IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2023

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU

W.A. Nos. 883, 1166 to 1169, 1176 and 1179 of 2022
and
C.M.P. Nos. 5926, 7391, 7392, 7394, 7396, 7397, 7429, 7432, 7443 and 7445 of 2022

W.A. No. 883 of 2022:-

1. The Managing Director,
   Tamil Nadu State Marketing Corporation Limited,
   Thalamuthu Natarajar Maligai, Egmore,
   Chennai – 600 008.

2. The District Manager/Sub-Collector,
   TASMAC Limited, Thiruvallur (East) District,
   No. 1, Bangalore High Road,
   Thiruvallur East. ... Appellants

-vs-

1. S.Jagannathan

2. P.Selvaraj

3. S.Ramanathan

4. Premkumar Joseph

5. S.Sakthivel

6. N.Saravanan

7. M.James

8. N.Dhayalan

9. S.Sakthivel

10. S.Sakthivel

11. K.Tamilalagan

12. V.Selvakumar

13. S.Sakthivel

14. A.Suresh

15. S.Sakthivel

16. S.Pasupathi

17. A.L.Nowsath Ali

18. K.Tamilalagan

19. S.Dharmaraj

20. A.Suthakar

21. T.Parthipan

22. K.Tamilalagan

23. V.Velayutham

24. M.Thondiraj

25. R.Yuvaraj

26. S.S.Parthiban
(R2 to R26 are impleaded vide order dated 26.07.2023
in C.M.P. No. 8421 of 2022 etc., batch) ... Respondents

Prayer:- Appeal under Clause 15 of the Letters Patent, 1865, to set aside the order passed by this Court in W.P. No. 27352 of 2021 dated 31.01.2022, insofar with respect to the findings, observations and directions which are against the Appellants herein are concerned, by allowing the Writ Appeal.

For the Appellants	:	Mr. R.Shunmugasundaram, Advocate General assisted by Mr. K.Sathish Kumar, Standing Counsel and Ms. A.G.Shakeena
For the Respondents	:	Mrs. A.L.Ganthimathi, Senior Counsel assisted by Mr. AR.Karthik Lakshmanan (for R1) Mr. K.M.Vijayan, Senior Counsel for M/s. K.M.Vijayan Associates (for R2 to R26)

W.A. Nos. 1166, 1168, 1169,1176 of 2022:-

S.Paramasivam	... Appellant in W.A. No. 1166 of 2022
V.Suresh	... Appellant in W.A. No. 1168 of 2022
S.Jagannathan	... Appellant in W.A. No. 1169 of 2022
R.Rajamani	... Appellant in W.A. No. 1176 of 2022
M.Kumar	... Appellant in W.A. No. 1179 of 2022

-vs-

1. The Managing Director,
   Tamil Nadu State Marketing Corporation Ltd.,
   Thalamuthu Natarajar Maaligai, Egmore,
   Chennai – 600 008.

2. The District Manager/Sub-Collector,
   Tamil Nadu State Marketing Corporation Ltd.,
   Thiruvallore (East) District,
   No. 1, Bangalore High Road,
   Chembarambakkam,
   Chennai – 600 123. ... Respondents in W.A. Nos. 1166, 1168, 1169, 1176 and 1179 of 2022

Prayer:- Appeal under Clause 15 of the Letters Patent, 1865, to set aside the order dated 31.01.2022 in W.P. Nos. 27352, 27357, 27361, 27605 and 27617 of 2021 and allow the Writ Appeals as prayed for.

W.A. No. 1167 of 2022:-

K.Mani ... Appellant

-vs-

1. The Managing Director,
   Tamil Nadu State Marketing Corporation Ltd.,
   Thalamuthu Natarajar Maaligai, Egmore,
   Chennai – 600 008.

2. The District Manager/Sub-Collector,
   Tamil Nadu State Marketing Corporation Ltd.,
   Thiruvallore (West) District,
   G-29 and 30, Industrial Estate,
   SIDCO Road, Kakalur,
   Tamil Nadu – 602 003. ... Respondents

Prayer:- Appeal under Clause 15 of the Letters Patent, 1865, to set aside the order dated 31.01.2022 in W.P. No. 27602 of 2021 and allow the Writ Appeal as prayed for.

