

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 25.02.2016

PRONOUNCED ON : 07-03-2016

Coram

THE HONOURABLE MR. JUSTICE R. SUBBIAH

Writ Petition No. 5648 of 2016
and

W.M.P. No. 5004 of 2016

M/s. Vaaman Texprint Private Limited
(formerly M/s. C.S.R. Fabrics Private Limited)
represented by its Managing Director, Suresh Raju
Sy.No.171/A, Chinnaraviryala
Hayatnagar, Rangareddy District
Telengana State .. Petitioner

Versus

1. The Director of Handlooms and Textiles
Department of Handlooms and Textiles
Kuralagam, II Floor
Chennai - 600 108
2. Tender Committee/Joint Director (Uniforms)
rep. by its Members
Kuralagam, II Floor
Chennai - 600 108
3. State of Tamil Nadu
rep. by the Principal Secretary
Department of Handlooms and Textiles
St. George Fort, Chennai
4. Pioneer Syntex Private Limited
Plot No.391, GIDC Estate
Pandrasa - 394 221
Tal : Chorasi, District, Surat
Gujarat State
5. United Bleaches Private Limited
PO No.12, Nellithurai Road
Mettupalayam 641 301
6. Aruna Textile Processing Mills
80/5, Avaudayankadu
Kongampalayam
Gangapuram Village
Chittur Post
Erode - 638 102

.. Respondents

Prayer amended as follows:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus calling for the papers culminating in the impugned order/notice dated nil. passed by the respondents 1 to 3 declaring the petitioner as ineligible for the opening of the price bid and displayed on the notice board of the said respondents after the working hours on 12.02.2016 and quash and set aside the same and consequently declare the petitioner as an eligible tenderer and open the petitioner's price bid and award the contract to the petitioner in accordance with law.

(Prayer in the writ petition has been amended as per the order dated 25.02.2016 passed in WMP Nos. 6646 and 6647 of 2016 in WP No. 5648 of 2016)

For Petitioner : Mr. P.S. Raman, Senior Advocate
for Ms. Pushpa Menon

For Respondents : Mr. A.L. Somayaji, Advocate General
assisted by Mr. V. Jayaprakash Narayanan
Special Government Pleader for RR1 to 3

Mr. P. Wilson, Senior Advocate
for Mr. S. Rajmakesh for R4

Mr. R. Krishnamoorthy, Senior Advocate
for Mr. S. Rajmakesh for R5

Mrs. Hema Sampath, Senior Advocate
for Mrs. Meenal for R6

ORDER

The petitioner has come forward with this writ petition seeking to issue a Writ of Mandamus directing the respondents 1 to 3 to open his price bid and consider the same in awarding the tender in respect of processing of uniform cloth free supply of Uniform scheme 2015-2016 (Academic year 2016-2017) in accordance with law.

2. The essential facts which led to the institution the present writ petition are as follows:

(i) The petitioner is a private limited company engaged in the business of processing and dyeing of all kinds of cloth, including cotton and printed fabrics. According to the petitioner, they are engaged in such business for the past more than a decade and supplied their products to respondents 1 to 3 as also other Central Government and State Government Agencies. During the course of such business, on 01.02.2016, the respondents 1 to 3 have flouted a tender for dyeing and processing of cloth under a Free Supply of Uniform Scheme 2015-2016 introduced by the Government. One of the conditions incorporated in the tender notification is that the tenderers should have the capability to process and deliver a minimum of

1,00,000/- meters per day. The tenderers also should engage themselves in the process of their manufacturing activities by properly installing effluent treatment plant and reverse osmosis system besides obtaining appropriate CTO Certificate/Order from the Pollution Control Board. According to the petitioner, they satisfy all the requirements incorporated in the tender notification. The petitioner has obtained certificate from the Pollution Control Board to operate their unit till 31.12.2020. As per the consent given by the Pollution Control, the petitioner is capable of processing of cotton and printing man made fabric to the tune of 1,40,000/- meters per day, which is over and above the 1,00,000/- meter per day potentiality required in the tender notification.

