



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 06.02.2018
DELIVERED ON : 22.02.2018

CORAM

WEB COPY

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

W.P. (MD) Nos.23589 to 23592 of 2017
and
WMP (MD) Nos.19849 to 19852 of 2017

M/s.Swaraj Equipment Pvt Ltd.,
Managing Director K.Sureshkumar
No.53, Annajirao Nagar,
Vembuliamman Koil Street,
West K.K.Nagar,
Chennai.

.. Petitioner in WP (MD) No.23589/17

G.Stalin
Civil Contractor,
Plot No.3, Vinayagar Avenue,
Raghmath Nagar,
Maharaja Nagar (PO)
Palayamkottai,
Tirunelveli.

.. Petitioner in WP (MD) No.23590/17

I.Ganapathy
Civil Contractor,
No.17/1, Shankar Colony,
Tiruchendur Road,
Palayamkottai,
Tirunelveli.

.. Petitioner in WP (MD) No.23591/17

M.Sivagami
Civil Contractor,
No.111/1, Janaki Street,
Kamarajar Nagar,
Palayamkottai,
Tirunelveli.

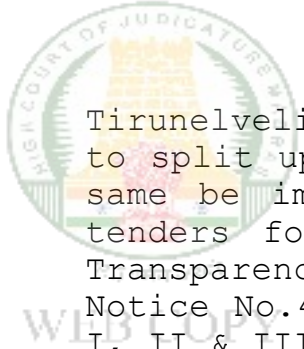
.. Petitioner in WP (MD) No.23592/17

Vs.

1.The Commissioner,
Tirunelveli Municipal Corporation,
Tirunelveli.

2.The Commissioner of Municipal Administration,
Ezhilagam Annex Building,
Chepauk, Chennai - 600 005.

.. Respondents in all WPs.



Tirunelveli Corporation and quash the same and direct the Respondent to split up Tirunelveli UGSS project into multiple packages and the same be implemented by E-tender submission and processing in the tenders for the Respondents UGSS projects as per the Tamil Nadu Transparency in Tenders Rules, 2000 in the tender project in Tender Notice No.40/2017-18 for providing sewage collection system in Zone I, II & III for Under Ground Sewage Scheme in Tirunelveli.

For Petitioners	: Mr.Ar.L.Sundaresan Senior Counsel for Mr.B.Natarajan
For R1	: Mr.Isaac Mohanlal Senior Counsel for Mr.Aayiram K.Selvakumar Additional Government Pleader
For R2	: Mrs.J.Padmavathi Devi Special Government Pleader (all the writ petitions)

COMMON ORDER

These writ petitions have been filed challenging the tender notification issued by the Tirunelveli Municipal Corporation, calling for tenders for construction and completion of Providing Underground Sewage Collection System (herein after referred to as UGSS) in Tirunelveli Corporation.

2.Since all the writ petitions have been filed challenging the tender notification issued by the first respondent/Tirunelveli Municipal Corporation, all the writ petitions are disposed of by a common order.

3.The case of the petitioners, in brief, is as follows:

(i)The tender invited by the respondent Corporation is the biggest tender in Tamil Nadu for UGSS, which is being funded by the Asian Development Bank through the Government of India. The estimated value of the project is at Rs.238 crores and one of the qualifying conditions fixed in the tender condition is that the contractors, bidding for the project should have a turn over of Rs.119 crores, which is 50% of the total value of the project and none of the contractors in Tamil Nadus possess such qualification. The highest value of UGSS project done till date in Tamil Nadu is only 90 crores. While calling for tenders, the Corporation did not allow submission of the tenders through online/electronic submission, which is violative of the Tamil Nadu Transparency in Tenders Rules, 2000 and the petitioners were directed to submit their tenders only by post or couriers, which leads to corruption, nepotism and favouritism. In various instances in Tamil Nadu, the system of sending tender documents by post or courier leads to favouritism. That apart, now, tender has been called for a single package in order to favour someone and it will lead to price rigging among a limited number of bidders, if the Corporation split the project into multiple packages, there would be healthy competition, enabling more local contractors to participate in the tender. By



calling for a single package, fair and free competition is being prevented. Apart from that, the entire project has been put in a single package without proper scientific study.

