

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 11.12.2018

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR. JUSTICE P.RAJAMANICKAM

WA.No.2706/2018

S.Manivel

Appellant / Writ
Petitioner

Versus

- 1 The Superintending Engineer
PWD, WRO, Pennaiyar Basin
Circle, Tiruvannamalai.
- 2 The National Informatics Centre
A-Block, CGO Complex
Pragathi Vihar
New Delhi 110 003. ... Respondents / Respondents

Prayer:- Writ Appeal filed under Clause 15 of the Letter Patent
against the order made in wP.No.12903/2018 dated 13.07.2018.

Prayer in W.P.No.12903 of 2018:

Writ Petition filed Under Article 226 of the Constitution of
India praying for the issuance of a writ of Certiorarified
Mandamus or any other writ, order or direction to call for the
records in Tender Notification dated 10/05/2018, on the file of
the 1st 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 1st respondent
to consider the tender application submitted by the petitioner
on 18.05.2018.

For Appellant : Mr.Avinash Wadhvani for
Mr.V.Raghavachari

For R1 : Mr.E.Manoharan, AGP

JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.,]

By consent, the writ appeal is taken up for final disposal and is disposed of by this judgment. Mr.E.Manoharan, learned Additional Government Pleader accepts notice on behalf of the 1st respondent.

2 The appellant is the writ petitioner and he had participated in the Tender process relating to replacement of Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District and has also submitted his Tender application. The appellant/writ petitioner on becoming aware that he was not within the Zone of consideration, made a challenge to the Tender Notification dated 10.05.2018 by filing WP.No.12903/2018 and it was entertained and interim orders were granted, not to confirm the tender until further orders. The appellant/writ petitioner alleging violation of the said interim order, filed a contempt petition in Cont.P.No.1529/2018 and pendency of the same, was issued with a communication stating that his application has been rejected.

3 The contesting respondent, viz., the 1st respondent herein, filed a counter affidavit and the learned Judge, after taking note of the factual aspects and various decisions rendered by the Hon'ble Supreme Court of India as well as this Court, as to the scope of judicial review/interference in the process of tender, has dismissed the writ petition vide impugned order dated 13.07.2018 and aggrieved by the same, the appellant/writ petitioner has filed the present writ appeal.

4 It is brought to the knowledge of this Court that the successful bidder has also completed the work.

5 The facts leading to this litigation have been narrated in detail and in extenso by the learned Judge in the impugned order dated 13.07.2018 in dismissing the writ petition and in order to avoid repetition, the said facts are not narrated once again and only the relevant facts are stated for the disposal of this writ appeal.

6 The appellant/writ petitioner was one of the applicants who had submitted the tender for the said work and he raised two grounds. Firstly, the formula adopted in respect of minimum tender value is per se arbitrary for the reason that in similar type of works undertaken by the Central Public Works Department [CPWD] and the Tamil Nadu Generation and Distribution

Corporation [TANGEDCO], the formula was different and secondly, for such a magnitude of the work, the time limit was too short. Additionally, the appellant/writ petitioner also took a stand that the conditions incorporated in the Tender were tailor-made to accommodate the already identified individual/concerned and cumulatively, the act of the 1st respondent is arbitrary and mala fide exercise of power. The learned Judge after taking into consideration the materials placed, including the counter affidavit filed by the 1st respondent and after placing reliance upon various decisions as to the Tender Laws, has dismissed the writ petition.

7 Mr.Avinash Wadhwani, learned counsel representing Mr.V.Raghavachari, Mrs.V.Srimathi and Mr.V.Lakshminarayanan, learned counsel appearing for the appellant would vehemently contend that the formula adopted in respect of minimum turnover value is only to suit the convenience of an already identified indicating to award the Tender and similar entities doing similar type of works, viz., CPWD and TANGEDCO, had adopted a very transparent procedure. Though the cost of the project is about Rs.3 Crores, Tender Notification was approved on 07.05.2018 and was published on 10.05.2018 and was uploaded in the Website on 14.05.2018 and the last date for submission of the tender application was on 18.05.2018 and hardly, 8 days time granted and within a short span of time, it was impossible to collect all the particulars for proper submission of the tender application and despite that, the appellant/writ petitioner has submitted the tender application on or before 18.05.2018 and for reduction of such a time limit also, the superior official did not assign any proper and sufficient reasons in terms of Rule 20 [2] of the Tamil Nadu Transparency in Tenders Rules, 2000 [in short 'the Tender Rules'] and the altered/modified time limit has also not been uploaded in the Website.

