

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

TUESDAY, THE 10TH DAY OF FEBRUARY 2015/21ST MAGHA, 1936

WP(C).No. 3982 of 2015 (W)

PETITIONER:

**M/S A.P.VARGHESE & SONS,
ENGINEERING & TRANSPORTING CONTRACTORS,
ANTHIKAD HOUSE, ELOOR SOUTH,
UDYOGAMANDAL P.O. KOCHI 683501,
REPRESENTED BY ITS MANAING PARTNER,
SRI.ANTONY VARGHESE S/O. A.P.VARGHESE.**

**BY ADVS.SRI.ABRAHAM MATHEW (VETTOOR)
SMT.BINI ELIZABETH
SMT.M.J.SAJITHA
SRI.SRI.ANIL ABHEY JOSE**

RESPONDENT(S):

- 1. THE FERTILIZERS AND CHEMICALS TRAVANCORE LTD.
(A GOVERNMENT OF INDIA ENTERPRISE)
REGISTERED OFFICE AT ELOOR, UDYOGAMANDAL,
COCHIN - 683 501, REPRESENTED BY ITS
CHAIRMAN AND MANAGING DIRECTOR.**
- 2. THE GENERAL MANAGER,
THE FERTILIZERS AND CHEMICALS TRAVANCORE LTD.,
UDYOGAMANDAL DIVISION, UDYOGAMANDAL,
COCHIN - 683 501.**
- 3. THE MANAGER,(MATERIALS) TS,
THE FERTILIZERS AND CHEMICALS TRAVANCORE LTD.,
CORPORATE MATERIALS,
PD ADMINISTRATION BUILDING, UDYOGAMANDAL,
COCHIN - 683 501.**

BY SRI.M.GOPIKRISHNAN NAMBIAR, SC

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 10-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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APPENDIX

PETITIONER(S)' EXHIBITS:

- EXT.P1: TRUE COPY OF THE WORK ORDER NO.03000708009 DATED 22.07.2008 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P2: TRUE COPY OF THE WORK ORDER NO.M(PUR) TS TFPR(K) 2006-08 DATED 20-12-2006 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P3: TRUE COPY OF THE WORK ORDER NO.M(PUR) TS TBCR/1004-06/07 DATED 10-03-2007 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P4: TRUE COPY OF THE AMENDED WORK ORDER NO. M(PUR) TS-THGYPW -CD(R) 09 FUEL 2 DATED 30-01-2011.
- EXT.P5: TRUE COPY OF THE WORK ORDER DATED 30-04-1999 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER IN RESPECT OF TRANSPORTATION OF FINISHED PRODUCTS FOR A PERIOD OF 2 YEARS.
- EXT.P6: TRUE COPY OF THE WORK ORDER NO.M(PUR)-TS-TFPR/06/08 DATED 05.07.2006 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P7: TRUE COPY OF THE WORK ORDER NO.DYCM(MAT)ESS-53-LDG/2317/020 DATED 15-02-2006 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P8: TRUE COPY OF THE WORK ORDER NO.0300090809 DATED 28.08.2008 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P9: TRUE COPY OF THE WORK ORDER NO.M(PUR)-TS/TGYPR/CD07-08 DATED 29.11.2007 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P10: TRUE COPY OF THE WORK ORDER NO. SRM-MK-SKR-UDL-42 DATED 28-07-2008 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P11: TRUE COPY OF THE WORK ORDER NO.M(PUR)-TS/THGYPW -CD(R) 08-09 DATED 31.01.2009 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P12: TRUE COPY OF THE WORK ORDER NO.0300040809 DATED 22.05.2008 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.

