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W.P.(MD) Nos.18246 & 13596 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	:	30.11.2022
Pronounced on	:	27.01.2023

CORAM

THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

W.P.(MD).Nos.18246 & 13596 of 2014

W.P.(MD).No.13596 of 2014

R.Thanikachalam

... Petitioner

Vs.

1.The Commissioner

The Hindu Religious Charitable Endowments Department,
No.119 Uttamar Gandhi Salai,
Nungambakkam, Chennai 600 034.

2.The Joint Commissioner/Executive Officer,

Arulmigu Mariamman/Temple,
Samayapuram 621 112,
Tiruchirapalli.

3.M/s.Supreme Overseas Traders,

Old No.s58, New No.84 2nd floor,
SSP Building, Maddox Street,
Vepery, Chennai 600 007.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records relating to short term public auction-cum-tender Notification bearing Na.Ka.No.2425/1423/C4 dated

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22.07.2014 issued by the 2nd respondent culminating in 2nd respondent passing an order in favour of the 3rd respondent, quash the same as illegal.

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Petitioner : Mr.Sivaraman.D

Respondents : Mr.M.Ajmal Khan,
Senior Counsel for Ajmal Associates

W.P.(MD).No.18246 of 2014

M/S.Supreme Overseas Traders
Manufactures, Exporters & Importers,
Old No.58, New No.84, II Floor,
SSP Building, Meddox Street,
Vepery, Chennai 600 007.
Rep. by its Proprietor, S.Kandavel

... Petitioner

Vs.

1.The Commissioner
Hindu Religious & Charitable Endowments Department
Government of Tamil Nadu,
Nungambakkam High Road,
Chennai 600 034.

2.The Joint Commissioner/Special Officer,
Arulmighu Mariamman Thirukoil,
Samayapuram,
Trichy District.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records of the 2nd respondent herein Na.Ka.No.2425/1423/C4 dated 03.11.2014 and quash the same and direct the 2nd respondent to forthwith refund the sum of Rs.1.00 Crore to the petitioner together with Interest at 15% p.a. till the date of actual payment.

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Petitioner : Mr.Ajmal Khan,
Senior Counsel for
Mr.Mohan.B

Respondents : Mr.P.Subburaj,
Special Government Pleader

ORDER

In W.P.(MD).No.18246 of 2014:

The writ petition in W.P.(MD).No.18246 of 2014 has been filed to quash the order passed by the 2nd Respondent in Na.Ka.No.2425/1423/C4 dated 03.11.2014.

2. The short question that arises for consideration in the present writ petition is with regard to the forfeiture made by the 2nd Respondent. The petitioner had failed to comply with the Tender Conditions which requires payment of the entire bid amount on the day when the Tender is finalized/opened/closed. The petitioner having violated the Tender Conditions whether the Earnest Money Deposit (hereinafter referred to as "EMD") is liable to be forfeited.

3. Before proceeding further, I shall set out the brief facts:

The petitioner company is an export of human hair, for several years. The petitioner had procured various contracts for human hair offered by devotees in temples across India and exports the same to various countries. The petitioner had

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also acquired human hair in Arulmigu Mariamman Thirukoil, Samayapuramm Trichy (hereinafter referred to as "Temple") in the past. A Tender for the human hair offered by the devotees in the Temple was called for the Fasli years 1424 - 1426 by the 2nd Respondent i.e., the Joint Commissioner/Special Officer of the Temple. The temple administration on getting the approval from the 1st Respondent vide proceedings dated 21.07.2014 conducted auction for collection of tonsured hair for three Fasli years viz., 1424 to 1426. The Tender notification was published on 22.07.2014. The Tender notification *inter alia* contained / set out the following conditions:

- a) Clause 2 - Required Deposit of Rs.1,00,00,000/- by the participants.
 - b) Clause 10 – The participants who had made the deposit were to submit the quotation which was to be entered in the auction register forthwith / immediately and was announced through a loudspeaker.
 - c) Clause 11 – After the bids have been submitted the Tender cover shall be opened and the highest bidder would be registered subject to approval by the Commissioner/1st Respondent herein.
 - d) Clause 12 - Provides that on completion of Auction cum Tender the successful bidder shall deposit/pay the Tender/bid amount for the Fasli Year 1424 in full immediately, the bid amount for the Fasli Year 1425 shall be paid on or
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before 20.06.2015 and the Tender/bid amount for the Fasli Year 1426 shall be paid on or before 20.06.2016.

