IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 29.10.2021
CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN

Writ Petition Nos. 13481 and 13488 of 2021
and
WMP. Nos. 14354,14349,14350,14355 and 14356 of 2021

P. Ravishankar
Civil Contractor (Reg.No.25/2011-12)
1/3, Chinnapollapatti Village
Kottumaranahalli Post
Periyampatti
Palacode Taluk
Dharmapuri District - 635 205 .. Petitioner in both the writ petitions

Versus

1. State of Tamil Nadu
Highways Department
rep. by its Superintending Engineer (Highways)
NABARD and Rural Roads Circle
Salem - 1

2. The Divisional Engineer (Highways)
Quality Control Division
Salem - 7

3. The Deputy Director (Highways)
Office of the Divisional Engineer (Highways)
Quality Control Division
Salem – 7 .. Respondents 1 to 3 in both the writ petitions

4. Mr. P. Baskar
Contractor
No.39/1, First Cross Street
Nedumaran Nagar
Dharmapuri - 636 701

5. M/s. Sasi Road Finishers and Engineering Contractors
No.41/2, First Cross Street
Nedumaran Nagar
Dharmapuri - 636 701 .. Respondents 4 & 5 in WP. No. 13481 of 2021

4. Mr. D.S. Akbal
Contractor
No.3/1407, New Colony
Behind R.S. Mosque
Kumarasamypettai
Dharmapuri - 636 703

5. M/s. DSA Construction
No.3/1407, New Colony
Behind R.S. Mosque
Kumarasamypettai
Dharmapuri - 636 703 .. Respondents 4 & 5 in WP. No. 13488 of 2021

WP No. 13481 of 2021:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the impugned Tender Summary Report dated 23.06.2021 bearing Tender ID 2021_HWAY_199023_1 relating to the works under Dharmapuri Package No.59 issued by the first respondent and quashing the same as illegal and consequently directing the first respondent to call for fresh tenders in respect of the works relating to the Dharmapuri Package No.59 by complying with the provisions of the Tamil Nadu Tender Transparency Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000.

WP No. 13488 of 2021:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the impugned Tender Summary Report dated 23.06.2021 bearing Tender ID 2021_HWAY_199030_1 relating to the works under Dharmapuri Package No.60 issued by the first respondent and quashing the same as illegal and consequently directing the first respondent to call for fresh tenders in respect of the works relating to the Dharmapuri Package No.60 by complying with the provisions of the Tamil Nadu Tender Transparency Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000.

For Petitioner : Mr. Sricharan Rengarajan
for Mr. K. Gowtham Kumar
in both the Writ Petitions

For Respondents : Mr. Stalin Abhimanyu
Government Counsel for RR1 to 3
in both the Writ Petitions

No representation for R4 in WP No.13481/2021

Mr. N.R. Elango, Senior Counsel
for Mr. C. Munusamy for R5
in WP No. 13481 of 2021

Mr. T.A. Srinivasen for R4 and R5
in WP No. 13488 of 2021

COMMON ORDER

In both these writ petitions, the petitioner challenges the validity and legality of the Tender Summary Reports dated 23.06.2021 relating to the works under Dharmapuri Package

Nos.59 and 60 respectively issued by the first respondent. He also seeks a consequential direction to the first respondent to call for fresh tenders in respect of the said works in compliance with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 (for brevity, 'the Act') and the Tamil Nadu Transparency in Tenders Rules, 2000 (for brevity, 'the Rules').

2. The petitioner claims himself to be a Taluk Level Class I Civil Contractor registered with the Highways Department in Dharmapuri District for the works above the value of Rs.75 lakhs and he possesses the experience of over 10 years in the field of civil construction contracts, including Government contracts.

3. According to the petitioner, the first respondent issued Tender Notice No.27/2020-2021/SDO dated 22.02.2021 inviting percentage bids under two cover system through on-line for the works viz., Package No.59 (upgradation of Panchayat and Panchayat Union Roads (5 works), Package No.60 (upgradation of Panchayat and Panchayat Union Roads (5 works) and Upgradation of Panaiyur to Neithalur Natchalur Road Km 0/3-3/3. As per the said tender notification, the last date for submission of bids was indicated as 29.03.2021 at 11.00hours. Subsequently, the election to the Sixteenth Tamil Nadu State Legislative Assembly, 2021 was announced by the State Election Commission on 26.02.2021, as a result of which, the Model Code of Conduct (MCC) came into force on the same day i.e., 26.02.2021. Pursuant to the same and also due to the surge in Covid-19 cases in the State of Tamil Nadu, the date for submission of the bids and the date for opening the same were postponed by issuing Corrigendum 1 to 5 by the first respondent.

4. The petitioner further averred that one of the terms and conditions of the said tender notice is that the contractor should produce the documents for possession of sufficient plants and machineries on his own and obtain certificate from the competent authorities, after inspecting the working condition of the same, so as to complete the work in time with quality. Though the petitioner approached the authority concerned for getting quality certificate, the same was delayed by citing the declaration of general election. Immediately after the declaration of results for the Assembly election, he sent a letter dated 07.05.2021 requesting for issuance of quality certificate to the authority concerned by speed post, which was delivered to the second respondent only on 07.06.2021, but there was no response from the authority concerned. Hence, the petitioner addressed a letter dated 11.06.2021 to the Assistant Director (H), Quality Control Division, Salem -7, making the same request of issuance of a quality certificate, after inspection of the plants and machineries made available in his business premises. However, he was not issued with necessary certificate by the second respondent.

5. It is also stated in the writ petition that in the mean while, the first respondent issued Corrigendum-6 dated 14.06.2021, indicating the last date for submission of bids as 22.06.2021 and opening the same on 23.06.2021 through online, which according to the petitioner, is in clear violation of Rule 20 of the Rules, as minimum time of 30 days for submission of bids from the date of notification, was not provided. Further, the approximate value of contract for the works under Package No.59 is Rs.674.45 lakhs and under Package No.60 is Rs.587.20 lakhs and hence, the notice inviting tender should be published in an English newspaper in the All India Edition, besides in the Tamil daily having wide circulation in the State, so as to enable all the eligible bidders to participate in the bids, as per Rule 11(2) of the Rules, but the tender notification was published only in New Indian Express and Dinamalar on 25.02.2021.

6. The petitioner further stated that in view of the inaction on the part of the second respondent, he again sent a letter on 17.06.2021 expressing his intention to participate in the bids for the works under package Nos.59 and 60 and requesting the second respondent to issue quality certificate, after inspecting his plants and machineries, but no action was taken on the said communication. Finding no option, the petitioner has submitted the bids without quality certificate. Consequently, the first respondent by tender summary reports dated 23.06.2021, rejected the petitioner's technical bids and thereby declared him as disqualified bidder. Feeling aggrieved, the petitioner has filed the present writ petitions.

7. Denying the allegations raised in the writ petitions, two separate counter affidavits have been filed by the respondents 1 to 3. The common averments made therein are as follows:

(i) Due to the Tamil Nadu Legislative Assembly election, the MCC came into force with effect from 26.02.2021 and as per the 1st Corrigendum and 2nd Corrigendum, the date of opening the bids was postponed to 28.04.2021 and 12.05.2021 respectively; and due to covid-19 pandemic, 3,4,5 and 6th Corrigendum came to be issued postponing the bids opening date to 20.05.2021, 04.06.2021, 16.06.2021 and 23.06.2021 respectively.

