

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2019

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.27731, 27755, 27777, 27784, 27800, 27808,
27818, 27825, 27832, 27843, 27865 and 28145 of 2018
& connected Mps.

P.K.Shefi

Licensee Railways/IRCTC,
R/o 9/46, Honey Dew Apartments,
Kilpauk Garden II Street,
Kilpauk, Chennai-600 010.

.. Petitioner in all WP's

Vs.

1. Union of India,
Ministry of Railways,
rep. by its Secretary,
Parliament Street, Rail Bhavan,
New Delhi-110 001.
2. Indian Railway Catering and
Tourism Corporation Ltd.
rep. by its Chairman & Managing Director,
11th Floor Statesman House Building,
Bharakamba Road,
New Delhi-110 001.
3. Group General Manager,
Indian Railway Catering and
Tourism Corporation Ltd. (South Zone),
6A, The Rain Tree Place,
No.09, Mc Nichols Road,
Chetpet, Chennai-600 031.
4. The General Manager,
Indian Railway Catering and
Tourism Corporation Ltd. (South Zone),
6A, The Rain Tree Place,
No.09, Mc Nichols Road,
Chetpet, Chennai-600 031.

Respondents 1 to 4 in all WPs

5. The Assistant General Manager,
Indian Railway Catering and
Tourism Corporation Ltd. (South Zone),
6A, The Rain Tree Place,
No.09, Mc Nichols Road,
Chetpet, Chennai-600 031.

5th respondent in WP.Nos 27731,
27755, 27777, 27784, 2780, 27808,
27818, 27825, 27843 & 27865

6. M/s.Seema Caterers,
No.32, 61/3277,
K Azeez Road,
Bangarpet-553 114.

... 6th Respondent in WP.No. 27731,
27755, 27777, 27784, 27800 & 27808/18

7. M/s.Vasantham Catering,
No. 137/18, St.Paul Complex,
A.Block, Bharathiyar Salai,
Contonment, Tiruchy 620 001.

... 6th Respondent in WP.No. 27818/18
& 27825/18

8.M/s.KMA Caterers,
No. 20, Mubeena House,
Robertson Road, Fraze Town,
Bangalore 550005

... 6th Respondent in WP.No. 27832/18
& 27843/18

9.M/s.Sanraj Hospitality Pvt Ltd.,
No. 12/2, First Floor,
Nehru Enclave Kalkaji,
New Delhi

... 6th Respondent in WP.No. 27865/18

Prayer in W.P.Nos.27731, 27755, 27777, 27784, 27800, 27808, 27818,
27825, 27832, 27843 & 27865:-

These Petition filed under Article 226 of the Constitution of India calling for the records connected with the impugned Letter of Award No.IRCTC/SZ/LOA/TSV-Section-IV/18, dated 09.10.2018, issued by the fifth respondent pursuant to the Tender Notification No.IRCTC/SZ/TSV/Genl/18-19/01, dated 24.09.2018 issued by the third respondent, quash the same and consequently direct the respondents 1 to 5 to grant temporary license to the petitioner for providing Train Side Vending (TSV) services in SR/Section-IV (MAS-KPD-SBC), VI (MDU-PGT-MAQ), VII (MDU-PGT-TVC), VIII (MS-MDU-TVC), X (MS-VM-TPJ), XII (TVC-MDU-MAS-RU), I (CBE-MDU-RMM), IX (MS-TPJ-MDU), III (MAS-DG/PGT-TVC), V (MAS - SRR- MAQ) and III (TPJ/SA/PGT/MAQ) respectively.

Prayer in WP.No. 28145 of 2018:

calling for the records connected with the impugned Tender No.IRCTC/SZ/TSV/Genl/18-19/02 dated 15.10.2018 issued by the 3rd respondent quash the same and consequently direct the respondents to allot the temporary licence to the petitioner for the sections covered in Annexure-C of the impugned E-Tender notification dated 15.10.2018 for operation of Train Side vending services(TSV) in Non-Pantry Car super Fast/ Express trains originating and passing through various sections as per the scope of business mentioned in the Tender conditions of the operation and management of cell Kitchen allotted to the petitioner.

