

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 03.10.2019

PRONOUNCED ON 16.10.2019

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

AND

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

WP.No.28978/2019 & WMP.Nos.28734 & 28738/2019

R.Ravichandran .. Petitioner

Versus

- 1.The Principal Secretary to Government
Government of Tamil Nadu
Department of Energy
Secretariat, Fort St George
Chennai 600 009.
- 2.The Chairman & Managing Director
Tamil Nadu Generation & Distribution
Corporation Ltd., [TANGEDCO]
10th Floor, NPKRR Maaligai
144, Anna Salai, Chennai 600 002.
- 3.The Chief Engineer
Mettur Thermal Power Station-I [MTPS-I]
Mettur Dam 636 406.

.. Respondents

Prayer:- Writ petition filed under Article 226 of the Constitution of India, praying for a writ of certiorari calling for the entire records relating to the Tender Notification in E-Auction Specification No.ce/SE/M-II/MTPS-I/53/2019-20 dated 16.09.2019 [Name of Work-Lifting and Disposal of Wet Ash for Two years from MTPS-I [4x210 MW]] issued by the 3rd respondent and quash the same as unconstitutional, arbitrary.

For Petitioner : Mr.M.Madhuprakash
For RR2&3 : Mr.S.K.Rameshuwar

ORDER

M.SATHYANARAYANAN, J.,

- (1)The writ petitioner is a resident of Mettur and he filed this writ petition, as a Public Interest Litigation, challenging the Tender Notification dated 16.09.2019 issued by the 3rd respondent for lifting and disposal of wet ash for two years from Mettur Thermal Power Station [MTPS] - I.
- (2)The petitioner would aver that in Thermal Power Plants, Coal is used as a fuel for generating electricity and after burning of coal, 40% of the total coal consumption is converted into ash, which is to be properly disposed of from the concerned Power Plant and the ash generated below the Furnace of the Thermal Plant, is called the 'Bottom Ash' and it will be around 20% of the total ash. The Bottom ash is mostly coarse in nature and hence, it needs to be further crushed before being transported to ash handling system.
- (3)There are three types of Handling System, viz., [1] Fly Ash Handling System ; [2] Bottom Ash [Wet Ash] Handling System ; and [3] Slurry Disposal System.
- (4)It is the case of the petitioner that there are very many experienced persons available, who are well experienced in the method/process of lifting the wet ash and some of the conditions of the Tender floated by the 3rd respondent, are indirectly inviting some favourable persons, who have no experience in the field of lifting the wet ash. The petitioner also invited the attention of this Court to Clause No.60.10 of the Tender Condition and Clause 7.3 of the Special Condition and would submit that the said clauses are totally different from the clauses in the old tender, which also supports the case of the petitioner. Some inexperienced persons who have already been identified, are going to be invited for the purpose of awarding the Tender and rather, it is tailor-made to suit the needs of some tenderers who have already been identified by the respondents for awarding of tender.
- (5)The petitioner further points out that without adopting transparent tender process and in gross violation of the Tamil Nadu Transparency of Tenders Act, 1998 and the Rules framed thereunder, the Tender has been floated by fixing a shorter date despite Rule 20[b] stipulates that 30 days time ought to be provided for submission of bids from the date of Notification.

- (6) It is also pointed out by the petitioner that tenders are invited only from reputed Cement Manufacturers/consortium of Cement Manufacturers and major traders and the condition, fixing minimum bidding quantity at 50,000 metric tons is discriminatory and violative of Article 14 of the Constitution of India as the said condition would encourage monopoly and suited the need of a particular person, who is going to be awarded the tender and thereby, became a successful bidder.
- (7) The learned counsel for the petitioner has invited the attention of this Court to the impugned Tender Notification as well as the conditions and would submit that the writ petitioner being a resident of Mettur and that the tender process is for disposal of the wet ash, generated by the said Thermal Power Station, he is having every locus standi to maintain this writ petition which is filed purely in the public interest.
- (8) He would further submit that in the impugned Tender Notification, some new conditions came to be incorporated which were not available in the earlier tenders floated for disposal of wet ash / fly ash and the said conditions are incorporated only to benefit certain entities to show that in all probability, they would become the successful bidders. It is also the submission of the learned counsel for the petitioner that lifting and disposal of the bottom ash [wet ash] required expert handling and by incorporating tailor-made conditions, they sought to be eliminated only with a view to award the tender in favour of an entity/person, who has already been identified and prays for interference. Learned counsel for the petitioner, in support of his submissions, placed reliance upon a decision rendered by the Hon'ble Supreme Court of India reported in 2012 [8] SCC 216 [Michigan Rubber [India] Limited V. State of Karnataka and Others].
- (9) Per contra, Mr.S.K.Rameshuwar, learned Standing counsel who accepts notice on behalf of the respondents 2 and 3, on instructions, would submit that one individual, viz., Mr.A.A.Anguraj, made a challenge to the very same Tender Notification by filing WP.No.28587 of 2019 and a Single Bench of this Court has entertained the writ petition and though the said writ petitioner, prayed for interim stay of all further proceedings in pursuant to the Tender Notification in WMP.No.28330 of 2019, a Single Bench of this Court was not inclined to grant any interim order. It is the further submission of the learned Standing Counsel for the respondents 2 and 3 that the present writ petition lacks bona fide and is not at all maintainable for the reason that except stating that the writ petitioner is a resident of Mettur, he has failed to

