

(2010) 09 MAD CK 0407
In the Madras High Court
Case No : Writ Petition No. 15190 of 2010

B. Muraliharan

APPELLANT

Vs

Union of India (UOI) and A. Periasamy

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19(1), 21

Citation : (2011) 1 CTC 428

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : Karl Marx, for the Appellant; R. Achuthan, SCCG for Respondent 1 in W.P. No. 15190/2010, T. Kokilavani, SCCG for Respondent 1 in W.P. No. 17402/2010 and S.R. Sundaram, for Respondents 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

V. Dhanapalan, J.—By consent, the Writ Petitions themselves are taken up for disposal.

2. While W.P. 15190 of 2010 has been filed for issuance of a writ of certiorarified mandamus calling for the records of the third respondent's Notice Inviting Tender (NIT) dated Nil, issued during the month of June, 2010, relating to maintenance of Residential Colony, including improvement and civil works at the airport of Chennai, to quash the same and consequently direct the second and third respondents to permit the petitioner to participate in any future tender proceedings to be conducted by them, touching the maintenance/improvement by way of civil works at the airport of Chennai, W.P. No. 17402 of 2010 has been filed for a similar relief calling for the records of the third respondent's Notice Inviting Tender (NIT) dated Nil, issued during the month of July, 2010, relating to annual maintenance contract for Kamaraj Domestic Terminal and Link Building at airport of Chennai, to quash the same and consequently direct the second and third respondents to permit the petitioner to participate in any future tender proceedings to be conducted by them, touching the annual maintenance/

improvements proposed at Kamaraj Domestic Terminal and its contiguous Link Building at the airport of Chennai.

3. Since these two Writ Petitions involve identical issues, they are being disposed of in common. For the sake of disposal, let us take the facts in W.P. No. 15190 of 2010, which are as under:

3.1 According to the petitioner, he is a Class I registered contractor with PWD Department of the Government of Tamil Nadu. He has undertaken several civil works projects of the Airport of Chennai, by successfully participating in the tender proceedings conducted by the second and third respondents. The third respondent had issued a Notice Inviting Tender from participating contractors during the month of June, 2010, inviting tenders for maintenance of Residential Colony, including improvements and committing minor civil works at the Chennai Airport. The said maintenance contract has been on an annual basis and the estimated cost of work is pegged at Rs. 38,55,482/-. The earnest money deposit payable was Rs. 77,110/- and that the intending contractors, who are willing to participate in the tender have to make the second and third respondents complacent about their competency to participate in the tender proceedings by turning over crucial documents with regard to their past performance/experience in works contract along with their respective applications requisitioning the second and third respondents for a tender form. One amongst such conditions to be fulfilled by a contractor is that he, in the past, should have undergone three works contract worth to the tune of Rs. 15.42 lakhs or two contracts of worth Rs. 19.28 lakhs or of an isolated work contract worth Rs. 30.84 lakhs. The applications along with supporting documents with regard to their competency from the participating contractors have to reach the office of the third respondent on or before 11.06.2010, so that the third respondent would furnish the tender forms to participating contractors in reciprocity, who in turn shall submit their filled in tender forms to the third respondent on or before 25.06.2010. The time schedule for opening tender forms has been fixed at 03.30 p.m. on 25.06.2010 and that the emerging successful bidder's tender proposal shall be subjected to concurrence of the finance department of the second and third respondents, who in turn shall confirm the selection of successful bidder, pursuant to which work orders shall be issued and works resumed.

3.2. In compliance with the said stipulations, the petitioner turned over a document dated 04.10.2008 which would evidence the fact that he had carried out civil engineering contracts at Pammal, Anna Nagar, Chennai, worth about Rs. 21,60,500/-. The other document furnished by the petitioner to prove his prowess in the civil engineering line is a letter dated 07.01.2010 addressed by the Assistant General Manager, Engineering (Civil), CMD-II, the third respondent herein, which reflects the fact that he undertook an assignment at the Airports Authority of India vis-a-vis maintenance of Terminal Building in the operational area at Chennai Airport, during the year 2009-2010 for a period of 12 months, commencing from 09.04.2009 to 08.04.2010, whereupon the pecuniary worth of

the said contract is Rs. 25.00 lakhs. Hence, the petitioner is entitled to participate in the tender.

4. Respondents 2 and 3 have filed a common counter affidavit, stating inter alia as follows:

4.1. The eligible contractors who possess with the pre-requisite eligibility, on production of documentary evidences in proof of their having eligibility and qualifications, should submit the applications along with supporting documents on or before 11.06.2010 to the third respondent's office, who, after examination, shall furnish tender forms for participation in the tender. The pre-condition is that any contractors who have pre-requisition eligibility conditions with respect to the terms as specified alone are eligible to be issued with the tender forms. In the absence of documentary evidences in support of experience, eligibility qualification and certificate, the applicant is not entitled to even receive the tender forms. The completed tender forms should be submitted on or before 25.06.2010, which will be open for scrutiny at 03.30 p.m. on the same day. The successful bidders tender proposal shall be subject to the concurrence from the finance department of the respondents and thereafter the selection of successful bidder will be confirmed. After scrutiny, it was evidently found that the petitioner was not eligible for issue of tender document, since he had not submitted or produced valid proof of experience certificate of similar nature of work. Strictly following the NIT conditions, the fourth respondent has been selected on 01.07.2010 as successful bidder for award of the contract. In view of the interim order of this Court dated 14.07.2010, confirmation has been kept in abeyance and hence the writ petitions may be dismissed.

