



W.P. No.7276/2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
13.03.2023	16.03.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO.7276 OF 2023

AND

W.M.P. NOS.7326 & 7327 OF 2023

Quality Property Management Service
Private Limited, rep. by its Director
Mr.Chinta Bharath
3rd Floor, No.86, Sudharshan Building
Pasumpon Muthuramalingam Thevar Salai
Nandanam, Chennai 600 018.

.. Petitioner

- Vs -

1. Tamil Nadu Textbook & Educational
Services Corporation
EVK Sampath Maaligai
DPI Campus, No.68, College Road
Chennai 600 006.

2. The Principal Secretary
To Government of Tamil Nadu
School Education Department
Secretariat, Fort St. George
Chennai 600 009.

.. Respondents



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Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari calling for the records pertaining to the impugned notice issued by the 1st respondent dated 27.02.2023 in Tender Ref. RC No.613/PUR-1/2023 insofar as it relates to Criteria III (3), (4) and (5) and quash the same.

For Petitioner : Mr. Murali Kumaran, SC, for
M/s. McGan Law Firm

For Respondents : Mr. J.Ravindran, AAG
Assisted by Ms. Varsha, Std. Counsel

ORDER

Challenging the eligibility criteria fixed by the respondents in the tender document calling for tender relating to facility management service, the present petition has been filed, alleging that the fixation of eligibility criteria is in violation of Article 14, 19 (1) (g) and is violative of the Tamil Nadu Transparency in Tenders Act, 1998.

2. It is the averment of the petitioner that the petitioner company is in the field of facility management service and is a company of repute, being



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awarded with contract for the upkeep and maintenance of 54 Government Hospitals and also the Integrated Hospital Facility Management Services at Osmania General Hospital.

3. It is the further averment of the petitioner that the 1st respondent invited tender for House Keeping, Sanitation and Security Services for the Government Schools. However, the conditions of eligibility prescribed in the tender document are of such a nature that it reveals that the tender conditions have not been prepared by the 1st respondent but by some other entity and that it is a reproduction of the tender floated by the Delhi Government.

4. It is the further averment of the petitioner that the eligibility conditions prescribed in the tender document, more particularly Criteria No. III (3), (4) and (5) does not create a level playing field, thereby the participation of MSME's are curtailed, as the conditions imposed are not only onerous, which are incapable of being fulfilled, more so, the period during which fulfillment is sought is during the pandemic period. It is the further



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averment of the petitioner that the bidding is intended only for big stakeholders in deprivation of MSME's in view of imposing restrictive eligibility conditions, which creates discrimination.

5. It is the further averment of the petitioner that the impugned tender conditions are devoid of crucial details and further the eligibility conditions have absolutely no nexus with the objective sought to be achieved. It is the further averment of the petitioner that the eligibility conditions imposed are not only arbitrary but is offending the mandate of Article 14 of the Constitution. It is the further averment of the petitioner that though the pre-bid queries were directed to be raised four days before the pre-bid meeting on 4.3.2023, the notification itself was published only on 27.2.2023, which gives only four days time to the intending participant in which time it is a practical impossibility for the intending participant to visit 6000 schools all over Tamil Nadu, which clearly reflect the pre-determined mind of the tender inviting authority.



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6. It is the further averment of the petitioner that the petitioner had successfully submitted his tender document on 4.3.2023. However, in view of the above fallacies in the tender document and the mala fide nature of the same, the present writ petition has been filed challenging the eligibility imposed in the tender conditions.

7. Learned senior counsel appearing for the petitioner submits that the impugned tender conditions stipulated by the respondents is patently illegal, arbitrary, untenable and beyond the statute, which severely jeopardizes the rights of the petitioner. The tender conditions stipulated by the respondents are without any basis and without adhering to the principles of natural justice, which affects the rights of the petitioner.

