

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.P.NO.1220 OF 2018

&

WMP.NOS.1521 & 1522 OF 2018

V.M.Shamshudeen

.. Petitioner

Vs.

1. The Government of India,
Ministry of Railways,
Railway Board,
Rail Bhavan, Raisina Road,
New Delhi-600 023.
2. The Divisional Railway Manager,
Southern Railway,
Salem-636 005
3. The Divisional Electrical Engineer,
Southern Railway,
Salem-636 005
4. T.Koteswara Rao

.. Respondents

(R4 impleaded vide order
dated 12.06.2019 made
in WMP No.13624 of 2018
in WP.No.1220 of 2018 by PDAJ)

PRAYER :

Writ Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records of the third respondent pursuant to the Tender Notice No.SA/OP/2017-18/08 dated 17.10.2017 and quash the same and further direct the 3rd respondent to issue re-tender for complete maintenance, cooking and serving of food in accordance with the communication of the first respondent No.2010/RS(G)/363/1)-New Delhi dated 05.07.2012.

For Petitioner : Mr.M.Raja Sekhar

For Respondents : Mr.P.T.Ramkumar

O R D E R

This Writ Petition has been filed seeking issuance of a Writ of Certiorarified Mandamus to call for the records of the third respondent pursuant to the Tender Notice No.SA/OP/2017-18/08 dated 17.10.2017 and quash the same and further direct the 3rd respondent to issue re-tender for complete maintenance, cooking and serving of food in accordance with the communication of the first respondent No.2010/RS(G)/363/1)-New Delhi dated 05.07.2012.

2.The petitioner claims to be a Contractor involved in providing food and service activities operation of canteen and cleaning of buses, trains etc., and he is registered under the Ministry of Micro Small and Medium Enterprises (MSME). He claims that he has been doing the said business for the past 10 years. He had also been enrolled with the said Ministry from 05.09.2013. He is also providing running rooms at Mangalore Junction and Mangalore Central of Southern Railway and he is also maintaining running rooms at Shoranur and Ernakulam.

3. The petitioner sought to participate in the Tender notice issued by the third respondent on 17.10.2017 for maintenance, cooking and serving of food to the running room for a period of 2 years. The value of the tender was Rs.1,89,39,030/- and the last date for closing of the tender was 20.11.2017. It is the grievance of the petitioner that he sought to claim exemption from payment of Earnest Money Deposit (EMD). Since the third respondent had granted exemption to the MSE's, he also claimed exemption under the policy of the Government as issued by the Ministry of Railways in No.2010/RS(G)/363/1, New Delhi dated 05.07.2012. The said notification, was for Public Procurement Policy for goods produced and services rendered by MSEs by Central Ministries/Departments/Public Sector Undertakings(PSUs). It had been very specifically stated that in respect of procurement of goods and services, produced and provided by Micro and Small Enterprises, it had been decided that MSEs registered with the above agencies will be exempted from payment of Earnest Money Deposit (EMD). Subsequently, it is claimed by the learned counsel for the petitioner that the petitioner tried to participate in the Tender on 17.10.2017, but was not permitted to do so since he claimed exemption from payment of Earnest Money Deposit (EMD). In this connection, it is stated that the petitioner had given a representation dated 04.11.2017, but such representation is denied and disputed by the learned counsel for the respondents stating that it was never received by the respondents.

4. At any rate, the tender process continued and the tender

was finalized and opened on 20.11.2017. The petitioner had not participated in the same.

5. The writ petition has been filed in the nature of Certiorarified Mandamus to call for the records of the third respondent with respect to the tender notice, for which the petitioner wanted to apply without payment of Earnest Money Deposit (EMD) and quash the same and also further direct the respondents to re-issue the said tender.

6. However, during the course of hearing, since objections had been raised before my learned Predecessor by the learned counsel for the respondents that the petitioner had not participated to the tender process and subsequently, cannot seek a certiorari prohibiting the opening of the tender, the petitioner had come forward with an additional affidavit, claiming as a person interested and as a registered MSEs, that he may be permitted to question the claim for deposit of EMD amounts by the respondents. It must be mentioned that pursuant to the said additional affidavit filed by the petitioner, the writ petition has not been amended but rather the prayer originally sought still remains.