(ii) The tender notification was published in the state tender bulletin as well as the newspapers viz., New Indian Express and Dinamalar on 25.02.2021 mentioning the last date for submission of bids as 29.03.2021; in Sl.No.9 of the notes in the notice inviting tender, it was specifically stated that Corrigendum if any will be available only in the website; and hence, there is no violation of Rule 11(2) of the Rules.

(iii) The time gap between the date of issuance of tender notification in the state tender bulletin and the date of opening the bids is 117 days and instead of minimum 30 days, sufficient time was provided to the bidders enabling them to submit the required documents and hence, the mandatory requirement of Rule 20 has been complied with by the first respondent.

(iv)On 16.05.2021 onwards, the Tamil Nadu Government imposed lock down and the regular work was resumed only on 07.06.2021 onwards with 30% staff attendance and hence, the petitioner's application dated 07.05.2021 requesting to issue plant working certificate received by the second respondent on 07.06.2021 was not considered; his another request dated 11.06.2021 received on 14.06.2021 was addressed only to the Assistant Director (H), Quality Control Division, Salem and not to the second respondent; and due to other official works outside the jurisdiction, the petitioner's further communication dated 17.06.2021 seeking quality certificate, was seen by the second respondent just one day before the date of opening the bids i.e., on 22.06.2021 and therefore, he was not issued with any quality certificate.

(v)It is mandate that the contractor should produce the documents for his own possession of plants and machineries and obtain plant working certificate from the competent authority. Except the petitioner, all the other private respondents approached the second respondent and obtained the said certificate in time.

(vi)The tender was awarded for the lowest tenderer at the estimated rate and the work was commenced for the benefit of the public and hence, the question of levying huge burden on the public exchequer does not arise.

Thus, according to the respondent authorities, since the petitioner did not submit the plant working certificate, his technical bids were rejected and he was declared as disqualified bidder and hence, the tender process was done in accordance with the Act and the Rules and the same warrants no interference by this court.

8. Upon notice, the fifth respondent in WP.No.13481 of 2021 filed a detailed counter affidavit, wherein it is inter alia stated that they are the registered class I contractor and have completed various projects within the time stipulated by the authorities concerned with high quality of work; pursuant to the notification dated 22.02.2021 issued by the first respondent, the fifth respondent submitted its bids and the authorities have opened the technical bids on 23.06.2021, in which this respondent was one among the qualified bidders; subsequently, price bids were opened and after thorough scrutiny and verification of records, this respondent was declared as successful bidder and was awarded with contract by work order dated 25.06.2021. The counter affidavit further proceeds to state that the respondents 4 and 5 are separate and independent entities; there is no bar under the law in members of the family conducting the businesses separately and independently; the tender condition also did not prohibit any firm or legal entity related to each other, to participate in the tender process; and therefore, the allegation of malafide or whatsoever is unfounded and the same is concocted by the petitioner for his personal undue gain and illegal enrichment so as to stall the entire tender process, thereby causing huge loss to the Government exchequer and inconvenience to the general public at large. This respondent also stated therein that as per the tender condition, the petitioner should have

produced the plant working certificate obtained from the second respondent, but he failed to do so, due to which, his technical bids were rejected; and hence, there is no arbitrariness or malafide on the part of the respondent authorities in awarding contract to this respondent, which has duly complied with all the terms and conditions of the tender notification. Thus, according to this respondent, the petitioner has not made out any prima facie case for interference of this court to the tender process by invoking Article 226 of the Constitution of India.

9. It is stated in the counter affidavit filed by the fifth respondent in WP.No.13488 of 2021 that their Unit viz., DSA constructions is comprised of three members viz., A.Masood and his brother and mother and the joint registration certificate was duly issued on 23.05.2012 bearing No.77 and it is a separate entity having different assessment; the fourth respondent / D.S.Akbal, who is the father of A.Masood, is carrying on his business in his personal name and he has no connection with the fifth respondent; however, the petitioner having failed to comply with the conditions set out in the tender notification, has preferred this writ petition impleading the fourth respondent, for the purpose of meddling with the issue. Stating so, this respondent sought to dismiss this writ petition.

10.1 The learned counsel for the petitioner submitted that the petitioner is a Taluk Level Class I Civil contractor and he successfully completed various Government contracts for the past five years. Adding further, the learned counsel submitted that immediately after issuance of the notice inviting tender, the petitioner made several oral requests before the second respondent to inspect his plants and machineries and issue quality certificate for participating in the bids for the works under package Nos.59 and 60. However, the said requests were not acceded to by the second respondent stating that the MCC came into force on 26.02.2021. Immediately after declaration of the election result, on 07.05.2021, the petitioner sent a letter to the second respondent through speed post, requesting to issue quality certificate, which was received by the second respondent only on 07.06.2021, but the same was not considered. The petitioner again sent letters dated 11.06.2021 and 17.06.2021, reiterating the same request. Even thereafter, he was not issued with plant working certificate, which compelled the petitioner to submit the bids on 22.06.2021 without enclosing the said certificate. Resultantly, the first respondent rejected the petitioner's technical bids for both the packages on 23.06.2021 and declared him as disqualified bidder. Thus, according to the learned counsel, there is no delay or lapses on the part of the petitioner in approaching the respondent authorities for getting plant working certificate / quality certificate, whereas the second respondent has acted in malafide with an intention to deprive the petitioner from participating in the tender process.

10.2 The learned counsel further submitted that though the notice inviting tender was published on 22.02.2021, the Model Code of Conduct commenced on 26.02.2021 and concluded on 07.05.2021 and the state wide lockdown was imposed from 10.05.2021 to 07.06.2021. Therefore, excluding the time under the Model Code of Conduct and covid 19 lock down, only 19 days time was provided between the notice inviting tender and the last date for submission of bids. Even the time gap between the publication of corrigendum 6 dated 14.06.2021 and the last date for submission of bids indicating as 22.06.2021 is only 8 days. Therefore, the minimum time of 30 days between the Notice Inviting Tender and the submission of bids was not provided to the bidders, which is contrary to Rule 20 of the Rules. In support of the same, the learned counsel placed reliance on the orders of this court in (i)Sri Venkatram Spinners Pvt. Ltd and others v. State of Tamil Nadu and others [MANU/TN/2421/2017] and (ii)R.Kanagasabapathy v. the Commissioner, Tirunelveli Municipal Corporation and others [MANU/TN/6156/2020].

10.3 It is also contended that neither the notice inviting tender nor the corrigendum 6 was published in accordance with Rule 11(2) read with annexure to the Rules. According to the learned counsel, the value of the subject works is more than Rs.5 crores, however, the notice inviting tender was not published in an English newspaper circulated in All India Edition, but was published in the New Indian Express having circulation only in South India and that, the corrigendum 6 revising the date for submission of bids was not published in any newspaper and hence, the same is in violation of Rule 11(2) of the Rules, which vitiates the entire tender process. In this context, the learned counsel referred to the order of this court in Appu Food products v. Akram and others, [2019 SCC Online Mad 12378].

10.4 The learned counsel further submitted that as per the impugned tender summary reports of the first respondent, four bidders participated in the bids for the works under package Nos.59 and 60, among which, the technical bids of the fourth and fifth respondents have been accepted. The fifth respondent in WP.No.13481 of 2021 is a partnership firm whose partners are the wife and son of the fourth respondent. Similarly, the fifth respondent in WP.No.13488 of 2021 is a firm whose Managing Director is the son of the fourth respondent. According to the learned counsel, it is the bounden duty of the first respondent to ensure that there is no nexus between the parties as the same may lead to exercise influence over each other and gain access to the information, besides eliminating the competition in the bidding process. In the case at hand, the respondents 4 and 5 who were declared as qualified bidders in the technical bids opened on 23.06.2021, are related to each other, which undoubtedly affects the principle of fairness. To substantiate his submission, the learned counsel relied on the decisions of this court in (i)Kumbhat Holographics v. Government of Tamil Nadu [2021 SCC Online Mad 1724 : (2021) 4 Mad LJ 225](DB) and (ii)Travel News Services (India) Private Limited v. Airports Authority of India [MANU/TN/2423/2017].