8 It is further pointed out by the learned counsel for the appellant/writ petitioner that there is no real urgency involved in carrying out the execution of the said work for the reason that even as per the counter affidavit of the 1st respondent, one of the Shutters of Krishnagiri Dam [Shutter No.1] got damaged on 29.11.2017 itself and however, the tender was floated only on 07.05.2018 and that Rule 20[1] of the Tender Rules ought to have been followed in respect of the time limit along with Rule 20[2] and would further urge that despite the fact that the tender has been awarded in favour of the successful bidder and that he has completed the work and in the light of the important points urged in this appeal which also pertains to public interest, this Court may entertain the writ appeal and after eliciting the response of the 1st respondent/contesting respondent, may pass appropriate orders.

9 This Court has carefully considered the submissions made by the learned counsel for the appellant/writ petitioner and also perused the materials placed before it.

10 The 1st respondent took a stand that the said shutter got damaged on account of overflowing in the downstream Reservoirs and rain was also expected in the light of ensuing monsoon during November 2018, a fair and conscience decision to replace the said Shutter immediately, was taken and accordingly, the Public Works [S2] Department had accorded sanction in G.O.Ms.No.123, dated 04.05.2018 for an amount of Rs.300 Lakhs and the estimate for the above work was technically sanctioned by the Chief Engineer, PWD, WRD., Chennai Region, vide proceedings dated 07.05.2018 for Rs.300 Lakhs. Accordingly, the Tender was published on 07.05.2018 after necessary approval and five tenderers, including the appellant herein, had participated and out of which, two tenderers were found to be qualified and eligible for participating in the open price tender and the Pre-Qualification Tenders offered by the tenderers have been approved by the Tender Award Committee in its 286th Committee Meeting held on 21.05.2018. Insofar as the reduction of time limit is concerned, in terms of Rule 20[2] of the Tender Rules, it is the stand of the 1st respondent that the minimum period of thirty days for submitting tender is only directory and not mandatory and in the light of the urgency exhibited, a fair decision has been taken to reduce the time limit and the appellant/writ petitioner cannot express any grievance in that regard for the reason that even within the reduced time limit in terms of the above said Rule, the appellant/writ petitioner had participated in the tender process by submitting the tender application before the cut-off date on 18.05.2018. It is also the stand of the 1st respondent insofar as the minimum turnover value is concerned, that the Minutes of the Board of Engineers in 402nd Board of Engineers Meeting held on 28.08.2000, one of the Agendas taken up was relating to the said subject and the qualification of Annual Turnover was arrived in a formula basis and will be increased or decreased according to the period of completion and 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 also been described according to the requirement of works to be executed and also extracted the formula in paragraph 11 of the counter affidavit and it is relevant to extract the same:-

Formula:-

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

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*12/3*1.5 times=Rs.1728.90 [or]
Rs.1729 Lakhs [or] Rs.17.29 Crore.

11 It is also the stand of the 1st respondent that the calculation of the Annual Turnover is increased when the period of completion is shorter and decreased when the period of completion is longer and as per the above calculation, the period of completion of work is minimum of three months and so that the fixation of annual turnover is increased. The 1st respondent also dealt with the issue relating to tailor-made conditions to suit a particular individual who is said to have already been identified and denied the said averment and the qualification and quantities to be executed, are fixed and executed according to technically sanctioned estimate and not tailored to the benefit of any other individual and that apart, wide notification / publication has also been effected, inviting the tenderers to participate in the tender process.

12 The learned Judge has done an elaborate exercise in analysing the factual aspect and appreciated the legal position and also dealt with the relevant case laws pertaining to the Tender Laws. The learned Judge, in paragraph No.38, has dealt with the mala fide aspect and recorded the finding that admittedly, the authority against whom the allegation of mala fide was raised, has not been impleaded as a party and only an attempt has been made to draw inference out of six grounds raised.

