

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 24.04.2018	Delivered on 12.06.2018
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CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
W.A.Nos.137 and 138 of 2017

and

C.M.P.Nos.2348 and 2349 of 2017

The Tamil Nadu Police Housing Corporation Limited
Represented by its Superintending Engineer,
No.132, E.V.R.Salai (Poonamallee High Road),
Near G-3 Police Station,
Kilpauk, Chennai - 10.

... Appellant in both the Writ Appeals

-Vs.-

M/s.P & C Projects (P) Ltd.,
Represented by its Executive Director,
Mr.S.C.Keerthi Shankar,
P & C Garden, Nolambur,
Mogappair West, Chennai - 37.

... Respondent in both the Writ Appeals

PRAYER: The Writ Appeals in W.A.Nos.137 and 138 of 2017 filed
against the orders passed by this Court dated 20.12.2016 in
W.P.Nos.32289 and 32290 of 2016 respectively.

WP.No.32289 of 2016:Petition filed under Article 226 of the
Constitution of India praying for a Writ of Certiorarified
Mandamus to call for the records pertaining to the impugned
order / Email dated 30.08.2016 at 7.24PM pertaining to Tender
id. 2016 TNPHC - 62692- 1 Tender Reference NO. SE/ CC/ DB/ 08/
2016- 17 (851) issued by the respondent and the consequent order
of the Respondent vide Lr No. SE/ CC/ DB/ 838/ 2015 dated
06.09.2016 and quash the same and direct the Respondent to
consider the bid of the Petitioner by opening their financial
bid and evaluate and finalise the same based on the
qualifications and experience

WP.No.32290 of 2016:Petition filed under Article 226 of the
Constitution of India praying for a Writ of Certiorarified
Mandamus to call for the records pertaining to the impugned
order / Email dated 30.08.2016 at 7.28PM pertaining to Tender
id. 2016 TNPHC - 62689- 1 Tender Reference NO. SE/ CC/ DB/ 08/

2016- 17 (838) issued by the respondent and the consequent order of the Respondent vide Lr No. SE/ CC/ DB/ 851/ 2015 dated 06.09.2016 and quash the same and direct the Respondent to consider the bid of the Petitioner by opening their financial bid and evaluate and finalise the same based on the qualifications and experience

For Appellant : Mr.Vijayanarayan, Senior Counsel
[in W.A.No.137 of 2017]
Mr.N.C.Ramesh, Senior Counsel
[in W.A.No.138 of 2017]
for M/s.T.Sivaprakasam &
A.Mohammed Sadiq Hussain

For Respondent: Mr.A.L.Somayaji, Senior Counsel
for M/s.P.J.Rishikesh
[in both the Writ Appeals]

J U D G M E N T

R.SUBRAMANIAN, J.

1. The challenge in these intra-Court appeals is to the common order of the learned Single Judge made in W.P.Nos.32289 and 32290 of 2016, in and by which, the learned Single judge had allowed the Writ Petitions quashing the rejection of tenders of the petitioners therein and directing the appellant to consider the financial bids of the respondent and evaluate them along with other tenderers before awarding the contract in question.

The facts led to the filing of the Writ Petitions are as follows:

2. The appellant in the Writ Appeals viz., The Tamil Nadu Police Housing Corporation Limited had issued a tender notification on 29.06.2016 inviting tenders for construction of 1036 numbers of PC/HC Quarters with development works at Cochin House in Chennai City for a value of Rs.13679.46 Lakhs. Under the very same tender notification, applications were also invited for construction of another 596 numbers of PC/HC quarters at Pudupet with development works for the Armed Reserve Police in Chennai for a value of Rs.8132.67 Lakhs. As per the tender notification dated 29.06.2016, the technical bids were to be opened on 28.07.2016.

3. It is claimed by the respondent that the respondent which is a Class I contractor registered with the Government of Tamil Nadu had submitted its tenders. There were in all five tenderers for the first work viz., construction of 1036 quarters and four tenderers for the second work viz., construction of 596 quarters. The tender notification also disclosed that the bids will be evaluated at two stages viz., the technical evaluation and the financial evaluation. The entire tender process was to be done online and e-tender documents were to be uploaded by the

tenderers.

