IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :30.04.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.4247 of 2015

And M.P.Nos.1 & 1 of 2015

Reserved on 31.03.2015

Mr.M.Chandran ..Petitioner

-Vs-

1. Union of India,
Ministry of Shipping,
Transport Bhawan,
New Delhi-110 001.

2. Seafarer's Club,
Rep. by its Secretary,
Opp.Reserve Bank of India,
Rajaji Salai,
Chennai-01. .. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, to call for the records on the file of the 2nd respondent pertaining to Tender Notice issued in 2nd respondent Website, for manning, operating and maintaining the A/c Bar & Restaurant and Coffee Shop and quash the same.

For Petitioner : Mr.A.Edwin Prabakar

For Respondents : Mr.A.S.Vijayaraghavan

ORDER

The Seafarers' Club, Chennai, the second respondent herein, has issued a Tender Notice, dated 2.2.2015, inviting sealed tenders quoting monthly services-cum-license fee/charges inclusive of goodwill, from the financially sound, experienced parties in the field of catering and A/c Liquor Bar business for taking over the operation and maintenance of the present running bar having FL-5 Licence and catering restaurant and Coffee shop at the Seafarers' Club, Chennai with effect from 01.03.2015.

2. Challenging the above said Tender Notice, dated 2.2.2015, the petitioner has come forward with the present writ petition.

3. The case of the petitioner, in brief, as narrated in his affidavit filed in support of the writ petition, is as follows:

4. The Searfarer's Club, 2nd respondent herein, is a society registered under the Societies Registration Act, XXI of 1860 vide Registration No.143/1969 and it was constituted at Chennai built out of an initial grant by the Joint War Charity Committee during the war and the Government of India leased the current land from Government of Tamil Nadu and the new building was constructed. The first respondent, Government of India, also contributed for construction of the 2nd respondent club and it has appointed the Principal Officer, Mercantile Marine Department, Chennai as the Chairman of the Club and the other Government agencies appointed their officers as their representatives of the Club, who form part of the Committee and general body members of the Club. The Union of India also contributed for construction of the club. According to the petitioner, the 2nd respondent has to obtain prior approval and sanction of the Government of India with regard to all business transactions, such to raise money as loans, sell properties, etc., and pass resolutions and most of the members of the society are central and state government employees. The 2nd respondent club was established solely for the purpose of welfare of seamen fraternity by providing accommodation, recreational, cultural, medical and welfare activities. The petitioner worked as AB seaman from 13.2.1964 to 12.08.1999 and taking up contract jobs in ports, like water barge, painting etc., He came to understand that the committee of the 2nd respondent passed a resolution on 23.1.2015 to float a tender for contract for manning the immovable properties of the club like restaurant and bar and servicing food and beverages. In pursuant to the said resolution, the present tender notification was issued on 2.2.2015. In Tender notification, 2nd respondent fixed a minimum quote of Rs.5,50,000/- plus service tax, water charges and electricity charges has to be paid to the 2nd respondent on monthly basis which is exorbitant and at the same time, they have fixed rates for all the foods, beverages and services, which according to the petitioner, created an anomalous situation that any successful bidder who pays a premium down payment of Rs.5.5 lakhs per month along with miscellaneous expenses, taxes and salary for the workers, cannot maintain the restaurant and bar at the same price rate which prevail now or as fixed in the tender. The club is for the welfare of the seafarers who come to club in small numbers and if a hefty amount is charged from the contractor every month, the contractor would either charge exorbitant prices illegally or encourage only outsiders to come to club thereby making the club a non-seafarer's welfare club, which goes against the roots of the establishment of the club itself. According to the petitioner, as per amended provision of Rule 24 of Memorandum of Association of the 2nd respondent, prior sanction of the general body at annual or an extraordinary meeting and also consent of the Government of India has

to be obtained for any resolution with regard to immovable property, whereas, the 2nd respondent, without obtaining proper sanction or approval, arbitrarily floated the tender. Hence the Writ petition.

