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W.P.No.27323 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : **09.11.2022**

CORAM:

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

**W.P.No.27323 of 2022
and W.M.P.No.26509 of 2022**

ACS Marine Services Pvt., Ltd.,
Rep. by R.Singaravadivelan,
General Manager,
502/B1, Nadupangu Paradise,
Dharapuram Road,
Tirupur - 641 608.

... Petitioner

Vs.

1. M/s. Poompuhar Shipping Corporation
(A Govt. of Tamil Nadu Enterprise)
IV Floor, 692, Anna Salai,
Nandanam, Chennai - 600 035.

2. The State of Tamil Nadu
Rep. by the Principal Secretary
Highways and Minor Ports Department,
Fort St. George,
Chennai - 600 009.

3. M/s. Sarat Chatterjee and Co.,
28-2-47, Daspalla Centre Suryabagh,
4th Street, Visakhapatnam,
Andhra Pradesh - 503 020.

... Respondents



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Prayer : Writ Petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Mandamus, to declare the action of the first respondent in accepting the tender of the third respondent who had substituted M.V.Prabhu Sumat (Kamsarmax - 86,000 Mt.Tonnes) with M.V.Prabhu Puni (Panamax 76,000 Mt. Tonnes), thus violating the tender conditions as illegal, arbitrary and void and further direct the first respondent to accept the tender of the writ petitioner.

For Petitioner : Mr.V.Raghavachari

For Respondents : Mr.Edwin Prabhakar
Spl. Govt. Pleader (CS)
assisted by Mr.R.Siddharth, GA for R1
Mr.B.Vijay, AGP for R2
Mr.Sathish Parasaran
Senior Counsel
for M/s. B.Deepak Narayanan for R3

ORDER

The prayer sought for in this writ petition is for a writ of mandamus, to declare the action of the first respondent in accepting the tender of the third respondent who had substituted M.V.Prabhu Sumat (Kamsarmax - 86,000 Mt.Tonnes) with M.V.Prabhu Puni (Panamax 76,000 Mt. Tonnes), thus violating the tender conditions as illegal, arbitrary and void and further direct the first respondent to accept the tender of the writ petitioner.



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2. The first respondent, hereinafter would be called as Charterer, invited tender for spot term time chartering of one Self Trimming Supramax / Panamax / Kamsarmax Gearless (or with gears considered as Gearless) or with gear considered as vessel with capacity of about 50000 to 86000 DWT. Sealed tenders were called for from the ship owners or disponent owners for the specification.

3. The last date for issue of tender was 05.09.2022 - 12 hours, the tender closing date and time 05.09.2022 - 15 hours, tender opening date and time - 05.09.2022 - 15.30 hours. The petitioner is one of the tenderers who offered its bid by offering a ship called M.V.Mahavir (Panamax) type with capacity of 74,005 Mt. Tonnes. The third respondent is also one of the tenderers who also made its bid in a Kamsarmax category with ship name called M.V.Prabhu Sumat.

4. As per the tender conditions, the validity of the offer was 10.09.2022 and duration of the time charter is 3 months + 3 months +/- 10 days choption. The ship earmarked must be produced by the tenderer within the lay days, i.e., between 10.09.2022 and 24.09.2022.



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5. In this context, it is the case of the petitioner that, within the lay days period, the petitioner even though had made ready or produced the ship called M.V.Mahavir in Panamax category and it was made available at Chennai Port for the first respondents inspection and satisfaction, the third respondent who was considered to be L1 could not produce the ship namely M.V.Prabhu Sumat under the Kamsarmax category within the lay days period. It is the further case of the petitioner that, however the third respondent instead of production of M.V.Prabhu Sumat under Kamsarmax category wanted to substitute the same by another ship called M.V.Prabhu Puni which comes under the category of Panamax and that production was accepted by the first respondent during the lay period, i.e., between 10.09.2022 to 24.09.2022.

6. The said acceptance of the alternative ship namely M.V.Prabhu Puni, according to the petitioner, is against the tender conditions which has been mandatorily imposed by the Charterer, i.e., the first respondent. Therefore the said acceptance is to be declared as void, illegal or unlawful and if it is declared so, as a sequel, the petitioner is entitled to get the



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contract and therefore he seeks for direction to the first respondent to accept the tender of the petitioner and to award the contract.

