IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.02.2020

Pronounced on : 20.02.2020

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

W.P.No.19515 of 2019
and
W.M.P.Nos.18993, 18995 & 20907 of 2019

M/s.Saraswathi Transport .. Petitioner

..Vs..

1.The General Manager,
Marketing Division,
Indian Oil Corporation Limited,
139, Nungambakkam High Road,
Chennai - 600 034.

2.Deputy General Manager,
Tender Inviting Authority,
Indian Oil Corporation Limited,
139, Nungambakkam High Road,
Chennai - 600 034.

3.Dynamic Roadways,
No.1/6, Abirami Avenue First St.,
Kannadasan Nagar,
Kodungaiyur
Chennai - 600 118.

.. Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent in Tender No.SRCC/PT/122/TNSO/2018-19, quash the Technical and Finance bids which were evaluated on 23.04.2019 in respect of the 3rd respondent and consequently directing the 2nd respondent Corporation to re-tender in respect to Tender No.SRCC/PT/122/TNSO/2018-19 dated 23.04.2019.

For Petitioner :Mr.T.N.Rajagopalan for Mr.S.Siva Shanmugam

For R1 and R2 :Mr.Mohammed Fayaz Ali

For R3 :Mr.O.R.Santhanakrishnan

ORDER

This Writ Petition has been filed in the nature of Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent, Deputy General Manager, Tender Inviting Authority, Indian Oil Corporation Limited, Chennai in Tender No.SRCC/PT/122/TNSO/2018-19 and quash the Technical and Financial bids which were evaluated on 23.04.2019 in respect of the 3rd respondent namely, Dynamic Road ways, Kodungaiyur, Chennai and consequently, direct the 2nd respondent to re-tender in respect of the said tender.

2. In the affidavit filed in support of the petition, it had been stated that the petitioner firm, M/s.Saraswathi Transport, Royapettah, Chennai, has been established for the purpose of carrying on business for transportation of essential commodities and other goods to various places throughout the country. It has been claimed that the petitioner's firm is in the business for a long time and has rich experience. It is also been stated that they had also done business with Indian Oil Corporation. It is stated that the 2nd respondent namely, the Deputy General Manager, Tender Inviting Authority of Indian Oil Corporation Limited, Chennai, had issued a tenders for transportation of white oil, black oil, tank trucks contract for bunkering including arranging tank trucks, loading, transportation and delivery at Chennai, Ennore, Katupalli,

Adani, Puducherry, Karaikal Ports, and other non-bunker customers loading. It is stated that the petitioner has participated in the tender and submitted their tender online on 17.02.2019 and Bid No.494621 was assigned. They offered their tender for 12 vehicles owned by them and 5 vehicles attached to them with capacity ranging from 12KL to 24 KL.

3. It was stated that however the petitioner had not submitted the Provident Fund Certificate. The Technical bid of the petitioner was therefore rejected by the 2nd respondent on 03.04.2019. This was also updated in the website. The 3rd respondent herein namely, Dynamic Roadways, Chennai, was declared to be the successful bidder. The petitioner stated that the 2nd respondent had permitted acceptance of the tender document of the 3rd respondent. It was claimed that the petitioner's bid was rejected on the ground of non submission of Provident Fund Certificate, and simultaneously, the bid of the 3rd respondent was accepted, even though they did not have a single truck in their name. The petitioner had been discriminated. It is under these circumstances, that the petitioner has filed the present Writ Petition in the nature of Certiorarified Mandamus to set aside the tender granted to the 3rd respondent.

4. A counter affidavit had been filed on behalf of the 1st and 2nd respondent namely, the General Manager, Marketing Division and Deputy General Manager, Tender Inviting Authority of the Indian Oil Corporation, Chennai. It was stated that the tender had been floated for white oil, black oil, tank trucks contract for bunkering including arranging tank trucks, loading, transportation and delivery at Chennai, Ennore, Katupalli, Adani, Puducherry, Karaikal Ports, and other non-bunker customers loading. It was also stated that the contract period was for 3 years with an option to extend for a further period of 2 years at the discretion of the petitioner. The Tank Trucks required are 8 numbers in the capacity of 20 KL to 24 KL for black oil and 5 numbers in the capacity of 12 KL for 2 numbers and 20 KL - 24 KL for 3 numbers for white oil. It was also stated that the requirement was indicative and subject to change. It was stated that a pre-bid meeting was held on 08.02.2019, wherein it was stated that there was no requirement to produce the Registration Certificates or Fitness Certificates or CCOE License and Road Permits and that it would be sufficient to give an undertaking by way of an indemnity bond, assuring that the necessary documents together with the Tank Trucks would be placed within one month from the date of issuance of Letter