(ii) Before submission of the price bid, an inspection was conducted by the representative of the respondents 1 to 3 on 02.02.2016 in compliance of clause V of the tender notification. After inspection, the petitioner was informed that they are satisfied with the infrastructure facilities provided by the petitioner in their unit. It is the grievance of the petitioner that even though the tender flouted by the respondents 1 to 3 does not stipulate multiple inspections, the representatives of the respondents 1 to 3 conducted a second inspection on 04.02.2016. This inspection, according to the petitioner has been conducted to find some fault with the infrastructural facilities and other processing system maintained by the petitioner. However, the second inspection team also could not point out any shortcoming on the part of the petitioner. Therefore, the petitioner legitimately expected that they will be awarded the tender. While so, to the shock and surprise of the petitioner, a third inspection team visited the place of business of the petitioner on 11.02.2016 purportedly to disqualify them from being awarded with the contract. The third inspection team appears to have submitted a report stating that the petitioner does not have the capacity to process 1,00,000 meters per day even though the certificate issued by the Pollution Control Board clearly indicates that the petitioner has the potentiality to manufacture 1,40,000 meters per day. Therefore, on the basis of the third inspection report submitted by the inspection team, the petitioner's bid was not accepted by the respondents 1 to 3. Rather, the respondents 4, 5 and 6 have been awarded with the contract. Therefore, the petitioner has filed this writ petition praying for a Mandamus as mentioned above.

(iii) During the pendency of the writ petition, the petitioner has filed W.M.P. Nos. 6646 and 6647 of 2016 to amend the prayer in the writ petition as well as in the miscellaneous petition inasmuch as they came to know about an order passed by the respondents 1 to 3 rejecting the application of the petitioner during the pendency of the writ petition on 15.02.2016. Both the petitions for amendment were ordered by this Court.

the petitioner would vehemently contend that before opening of the price bid, the inspection team conducted inspection of the manufacturing facility of the petitioner thrice, which was purportedly made to make the petitioner ineligible from getting the contract. In other words, during the first and second inspections, which were conducted on 02.02.2016 and 04.02.2016, the inspection team could not see any deficiency or defect in the processing system of the petitioner. While so, it is crystal clear that a third inspection has been purportedly and purposefully made only to make the petitioner ineligible and to oust them from the purview of the contract. It is vehemently contended by the learned senior counsel for the petitioner that the decision of the respondents 1 to 3 to make the petitioner ineligible wholly rests on the report of the third inspection team. Yet another deficiency pointed out by the third inspection team is that there is no Evaporator plant installed in the manufacturing unit of the petitioner. Whereas, in para No.15 of the counter affidavit dated 20.02.2016, the first respondent stated that the petitioner has not given proper explanation regarding the working condition of the evaporator. Thus, totally contrary statement have been made in the counter affidavits filed before this Court which are against truth. At any rate, non-installation of evaporator is not assigned as a reason for rejecting the tender by the respondents 1 to 3 and it is not at all a ground for rejection of the bid of the petitioner. In any event, even assuming that the petitioner did not provide the requisite infrastructural facility as per the report of the third inspection team, the petitioner ought to have been put on notice and called upon to clarify their position. However, the respondents 1 to 3 have not even served the copy of the third inspection report or called upon the petitioner to explain the shortcomings allegedly pointed out in the third inspection report.

4. The learned senior counsel for the petitioner further contend that the price bids were purportedly opened on 12.02.2016 at about 4.00 p.m. and after the close of office hours i.e., beyond 5.00 p.m. the impugned order was displayed in the notice board. It is further contended that 13th and 14th falls on Saturday and Sunday and therefore, only on the next working day i.e., 15.02.2016, the petitioner came to know about the order of rejection passed by the petitioner. Immediately, on the same day, the petitioner has filed this writ petition and sought for amendment of the prayer after serving the typed set of papers on the respondents. In spite of the same, on 15.02.2016, the respondents 1 to 3 have entered into agreements of contract with the respondents 4 and 6.

