

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.08.2016

DATE OF VERDICT: 12.08.2016

CORAM

THE HON'BLE MR. JUSTICE M.M.SUNDRESH

W.P.Nos.39386 and 39561 of 2015
and M.P.Nos.1, 2, 1 and 2 of 2015

M/s.Aarthi Transports rep. by its
Proprietor T.Marappan

... Petitioner in
W.P.39386 of 2015

M/s.Vijay Logistics rep. by its
Proprietor M.Vijaykumar

... Petitioner in
W.P.39561 of 2015

Vs

1. The Government of Tamil Nadu
rep. by the Secretary to the Government,
Department of Animal Husbandry,
3A, Pasumpon Muthuramalingam Salai,
Nandanam, Chennai.

2. The Managing Director,
The Tamil Nadu Co-operative Milk
Producers' Federation Ltd.,
2, Pasumpon Muthuramalingam Salai,
Nandanam, Chennai - 35.

3. The Tamil Nadu Co-operative Milk
Producers' Federation Ltd.,
rep. by its Joint Managing Director,
2, Pasumpon Muthuramalingam Salai,
Nandanam, Chennai - 35.

... Respondents in
both the W.Ps

Petitions filed under Article 226 of the Constitution of India praying to issue a writ of certiorari to call for the tender notification bearing Tender No.3560/P1/2015/MKG.UNIT/2016-2018, on the file of the third respondent and quash the same as illegal.

For Petitioner : Mr.V.Raghavachari
in W.P.No.39386 of 2015

Mr.T.D.Vasu
for M/s.E.Vijay
in W.P.No.39561 of 2015

For Respondents : Mr.A.L.Somayaji,
Advocate General
assisted by
Mr.A.Rajaperumal,
Additional Government Pleader
for R1 in both the W.Ps

Mr.R.Bala Ramesh for R2 & R3
in both the W.Ps

COMMON ORDER

As the issues involved in both the writ petitions are one and the same laying challenge to the impugned Notification, they have been taken up together and disposed of by way of a common order.

2. W.P.No.39386 of 2015 has been filed by a transporter, who was found ineligible to participate in the tender proceedings, in view of the bar stipulated under Clause 19 of the Tender document for hiring 132 Nos. of insulated vehicles qua the experience. The writ petition in W.P.No.39561 of 2015 has been filed by an enthusiastic public spirited auto mobile engineering graduate with the very same grievance. It appears that this petitioner has not filed any writ petition in public interest either prior to or after this writ petition. However, this Court, during the hearings, could see the existence of a common thread connecting the petitioners.

3. The respondents have called for applications for hiring 132 Nos. of insulated vehicles by publishing the tender document meant for the purpose of collection and distribution of sachet milk from Madhavaram, Ambattur, Sholinganallur and Kakkalur dairies to Chennai Metro and its suburban areas for a period of two years. As per the tender document, considering the transportation of the product being perishable, insulated vehicles alone are sought to be used.

4. Clause 16 speaks about the nature of transport being sachet milk and milk products. Clause 17 speaks about the

condition of the vehicle. As per Clause 19, a tenderer should have a minimum two years of experience within the last five years period in sachet milk distribution through insulated vehicles in Government/Government Undertakings/Co-operative Dairies/any Private Dairy with adequate handling capacity of minimum one lakh litres per day. As per Sub Clause (c) of Clause 19, the R.C. Book of the insulated vehicle, in the case of a Co-operative Society, shall either be in the name of the said Society or its Member.

5. Clause 20 speaks about the evaluation criteria. Under Sub Clause (A), the vehicle should be in the name of the tenderer. It should be produced for inspection by the federation officials. A tenderer should produce the original documents at the time of technical evaluation. Clause 22 mandates the production of tendered vehicle on the first day of the commencement of the contract and failure to produce the vehicle will lead to termination of the contract. If the tendered vehicle is not insulated, penalty will be levied from the first day of the contract. In the event of a tenderer unable to produce the vehicle on the first day after the contract having been awarded, the alternative vehicle with all the qualifications attached to the tender conditions should be produced immediately. On prior request, the respondents 2 and 3/Federation reserves the right to extend the time with penalty upto 90 days. However, in case of failure to produce the insulated vehicle within 90 days, the same would result in automatic cancellation of the contract.

6. Clause 30 speaks about specifications of the insulated vehicles. Sub Clause (12) of Clause 30 speaks about the consequence of non-compliance. Accordingly, the vehicle, which does not conform or satisfy any of the specifications or conditions stipulated, will be treated as a substituted vehicle, resulting in payment of hire charges. Even in such a case of failure to produce the tendered vehicle within 90 days, the consequence would be an automatic cancellation of the contract. As per Sub Clause (13) of Clause 30 also, 90 days time has been given with penalty to produce the insulated vehicle with due compliance of the specifications mentioned.

