BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.08.2024

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

W.P.(MD)No.19307 of 2024
and
W.M.P.(MD)Nos.16369 and 16372 of 2024

P.Savarimuthu ... Petitioner

Vs.

1.The Commissioner,
Milk Production and Dairy Development,
Aavin Illam, Nandhanam, Chennai.

2.The Managing Director,
Tamil Nadu Co-operative Milk Producers Federation,
Madhavaram, Chennai.

3.The Genereal Manager,
Dindigul District Co-operative,
Milk Producers Union Ltd.,
No.9, East Govindapuram,
Dindigul-624 001.

4.The Deputy Registrar,
Dindigul District Co-operative,
Milk Producers Union Ltd.,
Dindigul. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari calling for the records relating to the impugned tender notification issued by the third respondent inviting tenderers for supplying milk and milk products in the Dindigul District dated 11.07.2024 and quash the same.

For Petitioner	: Mr.T.Cibichakraborthy
For R1 & R2	: Mr.P.Veerakathiravan Additional Advocate General assisted by Mr.D.Gandhiraj Special Government Pleader
For R3	: Mr.K.Prabhu

ORDER

The petitioner has filed this writ petition challenging the tender notification dated 11.07.2024 issued by the third respondent for supplying milk and milk products in the Dindigul District.

2.The third respondent issued a tender notification, dated 11.07.2024 for the purpose of appointing an agent for selling the milk and milk products for 8 routs in Dindigul District for a period from 13.08.2024 to 12.08.2027. The tender process consists of two folds. The first one is technical bid and the second one is price bid. The last date for submitting the tender is on 12.08.2024. In the said tender, certain methods for evaluating the technical bid have been introduced for the first time in the tender notification.

3.In the tender notification, certain parameters have been fixed in assessing the eligibility, performance, capacity and capabilities for the appointment of wholesale dealers for milk and milk products. If the applicant does not score minimum of 70 marks to be eligible for the technical bid qualification, he will not be considered for the commercial bid opening. In the said evaluation process, they have segregated the criteria as follows:

Sl. No.	Criteria	Maximum Marks
1	Experience as Exclusive Milk Distributor	20
2	Financial Capability	20
3.	Infrastructure (Vehicle)	10
4.	Cold Storage Facility	10
5.	Volumes Handled in Previous Years	10
6.	No or Retailers Served	20

4.Initially, in the tender notification, one of the conditions is that the successful tenderer has to arrange the cold storage facility within 30 days from the date of allotment. However, by way of corrigendum, the said condition was deleted and the cold storage facility has now been added as a pre-condition. According to the petitioner, due to this pre condition, no new persons will be able to submit the tender application and it cannot be considered as a transparent one.

5.The petitioner was appointed as a distributor in route Nos.6 and 7 for the last three years. Though notification was issued for these routes, the petitioner was not eligible to participate in the tender process. The petitioner has been given with temporary work orders periodically between every two or three months for supplying the milk and milk products in the said routs, which are the rural areas. Having previous experience as an exclusive milk distributor in the said routes, the petitioner was not in a position to participate in the tender process in view of these pre conditions.

6.The above said evaluation method is challenged on the following six heads:

i) Maximum of 20 marks are being awarded to the tenderer, if he possesses previous experience of three years in the so called wholesale. It curtails the rights of participation of new individuals in the tender.

ii) For financial capacity, maximum of 20 marks are being awarded, which is an empty formality.

iii) Maximum of 20 marks are being awarded, if the tenderer possesses own vehicles for each routs. This condition is against the individuals and it is the indirect method of trying to allot the tender to a particular person.

iv) For having cold storage facility, maximum of 10 marks are being awarded. Initially, there was a condition to arrange a cold storage facility within 30 days from the date of his appointment. However, the same has been deleted by way of corrigendum. This also shows the predetermination of tender.

v) 10 Marks are being awarded for the volumes handled in the previous years. It is stated that 10,000/- liters per day have to be dealt with by the tenderer. This will be possible only to the dealers, who have obtained the dealership in the urban areas. .