5. As regards the alleged disqualification pointed out by the respondents, they are factually incorrect and contrary to truth. As per the Pollution Control Board certificate issued to the petitioner, the petitioner has the potentiality, capability and capacity to manufacture 1,40,000 meters per day which is over and above the required strength and capability of

1,00,000 meter per day required by the official respondents. The learned senior counsel for the petitioner invited the attention of this Court to clause VIII (8) wherein it was stated that the certificate issued by the Pollution Control Board would be the basis for determining the processing capacity of the tenderers, while so, dehors the certificate produced by the petitioner, the respondents 1 to 3 have invented untenable reasons to reject the bid of the petitioner. Further, as per clause 4 of the tender schedule, the effluent treatment plant and reverse osmosis system are already in existence in the manufacturing unit of the petitioner, which was not taken note of by the respondents 1 to 3.

6. The learned senior counsel for the petitioner also brought to the notice of this Court that after filing the writ petition, on 19.02.2016, the petitioner has obtained a certificate issued by a Chartered Engineer regarding the facilities made available by the petitioner in their manufacturing unit which would falsify the case projected by the respondents in their counter. The certificate obtained from the Chartered Engineer also clearly indicates that the petitioner has 2 Mercerizers, which falsifies the theory put forth by the respondents 1 to 3 that the capacity of the one Mercerizer available in the unit is not capable of meeting the expected supply, while so, the reasons assigned by the respondents 1 to 3 for rejecting of the petitioner's bid warrants interference by this Court. Further, the learned senior counsel for the petitioner invited the attention of this Court to the consent order issued by the Gujarat Pollution Control Board in favour of fourth respondent and submitted that in the said order it has been clearly stated that the processing capacity of the fourth respondent is 45,000 meters per day as against the requirement of 1,00,000 indicated in the tender notification. In spite of the same, the respondents 1 to 3 are awarded the tender in favour of the 4th respondent.

7. On the contrary, the learned Advocate General appearing for the official respondents would oppose the writ petition mainly on the ground that the acceptance of the bids submitted by the respondents 4 to 6 and the rejection of the bid of the petitioner are on the basis of a transparent procedure adhered to by the official respondents. Even the petitioner has not raised any allegations of bias as against the official respondents 1 to 3 in this case. In the absence of any such allegations against the official respondents, this Court cannot, in exercise of the powers conferred under Article 226 of The Constitution of India, go in to the disputed questions of fact and consequently the writ petition filed by the petitioner is not maintainable.

8. Relying on the counter affidavit filed by the first respondent, the learned Advocate General would mainly contend that the object of flouting tenders is to get qualify material supplied to the school children pursuant to the introduction of

a benovolent scheme called Free Supply of Uniform Scheme introduced by the Government to distribute free uniform to the school going children. Any deficiency or shortcoming on the part of the tenderers will have an adverse impact in the implementation of the scheme in a time bound manner. Therefore, need based conditions were imposed in the tender notification which include provision for minimum required supply of clothes in a time bound manner. In other words, as per the scheme, 435 lakh meters of various cloth materials are required to be processed within 150 days. As per clause VIII (8) of the tender, the processing capacity, to process and manufacture 1,00,000 meters per day will be assessed based on the pollution control board consent certificate of the respective State but at the same time, the pollution control board certificate alone is not a criteria and the infrastructural availability will be inspected and assessed by technical team at processing mill, which will be final. Therefore, apart from the submission of the consent order given by the pollution control board, an inspection will be conducted and the inspection team has to arrive at a subjective satisfaction with regard to the potentiality of the manufacturing capability of the mill. In the present case, the petitioner relied on a Certificate issued by the Pollution Control Board, Telengana which is contrary to the conditions issued in the tender notification. On the basis of such certificate issued by the Telengana Pollution Control Board, the eligibility, capacity or capability of the petitioner could not be determined by the respondents 1 to 3. Therefore, as per clause VIII, a team visited the manufacturing facility of the petitioner on 03.02.2016 which consists of a two member Scrutiny committee consisting of one Senior Technical Assistant and one Junior Technical Assistant. According to the inspection team, effluent discharge available in the petitioner unit is less than the required 750 KLD. The first inspecting team also found that they could not ascertain the capacity of the dye house. Therefore, it was decided that a second inspection could be conducted to elaborately assess the capability and potentiality of the petitioner unit. Accordingly, a committee consisting of Assistant Director of Handlooms and Textiles along with one Junior Technical Assistant inspected the petitioner unit on 05.02.2016. Such a committee was formed not only to visit the petitioner's manufacturing facility but also that of the other tenderers. While so, on 08.02.2016, a petition was received by the third respondent from Jaya Balaji Dyeing Mills Private Limited, Erode stating that the petitioner unit did not possess the capacity or capability to manufacture 1,00,000 meters cloth per day and they are not entitled to be awarded with the contract. This has necessiated a third inspection to be conducted in the petitioner unit constituted by the first respondent consisting of one Joint Director and a Processing Manager of Tamil Nadu Cooperative Textile Processing Mills, Limited, Erode. The third inspection was conducted in the presence of the petitioner. The third inspection team has opined that as per the Pollution Control Board consent, relied

