

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 29.03.2016

PRONOUNCED ON : 15-04-2016

CORAM

THE HONOURABLE MR. JUSTICE R. SUBBIAH

Writ Petition Nos. 3100, 7638 and 7639 of 2016
and

W.M.P. Nos. 2562, 6867 and 6868 of 2016

Thyssenkrupp Industries India Pvt Ltd
Registered Office at
154-C, Mittal Tower, 15th Floor
210, Nariman Point
Mumbai - 400 021

Also at :

Chief Place of Business
Pimpri, Pune - 411 018, India

... Petitioner in
all the Writ Petitions

Versus

1. State of Tamil Nadu
represented by its Secretary
Department of Industry
Fort St. George, Chennai
2. The Tamil Nadu Cements Corporation Limited
represented by its Managing Director
LLA Buildings, Second Floor
735, Anna Salai, Chennai - 600 002
3. L&T Constructions Campus
2nd Floor, TC 1 Building
Mount Poonamallee Road, Manapakkam
Chennai - 600 089

... Respondents in WP No.
3100 of 2016

1. State of Tamil Nadu
represented by its Secretary
Department of Industry
Fort St. George, Chennai
2. The Tamil Nadu Cements Corporation Limited
represented by its Managing Director
LLA Buildings, Second Floor
735, Anna Salai, Chennai - 600 002

3. The Manager (Materials)
(Tender Inviting Authority)
The Tamil Nadu Cements Corporation Limited
LLA Buildings, Second Floor
735, Anna Salai, Chennai - 600 002

4. M/s. Larsen & Toubro Limited
Construction Division
L&T Construction Campus
2nd Floor, TC 1 Building
Mount Poonamallee Road, Manapakkam
Chennai - 600 089

... Respondents in WP No.
7638 & 7639 of 2016

WP No. 3100 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records culminating in communication No. TANCEM/CO/MM/Expansion of ACW/2016 dated 18.01.2016 from the second respondent in declaring the petitioner as L2 and quash the same and consequently direct the second respondent to evaluate the bid as per law and the tender conditions taking into consideration the representation dated 26.10.2015 regarding the calculation error made by the petitioner.

WP No. 7638 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records of the second respondent's impugned proceedings bearing Letter No.TANCEF/CO/Proj/Ari.Cem.Plant Expan./LOA-Main Machin/2015-16 dated 20.01.2016 the Letter of Award (Intent) awarding to the fourth respondent the Tender No.TANCEM/MM/15/ PROJ/ARI.CEM.PLANT EXPAN/2015 dated 06.05.2015 and quash the same and consequently direct the second respondent to determine the award of the tender strictly in terms of the Tender/Bid documents and provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and Tamil Nadu Transparency in Tender Rules made therein.

WP No. 7639 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records culminating in the impugned communication No.TANCEM/CO-P/Ariyalur Cement Plant Expansion/2016 dated 04.02.2016 from the third respondent rejecting the request to consider the calculation error and quash the same and consequently direct the second respondent to declare the petitioner as lowest bidder (L1) of the Tender No. TANCEM / MM / 15 / PROJ / ARL.CEM.PLANT.EXPAN./2015 dated 06.05.2015.

For Petitioner : Mr. Sriram Panchu, Senior Advocate
for Mr. S. Ravichandran in WP. 3100 of 2016

For Respondents : Mr. V. Jayaprakash Narayanan
Special Government Pleader for R1
in all the writ petitions

Mr. A.L. Somayaji, Advocate General
assisted by Mr. Abdul Saleem
for R2 in WP No. 3100
for RR2 and 3 in WP Nos. 7638 & 7639/2016

Mr. Vijay Narayanan, Senior Advocate
for Ms. Preethi Mohan for R3 in WP No. 3100
for R4 in WP Nos. 7638 & 7639 of 2016

COMMON ORDER

The issue that arises for consideration in all these writ petitions are common and identical. In all these writ petitions, the petitioner company questions the award of the tender in favour of Larsen and Toubro Company Limited (in short L & T), one of the respondents in these writ petitions, for expansion of Ariyalur Cement Plant at Ariyalur. The counsel on either side have advanced common argument in all these writ petitions, therefore, by their consent, the writ petitions are taken up together and are disposed of by this common order.

2. The facts which led to filing of WP No. 3100 of 2016 can briefly be set out hereunder:-

(ii) It is claimed that the petitioner company is a preferred turnkey contractor in the field of Open Cast Mining & Bulk Material Handling Cement Plants, Industrial Boilers and Sugar Plants. The petitioner company is an ISO 9001 Company accredited with various certificates. It is claimed that the technology used by the petitioner company is much better than the other companies in India.