(ii) The work described in the tender notice is not a specialised work and it could be done by the contractors established in Tamil Nadu. But the respondents with an *mala fide* intention, set extraordinarily very high prerequisites with ulterior motive to favour the persons, outside from Tamil Nadu. In other Municipal Corporations, this kind of work has been done by various contractors, after the work has been split up. But, for the reasons best known to the Tirunelveli Municipal Corporation, they have called for single package, which is illegal and arbitrary. The respondents have called for a single package, which only leads to formation of cartels and they have also imposed conditions with *mala fide* intention to eliminate all the eligible contractors in Tamil Nadu and also with an intention to prevent the local contractors from participating in the tender. On these grounds, the petitioners, being the civil contractors, have challenged the notification.

4. The second respondent has filed a detailed counter affidavit stating as follows:

(i) Earlier, the Tirunelveli Municipal Corporation has UGSS only in 20% of the Corporation area. Since the Corporation wants to expand the UGSS to the entire Corporation area, the first respondent by the resolution dated 21.12.2011, appointed one M/s. Infra En (India) Pvt. Ltd., Bangalore, as a consultancy firm to submit a detailed project report for the implementation of UGSS. The above consultancy firm, conducted a detailed study on the feasibility and the structure of the said project and submitted a detailed project report for an estimated cost at Rs.490 crores and that report was also approved by the Tirunelveli Municipal Corporation by the resolution dated 30.05.2013, and the same was forwarded to the second respondent for approval. Since the cost was exorbitant, the second respondent directed the first respondent to provide the UGSS in a phased manner. Then, a re-design and re-work was done by the said Consultancy Firm with the additional cost of Rs.19.50 lakhs and the Firm after conducting a detailed study on the vital factors viz., geographical terrain, contour levels, surface levels and existing UGSS phase - I, Sewerage Treatment Plant (STP) and after considering the need for uniform synchronisation of sewerage collection and pumping/lifting system for the disposal of sewage through the existing single STP site, submitted a report stating that the project can be implemented in two phases. Ist phase - covering the Corporation areas on the Western side of river Thamirabarani and II phase, covering the Corporation areas on the Eastern side of Tamirabarani and for technical purpose, the said Consultancy Firm, divided the areas of the I phase into three zones, comprising various Wards and finally filed the project report on 24.02.2016 in respect of I phase of UGSS at the estimated cost of Rs.289.01 crores.

(ii) Thereafter, the said report has been placed before the State Level Technical Committee (SLTC) and the Committee has also



approved the project and it was forwarded to the State Level High Powered Steering Committee (SLHPSC) along with recommendation for approval and after carefully considering the entire report, the said Committee (SLHPSC) has also approved the project. Thereafter, financial sanction for UGSS was also issued by the Chairman and Managing Director of the Tamil Nadu Urban Finance and Infrastructure Development Corporation Ltd., (TUFIDCO) to the total estimated cost of Rs.289.01 crores, with the financial assistance from the Government of India (50% share), Government of Tamil Nadu (20% share), ULB share - own fund (10% share) and ADB (Asian Development Bank), (20%) loan through the Tamil Nadu Urban Finance and Infrastructure Development Corporation Ltd., (TUFIDCO) and through the Tamil Nadu Urban Infrastructure Financial Services Limited (TNUIFSL) (20% share) under AMRUT scheme (Atal Mission for Rejuvenation and Urban Transformation) 2016-2017. After considering all the above materials, the State Government has also given sanction to the UGSS project vide G.O.No.111, Municipal Administration and Water Supply (MC-2), Department dated 25.10.2017. Thereafter, the first respondent/Tirunelveli Municipal Corporation, submitted the draft bidding document to the Asian Development Bank (ADB). The ADB also after considering the entire materials, has issued no objection for the draft bidding documents on 08.11.2017. Thereafter, the TNUIFSL, by the letter dated 10.11.2017 instructed the first respondent to submit a copy of the Invitation for Bids (IFB) for review and approval by the ADB prior to the publication and the same was also submitted. Thereafter, after obtaining technical sanction from the second respondent, the first respondent invited tenders from the bidders across the eligible source countries of Asian Development Bank (ADB) and the same was also duly published in various newspapers both English and vernacular, State Tender Bulletin and also in tender website.

(iii) It is further stated in the counter affidavit that the funding agency namely ADB, through the Tamil Nadu Urban Finance and Infrastructure Development Corporation Ltd., (TUFIDCO) and through the Tamil Nadu Urban Infrastructure Financial Services Limited (TNUIFSL), has set out the pre-qualification requirement for the tender project and it has been categorically stated that there shall not be online electronic submission of tenders, which is also not violating the Rule 18(3) of the Tamil Nadu Transparency in Tenders Rules, 2000. The respondents have decided to call for a single package, only based on the detailed report submitted by the competent Consultancy Firm, which is an expert in the above field and the decision has not been taken the respondents on their own.