7. The tender was floated by the first respondent for using the ship for the purpose of carrying coal from Pradeep port to Ennore Port, Chennai. Insofar as the cargo ships are concerned, there are three types of ships depending upon their capacity to carry. The first category is Supramax, the second one is Kamsaramax and the third category is Panamax. Insofar as the Kamsaramax type ships are concerned, those vessels which are able to carry 81000 Mt. Tonnes and more can be categorised as such and those vessels which are able to carry less than 81000 Mt. Tonnes can be categorised as Panamax.

8. Depending upon the type of vessel, the rate would differ, therefore based on the ship to be offered by the tenderer only, the rate for tonnage for carrying the coal would be fixed and therefore once a tenderer offer a particular type of ship, that should be made available or ready for inspection during the lay days period, for which 15 days lay days period has been



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provided as stated supra, i.e., between 10.09.2022 to 24.09.2022, within which, if the tenderer is not able to produce the ship concerned, no alternative or substitute can be accepted by the first respondent concerned, that is the contention of the petitioner side.

9. In this context, it is the specific case of the petitioner that, since the M.V.Prabhu Sumat under Kamsarmax category was offered by the third respondent, that ship should have been made available or ready for inspection during the lay days, but admittedly the third respondent failed to produce the said ship, instead, he wanted to produce the alternate one or substitute one, namely M.V.Prabhu Puni which comes under Panamax category and since the same was accepted by the first respondent, by thus the first respondent violated the tender conditions. Therefore the acceptance of the tender of the third respondent by the first respondent is to be declared as unlawful or void and as a sequel, the tender of the petitioner shall be directed to be accepted by the first respondent, i.e., the reason why the petitioner has moved the present writ petition with the afore referred prayer.



10. In support of the petitioners contention, Mr.V.Raghavachari,

learned counsel for the petitioner has made the following submissions :

(i) that the ship offered by the tenderer must be produced or be made ready for inspection during the lay days period, which commences on 10.09.2022 and ends on 24.09.2022. During these period, the third respondent has not produced the ship called M.V.Prabhu Sumat, i.e., a Kamsarmax category vessel.

(ii) Under Section-V, under the heading "Rejection of Tenders" of the tender document, it is stated that, the tenders will be summarily rejected if not meeting the Bid qualification requirements and if it is not in conformity with the PSC's commercial terms and technical specification.

(iii) Under Section-IV with the heading "Technical Specification", the type of vessel would be three types, namely Supramax / Panamax / Kamsarmax gearless (or with gears considered as gearless) vessel and the Dead Weight Tonnage (DWT) is about 50,000 to 86,000 DWT. Therefore if particular ship is to be produced or offered to be produced, the same shall also be accepted by the first respondent and in this regard if the particular ship offered is not produced by the tenderer within the lay days no alternative or substituted ships can be accepted.



(iv) In Section-III in the tender document under the heading "Earnest Money Deposit" (EMD), clause (iv) says that, if he does not deliver the vessel within the stipulated lay days specified, unless Charterers accepted the extension, then the EMD would be forfeited.

11. The learned counsel appearing for the petitioner also relies upon clause 37(g) of the tender document, which reads thus :

"37. Performance clause and liquidated damages :

...

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...

g. Delay in delivery of vessel beyond the lay days :

(i) On confirmation of the acceptance of the vessel by the charterers, the owners shall give readiness of the vessel within the lay days. The delivery of the vessel to be accepted by the charterers at arrival pilot station (APS). If the owners fail to deliver the vessel within the lay days, the charterer reserves the right of termination of charter, however, if the charterer and owners mutually agree, in the event of delay in delivery of the vessel, the charterer reserves the right to the period



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of delay beyond the lay days. And such extension of period shall be paid at 50% of charter hire.

Should the charterers engage another vessel in this connection, as a substitute vessel or otherwise, the owners shall be liable to compensate charterers for the cost per ton difference on the total cargo transported in connection with such engagement of vessel until the bidders vessel enters the PSC charter and the charterers are entitled to deduct / adjust / debit such damages and expenses from money / amount if any available with the charterers belonging to / payable to the owners.

