



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.P. (MD) No.295 of 2022

and

W.M.P (MD) Nos.226, 227, 228 and 229 of 2022

WEB COPY

- 1.Bollore' Africa Logistics
31-32, Quai De Dion Bouton,
92811 Puteaux, France.
- 2.India Ports and Logistics Private Limited,
141, 14th Floor, Jolly Maker Chambers II,
Nariman Point, Mumbai 400021, India.
- 3.Highgate Terminals Private Limited,
3B, 2nd Floor, Shree Pant Bhuvan,
SVP Road, Madurai 400007, India.

The petitioners 1 to 3 are represented herein
by the Lead Member in the Consortium:

Bollore' Africa Logistics,

Represented by its Authorised Signatory,

Mr.Arul Phillip Kennedy Xavier

... Petitioners

vs.

V.O.Chidambaranar Port Trust

Represented by the Chief Mechanical Engineer,
Mechanical and Electrical Engineering Department,
Planning and Monitoring Division,
Tuticorin-628 004.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records and quash the impugned order viz., the Letter bearing No.MEE-CMEP1-MIS-CONVE-V1-20 (60768) D.4034, dated 16.12.2021 issued by the respondent to the petitioners and consequently, permit the petitioners' Consortium to take part in the Bidding Stage (2nd Stage) of the Bidding Process being held in connection with Public Notice, dated 05.05.2021 bearing No.MEE-CEMP1-MIS-CONVE-V1-20(60768) and the request for qualification for the project- "Conversion of 9th Berth as Container Terminal through P.P.P on D.B.F.O.T. basis" issued during May, 2021, by providing opportunity to raise queries on the request for proposal and reasonable time to the petitioners' Consortium to submit its Bid.



For Petitioners : Mr.T.R.Rajagopalan
Senior Counsel
for M/s.TATVA Legal, Chennai
For Respondent : Mr.Yashod Vardhan
Senior Counsel
(Not called)

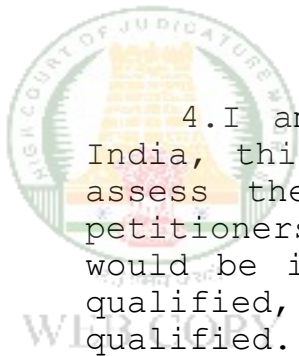
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O R D E R

The writ petition has been filed in the nature of Writ of Certiorarified Mandamus, seeking interference with the Letter bearing No.MEE-CMEPl-MIS-CONVE-V1-20(60768)D.4034, dated 16.12.2021 issued by the respondent/V.O.Chidambaranar Port Trust represented by the Chief Mechanical Engineer at Tuticorin in Tamil Nadu to the petitioners, and for a further relief seeking a direction that the Court must permit the petitioners' consortium to take part in the bidding stage/second stage of the bidding process which is ongoing consequent to a Public Notice, dated 05.05.2021 issued by the respondent. The said project for which the bid was issued was for Conversion of 9th Berth as Container Terminal through P.P.P. on D.B.F.O.T basis. This was issued in May 2021.

2.The petitioners seem to have a lot of grievances. The petitioners have grievances raised against the respondent. Straight away, it can be said that as on date, there is no contractual relationship between the petitioners and the respondent. The petitioners have submitted a bid pursuant to the aforesaid notification. The respondent, stating reasons, deemed that the bid did not qualify to their standards and did not permit the petitioners to be categorized as having qualified to cross the first stage of technical evaluation and that therefore, they cannot participate in the second stage for financial evaluation. The first stage is the technical assessment of the petitioners' bid. They have failed to cross the assessment of the respondent. Assailing that particular order or assessment or proceedings, which was informed to the petitioners, the present writ petition has been filed.

3.Heard Mr.T.R.Rajagopalan, learned Senior Counsel on behalf of the petitioners. The learned Senior Counsel made a vain attempt seeking interference of this Court into the said process and stated that this Court should examine the correctness of the order passed by the respondent or rather the reasons given by the respondent for not accepting the bid of the petitioners and stated that factually, the petitioners have explained all the clarifications sought by the respondent and therefore, insisted that a particular form of interpretation must be given by the respondent accepting the bid of the petitioners and assailed what was stated in the impugned proceedings.