(iv) As per the detailed project report, the projects consists of 2 pumping stations, 11 lifting stations, pumping main - 27.54 km and sewer main having length of 317.12 km. Since the entire works are interrelated, these collection systems should be uniformly laid and installed through proper planning, and proper synchronisation is vital for the successful implementation and maintenance of the UGSS project in all the three regions. In the above circumstances, tender was called for as a single package. Engaging several contractors, is not only technically non feasible, but also it will jeopardize the project itself and the entire investment would go waste. Apart from that, it is a global contract, inviting the tenders from eligible

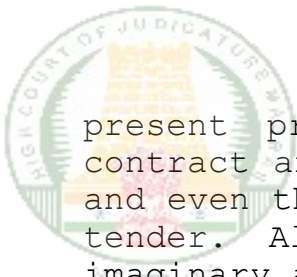


bidders across source countries of Asian Development Bank (ADB). Hence, the petitioners cannot allege any *mala fide* against the respondents and they are not doing favour to anybody and the qualified bidders from Tamil Nadu can also participate in the tender process.

WEB COPY

5. The learned Senior Counsel appearing for the petitioners has vehemently contended that if the entire tender work has been divided into multiple packages, it will enable more eligible contractors to participate in the bid and competition will be wide open, by that the Corporation is likely to gain. By calling for a single package, the competition is restricted to limited bidders, which would lead to corruption and favouritism to the contractors with vested interest. Since the project has been divided into three Zones, it is not difficult for the respondents to split the project into multiple packages. The learned Senior Counsel further contended that similar tenders for UGSS, called for in other Municipal Corporations viz., Salem, Vellore and Trichirapalli have been divided into three packages, in which, number of bidders have participated. So far as this tender is concerned, without any valid reason, the respondents have called for single package, which will lead to formation of cartels. The learned Senior Counsel further submitted that from the perusal of the tender notification, there is no acceptable materials available to show that there is a necessity to go for a single package, when the UGSS project consists of three Zones and all the divisions are easily identifiable and there is no difficulty in identifying and splitting the work and give the same to various contractors instead of giving work to a single contractor. It is further contended that the respondents have prevented the submission of tenders through online, which is in violation of the Tamil Nadu Transparency in Tenders Rules, 2000.

6. Per contra, the learned Senior Counsel appearing for the respondents submitted that it is a global contract and one of the funding agency namely Asian Development Bank (ADB) approved the tender notification, wherein it has been clearly stated that there shall not be any online submission of tenders and non submission of the tenders through online, will not cause any prejudice to the tenderers. The learned Senior Counsel further submitted that the tender has been called for in a single package only based on the expert report. For that purpose, the respondent Corporation engaged a separate Consultancy Firm and the expert conducted a detailed study on the vital factors viz., geographical terrain, cantour levels, surface levels and Sewerage Treatment Plant and finally, recommended for single package tender for uniform synchronisation of sewerage collection and pumping/lifting system for the disposal of sewage through the existing single STP and therefore, the petitioners cannot allege any *mala fide* intention on the part of the respondents. The learned Senior Counsel further submitted that it is for the Corporation to decide how the tender should be called and the petitioners have no say in this regard. The learned Senior Counsel further submitted that so far as other Corporations referred by the petitioners are concerned, it depends upon the nature of work involved and also based on various factors, the yardstick applied in other Corporations cannot be applied to the



present project. It is further submitted that it is a global contract and the respondents cannot show any favouritism to anybody and even the petitioners are not prevented from participating in the tender. All the allegations made by the petitioners are only imaginary and they have not been substantiated with any material.

WEB COPY

7. I have considered the rival submissions made on either side and perused the records carefully.

8. The law has been well settled that, while dealing with contractual matters, the Court should follow certain principles that;

"(i) writ Court is not court of appeal; it cannot review decision but only decision making process;

(ii) courts do not have necessary expertise to correct such technical decisions.;

(iii) the Government must have freedom to take decisions within certain limits;

(iv) if decision is bona fide and in public interest courts should refrain from exercising judicial review;

(v) if action suffers from mala fides or intention to favour someone or arbitrariness or perversity then court can interfere with decision making process."

