

Reserved on : 27.07.2017

Delivered on : 11.08.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2017

CORAM

THE HON'BLE Mr. JUSTICE M.DURAI SWAMY

W.P.Nos.17261, 18987 & 18988 of 2017 and
W.M.P.Nos.18761, 20502 to 20505 of 2017

Sri Venkatram Spinners Pvt. Ltd.,
rep by its Managing Director,
having its Office at 109/1,
Koonamkulam Road,
Cholapuram - 626 139.

... Petitioner in W.P.No.17261/2017

T.Muruganantham

... Petitioner in W.P.Nos.18987 &
18988/2017

Vs.

1.State of Tamil Nadu
rep by the Principal Secretary,
Department of Handlooms and Textiles,
St.George Fort, Chennai.

2.The Director,
Department of Handlooms and Textiles,
Kuralagam, Second Floor,
Chennai - 600 108.

3.The Joint Director (Uniforms),
(Tender Inviting Authority),
Department of Handlooms and Textiles,
Kuralagam, Second Floor,
Chennai - 600 108.

... Respondents in all the W.Ps

W.P.No.17261 of 2017 filed under Article 226 of The Constitution of India praying to issue a writ of mandamus directing the respondents to consider the bid of the petitioner without insisting on the production of a certificate in line with minimum qualification Item No.5 and 6 of the tender document, Sl.No.:FDS-2018/DC/001 and consequently accept the Consent Certificate issued by the Pollution Control Board, Mumbai for compliance with Item No.5 and 6 minimum qualifications of the said tender document and such other orders as may be deemed fit and proper in the circumstances of the case. (Prayer amended as per order dated 27.07.2017 made in W.M.P.No.19302 of 2017 in W.P.No.17261 of 2017)

W.P.Nos.18987 of 2017 filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records of the 3rd respondent and quash the notice inviting tender bearing Sl.No.FDS-2018/DC/001 for the supply of 60SC dyed cotton warp yarn for production of Polycot Sarees and Polycot Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018.

W.P.No.18988 of 2017 filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records of the 3rd respondent and quash the notice inviting tender bearing Sl.No.FDS-2018/PTY/002 for the supply of polyester yarn for production of Polycot Sarees and Polycot Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018.

For Petitioner : W.P.No.17261 of 2017
Mr.P.S.Raman, Senior Counsel
for Ms.Pushpa Menon

W.P.Nos.18987 & 18788 of 2017
Mr.Ravi for M/s.Gupta & Ravi

For Respondents : Mr.R.Muthukumarasamy, Advocate General
assisted by
Mr.R.Rajeswaran,
Special Government Pleader
and
Mr.Arun Dhanapalan,
Government Advocate

COMMON ORDER

W.P.No.17261 of 2017 has been filed by the petitioner viz., Sri Venkatram Spinners Private Limited to issue a writ of mandamus directing the respondents to consider the bid of the petitioner without insisting on the production of a certificate in line with minimum qualification Item Nos.5 & 6 of the tender document, Sl.No.:FDS-2018/DC/001 and consequently accept the Consent Certificate issued by the Pollution Control Board, Mumbai for compliance with Item No.5 & 6 of the said tender document.

2.W.P.No.18987 of 2017 has been filed by T.Muruganantham to issue a writ of certiorari to call for the records of the 3rd respondent and quash the notice inviting tender bearing Sl.No.FDS-2018/DC/001 for the supply of 60SC dyed cotton warp yarn for production of Polycot Sarees and Polycot Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018.

3.W.P.No.18988 of 2017 filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records of the 3rd respondent and quash the notice inviting tender bearing Sl.No.FDS-2018/PTY/002 for the supply of polyester yarn for production of Polycot Sarees and Polycot Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018.

4.Since the issues involved in the above Writ Petitions are common, by consent, all the three Writ Petitions are disposed of by this common order.

5.The brief case of the petitioners necessary for the disposal of the Writ Petitions is as follows:

(i)The 3rd respondent had issued a tender notification, published in the Newspaper on 22.06.2017 for the supply of polyester yarn for production of Polycot Sarees and Polycot Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018. The last date for submission of bid was 07.07.2017 before 11.00 am.

