IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.11.2024

Pronounced on : 18.12.2024

CORAM: JUSTICE N.SESHASAYEE

W.P. No.20228 of 2023
and WMP.Nos.19551 & 19553 of 2023

T.Muruganandam
Proprietor
M/s.SKS Industries
SF.No.11/1, Senthanpalayam Road
Pachapalayam Village
Annur Taluk
Coimbatore. ... Petitioner

Vs

1.The State of Tamil Nadu
Represented by its Principal Secretary to Government
Food and Consumer Protection (B1) Department
Fort St.George
Chennai - 600 009.

2.Tamil Nadu Civil Supplies Corporation
Represented by its Managing Director
No.12, Thambusamy Salai
Kilpauk, Chennai - 600 010.

3.National Co-operative Consumer Federation
of India Limited
No.408, Rashid Mansion
Anna Salai, Chennai - 600 006.

Head Office at NCUI Block
Basement No.3, Siri Institutional Area
August Kranti Marg
Hauz Khas
New Delhi - 110 016. ... Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India for a Writ of Certiorarified Mandamus, calling for the records of the first respondent comprised in G.O.Ms.No.124, Co-operation, Food and Consumer Production (B1) Department dated 17.11.2022, quash the same as arbitrary, unconstitutional, ultra vires under Tamil Nadu Transparency in Tenders Act and consequently forbear the first and second respondents from in any manner awarding tender for procurement of agricultural produce and commodities without following the procedures contemplated under the Tamil Nadu Transparency in Tenders Act and Rules made thereunder.

For Petitioner	:	Mr.V.Raghavachari, Senior Counsel Assisted by Mr.S.Ramesh
For Respondents	:	Mr.R.Shanmugasundaram Advocate General Assisted by Mr.C.Kathiravan, Special Govt. Pleader for R1 Mr.C.Selvaraj & Ms.Shakeena for R2 Mr.A.V.Arun for Mr.G.Saravanan for R3

ORDER

1.1 The petitioner challenges G.O.(Ms).No.124, Co-operation, Food and Consumer Protection (B1) Department, dated 17.11.2022, which was issued under Section 16 (f) of Tamil Nadu Transparency in Tenders Act, 1998 (henceforth 'the Act').

1.2 The object behind the G.O. is to enable the Government to procure rice from the third respondent as a one time measure to meet out the contingency arising out of the shortfall in rice from the central quota for distribution through ration shops between October, 2022 and December 2022. Indeed, during the hearing of this petition, the purpose of this G.O. has spent itself and in that sense this petition may have become infructuous. However, the Government had brought out another Government Order of similar nature and hence the permissibility of the Government resorting to non-tender procurement of rice from the 3rd respondent. As this is likely to be resorted to again, to avoid future litigation, this Court considered it fit to decide the permissibility of the method as envisaged in the impuged GO is considered.

1.3 The defence was that the G.O. is protected by Sec.16(f) of the Act. Sec.16 lists situations where procurement is exempted from the operation of the Act. Whether procurement, howsoever imminent it might be, enables the government to bypass the mandate of the Act is the theme of this litigation.

Arguments:

2.1 Thiru.V.Raghavachari, the learned senior counsel for the petitioner submitted that :

(a) The Preamble of the Act states that the Act is aimed to "*provide for transparency in the public procurement and to regulate the procedure in inviting and accepting tenders..*" The primary object of the Act therefore, is to provide transparency in public procurement. And the legislature in its wisdom has felt that public procurement through the process of tender would ensure requisite transparency. In other words, the rule is procurement through tender, to which exceptions are provided in Sec.16 of the Act, where the Government has reserved to itself the authority to make public procurements without resorting to tender process.

(b) The G.O. now impugned in this case enables procurement of rice outside the scheme of the Act, but its sustainability in law is sought to be achieved by seeking justification under Sec.16(f). So far as agricultural produce is concerned, this provision essentially enables procurement through tender can be ignored for spot purchase of agricultural commodities, agricultural produce and live stock from primary producers, the farmers. It obviously does not apply to procurement of agricultural produce through traders.