With these submissions, the learned counsel ultimately prayed to set aside the tender summary reports relating to the works under package nos. 59 and 60 which are impugned in these writ petitions and consequently, direct the respondents to call for fresh tenders for the same.

11. Per contra, the learned Government Counsel appearing for the respondents 1 to 3 submitted that as a tender inviting authority, the respondent authorities are at free to impose any condition for the purpose of executing and implementing the contract. Accordingly, the notice inviting tender mandates a condition that the contractor should produce the documents for own possession of sufficient plants and machineries and obtain certificate from competent authorities for working condition of such plants and machineries to complete the work in time with quality. Adding further, the learned Government Counsel submitted that though the petitioner claimed that he has already approached the second respondent in person and thereafter, through written communications, for issuance of plant working certificate, he applied for such certificate only on 17.06.2021, which was received by the second respondent on 21.06.2021. Since the second respondent / Divisional Engineer (H), Quality Control Division, Salem, was not available in his office from 15.06.2021 to 23.06.2021 and was on duty at Highways Research Station, Chennai and from there he proceeded to Tirunelveli and Thoothukudi for inspection; and since there was only two working days left for causing an inspection and issuing quality certificate, the petitioner was not issued with such certificate. On the other hand, the other private respondents have submitted their applications well in advance and hence, they were issued with quality certificate, before the date of submission of bids. Thus, according to the learned Government counsel, the petitioner was not issued with quality certificate only due to the fault on his part. It is also submitted that since the tender condition specifically mandates the bidder to get the plant working certificate from the competent authorities and the petitioner did not fulfil the said condition, his technical bids were rejected. Hence, the tender process was done in accordance with the Act and Rules and there was no undue haste in awarding contract in favour of any particular tenderer. Stating so, the learned Government Counsel prayed that the tender summary reports which are impugned herein, need not be interfered with by this court.

12.1 The learned Senior counsel appearing for the fifth respondent in WP No. 13481 of 2021 submitted that the fifth respondent is a registered class I contractor and has completed several projects for the Highways Department and other Government departments with high quality, within the time frame. Adding further, the learned senior counsel submitted that the notice inviting tender was originally published on 22.02.2021 indicating the date of submission of bids as 29.03.2021, which was subsequently extended from time to time due to the existence of MCC on account of state legislative assembly election and the lock down imposed by the State Government to arrest the spread of Covid-19 pandemic. Ultimately, the last date for submission of bids was fixed on 22.06.2021 and the date for opening the same was on 23.06.2021. Accordingly, the authorities opened the technical bids on

23.06.2021 and the fifth respondent was declared as one among the qualified bidder. Subsequently, they were awarded with the contract by work order dated 25.06.2021.

12.2 It is also contended by the learned senior counsel that the notice inviting tender was widely published in newspapers as stipulated under Rule 11 of the Rules and the respondent authorities have scrupulously followed the procedure with due diligence and care. Adding further, the learned senior counsel submitted that the tender inviting authority has published the tender notification on 22.02.2021 giving time limit till 29.03.2021 giving 36 days for submission of tenders which is more than the stipulated period. Besides that, the said time was extended from time to time as long as five months enabling more bidders to participate in the tender. Ultimately, the last date for submission of bids was fixed on 22.06.2021 giving four months time. Therefore, sufficient time was granted more than the stipulated time as contemplated under Rule 20 of the Rules. Despite the same, the petitioner could not produce the required documents to become eligible in the technical bids, which compelled the authorities to reject his bids. However, with an intent to stall the entire works, the petitioner has made vague and baseless allegations against the respondents.

12.3 The learned senior counsel also submitted that the citizens of India are having fundamental right to practice any profession or to carry on any occupation, trade or business as guaranteed under Article 19(1)(g) of the constitution of India and hence, the members of the family can do the same business independently by establishing separate business entities. Thus, according to the learned senior counsel, the relationship between the respondents 4 and 5, who are doing business independently on their own, would not constitute any conflict of interest over the tender process and therefore, the same cannot be treated as a criterion for disqualification, that too, in the absence of one such condition in the tender notification.

12.4 It is also submitted that as the fifth respondent has complied with all the essential requirements as called for by the tender inviting authority, he was granted the work order on 25.06.2021. Pursuant to the same, the fifth respondent has started the work. In such circumstances, if the work is stalled in a midway, it would cause heavy loss to the government exchequer. Besides that, the public interest will be at peril and the rights and interest of the successful bidder will also be at stake.

12.5 Above all, placing reliance on the decisions of the supreme court in (2007) 14 SCC 517 [Jagdish Mandal v. State of Orissa and others] and Michigan Rubber (India) Ltd. v. State of Karnataka and others [(2012) 8 SCC 216], the learned senior counsel submitted that the scope of judicial review in the contractual matters is very limited, unless there is arbitrariness, irrationality, unreasonableness, bias and malafides. Thus, questioning the locus standi of the petitioner, who is the unsuccessful bidder, to file this writ petition, the learned senior counsel prayed to dismiss the same.

13. The learned counsel for the respondents 4 and 5 in WP.No.13488 of 2021 submitted that the fifth respondent viz., DSA constructions consists of its Managing Director by name A.Masood and his brother and mother. The fourth respondent is the father of said A.Masood and he has no legs to stand with the fifth respondent entity. The respondents 4 and 5 have no business relationship among themselves and they are separate and different entities. Hence, there is no illegality or arbitrariness in the tender process, warranting interference at the hands of this court. In respect of other issues, the learned counsel has adopted the arguments advanced on the side of the respondents in WP.No.13481 of 2021.

14. Heard all the parties and perused the materials available on record.

15. It is not in dispute that the petitioner is a class I civil contractor and he carried on various Government projects. Pursuant to the notice inviting tender dated 22.02.2021 for the works under Package Nos.59 and 60, he submitted his bids among others. One of the conditions stipulated in the said tender notification is that the contractor should produce the documents for own possession of sufficient plants and machineries and obtain certificate from the competent authorities for working condition of the plants and machineries to complete the work in time with quality. Due to State legislative Assembly election and covid-19 pandemic situation, the date of submission of the bids and the date of opening the same were postponed by issuing Corrigendum 1 to 5. Ultimately, Corrigendum 6 was issued on 14.06.2021 revising the last date for submission of bids as 22.06.2021. Though the petitioner approached the second respondent by making application for issuance of plant working certificate, he was not issued with such certificate. Therefore, he submitted the bids without the necessary documents, due to which, his technical bids for the works under packages 59 and 60 were rejected, on 23.06.2021 and he was declared as disqualified bidder, by the tender summary reports, which are impugned in these writ petitions.

16.1 At the outset, this court is inclined to examine the pertinent issue raised on the side of the fifth respondent in WP.No.13481 of 2021 with respect to the power of judicial review in the tender / contractual matters. In this connection, the observations of the supreme court in some of the decisions may be summarised as follows:

(a) Tata Cellular v. Union of India [(1994) 6 SCC 651], wherein, having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles:

"94. 1) The modern trend points to judicial restraint in administrative action.

2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3) 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.

4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) hut must be free of arbitrariness not affected by bias or actuated by mala fides.