For Petitioner in :Mr.Ravikumar Paul, Senior Counsel
all W.Ps. for M/s.Paul and Paul

For Respondents : Mr.R.Thiyagarajan, Senior Counsel
in all W.Ps. for Mr.V.G.Suresh Kumar,
Standing Counsel for RR1-5

C O M M O N O R D E R

Since the parties and the issue involved in these writ petitions are one and the same, these writ petitions have been taken up for hearing together and this common order is being passed.

2. The petitioner seeks to quash the Letters of Award of contract issued by the fifth respondent to the sixth respondent in these writ petitions pursuant to the tender notification dated 24.09.2018 and consequently to direct the respondents 1 to 5 to grant temporary license on nomination basis to the petitioner for providing Train Side Vending (TSV) services in various sections in Southern Railway and South Western Railway.

3. The facts, which are necessary for better appreciation of the case, in a nutshell, are as follow :

3.1. The petitioner is a licensee of Indian Railways. In 2006, the second respondent invited tenders for setting up, operation and management of the state of the art kitchens at various railway stations. The petitioner submitted the tender for various "Cell Kitchens" on 23.11.2006 for 14 stations - 6 in the South Zone (in short "SZ"), 7 in the South Central Zone (in short "SCZ") and 1 in West Zone (WZ) and was being successful in the bid, was given the contracts, entered into the agreements and commenced operations between 2009 and 2010. For installing state of the art kitchens, he depleted his resources to the tune ranging between Rs.50,00,000/- and Rs.1,50,00,000/- for each kitchen.

3.2. According to him, the scope contained in the tender documents allows the "Cell Kitchen" to supply food for Platform Vending (PV), Train Side Vending (TSV), Supply to other Railway Stalls in the Station and City, and Supply to Train with Pantry Cars gradually, Supply to Value Added Tour Packages, Luxury Trains or any other Train/Coaches, which attracted him towards the bidding and to spend the money.

3.3. On 24.05.2018 and 05.07.2018, the petitioner sent requests to the Group General Managers of SCZ and SZ seeking permission to carry out Segmentation/Section wise TSV as offered in the scope of work contained in the tender document and agreement and also as per paragraph 3.5. of the Railway Catering Policy, 2017 to augment the sales of the Cell Kitchens to minimize any accruing losses. His request was acceded to and on 09.07.2018 and 23.07.2018 respectively he was permitted to carry out Segmentation/Section wise TSV by the SCZ and SZ in certain sections with certain terms and conditions, which includes payment of license fees.

3.4. The petitioner made representation dated 13.07.2018 to the Group General Manager of SCZ seeking to reduce the license fees. Accordingly, the license fees was modified and the petitioner was given with offer letters and he commenced the Segmentation/ Section wise TSV in the given sections. The petitioner made similar representation dated 27.07.2018 to the Group General Manager of SZ and the same is yet to be considered by the said authority. Hence, he sent an appeal/representation to the second respondent on 29.09.2018.

3.5. While so, an E-Tender notification dated 24.09.2018 was issued by the Railways offering to grant TSV licence for certain sections. Challenging the E-Tender notification dated 24.09.2018, the petitioner filed W.P.No.26839 of 2018.

3.6. However, upon opening of bids with respect to the tender dated 24.09.2018 on 09.10.2018, and after finalizing the bid process, the successful bidders were also issued with the Letters of Award on the same day, i.e., on 09.10.2018.

3.7. In the interregnum, the Railways issued another E-Tender dated 15.10.2018 offering to grant TSV licence for certain other sections. Challenging the same, the petitioner filed W.P.No.28145 of 2018.

3.8. Since the Letters of Award numbering 12 were issued for the successful, Seeking to quash 11 such Letters of Award, the petitioner filed the remaining writ petitions.

4. When these writ petitions were taken up for hearing on 29.10.2018, this Court directed the official respondents to keep all other proceedings in abeyance. Accordingly, though the tenders with respect to the notification dated 15.10.2018 were opened on 29.10.2018, they were not acted upon by the official respondents.

