

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, THE CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.No.1847 of 2019

- 1.The State of Tamil Nadu,
rep. by its Secretary,
Public Works Department,
PWD Estate, Chepauk, Triplicane,
Chennai - 600 005.
- 2.The Public Works Department (WRD),
rep. by office of the Superintending Engineer/
Special Chief Engineer,
Palar Basin Circle, Chepauk,
Chennai - 600 005. Appellants

Vs.

M.Kandan

.... Respondent

Prayer: Appeal filed under Clause 15 of the Letters Patent against the order dated 06.03.2019 made in W.P.No.3479 of 2019.

WP.No.3479/2019 Prayer : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the second respondent culminating in the tender notice made in Tender Notice No.20/PBC/2018-19 dated 24/01/2019, quash the same.

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For Appellants

: Mr.S.R.Rajagopal
Additional Advocate General
assisted by
Mr.V.Jayaprakash Narayanan
State Government Pleader
and
Mr.K.S.Suresh,
Government Advocate

For Respondent

: Mr.S.Saisathyajith

JUDGMENT

(Delivered by The Hon'ble Chief Justice)

The State is in appeal against an order of March 6, 2019 by which the entire work relating to the de-silting of the Sathyamoorthy Sagar Reservoir, Poondi in Tiruvallur taluk and district has been stalled.

2. The appellants contend that there were four grounds which were raised by the writ petitioner, the respondent herein, that weighed with the learned Single Judge. The writ petitioner questioned the propriety of the tender process on the ground that no advertisement pertaining thereto was published in the trade journal in accordance with the requirement of the Tamil Nadu Transparency in Tenders Act, 1998 and the 2000 Rules framed thereunder. The writ petitioner had also complained of the shortness of time given to receive bids. The writ petitioner had pointed out that the tender documents ought to have been made available free of cost, but a fee of Rs.500/- per set was levied. The writ petitioner had also referred to an order of the National Green Tribunal to the effect that such a project would require environmental clearance, but it was not evident from the tender documents or elsewhere that any environmental clearance was obtained by the State before inviting offers to undertake the work.

3. As to the advertisement to be published in the trade journal in terms of Rule 11 of the Tamil Nadu Transparency in Tenders Rules, 2000, the appellants point out that the publication has been made mandatory in cases where the value of the procurement exceeds Rs.74 crore. It is the appellants' case that nothing was to be procured in respect of the relevant project and there really was no project cost. According to the appellants, a minimum base price was indicated which would have to be paid by the contractor to remove every cubic metre of silt from the reservoir.

4. On the issue of time, the appellants say that rules permit the time to be abridged in case of urgency. It is contended that the price fixed for obtaining the tender papers was not in violation of any statutory provision. Finally, the appellants claim that it was notified by the Union Environment Ministry that no environmental clearance was necessary for the purpose of de-silting at any lake or reservoir. For good measure, it is submitted that though an order of the National Green Tribunal required the Union to re-consider the issue, subsequent to such re-consideration, the Union has maintained the same stand. However, the matter pertaining to the re-consideration of the issue by the Union and the Union maintaining its original position was not a part of the appellants' submission before the Writ Court.

5. The appellants say that for any tender process to be arrested, the Court must find malafides in the process or patent arbitrary action on the part of the State employer or the entire procedure being opposed to public interest. According to the appellants, no case on any of such counts was made out by the respondent herein. The appellants say that it was open to the respondent to participate in the process and it would not do for a prospective tenderer to approach the Court after the process has been completed to complain of illegalities when such person did not participate in the process. The appellants also point out that this was not a public interest litigation that the respondent herein had carried to this Court. The respondent was personally aggrieved and brought the writ petition so that the original tender process was scuttled and the writ petitioner had a chance to participate in the next.

6. On behalf of the writ petitioner, it is submitted that the major plank of the writ petitioner's case was that the writ petitioner was not afforded an opportunity to make an offer or participate in the tender process. Paragraph 12 of the petition is placed where it was squarely alleged that even though the writ petitioner accessed the relevant website, the tender forms and papers could not be downloaded and there was no mechanism made available on the relevant website to download the tender papers. The underlying suggestion of the writ petitioner is that the tender process may have been confined to a select few to exclude all others. If such was the case, it had to be established.