vii) 20 marks are being awarded for having number of retailers. The retail shops will differ based on locality. In rural areas, the retail shop will be less comparing to urban areas. Therefore, the third respondent indirectly thrives to exclude the rural area dealers from participating in the tender process

7.The third respondent has filed counter affidavit stating that the petitioner has not filed any application to participate in the tender process. Hence, the petitioner has no *locus standi* to maintain this writ petition. It is averred that Dindigul is having 8 routes for milk supply as mentioned under:

i.Dindigul
ii.Dindigul-II
iii.Batlagund-Nilakottai
iv.Palani-Ottanchatiram
v.Kodaikanal
vi.Natham-Sendurai
vii.Vedasandur-Vadamadurai
viii.Gujiliyamparai

8.The petitioner was operating in 'vi' and 'vii' routes, namely Natham-Sendurai and Vedasandur-Vadamadurai on quotation basis from 01.11.2021 and the same was extended periodically. The other routes are being operated by the wholesale dealers, who had been successful in the earlier tender and they were permitted to continue the same till the finalization of the present tender. The petitioner without participating in the tender process, with an intention to continue in the routes, in which he is presently doing business, had filed this writ petition with a *mala fide* intention.

9.it is further averred that initially, the petitioner was doing his business in the name of his wife as a retailer. The petitioner’s wife filed a writ petition in W.P.(MD)No.5085 of 2020 challenging the notification of the General Manager, and the same came to be allowed by directing the authorities to issue a tender. Accordingly, the new tender notification was also issued on 21.09.2020. However, the petitioner’s wife was not able to satisfy the tender conditions and was unsuccessful.

10.Further, the brother of the petitioner, namely Mr.Arockiya Francis, had been given contract to transport milk for Dindigul-Senkurichi route. The same was later cancelled by the proceedings of the third respondent on the allegation of loading excess milk from the union. Thereafter, on the request of the petitioner for running business in his name, two routes were given to him and the same was also extended from time to time on the basis of the orders of the third respondent. The petitioner had been operating some of the routes in quotation basis and with a view to continue in the same locality, without participating in the tender, has filed this writ petition.

11.The bid consists of 2 levels. The first one is technical bid and the second is the commercial bid. Initially, the petitioner should pass the technical bid as prescribed in the notification to participate in the commercial bid. As per the notification, quality and cost based system (QCBS) of evaluation is introduced. The technical evaluation of the bidders will be decided by QCBS and thes fixed parameters in assessing the eligibility, performance, capability for appointment of wholesale dealers for milk and milk products distribution and sales. Each parameter consists of marks. The bidders should have scored 70 marks to be eligible. No one is denied from participating in the bid. The petitioner has not even applied for NOC and only in order to avoid the tender, he has filed this writ petition.

12.The learned counsel for the petitioner would mainly contend that the routes prescribed in the notification do not contain any details except stating the names of the routes, i.e., Dindigul I and II, Batlagundu-Nilakottai, Palani-

Ottanchatiram, Kodaikanal, Natham-Sendurai, Vedasandur-Vadamadurai and Gujiliamparai. The details of areas have not been mentioned in the notification. According to him, the main job is only to distribute milk and milk products in various routes, however, the same has not been clearly mentioned in the tender notification. Further, originally in the tender notification, it is stated that the successful bidder would construct the cold storage in 200 sq.feet, within 30 days from the date of allotment. Now, it has been changed that the tenderer should have a cold storage capacity as a precondtion.

13.He further submitted that in the technical bid, the tenderer should score 70 marks, otherwise the tenderer will not be considered for commercial bid. The marks prescribed for various criteria are unreasonable and only in order to support the persons, who are doing the business in urban areas, these conditions were prescribed. He further contended that a reverse engineering process is evolved to award the contract to a particular party. Further, the financial capacity prescribed as a condition in the tender notification is also unreasonable.