(ii) According to the petitioner, the Tamil Nadu Cements Corporation Limited (TANCEM) hereinafter referred to as Corporation, is a wholly owned Tamil Nadu Government Enterprise which is manufacturing Arasu brand cement for various grades in their two factories at Alangulam and Ariyalur in Tamil Nadu. The Alangulam Plant was commissioned in the year 1970 with a rated capacity of 0.4 MTPA and the second plant was commissioned in the year 1979 with a capacity of 0.5 MTPA. In this direction, the corporation intended to expand the present capacity of Ariyalur Cement Plant by setting up a new production line with a capacity for producing 1 million tone of clinker per day on design, build, transfer (DBT)/EPC basis. In this context, the corporation had invited tender during the month of January 2015 consisting of two stages, one at the qualification stage and the other being bid stage for installation of 3000 TPD clinkerisation and 1.13 MTPA Cement plant at Ariyalur Tamil Nadu. The corporation intended to pre-

qualify and short list suitable applicant based on the conditions set out in the Request for Qualification (RFQ). The short listed applicants will be eligible for participation in the Request for Proposal Stage (RFP Stage or Tender Stage) and it was informed that the project will be awarded through an open competitive tender process in accordance with the procedure set out in the RFQ document. According to the petitioner, in the tender stage, the qualified applicants will be called upon to submit their technical and financial offers in respect of the project which is collectively called tender documents. Such pre-conditions and qualifications are laid down to ensure that the contractor has the capacity and resourcefulness to successfully execute the work. It is contended that only two companies i.e., the petitioner and third respondent herein were qualified for the second stage of the tender process and the RFP was issued on 06.05.2015. According to the petitioner, they have submitted the Technical Proposal as per the instructions given by the second respondent corporation. While so, on 27.08.2015, the corporation has revised the schedule of bidding process which was intimated to the petitioner through an e-mail on 28.08.2015 specifically informing that the attachment annexed thereto has to be filled up and they are compulsory and mandatory. Accordingly, the petitioner has submitted their technical bid along with the price bid in the format issued on 02.09.2015.

(iii) On 07.09.2015, the representative of the petitioner company attended the opening of price bid. At that time, it was informed that the third respondent in WP No. 3100 of 2016 (L & T) has not submitted the price bid as per the format and they have only submitted the grand price summary. Therefore, the representative present on behalf of the petitioner company requested to reject the application of the third respondent. In spite of such objection raised, the corporation requested the said third respondent to produce the required documents at a later point of time and opened the price bid. According to the petitioner, as per the revised schedule, the Evaluation of Financial Bid has to be conducted on 14.09.2015 and negotiation and finalising the party has to be done on 19.09.2015, but the same was not done as per the revised schedule. At this stage, the petitioner noticed that they had made a calculation error in the price break-up of civil construction works, which works out to Rs.147,45,34,900/- instead of Rs.169,11,60,000/- which is Rs.21,66,25,100/- less than the one mentioned in the grand price summary and as a result of this taxes and duties were reduced by Rs.3,00,00,000/-. Thus, the net reduction amounts to Rs.24,66,25,100/- resulting in the corrected total price including taxes and duties to be Rs.678,00,74,900/- in the place of Rs.702,68,00,000/-. According to the petitioner, because of the calculation error, the total was wrongly indicated as Rs.169,27,00,000/- for civil construction and because of this the grand total amount was mentioned as 702,68,00,000/- instead of Rs.678,00,74,900/-.

(iv) The petitioner would contend that the above fact was explained to the corporation and it was also acknowledged by the Managing Director, who in turn informed that he will look into the same at the time of evaluation. The petitioner also sent letters dated 26.10.2015 and 04.01.2016 to this effect and requested to consider the same. In the letter dated 04.01.2016 sent to the Chairman of the corporation, the petitioner has informed that the third respondent has submitted the bid by only indicating the lump sum without any detailed break-up which was a strict requirement according to the tender. However, the corporation has not chosen to consider the genuine grievance made by the petitioner. The petitioner further asserts that the corporation had appointed a Consultant who has submitted an evaluation report recommending the claim of the petitioner, but it was also not considered. The petitioner also reliably learnt that the Consultant so appointed by the corporation has informed the calculation mistake committed by the petitioner and declared them as L1. Since there was no communication from the corporation, the petitioner once again sent a letter dated 12.01.2016 to the Additional Chief Secretary of the Government and requested to consider their claim for award of the contract in their favour. While so, the corporation has sent the impugned letter dated 18.01.2016 declaring the petitioner as L2 and returned the Bid Security Bank Guarantee. Challenging the same, petitioner company has filed WP No. 3100 of 2016.

