his duties as Storage Agent, opposite party No.4 issued a tender call notice inviting tender for appointment of handling and transport contractor for handling and transportation of food grains from RRC-cum-D.S.C. to retail centres of Block/ULB with an intention to discontinue the storage agent system. Hence, the present writ petitions.

5. Mr. H.S. Mishra, learned counsel appearing for the petitioner in W.P.(C) No.5689 of 2012 submitted that the work assigned to any storage agent under Order, 2008 for transportation and storage of PDS commodities is going to be entrusted to the transport contractors and they will transport the food grains to the retail centres. The appointment of said transport contractor is said to be outcome of the recommendations made by the committee constituted by order dated 12th July, 2006 passed in W.P. (C) No.196 of 2001 of the Supreme Court headed by the Justice D.P. Wadhwa as the Chairman of the constituted committee namely the Central Vigilance Committee on Public Distribution System. Pursuant to the said order of the Hon'ble Supreme Court, the said Committee submitted report to the Hon'ble Supreme Court and by order dated 10.11.2008, while accepting the report, Hon'ble Supreme Court directed the said committee to do the similar exercise for the entire country and accordingly the report is prepared by the said committee. The Committee classified the maladies affecting the PDS in Odisha in different chapters and ultimately in Chapter-IX of the report recommendations are made for smooth distribution of PDS commodities. On the basis of the report and recommendations made therein to implement the recommendations, the State of Odisha constituted one Apex Committee headed by opposite party No.1-Chief Secretary. Apart from other decisions taken by the Apex Committee with respect to replacement of private storage agency by departmental officials as suggested by Justice Wadhwa in his report to Hon'ble Supreme Court, it is

suggested that Departmental operation will be possible only when the requisite man power and equipments are provided to the Corporation. The Committee also suggested to be considered to engage XIMB in Bhubaneswar to study the Public Distribution System chain vis-à-vis proposed system and give suggestions. Opposite party no.2 understood the report that the Apex Committee headed by opposite party No.1 recommended for abolition of private storage agency and communicated the decision of the Government not to appoint private storage agents in the State after expiry of their extended terms and they will manage private distribution system through the corporation by store staff. It was further directed not to appoint private storage agents in the State after expiry of their extended terms. Thus, without implementing the recommendation of Wadhwa Committee, opposite party no.3 directed the Collectors of the State to appoint contractors for handling and transportation of food grains in place of private storage agents. Pursuant to the said direction of opposite party No.3, the Collector invited tenders for appointment of handling and transport contractors from the reputed Firms/Companies/ Persons under Annexure-2.

6. Mr. Mishra, learned counsel further submitted that the steps taken by opposite party Nos. 3 and 4 to appoint contractors for handling and transport of food grains are illegal, mechanical with non-application of mind, arbitrary decision and contrary to the recommendations made by Justice D.P. Wadhwa. Therefore, the entire decision is illegal. As per the

recommendation of Justice Wadhwa Committee as well as the decisions taken by the Apex Committee headed by opposite party no.1, no private agency can be appointed for handling and transportation of food grains under the PDS System. The entire process of appointment is not only contrary to the recommendation made by Justice Wadhwa Committee but also beyond the scope of Order, 2008. The private transport agency will perform the job of the storage agent and there will be no material change excepting ousting the storage agents in its name. Without making necessary amendment in the Order, 2008 the appointment of handling and transport contractors will lead to arbitrariness and corruption. The decision taken by the Government as indicated under Annexure-4 is based on error of record. By appointing the private transport contractor and without requisite man power and equipments it cannot be said that the same is managed by their own staff. Concluding his argument Mr. Mishra prays to allow the prayer made in the writ petition.

7. Mr. Nanda, learned counsel appearing for opposite party No. 3 submitted that there is no illegality in floating notice inviting sealed tender from intending persons for appointment of Handling and Transport Contractors for handling and transportation of food grains from rice receiving centres and Departmental Storage centres to retail centres of block/U.L.B. The writ petition is devoid of any merit and therefore, he prayed for dismissal of the same.