13 It is well settled position of law that the allegation of mala fide should not only be alleged, but it should also be strictly proved and mere averments would not shift the burden on the concerned person. It is also to be noted at this juncture that though nowadays, allegations of such nature, are freely made, but it is very difficult to sustain the said allegations in the absence of proper and tenable materials.

14 Insofar as the primordial submission as to the fixation of minimum turnover value is concerned, this Court is of the considered view that those points are technical in nature and though it is open to the Court to exercise its judicial review, unless and until the approach of the concerned authority is arbitrary or mala fide and the procedure adopted is to suit the convenience of somebody.

15 In the decision reported in 2016 [10] Scale 50 [Montecarlo Ltd., Vs. NTPC Ltd], the scope of judicial review pertains to techno/commercial bid came up for consideration and

the Hon'ble Supreme Court after placing reliance upon the often quoted judgment in Tata Cellular Vs Union of India reported in 1994 [6] SCC 651 and Sterling Computers Limited Vs. M/s.M.N.Publications Limited and others reported in 1993 [1] SCC 445 and Afcons Infrastructure Ltd., Vs. Nagpur Metro rail Corporation Limited reported in 2016 [8] SCALE 765, in paragraph No.24, has observed as follows:-

'24 We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third party assistance from those unconnected with the owners organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach, highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But, where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible. The principle that is

applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

16 In the decision reported in 2016 [10] SCALE 69 [Tamil Nadu Generation and Distribution Corporation Ltd [TANGEDCO] rep.by its Chairman and Managing Director and Another vs. CSEPDITRISHE Consortium rep.by its Managing Director and Another], the scope of judicial review pertains to tender process was considered and after placing reliance upon the decision in Jagdish Mandal Vs. State of Orissa reported in 2007 [14] SCC 517 and Star Enterprises Vs. City and Industrial Development Corporation of Maharashtra Ltd., reported in 1990 [3] SCC 280, the Hon'ble Apex Court, in paragraph No.36, has observed as follows:-

'36 At this juncture, we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies etc., have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.'

17 The counter affidavit of the 1st respondent also gives the reason as to the adoption of the said formula and since it had fallen within the domain of the experts, this Court cannot interfere with the same and also in the ratio laid down in the above cited decisions.

18 The learned Single Judge in paragraph No.42, had dealt with the reduction of time limit in terms of Rule 20[2] of the Tender Rules and recorded the finding that the Chief Engineer had accorded permission to reduce the minimum time limit of 30

days vide proceedings dated 07.05.2018 and on receipt of such communication, the Superintending Engineer issued the Tender Notification dated 10.05.2018 and the last date for submission of tender was fixed on 18.05.2018 and since the Rule has accorded for reduction of the time limit, the learned Judge found no infirmity as to the procedure adopted and the learned Judge has also taken note of the judgment dated 29.08.2018 in WA.NO.949/2018 [S.V.K.Sahasramam Vs. The Deputy Registrar of Co-op. Societies, Tiruvannamalai Circle, Tiruvannamalai, Tiruvannamalai District and others], wherein it is held that the time limit prescribed in the Statute are directory and can never be construed as mandatory and such time limits are prescribed in the Statutes to prevent undue delay on the part of the competent authorities and in certain urgent circumstances or in public interest, such time limit can be waived or relinquished.

19 Admittedly, one of the Shutters of Krishnagiri Dam got repaired and therefore, water was getting discharged and in the light of impending monsoon during November 2018, a fair and conscience decision was taken to replace the Spillway Shutter No.1 of Krishnagiri Dam in Krishnagiri District and therefore, it cannot be said that the action initiated by the 1st respondent in that regard, is mala fide or arbitrary.

20 It is also very pertinent to point out at this juncture that the appellant was one of the parties to the tender process and therefore, it is not open to him to turn around and make a challenge to the tender conditions / prescription of norms and that apart, the tender was also awarded and the successful bidder had also completed the work and admittedly, the said party has not been arrayed as a respondent.

21 The Tender submitted by the appellant/writ petitioner also came to be rejected on 22.05.2018 and was received by him on 18.06.2018 and despite availability of alternate remedy u/s.11 of the Tamil Nadu Transparency of Tenders Act, 1998, with a provision for grant of interim stay, the appellant/writ petitioner did not avail the same.