14.In support of his contentions, he has relied upon the following judgments:

1.J.P.Drags through the Proprietor Deepak Pannalai vs. State of Chhattisgarh through Secretary and others [2023 SCC online Chh 457];

2.Association of Registration Plates vs. Union of India and others [(2005) 1 SCC 679];

3.Directorate of Education and others vs. Educomp Datamatics Ltd and others [(2004) 4 SCC 19];

4.Jagdish Mandal vs. State of Orissa and others [(2007) 14 SCC 517];

5.Quality Property Management Service vs. Tamil Nadu Textbook and Educational Services and another [W.A.No.660 of 2023 dated 20.04.2023];

6.Maa Binda Express Carrier and another vs. North-East Frontier Railway and others [(2014) 3 SCC 760];

7.Union of India and another vs. International Trading co and another [(2003) 5 SCC 437];

8.Silippi Constructions Contractors vs. Union of India and another [(2020) 16 SCC cases 489];

15.The learned Additional Advocate General appearing for the respondents would submit that the petitioner has not even applied for the tender and he has no right to challenge the tender notification. The petitioner is an existing contractor in two routes. Only in order to prevent the tender in these two routes, this writ petition has been filed.

16.He would further submit that earlier, the wife of the petitioner has challenged the orders passed by the General Manager before this Court in W.P.

(MD)No.5085 of 2020. While allowing the said writ petition, this Court directed the authorities to proceed with the tender process. Therefore, the committee had imposing several conditions has issued the tender notification. The employer has right to stipulate conditions and it is the employer's domain. Therefore, the petitioner cannot insist that conditions should suit his convenience and this writ petition is not maintainable.

17.In support of his contentions, he has relied upon the following judgments:

1.Michigan Rubber Limited vs. State of Karnataka [(2012) 8 SCC 216];

2. Balaji Ventures Pvt.Ltd., vs. Maharashtra State Power Generation [2022 SCC online SC 1967];

3.TATA Motors vs. Brihan Mumbai Electric Supply & Transport Undertakings [2023 LiveLaw (SC) 467];

4.Primatel Fibcom Ltd., vs.Indian Oil Corporation Ltd., and others [W.P.(C)8220/2024 & CM Appeal No.33782/2024].

18.I have heard the submissions made on either side and perused the materials placed on record.

19.The fact that the petitioner is the existing contractor in respect of two routes mentioned in the impugned tender notification is not in dispute. Similarly, the petitioner has not filed any application for participating in the tender process. The petitioner continues to operate in the Route Nos.6 and 7, namely, Natham to Senduria and Vedasndur-Vadamadurai on quotation basis from 01.11.2021. The petitioner is operating business from the year 2015 and he has also done his business in the name of his wife, namely, Mercy Thanies Mary, who had filed a writ petition in W.P.(MD)No.5085 of 2020 challenging the orders passed by the General Manager (Marketing) dated 13.02.2020. Thereafter, pursuant to the orders passed by this Court in the said writ petition, tender notification was issued on 21.09.2019. However, the petitioner's wife was not able to succeed in that tender. Now the impugned tender has been issued for the year 2024 to 2027, in which the routes that are being operated by the petitioner is also included. At this stage, the entire notification is challenged by the petitioner on account of the eligibility criteria mentioned in the tender notification.

20.The tender notification consists of two stages, namely technical bid and commercial bid. If the tenderer cleared the first stage, then he will be considered for the second stage. The tenderer should score 70 marks to clear the fist stage that is technical bid. The said marks are divided into six categories such as 20 marks have been awarded to the tenderer for possessing three years experience in wholesale business; 20 marks for financial capacity; 20 marks are awarded for possessing own vehicle; 10 marks are awarded for having cold storage facility; 10 marks for volume of sale in the previous years and 20 marks are being awarded for retailers. Hence, according to the petitioner, this marks system will certainly prevent the other persons from participating in the tender process and will only aid the existing tenderers especially, the tenderers from the urban areas.

