

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.02.2019

Delivered on : 06.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.3479 of 2019 and
W.M.P.Nos.3779, 3780 and 4773 of 2019

M.Kandan Petitioner
Vs

1.The State of Tamil Nadu,
Rep by its Secretary,
Public Works Department,
PWD Estate, Chepauk, Triplicane,
Chennai 600 005.

2.The Public Works Department (WRD),
Rep by Office of the Superintending Engineer/
Special Chief Engineer,
Palar Basin Circle, Chepauk,
Chennai 600 005. Respondents

PRAYER : Petition filed under Article 226 of the
Constitution of India, praying to issue a writ of
Certiorari, to call for the records of the second
respondent culminating in the tender notice made in
Tender Notice No.20 PBC/2018-19 dated 24.01.2019, quash
the same.

For Petitioner : Mr.T.Mohan for
Mr.S.Saisathyajith

For Respondents : Mr.S.R.Rajagopal, AAG, assisted by
Mr.J.Ramesh,
Additional Government Pleader

O R D E R

Heard Mr.T.Mohan, learned counsel for the petitioner
and Mr.S.R.Rajagopal, learned Additional Advocate
General, assisted by Mr.J.Ramesh, learned Additional
Government Pleader appearing for the respondents.

2. The petitioner has approached this Court, seeking the following relief:-

"To issue a writ of Certiorari, to call for the records of the second respondent culminating in the tender notice made in Tender Notice No.20 PBC/2018-19 dated 24.01.2019 and quash the same."

3. The case of the petitioner is as follows:-

(i) The petitioner is a first class contractor recognized by the State Government with Contractor Code No.02-TV-A-0063-C. According to the petitioner, he is qualified to participate in the tender process as notified in the impugned tender notice dated 24.01.2019, issued by the second respondent. According to the petitioner, the tender notice dated 24.01.2019 has been issued for the work of desilting the Sathyamoorthy Sagar Reservoir, Poondi in Thiruvallur Taluk and District. The total cost and value of the project estimated was Rs.2,57,93,97,000/- (Rupees Two Hundred and Fifty Seven Crores, Ninety Three Lakhs and Ninety Seven Thousand Only). The approximate quantity of earth to be sold in Cu.m for the tender is 2,04,71,404.00 cu.m. The completion time for the above work is 72 months, including the monsoon period. The last date for submission of tender application was 07.02.2019 before 3.00 p.m. and the tender documents could be obtained after notice dated 24.01.2019 till 06.02.2019.

(ii) According to the petitioner, the tender notice suffers from various illegalities and was in violation of various provisions of the Tamil Nadu Transparency in Tenders Act, 1998 (hereinafter referred to as Tender Act) and the rules framed thereunder. Although the tender for the work as envisaged in the notice was to protect and conserve the water bodies, the tender has a flavour of commercial nature, since as per the tender condition, the bidder should deposit the entire project cost before handing over the sale component and the extracted material. Despite the fact that the huge cost of the project running to hundreds of crores, there appears to be a lack of transparency in the impugned tender notification which resulted in apprehension among the minds of the eligible contractor like the petitioner herein about the viability and genuineness of the project.

4. The learned counsel for the petitioner would submit that number of violations are to be seen in the impugned tender and the process that was let in, in

motion thereafter. The learned counsel would first of all submit that the Rule 11 of the Tamil Nadu Transparency in Tender Rules, 2000 (hereinafter referred to as Tender Rules) is violated, since the tender inviting authority has not published any notice inviting tenders in the Indian Trade Journal, where the value of the procurement exceeds fifty crores. The said rule is extracted hereunder:-

"11. Publication of notice inviting tenders in newspapers.-

(1) The Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds rupees fifty crores.

(2) The number, editions and language of the newspapers in which the notices inviting tenders shall be published will be based on the value of procurement.

(3) In cases where publication of Tender Notices is to be done only in Newspapers with circulation within the District, the Information and Public Relations Officer attached to the District Collectorate shall be the competent authority to release the advertisement and in all other cases the competent authority to release the advertisement shall be the Director of Information and Public Relations, Chennai.