5. A counter affidavit has been filed on behalf of the 2nd respondent, wherein, it has been stated that the 2nd respondent club was constituted in Chennai with an initial grant by the Joint War Committee and thereafter, the present premises of the club were constructed by using the funds raised from private shipping companies, leading philanthropists and partly from the Government of India. The management and affairs of the club are not directly or indirectly controlled by the Government of India, but the Memorandum and Articles of the Association of the Club alone govern the management. There is absolutely no control exercised by the Government of India in relating to the affairs and management of the 2nd respondent club even though some officials working in the Government of India are designated as ex-officio Chairman or Secretary or members of the club. Mere fact that the officials of Central and State Government are designated as members and representatives of the club, it does not give effect that the Government of India, department or organization is having absolute or partial control over the management or the affairs of the club. The 2nd respondent club is being managed by the volunteers from the Shipping fraternity towards the welfare of the seafarers. It is further stated that the Club is registered under the Tamil Nadu Societies Registration Act, 1975 and as a society, no writ petition will lie as against it. The present writ petition filed questioning the impugned tender notification of the 2nd respondent is an abuse of the process of law and absolutely not maintainable for the reason that the tender is in the realm of contracts and for the reason that the petitioner cannot be termed as a party aggrieved. One Sri Amman Enterprises was running the bar and catering services in 2nd respondent Club from 2003 onwards, whose license under agreement came to an end on 31.12.2013 and though the licensee sought an extension of the period of license for 5 years, 2nd respondent was not inclined to grant such extension and consequently decided to call for tenders from eligible contractors. The 2nd respondent in its E.C.meeting held on 23.1.2015, decided to pursue the tender process upon the same terms and conditions that were found in the earlier tender advertised for on 31.10.2013 and entrusted the task to an executive sub-committee for further processing. The tender was notified on 2.2.2015 and the last date for submission of tender forms is 17.2.2015, however, none of the elected members raised objection to the decision to call for a fresh tender to give license. The petitioner was aware of the fact that the previous contractor Sri Amman Enterprises was paying monthly license fee amount of Rs.4,75,000/- plus water and electricity charges to the 2nd respondent club. While so, the nominal increase of Rs.75,000/- in the monthly license fee amount in the year 2013 itself while calling for tenders, taking into consideration the inflationary trend, steep increase of prices of all goods and services after 2012 and the steep fall or decrease in the real time value of money, after due consideration by the members of the executive committee of the 2nd respondent club cannot be found fault

with. The said amount of Rs.5,50,000/- was fixed by the then executive committee of the 2nd respondent club and none of the elected members of the 2nd respondent club ever objected to the fixing of Rs.5.5. lakhs per month. The tender notification was floated on 2.2.2015 as per the decision taken in the Executive Committee meeting held on 23.1.2015 in order to serve the Seafarers in a better manner and to continue the earlier tender process. The allegation and contention of the petitioner that the minimum quote of Rs.5,50,000/- plus service tax, water and electricity charges fixed for in this tender is highly excessive and unrealistic is false and cannot be taken as a genuine complaint as the petitioner has no knowledge in the field of catering service and he is only a seafarer and permitted to use the facilities in the club and he is not even a member of the society which manages the affairs of the club. There is no legal embargo for the 2nd respondent to obtain any prior approval from the first respondent to grant licence to any contractor and right from the inception till date, no such permission or approval had ever been sought for or taken from any authority including the first respondent. As per Letter No.1967/M2000-22, dated 16.5.2013 of the Secretary to Government of Tamil Nadu, Commercial Taxes Department, Chennai, the 2nd respondent Club, registered under the T.N.Societies Registration Act, 1975 is exempted from the provisions of Section 15(3) and (4) of the Tamil Nadu Societies Registration Act, 1975 in respect of its Ex-officio members. With these averments, the respondents sought for dismissal of the writ petition.

6. Heard the learned counsel appearing on either side and perused the entire records.

7. Questioning the impugned tender notice, dated 2.2.2015, Mr.A.Edwin Prabakar, learned counsel appearing for the petitioner, would mainly contend that the said tender notice floated by the 2nd respondent is bad in law since it was notified by the 2nd respondent without prior approval or sanction from the Government of India as per the Memorandum of Association of the society, there are 16 members of the committee of management appointed by the Government, viz., Director General of Shipping as Chairman, Deputy Director General of Shipping as Vice-chairman, two government nominees, two persons representing Indian Ship-owners, two persons representing foreign ship owners, one person representing Indian Seamen, one person representation Merchant Navy Officers, one Secretary and one Treasurer of the Committee and thereby when it is clear that the composition of the society is dominated by the representatives appointed by the Central Government and the monies required for running the 2nd respondent Club are provided by the Central Government, whatever decision to be made by the Society is required to have the prior approval of the Government of India, which admittedly, the 2nd respondent has not obtained before issuing the impugned Notification and hence, it is liable to be set aside. He would contend that there is no rationale or nexus in fixing the amount of Rs.5.5 lakhs towards monthly fee/charges for manning the restaurant and bar and such fixation of exorbitant amount would ultimately have impact on food and beverage prices since the