(ii) In addition to the aforesaid remedy, the charterer reserves the right to exercise the option of reducing the charter period to the extent of the period of delay beyond the lay days."

12. By relying upon the aforestated tender conditions, the learned counsel appearing for the petitioner made submissions stating that, on confirmation of the acceptance of the vessels by the charterer, the owner shall give readiness of the vessel within lay days, i.e., between 10.09.2022 to 24.09.2022. If the owner failed to deliver the vessel within the lay days,



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the charterer reserve the right of termination of charter. Should the charterer engage another vessel in this connection as a substitute vessel or otherwise, the owner shall be liable to compensate charterer for the cost per ton difference on the total cargo transported in connection with such engagement of vessel until the bidders vessel enter the PSC charter.

13. By these conditions, under clause 37(g), according to the learned counsel appearing for the petitioner, the first respondent has made it clear that, during the lay days period, the owner must deliver the vessel and if he fails to deliver the vessel, the charterer shall terminate the charter, thereby no contract can be entered upon with such tenderer. Therefore, in the present case since the third respondent has admittedly failed to produce or deliver the vessel, namely M.V.Prabhu Sumat within the lay days period, the charterer, i.e., the first respondent should have terminated the charter. Thereafter if at all the charterer wants to engage a new vessel for immediate transportation of the coal, for which the tender was floated, the amount paid by the charterer to the substituted vessel shall be compensated by the owner.



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14. When that being the condition stipulated in the tender document, according to the learned counsel appearing for the petitioner, the charterer, i.e., the first respondent ought not to have accepted the alternative offer or substitute offer made by the third respondent to offer an another category of ship, namely M.V.Prabhu Puni in Panamax category during the lay days period. Therefore the contract awarded to the third respondent, if any, to be cancelled and the tender submitted by the petitioner to be accepted and the contract to be awarded to the petitioner, he contended.

15. On the other hand, Mr.Edwin Prabhakar, learned Special Government Pleader appearing for the first respondent would submit that, the tender was floated for the purpose of carrying coal from Pradeep Port to the Ennore Port at Chennai, therefore the very charter itself is a time charter with a charter duration of 3 to 5 days per charter only in order to ensure the hassle free supply of coal to various thermal power stations in the State and the very contract period itself is 3 months + 3 months +/- 10 days, ie., only a shorter duration. When the tender was floated, both the petitioner and the third respondent submitted their bids and after consideration, it was found



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that, the third respondent was L1 and insofar as offering the vessel within the lay period is concerned, the vessel originally mentioned by the third respondent, i.e., M.V.Prabhu Sumat under Kamsarmax category could not be delivered by the third respondent as the said vessel had been in another charter and would take some reasonable time to reach the port, where it was expected to be during the lay period, an alternative substitute vessel has been offered within the lay days period.

16. The substituted vehicle, namely M.V.Prabhu Puni comes under the Panamax category, accordingly the rate has been modified, based on which only the contract was awarded to the third respondent, he contended.

17. Insofar as clause 25 and 37(g) of the tender document is concerned, the learned Special Government Pleader would submit that, it is possible for the tenderer to provide the substitute, if he is not able to deliver the vessel earmarked. That kind of alternative or substitute vessel if it is offered, that can be accepted by the first respondent and therefore that has been accepted, hence, the ground urged by the petitioner side that, the



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substituted vessel from the third respondent ought not to have been accepted cannot be countenanced and therefore on that ground no interference is called for against the tender. Moreover he would also submit that, since on emergent need to transport the coal from Pradeep Port to Chennai, i.e., Ennore Port for distribution of the coal to the thermal power stations, this contract was awarded and therefore if the same is stalled for such kind of flimsy reason or the reasons which is nonest in law, heavy damage would be caused to all stake holders, i.e., the first respondent as well as the thermal power stations, therefore he wants the writ petition to be dismissed.