21.Perusal of the counter filed by the third respondent makes it is clear that the four man committee suggested the proposed evaluation of tender process under QCBS. The following parameters have been fixed in the tender notification for such evaluation:

QUALITY AND COST BASED SYSTEM OF EVALUATION:

TECHNICAL EVALUATION OF THE BIDDER'S ELIGIBILITY will be decided by the QCBS.

The following are the quality parameters involved in assessing the eligibility, performance, capacity, capability for the appointment of Wholesale Dealer for Milk and Products distribution and sales.

1.0. Should have been in the Exclusive Milk distribution business

(Document proof to be submitted work order copy or allotment order as WSD or agent from the DCMPU or TCMPF)
Maximum marks:20

S. No.	Criteria	Marks	Document Proof to be submitted
1.1	If aavin WSD for milk for more than 3 years as on March 2024	20	Proof copy of the work order or commission receipts from the Unions
1.2	If aavin WSD for a period of two years	10	
1.3	If aavin WSD for a period of one year only	5	
1.4	If aavin milk agent or dealer or transporter for more than three years	10	
1.5	IF Dealing with FMCG goods for more than three years	10	
1.6	If aavin WSD for milk products alone for more than three years	10	
1.7	If the experience is less than three years for all other categories except WSD for milk	5	
1.8	**Maximum category is Marks for this**	**20**	

2.0. Financial capability: Annual turnover (Last Three years 2021-22, 2022-23, 2023-24 (in each of the three financial years)

Audited and CA certified annual returns, balance Sheet, IT returns. GST returns, Profit loss statements should be submitted as proof

S.No.	Criteria	Marks	Remarks
1.1	Above Rs.1000 lakh	20	
1.2	Rs.760 lakh to 1000 lakh	15	
1.3	Rs.501 lakh to 750 lakh	10	
1.4	Upto Rs.500 lakhs	2	

3.0 Infrastructure

Having PUF insulated Vehicle in their own name or Company's name (Minimum 60mm Puf) (Model 2012 and above) Proof: R.C Book, Insurance, Permit and related documents.

S. No.	Route	Present Milk sales	Required Vehicle Capacity	Remarks
1.1	Dindigul-1	5000	3 MT 1 Vehicle	
1.2	Dindigul-2	10200	1.5 MT 5 Vehicles	
1.3	Batlagundu-Nilakottai	2300	1.6 MT 1Vehicle	
1.4	Palani-Oddanchatram	3400	5 MT 1 Vehicle	
1.5	Kodaikanal	3900	5 MT 1 Vehicle	
1.6	Natham-Sendurai	1800	1.5 MT 1 Vehicle	
1.7	Vedasandur-Vadamadurai	2100	2.0 MT 1 Vehicle	
1.8	Gujiliamparai	1000	1MT 1 Vehicle	

Vehicles of required capacity for each route must be in the name of the tenderers at the time of submission.

If owned by the tenderer -20 Marks.

Not owned by the tenderer - 0 mark

4.0 Cold storage Facilities

Location and Address details proof and should attested by Notary public. Should be situated on specific route areas.

S.No.	Criteria	Marks	Remarks
1.1	More than 5000 Litre Cold room to store milk	10	
1.2	4000 litre 4999	7.5	
1.3	3000 litre 3999 upto 3 Vehicles or Cumulative 6000 to 7999 Litre per shift capacity	5	
1.4	2000 litre or less	2.5	
1.5	No cold room facilities	0	

5.0. Volume Based Evaluation (Volume Handled in Previous year) in milk sales:

Proof for performance as commission claim or performance certificate from the Union/ TCMPF or Private dairy

S. No.	Criteria	Marks	Remarks
	Previous year milk sale volume		
1.1	Above 10000 litres per day	10	
1.2	9000 to 9999 litres	9	
1.3	8000 to 8999 litres	8	
1.4	7000 to 7999 litres	7	
1.5	6000 to 5999 litres	6	
1.6	5000 to 4999 litres	5	
1.7	4000 to 3999 litres	4	
1.8	3000 to 2999 litres	3	

6.0. No of Retailer served:

Proof of billing to retailers should be submitted. Bill should have been created in any one of the billing software. (One year data to be submitted)

S.No.	Criteria	Marks	Remarks
1.1	More than 200 retailers in the District	20	
1.2	150 to 199	15	
1.3	100 to 149	10	
1.4	51 to 100	5	
1.5	Less than 50 retailers	0	

<u>Minimum 70 marks is the eligibility criteria</u>

Ranking will be done as per the marks obtained in the QCBS method of technical evaluation apart from fulfilling other terms and conditions of the tender like GST, PAN, SD, EMD etc,.