4.I am afraid that under Article 226 of the Constitution of India, this Court can never sit in the shoes of the respondent and assess the bid of the petitioners in the manner in which the petitioners seek to be assessed. If they are qualified then they would be invited to move on to the second stage. If they are not qualified, it is simple. It would be indicated they have simply not qualified.

5.As observed earlier, there is no binding compulsion on the respondent to actually accept the bid of the petitioners. The clause is very clear. The clause is simple. The clause is straight forward. It gives unreserved right to the respondent to either accept or to reject any bid. The petitioners had applied for the bid knowing that the respondent had reserved such right. The petitioners should have taken care that before they bid they had the requisite qualifications as stated by the respondent. If they did not so have, then they cannot turn around and weep that they have been unjustly disqualified.

6.Before addressing the issues, more specifically, let me address the law on this particular aspect and the binding precedent as stated in **Uflex Limited Vs. The Government of Tamil Nadu and others** reported in **2021 SCC Online 738**, which can be safely stated to be the latest pronouncement in which, interference of the High Courts in tender matters had been examined by the Supreme Court and the Supreme Court had come down very heavily on the tendency of the High Courts encouraging such interference thereby protracting bid processes. The Supreme Court had also referred to **Tata Cellular Vs. Union of India** reported in **1994 (6) SCC 651**.

7.The principles as reduced in **Tata Cellular Vs. Union of India** as pointed out by the Hon'ble Supreme Court in **Uflex Limited** referred *supra* are as follows:-

"...7.It may also be pertinent to note the principles elucidated in the case of **Tata Cellular Vs. Union of India**:

"94.The principles deducible from the above are:

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

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

(3)The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4)The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to

<https://hcservices.courts.gov.in/hcservices/accept-the-tender-or-award-the-contract-is-reached-by>



process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

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

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

8. The Supreme Court in **Uflex Limited's case** then laid down their own observations in paragraph No.40, which is extracted below:-

"..40. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examine are restricted as set out in **Tata Cellular** and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them."

9. The Supreme Court had very clearly laid down that for every succeeding party who is awarded a tender, there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority making the said process.

10. In this case, we can safely presume that the respondent/Port Trust can be categorized as a public authority and may also encroach



upon the definition of a State. I am not examining that aspect for the present.

11.It had also been laid down that the activity of the State or a particular public authority has to be examined with restrictions as set out in **Tata Cellular's case** referred *supra*. It had also been laid down that the Court cannot be an appellate authority for scrutinizing as to whom the tender should be awarded.

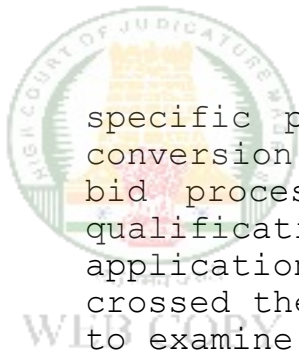
12.The above are, in my opinion, crucial dictums laid down by the Supreme Court. If the petitioners feel that they ought to have been considered as qualified and they have not been considered as qualified, then this Court, under Article 226 of the Constitution of India, cannot turn itself as an appellate authority overriding the views given by the respondent for rejecting the bid of the petitioners herein. The respondent had very categorically come to that particular conclusion and their subjective satisfaction should be respected and this Court cannot thrust upon the respondent an unwanted participant in the tender process, particularly, a participant who, according to the respondent is not qualified.

13.The Supreme Court further had held that economics must be permitted to play its role for which, the tendering authority knows best as to what is suited in terms of technology and price for them.

14.Thus, the issue revolves only between the petitioners and the respondent. As on date, the petitioners have only submitted a bid. They have no further right to question the order passed by the respondent. If the respondent had held that the petitioners are not qualified, the matter ends there. The petitioners will necessarily have to walk away and move on and search for greener pastures, where they may be appreciated better by other parties. They must just leave the respondent alone to proceed further with their tendering process for this particular bid of conversion of a particular berth, namely, 9th Berth as a Container Terminal through P.P.P. on D.B.F.O.T basis .

15.This being the position, so far as the law is concerned, wherein, the Supreme Court has placed very strict guidelines to be observed by the High Courts, let me examine the affidavit filed in support of the writ petition.