18. In the similar line, arguments were advanced by Mr.Sathish Parasaran, learned Senior counsel appearing for the third respondent who would also submit that, it is only a contract with shorter duration and based on this charter, only the ships are going to be involved for transporting the coal from Pradeep to Ennore via Kakinada ports and each charter is for a very shorter duration of three to five days. He would also submit that, depending upon the capacity of the ship it has been categorised and even though initially it was offered by the third respondent the ship called



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M.V.Prabhu Sumat under Kamsarmax category, the same since had been involved in another charter, immediately it could not be brought within the lay days period, hence simply the third respondent offered the substitute vessel called M.V.Prabhu Puni under the Panamax category and based on the capacity to carry, i.e., the tonnage to carry, the rates have been worked out and accepted by the third respondent and the first respondent. Therefore absolutely there could be no impediment for the first respondent to accept the alternative or substitute vessel, namely M.V.Prabhu Puni for the said contract work and that offer also was made with the vessel M.V.Prabhu Puni only for one or two charters within which the actual ship that was offered, namely M.V.Prabhu Sumat could be brought in, accordingly it was brought in infact and for the past two weeks or more, the ship M.V.Prabhu Sumat has been made available and it is waiting to take the contract.

19. The learned Senior counsel appearing for the third respondent would also submit that, this kind of substitution of ships is possible not only under clause 25 of the tender condition but also under clause 37(g) of the tender conditions, therefore such kind of substitution offered by the



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petitioner since has been accepted by the first respondent, ofcourse strictly in consonance with the tender condition, by thus, neither the first respondent nor the third respondent has violated the tender conditions. The learned Senior counsel appearing for the third respondent would contend that, the challenge made against the tender followed by the contract entrusted to the third respondent does not have any ground or reason to adjudicate and therefore he wants this writ petition to be dismissed.

20. I have considered the aforesaid rival submissions made by the learned counsel appearing for the parties and have perused the materials placed before this Court.

21. Though arguments were advanced at length by the learned counsel appearing for both sides, the issue to be resolved in this writ petition, in the considered opinion of this Court, is in very narrow compass.

22. The one and only reason cited by the petitioner to challenge the acceptance of the third respondent tender by the first respondent is that, as



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per the offer already made by the third respondent, the ship namely M.V.Prabhu Sumat of the Kamsarmax category had not been delivered by the third respondent during the lay period, i.e., between 10.09.2022 and 24.09.2022 and during the period if the substitute vessel, namely M.V.Prabhu Puni under Panamax category offered by the third respondent since was accepted by the first respondent, it is bad in law or against the tender conditions.

23. In this regard, it is the vehement contention of the learned counsel appearing for the petitioner that, if at all any substitute is to be made, that would be made only within the meaning of clause 25 of the tender document during the contract period, where if the vessel is temporarily withdrawn from the charter for the purpose of dry docking or annual repairs.

24. In order to delve into the said contention, the relevant clause, namely clause 25 of the tender document is extracted hereunder :

"25. Substitute vessel :

Should the Bidder require the vessel to be temporarily withdrawn from the charter for the



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purpose of dry docking or annual repairs the Bidder / owner should substitute the vessel with similar or higher tonnage.

In the event that the successful Bidder / owners fails to provide a substitute vessel, the charterer reserves the right to hire another vessel and the resultant difference in cost will be claimed from the owners.

However, the Charterer reserves the right to extend or not to extend the C/P period by an equivalent number of days for which the vessels was withdrawn by the owners for annual repairs, dry docking or for any other purpose."

25. No doubt clause 25 makes it clear that, if the bidder requires the vessel to be temporarily withdrawn from the charter for the purpose of dry docking or annual repairs, the bidder or owner should substitute the vessel with the similar or higher tonnage. Certainly this clause can be invoked by the owner or bidder only during the contract period, where there may be chances the vehicle get repaired or it may require dry docking and only in those circumstances, the vessel already put in service necessarily has to be



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withdrawn by the bidder / owner and if such withdrawal is made that is permissible against which the substitute vehicle with similar or higher tonnage should be offered by the owner / bidder. In this clause absolutely there can be no quarrel as this has been made with unambiguous language.