8. Mr. Banamali Sahoo, learned counsel appearing for opposite party No.4 referring to its counter dated 03.04.2012 filed by Nilakantha Mohanty, working as C.S.O.-cum-District Manager, Odisha State Civil Supplies Corporation Ltd., Cuttack (for short, 'the Corporation') submitted that the Corporation being fully owned by the State Government is under the direct administrative control of Food Supplies and Consumer Welfare Department of the State Government. The Corporation is only acting as an agency for Government for implementation of Government decision. The Hon'ble Supreme Court on the basis of the report/recommendation of Justice Wadhwa Commission have ordered the Government to ensure door step delivery of food grains to ration shops. The Government in Food, Supplies and Consumer Welfare Department in their letter No. 19914 dated 26.11.2011 and letter No. 11328 dated 01.07.2011 has communicated decision of the Government to operationalize the departmental storage centres in place of private storage agents and to deliver PDS stock at retail points. Accordingly, the Managing Director of the opposite party Corporation by letter No. 20353 dated 18.11.2011 has directed to call for the tender for implementation of the above Scheme through two categories of Handling and Transport Contractors. They are (i) Handling and transportation of food grains from FSD, FCI/Sugar Zonal Depot./Bare RRC to RCC-cum-DSC where food grains to be stored departmentally; (ii) Handling and transportation of food grains from RRC-cum-DSC to Retail Points for door step delivery through Handling and

Transport contractor level-II. The aforesaid policy of the Government to engage the Handling and Transport Contractors directly through the Corporation has already been implemented in four districts, namely, Sonepur, Deogarh, Nuapada and Boudh since November, 2011 and from 01.04.2012. The said policy is in operation in rest of the districts of the State. Since it is the policy decision of the State Government to improve smooth distribution of PDS commodities, the same need not be interfered with by this Court. Mr. Sahoo further submitted that it is not correct on the part of the petitioners to say that the Corporation has no machinery to manage the distribution of its own. The requisite manpower and equipments are provided in this regard. The procurement Inspectors are already posted and placed through RRC-cum-DSC. The RRC-cum-DSC are well equipped with equipments like weighing scale, sample divider, analysis kit box, moisture meter set of sieves etc. Petitioner in W.P.(C) No.5689 of 2012 was an agent of Sadar Block, Cuttack and continued as such till 31.03.2012. He has not submitted tender paper for appointment as Handling and Transport Contractor pursuant to the tender call notice. Therefore, the writ petition being devoid of any merit is liable to be dismissed.

9. On the rival contentions, the following questions arise for consideration by this Court.

- (i) Whether the decision taken by OPS for appointment of transport contractor for handling and transport of food grains and the tender call notice No.1838 dated

28.11.2011 floated by CSO-cum-District Manager of the opposite party-Corporation inviting sealed tender from reputed firms/companies/persons for appointment as Handling and Transport Contractors for handling and transport of food grains from RCC/DSC to retail centres of block/U.L.B. tagged suffers from any illegality or infirmity so as to be liable to be quashed?

- (ii) Whether in the facts and circumstances of the case relief claimed by the petitioners in the present writ petitions can be granted to the petitioners?

10. Since both the questions are inter-linked, they are dealt with together.

Undisputedly, the petitioner in W.P.(C) No.5689 of 2012 was a Storage agent of Cuttack block and continued as such till 31.03.2012. He had not submitted tender paper for appointment of Handling and Transport Contractor pursuant to tender call notice dated 28.11.2011 issued under Annexure-2. The Corporation is fully owned by the State Government. Its object is to implement the Government decision. The Hon'ble Supreme Court on the basis of the report/recommendation of Justice Wadhwa Commission have ordered the Government to ensure door step delivery of food grains to ration shops. The Commissioner-cum-Secretary to Government, Food Supplies & Consumer Welfare Department, Government of Odisha vide his office letter No.366 dated 06.01.2011 communicated to the Managing Director of the opposite party-Corporation that as per the

