IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment 21.03.2017	Date of pronouncing Judgment 27.04.2017

CORAM:

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

W.P.No.1414 of 2017
and
W.M.P.Nos.1351, 1352 and 4595 of 2017

K.C.Ayyasami (M.No.1017) .. Petitioner

Versus

1. The District Registrar,
Cooperative Societies (Fisheries)
DMS Complex
Teynampet
Chennai - 600 006.

2. The Commissioner of Fisheries
DMS Complex
Teynampet
Chennai - 600 006.

3. Assistant Director of Fisheries
K.K.98 - Mettur Dam Fishermen
Cooperative Marketing Society Limited
Mettur Dam.

4. K.K.98 - Mettur Dam Fishermen
Cooperative Marketing Society Limited
represented by its President
opposite to Mettur Dam Park
Kolathur Road
Mettur Dam - 636 401.

5. M.Chinnakannan .. Respondents

This Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the second respondent relating to his order Na.Ka.6642/D1/2015 dated 21.11.2016 and the consequential tender notice dated 05.01.2017 published in Daily Thanthi by the 4th respondent, quash the same and direct the respondents to call for a fresh tender with the conditions prevailing in earlier years.

For Petitioner : Mrs.R.Meenal
For Respondents 1 to 4 : Mr.S.T.S.Moorthy
Additional Advocate General
assisted by
Mr.V.Selvaraj
Additional Government Pleader

For Respondent - 5 : Mr.P.Wilson
Senior Counsel
for
Mr.P.Dhamodaran

O R D E R

This Writ Petition is filed praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the second respondent relating to his order Na.Ka.6642/D1/2015 dated 21.11.2016 and the consequential tender notice dated 05.01.2017 published in "Daily Thanthi" by the 4th respondent, quash the same and direct the respondents to call for a fresh tender with the conditions prevailing in earlier years.

2. According to the learned counsel for the petitioner, the petitioner is a fisherman and one of the Executive Committee member of the fourth respondent Cooperative society. The members of the fourth respondent Cooperative society are permitted to catch fish in the specific stretch of river Cauvery from Hogenekkal to Mettur Dam. The fourth respondent society is arranging for marketing the fish caught from the river Cauvery and brought by the members, who have been issued with licence to catch fish in the Mettur Reservoir by the Fisheries Department. The fishes brought are categorised into five groups. The fourth respondent society fixed the rate per kilogram for each group of fish as upset price. Based on the representation, dated 08.06.2016, of the fifth respondent, who is the President of the fourth respondent society, and also on the decision taken in the General Body Meeting held on 26.08.2016, the second respondent has passed an order dated 21.11.2016 directing the fourth respondent society to invite tenders for the sale of the fish, by including the following new tender conditions.

> "36. The tenderer must have prior experience on fish sales for not less than 3 years. The fish sales experience means that he/she should produce certificate of either prior tenderer of fish marketing societies or fishing from Government Reservoirs or tanks or registered fish merchants.

> 37. The tenderer should submit relevant documents with Income Tax Return (ITR) Certificate for the last three years.
>
> 39. Every tenderer should enclose latest solvency certificate obtained after 25.01.2016 for Rupees One Crore with the application form."

The aforesaid order dated 21.11.2016 passed by the second respondent was placed before the Board meeting of the society, which was held on 15.12.2016 and a resolution was passed by the majority of the Board members fixing the price of each group of fish by increasing 10% of the previous year and to call for the tenders as directed by the second respondent. The petitioner and other two members have strong objection for the incorporation of aforesaid new conditions in the tender notice, on the ground that, if the new conditions will be incorporated, there will be restriction in the competition among the tenderers and if there are several bidders/tenderers, they will quote higher price for the fish and if there is only one bidder or if there are few bidders, the bid price for the fish will be the minimum price stipulated in the tender and therefore, the petitioner will loose huge amount throughout the year, as the fish will have to be sold to the successful bidder and in open market through the Society, for the amount quoted at the time of tender. However, the fourth respondent published tender notice, dated 05.01.2017, by including the aforesaid new tender conditions. Therefore, the petitioner has filed the present Writ Petition before this Court challenging the inclusion of aforesaid new tender conditions, in the present tender notice.

