

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 22.04.2016

Pronounced on : 29-04-2016

Coram

THE HONOURABLE MR. JUSTICE R. SUBBIAH

Writ Petition Nos. 14124 and 14125 of 2016
and
W.M.P. No. 12356, 12357, 12358 and 12359 of 2016

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M/s. C.S. Traders
rep. by its Proprietor
C. Ramesh
No.139, Shop No.13
Rangapillai Street
Puducherry

.. Petitioner

Versus

The Managing Director
Tamilnadu Civil Supplies Corporation
No.12, Thambusamy Road, Kilpauk
Chennai - 600 010

.. Respondent

Petitions filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus calling for the record of the respondent in tender ref.No.BS6/10739/2016 dated 15.04.2016 and quash the same and consequently direct the respondent to redefine the tender condition in accordance with the Tamil Nadu Transparency in Tenders Act for the scrutiny of this Court before publishing the same.

For Petitioner : Mr. R. Krishnamoorthy, Senior Advocate
for Mr. M. Kempraj in WP No. 14124 of 2016

Mr. R. Muthukumarasamy, Senior Advocate
for Mr. M. Kempraj in WP No. 14125 of 2016

For Respondents : Mr. P.H. Aravindh Pandian
Additional Advocate General
Assisted by Mr. L.P. Shanmuga Sundaram

standing counsel for TNCSC
COMMON ORDER

In both these writ petitions, the petitioner questions the incorporation of certain tender conditions as tailor-made, arbitrary and violative of the Tamil Nadu Transparency in Tenders Act (hereinafter called as The Act) and the Tamil Nadu Transparency in Tenders Rules (hereinafter called as The Rules). The learned senior counsel appearing for the respective writ petitioner and the learned Additional Advocate General appearing for the respondent adduced common arguments in both the cases. Therefore, with their consent, the writ petitions are taken up for final disposal and are disposed of by this common order.

2. According to the petitioner, he is carrying on the business of trading of pulses and grains for several years and had regularly participated in the tenders floated by the respondent corporation. During the course of such business, the respondent floated the impugned tender on 15.04.2016 for procuring Urud Dal and Canadian Lentil (Split Husked) 10000 MTs each worth about Rs.150 crores for the purpose of distributing it to the Family Card holders in the State at a subsidised rate. It is contended by the petitioner that earlier he has filed WP No. 9334 to 9338 of 2016 etc., batch before this Court challenging the tender notification dated 31.12.2015 issued by the respondent and the same is pending before this Court. During the pendency of the writ petitions, the respondent has floated the impugned tender notification with conditions which are tailor-made to enable only certain tenderers to participate in the tender to the exclusion of others. According to the petitioner, under Clause 3 (2) of the tender relating to pre-qualification criteria, the

bidder is required to have quality certification either under Agricultural Produce (Grading and Marking) Act and Rules or Bureau of Indian Standards. The fact remains that such certification affixing the Agmark Logo or ISI mark is not available on the product sought to be supplied namely Canadian Yellow Lentil. The Bureau of Indian Standards Mark (ISI) is given only for items that are manufactured and there is no ISI mark. This according to the petitioner is an arbitrary condition intended to exclude the regular bidders like the petitioner herein from participating in the tender. In such circumstances, challenging the tender notification dated 15.04.2016 of the respondent, the petitioner has filed these two writ petitions.