3. When WP No. 3100 of 2016 was taken up for hearing, this Court granted an interim order in WMP No. 2562 of 2016. Thereafter, a counter affidavit was filed on behalf of the corporation indicating that the Letter of Award (intent) was already issued in favour of the third respondent in WP No. 3001 of 2016 on 20.01.2016. Challenging the letter of Award in favour of the third respondent in WP No. 3001 of 2016, the petitioner has filed WP No. 7638 of 2016.

4. When the above two writ petitions were pending before this Court, the Corporation has rejected the representation dated 26.10.2015 submitted by the petitioner company by a letter dated 04.02.2016. Challenging the letter dated 04.02.2016, the petitioner has filed WP No. 7639 of 2016.

5. Mr. Sriram Panchu, learned senior counsel appearing for the petitioners would contend that the petitioner has submitted their bid on 02.09.2015. When the applications of the petitioner and the third respondent in WP No. 3100 of 2016 were scrutinised and the process of bid was in the negotiation stage, the petitioner company has noticed certain calculation error in the price break up of Civil and Structural part. Such arithmetical error was immediately brought to the notice of the corporation by a letter dated 26.10.2015. At that time, the tender submitted by either the petitioner or the third respondent in WP No. 3100 of 2016 was accepted by the corporation. According to the learned senior counsel for the

petitioner, such arithmetical error is a multiplication error and if the error is permitted to be corrected, the lump sum price offered by the petitioner will be the lowest one than that of the third respondent in WP No. 3100 of 2016. In this regard, the learned Senior counsel for the petitioner invited the attention of this Court to clause 18 of the conditions of the tender which specifically provides for correction of arithmetic errors discovered by the employer in the evaluation of the bids. Reference was also made to Rule 29 of the Tender Transparency Act which provides for correction of arithmetic error. While so, the corporation ought to have permitted the petitioner to correct the arithmetic and/or clerical errors committed by them. The learned senior counsel for the petitioner mainly contended that if the arithmetical errors are permitted to be corrected, it will not alter or vary the estimates given by the petitioner on various heads. According to the learned senior counsel for the petitioner, the arithmetical error had crept in due to inadvertence. The error in calculation is an error on the face of the document and is merely a multiplication error. Such error was brought to the notice of the corporation even before any evaluation of the tender was done. Even the corporation has not denied the fact that if the petitioner is permitted to correct the arithmetical error, the price quoted by them would be much lower than the third respondent in WP No. 3100 of 2016 and in such event they have to be declared as L1. In such event, the corporation alone is going to be benefitted by getting a lowest offer from the petitioner instead of accepting the bid of the third respondent in WP No. 3100 of 2016. Merely on the ground of making arithmetical or calculation error in the bid, the petitioner should not be deprived of awarding the contract. However, for the reasons best known, the corporation has awarded the tender in favour of the third respondent in WP No. 3100 of 2016.

6. The learned senior counsel for the petitioner would vehemently contend that the terms and conditions are incorporated in the tender document to have a check and balance to accurately estimate the capacity and viability of accepting a tender. The petitioner company has the resourcefulness to undertake the contract and the quality of work accomplished by them with various other companies would speak volumes about their capability and capacity to handle the contract of this nature. While so, according to the learned senior counsel for the petitioner, the corporation has failed to take note of the strengths and resourcefulness of the petitioner company to perform the work and acted in haste without following the various conditions imposed in the tender floated by them and thereby treated the petitioner unfairly. In fact, the bid submitted by the third respondent in WP No. 3001 of 2016 is not substantially responsive as per the clauses in the tender notification. When the corporation required the petitioner and the third respondent in WP No. 3001 of 2016 to fill up the price summary with details, the petitioner furnished the same

but the third respondent in WP No. 3001 of 2016 only gave a lumpsum without furnishing any other required details. According to the learned senior counsel for the petitioner, the process of the tender requires a detailed evaluation as per Section 10 (2) of the Tamil Nadu Transparency in Tenders Act but the same has not been scrupulously followed by the Corporation in this case. The process and procedure adopted by the corporation is arbitrary, discriminatory and lacks transparency and it violates the fundamental rights guaranteed to the petitioner under Article 14 of The Constitution of India.

7. The learned senior counsel for the petitioner also submits that even according to the corporation, the petitioner and the third respondent in WP No. 3001 of 2016 alone were qualified for the second stage of the tender process. The bid offered by the petitioner company is the best one when compared to the offer made by the third respondent in WP No. 3001 of 2016. The petitioner was ousted from the tender process only on the basis of the calculation error committed by them in submitting their bid. In this context, it is submitted by the learned Senior counsel for the petitioner that the bid submitted by the petitioner company is superior to that of the third respondent in WP No. 3001 of 2006 and this was also recommended by the Consultant appointed by the corporation for scrutinising the bids submitted by the petitioner and other participants. However, the corporation has grossly ignored the recommendation made by the consultant appointed by them and refused to award the contract in favour of the petitioner.