(ii)According to the petitioners, under Rule 11 of the Tamil Nadu Transparency in Tenders Rules, 2000, the Tender Inviting Authority shall

have the notice inviting tender published in the Indian Trade Journal in all cases where the value of procurement exceeds Rs.50 crores. Admittedly, in the case on hand, the value of the procurement of dyed cotton yarn as well as the polyester yarn exceeds Rs.50 crores and consequently, the Tender Inviting Authority should have published the notice inviting tenders in Indian Trade Journal. The said provision has been incorporated so that the manufacturers and suppliers throughout the Country will have an opportunity to participate in the tender when the State procures materials of such large quantity exceeding Rs.50 crores.

(iii) In the case on hand, the notice inviting tender for purchase of dyed cotton yarn and polyester yarn was published only in the State Tender Bulletin and not in the Indian Trade Journal as mandated under Rule 11(1) of the Tamil Nadu Transparency in Tender Rules 2000. In such circumstances, the impugned notice inviting tenders for supply of dyed cotton yarn and polyester yarn is clearly vitiated and ought to be set aside.

(iv) Under Rule 20 of the Tender Rules 2000, the Tender Inviting Authority shall ensure that adequate time was provided for submission of the tenders and a minimum time was allowed between the date of publication of the notice inviting tenders in the relevant Tender Bulletin or

in the Newspapers, whichever is later and the last date for submission of the tenders. The minimum period for tenders more than Rs.2 crores in value shall be 30 days. The notice inviting tenders is in clear violation of Rule 20 of the Tender Rules 2000, in view of the fact that though the notice inviting tenders was published in the State Tender Bulletin on 22.06.2017, the last date for submission of the tender was only 07.07.2017, which is less than 30 days contemplated under Rule 20 of the Rules. Since the minimum time for submission of the tenders in excess of Rs.2 crores as stipulated under Rule 20 has been clearly violated, the two tenders issued by the 3rd respondent for supply of dyed cotton yarn and polyester yarn is clearly vitiated and ought to be set aside.

(v) The tender floated by the 3rd respondent is an All India Tender and the malafides of the respondents or the action of the respondents in introducing the said condition and the tender has been done deliberately in order to keep out other bidders and restrict the tender to a few bidders favoured by them in the State, which has been awarded repeatedly year after year.

(vi) The petitioner in W.P.No.17261 of 2017 has a Contract Agreement with a Company functioning in Mumbai for the purpose of dyeing the yarn.

The said Company viz., M/s.Esheetex has been functioning in Mumbai for several years. According to the petitioner, the concept of Zero Liquid Discharge exists only in the State of Tamil and in other States, more particularly Maharashtra, the level of effluence in the liquid discharge after the process is limited and allowed to be discharged at prescribed depth in the sea. Consent Certificates were given by the Pollution Control Board, if the concerned Industries limit their level of effluence to the prescribed limits, since they are discharging the same at great depths prescribed by the Pollution Control Board into the sea.

(vii)The tender prescribed several conditions as minimum qualifications for the bidders. As the State of Tamil Nadu is only enforcing the Zero Liquid Discharge condition for dyeing units, the Pollution Control Board of State of Tamil Nadu will be in a position to issue certificates for Zero Liquid Discharge criteria for the processing units functioning in the State. For this purpose, a condition has been imposed as Condition No.5 for obtaining Consent Order from the Pollution Control Board with validity in currency should be enclosed with the tender document in which dyer should be capable of dyeing 250MT of yarn per month or 10,00,000 litres of Zero Liquid Discharge (ZLD) quantity of trade effluent from the factory per day which is mandatory prequalification. Since the Consortium Company is

functioning at Mumbai, the Pollution Control Board of Maharashtra issued a Consent Certificate without a Clause with regard to Zero Liquid Discharge.