3. Mr. R. Krishnamoorthy, learned Senior counsel appearing for the petitioner in WP No. 14124 of 2016 would contend that the conditions incorporated in the tender notification dated 15.04.2016 are very difficult to be complied with by the petitioner and such conditions are imposed only to help some specific bidders. The learned senior counsel for the petitioner invited the attention of this Court to Rule 20 of The Rules relating to minimum time to be granted for submission of tenders. As per Rule 20 (b), when the value of the tender exceeds Rs.2 crores, 30 days time has to be given to enable the bidders to submit their bids. As per Rule 20 (2) any reduction in the time stipulated as per Sub-rule (1) has to be specifically authorised by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing. Relying on Rule 20, the learned Senior counsel for the petitioner contends that in the instant case, the value of the tender is Rs.150 crores and therefore, as per Rule 20 (b) of The Rules, 30 days time has to be given to the bidders to submit their bids. However, in this case, the

impugned tender notification was published on 23.03.2016 and the tender document was to be made available from 29.03.2016 in the website, however, it was made available only from 05.04.2016. In the tender notification, the last date for submission of the tender is mentioned as 15.04.2016. In effect, only 10 days time was granted to the bidders to submit their bid, which is in violation of Rule 20 of The Rules. Further, a perusal of the impugned tender notification would indicate that there is no reason assigned for reducing the time limit prescribed in Rule 20 of The Rules. It is also not indicated in the tender notification that the time limit contemplated in Rule 20 of The Rules has been reduced by an authority superior to that of the tender inviting authority by recording reasons. The respondent, who is the Managing Director of the Tamil Nadu Civil Supplies Corporation is the Tender Inviting Authority and the authority superior to the respondent is the Board of Directors of the Corporation. The Board alone is competent to pass appropriate orders to reduce the time limit stipulated in the tender notification as per Rule 20 of The Rules and except the Board, no one is authorised to do so. In this case, even as admitted by the respondent in para No.13 of the counter affidavit, the Board Sub-Committee consisting of the Principal Secretary to Government/Commissioner of Civil Supplies and Consumer Protection Department, Managing Director of TNCSC (respondent herein) and Deputy Secretary to Government, Finance Department have been given approval for waiving the minimum required period on 22.03.2016. This according to the learned Senior counsel for the petitioner is in violation of Rule 20 of The Rules. Further, as per Clause 10 (V) of the tender conditions relating to "other conditions", the respondent herein reserved his right to accept or reject any tender without assigning any reasons and the same shall not

be questioned on any ground whatsoever. Further, as per Clause 18 (r) of the Tender Conditions, the Managing Director i.e., respondent reserved his right to relax or waive or amend the tender conditions either in full or part thereof and to reject the tender if any of the conditions enumerated are violated. These conditions in clause 10 (V) and 18 (r) are in direct conflict with Section 10 and 11 of the Act. As per Section 10 of The Act, the tender accepting authority shall assign reasons on evaluation of tenders. Section 11 of the Act provides for an appeal against the order of the tender accepting authority before the Government. Thus, by virtue of insertion of Clause 10 (V) and 18 (r) of the tender conditions, the respondent curtailed the appeal remedy or any further remedy available to a tenderer with a vindictive motive. Therefore, the learned Senior counsel for the petitioner mainly contends that the impugned tender notification is in violation of Rule 20 of The Rules and on that ground it is liable to be set aside.

4. The learned Senior counsel for the petitioner in WP No. 14124 of 2016, pointing out the averments in the counter affidavit and additional counter affidavit of the respondent, would contend that the respondent has stated that if there is any conflict between the terms and conditions incorporated in the tender notification, then the Act and The Rules shall prevail over. This contention of the respondent in the counter affidavit is to cover up the lacuna *inter alia* to justify the incorporation of the tailor-made conditions in the tender conditions. This is specifically against Rule 25 of the Tender Evaluation process in the Rules wherein it is stated that the Tender Accepting Authority shall cause the evaluation of tenders to be carried out strictly in accordance with the evaluation criteria indicated

in the tender documents. When the respondent reserved his right to accept or reject any tender, as indicated in clause 18 of the tender conditions, it would amount to violating Rule 25 of the Rules. The conditions incorporated in clause 18 (r) of the tender conditions will nullify all other conditions incorporated in the tender notification as it gives enormous power for the respondent to reject or accept any tender according to his whims and fancy. The incorporation of this clause in the tender, according to the learned Senior counsel for the petitioner, is arbitrary and unwarranted.

