

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 08.02.2019

Delivered on 15.02.2019

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THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.Nos.21600 & 30503 of 2018

and

W.M.P.No.25362 & 35569 of 2018

W.P.No.21600/2018

M/s. SDV CHANDRU
G.-5064, 19th Street,
Belly Area,
Anna Nagar,
Chennai - 600 040

.. Petitioner

vs.

Tamilnadu Civil Supplies Corporation
Rep. by its Managing Director,
No.12, Thambusamy Road,
Kilpauk,
Chennai - 600 010.

..Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Declaration or any other writ or order in the nature of a writ declaring clause 8 of Part I of the Notice Inviting Tender published in the Website dated 27.07.2018 issued by the respondent as arbitrary and violative of Article 14 of the Constitution of India.

W.P.No.30503 of 2018

M/s. SDV CHANDRU
 G.-5064, 19th Street,
 Belly Area,
 Anna Nagar,
 Chennai - 600 040

.. Petitioner

VS.

The Managing Director,
 Tamilnadu Warehousing Corporation,
 82, Anna Salai, Guindy,
 Chennai - 600 032.

..Respondent

Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Declaration or any other writ or order in the nature of a writ declaring Clause 5 (Items iii, viii, xvii) or any other similar condition contained in Part I of the Notice Inviting Tender dated 16.10.2018 restricting the eligibility of prospective Tenderers to those who have catered only to State and Central Public Sector Undertakings or Governments during the last three preceding years, issued by the respondent as arbitrary and violative of Article 14 of the Constitution of India.

For Petitioner
 in both the W.Ps. : Mr.M.Vaidyanathan

For Respondent
 in both the W.Ps. : Mr.L.P.Shanmugasundaram,
 Special Government Pleader (Co.op.)

COMMON ORDER

W.P.No.21600 of 2018 is filed to issue a Writ of declaration, declaring Clause 8 of Part-I of the Notice Inviting Tender dated 27.07.2018 as arbitrary and violative of Article 14 of the Constitution of India.

2. W.P.No.30503 of 2018 is filed to issue a Writ of declaration to declare Clause 5, Items iii, viii and xvii or any other similar condition contained in Part-I of the Notice Inviting Tender dated 16.10.2018 restricting the eligibility of prospective Tenderers to those who have catered only to State and Central Public Sector Undertakings or Governments during the last three preceding years as arbitrary and violative of Article 14 of the Constitution of India.

3. The petitioner is one and the same in both the writ petitions. Since the grievance of the petitioner is common in both the above writ petitions, they are taken up together and decided as herein below.

4. The case of the petitioner in W.P.No.21600/2018 is as follows:

They are engaged in the business of transportation of food grains and other raw materials ever since 1971. They have undertaken transport contracts for Government, Public Sector/ Public Ltd. and Private Ltd. Companies. Their performances have been appreciated and they have never been black listed. They transport food grains for ITC from the year 2007 till date. The respondent invited tender dated 27.08.2018 for transportation of commodities from the Food Corporation of India depots to the Civil Supplies Corporation storage

points. The petitioner satisfies all the qualification set out in the tender form. However, Clause 8 of Part-I, which lists the documents to be filed and particulars to be furnished is highly discriminatory, arbitrary and malafide, since it stated that the tenderer must have experience in transportation of food grains for three financial years i.e., 2015-16, 2016-17 and 2017-18 and that the experience certificate should be obtained from the State/Central Government/ Public Sector Undertaking of State/ Central Government containing the particulars of transport charges received, the commodity and quantity transported. Thus, the eligibility to tender is restricted to only those Companies/ Organisation which have transported food grains to Government or Governmental Organisation and the Companies which have not transported commodities to Government or Governmental Organisation during the period mentioned in Clause 8 are made ineligible to participate in the tender process. If Clause 8 is to be enforced only three persons alone will be eligible for Chennai Region along with the contractors of other Regions who have formed a cartel to take contract for the Chennai Region. The petitioner had 46 years of experience in the transportation of food grains to various Governmental Organisation and Private Companies. However, during the last three years, the petitioner was transporting goods only to Public Limited Companies. Since, Clause 8 makes the petitioner ineligible, the present writ petition is filed.

5. The case of the petitioner in W.P.No.30503 of 2018 is as follows:

The respondent invited technical bids for appointment of contractors for handling and transporting for the period 2018-2020 for 24 Warehouses. The petitioner satisfies the qualification set out in the Form. The eligibility criteria contains in Clause 5 tender form mandates that documentary evidence mentioned therein should be uploaded. There are 21 documents which have to be submitted. Though the petitioner is in a position to submit 20 of the required documents, they are not in a position to submit a document mentioned as Item 3 in Clause 5 which mandates that the petitioner company should have transported the commodities mentioned in Clause 5 (Item iii) for the periods set out therein to the State or Central Government or Public Sector Undertakings. Therefore, it excludes the persons who transported commodities to Public Limited Companies or Private Undertakings. Such restriction is highly arbitrary and has been obviously made to favour the existing contractors who have been awarded transport contracts for three financial years. Thus, the impugned Clause 5 (Item iii) of the tender notice is highly discriminatory and arbitrary and malafide. Hence, the present writ petition.

