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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 23.07.2018
PRONOUNCED ON : 27.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

W.A(MD)No.977 OF 2018
and
C.M.P(MD)No.6578 of 2018

1.The Chairman
V.O.Chidambaranar Port Trust,
Tuticorin.

2.The Chief Engineer,
Engineering Department (Civil)
V.O. Chidambaranar Port Trust,
Tuticorin. :Appellants/Respondents

.vs.

M.Sindhu
: Respondent / Writ Petitioner

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent praying this Court to set aside the order dated 17.07.2018 made in W.P(MD)No.14375 of 2018 on the file of this Court insofar as setting aside Clause - 4 of tender notification in NIT No.02/Rubble Bund/PD/2018-19 dated 27.06.2018 issued by second appellant pertaining to pre-qualification of 26% experience of lead partner / partner in the joint venture partnership.

Prayer in WP(MD).No. 14375/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus calling for the records pertaining to the Clause Nos.3 and 4 of the Impugned Tender Notice in NIT No.02/Rubble Bund/ PD/2018-19 DATED 27.06.2018 on the file of the 2nd Respondent and quash the same and consequently direct the 1st Respondent to conduct the Tender in a Fair manner by amending the Clauses No.3 and 4 suitably in consonance with the Tender Transparency Act.

For Appellants

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

:Mr.Veerakathiravan
Senior Counsel for
Mr.A.Airuchandran



For Respondent

:Mr.KM.Vijayan
Senior Counsel for
Mr.N.Anandakumar

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JUDGEMENT

[Judgement of the Court was made by K.RAVICHANDRABAABU,J.]

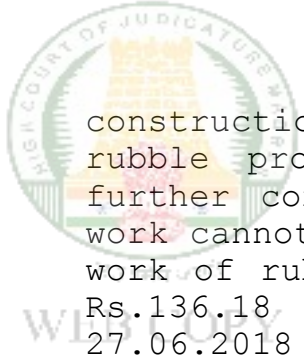
This writ appeal is filed against the order passed by the Writ Court in W.P(MD)No.14375 of 2018 dated 17.07.2018.

2.The appellants herein are the respondents before the Writ Court. The respondent herein, as the writ petitioner, challenged Clause Nos.3 and 4 of the Tender Notice dated 27.06.2018 on the file of the second respondent. Consequently, the writ petitioner sought for a direction to the first respondent to conduct the tender in a fair manner by amending Clauses 3 and 4 suitably in consonance with the Tender Transparency Act.

3.The Writ Court allowed the writ petition in part and quashed the Clause No.4 of the Tender Notification alone. Thus, the present writ appeal is filed by the aggrieved respondents. For the sake of convenience, the parties arrayed before the Writ Court are called as such here in this writ appeal.

4.The brief facts and circumstances, which culminated into filing of this writ appeal, are as follows:-

a) The Union of India proposed to take development activities to deepen the Harbour Basin and the approach channel to handle Draught Vessels to the level of 15.2 meters at the first respondent Port. The project is for the purpose of construction of break water rubble protection bund and strengthening of berth and widening of the Port entrance channel and deepening of entrance channel and harbour basin. The initial work of construction of rubble protection bund for dumping of dredged materials of capital dredging at South of South break water in the first respondent Port was estimated at the cost of Rs.136.19 Crores. Initially a tender was floated on 28.04.2018. There was a meeting of the bidders, called pre-bid meeting. A technical objection was raised that the "similar work" definition in the Tender Notice was meaningless and the road work cannot be compared with the nature of work in the proposed tender dated 28.04.2018. After considering the objection from participants, the respondent Trust thought fit that it cannot proceed with the tender floated on 28.04.2018 and thus, cancelled the same, by proceedings dated 24.05.2018. The respondents decided to appoint an Expert Body consisting of Professors, who have highest reputation and rich experience in the field of Ocean Engineering to give advice in this matter to take a decision pertaining to the qualification and experience in the project of construction of rubble protection bund. Accordingly, the Expert Body was constituted, which in turn gave a report that an experience in