(c) Where a statute provides how things ought to be done, then it shall be done in the manner prescribed and no other.

(d) Achieving transparency through tender process, also brings in an opportunity for all those who are identically placed to compete with the other, which in turn, will have a check on corruption based preferences. The G.O. in question, in one stroke, has breached the mandate of the statute, and has declared its preference for an entity which is a mere trader and not a primary producer.

2.2 In response, Mr.R.Shanmugasundaram, the learned Advocate General submitted that:

a) the State's monthly requirement of PDS rice for public distribution to the ration card holders is about 3.20 lakh MT. Out of this, it obtains about 2.75 lakh MT during the period covered by the GO now under challenge from the Central Pool. Therefore, to meet out the deficit of around 45,000 MT, if tender process is resorted, it would pose difficulty in identifying a contractor within a short period. What would be the shortfall during a given period may not be predicted or ascertained in advance as it is essentially determined by the allotment from central pool to the State. Hence, the Government cannot float a tender for contingent procurement of rice, for no contractor would be interested in it for even they may not know if any such contingency would arise. It is hence, procurement either directly from the farmers themselves or from any organization similar to a Co-operative Society is enabled within the frame work of Section 16(f).

b) The requirement of the Government for distribution of rice through public distribution system will be in the range of few lakhs metric tonnes in a quarter, and local procurement of that size through a single window through a tender-process might not be feasible because none can supply that volume of rice which the Government requires on a short notice.

c) So far as the petitioner case is concerned, the 3rd respondent itself vide its correspondence dated 20.11.2018, had required even the petitioner to supply some 7,000 tonnes of rice on its behalf to the Government.

d) Sec.16(f) of the Act *inter alia* provides for purchase of paddy from direct purchase centers of the Tamil Nadu Civil Supplies Corporation and also from similar organizations. The third respondent will fall squarely within the phrase '*similar organization*'.

e) The advantage of resorting to this mechanism is that in case there is a shortage in the supply of rice for PDS purposes from the Central Pool, the Government can make available the deficit through the third respondent, since it has network spread across the country. This apart, the third respondent is an institution under the Central Government and hence, even the pricing of rice will not carry much profit. This is more like a Government to Government transaction, where State Government will have a competitive edge in the purchase price of the rice.

Reliance was placed on the ratio in ***Kusum Ingots & Alloys Ltd. Vs Union of India and another*** [(2004) 6 SCC 254], ***Union of India and others Vs Puna Hinda*** [(2021) 10 SCC 690] and ***Balaji Ventures Pvt. Ltd. Vs Maharashtra State Power Generation Company Ltd.,*** [SPL (C) No.1616 of 2022 dated 11.02.2022].

2.3 Mr.A.V.Arun, the learned counsel appearing for the third respondent made the following submissions :

(a) The petitioner has not demonstrated how he is aggrieved. If he is personally aggrieved, then he has to challenge the notification, before which the next notification was issued by the Government, but this has not been challenged. And if he is not personally aggrieved, then it can only be a Public Interest Litigation, which he has not attempted.

(b) Section 16(f) of the Tamil Nadu Transparency in Tenders Act, 1998, *inter alia* exempts procurement of Tamil Nadu Civil Supplies Corporation. This implies, where any procurement is made by Tamil Nadu Civil Supplies Corporation, then Sec. 16(f) can be resorted to, and the Government has every authority to issue the notification that it has issued.

(c) So far as the 3rd respondent is concerned, the Director, Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, New Delhi vide his communication dated 20.12.2021, has certified that NCCFI functions under the administrative control of the Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, and that the Government of India holds more than 61% of the share in NCCF.

Reliance was placed on the authorities in ***Uflex Limited Vs Government of Tamil Nadu and Others*** [(2022) 1 SCC 165]; ***M.S.P.L. Limited Vs State of Karnataka & Others*** [(2022) SCC OnLine SC 1380]; ***Dental Council of India Vs Biyani Shikshan Samiti and Another*** [(2022) 6 SCC 65]; and ***The Secretary to Government, Tamil Development, Culture and Religious Endowments Department & Others Vs Palanikumar*** [2016 SCC OnLine Mad 4942 : 4 CTC 406 : (2016) 5 Mad LJ 641].