3. According to the learned Additional Advocate General appearing on behalf of the respondents 1 to 4, average sale of the fish to the society by the tenderers range from Rs.50,000/- to Rs.1,00,000/- per day with annual sale of more than Rs.2 crores. Weekly bill is raised for the fish delivered and the tenderer should make payment on every Monday and Thursday. Earlier, the small fish merchants, who were awarded contracts, could not make regular payments to the society, indulged in unlawful practice of direct purchase of fish from the members at lower rates. Therefore, if there is any violation of tender conditions, it is difficult to take action against those licenceholders by the society. It has also been submitted by the respondents that on earlier occasions, some tenderers were default in payment of amount to the society and it is very difficult for the society to recover the amount with interest from the above tenderers, and after more than several years of legal battles, the amount is recovered without interest. Further it is submitted by the respondent society that the small fish traders were not in sound financial position for purchasing

and selling the fish for annual turn over of more than Two Crores Rupees. Therefore, the amendment of the tender conditions is necessary to safeguard the interest of the respondent society. Further, the contention of the respondents 1 to 4 is that the terms of tender are within the realm of contract and therefore, this Court cannot interfere in the tender conditions except only if there is any malafide, illegal, arbitrary and discriminatory, Wednesbury principle of reasonableness and in the absence of said allegations, the Writ Petition may be dismissed.

4. The learned Additional Advocate General would also submit that the Writ Petition is not maintainable against the fourth respondent society, as no Writ Petition lie against the cooperative society, in the light of the decision of this Court reported in "2006 (4) CTC 689 (Marappan ..vs.. The Deputy Registrar of Cooperative Societies')". Therefore, the Writ Petition is liable to the dismissed.

5. Further, it is also submitted by the learned Additional Advocate General that during trading account for the year 2012-13, the sale proceeds out of fishing comes to Rs.2,60,74,416.13 and for the year 2013-14, the sale proceeds comes to around Rs.2,00,10,118/- and for the year 2014-15 the sale proceeds comes to around Rs.2,14,04,473/- and in the previous year, tender notice was issued on 04.02.2015, wherein in clause - 5, some conditions were incorporated by the Department, viz., EMD of Rs.2,47,465, solvent certificate for not less than Rs.4,94,93,000/- and also an Upfront amount of Rs.1,85,59,875/-. But due to some objection, the said tender was not conducted.

6. The learned Additional Advocate General would further submit that the new conditions have been incorporated in the tender to safeguard the interest of the members of the society. The said conditions imposed by the respondents would not prejudice the petitioner. On contrary, by including the above new conditions and on publishing the tender notice, more number of persons, who fulfil the aforesaid conditions, are eligible to participate in the tender proceedings. A decision was taken in the General Body Meeting held on 26.08.2016, regarding the sale of fish. On receipt of the said proposal, the second respondent has convened the Board meeting. In the aforesaid meeting, the authorities concerned and the fifth respondent were represented and submitted their statements before the second respondent and the second respondent, after considering the representation submitted by the President of the fourth respondent society and also the decision taken in the Board meeting, decided to include the said conditions in the tender notice in order to ensure

sound financial status of the tenderers and their experience in the fishing trade and also to safeguard the interest of the fourth respondent society and its members for getting their payment, on sale of the fish to the society.

7. The learned Additional Advocate General would further submit that the imposition of the aforesaid conditions has not been challenged by any of the aggrieved persons, viz., tenderers. As the cooperative society is governed by the bylaws of the society, the petitioner, being the member of the society, cannot have any independent right to challenge the aforesaid conditions before this Court. Moreover, the petitioner has not stated as to how, he is personally affected, on imposing new tender conditions. Hence the petitioner has no locus standi to file this Writ Petition.