(4) The notice inviting tender shall be given due publicity in Newspapers and also on notice boards in the District Offices. For tenders above rupees fifty lakhs, Director of Information and Public Relations will publish the Notice Inviting Tenders as per instructions of the tendering department. For other tenders, Director of Information and Public Relations will publish keeping in mind the request of the department. There should not be any additional insertion and no publication of Notice Inviting Tenders in newspapers not requested by the tendering departments for tenders above rupees fifty lakhs."

5. According to the learned counsel for the petitioner that in cases of such tender involving crores of rupees, it is imperative that the tender notice is to be published in Indian Trade Journal, in order to invite wider participation and it cannot be a closed affair, restricting the number of participants. The learned counsel would submit that Rule 16 of the Tender Rules

provided for availability of tender documents for free of cost. According to him, the tender documents were not available when the site was visited by the petitioner and in the absence of availability of tender documents, the genuine contractors like the petitioner herein, were prevented from participating in the tender process. Rule 16 of the Tender Rules provides for following such procedure which is extracted hereunder:-

"16. Supply of tender documents.-

(1) The Tender Inviting Authority shall make available the tender documents from the date of publication of the tender.

(2) The Tender Inviting Authority shall ensure that the tender documents are made available to any person who is willing to remit the cost of such documents.

(3) (a) The tender documents shall be made available at:-

(i) the office of the Tender Inviting Authority;

(ii) any other office or place indicated by the procuring entity.

(b) In respect of procurement where the estimated value of procurement is Rupees Twenty Five Lakhs and above in value for construction and Rupees Ten Lakhs and above in value for all other categories of procurement inclusive of consultancies for construction, the tender document shall be made available for downloading free of cost at the website designated for this purpose by the Government. Tender documents may also be made available free of cost at such other web sites as may be indicated by the Tender Inviting Authority.

(4) The Tender Inviting Authority shall send by registered post or courier the tender documents to any prospective tenderer who makes a request for the documents on payment of cost along with postal charges at the risk and responsibility of the prospective tenderer."

6. The learned counsel for the petitioner would further submit that most importantly, the rule 20 of the Tender Rules is violated, which rule is also extracted hereunder:-

"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."

7. According to the learned counsel, the tenders in excess of Rupees two crores in value, the minimum time for submission of tender is 30 days and in this case, it is less than 30 days as the impugned tender notice was issued on 24.01.2019 and the last date for submission of the application form was 07.02.2019. He would therefore submit that prima facie, the said rule is violated and according to his information that any reduction in time as stipulated in Sub-rule 2 of Rule 20, has not been authorised by any authority superior to the tender inviting authority.

8. Besides this statutory violation in terms of the Tender Act and Tender Rules, the learned counsel would also point out the serious violation by the respondents in not obtaining environmental clearance as per Clause 2 of the Environment Impact Assessment Notification, 2006 (EIA Notification) read along with Entry 1(a) of the schedule to the Notification. According to him, the said notification was issued as per Section 5 of the Environmental Protection Act, 1986. The Environmental clearance is mandatory without any exemption as per the various orders of the Courts. Such environmental clearance is a must and mandatory, since the proposed excavating of earth was in huge quantity along with the entire reservoir and therefore, the environment clearance has to be obtained, since such excavation of earth/desilting may impact the environment.

9. According to the learned counsel that only when an application is made for environmental clearance, the project would be assessed for risks and necessary mitigative measures and technologies could be put in place in operating the desilting process and that will

also have an impact in all factors including the sale component, price, quantity, methodology, time etc. When considering all these factors, the impugned notification was hurriedly published and a short time of two weeks was granted for submission of tender and therefore, the impugned tender notification suffers from range of illegalities as pointed out above and hence, liable to be interfered with.

