

W.P.(MD) Nos.26373, 25514, 25611, 25612 & 27530 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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<i>Reserved on</i>	03.12.2024
<i>Pronounced on</i>	21.01.2025

CORAM :

THE HONOURABLE MR. JUSTICE M.S.RAMESH
AND
THE HONOURABLE DR. JUSTICE A.D.MARIA CLETE

W.P.(MD) Nos.26373, 25514, 25611, 25612 & 27530 of 2024
and
W.M.P.(MD) Nos.21645, 21646, 21719, 21720, 21746, 21747, 23360,
23851, 22340, 22343 & 23359 of 2024

W.P.(MD) No.26373/2024

N.Chelladurai

...Petitioner

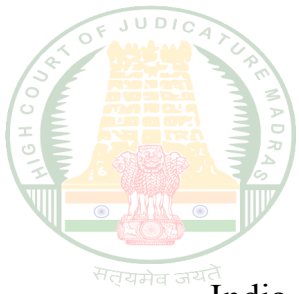
Vs.

1.The Secretary to the Government,
Highways & Minor Ports (HN1) Department,
Secretariat,
Chennai.

2.The Chief Engineer,
Construction & Maintenance,
Highways Department,
Chennai.

3.The Superintendent Engineer, (Highways)
Construction & Maintenance,
Highways Department,
Tirunelveli Circle.

...Respondents



W.P.(MD) Nos.26373, 25514, 25611, 25612 & 27530 of 2024

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the entire records pertaining to the impugned Government Order in G.O. (Ms) No.162, Highways & Minor Ports (HN1) Department dated 01.10.2012 issued by the 1st respondent and quash the same and consequently direct the respondents to invite the tender for the works to be taken place in their department individually.

For Petitioner : Mr.R.Anand

For Respondents : Mr.J.Ravidran,
Additional Advocate General,
assisted by Mr.P.Thilak Kumar,
Government Pleader

COMMON ORDER
(Order of the Court was made by M.S.RAMESH, J.)

The issue involved in all these Writ Petitions are one and the same and hence, all these Writ Petitions are heard together and disposed of through a common order.

2.1. In the year 2003, the Government, through G.O(Ms)No.88, Highways(HN.1) Department, dated 07.05.2003, had ordered for calling of tenders in packages in a division in respect of the works to be taken up, with the loan assistance from NABARD and HUDCO. However, on the basis of the representation received from a section of the contractors,



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as well as on the recommendations of the Board of Engineers, the package tendering system was withdrawn through the Government Order in G.O.(Ms) No.125, Highways Department, dated 04.08.2006.

2.2. Later in the year 2012, the Director General of Highways Department had proposed for re-introduction of the package system, putting forth the advantages/justifications of the system, based on which, the Government, through G.O.(Ms) No.162, Highways & Minor Ports (HN1) Department, dated 01.10.2012, had reintroduced the package system for inviting tenders for road works, by amending the Tamil Nadu Highways Manual Volume IV. The said amendment reads as follows:-

“157 – Tender documents must be prepared for each package or work, as the case may be, separately and noted in a register. The name of the works or packages, as the case may be, the names of persons to whom the forms are sold and date should be entered in the forms making necessary entries in the register. Only such forms sold by the department/downloaded from the Tamil Nadu Government Website should be deemed valid for a particular work/package, as the case may be.”



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2.3. On the strength of G.O(Ms) No.162, the tender notifications for widening of the road under the Highways Department under a Comprehensive Road Infrastructure Development Programme 2024-25 in Tirunelveli (H) C&M Division was issued inviting tenders from the qualified contractors. Similar tender notifications were also called for from C&M Circular of Tirunelveli, through tender notices dated 03.10.2024, 04.10.2024, 05.10.2024, 07.10.2024 and 08.10.2024.