5. The learned Senior counsel for the petitioner in WP No. 14124 of 2016 would further contend that as per Rule 31 (4) of The Rules, if the tender accepting authority is of the view that the commodity to be purchased is so vital in nature and the failure in supply would affect the public interest, he may place orders on the tenderer quoting the lowest evaluated price for not less than 60% of the quantity covered in the tender at the price quoted by him and the remaining quantity on the tenderers quoting the next lowest evaluated prices. This, according to the learned Senior counsel for the petitioner has not been indicated in the tender notification especially when it is stated that the procurement of the pulses is essential for public distribution. The learned senior counsel for the petitioner therefore submits that since the conditions incorporated in the tender notification are tailor-made besides being arbitrary, the petitioner could not participate in the tender. The learned senior counsel for the petitioner in WP No. 14124 of 2016 therefore prayed for allowing the writ petition.

6. Mr. Muthukumarasamy, learned Senior counsel appearing for the petitioner in WP No. 14125 of 2016 has advanced arguments in line with the submissions of the learned senior counsel for the petitioner in WP No. 14124 of 2016. According to the learned Senior counsel for the petitioner, the condition relating to supply of products affixing the Agmark logo or ISI mark is clearly without application mind inasmuch as ISI mark is given only for items that are manufactured and there is no ISI mark for any agricultural commodity in general and for Canadian yellow Lentil in particular. The learned senior counsel for the petitioner also invited the attention to Rule 31 (4) of The Rules to contend that the respondent has to order supply with more than one tenderer by awarding 60% of the quantity in favour of L1 tenderer. In the present case, as per clause 10 (ix), it is stated that if a tenderer is placing order for only 10%, then he will become L1 tenderer and he will be ordered to place the supply of 10% and as such the respondent has contravened Rule 31 (4) of The Rules.

7. The learned Senior counsel for the petitioner in WP No. 14125 of 2016 would further submit that in the impugned notification, a condition was imposed to the effect that if a tenderer is having a grading capacity of 25% of the tenderer quantity, then he can be permitted to quote 100% of the requirement of the tenderer. However, those having grading capacity of 10% are prevented from even participating in the tender even though the minimum quantity to be offered is fixed as 10%. This, according to the learned Senior counsel would indicate that the respondent has tailor-made the condition with ulterior motive and therefore he prayed for allowing the writ petition as prayed for.

8. Mr. P.H. Aravindh Pandian, learned Additional Advocate General appearing for the respondent would oppose the writ petitions. The learned Additional Advocate General, relying on the counter affidavit of the respondent, would submit that the tender notification has been published for the purpose of ensuring uninterrupted supply of Canadian yellow Lentil and Urad Dal which is meant for distribution through the Public Distribution System to the general public during May 2016. The tender was published for purchase of 10000 MT of Urad Dal and 10000 MT of Canadian Yellow Lentil (split-husked). According to the learned Additional Advocate General, if there are any flaw or any clarification is required, the petitioner ought to have approached the respondent and this is also clearly indicated in the tender document. The petitioner, without approaching the respondent and without even participating in the tender, has come up with these writ petitions. The petitioner has therefore no *locus standi* to file the writ petitions and on that ground the writ petitions are liable to be dismissed.

9. The learned Additional Advocate General further would submit that the Canadian Yellow Lentil and Urad Dal are urgently required for public distribution during May 2016. The existing stocks are sufficient enough for distribution only till 30th April 2016. In such a situation, the Board Sub-Committee approved the proposal of the respondent for invitation of a short tender by waiving the period stipulated in Rule 20 of The Rules. As per the said Rule, the period shall be waived only by an authority who is superior to the tender inviting authority. In the present case, definitely, the Board Sub Committee consisting of the Deputy

Secretary to Government, Finance Department and Principal Secretary and Commissioner of Civil Supplies and Consumer Protection Department are part of the Board Sub Committee and they are certainly superior than the respondent. The Board Sub-committee is part of the Board and is competent to waive the mandatory period. Even otherwise, if the respondent has taken an unilateral decision and waived the mandatory period, having regard to the urgency in floating the tender, it can be ratified by the Board at a later point of time and it is only a curable defect. Therefore, according to the learned Additional Advocate General appearing for the respondent, there is no violation of Rule 20 of the Rules as contended on behalf of the petitioner.