(viii) According to the petitioners, this Clause has been incorporated in the tender condition only to prevent the parties from other States participating in the tender. When the petitioners participated in the tender in the year 2013 for the supply of polyester yarn for production of Polycot Sarees and Dhoties, the said tender also contained an identical qualification Clause, however, the respondents did not give effect to the same while considering the tenders at that time. Therefore, according to the petitioners, the respondents have malafidely introduced the said condition and the tender has been done deliberately in order to keep out bidders and restrict the tender to as little as four bidders favoured by them in the State.

6. The brief case of the respondents is as follows:

(i) According to the respondents, in view of the order passed by this Court in W.P.No.27611 of 2016, the Zero Liquid Discharge, which forms part of Criteria No.5, which cannot be segregated and hence, the petitioners cannot raise the issue regarding Zero Liquid Discharge stipulated in tender conditions, which were already decided by this Court. As per the directions

of this Court, the tenders received on 07.07.2017 were opened by the Tender Acceptance Committee in the presence of the tenderers. The Tender Acceptance Committee formed Tender Scrutiny Committee to scrutinize the tender documents, supervise opening of tenders, to carry out the preliminary examination and detailed evaluation of the tenders received and to prepare an evaluation report for the consideration of the Tender Acceptance Committee. Therefore, all the 10 Technical Bids received were referred to the Scrutiny Committee for examination and evaluation of documents, besides inspection of the facilities.

(ii) As per the directions of this Court, bid of the petitioner has not been rejected and it is now under technical scrutiny of the Committee. As per the Budget announcement made by the Finance Minister for the year 2017-2018, Rs.490 crores was allocated for implementation of cost free distribution of Sarees and Dhoties Scheme. The minimum qualification set out in the tender schedule is meant for one and all bidders, who are willing to participate in the tender.

7. Heard Mr.P.S.Raman, learned Senior Counsel for the petitioner in W.P.No.17261 of 2017, Mr.Ravi, learned counsel for the petitioner in W.P.Nos.18987 & 18788 of 2017 and Mr.R.Muthukumarasamy, learned

Advocate General appearing for the respondents.

8.Mr.P.S.Raman, learned senior counsel appearing for the petitioner in W.P.No.17261 of 2017 submitted that the respondents have violated the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and Tenders Rules, 2000. The learned senior counsel submitted that as per Rule 11 of the Tamil Nadu Transparency in Tenders Rules, 2000, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of the procurement exceeds Rs.50 crores and G.O.Ms.No.307 Finance (Salaries) Department dated 01.11.2011, the guidelines to be followed while publishing advertisement in the Newspapers etc for the value of tender more than Rs.50 crores should be in Indian Trade Journal. The provisions of Rule 11 and G.O.Ms.No.307 dated 01.11.2011 is also supported by the provisions of Section 9(3) of the Act. Further, the learned senior counsel submitted that the respondents have also violated Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000 by not providing 30 days time for the submission of the tenders between the date of publication of notice inviting tenders and the last date for submission of tenders. Since the respondents have violated the provisions of the Act, the learned senior counsel submitted that the tender notification dated 22.06.2017 is liable to be quashed.

9. In support of his contentions, the learned senior counsel relied upon the following judgments:

(i) JT 1996 (8) 67 [ITC Bhadrachalam Paperboards & another Vs. Mandal Revenue Office, Andhra Pradesh & others] wherein the Hon'ble Supreme Court held as follows:

“...

The next question is whether the requirement of 'laying' before the Legislature is mandatory? Sub-section (2) of Section 11 of the Act requires that an order made under Section 11(1) shall be laid on the Table of the Legislative Assembly for the period prescribed therein and shall be subject to such modifications as may be made by the Legislature. The legislature is also entitled to annul the said order. This is one form of legislative control over subordinate legislation. Sri Sorabjee cited the decision of this Court in *M/s. Atlas Cycle Industries Ltd. & Ors. v. State of Haryana* [1979 (2) S.C.C. 196] holding that the requirement of 'laying', couched in the language akin to sub-section(2) of Section 11 - a case of 'simple laying' in contra-distinction to 'laying subject to negative resolution' and 'laying subject to affirmative resolution' - is not mandatory notwithstanding the use of the expression "shall" in the relevant provision. The Court was dealing with sub-section (6) of Section 3 of the Essential Commodities Act, 1955 which provides for laying the orders made under the Act before the appropriate Legislature, an