For the Appellants	:	Mrs. A.L.Ganthimathi, Senior Counsel assisted by Mr. AR.Karthik Lakshmanan
For the Respondents	:	Mr. R.Shunmugasundaram, Advocate General assisted by Mr. K.Sathish Kumar, Standing Counsel & Ms. A.G.Shakeena

COMMON JUDGMENT

(Order of Court was made by P.D.AUDIKESAVALU, J.)

These intra-Court appeals invoking Clause 15 of the Letters Patent, 1865, arise out of the common order dated 31.01.2022 in W.P. Nos. 27352, 27357, 27361, 27602, 27605 and 27617 of 2021 passed by the Writ Court.

2. The parties are hereinafter referred as per their description in the said Writ Petitions for the sake of clarity and convenience.

3. In the State of Tamil Nadu, monopoly in retail vending of liquor has been conferred on the Tamil Nadu State Marketing Corporation Limited (hereinafter referred to as 'TASMAC' for short). Rules 3 and 4 of the Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003 (hereinafter referred to as 'the Rules' for short) made in exercise of

powers conferred under Sections 17-C, 17-D, 21, 22-D and 54 of the Tamil Nadu Prohibition Act, 1937, pertain to the grant of licence for retail vending of liquor in shops and bars for the whole of the State of Tamil Nadu. Rule 2(r) of the Rules defines 'shop' as the building in which the liquor is stocked and sold, and as per Rule 2(d) of the Rules, 'bar' means a place located within the shop or adjoining the shop used for consumption therein of liquor. While Rules 8 and 9 of the Rules pertain to the location of the shop, Rule 9-A inserted by G.O. Ms. No. 20, Home, P & E (VI) Department dated 29.03.2013 issued by the Government of Tamil Nadu, reads as follows:-

> *"**9-A. Grant of privilege to run the bar.**- The privilege of running bars may be granted to private parties by tender. The Board of the corporation may decide the upset price and other terms and conditions of tender, from time to time, with the prior approval of the Commissioner of Prohibition and Excise. The Corporation, as agency shall collect the tender amount from the successful tenderers and remit the same to the Government on or before the 25th of the following month and the Corporation may retain 1% of the amount so collected as agency commission."*

The said rule was later re-numbered as Rule 9-B by G.O. Ms. No. 17, Home, P&E (VI) Department dated 13.02.2022 issued by the Government of Tamil Nadu. Rules 10 and 11 of the Rules read as follows:-

> "***10. Location of Bar.–*** *(1) The bar shall lie within the shop or adjoining the shop.*
>
> *(2) The bar shall have a minimum plinth area of fifteen square metres. The requirement of plinth area for any bar exceeding fifteen square metres shall be decided by the Collector.*
>
> *(3) Every bar shall be housed in pucka building and no part of the bar shall be thatched either on the sides or on the roof. The bar room shall be sufficiently screened so that consumption of liquor is not visible from outside and shall also be provided with fans. Sufficient number of tables and chairs for the consumers to conveniently sit and consume liquor shall be provided. Such room shall not be used as a club or recreation room or for any other purpose whatsoever. No gambling or any kind of disorderly conduct in the shop shall be permitted.*
>
> *(4) Facilities such as drinking water and wash basin within the surroundings of each shop premises shall be provided and the*

shop, its premises and surroundings shall be always kept clean, hygienic and well lit.

(5) Every shop shall have a signboard in Tamil in front of the shop showing the number of the shop and details regarding authorization issued by the Corporation for the shop, the price of liquor in different sizes of bottles sold in the shop shall also be displayed. There shall also be displayed on the signboard the following slogans in bold letters about the evils of drinking and such other slogans as may be approved by the Commissioner.

"மது – நாட்டுக்கு, வீட்டுக்கு, உயிருக்கு கேடு"

"Liquor – ruins country, family and life"

11. Working hours of the shop and bar.– *No business shall be transacted at the shop and bar except during the hours as may be specified by the Government by order."*

4. The Managing Director of TASMAC had issued Circular No. A3/ 19/2014 dated 22.07.2014 relating to the instructions to be followed in granting of privilege to run the bar and the same is extracted below:-

*"TAMIL NADU STATE MARKETING CORPORATION LIMITED
CMDA TOWER-II, IV FLOOR, GANDHI IRWIN BRIDGE ROAD
EGMORE, CHENNAI – 600 008*

Circular No.A3/19/2014 *dated 22 July 2014*
Rc.No.P1/6411/2011

CIRCULAR

Sub :- TASMAC Ltd., - Bar Tender – inclusion of certain clauses in the Tender Documents and instruction to be followed while evaluating the bar tender and awarding the contract – reg.