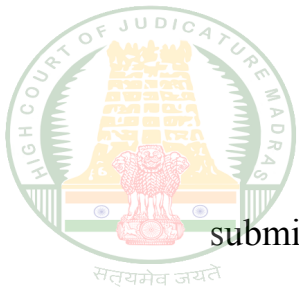
2.4. The Government Order in G.O(Ms)No.162 as well as the aforesaid tender notifications, are put under challenge in all these Writ Petitions.

3. Mr.R.Anand and Mr.P.Ganapathi Subramanian, learned counsels appearing for the petitioners in all the Writ Petitions predominantly raised a ground that the decision of the Highways Department in G.O.Ms.No.162 to resort to package system tenders, deprives the small time contractors from participating in the same thereby violating their fundamental rights under Article 14 of the Constitution of India and therefore is unconstitutional and illegal. It is their further submission that when identical package system was introduced in the Public Works Department, the same was subsequently



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abolished through G.O.(Ms)No.139, Public Works (G2) Department, dated 27.09.2021, by accepting the proposal of the high level officials of the Public Works Department. Likewise, when similar tender notifications were issued through package system by the Tiruppur Corporation, the Writ Court had quashed the tender notification, predominantly on the ground that such grouping of the works are irrational and made with an object to eliminate certain class of contractors, thereby avoiding healthy competition. Even the Highways Department had originally withdrawn the package system tenders that was introduced in the year 2003, through G.O.(Ms) No.125, Highways Department, dated 04.08.2006, based on the recommendations of the Board of Engineers, as well as the contractors and re-introduction of the same after 6 years in 2012, through G.O.(Ms) No.162, is arbitrary. By referring to the recitals of G.O.(Ms) No.162, the learned counsels submitted that the packaging system is not applicable to centrally sponsored schemes/deposit works and service department works and therefore, the present tender notifications, which are sponsored by the NABARD, will not empower the authorities to invoke the said Government Order for clubbing several works and in the absence of any other regulation or order, the arbitrary notifications, eliminating the small time contractors, are liable to be quashed. In view of the same, they



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submitted that the decision passed by the Co-ordinate Bench of this Court, upholding G.O.(Ms) No.162, is *per incurium*. The learned counsels also placed reliance on certain debates of the Parliament, wherein package system tenders was deprecated by the Hon'ble Ministers and submitted that such parliamentary debates can also be taken into consideration by the Courts as per Section 57(4) of the Indian Evidence Act.

4. The learned Additional Advocate General raised a preliminary ground stating that G.O.(Ms) No.162 was already put to challenge before a Co-ordinate Bench of this Court in the case of *N.Gunasekaran Vs. State of Tamil Nadu, Highways & Minor Ports Department and Others* passed in *W.A.No.3302 of 2019*, as well as in the case of *B.Sambath and Others Vs. State of Tamil Nadu, Highways & Minor Ports Department and Others* passed in *W.A.No.3597 of 2019*, **batch** and this Court had upheld the packaging system introduced through G.O.(Ms) No.162, which judgments have become final and therefore, the present Writ Petitions, challenging the very same Government Order, is not maintainable. The learned Additional Advocate General further submitted that the Writ Petitions are liable to be dismissed, on the ground of delay and laches, since the challenges to the



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Government Order is made after an inordinate delay of 12 years, without

any reasonable or acceptable explanation. Insofar as the applicability of

G.O.(Ms) No.162 is concerned, he would submit that the NABARD is

neither a Ministry nor a Department of the Central Government and

therefore cannot be termed as a centrally sponsored scheme. On the other

hand, in order to qualify a scheme as centrally sponsored, the funding

should be only by the Central Ministry or the concerned Department.

According to him, the role of the NABARD will not fall within the

meaning of centrally sponsored scheme, but on the other hand, the

NABARD is termed to be only a Bank, which sponsors state projects by

lending money and is not a “centre” simpliciter. By placing reliance on

several decisions of the Hon'ble Supreme Court, the learned Additional

Advocate General submitted the scope of judicial review of a tender

notification by this Court, in exercise of its powers under Article 226 of

the Constitution of India, is very limited and should not normally venture

to test the tender conditions.