construction of road work cannot be treated with the experience of rubble protection bund for capital dredging. The Expert Body further concluded that the road construction, maintenance of bund work cannot be considered as eligible qualification for the proposed work of rubble protection bund for capital dredging at the cost of Rs.136.18 Crores. Hence, a fresh notification was issued on 27.06.2018 also by explaining as to what is "similar work" meant under Clause 3(a) of the Tender Notification. The said notification was put to challenge by the writ petitioner only by questioning Clause - 3 and Clause - 4 therein. While Clause - 3 deals with minimum qualifying criteria, wherein similar work was defined as Construction of breakwater in any ports/harbour in India/Abroad using armor stones, tetrapods, accropodes etc, Clause - 4 stipulates the Minimum Eligibility Criteria for each joint venture partner including the lead partner thus, to the effect that each of them should meet not less than 26% of the Average Annual Turnover and Specific work Experience.

b) According to the writ petitioner, the above Clauses No.3 and 4 are introduced only to avoid other tenderers and to pave way to a particular person. In other words, the claim of the writ petitioner is that the above two Clauses purposely exclude the writ petitioner from participating in the tender process.

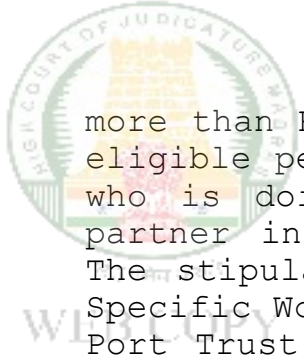
c) The writ petition was opposed by the respondents by filing a counter affidavit. It was contended by the respondents before the Writ Court that introduction of Clause-4 is only to implement the standard of experience to the participants in the tender and therefore, the introduction of the joint venture clause is only to enable several experienced persons to form a single entity. Hence, such condition was stipulated that each partner should have at least a minimum of 26% in the eligibility turnover and work experience to improve the standard of qualifications and experience. It was also contended by the respondents that the road work experience both by turnover or by contract cannot be equated with the experience required for executing the present contract work.

d) The Writ Court agreed with the respondents in respect of Clause -3 dealing with "similar work", and found that there is no infirmity in the respondents' act of removing the term "road works" from the definition of "similar work" which was based on the Expert Committee's report. However, the Writ Court found that inclusion of Clause - 4 requiring 26% of the Average Annual Turnover and Specific Work Experience of each joint venture partner is an arbitrary action and mulcted with *mala fides*. Therefore, the Writ Court quashed Clause No.4 of the Tender Notification, thereby allowing the writ petition in part.

5.Mr.Veerakathiravan, learned Senior Counsel for the appellants submitted as follows:-

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The nature of work, which is the subject matter of tender notification, is a specialised work having total project value of



more than Rs.136 Crores. Therefore, a road contractor cannot be an eligible person or considered to be a person equal with the person, who is doing such specialised work. Therefore, the name sake partner in a joint venture consortium will not meet the purpose. The stipulation of 26% requirement of Average Annual Turnover and Specific Work Experience is not introduced as the first time in this Port Trust and on the other hand, other Ports in this country are also stipulating such condition. The learned Judge was not justified in holding that stipulation of such condition was arbitrary and with *mala fide*, more particularly, when the tender itself is yet to be opened. The first respondent being the tender inviting authority and the owner of the subject matter of contract is entitled to stipulate the terms and condition of the contract suitable for executing the work. Neither the writ petitioner nor any willing participants can question the terms, merely because, such terms are not suitable to them. The judicial review over the commercial contract is very limited and under the above stated facts and circumstances, the Writ Court ought not to have exercised such power, that too, by quashing Clause - 4 of the Tender Notification. In support of his contention, the learned Senior Counsel relied on the following case laws:-

- “(i) (2004)4 SCC 19 [Directorate of Education vs. Educomp Datamatics Ltd]
- (ii) (2012)8 SCC 216 [Michigan Rubber (India) Ltd., vs. State of Karnataka]
- (iii) (2017)7 SCC 486 [Consortium of Titagarh Firema Adler S.P.A, - Titagarh Wagons Ltd., vs. Nagpur Metro Rail Corporation Ltd.,]