4. The respondent would claim that it had uploaded all the required documents while submitting its bids for both the works. The technical bids were opened on 28.07.2016. The respondent, subsequently discovered that there has been a mistake in uploading the affidavit which was sought for by the appellant. In order to rectify the defect, the respondent had submitted the original affidavit to the appellant on 11.08.2016. Subsequently, by a letter dated 19.08.2016, the appellant raised certain queries and those queries were also answered by the respondent.

5. While things stood thus, the respondent received a communication dated 29.08.2016, informing the respondent that the pre-qualification tender documents submitted by the respondent were under scrutiny. To the shock and surprise of the respondent on 30.08.2016, the respondent received an e-mail informing the respondent that its bids were rejected even during the technical evaluation done by the Tender Awarding Committee on 30.08.2016 at the pre-qualification stage. Since, the e-mail dated 30.08.2016 did not disclose any reason for rejection of its bids, the respondent by its letter dated 01.09.2016 required the appellant to assign reasons for rejecting its bid. The price bids also came to be opened on 01.09.2016.

6. Claiming that the appellant attempted to award the contract after having wrongly rejected the bids of the respondent, the respondent has approached this Court challenging the action of the appellant in rejecting the bids of the respondent. The respondent was informed by a communication dated 06.09.2016 that the appellant was not bound to assign any reasons for rejecting the bids of the respondent at the technical evaluation stage. However, the appellant also added that the respondent Company had not complied with the terms and conditions relating to the pre-qualifications incorporated at page 29 of the tender document.

7. This Court had ordered status quo on the award of the contracts on 15.09.2016. The appellant corporation filed a counter affidavit contending that the respondent having failed to comply with the conditions incorporated in the tender notification cannot be heard to contend that they should be given an opportunity to rectify the defects. As per the conditions enumerated in the tender notification, the tendering Authority had right to accept or reject any bid without assigning any reason therefor. This was also made clear in condition No.22 of the tender conditions and therefore, the plea of the respondent that they were not given an opportunity before passing an order of rejection is mis-conceived and wholly unjustified.

8. The appellant Corporation would further claim that meticulous compliance with the conditions incorporated in the tender notification is essential, in order to enable the appellant to assess the ability and the technical wherewithal of the tenderers. The respondent having failed to comply with the conditions in the tender notification, cannot now be heard to contend that it should have been given an opportunity to rectify the defects if any. Detailing the procedure that should be adopted by the tenderers while uploading their bids in accordance with the e-tender notification, the appellant would claim that compliance with each and every condition of the tender notification is mandatory and any violation would result in the bid being rejected without any further scrutiny.

9. Insofar as the petitioner/respondent herein in W.P.Nos.32289 and 32290 of 2016 is concerned, it is the contention of the respondent Corporation/appellant herein that the affidavits in 20 rupees Stamp Papers were not uploaded. It was found that only one affidavit was uploaded as against the requirement of two separate affidavits for the two works. It is also the claim that even the uploaded affidavit contains only the first page and the second page was missing. According to the respondent Corporation/appellant herein, the affidavit is required to find out the balance work that the tenderer had on hand and non-fulfilling of the said conditions would render the entire bid invalid.

10. It was also pointed out that, the entire pre-qualification schedule forming part of pages 1 to 32 were not uploaded by the petitioner in W.P.Nos.32289 and 32290 of 2016 respondent herein. It is the further contention of the appellant that though the respondent had claimed that it had fifteen works pending on hand, it had uploaded the details of only three works and certificates relating to the other twelve works were not uploaded by the respondent. According to the Corporation, in view of the non-availability of the required details, the Tender Evaluating committee was not in a position to assess the ability and wherewithal of the respondent to complete the work, which according to the Corporation is a major work running to several crores of Rupees. The respondent Corporation (appellant herein) would contend that in the absence of vital documents which were not uploaded by the petitioner (respondent herein) the tender Evaluation Committee had no other option but to reject the tenders of the petitioner/respondent herein at the pre-qualification stage, while the technical Evaluation of the bids was undertaken.

