



WP(MD)Nos.4531 & 4532 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.03.2024

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)Nos.4531 & 4532 of 2024

and

WMP(MD)Nos.4371, 4372, 4375 & 4376 of 2024

Meenakshisundaram Kumararaja
Proprietor of Galaxy Enterprises,
Poongavanapuram Street, Thiruvattiyur,
Chennai.

... Petitioner in both cases

Vs.

1.The Superintending Engineer,
Highways Department,
Construction and Maintenance,
Madurai Circle, Madurai.

2.Divisional Engineer,
Highways Department,
Construction and Maintenance, Dindigul.

5.Hariway Lines Pvt Ltd.,
No.14/09, Flat No.102,
Bhakthavatchalam Nagar 4th Street,
Adayar, Chennai – 600 020.

... Respondents in both cases

Prayer in WP(MD)No.4531 of 2024 : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari calling for the records of the first respondent in Tender ID No.2024-HWAY-419796-1 dated 20.02.2024 and quash the same.



WP(MD)Nos.4531 & 4532 of 2024

Prayer in WP(MD)No.4532 of 2024 : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari calling for the records of the first respondent in Tender ID No.2024-HWAY-419896-1 dated 20.02.2024 and quash the same.

In both cases : -

For Petitioner : Mr.Srinath Sridevan, Senior Counsel
for Mr.P.M.N.Bhagath Krishnan

For Respondents : Mr.Veera Kathiravan,
Additional Advocate General
assisted by Mr.V.Nirmal Kumar
Government Advocate for R1 & R2

Mr.Isaac Mohanlal, Senior Counsel for R3
for M/s.Isaac Chambers

COMMON ORDER

The writ petitioner is a Class – I contractor registered with Tamil Nadu Highways Department. The first respondent issued two tender notifications on 19.01.2024 inviting tenders for providing Roller Crash Barriers in State Highways in Kodaikanal (H) C&M Sub Divisions (MDU-177&187). The last date for bid submission was 19.02.2024 up to 03.00 P.M. The petitioner applied in response thereto. On 20.02.2024, technical evaluation was conducted. The petitioner's tenders were rejected on the ground that hard copies of the uploaded documents were not submitted. On 21.02.2024, the tender processes were finalised. The third respondent herein turned out to be the



WP(MD)Nos.4531 & 4532 of 2024

successful tenderer. Assailing the rejection of his tenders, these writ petitions were filed.

2.The learned Senior Counsel appearing for the petitioner reiterated all the contentions set out in the affidavits filed in support of these writ petitions and called upon this Court to set aside the impugned orders and grant relief as prayed for. He relied on a catena of decisions in support of his stand that this Court should ignore the condition that the tenderer must submit the uploaded documents in physical form in person.

3.The learned Additional Advocate General and the learned Senior Counsel appearing for the third respondent submitted that the petitioner having taken part in the tender process with his eyes wide open is estopped from challenging the same. They placed reliance on Clause – 5 of the tender notice dated 24.01.2024. Since the impugned orders are in consonance with the aforesaid clause which stipulated submission of original/attested technical bid documents in person, they do not warrant interference. The learned Additional Advocate General relied on the decisions reported in 2022 LiveLaw (SC) 814 (Airport Authority of India v. Centre for Aviation Policy, Safety and Research (CAPSR) & ors) and (2022) 6 SCC 127 (N.G.Projects Limited v. Vinod Kumar Jain and ors) in support of the proposition that judicial review of tender



WP(MD)Nos.4531 & 4532 of 2024

conditions is highly limited. The third respondent also filed counter affidavit and the learned Senior Counsel took me through its contents. The respondents pressed for dismissal of the writ petitions.

4.I carefully considered the rival contentions and went through the materials on record. Clause – 5 of the tender notices reads as follows :

“The original and all other Original/attested technical bid documents as uploaded shall be received by the Superintending Engineer (H) C&M, Madurai Circle on or before 19.02.2024, 15.00 hrs failing which, the bid shall be summarily rejected.”

It is beyond dispute that the petitioner failed to adhere to the above condition. The question that calls for consideration is whether on this score, the tender inviting authority was justified in showing the door to the petitioner. According to the official respondents, the petitioner failed to pass muster at the technical scrutiny stage itself.

5.Before considering the contentions of the learned Senior Counsel appearing for the petitioner, I wanted to know if the petitioner had quoted lower than the third respondent. At my instance, the financial bids offered by the petitioner were opened and it was admitted by the officials that the petitioner had quoted lower than the third respondent in both the cases. I therefore decided to examine the case on merits.



WP(MD)Nos.4531 & 4532 of 2024

6.The first page of the tender notification in bold letters was as follows :

"TENDER DOCUMENT

(Online Only)"

The tender notices dated 24.01.2024 opened in the following terms :

"For and on behalf of the Governor of Tamil Nadu the Superintending Engineer, Highways, Construction and Maintenance, Madurai invites **Percentage tender for Single Cover System** through online only for construction work as detailed in the table."