instance of 'simple laying' or 'laying without further procedure'. The said decision appears to be consistent with the authorities on the subject, both in India and in the United Kingdom, and is binding upon us. It is brought to our notice that as early as 1956, Subba Rao, C.J. had taken the same view in Andhra Pradesh High Court vide *D.K. Krishnan v. Secretary, Regional Transport Authority, Chittoor* [1956 A.P.129]. Accordingly, we hold that the requirement of 'laying' prescribed by sub-section (2) of Section 11 is not mandatory and an order of exemption under Section 11 cannot be said to be ineffective or unenforceable for the reason of 'non-laying' as required by Section 11(2) of the Act. Sri Sorabjee next contended that even if it is held that the publication in the Gazette is mandatory yet G.O.Ms. No. 201 can be treated as a representation and a promise and inasmuch as the appellant had acted upon such representation to his detriment, the government should not be allowed to go back upon such representation. It is submitted that by allowing the government to go back on such representation, the appellant will be prejudiced. Learned counsel also contended that where the government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. Counsel further submitted that allowing the government to go back upon its promise contained in

G.O.Ms.No.201 would virtually amount to allowing it to commit a legal fraud. For a proper appreciation of this contention, it is necessary to keep in mind the distinction between an administrative act and an act done under a statute. If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent Legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the Legislature of a State has the power to make laws [Article 162 of the Constitution]. The proposition urged by the learned counsel for the appellant

falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well-settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to the rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the government acts outside its authority, as in this case, it is difficult to say that it is acting within its ostensible authority. If so, it is also not permissible to invoke the principle enunciated by the Court of Appeal in *Wells & Ors. v. Minister of Housing & Local Government & Anr.* [1967 (2) All.E.R.1041].”

(ii) Un-reported judgment of the Karnataka High Court *dated 20.04.2012 made in Writ Appeal No.4066 of 2011 and 4739 of 2011 [Shimnit Utsch India Pvt. Ltd., A Company incorporated under the provisions of the Companies Act, 1956 having its registered office at 8th Floor, Regent Chambers, Nariman Point, Mumbai - 400 021 through Dhruv Patel, Marketing Manager, Shimnit Utsch India Pvt. Ltd. Vs. State of Karnataka and others]* wherein the Division Bench of Karnataka High

Court held as follows:

“...

22.The non-publication of the notification inviting tender in the Indian Trade Journal as required under Rule 10 of the KTPR Rules is fatal and vitiates the entire tender processing. The said lapse is made as one of the grounds for cancellation of tender vide Annexure-A.”

10.Mr.Ravi, learned counsel appearing for the petitioner in W.P.Nos.18987 & 18988 of 2017, reiterated the contentions raised by the learned senior counsel for the petitioner in W.P.No.17261 of 2017.

11.Countering the submissions made by the learned counsel for the petitioners, Mr.R.Muthukumarasamy, learned Advocate General submitted that the petitioner in W.P.No.17261 of 2017 is bound by the conditions of the tender and they cannot question the conditions stated in the tender schedule. The learned Advocate General further submitted that as per Rule 20 (2), the Tender Inviting Authority has obtained authorization from his superior for the reduction in time stipulated as per sub-rule(1) of Rule 20.

12. In support of his contentions, the learned Advocate General relied upon the following judgments:

(i)(1989) 4 Supreme Court Cases 671 [Owners and Parties interested in M.V. "Vali Pero" Vs. Fernando Lopez and others] wherein the Hon'ble Supreme Court held as follows:

"...

