

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.No.762 of 2021

Ind-Vigo Coal Pvt. Ltd.,
rep. by its Authorized Signatory
S.Thirumalaisamy,
4-106-B, CGE Colony, 3rd Street
(Near Thiraviyam Ortho Hospital)
Tuticorin - 628 002.

Also at

New No.4/1, Old No.23/1, 1st Floor,
Kanniappa Nagar, 86th Street,
Ashok Nagar, Chennai - 600 083. ... Appellant/Petitioner

Vs.

Tamil Nadu Electricity Generation and
Distribution Company Limited (TANGEDCO),
rep. by its Chairman,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002. ... Respondent/Respondent

Prayer: Appeal filed under Clause 15 of the Letters Patent
against the order dated 24.02.2021 passed in W.P.No.4357 of 2021.

Prayer in W.P.4357/2021: Writ Petition in filed under Article
226 of the Constitution of India Seeking issuance of a writ of
Certiorarified calling for the records of the Respondent in
relation to the Impugned E- Tender issued by the Respondent in
SPECIFICATION NO.COAL-74 Dated 18.01.2021 and quash the same as
being in contravention of the Tamil Nadu Transparency in Tenders
Rules 2000 and Amendments in Public Procurement (preference to
Make in India) Order 2017 Published by the Government of India.

For Appellant : Mr.Sathish Parasaran
Senior Counsel
for Mr.R.Parthasarathy

For Respondent : Mr.Vijay Narayan
Advocate-General
assisted by
Mr.Krishna Pradeep

JUDGMENT

(Delivered by The Hon'ble Chief Justice)

The appeal is directed against an order of February 24, 2021, by which the appellant's writ petition challenging a tender process initiated by respondent TANGEDCO has been dismissed.

2. The appellant had questioned the tender process initiated by an advertisement published on January 18, 2021 for supply of 20 lakh tonnes of imported coal having a particular calorific value during the period May, 2021 to May, 2022. The last date for submission of the offers was February 23, 2021. Only on-line bids were to be made till 2 pm on such day and the e-reverse auction method was to be followed.

3. According to the appellant, the tender documents were in derogation of the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules of 2000 framed thereunder. The appellant complains that the tender papers would reveal that TANGEDCO had deliberately excluded any Indian party from participating in the process. According to the appellant, even consortia could not participate as would be evident from the nature of the documents demanded.

4. The principal grounds urged by the appellant are the violation of Section 9(3) of the said Act of 1998, inasmuch as the notice inviting tender was not published in the Indian Trade Journal and that prior approval of the bid had not been obtained though the bid involved an amount well in excess over the threshold limit requiring such prior approval. The appellant insists that in terms of Section 4 of the Act of 1998, no offer could have been invited and none accepted except in accordance with the procedure specified in the said Act and the Rules made thereunder. Once it was demonstrated before the Writ Court that some provisions of the Act and the Rules had not been complied with, the Writ Court had no alternative but to quash the tender process upon annulling the same.

5. In addition, the appellant questions the propriety of the

Indian suppliers being excluded. The appellant says that all that the respondent required was coal of a particular grade and it did not involve either rocket science or any involved technology for effecting supply of such grade of coal as specified in the tender documents.

6. By the judgment and order impugned dated February 24, 2021, the last date for the submission of tender has been extended by permitting the respondent to obtain the approval and to publish the notice inviting tender in the Indian Trade Journal. However, again, the appellant has a grievance in such regard as the appellant claims that the period of publication in the Indian Trade Journal should be thirty days prior to the time for receipt of the offers and the thirty-day period in this case has not been complied with. The appellant also submits that this was a matter which ought to have been planned well in advance and it will not do for the respondent to seek an exemption and abridge the time for publication or obtain ex-post facto approval.