8. The learned senior counsel for the petitioner vehemently contended that even on 26.10.2015, the petitioner has intimated the corporation regarding the calculation error made by them in the bid. The Corporation has taken a decision to award the contract in favour of the third respondent in WP No. 3001 of 2016 only on 11.01.2016. Therefore, as on the date when the calculation error was brought to the notice of the corporation, the corporation has not even processed the bids of the petitioner and the third respondent in WP No. 3001 of 2016 and at that time whose bid was the lowest one has not been determined. Therefore, the corporation ought to have permitted the petitioner to correct the calculation error instead of declaring them as L2. In this context, the learned Senior counsel for the petitioner invited the attention of this Court Section 10 (2) of the Tamil Nadu Transparency in Tenders Act to impress upon the fact that only after evaluation and comparison of tenders, the tender accepting authority shall accept the lowest tender on the basis of objective and quantifiable factors by giving relative weights to the bids received from the tenderers. The learned senior counsel for the petitioner also relied on the decision of the Division Bench of this Court in (CSEPDI-TRISHE Corporation vs. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) and others reported in 2015 (5) CTC 642 to drive home the point that after evaluation and comparison of tenders and after

giving relative weights to the bids received, the tender accepting authority shall determine a bid as lowest. By relying on this decision, the learned Senior counsel for the petitioner would contend that the Tender Accepting Authority has a role to cause objective evaluation of the tenders and should not be carried away by any other factors, including curable defects. The learned Senior counsel for the petitioner therefore prayed this Court to allow the writ petitions as prayed for.

9. Mr. A.L. Somayaji, learned Advocate General appearing for the corporation would contend that the corporation has initiated action for expansion of Ariyalur Cement Unit from the existing 0.5 Million Ton Per annum (MTPA) to 1 MTPA Clinkerisation Unit by effecting advertisement in newspapers on 20.01.2015. The tender activities are carried out by following RFQ/RPP. The corporation has appointed Tender Scrutiny committee and Tender Accepting Authority in the process of the above said project. The tender documents were issued on 06.03.2015 fixing the date of technical bid on 16.06.2015. On 10.07.2015, both the petitioner and the third respondent in WP No. 3001 of 2016 have submitted their bid. The corporation has also appointed M/s. DCPL, Kolkatta as Project Management Consultant to evaluate the technical bid and pre-technical bid. In this connection, a meeting was conducted from 28.07.2015 to 31.07.2015 and on 24.08.2015 and 25.08.2015. In the pre-technical bid meeting, after several rounds of discussion, the bids of the petitioner and the third respondent in WP No. 3001 of 2016 were accepted and they alone were permitted to proceed to the next stage. On 02.09.2015, final technical bid along with the price bid was submitted by the petitioner and the third respondent in WP No.3001 of 2016 and they were evaluated. Such bids were opened on 07.09.2015 in the presence of the representatives of the petitioner and the third respondent in WP No. 3001 of 2016. At that time, the representative of the petitioner accepted their status as L2 by signing the tender register and left without raising any objection. While so, after 50 days of opening of price bid, as an after-thought, the petitioner came with a claim that there were certain calculation error in 13 columns out of 20 but the so-called arithmetical error was not brought to the notice of the tender scrutiny committee during the price bid meeting. According to the learned Advocate General appearing for the corporation, there is no procedure to receive post bid correction/revision of price as per Rule 23 of the Tamil Nadu Tender Transparency Rules, 2000. In fact, immediately after declaring the third respondent in WP No. 3001 of 2016 as L1, price negotiation meeting took place with them on 05.10.2015 and 09.10.2015. On 09.10.2015, the third respondent in WP No. 3001 of 2016 has submitted the break up of data. A further negotiation meeting was also convened with the third respondent in WP No. 3001 of 2016 on 22.12.2015 and 23.12.2015 and they have also finally reduced the rate on 02.01.2016 to Rs.572 crores along with applicable taxes. At this stage, the petitioner made a claim

as though there has been some arithmetic errors which crept in their bid and sought to declare them as L1. When the prices quoted by the participants in the tender has been disclosed, thereafter, it is not permissible for any one to revise or re-schedule the rates already quoted. In this context, the representations given by the petitioner company has been given due consideration by the corporation. The corporation, after detailed discussions and deliberations by convening a board meeting has unanimously decided that the claim of the petitioner is not feasible of compliance and rejected it. Thereafter, on 20.01.2016, the corporation has issued the work order in favour of the L1 i.e., third respondent in WP No. 3001 of 2016. At this stage, the petitioner has approached this Court and obtained an interim order on 28.01.2016 restraining the corporation from finalising the tender.