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e) Clause 13 - Provided that failure to pay the Tender /bid amount would result in cancellation of the Tender and reauction would be conducted.

f) Clause 16 - The successful bidder upon payment of the entire bid amount and after obtaining the receipt would be recommended for sanction by the Commissioner.

g) Clause 34 – Further provides that failure to comply with any of the conditions would result in forfeiture of the Deposit.

4. The Tender was called for / conducted for the Fasli Year 1424 on four earlier occasions however there were no bidders. Thereafter, the Temple administration on getting the approval from the 1st Respondent vide proceedings dated 21.07.2014 conducted auction for collection of tonsured hair for three Fasli years viz., 1424 to 1426. The Tender notification was published on 22.07.2014. It may also be relevant to note that the petitioner submitted a bid for Rs.9,11,00,000/- for the Fasli Year 1424 and to enhance the bid amount by 8% and 10% respectively for the succeeding years viz., Fasli Years 1425 and 1426 for Rs.9,11,00,000/- i.e., bid amount for Fasli Year 1424. The petitioner had after turning out to be the



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successful bidder failed to deposit the entire bid amount as required in terms of the Tender Condition, following which the EMD of Rs.1 Crore was forfeited.

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5. Against this background, the petitioner had challenged the impugned proceeding of forfeiture of the EMD *inter alia* on the following grounds:

a) That the petitioner had made a request for payment of the offer/bid amount in four installments vide letters dated 12.07.2014 and 31.07.2014 addressed to the 2nd Respondent. However, the impugned order forfeiting the deposit has been made without even considering the petitioner's above request.

b) That a Writ Petition in W.P.(MD)No.13596 of 2014 was filed challenging the very same Tender notification dated 22.07.2014 and it was in view of the uncertainty consequent thereto that the petitioner did not pay the bid amount.

c) That the petitioner having made his position clear vide letter dated 12.07.2014 that he could make the payment of the bid amount only in four installments the failure on the part of the petitioner to pay the bid amount when the Tenders were opened would not constitute violation of the Tender Conditions.

d) That Clause 34 would show that it only provides for cancellation of license and conduct of retender /reauction and forfeiture of license. In other words, Clause 34 would come into operation only after license is granted and violation of



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Tender Conditions thereafter. Further, the Tender notification was not continued by the 2nd Respondent for the Fasli years 1424- 1426, as the subject of Tender was changed from license to collect human hair to sale of human hair. Since, the very basis / subject of Tender have been materially altered, the Tender notification ought to be treated as cancelled and consequently, the forfeiture of the deposit of Rs.1 crore is arbitrary, illegal and unsustainable. Insofar as Clause 16 it was submitted that it is only procedural in nature and does not provide for forfeiture.

e) It was also submitted during the course of hearing that the Tender is invalid inasmuch as it is issued/called for in violation of Tamil Nadu Transparency in Tenders Act, 1998 and the corresponding Rules made thereunder.

6. To the contrary, it was submitted by the learned counsel for the Respondents as under:

a) That the Temple administration after obtaining the approval from the 1st Respondent vide proceedings dated 21.07.2014 conducted auction for three Fasli Years viz., 1424 – 1426. The notification calling for Tenders for collection of tonsured hair for the period 01.07.2014 to 30.06.2017 was published on 22.07.2014. The Tender form was issued for Rs.500/- and EMD was fixed at Rs. 1 crore. The last date for submission of Tender was 30.07.2014. The Tender



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Conditions provided that auction would be held on that day i.e., 30.07.2014 and

Tender will be opened after auction on the very same day i.e., 30.07.2014.

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(b) Reliance was placed on the following Clauses in the Tender conditions

viz.,

"10.nlg hrpl; nrYj;jp Vyj;jpy; fye;J nfhz;L> Vy Nfl;gth;fspd; xt;nthU Vyf;Nfs;tp njhifiaAk;> clDf;Fld; Vy gjpNtl;by; gjpT nra;tJld; midtUk; mwpe;J nfhs;Sk; tz;zk; xypngUf;fP %yKk; xyp gug;G nra;ag;gLk;.

11. Vyf;Nfs;tp Kbtile;J gpd;dh;> clDbahf ,e;j ,dj;jpw;F tug;ngw;w nlz;lh; fth;fs; jpwf;fg;gl;L> Vyj;jpy; Nfl;fg;gl;l cah;e;j Vyf;Nfs;tpj;njhif kw;Wk; tug;ngw;w nlz;lh;fspy; cah;e;j nlz;lh; kjpg;Gj;njhif-,itfs;py; vJ Mizahpd; mq;fPfhuj;jpw;F cl;gl;L gjpT nra;ag;gLk;.