10. The learned Additional Advocate General further brought to the notice of this Court that the tender notification was issued by the respondent and it was published in one issue of the English Daily The Hindu and Business Standard on 02.04.2016. The tenders were opened on 15.04.2016. Further, having regard to the nature of urgency expressed, the Election Commission of India has allowed the respondent to float and finalise the tenders for procurement of essential commodities. In such view of matter, the learned Additional Advocate General justified the waiving of the mandatory period contained in Rule 20 of the Rules, which was waived after following the procedures contemplated therein.

11. The learned Additional Advocate General invited the attention of this Court to clause 23 of the tender conditions which provides for referring the dispute with regard to interpretation of any of the clauses in the tender or for execution of

the contract to the arbitrator. According to the learned Additional Advocate General, the petitioners have failed to exhaust such a relief provided in Clause 23 and straightaway approached this Court by filing these writ petitions. When an alternative relief is provided in the tender document itself, the present writ petitions need not be entertained at the instance of the petitioners.

12. The learned Additional Advocate General would mainly contend that the petitioners did not participate in the tender and therefore, they have no legal right to question the conditions incorporated in the tender notification. In this context, the learned Additional Advocate General relied on the order passed by me on 28.08.2015 in WP (MD) Nos. 9203 of 2015 etc., batch wherein, I held that when the petitioners did not participate in the tender, they cannot claim that they have suffered due to confirmation of the tender in favour of the successful bidder. The learned Additional Advocate General also placed reliance on another order passed by this Court in the case of (**Chandragiri Construction Company vs. State of Tamil Nadu and others**) reported in **2010 (1) CWC 824** wherein this Court held that when the tenderer participated in the tender proceedings and did not raise any protest, it is not open to them to challenge the conditions incorporated in the tender or question the award of contract in favour of successful bidder. In this case, the petitioner did not even participate in the tender and therefore, he has no *locus standi* to question the conditions incorporated in the tender.

13. The learned Additional Advocate General also would contend that in contractual matters, the scope of judicial review is limited and restricted to examine

as to whether there are any procedural violation or bias in award of contract. In the present case, the respondent has followed all the mandatory procedure in the matter of invitation of tender and incorporation of conditions thereof and therefore, interference of this Court is not warranted. In this context, reliance was placed on the decision of this Court in the case of (**Southern Regional Bulk Transport Owners Association, rep. by its President M. Ponnambalam vs. Union of India, rep. by its Secretary to Government, Ministry of Petroleum and Natural Gas and others**) **2010 SCC Online Madras 3373** wherein this Court has held that the terms of invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract, unless they are wholly arbitrary, discriminatory or actuated by malice. For the very same proposition, the learned Additional Advocate General also relied on the decision of the Honourable Supreme Court in the case of (**Meerut Development Authority vs. Association of Management Studies and another**) reported in **(2009) 6 Supreme Court Cases 171**.

14. It is brought to the notice of this Court by the learned Additional Advocate General that totally 7 tenderers have participated and submitted their bid. They have fulfilled all the criteria while submitting their bid and they have no qualm over the conditions incorporated in the tender notification. While so, the allegation that the conditions in the tender notification are tailor-made cannot be accepted.