of Intent. It was further stated in the counter affidavit that by letter dated 07.03.2019, the petitioner was called to rectify the defects in the tender submitted. However, the petitioner did not submit the Provident Fund Registration Certificate and therefore, the petitioner was rejected at the Technical bid itself. The only eligible candidate was Dynamic Roadways, whose bid was accepted on 03.04.2019. The Financial bid was opened on 04.04.2019 and it was found that the 3rd respondent was the L1 bidder. A Letter of Intent dated 22.04.2019 was also issued and Earnest Money Deposit was also directed to be paid. It was also stated that on 08.05.2019, a meeting was held with the 3rd respondent and it was stated that they should comply with the conditions of the Letter of Intent.

5. On 24.05.2019, the 3rd respondent informed that due to water scarcity and restrictions in Chennai, they could not get water for degassing the Tank Trucks to carry out the welding work and therefore requested for extension of time. On 29.05.2019, Bunker Delivery Contract Agreement was submitted by the 3rd respondent. On 29.06.2019, the 3rd respondent submitted four affidavits all dated 14.06.2019 from the registered owners of the Tank Trucks together with the original documents as proof that the Bunker Tank Trucks were attached with the 3rd respondent. A Bank Guarantee for the value of Rs.20 lakhs was also submitted. Thereafter, the 3rd respondent by letter dated 29.06.2019, requested the respondents to accept a Tank Truck of the capacity of 20 KL instead of 12 KL as the two 12 KL Tank Trucks were under fabrication and also agreed to induct two 12 KL Tank Trucks soon. Finally, the 3rd respondent produced all the 13 Tank Trucks on 10.07.2019 and by letter dated 11.07.2019 requested the respondents to induct the 13 Trucks. It was stated by the 3rd respondent that the delay was due to modification in the locking system, IOCL branding and fulfilment of safety standards and on account of water shortage. It was stated that, in the meanwhile, this Court by order dated 08.07.2019 had directed the 3rd respondent to execute a letter of undertaking agreeing that the payments paid to them under the contract in pursuance of the impugned tender would be refunded to the extent that would be determined in the Writ Petition.

6. It was further stated in the counter affidavit that the Tank Trucks produced by the 3rd respondent were inspected between 19.07.2019 to 24.07.2019 and were found suitable and by inspection report dated 17.10.2019, recommendation was given for issuance of the work order. It was stated that the 3rd respondent had justified the delay by stating that there was modification

to the locking system which could be done only after filling water upto full capacity and since the workshops were prevented from using water for carrying out the locking system modification, the Tank Trucks could not be placed on time. It was further stated that there was no malafide in issuing the work order to the 3rd respondent. It was also stated that the previous Tank Truck contractor was also blacklisted on 12.03.2019 and since it would be difficult to handle the growing demand for supply of oil to the customers, especially the bunkering services at various ports, work order was issued on 19.10.2019. It was stated that the Writ Petition should be dismissed.

7. The 3rd respondent also filed a counter affidavit in which, they stated that Clause 44.0 of the tender condition contains an arbitration clause. It was also stated that the 3rd respondent has been in business from 2004 onwards and from 2008 onwards with the Indian Oil Corporation Limited. It was stated that they had annexed the necessary documents along with the tender document. It was also stated that there was a pre-bid meeting on 06.02.2019 where it was stated that the documents relating to the Tank Trucks can be produced if readily available and were not mandatory. It was also stated that offering of Tank Trucks and verification before submission of tender and before issuance of Letter of Intent was not mandatory. It was stated that the 3rd respondent had duly submitted all the relevant documents. It was also stated that the 2nd respondent by an E-mail dated 03.04.2019 informed that the bid of the 3rd respondent had been accepted in Technical bid and subsequently after the Financial bid on 23.04.2019, the Letter of Intent was received on 24.04.2019. It was also stated that the 2nd respondent had advised the 3rd respondent to place all Tank Trucks with stainless steel single locking system and IOCL branding with necessary safety standards for physical verification. It was stated that the 3rd respondent was not able to carryout the modifications immediately, since fresh water had to be filled in all the compartments to carryout hot welding work. It was stated that the Tank Trucks were positioned for physical verification inside the port premises after authorization and issuances of Port passes. The work order was issued on 19.10.2019. The letter of undertaking was issued by the 3rd respondent also on 19.10.2019. It had been stated that they had commenced bunkering services and consequently stated that the Writ Petition had become infructuous and also stated that it should be dismissed.