Ref :- The office letter No.Rc.No.P1/6411/2011 dated 18.06.2015.

In continuation of this Office letter referred above, the following instructions are issued in connection with bar tender-

1. The tender applicants need not enclose the No objection Certificate, obtained from the bar premises owner, along with the bar documents.

2. The Tender Inviting Authority should evaluate the tenders only based on price bids received from the bidders subject to compliance of other, terms and conditions of the tender.

3. After evaluation of the price bids and selection of the highest bidder (H1), the Tender Inviting Authority should intimate, within 24 hours, the successful bidder (H1) about the selection *subject to submission of the following within seven days by the successful bidder-*

a) The rental agreement between the bar premises owner and the successful bidder;

b) Single demand draft for the security deposits; and

c) Single demand draft for the current month bard amount.

4. The rental agreement between the bar premise owner and the successful bidder must contain, inter-alia, the following clause-

> *"The Lessor unconditionally permits the lessee to undertake the business of running the bar including collecting empty bottles and selling of eatables during the period of lease agreement".*

5. If the successful bidder (H1) fails to furnish the rental agreement entered into with the bar premises owner within seven days, the Tender Inviting Authority may request the next highest bidder (H2) to match the offered/bid price of highest bidder (H1) and only upon acceptance of the same, award the contract to H2 bidder provided that H2 bidder furnish the rental agreement that he has entered into with bar premises owner.

6. If bidder fails to furnish the rental agreement to the Tender Inviting Authority, then the bidders will perpetually be banned/blacklisted to participate in subsequent tenders of TASMAC in addition to forfeiture of the Earnest Money Deposits of the bidders.

7. According to rule 2(d) of the Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003, "bar" means a place located within the shop or adjoining the shop used for consumption therein of 'liquor'. Thus, it is hereby clarified that the word "adjoining" means premises located immediate left side/right side/back side of the shop or immediate top floor, or immediate bottom floor to the shop and in all cases the bar premises walls should physically touch any wall of the retail vending shop.

8. The Tender Inviting Authority should not accept single offer and shall invariably re-tender wherever single/no offer is received for any shop.

9. The Tender Inviting Authority should invariably incorporate the following clauses in the bar tender document:-

> *"Bidder must enclose a copy of the first page of bank passbook of the bidder containing photo and present*

address of the bidder. This copy should be attested by either the concerned bank branch manager or notary public".

10. In so far tenders which are already published or under the process of awarding the contract, the Tender Inviting Authority must obtain a copy of first page of bank passbook of the bidder containing photo and present address of the bidder attested by either the concerned bank branch manager or notary public. The Tender Inviting Authority must cross check the details of bank document with the address proof and ID proof submitted by the bidders along with the tender documents.

Sd/-
Managing Director

To

All Senior Regional Managers,
All District Managers.

//By order//

Sd/-
Section Officer."

On a bare reading of the said circular, it is evident that it is intended to supplement the procedure to be followed under Rules 9-B and 10 of the Rules in locating the bar attached to a liquor vending shop and entering into rental agreement with the owner of that premises for running such bar.

5. TASMAC had published the Notification bearing Na. Ka. No. A3/3342/2021 dated 14.12.2021 calling for tender for grant of privilege to run the bar attached to some of its shops for the period from 01.01.2022 to 31.12.2023 without any condition insisting for production of No Objection Certificate/consent from landlord of the premises where the bar was proposed to be run by the applicant. Some of the existing holders of the privilege to run such bars attached to the shops had filed the Writ Petitions in W.P. No. 27352 of 2021 etc., batch questioning the absence of the said condition in the said tender notification. The Writ Court after referring to the provisions of the Tamil Nadu Prohibition Act, 1937, in the light of Article 47 of the Constitution of India, held as follows:-

> *"155. Statutorily, the respondents TASMAC have been given powers merely to engage itself in wholesale and retail sale of alcoholic liquor alone. It has not been given power to consumption of liquor in public or the so called Bar.*
>
> *156. The respondents TASMAC cannot be seen to encourage violation of Section 4-A of the Tamil Nadu Prohibition Act, 1937 even though the intention of introducing Section 4-A was to discourage persons from going to wet areas and return intoxicated in the dry areas when the prohibition was still in force.*

157. The consumption of alcohol/ liquor as law stands under the prohibition of the Tamil Nadu Prohibition Act, 1937 and the Rules made thereunder stands is permissible only in private space and/or in the recess of one's home.