Clause 3 and Clause 6 of the tender notices read as follows :

"3.Bids must be submitted through Online upto 19.02.2024, 15.00 hrs (as per server system clock)

6.The technical cover containing pre-qualification documents as prescribed in the tender documents received through "online" only shall be opened at 16.00 hrs on 20.02.2024 in the office of the Superintending Engineer (H) C&M, Madurai Circle".

Clause 5 relied on by the respondents sits ill at ease. It is obviously not in ambient company. The preceding and following clauses in the tender notice as well as the overall picture is all about online submission of tender application and documents. It is not as if online submission has been provided as additional or alternative mode. On the other hand, the expression



WP(MD)Nos.4531 & 4532 of 2024

repeatedly employed is "Online Only". As rightly pointed out by the learned Senior Counsel for the petitioner, the expression "only" must be given the meaning applied in common parlance. It has no technical connotation in this context. The concise Oxford Dictionary defines "only" as "solely", "exclusively" and "nothing more besides". My attention was drawn to the decision of the Hon'ble Supreme Court reported in **(1973) 2 SCC 825 (DDA v. Durga Chand Kaushish)**. It was held therein that if there is some conflict between an earlier part of a deed of contract with the later part, the inconsistency will be resolved by preferring the earlier part over the later one. This is in contrast to the manner in which terms of a Will are construed where the reverse approach of interpretation and construction is adopted. A tender notification is not a testamentary disposition. The principles of interpretation and construction applicable to contractual documents will have to be applied to tender notifications. If there is innate ambiguity or conflict, it will have to be resolved by adopting a reasonable and sensible approach. If there is no possibility of reconciling, the overall thrust as is discernible will be taken note of. Any clause that sticks out like a sore thumb or odd man out will be ignored and not given effect to by courts. In view of the categorical stipulation that the tender is online only, the tender inviting authority could not have incorporated clause 5 which envisages submission of hard copies in person.



WP(MD)Nos.4531 & 4532 of 2024

7.Clause 5 insisted that the original/attested technical bid documents as uploaded shall be received by the authority on or before 19.02.2024, 15.00 hrs. Clause 3 provides for submission of online bids up to 19.02.2024, 15.00 hrs (as per server system clock). Since a tenderer can submit through online up to 15.00 hrs on 19.02.2024, he cannot at the same time submit the documents in original in person. It is possible only in quantum world and not in this physical word. If clause 3 had read that online submission was permissible up to 13.00 hrs on 19.02.2024 and breathing time had been given, the tenderer could go to the office of the first respondent and submit the documents in person. Here, such time-gap has not been provided. This by itself renders clause 5 impossible of performance. A condition that is logically not capable of performance can safely be ignored. Law does not expect one to perform the impossible (lex non cogit ad impossibilia). A condition should be capable of fulfilment under all circumstances. If it fails this test, it must be treated as legally unenforceable.

8.In fact, the issue raised in these writ petitions had already been answered by me vide order dated 30.11.2023 in WP(MD)No.25916 of 2023 ***(M/s.Sai Hridham Infraa Private Ltd., vs. The Secretary to Government of Tamil Nadu)***. In Paragraph 7, the issue was framed in the following terms :



WP(MD)Nos.4531 & 4532 of 2024

“a) Whether the incorporation of the condition that the original EMDs and all other original/attested technical bid documents as uploaded should be received in person by the tender inviting authority is legal.

b) Whether as a result of the non-submission of the original EMDs and other documents to the tender inviting authority, the petitioner is the sole remaining tenderer in the field and whether on that ground, the authority was justified in cancelling the tender process.”

The issue was answered as follows :

“Rule 4-A of the Tamil Nadu Transparency in Tenders Rules, 2000 states that the Government may mandate procuring entities to do procurement through electronic mode through web portals as may be specified by order. It was inserted by G.O Ms. No.93 Finance (Salaries) dated 30th March 2023. G.O Ms. No.94 dated 30.03.2023 reads as follows :



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WP(MD)Nos.4531 & 4532 of 2024

Government of Tamil Nadu
2023



MANUSCRIPT SERIES

FINANCE (Salaries) DEPARTMENT
G.O.Ms.No.94, Dated 30th March 2023.

சம்பளம் (சம்பளம்) துறைமன்றம் ஆணை, 2023

ABSTRACT

Tenders – Instructions issued to all procuring entities to do procurement through electronic mode under the Tamil Nadu Transparency in Tenders Rules, 2000 – Orders- Issued.

Read:

G.O.Ms.No.93, Finance (Salaries) Department, Dated: 30.03.2023.