12.Vyk; kw;Wk; nlz;lh;fspy; kpf cah;e;j njhiff;F Nfs;tp Nfl;l egh;fs; 1424 k; gryp chpkj;njhif KOfijAk; nuhf;fkfhNth> tiuNthiy %ykhfNth clDbahf nrYj;j Ntz;Lk;. 1425 k; gryp chpikj;njhifia 20.06.2015 Njjpf;Fs;Sk; 1426 -k; gryp chpikj;njhifia 20.06.2016 Njjpf;Fs;Sk; nrYj;j Ntz;Lk;. chpkj;njhif vf;fhuzj;ij Kd;dpl;Lk; fhNrhiyahf ngw;Wf;nfhs;sg;gl khl;lhJ.

13. Vyk;/nlz;lh; Kbe;jTld; chpikj; njhifia nrYj;j jtwpdhy; nlz;lh; kw;Wk; Vyk; uj;J nra;ag;gl;L kW nlz;lh;/ kW Vyk; elj;jg;gLk;.

14. nlz;lh;/Vyj;jpy; FiwT Vw;g;gl;lhy; Kd; Vyjhuh;/nlz;lh;jhuh; mjid <L nra;aNtz;Lk;. \$Ljy; njhiff;F nlz;lh;/Vyk; nrd;why; Nkw;gbahUf;F ,jpy; vt;tpj chpikAk; ,y;inyad;gJld; Kd;nlz;lh; kw;Wk; Vyj;jpy; fye;J nfhs;s nrYj;jpAs;s nlghrpl; njhifAk; gwpKjy; nra;ag;gLk;.



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15.nlz;lh;/Vyj;jpy; nghJthf cah;e;j njhiff;F chpkk; cWjpnra;a
ghpe;Jiy nra;ag;gLk;.

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16.nlz;lh;/Vy; vLj;jth;fs; chpkj;njhif KOfijAk; clDbahf nrYj;jp
urPJ ngw;Wf; nfhz;l gpd;dNu Mizahpd; mq;fPfhu;jpw;F
ghpe;Jiuf;fgLk;

....

34.Nkw;fhZk; epge;jidfs;py; vijNaDk; kwPdhy;> vf;fhuzKk;
fhl;lhJ chpkq;fis clDbahf uj;J nra;J> kW nlz;lh; kW/Vyk; tPlTk;
chpikj;njhifapid gwpKjy; nra;aTk;> rl;lgb eltb;f;if Nkw;nfh;S;Tk; ,iz
Mizah;/nray; mYtyUf;F KO mjpfhuk; cz;L. ""

On the strength of the above conditions, it was submitted by the learned counsel for the Respondents that the challenge to the forfeiture is baseless and unsustainable inasmuch as the petitioner had participated in the Tender knowing fully well the conditions of the Tender include forfeiture of the Deposit in the event of non-compliance with the Tender Conditions.

c) The Respondents submitted that the averments that the petitioner had requested for permission to pay in four equal installments vide communications dated 12.07.2014 and 31.07.2014 is false and imaginary nor was any suggestion made by the Respondents about considering or granting the petitioner's opportunity for payment of the bid amounts in four months, for no such request was ever made by the petitioner.



d) It was submitted that a reading of the various Clauses of the Tender Conditions as a whole, would show that the petitioner's understanding is wholly misconceived.

e) The Reliance upon the Tamil Nadu Transparency in Tenders Act, 1998 and Rules again suffers from misconception for the same is inapplicable to the Tenders issued/ called for by the Respondents.

7. Heard both sides and perused the materials available on records. I find no reason to interfere with the impugned order for the following reasons:

i) It is not in dispute that the petitioner had after making the EMD / deposit and turning out to be highest bidder had failed to comply with Clause 12 of the Tender Conditions which requires the successful bidder to make the payment of the Tender/ bid amount for the Fasli Year 1424 fully / wholly forthwith / immediately.

ii) From a reading of Clauses 10,11,12,13,14,15,16 and 34 of the Tender Conditions, it leaves no room for any doubt that deposit of the entire bid amount immediately i.e., on the very same day is one of the Tender Conditions and failure to comply would warrant forfeiture in terms of the above Tender Conditions. It is fairly well settled that when a person participates in a Tender knowing fully well



and with his eyes wide open to the conditions it is not open to contend to the contrary. In this regard, it may be relevant to refer to the following judgments:

i) **Villayati Ram Mittal (P) Ltd. v. Union of India, (2010) 10 SCC 532:**

"10. The legal principles relating to "earnest money" are well settled. In Chiranjit Singh v. Har Swarup [AIR 1926 PC 1] the Judicial Committee of the Privy Council held : (AIR p. 2)

"Earnest money is part of the purchase price when the transaction goes forward : it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

These observations of the Judicial Committee have been quoted (at SCC p. 531, para 20) in the judgment of this Court in Shri Hanuman Cotton Mills v. Tata Air Craft Ltd. [(1969) 3 SCC 522] in which the principles relating to earnest money have been laid down.

