

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 31.10.2019	PRONOUNCED ON: 01.06.2020
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CORAM

THE HONOURABLE MR.JUSTICE P.D.AUDIKESAVALU

W.P.NOS.23785 & 23823 OF 2019

AND

W.M.P.NOS.23654, 26103 AND 26142 OF 2019

Diamond Footcare Udyog Pvt. Ltd.
Represented by its Director,
Mr. Ramesh Kumar Gupta,
Plot No. 345, HSIIDC, Footwear Park,
Sector-17, Bahadurgarh, Dist. Jhajjar,
Haryana - 124 507. Petitioner

-vs-

1. Tamil Nadu Textbook and Educational Services Corporation,
Rep. by its Managing Director,
68, E.V.K. Sampath Maaligai,
D.P.I. Campus, College Road,
Chennai, Tamil Nadu - 600 006.
2. M/s. XO Footwear Private Limited,
Rep. by its Managing Director,
A-122, Mangolpuri,
Industrial Area Phase-II,
Delhi - 110 034.
3. M/s. Infinity Footwear Private Limited,
Rep. by its Managing Director,
313/36-B, Main Road,
Chara Mandi, Inderlok,
New Delhi - 110 015.
4. M/s. Shamsons Industries,
Rep. by its Managing Director,
R-9/5 Raj Nagar,
Ghaziabad - 201 001.
5. M/s. Shamsons Polymers Pvt. Ltd.,
Rep. by its Managing Director,
E-250, Third Floor,
Greater Kailsash,
New Delhi - 600 048.

6. M/s. B.N.G. Fashion Gear Private Limited,
Rep. by its Managing Director,
319-320, Sector 17,
Footwear Park, HSIIDC,
Bahadurgarh,
Haryana - 124 507.
 7. M/s. Charanpaaduka Industries Private Limited,
Rep. by its Managing Director,
11/371, 1st Floor, Sundervihar,
Outer Ring Road,
Delhi - 83.
 8. M/s. Powertech Electroinfra Pvt. Ltd.,
Rep. by its Managing Director,
No. 241, Tagore Park,
Delhi - 110 009.
 9. M/s. M B Rubber Private Limited,
Rep. by its Managing Director,
195, Gagan Vihar,
Delhi - 110 051.
 10. M/s. H B Rubber Private Limited,
Rep. by its Managing Director,
195, Gagan Vihar,
Delhi - 110 051.
 11. M/s. Liberty Shoes,
Rep. by its Managing Director,
Liberty Puram,
13th Milestone Gt Karnal Road,
Kutail Po Bastara,
Karnal Haryana.
 12. M/s. Lawreshwar Polymers,
Rep. by its Managing Director,
A-243 (A) Road No. 6,
V.K.I. Area, Jaipur,
Rajasthan - 302 013.
- ... Respondents

PRAYER:-

Writ Petition filed under Article 226 of the Constitution of India, 1950, praying to issue a Writ of Mandamus, directing the First Respondent herein to consider the representation of the Petitioner dated 10.07.2019, 20.07.2019 and 01.08.2019 consequentially direct the First Respondent to disqualify the bidders who are involved in forming a cartel in the tender bearing reference Rc. No. 288/PUR-1/2019 floated by the First

Respondent for Delivery of Footwear (Velcro Sandal for Boys and Girls) to the School Children in Tamil Nadu on Annual Rate Contract Basis.

For Petitioner : Mr.AR.L.Sundaresan, Senior Counsel
assisted by Mr.G.Rajkumar

For Respondents: Mr.Vijay Narayan, Advocate General
assisted by Mr.C.Munusamy,
Special Government Pleader (Education)
(for R1)

Mr.T.N.C.Kaushick (for R2)

Mr.K.V.Sajeevkumar (for R3)

M/s.Giridhar & Sai (for R4 and R5)

Mr.G.Masilamani, Senior Counsel
assisted by Mr.V.Kumaravelan (for R7)

Mr.R.Thiyagarajan, Senior Counsel
assisted by
Mr.V.R.Kamalanathan (for R8)