6.Mr.K.M.Vijayan, learned Senior Counsel appearing for the writ petitioner/respondent contended as follows:-

i) The respondents have acted with *mala fide* only to choose some one by introducing Clause-3 and 4. The earlier notification which was cancelled later, stipulated the liability of satisfying the eligibility criteria only on the lead member of joint venture. However, the present notification stipulated such liability on each Joint Venture Partner including lead partner. Therefore, such stipulation is arbitrary as it defeats the very object of joint venture. Once joint venture is permitted, the question of applying the eligibility criteria jointly and severally does not arise.

ii) In support of his contention, the learned Senior Counsel relied on (2012)8 SCC 216 [Michigan Rubber (India) Ltd., vs. State of Karnataka] and (1998)8 SCC 1 [Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others].

7. Heard both sides and perused the materials placed before us.

8.The point for consideration in this writ appeal is as to whether the Writ Court is justified in quashing the Clause - 4 of the Tender Notification, dated 27.06.2018, by exercising its judicial review on a commercial contract matter.



9.The first appellant/Port Trust through its tender notice, dated 27.06.2018, invited tender for executing the work of Construction of Rubble Protection Bund for dumping dredged materials of Capital Dredging at South of South Breakwater at VOC Port, through E-Tendering mode. The work was estimated at the cost of Rs.136,18,89,033/-. The writ petitioner, claiming to be the willing participant in the tender process, is aggrieved against two Clauses in the said tender notice, namely, Clauses 3 and 4, which read as follows:-

"3.Minimum qualifying criteria:-

The Tenderer shall meet the minimum qualifying criteria as follows:-

a) Work Experience: The tenderer should have successfully completed similar work as detailed below during the last Seven Years ending May, 2018 with either of the following:-

Three works, each costing not less than Rs.54,48 crores

(or)

Two works, each costing not less than Rs.68,09 crores

(or)

One work costing not less than Rs.108.95 crores.

Similar work means Construction of breakwater in any ports/harbor in India/ Abroad using armor stones, tetrapods, accropodes etc....."

"4.The tender document is open to firms /companies / voluntarily formed Joint Ventures / consortia, meeting all the Minimum Eligibility Criteria as stipulated hereinabove. The joint venture must satisfy collectively the eligibility criteria as described in this section. For this purpose, the following information of each member of the joint venture may be submitted which will be added together to assess the collective eligibility criteria;

(i) Average Annual Turnover

(ii) Specific Work Experience

(iii) Capacity of key Personnel

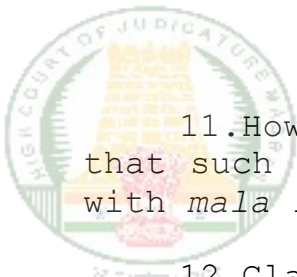
(iv) Ability to own / lease relevant equipment

Each JV Partner including the lead partner shall meet not less than 26% of the following criteria:

(i) Average Annual Turnover

(ii) Specific Work Experience"

10.Though the writ petition was filed by challenging the above said two Clauses, the Writ Court did not agree with the writ petitioner insofar as her contention against Clause - 3. In other words, the Writ Court refused to quash Clause - 3. Admittedly, the writ petitioner has not challenged the order of the Writ Court. Therefore, there is no quarrel with regard to the definition of "work experience" referred to under Clause - 3.



11. However, the Writ Court quashed Clause - 4 on the reasons that such introduction of Clause is arbitrary in nature and tainted with *mala fide*.

12. Clause - 4 requires that joint venture must satisfy collectively the eligibility criteria and each joint venture partner including the lead partner shall meet not less than 26% of the Average Annual Turnover and Specific Work Experience. This Clause is opposed by the writ petitioner by contending that it is introduced only to exclude the writ petitioner and others and to pave way to a particular person. The Writ Court accepted such contention and quashed Clause - 4 by holding that it is an arbitrary exercise and mulcted with *mala fide*.