158. If respondents TASMAC has to continue to encourage consumption of liquor in the so-called bar, the substantive law under the Tamil Nadu Prohibition Act, 1937 has to be amended taking note of the changes and in the light of the decision of the Hon'ble Supreme Court in State of Punjab Vs. Devans Modern Breweries, (2004) 11 SCC 26.

159. Since the practice of running a bar is in vogue since 2003 which not strictly in accordance with the provisions of the Tamil Naidu Prohibition Act, 1937 and Article 47 of the Constitution of India, the legislature may bring in suitable legislation to amend the Act.

160. The provision as it stands today does not permit a person to be in public in an intoxicated state. Therefore, the respondents TASMAC as a State Monopoly can only confine itself with "wholesale" and "retail sale" of alcohol/liquor and cannot be allowed to be seen actively encouraging a person to consume *alcohol in public space and violate the sanctions under the law.*

161. The practice of respondents TASMAC to allow mushrooming of "Bar" within the meaning of Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003 is contrary to the provisions of the Tamil Nadu Prohibition Act, 1937.

162. Till the law is amended, and proper rules are framed which are in tune and consistent with the provisions of the Tamil Nadu Prohibition Act, 1937, the respondents TASMAC shall refrain from granting licences/permits to the petitioners and others to do the support service or the business in the sale of short eats or collecting used bottles.

163. The respondents TASMAC may therefore take suitable steps to recall the tender called for instead of encouraging violation of law by its consumers. Commercial expediency to garner profit cannot justify the continuance of the Bar.

164. The respondents TASMAC is therefore directed to take steps to close down the Bars attached to the TASMAC shops wherever licences have been issued to a section of the bidders, within a period 6 months.

165. These Writ petitions are dismissed with the above observation. No costs. Consequently, connected miscellaneous petitions are closed."

In respect of the challenge made to the non-inclusion of the condition that No Objection Certificate/consent from landlord of the premises where the bar was proposed to be run by the applicant, the Writ Court held as follows:-

> *"149. At the same time, the petitioners also cannot arm twist the respondents TASMAC to give them business to them merely because they have a prior lease arrangement with the owners of the bar premises and that they may suffer loss. Even otherwise, the Tender conditions indicate that petitioners cannot complain. Relevant portion of the Tender Condition reads as under:-*
>
> > *"(i) If the circumstances required to close the liquor shop or changed to another place due to administrative reason, new tender will be floated cancelling the tender. If the liquor shop/ bar is closed, the tenderer cannot claim any compensation.*
> >
> > *(ii) If any change is made in the Government policy, this tender itself will be closed. The Government need*

not give any reason to intimate the tenderer. If the tender was ended, there is no need to pre-notice. If closed the liquor shop/bar, the tenderer cannot claim any compensation."

150. The attempt of the petitioners to strangulate and muzzle out the auction proceedings by the respondents TASMAC cannot be countenanced. Further, sale of liquor is a res extra commercium in the State of Tamil Nadu. It is an activity outside the scope of commerce. Consumption of alcohol/liquor is injurious to health and interferes with the safety welfare and health of society even though over a period of time, consumption of alcohol/liquor found social acceptance due to increase in the disposal income in the hands of individuals. [see ***Khoday Distilleries Ltd. -vs- State of Karnataka****, (1995) 1 SCC 574].*

151. In ***State of Punjab -vs- Dial Chand Gian Chand and Co.,*** *(1983) 2 SCC 503 : AIR 1983 SC 743), the Hon'ble Supreme Court held that a licensee who participates in the auction voluntarily and with full knowledge is bound by the bargain and the writ petition filed under Article 226 by such licensee in an attempt to dictate terms of the licence without paying the licence fee must fail. The Court held that highest bidder after acceptance* *of his bid cannot challenge the second auction on the ground of adverse effect on his business.*

152. Therefore, even on this count the petitioners cannot have grievance against the act of Respondent-TASMAC under Article 226 of the Constitution of India before this court. The petitioners cannot hold the respondents TASMAC to ranson by forcing latter to give privileges/licence to them for running the so-called bar by taking advantage of prior lease agreement/agreement with the owners of the premises where such bar are being currently operated.

