IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2015

Date of Reserving the Judgment	Date of Pronouncing the Judgment
21.01.2015	23.01.2015

CORAM

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

W.P. No.1504 of 2014

Sri.Anjaneya Transport,
Rep., by its Partner
K.S.Giribala
having office at No.153 C/7, Salem Road,
Namakkal Post, Namakkal,
Namakkal District. ...Petitioner

Vs.

1. The Executive Director,
   Bharat Petroleum Corporation Limited,
   Southern Region,
   1, Ranganathan Gardens,
   11th Main Road, Anna Nagar,
   Chennai - 600 040.

2. The Deputy General Manager - Logistics,
   (Retail South)
   Bharat Petroleum Corporation Limited,
   Southern Region
   1, Ranganathan Gardens
   11th Main Road, Anna Nagar,
   Chennai - 600 040.

3. M/s.Shri Ramajayem Roadways (Reg.,)
   Rep., by K.Narasimmaan, Partner,
   Old No.4, New No.48,
   Gandhi Street, Krishnamoorthi Nagar,
   Kodungaiyar, Chennai - 600 118.

4. M/s.P.C.S., Transports,
   Rep., by P.Sundar Rajan, Partner,
   No.1, A, Mayam Pillaiyar Kovil Road,
   Salem Road, Namakkal - 637 001.

5. M/s.EN Transports,
Rep., by V.Elacheran Partner
No.42-C, Pathi Nogan,
Salem Road, Namakkal - 637 001. ...Respondents

R3 to R5 impleaded as per order dated 11.02.2014, in M.P.Nos. 2 to 4/2014 in W.P.No.1504 of 2014

Prayer :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Mandamus, to direct the respondents to evaluate and finalise the tender as per Clause 9 of the Tender Schedule and to evaluate the tenders for 12KL tanker lorries and above 18KL tanker lorries together in Tender Schedule No.BPCL/SR/POL/BULK/KARUR/2013-2015, dated 04.10.2013.

For petitioner : Mr.P.Solomon Francis

For Respondents : Mr.O.R.Santhana Krishnan for RR1&2

Mr.G.S.Soundar Rajan for R3

Mr.L.Chandrakumar for
Mr.A.M.Packianathan Easter for R4 & R5

O R D E R

The petitioner has filed this Writ Petition praying for issuance of a Writ of Mandamus to direct the respondents 1 and 2 to evaluate and finalise the tender as per clause 9 of the tender schedule and to evaluate the tenders for 12 KL tanker lorries and above 18KL tanker lorries together in the tender schedule, dated 04.10.2013.

2. The respondent corporation invited tenders for transportation of Bulk White Oil Products namely Motor Spirit, High Speed Diesel Superior Kerosene Oil for their Karur Installation in Tamilnadu to Retail Outlets, Customers/Depots/Installations within the State of Tamil Nadu and outside the State of Tamilnadu. The contract to be awarded for a period of two years. The tender consist of two parts namely, technical bid and price bid and the last date for submission of tender was fixed as 08.11.2013. 36 applications were received by the respondent Corporation and such of those applicants, who were qualified in the technical bid would be called for price bid scheduled on 10.01.2014. The petitioner firm consisting of 20 partners applied for the tender. The petitioner would state that prior to formation of the petitioner firm, the

individual partners were Lorry operators who were engaged for transporting oil products for the respondent Corporation and other oil companies. The controversy involved in this writ petition is with regard to the interpretation of clause 9 in Section B of the tender notification dealing with evaluation of the tenders. For better appreciation, clause 9 is extracted hereunder:-

> 9. In case, for a particular ranking, tank-lorries offered are more than the requirement then the tank-lorries will be taken based on the following order of priority:
>
> (i) No of Owned tank lorries offered for 12KL and no. of Higher Capacity tank lorry offered for above 12 KL
>
> (ii) No of Own Tank Lorry offered
>
> (iii) No of Tank Lorry offered with Lower Age
>
> (iv) No of Total Tank Lorries offered.
>
> Transporters in a particular ranking will be further ranked based on the above order of priority and allocations will be made only till such time that the full requirement of Tank Lorry is met. Consequently, transporters who rank lower may not get any allocation.