13. Before we proceed to decide the merits of the contentions raised by both parties, let us first remind ourselves that scope of judicial interference with the commercial contract matters is very limited. The tender inviting authority, being the owner, is undoubtedly having right and every justification to impose terms and conditions in the tender notification suitable for them, in order to select a qualified person to execute the contract work. Neither the intending bidder nor third party can have any say, whatsoever, on the terms and conditions of the contract, as to how it should be, so long as those terms and conditions are not opposed to public policy. Merely because, a particular Clause or condition in the tender notification is not either suitable for a person or it indirectly excludes his participation in the tender process, that itself cannot be a reason to say that imposition of such Clause or condition is either arbitrary or tainted with *mala fide*. The owner, certainly, cannot be expected to impose only such of those conditions which would suit all the intending bidders. Scope and ambit of commercial contract do not justify such expectation as reasonable. It is well settled that the Court should desist from interfering with the terms and conditions of the contract either by substituting the one, as projected by the intending bidder, or diluting the existing condition, in a way that would suit the said proposed party. After all, the owner of the contract, namely, the tender inviting authority is to be left with free hands to select a suitable and fully qualified person to execute the contract work, more particularly when the public money is involved in such project. The Hon'ble Supreme Court, in very many decisions, has considered the aspect of judicial review on commercial contract and laid the following principles:-

"(a) The terms and conditions of the invitation to tender being in the realm of contract, the owner must have a free hand in setting the terms in the tender which are not open to judicial scrutiny.

(b) Merely because it appears that some other terms would have been fair, wiser or logical, cannot be a ground for the court to strike down the tender prescribed by the owner, as it was for the authority to set the terms of the condition, unless it is established that such



administrative policy decision is arbitrary, discriminatory or mala fide.

(c) Merely because a particular term or condition of the tender may result in depriving a particular individual bidder to take part in the tender process, that itself cannot be cited as an event of discrimination, since those terms and conditions are issued in common to all intending bidders and not stipulated on the particular individual alone.

(d) If the decision relating to award of contract is bonafide and is in public interest, Courts will not, in exercise of power to judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.

(e) The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

(f) A mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere, as the owner or the employer of the project having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents."

14. The relevant decisions of the Apex Court, which settled the above principles, are as follows:-

- "(i) (2004)4 SCC 19 [Directorate of Education vs. Educomp Datamatics Ltd];
- (ii) (2005)4 SCC 435 [Global Energy Ltd., vs. Adani Exports Ltd];
- (iii) (2005)1 SCC 679 [Association of Registration Plates vs. Union of India];
- (iv) (2007)14 SCC 517 [Jagdish Mandal vs. State of Orissa];
- (v) (2017)4 SCC 170 [JSW Infrastructure Ltd., vs. Kakinada Seaports Ltd]."

15. Keeping the above principles in mind, let us now deal with the factual aspects of the present matter. The grievance of the writ petitioner is that the introduction of Clause - 4 indirectly excludes her from being the one of the joint venture partner. Therefore, it is evident that the writ petitioner will not meet the requirement of minimum 26% of Average Annual Turnover and Specific Work Experience. Merely because, the above said Clause prevents the petitioner from being a partner of Joint Venture and consequently participating in the tender process, would such clause be construed as either arbitrary or an act tainted with *mala fide*?. Certainly not. At this juncture, it is useful to refer to the observation made by the Apex Court in Association of Registration Plates vs. Union of India reported in (2005)1 SCC 679 at paragraph No.42, which



reads as follows:-

"42.It is easy to allege but difficult to accept that terms of the notices inviting tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory."

(emphasis supplied)

16. Likewise, in (2016)16 SCC 818 [Afcons Infrastructure Ltd vs. Nagpur Metro Rail Corporation Ltd.,] the Apex Court observed at paragraph 15 that the owner and the employer of a project is the best person to understand and appreciate the tender documents and the terms of the tender condition. The Apex Court also has gone to the extent of emphasizing that even an interpretation to tender documents given by the employer is not acceptable to the constitutional court, that itself cannot be a reason for interfering with the interpretation given. Para 15 of the said decision is reproduced hereunder:-

