

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2021

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.20301 of 2020 and 4028 of 2021
and W.M.P.Nos.25080 of 2020, 3696 and 4605 of 2021

R.Parthiban

..Petitioner in both WPs

Vs.

1. State of Tamil Nadu
rep. by its Principal Secretary to Government,
Adi Dravidar & Tribal Welfare Department,
Secretariat,
Chennai-600 009.
2. Tamil Nadu Adi Dravidar Housing and Development
Corporation Ltd. rep. by its
General Manager (Technical),
Teynampet, Chennai-600 018. ...Respondents in both WPs

Prayer in W.P.No.20301/2020 : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records in relating to the tender notification bearing No.04/2020-2021, dated 27.11.2020 on the file of the second respondent, quash the same insofar as imposing the condition Nos.20 and 21 are concerned and direct the respondents to permit the petitioner to participate in the above tender and future tenders.

Prayer in W.P.No.4028/2021 : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records in relating to the tender notification bearing No.07/2020-2021, dated 10.02.2021 on the file of the second respondent, quash the same insofar as imposing the condition Nos.20 and 21 are concerned and direct the respondents to permit the petitioner to participate in the above tender and future tenders.

For Petitioner in both :Mr.S.Doraisamy
writ petitions

For Respondents in :Mr.S.R.Rajagopal,
both Writ Petitions Additional Advocate General
assisted by Mr.V.Shanmugasundar,
Special Government Pleader

COMMON ORDER

Since the parties and the issue arising out of these writ petitions are one and the same, these writ petitions are taken up together for hearing and disposed of by this common order.

2. There are two writ petitions filed by the petitioner. While in W.P.No.20301 of 2020, he sought to quash the tender notification bearing No.04/2020-2021, dated 27.11.2020 issued by the second respondent, insofar as imposing the condition Nos.20 and 21 are concerned, and issue a direction to the respondents to permit him to participate in the above tender and future tenders, in W.P.No.4028 of 2021 he sought a similar relief with respect to the tender notification bearing No.07/2020-2021, dated 10.02.2021.

3. The petitioner, who was a State Level Contractor previously under the second respondent Department, is now a Class-I Contractor of the said Department in Salem Division, since the registration certificate under the State Level was modified into Division Level. According to the petitioner, if a Contractor holds a registration certificate in Division Level, he can also participate in the tender in all divisions in the State.

4. On 27.11.2020, the second respondent issued a notification bearing No.04/2020-2021, dated 27.11.2020 calling for the bids for 16 works in various divisions. The same was uploaded in the website on 14.12.2020 and the last date for submission through online was on or before 29.12.2020 upto 3.00 p.m. The petitioner, desirous of applying for the same, had gone through the tender document and found that there were 21 conditions imposed by the second respondent to be fulfilled by the Contractors before submitting the bids. According to the petitioner, condition Nos.20 and 21 are onerous and they were recently added in the tender notices. The said conditions are thus :

"20. ஒப்பந்தப்பள்ளியில் பங்கேற்கும் ஒரு ஒப்பந்ததாரர் இரண்டு பணிகளுக்கு மேல் பங்கேற்க கூடாது. முன்றாம் பணிக்கான ஒப்பந்தப்பள்ளியில் பங்கேற்கும்பட்சத்தில் ஒப்பந்ததாரரின் முன் அனுபவம், பணித்திறன், நிதித்திறன் ஆகியவற்றின் அடிப்படையில் பணி வழங்குதல் குறித்து முடிவு செய்யப்படும்.

21. ஒப்பந்தப்பள்ளியில் கோரப்பட்டுள்ள பணிகளுக்கு சம்மந்தப்பட்ட கோட்டத்தில் தகுந்த வகுப்பில் பதிவு பெற்ற ஒப்பந்ததாரர்கள் மட்டும் பங்கேற்க வேண்டும்."

5. Now, the challenge in these writ petitions is with respect to those two conditions in those two tenders.

6. The objections raised by the learned counsel for the petitioner on behalf of the petitioner are hereunder :

(i) The above said two conditions, i.e., condition Nos.20 and 21, are issued with an ulterior motive, as in another tender issued by the second respondent on the same date under Notification No.05/2020-2021, condition no.21 was not found. Similarly in tender Notification No.02/201-2021, dated 17.06.2020, the condition No.21 did not find a place.

(ii) As per Condition No.21, if a Contractor had registered his name in a particular division, he can participate only in the said division. This would prevent the other contractors from other divisions from participating the tender, which is an unreasonable restriction.

(iii) The other tenders floated by the second respondent did not contain the said clause of restricting the Contractors from participating in other divisions.

(iv) The tenders floated by the other Departments, namely, Highways, Public Works Department and Corporations do not contain such a condition and they permit all the registered Contractors to participate in the tenders.

(v) The above said condition would disable a Contractor from taking part in the tender, as it is not possible for any Contractor to execute works continuously for five years as per Condition Nos.9 and 10, if such a restriction is imposed.

(vi) Condition No.20 restricting the Contractors from participating in more than two tenders is also an unreasonable restriction.