2.4 Responding the above arguments of the respondents, Thiru.V.Raghavachari, made his perorative submission as below:

a) the Tamil Nadu Transparency in Tenders Act, 1998, as is available in the official website of the Government and added, what is there in Sec. 16(f) is "*of paddy by Direct Purchase Centres of the Tamil Nadu Civil Supplies Corporation*;" and there is no punctuation mark after the "*Direct Purchase Centres*". Insofar as the *locus standi* of the petitioner is concerned, because the Government had resorted to Sec.16(f) route, and has avoided competition, and the petitioner is aggrieved because he could not compete.

b) By opting exclusively for the 3rd respondent, the Government not only has flouted Secs. 9 and 10 of the Act, without even ascertaining if there are other suppliers or agricultural producers who are capable of supplying the quantity of rice which the State requires.

c) The 3rd respondent in the instant case is a trader, and not a grower of agricultural produce. The third respondent is neither a public sector undertaking nor does it fall within the definition of State under Article 12 of the Constitution, and this aspect is no more *res integra* vide ratio in ***Shri.Sanjay Singh Vs National Co-operative Consumers Federation of India Ltd.*** [2013 SCC OnLine Del 2811], ***J.S.Arneja Vs National Co-operative Consumers Federation of India Ltd., & Others*** [1994 (28) DRJ 546 (DB)], and ***Ramu Ram Sahu Vs National Co-operative Consumer's Federation of India*** [AIR 1991 M.P.63].

d) If the membership of NCCFI is noted, there are 18 District Co-operative Societies, which are listed as members of the NCCFI. What it signifies is that each of these 18 District Co-operative Societies can have its independent existence to advance the objective for which they are created, and can also be part of NCCFI. On it becoming a member of NCCF, none of these Co-operative Societies lose their right to do their independent business. In the authorities cited, the object, the control and the functional aspects of the third respondent have been considered and it was tested on well settled principles evolved for identifying an institution as an instrumentality of the State. Inasmuch as NCCFI is found not to share the character of the State within the meaning of Article 12, and inasmuch as it was found that the Central Government does not exercise any control in its administration, it cannot be equated to any State public sector undertaking within the meaning of Section 16(f). This will also be known from the list of members of NCCFI.

Discussion & Decision

3. The point is not so much about the status of the 3rd respondent, but is about the power of the Government to procure rice from open market as a contingent measure. The rice, it must be underscored, is intended for public distribution through ration shops. It cannot be dismissed as a mere welfare measure of the Government of the day, as it has a larger constitutional purpose: It solves the existential requirements of those among us who are born poor for no fault of their's and are struggling to make both their ends

meet. Deny them their ration, their right to live – their sheer right to physical existence will be in deep crisis. It involves not merely humanitarian consideration for the have-nots but also a threat on their human rights.

4. Set in the context, howsoever noble the idea to procure rice to adjust the short fall in supply from the central pool as a contingent measure, in a country run by rule of law, law is considered nobler. The petitioner contends that the Tamil Nadu Transparency in Tenders Act, 1998 is breached, and the respondents contend that such procurement is enabled under Sec.16(f) of the Act. Does Sec.16(f) of the Act enable an exemption for contingent procurement of rice for public distribution? Sec.16 reads:

> ***'16. Provisions of this Act not to apply in certain cases: The provisions of sections 9 and 10 shall not apply to procurement:-***
>
> *a) during natural calamities and emergencies declared by the Government;*
>
> *b) available from a single source only from a supplier or cases in which a particular supplier or contractor has exclusive rights in respect of the goods or services or construction and no reasonable alternative or substitute exists or where the procuring entity having procured goods, equipment, technology from a supplier or contractor determines that additional supplies must be procured from that specific supplier or contractor for*

reasons of standardization and compatibility with the existing goods, equipment or technology;

