IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2023

CORAM :

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.Nos.30741, 30746, 30751, 30753, 30756, 30761 and 30765 of 2023
& W.M.P.Nos.30407, 30414, 30387, 30388, 30390, 30392, 30395, 30397, 30402, 30403, 30406, 30415, 30418 and 30419 of 2023

<u>In W.P.No.30741 of 2023 :-</u>

P.Arunkumar .. Petitioner

Versus

1. The District Collector,
   Chennai District,
   Chennai.

2. The Commissioner of Prohibition of Excise
   Ezhilagam,
   Chepauk, Chennai - 600 005.

3. The Managing Director,
   Tamil Nadu State Marketing Corporation Ltd.,
   4th Floor, Thalamuthu Nadarasan Maligai,
   Egmore, Chennai - 8.

4. The District Manager (Chennai South),
   TASMAC Ltd.,

IMFS depot, Banglore High Road,
Chembarambakkam, Thiruvallur - 600 123. .. Respondents

Prayer in W.P.No.30741 of 2023 : Writ Petition filed under Article 226 of the Constitution of India, pleased to issue a Writ of Certiorari calling for the records relating to the Tender Notification of the 4th respondent in Tender Reference No.A3/297/2023, dated 07.10.2023 calling for tenders for the grant of the right to collect empty bottles and sell eatables in the bars attached to the TASMAC shops Chennai South District for a period from 01.11.2023 to 31.10.2025 and quash the same.

For Petitioner (in all W.Ps)	: Mr.V.Raghavachari, Senior Counsel and Mr.Avinash Wadhwani
For Respondents (in all W.Ps)	: Mr.S.Yashwanth, Additional Government Pleader, for RR-1 and 2
	: Mr.J.Ravindran, Additional Advocate General Asstd. by Mr.K.Sathish Kumar, for RR-3 and 4

COMMON ORDER

(Order made by the Hon'ble Mr.Justice D.Bharatha Chakravarthy)

These Writ Petitions are filed challenging the tender notification issued by the Tamil Nadu State Marketing Corporation Limited by inviting online tenders / bids in two cover system (Cover I-Technical bid and Cover II - Financial bid) from individuals for selection of Bar Eatable Contractors for the sale of eatables and to collect empty bottles in the bars attached to the retail vending shops of TASMAC Limited, for a period of two years from 01.11.2023 to 31.03.2025 in respect of different districts. Since the grievance of the petitioners are identical, these Writ Petitions are taken up and are disposed of by this common order.

2. The petitioners are desirous of participating in tender and running the business of conducting the bars for and on behalf of the TASMAC. However, without any clarity, the tender notification calls for as if it is inviting contractors for supply of eatables and collection of empty bottles alone. When already the TASMAC is running bar through licensees, inviting one more tender in respect of the above two purposes alone is not in the realm of the respondents inasmuch as Rule 4 of the *Tamil Nadu Liquor Retail Vending (in Shops and Bars) Rules, 2003* (hereinafter referred to as '*Rules*') is concerned. The tender clauses unreasonablyfurther stipulate getting of No Objection Certificate and Rental Agreement from the landlord for the bar premises. It

will result in formation of cartel and defeat the very purpose of calling for tender. No details of bar premises are furnished. Not even the particulars as to the shop's location etc., are there in the tender notification. The tender conditions violate various provisions contained in the *Rules*. Therefore, they pray that the tender notification be quashed.

3. The case is resisted by the respondents by filing a common counter-affidavit. It is the case of the respondents that as per Section 17-C (1-A) of the *Tamil Nadu Prohibition Act, 1937*, the third respondent Corporation which is a wholly owned and controlled by the State Government, has the exclusive privilege of supply of Indian made foreign spirits and foreign liquor for the whole of the State of Tamil Nadu. So also the exclusive privilege of selling by retail is granted to it under Section 17-C (1-B). The *Rules* provide for grant of license to the third respondent Corporation *vide* Rule 4. Rule 9B also grants privileges to run the bar. The bar is defined as the place of consumption of alcohol. The proposed / existing bars which are attached / adjacent to the TASMAC Retail Vending Shop is only to provide an enclosed space for the purchasers of liquor in the TASMAC shops to sit and consume

the same. No sale of liquor is made in the bar. Therefore, throughout the State of Tamil Nadu, across various districts, now, wherever the existing bar contracts are expiring and in some of the new places identified, the bar contracts are sought to be newly given. It is incorrect to state that the particulars are not given. The shops in respect of each and every district is uploaded in the website and forms part of the tender documents. The corrigendum came to be issued only because of the interim orders granted by the Court and therefore, the dates have to be extended.