6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(b) In Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617], the Supreme Court observed as follows:

"7.....The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

(c)In Monarch Infrastructure (P) Limited v. Commissioner, Ulhasnagar Municipal Corporation and others [(2000) 5 SCC 287], at para 11, it has been held by the Supreme Court as follows:

> "11.Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide."

(d)In Directorate Of Education and Others vs. Educomp Datamaatics Ltd. & Ors. [(2004) 4 SCC 19], the Supreme Court held thus:

> "9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India; (1994) 6 SCC 651.

(e)In State of U.P and Another. v. Johri Mal [(2004) 4 SCC 714], it was held by the Supreme Court as follows:

> "It is well settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision- maker's opinion on facts is final. But while examining and scrutinising the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of

judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinising the decision- making process, it is always open to the court to review the evaluation of facts by the decision-maker."

(f) In Jespar I. Slong v. State of Meghalaya and others [(2004) 11 SCC 485], the Supreme Court considered grants of Government contracts awarding rights to collect tolls, weighment charges etc. and held thus:

"19. It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. (See para 7 of Hindustan Development case; (1993) 3 SCC 499). The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted."

(g) In Master Marine Services Pvt. Limited v. Metcalfe and Hodgkinson Pvt. Limited [(2005) 6 SCC 138], wherein, at paragraph 12, it was held by the Supreme Court that 'the discretionary power under Article 226 should be exercised in matters relating to tenders only in furtherance of public interest and not merely because a legal point was made'.

(h) In Jagdish Mandal v. State of Orissa [(2007) 14 SCC 517], it was held by the Supreme Court as under:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 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. 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 mala fide or intended to favour someone.

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

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

(i) In Michigan Rubber (India) Limited v. State of Karnataka [(2012) 8 SCC 216], it has been observed by the Supreme Court as follows:

“23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”?; and

(ii) Whether the public interest is affected?.

If the answers to the above questions are in negative, then there should be no interference under Article 226.

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

(j) In Maa Binda Express Carrier v. North-East Frontier Railway [(2014) 3 SCC 760], the Supreme Court held thus:

"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the

Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.”

(k) In Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others [(2016) 8 SCC 622], it was held as follows:

“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.”

(l) In Municipal Corpn., Ujjain v. BVG India Limited, [(2018) 5 SCC 462], the Supreme Court has held as follows:

64.1 Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.3 It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint.

Thus, it is lucid from the legal principles as enunciated in the aforesaid decisions of the supreme court that the Courts can scrutinise the award of the contracts by the Government or its agencies in exercise of its power of judicial review to prevent arbitrariness or favoritism. Further, the interference in the contractual matters is permissible, if decision-making process is illegal, irrational, arbitrary and procedural impropriety and it must meet the test of reasons and relevance.

16.2 Regarding the contention that the petitioner, who is an unsuccessful bidder, cannot question the decision of the first respondent, this court is of the view that he has participated in the tender process, pursuant to the notice inviting tender and hence, he can very well challenge the tender process. The supreme court in NHAI v. Gwalior Jhansi Expressway Ltd [Civil Appeal No.3288 of 2018 dated 13.07.2018], holds that 'the right to exercise by any contractor would come into play only if he participates in the tender process pursuant to notice inviting tenders from other interested parties'. Therefore, the petitioner has locus standi to file the present writ petitions, to challenge the decision of the first respondent. Accordingly, the issue relating to maintainability is answered in favour of the petitioner.

17. In these writ petitions, the learned counsel for the petitioner has advanced three-fold submissions viz., (i)non-issuance of plant working certificate by the second respondent to the petitioner is with a malafide intention to deprive the petitioner from participating in the tender process; (ii)the mandatory provisions of Rules 11 (2) and 20 of the Rules have not been complied with by the respondent authorities; and (iii) there is conflict of interest over the tender process, as the respondents 4 and 5, who were declared as qualified biders in the technical bids, are related to each other.

18.1 As regards the first submission relating to non-issuance of plant working certificate, it is contended by the learned counsel for the petitioner that though the petitioner made several oral requests immediately after issuance of notice inviting tender i.e. during the month of February 2021 for inspection of his plants and machineries and issuance of plant working certificate so as to enable him to participate in the tender process, the same was not considered due to existence of MCC. Thereafter, the petitioner made written requests on 07.05.2021, 11.06.2021 and 17.06.2021, which were also not considered. Resultantly, his technical bids were rejected and he was disqualified from the tender process, which according to the learned counsel, is solely due to the inaction of the second respondent on the petitioner's application seeking quality certificate.

18.2 On the other hand, it is submitted on the side of the respondent authorities that the petitioner applied for plant working certificate only on 17.06.2021, which was received by the second respondent on 21.06.2021 just two days prior to the date of opening the bids. The second respondent, Divisional Engineer (H), Quality Control Division, Salem, was not available in the office from 15.06.2021 to 23.06.2021 and was on duty at Highways Research Station, Chennai and thereafter to Tirunelveli and Thoothukudi Division Works inspection and hence, he was unable to take action on the petitioner's said application.

18.3.1 This court considered the rival submissions. Admittedly, there are three communications sent by the petitioner to the second respondent seeking plant working certificate / quality certificate viz., 07.05.2021, 11.06.2021 and 17.06.2021. On a careful scrutiny of the documents available on record, it could be seen that there are contradictory statements made by the respondent authorities qua receipt of those communications. In respect of the first letter dated 07.05.2021, in paragraph 7 of the counter affidavit, it was stated that the petitioner has applied for the plant working certificate only on 17.06.2021. Whereas in paragraph 31, it was stated that the request for issuing plant certificate in the letter dated 07.05.2021 was received only on 07.06.2021. Paragraphs 7 and 9 proceed to state that the second respondent was not available in the office from 15.06.2021 to 23.06.2021 and could not see any letter. On the other hand, in paragraph 27, it was stated that the letters were received on 14.06.2021 seen on 23.06.2021 due to other official works from 14.06.2021 afternoon to 23.06.2021. Regarding the petitioner's second letter dated 11.06.2021, a vague statement was made in the additional affidavit filed by the first respondent that the said letter was addressed to the Assistant Director, Highways, Quality Control, Salem and there was no such post called 'Assistant Director'. With respect to the petitioner's application dated 17.06.2021, it was stated in paragraph 10 of the counter affidavit that the petitioner has applied for plant working certificate only on 17.06.2021 with only two working days for causing inspection and insurance of the same; and the Divisional Engineer was not available in the office from 15.06.2021 to 23.06.2021 and hence, he could not see any letter received in his office. Thus, the said contradictory statements made in the counter affidavit filed by the respondent authorities would only support the case of the petitioner that he approached the second respondent in time, but the second respondent did not consider the petitioner's request seeking plant working certificate.

18.3.2 It is further evident from the additional affidavit filed by the first respondent that all the other bidders viz., respondents 4 and 5 made their respective applications seeking quality certificate on 08.06.2021/09.06.2021, which were received on 09.06.2021 and the quality certificates were issued to them on 14.06.2021, after conducting inspection on 10.06.2021. Whereas in the case of the petitioner, he applied for working condition certificate on 07.05.2021 itself, which was received by the office of the second respondent only on 07.06.2021, but prior to the date on which other bidders made their applications. Even then, the petitioner's application was not considered. The said fact would belie the statement made on the side of the respondent authorities that the petitioner did not approach the second respondent well in advance, like that of other private respondents, for issuance of plant working certificate. Therefore, this court is of the view that the inaction of the second respondent on the petitioner's application for issuance of plant working certificate is arbitrary and unreasonable, which definitely vitiates the tender process.