ORDER:

The rule 4-A of Tamil Nadu Transparency in Tenders Rules, 2000 states that the Government may mandate procuring entities to do procurement through electronic mode through web portals as may be specified by order.

2. Accordingly, Government issue instructions to all procuring entities as detailed below:-

- a) From 01-04-2023 onwards all tendering activities shall be done through the web portal <https://tntenders.gov.in>.
- b) The Government further direct that such tendering activities shall include all stages of procurement from floating the bid upto generating and issuing the Letter of Award.
- c) Further, any tender floated and finalized without following the web portal <https://tntenders.gov.in> route shall be considered a violation of procedure.
- d) Finance (Salaries) Department may issue further instructions to streamline the process.
- e) This order shall not be applicable to the following procurements:-

(i) Tenders which have already been floated before **01.04.2023**.

(ii) Procurement covered under **Section 16** of Tamil Nadu Transparency in Tenders Act, 1998.

(BY ORDER OF THE GOVERNOR)

S.MURUGANANDAM
ADDITIONAL CHIEF SECRETARY TO GOVERNMENT.

Even a bare reading of the aforesaid Rule and the G.Os would lead one to the conclusion that the tender inviting authority must ensure that there is no human interface between tenderers and the evaluation authority. It is submitted by the learned counsel for the petitioner and it is not disputed by the learned Additional Advocate General that many other departments are already implementing the e-tender system without making any room for human interface.

8.It appears that the Tamil Nadu Highways Department alone is continuing to insist on submission of original EMD and other



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WP(MD)Nos.4531 & 4532 of 2024

documents in person. Rule 4-A was introduced as early as on 30.03.2023 and G.O Ms.No.94 was issued on the same date. I fail to understand as to why the Highways Department alone is continuing to retain the aforementioned clause in their tender notification. This makes me suspect the very motives of the individuals issuing the tender notification. Since in other districts also, tender notifications containing similar clauses have been issued. I refrain from censuring the fourth respondent. May be, I have to censure the entire Highways Department. I refrain from doing so with the fond hope that in future all the tenders of the Highways Department will strictly conform to Rule 4-A r/w. G.O Ms.No.94 dated 30.03.2023. The Government had introduced the aforesaid Rule with the fond hope of eradicating corruption in high value tenders. Such a noble object cannot be allowed to be frustrated by officials by retaining the clauses such as the one mentioned above. I, therefore, answer the first issue in favour of the petitioner by holding that the incorporation of Clause 5 in the tender notification is patently illegal.

Clause 5 of the tender notification in that case read as follows :

“5.The original EMD and all other original/attested technical bid documents as uploaded shall be received by the Superintending Enigneer (H), C&M, Tiruchirappalli Circle or or before 19.10.2023, 14.00 hours failing which, the bid shall be summarily rejected.”



WP(MD)Nos.4531 & 4532 of 2024

The first respondent in this case had indulged in a silly tinkering. He was obviously aware of the striking down of an identically worded clause. That is why, the word "EMD" alone had been deleted. The clumsiness is evident from the fact that the word "original" occurs twice in succession. I had held that incorporation such a clause is illegal. This order was passed by me on 30.11.2023. The Secretary to Government of Tamil Nadu, Highways Department was the first respondent in the said writ petition. A clause that was declared to be illegal could not have found place in a subsequent tender notice issued on 24.01.2024 by the same department. It amounts to contempt of court in the sense that the tender inviting authority has acted in willful disregard of a judicial precedent. It is also not in keeping with the statutory rule. Rule 4A of Tamil Nadu Transparency in Tenders Rules, 2000 r/w. G.O Ms No.94 Finance Department dated 30.03.2023 has been breached.

9.The question of invoking the doctrine of estoppel will not arise. One is entitled to ignore what is ex-facie illegal. Like vibhoothi on one's forehead, (though the analogy is not appropriate) the illegality characterizing clause 5 is evident and apparent. The petitioner rightly did not take note of the same.

10.For the foregoing reasons, I hold that rejection on the petitioner's tenders for non-compliance of clause 5 of the tender notices is arbitrary and



WP(MD)Nos.4531 & 4532 of 2024

illegal. The rejection orders are set aside. The matter is remitted to the file of the first respondent. The process will resume from the stage of technical scrutiny. In other words, the petitioner's tenders will be treated as eligible and considered along with other tenderers. The writ petitions are allowed on these terms. No costs. Connected miscellaneous petitions are closed.

01.03.2024

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
SKM

To:

- 1.The Superintending Engineer, Highways Department,
Construction and Maintenance, Madurai Circle, Madurai.
- 2.Divisional Engineer, Highways Department,
Construction and Maintenance, Dindigul.



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WP(MD)Nos.4531 & 4532 of 2024

G.R.SWAMINATHAN, J.

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4375 & 4376 of 2024**

01.03.2024