

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 13-07-2018

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.12903 of 2018

And

W.M.P.Nos.15155 to 15157 of 2018 and 18392 of 2018

S.Manivel

Petitioner

Versus

1.The Superintending Engineer,
PWD, WRO,
Pennaiyar Basin Circle,
Tiruvannamalai.

2.National Informatics Center,
A.Block, C.G.O. Complex,
Pragathi Vihar,
New Delhi - 110 003.

Respondents

PRAYER: Writ petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records in Tender Notification dated 10.5.2018, on the file of the first respondent for the 'Replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District', quash the same in so far as Clause 2(iv), Clause 2(vi) and Clause K of 'Evidence to be produced' and to further direct to consider the first respondent to consider the tender application submitted by the petitioner on 18.5.2018.

For Petitioner : Mr.V.Raghavachari

For Respondent-1: Mr.S.R.Rajagopal,
Additional Advocate General assisted by
Mr.M.Elumalai, Government Advocate.

O R D E R

The Tender Notification, issued by the first respondent on 10th May 2018, for the replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District in so far as Clause 2 (iv), Clause 2(vi) and Clause K of evidence to be produced, is sought to be quashed and further direction is sought for to

direct the first respondent to consider the tender application submitted by the writ petitioner on 18.5.2018.

2. The writ petitioner is an established Contractor in the field of Mechanical, Electrical and Civil Engineering for the past 23 years. The name of the writ petitioner has already been registered on the rolls of the Public Works Department. The writ petitioner claims that he had completed various projects for the Government as well as for the Statutory Bodies. The turnover for the assessment year 2017-2018 of the writ petitioner is Rs.9,42,53,133/-.

3. The first respondent has floated a tender on 10.5.2018 for the replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District. The tender was published on 10.5.2018. However, the schedule of the tender was not uploaded until 14.5.2018. The last date for submission of bids was 18.5.2018. The writ petitioner had submitted his bids on 18.5.2018 and became qualified to participate in the tender.

4. The learned counsel, appearing on behalf of the writ petitioner, contended that the delay in not uploading the tender as on the date of publication of the tender on 10.5.2018 is evident from the records that the respondents have designed, developed and housed the portal for the submission of the tender documents. Further, the time limit prescribed has not been followed. Thus, the action of the respondents are in violation of the Rule 20 (a) of the Tamil Nadu Tender Transparency Rules, 2000. As per the said Rule, the updation on the website should be at least 30 days before the last date of submission. The learned counsel proceeded by stating that the tender contains certain contentious conditions which are tailor made for the purpose of granting the tender to the previously identified offeror and the said conditions are :

"a. The Annual Turnover of the applicant should be Rs.17,29,00,000/- in one of the previous 5 years. [Clause 2 (iv)].

b. That the applicant should have executed in any year the following minimum quantities (i.e., 100% of the Schedule quantity) of works noted below as a prime contractor in the preceding 5 years

i. Design, fabrication, supply & erection of skin plate - 1 job

ii. Providing abrasive blast cleaning using air blast cleaning - 396 m²

iii. Providing metalizing using electric thermal spraying - 396 m²

iv. Application of coal tar epoxy over the primer shall be through airless - 396 m²

v. Replacement of old damaged 4 core x 10 sq. mm. aluminum cable - 1 job

vi. Providing an electromagnetic safety brake - 1 job

vii. The dial guage is a safety instrument to read the position - 1 job

viii. Overhauling of existing hoisting agreements (Clause 2(vi) - 1 job

c. Further, as per Clause K at Page 13 of the tender, the applicant is to prove he owns or has leased the following equipments:

i. 1 Medium Goods Vehicle

ii. 1 Crane 12 Ten

iii. 2 Chain Pulley Blocks

iv. 4 Gas Cutting Equipment

v. 2 Mig Welding Equipment

vi. 2 Arc Welding Equipment

vii. 1 AG7 Grinding Machine

viii. 2 AG5 Grinding Machines

ix. 2 Magnetic Drilling Machines

x. 1 Screw Compressor

xi. 1 Airless Spray Painting Machine

xii. 1 Metallising Gun

xiii. 1 45 KVA Generator

These are neither germane nor condition precedents for the purpose of execution of the work."

5. The learned counsel for the writ petitioner is of an opinion that certain conditions seem to be intended to favour certain class of applicants. The condition that an applicant needs to have a turnover of over Rs.17 Crores as required under Clause 2 (iv) is unknown in the field. The writ petitioner claims that in his previous experience he never found such a condition at all. The requirements in Clause 2 (vi) seem to have been tailored to benefit certain applicants. The Supreme Court had explained the meaning of tailor made conditions in Meerut Development Authority vs. Association of Management Studies [(2009) 6 SCC 171], reads as under:-

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be

available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process."

6. In the case of Michigan Rubber (India) Ltd vs. The State of Karnataka [(2012) 8 SCC 216], the Supreme Court had elucidated the circumstances under which judicial review is warranted. The Court observed as follows:-

"23. From the above decisions, the following principles emerge:

(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.

24. 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"? and

(ii) Whether the public interest is affected?"

7. Under these circumstances, the writ petitioner has raised the following grounds:-

A. That the first respondent ought to have seen that it is absurd to demand that the applicants were to have an annual turnover 500% the tender cost. Such a condition excludes a majority of contractors, leading to lesser participation and seems tailor made to identify a particular entity.

B. That the first respondent had arbitrarily called upon the applicants to have experience in various installations and services which are generic. Applicants, such as the petitioner have undertaken larger projects of a similar nature and have completed them satisfactorily. To insist upon proving completion of work of exact specification is arbitrary.

C. That the first respondent should have noted that requiring the applicants to be in possession of all equipments as a pre-bid qualification is arbitrary. The contractor engaged must have the liberty to arrange for machines as and when required, over the various stages of the project. To require the contractor to have machines throughout the project would lead to idling costs and consequently increase the cost of the tender.

D. That the tender conditions seem to have been tailored to suit certain applicants. As stated, there is no requirement for a 17 crore turnover to complete a 2 crore project.

E. That the first respondent is aware that the contractors

do not own or lease machines year long and avail their service, on a project to project basis, as and when required. Despite being aware as to these facts, the inclusion of such a clause seems to be a deliberate attempt by the first respondent to exclude otherwise qualified applicants.

F. That the first respondent should have seen that these clauses are absent for similar works executed across the State and to include it only for this project raises deep concerns on the very bona fides of the demands.