on by the petitioner, the permitted quantity available for trade effluent is 4.88 lakh litres per day and out of the same, the feed for boiler water is 92 KLD and domestic use is 10 KLD. Therefore, the quantity available for processing is only 386 KLD i.e., 3,85,000 litres per day. As per the third inspection team, the requirement of water for processing per kg of cloth is 60 to 70 litres. Even if the water requirement for processing 1 kilogram of cloth is taken as 60 litres, for processing 1 lakh meters polycot variety of uniform cloth per day, 7,08,000 litres of water is required as against 3,86,000 litres available in the petitioner unit. Out of this water requirement, the petitioner could at the best manufacture 54517 meters per day which is against the requirement of 1 lakh meter per day. That is the reason why, the expert committee recommended that the bid of the petitioner need not be considered and it is not as though the third inspection team was conducted for unearthing certain deficiency from the unit to oust the petitioner from the purview of awarding the contract, as alleged. The learned Advocate General also submitted that the pollution control board consent certificate submitted by the petitioner indicates that the processing capacity of the petitioner mill is 1,40,000 meters per day. However, as per the flow chart given in the tender notification for processing of Polycot Uniform cloth, the petitioner unit should have processing capacity of 1,00,000/- meter per day at each stage mentioned in the flow chart. Whereas, the inspection team found that the petitioner mill does not have processing capacity of 1,00,000 meter per day at each stage mentioned in the said flow chart.

9. The learned Advocate General would further submit that as per clause VIII (2) of the tender conditions, the tenderer shall possess own facility for heat setting, mercerizing, scouring, bleaching, dyeing of polyester/cotton blend and other finishing facilities with the machineries. In the case of the petitioner, even though the petitioner unit is having 2 mercerizing machines with 72 inches width, as per the technical parameters, both the machines are capable of processing only 77880 meters per day which is below the 1 lakh meter per day requirement stipulated in the tender condition. These shortcomings on the part of the petitioner were discussed in detail by the tender acceptance committee during the meeting held on 12.02.2016 with the specific remarks made by the inspecting team. Only thereafter, the respondents 1 to 3 have refused to accept the bid of the petitioner and it was duly displayed in the notice board on the same day.

10. As regards the allegation of the petitioner that the rejection of their tender has not been intimated to them, the learned Advocate General would contend that as per Rule 27 of the Tamil Nadu Tender Transparency Rules, 2000, confidentiality of the process of tender evaluation shall have to be ensured until orders on the tenders are passed. In this case, after the respondents 1 to 3 decided to accept the bids of the

respondents 4 to 6, the impugned notice was immediately displayed in the notice board. As the petitioner did not participate in the opening of the bid on 12.02.2016, he was not aware of these developments. That is the reason why the petitioner has initially filed this writ petition only for a Mandamus and later amended the prayer.