11. A rejoinder to the counter affidavit was filed by the petitioner (respondent herein) in the Writ Petition, wherein, it was contended that the alleged non-compliance is only trivial in nature and would have been rectified if only the appellant

Corporation had given an opportunity to the respondent herein. It is the further contention of the respondent herein that the details regarding twelve works that were on hand were not furnished because the works had not been completed and the bills had not been raised by the respondent herein. With reference to the non-uploading of the affidavits it was contended that since both the affidavits were identical and similar, an oversight had occurred while uploading the affidavits. It is also pointed out that the original affidavits were in fact sent to the respondent on 11.08.2016 and the receipt of the same was acknowledged by the respondent Corporation. It is also contended that the purpose of seeking details of the pending works on hand was only for calculation of the working capital availability. The said calculation could have been done by taking the total contract value and the rejection of the bid on the ground that the details of the twelve works and the stage at which they were pending were not disclosed is according to the respondent herein, a hyper-technical approach.

12. The learned Single Judge who heard the Writ Petitions agreed with the contentions of the petitioner/respondent herein in the Writ Petitions viz., the tenderer and had found that the violations complained are trivial in nature and had an opportunity been given to the petitioner/respondent herein they would have rectified the defects or explained the reasons for omissions. Upon such finding, the learned Single Judge allowed the Writ Petitions quashing the order of rejection dated 29.08.2016 and directed the respondent Corporation/appellant herein to consider the price bids of the petitioner/respondent herein also along with the other tenderers. Yet another factor that weighed with the learned Single Judge was that the rates offered by the petitioner in the Writ Petitions in W.P.Nos.32289 and 32290 of 2016 were in fact lesser than the rates quoted by the L1 tenderer as found in the website of the appellant.

13. Aggrieved, the appellant Corporation is on appeal before us. Originally four Writ Petitions were filed by two of the tenderers viz., M/s.Renaatus Projects Private Limited [W.P.Nos.32287 and 32288 of 2016] and M/s.P&C Projects Private Limited [W.P.Nos.32289 and 32290 of 2016]. All the four Writ Petitions were allowed, hence, four appeals came to be filed in W.A.Nos.135, 136, 137 and 138 of 2017. W.A.Nos.135 and 136 of 2017 were filed by M/s. Renaatus Project Private Limited and W.A.Nos.137 and 138 of 2017 were filed by the M/s. P&C Projects Private Limited. Pending the above appeals it appears that the Writ Appeal Nos.135 and 136 of 2017 were disposed of based on the submissions made by the learned counsel for the appellant in those Writ Appeals viz., M/s. Renaatus Project Private Limited that they are not pressing the Writ Petitions any further. Hence, only two appeals viz., W.A.Nos.137 and 138 of 2017 are before us now.

14. We have heard Mr.Vijayanarayan, learned Advocate General appearing for the appellant in W.A.No.137 of 2017, Mr.N.C.Ramesh, learned Senior Counsel appearing for the appellant in W.A.No.138 of 2017 and Mr.A.L.Somayaji, learned Senior Counsel appearing for the respondent in both the appeals.

15. Mr.Vijayanarayan, learned Advocate General as well as Mr.N.C.Ramesh, learned Senior Counsel appearing for the appellant Corporation would vehemently contend that the tender conditions being very clear to the effect that any failure on the part of the tenderer to upload the required documents would result in rejection of the tender, the learned Single Judge was not right in interfering with the rejection, after having found that there were defects in the tender documents uploaded by the petitioner with reference to both the contracts. Having found that there were defects, it was not open to the learned Single Judge to go into the nature of the defects and conclude that the defects being trivial in nature, the tenderers should have been given an opportunity to rectify the defects.

16. Our attention is also drawn by the learned Senior Counsel to the judgment of the Hon'ble Supreme Court in Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited and others reported in (2018) 3 SCC 13 as well as the judgments of the Hon'ble Supreme Court in Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622. Drawing our attention to the judgment of the Hon'ble Supreme Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 SCC 451, wherein, the Hon'ble Supreme Court had concluded that the negligent mistakes in bid documents cannot be permitted to be corrected on the basis of equity, more so, when the facts indicate that the mistake was not beyond the control of the bidder and when it was shown that the bidder was not vigilant, the learned Advocate General and the learned Senior Counsel for the appellant Corporation would contend that the respondent cannot seek an opportunity to rectify the defects or to fill up the lacuna.

17. The learned Senior Counsel would also draw our attention to the judgments of the Hon'ble Supreme Court in Laxmi Sales Corporation Vs. M/s.Bolangir Trading Co. and others reported in AIR 2005 SC 1962, Goldyne Technoserve Ltd., Vs. State of Madhya Pradesh and others reported in AIR 2011 SC 2574 and Michigan Rubber (India) Ltd., Vs. State of Karnataka and others reported in (2012) 8 SCC 216.