5. We have given our anxious consideration to the submissions made by the respective counsels.

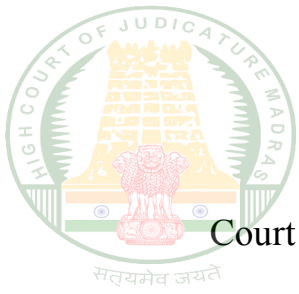


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6. The Tamil Nadu Transparency in Tenders Act, 1998, has been enacted to foster and encourage effective participation by the tenderers in the process of tenders and to promote healthy competition by providing fair and equitable treatment to all the tenderers. By clubbing several work orders into a single package and imposing pre-qualification conditions to suit the value of the tenders, may preclude small time contractors to even qualify for participation. One of the basic requirements of Article 14 of the Constitution of India is fairness in action by the State and non-arbitrariness in essence and substance is the heart beat of fair play. With this prelude in mind, we shall now deal with the submissions made by the respective counsels.

7. The first and foremost submission of the learned counsel appearing for the petitioners is that the decision of the Government in G.O(Ms)No.162 is arbitrary and unreasonable, which paves way only for the big time contractors to qualify in a package system tenders, thereby eliminating the small time contractors for want of qualifications.

8. The preliminary objection raised by the learned Additional Advocate General to counter the petitioners' case is that G.O(Ms)No.162 was already put to challenge before the Hon'ble Division Bench of this



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Court in the case of ***N.Gunasekaran vs. State of Tamil Nadu, Highways & Minor Ports Department [W.A.No.3302 of 2019, dated 04.11.2019]***.

The challenge to G.O(Ms)No.162 was rejected and the writ appeal was dismissed, confirming the order of the Writ Court, which was impugned in the appeal.

9. G.O(Ms)No.162 was the subject matter of challenge before the Writ Court in W.P.No.28340 of 2019 and by an order dated 25.09.2019, a learned Single Judge had upheld the Government Order, which order came to be challenged in W.A.No.3302 of 2019. The Co-ordinate Bench of this Court rejected the contentions of the appellant in the writ appeal that the said Government Order was tainted with arbitrariness, since the same was in favour of the selected few contractors, who could participate in the package system tenders, depriving the other regular contractors. The Co-ordinate Bench had also gone into the question of scope of judicial review and held that the policies of the Government in matters of tenders, cannot be interfered with by the Writ Court, in exercise of its powers under Article 226 of the Constitution of India. Following are some of the relevant portions of the order:

"15.As rightly pointed out by the learned Advocate General by



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relying upon the Judgment of the Hon'ble Supreme Court reported in "(2010) 6 Supreme Court Cases 303" that policy may change with changing circumstances including changes in the political scenario as stated by this Court in the opening paragraph of this judgment. The Hon'ble Supreme Court in detail analyzed as to, how the policy of the Government cannot be interfered with and the relevant Paragraphs of the above Judgment of the Hon'ble Supreme Court are usefully extracted as follows:

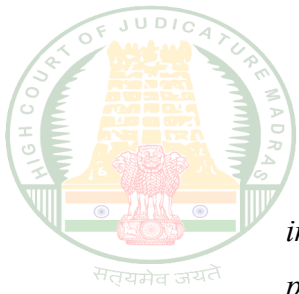
"31. Before we refer to some of the important decisions of this Court dealing with the aspects of judicial review in the matters of government contracts, tenders and change in policy, it is appropriate to notice the observations made in a couple of English decisions and one Australian case on judicial review in the matters of change in administrative policy.

32. In *Hughes v. Deptt. of Health and Social Security*², Lord Diplock, J. said:

"....Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government....." 1985 AC 776

33. In *Attorney-General for the State of New South Wales v. Quin*³, Mason C.J. (majority view, Australian High Court) observed :

"Once this is accepted, I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does. The Executive cannot by representation or promise disable itself from; or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way



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in advance of the actual performance of the duty or exercise of the power....."