19.1 As regards the second submission that there is clear cut violation of the mandatory provision of Rules 11(2) and 20 of the Rules. For better understanding, the said provisions are extracted below:

> "Rule 11:Publication of Notice Inviting Tenders in Newspapers-
>
> (2)The Tender Inviting authority shall have the Notice Inviting Tenders published in daily newspapers. The number, editions and language of the newspapers in which the Notice Inviting Tenders shall be published will be based on the value of procurement as specified in the Annexure."

As per annexure, if the financial limit of the tender works is above Rs.5 crores, the notice inviting tender should be advertised in an English newspaper in the All India Edition as well as in the Tamil newspapers having wide circulation in the State.

> "Rule 20. Minimum time for submission of tenders - (1) The Tender Inviting Authority shall ensure that adequate time is provided for the submission of tenders and a minimum time is allowed between date of publication of the Notice Inviting Tenders in the relevant Tender Bulletin or in the newspapers whichever is later and the last date for submission of tenders. This minimum period shall be as follows-
>
> (a)for tenders upto rupees two crores in value, fifteen days; and
>
> (b)for tenders in excess of rupees two crores in value, thirty days.
>
> (2)Any reduction in the time stipulated as per sub -rule (1) has to be specifically authorized by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing."

19.2 The petitioner alleges that neither the notice inviting tender nor the corrigendum 6 was published in accordance with Rule 11 read with annexure to the Rules.

Concededly, the value of the works is above Rs.5 crores. The notice inviting tender was published only in the New Indian Express having circulation in South India and Dinamalar on 25.02.2021. The corrigendum 6 revising the date for submission of bids and the date for opening the same, was not published in any newspaper. Though the learned Government counsel appearing for the respondent authorities pointed out that in the notice inviting tender dated 22.02.2021, under the head 'NOTES', in clause (9), it was specifically stated that Corrigendum if any, will be available only in the website, the same cannot be countenanced by this court, as the said clause itself is contrary to the mandatory provisions of the Rules. Thus, as rightly contended by the learned counsel for the petitioner, the respondent authorities have not complied with the mandatory requirements as laid down in Rule 11(2) of the Rules.

19.3.1 Similarly, it is alleged by the petitioner that the minimum time of 30 days between the notice inviting tender and the last date of submission of bids as prescribed under Rule 20 was not provided. The notice inviting tender was published on 22.02.2021. The MCC commenced on 26.02.2021 and concluded on 07.05.2021. The state wide lock down was imposed from 10.05.2021 to 07.06.2021. Therefore, excluding the time under MCC and covid 19 lockdown, only 19 days time was provided between the notice inviting tender and the last date of submission of bids.

19.3.2 The aforesaid allegation was refuted on the side of the respondent authorities by stating that the first respondent has granted sufficient time of 117 days for submitting the bids, instead of minimum 30 days time as provided under Rule 20 of the Rules.

19.3.3 This Court after having considered the submissions on both sides, finds that the respondent authorities on one hand stated that due to MCC and covid 19 situation, the petitioner's application dated 07.05.2021 received on 07.06.2021 seeking plant working certificate was not considered, on the other hand stated that 117 days were provided for submitting the bids including all the days of MCC and lockdown. Even the time gap between the publication of corrigendum 6 dated 14.06.2021 and the last date for submission of bids mentioned therein as 22.06.2021 is only 8 days. Therefore, the respondent authorities have not complied with the mandatory provisions of Rule 20 in the tender process.

19.4 (i)In similar circumstances, in Sri Venkatram Spinners Pvt. Ltd case (cited supra) relied on the side of the petitioner, this court held as follows:

> "13.On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side and also the judgments relied upon by the learned counsel on either side, it is not in dispute that the 3rd respondent had issued the tender notification published in the Newspaper on

22.06.2017 for the supply of polyester yarn for production of polycot Sarees and Dhoties under cost free distribution of Sarees and Dhoties Scheme Pongal 2018. The last date for submission of bid was 11.00 am on 07.07.2017. Admittedly, the tender notification was published only in the Newspapers and in the State Tender Bulletin. As per the provisions of Section 9(3) of the Tamil Nadu Transparency in Tenders Act, 1998, the Tender Inviting Authority shall also publish the notice inviting tenders in Indian Trade Journal and in daily Newspapers having wide circulation depending upon the value of the procurement prescribed. As per Rule 11 (1) of the Tamil Nadu Transparency in Tenders Rules, 2000, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds Rs.50 crores. On 01.11.2011, a Government Order was also issued in G.O.Ms.No.307 Finance (Salaries) Department wherein while specifying the financial limits for advertising tender notice, the Government had framed guidelines that if the value of the tender is more than Rs.50 crores, the tender notice should be published in Indian Trade Journal. Therefore, as per Section 9(3) of the Act and Rule 11 (1) of the Rules and also G.O.Ms.No.307 dated 01.11.2011, if the value of the tender is more than Rs.50 crores, the tender notice should be published in the Indian Trade Journal. Admittedly, the tender notification dated 22.06.2017 was not published in the Indian Trade Journal. The provisions of Section 9(3) and Rule 11(1) are mandatory and the said provisions cannot be given a go-by, by the authorities.

14.The Division Bench of the Karnataka High Court in the un-reported judgment made in Writ Appeal No.4066 of 2011 and 4739 of 2011 (cited supra) also held that non-publication of the notification inviting tender in the Indian Trade Journal, as required under Rule 10 of the Karnataka Transparency Public Procurement Act, 1999, is fatal and vitiates the entire tender processing. The ratio laid down in the said judgment squarely applies to the present case.

15.Since the tender notification has not been published as per the provisions of the Act, on this ground alone, the notification is liable to be quashed.

16.Apart from this, the petitioner has contented that the 3rd respondent has not provided 30 days time for the submission of the tenders from the date of publication of the notice inviting tenders to the last date of submission of the tenders. In the case on hand, the notification was published in the Newspapers on 22.06.2017 and the last date for submission of the tenders was 07.07.2017.

17.The learned Advocate General submitted that under sub-rule (2) of Rule 20 of the Tamil Nadu Transparency in Tenders Rules, 2000, the 3rd respondent had obtained the written authorization for reducing the time limit from 30 days. The learned Advocate General also produced the note dated 19.06.2017 put up by the 3rd respondent to the 2nd respondent for reducing the minimum period from 30 days to 15 days.

18.....

19.On a reading of the endorsement made by the 2nd respondent, it is clear that inspite of the delay in calling for tender for the years 2016 and 2017, citing the delay in the said orders as precedence, the 2nd respondent had ordered for short tender, reducing the minimum time limit contemplated under Rule 20. Merely because in the previous years, the respondent had called for tender reducing the time limit as contemplated under Rule 20, that cannot be cited as a precedence for reducing the time limit from 30 days. There must be acceptable reasons given by the superior authority viz., the 2nd respondent for reducing the time limit to less than 30 days. The exercise cannot be done in a mechanical way and there must be application of mind and there must also be acceptable reasons for reducing the time limit from 30 days. When the Rules say that there must be 30 days time limit, it must be adhered to by the authorities, unless the superior authority gives sufficient reason for reducing the time as contemplated under Rule 20(2) of the Rules. The 2nd respondent has not given any reason for reducing the time limit from 30 days, except stating that in the previous years also, the time limit was reduced.

20.In these circumstances, the impugned tender notification dated 22.06.2017 are liable to be set aside. Accordingly, the same are set aside.