4. We have heard *Mr.V.Raghavachari*, learned Senior Counsel, *Mr.Avinash Wadhwani*, learned Counsel appearing on behalf of the petitioners, *Mr.S.Yashwanth*, learned Additional Government Pleader appearing on behalf of the respondent Nos.1 and 2 and *Mr.J.Ravindran*, learned Additional Advocate General, assisted by *Mr.K.Sathish Kumar*, learned Counsel appearing on behalf of the respondent Nos.3 and 4.

5. *Mr.V.Raghavachari*, learned Senior Counsel appearing on behalf of the petitioner would submit that the sale of eatables and collection of bottles

do not have any enabling provision in the *Rules*. The *Rules* grant exclusive privilege only for retail vending shops and bars. While so, when the bar is already run, appointing one more set of contractors for selling eatables and collecting bottles alone is beyond the jurisdiction of the respondents. The same is in clear violation of Rules 4, 5, 9, 13 and 14 of the *Rules*. He would further submit that the very purpose of issue of tender is to get a competitive price to the third respondent Corporation. Now, if the successful bidder is to get No Objection Certificate and Rental Agreement from the landlord, then it would only be the landlord who would be picking and choosing who runs the bar. Ultimately, as per the existing tender conditions, the respondent Corporation has to go L1, thereafter, L2, L3 etc., until the person chosen by the landlord is appointed as the successful tenderer. This only promotes the cartel and strikes at the very root of the tender process.

6. He would further submit that repeated corrigenda have been given. The same amount to adding to the tender and therefore, if the original tender conditions have become unworkable, the respondents ought to have issued fresh tender. He would further submit that the reliance placed by the

judgment in the judgment of the first bench of this Court in W.A.Nos.374 of 2023 etc., (batch cases) is misplaced. The judgment of the first bench of this Court should not be read in the manner as proposed by the respondents. As a matter of fact, it was not considered that the place itself was not identified before the tender. A reading of paragraph Nos.18 and 19 of the judgment would only run counter to the stand of the respondents and the tender conditions have to be held illegal.

7. *Mr.Avinash Wadhwani*, learned Counsel further supplementing the arguments of the learned Senior Counsel would submit that even the tender conditions, mentioning the scheme of buyback, do not even specifically mention as to in which district the same is in force. The shops or the places where the new bars are proposed to be opened is not at all mentioned. If the corrigendum and the extension of date has the effect of changing the date of opening of the tender and place of tender etc., then the same is violative of the the *Tamil Nadu Transparency in Tenders Act, 1998* and the Rules framed thereunder.

8. Per *contra*, *Mr.K.Sathish Kumar,* learned Counsel appearing on behalf of the respondent Nos.3 and 4 would submit that the *Rules* clearly define the bar as the place of consumption. In the scheme of things as run by the TASMAC though it is termed as bar, there is no sale of liquor in the bar. The third Corporation runs the bar or proposes to run the bar adjacent or appurtenant to the existing TASMAC shops only to prevent public nuisance and to provide place for the purchasers of liquor to sit and drink. So as to facilitate this, bar would be an enclosed place providing tables and chairs and the licensees / successful tenderers would be supplying / selling eatables to them and also collect empty bottles which are either left over or handed over to them as a part of the buyback scheme.

9. The tenderer can sell bottles at appropriate prices by themselves and the license fee is calculated or arrived at and will be accepted in the tender by also taking into account the profit which they will make by selling bottles. The tender does not in any manner violate the orders of this Court. As a matter of fact, the question relating to obtaining of No Objection Certificate and Rental Agreement from the landlord is already settled by the order of the First

Bench of this Court in W.A.Nos.374 of 2023 etc., (batch cases). He would submit that since the dates have been extended, ultimately, the necessary adjustments in respect of date of commencement of tender etc., will be decided by the respondent authorities and in that process, no vested right would be violated.

10. We have considered the rival submissions made on either side and perused the material records of the case.

11. The primary argument on behalf of the petitioners is that the responsibility of entering into a rental agreement with landlord cannot be fixed on them and the same would render the very process of tender a futile exercise. It is seen that the scheme of things, as proposed by the third respondent Corporation, is that the shops are mentioned in the schedule. Now, these bars have to be located in the same building or any other adjacent building. Therefore, the bidders are free to inspect site of the shops and bid for the same. It is their look out to find suitable premises in the same building or in the adjacent buildings and to enter into lease with the landlord. In this regard, if

the third respondent Corporation itself has to look around and arrange for rented premises, then being the State owned Corporation, they have thrown limitations and therefore, there is hardship. When all the bidders, even before the bid is opened, were directed to get No Objection Certificates from the landlords, that again created hardship as even at the pre-bid stage, the landlords will be in a commanding position. Only considering of the above, the first bench of this Court in W.A.Nos.374 of 2023 etc., (batch cases) has passed the following order :-

> " **17.** Having due regard to the aforesaid legal principles, the validity of Clauses (1) to (6) of the said Circular No. A3/19/2014 dated 22.07.2014 issued by the Managing Director of TASMAC would have to be examined. As already noticed, the validity of the Circular No. A3/19/2014 dated 22.07.2014 issued by the Managing Director of TASMAC has been upheld by this Court also in ***G.Sakthivel -vs- Managing Director, Tamil Nadu State Marketing Corporation (TASMAC), Chennai*** (Order dated 28.03.2018 in W.P. (MD) No. 1519 of 2018). 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.