16. It is needless to burden our decision with the several well-known authorities cited at the Bar indicating the test to be applied to decide whether a provision is mandatory or directory. The real difficulty arises only in the application of the well settled principles. The essential requirement of Rule 4 is that the deposition of a witness examined on commission shall be taken down in writing read over, and, where necessary, translated to the witness in order that mistakes or omissions, if any, may be rectified or supplied. The mandate in Rule 4 to this extent must be complied strictly in order to ensure a correct record of the deposition. The further requirement of signature of Commissioner with the date of examination and deposition being left with the Commissioner to enable its production in court is to ensure its authenticity. The only remaining requirement in Rule 4 of the witness' signature on the deposition has relevance to the admission of the witness of its correctness. The signature of the witness is not a part of the deposition and apart from acknowledging the correctness of his deposition on the

deposition itself, it is not essential for any other purpose in this context. It is well-known that under the Code of Civil Procedure a deposition recorded in a Court, except that under Order 18, Rule 16 C.P.C., does not require the witness' signature on the deposition. It appears that witness' signature on the deposition recorded on commission is only required for court's assurance since the witness is not examined in court. Accordingly, it cannot be said reasonably that the omission of witness' signature on the deposition renders the deposition incomplete. If this be the true import of the witness' signature on the deposition recorded on commission, the deposition cannot be treated as incomplete, much less, invalid merely due to omission of witness' signature when correctness or authenticity of the deposition is undisputed."

(ii)(1988) 1 Supreme Court Cases 440 [Paradise Printers and others Vs. Union Territory of Chandigarh and others] wherein the Hon'ble Supreme Court held as follows:

"...

10. The next step in the argument was that the Estate officer ought to have allotted the sites upon the receipt of applications of the appellants. The reliance was placed and emphasis was put on the word "shall" used in sub-rule (3) of Rule 8. Sub-rule (3) of Rule 8 provides that when 10 per cent of the premium has been tendered, the Estate officer shall, subject to such directions as may be issued by the Chief

Administrator in that behalf, allot a site of the size applied for. We do not think that there is much force in this contention also. Generally the use of the word "shall" prima facie indicates that the particular provision is imperative. But that is not always so. The meaning to be given to a word depends upon the context in which it is used. The word takes the colour depending upon the context. We must ask what does the word mean in its context? We must examine why the Rule making authority has chosen that word. After examining the purpose and scope of the rule, we must give such meaning as to render the rule workable in a fair manner. We must give that meaning which would promote the purpose and object of the rule. When there is a choice of meanings, there is a presumption that one which produces an unjust or inconvenient result was not intended. Let us now take a brief look at Rule 8. If sub- rule (3) of Rule 8 is construed as mandatory, then every person who applies for a site with earnest money must be allotted a site. That means the administration must receive only equal number of applications as there are sites available for allotment. That would be impracticable. The administration cannot restrict the number of applications to be received when the public are notified. Secondly, the sites are required to be disposed by auction or allotment. If it is by allotment, it should be after considering all applications. The sites cannot be allotted by private arrangement. All the applications received must be considered and if there are more applications than the available sites, some reasonable procedure should be adopted

for consideration and elimination. In our opinion, the right of every applicant under sub-rule (3) of Rule 8 is only the right to have his application considered. The acceptance of application does not create a right for allotment of a site. The word "shall" used in sub-rule (3) must, therefore, be considered as not mandatory. The imperative meaning would defeat the purpose of the rule."

(iii)(1984) 2 Supreme Court Cases 486 [Dalchand Vs. Municipal Corporation, Bhopal and another] wherein the Hon'ble Supreme Court held as follows:

"...