7. Learned counsels appearing for the petitioners made the following submissions:

The participation of the tenderers without the insulated vehicles would be contrary to the Food Safety and Standards Act, 2006 and Tamil Nadu Transparency in Tenders Rules, 2000. There cannot be any dilution of the technical evaluation. Clause 19 has been introduced to encourage cartilisation and the entire tender

document is an arbitrary exercise to help few persons. There is lack of bonafides in the introduction of various clauses. By the impugned Notification, unqualified persons were allowed to participate, contrary to the object. The petitioner in W.P.No.39386 of 2015 is in possession of the insulated vehicles. The condition in Clause 19 is tailor made to suit few people. What cannot be done directly cannot be done indirectly. Thus a Member of the Co-operative Society, who is otherwise ineligible, cannot be allowed to get the benefit. There is no power or authority to respondents 2 and 3 in issuing the tender document. The decision taken earlier was not reversed. The Notification is contrary to the Tamil Nadu Co-operative Societies Rules and the Board resolution. The tender conditions are also contrary to the Motor Vehicles Act. When the entire action is arbitrary, illegal and unreasonable, the power of judicial review is very much available to the Court. To buttress the submissions, the learned counsels have made reliance on the following decisions:

1. Order of the High Court of Karnataka dated 26.04.2013 in W.P.No.39337 of 2012 etc., (B.R.Ganesh Vs. State of Karnataka and Others)

2. New Horizons Limited and Another Vs. Union of India and Others ((1995) 1 SCC 478)

3. Delhi Development Authority and Another Vs. Joint Action Committee and Others (2008 (2) SCC 672)

4. Union of India Vs. Hindustan Development Corporation and Others (1993(3) SCC 499)

5. Integrated Databases India Limited Vs. Union of India and Another (AIR 1996 Del 343)

6. Jespar I.Slong Vs. State of Meghalaya and Others (2004(11) SCC 485)

7. Chua Seng Sam Reality Sdn Bhd Vs. Say Chong Sdn Bhd and Others (2012 (10) SCC 1)

8. Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others ((2011) (5) SCC 29)

9. Dutta Associates Pvt. Ltd., Vs. Indo Mercantiles Pvt. Ltd., and Others ((1997) (1) SCC 53)

8. The learned Advocate General appearing on behalf of the respondents submits that the petitioners have not established any malice either in law or on fact. There is no arbitrariness that has been demonstrated. The conditions have been imposed qua the experience by taking into consideration the perishable nature of the goods. For the first time, more number of persons have participated. It is wrong to contend that the vehicles without undergoing the process of insulation would be permitted to transport. The time has been granted only to encourage new participants. Totally, 23 persons participated and about 17 tenders were rejected for non-compliance of various clauses contained in the tender document. Thereafter, the eligible tenderers were identified. Clause 16 has to be read with clause 19. Thus the transportation of milk product would not be as frequent as that of milk sachet and therefore the emphasis was made more on that. The provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and Tamil Nadu Transparency in Tenders Rules, 2000 are duly complied with. Due publication was made followed by e-tendering. The tender document was uploaded in Government and Aavin websites. It was published in the State Tender Bulletin. The power is available to the second respondent as mandated under Rules 146(2) and 146(9) of the Tamil Nadu Co-operative Societies Rules, 1988. Thus the second respondent shall have the overall control of the day-to-day administration coupled with the power of delegation. There was also resolution by the Board of Directors in Resolution No.1430 delegating full powers to the second respondent. Rule 45 of the Tamil Nadu Co-operative Societies Rules does not have any application in view of the exemption granted as per the Government Order in G.O.Ms.No. 99 Animal Husbandry and Fisheries (MP-I) Department dated 17.05.1999 in exercise of the power conferred under Section 170 of the Tamil Nadu Co-operative Societies Act, 1983.

9. It is further submitted that the power of judicial review is very limited. The petitioners cannot seek, as a matter of right, that they should be allowed to participate. This Court cannot substitute its views by acting as an Appellate Authority to the rationale adopted by the respondents. Reliance has been made on the following decisions:

1. Order of this Court dated 14.09.2009 in W.P.No.22828 of 2008 (E.Gunasekaran Vs. The Managing Director, Pondicherry Co-operative Milk Producers' Union Ltd.,)

2. Order of this Court dated 14.10.2015 in W.P.Nos.5685 to 5689 of 2015 etc., (Vishnu Electricals Vs. Tamil Nadu Generation and Distribution Corporation Limited and Others)