15. I heard the learned Senior counsel appearing for the respective writ petitioner and the learned Additional Advocate General appearing for the

respondent. I had carefully perused the material records placed on record. Earlier, when the writ petitions were taken up for hearing on 13.04.2016, this Court granted an order of status-quo till 15.04.2016. Subsequently, on 15.04.2016, when the writ petitions were taken up for hearing, the respondent filed counter affidavit and based on the same, it was submitted that absolutely, there is no violation of any of the provisions of the Act and the Rule in conducting the tender. Having regard to such submission and considering the urgency expressed on behalf of the respondent to expedite the tender process within a time frame, this Court modified the order of status-quo and permitted the respondent to proceed with the tender as per schedule, but it shall not be confirmed until orders from this Court.

16. The main grievance adduced on behalf of the petitioner is that the conditions incorporated in the tender notification are tailor-made and they are intended to help others. In other words, the petitioners allege malafide intention as against the respondent in incorporating the conditions in the tender. However, before proceeding any further, I find that the petitioner has merely used the word "arbitrary" and "illegal" in the affidavits filed in support of the writ petitions. Such usage of words are insufficient to prove malafide intention on the part of the respondent. It is well settled that arbitrariness or malafide intention should not only be pleaded but they have to be proved to the satisfaction of the Court with material evidence. In this case, except by using the words malafide, arbitrary and illegal, there is no material evidence produced by the petitioner to show that the respondent has incorporated certain conditions in the tender notification specifically to exclude the petitioner from participating in the tender proceedings.

17. It is mainly urged on behalf of the petitioner that the respondent has violated and contravened Rule 20 of The Rules in waiving the mandatory period. In this context, the respondent produced along with the counter the minutes of the meeting of the Board Sub-Committee on 22.03.2016 which is extracted below:-

"The Government in its G.O. Ms. No.113, Co-operation, Food and Consumer Protection (F1) Department dated 30.09.2015 have extended the scheme of supplying Dhall and RBD Palmolen oil to the family card holders through Fair Price Shops under Special Public Distribution Scheme from 01.10.2015 to 30.09.2016.

As per Rule 20 (b) of Tamil Nadu Transparency in Tender Rules 2000, "For Tenders in excess of Rs.2.00 Crores in value, thirty days (2) Any reduction in the time stipulated as per sub-rule (1) has to be specifically authorised by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing"

With a view to ensure the uninterrupted supply of Canadian Yellow Lentil and Urad Dal under Special Public Distribution Scheme for the month of May 2016, the Managing Director (Tender Inviting Authority) proposes to invite short tender to purchase Urad Dal (FAQ) 10000 MT and 10,000 MT of Canadian Yellow Lentil (split-husked) as per Agmark specification for issue under Special Public Distribution System seeking exemption under the Rule 20 (b) of Tamil Nadu Transparency in Tender Rules, 2000.

The Board Sub-Committee approved the proposal of Managing Director, TNCSC to invite short tender as provided for in 20 (b) of Tamil Nadu Transparency in Tender Rules, 2000 in order to ensure uninterrupted supply of Canadian Yellow Lentil and Urad Dal through Special Public Distribution System for the month of May 2016."

18. The Board sub-committee consists of The Principal Secretary, Commissioner of Civil Supplies and Consumer Protection Department as its Chairman; The Deputy Secretary to Government, Finance Department as one of its members along with the respondent herein as another member. The Board Sub-Committee is undoubtedly superior than the tender inviting authority, being the respondent and it is competent to waive the mandatory period prescribed in Rule

20 of the Rules. The Board committee has also given reasons for waiving the mandatory period by citing the urgency to procure the essential commodities for distribution under the Public Distribution Scheme to the general public. Therefore, I am of the considered view that the Board Sub-committee has approved the proposal of the respondent to waive the mandatory period prescribed in Rule 20 of The Rules and such an approval given by the Board Sub-Committee is in compliance with Rule 20 of The Rules. As rightly pointed out by the learned Additional Advocate General, the Board sub-committee is part of the Board and the Chairman of the Board is a superior authority than that of the respondent. The Board Sub-committee is therefore competent to accord approval for waiving the mandatory period and I do not find any violation of Rule 20 of The Rules in issuing the tender notification by the respondent.