7. In dealing with the allegations contained in paragraph 12 of the writ petition, the State denied that the tender documents could not be downloaded from the website or that any person intending to obtain the tender papers could not get the same in the usual course. Such denial is evident from paragraph 12 of the counter-affidavit filed on behalf of the appellants before the Writ Court.

8. If this was the principal ground on which the writ petition was founded, it ought to have been inquired into. An allegation by a prospective participant in a tender process that such person did not have access to the tender documents is a grave charge and it ought to have been seriously dealt with. There is no doubt that the writ petitioner asserts that the writ petitioner had appended a screen shot of the website on a particular date to the writ petition. The writ petitioner also makes out that the relevant website was modified after the petition had been instituted and there was no answer as to whether on the relevant date on which the screen shot was obtained, a prospective tenderer could have downloaded the tender documents upon accessing the relevant website.

9. However, in the impugned judgment, there does not appear to be much discussion on such aspect of the matter, which the writ petitioner now fashions as the principal plank for attacking the tender process. At paragraph 23 of the impugned judgment, it has been recorded, inter alia, as follows:

"23. The relevant documents, admittedly as could be seen from the contents found in the website, were not made available for the bidders to download and view."

10. Though the word "admittedly" appears in the sentence, there is no recording of any admission in the preceding paragraphs of the judgment. In the counter-affidavit, there was no admission of the relevant allegation. Indeed, there was a robust denial of the relevant assertion in the counter-affidavit. Further, it does not appear from the preceding paragraphs of the judgment that any inquiry was attempted to be conducted on such aspect before rendering any conclusion thereon. It is not the writ petitioner's case that in course of oral submission on behalf of the appellants herein it was admitted that the website did not allow access to the tender documents.

11. The four grounds that found favour with the learned Single Judge pale into insignificance in the backdrop of the writ petitioner having to be regarded merely as a prospective participant who otherwise appears not to have participated in the process. In the absence of the writ petitioner establishing that the writ petitioner was denied access to the tender papers or an opportunity to participate in the process, the writ petitioner must necessarily be regarded as not having participated in the process. The writ petitioner was well within his rights not to participate in the process and rest on his principled stand that the process was illegal. But the very basis of the action was that the writ petitioner could not participate in the tender process. When the writ petitioner could not affirmatively demonstrate that he had been denied

access to the tender documents, the Court could not have ruled in favour of the writ petitioner. The other grounds asserted appear to run contrary to the underlying basis for the writ petitioner bringing the action. On the one hand, the writ petitioner wanted to participate in the process, yet the writ petitioner found that the entire process was illegal and could not have been sustained.

12. On the price fixed for downloading the documents, there does not appear to be any patent illegality. Also, it was a possible view, given the nature of the work involved, that the project cost either did not exceed the threshold limit or that there was no project cost at all for the advertisement to be published in the trade journal. As to the time, there is a provision for the relaxation thereof. As to the environmental clearance, the State had acted on the basis of a notification and the Court ought not to have gone into such aspect since the writ petitioner appeared to be interested in obtaining the work and such bogeys had been raised upon not participating in the tender process.

13. In view of the aforesaid, the judgment and order impugned dated March 6, 2019 cannot be sustained and the same are set aside. As a consequence, there is no impediment to the appellants herein having the work executed in accordance with law. It is made clear that no final pronouncement is made as to whether environmental clearance is necessary or not for the project, the issue has been discussed only in the context of the writ petitioner's objection.

14. W.A.No.1847 of 2019 is allowed. There will be no order as to costs. As a consequence, the writ petition, W.P.No.3479 of 2019 stands dismissed. Consequently, C.M.P.No.12501 of 2019 is closed.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1.The Secretary,
State of Tamil Nadu,
Public Works Department,
PWD Estate, Chepauk, Triplicane,
Chennai - 600 005.

2.The Superintending Engineer/Special Chief Engineer,
Public Works Department (WRD),
Palar Basin Circle, Chepauk,
Chennai - 600 005.

+lcc to the Government Pleader, S.R.No.7686

MG (CO)
SM/22/02/2021

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