8. It is the further submission of the learned senior counsel that MSME's are thoroughly sought to be excluded from the purview of this tender through the aforesaid conditions stipulated in the eligibility criteria at Criteria No.III (3), (4) and (5). It is the further submission of the learned counsel that the bid being called for zone-wise not only arbitrarily affects the petitioner,



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but it also affects many MSME's, more so, when it is the duty of the Government to promote MSME's. It is the further submission of the learned senior counsel that had the respondent called for bid district-wise, the participation would not only be more, but it would have yielded more diversified bidders which would in turn have financial implications in the tender process, which would be in the interest of the respondent. However, the respondents, for reasons best known to them, have not only imposed onerous conditions, but also precluded many bidders from participating in the bid, which is against the Tamil Nadu Transparency in Tenders Act.

9. It is the further submission of the learned senior counsel that for bidding in one zone, the prescription of eligibility conditions being very onerous, the tender conditions stipulate that for bidding in all the four zones, the eligibility conditions should be multiplied by the number of zones clearly shows that the tender conditions are impractical and cannot be fulfilled and that the fulfillment of the conditions could be only by major conglomerates to the exclusion of the other bidders, which is against the essence of the Tamil Nadu Transparency in Tenders Act.



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10. Learned senior counsel appearing for the petitioner, to buttress his submissions, placed reliance on the following decisions :-

- i) *Reliance Energy Limited and Ors. – Vs - Maharashtra State Road Development Corporation Ltd. and Ors. (2007 (8) SCC 1);*
- ii) *State of Orissa and Ors. – Vs - Utkal Pharmaceuticals Manufacturers Association and Ors. (2016 (12) SCC 780);*
- iii) *Ajay Kumar Jain – Vs – State of Odisha (2017 SCC OnLine Ori 473);*
- iv) *JCB India Ltd. – Vs – State of Maharashtra (2018 SCC OnLine Bom 7942);*
- v) *JMC Projects (India) – Vs – Union of India (2022 SCC OnLine Bom 3641); and*
- vi) *Kamala Agencies – Vs – State of Odisha (2002 SCC OnLine Ori 2451)*

11. Per contra, learned Addl. Advocate General appearing for the respondents, relying upon the counter affidavit filed, submitted that the petitioner is estopped from challenging the tender conditions, which are very much within the realm of the Tender Inviting Authority (for short 'TIA') and



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the TIA has the right and privilege to fix the eligibility criteria, which cannot be put to challenge.

12. It is the further submission of the learned Addl. Advocate General that the State of Tamil Nadu has been divided into four zones and the total number of schools to be catered to in the four zones if a whopping 6155 for which more than 16500 personnel have to be engaged for maintenance operations. The contractual term having been fixed at three years and considering the enormity of the project, which is to cater to the students in all the schools by giving them the best of the conditions for studies, the conditions in the tender document have been framed so that the best services are made available by the successful bidders.

13. It is the further submission of the learned Addl. Advocate General that the eligibility conditions have been fixed keeping in mind the large scale nature of the projects, which requires minimum turn over and previous experience in jobs of the nature having been rendered by the bidders. It is the further submission of the learned Addl. Advocate General that the complexity



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and stringent tender conditions would in no way be termed to be a predetermined proposal on the part of the respondent as the said allegations are made without any basis. Merely because the petitioner is not satisfying the aforesaid eligibility criteria cannot be a ground to interfere in the tender process.

14. It is the further submission of the learned Addl. Advocate General that the petitioner has already submitted his bid on satisfying himself that it fulfills the eligibility criteria. That being the case, the present writ petition is nothing but an act on the part of the petitioner to prejudice the case against the respondent to obtain favourable orders with regard to the tender. It is the further submission of the learned Addl. Advocate General that the every criteria in the tender is specific and precise and it is fully in consonance with the Tamil Nadu Tender Transparency Act and merely because the tender conditions are not to the liking of the petitioner cannot be the basis to interfere with the conditions imposed by the respondent.