3. According to the petitioner, tanker lorries offered by the tenderers for both 12KL and 18 KL would have to be considered together and not separately and the respondent Corporation are trying to interpret clause 9(i) by stating that they would consider two categories separately. This according to the petitioner is in violation of clause 9 of the tender conditions and if such interpretation is given, it would render clauses 9(ii), 9(iii) and 9 (iv) as otious. Further, the petitioner has stated that the respondent Corporation in order to favour some tenderers with a biased attitude, are trying to interpret clause 9 to suit their whims and it has been made only to defeat the petitioner's rights. At this stage, it is relevant to note that the petitioner has been allotted 50 vehicles as against his tender for 174 vehicles, pursuant to the subject tender. Therefore, the petitioner would state that clause 9 (i) has to be strictly interpreted by the respondents and they have to rank the tenderers by considering the number of tanker lorries offered for 12KL and for 18KL together and not separately.

4. The learned counsel appearing for the petitioner after referring to the factual details and to clause 9 of the tender conditions submitted that the interpretation given by the respondent Corporation is wholly inconsistent with clause 9 of the tender conditions. It was further pointed out that in respect of another tender for Irugur, no such condition was imposed and the priority was determined taking note of the maximum number of tanker lorries offered in each category. Therefore, it is submitted that there is gross discrimination and arbitrariness in the manner in which the respondent Corporation has evaluated the tender for the purpose of

ranking the bidders and granting priority.

5. The learned counsel appearing for the respondent Corporation by referring to the counter affidavit submitted that the intention of the Corporation is to treat both 12KL and above 12KL tanker lorries independently to decide the allotment and that is why the Corporation has mentioned both the categories separately in the said clause. It is further submitted that if the intention of the Corporation is interpreted otherwise to treat both 12KL and above 12KL tanker lorries combinedly, there is no need to mention separately, the capacity of tanker lorries as mentioned in the said clause. Further, it is submitted that 12KL and above 12 KL tanker lorries are separate and independent and have different rates for transportation and independent usage and therefore, the respondent Corporation have clearly expressed their intention in the tender notification. It is further submitted that as per the tender requirement for 12KL tanker lorries is 116 and above 12KL is 87 and it has been clarified by the Corporation that both categories will be treated separately. Therefore, it is submitted that the petitioner's contention that both the categories have to be treated together to decide the priority as per clause 9 is not tenable. Further, by referring to the price band for 12KL tanker lorries, it is stated that it is between Rs.1.78 to Rs.2.18 and for 12KL tanker lorries, the price band is Rs.1.42 to Rs.1.74. Therefore, it is clear that the two categories have been treated differently. The allegation of bias has been denied in the counter affidavit and it is submitted that the intention of the Corporation is clear as per the tender conditions and if the interpretation of the petitioner is to be accepted, the interest of the Corporation will be affected and it would result in allotting major portion of the tanker lorries to a single contractor, which is against public interest. Further, it is submitted that the tender floated for Irugur installation has no relevance to the present tender, as it is an independent tender published at a different point of time with different conditions and no comparison can be made with the subject tender. In support of his contention reliance was placed on the decision of the Hon'ble Supreme Court in the case of Master Marine Services Pvt., Ltd. vs. Metcalfe and Hodgkinson Pvt., Ltd., and Anr., reported in AIR 2005 SCC 2299.

6. The private respondents have also filed their affidavits stating that on account of the pendency of the Writ Petition, the work order has not been issued and they are put to great prejudice and financial hardship.

7. Heard Mr.P.Solomon Francis, learned counsel appearing for the petitioner, Mr.O.R.Santhana Krishnan, learned counsel appearing for the respondents 1 and 2, Mr.G.S.Soundar Rajan, learned counsel appearing for the third respondent and Mr.L.Chandrakumar learned counsel appearing for Mr.A.M.Packianathan Easter, learned counsel

appearing for the fourth respondent and perused the materials placed on record.

8. At the first instance, it has to be pointed out that the petitioner participated in the tender and submitted its bid for 174 tanker lorries in both the categories namely, 12KL and above 12KL and has been awarded the contract for 50 vehicles under both categories. The rates fixed for both the categories in the allotment order, dated 03.04.2014, issued in favour of the petitioner prescribes different rates namely, upto 12KL within the State is Rs.1.78 and outside the State is Rs.1.80 and for above 12KL, the rate within the State is Rs.1.42 and outside the State is Rs.1.43.