21.Since the tender notification dated 22.06.2017 are set aside, I do not find any reason to go into the merits of the Writ Petition in W.P.No.17261 of 2017 in which Item Nos.5 & 6 of the tender conditions are challenged by the petitioner. The respondents are at liberty to call for fresh tender in accordance with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998."

(ii)In yet another case in Appu Food Products case (cited supra), this court was of the view that non-adherence of the mandatory provisions vitiates the tender process. The relevant passage of the said order is extracted below:-

> "54. The next ground of attack is that there are various procedural defects, such as, non publication in Indian Trade Journal and All India News Papers by the respondents. The petitioners stated that the respondents have violated the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 (for short, 'the Act') and Tenders Rules, 2000 (for short, 'the Rules'). According to them, as per Rule 11 of the Rules, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of the procurement exceeds Rs.50 crores; and the provisions of Rule 11 is also supported by the provisions of Section 9(3) of the Act. They further submitted that the respondents have also violated Rule 20 of the Rules by not providing 30 days time for the submission of the tenders between the date of publication of notice inviting tenders and the last date for submission of tenders. Placing reliance on the decision of this Court in Sri Venkatram Spinners Pvt. Ltd v. State of Tamil Nadu and others (W.P.Nos.17261, 18987 and 18988 of 2017), the petitioners stated that when Rule 20(2) of the Rules is not followed, then the tender is liable to be quashed and it is not open for the respondents to claim that the conditions are in the frame of policy making and hence, the tender notification dated 20.08.2018 is liable to be quashed. The learned Senior Counsel for the petitioners further contended that the impugned G.O.Ms.No.57 contemplates the supply of eggs and the tender is for a period of six months only and therefore, the respondent authorities have to advertise and follow the procedure for the tendering process every six months, which is going to cost enormous expenditure to the State exchequer, which was sought to be avoided in the centralized system, as per the statement of the respondent authorities in the earlier writ petitions. It is also submitted that Clause 2(13) specifies that eggs should be delivered directly to the Anganwadi/Noon Meal Centres; each zone has nearly 15,000 centres (approx.) and totally one lakh centres located all over the State, to which a minimum of 250-500 eggs (approx.) will have to be supplied twice a week; as such, ensuring prompt supply of the requisite quantity of eggs requires a central delivery system involving sufficient manpower and skillfully planned logistic support, which can be efficiently executed by a supplier of

goods, who has that as a predominant activity, rather than a poultry farmer whose primary occupation is rearing layer hens; therefore, the tender condition for the alleged reason of benefiting poultry farmers has seriously compromised and jeopardized the main object of supplying quality eggs to the Noon Meal Centres for the benefit of children.

55. On the contrary, the respondent authorities have stated in their counter affidavit that they have not violated any of the provisions of the Act and Rules and they have framed tender conditions for the benefit of the beneficiaries and to foster healthy competition among the egg suppliers and support the egg producers of the State, strictly following all the provisions of the Act and Rules as well as the various Government Orders. They have further stated that Rule 11(3) will not be attracted to the facts and circumstances of the present case, since the tenders have been issued on zonal basis and the total requirement for each zone does not exceed Rs.75 crores. It is further averred in the counter affidavit that there is no vagueness in the tender conditions and the terms and conditions of the tender are transparent. Hence, they strongly refuted the allegations so made against the respondent authorities.

56. Before going into the rival submissions, it is to be noted that the Act was enacted with the object of (a) eliminating irregularities and corrupt practices in the tender processes, (b) to provide for fair and equitable treatment to all, and (c) to make the whole process transparent. Therefore, the tripod on which the Act stands, comprises (i) fairness, (ii) equitable treatment of all, and (iii) transparency. Admittedly, the tender notification was not published in the Newspapers and in the All India Trade Journal. As per the provisions of Section 9(3) of the Act, the Tender Inviting Authority shall also publish the notice inviting tenders in Indian Trade Journal and in daily Newspapers having wide circulation depending upon the value of the procurement prescribed. As per Rule 11 (1) of the Rules, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds Rs.50 crores. Therefore, as per Section 9(3) of the Act and Rule 11 (1) of the Rules, if the value of the tender is more than Rs.50 crores, the tender notice should be published in the Indian Trade Journal. Under the Act, the aforesaid objects are sought to be achieved by looking at the whole tender process in a three dimensional setting. All the provisions of the Act and the Rules are aimed at taking care

of (i) the best interests of the procuring entity (for whose benefit the tender is floated), (ii) the perspective of those who eventually lose in the race, and (iii) the perception of the public about the manner in which the whole exercise was undertaken. Once these underlying principles behind the Act and the Rules are violated, then, this Court has to exercise its power under Article 226 of the Constitution to interfere with the same. Rule 11(3) states that the tender ought to be published in an All India Newspaper, the reason being that Act and Rules visualize participation from all over the country, since the object of the Act and Rules is for wider participation so as to make the tender process more competitive. As such, this Court is of the view that the provisions of Section 9(3) and Rule 11(1) are mandatory and the said provisions cannot be given a go-by, by the respondent authorities and the failure to adhere to the same, vitiates the tender process.”

(iii)In R.Kanagasabapthy's case (cited supra), it was held by this court as follows:

“19. As seen from the aforementioned rules, in respect of tenders upto Rs.2,00,00,000/- in value, 15 days time shall be provided between the date of publication of the notice inviting tenders in the relevant tender bulletin and the submission of tenders. In the case on hand, the tender notification has been issued on 01.11.2020, whereas, the date for submission of the tender has been fixed as 10.11.2020 and 15 days time has not been granted as per the requirements of Rule 20(1)(a) of the Tamil Nadu Transparency in Tender Rules, 2000.

20. Learned counsel for the petitioner has also relied upon the authorities referred to supra, wherein, the learned Single Judges of this Court as well as the Division Bench of this Court have held that, when the tender notification has been issued in violation of the statutory provisions, it has to be struck down. In the case on hand, as observed earlier, the respondent Municipal Corporation has not followed the procedure contemplated under Rule 20 of the Tamil Nadu Transparency in Tender Rules, 2000 since the date between the tender notification and the date of submission of bids is only 10 days and not 15 days, which is the minimum required period. Therefore, necessarily the tender notification, dated 01.11.2020 issued by the second respondent which is the subject matter of W.P.(MD) No.15537 of 2020 has to be quashed, as it has not followed the procedure contemplated under Rule 20 of the Tamil Nadu

Transparency in Tender Rules, 2000. However, it does not preclude the second respondent from issuing a fresh tender notification by following Rule 20 of Tamil Nadu Transparency in Tender Rules, 2000.

21. Admittedly, the 'Pay and Use Toilets' which were leased to the petitioner were not put to use during the lock down period (i.e.) from 24.03.2020 to 30.06.2020. The petitioner has admittedly given representations on 14.08.2020 and 04.09.2020 seeking for extension of lease due to the non-enjoyment of the lease period during the lock down period by another period of 110 days.

22. This Court is of the considered view that the said representations will have to be considered by the respondents on merits and in accordance with law.

23. For the foregoing reasons, the impugned auction notification, dated 01.11.2020 issued by the second respondent, which is the subject matter of W.P.(MD) No.15537 of 2020 is hereby quashed. However, it shall not preclude the Tirunelveli Municipal Corporation from issuing a fresh notification by adhering to Rule 20 of the Tamil Nadu Transparency in Tender Rules, 2000. Accordingly, W.P.(MD) No.15537 of 2020 is allowed."

Thus, in the light of the aforesaid orders, this court comes to an irresistible conclusion that the respondent authorities have not scrupulously complied with the mandatory provisions of Rules 11(2) and 20 of the Rules and on this ground alone, the entire tender process is liable to be quashed.