18. Per contra, Mr.A.L.Somayaji, learned Senior Counsel appearing for the respondent tenderer would submit that, of course, there were mistakes committed by the respondent tenderer

while submitting its bids. But if the Court finds that the mistakes were trivial or the mistakes were such that they could be rectified provided the tenderer is given an opportunity to rectify the same, the Authority while scrutinizing the technical bid need not mechanically reject the same.

19. The learned Senior Counsel would draw our attention to the judgment of the Hon'ble Supreme Court in Mohinder Singh Gill Vs. Chief Election Commissioner reported in (1978) 1 SCC 405 to contend that a quasi-Judicial Authority has to give reasons for passing an order and cannot supplement the reasons through counter affidavits or affidavits filed in the proceedings initiated challenging the orders of such Authority. He would also rely upon the judgments of the Hon'ble Supreme Court in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548, G.J.Fernandes Vs. State of Karnataka reported in (1990) 2 SCC 488 and Poddar Steel Corporation Vs. Ganesh Engineering Works reported in (1991) 3 SCC 273.

20. Relying heavily on the observations of the Hon'ble Supreme Court in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548, Mr.A.L.Somayaji, learned Senior Counsel appearing for the respondent tenderer would submit that the rejection of the technical bids on a technical ground cannot be sustained. He would also urge us to take into account the fact that the prices quoted by the petitioner in its price bids are lesser than that of the L1 tenderer and contend that when it is beneficial to the State to award the contract to the petitioner in W.P.Nos.32289 and 32290 of 2016, inasmuch as the price bid of the petitioner in the said Writ Petitions/ respondent before us, it would not be proper for the Tender Evaluating Authority to have rejected the tender of the petitioner at the technical evaluation stage.

21. By way of reply Mr.Vijayanarayan, learned Advocate General as well as Mr.N.C.Ramesh, learned Senior Counsel appearing for the appellant Corporation in these Writ Appeals would submit that the tender Evaluation Committee was un-aware of the price bid of the petitioner or the other tenderers when it rejected the technical bids of the petitioner. Therefore, according to them, the difference in the price bids cannot be a ground for this Court to interfere with the order of rejection made by the Tender Evaluation Committee.

22. Taking note of the fact that the price bid of the petitioner/ respondent before us is less than the price bid of the L1 tenderer, this Court had required the Tender Evaluation Committee to reconsider the possibility of negotiation. The Tender Evaluation Committee had after reconsideration, reiterated its stand. Therefore, the Division Bench had recorded

the same and had directed the above appeals to be listed for hearing to be heard on merits. It is pursuant to the said direction, these Writ Appeals were listed before us and we have heard the learned counsel appearing on either side on merits.

23. The questions that arise for our consideration in these two appeals are :-

1. Whether the order dated 30.08.2016 made by the Tender Evaluation Committee rejecting the technical bids of the respondent herein for certain admitted defects is justified or not?

2. Whether this Court in exercise of the powers of the Judicial Review could substitute its own conclusions in the place of the decision arrived at by the Tender Evaluation Committee?

On the questions :-

24. As already pointed out, admittedly, there were certain defects in the tender documents uploaded by the respondent. The major defects that were sought to be projected are:

1. Instead of two affidavits as required by the tender conditions only the first page of one affidavit was uploaded for both the tenders.

2. The scanned copies of the tender schedule consisting 32 pages was not uploaded by the respondent herein.

3. Out of fifteen pending works, certificates relating to the stage of which the works were pending were produced only for three works and for the remaining twelve works no certificates were produced.

25. Mr.Vijayanarayan, learned Advocate General and Mr.N.C.Ramesh, learned Senior Counsel appearing for the appellant Corporation would contend that the non-furnishing of the affidavits as required under the tender conditions, the non-uploading of the pre-qualification schedule and the non-production of certificates relating to twelve out of fifteen of the pending works would have the effect of disabling the Tender Evaluation Committee to properly evaluate the wherewithal of the tenderer. Hence, the rejection of the tender at the pre-qualification stage was justified.

26. The learned Senior Counsel would also invite our attention to the observations of the Hon'ble Supreme Court in Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622. It will be pertinent to point out that the Hon'ble Apex Court while deciding the issues raised had also referred to the earlier judgments in G.J.Fernandes Vs. State of Karnataka reported in (1990) 2 SCC 488 and Poddar Steel Corporation Vs.Ganesh Engineering Works reported in (1991) 3 SCC 273. After reviewing

the entire case law on the point, the Hon'ble Supreme Court had referred to the observations made by the Court in Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517, wherein, it was observed as follows:

"Evaluating tenders 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, court 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."