26. However, it is the contention of the learned counsel for the petitioner that, this kind of temporary withdrawal of the vessel would be possible only during the contract period and this kind of temporary withdrawal by making a substitute vessel is not possible at the initial stage, i.e., before awarding the contract. In other words, during the first lay period of fifteen days, the vessel offered by the bidder alone should be made ready and during the lay period, no alternative or substitute vehicle shall be permitted to be delivered. This is the main contention of the petitioner side.

27. In order to examine this ground raised by the petitioner, clause 37 of the tender document can be usefully referred to which has already been quoted herein above. Clause 37(g)(i) makes it clear that, on the confirmation of the acceptance of the vessel by the charterer, i.e., the first respondent, the



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owner like the petitioner or the third respondent shall give readiness of the vessel within the lay days. The further condition was that, the delivery of the vessel to be accepted by the Charterer at Arrival Pilot Station (APS).

28. The second limb of clause 37(g)(i) is crucial, where it states that, if the owner failed to deliver the vessel within the lay days, the charterer reserves the right of termination of charter, however, if the charterer and owner mutually agree, in the event of delay in delivering the vessel, the charterer reserve the right to extend the period of delay beyond the lay days and such extension of period shall be paid at 50% of charter higher.

29. Further it is to be noted that, should the charterer engage another vessel in this connection as a substitute vessel or otherwise, the owner shall be liable to compensate charterer for the cost per tonne difference on the total cargo transported in connection with such engagement of vessel until the bidders vessel enters the PSC charter and the charterers are entitled to deduct, adjust, debit such damages and expenses.



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30. If we look at sub-clause (g) of Clause 37 of the tender document, it has made very clear that, the moment the confirmation of acceptance has come from the charterer, the tenderer or owner must give his readiness of the vessel within the lay days.

31. In this case, between 10.09.2022 and 29.09.2022, i.e., the lay days, though the offer for M.V.Prabhu Sumat vehicle is made in Kamsarmax category by the third respondent, the said vessel could not be delivered by the third respondent during the lay days.

32. In this context it is the contention of the petitioner counsel that, the moment the particular ship or vessel offered by the third respondent was not made ready or delivered by the third respondent within the lay days, the contract should have been terminated against him.

33. However, it is to be noted that, if the charterer and owner mutually agrees, i.e., the first respondent and third respondent mutually agrees, in the event of delay in delivering the vessel, the charterer reserve



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the right to the period of delay beyond the lay days, that means the period can be extended.

34. Here in the case in hand, it was also argued on behalf of the petitioner that the period was not expressly extended and no such extension was sought for even by the third respondent. In this context, it is further to be noted that, if the charterer engage another vessel in this connection, i.e., if the first respondent wants to engage another vessel in view of the failure on the part of the third respondent in delivering the vessel within the lay period, for engaging such substitute vessel or otherwise, the owner shall be liable to compensate the charterer.

35. Therefore it is possible for the first respondent to engage a substitute vessel which they can get it from any source including the very third respondent himself.

36. This is what exactly taken place in this case, where, the third respondent, since could not made ready the M.V.Prabhu Sumat under



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Kamsarmax category within the lay days period, was able to deliver the vessel M.V.Prabhu Puni which comes under the category of Panamax within the lay days period. That factor is not disputed by the first respondent. Therefore that ship or vehicle can be taken as a substitute one and if that is pressed into service, based on which if any loss is occurred, that has to be compensated from the owner, i.e., from the third respondent.

37. In this context, factually the learned counsel appearing for the first respondent argued that, the rate, which has to be revised because of the vessel M.V.Prabhu Puni was utilised for one charter instead of M.V.Prabhu Sumat, had been worked out and accordingly the rate has been fixed and if any amount was to be payable by the owner to the charterer, that would be adjusted as the third respondent had immediately brought the originally offered ship, namely M.V.Prabhu Sumat of Kamsarmax category and that is ready for utilisation and because of the pendency of the writ petition, where some interim orders were passed by this Court on 13.10.2022, it was not pressed into service.