11. The learned Advocate General would further contend that as per the Tender scrutiny team, the fourth respondent organisation is eligible and they have met all the criteria stipulated in the tender notification. The bid of the respondents 4 to 6 was accepted based on their qualification assessed by the inspection team. Further, as per Rule 28 of the Tamil Nadu Transparency in Tender Rules, 2000, initial examination has to be made to determine substantial responsiveness of the tenders and in compliance with this Rule, inspection was made by the team. Further, the award of contract in favour of the petitioner in the earlier tender process has nothing to do with the award of the present contract. Each and every bid has to be assessed and evaluated on its own merits and the petitioner cannot rely on the award of the contract in their favour earlier. As the petitioner unit failed to meet the eligibility criteria, they were declared ineligible. Further, if the petitioner has any grievance against their non-selection, they ought to have filed an appeal provided under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998 and Rules, 2000. Further, as per Clause XV (2) of the terms and conditions of the tender, in case of dispute or difference relating to any matter arising out of or connected with the tender, such disputes shall be referred to the Government who shall be the Arbitrator and the decision of the Government will be final and binding on the parties. When the petitioner has subjected themselves to the terms and conditions incorporated in the terms and conditions of the tender, it is futile on their part to file this writ petition without exhausting such alternative remedy. In fact, the Government is competent to assess the technical eligibility or otherwise of the petitioner, which cannot be adjudicated by this Court in exercise of powers under Article 226 of The Constitution of India. Therefore, according to the learned Advocate General, the writ petition is not maintainable when the petitioner fails to exhaust the alternative remedy available before the Government and he prayed for dismissal of the same.

12. In support of his contentions, learned Advocate General appearing for the respondents 1 to 3 relied on the following decisions:-

(i) (Vijay vs. State of Maharashtra) reported in AIR 2009 Supreme Court 1217 to drive home the point that judicial review cannot be exercised by this Court with respect to a contractual powers of government or instrumentalities of the government unless there is clear and cogent material made available to show that the decision made by the authorities is an outcome of

bias and arbitrary exercise of power.

(ii) (Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa and another) reported in (2012) 6 Supreme Court Cases 464 to contend that any delay due to interference of this Court in contractual matters at the instance of the petitioner would vitiate the object with which the tender was flouted. By contending that the successful bidders were awarded the contract even on 15.02.2016 and they have also commenced the work, the learned Advocate General would pray this Court to refuse to exercise the power of judicial review in a case of this nature.

(iii) (Elektron Lighting Systems Private Limited and others vs. Shah Investments Financial Developments and Consultants Private Limited and others) reported in (2015) (12) SCALE 538 to contend 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.

(iv) (TTBL Tea and Technologies Limited, formerly called Tamil Nadu Tea Brokers Limited (TTBL) rep. by its Director, Coonoor and others vs. Government of Tamil Nadu, rep. by its Department of Industries and Commerce Department and others) (2002) 2 MLJ 65 wherein this Court has held that reasons for rejection of a bid is not required to be communicated. In other words, merely because the reason for rejection is not communicated to a bidder, the tender process or award of contract will not be vitiated. There is no obligation on the part of the authorities to communicate the decision for accepting or rejecting the tender.

13. Mr. P. Wilson, learned senior counsel for the fifth respondent would only contend that the chartered engineer certificate independently produced by the petitioner will not entitle the petitioner to get the contract awarded in their favour. When the inspection team found certain deficiencies, it will not be cured by producing a certificate from the Chartered Engineer. Such certificate need not be relied on or considered by the official respondents in the matter of awarding the contract. The writ petition has been filed by the petitioner only to delay the commencement of the contract by this respondent. The learned senior counsel further submitted that it is incorrect to state that the fourth respondent has submitted a consent order issued by the pollution control board wherein it is indicated that the fourth respondent has processing capacity of 45000 meters per day as against the requirement of 1,00,000 meter per day. According to the learned senior counsel for the fourth respondent, the petitioner has produced some documents said to have been filed

by the fourth respondent before this Court, which documents have not been submitted by the fourth respondent along with the technical bid. In any event, the tender was awarded in favour of the fourth respondent by following transparent procedures and it does not call for any interference by this Court. Therefore, the learned senior counsel for the fourth respondent prayed this Court to dismiss the writ petition.

