



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.11.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.Nos.30905, 30909, 30910 & 30913 of 2022

and WMP.Nos.30306, 30310, 30311,

30312, 30313 & 30314 of 2022

M/s. Shiva Ganga Enterprises,
Represented by its Authorised Signatory, G.Manikandan
S.No:57, Minnpura Village, T.Begur, Nelamangala Taluk,
Bangalore Rural District,
Karnataka ... Petitioner in all W.Ps.

-Vs-

The Director cum Mission Director,
Integrated child Development Services Scheme,
Pammal Nallathambi Road, Periyar Nagar, Taramani,
Chennai – 600 113. ... Respondent in all W.Ps.

Prayer in W.P.Nos.30905 & 30909 of 2022: Writ Petitions under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorified Mandamus, call for the records pertaining to the impugned tender notification i.e., Roc.No.9797/NC-1(2)/2022, Roc.No.9798/NC-1(2)/2022 respectively dated 07.11.2022 issued by the respondent and quash the same and consequently direct the respondent to float a fresh tender for the tendered product with liberalised conditions, which enable the petitioner to participate in the tender for the tendered product.

Prayer in W.P.Nos.30910 & 30913 of 2022: Writ Petitions under



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

Article 226 of the Constitution of India praying for the issuance of a Writ of Declaration, to declare the pre-qualification conditions contained in Clause 11(2)(a)(I), 11(2)(a)(III), 11(2)(a)(IV), 11(2)(a)(V) and 11(ii)(a)(2), (3), (4), (5) and (12) as arbitrary and malafide as the same have been framed without any rationality and nexus to the object sought to be achieved.

For Petitioner : Mr. Jaishankar Ramakrishnan
[in all W.Ps.]

For Respondents : Mr.R.Shunmugasundaram
[in all W.Ps.] Advocate General assisted by
Mrs.S.Anitha
Special Government Pleader
and Ms.A.G.Shakeena

COMMON ORDER

Since the issue raised in these writ petitions is one and the same, with the consent of learned counsel appearing for both sides, these writ petitions were heard together and are disposed of by this common order.

2. In W.P.No.30905 & 30913 of 2022, the petitioner has challenged the tender notice dated 07.11.2022 in ROC.No.9797/NC-1(2)/2022.

3. The said tender was called for supplying of three ICDS food supplements (Sathu Mavu) for the period from 2022 upto 2024. The total



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

approximate value of the tender for two years is Rs.799 crore, the E.M.D. to be deposited is Rs.7.5 crore, the date of commencement of sale of bid document is 07.11.2022, the last date and time of sale of bid document is 08.12.2022 at 11.00 AM, the last date and time for receipt of sealed bid is 08.12.2022 at 11.30 AM and the time and date of opening of Technical Bids for pre-qualification is 08.12.2022 at 12.30 PM.

4. Mr.Jaishankar Ramakrishnana, learned counsel appearing for the petitioner would submit that, the reason for challenging the tender document in these two writ petitions is, because of the arbitrary and onerous conditions imposed by the respondent, which according to the petitioner counsel is condition Nos.2, 3, 4 and 12, which read thus:

“2. The bidder should have experience in manufacture and sale of supply of cereals and pulses based ICDS Food Supplement (Sathu Mavu) containing amylase activity in powder form or any other children food in similar form to a minimum of Two thousand delivery points per month under any Government Scheme for minimum three years and should have supplied the same atleast for a value of Rs.20 crore a year, during each of the last three completed financial years (2019-2020, 2020-2021 and 2021-2022).

3.The manufacturing unit of the bidder should be



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accredited with ISO 22000 standard (latest amended standards) for the manufacture of ICDS Food Supplement (Sathu Mavu) as per tendered composition or similar composition, issued by any NABCB (National Accreditation Board for Certification Bodies) Approved Certifying Agency. The bidder should obtain the updated ISO 22000 standard certificate as and when the same is amended.

4.For ensuring the food safety and final product specifications as required during the shelf-life of 120 days, the proven technology of the bidder should establish the shelf-life along with confirmation to the respective specifications atleast for a period of 120 days of all the raw materials as well as all the three ICDS Food Supplement (sathu mavu) as per tendered composition or similar composition as evaluated during such shelf-life period under normal storage conditions by any Government Food Research Laboratory.