18. 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.
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> **19.** It is needless to add here that if there are any practical difficulties in carrying out the aforesaid procedure, it would be certainly open to TASMAC to suitably modify the same, but such possibility cannot be a reason for this Court, in the limited exercise of its powers of judicial review of the decision making process, to substitute the decision itself merely because some other better option is available in its perception."

Therefore, the question is already decided by this Court and it cannot be re-agitated in the present Writ Petitions.

12. The next contention is that the sale of eatables and collection of bottles is beyond the purview of the *Rules*. We are unable to accept the said contention. Here, the very running of the bars itself is to provide a space, eatables and collect bottles. Therefore, the attempt of the learned Senior Counsel to give a different meaning to the present tender cannot be countenanced as the present tender is only to appoint licensees / contractors to run the bars on behalf of the TASMAC. On careful consideration of the *Rules*,

it can be seen that the privilege has been given to the third respondent Corporation under Rule 9B. Rule 10 deals with location of bar. It clearly states that the bar shall lie within the shop or adjoining the shop. Rule 10(2) states that the bar shall have a minimum plinth area of fifteen square meters. The requirement of plinth area for any bar exceeding fifteen square meters shall be decided by the Collector. We do not see anything in the tender condition which would violate Rule 10(1) or 10(2). Rule 10(2) only provides that normally, the plinth area of the bar shall be fifteen square meters. If a larger area is required, it should be determined by the Collector. Therefore, when the shops are notified in the tender and it is clearly mentioned in the tender condition that the bidders have to inspect the sites and zero in at the premises, in which, they want to house the bar and upon being successful, they have to enter into a Rental Agreement with the concerned landlord, we do not see any violation. Similarly, Rule 14 relates to sale of liquor and the present system of the bar which is proposed to the third respondent, has nothing to do with the sale of the liquor.

13. The final attack is relating to the corrigenda issued on behalf of the third respondent. The corrigendum No.1, dated 26.10.2023 reads as follows:-

> "Due to administration reason the tender for sales of Eatables in respect of Kancheepuram North (Tender ID: 2023_TASMA_377419_1) it has been decided to extend the time limit of submission of E-Tender bid upto 5.p.m. on 01.11.2023."

14. The corrigendum No.2, dated 31.10.2023 reads as follows :-

> "Due to administration reason the tender for sales of Eatables in respect of Kancheepuram North (Tender ID: 2023_TASMA_377419_1) it has been decided to further extend the time limit for submission of E-Tender bid upto 5.p.m. on 09.11.2023."

15. The corrigendum No.3, dated 02.11.2023 reads as follows :-

> "In the Corrigendum No.2 dated 31.10.2023 it was mentioned as Tender for sale of Eatables in respect of Kancheepuram North instead of Tender for sales of Eatables and collection of empty bottles in respect of Kancheepuram North (Tender ID: 2023_TASMA_377419_1). The correction may be noted."

16. It can be seen that it is only the last date of bid, submission has been accepted that too for a valid reason on account of Court orders. Therefore, the same does not in any manner violate the *Rules*. Similarly, it does not add or modify the conditions. While seeing the corrigendum No.1, it was simply mentioned as sale of eatables which was sought to be corrected by giving full name of the tender process, the sale of eatables and collection of bottles. The same does not amount to any addition or introduction of new criteria in the tender conditions. It is trite that tenders are made on commercial considerations and the understanding of the Tender Floating Authority in respect of the tender conditions would be accepted and implemented unless the same is illegal or violative of law. Mere hardship in locating the premises or their chances of convincing the landlord to execute Rental Agreement in their favour by itself cannot invalidate the tender process. In any event, the third respondent Corporation has to go by the directives of the First Bench of this Court in W.A.Nos.374 of 2023 etc., (batch cases), dated 05.09.2023. It can be seen that after the present process, if they notice any practical difficulties, they

are already enabled to modify scheme. The scheme in the present form is held to be valid.

17. Therefore, these Writ Petitions are without any merits and are accordingly dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

(N.S.K., J.) (D.B.C., J.)
29.11.2023

Index : yes/no
Speaking order/Non-speaking order
Neutral Citation : yes/no
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To

1. The District Collector,
Chennai District,
Chennai.

2. The Commissioner of Prohibition of Excise
Ezhilagam,
Chepauk, Chennai - 600 005.

3. The Managing Director,
Tamil Nadu State Marketing Corporation Ltd.,
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