Provided that a committee of three experts consisting one technical representative of the procuring entity, one technical representative of a State or Central Government Organisation dealing with similar procurement and one representative from a reputed Academic or Research Institution or Non-commercial Institution having expertise in such line, declares it as single source procurement;

c) *from certain departments of Government, public sector undertakings, statutory boards and such other institutions only in respect of goods manufactured or services provided by them for a period not exceeding eleven years1 from the date of commencement of this Act;*

d) *of low value and local purchases as may be prescribed;*

e) *from the rate contracts of Association of State Road Transport Undertakings;*

f) *by spot purchase of cotton by Spinning Mills, Oil Seeds and Oils by Tamil Nadu Agro Industries Corporation or Tamil Nadu Cooperative Oil Seeds Growers' Federation Limited, animals from shanties, Sugarcane by Sugar Mills, Paddy by direct purchase centres of the Tamil Nadu Civil Supplies Corporation, Clothing by Co-optex from registered Primary Weaver Co-operatives, Milk by Tamil Nadu Cooperative Milk Producers Federation from Districts and Primary Milk Co-operative Societies,* *Palm oil by Tamil Nadu Civil Supplies Corporation from Tamil Nadu Cooperative Oil Seeds Growers' Federation for Noon Meal Scheme, Clothing by Government Departments, Public Sector Undertakings and statutory departments from Co-optex by* *<u>similar organisations</u>* *and of similar goods and services, as may be notified by the Government"*

5. The Government's line of defence, as stated earlier, was founded on Sec.16(f), but it concedes that it is not a direct procurement from farmers or agricultural producers, and hence it chose to rely on the last sentence thereof "*of similar organisation*". Though the phrase "*similar organisation*" may have to be read *ejusdem generis* with what preceded before, it at any rate requires a prior notification from the Government. Sensing perhaps its difficulty to justify the impugned notification within the meaning of Sec.16(f), the government shifted its gears to contend that its procurement from the third respondent is akin to Government to Government procurement, but this falls not within Sec.16(f) but within Sec.16(c). It hence evoked a debate on whether the 3rd respondent, a multi State Co-operative Society, can be considered as an instrumentality of the State. This Court considers that to engage in this debate is a distraction, for, what if in a

given case the Government has chosen to procure rice as a contingent measure from the open market from any other entity other than the 3rd respondent? The issue therefore, need not rest on a discussion as to whether the 3rd respondent may fall within Sec.16(c), but whether the Government has the power to go for public procurement by deviating from the provisions of the Act?

6.1 Here the nearest provision appears to be Sec.16(a), and it provides that if there are '*natural calamity or emergencies declared by the Government,*' then the Government has the authority to by-pass the Act. And Sec.16(a) only speaks about a declaration of the Government, and not about any need to issue a notification declaring any emergency under any statute such as the Disaster Management Act, 2005. Therefore, even a declaration in a G.O. about any such emergency can be sufficiently accommodated within the meaning of Sec.16(a). Otherwise, Sec.16 should be suitably amended to deal with contingencies such as the one which is encountered by the Government in the instant case.

6.2 Having held thus, this Court intends to add a rider: That the emergency which can accommodated under Sec.16(a) must be those which are demonstrable on the basis of tangible facts. Creating artificial emergency, or, making an arbitrary declaration of an emergency in a G.O. but unsupported by tangible facts will be a fraud on the statute, a fraud on the Constitution and a fraud on the people of this State.

7. Since the G.O. which was challenged has spent itself, there is nothing which is required to be specifically decided. But similar situation may still arise, and similar petition can still be filed. Hence this Court ventured to discuss the issue. This petition is accordingly disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

18.12.2024

Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation : Yes / No
tsg/ds

To:

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State of Tamil Nadu
Food and Consumer Protection (B1) Department
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N.SESHASAYEE.J.,

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Pre-delivery order in
W.P.No.20228 of 2023

18.12.2024