27. It was also observed that the tender conditions cannot be ignored as being redundant or superfluous, they must be given a meaning and the necessary significance. In West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 SCC 451 the Hon'ble Supreme Court had an occasion to consider the claim of the bidder to correct his bid documents. The Hon'ble Supreme Court while considering such claim had rejected the same observing that a bidder who participates in tenders of very high value should be careful and they cannot make mistakes and thereafter seek to rectify the said mistakes. While saying so, the Hon'ble Supreme Court had observed as follows:

"24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/ bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of

issuing rules/ instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided.

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28. In *Michigan Rubber (India) Ltd., Vs. State of Karnataka and others* reported in (2012) 8 SCC 216, the Hon'ble Supreme Court had categorized the principles involved in cases relating to grant of contracts as follows:

"(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

29. In Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited and others reported in (2018) 3 SCC 13, the Hon'ble Supreme Court had rejected the contention of the tenderer that a tenderer should be afforded a second opportunity to rectify the defects since the same is impermissible as per the tender conditions. No doubt the Hon'ble Supreme Court in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548 had relying upon the judgment in G.J.Fernandes Vs. State of Karnataka reported in (1990) 2 SCC 488 held that the requirements in a tender notice can be classified into two categories viz., those which lay down the essential conditions of the eligibility and others which are merely auxiliary or subsidiary to the main object to be achieved by the conditions. Upon such classification, the Hon'ble Supreme Court had held that there can be a relaxation of such conditions which are of the second type viz., the conditions which are auxiliary or ancillary or subsidiary to the main object.

30. But the said judgment in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548 as well as the decision in G.J.Fernandes Vs. State of Karnataka reported in (1990) 2 SCC 488 were considered by the Hon'ble Supreme Court in Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622 and the Hon'ble Supreme Court had in fact deprecated such classification.

31. A three Judge Bench of the Hon'ble Supreme Court in Laxmi Sales Corporation Vs. M/s.Bolangir Trading Co. and others reported in AIR 2005 SC 1962 had also reiterated the law to the effect that the Court cannot go into the nature of the tender conditions and re-write the contract between the parties while exercising the power of Judicial review under Article 226 of the Constitution of India. Though it is contended that the non-furnishing of the copy of the affidavits and the non-furnishing of the details of the pending works would not materially affect the evaluation of the bids of the respondent before us, we are

of the considered opinion that the correctness of the action of the Tender Evaluation Committee in rejecting the bids of the respondent for certain deficiencies cannot be interfered on the assumption that the deficiencies or mistakes or omissions are trivial in nature.

32. The combined effect of the judgments of the Hon'ble Supreme Court in Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622, Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited and others reported in (2018) 3 SCC 13, West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 SCC 451 and Goldyne Technoserve Ltd., Vs. State of Madhya Pradesh and others reported in AIR 2011 SC 2574 would go to show that it is not for the Court to substitute its own opinion as to the relevancy of the tender conditions. If the Tender Evaluating Authority had rejected the bids on the ground that they are not in strict compliance of the requirement of the tender conditions, this Court cannot substitute its own reasons to nullify the rejection on the ground that the deficiencies are either trivial in nature or are capable of rectification by providing an opportunity.

33. On the question of judicial review, the Hon'ble Supreme Court has time and again pointed out that this Court sitting under Article 226 exercising its power of judicial review cannot and shall not interfere with the orders of the Administrative Authorities on substituting its own findings. In Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622, the Hon'ble Supreme Court had, while dealing with the powers of the judicial review observed as follows:

"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."

34. In Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517, the questions that are to be posed by the Court to itself before interfering in the tender or contractual matters have been summarised as follows:

"(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 reasonable and in accordance with relevant law could have reached";

(ii) Whether public interest is affected."

34 (a). It was also pointed out that, whether a condition is essential or not has to be left to the Authorities to decide and it is not for the Court to substitute its own opinion. After discussing the earlier judgments on the question, the Hon'ble Supreme Court had observed as follows:

"Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with."