7. On behalf of TANGEDCO, it is submitted that while the planning on TANGEDCO's part should have been better and all loose ends tied up before the publication was made, it is once again the pandemic and the lockdown which is used as a magic wand to ward off all objections. The excuse proffered in this case is that following the lockdown in the wake of the pandemic and the closure of several industries, TANGEDCO did not anticipate that upon the economy re-starting, there would be such an increased demand that the reserve quantities of coal may not be adequate to tide over even the summer. TANGEDCO says that it has adequate coal supply to last it till the end of April or the beginning of May, but it needs a kind of a buffer of a few days and in terms of the tender documents, the prospective supplier would need sufficient time to effect the supply. Whether or not the limited supply argument is made to persuade the Court to overlook the shortcomings on the part of TANGEDCO or there is any basis to the claim of increased demand in recent times, cannot be ascertained immediately.

8. However, the other grounds urged on behalf of TANGEDCO stand to reason. For one, TANGEDCO says that the appellant herein has no business to interfere with the process since the appellant does not meet even one of the three essential eligibility criteria set down in the tender papers. According to such conditions, a prospective bidder should have supplied five lakh tonnes of coal in a year within the last few years to any one entity; it should have had a turnover in excess of Rs.335 crore in one of the last three financial years; and, it ought to have a tie-up with a coal producing mine. TANGEDCO claims that despite its challenge, the appellant did not produce

any document to suggest that it qualified under even one of the three heads.

9. As to the contention of the appellant that Indian suppliers appear to have been excluded, TANGEDCO says that suppliers of Indian origin have not been excluded, but certain conditions have been imposed which all enure to the benefit of TANGEDCO and for a simpler process of identifying the genuineness and capability of the supplier. TANGEDCO says that it needs the specified calorific value of coal to mix the same with Indian grade coal obtained by it on an annual basis from Coal India or its subsidiaries for the purpose of generating electricity at the several thermal units in the State. TANGEDCO adds that while it is open to any person qualifying to participate in the tender process to make a bid, usually the coal of Indonesian origin has been found to be the best for the purpose of completely answering to the calorific content as sought by TANGEDCO.

10. TANGEDCO confirms that it has obtained ex-post facto approval of its notice inviting tender since the value of the quantum of goods to be supplied thereunder exceeds Rs.75 crore. TANGEDCO also confirms that the publication of the notice inviting tender has been made in the Indian Trade Journal. In such regard, TANGEDCO refers to sub-rule (2) of Rule 20 of the said Rules to contend that in case of an urgent requirement, the time provided under the Rules may be abridged.

11. In the tender papers, export licenses have been sought from the bidders and the supplies are required to be effected through bills of lading where TANGEDCO would be the consignee. In response to the appellant's assertion that these are all ruses to keep the Indian participants at bay, TANGEDCO claims that previous experiences in such regard reveal the submission of manufactured or fabricated documents to establish the eligibility criteria without the supplier having the capability to effect such a large supply. TANGEDCO points out that the supply in this case is of 20 lakh tonnes over a year and it is only entities which have direct tie-ups with foreign coal mines or the like which may be in a position to effect the regular and uninterrupted supply during such period. In other words, TANGEDCO suggests that parties which deal in trading may not be ideal to award such a contract to as such parties may not be able to ensure uninterrupted supply. Any disruption in supply, TANGEDCO is quick to point out, may result in electricity not being generated at the thermal units for want of the appropriate quality and quantity of coal.

12. The Writ Court addressed the two principal grounds urged by the appellant herein by requiring TANGEDCO to obtain an

approval and publish the notice inviting tender in the Indian Trade Journal upon extending the deadline for receiving the bids.

13. TANGEDCO claims to have complied with the directions in such regard. In addition, it must not be lost sight of that the writ petition has not been filed in public interest. Even if the reliefs were to be granted, the appellant would not be eligible to participate in the bidding process since the appellant does not appear to possess any of the three essential qualifications as stipulated.

14. For the reasons aforesaid, the judgment and order impugned dated February 24, 2021 do not call for any interference, particularly at the behest of the present appellant. The deadline for receiving the bids has been extended to March 10, 2021.

15. W.A.No.762 of 2021 is dismissed. There will, however, be no order as to costs. Consequently, C.M.P.Nos.4076 and 4078 of 2021 are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

The Chairman,
Tamil Nadu Electricity Generation and
Distribution Company Limited (TANGEDCO),
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002.

+1 cc to M/s.R.Parthasarathy, Advocate Sr.No. 14633

W.A.No.762 of 2021

RR(CO)
RMP(24/03/2021)