8. The learned Senior Counsel appearing on behalf of the fifth respondent, after reiterating the above submissions made by the learned Additional Advocate General, would further submit that the fifth respondent is the President of the society and he made a representation on 08.06.2016 requesting the second respondent not to take away the fishing right of the members of the society and not to give fishing rights to private persons as the G.O.Ms.No.1635 Animal Husbandry and Fisheries Department dated 25.09.2015 is not applicable to the society. Thereafter, a decision was taken in the General Body Meeting held on 26.08.2016 with regard to the issue of sale of fish through the tender system and a resolution was passed to request the Deputy Director (Fisheries), Dharmapuri, through the Assistant Director (Fisheries) to follow the tender system, for sale of fish. Since the representation of the President / fifth respondent dated 08.06.2016 was not considered, he has filed W.P.No.32187 of 2016. By order dated 15.09.2016, the aforesaid Writ Petition was disposed of with a direction to the second respondent herein (first respondent in W.P.No.32187 of 2016) to consider the aforesaid representation dated 08.06.2016 and pass orders on merits and in accordance with law. Pursuant to the order passed by this Court, the second respondent herein had conducted enquiry on the representation of the fifth respondent dated 08.06.2016. The Assistant Director (Fisheries), Mettur Dam, the Deputy Director (Fisheries), Dharmapuri and the fifth respondent have attended the aforesaid enquiry and their statements were obtained by the second respondent herein. After considering the representation made by the fifth respondent and the statements made by the authorities, the second respondent has passed an order dated 21.11.2016 to invite tenders for the sale of the fish to be caught by the members by increasing the price by 10% every year, by incorporating the aforesaid tender conditions. Therefore, there is no arbitrariness, illegality or malafide in

the action of the second respondent and the said action is only for the welfare of the members of the society and in the interest of the society and therefore, this Court cannot interfere in the order of the second respondent dated 21.11.2016 and the consequential tender notice dated 05.01.2017 by the fourth respondent, by including the new tender conditions and he prays that the Writ Petition may be dismissed.

9. Heard the learned Senior Counsel appearing on behalf of the petitioner as well as the learned Additional Advocate General appearing on behalf of the respondents 1 to 4 and the learned Senior Counsel appearing on behalf of the fifth respondent and perused the materials available on record.

10. The points for consideration in this Writ Petition are :-

(i) Whether the Writ Petition is maintainable or not ?

(ii) Whether the order of the second respondent dated 21.11.2016 to include new tender conditions and the consequential tender notice dated 05.01.2017 by the fourth respondent are arbitrary, illegal, or discriminatory ?

(iii) Whether the terms/conditions of the tender are open to judicial scrutiny ?

(iv) Whether the petitioner is an aggrieved person to file this Writ Petition ?

11. Point No.1:

According to the learned Senior Counsel appearing for the petitioner, admittedly, the petitioner is the member of the fourth respondent Cooperative society and also one of the seven members of the Executive Committee of the society. The learned Senior Counsel for the petitioner would submit that the petitioner had filed a petition under Section 90 of the Tamil Nadu Cooperative Societies Act, 1983, before the second respondent, challenging the condition Nos.16(a), 36, 37, 39 stipulated in the tender notice dated 05.01.2017 issued by the fourth respondent society for the year 2016 - 2017. The second respondent, after examining the prayers in the aforesaid petition, decided that the issue involved in the petition would not attract under Section 90 of the Tamil Nadu Cooperative Societies Act, 1983 for the reason that the tender conditions questioned in the petition were incorporated pursuant to the proceedings dated 08.12.2016 passed by the Additional Director of Fisheries, Mettur (third respondent herein), based on the communication dated 21.11.2016 of the Commissioner of Fisheries (second respondent herein). Therefore, according to the learned counsel for the petitioner, the present Writ Petition challenging the aforesaid conditions, viz., condition Nos.16(a), 36, 37, 39 stipulated in the tender notice dated 05.01.2017, is maintainable.

12. The learned Senior Counsel appearing on behalf of the fifth respondents has objected the maintainability of the Writ Petition stating that the petitioner has remedy under Section 153 of the Cooperative Societies Act, 1983 and no Writ Petition lie against the cooperative society, in the light of the Full Bench decision of this Court in ''Marappan ..vs.. The Deputy Registrar of Cooperative Societies'' reported in 2006 (4) CTC 689.

13. The learned Additional Advocate General appearing for the respondents 1 to 4 as well as the learned Senior Counsel appearing for the fifth respondent would admit that the petition filed by the petitioner under Section 90 of the Tamil Nadu Cooperative Societies Act, 1983, has been rejected by the second respondent stating that the said conditions imposed by the fourth respondent society is pursuant to the proceedings dated 08.12.2016 passed by the Additional Director of Fisheries, Mettur (third respondent herein), based on the communication dated 21.11.2016 of the Commissioner of Fisheries (second respondent herein). The said communication was sent by the second respondent, after considering the representation made by the fifth respondent and the resolution passed by the Board and also the statements made by the authorities to include the new conditions, for the welfare of the members of the society and in the interest of the society. Therefore, in the light of the aforesaid orders passed by the second and third respondents, the Writ Petition is not maintainable before this Court.