35. In Bakshi Security and Personal Services Private Limited Vs. Devikishan Computed Private Limited and others reported in (2016) 8 SCC 446, the Hon'ble Supreme Court had while dealing with the power of judicial review had after referring to Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517, reiterated the observations made therein regarding the power of the judicial review. After referring to the judgment in Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517, the Hon'ble Supreme Court in Bakshi Security and Personal Services Private Limited Vs. Devikishan Computed Private Limited and others reported in (2016) 8 SCC 446 had observed as follows:

"However, we do not think that the justice of the case requires us to do so, for two reasons. First and foremost. Respondent 1 before us has clearly violated the strict terms of the tender condition on every occasion and hence cannot be given relief. And, secondly, we already find that due to litigation the present tender has not taken off for over one year. In the absence of mala fides, and indeed the High Court judgment has found that mala fides did not vitiate the calculation of minimum wage by the Labour Department, we cannot accept Shri Divan's submission that the figure of Rs.2,91,00,000 was tailor-made to suit the bid offered by the appellant herein. "

36. In the light of the above law, laid down by the Hon'ble

Supreme Court, in various decisions cited supra we are constrained to conclude that the learned Single Judge was not right in going into the nature of the conditions and the violations. We are of the considered opinion that whether the bidder/ tenderer should be given an opportunity to correct the mistakes or the bid should be rejected at the stage of technical evaluation itself for non-compliance with the tender conditions is a matter which is solely within the purview of the Tender Evaluation Committee and this Court cannot substitute its own reasons.

37. In fact, in the case on hand, it is seen that the respondent/ tenderer in these appeals has not produced work evaluation certificates for twelve of the fifteen pending works. As rightly pointed out by the learned Advocate General, the requirement of provision of workdone statement is not only for calculation of the working capital requirement, it would also be of relevance to the Tender Evaluation Committee while evaluating the wherewithal and capacity of the bidder to do a work of such magnitude which involves construction of more than 1500 quarters for Police men in the city. Therefore, the contention of Mr.A.L.Somayaji, learned Senior Counsel appearing for the bidder that the violations were trivial in nature or that they could be rectified upon being given an opportunity does not appeal to us.

38. The Hon'ble Supreme Court in subsequent judgments had not approved the reasoning in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548. The law as it stands as of today, as could be culled out from later judgments of the Hon'ble Supreme Court is that the tender conditions which have been violated are stipulations which would result in the consequence of the tender being rejected or they are only ancillary which will not have a bearing on the final decision of the Tender Evaluation Committee cannot be gone into by the Court. It is for the Tender Evaluation Committee to decide whether the non-compliance of the conditions would result in dis-qualification or rejection of the tender at the pre-evaluation stage.

39. We therefore, find that the reasons that prevailed upon the Tender Evaluation Committee for rejecting the tenders cannot be interfered with unless it is shown that they are not bonafide. The learned Single Judge had taken into account, the price bid and had after noticing the fact that the price bid of the respondent tenderer is less than the L1 tenderer, had concluded that it will be in the public interest to give an opportunity to the respondent tenderer to participate in the further process. As already pointed out, while discussing the scope of judicial review of such actions the Hon'ble Supreme Court had pointed out that the Court cannot go into the merits or otherwise of the decision, but it is the decision making

process which will have to be looked into.

40. Admittedly, the technical bids of the tenderer/ the respondent were rejected even before the price bids were opened. Therefore, the Authorities had no clue of the price bid of the respondent tenderer at the time when they rejected the technical bid. Hence, we are unable to accept the said submission on behalf of the respondent based on the actual price bids which were subsequently opened.

41. In view of the above reasons, we are constrained to interfere with the order passed by the learned Single Judge. In view of the subsequent decisions of the Hon'ble Supreme Court which deviate from the position of law as was laid down in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548, we find that the judgment of the learned Single Judge deserves to be set aside and the same is accordingly set aside. The appeals are allowed, however, in the circumstances there will be no order as to costs. Consequently, the connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

dsa
To

The Tamil Nadu Police Housing Corporation Limited
Represented by its Superintending Engineer,
No.132, E.V.R.Salai (Poonamallee High Road),
Near G-3 Police Station,
Kilpauk, Chennai - 10.

+2 ccs to Mr.T.Sivaprakasam Advocate sr 36825
+2 ccs to Mr.P.J.Rishikesh Advocate sr 36403 & 36404

W.A.Nos.137 and 138 of 2017

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