20.1 The third submission made by the learned counsel for the petitioner is with respect to the nexus between the respondents 4 and 5. Admittedly, the respondents 4 and 5, in both the cases, are related to each other. It is evident from the documents produced before this court that the fifth respondent in WP.No.13481 of 2021 is a partnership firm whose partners are the wife and son of the fourth respondent. The fifth respondent in WP.No.13488 of 2021 is a firm whose Managing Director is the son of the fourth respondent. Even then, they were declared as qualified bidders in the technical bids for the works under package nos.59 and 60, vide the impugned tender summary reports.

20.2 According to the petitioner, the respondents 4 and 5, who are the members of the same family, though doing same business separately, are in a position to have access to each other's information to influence the proposal of either or each other and there is every possibility of conflict of interest over the tender process. Without considering the said aspect, the respondent authorities declared them as successful bidders in the technical bids opened on 23.06.2021.

Subsequently, price bids were opened and the contracts were awarded to the respective fifth respondents by work orders dated 25.06.2021.

20.3 Whereas, the learned Government counsel submitted that the respondent authorities have acted strictly in accordance with the Act and Rules and there was no specific clause in the notice inviting tender with respect to the relationship between the bidders and hence, no weightage can be attributed on the allegation raised by the petitioner.

20.4 It is contended on the side of the fifth respondents that there is no common business or corporate relationship between the respondents 4 and 5 and they are the separate entities. They were not officially associated and their family relationship cannot be equated with corporate relationship. Hence, there was no conflict of interest over the tender process.

20.5 This court considered the rival submissions. There is no dispute with regard to the relationship between the respondents 4 and 5. It is settled law that any nexus between the bidding parties will undermine the tendering process and therefore, the same cannot be wished away slightly. Undoubtedly, there will be conflict of interest, if a bidder has relationship with another bidder directly or through common third party that puts either or both of them in a position to have access to each other's information about or to influence the proposal of either or each other and that, the same is an eligible criterion even for shortlisting the bidders. Rule 15 of the Tamil Nadu Transparency in Tender (Public-Private Partnership Procurement) Rules, 2012 pertains to conflict of interest, as per which, it is the responsibility of the Tender Inviting Authority and Tender Accepting Authority to ensure that the prospective tenderers do not have a conflict of interest that affects the tender proceedings and hence, the omission to include such a clause in the notice inviting tender, that too in a high value contract, would lead to an inference that the respondent authorities have not strictly adhered to the provisions of the Act and Rules.

20.6 In Board of Control for Cricket in India v. Cricket Association of Bihar and others [MANU/SC/0069/2015 : (2015) 3 SCC 251], it was held by the supreme court that the scope of conflict of interest is not that such conflict resulted in any abuse of position, but mere possibility of such abuse, taint such transactions.

20.7 In Travel News Services (India) Private Limited (cited supra), this court was of the view that the personal nexus between the parties stands on a higher footing as the parties may have easy access to information about each other or to influence the response of either or each other. The relevant passage of the said order is extracted below:

> "12.5.As per Clause-2.2.1(c)(vi), it is clear that a bidder who has a relationship with another bidder directly or through a common third party that puts either or both of them in a position to have access of each other information about or to influence the

proposal of either or each other shall be deemed to have conflict of interest affecting the bidding process. Therefore, from the above, I am of the view that the relationship between two bidders need not necessarily be corporate relationship, but a close relationship of two bidders that puts either or both of them in a position to have access of each other information about or to influence the proposal of either or each other, shall be deemed to have Conflict of Interest. In Clause-2.2.1(c)(vi), the authority has not mentioned about the corporate relationship. The main criteria under Clause-2.2.1(c)(vi) is whether either or both of the bidders are in a position to have access of each other information about or to influence the proposal of either or each other. In the case on hand, the respondents 2 & 3, being close relatives and were carrying on business in the same premises and also have engaged a common Consultant, who had mistakenly mentioned the Account ID of the 3rd respondent in the 2nd respondent's EMD Challan, would establish that the respondents 2 & 3 were in a position to have access to each other information about or to influence the proposal of either or each other in the bidding process, which is a conflict of interest affecting the bidding process.

12.6.So far as the contention of the Airports Authority of India is concerned that only corporate relationship shall be taken as conflict of interest cannot be accepted for the reason that the term Associate has been defined in the RFP as follows:

"Associate shall mean, in relation to the Bidder/Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder/Consortium Member (the Associate). As used in this definition, the expression control means, with respect to any person which is a company or corporation, the ownership directly or indirectly, of at least 75% (Seventy Five percent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law."

Similarly, the Bidder has been defined in the RFP as

"The Bidder shall mean a sole entity or a Consortium of entities, submitting a proposal pursuant to the RFP. Therefore, even a sole entity (i.e.) an individual is entitled to participate in the tender process."

12.10.But, in the case on hand, when Clause-2.2.1(c)(vi) of RFP has been violated, this Court has no other option, except to interfere in the tender process. The basic requirement of Article 14 is fairness in action by the Tendering Authority and no arbitrariness in essence and substance is the heartbeat of fair play. While exercising the power of judicial review in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been infirmity in the decision making process. The Courts can certainly examine whether the decision making process was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. The Tendering Authority has the public duty to be fair to all concerned. The Tendering Authority is bound to adhere to the criteria, standards and procedures laid down by them and cannot depart from them arbitrarily.

12.11.So far as the judgments relied upon by the learned counsel for the 3rd respondent that even husband and wife do not automatically become related persons and cannot automatically assume mutuality of interest is concerned, the said proposition has been laid down in the judgments pertaining to the Central Excise matters. The said proposition is applicable to a case under Central Excise Act and cannot be applied to the tender process, which bars two close relatives participating in the tender process as per Clause-2.2.1(c)(vi) of the RFP.

13.In these circumstances, applying the bar under Clause-2.2.1(c)(vi) of RFP, since the bids submitted by the 3rd respondent is contrary to the tender condition of RFP dated October 2016, the same is liable to be set aside.

14.So far as the Writ Petition in W.P.No.7251 of 2017 is concerned, the petitioner has filed the Writ Petition to issue a Writ of Mandamus forbearing the 1st respondent from awarding the Letter of Award to the 3rd respondent and consequently award the same to the petitioner, being the highest bidder, post disqualification of 3rd respondent at the technical evaluation stage. Since it was brought to the notice of this Court that the Tendering Authority had awarded the tender as early as on 04.03.2017 itself and that the Writ Petition was filed only after the award of the tender (i.e.) on 22.03.2017, the relief sought for in the Writ Petition has become infrucutous even on the date of filing of the Writ Petition.

15.The bid submitted by the 3rd respondent is declared as contrary to the tender conditions of RFP dated October 2016. In the interest of justice, the respondents 1, 4 & 5 are at liberty to call for fresh tender and conduct the tender process in accordance with law following the terms and conditions of the tender without any deviations whatsoever."

20.8 At this juncture, pertinent it is to point out the very recent judgment of the supreme court in Civil Appeal Nos.4862-4863 of 2021 dated 17th September 2021 [Uflex Limited v. Government of Tamil Nadu and others] which touches upon the validity of the judgment of the Division Bench of this court in Kumbhat Holographics v. Government of Tamil Nadu [2021 SCC Online Mad 1724 : (2021) 4 Mad LJ 225], relied on the side of the petitioner. The supreme court having examined the various decisions on the scope of judicial review, observed that the courts can interfere with the contractual matters, to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. At the same time, after analysing the facts of the case, the supreme court was of the view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technological and commercial expediency, which is not the role which a court ought to play. The relevant paragraphs of the said judgment of the supreme court are profitably reproduced below:

> "40. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.
>
> 41. The present dispute has its history in many prior endeavours by the original petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient, obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It

does appear to us that this is what is happening; that the two original petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a Court ought to play.