14. However, during the course of the argument, the learned Additional Advocate General appearing for the respondents 1 to 4 as well as the learned Senior Counsel appearing for the fifth respondent would concede that the Writ Petition is maintainable before this Court. Therefore, this point is answered in favour of the petitioner.

15. Point Nos.2 & 3:

The next points to be decided is whether the order of the second respondent dated 21.11.2016 to include new tender conditions and the consequential tender notice dated 05.01.2017 by the fourth respondent are arbitrary, illegal, or discriminatory ? and Whether the terms/conditions of the tender are open to judicial scrutiny ?

16. According to the petitioner, he is a fisherman and member of the fourth respondent Cooperative society and also one

of the seven members of the Executive Committee of the society. The members of the fourth respondent Cooperative society are permitted to fish in the specific stretch of the Mettur Reservoir. The fish caught from the river Cauvery has to be handed over to the fourth respondent society. The fourth respondent society is arranging for marketing the fish caught and brought by the members, who have been issued with licence to catch fish in the Mettur Reservoir by the Fisheries Department by inviting tenders from the bonafide fish merchants.

17. The fifth respondent / President of the society made a representation on 08.06.2016 requesting the second respondent not to take away the fishing right of the members of the society and not to give fishing rights to private persons. However, in the General Body Meeting held on 26.08.2016 with regard to the issue of sale of fish through the tender system, a resolution was passed to request the Deputy Director (Fisheries), Dharmapuri, through the Assistant Director (Fisheries) to follow the tender system, for sale of fish. Pursuant to the order passed by this Court in W.P.No.32187 of 2016 dated 15.09.2016 directing the second respondent to consider the representation of the fifth respondent dated 08.06.2016, the second respondent had conducted enquiry and the Assistant Director (Fisheries), Mettur Dam, the Deputy Director (Fisheries), Dharmapuri and the fifth respondent have attended the enquiry and thereafter, based on the representation made by the fifth respondent and also the suggestions/statements made by the authorities, the second respondent has passed the impugned order dated 21.11.2016 and the same was placed before the Board Meeting held on 15.12.2016 and a resolution was passed to invite tenders for the sale of the fish to be caught by the members by increasing the price by 10% every year, with the aforesaid new tender conditions. The petitioner also attended the said meeting, but walked away without signing the minute book, after the resolution was passed. The second respondent has incorporated the following conditions in the impugned tender notifications:-

> "16(a). Every successful tenderer must give below a Bank Guarantee from any one of the nationalized banks or any branch of Salem District Central Cooperative Bank and the same should be submitted within 3 days of tender confirmation in favour of the society.
>
> The bank guarantee shall be as follows:-

Successful Tenderes	Bank Guarantee amount (Rs.) In lakhs
For any one group	4.00
For any two groups	8.00

Successful Tenderes	Bank Guarantee amount (Rs.) In lakhs
For any three groups	12.00
For any four groups	16.00
For any five groups	20.00

> 36. The tenderer must have prior experience on fish sales for not less than 3 years. The fish sales experience means that he/she should produce certificate of either prior tenderer of fish marketing societies or fishing from Government Reservoirs or tanks or registered fish merchants.
>
> 37. The tenderer should submit relevant documents with Income Tax Return (ITR) Certificate for the last three years.
>
> 39. Every tenderer should enclose latest solvency certificate obtained after 25.01.2016 for Rupees One Crore with the application form.”

Pursuant to the order of the second respondent, the fourth respondent has published tender notice dated 05.01.2017 by including the aforesaid new conditions. Challenging the said condition Nos.16(a), 36, 37, 39 in the tender notice, the petitioner has preferred a petition under Section 90 of the Tamil Nadu Cooperative Societies Act, 1983, before the second respondent. The said petition has not been entertained by the second respondent under Section 90 of the Act. Therefore, challenging the aforesaid clauses, the petitioner is before this Court, by raising the grounds that the fifth respondent viz., the President of the society was not authorised neither by the General Body of the members nor by the Cooperative Department to give a representation drastically to change the tender conditions, thus violating clause-26 of the bylaws and under clause 42 (b) of the Tamil Nadu Cooperative Societies Act, only the Cooperative Department members are eligible to make arrangement for sale of the fish brought by the members and since the conditions imposed in the tender notice are the stringent conditions, it restricts the number of participants in the tender and therefore, the action of the fifth respondent is illegal, arbitrary and discriminatory.