153. Further, the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules made thereunder contemplate an alternate remedy for a redressal of their grievances.

154. It is therefore for the petitioners to approach the appropriate authority under the provisions of the aforesaid Act and the Rules made thereunder if there was any violation. Therefore, on this score also, there is no merits in these Writ petitions."

Aggrieved by the said decision, the unsuccessful Petitioners in W.P. Nos. 27352, 27357, 27361, 27602, 27605 and 27617 of 2021 have preferred the appeals in W.A. Nos. 1166 to 1169, 1176 and 1179 of 2022, while TASMAC has preferred the appeal in W.A. No. 883 of 2022 before this Court.

6. We have elaborately heard Mrs. A.L.Ganthimathi, Learned Senior Counsel assisted by Mr. AR.Karthik Lakshmanan, Learned Counsel and Mr. K.M.Vijayan, Learned Senior Counsel appearing for the Petitioners and Mr. R.Shunmugasundaram, Learned Advocate General assisted by Mr. K.Sathish Kumar, Learned Standing Counsel and Ms. A.G.Shakeena, Learned Counsel for the Respondents and perused the materials placed on record, apart from the pleadings of the parties.

7. At the outset, it must be recapitulated here that it is well settled that disposal of public property by the State or its instrumentalities partakes the character of a trust and the methods to be adopted for its disposal must be fair and transparent providing an opportunity to all the interested persons to participate in the process and the law in that regard has been lucidly explicated by the Hon'ble Supreme Court of India in ***Kasturi Lal Lakshmi Reddy –vs- State of Jammu & Kashmir*** [(1980) 4 SCC 1] in the following words:-

> *"10. …. There is increasing expansion of the magnitude and range of Governmental functions, as we move closer to the Welfare*

State, and the result is that more and more of our wealth consists of these new forms of property. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. The law has however not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights, while others have been given legal protection not only by forging procedural safeguards but also by confining, structuring and checking Government discretion in the matter of grant of such largess. The discretion of the government has been held to be not unlimited in that the Government cannot give largess in its arbitrary discretion or as its sweet will or on such terms as it chooses in its absolute discretion. There are two limitations imposed by law which structure and control the discretion of the Government in this behalf. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess.

11. So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though ordinarily a *private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contractor dealing with his property. But the Government is not free lo act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in and unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either best, it would be unconstitutional and invalid….*

14. …. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. ***The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so****. ….*

15. The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in ***Ramana Dayaram Shetty –vs- International Airport Authority of India*** *[(1979) 3 SCC 489] that the Government is not free like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion.* ***The law is now well established that the Government need not deal with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public, whether by way of giving jobs or entering into***

contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. *This rule was enunciated by the Court as a rule of administrative law and it was also validated by the Court as an emanation flowing directly from the doctrine of equality embodied in Article 14. ….”*

(emphasis supplied)

It would also be relevant to extract the legal position from the decision of the Hon'ble Supreme Court of India in ***Jagdish Mandal -vs- State of Orissa*** [(2007) 14 SCC 517], which reads as follows:-

“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 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 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."

(emphasis supplied)

The Hon'ble Supreme Court of India in ***Meerut Development Authority -vs- Association of Management Studies*** [(2009) 6 SCC 171] considered as to what is the nature of the rights of a bidder participating in the tender process and held as follows:-

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."

The Hon'ble Supreme Court of India in ***Michigan Rubber (India) Limited -vs- State of Karnataka*** [(2012) 8 SCC 216], after referring to earlier decisions, has laid down the law relating to interference of the Constitutional Courts in contractual matters as follows:-

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a

discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again,

interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

While reiterating the limited scope of judicial review in matters of relating to the award of contracts by the State and its instrumentalities, it has been observed in ***Maa Binda Express Carrier -vs- North-East Frontier Railway*** [(2014) 3 SCC 760] as follows:-

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. ***It is also fairly well settled that award of a contract***

is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. *So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."*

(emphasis supplied)

Again, in ***Bharat Coking Coal Limited -vs- AMR Dev Prabha*** [(2020) 16 SCC 759] the Hon'ble Supreme Court of India has restated the legal position on the maintainability of Writ Petition in interfering with the award of tender contracts by the State as follows:-