6. A counter affidavit is filed in W.P.No.21600/2018 wherein it is stated as follows:

Writ petition is not maintainable either in law or on facts. As per Clause VIII of Part-I of the tender conditions, the tenderer must have experience in transportation of food grains such as Rice, Sugar, Wheat, Paddy, Dhall etc.,

for 3 financial years i.e., 2015-16, 2016-17 and 2017-18. The experience certificate obtained from the State/ Central Government/ Public Sector Undertaking of State or State/Central Government must be produced containing the particulars of transport charge received, the commodity and quantity transported. The writ petitioner does not satisfy the condition in Clause VIII. Recent 3 years experience in transportation of food grains was prescribed keeping the interest of public in mind and for smooth movement of essential commodities from the FCI Depots to Tamil Nadu Civil Supplies Corporation storage points. It was prescribed and coined out of past experience and shortcomings that were faced by the respondent in the past. It is prerogative right of the respondent to impose the conditions which are to protect the welfare of the consumers. The respondent cannot cut down the conditions to suit the petitioner's requirement. The said tender conditions is not new for this tender. It is also available in previous years. Liberty to participate in the tender has been provided to all the transport contractors who are having prescribed qualification. Therefore, there is no intention of preventing others to participate in the tender process as alleged by the petitioner.

7. Heard the learned counsel for the petitioner and the learned Special Government Pleader appearing for the respondent Corporation.

8. In both these writ petitions, the petitioner is aggrieved against

imposing the particular condition requiring past 3 years experience in transporting food grains to the State / Central Government/ Public Sector Undertaking of State/ Central Government. The impugned Clause VIII of Part-I of the tender notice, which is put to challenge in W.P.No. 21600/2018 reads as follows:

VIII. The tenderer must have experience in transportation of food grains such as Rice, Sugar, Wheat, Paddy, Dhall etc., for 3 Financial a year i.e., 2015-16, 2016-17 and 2017-18. The experience certificate obtained form the State/ Central Government/ PSU of State/ Central Govt. must be produced containing the particulars of transport charges received, the commodity and quantity transported.

9. The impugned Clause VIII Item Nos. 3, 8 & 17 contain in Part-I of the notice inviting tender which is impugned in W.P.No.30503/2018 reads as follows:

3) Tenderer must have the experience of H&T operations for a minimum period of three years in FCI, CWC or any department of Central or State Government or any Public Sector Undertakings especially in the field of Fertilizer, Food grains, Cement, Sugar, Coarse grains or any other goods.

Experience certificate in the prescribed proforma as per the Appendix-iii shall be uploaded.

8) The Tenderer should have achieved the turn over during the preceding 3 financial years, as specified below.

- i. For Grade A Ware house - Rs.50 Lakhs
- ii. For Grade B Warehouse - Rs.40 Lakhs
- iii. For Grade C Warehouse - Rs.10 Lakhs
- iv. For Grade D Warehouse- Rs.2 Lakhs

The Tenderer is required to upload the audited Balance Sheet and Statement of Profit & Loss A/C for the preceding three financial years with the tender documents.

In case Balance Sheets and Statement of Profit & Loss A/c for the immediate preceding financial prepared/ audited, the accounts for the year previous to the preceding three financial years should be uploaded.

Where the tenderer is not under statutory obligation to get his Accounts audited, he can upload certificate of practising Chartered Accountant certifying his Annual Turnover and Profit after Tax for proceedings three financial years.

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17) Experience:

For Grade A, B, C & D Warehouses

i) The Tenderer must have minimum 3 years experience in combination of similar type of Handling and Transport Contract works without any specific adverse complaints.

ii) The experience certificate should be obtained from the organization of State/ Central / Government/ Public Sector Undertaking.

iii) Experience certificate other than State/ Central/ Government Department/ PSU will not be accepted.

iv) The scanned copies of the experience certificate should be uploaded.

10. The above impugned conditions are one among the conditions prescribed as qualification criteria for the person who wants to bid. According to the petitioner, though they are having enough experience in the transportation of food grains to various Governmental Organisation and Private Companies for several number of years, they were not doing such transportation work in any one of the Department of Central or State Government, FCI, CWC or any Public Sector Undertakings for the past 3 years period. Therefore, it is contended by them that stipulating such condition as one of the eligible criteria indirectly excludes the petitioner from participating the tender process.

11. On the other hand, it is contended by the respondents that the said condition was imposed among other conditions by taking note of the past

experience and shortcomings that were faced by the respondent and that those conditions are stipulated only to protect the welfare of the consumers who depend on the respondent in the supply/ movement of food grains.