8. Heard arguments advanced by T.N.Rajagopalan learned counsel for Mr.S.Siva Shanmugam for the petitioner, Mr.Mohammed Fayaz Ali learned counsel for R1 and R2 and Mr.O.R.Santhanakrishnan learned counsel for R3.

9. The petitioner is in the business of transportation of essential commodities and other goods to various places throughout the Country. They claim that they have done business with the 1st and 2nd respondents, namely, Indian Oil Corporation Limited, Chennai. The 2nd respondent, Deputy General Manager, Tender Inviting Authority, Indian Oil Corporation Limited, Chennai had called for tenders for transportation of white oil, black oil, tank trucks contract for bunkering including arranging tank trucks, loading transportation and delivery at Chennai, Ennore, Katupalli, Adani, Puducherry, Karaikal Ports and other non-bunker customers loading.

10. The estimated value of work was Rs.83,05,070/- for one year including GST @ 5% and Rs.4,15,25,348/- for 5 years including GST @ 5%. The submission of tender in the E-tender Portal commenced on 11.02.2019 at 15.00 hrs and ended on 19.02.2019 at 15.00 hrs. The opening of tender for the Technical bid alone was on 20.02.2019 at 15.00 hrs. It was stated that the offer shall be valid for a period of 180 days from the date of opening of the Technical bid. The expected month / year for commencement of contract was from 01.05.2019 or the date decided at the sole discretion of the Corporation.

11. Among other qualifying parameters, one important parameter was with respect to tank trucks. It had been given in the tender document with respect to this stipulation as follows:

SL.No	QUALIFYING PARAMETERS
19.1	TANK TRUCKS: The tenderer shall submit indemnity bond in Rs.100/- Non-judicial Stamp Paper that 8 (eight) number of Black Oil TT's and 5 (Five) number of White Oil TT's along with Pumps and allied equipment will be positioned within one month from the date of LOI. The trucks shall be either owned or attached or leased. All the TT's shall meet BS-IV specifications. The capacity of the required TTs is as follows: ➢ Black Oil - Minimum 8 (Eight) Nos. All the TT's shall meet BS-IV Specifications. (Capacity: Minimum 20KL and Max.24KL - 8 Nos. of TTs.) ➢ White Oil - Minimum 5 (Five) Nos. All the TT's shall meet BS-IV Specifications. Lower Capacity: 12 KL - 2 Nos. & Higher Capacity: 20 KL to 24 KL - 3 Nos. Tank Truck requirement is only indicative and subject to change. The proposed/offered number of Tank Trucks shall be owned/attached/leased by the tenderer or in the name of Firm or Partner or Company or Proprietor or Leased during contract period. The physical verification of tank trucks/original documents offered by the tenderer will be carried out by the location after placement of LOI and before induction of tank trucks on contract. The offered tank trucks can be utilized by the tenderer for other use such as Ex-MI and OMC supplies whenever there is no bunkers. In case of partnership firm participating in this e-Public Tender, the formation of such partnership firm shall not be later than the due date of the tender submission 19.02.2019. The e-Public Tender submitted by the partnership firm formed later than this 19.02.2019 date shall be rejected. In case of attached or leased Tank Trucks, affidavit to be submitted by the owner of the attached TTs. All the proposed / offered TT's shall meet BS-IV specifications (As mentioned in RC book) and also shall be meeting prescribed Local Laws. All the offered TTs shall have valid RTO Registration Certificate, Fitness Certificate & Permit issued by competent Authority; Insurance for the Tank Trucks and product shall be kept valid during the Contract period. Calibration certificate and other related certificates of TTs to be submitted within 30 days from the date of receipt of LOI.