14. Mr. R. Krishnamoorthy, learned Senior counsel appearing for the fifth respondent, who is one of the successful bidders, would contend that the respondents 1 to 3 are justified in rejecting the tender of the petitioner inasmuch as they did not satisfy conditions incorporated in the tender notification. The learned senior counsel further submits that the allegation of the petitioner that the respondents 1 to 3 have improved their defence in the counter by assigning irrelevant and inconsistent statement is not correct. According to the learned senior counsel, the respondents have elaborated their submission in the counter in detail and it does not mean that the counter affidavit of the official respondents contain inconsistent statement. In other words, the official respondents have not assigned any new reasons or additional reasons in the counter affidavit and they have only elaborated the various deficiencies in the bid submitted by the petitioner. In any event, when the petitioner did not satisfy the conditions incorporated in the tender notification, the respondents 1 to 3 are having every right to reject such tender. There is no arbitrariness on the part of the respondents 1 to 3 in the matter of awarding the contract in favour of the fourth respondent and therefore, the learned senior counsel prayed for dismissal of the writ petition.

15. Mrs. Hema Sampath, learned Senior counsel appearing for the sixth respondent, who is also one of the successful bidders, would only contend that in case of this nature, where the dispute is with respect to award of contract, judicial review under Article 226 of The Constitution of India is very limited and shall be exercised only if the petitioner has filed this writ petition with allegations of malafide. In the present case, the petitioner has not made any such plea. The tender of the petitioner has not been considered only due to the shortcomings identified by the inspection team during the course of their inspection. Therefore, in the absence of any malafide raised, the petitioner is not entitled to maintain this writ petition. Accordingly, the learned senior counsel prayed this Court for dismissal of the writ petition.

16. I heard the learned counsel on either side at length and perused the materials made available on record. The respondents 1 to 3 have flouted the tender notification dated 31.12.2015 inviting applications from eligible bidders for dyeing and processing of cloth. The process includes Polycot Drill, Casement for Shirting /Salwar Kameez Tops and Salwar Kameez Dupatta clothes. The tender document contains several

clauses as to the minimum qualification to be possessed by the bidders, infrastructural facilities required for processing and supplying of 1,00,000 meters per day, period within which delivery of processed cloth should be supplied etc., Clause V of the tender conditions stipulated that inspection will be conducted in the premises of the tenderer to take stock of the infrastructural facilities made available.

17. The learned Senior counsel appearing for the petitioner that contrary to Clause V of the tender conditions, the respondents 1 to 3 caused inspection thrice in their plant. While the inspection team visited the premises for the first and second time did not find fault with the manufacturing process or their eligibility to be awarded the bid, the third inspection team allegedly found certain deficiencies. According to the learned senior counsel for the petitioner, the inspection conducted for the third time in succession is only to ensure that the petitioner is ousted from being awarded the contract. It is further contended that such inspection carried out for the third time by the inspection team is contrary to Clause V of the tender notification which never contemplates multi number of inspections to be conducted at the manufacturing unit. Such a contention urged on behalf of the learned Senior counsel of the petitioner cannot be countenanced. The object and purpose of inspection is to gain first hand information about the facilities provided by the unit and to ensure whether those facilities are adequate to meet the demand and supply criteria indicated in the tender condition. In this case, as per the counter affidavit of the first respondent, the first inspection team visited the manufacturing facility of the petitioner on 03.02.2016 consisting of technical personnel. During the course of first inspection, it was found that the effluent discharge available in the petitioner unit is less than the required 750 KLD. The first inspecting team also found that they could not ascertain the capacity of the dye house. Therefore, to ascertain the requisite facility made available, a second inspection was caused. The second inspection team inspected the petitioner unit on 05.02.2016. As per the counter affidavit, the second inspection team not only inspected the petitioner's unit but also that of the other tenderers to gain first hand information relating to certain technical facilities made available. As regards the third inspection in the case of the petitioner unit, it is countered by the learned Advocate General that based on a petition received by the third respondent from Jaya Balaji Dyeing Mills Private Limited, Erode the third inspection has become necessary. The third inspection team has made remarks relating to certain short comings. Therefore, the respondents 1 to 3 have assigned reasons for conducting successive inspection and it cannot be said that the respondents can conduct inspection only once. When the first inspection team entertained certain doubt, for getting it clarified, a second inspection team was sent. In any event, the word "inspection" incorporated in Clause V of the tender

notification cannot be confined to a single inspection or it will restrict or limit the inspection to be conducted once. As mentioned above, the object of conducting inspection is to gain first hand information about the facilities provided by the unit and to clarify any doubts with respect to existence of such facility, it is well open to the respondents to carry out inspections more than once.