One of the questions raised in this petition for special leave to appeal to this Court is whether the failure to supply a copy of the Report of the Public Analyst within the period of 10 days stipulated by Rule 9(j) of the Prevention of Food Adulteration Act, as it was in force at the relevant time-it may be noticed here that Rule 9(j) which was in force at the relevant time has since been omitted with effect from January 4, 1977 - was fatal to a prosecution under the Prevention of Food Adulteration Act. Was Rule 9(j) mandatory or directory? There are no ready tests or invariable formulae to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence

of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It is as well to realise that every prescription of a period within which an act must be done is not the prescription of a period of limitation with painful consequences if the act is not done within that period. Rule 9(j) of the Prevention of Food Adulteration Act, as it then stood, merely instructed the Food Inspector to send by Registered post copy of the Public Analyst's Report to the person from whom the sample was taken within 10 days of the receipt of the report. Quite obviously the period of 10 days was not a period of limitation within which an action was to be initiated or on the expiry of which a vested right accrued. The period of 10 days was prescribed with a view to

expedition and with the object of giving sufficient time to the person from whom the sample was taken to make such arrangements as he might like to challenge the report of the Public Analyst, for example, by making a request to the Magistrate to send the other sample to the Director of the Central Food Laboratory for analysis. Where the effect of non-compliance with the rule was such as to wholly deprive the right of the person to challenge the Public Analyst's Report by obtaining the report of the Director of the Central Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. Where no prejudice was caused there could be no cause for complaint. I am clearly of the view that Rule 9(j) of the Prevention of Food Adulteration Rules was directory and not mandatory. The decisions in *Public Prosecutor v. Murlidhar*, 1977 Crl LJ 1634 (AP) : 1977 Andh LT 34 : 1977 MLJ (Cri) 205 and *Bhola Nath v. State*, 1977 Crl LJ 154 (cal) : (1977) 1 FAC 38 to the extent that they hold that Rule 9(j) was mandatory are not good law. The petition is dismissed.”

(iv) Un-reported judgment of this Court ***dated 03.09.2010 made in W.P.No.5726 of 2010 [R.Ravichandran Vs. The Chairman-cum-Managing Director, Tamil Nadu State Marketing Corporation Limited CMDA Tower, IV Floor, Gandhi Irwin Bridge Road, Egmore, Chennai - 600 008]*** wherein this Court held as follows:

“...

10. It is well settled law that agreeing to the tender conditions and participated in the tender, the party cannot later challenge the conditions. If any condition in the tender document was unfavourable, or important covenant was omitted to be included, the petitioner should have printed out and raised his objection at the earliest point of time, or before submitting his tender. Otherwise the petitioner is estopped from challenging the same. The judgement of the Hon'ble Supreme Court in 2005(1) SCC 679 declares that unless the action of the tender authorities is found to be malicious and misuse of statutory power, the tender conditions are unassailable. In this case there is no such violation. The aforesaid said judgement is squarely applicable to the facts of the case. When the award contract is as per the tender document the same cannot be challenged by the unsuccessful bidder.”

(v)ILR 2003 Kar 2459 [A.V.Purushotam Vs. N.K.Nagaraj] wherein the Karnataka High Court held as follows:

“...

6.The Supreme Court in the case of SHARIF-UD-DIN v. ABDUL GANI LONE, AIR 1980 SC 303, dealing with the question whether a rule is mandatory or directory, has held as under:

"9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter, substantial compliance may be sufficient to achieve the object

regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of Courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification

to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that a failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specific consequence should not follow."

...

8. From the aforesaid proposition of law, it becomes clear that where the statute uses the word 'shall' while laying down a duty it is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of law is to be defeated by non-compliance with it, it has to be regarded as mandatory. A procedural rule ordinarily should not be construed as mandatory."

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(vi) AIR 2005 Pat 136 [Smt. Sunita Devi and others Vs. Abdes

Kumar Sinha alias Kamleshwari Pd. Sinha and others] wherein the Patna

High Court held as follows:

"...