(Emphasis Supplied)

12. The petitioner submitted his tender on 17.02.2019. Bid No.494621 was assigned. The petitioner offered 12 vehicles owned by them and 5 vehicles attached with them, each with capacity ranging from 12 KL to 24 KL. Among the documents to be uploaded in the website for meeting the Pre-Qualification Criteria was the copy of Provident Fund certificate issued by the Competent Authority. The petitioner claims that they had uploaded all the relevant documents except the Provident Fund certificate. It was stated that the Provident Fund certificate was inadvertently not uploaded. The Technical bid of the petitioner was rejected by the 2nd respondent on 03.04.2019, owing to non-submission of the Provident Fund certificate. The 3rd respondent, Dynamic Roadways, Kodungaiyur, Chennai, was declared to be the successful tenderer. It must also be mentioned that among other mandatory documents, which have to be uploaded like Provident Fund registration certificate, is an affidavit for positioning of tank trucks. The format of the affidavit was also given in the Annexure to the tender documents. It had also been provided with respect to the tank trucks as follows:

> "30.0.Placement and Inspection:
>
> 30.1.The bidder shall place the TTs and allied equipment along with all its original documents for inspection/acceptance at IOCL FST, Chennai prior to its placement for execution of Bunkers within 30 days from the date of Letter of Intent. No payment for mobilization/demobilization shall be admissible.
>
> 30.2.The Committee from IOCL FST Chennai will verify all the original documents (RC book, insurance, road tax and road permit etc.) and inspect the vehicles (own) which are readily in operating condition offered by the parties in the Tender before finalization. In case of any defects or deficiencies of the documents/vehicle noticed by the inspection team, the concerned tenderer shall be responsible to rectify the same immediately. In such case the vehicle/documents should be reproduced for inspection within 10 days from the date of the previous inspection after rectifying the defects. Even after rectification, if inspection team, found deficiencies or defects in vehicle/documents, the offer of such tenderer shall be rejected."
>
> (Emphasis Supplied)

13. A perusal of the conditions extracted above reveal that the tank trucks should be placed for inspection within 30 days from the receipt of the Letter of Intent. It had also been stated that if there are any defects or deficiencies in the documents/vehicles, then 10 days time would be given for rectification and if again the Inspection Team found deficiencies, the offer of the tenderer shall be rejected.

14. The Technical bid of the 3rd respondent was accepted by the 2nd respondent on 03.04.2019. The Financial bid was accepted on 23.04.2019. The contract was awarded to the 3rd respondent on 23.04.2019. The Letter of Intent was issued on 22.04.2019. In the Letter of Intent , it had been stated as follows:

LETTER OF INTENT

"Ref: SRCC/PT/122/TNSO/18-19 DATE:22.04.2019
M/s.Dynamic Roadways
.....
.....
Dear Sir,
SUB: Tender for white oil & black oil tank trucks contract for bunkering including arranging tank trucks, loading, transportation and delivery at Chennai, Ennore, Kattupalli, Adani, Puducherry, Karaikal ports & other non-bunker customers loading Ex FST, Chennai.

Tender ID:2019_SROTN_89519_1.

This has reference to your offer for the subject tender. ......
......
......
1. The Physical verification of Tank trucks/original documents of TTs offered by the tenderer, will be carried out by FST-Chennai, after placement of Letter of Intent and before induction of tank trucks on contract. (Sr.No.19.1 of NIT on Page 10 of 103 of tender document).
2. In line with point no.5 of Pre-bid MOM dated 06.02.2019, if the successful bidder is unable to place Trucks/Pumps (as per capacity and model asked in the tender) within 30 days after placing of Letter of Intent, EMD of the bidder shall be forfeited and vendor will be black listed.
......
......
For General Manager (Contract Cell), SR"

(Emphasis Supplied)

15. In this connection, it must also be pointed out that the 30 days for positioning of tank trucks for physical verification ended on 21.05.2019. After the said date, on 24.05.2019, the 3rd respondent had addressed a letter to the 2nd respondent seeking extension of time. In the said letter, they stated that 13 numbers of tank trucks will be placed for physical verification and the details of trucks were given. They were registered on 01.03.2019 and 11.03.2019. It is thus seen that on the date of the tender namely, 25.01.2019, the 3rd respondent did not even have one truck. It is also seen that the trucks were only leased out to the 3rd respondent. They sought extension of time for physical verification owing to the reason that modification of locking arrangement, IOCL Branding and calibration of tank trucks to avoid unwanted manpower and energy had to be done.