8. The learned counsel, appearing on behalf of the writ petitioner, contended that the Government of India, more specifically, the Central Public Works Department, issued Office Memorandum on 31.7.2008 and certain modifications in CPWD Works Manual 2007 were issued. Even as per the modification, the consideration period for work experience is modified from 5 years to 7 years. Further, the requirement of average annual turnover modified from 50% to 30% of the estimated cost. When the Central Public Works Department has modified the average annual turnover to be considered, then the respondents herein have increased the annual turnover without even considering the theory of proportionality. In other words, it is contended that the average annual turnover fixed by the respondents in the impugned tender is highly arbitrary and not in proportionate with the cost of the work to be executed and further imposed in order to favour very few contractors.

9. The learned counsel for the writ petitioner is of an opinion that there is a possibility of drawing an inference in respect of corrupt activities, since the conditions imposed are apparent that the authorities have decided to restrict the participation, so as to grant the contract in favour of a contractor of their choice. There is no rationale in respect of the decisions taken by the respondents. There is no relaxation in respect of the conditions imposed. For all these reasons, the conditions imposed in the Tender Notification is absolutely unreasonable, irrational and made to favour few individual contractors.

10. The learned counsel for the writ petitioner cited judgments in the case of MAA BINDA EXPRESS CARRIER AND ANOTHER vs. NORTH-EAST FRONTIER RAILWAY AND OTHERS [(2014) 3 SCC 760], wherein in paragraphs 8 and 9, the Hon'ble Supreme Court held as follows:-

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in

regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See Meerut Development Authority v. Assn. of Management Studies [(2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803] and Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617 : (2000) 1 SCR 505])"

11. In the case of CRRC CORPORATION LIMITED vs. METRO LINK EXPRESS FOR GANDHINAGAR AND AHMEDABAD (MEGA) COMPANY LIMITED [(2017) 8 SCC 282], wherein in paragraph 37, the Hon'ble Supreme Court held as follows:

"37. In that view of the matter, the status and the entitlements of the appellant Corporation, as already adjudicated in Consortium of Titagarh Firema Adler S.P.A. [Consortium of Titagarh Firema Adler S.P.A. – Titagarh Wagons Ltd. v. Nagpur Metro Rail Corpn. Ltd.(2017) 7 SCC 486] , as a single entity bidder in the present tender process would also by the yardstick of simple logic and analogy be available to it. Absence of the words "Government-owned entity" in Clause 4.1, presently under consideration, is of no consequence. The plea of the respondent that the tender conditions involved demand a different perspective in the overall conceptual framework thereof, lacks persuasion. Significantly, in Clause 4.1 involved in Consortium of Titagarh Firema Adler S.P.A. [Consortium of Titagarh Firema Adler S.P.A. – Titagarh Wagons Ltd. v. Nagpur Metro Rail Corpn. Ltd.(2017) 7 SCC 486] , "Government-owned entity" had been contemplated as one of the bidders in contradistinction to "private entity" and "any combination of such entities" in the form of a joint venture (JV). The expression used in the present clause being "single entity", understandably, it is inclusive of a private as well as a Government-owned entity. The unit envisaged as a single entity is thus independent of any combination or formation in the form of a JV or a consortium and thus is visualised to be one integral and composite whole. In such a logical premise, a Government-owned company with its 100% wholly owned subsidiaries has to be comprehended as a single entity, eligible to bid in terms of Clause 4.1 of the tender conditions and is to be regarded as single, coherent and homogeneous existence and not a disjointed formation."

12. In the case of Venkatram Spinners Pvt. Ltd., represented by its Managing Director vs. State of Tamil Nadu, represented by the Principal Secretary, Department of Handlooms and Textiles, St. George Fort, Chennai [(2017) Supreme (Mad) 2178], the Hon'ble Single Judge of the High Court of Madras delivered a judgment and the relevant paragraphs 16, 17 and 19, are extracted hereunder:-

"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.

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."

13. In an yet another case of the Madras High Court in Sree Balaji International vs. State of Tamil Nadu, represented by the Secretary, Co-operation, Food and Consumer Protection Department [(2017) Supreme (Mad) 3063], wherein in paragraph-10, the Court held as follows:-

"10. No doubt, Rule 20(2) of the Tamil Nadu Transparency in Tenders Rules 2000, empowers the reduction of time and however, such power has to be exercised only by the Authority, who is superior to the tender inviting authority, by specifically stating and recording the reasons for reducing such time limit. It is true that in this case, the respondents seemed to have obtained such permission. However, as this Court is satisfied to set aside the impugned tender notification on the first ground viz., want of publication in the Indian Trade Journal, the respondents have to go ahead with fresh publication only by following all the procedures. Therefore, they are not entitled to harp upon the permission already obtained from the superior authority in respect of the tender, which is being set aside herein for not complying with the mandatory requirement under Section 9(3) of the said Act. Accordingly, this writ petition is allowed and the impugned tender notification is set aside with liberty to the respondents to proceed afresh by strictly following the mandatory requirement of law. No costs. The connected miscellaneous petitions are closed."

14. The learned counsel for the writ petitioner relying on the abovesaid judgments, made a submission that the restrictions imposed in the present Tender Notification are also akin to that of the facts and circumstances of the cases cited and therefore, the present writ petition deserves to be allowed. The conditions imposed are unreasonable, arbitrary and mala fide. Thus, the tender impugned is to be scrapped and a fresh Tender Notification is to be issued in compliance with the established norms.

15. The learned Additional Advocate General, appearing on

behalf of the first respondent, strenuously contested the arguments advanced on behalf of the writ petitioner.

16. The first contention raised by the learned Additional Advocate General is that the Tender Notification was issued on 10.5.2018 and the writ petitioner had submitted his bid within the time limit fixed by the authorities. The writ petitioner had participated in the bid and submitted his quotation. His bid was also opened along with other bids. On scrutiny, it was found that the writ petitioner is not qualified as per the conditions stipulated in the Tender Notification. Thus, the application of the writ petitioner had been rejected. The present writ petition has been filed after participating in the tender and after knowing the fact that the writ petitioner was not qualified. Thus the present writ petition is liable to be rejected as the writ petitioner is estopped from challenging the conditions stipulated in the Tender Notification.

17. A person, who had participated in the tender and knowing the fact that he was unsuccessful, cannot challenge the conditions stipulated in the tender. Such after thought decisions or actions can never be entertained by the Courts.

18. The learned Additional Advocate General states that Krishnagiri Dam is located across the river Pennaiyar in Periyamuthur Village of Krishnagiri District in Tamil Nadu. The Dam was constructed during the period 1955-1957 and commissioned for irrigation from 1958 itself. The Dam comprises of masonry dam length 289.86 M, earthen dam at right flank of length 718.93 M, 8 Nos. of Spillway Shutters (Size 12.19 x 6.1 M), 2 Nos. canal sluice LMC (Size 1.52 x 1.82 M) and RMC (Size 1.22 x 1.22 M).