5. While so, this Court vide order dated 15.11.2018 dismissed W.P.No.26839 of 2018 as having become infructuous.

6. Refuting the allegations of the petitioner and seeking to sustain their action, the official respondents filed one counter affidavit in W.P.No.28145 of 2018 and another common counter affidavit in the remaining writ petitions. It is stated that the action of the respondents in awarding TSV Service to the petitioner for a period of six months is based on the communication of the office of the second respondent dated 12.06.2018. Consequently, the office of the second respondent directed all the Group General Manager to proceed with the tender process for awarding TSV service in compliance with the directions of the Central Vigilance Commission. It is also contended that the Commercial Circular 11/2011 issued by the Railway Board on 22.06.2011 superseded all the previous instructions and awarding of TSV contract is made in accordance with the instructions issued by the first respondent. The interim offer made to the petitioner is purely on ad-hoc basis and they have to proceed with the regular tender for awarding the contract, which, they had complied with. The awardees have also paid necessary security deposit, license fee and special security deposit. It is also claimed by the official respondents that though the petitioner is having Cell Kitchens within the South Western Railway jurisdiction, he had chosen not to challenge the tender issued by the said zone. Hence, the officials respondents pray for dismissal of these writ petitions.

7. Heard Mr.Ravi Kumar Paul, learned Senior Counsel appearing on behalf of the petitioner and Mr.R.Thiyagarajan, learned Senior Counsel appearing on behalf of the official respondents.

8. As per the Catering Policy 2005 of the Railway Board, the catering activities were taken over by the Indian Railway Catering and Tourism Corporation Limited (in short, "IRCTC"). Later, they were handed over back to the Indian Railways and were again taken over by IRCTC. In the year 2009, the contracts were awarded for setting up of Cell Kitchens at different stations in Southern Railway. The petitioner bagged the award of contract to set up four Cell Kitchens at Arakonam, Erode, Dindigul and Chengalpet. Two Cell Kitchens contracts were also awarded to the petitioner for South Western Railway. As per the Special conditions to the tender document, the Cell Kitchens will supply food for TSV, that is, those trains running without pantry cars. Besides TSV, all the static departmental units at the stations or other static units in railways within that particular city will also be supplied meals/ snacks.

9. As per Clause 2.5 of the tender documents, it is stated that the licensee may be permitted for TSV (sale of items through vendors in running trains between two pair of stations) and TSV will be permitted by IRCTC in exceptional cases and licensee shall not be entitled for any kind of losses/damages on this account. Clause 2.5 overrides clause 1.1. and thus, specifically stipulates that there is no compulsion on the part of the IRCTC to award TSV contracts to Cell Kitchens Contractor, as it is not mandatory and only optional and exceptional. Hence, it is pointed out by the learned counsel for the Railways that the operation of TSV does not form part of the contract awarded to the petitioner for establishing and running Cell Kitchens and that running of Cell Kitchens and TSV are two distinct and separate operations.

10. On 24.05.2018, the petitioner has given a representation to the Group General Manager, SCZ with a copy to the second respondent requesting for permission to carry out segmentation/section-wise TSV as offered in the scope of work in the Cell Kitchen Tender. It is the case of the petitioner that since all the trains are not provided with pantry cars TSV will be provided from a suitable unit of nominated station/stations enroute. The petitioner sought for this permission based on the scope of the work as per the original tender document. In fact, the petitioner was offered license to carry out segmentation/section-wise TSV for SCZ and in fact, at the request of the petitioner, there was a reduction of the licence fees made by the respondent.

