IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.06.2019

PRONOUNCED ON : 18.06.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.14478 of 2019 and
W.M.P.No.14491 of 2019

The Tamil Nadu Anna MGR Goods
Transport Services Co-operative Society Limited,
(registered Ind.1864)
No.4/2 Old Natarajapuram,
Ayyavoo Colony,
Aminjikarai,
Chennai - 600 029. ... Petitioner

Vs

1.The Government of Tamil Nadu,
Represented by the Secretary to the Government,
Department of Animal Husbandry,
Fort St. George,
Chennai - 600 009.

2.The Managing Director,
The Tamil Nadu Cooperative Milk Producers
Federation Ltd.,
Aavin Ilam, 3-A, Pasumpon Muthumaralinganar Salai,
Nandanam, Chennai - 600 035

3.Joint Managing Director,
The Tamil Nadu Cooperative Milk Producers
Federation Ltd.,
Aavin Ilam, 3-A,Pasumpon Muthumaralinganar Salai,
Nandanam, Chennai - 600 035 ... Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of certioarari calling for the records relating to the impugned tender No.450/MKG/P1/2019-2021, tender for hiring 137 vehicles issued by the second respondent and quash the same.

For petitioner : Mr.S.Muthukumar
For 1st Respondent : Ms.T.Girija, Government Advocate

For Respondents 2 and 3: Mr.Vijay Narayan, Advocate General,
Assisted by Mr.L.P.Shanmugasundaram,
Special Government Pleader

ORDER

The petitioner Society, aggrieved by the terms of the tender floated by the second respondent, has filed this writ petition, on the following grounds:-

> "(i)The respondents ought not to have ventured into the tender during the currency of Election Code of Conduct;
>
> (ii)The earlier tender floated by the respondents have been cancelled unilaterally without assigning any reason and modified the terms of tender. The impugned tender has been floated with a view to favour chosen few and
>
> (iii)The second respondent has invited tender without the approval of the Board of Management."

2.According to the petitioner, the second respondent has floated the tender for engaging 137 insulated vehicles for transporting milk sachets from the places like Madhavaram; Ambattur; Sholinganallur and Kakkalur diaries for distribution to various outlets in Chennai and its suburban areas. Before floating the tender, the elected body of the second respondent federation on the representation of the Contractors thought fit that, certain clauses of tender which were in vague earlier, has to be modified, so as to invite more competitors. As a result, the modification was made in the 'experience clause' which reads as below:-

"

Sl.No	Contractor request for modification	Decision by the committee
1	.....	....
2	....	....

Sl.No	Contractor request for modification	Decision by the committee
3	Experience Clause 3.1 Till 2014 there was no experience clause. This will facilitate only to the existing contractors instead of freshers. And request 2-5 years in milk and milk products vehicles instead of specifying insulated vehicle.	Modification in the Experience clause 3.1 To invite more competitors the experience clause is relaxed:- Milk is a perishable commodity and handling it requires experience. Hence the Tenderers shall have 7 years experience in milk and milk product distribution/transportation in a Government/Government undertakings /co-operative dairies/any private dairy with total handling capacity of minimum one lakh litres per day. The Tenderers should be in the same name as the bidding entity. The tenderer should submit valid documents to prove his experience in milk and milk products.

3.With this modified clause, the first tender was notified but after the expiry of the board term, the second respondent the Managing Director, on his own, has unilaterally altered the said clause which reads as follows:-

> “Experience: Milk is a perishable commodity and handling it requires experience. Hence the tenderers shall have minimum 2 years experience with in the last 5 - year period in sachet milk distribution through insulated vehicles in a Government/Government undertakings/co-operative dairies/any private dairy with total handling capacity of minimum one lakh litres per day. The 2 years experience of the Tenderer should be in the same name as the bidding entity. The five year period will be calculated proceeding from the date of publication of notice inviting tender. The tenderer should submit valid documents to prove his experience in sachet milk

distribution through insulated vehicles. ”

4.Further, it is contended by the petitioner that insulated vehicle must be engaged for transporting milk products as per the Food Safety and Security Act, whereas, the tender clause permits the transporters who does not have insulated vehicle for the present and they are given 90 days time to provide insulated vehicle which is contrary to Food Safety and Security Act.

