

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2017

CORAM

THE HON'BLE Mr. JUSTICE M.DURAI SWAMY

W.P.No.13613 of 2017 &
W.M.P.No.14759 of 2017

M/s.A.S.K.Earth Moovers
New No. 79 Old No. 17 Jaganathan Street
Agaram Chennai 600 082
Rep. by Proprietor
A.Sasi Kumar

... Petitioner

v.

Divisional Railway Manager
Chennai Division (Mechanical)
Southern Railway
Chennai 600 003

... Respondent

Petition filed under Article 226 of The Constitution of India praying to issue a writ of Certiorari, calling for the records made in the impugned Tender Notice No.M-M-Coach clng 130 Coaches, dated 26.04.2017, issued by the respondent namely (a) the total contract amount received during the last three financial years and in the current financial year should be a minimum of 150% of the advertised tender value and (b) the tenderer should have in the last 3 financial year and the current financial year upto to date of tender opening received

payment of at least 35% of advertised tender value on successful completion of one single work as in definition of similar single work. OR should have received till the date of tender opening payment of at least 35% of above said tender value against uninterrupted and satisfactory execution of an on-going cleaning service contract as in the definition of similar work, quash the conditions as illegal and invalid.

For Petitioner : Mr.S.Udhayakumar

For Respondent : Mr.P.T.Ramkumar
Standing Counsel

ORDER

Heard Mr.S.Udhayakumar, learned counsel appearing for the petitioner and ;Mr.P.T.Ramkumar, learned Standing Counsel appearing for the respondent.

2. The petitioner has filed the above Writ Petition to issue a writ of Certiorari to call for the records made in the impugned Tender Notice dated 26.04.2017, issued by the respondent and to quash the same.

3. By the tender notification dated 26.04.2017, the respondent, called for the tender for interior cleaning, exterior washing and watering of 130 primary maintenance coaches/day at BBQ coach maintenance depot for a period of two years. The petitioner, who has not participated in the tender, challenged the conditions of the tender, viz.,

"(a) the total contract amount received during the last three financial years and in the current financial year should be a minimum of 150% of the advertised tender value and

(b) the tenderer should have in the last 3 financial years and the current financial year upto to date of tender opening received payment of at least 35% of advertised tender value on successful completion of one single work as in definition of similar single work or should have received till the date of tender opening payment of atleast 35% of the above said tender value against uninterrupted and satisfactory execution of an on-going cleaning service contract as in the definition of similar work."

4. According to the petitioner, the condition imposed in the tender is onerous and the tender conditions would affect an ordinary citizen, since they are not in a position to satisfy the illegal conditions.

Further, the petitioner contended that only to accommodate the interested parties, fresh tender has been floated for the same work by the respondent.

5. The respondent filed their counter, wherein, they have stated that they have received four bids and the tender was opened on 30.05.2017. However, the same has not yet been finalized, in view of the order passed by this court on 25.05.2017. In the counter, the respondent has stated that the conditions and the eligibility criteria mentioned in the tender document cannot be termed as onerous and it was incorporated only to accommodate the interested parties. Further, the respondent contended that the contention of the petitioner is liable to be rejected solely on the ground that there were four bidders, who submitted their bids, for the tender and the said condition was not incorporated to suit only one interested party.

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6. The learned counsel appearing for the respondent submitted that the petitioner cannot question the conditions of the tender and he has no *locu standi* to file the writ petition for the reason that he has not participated in the tender. In support of his contention, the learned

counsel relied upon the following judgments:-

(i) **2016 Writ Law Reporter 704 [M/s.C.S.Traders v. The Managing Director Tamil Nadu, Civil Supplies Corporation]**, wherein, this court held as follows:-

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

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

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

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

15. To get over this position, it was argued on behalf of said Petitioner that he had enlisted himself after publication of the first tender notice and immediately thereafter challenged the terms and conditions of the first tender notice which are parameteria with the 2nd tender notice. In other words, the basis of challenge is common in respect of both the tender notices. We are not impressed with this submission. So long as the Petitioner is not participating in the tender process, it cannot be heard to question the validity of the tender process in question. "In the case of M/s.A.M.Yusuf vs. Mumbai Municipal Corporation and others in W.P.(Lodging).No.2666 of 2008, dated 11.12.2008, it has been held by the Bombay High Court as follows:-