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15. It is the further submission of the learned Add. Advocate General that the contention that the tender conditions are tailor-made and arbitrary is wholly unsustainable and that there is no violation of natural justice. It is the further submission of the learned Addl. Advocate General that the Doctrine of level playing field would stand attracted only insofar as persons falling within the eligibility criteria and the level playing field cannot be stretched to all the bidders irrespective of their standing. Insofar as the persons who fall within the eligibility criteria, the said entities would be in a position to participate in the tender process and evaluation would be done on the basis of least cost method. Therefore, the contention of the petitioner that the concept of level playing field has not been adhered to is nothing but a figment of imagination on the part of the petitioner.

16. It is the further submission of the learned Addl. Advocate General that the petitioner cannot seek modification of the tender conditions by relying on some other tender floated by the Tamil Nadu Medical Services Corporation cannot be accepted for the simple reason that comparison



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between two entities, which are not equivalent, is impermissible and every entity is distinct and cannot be compared with one another.

17. It is the further submission of the learned Addl. Advocate General that even in respect of MSME's, the turn over limit has been refixed by the Government through requisite gazette notification and, therefore, the claim of the petitioner with regard to discrimination does not hold water.

18. It is the further submission of the learned Addl. Advocate General that the eligibility qualifications prescribed are strictly commensurate with the quantum of service sought to be obtained from the bidders under the present tender and, therefore, the petitioner cannot have any qualms with regard to such prescription. It is the further submission of the learned Addl. Advocate General that it is for the eligible bidders to bid for one or more zones and if they are eligible to apply for more than one zone, upon fulfillment of the criteria, the bidders can very participate in the tender process.



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19. However, it is fairly submitted by the learned Addl. Advocate General that insofar as the multiplying factor of number of zones for arriving at the eligibility criteria, the prescription has been given taking into consideration the enormity of the project. The eligibility criteria in no way excludes the MSME's from participation.

20. It is the further submission of the learned Addl. Advocate General that the petitioner has challenged the tender conditions, which is purely within the purview of the TIA and this Court, in exercise of judicial review shall not interfere with the powers of the TIA in fixing conditions, which are necessary for the bidders to successfully complete the project. It has been the consistent view of the Courts that the conditions relating to tender are clearly within the domain of the TIA and if the prayer of the petitioner is acceded to, it is nothing but negating the entire tender process, which would cause great prejudice and irreparable hardship to lakhs of school students across the State. The health and hygiene in the school campus is very essential for a conducive atmosphere for the students to showcase their talents in the academic stream and any interference, as sought for by the



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petitioner would be detrimental and delay the project, thereby, causing untold hardship to the student community. Accordingly, he prays for dismissing the present petition.

21. In support of his submission, learned Addl. Advocate General placed reliance on the decision of the Apex Court in ***Airport Authority of India – Vs – Centre for Civil Aviation Policy, Safety & Research (CAPSR) &Ors. (2022 LiveLaw (SC 814).***

22. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the decision relied on by the respondents.

23. In ***Uflex Ltd. - Vs – Government of T.N. &Ors. (2021 SCC OnLine SC 738)*** the Apex Court has broadly visualised about the process of tender and the limitations in judicial review in the said process and the same is quoted



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hereunder by this Court before embarking upon analysing the merits and demerits of the contentions put forth by the parties :-

“The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and



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not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "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.

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in Michigan Rubber v. State of Karnataka as under:

"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



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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 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 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



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person can claim fundamental right to carry on business with the Government.”

24. It is evident from the above ratio laid down by the Supreme Court, that fairness in action by the State, non-arbitrariness in essence and substance is the heartbeat of fair play, which are the basic requirements of Article 14 and that judicial review should not be for whimsical or ulterior purpose so long as the State acts are within the bounds of reasonableness. The Supreme Court had gone on to tabulate the various factors that govern the tender process and the yardstick that needs to be adopted and the leeway that needs to be given to the State in the discharge of its constitutional obligations by resorting to fair play and showing bona fide intent.

