

**HON'BLE SRI JUSTICE A. SHANKAR NARAYANA  
AND  
HON'BLE Dr. JUSTICE SHAMEEM AKTHER**

**WRIT APPEAL No.766 OF 2018**

**JUDGMENT:** (Per Hon'ble Sri Justice A. Shankar Narayana)

The writ petitioner is the appellant herein. He preferred the present Writ Appeal, under Clause 15 of Letters Patent, questioning the order, dated 02.05.2018, passed in W.P.No.32541 of 2017, whereby and whereunder, the learned single Judge refused to issue a Writ of Mandamus to declare the action of respondent No.3 in declaring respondent No.5 as the successful tenderer for supply of Diet at the Government General Hospital, Kakinada, by drawing lots, on the ground that the rates quoted by the rival tenderers being equal, despite the writ petitioner having scored higher marks in the technical bid in the tender opening process, dated 19.09.2017, as illegal, arbitrary and unconstitutional and further, to declare him as the successful tenderer for supply of Diet at the Government General Hospital, Kakinada, pursuant to the tender opening process, dated 19.09.2017.

2. Turning to the facts that are absolutely relevant to adjudicate upon the controversy herein, the appellant and respondent No.5 were tenderers in tender notification R.C.No.2251/B4/2017-2018, dated 08.09.2017. Both were technically qualified, since, they scored more than 70% marks. Both of them quoted equal rate of Rs.36/- per patient per day. That constrained respondent No.3 – Chairman of District Diet

Management Committee to draw lots to resolve the tie between the participants. When lots were drawn, twice the name of respondent No.5 came. In fact, the lots were drawn giving opportunity to both the petitioner and respondent No.5 and the Chairman himself. Preceding the process of lots being resorted to, respondent No.3 has given some time to both the tenderers to enable them to arrive at a consensus, but it proved abortive. In fact, after the lots were drawn, respondent No.5 was declared as successful bidder in the financial bid. The appellant herein submitted a protest letter, dated 19.09.2017, complaining that the procedure resorted to going for toss was illegal, since, there was no provision for toss in the State and he inclined to send a detailed notice. Thus, aggrieved by the procedure adopted by respondent No.3, the appellant filed the Writ Petition for the aforesaid relief.

3. The learned single Judge observing that the minutes, dated 19.09.2017, reflect that with a view to finalise the Diet contract, the Chairman has drawn lots and allotted Diet contract to a person, who was successful in the lots and that the condition excerpted from tender, confers power on respondent No.3 to resolve the discrepancy and the ambit discrepancy is not stated can be construed as conferring enough discretion on respondent No.3 to resolve the discrepancy and the tie between the parties is a discrepancy and that the objections raised by the appellant ought not to have been considered by this Court under Article 226 of the Constitution of India, when, kept in view, the scope of judicial review, and opining that there is no

infirmary or illegality or any ground warranting interference under Article 226 of the Constitution of India against the steps taken by respondent No.3 to award Diet contract, dismissed the Writ Petition.

4. Challenging the aforesaid order, the present Writ Appeal is filed.

5. Various grounds have been agitated in the Writ Appeal. Of course, it is unnecessary to refer to each of the grounds and it would suffice if the submissions made by Sri Vedula Srinivas, learned counsel for the appellant, and Sri K. Rathanga Pani Reddy, learned counsel for respondent No.5, are projected.

6. Learned counsel for the appellant would submit that when there has been a tie in regard to the rate quoted by the appellant and respondent No.5, the established procedure is to bank upon the marks scored by them and who ever scored more marks, ought to have been considered as successful bidder and ought to have been awarded contract. The second submission is that the tender notification does not contemplate drawing lots, in case of a tie, and, therefore, a foreign procedure is adopted, which, in fact, ought to be construed as forbidden. The third submission is that the order under challenge is utterly perverse, for the reason there was no discrepancy, as such, which is referred to in the tender notification and it was only a tie, and the learned single Judge construing this as discrepancy and proceeding with examining the issue at the power of respondent No.3

is not permissible and that itself would account for patent illegality warranting interference and, therefore, sought to set aside the order under challenge.

7. Learned counsel for respondent No.5 would support the order under challenge contending that the marks scored by the appellant is inconsequential and respondent No.3 resorting to lots cannot be faulted, as there should be a resolution on the dispute and award of contract, as notified under the tender. It is his submission that the appellant having submitted himself for drawing lots, after he became unsuccessful, he cannot turn round and raise objection and it is nothing but blowing hot and cold at a time and that itself is sufficient to reject the present appeal confirming the order passed by the learned single Judge. Learned counsel also placed reliance on the ruling of a Division Bench of Honourable Karnataka High Court in **M. Subba Reddy v. Bangalore Development Authority** (W.A.No.8445 of 2012) and pointed out what has been observed by the learned Division Bench that a bidder having participated in the proceedings, cannot turn down and say that the procedure is improper and cannot be sustained.

8. In our view, the entire appeal rests on two important events. The first is the appellant ought not to have submitted himself for the process of lots being drawn by respondent No.3, in case, he was not inclined to proceed further, when there was no consensus between

himself and respondent No.5, that preceded the process of drawing lots, and ought to have withdrawn from the process, which he did not do. It is not as though he did not draw the lot. He was given an opportunity and he has taken out the lot and similar was the case with respondent No.5. Thus, his active participation is to be found and, therefore, when the result was declared by respondent No.3 that respondent No.5 has become successful bidder, as his name came twice, he cannot raise a protest by filing an objection petition, dated 19.09.2017. The said conduct of the appellant is worth condemning, for the reason that he is estopped by his conduct in raising any protest as regards the process of drawing of lots followed by respondent No.3. At this stage itself it is necessary for us to mention that the learned counsel for appellant did advance an ancillary argument that respondent No.3 did not show the slips before declaring that respondent No.5 has become successful bidder. But, that argument appears to be without any merit, for the reason that such an objection was not raised in the letter, dated 19.09.2017, submitted by the appellant.

9. The second ground is, it is no doubt true the appellant has scored 100 marks, as against 98 marks scored by respondent No.5, but, however, it could not have any consequence, for the reason the tender notification/tender document appends a note to Clause 13 (3), at page No.4, reading thus:



“Only those Bids obtaining more than 70% marks will be qualified for Financial bid.”

10. Thus, a tenderer, who scores more than 70% marks, becomes eligible to participate in financial bid. Therefore, the marks scored by the appellant and respondent No.5 will not have any effect for awarding the tender. Though, the learned counsel for appellant did address at one stage that respondent No.3 proceeded with further process of drawing lots, instead of resorting to the established procedure, but he has not placed any material to substantiate what has been the established procedure that is to be resorted to, in case, a tie occurs. Thus, in our considered opinion, there is no merit in the present Writ Appeal.

11. Therefore, the present Writ Appeal is dismissed.

Miscellaneous Petitions, if any, pending in this Writ Appeal shall stand closed. There shall be no order as to costs.

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**A. SHANKAR NARAYANA, J**

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**Dr. SHAMEEM AKTHER, J**

May 31, 2018.  
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**HON'BLE SRI JUSTICE A. SHANKAR NARAYANA  
AND  
HON'BLE Dr. JUSTICE SHAMEEM AKTHER**



**WRIT APPEAL No.766 OF 2018**  
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**May 31, 2018**

MD