18. It is seen from the common counter affidavit filed by the respondents 1 to 3 that on earlier occasions, the fourth

respondent society had experienced facing various problems in collecting the amounts from the merchants/successful bidders towards the fish caught by the members sold through the society. The problem faced by the fourth respondent society had been extracted in para-8 of the counter affidavit, which reads as follows:-

> "8. It is submitted that the 4th respondent society experienced various problems in collecting the amount due to the society from the fish merchants / successful bidder towards the fish catch of members sold through the society.
>
> (1) The fish merchant / successful bider who obtained the right to buy fish from the members for a year did not have the adequate financial resource for rotation of money and therefore delayed the payment of money to the society for disbursement to members.
>
> (2) The fish merchant/successful bidder who could not make payment to the society on the due dates indulged in unlawful practice of encouraging the members for direct sale of fish catch to them at lower rates by exploiting their poverty and urgent need of cash.
>
> (3) The fish merchant/succcessful bidder engaged sub agents for purchase of fish catch from the members, for want of funds.
>
> (4) When the fish merchant/successful bidder did not have the money to buy the fish catch from the members through the society, they rejected the fish catch of members for some reason or other to the disappointment of members of depriving their daily bread.
>
> (5) The society has to fight a long battle of legal war against the merchants/successful bidder in case of their default on the payment of money due to the society and the society had to suffer heavy financial loss.
>
> (6) In the event of cancellation of the award of right to buy fish catch for a year for violating the conditions prescribed in the order of award by the fish merchant/ successful bidder the society has to restart the process of tender cum public auction again leading to the suffering of poor members till such time of finalization of tenders. In one such case.Tmt.A.Sumathi filed a W.P.No.8319 of 2010 against the suspension of contract for the year 2010-11

for violations of tender agreement and obtained stay against the society.

(7) One M.H.Sheik Thasthageer, fish merchant who obtained the contract for the purchase of fish for the year 1986-87 defaulted in payment of Rs.7,61,342/87. The above amount could not be recovered from him despite the award passed for Rs.9,05,368/88 with interest. Even after a long struggle in the courts of law, the society was able to collect only the principal amount of Rs.7,61,342/57 in the year 2015. The society suffered a financial loss of Rs.43,76,331/55 towards the interest for the above amount for 29 years. In G.O (MS) No.55 Animal Husbandary, Diary & fisheries Department (Fish - 3) Department. The government have issued orders waiving the amount of Rs.43,76,331/55 due to the society."

In the light of the aforesaid problems in awarding the contract of right to purchase the fish caught through the tender, no public auction was held after 31.03.2016. In the year 2015, the second respondent, who is the competent authority, invited open tender cum auction to lease fishing right of Mettur Dam for continuous period of five years. In the aforesaid tender, as per the Government norms, the tendering authority has included the conditions, viz., EMD is of Rs.2,47,465 and solvent certificate to be obtained for not less than Rs.4,94,93,000/- and also an Upfront amount of Rs.1,85,59,875/- for participating in the tender. Since there are some objections from the members of the committee, the said tender process was not proceeded by the second respondent. Hence, at the instance of the General Body Meeting of the fourth respondent society held on 26.08.2016, resolution has been passed requesting to issue orders to the society to proceed with the sale of fish caught and brought by the members through the tender system. Therefore, the Writ Petition has been filed by the fifth respondent in W.P.No.32187 of 2016 before this Court for a Writ of Mandamus against the non-consideration of his representation dated 08.06.2016. Pursuant to the order dated 15.09.2016 passed by this Court in W.P.No.32187 of 2016 , the second respondent has conducted the meeting on the basis of the said representation dated 08.06.2016 and in the said meeting, the fifth respondent and the authorities concerned had made statements on 21.11.2016 requesting the second respondent to include the following three conditions in the tender notice, for one year period, in the interest of the society and its members:-

(i) Tenderer should furnish certificate of experience for three years either from fish

marketing societies (or) fishing from Government Reservoirs or lakes or registered fish merchants;
(ii) Tenderer should furnish I.T. Statements for the last three years;
(iii) Tenderer should furnish solvency certificate for Rs.1 crore.