25. In the case of ***Tata Cellular – Vs – Union of India (1994 (6) SCC 651)***, the Supreme Court has elucidated the following principles :-

“94. The principles deducible from the above are:

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



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(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 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 reasonableness (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."*

(Emphasis Supplied)



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26. Yet again, the Supreme Court in ***Silppi Constructions Contractors – Vs – Union of India &Anr. (2020 (16) SCC 489)*** has succinctly pointed out that *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. 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 and the Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.*

27. A careful perusal of the ratio laid down on the question of appreciation and interference by the Courts in matters relating to contracts/tenders, it is clear that the Courts should be very much circumspect, while interfering in the tender process, as it is a qualitative analysis to be made by experts in the particular field. Suffice for the Court to see that no unreasonableness, arbitrariness, bias or mala fides has crept in, in the tender process. The Supreme Court has also cautioned that the awarding



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of contracts by the Government and the Public Sector should not be made a cumbersome exercise in a long drawn out litigative battle.

28. Keeping the aforesaid ratio laid down by the Supreme Court in mind, even a cursory perusal of the present petition reveals that all is not well with the petitioner. The petitioner is questioning the eligibility criteria that has been imposed as part of the tender conditions. The grievance expressed by the petitioner with regard to the eligibility conditions stems from the fact that only large corporations/establishments could partake in the tender process, thereby limiting the chance of medium and micro establishments from coming out successful.

29. It is true that fair play is the essence of any tender. But that fair play should be between equal entities and unequal entities cannot come and claim that the doctrine of fair play has been nullified. The eligibility criteria has been formulated by the TIA keeping in mind various factors, which cannot be gone into by this Court. As aforesaid by the Supreme Court, it is within the realm of the TIA to fix the terms of the tender and it is not open to judicial



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scrutiny so long as the same is not actuated by fraud and malice. The principles elucidated in ***Michigan Rubber (India) Ltd. – Vs – State of Karnataka (2012 (8) SCC 216)***, has been succinctly dealt with by the Supreme Court in *Uflex case*, wherein it has been laid down that fixation of value of the tender is purely within the purview of the executive and in the matter of formulating tender conditions, greater latitude is required to be conceded to the State authorities and unless the action is found to be malicious and is a misuse of statutory powers, interference by the Courts are not warranted.

30. In the case on hand, the TIA, based on the requirements and the enormity of the tender, is well within its rights to impose restrictive conditions, which cannot be the subject matter of judicial review so long as the doctrine of fair play is followed. Merely because certain conditions imposed in the tender are not to the liking of the bidders, cannot be the basis for the Court to interfere with the tender process.

31. Further, it is to be pointed out that even after the opening of the bids, it is the decision of the TIA to accept the tender or award the contract,



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which is reached by process of negotiations through several tiers. When the TIA, conscious of the enormity of the tender, has thought it fit to fix certain eligibility criteria, which does not suffer the vice of arbitrariness or perversity, the Courts should not normally interfere with the tender process, lest quashing such decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

32. In the case on hand, the TIA has divided the State into four zones and has prescribed eligibility criteria for the bidders and it is open to the bidders to either bid for a single zone or multiple zones and if the bid is for multiple zones, then the eligibility criteria has been fixed to be in multiples of the basic eligibility criteria per zone. The eligibility criteria has been fixed by TIA on the basis of the reasoning that it involves more than 6,000 schools throughout the State. The vastness of the work requires that the bidder, who bids and comes out successful in the bid should be in a position to discharge the duties assigned to it. Failure of the bidder to proceed further for reason of lower eligibility would have a telling impact on the work, which has been entrusted with the bidder and would also lead to budgetary ramifications at a



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later point of time. Further, the failure to execute the work would also hamper the functioning of the school and the students would be put to much hardship as the health and hygiene, which are sought to be maintained at a balanced and high level in the schools would suffer great impact, which would reflect in the health of the students.