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

17. Further in (2004)4 SCC 19 (cited supra), it is observed as follows:-

"12..... The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

18. In (2017)7 SCC 486 (cited supra), the Apex Court at paragraphs 30 and 31 as follows:-

"30. Before we proceed to deal with the concept of single entity and the discretion used by the 1st respondent, we intend to deal with role of the Court when the eligibility criteria is required to be scanned and perceived by the Court. In Montecarlo Ltd. (supra), the



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Court referred to TATA Cellular (supra) wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the part of the court to correct the administrative decision; the conferment of freedom of contract on the Government which recognizes a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be tested by the application of Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. The two-Judge Bench took note of the fact that in Jagdish Mandal (supra) it has been held that, if the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The decisions in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another[16], B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others[17] and Michigan Rubber (India) Ltd. (supra) have been referred to. The Court quoted a passage from Afcons Infrastructure Ltd. (supra) wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given. After referring to the said authority, it has been ruled thus:

"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 scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's 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 malafide 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."

31. In Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director and another v. CSEPDIT-Trishe Consortium, rep. by its Managing Director and another [18], the Court, after referring to Jagdish Mandal (supra) and taking note of the complex fiscal evaluation and other aspects, held:

"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."

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19. The learned Senior Counsel for the writ petitioner/respondent sought to rely upon (2012)8 SCC 216 (cited *supra*) to contend that this Court can interfere if the process adopted by the respondents is *mala fide* or intended to favour some one. In support of such contention, the learned counsel relied on paragraph 21 of the said decision, which reads as follows:-

21) In *Jagdish Mandal vs. State of Orissa and Others*, (2007) 14 SCC 517, the following conclusion is relevant:

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



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

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

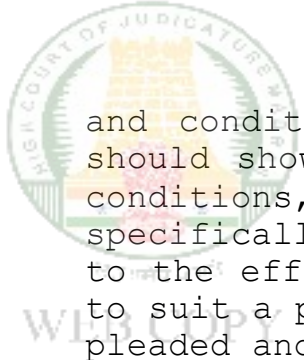
(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

20. In our considered view the said decision can be applied only in cases where the *mala fide* or favoritism is so pleaded and established. In this case, a bare perusal of the affidavit filed in support of the writ petition would show that except a vague averment made in ground (d) to the effect that the Clause - 4 was introduced only to pave way to a particular person and avoid other tenderers, no other specific allegation of favoritism, by naming any person to be favoured by the respondent, is stated in the affidavit and no such person was also impleaded as respondent. Needless to state that a mere vague allegation or averment will not satisfy the requirement of pleading and proving the *mala fide*. Even otherwise, we have already expressed that the introduction of such clause cannot be termed as mala fide or arbitrary since such clause is being applied not only in the first respondent Port Trust and also in other Ports such as Pradeep Port Trust etc. Therefore, we are of the firm view that there is absolutely no *mala fide* or arbitrariness in the action of the respondents in incorporating Clause - 4. On the other hand, it is evident that the very purpose of having such clause, is only to get a fully qualified person having enough experience in the particular field of work for which the tender is floated. We cannot find fault with the owner, namely, the tender inviting authority to introduce such clause, since he is having every right to have such qualified person to execute the work. Question of compromising with the terms of the contract at the whims and fancies of the intending bidder does not arise in the commercial contract matters. Will anybody say that emphasising the requirement of minimum percentage of experience in the specialised work, is arbitrary or unreasonable or *mala fide*?

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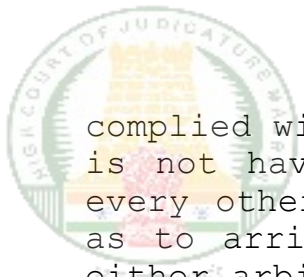
21. When certain terms and conditions of tender notification are put to challenge, it should be first seen as to whether those terms



and conditions are opposed to public policy. If not, the Court should show utmost restraint from interfering with those terms and conditions, unless an allegation of *mala fide* or favoritism is specifically pleaded and proved. The pleadings must be so specific to the effect that those terms and conditions are tailor-made only to suit a particular individual alone. In other words, it should be pleaded and established that except such individual, no other person can satisfy those offending terms and conditions. To put it more specific, the crux of the allegation of *mala fide* or favoritism should be in such a way of establishing that incorporation of those offending terms and conditions is an attempt to monopolize the work by a particular individual alone. On the other hand, if there is a possibility for a reasonable presumption that more than one person will have such qualification, then raising the question of *mala fide* or favoritism does not arise.