18. The remarks made by the inspection team after conducting inspection are purely technical and based on an assessment on the actual requirement. To be specific, the averments in para No.19 of the counter affidavit of the first respondent, is extracted as follows:-

"19. It is submitted that the said team visited the processing unit of the petitioner for inspecting the machinery and verifying the documents. During the inspection, the Managing Director and Joint Managing Director of the petitioner organisation were present. The team has submitted the report that as per the Pollution Control Board consent, the permitted quantity available for trade effluent is 4.88 lakh litres per day. It is further reported that out of the permitted quantity, the feed for boiler water is 92 KLD and domestic use is 10 KLD. Hence, the quantity available for processing is only 386 KLD i.e., 3,85,000 litres per day. A minimum requirement of water per kg of cloth for processing of Polycot varieties is 60 to 70 litres. The team has further reported that even if considering the minimum quantity of 60 litres per kg of cloth to be processed, the water requirement for processing 1.00 lakh meters polycot variety of uniform cloth per day, as called for in the tender is worked out at 7,08,000 litres per day. The pollution control Board consented quantity for the petitioner unit is only 3,86,000 litres per day out of which it can process about 6433 kgs of cloth i.e., 54517 meters per day. Further, the team has reported that as per the Pollution Control Board consent order, the units shall provide Zero Liquid discharge, Effluent Treatment Plant with Reverse Osmosis and Evaporator Plant. But the petitioner is not complying with the minimum requirement prescribed for mercerizing capacity and Pollution Control Board consent and concluded the petitioner unit is not responsive."

19. It is evident that the technical team has made certain remarks with regard to non-availability or non-adherence or short coming on the part of the petitioner unit with regard to certain facilities. Of course, this is disputed by the petitioner and contends that the petitioner has made available all the facilities. The existence of availability of certain facilities to technically conform to specific standards cannot be determined by this Court by conducting a roving enquiry.

These are all disputed questions of facts in which interference of this Court is limited. In this context, useful reference can be made to the 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 respondents 1 to 3. In the absence of the same, as rightly pointed out by the learned Advocate General, the writ petition is not maintainable.

21. 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, which was relied on by the learned Advocate General. In that case, 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. In the present case, the tender flouted by the respondents 1 to 3 is to implement a scheme introduced by the Government to distribute free school uniforms to the children. The scheme has to be implemented within a time frame and that is the reason why the respondents 1 to 3 have incorporated certain checks and balance in the terms and conditions of the tender to ensure it's implementation within the time. This being a scheme introduced in public interest and there being no plea of malafide or malice alleged by the petitioner as against the respondents 1 to 3 in award of contract in favour of the respondents 4 to 6, I hesitate to interfere with the order impugned in this writ petition.

22. The learned senior counsel for the petitioner would further contend that the respondents 1 to 3 have conducted the opening of the bids and rejected the tender of the petitioner hurriedly and it was not disclosed to the petitioner in time. Even assuming that the decision arrived at by the respondents 1 to 3 relating to rejection of the tender of the petitioner has not been communicated immediately, it will not vitiate the tender process. Admittedly, at the time when the tenders were opened on 12.02.2016, the petitioner or their representative were not present. According to the respondents, a decision was taken relating to acceptance or rejection of the

tenders by the tender committee and only thereafter the impugned order was displayed in the evening of 12.05.2016 after office hours. This submission of the respondents 1 to 3 merit acceptance and I do not find any irregularity in the procedure adopted by the respondents. In any event, the respondents 1 to 3 are not obliged to communicate or intimate the petitioner regarding the rejection of his tender as per Section 27 of the Tamil Nadu Tender Transparency Rules, 2000 and the respondents 1 to 3, in their wisdom and discretion, are free to either accept or reject any tender. Of course, such a decision of the tendering authority can be interfered with by this Court only if it is shown that the decision was taken deliberately with a mala fide intention.