9. The short issue which falls for consideration is as to whether clause 9(i) of the tender condition, which falls under the chapter 'Evaluation of Tender' has to be interpreted in the manner sought to be projected by the petitioner. In terms of clause 9, for a particular ranking, if tanker lorries are more than the requirement, then the tanker lorries will be taken based on the order of priority mentioned in sub-clause (i) to (iv) under clause 9. We are not concerned with clause (ii) to (iv), but the focus is on sub-clause (i) of clause 9. Sub-clause (i) of clause 9 states that the number of owned lorries offered for 12KL and number higher capacity offered for above 12KL will be taken into consideration for the purpose of ranking. The issue is whether the evaluation has to be done to ascertain the ranking by splitting up sub-clause (i) into two parts that is for tanker lorries with 12KL capacity and tanker lorries above 12KL capacity. The emphasise is on the word “and” used in sub-clause (i) of clause 9 and the petitioner would state that combined evaluation has to be done for both categories. The said submission does not merit acceptance for the simple reason that the price bid offered by the tenderers is separate for both the categories.

10. It is an admitted fact that the petitioner themselves have offered different rates for 12KL tanker lorries and tanker lorries with capacity over and above 12KL. Therefore, the petitioner cannot be heard to say that there should be combined evaluation of both categories. The capacity of the tanker lorries differs in both the categories, consequently the operating cost is also different. The petitioner being fully aware of the same has quoted different rates for both categories and the Corporation has accepted the tender submitted by the petitioner under both categories and awarded contract for 50 Lorries under both categories stipulating different rates by order dated 03.04.2014. Therefore, for the purpose of ranking both the categories cannot be clubbed together as both the categories are not similar, but they are separate distinct categories. The capacity of the tanker lorries under both categories are different, consequently the rates offered by the

tenderers, are higher in cases of tanker lorries having capacity over and above 12KL. Therefore, for the purpose of ranking, both categories cannot be clubbed together and the interpretation given by the petitioner is wholly untenable.

11. While on this issue, this Court has to take note of the decision of the Hon'ble Supreme Court laying down the principles which have to be applied in judicial review of administrative decisions especially those relating to acceptance of tender and award of contract. In the celebrated decision of the Hon'ble Supreme Court in the case of Tata Cellular vs. Union of India, reported in AIR 1996 SC 11, the Hon'ble Supreme Court pointed out that there are inherent limitations in exercise of the power of judicial review in administrative decisions especially in matters relating to acceptance of tender and the Government being the guardian of the finances of the State is expected to protect the financial interest of the State and that the Court does not sit as a court of appeal over the administrative action, but merely reviews the manner in which the decision was made. That the Government must have freedom of contract and a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and the decision must be free from arbitrariness not affected by bias or actuated by mala fides.

12. As pointed out earlier, the interpretation given by the petitioner to clause 9(i) of the tender condition is untenable. If the interpretation given by the petitioner is to be accepted, then it would virtually result in entrusting the entire work to a single contractor, which is against public interest. In the affidavit filed in support of the Writ Petition, though it has been stated that the action of the respondent Corporation is biased with a view to help a few contractors, the averment is totally vague and has not been substantiated. Furthermore, there is no allegation of malafides pleaded and established by the petitioner. The petitioner does not complain about the decision making process, since the petitioner themselves are a beneficiary, in the tender and they have been issued a contract by proceedings dated 30.04.2014.

13. Therefore, bearing in mind the legal principles as enunciated by the Hon'ble Supreme Court in the aforementioned decision, this Court is of the view that there is no arbitrariness or unreasonableness in the decision taken by the respondent Corporation and the interpretation given by the petitioner to clause 9(i) of the tender conditions is wholly untenable. The reference to the tender floated for Irugur installation is of little avail, as it is an independent tender and the petitioner having participated in the present tender cannot seek to draw any inspiration for some other tender called for by the respondent Corporation. Therefore, the said submission does not in any manner advance the case of the petitioner.

14. For all the above reasons, the petitioner has not made out a case for interference. Accordingly, the Writ Petition fails and it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Executive Director,
   Bharat Petroleum Corporation Limited,
   Southern Region,
   1, Ranganathan Gardens,
   11th Main Road, Anna Nagar,
   Chennai - 600 040.

2. The Deputy General Manager - Logistics,
   (Retail South)
   Bharat Petroleum Corporation Limited,
   Southern Region
   1, Ranganathan Gardens
   11th Main Road, Anna Nagar,
   Chennai - 600 040.

1 CC to Mr.P.Solomon Francis, Advocate SR.No. 3930

1 CC to Mr.O.R.Santhana Krishnan, Advocate SR.No. 3906

1 CC to Mr.A.M.Packianathan Easter, Advocate SR.No. 4040

W.P. No.1504 of 2014

BVR (CO)
PSI (03.02.2015)