19. The second respondent, after examining the statements made by the fifth respondent and the authorities concerned and also considering the financial condition of the society and the volume of the sale and in the interest of the society and its members and also after discussion with the third respondent, has passed the order in Na.Ka.No.6642/D1/2015 dated 21.11.2016, directing the fifth respondent and the Executive Committee of the fourth respondent society to prescribe new tender conditions and to invite tender cum public auction for the award of contract for buying fish caught from the members through the society for a period of one year, after including the aforesaid conditions. The aforesaid order has been passed by the second respondent, to safeguard the interest of the members and also for smooth functioning of the society. As per bylaw, 42(2)(a) of the society, the Board of Directors is competent to frame regulations to conduct business of the society in accordance with Act, Rules and bylaws. Under the bylaw 26(a), the General Body shall not interfere in the exercise of power by the Board of Directors.

20. It is useful to refer Section 181 of the Tamil Nadu Cooperative Societies Act, 1983, wherein, it is stated as follows:-

"181. Power of the Registrar to give directions in the public interest, etc.

(1) Where the Registrar is satisfied that in the public interest or for the purpose of securing proper implementation of Cooperative production and other development programmes approved or undertaken by the Government or to secure the proper management of the business of any class of registered Societies generally, or for preventing the affairs of any registered Society being conducted in a manner detrimental to the interests of the Members, or of the Depositors or the Creditors thereof, it is necessary to issue directions to any class of registered Societies generally or to any registered Society or registered Societies in particular, he may, by order issue directions to them from

time to time, and all registered Societies or the registered Society concerned, as the case may be, shall be bound to comply with such directions.

(2) The Registrar may, by order, modify or cancel any directions issued under sub-section (1) and in modifying or cancelling such directions may impose such conditions as he may deem fit. "

21. In view of the above said provisions of Act, the second respondent / Registrar of Society of Fisheries is competent to issue direction in the interest of fourth respondent society, which is bound to comply with his orders. Therefore, the contention of the petitioner that the said conditions imposed by the second respondent are illegal and arbitrary, cannot be countenanced.

22. It is also brought to the notice of this Court that pursuant to the order passed by the second respondent dated 21.11.2016, the aforesaid order directing to impose the additional conditions was placed before the Board of Meeting of the society held on 15.09.2016 and a resolution was passed by the majority of the Board members fixing the price of each group of fish by increasing 10% from previous year and to call for tenders.

23. The terms of the tender have been fixed by the competent authority, viz., second respondent. Subsequently, the said conditions were placed before the Board meeting of the society. Therefore, there is no illegality, arbitrary or discriminatory, in the said conditions passed by the second respondent. The petitioner has not specifically pointed out in the affidavit that the action of the second respondent imposing the said conditions would amount to malafide. In the absence of such allegations, this Court cannot interfere in the order of the second respondent and the consequential tender notice imposing the additional conditions.

24. This Court has considered the aforesaid conditions, in the light of the following decisions of the Hon'ble Supreme Court as well as this Court:-

(i) In the case of "Global Energy Limited and another .. vs.. Adani Exports Ltd., and others" reported in 2005 (4) SCC 435, the Hon'ble Apex Court has set aisde the order of the Division Bench stating that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. The relevant portion of the said judgment is extracted as follows:-

> 10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench. "

25. In yet another decision in "Association of Registration Plates ..vs.. Union of India and others" reported in 2005 (1) SCC 679, the Hon'ble Supreme Court has held that unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable. The relevant portions in paragraphs - 38, 41 and 42 of the judgment are extracted as follows:-

> 38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause underArticle 14 or encroach on fundamental rights of a class of intending tenderer under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the

impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep out of field indigenous manufacturers. It is explained that on the date of formulation of scheme in rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