42. The checks and balances before the tendering process itself has been provided by constitution of the various committees, more specifically the TSC and the TSFC. The objective is to keep the role of these Committees separately defined.

43. We are concerned with sale of liquor. The objective has been set out by the State Government, i.e., use of such technology as would prevent spurious liquor from being sold. It is a well-known fact that a large revenue collection comes in Tamil Nadu through sale of liquor. It thus must be left to the State Government to see how best to maximize its revenue and what is the technology to be utilized to prevent situations like spurious liquor, which in turn would impede revenue collection, apart from causing damage to the consumers.

44. A grievance was made about what was stated to be "patented technology". At the stage when the concerned committees were still looking to the objections/suggestions of the parties, Kumbhat and Alpha rushed to the Court. The State Government did provide relief by issuing a corrigendum to address the issue relating to hidden text being visible only through Polaroid, as colour change background viewable with film as an identifier did not attract the rigour of this stated patented technology. The issue was actually over with that corrigendum.

45. Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate. The prohibition arising from only a Limited company being permitted to participate was again addressed by the corrigendum permitting LLPs to participate. If entities like Kumbhat and Alpha want to participate they must take some necessary actions. Alpha is already an LLP. Kumbhat cannot insist that it will continue to be a partnership alone and, thus, that partnerships must necessarily be allowed to participate.

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48. We have also noticed the submissions based on the fact that repeated endeavours of Alpha and Kumbhat have failed not only before the Madras High Court but before different High Courts based on a similar challenge. Broadly, similar tender conditions have been upheld. It cannot be that every time a tender is floated, Kumbhat and Alpha would be permitted to seek a toehold on one pretext or the other. As noticed, it is not really the function of the Court to vet the terms of the NIT, as it is the decision-making process which can be reviewed in judicial scrutiny.

49. A lot of emphasis has been placed by the Courts below in seeking to go into the financial linkages between the two companies, i.e., Uflex and Montage. The correct way of examining this issue should have been that whether under the terms of the NIT, any of the aspects which were examined by the Courts could be said to be a disqualification. In our view, the answer to the same was in the negative. One company had invested in another through certain preference shares without having any controlling interest, this cannot be the basis of judicial scrutiny. The present case is not one of an intercorporate battle or of minority shareholders claiming the rights or any debts due, where the principle of lifting the corporate veil should be applied. What one may have said in some income tax proceedings, whether a small percentage of the funds of one company have been utilized as investment in the other are hardly the principles which should come into play in such a tender matter.

50. We are thus unequivocally of the view that the impugned order cannot be sustained for all the aforesaid reasons and must be set aside and the appeals are accordingly allowed."

A cursory glance at the decision extracted above would reveal that the supreme court commented upon the decision of the Division Bench of this court with respect to the issue dealing with technological and commercial expediency of the companies. After having found that the objective set out by the Government in the said case was relating to use of technology as would prevent spurious liquor from being sold, the supreme court has observed that it must be left to the state Government to see how best to maximize its revenue and what is the technology to be utilized to prevent situations like spurious liquor, which in turn would impede revenue collection, apart from causing damage to the consumers. It was further observed by the supreme court that in every tender, there are certain qualifying parameters whether it be technology or turnover; the court cannot sit over in judgment on what should be the turnover required for an entity to participate; that, it is not really the function of the court to vet the terms of the notice inviting tender, as it is the decision-making process, which can be reviewed in judicial scrutiny. Ultimately, the supreme court has set aside the Division Bench judgment and accordingly, allowed the appeals. Whereas, in the instant case, the petitioner raised a plea of conflict of interest as the respondents 4 and 5 in both the cases are closely related to each other, though they are doing business by establishing separate entities, besides challenging the tender process on the ground of arbitrariness, malafide and violative of the mandatory requirements as laid down under the Rules and hence, the facts obtaining herein are clearly distinguishable from the case decided by the supreme court.

20.9 Thus, for the aforemade discussions, this court is of the considered opinion that the conflict of interest is against the principle of fairness and hence, the close relationship between the respondents 4 and 5 in both the cases, assumes great significance as it undermines the tender process and hence, the same cannot be disregarded in judicial review.

21. As a matter of fact, it is to be noted that though the petitioner approached the second respondent well in advance, he was not issued with plant working certificate, which led him to eliminate in the tender process. Without any delay, the petitioner immediately rushed to this court challenging the said tender process. When he informed about the filing of the writ petitions and requested to postpone the opening of price bids, the respondent authorities did not respond to the same, opened the price bid, declared the fifth respondents as successful bidders and awarded the contracts to them on 25.06.2021. As averred in the additional affidavit filed by the petitioner, the estimated rate fixed by the first respondent for Package No.59 is Rs.674,42,000.34 and the petitioner had quoted Rs.657,55,950.33 i.e., 2.5% lower than the estimated rate. Whereas the fifth respondent had quoted a sum of Rs.687,90,840.345 and the fourth respondent had quoted Rs.701,39,680.352 i.e.. higher than the estimated rate by 2% and 4% respectively. Similarly, the petitioner had quoted the lesser value than the respondents 4 and 5 in respect of Package No.60 as well. However, he was unable to qualify as the successful bidder, in view of the arbitrariness and malafide on the part of respondent authorities in not issuing plant working certificate. As discussed above, the respondent authorities have conducted the tender process in undue haste manner, without following due procedure as laid down in the Act and the Rules and therefore, the entire tender process is liable to be quashed, in the considered opinion of this court.

22. At this stage, the learned counsel for the fifth respondents submitted that pursuant to the work orders given to the fifth respondents, they started the works and completed part of the same and that, they invested huge amount in these works. In the event of cancelling the entire tender process,

they would be put to irreparable loss, inconvenience and hardship. The submissions so made on the side of the fifth respondents cannot be slightly brushed aside, as huge public money is involved and that, there would be considerable loss to the public exchequer, if the entire tender process is set aside.

23. It is noteworthy to mention here that the supreme court has repeatedly held that the courts have ample powers under Article 226 of the constitution to mould the relief and give a relief even if a prayer is not sought. Therefore, taking note of all the attendant circumstances, this court, to meet the ends of justice and keeping in mind the larger public interest, deems it fit and appropriate to quash the tender process and consequential award of contracts granted to the fifth respondents to the limited extent of unfinished works qua package nos.59 and 60 and are accordingly, quashed. As a sequel, the first respondent shall call for fresh tender only in respect of the unfinished works and conduct the tender process in accordance with law following the terms and conditions without any deviations whatsoever.

24. With the aforesaid directions, both the writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. Superintending Engineer (Highways)
State of Tamil Nadu
Highways Department
NABARD and Rural Roads Circle, Salem - 1

2. The Divisional Engineer (Highways)
Quality Control Division, Salem - 7

3. The Deputy Director (Highways)
Office of the Divisional Engineer (Highways)
Quality Control Division , Salem - 7

+1 cc to Government Pleader Sr.NO. 56640
+1 cc to Mr. K. Gowtham Kumar, Advocate Sr.NO. 56925
+1 cc to Mr. K. Gowtham Kumar, Advocate Sr.NO. 5692(27.12.2021)

WP Nos. 13481 & 13488/2021

ssd(CO)
A.SK(03.12.2021)