recommendation of Justice Wadhwa Commission appointed by the Hon'ble Supreme Court the system of private storage agency is required to be abolished in the State. Accordingly, the Apex Committee recommended for abolition of private storage agency in compliance of recommendation of Justice Wadhwa. After careful consideration, the Government decided not to appoint private storage agents in the State and wherever there is vacancy of private storage agent in Odisha, the Corporation will manage the private distribution system by its own staff. In the said letter, the Managing Director of the opposite party Corporation was requested not to appoint any private storage agent further in the State after expiry of their extended term. Thereafter, the Managing Director of the Corporation vide letter No.20353 dated 18.11.2011 has directed the Collector and District Magistrate of various districts mentioning therein with regard to functioning of departmental storage centres, lifting of stock from Rice Receiving Centre-Cum-Departmental Storage Centre (RRC-cum-DSC) to retail points.

11. It is pertinent to reproduce here the relevant portion of the said letter:

“Sir,

In inviting reference to the letter on the subject cited above I am to say that Govt. in FS & CW Deptt. in their letter No.11328 dt.01.07.2011 has communicated decision of the Govt. to operationalise the Departmental Storage Centre in place of Private Storage Agents and to deliver PDS stock at Retail points.

2. The Govt. in FS & CW Deptt. has extended tenure of Private Storage Agents till 31.03.2012 which has

been communicated to districts in this office letter No.16980 dt.19.09.2011.

3. As such, Departmental operation in place of Private Storage Agents and door delivery of PDS stock to retail points will start from 1st April, 2012 in respect of all Blocks/ULBs from the concerned RRC-cum-DSC. For this purpose, PDS stock of April has to be lifted from March, 2012.
4. RRC-cum-DSC from where departmental operation will be made has been finalized as intimated by CSO-cum-DM of your district.
5. To implement the above scheme, 02 types of Handling Transport Contractor for transportation of food grains will be engaged.
 - (i) Handling & Transportation of food grains from FSD, FCI, Sugar Zonal Depot. Base RRC to RRC-cum-DSC.
 - (ii) Handling & Transportation of food grains from RRC-cum-DSC to retail points for door steps delivery.
6. Tender documents for appointment of Handling & Transport Contractor at district level for transportation of food grains from FSD, FCI, Sugar Zonal Depot. Base RRC to RRC-cum-DSC is sent separately.

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11. A District Tender Committee shall be constituted with the following members in finalizing the selection of the H & T Contractor.

a)	Collector & District Magistrate	Chairman
b)	District Labour Officer/Assistant Labour Officer	Member
c)	District Social Welfare Officer	Member
d)	Regional Transport Officer	Member
e)	CSO-cum-District Manager, OSCSC Ltd.	Member Convener

Collector may nominate any other Officer as member of the Committee, as he/she thinks fit.

12. The Guide line/Instructions for finalizing of tender (up to Price Bid) is enclosed at Annexure-1. These

Guideline/instructions may be referred for issue and receipt of Tender Paper and to finalize the tender in appointing H & T Contractor.

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Yours faithfully,
Sd/-
Managing Director”

12. Thus, it is the policy decision of the Government in Food, Supplies and Consumer Welfare Department, Government of Odisha not to appoint private storage agent in the State after expiry of their extended term till 31.03.2012 and departmental operation in place of private storage agent and door delivery of PDS stock to the retail points would start from 1st April, 2012 in respective RRC-cum-DSC and retail centres of tagged Block/ULB from the concerned RRC-cum-DSC. Thus, Annexure-2 has been issued pursuant to the policy decision of the Government in Food, Supplies and Consumer Welfare Department.

13. It is settled legal proposition that policy decision taken by the State Government or its authorities / instrumentalities is beyond the purview of judicial review unless the same is found to be arbitrary, unreasonable or in contravention of the statutory provisions or violates the rights of individual guaranteed under the Statute.

14. In ***Tamil Nadu Education Deptt., Ministerial and General Sub-ordinate Services Association Vs. State of Tamil Nadu & Ors.***, AIR 1980 SC 379, the Hon’ble Supreme Court held as under:

“Once the principle is found to be rational, the fact that a few freak instances of hardship may arise on either side cannot be ground to invalidate the order or

the policy. Every cause claims a martyr and however unhappy we be to see the seniors of yesterday becoming the juniors of today, this is an area where, absent arbitrariness and irrationality, the Court has to adopt a hand-off policy.”