19. The learned Senior counsel appearing for the respective petitioner, in unison, have submitted that clause 18 (r) of the tender conditions will nullify all other conditions incorporated in the tender notification as it gives sweeping power to the respondent to reject or accept any tender according to his whims and fancy. This submission cannot be accepted. It is well open to the tender inviting authority to accept or reject any tender and the tender inviting authority has a prerogative over the same. Such a power is given to the tender inviting authority to decide as to which of the bid would best suit their needs. Such decision making power is absolutely warranted in contractual matters. The acceptance or rejection of a tender is a process by which the respondent takes into account various aspects relating to price submission, experience of the tenderer in the field, resourcefulness of the tenderer to supply the product in a given time, their ability to execute the

work with precision, understanding and confirmation to technical specification etc., While so, such a condition is but essential to conclude as to which of the bids will best suit them. Therefore, I do not find any arbitrary or unquestionable power vested on the respondent by incorporation of clause 18 (r) in the tender notification and hold that such a clause is absolutely essential in the realm of contract.

20. The learned Senior counsel appearing for the respective petitioner, in unison, would contend that most of the conditions incorporated in the tender notification are tailor-made and are arbitrary. In this context, it is necessary to note that already 7 persons have submitted their bids and they are being processed by the respondent. If 7 persons could submit their bids without any objection to the conditions incorporated in the tender, it is not known as to what prevented the petitioner from even submitting their bids. In my considered opinion, when the petitioner did not submit their bid for participating in the tender, the petitioner has no *locus standi* to question the conditions incorporated in the tender or question the authority of the respondent from awarding the contract in favour of the successful bidder. In this context, useful reference can be made to the order dated 28.08.2015 passed by me in WP (MD) Nos. 9203 of 2015 etc., batch wherein, relying on the decision of the Bombay High Court, I held as follows:-

16. At the outset, I am of the opinion that the question with regard to the entitlement of the petitioners in W.P.(MD).Nos.9203, 9587 & 10116 of 2015 to file the writ petitions has to be decided and in the event of non-entitlement of the petitioners, there is no need for this Court to traverse into the other averments.

17. Admittedly, even according to the petitioners, they have not taken participation in the tender process. It is also not the case of the petitioners in the affidavit that they were prevented by the respondents from participating in the tender. In fact, from the affidavits of the

petitioners, it could be seen that they were well aware of the tender process. Even according to the petitioners, they were present on 07.04.2015 and public gathered before the Pachayat office on that and requested the Panchayat President not to open the tender. The petitioners herein were also present at that time. Therefore, the averments in the affidavits would show that they were well aware of the public auction on 07.04.2015 and inspite of the same, they have not chosen to buy the tender forms. Now, after completion of all the process, the present writ petitions have been filed by the petitioners. When the petitioners have not taken any part in the public auction, I am of the opinion that they have no *locus standi* to challenge the impugned notification dated 19.03.2015. In this regard, it would be appropriate to place reliance on the judgment of Bombay High Court in ***W.P.No.2415 of 2010, dated 29.04.2010, in the case of S.Motilal Plywood House Vs. The State of Maharashtra and other***, wherein it has been held as follows:-

“14.The foremost question that needs to be considered is whether the Petitioners in the respective Petitions have *locus standi* to maintain the challenge before this Court in respect of the tender conditions. In so far as Petitioner in Writ Petition No.2415/2010 is concerned, it is noticed that he has not even enlisted himself after the publication of 2nd tender notice. If it is so, there is force in the argument of the Respondents that such person cannot be permitted to assail the terms and conditions which are essentially a contractual matter.

15.To get over this position, it was argued on behalf of said Petitioner that he had enlisted himself after publication of the first tender notice and immediately thereafter challenged the terms and conditions of the first tender notice which are parameteria with the 2nd tender notice. In other words, the basis of challenge is common in respect of both the tender notices. We are not impressed with this submission. So long as the Petitioner is not participating in the tender process, it cannot be heard to question the validity of the tender process in question.”