Mr.M.Palanimuthu (for R9)

Mr.P.S.Raman, Senior Counsel
assisted by
Mr.S.Thiruvengadam (for R10)

Mr.V.Ayyadurai, Senior Counsel
assisted by Mr.M.Baskar (for R11)

Mr.Bharadwajaramasubramaniam R.
(for R12)

सत्यमेव जयते
O R D E R

Heard Mr.AR.L.Sundaresan, Learned Senior Counsel assisted by Mr.G.Rajkumar, Learned Counsel for the Petitioner, Mr.Vijay Narayan, Learned Advocate General assisted by Mr.C.Munusamy, Learned Special Government Pleader (Education) appearing for the First Respondent, Mr.T.N.C.Kaushick, Learned Counsel appearing for the Second Respondent, Mr.K.V.Sajeevkumar, Learned Counsel appearing for the Third Respondent, M/s.Giridhar & Sai, Learned Counsel appearing for the Fourth and Fifth Respondents, Mr.G.Masilamani, Learned Senior Counsel assisted by Mr.V.Kumaravelan, Learned Counsel appearing for the Seventh Respondent, Mr.R.Thiyagarajan, Learned Senior Counsel assisted

by Mr.V.R.Kamalanathan, Learned Counsel appearing for the Eighth Respondent, Mr.M.Palanimuthu, Learned Counsel appearing for the Ninth Respondent and Mr.P.S.Raman, Learned Senior Counsel assisted by Mr.S.Thiruvengadam, Learned Counsel appearing for Tenth Respondent, Mr.V.Ayyadurai, Learned Senior Counsel assisted by Mr.M.Baskar, Learned Counsel appearing for the Eleventh Respondent and Mr.Bharadwajaramasubramaniam. R, Learned Counsel appearing for the Twelfth Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The First Respondent, viz., Tamil Nadu Textbook and Educational Services Corporation, by advertisement dated 28.05.2019 called for tenders to implement the scheme of supply of 59.92 lakh cost free footwear (Velcro Sandal) to school children studying in Government and Government Aided Schools in Tamil Nadu for the year 2019-2020 on annual rate contract basis to the designated locations within a period of 120 days from the date of issuance of purchase order as per the provisions of the Tamil Nadu Transparency in Tenders Act, 1998, and the Tamil Nadu Transparency in Tenders Rules, 2000. In the two cover system followed in that tender process, the Tenderers were required to simultaneously submit two covers, viz., first cover containing the earnest money deposit and the details of their capability to undertake the tender, which will be opened first (called as 'technical bid' in the common parlance), and the second cover containing the price quotation, which will be opened only if the Tenderer is found to be qualified to execute the tender (called as 'price bid' in the common parlance). The time schedule for the aforesaid tender has been provided in the following table:-

S.NO.	EVENT	DATE
1	Date of Advertisement	28.05.2019
2	Pre-Bid Meeting	12.06.2019 at 3.00 p.m.
3	Last date & time for submission of tender	01.07.2019 upto 3.00 p.m.
4	Date & time of opening of Technical Bids	01.07.2019 at 3.30 p.m.

3. The Petitioner was one of the participants in the aforesaid tender and after the technical bids were opened on 01.07.2019, the Petitioner made a representation dated 10.07.2019 to the First Respondent alleging that a cartel has been formed by the Second to Twelfth Respondents, which was so strong that it was so sure that they would bag the contract and that they were manoeuvring to get the samples submitted by them

to be tested in a laboratory of their choice, which would favour them, and see to it that the samples submitted by others including the Petitioner are not successful, and it was requested to ensure that there is no cartel working within the tender process, and that the samples submitted by the Tenderes be sent to a laboratory which has an unblemished reputation and ensure that no foul play happens in that tender process. The Petitioner subsequently sent two further representations dated 20.07.2019 and 01.08.2019 repeating the earlier allegations and bringing to notice that one Sughir Agarwal was promoting the cartel and that the supporting documents submitted by the other bidders to substantiate their past experience had been manipulated to suit their needs.