5.The petitioner attributes motive for modifying the tender terms and conditions which was in vague before October - 2018. It is contended that the second respondent first floated tender on 27.09.2018 with pre-amended terms. The tender committee accepted major points for concern raised by the petitioner and other tenderers and accepted the suggestions. When the tender process was challenged by one M/s.Deepika Transports, the modified tender conditions were placed before the Court and the Honourable Court recorded the submissions of the respondent and disposed of the writ petition being satisfied with the modified condition. Thereafter, on superstition of the Board, the second respondent reverted back to the old terms and has issued tender notification on 06.03.2019 which is identical to the first tender document which was aborted. The second tender document which contains the accepted conditions by the tender committee on 15.10.2018 has been suppressed. Without considering the suggestion of the tender committee, the present terms has been finalised which is contrary to the Tender Transparency Act.

6.The learned Advocate General appearing for the first respondent at the outset would submit that the scope of judicial review in tender matters is very limited. Unless, malafide or arbitrariness or violation of Article 14 of the Constitution of India, alleged and proved the tender process cannot be interfered. In support of his contention, the learned Advocate General has relied upon a judgment of the Hon'ble Supreme Court in Air India Ltd., v Cochin International Airport Ltd., (2000(2) CC 617) wherein it has been held as follows:-

> “The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for

awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene "

7.The learned Advocate General would also rely on a judgment in Sterling Computers Limited and Ors v. M & N Publications Limited and Ors (AIR 1996 SC 51), wherein, it has been held as follows:-

"At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by Courts while dealing with public property. It is not possible for Courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive"

8.In this case, the petitioner has failed to place any palpable material to show malafide or arbitrariness on the part of the respondents. As far as the contention raised by the learned counsel for the petitioner that the respondent Federation cannot take policy decision, in the absence of the elected Board, which is the supreme authority of the Federation is countered by the learned Advocate General stating that, after the expiry of Board, the Administrator has been appointed as per Section 88 of the Tamil Nadu Co-operative Societies Act. The Powers of Duties of the Board is now vested with the Managing Director and therefore, there is no bar under law for the Managing Director to float the tender.

9.As far as the objection raised by the learned counsel for the petitioner that, the tender has been floated during the pendency of Election Code of Conduct, the learned Advocate General has circulated the order passed by the Election

Commission on 26.02.2019 exempting the tender process floated by the Aavin, taking note of the essentiality of milk supply.

10.As far as the modification made in the tender conditions regarding experience, the learned Advocate General would submit that based on the past experience, the tender under clause 3.1, a minimum experience of two years within the last five year period has been fixed and such experience shall be in respect of distribution through insulated vehicles for Government/Government undertakings/Cooperative diaries and any private diaries with total handling capacity of minimum 1 lakh litres per day. In this clause, there is no arbitrariness or discrimination. Therefore, when there is no discrimination or malice in the above said terms, the principle laid down by the Hon'ble Supreme Court in Tata Cellular vs. Union of India (1994 (6) SCC 651) squarely applies.

11.The learned Advocate General would also draw the attention of this Court that in the writ petition filed by M/s.Aarthi Transport, in W.P.Nos.39386 and 39561 of 2015, this Court has held that the terms of tender floated by the respondents does not suffer any malafide or violation of tender transparency act and rules. While so, the writ petition is devoid of merits.

12.As submitted by the petitioner herein, in his affidavit, the attempt of the second respondent to float tender for transporting milk sachets from diaries in and around Chennai to its outlets have suffered a checkered history. When the elected Board was functioning between 2014-2018, an attempt was made to float the tender which got aborted later certain modifications were made and tender was floated for the second time during the month of November 2018. This also was subjected to challenge and resulted in withdrawal of the tender process leading to floating of tender for the third time, in February - March 2019, the terms of which now under challenge.

13.At the outset, it is pertinent to record that, it is now well settled principle of law that judicial review in respect of tender is very limited and specific case of malafide and arbitrariness has to be made out. In this case, this Court finds no element of malafide or arbitrariness placed by the petitioner except comparing the clause found in the previous tender and the present tender. It is the prerogative of the tenderer who floats the tender and his wisdom should prevail unless and until the terms violates the principle of equity and natural justice.

14.The Hon'ble Supreme Court in Jagdish Mandal v. State of Orissa and others (2007 (14) SCC 517) has observed as under:-

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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.

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.'

ii) Whether public interest is affected. ”

15.The two questions which has been formulated by the Hon'ble Supreme Court in the above said judgment tested now with the clauses which are under cloud. This Court finds that insisting upon the participant to have minimum experience of two years within 5 years is neither arbitrary nor irrational. Similarly, a minimum experience of 1 lakh litres transportation of milk also not irrational.