15. However, with regard to the amended provision of Rule 1 of Order VIII of the Code, two expressions used therein, namely, 'shall' and 'not later than ninety days' have to be considered. It is a well settled principle of law that where 'May' and 'Shall' both are used in the same provision. It will be mandatory where 'Shall' is used and it will be directory where 'May' is used as has been made clear by Maxwell on Interpretation of Statute (12th Edition) at page 282. But even then the Courts can still ascertain the real intention of the Legislature as has been held by the Hon'ble Apex court in the case of *Govind Lal Chagga Lal Patel v. The Agriculture Produce Market Committee*, reported in AIR 1976 SC 263, which relied upon the following passage of Crawford on 'Statutory Construction' (Edn. 1940, Art. 261, Page 516);

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

13. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side and also the judgments relied upon by the learned counsel on either side, it is not in

dispute that the 3rd respondent had issued the tender notification published in the Newspaper on 22.06.2017 for the supply of polyester yarn for production of polycot Sarees and Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018. The last date for submission of bid was 11.00 am on 07.07.2017. Admittedly, the tender notification was published only in the Newspapers and in the State Tender Bulletin. As per the provisions of Section 9(3) of the Tamil Nadu Transparency in Tenders Act, 1998, the Tender Inviting Authority shall also publish the notice inviting tenders in Indian Trade Journal and in daily Newspapers having wide circulation depending upon the value of the procurement prescribed. As per Rule 11 (1) of the Tamil Nadu Transparency in Tenders Rules, 2000, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds Rs.50 crores. On 01.11.2011, a Government Order was also issued in G.O.Ms.No.307 Finance (Salaries) Department wherein while specifying the financial limits for advertising tender notice, the Government had framed guidelines that if the value of the tender is more than Rs.50 crores, the tender notice should be published in Indian Trade Journal. Therefore, as per Section 9(3) of the Act and Rule 11 (1) of the Rules and also G.O.Ms.No.307 dated 01.11.2011, if the value of the tender is more than Rs.50 crores, the tender notice should be published in the Indian Trade

Journal. Admittedly, the tender notification dated 22.06.2017 was not published in the Indian Trade Journal. The provisions of Section 9(3) and Rule 11(1) are mandatory and the said provisions cannot be given a go-by, by the authorities.

14.The Division Bench of the Karnataka High Court in the un-reported judgment made in Writ Appeal No.4066 of 2011 and 4739 of 2011 (cited supra) also held that non-publication of the notification inviting tender in the Indian Trade Journal, as required under Rule 10 of the Karnataka Transparency Public Procurement Act, 1999, is fatal and vitiates the entire tender processing. The ratio laid down in the said judgment squarely applies to the present case.

15.Since the tender notification has not been published as per the provisions of the Act, on this ground alone, the notification is liable to be quashed.

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16.Apart from this, the petitioner has contented that the 3rd respondent has not provided 30 days time for the submission of the tenders from the date of publication of the notice inviting tenders to the last date of submission of the tenders. In the case on hand, the notification was

published in the Newspapers on 22.06.2017 and the last date for submission of the tenders was 07.07.2017.

17.The learned Advocate General submitted that under sub-rule (2) of Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000, the 3rd respondent had obtained the written authorization for reducing the time limit from 30 days. The learned Advocate General also produced the note dated 19.06.2017 put up by the 3rd respondent to the 2nd respondent for reducing the minimum period from 30 days to 15 days.

18.On a perusal of the note dated 19.06.2017, the 2nd respondent, the Director, Department of Handlooms and Textiles has made an endorsement, which reads as follows:

“Based on the notes given by th JD (U) due to urgency we may go in for short tender. It was told that there was precedent in Pongal 2017, Pongal 2016 etc.

sd/-

19.06.2017”

19.On a reading of the endorsement made by the 2nd respondent, it is clear that inspite of the delay in calling for tender for the years 2016 and

2017, citing the delay in the said orders as precedence, the 2nd respondent had ordered for short tender, reducing the minimum time limit contemplated under Rule 20. Merely because in the previous years, the respondent had called for tender reducing the time limit as contemplated under Rule 20, that cannot be cited as a precedence for reducing the time limit from 30 days. There must be acceptable reasons given by the superior authority viz., the 2nd respondent for reducing the time limit to less than 30 days. The exercise cannot be done in a mechanical way and there must be application of mind and there must also be acceptable reasons for reducing the time limit from 30 days. When the Rules say that there must be 30 days time limit, it must be adhered to by the authorities, unless the superior authority gives sufficient reason for reducing the time as contemplated under Rule 20(2) of the Rules. The 2nd respondent has not given any reason for reducing the time limit from 30 days, except stating that in the previous years also, the time limit was reduced.