4. At that stage, the Petitioner on 06.08.2019 filed this Writ Petition for directing the First Respondent to consider the representations dated 10.07.2019, 20.07.2019 and 01.08.2019 made by the Petitioner and consequently direct the First Respondent to disqualify the bidders, who are involved in forming the cartel in that tender.

5. When the matter came up for admission before this Court on 14.08.2019, this Court passed the following self-explanatory order in W.M.P. No. 23654 of 2019 in this Writ Petition:-

"4. It is submitted by the Learned Senior Counsel appearing for the Petitioner that in terms of clause 4.21 of the instructions to the bidders in the said tender, the samples have to be tested in any of the accredited laboratory, but the First Respondent, with the intention to unduly favour the Second to Twelfth Respondents, who have formed a cartel, is clandestinely attempting to get the same tested at an undisclosed laboratory to suit their convenience without any fairness or transparency in the process.

5. Learned Additional Advocate General appearing for the First Respondent in reply to the same, claims that the laboratory in which samples are sent for testing is a matter of confidentiality and the Petitioner cannot have any grievance in that regard.

6. Having regard to the aforesaid submissions made, the First Respondent shall provide the name and credentials of the laboratory in which the samples are intended to be sent for testing in a sealed cover to this Court on the next hearing.

7. There shall be an order of interim injunction restraining the First Respondent from opening the financial bid till the next hearing."

Further, this Court on 05.09.2019, passed the following order in W.M.P.No.23654 of 2019 in this Writ Petition:-

"In pursuance of the order dated 14.08.2019 passed by this Court, Learned Advocate General appearing for the First Respondent has produced a sealed cover containing the names of two laboratories along with their credentials to which the samples of the bidders are proposed to be sent for testing. After opening the said cover and perusing the contents of the information furnished, the same has been returned to him.

2. Learned Advocate General relying on Rule 27 of the Tamil Nadu Transparency in Tenders Rules, 2000, submits that the identity of the laboratories to which samples are to be sent for testing have to be kept confidential till the tender process is completed. It is further represented that all the samples of the bidders would be sent to the two laboratories and their reports received in that regard would be placed in a sealed cover and produced before this Court on the next hearing.

3. Recording the aforesaid submissions made, the order of interim injunction earlier granted on 14.08.2019 restraining the First Respondent from opening the financial bid shall continue till the next hearing.

Post the matter on 16.09.2019."

When the matter came up for hearing on 16.09.2019, the following order was passed:-

"2. It is represented today by the Learned Special Government Pleader appearing for the First Respondent that in pursuance of the aforesaid order passed by this Court that one of the accredited laboratories has received the samples on 06.09.2019 and requested time for atleast 20 working days to send the test reports of all samples by 04.10.2019.

3. It is submitted by the Learned Counsel appearing for both sides that legal submissions on other respects of the matter could be heard in the meanwhile.

4. Having regard to the aforesaid submissions made, the interim order earlier granted on 14.08.2019 restraining the First Respondent from opening the financial bid shall continue till the next hearing.

Post the matter on 18.09.2019 at the end of the list"

This Court on 18.09.2019 passed the following order:-

"2. It is common ground that having regard to large volume of procurement of the footwear (Velcro Sandal for Boys and Girls), the award of the contract in the tender would not be confined to the lowest tenderer and the same would also be distributed to other tenderers, who qualify in the technical bid, if they are willing to match the price of the lowest tenderer in the financial bid.

3. In view of that factual position, if the samples of the respective tenderers pass the quality test satisfying the prescribed requirements in both the laboratories to which samples have been sent, the financial bids of those tenderers may be opened for evaluation and further action may proceed for allocation of work amongst the successful bidders. However, the final decision to issue work orders to the selected bidders shall await further orders of this Court.

4. The interim order passed by this Court on 14.08.2019 is modified to this extent."

This Court on 14.10.2019, passed the following order:-

"Learned Advocate General appearing for the First Respondent submits that the Technical Committee is now seized of the matter after receiving reports from the two laboratories to which the samples have been sent for quality test, and outcome would be informed on the next hearing."