19. Due to very heavy rainfall during the month of September 2017, in upper catchment of the river Pennaiyar in Karnataka and Andhra Pradesh, the Krishnagiri Dam attained nearing FRL stage in September 2017 and started releasing the water to downstream. Due to this occasion, the downstream reservoirs also got sufficient inflow and Sathanur Dam was very near its Full Reservoir Level. In such situation, on 29th November 2017, one of the shutters of the Krishnagiri Dam (Shutter No.1) got damaged and water started flowing through the damaged shutter and storage level of water fall to Spillway crest level.

20. The Krishnagiri reservoir is feeding to total registered ayacut area of 9,012 Acres. In addition to this registered ayacut, the KRP Dam water regulation is also goes to downstream anicut of (10 Nedugal Anicut in Krishnagiri Taluk and District which is feeding to total registered anicut of 4644 Acres (2) Ichambadianicut in Arur Taluk of Dharmapuri

District, which is feeding to registered ayacut of 6250 Acres and totally the registered anicut of Krishnagiri Dam to Ichanbadi Anicut is 19906 Acres and this entire ayacut area could not be irrigated due to loss of inflow from the upstream of Dam upto the period of fixing the permanent Spillway Shutter. In view of urgency for taking up replacement of damaged Shutter No.1 of the Krishnagiri Dam before the onset of the South West Monsoon and to store water in the Dam to the full capacity, the Government have accorded the Administrative Sanction in G.O.(Ms.) No.123, Public Works (S2) Department, dated 4.5.2018 for the work of replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District for an amount of Rs.300 lakh and the estimate for the above work has been technically sanctioned by the Chief Engineer, PWD,WRO, Chennai Region, Chennai vide RR No.02CE/CR/2018-19 dated 7.5.2018 for Rs.300 lakh.

21. The learned Additional Advocate General emphasised that such urgent steps were taken to avoid any unstable situation in Reservoir at the time of South West Monsoon period i.e., from May onwards and also due to availability of very meagre time for carryout the work it has been proposed to call that tenders as Short Term Tender Invitation to execute the work within short time period before June 2018 for avoiding of insufficient storage consequent to the loss of inflow in river during South West Monsoon period.

22. Necessary Two Cover System Short Term Tender Notice and Draft Pre-Qualification tender documents were approved by the Chief Engineer, PWD, Chennai Region, WRD, Chennai in letter No.DB/T5(4)/F-Krishnagiri Dam dated 7.5.2018 and necessary Pre-Qualification Comparative Statement has been prepared and submitted to the Chairman, Tender Award Committee, Engineer-in-Chief, WRD and Chief Engineer (General), PWD, Chepauk, Chennai-5 through Chief Engineer, PWD, Chennai Region, WRD, Chennai-5 by the Superintending Engineer, PWD, WRD, Penniyar Basin Circle, Tiruvannamalai based on the details furnished by the five tenderers. It is found that out of above five said tenderers only two tenderers are qualified and eligible for participating in opening the price tender. The Pre-Qualification Tenders offered by the following Tenders have been approved by the Tender Award Committee in the Minutes of the 286th Tender Award Committee Meeting held on 21.5.2018.

23. The tender impugned in the present writ petition was floated for the replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District. The tender was notified on 10.5.2018 in three newspapers one in English and two in Tamil and entry made in the website on 10.5.2018 and the Schedule was uploaded on 14.5.2018 and the last date for submission of tender was on 18.5.2018. The writ petitioner

knows very well that this is a short term tender notice and agreeing to this and all other conditions prescribed in the tender notice, the writ petitioner took part in the tender dated 18.5.2018 and offered his rates. Further, the minimum at least 30 days for submitting tender is only directory and not mandatory and having submitted the application on 18.5.2018, the petitioner has no right to raise this point. After satisfying himself with the conditions imposed while inviting tender for the work only the writ petitioner herein submitted his tender on 18.5.2018. However, the contractors were not forbidden to apply for the hard copy of the Schedule on payment of prescribed cost as advertised from 10.5.2018 to 17.5.2018 from the first respondent's office. The writ petitioner opted to download the tender documents from the website at free of cost and tendered for the work on 18.5.2018 within the stipulated time. Having accepted the tender conditions and submitted the tender within the date and time stipulated, the writ petitioner has no locus standi to file the present writ petition challenging the conditions of tender and once he applied accepting the conditions and the writ petitioner ought to have challenged the notice inviting tenders for work. It is pertinent to point out that the short term tender is permitted under Rule 20(2) of the Tamil Nadu Transparency in Tender Rules wherever necessary by getting authorisation from the Superior Authority to the Tender Inviting Authority.

24. The prescription of the conditions of tender is only in the interest of the work to be carried out successfully and efficiently from those intending bidders who are technically competent to complete the work successfully and the respondent authorities are to ensure their professional competency in the execution of work and it is prerogative of the authorities inviting tender to prescribe the conditions so that quality of work is ensured from out of the successful bidders.

25. The learned Additional Advocate General urged this Court by stating that the annual turnover qualification has been fixed according to the emergent nature of work, which is to be completed within short period and also guidelines issued in the Minutes of the 402nd Board of Engineers Meeting dated 28.8.2000 in Para 3 of Public Works Department and the main Agenda Item No.6, on the criteria for pre-qualification of tenders for the State funded works costing more than Rs.1 crore for common adoption by all the wings of Public Works Department and the qualification for minimum quantities executed as a prime contractor in the preceding five years have been fixed according to the requirements on the type of items and their quantum to be executed as per technically sanctioned estimate for execution of these works and also according to the guidelines ibid issued in the Minutes of the 402nd Board of Engineers as also the possession of the items of construction

equipment, tools and plants, vehicles etc., to execution of works are described according to the nature of work to be carried out as per technically sanctioned estimate as per the guidelines stated. The qualification of annual turnover is arrived in formula basis and it will be increased or decreased according to the period of completion. The qualification of quantities executed in the preceding five years have been fixed according to the nature of work to be executed in the site as per technically sanctioned and the requirement of construction equipment have been described according to the requirement of works to be executed. Pertaining to this work annual turnover of the applicant should not be less than Rs.1,729/- lakhs (Rupees One Thousand Seven Hundred and Twenty Nine lakhs only) including GST per year in any one of the preceding five years. The formula for fixing the annual turnover is as follows:-

"Formula:

$$\frac{VPT \times 12 \times 1.5 \text{ times}}{POC}$$

Where VPT = Value of work put to tender (i.e., Rs.288.15 lakhs

POC = Period of completion (i.e.) 3 months

12 = Months of a year

Annual turnover = $288.15 \times 12 \times 1.5 \text{ times} =$

Rs.1728.90 (or) Rs.1729 lakhs or Rs.17.29 crore.

