

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	03.08.2017
Pronounced on	25.10.2017

DATED : 25.10.2017

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM**W.P.(MD)No.13597 of 2017****and****WMP(MD)No.10626 and 10627 of 2017**

Tmt.S.Poovammal

... Petitioner

Vs.

1. The Managing Director,
Tamil Nadu Civil Supplies Corporation,
No.12, Thambbu Samy Road,
Kilpauk,
Chennai-10.

2. The Regional Manager,
Tamil Nadu Civil Supplies Corporation,
No.9-F, St. Thomas Road,
Maharaja Nagar,
Tirunelveli-11.

3. M/s.L.Helan,
T.T.N. Transport,
Ave Mariya Building,
Valliyur,
Tirunelveli District.

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the entire records pertaining to the impugned order passed by the 2nd respondent vide his proceedings Ref.No.R.C.No.B2/3586/2017, dated 18.07.2017, quash the same and consequently direct the respondents 1 and 2 to open the price bid submitted by the petitioner in respect of Tirunelveli Region and thereafter finalise the lowest tenderer and award transport contract for the period 01.08.2017 to 30.06.2018.

For Petitioner

: Mr.Niranjana S.Kumar

For R1 and R2

: Mr.B.Pugalendhi

Additional Advocate General
assisted by Mr.G.Muthukannan
Government Advocate

For 3rd Respondent

: No appearance

ORDER

The petitioner has come up with the present writ petition challenging the order of the 2nd respondent, in and by which, the



technical bid of the petitioner was rejected and for a direction to the respondents 1 and 2 to open the price bid of the petitioner and to finalise the lowest tenderer and award transport contract for the period 01.08.2017 to 30.06.2018.

2. According to the petitioner, she is a transport contractor and she has executed several contracts from 1998 and she is also a Managing Partner of M/s.S.P. Agencies. The 2nd respondent has issued notification calling for tender for transportation of commodities, such as Paddy, Rice Oil-barrels, Gunnies etc. from Food Corporation of India [in short "FCI"] depots to the Civil Supplies Corporation [in short "CSC"] storage points. The petitioner as an individual contractor, submitted her tender in respect of Tirunelveli region. As per the tender schedule, Part I Technical bid was opened on 10.07.2017 at 11.30 a.m and Part II Price bid was scheduled to be opened on the same day at 4.30 p.m.

3. The petitioner would claim that the Tender Scrutiny Committee opened the technical bid of the petitioner and it was satisfied with the documents, but subsequently the price bid of the petitioner was not opened. Hence, she filed a writ petition in W.P.(MD)No.13194 of 2017 and after filing of the writ petition, the rejection of the technical bid was served on the petitioner. Hence, the present writ petition.

4. In the counter filed by the 2nd respondent, it is stated that the petitioner has not enclosed the experience certificate for the year 2016-2017 as per the tender condition and hence, the Scrutiny Committee was constrained to reject her application. Part II was opened on 11.07.2017 and the 3rd respondent was L1. It is further stated that as per section 11 of the Tender Transparency Act, appeal remedy is available to the petitioner and hence, the present writ petition is liable to be dismissed.

5. To decide the issue involved in this writ petition, it would be appropriate to extract the relevant conditions mentioned in the tender notification:-

"VII. Tenderer must have an average annual turnover of Rupees Two Crore for the preceding three Assessment years I.e., 2014-2015, 2015-2016 and 2016-2017 in transportation of food grains such as Rice, Sugar, Wheat, Paddy, Dhall etc., with the details of quantity & commodity transported should be produced duly certified by the concerned authority and also duly certified by the Chartered Accountant and produce Xerox copy of Income Tax return filed in the name of tenderer or firm with I.T Department office seal, & loss statement, Balance sheet, SARAL/Form No.2/2D duly attested by the Chartered Accountant (Annexure-III).

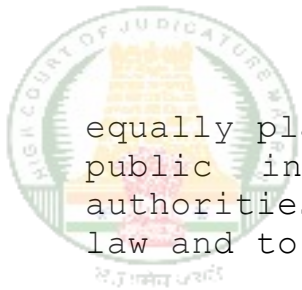


VIII. The tenderer must have experience in transportation of food grains such as Rice, Sugar, Wheat, Paddy, Dhall etc. for 3 years, the experience certificate must be produced containing the particulars of transport charges received, the commodity and quantity transported obtained from the PSU of State/Central Govt. The amount received for transportation of food grains such as Rice, Sugar, Wheat Paddy, Dhall etc. alone will be calculated in respect of turn over for preceding 3 years.

Tenderer must have experience in transportation of any one of the commodity food grains such as Rice, Sugar, Wheat, Paddy, Dhall etc., Certificate based on the transport charges received from the State/Central Government/PSU of State & Central Govt. in the commodity & quantity transported should be produced as turn over for preceding 3 years."

6. The petitioner has admitted in para 2 of the affidavit that as per the tender conditions, every tenderer has to enclose the experience certificate, turn over certificate, non-Hulling Agent Certificate and in order to participate in the tender, she requested the TNWHC to issue experience certificate, but it was not furnished to her. In ground No.(c) also, it is stated that the petitioner has enclosed a letter along with the tender documents explaining about the experience that she had experience in transportation for the period 2016-2017 in respect of Vellore region for TNWHC. Hence, it is an admitted fact that the petitioner had not furnished the experience certificate for 2016-2017, but she was aware that as per the tender conditions, she should have enclosed the experience certificate for the year 2016-2017.