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34. In *R. v. Secretary of State for Transport, Ex parte Richmond upon Thames London Borough Council & Ors.*⁴ while laying down that the *Wednesbury* reasonableness test alone was applicable for finding out if the change from one policy to another was justified, Laws, J. stated :
"The court is not the Judge of the merits of the decision maker's policy. ...The public authority in question is the Judge of the issue whether 'overriding public interest' justifies such a change in policy...But this is no more than to assert that a change in policy, like any 1990 64 ALJR 327 (1994) 1 All E.R. 577 discretionary decision by a public authority, must not transgress *Wednesbury* principles....."

35. Now, we consider the decisions of this Court. In *Mohd. Fida Karim and Anr. v. State of Bihar & Ors.*, while dealing with a case of change in Government policy for licence under Bihar Excise Act, this Court held thus :

".....The new policy of adopting the method of auctioncum-tender is certainly a change of policy. The reason for change of policy given by the Government is that it realised that making settlement for five years would give rise to monopolistic tendency, which will not be in public interest, at the same time the interest of revenue was not fully protected in the former policy. This clearly goes to show that the Government wanted to adopt a new policy in public interest to be made applicable from the year 1991-92. Learned Counsel appearing on behalf of the State of Bihar submitted in clear terms that the earlier policy was wrong and the Government realised its mistake and thus adopted a new policy to augment its revenue and to avoid monopolistic tendency. We do not find anything wrong in taking such view by the State Government and to change its policy considering the same to be in public interest....."

36. This Court in *Sterling Computers Limited v. M/s. M & N Publications Limited & Ors.*⁶, while dealing with judicial review in a matter relating to publication of telephone directories of Mahanagar

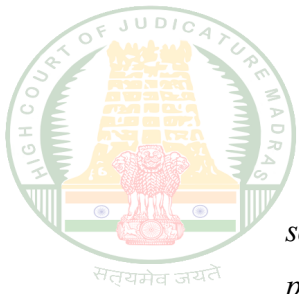


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Telephone Nigam Limited (a (1992) 2 SCC 631 (1993) 1 SCC 445 Government of India Undertaking) made the following observations :

"12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

37. In the case of Tata Cellular v. Union of India, a three-Judge Bench of this Court extensively considered the English decisions as well as the previous decisions of this Court in the matter of judicial review and



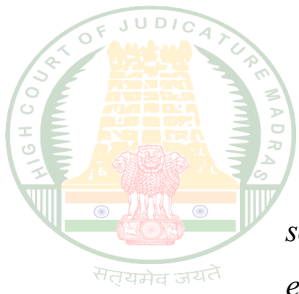
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scope relating to government contracts and tenders and deduced the legal principles in paragraph 94 of the report thus :

- "(1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (1994) 6 SCC 651 (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

38. That the award of a contract, whether it is by private party or by a public body or the State is essentially a commercial transaction was highlighted by this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors.* In that case, this Court spelt out the following considerations that weigh in making a commercial decision :

- "(1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or



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services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier; (1999) 1 SCC 492

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services."

39. Again in the case of *Punjab Communications Ltd. v. Union of India & Ors*, a two-Judge Bench of this Court elaborately examined the principles of legitimate expectation and a change in policy by the Government. While dealing with second question formulated by the Court viz., whether if essentially the Government decided to fund the proposed contract for Eastern U.P. from its own resources, it was permissible for the Government to change its policy into one for providing telephones for rural areas in the entire country and whether 'legitimate expectation' of the appellant in regard to the earlier notification required the Court to direct that a notification for Eastern U.P. should be continued, this Court held in paragraph 45 of the report thus:

"45. It will be noticed that at one stage when the ADB loan lapsed, the Government took a decision to go ahead with the project on its own funds. But later it thought that the scheme regarding telephones in rural areas must cover not only the villages in Eastern U.P. but also in other backward rural areas in other States (1999) 4 SCC 727 The statistics given in the counter-affidavits of the Union of India to which we have already referred, show that there are other States in the country where the percentage of telephones is far less than what it is in Eastern U.P. The said facts are the reason for the change in the policy of the Government and for giving up the notification calling for bids for Eastern U.P. Such a