20. In these circumstances, the impugned tender notification dated 22.06.2017 are liable to be set aside. Accordingly, the same are set aside.

21. Since the tender notification dated 22.06.2017 are set aside, I do not find any reason to go into the merits of the Writ Petition in

W.P.No.17261 of 2017 in which Item Nos.5 & 6 of the tender conditions are challenged by the petitioner. The respondents are at liberty to call for fresh tender in accordance with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998.

22.In these circumstances, the Writ Petitions in W.P.Nos.18987 & 18988 of 2017 are allowed. The Writ Petition in W.P.No.17261 of 2017 is closed. No costs. Consequently, the connected miscellaneous petitions are closed.

Index : Yes/No
Internet : Yes
va

11.08.2017



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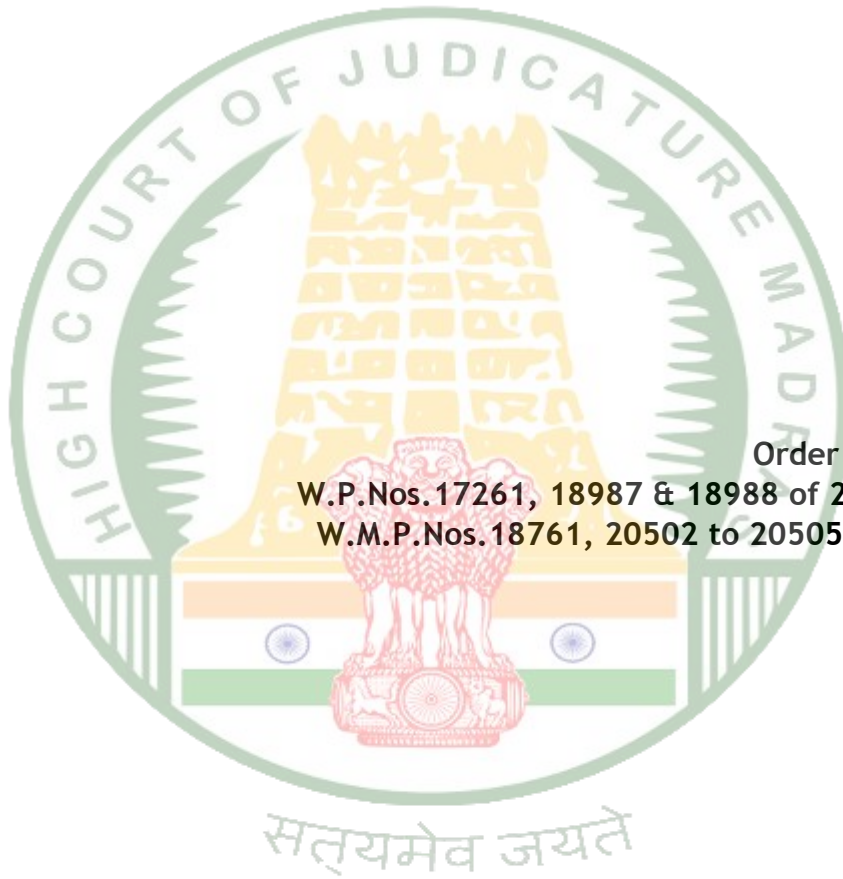
- 1.The Principal Secretary,
State of Tamil Nadu,
Department of Handlooms and Textiles,
St.George Fort, Chennai.
- 2.The Director,
Department of Handlooms and Textiles,
Kuralagam, Second Floor,
Chennai - 600 108.
- 3.The Joint Director (Uniforms),
(Tender Inviting Authority),
Department of Handlooms and Textiles,
Kuralagam, Second Floor,
Chennai - 600 108.



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M.DURAISWAMY, J.

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Order made in
W.P.Nos.17261, 18987 & 18988 of 2017 and
W.M.P.Nos.18761, 20502 to 20505 of 2017

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