23. It is seen from Clause XV (2) of the terms and conditions of the tender that in case of dispute or difference relating to any matter arising out of or connected with the tender, such disputes shall be referred to the Government who shall be the Arbitrator and the decision of the Government will be final and binding on the parties. When such a specific clause is available, the petitioner is not entitled to maintain this writ petition. The petitioner ought to have exhausted the alternative remedy incorporated in the tender document itself in clause XV (2). This is more so that the Government will be competent to assess and evaluate the plea of the petitioner technically which this Court cannot assess in exercise of its jurisdiction under Article 226 of The Constitution of India.

24. As regards the respondents 4 to 6, it is brought to the notice of this Court that they have entered into an agreement on 15.02.2016 itself with the official respondents 1 to 3 and they have commenced the work relating to the contract. Therefore also, at this stage, I am not inclined to entertain this writ petition at the instance of the petitioner. The writ petition is therefore liable to be dismissed as being devoid of merits.

25. For all the above reasons, the order impugned in this writ petition is upheld. The writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

rsh

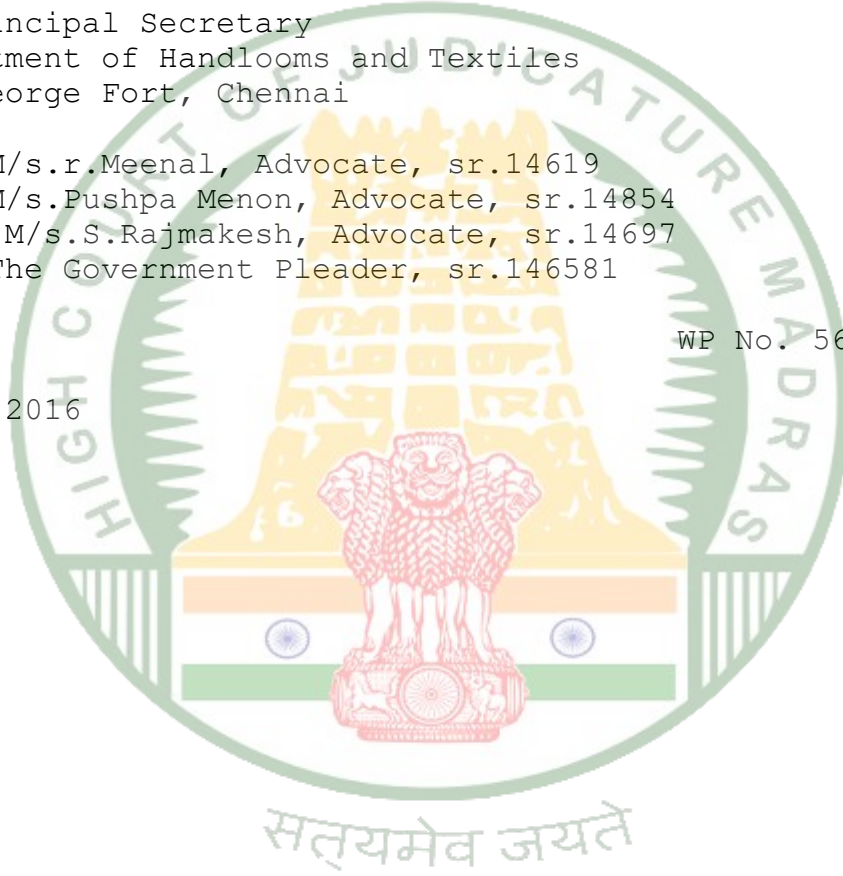
To

1. The Director of Handlooms and Textiles
Department of Handlooms and Textiles
Kuralagam, II Floor
Chennai - 600 108
2. Tender Committee/Joint Director (Uniforms)
rep. by its Members
Kuralagam, II Floor
Chennai - 600 108
3. The Principal Secretary
Department of Handlooms and Textiles
St. George Fort, Chennai

+1 cc to M/s.r.Meenal, Advocate, sr.14619
+1 cc to M/s.Pushpa Menon, Advocate, sr.14854
+2 ccs to M/s.S.Rajmakesh, Advocate, sr.14697
+1 cc to The Government Pleader, sr.146581

WP No. 5648 of 2016

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kra 11.03.2016



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