The calculation of annual turnover is increased when the period of completion is in shorter and decreased when the period of completion is longer. In the above calculation, the period for completion of work is in minimum (i.e.) 3 months and so that the fixation of annual turnover is increased."

26. Thus the tender conditions prescribed in the impugned Tender Notification is not tailored as alleged in paragraph 5 of the affidavit but actually based on the guidelines issued in the Minutes of the 402nd Board of Engineers and real according to the need of the work and its efficient execution and these conditions never arbitrary or contrary to the Tender Rules, 2000 and conditions need not be prescribed according to the needs of the applicant and found unsuitable in the tender.

27. The learned Additional Advocate General contended that the judgments cited by the learned counsel for the writ petitioner in Meerut Development Authority vs. Association of Management Studies [(2009) 6 SCC 171] and the Michigan Rubber (India) Ltd vs. The State of Karnataka [(2012) 8 SCC 216], are not applicable in respect of the facts and circumstances of the

present case on hand. In the very same rulings, it is stated that the terms of invitation of tender cannot be open to judicial scrutiny because the invitation of tender is in the realm of contract which favours only the respondents.

28. The learned Additional Advocate General, appearing on behalf of the first respondent, made a submission that imposing a condition is also a policy decision of the State Government and it is a prerogative of the competent authorities who forms an expert opinion for imposing such conditions. The decisions taken in this regard by the competent authorities are the administrative prerogative and the writ petitioner, being a contractor, has no locus standi to question the conditions. The rationale behind the imposition of such conditions are well discussed and adopted based on the opinions of the experts and the competent authorities of the State. Considering the nature of the work involved and the expertise required for execution of the works, such conditions are imposed in the Tender Notification. Thus, the writ petitioner cannot make such bald allegations that the conditions imposed are arbitrary and unreasonableness. Even in such cases, the writ petitioner ought to have challenged the same at the first instance. However, after participating in the tender, and knowing the fact that he was unsuccessful in the bid, thereafter, the writ petitioner cannot challenge the same.

29. The learned Additional Advocate General further contended that the notification issued by the Central Public Works Department of the Government of India are inapplicable in respect of the decisions taken by the State Government for grant of tender contracts. Such terms and conditions of the contract are to be fixed by the State Government and it is not necessary that the State Government should exactly follow the notification issued by the Central Public Works Department. When each work to be executed by the State Government is to be assessed by the Experts Committee and the competent and qualified Engineers in this regard are working out for the purpose of imposing certain conditions in order to identify the expert contractors, who can execute the work in a perfect manner. Thus, the very contention raised by the writ petitioner is untenable and the writ petitioner, being an unsuccessful contractor, cannot be permitted to challenge the conditions stipulated in the Tender Notification.

30. With regard to the grounds raised by the writ petitioner, the respondents denied all the grounds as extracted below:-

(a) The prescription of 500% annual turnover in the tender cost is only in the interest of Government for ensuring efficient contractor to execute the public contract and accepting the same, the writ petitioner had applied the tender

among other contractors and therefore, this condition is untenable.

(b) The Government is empowered to prescribe conditions that are found imminent to be incorporated while inviting tender for the works costing more than Rs.1 crore. The writ petitioner only has to carefully go through the conditions imposed in the notice inviting for tenders whether he can compete in the tender after satisfying or otherwise in fulfilling the conditions.

(c) The condition that the applicants should possess all equipment is reasonable and just to have efficient performance of contract and in the interest of Government to execute the work as within the time prescribed as per the guidelines and therefore, the contention that it is arbitrary is untenable and the petitioner can put pressure on the authorities to set out conditions, which are conducive to him the wish and according to the whims and fancies of the writ petitioner.

(d) The contention of the writ petitioner that it is tailoring to suit certain contractors is only his imagination and based on surmises but in fact many might have applied for the tender accepting the tender conditions. The contention of tailoring is denied and not acceptable one.

(e) This ground is vague and misconstrued but the respondent authorities should ensure that sufficient men and machinery are available with the writ petitioner and any deficiency in this regard would only hamper the progress of the work which would adversely affect the public in the case of protraction of the work which otherwise should be completed before the prescribed time limit as set out in the notice inviting for tenders and the agreement thereafter executed with the successful bidder and the writ petitioner is barred by law to impose any counter conditions while tendering for the work.

(f) The tender inviting authorities can impose different conditions for different work and as such they imposed certain conditions and the tenderer cannot decide the conditions while calling for tenders by the Government and therefore, this ground is to be ignored as ruled inter alia by the Hon'ble Apex Court in the case of Meerut Development Authority vs. Association of Management Studies [(2009) 6 SCC 171] and also in the case of Michigan Rubber (India) Ltd vs. The State of Karnataka [(2012) 8 SCC 216], to the effect that the terms of invitation of tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

31. The learned Additional Advocate General, appearing on behalf of the first respondent, cited the judgment in the case of AFCONS INFRASTRUCTURE LIMITED vs. NAGPUR METRO RAIL CORPORATION LIMITED AND ANOTHER [(2016) 16 SCC 818]. The relevant paragraphs 11 and 12 are extracted hereunder:

"11. Recently, in Central Coalfields
Ltd. v. SLL-SML (Joint Venture Consortium)

[Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons v. Port of Bombay [Dwarkadas Marfatia and Sons v. Port of Bombay, (1989) 3 SCC 293] it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] as mentioned in Central Coalfields [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99]."

32. In the case of PRESTIGE LIGHTS LTD vs. STATE BANK OF INDIA [(2007) 8 SCC 449], the relevant paragraphs 20, 35 and 36 are extracted hereunder:-

"20. [Ed.: Para 20 corrected vide

Official Corrigendum No.
F.3/Ed.B.J./83/2007 dated 27-11-2007.]
But, there is an additional factor also as to why we should not exercise discretionary and equitable jurisdiction in favour of the appellant. It is contended by the learned counsel for the respondent Bank that having obtained interim order and benefit thereunder from this Court, the appellant Company has not paid even a pie. The appellant is thus in contempt of the said order. The Company has never challenged the condition as to payment of amount as directed by this Court. Thus, on the one hand, it had taken benefit of the order of interim relief and on the other hand, did not comply with it and failed to pay instalments as directed. Neither it raised any grievance against the condition as to payment of instalments nor made any application to the Court for modification of the condition. It continued to enjoy the benefit of stay ignoring and defying the term as to payment of money. The Company is thus in contempt of the order of this Court, has impeded the course of justice and has no right of hearing till it has purged itself of the contempt.