22 This Court, on an independent application of mind to the entire materials, is of the considered view that there is no error apparent or infirmity in the reasons assigned by the learned Judge for dismissing the writ petition and the learned Judge had also assigned reasons by taking into consideration the relevant case laws relating to the scope of judicial review in awarding the Tenders by the concerned authority.

23 In the result, the writ appeal is dismissed confirming the order dated 13.07.2018 made in WP.No.12903/2018. No costs.

24 Since the issue pertains to public interest also, this Court directs [1] The Secretary to Government, Public Works Department, Secretariat, Fort St. George, Chennai-600 009 ; [2] The Chief Engineer, PWD, WRO, Chennai Region, Chepauk, Chennai-5 ; and [3] The Superintending Engineer, PWD, WRO, Pennaiyar Basin Circle, Tiruvannamalai, shall jointly file a Status Report as to the quality of the work done by the concerned Contractor for replacement of Spillway Shutter No.1 of Krishnagiri Dam at Krishnagiri and the preventive measures to be taken to avoid such kind of incidents in future in respect of dams located in the State of Tamil Nadu. The said Status Report is to be filed on 18.01.2019.

25 Call on 18.01.2019 for filing Status Report.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

AP

To

- 1 The Superintending Engineer
PWD, WRO, Pennaiyar Basin
Circle, Tiruvannamalai.
- 2 The National Informatics Centre
A-Block, CGO Complex
Pragathi Vihar
New Delhi 110 003.

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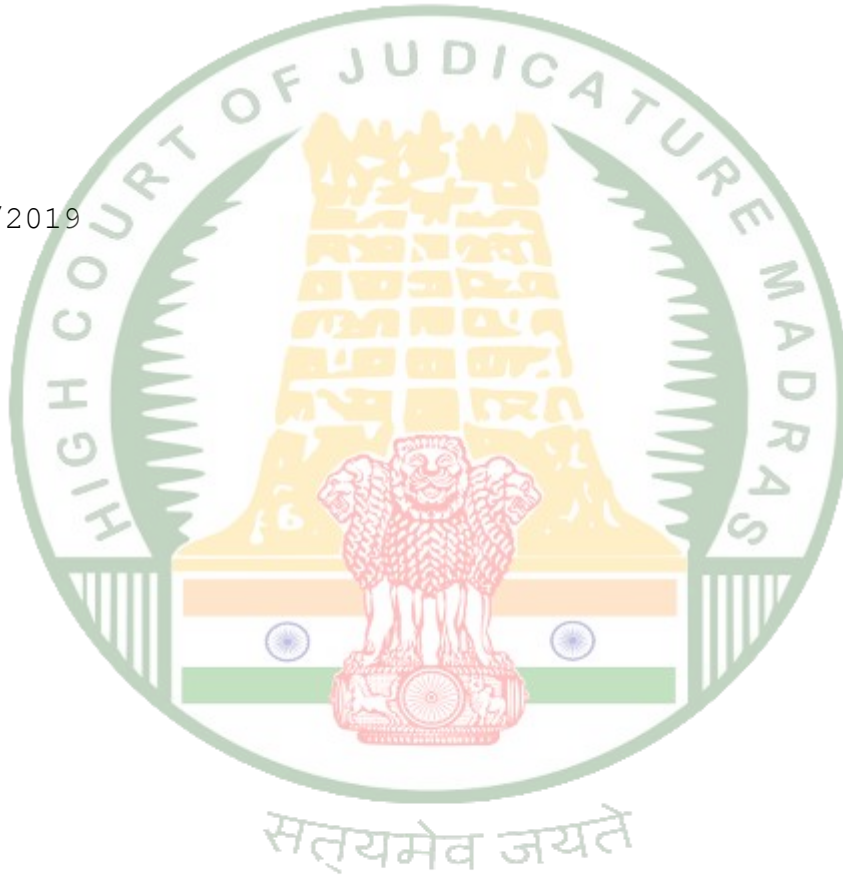
- [1] The Secretary to Government,
Public Works Department,
Secretariat,
Fort St. George,
Chennai-600 009.

[2] The Chief Engineer,
PWD, WRO, Chennai Region,
Chepauk, Chennai-5.

+1cc to Mr.V.Raghavachari, Advocate Sr.85353

WA.No.2706/2018

ev[co]
srg 04/01/2019



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