successful contractor who pays premium down payment of Rs.5.5 lakhs per month, would increase the prices of food, beverages, etc., which cannot be borne by the seafarer and thereby the object of the Club would be defeated. He also contended that tender notice was issued in violation of Rule 24 of Memorandum of Articles of the 2nd respondent Club and the members of the present committee are not authorized to pass any resolutions as the change in committee members have not been submitted to the Registrar of Societies and therefore, the resolution dated 23.1.2015 relied upon by the 2nd respondent as the basis for floating the tender is illegal. Hence, the learned counsel sought for quashing the impugned tender notification. IN support of his contentions, the learned counsel relied upon the decisions reported in "Ajay Hasia and others versus Khalid Mujib Sehravardi and others" reported in (1981) 1 SCC 722 (para 15), "Pradeep Kumar Biswas and others versus Indian Institute of Chemical Biology and others" reported in 2002(2) CTC 474 and "K.Marappan versus The Deputy Registrar of Co-operative Societies, Namakkal Circle, Namakkal and another" reported in 2006-4-L.W.495.

8. On other hand, Mr.A.S.Vijayaraghavan, learned counsel appearing for the respondents, while reiterating the averments narrated in the counter affidavit, would contend that there is absolutely no irregularity or illegality in issuing the tender notification by the 2nd respondent in respect of any aspect, such as fixing monthly fee, violation of Rules, etc., as contended by the petitioner. He would also contend that there is no necessity for the 2nd respondent to obtain prior sanction from the Government of India since at no point of time, right from its inception, the 2nd respondent has been issuing the tender as and when previous contract comes to end and the 2nd respondent club or its affairs are not under the control of the Government of India. He contended that the present writ petition filed by the petitioner who is neither aggrieved nor participant in the tender process, has any locus standi to question the tender notification. Therefore, the learned counsel for the respondents, sought for dismissal of the writ petition.

9. It is not in dispute that the 2nd respondent Club is an independent body, being a registered society constituted for the welfare of seafarers and the management and affairs of the Club are not directly or indirectly controlled by the Government of India. The petitioner has also not produced any authenticated documents or proceedings issued by the Government of India, to show that the 2nd respondent Club has been provided with funds and it is within the control of the Government of India and it is not the case of the first respondent also. It is not the case of the petitioner that from time to time as and when the previous contract comes to an end, the 2nd respondent Club used to get prior approval or sanction from the first respondent right from its inception. In fact, there were no such incidents where the 2nd respondent Club had obtained on any occasion before floating any tender notification from the first respondent. The petitioner has not produced any proceedings to show that the first respondent had granted sanction or approved the decision of the 2nd respondent Club in the matter of floating tender

notifications. The petitioner has not even mentioned under which rule or regulation which mandates the 2nd respondent club to get prior approval or sanction from the first respondent for its decisions taken by passing resolutions. Even assuming for a moment that if the 2nd respondent Club finalized the tender process without getting prior approval of the first respondent, it is for the first respondent to probe into the matter and take necessary action, but the petitioner is nothing to do with the matters between the first and second respondent. Further on a perusal of the records, it is apparent that some of the officials working under the Government of India, are designated as ex-officio Chairman, Secretary and members of the 2nd respondent Club and they act and exercise power to the extent as mentioned in the Memorandum of Articles of the 2nd respondent Club and they are not having any control over the affairs of the Club and as rightly contended by the learned counsel for the petitioner, mere the fact that the officials from the Mercantile Marine Department are appointed as Chairman, Secretary and Members of the Club, it does not give effect that the Club has been under the absolute control of the Government of India. In fact, there is an elected body, called Executive Committee consisting of 14 members including the Chairman, Vice Chairman and Honourary Secretary cum treasurer, etc., to lookafter day to day administration and management of the 2nd respondent Club and there was no complaint from any of the member of the Club muchless from the petitioner regarding the administration of the Club by the Executive Committee. Further, Rule 24 refers only to the sale/mortgage of immovabeable properties belonging to the 2nd respondent Club and this Court does not find that it would create any liability over the assets of the Club and that there is any violation thereof as contended by the petitioner.

10. It is the specific case of the second respondent that the tender notice, to man, operate and maintain A/c Bar, Restaurant and Coffee shop of the 2nd respondent club was floated on 2.2.2015 as per the decision taken in the Executive Committee Meeting held on 23.1.2015 and there were no objections by any of the elected members of the society and it is not in dispute that the petitioner is not a member of the society. In fact, the present tender notification was issued on the same terms and conditions as stipulated in the earlier tender advertised on 31.10.2013.