35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.

36. In the case on hand, several facts had been suppressed by the appellant

Company. Collusive action has been taken with a view to deprive the respondent Bank from realising legal and legitimate dues to which it was otherwise entitled. The Company had never disclosed that it had created third-party interests in the property mortgaged with the Bank. It had also shifted machinery and materials without informing the respondent Bank prejudicially affecting the interest of the Bank. It has created tenancy or third-party right over the property mortgaged with the Bank. All these allegations are relevant when such petitioner comes before the court and prays for discretionary and equitable relief. In our judgment, the submission of the respondent Bank is well founded that the appellant is not entitled to ask for an extraordinary remedy under Article 226 of the Constitution from the High Court as also equitable remedy from this Court under Article 136 of the Constitution. A party, whose hands are soiled, cannot hold the writ of the court. We, therefore, hold that the High Court was not in error in refusing relief to the appellant Company."

33. In the case of MUNICIPAL CORPORATION, UJJAIN AND ANOTHER vs. BVG INDIA LIMITED AND OTHERS, the Apex Court delivered a judgment on 28.3.2018 in Civil Appeal No.3330 of 2018. The Supreme Court in the above recent case decided the following questions enumerated in paragraph 5, are extracted as under:-

"5. The questions involved in these appeals are:

a) Whether under the scope of judicial review, the High Court could ordinarily question the judgment of the expert consultant on the issue of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

b) Whether a bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture can rely upon the technical qualifications of

any third party for its qualification;

c) Whether the High Court is justified in independently evaluating the technical bids and financial bids of the parties, as an appellate authority, for coming to the conclusion?"

34. In paragraph 6 of the abovesaid judgment, the Supreme Court held that "the principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by this Court in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, wherein this Court observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down."

35. In paragraphs 35 and 36, the Supreme Court dealt with the evaluation of tenders which reads as under:-

"35. Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness. The exercise of the power of judicial review

should be avoided if there is no irrationality or arbitrariness. In the matter on hand, we do not find any illegality, arbitrariness, irrationality or unreasonableness on the part of the expert body while in action. So also, we do not find any bias or mala fides either on the part of the corporation or on the part of the technical expert while taking the decision. Moreover, the decision is taken keeping in mind the public interest and the work experience of the successful bidder.

36. As held in *Tata Cellular (supra)*, the terms of the tender are not open to judicial scrutiny as the invitation to tender is a matter of contract. Decisions on the contract are made qualitatively by experts. M/s Eco Save Systems Private Limited [respondent no.2 in Civil Appeal arising from SLP (C) No. 11967/2016] is a project consultant and technical advisor of the Ujjain Municipal Corporation. It provides technical consultancy and advisory services. The documents produced along with the counter affidavit filed by respondent no.2 would show that respondent no.2 is an expert in municipal solid waste management. It is brought to our notice that respondent no.2 has developed a Detailed Project Report (DPR) cum Master Plan of Ujjain City for up-gradation, systematization and abidance of the Municipal Solid Waste Rules, 2000 for the period 2012 to 2042, and the Jawaharlal Nehru National Urban Renewal Mission is stated to have sanctioned 35.88 crores for the purpose. There is no dispute by any of the parties that respondent no.2 is an expert in municipal solid waste management. We also hasten to add that there are no allegations of bias or mala fides against the technical committee, though grounds are taken by BVG India Limited before the High Court that the decision of the expert committee is not proper."

36. Finally, the question raised by the Hon'ble Supreme Court of India had been answered in paragraph 50 which reads as under:-

"50. Thus, the questions to be decided in this appeal are answered as follows:

(a) Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

(b) A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any 3rd Party for its qualification.

(c) It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint."

37. In paragraph 50(c) of the abovesaid judgment, the Hon'ble Supreme Court unambiguously states that it is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met.

38. This Court has to consider the point of favouritism and tailor made conditions and the mala fides raised by the writ petitioner in the present writ petition has been substantiated or not. On a perusal of the entire affidavit, the authority against whom an allegation of mala fides are raised has not been impleaded as party respondents in the writ petition. At the first instance, even going by the averments set out in the affidavit filed in support of the writ petition, six grounds are raised and in respect of all those six grounds, the learned counsel for the writ petitioner made an attempt to draw an inference of mala fides relying on the conditions imposed in the Tender Notification. In other words, the learned counsel for the writ petitioner is of an opinion that the conditions

stipulated are self evident that there is a mala fide on the part of the officials, who issued the Tender Notification. Such an inference drawn by the writ petitioner in the absence of any incriminating materials or evidence, this Court cannot come to the conclusion that such conditions are issued with a mala fide intention.

39. Contrarily, the learned Additional Advocate General contended that such stringent conditions are imposed considering the nature of works involved. The work relates to replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District. Thus a contractor who is capable of performing such works in perfect manner alone to be given an opportunity to perform the works. In order to ensure perfectness and promptness in executing the works by a contractor, certain conditions are imposed. Those conditions are formulated with the opinion of the technical experts and other competent authorities. Thus, there is no hard element of mala fides as alleged by the writ petitioner involved in respect of the tender conditions. This Court is of an opinion that in the absence of any substantial allegation or any reason to believe that there is a possibility of mala fide intention, this Court cannot come to the conclusion that the conditions imposed will lead to mala fide intention.

40. This apart, even at the time of Tender Notification, the writ petitioner was aware about the tender conditions. Having accepted the conditions stipulated in the Tender Notification, the writ petitioner also had submitted his bid before the last date. Having participated in the tender and after came to know that the writ petitioner was unsuccessful, then the writ petitioner cannot say that the conditions are void and mala fide. A person who participated in the Tender Notification, cannot be permitted to challenge the tender conditions in normal circumstances. If at all such conditions are mala fide, the same must be raised at the first instance, and the unsuccessful tenderer cannot raise the ground that the tender conditions were mala fide and not in consonance with the guidelines issued by the Central Public Works Department of the Government of India. Such grounds raised, cannot be accepted by this Court at this point of time.

41. Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000, speaks about the minimum time limit for submission of tenders and the same reads as under:-

"20. Minimum time for submission of tenders.- (1) The Tender Inviting Authority shall ensure that adequate time is provided for the submission of tenders and a minimum time is allowed between 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 tenders. This minimum period shall be as follows.-

(a) for tenders upto rupees two crores in value, fifteen days; and

(b) for tenders in excess of rupees two crores in value, thirty days.

(2) Any reduction in the time stipulated as per sub-rule (1) has to be specifically authorized by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing."