make any grounds as to the interference in the tender process and that apart, he is also not a participant in the tender process and as such, he absolutely lacks bona fide and locus standi also. The learned Standing counsel appearing for the respondents 2 and 3, on point of law, would submit that the Tender process involves techno-commercial bid and it is prerogative of the tender floating authority to stipulate conditions for getting better bid and the stipulations of the terms and conditions of tender may not be normally be interfered in exercise of the jurisdiction under Article 226 of the Constitution of India. It is further pointed out that the Ministry of Environment, Forests and Climate Change, Government of India, also stipulates that the fly ash as well as wet ash generated in the Thermal Power Stations, should be removed and disposed as expeditiously as possible and in the event of accumulation of the ash the power generation is also likely to be hit and hence, prays for dismissal of the writ petition with exemplary cost.

(10) This Court paid its best attention to the arguments advanced by the respective learned counsel appearing for the parties and also perused the materials placed before it.

(11) It is the stand of the respondents 2 and 3 as per the submissions of the learned Standing counsel appearing for them that 100% ash utilisation is --- and insisted by the Pollution Control Authorities as well as by the National Green Tribunal and the Ministry of Environment and Forests of Government of India, vide Notifications dated 03.11.2009 and 08.11.2016, had provided certain guidelines and utility for the disposal of the wet ash and fly ash generated by the Thermal Power Plants.

(12) In the decision reported in 2012 [8] SCC 216 [Michigan Rubber [India] Limited V. State of Karnataka and Others], the Hon'ble Supreme Court of India, had considered the nature and scope of judicial review in respect of Government Contracts and Auctions and taken into consideration, its earlier decisions, more particularly, Tata Cellular V. Union of India [1994 [6] SCC 651] ; Raunag International Limited V. I.V.R. Construction Limited [1999 [1] SCC 492] ; and Associated Provincial Picture Houses Limited V. Wednesbury Corporation [1948 [1] KB 223] and culled out the following principles:-

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 the 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 the 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 a 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 the negative, then there should be no interference under Article 226.'

- (13)As per the principles culled out by the Hon'ble Apex Court in the above cited decision, the Court would not normally interfere with the Policy decision and in the matters challenging award of contract by a State or Public Authorities.
- (14)The locus standi of the non-participant in the tender also came up for consideration in the decision reported in 2018 [4] CTC 47 [Single Bench] [Hero Ecotech Limited V. The Commissioner of Backward Classes welfare, Chennai-5 and others] and a learned Single Judge of this Court had considered the scope of judicial review under writ jurisdiction in respect of a Government contract and after referring to various decisions of the Hon'ble Supreme Court of India, has observed in paragraph No.21 that, ''interference is called for only when there is an error in the decision making process and not in the decision itself''.
- (15)The last date for receipt of technical bids was on 04.10.2019 and the decision making process is going to start only now. In the decision of Jagdish Mandal V. State of Orissa reported in 2007 [14] SCC 517, it is held that ''evaluating tenders and awarding contracts are essentially commercial functions and that principles of equity and natural justice stay at a distance and in the decision as to the award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere despite procedural abrasion or error in assessment or prejudice to a tenderer is made out.''
- (16)Admittedly, the petitioner, who claims to be a public interest litigant, is not even a participant and in effect, challenges some of the conditions of the tender process and it is also the case that the Tamil Nadu Transparency in Tenders Act, 1988, and the Rules framed thereunder, have not been followed. However, it is the stand of the respondents 2 and 3 that since it pertains to disposal of ash, which is generated usually by the Thermal Power Plants on account of burning of coal and in the light of the conditions and mandates prescribed by various authorities, it is under obligation to dispose of the same at the earliest and as such, the Transparency in Tenders Act, 1988 as well as the Rules framed therein, need not be strictly adhered to.

(17) It is also to be noted at this juncture that one of the aggrieved individuals, also made a challenge to the very same tender notification by filing WP.No.28587 of 2019 and it was entertained and the Single Bench of this Court was not inclined to grant interim order, staying all further proceedings in pursuant to the said Tender Notification. In the considered opinion of the Court, in the light of the limited scope of interference as to the impugned tender process, which is purely a commercial and technical bid, finds no merit in this writ petition.

(18) In the result, the writ petition stands dismissed at the admission stage itself. No costs. Consequently, the connected miscellaneous petitions stand closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

AP

To

1. The Principal Secretary to Government
Government of Tamil Nadu
Department of Energy
Secretariat, Fort St George
Chennai 600 009.

2. The Chairman & Managing Director
Tamil Nadu Generation & Distribution
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10th Floor, NPKRR Maaligai
144, Anna Salai, Chennai 600 002.

3. The Chief Engineer
Mettur Thermal Power Station-I [MTPS-I]
Mettur Dam 636 406.

+1 cc to Mr.S.K.Raameshwar Advocate sr86852
+1 cc to Government Pleader sr86877

WP.No.28978/2019

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