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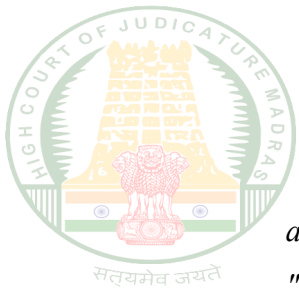
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change in policy cannot, in our opinion, be said to be irrational or perverse according to Wednesbury principles. In the circumstances, on the basis of the clear principles laid down in ex p Hargreaves and ex p Unilever, the Wednesbury principle of irrationality or perversity is not attracted and the revised policy cannot be said to be in such gross violation of any substantive legitimate expectation of the appellant which warrants interference in judicial review proceedings."

40. *In the case of Monarch Infrastructure (P) Ltd. v. Commissioner., Ulhasnagar Municipal Corporation & Ors.*10, this Court was concerned with the question relating to NIT issued by Ulhasnagar Municipal Corporation for appointment of agents for collection of octroi and revision of terms and conditions thereof. This Court held :

".....The High Court had directed the commencement of a new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi has to be made on day-to-day basis and payment must be made on a weekly basis entailing, in case of default, (2000) 5 SCC 287 cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge. We do not think that we should intercede to restore status quo ante the conditions arising in clauses 6(a) and 6(b) of the Tender Booklet and the bid offered much earlier by Konark Infrastructure (P) Ltd. should be accepted, for it filed a writ petition, which was allowed with a direction for calling for fresh tenders....."

41. *In Union of India and Anr. v. International Trading Co. and Anr.*11, this Court held that non-renewal of permit by the Government to a private party on ground of change in its policy cannot be faulted if such change is founded on Wednesbury reasonableness and is otherwise not



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arbitrary, irrational and perverse. It was held :

"22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil (2003) 5 SCC 437 sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

42. In the case of Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors.¹², this Court, inter alia, applied the principles enunciated in Tata Cellular and Monarch Infrastructure (P) Ltd.¹⁰ and held as follows :

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the



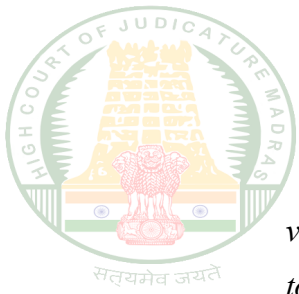
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particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

16. In that case, the question that fell for consideration was change of policy with regard to allowing the local manufacturers for supply of High Security Vehicle Registration Plates. Though the Hon'ble Supreme Court upheld the tender document when challenged by Indian Manufacturers in the case of "Association of registration plates Versus Union of India and others" reported in "(2005) 1 Supreme Court Cases 679", subsequently, there was a change in the policy of the Government to allow the local manufacturers also to supply the High Security Vehicle Registration Plates (HSVRPs). When the policy allowing local manufacturer to participate in the tender was challenged by the foreign manufacturers and the Hon'ble Supreme Court held that the subsequent policy cannot be interfered with because of the change in circumstances, even though the Hon'ble Supreme Court earlier upheld the tender by which only the foreign supplier alone was eligible to participate in the tender. In Paragraph No.58, the Hon'ble Supreme Court holds that unless it is arbitrary, the policy of the Government cannot be interfered with and the said paragraph is usefully extracted as follows:

"58. The statement of law expounded in S.Nagaraj is beyond question. As noticed above, in Assn. of Registration Plates this Court did not find any fault with the controversial conditions in NIT and overruled all objections raised by the petitioners therein in challenge to those conditions. The impugned conditions of NIT in that group of cases were not held to be arbitrary, discriminatory or irrational nor amounted to creation of any monopoly as alleged. The declaration of law by this Court in Assn. of Registration Plates is that in the matter of formulating conditions for a contract of the nature of ensuring supply of HSRP, greater latitude needs to be accorded to the State authorities. We find it difficult to hold that by



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virtue of that judgment the impugned conditions were frozen for all times to come and the States were obliged to persist with these conditions and could not alter them in larger interest of the public. In our view, the decision of this Court in Assn. of Registration Plates did not create any impediment for the States to alter or modify the conditions in NIT if the circumstances changed in material respects by lapse of time."