Sub-Clause (2) to Section 20 of the Rules categorically enumerates that any reduction in the time stipulated as per sub-rule (1) has to be specifically authorized by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing.

42. This Court has to examine whether the reduction of time limit in the present tender was made in accordance with the provisions of the Rules. In this regard, the Chief Engineer, WRD, Chennai Region issued a proceeding No.OT2/AE 5/DRIP/2018 dated 7.5.2018. In respect of estimate for the work of replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District, the estimated amount of Rs.3 crore was sanctioned in the said order. Subsequently, the Superintending Engineer has brought to the notice of the Chief Engineer for replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District is to be completed urgently.

43. In the event of not completing the same before the Monsoon period, then there is a possibility of wastage of water and other consequence may also happen. The nature of the work and the urgency had been explained by the Superintending Engineer and considering the same, the Chief Engineer, WRD, Chennai Region, issued a letter in proceedings dated 7.5.2018, granting relaxation of the time limit of 30 days prescribed under the Rules. The reduction of time limit is permitted under the same Rules. However, the Higher Authorities have to grant permission is the requirement.

44. In the present case on hand, the Chief Engineer has granted permission to reduce the minimum time limit of 30 days. The said proceedings were issued by the Chief Engineer on 7.5.2018. On receipt of the relaxation of time limit from the Chief Engineer, the Superintending Engineer issued a Tender Notification on 10.5.2018 and the last date for submission of tender was fixed as 18.5.2018. Thus, this Court do not find any irregularity or illegality in reduction of the time limit granted by the Chief Engineer. The Superintending Engineer also

properly assigned the reasons for the reduction of time limit to complete the tender and to execute the work and the reasons are certainly genuine and the same was accepted by the Chief Engineer and orders were also issued in proceedings dated 7.5.2018.

45. This Court is of an opinion that the work is in relation to replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District. From the month of June onwards, the Monsoon started in the States of Kerala and Karnataka, Krishnagiri is situated almost nearer to the State of Karnataka, more specifically, Bangalore. Therefore, the inflow of water during the rainy season to the Dam will be more. Since the Monsoon is going to be commenced in the State of Tamil Nadu also, it would be very difficult to preserve the water in the Dam in view of the fact that the Spillway Shutter had already been damaged in Krishnagiri Dam. Considering all these circumstances, urgent steps were taken by the authorities competent to complete the work at the earliest possible. This Court do not find any irregularity or illegality in taking such decision in view of the fact that such Spillway Shutters in Dams are to be maintained properly for the purpose of storage of water. If there is any damage in the Spillway Shutter, certainly the same may cause lot of damage and wastage of water. Under these circumstances, the relaxation of minimum required time for issuance of tender and execution of the work is perfectly justified and there is no reason to disbelieve the decisions taken by the authorities in this regard.

46. This apart, the Hon'ble Division Bench of the Madras High Court in the case of S.V.K. Sahasramam vs. The Deputy Registrar of Co-op. Societies, Tiruvannamalai Circle, Tiruvannamalai, Tiruvannamalai District and Others {decided on 29.8.2008 in W.A.No.949 of 2008}, held that the time limits prescribed in the Statute are directory and can never be construed as mandatory. Such time limits are prescribed in the Statute to prevent undue delay on the part of the competent authorities. However, in certain urgent circumstances or in the public interest, such time limit can be waived or relinquished. However, the reasons for the waiver to be explained by the authorities concerned. Thus, the Division Bench held that the time limit prescribed in the Co-operative Societies Act is directory and not mandatory. The following relevant paragraphs 5, 6 and 7 are extracted hereunder:-

"5. Therefore, the question which is falling for consideration before this Court is, whether the time limit which is provided under Section 81(4) of the said Act is mandatory or not and whether the word "shall" used in Section 81(4) of the said Act has to be construed as mandatory

or not.

6. It is well settled that the question whether an expression used in a section is mandatory or not has to be decided on various factors and the mere expression of the word "shall" alone is not decisive of the matter. This question came up for consideration before the Privy Council in the celebrated case of Montreal Street Railway Company vs. Normandin reported in A.I.R. 1917 Privy Council 142. Sir Arthur Channel, speaking for the Judicial Committee of the Privy Council, clarified the position at page 144 of the report as follows :-

"The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statutes must be looked at." The learned Judge relied on Maxwell on "The Interpretation of Statutes" and the portion on which reliance was placed is set out hereinbelow :-

"where the prescription of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

The aforesaid principles have been followed by the Constitution Bench of the Supreme Court in the case of State of U.P. vs. Manbodhan Lal (supra), wherein paragraphs 10 and 11 at pages 917 and 918 of the report are relevant and they are extracted hereunder :-

"The question may be looked at from another point of view. Does the Constitution provide for the contingency as to what is to happen in the event of non-

compliance with the requirements of Article 320(3)(c)? It does not, either in express terms or by implication, provide that the result of such a non-compliance is to invalidate the proceedings ending with the final order of the Government.

This aspect of the relevant provisions of Part XIV of the Constitution, has a direct bearing on the question whether Article 320 is mandatory. The question whether a certain provision in a statute imposing a duty on a public body or authority was mandatory or only directory, arose before their Lordships of the Judicial Committee of the Privy Council in the case of *Montreal Street Railway Company v. Normandin*, 1917 A.C. 170(B).

In that case the question mooted was whether the omission to revise the jury lists as directed by the statute, had the effect of nullifying the verdict given by a jury. Their Lordships held that the irregularities in the due revision of the jury lists, will not ipso facto avoid the verdict of a jury. The Board made the following observations in the course of their judgment:

"...The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in *Maxwell on Statutes*, 5th Edn., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

The principle laid down in this case was adopted by the Federal Court in the

case of Biswanath Khemka v. King-Emperor, 1945 F.C.R. 99 : A.I.R. 1945 FC 76 (C). In that case, the Federal Court had to consider the effect of non-compliance with the provisions of Section 256 of the Government of India Act, 1935, requiring consultation between public authorities before the conferment of magisterial powers or of enhanced magisterial powers, etc.

The Court repelled the contention that the provisions of Section 256, aforesaid, were mandatory. It was further held that non-compliance with that section would not render the appointment otherwise regularly and validly made, invalid or inoperative. That decision is particularly important as the words of the section then before their Lordships of the Federal Court, were very emphatic and of a prohibitory character.

An examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory.

If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter.

This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid.

On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will

not render the proceeding invalid. In that connection, the following quotation from Crawford on Statutory Construction # Article 261 at p. 516, is pertinent:

"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...."