10. The learned counsel for the petitioner would draw the attention of this Court to the tender documents published on the website, wherein, the column against the technical documents is left blank which means that no technical documents are available for any potential tenderer to download. Unless or until the technical documents are made available on the website, how could any bidder could possibly apply for consideration in the project of this nature.

11. The learned counsel would submit that in respect of similar project as found in another document filed along with the typed set of papers, it was shown that in the tender, the technical documents can be downloaded and viewed. As far as the impugned notification is concerned, the technical documents were not made available at all. Therefore, the very initiation of tender process stands vitiated in all and hence, the further processes of the tender are not to be continued and the respondents are to be directed to redo the entire exercise by recalling the impugned tender notice.

12. Per contra, learned Additional Advocate General appearing for the respondents would submit that it is not mandatory to publish the tender notification in All India Trade Journal as per Rule 11 of the Tender Rules, after advent of tender notification in electronic format. In regard to the objections raised by the learned counsel for the petitioner that the tender forms are not made available for free of cost, he would submit that it is available on payment of cost as provided under Sub-rule 2 of Rule 16 of Tender Rules.

13. As regards the reduced number of days for submission of tender forms, the learned Additional Advocate General would submit that the reduction of days has been done as per Sub-rule 2 of Rule 20 of the Tender Rules. According to the learned Additional Advocate General, the authorities superior to the tender inviting authority, has authorized such reduction time. Even otherwise, the learned Additional Advocate General would submit that the entire desilting work has to be completed

at the earliest point of time to pay way for storage of more water during the monsoon season. Since the monsoon season is fast approaching in few months, the project has to be kick started immediately and any delay would affect the desilting work that would be against the larger public interest. Therefore, he would submit that the respondents felt that the reduction in time for submission of the documents was necessitated because of the above fact.

14. As regards the objection regarding the environmental clearance is concerned, the learned Additional Advocate General would submit that the Ministry of Environment, Forest and Climate Change has issued a notification dated 15.01.2016 and in the said notification, appendix-IX provides for exemption of certain cases from requirement of environmental clearance. One such exempted category is given in Serial No.6, stating that the clearance is not required for the dredging and desilting of dams, reservoirs, weirs, barrages, river and canals for the purpose of their maintenance, upkeep and disaster management. Therefore, he would submit that the objection regarding not obtaining environmental clearance cannot be valid, in view of the notification issued by the Central Government on 15.01.2016.

15. The learned Additional Advocate General would lay great emphasis on the objective of the project which was envisaged first of its kind by the State. The objective of the project as detailed in paragraph No.6(i) of the counter affidavit was relied on by the learned Additional Advocate General, which is extracted below:-

"6(i). Desilting the Reservoir on revenue model to desilt the deposition of silt at an average depth of 1m in the entire water spread area keeping 15m width all around the boundaries from the toe of the bund. The nature and strata of siltation varies from earth, savudu, silty savudu. The removal of silt if departmentally carried out like any other irrigation maintenance, the main issue involved is the availability of dumping place and the huge cost by way of excavation, transportation, forming approaches and dumping which otherwise can be sold to public by way of fixing an agency who will take care of all such incidental costs detailed above and the silt removed can be used by the public for filling up low lying areas and for

agricultural purposes as the case may be. At the same time, if the silt is sold as per the rates fixed by the Mining Department, the Government can get revenue from the same. In short, the purpose of the estimate is for deriving substantial revenue from the desiltation work. Hence, it is submitted that this proposal is a model project and newly conceived."

He would therefore emphasize the importance of the project notified by the Government and would submit that any intervention in such important project, would only undermine the public interest at large. Ultimately, an attempt by the petitioner in questioning the action initiated by the tender inviting authority, has a flavour of public interest and in which event, the present writ petition cannot be maintained.

16. The learned Additional Advocate General while in the course of his submission, would also rely on the decision reported in (2009) 6 SCC 171. He would draw the attention of this Court to paragraph Nos.26 to 28, which are extracted hereunder:-

"WHAT IS THE NATURE OF RIGHTS OF A BIDDER PARTICIPATING IN THE TENDER PROCESS?