10. According to the learned Advocate General, the corporation has adhered to the terms and conditions incorporated in the tender strictly. They have also complied with the Tamil Nadu Transparency in Tender Act and Rules made therein. In fact, the petitioner has not made any averment relating to malafide or bias except certain bald averments relating thereto. In the absence of any proof of allegations relating to bias or arbitrariness, the writ petition need not be entertained. In this context, the learned Advocate General placed reliance on the decision of the Honourable Supreme Court in the case of (West Bengal Electricity Board vs. Patel Engineering Company Limited and others) reported in (2001) 2 Supreme Court Cases 451 to contend that even assuming that the price quoted by the petitioner is the lowest, there is no obligation cast on the part of the corporation to award the tender in favour of the petitioner inasmuch as price alone will not determine the eligibility of a tenderer and it is subject to various other factors.

11. The learned Advocate General appearing for the corporation would vehemently contend that the petitioner company failed to adhere to the instructions given in the tender document scrupulously which resulted in the error. When the petitioner company claim themselves to be a globally acclaimed company, it is not known as to how such arithmetical or clerical error could have been allowed to occur. The very purpose and object of incorporating various tender conditions is to ensure the resourcefulness, capability, financial viability and technical feasibility of the bidders by subjecting them to adopt various guidelines and instructions. While so, permitting the petitioner to modify or vary the amount already quoted, especially when the bid of the other tenderers were disclosed, is not permissible. If it is done, it would create justifiable doubts in the minds of other bidders rendering the procedures adhered to by the corporation as non-transparent and unfair. The evaluation was made on the final EPC price quoted and the correctness or otherwise of these calculation errors are immaterial to the bid. The

corporation has processed the tender with prior approval of the Board which is the supreme authority. The calculation error claimed by the petitioner was also brought to the notice of the Board of TANCEM in its 269th Board meeting and after considering the same, the Board pointed out that in case of EPC Contracts, evaluation is based only on lumpsum price quoted and not based on break up details as they are only additional information. Therefore, the Board decided that such post bid justification for errors in non-mandatory information cannot be entertained to declare the petitioner as L1.

12. The learned Advocate General would further contend that the corporation had appointed a Project Management Consultant namely M/s. Development Consultant Private Limited, Kolkata who had been assigned with a job of Project Report Preparation, Tender documents preparation, evaluation of technical bids and recommending the eligible qualified bidders and subsequent execution of work till it is completed. The consultant has no business either in price bid evaluation or to make any recommendation for declaring the status of price bid. Therefore, the recommendation, even if it is made by the consultant in favour of the petitioner, will not bind the corporation in any manner.

13. The learned Advocate General further brought to the notice of this Court that apart from the price bid, the Corporation has considered several other factors which led to the awarding of contract in favour of the third respondent in WP No. 3001 of 2016. It is brought to the notice of this Court that the period of project completion quoted by the petitioner is 26 months, whereas the third respondent in WP No. 3001 of 2016 has indicated as 24 months which is more advantageous to the corporation. This according to the learned Advocate General is one of the several other factors which weighed the corporation to award the contract in favour of the third respondent in WP No. 3001 of 2016. The learned Advocate General also submits that in matters of this nature relating to award of contracts, judicial review has to be restricted only if it is shown that the tender process has not been carried out properly and they are in violation of the established principles of Law, Rules and Regulations. According to the learned Advocate General, the entire tender process and the finalisation is done as a team by the tender scrutiny committee in accordance with law and therefore, interference of this Court is not warranted.

14. With regard to the averment of the learned senior counsel for the petitioner that the petitioner had submitted the bid as per the e-mail dated 28.08.2015 received from the second respondent corporation and in the mandatory format prescribed therein for each item of work, with break-up detail, the learned Advocate General submitted that as per clause 26 of the Tender conditions, the bidder has to submit the bid in lump sum only. In fact, in the meeting held by the corporation for

clarifying certain doubts, the representative of the petitioner participated and it was reiterated that the price bid has to be submitted only in lump sum. Therefore, the petitioner is fully aware about the manner in which the price bid has to be submitted. Even assuming that the petitioner has submitted the price bid as per the format annexed along with the e-mail sent by the employee of the company, it will have no force and the petitioner is required to only the conditions prescribed in the tender. Therefore, the learned Advocate General prayed for dismissal of the writ petition.