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- EXT.P13:** TRUE COPY OF THE WORK ORDER NO.M(PUR) TS/THGYPW -CD-EMER/ 08-09 DATED 24.12.2008 ISSUED BY THE RESPONDENTS IN FAVOUR OF THE PETITIONER.
- EXT.P14:** TRUE COPY OF THE CRTIFICATE NO.CSP-CD.OPNS -1711 DATED 11.03.2011 ISSUED BY THE CHIEF SUPERINTENDENT OF PRODUCTION OF THE RESPONDENT.
- EXT.P15:** TRUE COPY OF THE CRTIFICATE NO.CSP-CD.OPNS -1710 DATED 11.03.2011 ISSUED BY THE CHIEF SUPERINTENDENT OF PRODUCTION OF THE RESPONDENT.
- EXT.P16:** THE EXPERIENCE CERTIFICATE DATED 13.09.2010 ISSUED BY THE RESPONDENT IN FAVOUR OF THE PETITIONER.
- EXT.P17:** TRUE COPY OF THE COMMUNICATION DATED 21.01.2015 ISSUED IN FAVOUR OF THE PETITIONER ALONG WITH ENVELOPE.
- EXT.P18:** TRUE COPY OF THE NOTICE INVITING TENDER UNDER ENQUIRY NO.MM/BR/12442 DATED 21.01.2015 ISSUED BY THE RESPONDENTS TO THE PETITIONER.

RESPONDENT(S)' EXHIBITS: - NIL

/TRUE COPY/

P.A. TO JUDGE

mbr/

P.R. RAMACHANDRA MENON, J.

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W.P.(C). No. 3982 of 2015

Dated this the 10th day of February, 2015

JUDGMENT

The correctness and sustainability of Clauses 2.1, 2.2 and 2.3 of Ext.P18 tender notice issued by the respondent Company is under challenge in this writ petition.

2. The case of the petitioner is that, by virtue of unreasonable restrictions, the petitioner who is otherwise qualified, is not in a position to participate in the bid, which is incorporated only to extend undue favours to the persons of choice of the respondents, comparatively the new comers in the field.

3. The petitioner is a transporting contractor, who is undertaking various works awarded by the 1st respondent Company and other similar establishments for the past few decades. Admittedly, the petitioner could not win any contract after the year 2011, as the petitioner did not turn to be successful in the bids. The credentials of the petitioner are sought to be substantiated with reference to Exts.P14 to P16

experience certificates. Recently, Ext.P18 tender was floated by the respondent Company and the last date for submitting the bids, to be given separately as Part A bid (Pre-qualification cum Techno Commercial Bid) and Part B (Price Bid) was by 2 p.m. on 11.02.2015.

4. The challenge raised by the petitioner is vehemently opposed from the part of the respondent Company stating that, there is absolutely no merit or bonafides in the writ petition. From the pleadings set forth by the petitioner, it is revealed that the petitioner is not qualified in terms of the tender and as such, it is not open for the petitioner to challenge the tender conditions. It is also pointed out that the conditions as now exist vide 2.1 to 2.3 were similar to the conditions as existed earlier in respect of the tender floated in the year 2012. A copy of the relevant tender notification dated 27.7.2012 is placed for consideration before this Court.

5. Heard both the sides in detail.

6. The learned counsel for the petitioner points out that, the course pursued by the respondents is tainted with malafides and there is absolutely no rhyme or reason for stipulating the

condition in such a manner, so as to have an experience of 'three years' during the last five years, reckoning the same with reference to the date of tender. According to the petitioner, this should have been something else, so as to include more persons/competent hands in the zone of consideration. Under such circumstance, interference of this Court is possible, submits the learned counsel, with reference to the law declared by the Apex Court in **Union of India & Another v. International Trading Co. & Another** [(2003) 5 SCC 437] and **Michigan Rubber (India) Limited v. State of Karnataka & Others** [(2012) 8 SCC 216].

7. The learned counsel for the respondent Company on the other hand points out that, the scope of interference in contractual matters, by way of judicial scrutiny, is very much limited. Reliance is sought to be placed on the decisions rendered by the Apex Court in **Tata Cellular v. Union of India** [(1994) 6 SCC 651], **Air India Ltd. v. Cochin International Airport Ltd. & Others** [(2000) 2 SCC 617] & **Global Energy Ltd. & Another v. Adani Exports Ltd. & Others**. (2005) 4 SCC 435.