12. There is no dispute to the fact that the respondent is the owner in respect of the nature of work to be executed by the contractors. Needless to say that the owner is entitled to stipulate the terms and conditions for selecting the suitable person for executing the work. So long as those terms and conditions are not opposed to public policy or ex facie illegal or unlawful, it is not for the Court to interfere with such exclusive right of the owner in stipulating such condition. Needless to say that it is within the exclusive domain of the owner to stipulate the qualification criteria for selecting the best suitable contractor and hence, the intending bidder can never have a say in the terms of the qualification criteria as to how and in what manner those conditions should be. In other words, it is not for the intending bidder to say as to what should be the qualification criteria and how it should be fixed by the owner. Merely because either whole or any one of the conditions do not suit the intending bidder, he cannot be said as having a vested right to question such prescription of qualification. The very same issue was considered by this Court as well as the Apex Court in very many cases. I myself considered the above issue and rejected similar objection raised by the intending bidder in a cases reported in **2018(4) CTC 47 (Hero Ecotech Ltd. v. Commissioner of**

Backward Classes Welfare) and *2018(2) CTC 481 (TDI International India (P) Ltd. V. Airport Director, Airport Authority of India)* after following various decisions of the Apex Court. In *2016(16) SCC 818 Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd.*), the Honourable Apex Court has observed at paragraph No.15 as follows:

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.

13. In *2019(1) TNLJ 212(Civil) in V.O.Chidambaranar Port Trust, The Chairman Tuticorin & another vs. Sindhu.M.*, the Division Bench of this Court, where I am a party, in paragraph Nos.22 & 23 it has been observed as follows:

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.

14. In view of the above stated facts and circumstances and the ratio laid down in the above decisions, this Court is of the view that the petitioner has not made out a case to interfere with the impugned Clauses in the tender notice. Accordingly, both the Writ Petitions fail and the same are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

15.02.2018

Index:Yes/No.
Speaking/Non-speaking order
vsi

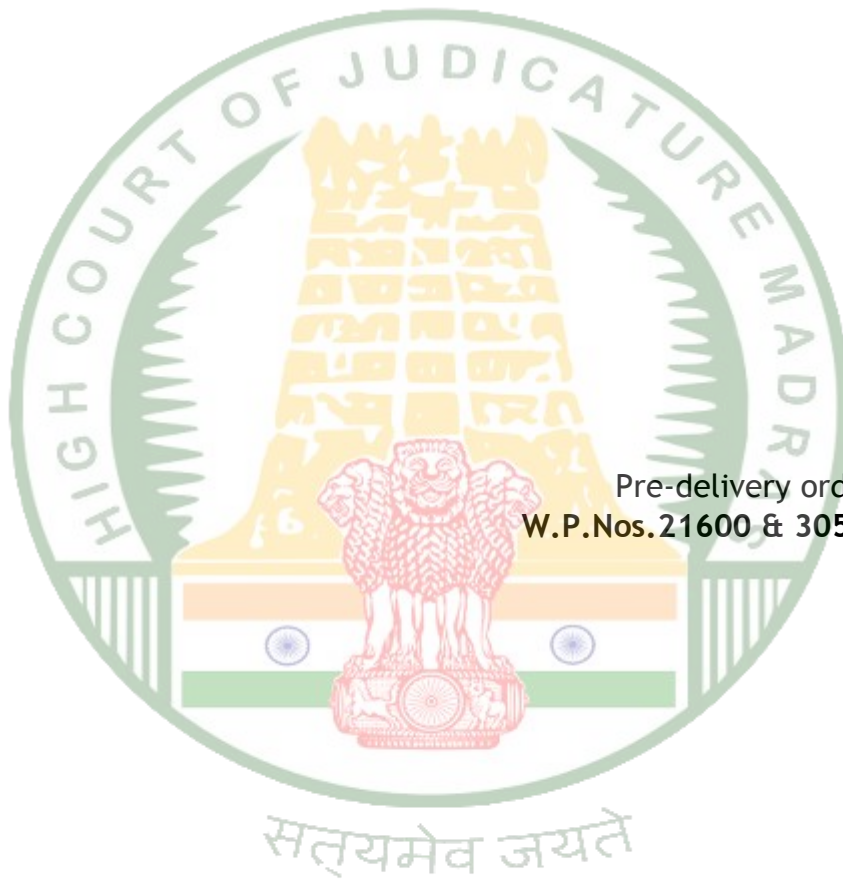
To

1. The Managing Director,
Tamilnadu Civil Supplies Corporation
No.12, Thambusamy Road,
Kilpauk, Chennai - 600 010.

2. The Managing Director,
Tamilnadu Warehousing Corporation,
82, Anna Salai, Guindy,
Chennai - 600 032.

K.RAVICHANDRABAABU,J.

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Pre-delivery order made in
W.P.Nos.21600 & 30503 of 2018

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