15. In ***Sterling Computers Ltd. Vs. M/s M & N Publications Ltd.***

And others, AIR 1996 SC 51, it was held:

“It is not possible for Courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in *bona fide* manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of play in the joints to the executive.... On the basis of those judgments it cannot be urged that the Court has left to the option of the authorities concerned whether to invite tenders or not according to their own discretion and to award contracts ignoring the procedures which are basis in nature, taking into account factors which are not only irrelevant but detrimental to the public interest.”

16. In ***Ugar Sugar Works Ltd. Vs. Delhi Administration & Ors.***,

(2001) 3 SCC 635, it has been held that in exercise of their power of judicial review, the Courts do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on the ground of *mala fide*,

unreasonableness, arbitrariness or unfairness etc. Indeed arbitrariness, irrationality, perversity and *mala fide* render the policy unconstitutional. However, if the policy cannot be touched on any of these grounds, the mere fact that it may affect business interests of a party does not justify invalidating the policy.

17. Unless a policy decision is capricious or arbitrary and not informed by any reason or discriminatory or infringing any Statute or the Constitution, it cannot be a subject of judicial interference. However, if the policy cannot be touched on any of these grounds, the mere fact that it may affect business interests of a party does not justify invalidating the policy. [See ***Balco Employees' Union (Regd.) Vs. Union of India & Ors.***, AIR 2002 SC 350; and ***Federation of Railway Officers Association Vs. Union of India***, (2003) 4 SCC 289].

18. In ***Krishnan Kakkanth Vs. Govt. of Kerala***, AIR 1997 SC 128, the Hon'ble Supreme Court held as under :-

“34. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial if a better or more comprehensive policy decision should have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a

public policy in the context of illegality and unconstitutionality, Court should avoid "embarking on uncharted ocean of public policy."

19. Undisputedly, the State Government pursuant to report/recommendation of Justice Wadhwa Commission appointed by the Hon'ble Supreme Court has taken a policy decision not to appoint private storage agent in the State and to operationalize the departmental storage centres in place of private storage agent and to deliver PDS stock at retail point for smooth distribution of PDS stock.

20. In view of the above, we do not find any fault in the said policy on the point of unreasonableness, arbitrariness, unfairness to render the policy irrational or unconstitutional. Such a policy cannot be interfered with by the Court merely because it affects the business and interest of some private parties like the petitioners.

21. In W.P.(c) No.5689 of 2012, the petitioner has been appointed as a Storage Agent in the year 2008-09 and the same has been extended from time to time till March, 2012. Thus, licence granted to the petitioner was for a specific period. After expiry of the said period, they have no right for renewal, when a policy decision has been taken by the Government for appointment of storage agents.

22. In W.P.(c) No.1309 of 2012 and W.P.(c) No.1310 of 2012, the petitioners were issued with licenses in their favour to operate as wholesaler/storage agent of commodities i.e. rice, wheat, sugar etc. under

the PDS. The period of validity of their licences has been extended till 31st. March, 2012 and their prayer is to extend the validity of their licence on the ground that the advertisement dated 14.12.2011 under Annexure-4 published in 'The Sambad' on 16.12.2011 inviting tender for engagement of contractor for transportation of stock from designated Rice Receiving Centre-cum- Departmental Storage Centre to retail point would adversely affect the distribution system of the essential commodities and also the right of the petitioners.

23. For the reasons stated in preceeding paragraphs, there is no illegality in inviting tender under Annexure-4 for engagement of contractor or transporter of stock under the PDS. Therefore, the period of validity of their licence cannot be extended beyond 31st March, 2012.

24. In view of the same, the writ petitions are devoid of merit and accordingly dismissed.

No order as to cost.

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B.N. Mahapatra, J.

V.Gopala Gowda, C.J. I agree.

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Chief Justice