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41. The fifteen years contract period has also been supported by Union of Indian and State authorities. We find great substance in the submissions made on the data supplied as a justification for awarding contract for long period of 15 years. There would be a huge investment required towards the infrastructure by the selected manufacturer and the major return would be expected in initial period of two years although he would be bound down to render his services for future vehicles on periodically for a long period. Looking to the huge investment required and the nature of the job which is most sophisticated requiring network and infrastructure, a long term contract, if thought viable and feasible, cannot be faulted by the court. If there are two alternatives available of giving a short-term or a long- term contract, it is not for the court to suggest that the short-term contract should be given. On the subject of business management, expertise is available with the State authorities. The policy has been chalked out and the tender conditions have been formulated after joint deliberations of authorities of the State and the intending manufacturers. Contract providing technical expertise, financial capability and experience qualifications with a long term of 15 years

would serve a dual purpose of attracting sound parties to stake their money in undertaking the job of supply and safeguard public interest by ensuring that for a long period the work of affixation of security plates would continue uninterrupted in fulfillment of the object of the scheme contained in rule 50. Our considered opinion, therefore, is that none of the impugned clauses in the tender conditions can be held to be arbitrary or discriminatory deserving its striking down as prayed for on behalf of the petitioners.

42. There is no material on record to infer any mala fide design on the part of the tendering authority to favour parties having foreign collaborations and keep out of fray indigenous manufacturers. The high security plates is a sophisticated article - new for manufacturer in India. It is being introduced for the first time under the scheme contained in rule 50 of the Rules and the Act. At the time of issuance of Notices of Tender, technical know-how for manufacture of plates and its further development was undoubtedly outside the country. Only a few concerns in India having collaboration with foreign parties possessed the expertise and were available in the market. The terms of the notice inviting tender were formulated after joint deliberations of Central and State Authorities and the available manufacturers in the field. The terms of the tender prescribing quantum of turnover of its business and business in plates with fixation of long term period of the contract are said to have been incorporated to ensure uninterrupted supply of plates to a large number of existing vehicles within a period of two years and new vehicles for a long period in the coming years. It is easy to allege but difficult to accept that terms of the Notices Inviting Tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because few manufacturers like the petitioners do not

qualify to submit tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.

26. In the other decision of the Hon'ble Supreme Court reported in 2004 (4) SCC 19 (Directorate of Education and others ..vs.. Educomp Datamatics Ltd., and others), it is held that the courts cannot strike down the terms of the tender prescribed by the government, because it feels that some other terms in the tender would have been fair, wiser or logical and the courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide. wherein in paragraph-12, which reads as follows:-

> 12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

27. In a decision reported in 2002 (2) SCC 619 (Air India Limited .vs. Cochin International Airport Limited and others), the Hon'ble Supreme Court has held that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not, and only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. The relevant paragraph is extracted below:-

> "7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and

agencies of the Government has been settled by the decision of this Court in R. D. Shetty v. International Airport Authority 1979 (3) SCC 488), Fertilizer Corporation Kamgar Union v. Union of India 1981 (1) SCC 568), Assistant Collector, Central Excise v. Dunlop India Ltd. 1985 (1) SCC 260 = 1984 (2) SCALE 819), Tata Cellular v. Union of India 1994 (6) SCC 651 = 1995 (1) Arb. LR 193), Ramniklal N. Bhutta v. State of Maharashtra 1997 (1) SCC 134 = 1996 (8) SCALE 417), and Raunaq International Ltd. v. I.V.R. Construction Ltd. 1999 (1) SCC 492 = 1999 (1) Arb. LR 431 (SC). The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. "

28. In the decision reported in 1994 (6) SCC 651 (Tata Cellular ..vs.. Union of India), the Hon'ble Supreme Court has laid down some principles, which are as follows:-

> 94. The principles deducible from the above are :
>
> (1) The modem 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 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 mala fides.

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

29. In short, from the aforesaid decisions, it is deduced that in the realm of contract, the Court cannot interfere, unless the Court is satisfied that the action of the authority is malafide, illegal, arbitrary and discriminatory. Insofar as the present case is concerned, this Court is of the view that the order of the second respondent and the consequential tender notice dated 05.01.2017 by the fourth respondent are passed to safeguard the interest of the society and its member and there is no arbitrariness, illegality or malafide or discriminatory in the impugned tender conditions as contended by the learned counsel for the petitioner. Hence, the impugned tender conditions cannot be open to judicial scrutiny, since they are in the realm of contract. Moreover, there is no material placed before this Court in support of the contentions made by the petitioner. Therefore, on merits, this Court cannot interfere with the order passed by the second respondent and the consequential tender notice incorporating new tender conditions, after placing the same before the Board of meetings of the fourth respondent society. Hence, this Court answers these points against the petitioner.