16. By e-mail dated 25.09.2019, the 3rd respondent stated that they would line the tank trucks on 27.05.2019 for physical verification. But it was not done.

17. By e-mail dated 02.07.2019, the 2nd respondent had addressed the 3rd respondent as follows:

> "Vide Letter of Intent REF:SRCC/PT/122/TNSO/18-19 dated 22.04.2019, contract for bunkering including arranging tank trucks was awarded to you for bunkering at designated ports as per tender condition. You visited the Chennai FST premises and needed time for modifying tank trucks as per single locking system. So far, you have not positioned any tank trucks for utilization. You are advised to position tank trucks immediately in time with tender condition."
>
> (Emphasis Supplied)

18. On 04.07.2019, the 3rd respondent gave a list of Nine trucks for inspection on 08.07.2019. They stated that the remaining Four trucks will be lined for physical verification on 10.07.2019. On 11.07.2019, the 3rd respondent again addressed to the 2nd respondent stating that the documents of the trucks were verified and they requested for physical verification and induction of the tank trucks. This physical verification was conducted on various dates, namely 19.07.2019, 23.07.2019 and 24.07.2019. It is thus seen that the 3rd respondent had actually lined up the trucks for verification only on 08.07.2019 and 10.07.2019 and they were actually verified on 19.07.2019, 23.07.2019 and 24.07.2019. In this connection, the tender condition that the truck should be positioned for inspection within 30 days from the date of Letter of Intent has to be recalled. This condition which was said to be mandatory had not been fulfilled by the 3rd respondent. The Letter of Intent was

issued on 22.04.2019. The truck should have been positioned on or before 21.05.2019. They were actually positioned for inspection only on 08.07.2019 and 10.07.2019. The reason why the 2nd respondent had shown undue favoritism to the 3rd respondent is not known. At any rate, it is clear that undue favoritism has been extended to the 3rd respondent.

19. In the counter affidavit filed by the 1st and 2nd respondents, it was stated that in the letter dated 11.07.2019, the 3rd respondent had stated that the delay had occurred due to modifications to be carried out in the trucks and on account of water shortage in the city, which prevented carrying out welding works. It must be pointed out that even the extension of time was only after the 30 days of the Letter of Intent.

20. During the course of hearing of the Writ Petition, when these facts had been brought to the notice of the Court, particularly that the 3rd respondent did not even have one truck on the date of submission of the tender documents and had produced for inspection of the trucks much much later than the 30 days stipulated under the tender conditions. This Court had passed the following orders on 08.07.2019:

> "4.Having regard to the facts of the case, it would be expedient that the Third Respondent should be required to execute a letter of undertaking to Indian Oil Corporation agreeing that payments due to them under the contract in pursuance of the impugned tender would be released on condition that they would refund those amounts to the extent that may be determined by this Court when the Writ Petition is ultimately disposed. It is made clear that if such undertaking is not obtained but payments are released to the Third Respondent, the concerned officials of Indian Oil Corporation shall be personally liable to compensate for that amount."
>
> (Emphasis Supplied)

21. Accordingly, the 3rd respondent had also executed a letter of undertaking, in which they have stated as follows:

> "Letter of Undertaking
>
> .....
>
> .....
>
> It is hereby agreed by M/s.Dynamic Roadways, Chennai that payments made to M/s.Dynamic Roadways, Chennai under the Letter of Intent Ref number SRCC/PT/122/TNSO/18-19 dated 22.04.2019

> entered into between M/s.Dynamic Roadways, Chennai and Indian Oil Corporation Limited in pursuance of the impugned tender bearing No.SRCC/PT/122/TNSO/18-19 would be refunded to the extent that may be determined by the Honourable High Court of Madras when the Writ Petitions in W.P.Nos.19515 of 2019 is ultimately disposed."
>
> (Emphasis Supplied)

22. A perusal of the dates and events clearly show that prima facie the 3rd respondent had violated the fundamental requirement namely, production of trucks for physical inspection within 30 days from the date of the Letter of Intent.