22. Mere vague averment bereft of material particulars cannot satisfy the requirement of pleading *mala fide* or favoritism. Likewise, the arbitrariness alleged also cannot be considered as existing, simply because it is stated so. On the other hand, such allegation of arbitrariness must be tested with touch stone of reasonableness, as what is arbitrary to one person may be reasonable to another person. It is obvious that a view on a particular clause of contract differ from person to person (intending bidder), depending upon their ability, suitability and capacity. Unsuitability or inability of a person to take part in a commercial contract cannot automatically lead to a presumption of arbitrariness against a particular clause which made such exclusion, more particularly when the terms and conditions stipulated are insisted upon all the intending bidders. Therefore, a particular clause, claimed to be arbitrary in nature, has to be tested from the point of view of owner / tender inviting authority and not from the point of view of the willing participants.

23. Preclusion is not prevention. If preclusion is resulting out of lack of the qualification of intending bidder, the owner / tender inviting authority cannot be found fault with or blamed for imposing such condition which precluded such person. Prescribing the necessary qualification for the bidders is the basic and in-built right of the owner and hence, it should be left within his exclusive domain. Any attempt to alter or meddle with such qualification criteria would only amount to an encroachment upon such exclusive right of the owner, so long as those conditions are not opposed to public policy. What is totally unworkable or not feasible or unreasonable for one person may be comfortably workable for another person. Merely because a condition seems to be onerous or unsuitable for a particular individual, the same cannot be termed as arbitrary or tainted with *mala fide*. If the offending condition appears to have nexus with the object sought to be achieved in the contract, then such condition cannot be termed either as arbitrary or tainted with *mala fide*. However, if a condition is totally unworkable or impossible to be performed by every intending bidder and such impossibility is apparent even by common prudence, then the Court may ask the owner to explain as to how such condition can be



complied with. It is not so in the present case. If the petitioner is not having 26% of the required experience, would it mean that every other intending bidder also will lack such qualification, so as to arrive at a conclusion that imposition of such condition is either arbitrary or tainted with *mala fide*? Certainly not. It is not the case of the petitioner also. Hence, we have no hesitation in holding that the finding and reasoning of the Writ Court to quash Clause - 4 are totally unsustainable.

24. The learned Senior Counsel for the respondent / writ petitioner relied on another decision reported in (1998) 8 SCC 1 (cited supra) in support of his submission that this Court by invoking jurisdiction under Article 226 of the Constitution of India has power to interfere with the terms of the contract. Power to interfere is one thing, whereas as to when and under what circumstances to invoke such power and interfere is another thing. Thus, in view of the various subsequent decisions made by the Hon'ble Supreme Court as discussed supra, more particularly, explaining the scope of judicial review in the commercial contract matters, we are of the firm view that the learned Senior Counsel is not justified in contending that the facts and circumstances of the present case warrant such interference. Therefore, we find that the Writ Court is not justified in quashing the Clause - 4 of the subject matter tender notification as we do not find any arbitrariness or *mala fide* in introducing such clause, as observed by the learned Judge.

25. Accordingly, the writ appeal is allowed and the order of the Writ Court is set aside. Consequently, the appellants are at liberty to proceed with the tender process further as per their schedule. No costs. Consequently, connected miscellaneous petition is closed.

Sd/
Assistant Registrar(CO)

/True copy/

Sub Assistant Registrar (CS-IV)

+1cc to Mr.V.MALAIYENDRAN, Advocate, SR.No.75365
+1cc to Mr.A.ARIVUCHANDRAN, Advocate, SR.No. 75529

W.A(MD) NO.977 OF 2018
and
C.M.P(MD) No.6578 of 2018
Dated:27.07.2018

SKN
KK/RP/SAR-4/27.07.2018/14P-3C/