8. Going by the pleadings and proceedings, it is seen that there is no case for the petitioner that the petitioner stands qualified as on date in respect of Ext.P18 tender, particularly in terms of Clauses 2.1 to 2.3. The question is whether any unreasonable restriction is placed by the respondent Company while incorporating such clauses. The aforesaid clauses read as follows:

"2.1 Bidder must have experience in transporting bagged materials like fertilizers, sugar, cement, etc. for any three years during the last five years ending on date of opening of Part – A Bid.

2.2 Bidder must also have transported not less than 10,000 MT of bagged materials as above for any single organization during any one of the last five years ending on date of opening of Part A Bid, and must enclose copies of (i) Work order (ii) Experience certificate and (iii) Performance certificate issued by the contractee with Part A bid as documentary evidence.

2.3 Documentary evidence in support of the above such as copies of work orders/experience certificate/performance certificates etc., from organization served shall be enclosed along with Part-A Bid. For this purpose the documents from organizations of similar standing as FACT, or organizations of sound financial

capability and having status of principal employer or Govt./Quasi Govt. Depts. Which do their work mainly through public contracts shall be considered for acceptance.”

9. It is seen that, by virtue of the concerned clauses, the Company has sought to ascertain whether a particular participant is currently available in the field and is having current experience of a minimum of three years in a total of five years on the given date. Similarly, the Company, taking note of the volume of work to be entrusted, has prescribed possession of experience by handling such transportation contract to an extent of 10,000 MT, so as to assess the calibre and competence of the bidder. This Court finds it difficult to accept the proposition of the petitioner that, the said clauses place any unreasonable restriction upon the participants, more so when, the petitioner did not turn to be successful in winning any contract (much less than the requisite extent) after the year 2011.

10. Coming to the scope of interference of this Court, the scope of judicial scrutiny was explained by the Apex Court in **Tata cellular** case cited supra. The observations made in paragraph 94 are relevant and hence it is extracted below:

"94. The principles deducible from the above are :

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) 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.

(4) **The terms of the invitation to tender cannot be open 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.**

(5) The Government must have freedom of contract. In other words, a fair play in the joints 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 (including its other facts pointed out above) but must be free from arbitrariness not affected by

bias or actuated by malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
(emphasis supplied)

Similar observations as to the judicial restraints to be followed are discernible from paragraph '7' of the judgment in **(2000) 2 SCC 617** cited supra. The principle was further alerted and explained in paragraph '10' of the decision in **2005 (4) SCC 435** cited supra.

11. Coming to the judicial precedents cited from the part of the petitioner, it is seen that the judgment passed by the Apex Court in **(2003) 5 SCC 437** cited supra is mainly with regard to the 'legitimate expectation'. The point considered was mainly as to whether any change in policy, if founded on Wednesbury reasonableness, can defeat a substantive legitimate expectation. The principles with regard to the 'Promissory Estoppel' were also discussed. After going through said verdict, this Court does not find any support to the case mooted by the petitioner in the writ petition. From the law laid down by the Apex Court **(2012) 8 SCC 216** (cited supra) or the other

judgment cited from the part of the petitioner, this Court finds that the same do not come to the rescue of the petitioner in any manner. It has been asserted and alerted by the Apex Court that, interference is possible only when there is malafides. It is also made clear that, Courts cannot interfere merely because it feels some other tender conditions would have been fairer, wiser or more logical.

12. After hearing both the sides, this Court finds that, it is for the awarder of the contract to stipulate the terms, so as to meet the requirements with regard to the object to be achieved. It is not for the participant/bidder to dictate terms; nor is it for the Court to re-write the terms of the contract. This does not come within the purview of judicial scrutiny, more so, in view of the law declared by the Apex Court on this aspect as discussed above.

Interference is declined and the writ petition is dismissed accordingly.

**P.R. RAMACHANDRA MENON,
JUDGE.**