9. In *Michigan Rubber (India) Limited Vs. State of Karnataka* and others reported in (2012) 8 SCC 216, the Hon'ble supreme Court has held as follows:

"The Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The courts cannot interfere with 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.

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 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 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 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. If the answers to the above questions are in negative, then there should be no interference under Article 226."

10. In *Tata Cellular V. Union of India*, reported in (1994) 6 SCC 651 a three Bench Judge of the Hon'ble Supreme Court has held as follows:

"(i) there should be judicial restraint in review of administrative action;

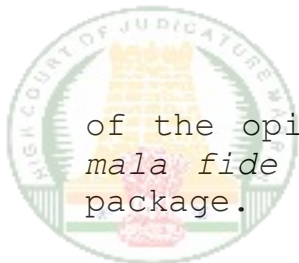
(ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process

(iii) the court does not usually have the necessary expertise to correct such technical decisions.;

(iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries."

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

11. In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn. Ltd*, reported in (2016) 16 SCC 818 the Hon'ble Supreme Court has held as follows:



of the opinion that it is not an arbitrary decision and I find no *mala fide* on the part of the respondents, in calling for a single package.

14. The next contention of the learned Senior Counsel appearing for the petitioners is that if multiple packages are given, many eligible contractors will be participating in the tender and it has not been done in this case. Hence, the act of the respondents calling for a single package is highly arbitrary. The said contention cannot be accepted for the simple reason that the petitioners cannot claim any constitutional right in participating the Government contract, ultimately, it is for the respondents to decide how the contract should be formulated and awarded and the petitioners cannot insist the respondents to invite tenders in a particular way.

15. So far as the contention of the learned Senior Counsel appearing for the petitioners that the petitioners are prevented from submitting their applications through online, which is in violation of the Tamil Nadu Transparency in Tenders Rules, 2000 is concerned, admittedly, the petitioners are not qualified to participate in the tender and hence, they are not entitled to raise such plea. Rule 18(3) of the Tamil Nadu Transparency in Tenders Rules, 2000, permits submission of tenders by post or courier or by electronic submission through designated website. Rule 18(3) of the Tamil Nadu Transparency in Tenders Rules, 2000, reads as follows:

"18(3). The Tender Inviting Authority shall permit the submission of tenders by post or courier or by electronic submission through the designated website, wherever applicable, provided that the Tender Inviting Authority shall not be responsible for any delay in transit in such cases."

Even as per the said Rule, there is no prohibition in calling for submission of tenders by post or courier and there is no compulsion that the tender should be submitted only by electronic submission.

16. The last contention of the learned Senior Counsel appearing for the petitioners is that in some other Municipal Corporations, similar kind of works have been split up into various packages. But in the instant case, the respondents have deliberately called for tenders in a single package. This contention also cannot be accepted, since the contract depends upon various circumstances like, nature of work, geographical terrain and other related aspects. Even assuming that some other Corporations have called for multiple packages, the petitioners cannot insist that the respondent Corporation also should follow the same line and call for multiple packages.

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

17. As stated earlier, awarding a contract is a commercial function and if the decision taken by the authorities is *bona fide* and also taken in the public interest, the Court should not exercise the power of judicial review and it should not interfere in the



decision making process, unless it is established as arbitrary or *mala fide*.

18. In the instant case, it is an admitted fact that it is a global contract and the respondents have invited tenders from bidders across the eligible source countries of Asian Development Bank and hence, question of favouring somebody does not arise. Further, based on the opinion of an expert and after getting approval from various authorities, tender has been called for as a single package. In the above circumstances, this Court find that there is no arbitrary or *mala fide* in the act of the respondents calling for the single package.

19. In view of the discussions made earlier, I find no merit in the writ petitions and the same are dismissed accordingly. No costs. Consequently, WMP(MD) Nos. 19849 to 19852 of 2017 are closed.

Sd/-

Assistant Registrar

/True Copy/

Sub-Assistant Registrar

To

1. The Commissioner,
Tirunelveli Municipal Corporation,
Tirunelveli.

2. The Commissioner of Municipal Administration,
Ezhilagam Annex Building,
Chepauk, Chennai - 600 005.

+4cs to M/s. Aayiram K. Selvakumar, Advocate, SR.Nos. 51126 to 51129

+One cc to M/s. Isaac Chamebers, Advocate, SR.No. 50657

mj

RL/8C/10P/SKN/RSK/SAR2/7/3/2018

Order made in
W.P. (MD) Nos. 23589 to 23592 of 2017
22.02.2018