"In the case of ***M/s.A.M.Yusuf vs. Mumbai Municipal Corporation and others in W.P.(Lodging).No.2666 of 2008, dated 11.12.2008***, it has been held by the Bombay High Court as follows:-

“13.Another important facet which requires examination by the Court is the conduct of the Petitioner. The Petitioner claims to have purchased the tender document in response to the notice dated 20th October, 2008. However, till 11th November, 2008, the petitioner did not submit the tender documents. Vide Corrigendum dated 11th November, 2008, the deposit of EMD was increased and the parties were given one week time for depositing the amounts.

The petitioner admittedly took no steps to deposit the amount as per the conditions of notice inviting tenders. The Petitioner did not move his little finger in the entire one week and did not approach the Respondents raising his grievance before them that the condition was likely to cause any prejudice to the Petitioner or other Applicants. While number of other Applicants including Class-A Contractors of the Corporation complied with the condition and deposited the amount, the Petitioner despite issuance of tabulated statement dated 14th November, 2008 did not deposit any amount nor had he raised any protest. The Petitioner just at the nick of time on 17th November, 2008 lodged the Writ Petition in this Court which came up for hearing on 19th November, 2008 and interim order was granted by the Court. Even at that stage, the Petitioner neither showed any intention to comply with the terms and conditions of the tender nor did he deposit money at the rate of 0.5% and/or 2% at any point of time. The Petitioner has challenged the tender process before this Court without even submitting tender and being an Applicant ineligible or otherwise. The very *locus standi* of the petitioner in filing this petition would be looked upon with some suspicion by the Court. This is cause of action, which is a private cause of action, if at all available to the petitioner, is not an action in public interest.

14. The doctrine of *Locus Standi* is well established in administrative law, law of contract and other allied laws. A person prejudicially affected would have a cause of action while in the specified class of cases a third party may be able to bring an action in public interest despite the fact that he may not have personal interest. But in the cases of present kind, the cause of action would be personal to the aggrieved party and not a cause of action in rem. Even if Litmus Test Principle is not strictly applied keeping in view the developing law, still it is difficult for us to hold that the Petitioner without being an Applicant to the tender process could maintain the present Writ Petition, in the peculiar facts and circumstances of the case. As such an approach would neither subserve the public interest and would also hold in avoidance of public mischief.

15. Examined from the view of public interest, we see no infirmity. The Corporation has admitted to protect the larger interest by raising EMD deposit. The Petitioner having opted of his own accord not to participate in the tender process can hardly be permitted to challenge the said process now at this stage. It is expected of every vigilant litigant or whose rights are effected to approach the Court at an appropriate time. Firstly, there is no indefeasible right vested in the Applicant and secondly, even if right of

participation/ consideration was available to the Petitioner, the Petitioner has voluntarily given up such right by his conduct. No reason whatsoever has been stated as to why the Applicant did not participate in the tender process or raise protest at an appropriate stage. Despite the fact that the concept of *locus standi* has since undergone a substantial change, still the basic rule that the person aggrieved or a person directly affected is the person who has right to invoke jurisdiction of the Court under Article 226 of the Constitution holds good. The impugned action normally should produce a change in the Petitioner's legal right and more particularly adversely. We have already discussed that the variation effected by Corrigendum dated 11th November, 2008 has no way prejudicially effected any of the applicants and it provided a fair and equal opportunity to the Applicants to participate in the tender process. The Petitioner having lost that opportunity of his own accord can hardly be permitted to raise a grievance now.

16. In the facts and circumstances of the case, we see no reason to interfere with the Writ Petition. The same is dismissed, leaving the parties to bear their own costs. Rule discharged. Interim relief stands vacated.”