23. The learned counsel for the 1st and 2nd respondents tried to justify the delay by pointing out the Pre-bid Minutes of the meeting, wherein, it had been stated that it was not mandatory to produce the trucks within a period of 30 days. This contention cannot be accepted because in the Pre-bid Meeting, it had been very clearly stated as follows:

S.No	Tender Description	Changes / Clarification Requested	IOCL Clarifications for the Bidder Queries
5	Sl.No.19.1 All TTs Shall meet BS IV specifications	BSIV TTs are to be procured for this particular tender. Request you to consider for placement of BS IV TTs within 30 days upon placement of Letter of Intent to successful bidder and not at the stage of Qualification.	...... If the successful bidder is unable to place Truck/pumps (as per capacity and model asked in this tender) within 30 days after placing of Letter of Intent/LOA or backing out after placing to Letter of Intent/LOA, EMD of bidder will be forefitted and vendor will be black listed. ......

(Emphasis Supplied)

24. It is thus seen that the positioning of trucks was mandatory and a duty had been cast on the 1st and 2nd respondents, to forfeit the tender granted to the 3rd respondent and to blacklist the 3rd respondent.

25. The learned counsel for the 1st and 2nd respondents pointed out the judgment in Montecarlo Limited V. National Thermal Power Corporation Limited, (2016) 15 Supreme Court Cases 272, in which it had been stated as follows:

"19. In Sterling Computers Ltd. v. M&N Publications Ltd. (1993) 1 SCC 445] , the Court has held that 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. It has also been observed that by way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry.

20. In Tata Cellular v. Union of India, (1994) 6 SCC 651 a three-Judge Bench after referring to earlier decisions culled out certain principles, namely, (a) the modern trend points to judicial restraint in administrative action, (b) the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made, (c) the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible, and (d) the Government must have freedom of contract and that permits a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. Hence, the Court has laid down that the decision must not only be tested by the application of the Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

21. In Jagdish Mandal v. State of Orissa , (2007) 14 SCC 517] the Court has held that: (SCC p. 531, para 22)

> "22. … 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.”

22. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. (2005) 6 SCC 138, it has been ruled that (SCC p. 148, para 15) the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that 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 powers 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.

23. In B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] a two-Judge Bench, after referring to series of judgments has culled out certain principles which include the one that where a decision has been taken purely on public interest, the Court ordinarily should apply judicial restraint.

24. In Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216 the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review, it should pose to itself the question 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 judicial conscience cannot countenance. The emphasis was laid on the test, that is, whether award of contract is against public interest.

25. Recently in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. (2016) 16 SCC 818 : (2016) 8 Scale 765 a two-Judge Bench eloquently exposited the test which is to the following effect:

"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."

26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure

adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

(Emphasis Supplied)

26. This Court cannot sit as Court of Appeal. However, the Court can review the procedure in which an administrative decision had been made. Under some special circumstances a discretion has to be granted to the Authorities, who enter into a contract giving them liberty to assess the overall situation and then take a decision to award the contract. The State can choose its own method to arrive at a decision. The Court can examine whether the process adopted is malafide or intended to favour someone. Judicial review can be exercised if the approaches are arbitrary or malafide or procedure adopted is meant to favour one person.

27. The ratio laid above clearly applies to the facts of this case. The Technical Qualification of the petitioner was rejected on the ground that they did not produce the Provident Fund certificate. The tender was for transportation of white oil, black oil, tank trucks contract for bunkering including arranging tank trucks, loading transportation and delivery at Chennai, Ennore, Katupalli, Adani, Puducherry, Karaikal Ports and other non-bunker customers loading. The availability of tank trucks is centrally to the tender. Even though Provident Fund certificate is essential, availability of tank trucks is more essential. When the 2nd respondent had taken a conscious decision to reject the Technical bid of the petitioner herein for non-providing of Provident Fund certificate then, the principles of equality would require them to also evaluate the offer of the 3rd respondent in the same manner. There cannot be arbitrary evaluation of the two tenders. If the 2nd respondent had intended to grant favoritism to the 3rd respondent, they need not have indulged in the farcical exercise of inviting tenders. They could have straight away awarded the tender to the 3rd respondent. On the date of submission of the tender documents,

the 3rd respondent did not have even one tank truck. Thereafter, the Letter of Intent was issued only on 22.04.2019. It was very specifically stated that the tank trucks should be lined up for inspection within 30 days. They were lined up for inspection only on 08.07.2019 and 10.07.2019, which dates, by any mathematical calculation are more than 30 days after 22.04.2019. The tender condition specifically stated that if the tank trucks are not produced for inspection within 30 days then the tenderer would be blacklisted. I hold that the 2nd respondent had deliberately failed in its duty by extending favoritism to the 3rd respondent.