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.

27. 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.

28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process."

17. According to the learned Additional Advocate General, the bidders who participated in the tender process has a limited right of challenge to the tender process, is only on exceptional ground. In this case, the petitioner has attempted to malign the tender process, sweepingly which ought not to be entertained by this Court.

18. At this, the learned counsel for the petitioner would submit that as regards the reduction of time for submission of tender documents as provided under Rule 20, no document has been produced in order to establish the factum of any superior officer authorized any such reduction of time. According to the learned counsel, even in the counter affidavit, there is no whisper about such authorization by any superior officer. Therefore, the violation of Rule 20 stands unanswered. He would submit that except stating that the Government Order dated 31.12.2018, was the basis of tender process as per paragraph No.17 of the counter affidavit, no other documents or specific averments have been made in the proceedings before this Court.

19. As regards this submission by the learned Additional Advocate General regarding the environmental clearance is concerned, the learned counsel for the petitioner would submit that the notification by the Government of India on 15.01.2016 has been stayed by the National Green Tribunal vide its order dated 11.12.2018 in E.A.No.55 of 2018 in O.A.No.520 of 2016. The National Green Tribunal has issued direction that the notification dated 15.01.2016, will not be acted upon and in paragraph No.7 of the order, it directed that the direction will be

applicable to all the State Environment Impact Assessment Authorities/State Governments.

20. The learned counsel for the petitioner would submit that the arguments advanced by the learned Additional Advocate General would no more valid in the eye of law. He would further add that admittedly no tender bulletin has been provided. In the absence of which, no genuine tenderer would participate and the denial of such participation of the genuine tenderer would only affect the public interest.

21. Lastly, the learned Additional Advocate General would submit that after the E-tender process has been introduced, no document is given for free of cost and that practice has been done away with.

22. Upon perusing the materials and pleadings placed on record and upon consideration of the submission of the learned counsels on either side, this Court has to come to the irresistible conclusion that by the impugned notification, the respondents have committed several violations of the provisions of the Tender Act, 1998 and the Tender Rules, 2000. As pointed out by the learned counsel for the petitioner that the present tender has violated Rules 11, 16 and 20 of Tender Rules and assuming that the prescription of publication of tender notification in All India Trade Journal is not mandatory in the present case, the provisions of Rule 16 and 20 have to be followed mandatorily.

23. The relevant documents, admittedly as could be seen from the contents found in the website, were not made available for the bidders to download and view. In the absence of technical and other documents, the participation of genuine bidders is discouraged and the consequences of such discouragement would only undermine the public interest. Since the project is a public project, aimed at conserving the water bodies and storage of water, needless to mention that such huge projects need to be entrusted to the genuine contractors who are well equipped to handle such huge projects. If the basic details including the technical difficulties, are not made available, hardly, there could be no wider participation in the tender process and in the absence of information, it is likely that the contract will be thrown open or eventually given to chosen persons. Such scenario is not in furtherance in the scheme of either in Tender Act or in Tender Rules framed thereunder.

24. As rightly contended by the learned counsel for the petitioner that there appears to be non-acceptable answer for reduction of time for submission of tender, except asserting that the superior authority has authorized the reduction of time, the learned Additional Advocate General has not produced any material before this Court in support of his assertion. The time as provided under Sub-rule 2 of Rule 20 is mandatory in nature and any exception to that, there must be an order in writing and spelling out reasons from deviating from the time schedule. In the absence of such order with reasons, the present tender notification provided hardly two weeks time for submission of tender is per se violative of Rule 20 of the Tender Rules, 2000 and the same is liable to be interfered with on this ground alone.

