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W.P.No.36039 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.04.2024

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.36039 of 2023

and

W.M.P.Nos.36015, 36014, 36013 & 36012 of 2023

Builders Association Of India,
Puducherry Centre,
Rep. by its Secretary,
No. 9, First Cross, Sree Kumaran Nagar,
Mudaliarpet, Pondicherry -605 004.

2. L.Murugan

3. L.Carttigueane

... Petitioners

Vs.

1. Union Of India,
Represented By Its Secretary To Government(Works),
Chief Secretariat,
Government Of Puducherry,
Puducherry.

2. The Chief Engineer,
Public Works Department,
Government Of Puducherry,
Puducherry.



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3. The Executive Engineer(Planning),
Central Office, Public Works Department,
Puducherry.

4. The Executive Engineer,
Irrigation Division,
Public Works Department,
Puducherry.

5. The Executive Engineer,
Public Health Division,
Public Works Department,
Puducherry.

... Respondents

Prayer :- Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Ceriorari, calling for the records on the file of the 3rd respondent relating to the impugned memorandum dated 07.11.2023 bearing Ref.No.3187/PW/CE/EE(P)/AE(P)3/F.No. Tech.Circular/ Vol.V/2023-24 in so far as it instructs to impose a tender condition of bidding capacity criteria in all government tenders costing Rs.3 crore and above; the e-Tender issued by the 4th respondent dated 28.11.2023 bearing Tender No. No. 36/PW/PHD/23 e-Tenders issued by the 5th Respondent dated 08.12.2023 bearing Tender Nos. 57, 58 and 59/PW/IRRN/2023-2024 in so far as it imposes the bidding capacity condition for tenderers and quash the same as arbitrary and illegal.

For Petitioners : Mr. T.Saikrishnan

For Respondents : Mr.A.Tamil Vanan,
Additional Govt. Pleader (Puducherry).



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ORDER

The writ petition has been instituted challenging the impugned memorandum dated 7.11.2023, issued by the Executive Engineer (Planning), Central Office, Public Works Department, Puducherry, and the circular, instructing to impose a tender condition of bidding capacity criteria in all government tenders, costing Rs.3 Crore and above. Perusal of the impugned memorandum, dated 7.11.2023 reveals that the Government of Puducherry, Public Works Department, issued modification of tender condition for eligibility criteria.

2. The learned counsel for the petitioner would contend that in respect of the eligibility criteria, even in the year 2021, the condition was imposed that the contractors, who are having three works on hand with tendered value of Rs.1 Crore and above, is not eligible to participate in the tender. Suddenly, the government of Puducherry has changed the eligibility criteria through the impugned memorandum, which would effect the prospects of the contractors in and around Puducherry. Relying on the Government Order, dated 14.10.1970, the learned counsel for the petitioner would submit that CPWD Code and Manual orders will be



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applied by the Public Works Department of the Government of Puducherry. Even the said order of the year 1970 has not been followed.

3. The learned Government Pleader, appearing on behalf of the respondents, would oppose by stating that it is a policy decision taken by the Government to revise the eligibility criteria in order to effectively conduct tenders. Modification of tender condition, for eligibility criteria, is the policy decision taken by the Government and the petitioner, being an Association, cannot challenge the same. Eligible members of the petitioner Association is entitled to participate in the process of tender, if any notified. Therefore, the writ petition is to be rejected.

4. In the case of ***Airport Authority of India vs. Centre for Aviation Policy, Safety and Research (CAPSR) and others***, reported in ***2022 Live Law (SC) 814***, the Hon'ble Supreme Court of India held as follows:

“7. While considering the scope and ambit of the High Court under Article 226 of the Constitution of India with respect to judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:



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*In the case of **Maa Binda Express Carrier (supra)**,
in paragraph 8, this Court observed and held as under:*

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



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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.”

*In the case of **Michigan Rubber (India) Ltd. (supra)**, after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 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 amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking



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down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

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

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

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is



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arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

*Similar views have been expressed in the case of **Educomp Datamatics Ltd. (supra)** and **Meerut Development Authority (supra).***

5. The policy decision of the Government, fixing tender condition or modification of tender condition, cannot be interfered by the Courts in a routine manner. Such policy decisions can be questioned only on limited grounds and in the present case, the grievances of the petitioners, that they became ineligible to participate, cannot be a ground to quash the impugned memorandum. There is no prohibition for the eligible members of the petitioner Associations to participate in the tender process, if any notified. That being the principles, the challenge made is beyond the scope of judicial review and thus, this Court is not inclined to consider the same.



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6. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes
Speaking Order
Neutral Citation : Yes
(sha)

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S.M.SUBRAMANIAM. J.,

(sha)

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