30. Point No.IV

The locus standi of the petitioner to file the Writ Petition has also been challenged by the second respondent stating that being the member of the society, the petitioner cannot file the Writ Petition against the society.

31. The petitioner is a member of the society and also one of the Executive Committee member of the society. The petitioner, being aggrieved by the new tender conditions, filed the Writ Petition against the respondent society, stating that third party interest will be involved and he would suffer with huge financial loss, if the tender is conducted as scheduled by the respondent society. The present petitioner is one of the Executive Committee member and attended the Board meeting, but walked away without signing the minutes book, after the resolution was passed. As per Section 35 of the Cooperative Societies Act, 1983, the petitioner is barred from participating in any tender or contract invited by the society. As per the bylaw, " a member of a registered society shall cease to be a member of the society if he undertakes directly or indirectly any business or industry or activity similar to that of the registered society or in consistent with, or prejudicial to, the work of the registered society. Hence, the petitioner cannot file this writ petition. He cannot represent all the members of

the society against the interest of society and its members. The petitioner filed the present Writ Petition on personal interest, without considering the general interest of the society. The petitioner has not placed any materials before this Court to show that the said conditions imposed in the tender notice would affect the interest of the society and its members. The said conditions have been incorporated in the tender notice to safeguard the interest of the society and for smooth functioning of the society, after examining the President of the society and the authorities of the Fisheries Department. Moreover, the petitioner has not furnished any details of alleged reduction of his income, and how he would be affected, if the said tender is finalised. On the contrary, one of the conditions placed before the General Body Meeting is to fix the upset price by increasing 10% every year and therefore, the amount to be quoted by the tenderer should be more than the upset price. The said notice has been published in newspaper and therefore, there would be more number of participants in the tender proceedings. Except the petitioner, no other members have challenged the said conditions. Eventhough, the petitioner has stated in the affidavit that the petitioner and other two members have strong objection for the incorporation of the aforesaid new conditions in the tender notice, the other members are not arrayed as parties in the writ petition. Hence, the above contentions of the petitioner cannot be accepted and the same are rejected. The petitioner has not produced any material to substantiate his allegation made in the affidavit and therefore, there is no case made out by the petitioner to interfere with the order of the respondents. In such circumstances, this Court is of the view that the petitioner is not an aggrieved person . The present Writ Petition is filed on assumption and presumption by contending that more number of persons could not participate in the tender and one or two persons will participate in the tender and the price will be very low. The Hon'ble Apex Court in a decision reported in (1962) Supp. 3 S.C.R.1, 6. "Calcutta Gas Company (Proprietary) Ltd. v. The State of West Bengal" has held that 'It is, therefore, clear that persons other than those claiming fundamental right can also approach the court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitle to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right .... The right that can be enforced under Art.226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified.' Therefore, being the member of the society, the petitioner is not an aggrieved person and hence, he has no locus standi to file this Writ Petition. Therefore, this point is also answered against the petitioner.

32. The Writ Petition is dismissed and there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

mra Sub Assistant Registrar

To

1. The District Registrar,
Cooperative Societies (Fisheries)
DMS Complex
Teynampet
Chennai - 600 006.

2. The Commissioner of Fisheries
DMS Complex
Teynampet
Chennai - 600 006.

3. Assistant Director of Fisheries
K.K.98 - Mettur Dam Fishermen
Cooperative Marketing Society Limited
Mettur Dam.

4. K.K.98 - Mettur Dam Fishermen
Cooperative Marketing Society Limited
represented by its President
opposite to Mettur Dam Park
Mettur Dam - 636 401.

+2cc to Ms.R.Meenal, Advocate, S.R.No.25564,26169
+1cc to Mr.V.Selvaraj, Advocate, S.R.No.25872
+1cc toMr.Damodaran, Advocate, S.R.No.25517

W.P.No.1414 of 2017
and
W.M.P.Nos.1351, 1352 and
4595 of 2017

KS(CO)
RS(22/05/2017)