33. The enormity of the work, as could be seen from the tender document clearly shows that the eligibility criteria fixed by the TIA cannot be said to be unreasonable. Apprehension of the petitioner cannot be a ground to hold that the tender conditions fall foul and requires interference. The apprehension of the petitioner that the tender conditions have been made onerous only to avoid competition on the part of MSME's cannot be the basis for this Court to infer that the TIA had acted with malice. The TIA is the best judge of the requirements and on introspection, if the TIA had imposed the aforesaid conditions of eligibility as mandatory for the purpose of participating in the tender, on the strength of the allegation of the petitioner, in the absence of any proof to substantiate the said allegations, the



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conditions laid out in the tender document cannot be said to be onerous or is against the doctrine of fair play.

34. Further, it is to be pointed out that the petitioner had submitted its tender document. It is not the case of the petitioner that it does not fulfil the criteria or that there are no persons, barring the predetermined entity by the TIA, who alone fulfils the criteria.

35. The contention of the petitioner that the tender should have been called for district-wise, which would have encouraged more participation cannot be accepted for the reason that the manner in which a tender should be called for is for the TIA to decide and this Court cannot substitute its views, on the insistence of the petitioner that district-wise calling of tender would have been more suitable. The TIA, clubbing districts together, has formulated four zones and a bidder is eligible to bid either for a particular zone or for all the zones or selected zones, upon fulfilling the eligibility criteria as mandated in the tender document. Therefore, all the entities, who satisfy the eligibility



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criteria, can very well participate and there is no exclusion of any entity from the purview of submitting tender document.

36. Decision in *Reliance Energy case*, which is relied on, on behalf of the petitioner is a case that relates to discrimination and violation of Article 14, but the present case does not fall within the four corners of the said decision as discrimination and violation is alleged, but not made out, as mere apprehension of the petitioner and alleging discrimination and violation would not suffice to quash the tender notification and, therefore, the said decision cannot support the case on hand.

37. Insofar as the decision in *Utkal Pharmaceuticals case* is concerned, the said decision also does not lend any support to the case of the petitioner. The said case is mainly on the issue of discrimination being made out in the tender process in which, without empirical data available before the High Court, the tender notification was quashed. However, in the case on hand, the extent of the project is writ large in the number of Government Schools and the extent of the square feet that is required to be catered to by the



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bidder. The calculation of manpower as also other factors have been taken into consideration, which has necessitated the districts being brought within four zones and eligibility criteria has been set. The necessity for bring the districts within a particular zone is only for the purpose of avoiding multiplicity of litigations, which clearly shows the mind of the TIA in drafting the tender conditions. Therefore, it cannot be said that there is no data available and there is proper application of mind on the part of the TIA. Further, as stated above, mere allegation of discrimination that is canvassed by the petitioner is not sufficient to hold that there is discrimination in the absence of any convincing material.

38. The other decisions which have been relied on by the learned senior counsel for the petitioner as aforesaid, though may have persuasive value, but cannot be a binding precedent for this Court to form the basis on which benefit can be given in favour of the petitioner. The TIA has applied its mind to all the facets of the matter and has drafted the eligibility conditions keeping in mind the totality of the project and, therefore, the conditions imposed, in no way, could be termed onerous, discriminatory or arbitrary.



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39. From a broad conspectus of all the facts, as evidenced above, the overall stand of the petitioner as is reflected in the petition is mere apprehension and apprehension cannot partake the character of proof and in the absence of any material to substantiate the stand of the petitioner, this Court, on the apprehension of the petitioner cannot strike down the tender document in exercise of its power of judicial review under Article 226 of the Constitution. The present writ petition is bereft of merits and is liable to be dismissed.

40. For the reasons aforesaid, the present writ petition fails and the same is dismissed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

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Internet : Yes / No

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To

1. Tamil Nadu Textbook & Educational
Services Corporation
EVK SampathMaaligai
DPI Campus, No.68, College Road
Chennai 600 006.

2. The Principal Secretary
To Government of Tamil Nadu
School Education Department
Secretariat, Fort St. George
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M.DHANDAPANI, J.

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**PRE-DELIVERY ORDER IN
W.P. NO.7276 OF 2023**

**Pronounced on
16.03.2023**



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