11. The main contention of the petitioner is that there is no rationale or nexus in fixing the amount of Rs.5.5 lakhs towards monthly fee/charges for manning the restaurant and bar and such fixation of exorbitant amount would ultimately have impact on food and beverage prices since the successful contractor who pays premium down payment of Rs.5.5 lakhs per month, would increase the prices of food, beverages, etc., which cannot be borne by the seafarer. I find no substance in the said contention. According to the 2nd respondent, the minimum quote of Rs.5,50,000/- plus other taxes, water and electricity charges, was fixed by the Executive Committee taking into consideration the fact that the previous contract was paying a monthly license fee amount of Rs.4,75,000/- plus water and electricity charges. The various rates for the food items, beverages

and services offered for sale at the Restaurant were fixed in the year 2013 and the same were adopted for the year 2015 also without any change thereof, however, the rates of the liquor alone is revised in the tender due to the hike in the procurement prices from government of Tamil Nadu. The apprehension of the petitioner as could be seen in para 3 of his affidavit filed in support of the petition, that "…any successful bidder who pays a premium down payment of Rs.5.5 lakhs per month along with miscellaneous expenses, taxes and salary for the workers cannot maintain the restaurant and bar at the same price rate which prevail now or as fixed in the tender …" "if a hefty amount is charged from the contractor every month, the contractor would either charge exorbitant prices illegally or encourage only outsiders to come to club making the club a non-seafarer's welfare club …", is in my opinion, is ridiculous, unreasonable and without any basis and mentioned as a ground just for the purpose of filing the writ petition. In fact, it is the lookout of the contractor who participated and succeeded in the bid and he has to analyze it as to whether it is reasonable to accept the quotation fixed by the 2nd respondent club in order to maintain the restaurant and coffee shop and to deliver the goods and services as per the specifications. It appears that the petitioner is showing more concern than the contractor. In fact, in response to the tender notice, four tenderers have participated and all of them have quoted over and above the minimum quote of Rs.5,50,000/-, which shows that the minimum quote of Rs.5,50,000/- is not an exorbitant amount as if it is considered as exorbitant as contended by the petitioner, no tenderer would have definitely participated.

12. In this juncture, it is worthwhile to refer the judgment of the Hon'ble Supreme Court in "Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492," wherein, the Hon'ble Supreme Court has held as under in para 9 to 16, which reads as under:

> "9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:
>
> (1) the price at which the other side is willing to do the work;
>
> (2) whether the goods or services offered are of the requisite specifications;
>
> (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
>
> (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
>
> (5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must

satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any retendering is prescribed, cost of the project can escalate substantially. What is more important is that ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electricity supply and the consequent obstruction in industrial development. If the project is for the construction of a road or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial setback to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226.

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes and the court is satisfied on the material before it that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to

evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work — which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee."

13. From the above, it is enlightened that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State or Private body can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the body which called for tenders, is bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. On going through the entire record and the case of the petitioner, this Court does not find any defect in the decision taken by the Executive Committee in fixing the quotation for Rs.5,50,000/- as license fee payable by the successful bidder or any unreasonableness or arbitrariness in the impugned tender notice, in order to interfere with the same.

14. For the foregoing reasons, this Court is of the considered view that there is no irregularity or infirmity in issuance of impugned tender notification, dated 02.02.2015 by the 2nd respondent and the petitioner has unnecessarily filed the present writ petition and frustrated the finalization of the tender process, for which, I feel it appropriate to impose costs while dismissing the writ petition.

In the result, the Writ Petition fails and it is dismissed as devoid of merits, with costs of Rs.10,000/- (Rupess Ten thousand) payable by the petitioner. The Registry is directed to recover the said amount and pay the same by way of Demand Draft drawn in favour of "Kakkum Karangal Old age Home, No.89 (old) No.47, Santhome High Road, Santhome, Chennai-600 028. Consequently, connected M.Ps. are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

Suk

To

1. Union of India,
Ministry of Shipping,
Transport Bhawan,
New Delhi-110 001.

Copy to

The Section Officer
Accounts Section,
High Court, Madras

2. The Sub Assistant Registrar
Accounts Section,
High Court, Madras

3. The Officer in charge
Kakkum Karangal Old age Home,
No.89 (old) No.47, Santhome High Road,
Santhome, Chennai-600 028.

1 cc to Mr.A.S. Vijayaragavan, SCGSC, Sr. 24787

W.P.NO.4247 OF 2015

JP (CO)

kk 25/5