



W.P. No. 29317 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.11.2023

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 29317 of 2023

and

W.M.P. No. 28945 and 28946 of 2023

M/s. Sumathi Constructions,
Represented by its Proprietor Mr.R.Chandrakannan,
"Thangaramaiya Building,
No. 17/1, Adam Sahib Street,
Royapuram, Chennai – 600 013.

... Petitioner

-VS-

1. The Government of Tamilnadu
Represented by Additional Chief Secretary to Government,
Industries, Investment Promotion & Commerce Department,
Secretariat, Fort St. George, Chennai – 600 009.
2. The Deputy Secretary to Government,
Finance Department,
Secretariat, Fort St. George, Chennai – 600 009.
3. The Chairman,
Tamil Nadu Small Industries Development Corporation,
Garment Complex-II, Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai – 32.
4. The Managing Director,
Tamil Nadu Small Industries Development Corporation,
Garment Complex-II, Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai – 32.
5. The Superintending Engineer (In charge),
Tamil Nadu Small Industries Development Corporation,
Garment Complex-II, Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai – 32.



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6. Shri. Somasundaram,
Working as Superintending Engineer (In charge),
Tamil Nadu Small Industries Development Corporation,
Garment Complex -II, Thiru.Vi.Ka. Industrial Estate.
Guindy, Chennai – 32.

Respondents

...

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, 1950, praying to issue a Writ of Certiorarified Mandamus, to call for the entire records relating to impugned Tender Notice No. 5600(TN-5)SE/DB/2023 dated 30.08.2023 of the 5th Respondent and quash the same and consequently direct the Respondents to proceed afresh with the said Tender in accordance with law.

For Petitioner : Mr. N.Nithianandam

For Respondents : Mr. S.J.Mohamed Sathik (for R1 and R2)
Government Advocate

Mr. K.Madhu (for R3 to R6)

ORDER

Heard Mr. N.Nithianandam, Learned Counsel appearing for the Petitioner, Mr. S.J.Mohamed Sathik, Learned Government Advocate appearing for the First and Second Respondent and Mr. K.Madhu, Learned Counsel appearing for the Third to Sixth Respondent and perused the materials placed on record, apart from the pleadings of the parties.



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2. The Petitioner, who had participated in the tender pursuant to the Tender Notification in Tender Notice No. 5600(TN-5)/SE/DB/2023 dated 30.08.2023 issued by the Fifth Respondent has challenged clauses 6 and 7 of the minimum eligibility criteria in that tender in this Writ Petition, which reads as follows:-

“6. Verification Certificate should be obtained from the Superintending Engineer, TANSIDCO Stating present working condition of plants & machineries by producing original documents for the ownership of Central Hot Mix Plant, Paver Finisher, Road Roller and other machineries on or before 08.09.2023.

7. Verification certificate for all other pre-qualification documents should be obtained from the Superintending Engineer, TANSIDCO by producing original and photo copy of documents on or before 08.09.2023.”

According to the Petitioner, the requirement of producing those Verification Certificates is arbitrary and in violation of the provisions of Tamil Nadu Transparency in Tenders Act, 1998 (hereinafter referred to as 'the Act' for short) and the rules made thereunder, apart from preventing the Petitioner and other



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eligible applicants from participating in the tender process, which prejudicially affects his right to carry on business under the tender.

3. In response, the Sixth Respondent has filed Counter-Affidavit dated 21.11.2023 explaining that the impugned clauses were introduced in the tender with the *bonafide* intent to make proper evaluation of the quality of previous works carried out by the applicants in public interest, which cannot be assailed.

4. It has been held by the Hon'ble Supreme Court of India in ***G.J. Fernandez -vs- State of Karnataka*** [(1990) 2 SCC 488] that the Tender Issuing Authority has the right to punctiliously and rigidly enforce the conditions and stipulations in a tender notice and if a tenderer does not strictly comply with that requirement, it is open to the Tender Issuing Authority to decline to consider that tenderer for the contract and if such tenderer comes to Court challenging such action, relief has to be declined. The Hon'ble Supreme Court of India in the decision in ***Jagdish Mandal -vs- State of Orissa*** [(2007) 14 SCC 517], has lucidly explicated the scope of judicial review in matters relating to award of contract by the State and its instrumentalities in the following words:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and



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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



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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



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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



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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 above stated 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*



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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



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discernible reason and not whimsically for any ulterior purpose.

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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



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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



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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



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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 Aktiengesellschaft & 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



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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:



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- (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.*



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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*



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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)

Having regard to the aforesaid legal principles, it is beyond any pale of doubt



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that prudent expects of a participant in the tender to be vigilant enough to obtain the Verification Certificates from the concerned authority in proof of its compliance and produce it along with the tender and the said procedure is certainly intended to safeguard the public interest, which is paramount. It is borne out from the materials placed on record that the tender was floated on 30.08.2023, but the Petitioner had made the application for Verification Certificates only on 07.09.2023, when the last date for submitting the tender fell on 08.09.2023. Further, the Writ Petition challenging the requirement to produce verification certificates in the tender has been filed on 04.10.2023, a month after the last date for submission of tender, which reflects the lack of *bonafides* of the Petitioner to participate in the tender. Moreover, the Petitioner had not produced the original documents, which were required by the concerned authority, to issue the verification certificates to him. In any event, the Petitioner has not whispered, much less established, as to how the said requirement is in violation of the provisions of the Act and the rules made thereunder, in the absence of which the public law remedy of Writ Petition could not be invoked by him.

5. Viewed from that perspective, there does not appear to be any acceptable



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reason to hold that clauses 6 and 7 of the impugned tender is invalid or any infirmity in the decision-making process of the concerned authority warranting interference by this Court in the exercise of discretionary powers of judicial review under Article 226 of the Constitution.

In the result, the Writ Petition is dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

23.11.2023

Index: Yes/No

NCC: Yes/No

Note: Issue order copy by 24.05.2024.

nsl/vjt

To

1. The Government of Tamilnadu
Represented by Additional Chief Secretary to Government,
Industries, Investment Promotion & Commerce Department,
Secretariat, Fort St. George, Chennai – 600 009.
2. The Deputy Secretary to Government,
Finance Department,
Secretariat, Fort St. George, Chennai – 600 009.
3. The Chairman,
Tamil Nadu Small Industries Development Corporation,
Garment Complex-II, Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai – 32.
4. The Managing Director,



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Tamil Nadu Small Industries Development Corporation,
Garment Complex-II, Thiru.Vi.Ka.Industrial Estate,
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5. The Superintending Engineer (In charge),
Tamil Nadu Small Industries Development Corporation,
Garment Complex-II, Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai – 32.



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