28. The learned counsel for the 3rd respondent relied on the judgment of the Hon'ble Supreme Court in (2014) 3 SCC 493, Sanjay kumar Shukla V. Bharat Petroleum Corporation Limited and Others, for the proposition that caution to be exercised while exercising extraordinary jurisdiction in contractual matters since serious consequences entail as result of entertainment of writ petition. It was also held that the power has to be exercised only when justified by public interest upon having due regard to relevant facts.

29. The learned counsel for the 3rd respondent also relied on the judgment of the Hon'ble Supreme Court in (2017) 4 SCC 318, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) Represented by its Chairman and Managing Director and Another Vs. CSEPDI-TRISHE CONSORTIUM Represented by its Managing Director and Another, wherein it had been held that the Court cannot sit in appeal over a financial consultant's assessment. It was also held that suffice it so say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.

30. In the present case, arbitrariness stares on the face of the 2nd and 3rd respondents. As pointed out by the Hon'ble Supreme Court in Montecarlo Limited V. National Thermal Power Corporation Limited, (2016) 15 Supreme Court Cases 272, exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay.

31. Here in this case, as repeatedly stated that the 3rd respondent did not have any truck on the date of submission of the bid and did not produce the tank trucks for verification within 30 days from the Letter of Intent. The tender conditions state that if it is not done, the tenderer will be blacklisted. They have not been blacklisted. On the other hand, they have shown favoritism and undue favoritism has been extended by granting time. This is clear from the records.

32. Therefore, in accordance with the earlier order of

this Court, that the 3rd respondent must refund the amounts to the extent that may be determined by this Court. I hold that, the 3rd respondent must refund the amounts paid from the date of the award of the contract till this date, to the 2nd respondent and the 2nd respondent must issue a fresh tender for the said works.

33. The learned counsel for the 1st and 2nd respondents pointed out that re-tendering would cost public money. Public Money has already been lost by awarding the contract to the 3rd respondent, in the process of which arbitrariness stares on the face.

34. The Court is not reviewing the decision of granting the contract to the 3rd respondent, but only reviewing the process under which continued favoritism was shown to the 3rd respondent. In that process, arbitrariness is evident. When arbitrariness is evident, the Court has no other option but to set the matters right. Justice can be done only if the order directing the 3rd respondent to undertake to refund the amount paid is enforced. As on date, the 2nd and 3rd respondents have not given the quantum of amount paid under the contract till this date. But they would certainly have the records of the same. The uprightness of the 2nd respondent would be evident if they seek refund of the entire amount till date.

35. The 3rd respondent is directed to refund the amount received from the date of commencement of work till this date within a period of 15 working days from the date of receipt of a copy of this order. The 2nd respondent is directed to re-tender the entire work. Till the fresh tender is finalized, the 2nd respondent may continue to avail the services of the 3rd respondent, but again on condition that any amounts paid shall be refunded to the 2nd respondent by the 3rd respondent.

36. With these observations, the Writ Petition is allowed. In view of the fact that there are continuing business relationship among the parties costs are not imposed. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-II)

//True copy//

Sub Assistant Registrar

smv

To,

1.The General Manager,
Marketing Division,
Indian Oil Corporation Limited,
139, Nungambakkam High Road,
Chennai - 600 034.

2.Deputy General Manager,
Tender Inviting Authority,
Indian Oil Corporation Limited,
139, Nungambakkam High Road,
Chennai - 600 034.

3.Dynamic Roadways,
No.1/6, Abirami Avenue First St.,
Kannadasan Nagar,
Kodungaiyur,
Chennai - 600 118.

+2cc to Mr.S.Siva Shanmugam, Advocate SR.No.15304 (25/02/2020)

+1cc to Mr.Mohammed Fayaz Ali, Advocate SR.No.14890 (25/02/2020)

+1cc to Mr.O.R.Santhanakrishnan, Advocate SR.No.14925(25/02/2020)

W.P.No.19515 of 2019

PP(CO)
GMY(21/02/2020)