A minimum of 70 marks has to be scored to eligible for Technical Bid qualification.
A tenderer who scores below 70 marks will not be considered for commercial bid opening."

22.The above parameters have been proposed by the committee appointed in this regard. The Quality and Cost Based System (QCBS) for evaluation was introduced in assessing the eligibility, performance, capability for appointment of wholesale dealers for milk and milk products distribution and sales. Though much emphasis has been made on reverse engineering process, this Court is of the view that the conditions have been imposed by the Committed appointed in this regard only to assess the financial capacity of the Contractor. Hence, it cannot be stated that these conditions have been made only to sue the convenience of the particular person.

23.The very purpose of fixing minimum criteria and conditions is only to ensure that only eligible persons come within the parameters to participate in the tender. Therefore, merely because, the petitioner would not be in a position to satisfy such conditions mentioned in the tender notification, he cannot challenge the entire notification even without filing any application for participating in the tender. Hence, this Court is of the view that the petitioner is trying to espouse the case of unknown individuals, who are not before this Court.

24.The fact remains that the petitioner is an existing dealer operating in two routes in Route Nos.6 and 7. In the tender notification, the routes, where the petitioner is operating, are also included. Filing of the writ petition itself indicates that the petitioner is in fact in some way or the other trying to avoid tender process in respect of his routes, in which he his operating. Be that as it may, when the person is not even applied for tender, still can he challenge the tender process?. In this regard, the Delhi High Court in the case of ***Primatel Fibcom Ltd., vs.Indian Oil Corporation Ltd., and others*** *[W.P.(C)8220/2024 & CM Appeal No.33782/2024],* has held that the party, who has not participated in a tender process does not have any locus to challenge the award of the tender and cannot be heard to make any grievances as such a party does not acquire any right in the tender.

25.The Hon'ble Supreme Court, in the case of ***Michigan Rubber Limited vs. State of Karnataka*** *[(2012) 8 SCC 216],* has held that the preconditions and qualifications for tenders are to ensure that the contractor has the capacity and the resources to successfully execute the work. Further, the Hon'ble Supreme Court in the case of ***Balaji Ventures Pvt.Ltd., vs. Maharashtra State Power Generation*** *[2022 SCC online SC 1967]*, has held as follows:

> *"10.In the case of Silppi Constructions Contractors vs. Union of India, (2020) 16 SCC 489, it is observed in para 20 as under:*
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> *"20. The essence of the law laid down in the judgments referred*

to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

26.In the case of ***TATA motors vs. Brihan Mumbai Electric Supply and Transport Undertakings [2023 live law (SC) 467]***, has held as follows:

“*53. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court* *should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.*

54. As observed by this Court in Jagdish Mandal v. State of Orissa and Others, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

27.Therefore, the conditions have been imposed, taking note of the Committee report. There are no materials to show that the said conditions have been introduced with malice or by misusing the statutory powers. Merely on the basis of certain conditions stipulated in the tender notification to assess the capacity and resources of the tenders, it cannot be stated that the said conditions are unreasonable and hence, the notification has to be quashed. Infact, by challenging the tender notification without any valid reasons, the petitioner is trying to achieve indirectly what he could not achieve directly.

28.In such view of the matter, this Court is of the view that the petitioner has not made out any *prima facie* case to interfere with the tender notification. Accordingly, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

19.08.2024

NCC:yes/no
Index:yes/no
Internet:yes/no
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To

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Tamil Nadu Co-operative Milk Producers Federation,
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N.SATHISH KUMAR, J.

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