The dictum laid down in the above said judgments is squarely applicable to the present facts of the case. Without participating in the tender, now the petitioners cannot claim that they suffered by the confirmation of the tender in favour of the successful bidder. Therefore, I am of the opinion that the petitioners in W.P.(MD).Nos.9203, 9587 & 10116 of 2015 have no *locus standi* to challenge the impugned notification. Therefore, on the ground of *locus standi*, the writ petitions in W.P.(MD).Nos.9203, 9587 & 10116 of 2015 are liable to be dismissed.

21. Above all, it is well settled proposition of law laid down by this Court as well as the Honourable Supreme Court in a catena of cases that invitation to tender as well as the terms and conditions incorporated thereof are not open for judicial scrutiny. In contractual matters, judicial interference is limited. Unless it is shown that the decision making process is against the well settled principles of law, arbitrary or bias, this Court cannot interfere in exercise of the powers under Article 226 of The Constitution of India. In this context, useful reference can be made to the off-quoted decision of the Honourable Supreme Court in (**Tata Cellular Vs.**

Union of India) (1994) 6 Supreme Court Cases 651 wherein in para 93 and 94, it was held thus:-

"93. In *Union of India V. Hindustan Development Corporation*, this Court held thus: (SCC p.515, para 9)

...the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In *Erusian Equipment & Cemicals Ltd. V. State of West Bengal*, this Court observed as under: (SCC p.75, para 17)

"When the Government is trading with the public, the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions". The activities of the Government have a public element, and, therefore, there should be fairness and equality. The State need not enter into any contract, with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."

94. The principles deducible from the above are:

- (1) ...
- (2) ...
- (3) ...

(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.

22. In this case, the Apex Court has categorically held that the terms of invitation to tender cannot be open to judicial scrutiny because the invitation to

tender is in the realm of contract and the Government must have freedom of contract.

23. In the decision rendered rendered by the Honourable Supreme Court in the case of (**Elektron Lighting Systems Private Limited and others vs. Shah Investments Financial Developments and Consultants Private Limited and others**) reported in (2015) (12) SCALE 538 it was categorically and clearly held that evaluating tenders and awarding contracts are essentially commercial functions of the State in which the principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, the Courts will not, in exercise of judicial power, interfere even if a procedural aberration or error in assessment or prejudice is shown to a tenderer. Such power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Applying the ratio laid down by the Honourable Supreme Court to the facts of this case, this being a contractual dispute and the Corporation is intending to get the essential commodities for supplying the same through the Public Distribution System within a specified time limit, this Court hesitates to grant the relief sought for in these writ petitions.

24. In another decision rendered by the Honourable Supreme Court in (**West Bengal Electricity Board vs. Patel Engineering Co. Ltd and others**) AIR 2001 Supreme Court 682 it was held that in para No.15 as follows:-

"15. Before proceeding to ascertain answers to the above questions, it will be useful to bear in mind the principles governing

the exercise of power of judicial review by the High Courts. We consider it unnecessary to refer to cases on the scope of the power of judicial review of administrative action by the High Court as a three Judge Bench of this Court has, after exhaustive consideration of long line of authorities, succinctly summarised the position and laid down the following principles in (*Tata Cellular vs. Union of India*) (1994) 6 SCC 651

"(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 it's own decision, without the necessary expertise which itself may be fallible

(4) The terms of the invitation of 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 mala fides

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

25. It is evident from the parameters laid down by the Honourable Supreme Court that in administrative action, this Court cannot interfere and substitute it's opinion unless a strong case is made out for such interference. In this case, I do not see any valid reason to interfere with the process of evaluation of the bids being carried out by the respondent.

26. In the result, the writ petitions fail and they are dismissed. No costs.
Consequently, connected miscellaneous petitions are closed.

29-04-2016

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Index : Yes

Internet : Yes

Note : Issue order copy on 02.05.2016

To

The Managing Director
Tamilnadu Civil Supplies Corporation
No.12, Thambusamy Road, Kilpauk
Chennai - 600 010

R. SUBBIAH, J

rsh

Pre-delivery Common Order in
WP Nos. 14124 and 14125 of 2016

29-04-2016