7. The learned counsel for the petitioner drew the attention of this Court to a similar tender notification issued by the Pune Division of the Railways, wherein also, MSEs were exempted from payment of EMD for provision of subsidized meal/food to running staff of Running room Pune for two years. Similarly, when a tender for On Board Housekeeping Services (OBHS) were called for at Salem Division, it was again stated that MSEs, who are registered need not pay the EMDs. The same position was reiterated for the Salem Division, Mechanical Branch. When the tender was issued for mechanized cleaning, washing, watering of primary/secondary trains and related places including platforms, MSEs were exempted for payment of EMDs. It was specifically pointed out by the learned counsel for the petitioner that a tender of the very same nature as in the present case, was issued by the Trichy Mechanical Department for maintenance of running room and allied activities including cooking and supply of food for Loco Pilots/Assistant Loco Pilots/Guards and Loading/Unloading of Line Boxes of Loco Pilots/Guards MSEs were again exempted from payment of EMDs. However, it was pointed out that only for the instant tender, which has been challenged in the writ petition, and which has been issued by the Salem Division for the very same Division, for cooking and supply of food to the Running room staff at Erode Running room, the petitioner, who is MSE was not permitted to participate since he claimed exemption from payment of EMDs. It is therefore, stated that the respondents had taken a very arbitrary stand for grant of exemption from payment of EMDs. It was also stated that even

in Salem Division as stated above, for participating in tender, MSEs were earlier granted exemption from payment of EMDs but only the petitioner has been refused and denied participation to participate in the tender process. It is therefore, claimed by the learned counsel for the petitioner that the entire tender process stands vitiated, since as a member he could not claim exemption from payment of EMDs by MSEs, particularly with respect to Salem Division of the respondents.

8. The learned counsel for the respondents on the other hand, seriously disputed the contentions raised. It was primarily stated that the writ petition itself is not maintainable since the petitioner, has not even participated in the tender process and therefore, cannot question the opening of the tender and cannot claim re-issue of the same tender. It was further pointed out that though additional affidavit had been filed, corresponding relief has not been incorporated in the writ petition and consequently, the learned counsel disputed the very maintainability of the writ petition. Even otherwise, it had been stated that to extend tender work for maintenance, cooking and serving of food to the running room stall at Erode, the learned counsel had also given the break up of the said tender. It was stated that even though, the tender was opened on 17.10.2017 and closed on 20.11.2017, representations which were given subsequently by the petitioner on 04.11.2017 and 04.12.2017 respectively were also considered by the respondents and a reasoned order was also passed.

9. The learned counsel for the respondents drew the attention of this Court to the representation given by the petitioner dated 04.12.2017. A perusal of the same reveals that the petitioner had sought necessary modification and re-tender, since, it was categorised as works contract and not as a service contract. In this connection, the minutes of the Tender Committee dated 10.01.2018 had also been perused by the Court, wherein, it has been stated that with respect to the present contract, the labour portion was Rs.66,87,530/- and the supply portion was Rs.93,62,495/-. Therefore, it has been stated that since the supply portion was higher than the labour portion, the respondents had treated it only as a labour contract and not as a service contract. It was stated that EMDs were exempted only for service contracts and not for work contracts. The learned counsel stated that this was the policy of the respondents with regard to the service contracts and the works contracts. It was also pointed out by the learned counsel that even in the Circular dated 28.09.2016, the categories of works in which exemption can be granted have been specified and stated that the present contract does not come within the purview of grant of exemption of EMDs filed by the petitioner herein.

10. I have carefully considered the rival submissions and also perused the materials available on record. The petitioner has experience in participating in tenders floated by the respondents. It is his claim that he has minimum experience and is also registered with necessary authorities. This gave him permission to participate in the tenders floated by the respondents. He had attempted to participate in the tender, which was issued by the Salem Division on 17.10.2017, which was for complete maintenance, cooking and serving of food to the Running room staff of Erode Running room dealt with for a period of two years. The total value was Rs.1,89,39,030/-. The Sub-division of the said tender was Rs.66,87,530/- towards labour portion and a sum of Rs.93,62,495/- towards supply portion. It is therefore, seen predominantly large amount is towards supply portion than the labour portion. The contract was therefore, considered as works contract by the respondents herein.

11. The Rules regarding the grant of exemption for the EMDs by MSEs has been issued by the Government of India on 05.07.2012, to which attention have been drawn earlier with respect to procurement of goods and services provided for MSEs. It is the contention of the learned counsel for the petitioner that there is sub-classification of works contract and service contract. However, specific stand has been taken by the respondents is that for works contract, there is no exemption from payment of EMDs, but EMDs were exempted only with respect to service contract. The principles underlining the classification of works contract and service contract cannot be gone into by this Court. The petitioner had drawn attention to the contracts awarded by the other Divisions. Unfortunately, that cannot be gone into in a writ petition filed by the petitioner as each contract is separate and distinguishable in itself. They are classified as service contract or works contract depending on the works to be done, pendency of the works, and pendency of the services also exempted. In the instant case, it has been very specifically stated that supply portion was Rs.93,62,495/- specifically higher than the labour portion of Rs.66,87,530/-. Consequently, the present contract is termed as work contract.