16.The petitioners claim that they are most reputed companies, involved in building, owning, operating, maintaining boats, providing logistics and allied services. In connection with these statements, I would also give them credit. But unfortunately, the respondent does not. It is a matter of the opinion of the respondent which is of more primary importance, not the petitioners' opinion. In the entire affidavit, they had stated that the petitioners have formed a consortium for submission of bid, for the



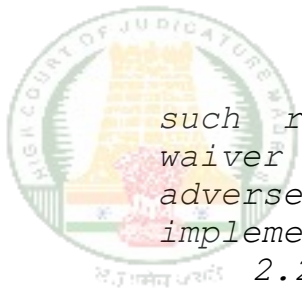
specific purpose and with respect to this particular tender for conversion of the 9th Berth. Thereafter, they have stated that the bid process was of two stage process. The first one involved qualification of interested parties/consortium, who make an application in accordance with R.F.Q. The petitioners have not crossed the particular stage. Therefore, it is not necessary for me to examine the next stage. The petitioners had simply failed in the first stage itself.

17. According to the respondent, in the impugned order, it has been stated that the petitioners are not a group company and associate of W.Q.M.P.L. But, the petitioners have asked for waiver under clause 2.2.8. It is stated that necessary document in this regard have been given by the petitioners herein, but they have not been properly appreciated by the respondent.

18. It is also complained that the respondent have taken up minor issues like a particular director had made the application, but had already resigned or who was in the process of contemplating to resign. These are issues about the status of a particular individual and whether he is a director or not a director. This is a fact to his exclusive knowledge and it is for him to answer and clarify whether he is a director or not a director. This Court can never examine that issue.

19. A reference can be made to clause Nos. 2.2.8, 2.2.9, 2.2.10, which are extracted below:-

"...2.2.8. An Applicant including any Consortium Member or Associate should, in the last (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant, Consortium Member or Associate, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Applicant, Consortium Member or Associate. Provided, however, that where an Applicant claims that its disqualification arising on account of any cause or event specified in this Clause 2.2.8 is such that it does not reflect (a) any malfeasance on its part in relation to such cause or event; (b) any wilful default or patent breach of the material terms of the relevant contract; (c) any fraud, deceit or misrepresentation in relation to such contract; or (d) any rescinding or abandoning of such contract, it may make a representation to this effect to the Authority for seeking a waiver from the disqualification hereunder and the Authority may, in its sole discretion and for reasons to be recorded in writing, grant such waiver if it is satisfied with the grounds of



such representation and is further satisfied that such waiver is not in any manner likely to cause a material adverse impact on the Bidding Process or on the implementation of the Project.

2.2.9. In computing the Technical Capacity and Net Worth of the Applicant/Consortium Members under Clauses 2.2.2, 2.2.4 and 3.2, the Technical Capacity and Net Worth of their respective Associates would also be eligible hereunder.

For purposes of this RFQ, Associate means, in relation to the Applicant/Consortium Member, a person who controls, is controlled by, or is under the common control with such Applicant/Consortium Member (the "**Associate**"). As used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

2.2.10. The following conditions shall be adhered to while submitting an Application:

(a) Applicants should attach clearly marked and referenced continuation sheets in the event that the space provided in the prescribed forms in the Annexes is insufficient. Alternatively, Applicants may format the prescribed forms making due provision for incorporation of the requested information;

(b) Information supplied by an Applicant (or other constituent Member if the Applicant is a Consortium) must apply to the Applicant, Member or Associate named in the Application and not, unless specifically requested, to other associated companies or firms. Invitation to submit Bids will be issued only to Applicants whose identity and/ or constitution is identical to that at pre-qualification;

(c) In responding to the pre-qualification submissions, Applicants should demonstrate their capabilities in accordance with Clause 3.1 below; and

(d) In case the Applicant is a Consortium, each Member should substantially satisfy the pre-qualification requirements to the extent specified herein."

The above conditions and requirements are clear. Either the petitioners satisfy them or do not satisfy them. There cannot be a half way stage. In the opinion of the respondent, the petitioners do not satisfy the requirements. The respondent has every right to state so.