3. Order dated 07.10.2013 in W.P.No.25870, 25871 and 26447 of 2013 (Chennai Fire Works Dealers Welfare Association Vs. Tamil Nadu Tourism Development Corporation Limited and Others)

10. The power of judicial review in tender matters is very limited. Unless this Court finds the right conferred under Article 14 of the Constitution of India being offended, there would not be any interference otherwise. The allegations pertaining to favouring individuals, cartilisation and malafides are to be proved by the persons alleging it. Thus, in the absence of any material substance, a Court is required not to venture into the issues pertaining to the tender process. This Court also cannot conduct a roving enquiry in such cases. An object behind a tender condition cannot be held arbitrary merely because there is another view possible. Ultimately, the authorities who deal with such works are the best persons to decide. Considering the scope and ambit of exercise of judicial review, it has been held by the Apex Court in Jagdish Mandal Vs. State of Orissa and Others ((2007) 14 SCC 517), as under:

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made lawfully and not to check whether choice or decision is sound. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. 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, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The 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. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to

thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.''

11. Coming to the case on hand, this Court does not find any ground for interference. The submissions made by the learned counsels for the petitioners are factually incorrect qua the usage of vehicles. On a combined reading of Clauses 17, 19, 20 to 22 and 30, the emerging position is very clear - no successful bidder can be allowed to transport milk sachets without insulation. If the vehicle is produced without insulation, the same will not be accepted but a leverage is given to produce another vehicle till the tendered vehicle is insulated. This is not a concession but would in turn attract penalty. The substituted vehicle also should be insulated one, which in turn, has to comply with all the specifications mandated under Clause 30. The failure to produce the tendered insulated vehicle within 90 days would result in automatic cancellation of the contract. Therefore, this Court does not find any arbitrariness in the said process adopted.

12. It is not necessary that the tenderer has to produce the insulated vehicle at the initial stage. The object was to make sure that there are sufficient participants. Such a classification cannot be called arbitrary. What is required is production of a fully insulated vehicle with all specifications at the time of commencement of the contract. Thus it cannot be said that there is a violation of The Tamil Nadu Transparency in Tenders Rules, 2000 and the safety norms as stipulated in Food Safety and Standards Act, 2006. The vehicles are subject to strict scrutiny as stipulated in the conditions.

13. The fundamental challenge of the petitioners is to Clause 19. Pursuant to the said clause, they were non-suited from their participation. Therefore, it is not even necessary to go into

other contentions. However, considering the submissions made, this Court is inclined to deal with the merits of the case as well. Clause 19 speaks about the pre-bid documents. The condition of two years experience within the last five years in sachet milk distribution through insulated vehicles cannot be called as arbitrary. It was not restricted to Governmental agency alone but also to a private dairy. This condition has been imposed, keeping in view the nature of the product, requiring adequate experience. Therefore, this Court does not find anything wrong in the said clause.

14. Clause 19(1) deals with two set of tenderers, one being individuals and the other consists of company, partnership and Co-operative society. In such cases, RC books can either be in the name of the Society or its Member. This clause also places an embargo on a member. He has to either choose to be a part of the Society or act as a proprietor. Thus he cannot take the best of both. Therefore, the differentiation shown between a proprietor and a company partnership firm and co-operative society is just and proper. Similarly, Clause 20(A)(1) has to be read in consonance with Clause 19(c), in which case, there is no room for confusion. This Court does not find any unreasonableness or illegality involved in the introduction of Clause 22 and 30. As discussed above, there is no exemption given for a vehicle, which is not insulated. It is only the time is extended for the production of tendered vehicles after insulation and compliance of specifications. Even in such cases, alternative vehicles should be produced, subject to payment of penalty. It is needless to state that the petitioners cannot challenge these conditions without crossing Clause 19.

15. The learned counsels appearing for the petitioners seek to project that the tenders of most of the members of the co-operative societies having been approved, an adverse inference will have to be drawn. This Court is afraid that the said submission cannot be countenanced. There is nothing illegal in allowing the co-operative society to participate. The society has to operate through its members. The qualification of the society will have to be attributed to its members as well. They stand a class apart other than the private entrepreneurs. By subsequent events, this Court cannot come to a conclusion that the entire tender document has been created to suit few persons. For the first time, there are more participants than the earlier occasions. 17 of the tenderers were rejected on various other grounds. For that, the eligible tenderers cannot be faulted with. Therefore, the contentions raised in this behalf also cannot be accepted.