15. Mr. Vijay Narayan, learned Senior counsel appearing for the third respondent in WP No. 3001 of 2016, in whose favour the tender has been awarded by the Corporation by declaring them as L1, would vehemently oppose the writ petition. According to the learned senior counsel, the petitioner company was not diligent enough in quoting their price bid accurately. The petitioner company has claimed that there were some mistakes in the bid quoted by them only after 50 days of opening of the price bid. Therefore, the petitioner is estopped from filing the present writ petition. The claim made by the petitioner company to permit them to correct the errors committed by them in the price bid is contrary to Rule 23 of the Tamil Nadu Tender Transparency Rules, 2000 as per which no changes, amendments which materially alter the tendered prices shall be permitted after opening of the tender. Therefore, according to the learned senior counsel, the claim made by the petitioner to carry out material corrections is barred by Rule 23.

16. The learned senior counsel for the third respondent in WP No. 3001 of 2016 would further submit that from the note submitted by the tender inviting authority, enclosed in the typed set of papers, it could be seen that the technical bid from all the four eligible bidders were received on 10.07.2015 and they were opened on the same day and evaluated with the assistance of the Consultant as well as the Technical Director of the Corporation. Thereafter, on 29.07.2015 and 31.07.2015, pre-bid clarification meeting was convened during which changes were made in the capacities and civil infrastructure and thereafter, the bidders have submitted their final technical cum price bid on 02.09.2015. Thereafter, in the meeting conducted on 07.09.2015, the representative of the petitioner was present and he made certain clarification. However, after 50 days thereof, the petitioner has come forward with a plea that they have committed certain arithmetical error and seeks permission to re-arrange the price bid. This is legally impermissible especially when the bid quoted by the other bidders were made known. Therefore, the claim made by the petitioner is clearly an after-thought to some how or the other get the project awarded in their favour. In fact, after declaring the third respondent in WP No. 3001 of 2016 as L1, negotiations took place which resulted in the third respondent in WP No. 3001 of 2016 further reducing the price quoted by

them. Therefore, at any stretch of imagination, it cannot be contended by the petitioner that the contract ought to have been awarded in their favour by the corporation. The petitioner, in the guise of correcting an arithmetical error, is effectively seeking to offer a revised price bid, which is legally impermissible. The alleged mathematical error has never been brought to the notice of the corporation at the earliest point of time, while so, the petitioner cannot be permitted to carry out the alleged errors committed by them. Therefore, the learned Senior counsel for the third respondent in WP No. 3001 of 2016 prayed for dismissal of the writ petitions.

17. I heard the learned senior counsel for the petitioner, the learned Special Government Pleader appearing for the Government, the learned Advocate General appearing for the Corporation as well as the learned Senior counsel for the third respondent in WP No. 3001 of 2016 at length. I had carefully gone through the submissions made by the counsel on either side and the counter and typed set of papers produced for my perusal. Upon hearing the submission of the counsel on either side, the question that arise for determination in these writ petitions are (i) whether the petitioner can be permitted to correct the arithmetical error committed by them while quoting the price bid and (ii) whether the act of the corporation in awarding the contract in favour of the third respondent in WP No. 3001 of 2016 is justifiable.

18. In response to the tender floated by the corporation, the petitioner as well as the third respondent in WP No. 3001 of 2016 have submitted their bids. Admittedly, the petitioner and the third respondent in WP No. 3001 of 2016 alone have fulfilled the requisite criteria and they alone were permitted to advance to the next stage of the tender process. Both the petitioner and the third respondent in WP No. 3001 of 2016 have submitted their price bids quoting their respective price for execution of the project. It is seen from the records that after opening the price bid, a tender clarification meeting had taken place in which the representative of the petitioner has specifically sought for certain clarification with respect to the price bid. In other words, the clarification is in the nature of submitting their price bid in lump sum or otherwise. A clarification was also issued in the meeting held by the corporation stating that the price bids have to be submitted in lumpsum. Therefore, it is evident that the prices has to be quoted only in lump sum. Even though the petitioner is fully aware about the manner in which the prices have to be quoted, the reason assigned by the petitioner that they have followed the format enclosed along with an e-mail sent by the employee of the petitioner corporation cannot be accepted. As rightly pointed out by the learned Advocate General, the petitioner is only expected to scrupulously follow the conditions incorporated in the tender and the reliance placed on an e-mail attachment has no significance. Further, according to the learned Advocate General, even on 07.09.2015 when the price bid was

opened in the presence of the representative of the petitioner and the third respondent in WP No. 3001 of 2016, the petitioner was declared as L2 and their status was made known to them. The representative of the petitioner also acknowledged the same by signing in the tender register. On perusal of the records, it is seen that on that day namely 07.09.2015, there was nothing to show that the petitioner has raised any objection with regard to the price quoted by L1. However, after 50 days thereof, the petitioner has come forward with a plea that they have committed certain arithmetical error and sought to correct such error. Whether the petitioner can be permitted to make corrections to such arithmetical error or not has to be seen.