*"28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. [**Central Coalfields Ltd. -vs- SLL-SML (Joint Venture Consortium**), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106; **Siemens Aktiengeselischaft & Siemens Ltd. -vs- DMRC,** (2014) 11 SCC 288]. Phrased differently, the courts ought not to sit in appeal over decisions of executive authorities*

*or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. [**Air India Ltd. -vs- Cochin International Airport Ltd.** (2000) 2 SCC 617]. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).*

29. This position of law has been succinctly summed up in ***Tata Cellular -vs- Union of India** [**Tata Cellular -vs- Union of India**, (1994) 6 SCC 651] , where it was famously opined that: (SCC pp. 677-78, para 77)*

> *"77. … Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly*

will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, ***Wednesbury [Associated Provincial Picture Houses Ltd. -vs- Wednesbury Corpn.****, (1948) 1 KB 223 (CA)] unreasonableness.*

(iii) Procedural impropriety."

30. But merely because the accusations made are against the State or its instrumentalities does not mean that an aggrieved person can bypass established civil adjudicatory processes and directly seek writ relief. ***In determining whether to exercise their discretion, the writ courts ought not only confine themselves to the identity of the opposite party but also to the nature of the dispute and of the relief prayed for. Thus, although every wrong has a remedy, depending upon the nature of the wrong there would be different forums for redress.***

31. In cases where a constitutional right is infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. ***Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources.***

....

33. Such conscious restraint is also necessary because judicial intervention by itself has effects of time and money, which if unchecked would have problematic ramifications on the State's ability to enter into contracts and trade with private entities. Further, it is not desirable or practicable for courts to review the thousands of contracts entered into by executive authorities every day. Courts also must be cognizant that often-a-times the *private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on "public interest" has been evolved by this Court. [**Jagdish Mandal-vs- State of Orissa** (2007) 14 SCC 517, para 22].*

*34. **It is thus imperative that** in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)(g), **public interest too is demonstrated before remedy is sought.** Although the threshold for the latter need not be high, but it is nevertheless essential to prevent bypassing of civil courts and use of constitutional avenues for enforcement of contractual obligations."*

(emphasis supplied)

8. Having due regard to the aforesaid legal principles, it is beyond any pale of doubt from Clauses (1) to (6) of the Circular No. A3/ 19/2014 dated 22.07.2014 that they intend to safeguard the financial interests of TASMAC. Prudence expects of a participant in the tender to be vigilant enough to inspect the premises and satisfy himself about the availability of place and its suitability for running of the relevant bar attached to the respective shops before submitting his bid. In that process, the tenderer would have to necessarily communicate with the owner of the proposed

premises to grant him lease for the Bar in the event he turns out to be the successful bidder. In all probability, there may be only one place attached to the existing shop in the same building for running the eating house and collection of bottles satisfying the requirements of Rules 9-B and 10 of the Rules. This would obviously mean that all the tenderers for a particular Bar cannot be expected to simultaneously obtain consent / no objection certificate from the owner of the premises before submitting their bid in the tender. As it is only the successful bidder who would be running the eating house with facility of bar, TASMAC has rightly imposed the condition that though the tender applicant need not enclose 'no objection certificate' from the owner of the bar premises at the time of submitting his tender, the highest bidder would have to furnish the rental agreement entered with the bar premises owner within seven days from the time of intimation of his selection after evaluation of the bid. In the event of his failure to produce that essential document, the second highest bidder would be called upon to produce such rental agreement with the owner of the bar premises at the offered / bid price of the highest bidder. If the bidders did not produce such rental agreement from the owner of the bar premises, they would obviously forfeit their Earnest Money Deposit, which is adequate to recompense TASMAC for the expenditure incurred in conducting the tender and to take up re-tender process. The said procedure is certainly in public interest to safeguard the financial interests of TASMAC and in consonance with the mandate of Article 14 of the Constitution *viz-a-viz* the rights of the participants in the tender in the light of the principles laid down in the binding judicial pronouncements governing the controversy involved.