12.The bidder should possess valid product license for IS 11536 as certified by Bureau of Indian Standards (BIS) atleast during the last three completed financial years for the premises from which the bidder will manufacture and supply ICDS Food Supplements (Sathu Mavu) under this tender and the same shall be valid as on date.”

5. The learned counsel would further submit that, since the

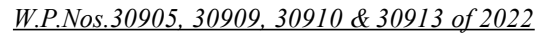


W.P.Nos.30905, 30909, 30910 & 30913 of 2022

petitioner is one of the suppliers, who have already been supplying these kind of food materials for the last three or four years to various stakeholders, of-course not to the Government and because of these arbitrary conditions now has been imposed in the tender document, which is impugned herein, small players like the petitioner are being eliminated or ousted from the purview of making the bid for getting tender to supply such food materials sought for by the respondent through the tender document.

6. He would also submit that, the condition No.12 i.e., Bureau of Indian Standards license for IS 11536 would normally be received only by the Multi National Company [in short, 'MNC'] and not by the small manufacturers or players like the petitioner in this country.

7. Like that, other conditions imposed i.e., Condition Nos.2, 3 and 4 are concerned, the supply value of Rs.20 Crore and more for the last three years is also yet another arbitrary condition, by thus, small player like the petitioner would be ousted and the other condition that the manufacturing unit of the bidder should be accredited with ISO 22000 standard i.e., latest amended standard for the manufacture of ICDS food



8. Like that, in W.P.Nos.30909 and 30910 of 2022 is concerned, the tender document on the same date issued by the respondent in No.9798/NC-1(2)/2022 for supply of blend of critical processed materials for the manufacture of ICDS food supplements (Sathu mavu) is a challenge.

9. The schedule for the tender processing is same or similar to that of other tender, which has already been quoted herein above.

10. In this tender document the following conditions imposed by the respondent, which according to the learned counsel appearing for the



petitioner are arbitrary. Those conditions are Condition Nos.3, 4 and 5, which read thus:

“III. The manufacturing unit of the bidder should be accredited with ISO 22000 standard (latest amended standards) for the manufacture of similar Blend of critical processed materials or children food in power form containing ragi malt, issued by any NABCB (National Accreditation Board for Certification Bodies) Approved Certifying Agency.

IV. For ensuring the food safety and final product specifications as required during the shelf-life of 150 days, the proven technology of the bidder should establish the shelf-life along with confirmation to the respective specifications atleast for a period of 150 days of all the raw materials as well as Blend of Critical processed materials as per tender formulation or similar formulation containing ragi malt, as evaluated during such shelf-life period under normal storage conditions by any Government Food Research Laboratory.

V. In order to ensure an accountable and proven testing system as required for making the supplies to the Weaning Food Manufacturing Women Industrial Co-Operative Societies, as mandated under Clause 35 “Inspection and Tests”, the bidder should have a valid Project Consultancy arrangement for the period tendered



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W.P.Nos.30905, 30909, 30910 & 30913 of 2022

with any Government Food Research Laboratory, for monitoring the final product specification and also should have been certified by such Project Consultant for maintaining the specifications of the Purchaser, for the similar Blend of Critical Processes materials or children food in powder form containing ragi malt manufactured and sold in any formulation for a value not being less than Rs.10 Crores for each of the last three completed financial years under any Government Scheme.”

11. In this regard, learned counsel appearing for the petitioner would submit that in condition No.3, the very same ISO 22000 standards was required to be obtained and the shelf-life in this case is fixed, at 150 days that is also arbitrary and in condition No.5, the value not being less than Rs.10 Crore for each of the last three completed financial years under any Government scheme has been fixed, that is also again arbitrary according to the learned counsel for the petitioner. Therefore, these conditions, which according to the learned counsel appearing for the petitioner, are arbitrary, therefore on that footing this tender document also is under challenge in these two writ petitions, that is how these four writ petitions have come up with the respective prayers.