Hence, it is evident that change in policy of the Government has been upheld by the Hon'ble Supreme Court."

10. On the same day, when the aforesaid decision was pronounced, a batch of similar writ appeals in ***B.Sambath vs. State of Tamil Nadu, Highways & Minor Ports Department [W.A.No.3597 of 2019 etc., dated 04.11.2019]***, in which, G.O(Ms)No.162 was the subject matter, were also dismissed.

11. It is a settled principle of law that the principles of *res judicata* as well as *constructive res judicata* are applicable to the proceedings under Article 226 of the Constitution, as held by the Constitutional Bench of the Hon'ble Supreme Court in the case of ***Devilal Modi vs. Sales Tax Officer*** reported in ***AIR 1965 SC 1150***. It is also not in dispute that G.O(Ms)No.162 was already upheld by a Co-ordinate Bench of this Court in ***N.Gunasekaran's case*** (supra) as well as in ***B.Sambath's case*** (supra) and the same has become final.



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12. In two of the writ petitions in the present batch of cases also, the same G.O(Ms)No.162 is assailed. In the light of the decision of the Hon'ble Supreme Court in **Devilal Modi's case** (supra), the challenge in these writ petitions to G.O(Ms)No.162, would be hit by the principles of *res judicata*.

13. However, the learned counsel for the petitioners had raised a ground that G.O(Ms)No.162 carves out certain exceptions for its applicability and one such exception is that the packaging system of tenders cannot be made applicable to centrally sponsored schemes, deposit works and other service department works.

14. According to the learned counsel, the packaging system tenders are sponsored by the National Bank for Agriculture and Rural Development (NABARD), which is deemed to be a centrally sponsored scheme and therefore, G.O(Ms)No.162 cannot be invoked for calling package system tenders. Since this ground has not been considered in **N.Gunasekaran's case** (supra), as well as in **B.Sambath's case** (supra), the decisions rendered therein are *per incuriam* and therefore, the principles of *res judicata* will not apply.



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15. For consideration of such a submission, it would be pertinent to first analyse as to whether the sponsorship of the project by the NABARD would amount to centrally sponsored scheme?

16. The learned Additional Advocate General had placed reliance on the definition of 'National Bank' that grants loans for the State Projects on interest, which loans are repaid and the business of the NABARD cannot be termed as a scheme, much less a centrally sponsored scheme.

17. The learned counsel appearing for the petitioners had produced copies of the Questioning Session before the Lok Sabha, wherein, the Hon'ble Minister had clarified the functional differences between the central schemes and the centrally sponsored schemes. It was clarified therein that the 'Central Sector Schemes' are those which deal with the subjects in the Union List and are funded and implemented by the Central Ministry/Department or its Agencies. 'Centrally Sponsored Schemes' are those schemes, which do not pertain to the subjects in the Union List, but which are funded directly by the Central Ministries / Departments, and are implemented by the States or their Agencies,



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irrespective of the pattern of financing. G.O(Ms)No.162 does not apply to centrally sponsored schemes, which fact is not under dispute.