During the hearing on 23.10.2019, this Court passed the following self-explanatory order in W.M.P. Nos. 23654, 26142, 26103 of 2019 in this Writ Petition:-

"2. Learned Advocate General appearing on behalf of the First Respondent submits that after examination of samples of footwear submitted by all the bidders, identical results have been received from the two laboratories to which they had been sent for quality test, except in the case of one bidder. It is further submitted that even in respect of that bidder, though the results of the various parameters in the two laboratories may have been the same, the difference of opinion in the recommendation may be attributable to their respective subjective satisfaction and in these circumstances, it would be appropriate that the ultimate decision to accept either of the opinions on the recommendation from the two laboratories may be left to the experts of the Technical

Committee entrusted with the matter as per the prescribed procedure.

3. Having regard to the fact that the experts constituting the Technical Committee would be the most suitable persons to assess and take decision on the difference of opinion on the recommendation from the two laboratories in respect of the quality test of the samples from one of the bidders mentioned supra, that aspect of the matter is left to be decided by the said Technical Committee appointed by the First Respondent, especially when it is not an issue raised by the Petitioner in the Writ Petition. It is also made clear that no view is expressed by this Court on the correctness or otherwise of either of the results received from the two laboratories in that regard.

4. In view of the aforesaid subsequent developments, the interim order passed on 18.09.2019 is further modified to the effect that the First Respondent is at liberty to proceed further in the matter in accordance with law subject to the result of the Writ Petition, which shall be mentioned in the decisions taken.

5. The Miscellaneous Petitions are disposed on the aforesaid terms."

6. In the Counter Affidavit filed by the First Respondent, it has been pointed out that the samples submitted by the Tenderers in the technical bid have been sent to a laboratory for testing, and at that pre-mature stage, the Petitioner has made the aforesaid representations to meddle with the fair and transparent tender process and has filed this Writ Petition.

7. The Fourth, Sixth to Eleventh Respondents in their Counter Affidavits have emphatically denied the allegations of cartelization levelled by the Petitioner against them as false and baseless.

8. In the Reply Affidavit filed by the Petitioner to the Counter Affidavit filed by the First Respondent, the Petitioner has reiterated his allegations against the Second to Twelfth Respondents.

9. The substance of the grievance of the Petitioner in this Writ Petition is that Second to Twelfth Respondents have formed a cartel and that they are manoeuvring to bag the contract by disqualifying the Petitioner and other bidders, and those bidders involved in such cartel formation must be disqualified as sought by the Petitioner in his representation

dated 10.07.2019, 20.07.2019 and 01.08.2019.

10. The Hon'ble Supreme Court of India in B.S.N. Joshi vs. Nair Coal Services [(2006) 11 SCC 548] has explained what is a cartel from the Advanced Law Lexicon, which reads as follows:-

"34. What is a cartel has been stated in Advanced Law Lexicon, 3rd edition by P.Ramanatha Aiyar at page 693 in the following terms :

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale of price of, or, trade in goods or provision of services."

The passage from the decision of the Hon'ble Supreme Court of India in Union of India v. Hindustan Development Corporation [(1993) 3 SCC 499] has also been extracted therein, which reads as follows:

"The cartel therefore is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. Analysing the object of formation of a cartel in other words, it amounts to an unfair trade practice which is not in the public interest."

Except for the bare assertions made, the Petitioner has not explained how the Second to Twelveth Respondents have formed a cartel as claimed so as to take cognizance of the same.