19. Section 23 of the Tamil Nadu Tender Transparency Rules, 2000 deals with changes and alterations to the bids after they were opened. As per Rule 23, no changes, amendments which materially alter the tendered price shall be permitted after the opening of the tender, except as per the procedure prescribed in sub-section (3) of Section 10 of the Act. Section 10 (3) of the Tamil Nadu Tender Transparency Act 1998 deals with negotiation for reduction of price, however, there is nothing to show that the prices already quoted can be permitted to be modified or varied. On perusal of the tender documents and the conditions incorporated therein, I could not find any conditions which would entitle the petitioner to carry out the arithmetical or clerical error made thereof. In this context, learned senior counsel for the petitioner relied on clause 18 of the tender conditions which relates to clarification of bids. Even as per clause 18, the bidder shall seek for certain clarification of his bid however, he is forbidden to seek for any change in the bid except the arithmetical error discovered by the employer in the evaluation of the bids. Clause 18 of the tender condition, however, does not stipulate any time frame for rectification or modification of the arithmetical errors. In the present case, the price bid was opened on 07.09.2015 and even on that date, the petitioner was declared as L2 and it was also acknowledged by the representative of the petitioner. However, after 50 days, the petitioner has come forward with a plea to rectify the clerical or arithmetical errors committed by them in quoting the price bid. Thus, the petitioner did not exercise due diligence and caution in drawing the price bid free from any errors. Even assuming such errors have been committed by inadvertence, the petitioner ought to have approached the Corporation at the earliest point of time and sought for rectification of the errors and the delay of 50 days in seeking to rectify the errors, in my considered opinion, cannot be considered especially when much water has flown under the bridge. Admittedly, after opening of the price bid and declaring the third respondent in WP No. 3001 of 2016 as L1, price negotiations took place and the third respondent in WP No. 3001 of 2016 also agreed for reduction of the price. While so, I am of the view that the delay in making a claim for carrying out certain arithmetical corrections cannot be permitted as it

would unsettle the settled procedures and formalities adhered to by the corporation. It is needless to mention that if the petitioner is permitted to do so, after 50 days, it would adversely affect the right and interest of the third respondent in WP No. 3001 of 2016 who was, in the meantime, declared as L1. This is also one of the reasons why the claim of the petitioner to carry out the arithmetical errors cannot be considered.

20. It is well settled proposition of law that after the parties have entered into the arena, the Rules of the game should not be changed to the detriment and disadvantage of the players. In this case, admittedly, after the price bid was opened on 07.09.2015 disclosing the prices quoted by the other bidder, the petitioner cannot be certainly permitted to carry out arithmetical errors or clerical errors much to the disadvantage of the other bidders, particularly the third respondent in WP No. 3001 of 2016. In this context, useful reference can be made to the decision of the Honourable Supreme Court in *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others* AIR 2000 SC 2272 wherein in Para-12, it was held thus:-

"12.The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena, it is like changing the rules of the game after it had began and therefore, if the Government or the Municipal Corporation was free to alter the conditions, fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition the wider net will be permissible and a larger participation of more attractive bids could be offered.

21. Applying the ratio laid down by the Honourable Supreme Court in the above decision, this Court is of the view that the claim made by the petitioner to carry out material corrections in the price bid in the guise of correcting arithmetical error, that too after 50 days from the opening of the price bid, is legally impermissible and it would amount to changing the Rules of the game after the players have entered into the arena.

22. It is well settled proposition of law that in contractual matters, judicial interference is limited. Unless it is shown that the decision making process is against the well settled principles of law or arbitrary or bias, this Court cannot interfere in exercise of the powers under Article 226 of The Constitution of India. The reason being, the Courts are not expert of experts and are not well versed with technical know how or knowledge relating to the specification or

execution of the contract. Furthermore, these are all disputed questions of facts in which interference of this Court is limited and restricted. 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 demoractic 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.

down 6 principles in which 4 and 5 are more appropriate to decide the case on hand. The terms of the 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. In other words, a fair play in the Government decision must not only be decided by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by malafides. As mentioned above, in this case, the petitioner has not raised the plea of bias or malafides attributable on the part of the corporation. In the absence of the same, this Court cannot slightly interfere with the decision arrived at by the corporation in awarding the tender in favour of the third respondent in WP No. 3001 of 2016.