11. Similarly, in HUDA v. Kewal Krishan Goel [(1996) 4 SCC 249] this Court quoted the following observations of Hamilton, J. in Sumner and Leivesley v. John Brown & Co. [(1909) 25 TLR 745] with regard to the meaning of "earnest" : (HUDA case [(1996) 4 SCC 249] , SCC p. 254, para 10)

"10. ... ' "Earnest" ... meant something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited.' "

12. It is thus clear that when earnest money is furnished by a



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tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer."

(emphasis supplied)

ii) National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410:

"9. In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his



own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted."

(emphasis supplied)

iii) NTPC Ltd. v. Ashok Kumar Singh, (2015) 4 SCC 252 :

10.....while a person may have a right to withdraw his offer at any time before the acceptance is conveyed to him if the offer is itself subject to the condition that the earnest money will be forfeited for not entering into contract or if some other act is not performed, then, even though he may have a right to withdraw his offer he will have no right to claim the refund of the earnest money. Forfeiture of the earnest money, in any such case, does not, observed this Court, infringe any statutory right under the Contract Act, 1872 for earnest/security is given and taken in such cases only to ensure that a contract comes into existence."

(emphasis supplied)

iv) State of Orissa v. Narain Prasad, (1996) 5 SCC 740:

"21....A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round, according to this decision, and question the validity of those obligations or the validity of the Rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Article



226, which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour."

v) Shree Rani Sati Investment and Finance Ltd. v. Union of India,
2004 SCC OnLine Bom 101:

"72..... If a person, who enters in certain contractual obligation with his eyes, open and works entire contract, can he be allowed to turn around; according to his choice, and question the validity of those obligations which constitute basic and essential terms of the contract. In our opinion, the answer has to be in negative. Neither justice nor equity lies in favour of such persons."

d) The reliance on the Tamil Nadu Transparency in Tenders Act, 1998 and the corresponding Rules to suggest that the minimum time for submission of Tenders in terms of Rule 20 of Tamil Nadu Transparency in Tenders Rules, 2000 is misconceived. In this regard, it may be relevant to refer to the following provisions of the said Act and Rules:

"2(e) "procuring entity" means the entity specified in the Schedule to this Act;

3. Prohibition or Procurement except by tender: 91) No procurement shall be made by the procuring entity except by tender.

.....

9.Functions of Tender Inviting Authority: (1) the Tender Inviting Authority shall invite tenders in the form of a notice containing such particulars as may be prescribed.



(2) *The Tender Inviting Authority shall communicate the Notice Inviting Tenders to the Bulleting Officers according to the value of the procurement and within such time as may be prescribed, so as to publish the same in the appropriateTender Bulletin.*

(3) *The Tender Inviting Authority shall also publish the Notice Inviting Tender hosted in indian Trade Journal and in daily newspapers having wide circulation depending upon the value of the procurement prescribed.*

(3-A) *The Tender Inviting Authority shall also cause the Notice Inviting Tender hosted in the dedicated website adminisitered by the State Tender Bulletin Officer.*

(4) *The Tender Inviting Authority shall supply the schedule of rates and tender documents in such manner and in such places as may be prescribed to every intending tenderer who has applied for such document.*

The Schedule

[(See Section 2(e)]

Procuring Entity

- 1.Government Departments.*
- 2.Public Sector Undertakings of the Government.*
- 3.Statutory Boards formed by the Government.*
- 4.Local Bodies in the State.*
- 5.Co-operative Institutions in the State.*
- 6.Universities.*
- 7.Societies formed by the Government.*

Tamil Nadu Transparency in Tenders Rule, 2000:

20.Minimun time for submission of tenders:

(1) The Tender Inviting Authority shall ensure that adequate time is provided for the submission of tenders and a minimun time is allowed



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between date of publication of the Notice Inviting Tenders in the relevant Tender Bulletin or in the newspapers whichever is later and the last date for submission of tenders. This minimum period shall be as follows:

- a) for tenders upto rupees two crores in value, thirty days; and*
- b) for tenders in excess of rupees two crores in value, thirty days.*

(2) Any reduction in the time stipulated as per sub-rule (1) has to be specifically authorized by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing."