9. The claim of the Petitioners in the Writ Petitions that TASMAC must insist that before submitting his bid in the tender, the participant must also obtain the consent / no objection certificate from the owner of the bar premises, is fraught with oblique motives. It would be unrealistic to expect the owner of the bar premises to grant such consent / 'no objection certificate' in writing to all potential tenderers of such bar before they submit their bid. If such claim as made by the Petitioners is accepted, it would lead to an anomalous situation where participation in the tender would be confined only to the existing lessee or owner of the bar premises and all other persons willing to make a higher bid than them would be prevented from participating in that tender, which would militate against public interest defeating the purpose of TASMAC granting the privilege to private individuals to run bars attached to its shops at competitive price to augment its income leading to formation of cartel, which cannot be countenanced.

10. In such circumstances, we concur with the Writ Court that the absence of any condition to produce consent / 'no objection certificate' from the owner of the premises where the bar was proposed to be run by the applicant, in a business transaction with profit motive of generating revenue, does not suffer from any infirmity warranting interference by this Court.

11. At the same time, it is not possible to subscribe to the views expressed by the Writ Court on the right of TASMAC to grant privilege of running bars attached to its shops inasmuch as it was neither pleaded by any of the parties nor formed the subject-matter of the controversy involved in the Writ Petitions. Moreover, TASMAC did not have the opportunity to defend the validity of its policy of providing Bars attached to its shops for consumption of liquor by its customers before the Writ Court. This view taken is fortified by the decisions of the Hon'ble Supreme Court of India in ***V.K.Majotra -vs- Union of India*** [(2003) 8 SCC 40], ***State of Maharashtra -vs- Jalgaon Municipal Council*** [(2003) 9 SCC 731], ***Secretary to the Government -vs- M.Senthil Kumar*** [(2005) 3 SCC 451], ***Sanjay Kumar -vs- Narinder Verma*** [(2006) 6 SCC 467] and ***State of Jammu and Kashmir -vs- Ajay Dogra*** [(2011) 14 SCC 243]. Further, the directions issued to amend the law cannot be sustained in the light of the dictum laid down in ***Union of India -vs-***

K.Pushpavanam (Order dated 11.08.2023 in Civil Appeal No. 5049 of 2023) which reads as follows:-

> *"12. The law regarding power of the writ court to issue a mandate to the legislature to legislate is well settled. No Constitutional Court can issue a writ of mandamus to a legislature to enact a law on a particular subject in a particular manner. The Court may, at the highest, record its opinion or recommendation on the necessity of either amending the existing law or coming out with a new law. The law has been laid down in this behalf in several decisions including a decision of this Court in the case of* ***Supreme Court Employees' Welfare Association -vs- Union of India*** [(1999) 4 SCC 189] *and* ***State of Jammu and Kashmir -vs- A.R. Zakki*** [(1992) Supp (1) SCC 548]. *The only exception is where the Court finds that unless a rule making power is exercised, the legislation cannot be effectively implemented."*

Consequently, the impugned order insofar as it relates to the directions issued in para nos. 155 to 165 are concerned, are alone set aide and it is made clear that no view has been expressed by this Court on those aspects of the matter, meaning thereby that the challenge to the policy of the State in granting the privilege of running bar is left open. Since the period of the impugned tender from 01.01.2022 to 31.12.2023 would lapse shortly, it may not be appropriate to proceed further with the impugned tender notification and TASMC shall be at liberty to issue fresh tender for future periods following the prescribed procedure in accordance with law.

In the upshot, the appeals in W.A. Nos. 1166 to 1169 and 1176 and 1179 of 2022 are dismissed, and the appeal in W.A. No. 883 of 2022 is allowed and the Writ Petitions stand dismissed with the aforesaid observations. Consequently, C.M.P. Nos. 5926, 7391, 7392, 7394, 7396, 7397, 7429, 7432, 7443 and 7445 of 2022 are closed. There will be no order as to costs.

(S.V.G., CJ.) (P.D.A., J.)
05.09.2023

Index : Yes
Neutral Citation : Yes

vjt

To:

1. The Managing Director,
   Tamil Nadu State Marketing Corporation Limited,
   Thalamuthu Natarajar Maaligai, Egmore,
   Chennai – 600 008.

2. The District Manager/Sub-Collector,
   Tamil Nadu State Marketing Corporation Limited,
   Thiruvallore (East) District,
   No. 1, Bangalore High Road,
   Chembarambakkam,
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3. The District Manager/Sub-Collector,
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THE HON'BLE CHIEF JUSTICE
AND
P.D.AUDIKESAVALU,J.

vjt

W.A. Nos. 883, 1166 to 1169, 1176 and 1179 of 2022

05.09.2023