16.Coming to the non-compliance of the provisions and the existence of jurisdiction also, the contentions are liable to be rejected. There are sufficient powers available to the second respondent under Rules 146(2) and 146 (9) of the Tamil Nadu Co-operative Societies Rules, 1988. His hands are strengthened by the resolution of the Board dated 08.10.1990. There is an exemption given to Rule 65 of the Tamil Nadu Co-operative Societies Rules, 1988. Thus, this Court does not find any lack of jurisdiction in issuing the impugned tender document.

17.This Court does not find any violation of Rule 2(e) of the Tamil Nadu Transparency in Tenders Rules, 2000, as there is no dilution of the process. This Court does not find any selective discrimination involved. The petitioner in W.P.No.39386 of 2015 is only an unsuccessful tenderer. Its tender was rejected due to disqualification under Clause 19. Thus knowingly, it had participated in the tender process. Perhaps that explains the need for the second writ petition to tide over any possible objections though technical. Even assuming there are certain irregularities, the petitioners cannot be the persons aggrieved as they are ineligible to participate in the tender. Therefore, there is no other challenge to the impugned tender document, at the hands of the transporters, who are involved in the business. Even the other rejected tenderers have not chosen to challenge the rejection. Insofar as the petitioner in W.P.No.39561 of 2015 is concerned, he is no way connected with the tender document, though this Court's curiosity is kindled by the collection of documents pertaining to the respondents by him through his common sources. There is no question of public interest in such matters.

18.In the result, both the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

mmi

To

1. The Secretary to the Government,
Department of Animal Husbandry,
3A, Pasumpon Muthuramalingam Salai,
Nandanam, Chennai.
2. The Managing Director,
Tamil Nadu Co-operative Milk
Producers' Federation Ltd.,
2, Pasumpon Muthuramalingam Salai,
Nandanam, Chennai - 35.
3. The Joint Managing Director,
Tamil Nadu Co-operative Milk
Producers' Federation Ltd.,
2, Pasumpon Muthuramalingam Salai,
Nandanam, Chennai - 35.

+2cc's to Mr.E.Vijay, Advocate, S.R.Nos.46171 & 46172

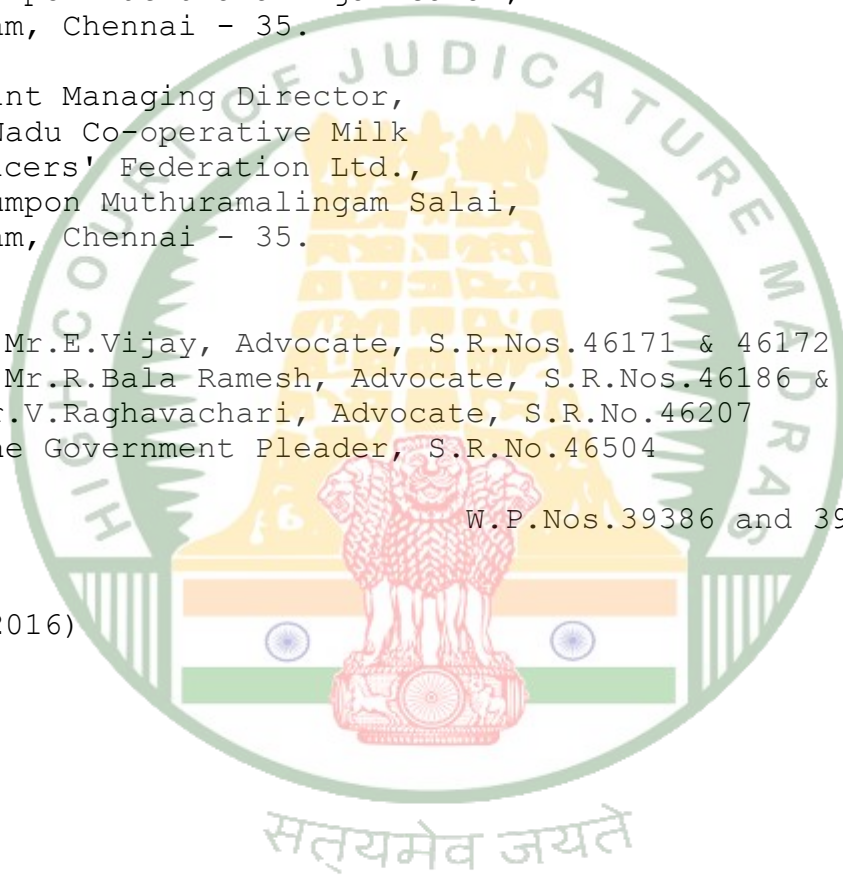
+2cc's to Mr.R.Bala Ramesh, Advocate, S.R.Nos.46186 & 46187

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.46207

+1cc to the Government Pleader, S.R.No.46504

W.P.Nos.39386 and 39561 of 2015

KJI (CO)
CA(26/08/2016)



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