11. As the petitioner has got those Cell Kitchens in the SCZ, he made once again a representation on 05.07.2018 seeking for licence to do TSV. The offer was given to the petitioner to carry out station-wise TSV on the same licence fees. As the licence fee was the same, the petitioner made a representation contending that the concept of TSV is in-built in the scope of the Cell Kitchen, as per the tender conditions Clause 2.5 and they should be allowed to operate TSV also. So far as the licence fee is concerned, the same has to be fixed based on the sale assessment. The duration of the TSV is based on the distance between stations. If the duration is shorter, the vendors may not get sufficient gain, as the petitioner is already the Contractor for the Cell Kitchens and the scope of work also provides for TSV, he requested the authorities to grant TSV licences to him. He has also made several representations in the order of hierarchy. However, the third respondent had issued E-tender for TSV in 12 sections, which is now assailed by the petitioner contending that it is contrary to the tender conditions of CK and also the Catering Policy 2017.

12. It is mainly contended by the petitioner that since he

is having a operational Cell Kitchens for 10 years and the scope of work also included TSV, he expected that the TSV contract would be given in his favour. But without advertng to the said conditions, the respondent has issued the E-Tender dated 15.10.2018 to grant TSV licences for those sections.

13. In response to the said contentions, learned counsel for the respondents contended that even if the TSV contract is awarded to a person other than the Cell Kitchen contractor, the Southern Railway and South Western Railway are under an obligation to procure food items for such TSV Services only from the Cell Kitchens, if available. In view of such arrangement, according to the respondents, the petitioner need not be aggrieved, as if there is a Cell Kitchen available in the section including those that are being operated by the petitioner, the licensee for the TSV will have to procure the food items only from those Cell Kitchens for sale in TSV.

14. The learned counsel for the respondents also presented the statistics of the number of trains and number of services. It is stated that out of 207 services, in respect of 44 services, the licensee, who has been awarded the TSV contracts, will have to procure food items only from the Cell Kitchens. Thus, by nominating the static units of the petitioner for supply of food to the TSV units, the interest of the petitioner is protected and he cannot be a person aggrieved.

15. Learned counsel for the respondents also further explained as to how the claim of the petitioner cannot be automatic merely because he is operating Cell Kitchens. Admittedly, the petitioner also had not participated in the tender floated for TSV either by the Southern Railway and South Western Railway by the IRCTC/South Zone and as the petitioner is asking only for a temporary licence, the same is also not permissible. It is also contended that Clause 2.5, relied on by the petitioner, is only an enabling provision to be used in exceptional circumstances. It is trite that terms of the contract can be express or implied. The conduct of the parties is a relevant factor in the matter of construction of a contract.

16. As stated supra, the petitioner was offered to operate the TSV by SCZ and the petitioner requested for a reduction in the licence fees and the same was reduced in respect of the said SCZ. Having accepted the TSV for the SCZ on a reduced licence fees, it is not open to the petitioner to contend that TSV is part of Cell Kitchen contract. Therefore, from the conduct of the petitioner, it is clear that he had only intended to deal the Cell Kitchen and TSV contract as independent of each other.

17. The petitioner has been into the Cell Kitchen business for more than ten years. Even in the earlier contracts, the respondents had felt the need of TSV and included a clause in the scope of work. However, the respondents had consciously not included that in the contract to the petitioner. If the respondents are desirous of awarding the contract of TSV also to the petitioner, the same would have been awarded at the time of offer itself.

18. So far as the pricing of TSV is concerned, in the event of granting of licence to the Cell Kitchen Contractor for TSV, the prices quoted by the respondents have to be accepted by the petitioner. In the event the price offered by the petitioner is not accepted, it would always be open to the respondents to go for a new tender. It is not the case of the respondents that the TSV offered to the petitioner for a price and the same was not accepted by him.

19. As aforesaid, from the conduct of the parties, it was intended to treat both the contracts independently. It was within the domain of the respondents to either give the TSV to the Cell Kitchen contractor temporarily or call for/issue a fresh tender. When it is open to the petitioner to participate in the tender, he cannot insist that he should be awarded TSV also.

20. As contended by the learned counsel for the Railways, TSV services are in addition or additional services. The TSV service itself is only for those trains running without pantry cars, but passing through Cell Kitchens. The respondents contended that it would be impracticable to award the entire section-wise contract in violation of TSV policy, which states that static units or stations will have to be identified and nominated for supply of food to trains without pantry cars at various stations of the section.