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38. Therefore clause 37(g)(i) has made it very clear that, even at the initial stage before the contract is awarded or concluded, substitute ship can be accepted and pressed into service and for that reason, the contract need not be terminated as it is only an option available to the charterer either to terminate the charter or if both the charterer and owner mutually agree, either the period can be extended or within the period if substitute ship is brought in, that can be pressed into service and if the difference of amount comes, that can be paid by the owner to the charterer.

39. Therefore the contention raised by the petitioner that, this kind of substitution is possible only during the contract period under clause 25 of the tender document is not correct and justifiable. Infact the clause 25 is entirely different from clause 37(g)(i) of the tender document as the earlier one is meant for substitution during the contract period due to dry docking or annual repairs and the later one is for any unforeseen reason if the owner fails to deliver the vessel what alternative could be made available even at the initial stage of the charter, has been envisaged in clear terms. Therefore there could be no hesitation for this Court to hold that, what has been done



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by the first respondent in accepting the substitute vessel, namely M.V.Prabhu Puni of Panamax category instead of M.V.Prabhu Sumat of Kamsarmax category during the lay days period even at the initial stage is strictly inconsonance with the tender conditions and in this context, it cannot be stated that, either the first respondent or the third respondent has violated such tender conditions.

40. Moreover what is the intention of a particular clause in tender document is best known to only the author of the tender document. This position has been made clear by number of Judgments of the Law Courts.

41. That apart, these kind of commercial transactions arising out of the tender, normally would not be interfered by the Court for any reasons, unless and until it is established that, there is an arbitrary exercise of power and with malafide intention the tender has not been accepted or tender of another person is accepted.



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42. Two latest decisions of the Hon'ble Supreme Court in this context can be usefully referred to herein.

(i) In 2020 SCC Online SC 1035 in the matter of Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K.Roadways, Fleet owners and Transport Contractors and others, in the tender matter, the Hon'ble Supreme Court has held as follows :

14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818, this Court held:

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the



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application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.” (page 825) (emphasis supplied)"

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17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench’s conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body,



being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, this Court noted:

"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



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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



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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. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand



on a different footing as they may require a higher degree of fairness in action.” (pages 531-532) (emphasis supplied)

(ii) In the latest Judgment in (2022) 6 SCC 127 in the matter of N.G.Projects Limited v. Vinod Kumar Jain and others, the Hon'ble Supreme Court has held as follows :

"22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona-fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the



liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather



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than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

43. So the terms and conditions of the tender document if it is taken up for interpretation, the Court has held that, the Author is the best person to understand and appreciate its requirement. Therefore its interpretation should not be second guessed by a Court in Judicial Review.

44. Therefore the clause 25 and 37(g)(i) first of all is to be best interpreted by the authors of the document, namely the first respondent. However the language used in both these clauses are very clear and the former's purpose is to make substitution of vehicles during the contract period and the later's purpose is to make the substitution even during the lay days period. Therefore even at the threshold, the substitution is possible



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and that has been made in clear terms under clause 37(g)(i). Therefore even for interpretation sake, this Court cannot have a different interpretation as sought to be employed by the petitioner.

45. Moreover in the latest Judgment in N.G.Projects Limited case (*cited supra*), the Hon'ble Supreme Court has infact stated that, even if the Court find that, there is a total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.

46. Here in the case in hand, no such arbitrariness is found and nothing has been violated, especially in the context of clause 25 and 37(g)(i) of the tender documents. Therefore looking from any angle, the case advanced on behalf of the petitioner cannot be appreciated and accepted, therefore it is liable to be rejected.



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47. In that view of the matter, this Court has no hesitation to hold that, the writ petition fails, hence, it is liable to be dismissed. Accordingly, it is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is dismissed.

09.11.2022

Index : Yes

Speaking Order : Yes

tsvn



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To

WEB COPY

1. M/s. Poompuhar Shipping Corporation
(A Govt. of Tamil Nadu Enterprise)
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2. The Principal Secretary
State of Tamil Nadu
Highways and Minor Ports Department,
Fort St. George,
Chennai - 600 009.

3. M/s. Sarat Chatterjee and Co.,
28-2-47, Daspalla Centre Suryabagh,
4th Street, Visakhapatnam,
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R.SURESH KUMAR, J.

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