18. NABARD is a Bank providing financial support to the State for strengthening rural infrastructure under the Rural Infrastructure Development Fund (RIDF). For the purpose of disbursement of funds, the Finance Department of the State Government is required to make a request for disbursement of funds and on consideration, the NABARD provides funds on reimbursement basis, apart from the initial loan given as mobilisation advance. The borrowings of the State Government under RIDF are governed by Article 293(3) of the Constitution of India. After approval of the borrowing power of the State Government and after scrutiny of the drawals, the State Government executes a time promissory note, pursuant to which, the NABARD releases loan to the department. The State Government, thereafter, is required to repay the RIDF loan, in equal annual instalments within seven years from the date of drawal, including the grace period of two years. As per the terms and conditions for the grant of loan, the State Government is required to adhere to certain stipulations as a pre-qualification requirement, for selecting / enlisting contractors / firms. The repayment of loan by the State Government shall be together with interest, which shall be 1.5% below

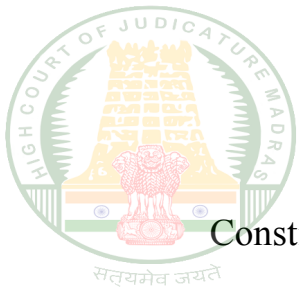


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the bank rate applicable as on the date of disbursement of the loan. The procedure for seeking loan for rural infrastructure development and its repayment are exclusively dealt with by the Regulations of the NABARD itself.

19. We do not find any intervention or involvement of the Central Government, for the purpose of sanctioning of loans to the concerned departments of the State Government. It does not appear that the loans dealt with by the NABARD are under a scheme, which is sponsored by the Central Government. In the light of the business activities of the NABARD as referred above, we have no difficulty in holding that the road works, which are sponsored by the NABARD is not under the centrally sponsored scheme. Thus, the exception carved out for the applicability of G.O(Ms)No.162, will not apply to the tender notifications, which are impugned in the present writ petitions. Consequently, it cannot be held that the earlier decisions of the Hon'ble Co-ordinate Benches in *N.Gunasekaran's case* (supra) as well as in *B.Sambath's case* (supra), are *per incuriam*.

20. The learned Additional Advocate General had submitted that the High Court in exercise of its powers under Article 226 of the



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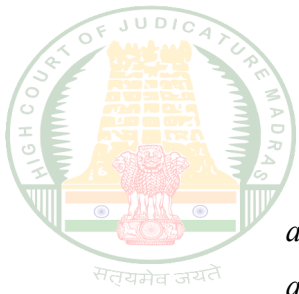
Constitution of India, should not venture to interfere with the terms and conditions of the invitation to tenders, except in cases where it is arbitrary and discriminatory. In the case of ***Airport Authority of India vs. Centre for Aviation Policy, Safety & Research (CAPSR) and others*** reported in ***2022 Live Law (SC) 814***, the Hon'ble Supreme Court had dealt with the scope of judicial review in matters relating to tenders, in the following manner:

"6. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.

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:

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



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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 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 down such action of the executive as is proved to be*



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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;

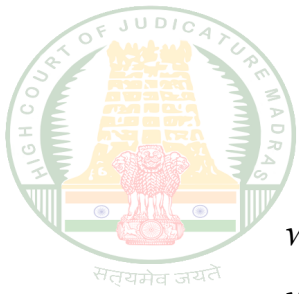
(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(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 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."

21. Similarly, in the case of ***The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and others*** reported in **2023 Lice Law (SC) 457**, a similar view was taken in the following manner:-

"52. Ordinarily a writ court should refrain itself from imposing its decision over the decision of the employer as to



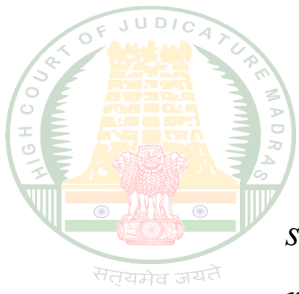
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whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in Association of Registration Plates v. Union of India and Others, reported in (2005) 1 SCC 679.

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



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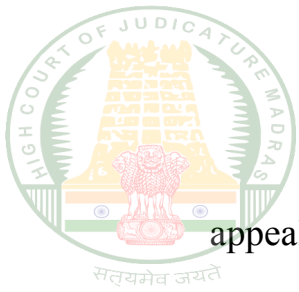


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should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when 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."