7. The writ petitions were resisted by the respondents through their counter and the submissions of Mr.S.R.Rajagopal, learned Additional Advocate General, raising the following grounds :

(i) Tender Notification Nos.04/2020-2021 and 07/2020-2021, which are under challenge, are admittedly single cover tenders valued less than Rs.2 Crores, whereas, the other tenders compared by the petitioner, are with two covers system.

(ii) Since it is a policy decision to restrict the tender only to the Contractors registered within the divisions, it is not open to the petitioner to challenge the same.

(iii) It is only to ensure fair competition among the Contractors and equal participation, the above said clauses were introduced.

(iv) The Tenders contain about 16 works, which includes construction of Residential Schools and Hostels for the students belonging to the Schedule Caste and Scheduled Tribes in Kalvarayan Hills. As the construction is to be made in the hilly area, it would be appropriate to select the Contractors only from the local region. Therefore, it is stated that there is no mala fide intention to favour anybody.

(v) In so far as the petitioner is concerned, it is pointed out by the respondents that initially he was registered as First Class Contractor in Villupuram Division for the year 2011-12 and even the registration certificate would go to show that he is a registered Contractor only for applying for tenders within the Villupuram Division. Therefore, having accepted the said condition, he is estopped from raising any objection on the same ground.

(vi) Similarly, he had also applied for the year 2016 requesting his name to be registered in Trichy Division as the First Class Contractor and obtained orders from the second respondent. Once again in the year 2018, he had applied for registration in Salem Division and his request was considered and his name was registered as the First Class Contractor in Salem Division. Recently, the petitioner had applied for Villupuram Division in December 2020, which is under consideration of the second respondent and orders are yet to be passed. As on date, the petitioner is a First Class Contractor having registered in the Salem Division, and thus, he is ineligible for participating in the tender in respect of other divisions.

(vii) The petitioner was allotted work, pursuant to an earlier tender notification dated 13.06.2020 and the works are still pending as, he had not yet commenced even the works in the said area.

8. Heard the learned counsel on either side and perused the materials available on record.

9. The only point that has to be considered in these writ petitions is whether the decision making process of the authorities suffers with any mala fide, arbitrariness or irrationality. It has also to be seen whether any public interest is affected because of this. In the absence of any mala fide or arbitrariness, the challenge of the petitioner has to fail.

10. There is no dispute with regard to the factual position. Admittedly, the petitioner is a First Class Contractor having registered in the Salem Division. It is the contention of the respondents that on the said ground he is not eligible to participate in the tender in respect of other divisions. It is the submission of the learned Additional Advocate General that it is a policy decision to restrict the tender only to the Contractors registered within the divisions and the same is not open to challenge.

11. The learned Additional Advocate General placed reliance on the judgment of the Hon'ble Supreme Court in Afcons Infrastructure Limited V. Nagpur Metro Rail Corporation Limited,

reported in (2016) 16 SCC 818, wherein, it has been held as follows :

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622, it was held by this Court, relying on a host of decisions that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons V. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293, it was held that the constitutional Courts are concerned with the decision making process. Tata Cellular v. Union of India, (1994) 6 SCC 651 went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal V. State of Orissa, (2007) 14 SCC 517 as mentioned in Central Coalfields.

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision."

12. The learned Additional Advocate General also relied upon the decision of the Hon'ble Supreme Court in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, wherein, after referring to various earlier decisions, it was held 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 the 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 the 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 a 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 the negative, then there should be no interference under Article 226."

12.1. Ultimately, the Hon'ble Supreme Court in the said decision observed as follows :

"35. 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, 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."

13. From the reading of the above decisions, it is clear that starting from Tata Cellular, it has been consistently held that the scope of the judicial review of an administrative action in tender matters is restricted to a limited extent. The Tendering Authority 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 and its undertakings, because it feels that some other terms in the tender would have been fair, wiser or logical.

14. The petitioner, who has been a contractor with the second respondent for more than a decade and having registered himself at various divisions only to participate in the tender floated in the particular division, is estopped from raising such objections and stalling the entire procedure, by filing these writ petitions.

15. It is also not out of place to mention that excepting the petitioner, no other Contractor has raised this issue. It is pointed out that there are 364 contractors registered with the second respondent, among them, 193 are First Class

Contractors, 76 are Second Class Contractors, 68 are Third Class Contractors and 4 of them are Fourth Class Contractors. When none of them has expressed any objection or difficulty, when the tender is restricted only to a particular division, only this petitioner alone has moved this Court and stalled the entire proceedings. The petitioner also has not made out any ground to interfere in the decision making process of the respondents.

16. For the foregoing reasons, there is no merit in these writ petitions and they are liable to be dismissed. Accordingly, these writ petitions are dismissed. However, there shall be no order as to costs. Consequently, the connected writ miscellaneous petitions are closed.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Principal Secretary,
Adi Dravidar & Tribal Welfare Department,
Government of Tamil Nadu,
Secretariat,
Chennai-600 009.

2. The General Manager (Technical),
Tamil Nadu Adi Dravidar Housing and
Development Corporation Ltd.,
Teynampet, Chennai-600 018.

+2 Ccs to Mr.S. Duraisamy, Advocate sr 23223 & 23224.

सत्यमेव जयते

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and W.M.P.Nos.25080 of 2020,
3696 & 4605 of 2021

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