16.As pointed out by the learned Advocate General, the tender does not restraining the Transporters who have involved in transporting milk sachets distribution through insulated vehicle for the Government and Government undertakings, it is open for the Transporters who have experience in transporting milk for cooperative diaries any private diaries therefore, the contention raised by the petitioner that the terms of tender tainted with arbitrariness has no basis.

17.Regarding the competency of Managing Director floating tender, Section 89 of the Tamil Nadu Co-operative Societies Act, empowers the Registrar to appoint an Administrator who shall exercise the functions of the Board and therefore, there is no lack of jurisdiction on the part of the second respondent inviting tender since, he has exercised the power in the place of the Board. The third contention raised by the petitioner that during the pendency of Election Code of Conduct, the second respondent ought not to have invited tender also falls to the ground in view of the permission granted by the election commission to proceed with the tender process vide his proceedings in Na.ka.No.6941/2018/Co-operative Election 5(1) dated 26.02.2019.

18.Regarding insulation of vehicle and Food Safety and Security, the learned Advocate General would point that a similar submissions were made earlier before this Court in the writ petition in W.P.Nos.39386 and 39561 of 2015 filed by M/s.Aarthi Transports wherein, this Court after considering the terms of the tender has rejected the said contention pointing out that no successful bidder can be allowed to transport milk sachet without insulation. within 90 days of confirming the tender, the successful bidder is bound to provide insulated vehicles and any failure to produce insulated vehicle within 90 days would result in automatic cancellation of contract. The relevant clause regarding insulated vehicle rules reads as below:-

"5.0 Production of Vehicles :-

The tendered vehicle should be produced on the first day if the commencement of the contract, which is compulsory: failure to produce the vehicle will lead to termination of the contract. If tendered vehicle is not insulted, penalty will be levied from the 31st day of the contract in their charges bill.

After the awarding of contract, if the tendered vehilce could not be produced on the 1st day, alternative vehicle with all qualifications attached to the tender conditions should be produced immediately. On proper request, Federation reserves the right to extend time upto 30 days with penalty of 20% trip charges per trip, after 30 days upto 60 days with penalty of 40% of trip charges per trip, after 60 days upto 90 days with penalty of 60% of trip charges per trip. Failure to produce insulated vehicle within this 90 days will lead to automatic cancellation of the contract and the security deposit and the pending bills amount shall be forfeited automatically and the contractor is responsible for the spoilage of milk and related expenses due to non-insulated in the period.

Vehicles should be produced with following conditions:

With endorsement in the R.C Book & Permit

With net carrying capacity (after insulation) as 8 MT/5 MT/2MT

Insulation Efficiency certificate from the DGM (OC) of the Federation and Fitness Certificate from DGM (Engg) Transport unit of the Federation.

FSSAI Certificate indicating vehicle no. and owner name."

19.The reading of the above said clause make sure that the tenderer to produce the vehicle on the first day of the commencement of the contract and if he fails to produce the vehicle, penalty will be imposed. If a tenderer fails to produce insulated vehicle within 90 days, his contract will also be canceled automatically.

20.On overall consideration of the tender clauses, this Court arrives to an irresistible conclusion that the tender floated by the second respondent herein is neither arbitrary nor contrary to the principles of natural justice. The second respondent is duly competent to float the said tender. The modification made to the earlier terms of tender does not indicate any colourable exercise of power or malafideness. In the absence of arbitrariness and malafideness, judicial review is not called for. Hence, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Government of Tamil Nadu,
Represented by the Secretary to the Government,
Department of Animal Husbandry,
Fort St. George,
Chennai - 600 009.

2.The Managing Director,
The Tamil Nadu Cooperative Milk Producers
Federation Ltd.,
Aavin Ilam, 3-A, Pasumpon Muthumaralinganar Salai,
Nandanam, Chennai - 600 035

3.Joint Managing Director,
The Tamil Nadu Cooperative Milk Producers
Federation Ltd.,
Aavin Ilam, 3-A,Pasumpon Muthumaralinganar Salai,
Nandanam, Chennai - 600 035

+1cc to Mr.L.P.Shanmugasundaram , Advocate SR.No. 50059
+1cc to Mr.R.Balaramesh , Advocate SR.No. 50040
+3ccs to Mr.S.Muthukumar , Advocate SR.No. 49605
+1 cc to spl Government Pleader (Co op)Sr.No. 50093

W.P.No.14478 of 2019

A.SK(05/07/2019)