12. The learned counsel for the respondents has also relied on the judgment of the learned Division Bench of this Court reported in (2018(2)CWC 403) in W.P.No.19352 of 2018 dated 27.07.2018 in the case of (A.Mohammed Rabik Vs. The Government of Tamilnadu, rep. by its Secretary, Health and Family Welfare Department, Fort St. George, Chennai-9 and others), wherein, in a Public Interest Litigation, in paragraph no.14, it has been held as follows:

'' 14. On a careful consideration of respective conditions, this Court holds that a person, who is not a participant in the concerned Tender Process and when he is a 'Third Party'', he cannot file a 'Public Interest Litigation' assailing the terms and conditions of the subject Tender. To put it succinctly, in Law, the ambit of interference by a Court of Law, relating to Contractual matters, is very much restricted. At the risk of repetition, suffice it for this Court to make a pertinent mention that the petitioner, in the present Public Interest Litigation, cannot challenge the terms of the subject Tender and that too, when he is not a party taking part in the 'Tender Process'. Viewed in that perspective, the present Writ Petition filed by the petitioner, under the Caption 'Public Interest Litigation' sans merits.

In fine, the present Writ Petition is dismissed 'in limine', as not maintainable in Law. There shall be no order as to costs. Connected Miscellaneous petitions are dismissed.''

13. A perusal of the facts, reveal that the third parties to the contract cannot question either opening of the tender, the terms of the contract or closure of the contract or the works of the contract. The petitioner had filed an additional affidavit. But, that cannot come to his rescue, since the additional affidavit for modified relief cannot be taken on record. Hence, I am not inclined to interfere with the works of the contract. Accordingly, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Government of India,
Ministry of Railways,
Railway Board,
Rail Bhavan, Raisina Road,
New Delhi-600 023.

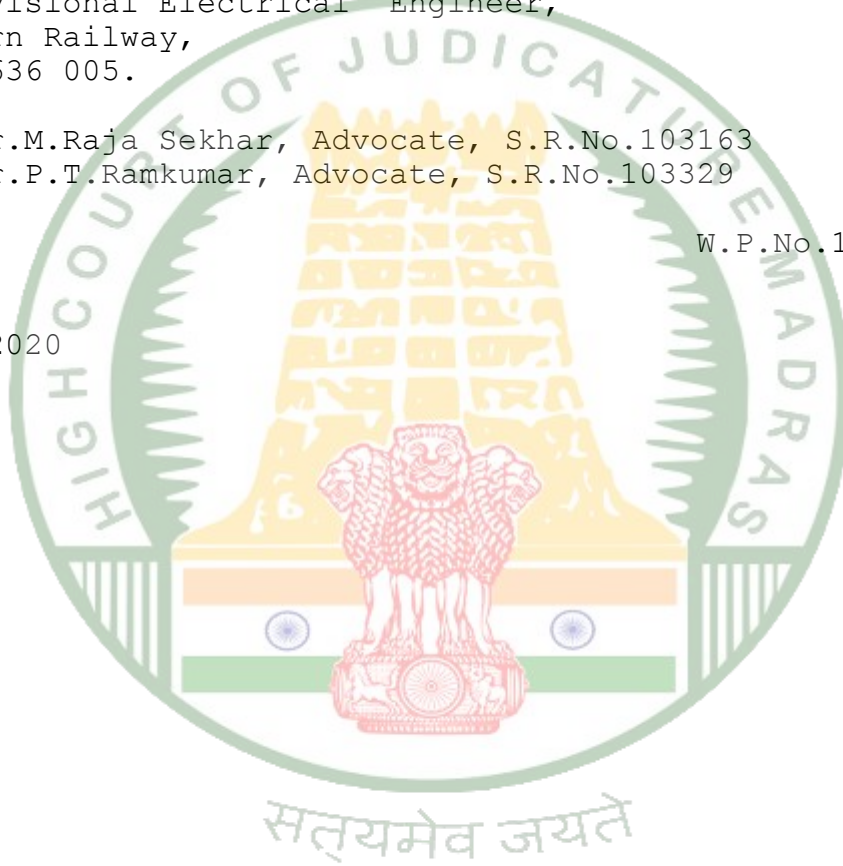
2. The Divisional Railway Manager,
Southern Railway,
Salem-636 005.

3. The Divisional Electrical Engineer,
Southern Railway,
Salem-636 005.

+1cc to Mr.M.Raja Sekhar, Advocate, S.R.No.103163
+1cc to Mr.P.T.Ramkumar, Advocate, S.R.No.103329

W.P.No.1220 of 2018

RSV(CO)
CS/24/01/2020



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