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

12. On the other hand, Mr.R.Shunmugasundaram, learned Advocate General appearing for the respondent would submit that, first of all, what conditions to be imposed in a tender document is best to be decided only by the tender inviting authority and it cannot be stated by a tenderer that a particular condition, if it is not suitable to him is an arbitrary one. This position has been held in unequivocal terms by many judgments by the law courts, he contended.

13. That apart, learned Advocate General would further submit that, insofar as the imposing condition of BIS standard is concerned, that has been fixed by the Bureau of Indian Standard [in short, 'BIS'] under the Bureau of Indian Standards Act, 2016 and in the standard document issued in this regard by the BIS with the heading Processed Cereal Based Complementary Foods Specification – Third Revision, lot of such standards have been prescribed. Therefore, only in consonance with the said standards prescribed by the BIS, these conditions have been incorporated in the tender document.

14. That apart, insofar as the shelf-life of 120 days and 150 days is concerned, where there has been a reasonable nexus that without these



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

kind of shelf-life, if the foods are being supplied by the tenderer and the same is distributed among the children, who are the ultimate beneficiaries under the scheme and if any untoward is happened because of less shelf-life that will have a very huge repercussion in the very health and well-being of the children. Therefore, the State Government being a Welfare State must take all precautionary measure. Therefore, this shelf-life period of 120 days and 150 days respectively fixed in the tender document is strictly in consonance with the requirements.

15. The learned Advocate General would also submit that insofar as the 20 Crores turn over for the last three years and 10 Crores in respect of the second document is concerned, these kind of conditions are not first time introduced and therefore, it is not a new addition.

16. Hence, the learned Advocate General would submit that none of these conditions can be treated as an arbitrary one.

17. Moreover, the learned Advocate General has also submitted that what is the right of the bidder or tenderer before even making the submission of tender application to challenge the tender document on the



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

ground that some of the conditions imposed by the tender calling authority is onerous or arbitrary or not suitable to the individual tenderer, the Courts have repeatedly held that such kind of right is not vested with the bidder and that is the prerogative action of the tender calling authority to impose any such conditions.

18. In this context, the learned Advocate General has relied upon the recent decision of the Hon'ble Supreme Court in the case of ***Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd. [SLP.No.1616 of 2022 dated 11.02.2022]*** , where he relied upon the following passages:

“5. Before we consider the submission on behalf of learned counsel for the petitioner on merits, we would like to observe and disapprove and deprecate the grant of interim relief by the High Court vide orders dated 14.12.2021 and 20.01.2022 respectively. The interim relief which was granted by the High Court was as such a final relief which could have been granted after deciding the matter finally. The High Court passed an interim relief directing that the petitioner shall be allowed to take part in the tender process without insisting to the impugned requirement or obtaining NOC from Vimla and to issue a corrigendum to the tender notice. Thus,



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by way of interim relief the High Court directed to ignore the tender clause which was under challenge that too at the interim stage virtually allowing the main writ petition. We disapprove and deprecate the grant of such interim relief virtually allowing the writ petitions at an interim stage. The High Court ought to have appreciated that if by way of interim relief, a tenderer/petitioner is permitted to participate in the tender process without insisting upon the tender clause which was under challenge and subsequently the writ petition is dismissed what would be the consequences. In the present case itself subsequently the writ petition has been dismissed. The question may arise what will be the consequences of the interim order by which the petitioner was permitted to take part in the tender process without insisting upon the impugned requirement by obtaining NOC from Vimla. Therefore, no such interim relief could have been passed by the High Court.

5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to



WEB COPY



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

5.2 In the case of Silppi Constructions Contractors vs. Union of India,(2020) 16 SCC 489, it is observed in para 20 as under:

“20.The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

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submitted before the opening of the price bid and the date for submission of the bid was extended, the High Court has rightly dismissed the writ petition and has rightly refused to interfere with the decisions of the respondents providing clause 1.12(V) of the tender document.

7. We are in complete agreement with the view taken by the High Court. No interference of this Court in exercise of powers under Article 136 of the Constitution of India is called for.

In view of the above and for the reasons stated above, the Special Leave Petitions stand dismissed.”