21. It is specifically pointed out that the petitioner had abstained himself from challenging the tenders called and finalised by zonal railways in the year 2013 as per the TSV policy issued by the Railway Board, wherein, the Cell Kitchen contracts with the provision of Clause 2.5 were operational even at that point of time, since 2009.

22. As already the TSV contracts were finalized through tender process in line with the guidelines issued by the CVC, it is not open to the petitioner to seek a direction or indulgence from this Court, when he has not chosen even to participate in the tender.

23. It is to be stated that the private respondents in the writ petitions have been issued with the Letters of Award dated

09.10.2018 pursuant to the tender notification dated 24.09.2018. Though the tenders floated on 15.10.2018 were opened on 29.10.2018, pursuant to the interim order passed by this Court on 29.10.2018, the same were not finalized.

24. With the above observations, these writ petitions are dismissed with no costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To

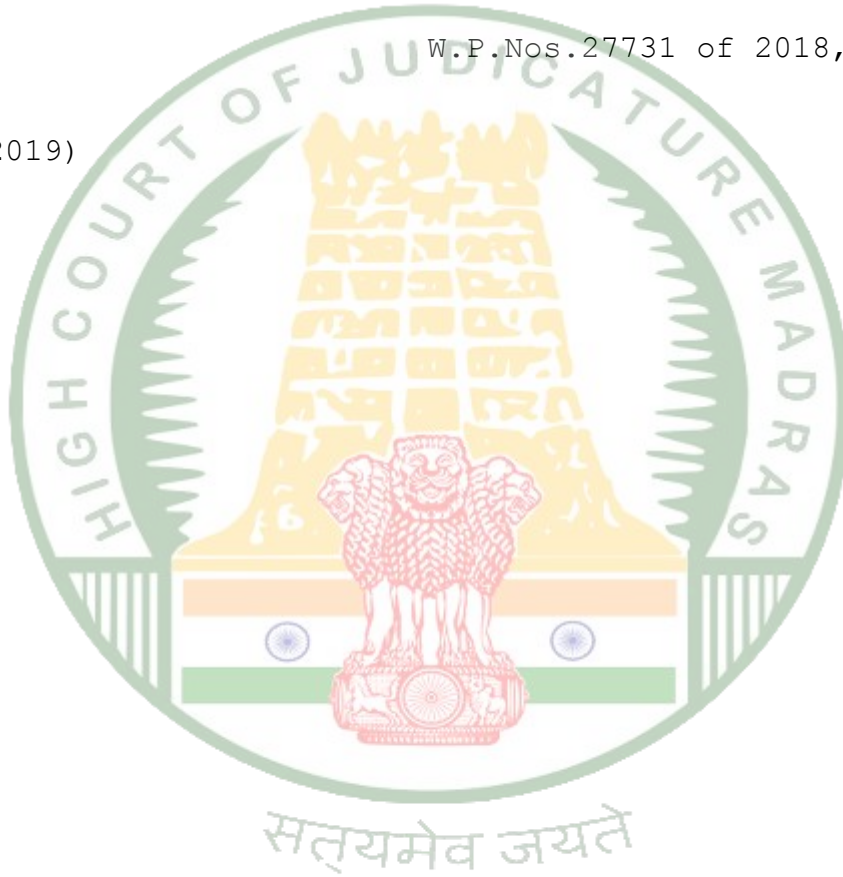
1. The Secretary,
Ministry of Railways,
Union of India,
Parliament Street, Rail Bhavan,
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5. The Assistant General Manager,
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No.09, Mc Nichols Road,
Chetpet, Chennai-600 031.

+2cc to M/s.Paul & Paul, Advocate, S.R.No. 4143
+1cc to Mr.P.T.Ram Kumar, Advocate, S.R.No. 3795
+1cc to Mr.V.G.Suresh Kumar, Advocate, S.R.No. 3778

W.P.Nos.27731 of 2018, etc. batch

RSV(CO)
GN(21/02/2019)



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