24. I also gained support for my above conclusion from the decision of the Honourable Supreme Court (Elektron Lighting Systems Private Limited and others vs. Shah Investments Financial Developments and Consultants Private Limited and others) reported in (2015) (12) SCALE 538 wherein it was categorically 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 has also already awarded the contract in favour of L1, the third respondent in WP No. 3001 of 2016, this Court hesitates to interfere with such decision in the absence of any pleading relating to bias or arbitrariness.

25. The learned senior counsel appearing for the third respondent in WP No. 3001 of 2016 also relied on several decisions in support of his contention that judicial review in matters of this nature is impermissible. One among them is the decision rendered by the Honourable Supreme Court in (West Bengal Electricity Board vs. Patel Engineering Co. Ltd and others) AIR 2001 Supreme Court 682 wherein 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 its 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."

26. It is evident from the parameter laid down by the Honourable Supreme Court that in administrative action, this Court cannot interfere and substitute its opinion unless a strong case is made out for such interference.

27. As far as the claim of the petitioner is concerned, it is seen that the representation submitted by the petitioner was placed before the Board of the Corporation in its 269th meeting held on 11.01.2016 in which the Tender Accepting Authority was also present. The Board, after analysing the various details including the price quoted by the tenderers concluded that the admission of calculation errors by the petitioner has been made only after knowing the price quoted by

the other bidder. Therefore, the Board thought it fit that there is no justification to permit the petitioner to carry out the so called arithmetical error. Thus, it is evident that the Board has considered the plea raised by the petitioner for altering or carrying out corrections in the price bid submitted by the petitioner and ultimately rejected it. Such a decision arrived at by the Board of the Corporation does not warrant any interference by this Court and this Court is not inclined to substitute its opinion than the one arrived at by the Board. As mentioned above, the decision arrived at in the Board meeting of the Corporation is an administrative decision over which this Court cannot, in exercise of the powers conferred under Article 226 of The Constitution of India, interfere and substitute any other opinion in its place.

28. The learned Advocate General invited the attention of this Court to the counter affidavit filed by the second respondent, particularly para No. 20 and 21, and pointed out that it is neither the price bid offered by the petitioner and the third respondent in WP No. 3001 of 2016 which weighed in the decision of the corporation nor was it a determining factor or criteria to award the contract. The learned Advocate General pointed out that the petitioner has indicated the period of completion of the project as 26 months, while the third respondent in WP No. 3001 of 2016 has assured to complete the project two months ahead of it namely in 24 months. Further, even though the machinery requirement of the corporation has been met both by the petitioner and the third respondent in WP No. 3001 of 2016, there is a difference and distinction in the fuel savings and power savings offered by them. As per the quotation of the petitioner, they have indicated fuel savings of 2 Kcal/Kg of clinker and Power savings of 0.5KW/hour/ton of cement, while the third respondent in WP No. 3001 of 2016 has offered a more advantageous quote than the petitioner. This according to the learned Advocate General is only a tip of the iceberg and there are more and more instances to be quoted from the bids submitted by the petitioner and the third respondent in WP No. 3001 of 2016 which weighed in the decision of the corporation to take a call. I find considerable force in the said submission of the learned Advocate General appearing for the corporation. The above aspects relating to power savings or fuel savings or other requirement have to be determined by experts in the field and this Court does not possess any expertise or technical know how relating to the same. This Court, in exercise of jurisdiction under Article 226 of the Constitution of India, can only confine its judicial review as to the procedure contemplated in arriving at a decision transparently without any bias. As mentioned above, the petitioner has not raised any plea relating to bias or mala fide while so, this Court hesitate to interfere with the decision of the Corporation.

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29. For all the above reasons, this Court is of the view that the prayer sought for in these writ petitions deserve no

consideration by this Court. Accordingly, all the writ petitions fail and they are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary
State of Tamil Nadu
Department of Industry
Fort St. George, Chennai
2. The Managing Director
Tamil Nadu Cements Corporation Limited
LLA Buildings, Second Floor
735, Anna Salai, Chennai - 600 002
3. The Manager (Materials)
(Tender Inviting Authority)
The Tamil Nadu Cements Corporation Limited
LLA Buildings, Second Floor
735, Anna Salai, Chennai - 600 002

+2cc's to Mr.Abdul Saleem, Advocate, S.R.No.23580
+1cc to Mr.Preeti Mohan, Advocate, S.R.No.23603
+1cc to the Government Pleader, S.R.No.23862

WP Nos. 3100, 7638 & 7639/2016

SCD(CO)
CA(26/04/2016)

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