7. However, now, it is contended by the learned counsel for the petitioner that as per clause 8 of the tender conditions, three years experience is sufficient and there is no necessity for production of the experience certificate for the preceding three years. The learned counsel has relied upon the decisions reported in **AIR 1979 SC 1628** [Ramana Dayaram Shetty vs. The International Authority of India and others], **AIR 2005 SC 4459** [Sangeeta Singh vs. Union of India and others], **(2007)8 SCC 1**, [Reliance Energy Limited vs. Maharashtra State Road Development Corporation Limited and others], **AIR 1977 SC 1496** [Radhakrishna Agarwal and others vs. State of Bihar and others], **(2009)3 MLJ 493(SC)**, [Nagarjuna Construction Company Limited vs. Andhra Pradesh and others], **2008(3) CTC 675** [Ion Exchange Waterleau Limited vs. The Commissioner of Madurai Municipal Corporation] for the proposition that the



equally placed competitors shall be allowed to bid, so that larger public interest could be sub-served and the administrative authorities have obligation to act fairly to ensure the rule of law and to prevent failure of justice.

8. The learned Additional Advocate General, by referring the counter, urged that in order to ensure uninterrupted transportation of supply of food-grains through Public Distribution System, besides pre-qualification, conditions and specifications were made in tender documents. The Tender Scrutiny Committee consisting of Financial Advisor and Chief Accounts Officer, General Manager (Marketing), General Manager (Commercial), Senior Manager (Quality Control) and concerned Regional Manager, while scrutinizing the tender documents found that the petitioner has not enclosed the experience certificate for the year 2016-2017 and hence, rejected her application. If any of the conditions in the qualification bid is not complied with, the price bid (Part II) will not be opened. It is further submitted that the terms of tender notification cannot be subjected to judicial review and the Government and their Undertakings must have a free hand in setting the terms of tender and only if they are arbitrary, they can be challenged before this court, by placing reliance on the following decisions:-

1(2012)8 SCC 216 (Michigan Rubber (India) Limited vs. State of Karnataka and others) ; and

2.(2017)4 SCC 318 (T.N. Generation and Distribution Corpn. Ltd. vs. CSEPMI-TRISHE Consortium)

9. I have the rival submissions made on either side and perused the materials available on record.

10. In the instant case, the tender conditions extracted above would reveal that every tenderer should produce the experience certificate for three preceding years. The petitioner having rightly understood the condition, took efforts to obtain certificate for 2016-2017 from TWHC, now cannot be permitted to take a different stand. Otherwise no necessity would have arisen for the petitioner to enclose a letter along with the tender documents about her experience for the period 2016-2017.

11. It is the case of the petitioner that she applied for experience certificate with the Tamil Nadu Warehouse Corporation much earlier, but the certificate was not yet issued. However, it is contended by the respondents that due to her poor performance, the Tamil Nadu Warehouse Corporation refused to give the experience certificate. Be that as it may, the fact remains that the experience certificate was not produced by the petitioner as per the tender condition.



12. It is settled law that the scope of judicial review in the writ petitions challenging tender notifications is very limited. The court has to see whether the authority followed the process properly, but the decision taken by the experts cannot be found fault with by the courts, unless the decision is arbitrary and against law.

13. There is no quarrel over the principles laid down in the decisions relied on by the learned counsel for the petitioner, but in my considered opinion, they have no application to the facts of this case.

14. In (2017) 4 SCC 318 [**Tamil Nadu Generation and Distribution Corporation Ltd vs. CSEPDITRISHE Consortium**], wherein the Hon'ble Apex court has held as follows:-

"37. Before parting with the case we are constrained to add something. We do so with immense pain. The respondent, before finalisation of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ court which directed for consideration of the representations. We are disposed to think that the High Court at that stage should have exercised caution. If the courts would exercise power of judicial review in such a manner it is most likely to cause confusion and also bring jeopardy in public interest. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently. But the present case is not one of such nature. Once the price bid was opened, a bidder could not have submitted representations on his own and seek a mandamus from the Court to take certain aspects into consideration. We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint."

15. In (2012) 8 SCC 216 [**Michigan Rubber (India) Ltd., v State of Karnataka**], the Hon'ble Apex court held as follows:-

"21. In Jagdish Mandal vs. State of Orissa (2007) 14 SCC 517, the following conclusion is relevant: (SCC p.531, para 22)

<https://hcservices.ecourts.gov.in/hcservices/>

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality,



unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tender and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:-

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached":

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving imposition of penal consequences on a tenderer/contractor or distribution of Stage largesse (allotment of sites/shops, grant of



licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

16. It is pertinent to note here that the consistent view of the Hon'ble Apex Court and this court is that unless the conditions in the tender notification are arbitrary, discriminatory, *mala fide* or actuated by bias, the eligibility criteria cannot be questioned in the writ petition.

17. In view of the above facts, I do not find fault with the rejection of the technical bid by the officials respondents. The petitioner has not made out any grounds to set aside the orders impugned in this writ petition.

18. In such view of the matter, the writ petition fails and accordingly, it is **dismissed**. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

/True copy/

Sub Assistant Registrar

To,

1. The Managing Director,
Tamil Nadu Civil Supplies Corporation,
No.12, Thambbu Samy Road,
Kilpauk,
Chennai-10.
2. The Regional Manager,
Tamil Nadu Civil Supplies Corporation,
No.9-F, St. Thomas Road,
Maharaja Nagar,
Tirunelveli-11.

+2cc to Mr.Niranjana S.Kumar, Advocate Sr.No.83825
+1cc to Mr.B.Pugalendhi, Advocate Sr.No.83964

ER

VB/SKN/RSK/SAR1/02/11/2017/7P/6C

W.P. (MD) No.13597 of 2017
25.10.2017