19. Hence, the learned Advocate General would submit that the petitioner has no locus to challenge the conditions imposed in the tender document and none of the conditions, which have been pointed out as an arbitrary one by the petitioner's counsel are arbitrary conditions. In fact, it is an inevitable condition to be incorporated in the tender document, without which, the tender cannot be completed as the food items to be supplied by the tenderer is meant for the young children of the State and it is a very huge amount tender. Therefore, the very minor player like the petitioner normally would not be able to make the supply uninterrupted. Therefore, in order to ensure the uninterrupted supply of



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

these food items for the whole tender period of three years, incorporating these kind of conditions has become inevitable one. Therefore, the learned Advocate General would submit that these writ petitions are deserved to be rejected.

20. I have considered the said submission made by the learned counsel appearing for the petitioner as well as the learned Advocate General appearing for the respondent.

21. I have gone through the conditions, which are specifically mentioned by the petitioner's counsel as arbitrary one in both the tender documents. As has been rightly pointed by the learned Advocate General, these kind of standards are necessarily to be fixed for supply of any food items. Therefore, in this regard standards prescribed by the Bureau of Indian Standards must be strictly complied with.

22. In this regard, the Processed Cereal Based Complementary Foods Specification has already been given by the Third Revision of BIS and that is the basis according to the respondents to prescribe these conditions.



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

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23. That apart, whatever the conditions imposed by the food safety and standard authority of India under the Act that also to be taken note of by the respondent while calling these kind of tenders.

24. These food supplements like Sathu Mavu is one of the important food material to be supplied to the children in the State. Therefore, the consumers being the children utmost care must be taken by the State Government before purchasing the food through the tender process. Therefore, these kind of strict conditions should necessarily be incorporated in the tender document.

25. Merely because some of the conditions imposed in the tender document are not suitable to one or more prospective tenderer, on that ground, it cannot be stated that those conditions are arbitrary or even onerous.

26. As has been rightly pointed by the learned Advocate General, this issue has already been settled before the Hon'ble Supreme Court in number of cases. In this regard, this Court had an occasion to decide these kind of issues in a recent case in the matter of *ACS Marine*



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

Services Pvt., Ltd. Vs. Poompuhar Shipping Corporation and

Ors.[2022 SCC online Mad 5248], where after having gone through the law declared by the Hon'ble Supreme Court in series of judgments held as follows:

“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.

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



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W.P.Nos.30905, 30909, 30910 & 30913 of 2022

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 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



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W.P.Nos.30905, 30909, 30910 & 30913 of 2022

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



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W.P.Nos.30905, 30909, 30910 & 30913 of 2022

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



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W.P.Nos.30905, 30909, 30910 & 30913 of 2022

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 mala fide. 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 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.”

27. Therefore, I have no hesitation to hold that the conditions imposed in the tender document, which have been quoted herein above,



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

are neither arbitrary nor onerous. Even assuming that if it is onerous from the point of view of the petitioner that cannot be the reason for the petitioner to have a successful challenge against the tender document.

28. The Hon'ble Supreme Court in a recent judgment, as quoted herein above, has held that, even if such condition is fixed, the tender process is taken place and completed and awarded the tender to any tenderer, the person, who lost the tender cannot have a right to challenge the tender or to stop the process. At the best he can be relegated to go before the Court of law to establish his right to get compensation, to that extent the law has been declared in the recent judgment of the Hon'ble Supreme Court.

29. When that being so, the present challenge made on the only ground that certain conditions are not imposable because it may not be suitable to the small players like the petitioner cannot be countenanced and on that ground, the impugned tender document cannot be successfully assailed by the petitioner.

30. In that view of the matter, this Court has no hesitation to hold



W.P.Nos.30905, 30909, 30910 & 30913 of 2022

that the petitioner has not made out any case, which warrant any interference against the impugned tender document. Hence, all these writ petitions fail and they are liable to be rejected, accordingly, they are dismissed. No costs. Connected miscellaneous petitions are closed.

18.11.2022

Index:Yes

Speaking order: Yes

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To

The Director cum Mission Director,
Integrated child Development Services Scheme,
Pammal Nallathambi Road, Periyar Nagar, Taramani,
Chennai – 600 113.

R.SURESH KUMAR.J.,

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W.P.Nos.30905, 30909, 30910 & 30913 of 2022

W.P.Nos.30905, 30909, 30910 & 30913 of 2022

18.11.2022