11. It must also be recapitulated here that the Hon'ble Supreme Court of India in Meerut Development Authority -vs- Association of Management [(2009) 6 SCC 171] has ruled that the bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. Viewed from that perspective, it would also be useful to refer to clauses 4.21 and 4.22 of the tender document which provides as follows:-

"4.21. Sample Testing for Tender Evaluation:

a) The Tenderer while submitting the tender documents shall submit three samples of Footwear (Velcro Sandal) in each category for Boys and Girls separately

manufactured as per the technical specifications in the Tender document. The samples shall be tested by the Corporation in any of the accredited laboratory. The testing of such samples submitted by the Tenderer shall be conducted to check whether the quality, size and dimension of the samples are in conformity with the technical specification prescribed in the tender document.

b) The following tests of the samples of Footwear (Velcro Sandal) shall be conducted by one of the accredited laboratories.

i. The quality tests in respect of the samples.

ii. Whether the quality, colour, shade, size, measurement and fabric weight of the samples are in conformity with the Technical specifications and other test parameters prescribed in the Tender document.

c) The Corporation reserves the right to test the samples at its discretion and in the event of failure of the samples in the test, the tender shall be summarily rejected and the price bid of such tender shall not be opened.

4.22. Site Visit:

4.22.1. On receipt of samples along with the technical bids, the authorised representative of the Corporation shall visit the manufacturing units of the tenderers to verify the manufacturing capacity. The availability of the plant machinery are manpower, the infrastructure facility including the quality testing, etc. Further the authorised representative shall inspect the original Certificates of Registration and incorporation of the Company and the Originals of all the relevant documents which the Tenderers filed along with the Tender. Mere site visit alone will not be construed as their eligibility.

4.22.2. The site will be made only to the manufacturing units mentioned in the profile of tender document in Annexure-XII.

4.22.3. If the report of the Field Inspection / Site Visit is adverse, Technically Qualified Tenderer shall be disqualified and the Price Bid of such Tenderer shall not be opened."

The aforesaid mechanism devised for verifying credentials and the quality of samples provides sufficient safeguards to ensure

that only genuine persons are in the fray and the other unsuitable persons are kept out. Further, the results of the tests of the samples received from two accredited laboratories have also been obtained by the First Respondent after the filing of this Writ Petition. It is expected that the First Respondent would carry out the necessary exercise to verify the correctness of other factual particulars submitted by the bidders whose samples have been approved before considering their price bids as per the tender conditions referred supra.

12. In the view of the foregoing discussion coupled with the subsequent events after the filing of the Writ Petition, as recorded in the earlier orders which have been extracted, there is no necessity to issue any direction to the First Respondent to consider and take action on the representations dated 10.07.2019, 20.07.2019 and 01.08.2019 made by the Petitioner as sought in the Writ Petition.

13. Be that as it may, as rightly pointed out on behalf of the Respondents, the facts of the instant case reveals that it does not satisfy any of the essential tests prescribed by the Hon'ble Supreme Court of India in Jagdish Mandal -vs- State of Orissa [(2007) 14 SCC 517] for interference of the High Court in tender matters in the exercise of discretionary powers under Article 226 of the Constitution. The relevant passage reads as follows:-

"22. 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 bonafide 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 malafide 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.

If the answers are in the negative, there should be no interference under Article 226."

14. There is also substantial force in contention of the Respondents that the Writ Petition ought not be entertained at a pre-mature stage under the pretext of the Petitioner seeking consideration of his representations made even before the technical bids of the tenderers had been finalized. Suffice here to notice that the Hon'ble Supreme Court of India in Tamil Nadu Generation and Distribution Corporation Ltd., -vs- CSEPDI - Trishe Consortium [(2017) 4 SCC 318] has cautioned against the interference of Courts in on-going tender process in the following words:-

"37. Before parting with the case we are constrained to add something. We do so with immense pain. The respondent, before finalization of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ court which directed for consideration of the representations. We are disposed to think that the High Court at that stage should have exercised caution. If the courts would exercise power of judicial review in such a manner it is most likely to cause confusion and also bring jeopardy in public interest. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently. But the present case is not a one of such

nature. Once the price bid was opened, a bidder could not have submitted representations on his own and seek a mandamus from the Court to take certain aspects into consideration. We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint."

15. In fine, the Writ Petition, which is devoid of merits, is dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vjt/sj

To

The Managing Director,
Tamil Nadu Textbook and Educational Services Corporation,
68, E.V.K. Sampath Maaligai,
D.P.I. Campus, College Road,
Chennai - 600 006.

W.P.No.23785 of 2019

KS (CO)
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