A cumulative reading of the above provisions would make it clear that the above Rules would be applicable only to the entities specified in the Schedule to the Act, which reads as under:

"The Schedule

[(See Section 2(e)]

Procuring Entity

- 1. Government Departments.*
- 2. Public Sector Undertakings of the Government.*
- 3. Statutory Boards formed by the Government.*
- 4. Local Bodies in the State.*
- 5. Co-operative Institutions in the State.*
- 6. Universities.*
- 7. Societies formed by the Government."*

A reading of the above Schedule would show that the Tender called for by the Respondent temple would not be covered by the said Act. To a pointed

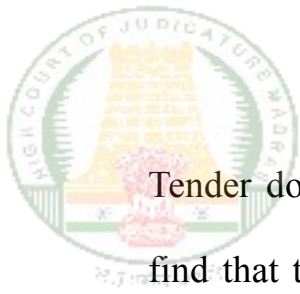


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question as to whether the Temple would fall within any of the entities enumerated in the Schedule under Section 2(e) of the Tamil Nadu Transparency in Tenders Act, 1998, the learned counsel for the petitioner was unable to fix the Temple under any of the enumerated entities. Assuming that Temples are regulated by HR and CE Department and the authorities under the said Act, that by itself may not convert the Temple as Government Department. In other words, even if the HR and CE Department were to regulate and the Tenders are issued under the supervision of the HR and CE Department, it may not be possible to equate a Temple to HR and CE Department, which regulates the same. The HR and CE Department is a Department which governs all the Temples and the Temple's identity does not get lost or merges with that of the Department. The distinction in their identity would continue to exist and therefore even though no attempt was made to submit that the Temple is a Government Department in any view the same does not have merit. Thus, the above attempt by the petitioner ought to be rejected as having no merit. For all the above reasons, the Writ Petition is dismissed. No costs.

W.P.(MD)No.13596 of 2014:

The Writ Petition in W.P.(MD)No.13596 of 2014 has been filed challenging the above Tender notification dated 22.07.2014, primarily on the ground that the



Tender does not comply with Tamil Nadu Transparency in Tenders Act, 1998. I find that the writ petition is not maintainable by the petitioner for admittedly he has not even participated in the Tender and has proceeded to challenge subsequent to the completion of Tender process. In this regard, it may be relevant to refer to the following judgments:

i) *Rajasthan State Industrial Development & Investment Corpn. v. Subhash Sindhi Coop. Housing Society, (2013) 5 SCC 427:*

24."The primary purpose of the writ is to protect and establish rights, and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justitiae) and its grant or refusal is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but to enforce one that stood already established"

ii) *NHAI v. Gwalior-Jhansi Expressway Ltd., (2018) 8 SCC 243:*

"23. An entity who stays away from the bidding process and fails to comply with the express terms and conditions of the tender documents cannot claim any right to match the lowest bid or exercise ROFR. Only a responsive bidder could do so. The High Court has overlooked the fact that the appellant is a body corporate under the 1988 Act. It has to act in a just and fair manner in the matter of allocation of contract albeit the balance and unfinished work of the project. No express exemption has been granted to the respondent vide order of the Arbitral Tribunal dated 23-7-2016 — to exercise ROFR or match the lowest bid without participating in the bidding process. The respondent had the option



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to participate in the bidding process which was not availed of for reasons best known to the respondent. The High Court also overlooked the fact that the tender process was not an empty formality and with the initiation of the same, third parties, who participated in the bidding process, were likely to be prejudiced by allowing the respondent to match the lowest bid or exercise ROFR, without participating in the bidding process despite the express stipulation in that behalf in the tender documents. Suffice it to observe that the High Court committed the same error as committed by the Arbitral Tribunal in not examining the core issues for grant or non-grant of the relief to the respondent, in conformity with the fundamental policy of Indian law."

It is settled law that it would not be open for strangers / third party who had not participated in the tender to challenge the Tender. In any view, I had already found that the above Acts and Rules may not have any applicability to the Tender called for by the petitioner. I have no hesitation in dismissing the writ petition. According the writ petition in W.P.(MD).No.13596 of 2014 stands dismissed. No costs.

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Index: Yes/No
Speaking/Non speaking order
Neutral Citation: Yes/No
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MOHAMMED SHAFFIQ, J.

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To:

1. The Commissioner
Hindu Religious & Charitable Endowments Department
Government of Tamil Nadu,
Nungambakkam High Road,
Chennai 600 034.
2. The Joint Commissioner/Special Officer,
Arulmighu Mariamman Thirukoil,
Samayapuram,
Trichy District.
3. The Public Prosecutor,
High Court of Madras.

Order in
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