25. More importantly, the environmental clearance is required to be obtained for such huge projects and admittedly, no environmental clearance has been obtained by the respondents. In fact, according to the learned Additional Advocate General, there is no requirement for obtaining environmental clearance, in view of the notification issued by the Government of India dated 15.01.2016. The respondents are quite oblivious to the latest development on the said aspect as pointed out by the learned counsel for the petitioner that the notification dated 15.01.2016 providing exceptional for environmental clearance, has directed that the same shall not be acted upon and the direction also ordered to be applied to all Environment Impact Assessment Authorities/State Governments. Therefore, it becomes mandatory and legal imperative that the respondents should get the environmental clearance before issuing tender notification.

26. As rightly contended by the learned counsel for the petitioner that only upon obtaining the environmental clearance, the various factors associated with the project can be assessed and examined and such exercise will pay way for potential bidders to understand the gravity of the project in which they are likely to be involved with. In the absence of such exercise, the project as envisaged for larger public purpose will lose its importance and such huge project will be reduced as routine Government projects which requires no extraordinary involvement of the stake holders. When the Government envisages such colossal project which is laudable, having larger public interest, it is all the more reason that such projects are executed through proper tender notification in conformity with all the

mandatory requirements of the Tamil Nadu Transparency in Tenders Act, 1998 and the Tender Rules, 2000.

27. Further, such projects ought not be proceeded with, without the mandatory environmental clearance, since the protection of environment is as much public interest as in the proposed project conceived by the Government. Therefore, in the interest of all stake holders viz, The Government, people and the persons interested in the execution of the project, the respondents are duty bound to take all measures in conformity with the requirements of law. Such compliance by the respondents alone would result in wider participation of bidders across the Board and wider participation would further result in the project being executed by the best and the competent. Otherwise, the process of tender selection gets narrowed and the choice for the Government becomes very limited and such scenario would only be against the public interest.

28. As regards the objection of the learned Additional Advocate General regarding the petitioner questioning the project which has a flavour of public interest, this Court is of the considered view that the petitioner being a registered contractor, has every right to question the tender notification being violative of law and violative of certain statutory provisions as contained in the Tender Act and Tender Rules and being an individual contractor and being affected by the impugned action of the respondents, it is well within his right to question the respondents' action. May be the project is envisaged for achieving larger public purpose and interest, but, such project has to be conceived and executed in the manner known to law and the procedures which are required to be valid are observed scrupulously, in order to avoid any flak or complaint from any sources on the integrity of the project.

29. Although this Court is conscious of the fact that it is a huge public project conceived by the Government and the execution of the same would benefit crores of people of the State, it is unfortunate that this Court is compelled to intervene because of several violations as pointed out by the learned counsel for the petitioner. Normally in such project, the Court would be circumspect in intervening, since stalling of such projects would undermine the public interest, at the same time, this Court cannot remain mute and numb when such objections are being pointed out at the instance of the registered contractor. This Court in fact was exploring to see whether there were minor infractions and the

theory of substantial compliance could be applied in the larger public purpose and interest. But, unfortunately it appears that the objections raised by the petitioner are too serious and fundamental which could not be ignored just to uphold the impugned tender notification.

30. In view of the same, this Court has no other option except to allow the writ petition by setting aside the impugned notification. Hence, the impugned notification in Tender Notice No.20 PBC/2018-19 dated 24.01.2019, is hereby quashed. In view of larger public interest of the State at stake, the respondents are directed to initiate the tender process for the project as envisaged by them, immediately and they are directed to follow the mandatory provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Tender Rules framed thereunder and they are further directed to obtain necessary environmental clearance. This Court hopes that the respondents would take necessary steps to re-initiate the process of tender as expeditiously as possible.

31. With the above observation, the writ petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/--

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

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To

1.The Secretary,
Public Works Department,
PWD Estate, Chepauk, Triplicane,
Chennai 600 005.

2.The Superintending Engineer/
Special Chief Engineer,
Public Works Department (WRD),
Palar Basin Circle, Chepauk,
Chennai 600 005.

+2ccs to Mr. S.Saisathyajith, Advocate SR.No. 21346,22215
+1 cc to Government Pleader SR.NO. 22103

W.P.No.3479 of 2019

A.SK (01/04/2019)