13. Another important facet which requires examination by the Court is the conduct of the Petitioner. The Petitioner claims to have purchased the tender document in response to the notice dated 20th October, 2008. However, till 11th November, 2008, the petitioner did not submit the tender documents. Vide Corrigendum dated 11th

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

14. The doctrine of Locus Standi is well established in administrative law, law of contract and other allied

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

15. Examined from the view of public interest, we see no infirmity. The Corporation has admitted to protect the larger interest by raising EMD deposit. The Petitioner having opted of his own accord not to participate in the tender process can hardly be permitted to challenge the said process now at this stage. It is expected of every vigilant litigant or whose rights are effected to approach the Court at an appropriate time. Firstly, there is no indefeasible right vested in the Applicant and secondly, even if right of participation/ consideration was available to the Petitioner, the Petitioner has voluntarily given up such right by his conduct. No reason whatsoever has been stated as to why the Applicant did not participate in the tender process or raise protest at an appropriate stage. Despite the fact that the concept of locus standi has since undergone a substantial change, still the basic rule that the

person aggrieved or a person directly affected is the person who has right to invoke jurisdiction of the Court under [Article 226](#) of the Constitution holds good. The impugned action normally should produce a change in the Petitioner's legal right and more particularly adversely. We have already discussed that the variation effected by Corrigendum dated 11th November, 2008 has no way prejudicially effected any of the applicants and it provided a fair and equal opportunity to the Applicants to participate in the tender process. The Petitioner having lost that opportunity of his own accord can hardly be permitted to raise a grievance now.

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

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

(ii) **2016(1) CWC 350 [Haritha Constructions and Logistics v. The Block Development Officer, Panchayat Union, Radhapuram, Tirunelveli District]**, wherein, this court held that the petitioner having failed to furnish documents and submit tender forms cannot find fault with the authority.

(iii) **2016(2) CTC 402 [Divya Impex v. State of Tamil Nadu, Rep. by Secretary to Government, Home, Prohibition and Excise Department, Secretariat, Chennai]**, wherein, this court held as follows:-

"19. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. If the respondents 1 & 2 act reasonably, fairly and in public interest in awarding the contract, the interference by the Court is very restrictive since no person can claim a fundamental right to carry on business with the Government. A Court before interfering in tender or contractual matters in exercise of power under judicial review, should satisfy itself whether the process adopted or decision made by the Authority is malafide or intended to favour some one or whether the process adopted or decision made is so arbitrary

or irrational that the Court can say that the decision is such that no responsible authority action reasonably and in accordance with relevant law could have reached and whether the public interest is affected. If the answer to these questions are in the negative, then there should be no interference under [Article 226](#) of the Constitution of India.

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that in the judgment reported in **2016(2) CTC 402 (cited supra)** this court, after considering various judgments of the Apex court and this court, has come to the conclusion that the conditions of the tender cannot be questioned by the bidder and it is for the authority to decide the terms, conditions and pre-qualification of the tenders. The petitioner cannot question the same unless the conditions made by the authority is *mala fide* or intended to favour some one or whether the process adopted or decision made are arbitrary or unreasonable.

8. In the case on hand, the conditions imposed by the respondent

shall not come within the said categories.

9. In these circumstances, the writ petition filed by the petitioner questioning the conditions of the tender is liable to be rejected. That apart, when the petitioner has not submitted his tender and participated in the tender process, in view of the judgment reported in **2016 Writ Law Reporter 704 (cited supra)** the petitioner has no *locus standi* to challenge the impugned notification.

10. The judgments relied upon by the learned counsel for the respondents squarely applies to the facts and circumstances of the present case.

11. For the reasons stated above, the writ petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

26.07.2017

Index : Yes/No
Rj

To
The Divisional Railway Manager
Chennai Division (Mechanical)

Southern Railway
Chennai 600 003

M.DURAISWAMY, J.

Rj



W.P.No.13613 of 2017 &
W.M.P.No.14759 of 2017

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