The very same passage from the judgment of the Privy Council referred to above has been approvingly quoted by the Supreme Court in extenso. Similar principles have been reiterated in a subsequent Constitution Bench judgment of the Supreme Court in the case of State of U.P. vs. Babu Ram Upadhyaya (supra). Justice K. Subba Rao, as His Lordship then was, speaking for the majority, quoting the same passage from Montreal Street Railway Company (supra), has come to the same conclusion [See page 765] :-

"The relevant rules of interpretation may be briefly stated thus: When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

The decision of the Supreme Court in State of U.P. vs. Manbodhan Lal (supra) was also reiterated.

7. In our view, the learned Judge of the writ court, therefore, placed reliance on the correct proposition of law and the judgment of the Apex Court and the formulation of the principles of the Privy Council. Subsequently also, in a two judge bench decision of the Supreme Court in the case of T.V. Usman vs. Food Inspector, Tellicherry Municipality reported in A.I.R. 1994 S.C. 1818, the same principles have been reiterated [See paragraph 14]:-

"In Maxwell on Interpretation of Statutes, Eleventh Edn., at page 362 it is stated as under:

"Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner, no doubt can be entertained as to the intention; that is to say, such a requirement would be imperative."

It is further stated on page 364 that:

"The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. * * *

When a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative."

In Craies' Statute Law, Seventh Edn., at page 62 it is stated thus:

"When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute; but those which are not essential and may be disregarded

without invalidating the thing to be done, are called directory." (emphasis in original)

At page 250 it is further stated thus:

"The question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at. ... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable not affecting the validity of acts done."

47. In view of the judgment of the Hon'ble Division Bench, this Court is of an opinion that the waiver of the minimum time limit prescribed in Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000 is directory and can never be construed as mandatory. This apart, the reasons stated by the competent authorities for the urgency in execution of the Dam works are certainly candid and convincing. Thus, there is no irregularity in granting relaxation of the time limit prescribed in Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000 and the competent authorities are justified in minimising the time limit for tender and subsequently to execute the work without any further delay.

48. The next question arises whether the contractor can challenge the waiver of minimum time limit after participating in the tender.

49. There seems to be the judicial consensus that unless it is challenged at the beginning of its tender amount to the party accepting the decision and that it cannot be challenged at the later stage.

50. The Hon'ble Supreme Court of Canada in the case of R. (Ont.) vs. Ron Engineering [(1981) 1 S.C.R. 111], held as follows:-

"The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a

unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn". No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders."

51. In the case of Meerut Devt. Authority vs. Association of Management [decided on 17.4.2009 in Civil Appeal No.2619 of 2009], the Hon'ble Supreme Court of India decided what is the nature of rights of a bidder participating in the tender process. The relevant paragraph 17 is extracted hereunder:-

"17. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to

tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."

52. In the case of Agni Trading Corporation vs. Government of Tamil Nadu [decided on 27.9.2017 in WP Nos.25807 and 25808 of 2017], this Court in paragraphs 7, 10 and 11 held as follows:-

"7. Mr.C.Mani Sankar, learned Additional Advocate General appearing for the respondents would submit that the writ petition itself is not maintainable in law as admittedly, the petitioner has not participated in the tender and already two persons have been awarded tender. He further submitted that the reference in the website, dated 15.09.2017, is only with regard to the State of Maharashtra and it will not be applicable to the State of Tamil Nadu. He further submitted that the reference of the decision of this Court dated 21.03.2017 in W.P.No.6823 of 2017 will not be applicable to the facts of this case. It is submitted that in terms of Rule 20 (2), the time prescribed in Rule 20(1) (b) referred to by the petitioner can be shortened by the Authority by recording reasons in writing and that taking note of the festive season, the period has been

reduced invoking the said provision and the said proceedings in B.S.No.6/038139/2017 has been produced before this Court.

10. The petitioner challenges the act of the respondents in fixing the higher value for Dal at Rs.63.50ps, which, according to the petitioner, is more than the value prescribed in Agriwatch website. Though it has been specifically mentioned as State of Maharashtra, admittedly, there are more website and in the earlier order, this Court has followed with the website of Agriwatch website, wherein, the Tur Dal was fixed as Rs.60,000/- Metric Tonne. Admittedly, in the present case, the Agriwatch website has mentioned as Rs.7,000/- per quintal and if the contention of the petitioner is accepted, the Government will have to increase the value of Dal to Rs.70 per kg. Hence, I find that the rate fixed in the website produced by the petitioner is only with regard to the State of Maharashtra. As rightly pointed out by the learned Additional Advocate General, the Agmarknet connecting Farmer to Market is only a website containing frequently asked questions and this cannot be taken note of for fixing the rate for the value of Dal as contended by the petitioner, as in this case, invoking Rule 20(2), the period of 30 days has been reduced to 15 days, which cannot be found fault with, as it is in consonance with Rule 20(2).

11. That apart, the order produced by Mr. Wilson, learned Senior Counsel, appearing for the petitioner is only an interim order and not a final order. Even assuming that it is a final order, when more than one website is available, this Court cannot come to a conclusion as to which value has to be taken based on the website. The value that is fixed is only a decision of the Government and the Court cannot go into the question as stated supra, unless it smacks arbitrariness or against any statutory provisions. If this Court is to accept the contention of the petitioner, then the Court will have to refer to Agriwatch website and direct the

Government to increase the value of Mysore Dal to Rs.70 per kg. Last but not the least, admittedly, the petitioner has not participated in the tender. The reasons given by the petitioner for not participating in the tender and that he is a prospective bidder cannot be accepted and having not participated in the tender, the petitioner cannot question the allotment made to the other two respondents i.e., respondents 3 and 4, who are the successful bidders."

53. The High Court of Jharkhand in the case of Sheo Kumar Agarwal Sunil Kumar vs. Shagun Udyog Pvt Ltd. [2007 (2) BLJR 1134], the relevant paragraph-8 is extracted hereunder:-

"8 At the very outset, I would like to mention here that pursuant to the tender notice issued by the respondent-HEC, both the appellant and the respondent writ petitioner along with others, submitted their tenders. The writ petitioner participated in the tender, but his bid was rejected due to non-fulfillment of the terms and conditions of the tender notice. The tender of the appellant was finalized and work order was issued on 6.2.2006. It has not been disputed that pursuant to the work order, the appellant lifted substantial quantity of wastes after depositing the security amount of Rs. 3.4 lacs and further deposited a sum of Rs. 12.01 lacs. It is only thereafter the writ petitioner, after participating in the tender and after having been declared unsuccessful, challenged the tender notice on the ground that the respondent-HEC cannot sell the non ferrous metal and wastes to any party, particularly the appellant on the ground of alleged violation of Rules 19 and 20 of the H.W. Rules, 1989. It is well settled that a tenderer, after participating in the tender and after being declared as unsuccessful tenderer, cannot be allowed to challenge the tender notice defeating the claim of the successful tenderer."