22. To sum up, we are in agreement with the submissions of the learned Additional Advocate General that since G.O(Ms)No.162 was already upheld by the Writ Court in exercise of its power under Article 226 of the Constitution of India, which was confirmed in the intra-court



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appeals also, the present writ petitions, in which, the challenge is to the same G.O(Ms)No.162, are barred by the principles of *res judicata* and hence, the same are not maintainable. Similarly, the ground that the funding of the projects under the tender notification by the NABARD, cannot be termed to be by a centrally sponsored scheme and therefore, it cannot be said that the earlier judgments rendered in ***N.Gunasekaran's case*** (supra), as well as in ***B.Sambath's case*** (supra) are *per incuriam*. Consequently, it requires to be held that the packaging system tender notification under G.O(Ms)No.162, which has been put to challenge in some of the writ petitions here, can be maintained, since they draw authority from G.O(Ms)No.162.

23. The learned counsel appearing for the petitioners had raised several other grounds, touching upon the terms and conditions of the tender notification. We do not intend to deal with such submissions, in view of the limited scope of interference by the judicial review, as held by the Hon'ble Supreme Court in ***Airport Authority of India's case*** (supra), ***Brihan Mumbai Electric Supply's case*** (supra), as well as owing to the bar for consideration in view of the principles of *constructive res judicata*.



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24. Though we are constrained to reject the challenge to G.O(Ms)No.162 in these writ petitions, we are conscious of the fact that such an order has been made on technicalities with regard to the maintainability of the writ petition. During the course of arguments, we were apprised of the fact that it is only the Public Works Department in the Government of Tamil Nadu, which calls for tender notifications through package system. When a package tender system was earlier introduced in the Public Works Department, the same was withdrawn, based on the proposal of the high level officials of that department. We were also apprised of the fact that when similar package system tender notification was issued by the Tiruppur Corporation, the same was quashed by the Writ Court, holding it as unconstitutional. While deprecating the drawing of tenders through a package system, it was held that grouping of several works into one tender is irrational and made with an object to eliminate certain class of contractors, thereby avoiding healthy competition. The Tamil Nadu Transparency in Tenders Act, 1998, was also introduced to encourage effective participation of tenderers and to promote healthy competition, by providing fair and equitable treatment to all the tenderers. Above all, Article 14 of the Constitution of India has an in-built requirement of fairness in all actions



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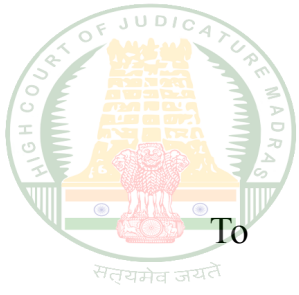
by the State and non-arbitrariness as a *sine qua non*. Though we are conscious of the fact that the present mode of tender adopted by the department is against the constitutional mandate under Article 14 and can also be termed to be arbitrary, since it effectively eliminates the small time contractors, even for qualifying to participate, we are hamstrung, in view of the unsuccessful challenge to G.O(Ms)No.162, in the earlier round of litigations before this Court. However, since G.O(Ms)No.162 effectively deprives healthy competition, by providing fair and equitable treatment to all the tenderers, we strongly recommend to the Government to re-consider their decision by discontinuing with the package system tender at the earliest.

25. For all the foregoing reasons, all the Writ Petitions stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

[M.S.R, J] [A.D.M.C, J]
21.01.2025

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

hvk/bala



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To

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1.The Secretary to the Government,
Highways & Minor Ports (HN1) Department,
Secretariat,
Chennai.

2.The Chief Engineer,
Construction & Maintenance,
Highways Department,
Chennai.

3.The Superintendent Engineer, (Highways)
Construction & Maintenance,
Highways Department,
Tirunelveli Circle.



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M.S.RAMESH, J.
and
A.D.MARIA CLETE, J.

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Pre-delivery common order made in
W.P.(MD) Nos.26373, 25514,
25611, 25612 & 27530 of 2024

21.01.2025