20.I am interested in the authority of the respondent to reject a particular bid. That provision had been given in clause No.2.7, which is extracted below:-

"2.7-Right to accept or reject any or all Applications/Bids

2.7.1. Notwithstanding anything contained in this RFQ, the Authority reserves the right to accept or reject any Application and to annul the Bidding Process and reject all Applications/Bids, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

2.7.2. The Authority reserves the right to reject any Application and/or Bid if:

(a) at any time, a material misrepresentation is made or uncovered, or

(b) the Applicant does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Application.

If the Applicant/Bidder is a Consortium, then the entire Consortium may be disqualified/rejected. If such disqualification/rejection occurs after the Bids have been opened and the Highest Bidder gets disqualified/rejected, then the Authority reserves the right to:

(i) invite the remaining Bidders to match the Highest Bidder/submit their Bids in accordance with the RFP; or

(ii) take any such measure as may be deemed fit in the sole discretion of the Authority; including annulment of the Bidding Process.

2.7.3. In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof, including the concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Applicant, or the Applicant has made material misrepresentation or has given any materially incorrect or false information, the Applicant shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Applicant/SPV has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFQ, be liable to be terminated, by a communication in writing by the Authority to the Applicant, without the Authority being liable in any



manner whatsoever to the Applicant and without prejudice to any other right or remedy which the Authority may have under this RFQ, the Bidding Documents, the Concession Agreement or under applicable law.

2.7.4. The Authority reserves the right to verify all statements, information and documents submitted by the Applicant in response to the RFQ. Any such verification or lack of such verification by the Authority shall not relieve the Applicant of its obligations or liabilities hereunder nor will it affect any rights of the Authority thereunder."

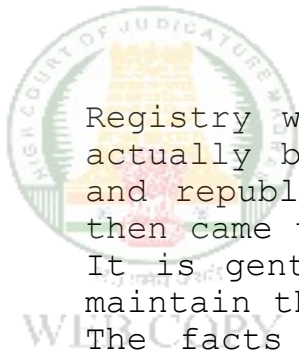
21. The terms have been disclosed to the petitioners. It gives the right to the respondent to reject any or all applications/bids. The petitioners had applied knowing that such a right was vested with the respondent. It had been stated that such a right can be exercised at any time, without any liability or any obligation for acceptance, rejecting without assigning reasons.

22. The respondent had issued the impugned proceedings stating that the petitioners had not qualified the first stage. Reasons thereof, are not to be examined by the Court. The report had followed a particular procedure. They have sought explanations from the petitioners. The petitioners have given the representations. Still the respondent have thought it fit that the bid of the petitioners should be rejected. The petitioners have not made a case for admission of the writ petition.

23. The writ petition should suffer an order of dismissal at the state of admission. It is dismissed.

24. Mr. Yashod Vardhan, learned Senior Counsel appeared on behalf of the respondent. However, the learned Senior Counsel was not called.

25. I must also express my opinion at the attitude of the counsel on record over this particular case. A mention was made about the listing of the writ petition even before it was filed. Thereafter, it transpires that two sets of papers were filed and therefore, the Registry after numbering and docketing had printed the cause list for the matter to be listed before the Division Bench on Friday/07.01.2022. The list was actually published. On 06.01.2022 in the late evening, when the counsels on record came to know that the matter is to be listed before the Division Bench, they raised a commotion and complained about that to the Registrar, stating that the matter should only be listed before a Single Judge. The proper procedure would have been to permit the listing to go ahead and address the Division Bench, when the matter was called in the morning, state the writ petition was wrongly posted and request the Division Bench to list it again before the Single Judge. In view of the vociferous attitude taken by the counsels on record, the



Registry withdrew the cause list of the Division Bench which had actually been published and removed this particular writ petition and republished the cause list of the Division Bench. The matter then came to be posted before me this morning in the admission list. It is gently reminded that the counsels on record have a duty to maintain the sanctity of the band which they are privileged to wear. The facts are recorded and I leave it to the conscience of the learned counsels to examine their particular attitude.

26.The Writ Petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

sjj

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

TO

V.O.Chidambaranar Port Trust

Represented by the Chief Mechanical Engineer,
Mechanical and Electrical Engineering Department,
Planning and Monitoring Division,
Tuticorin-628 004.

+2 CC to M/s.M/S.TATVA LEGAL CHENNAI, Advocate (SR-920[F]
dated 10/01/2022)

W.P. (MD) No.295 of 2022
10.01.2022

SK(CO)

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