54. The Madras High Court in the case of M/s.Chandragiri Construction vs. State of Tamil Nadu [decided on 1.4.2010 in WP No.25281 of 2009], wherein the rights of the bidders are enumerated in paragraph-53 which is extracted as under:-

"53. The petitioner (M.Manickavasalu)

has raised the ground that there was no clarity in the number of criteria to be fulfilled for being eligible at the pre-qualification stage. At the first instance, it has to be noted that the petitioner having not challenged the tender conditions is estopped from questioning the same, after participating in the tender. Secondly, it is an essential requirement to satisfy all the pre-qualification criteria for a bid to be considered as responsive. On facts, it is clear that the petitioner's pre-qualification bid is not responsive and therefore petitioner has to be non-suited on this ground alone. As regards the justification report submitted by the respondent Department, they have technically evaluated the same and justified their action. In the absence of any material placed by the petitioner to establish that the figures given in the justification report are erroneous or factually incorrect, this Court cannot be compelled to review the administrative decision of the experts in that regard."

55. Considering all the above judicial pronouncements by the Apex Court and by the High Courts, this Court is of an opinion that the writ petitioner, being an unsuccessful bidder, has chosen to challenge the conditions stipulated in the Tender Notification on the ground of mala fides. However, the same has not been substantiated. The main ground raised by the writ petitioner is that there is a mala fide on the part of the authorities competent was not raised at the first instance when the writ petitioner was aware of such conditions in the Tender Notification. The point of "tailor made conditions" are to favour some contractors, cannot be raised after participating in the tender process and after submitting the bid. Thus, the writ petitioner is estopped from raising the ground that the conditions stipulated is arbitrary after participating in the tender and submitting his bid. Secondly, the minimum time limit fixed under Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000 also provides that the said time limit can be relaxed by the Higher Authorities by assigning the reasons. In respect of the present tender, the work relates to execution of replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District. The Court is able to understand the seriousness and the urgency involved in such execution of works. A practical and pragmatic approach in execution of such urgent works are to be undertaken. If the Spillway Shutter of a Dam is under damaged condition, then it is the duty mandatory

on the part of the competent authorities to ensure that the Spillway Shutters are properly repaired and maintained without causing any further delay. Such works are to be executed without any lapse of time, and in the event of any lapse of time, there is a possibility of large scale damages in the Dam and for the public in general. Thus, the urgency involved is certainly genuine and this Court has no reason to disbelieve the reasons assigned by the Chief Engineer to reduce the minimum time limit prescribed under Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000. Applying the legal principles settled in the case of S.V.K.Sahasramam, cited supra, the time limit stipulated in the Rules are only directory and not mandatory.

56. This apart, the writ petitioner was very well aware of the relaxation granted because the Tender Notification was issued on 10.5.2018 and the last date was fixed on 18.5.2018. It is pertinent to note that the writ petitioner also had submitted his bid before the last date on 18.5.2018. Thus, the writ petitioner is estopped from raising the ground that the time limit granted is in violation of Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000, as per the legal principles enumerated by the Apex Court of India.

57. This Court is of an opinion that the writ petitioner has not established any genuinity in filing the present writ petition. Replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District can never be delayed and the execution of the work is to be done at the earliest possible and therefore, the actions of the respondents in this regard in granting relaxation of the minimum time limit prescribed under Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000 are perfectly justified and there is no reason to interfere with the decision taken by the competent authorities in this regard.

58. Considering the judicial pronouncements and the grounds raised on behalf of the writ petitioner and the respondents, this Court is of an undoubted opinion that the writ petitioner has not made out any valid ground for the purpose of interfering with the process of tender or otherwise. Thus the writ petition is devoid of merits and accordingly, the same stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are also dismissed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

Svn

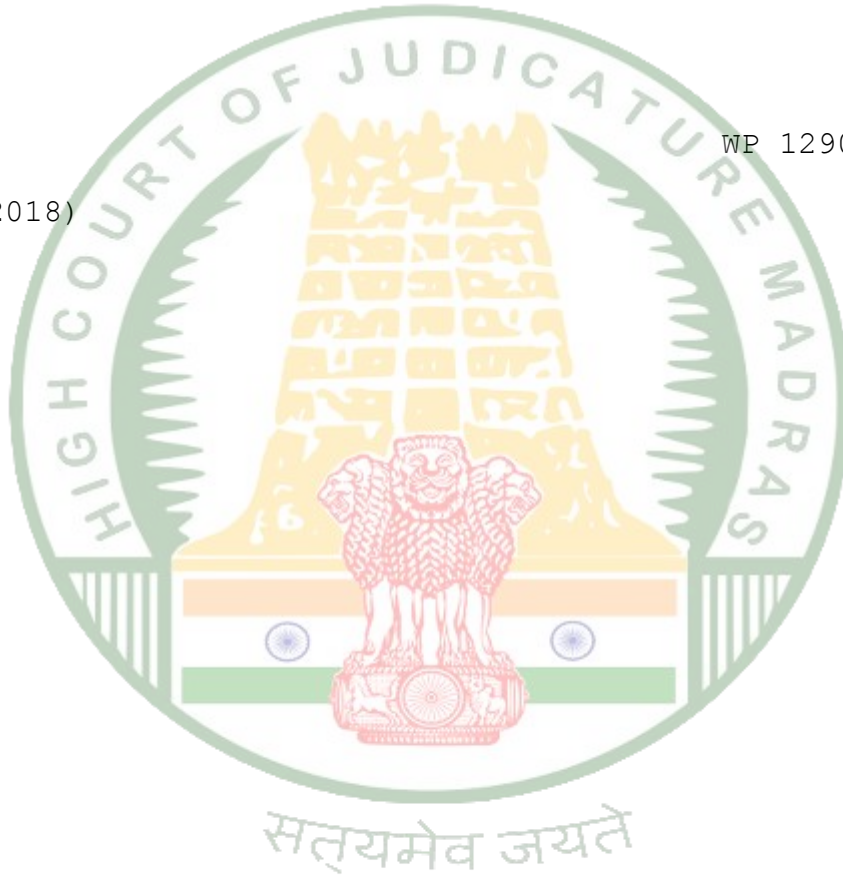
To

1.The Superintending Engineer,
PWD, WRO,
Pennaiyar Basin Circle,
Tiruvannamalai.

+1 CC to Govt. Pleader sr 46586.

WP 12903 of 2018

SP(27/07/2018)



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