5. The one and only contention of the learned Counsel for the petitioner is that the petitioner is entitled for the tender document to participate in the tender of the second and third respondents as he has complied with the stipulation of two work contracts of Rs. 19.20 lakhs each. It is also his contention that in so far as the first document dated 04.10.2008 is concerned, the petitioner has adduced a photostat copy of the Tax Payees counterfoil dated 02.12.2008, which would evidence the fact that the petitioner has cleared the income tax liability for a sum of Rs. 21,60,550/- arising therein, as it is impossible to effect tax liability payments under TDS at the instance of a private party. With regard to the other document dated 07.01.2010 issued by the Assistant General Manager (Civil) CMD-II, the contention of the learned Counsel for the petitioner is that the third respondent in clear and categorical terms held that the petitioner had undertaken works contract to the tune of Rs. 25.00 lakhs. The bottom line of the learned Counsel for the petitioner is that despite the competency of the petitioner, he has been denied the opportunity to participate in the tender. The learned Counsel has cited the following decisions:

(i) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, :

9. That takes us to the next question whether the acceptance of the tender of Respondents 4 was invalid and liable to be set aside at the instance of the appellant. It was contended on behalf of Respondents 1 and 4 that the appellant had no locus to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, what did it matter to him whose tender was accepted; what grievance could he have if the tender of Respondents 4 was wrongly accepted. A person whose tender was rejected might very well complain that the tender of someone else was wrongly accepted, but, it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint? This argument, in our opinion, is misconceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of Respondents 4, but that he was differentially treated and denied equality of opportunity with Respondents 4 in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as Respondents 4 were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance was well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of Respondents 4 was vitiated by any legal infirmity.

(ii) *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, :

25. Therefore, Mr Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution, in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest." Reliance may be placed on the observations of this-Court in *E.P. Royappa v. State of T.N.*; *Maneka Gandhi v. Union of India*, *R.D. Shetty v. International Airport Authority of India*, *Kasturi Lal Lakshmi Reddy v. State of J&K* and *Ajay Hasia v. Khalid Mujib Sehravardi*. Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in paras 101 and 102 of the *Escorts* case read properly do not detract from the aforesaid principles.

27. We are inclined to accept the submission that every activity of a public

authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities as the respondent, in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords, must be judged by that standard. If a governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. See the observations of this Court in *Kasturi Lal Lakshmi Reddy and R.D. Shetty v. International Airport Authority of India* (SCC pp. 505-06 : SCR p. 1034).

(iii) *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, :

18. In the recent decision in *Tata Cellular v. Union of India* this Court has examined the scope of judicial review in the field of exercise of contractual powers by Government bodies and, after noticing the current mood of judicial restraint in England, the Court has laid down the following principles: (SCC pp. 687-688, para 94)

(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 (including its other facets 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.

19. "*Wednesbury* principle of reasonableness" to which reference has been made in principle (5) aforementioned is contained in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*. In that case Lord Greene, M.R. has held that a decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court

concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. In *Tata Cellular*⁶ this Court, has mentioned two other facets of irrationality:

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld.

(2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes.

(iv) *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*, :

36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho v. State of T.N.*, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy

the test of "reasonableness", then such an act or decision would be unconstitutional.

6. In reply, learned Standing Counsel for the Central Government would contend that as per the Notice Inviting Tender, tender forms will be issued to those contractors who produce certificate from clients having satisfactorily completed at least three works each of Rs. 15.42 lakhs or two works of each of Rs. 19.28 lakhs or one work of Rs. 30.84 lakhs of similar nature during the last seven years ending on 30.04.2010 and the firms showing work experience certificate from non-government/non PSU organizations should submit "Tax Deduction at Source Certificate" in support of their claim for having experience of stipulated value of works and that phase/part completion of the scope of work in a contract shall not be considered for issuance of tender forms. He would also contend that as the petitioner has not fulfilled the requirements of the Notice Inviting Tender, his claim for issuance of tender forms has been rejected by the authorities.

7. I have heard the learned Counsel for the petitioner and also gone through the records.

8. As per the Notice Inviting Tender, a pre-requisite eligibility condition was made, stipulating "Tender forms will be issued to those contractors who produce certificate from clients having satisfactorily completed (phase/part completion of the scope of work in a contract shall not be considered) at least three works each of Rs. 15.42 lakhs or two works of each of Rs. 19.28 lakhs or one work of Rs. 30.84 lakhs of similar nature during the last seven years ending on 30.04.2010 (Firms showing work experience certificate from non-government/non PSU organizations should submit "Tax Deduction at Source Certificate" in support of their claim for having experience of stipulated value of works), produce proof of annualized average financial turnover of Rs. 11.57 lacs during the last three years ending on 31.03.2010 and should have adequate materials and manpower for execution of the work.

9. Keeping the above condition in mind, if we look at the stand of the petitioner that he has complied with the condition of two work contracts of Rs. 19.28 lakhs each and hence he is entitled for tender form and to participate in the tender process, in support of which he relied on the documents dated 04.10.2008 and 07.01.2010, it is to be stated that the document dated 04.10.2008 has been issued by an individual, namely, B.Gajapathy, Power of Attorney of G.Gajalakshmi, a private individual, certifying that the petitioner has constructed an independent house at No. 17-A, 7th Main Road, Pammal, Annanagar, Chennai-600 075, specifically mentioning that the agreement cost was Rs. 14,00,000/- and the completion period was only three months and date of completion as 31.10.2007, but, the completion cost was Rs. 21,60,550/-. The Notice Inviting Tender stipulates that any contractor/firm furnishing work experience certificate from non-government/non PSU organizations should submit "Tax Deduction at Source Certificate" in support of his/its claim for having experience of stipulated value of works. So, the said document, which has been

issued in respect of a private construction work of an individual house for an individual is evidently not the required document supported by Tax Deduction at Source Certificate. The statement produced by the petitioner at page No. 7 of the typed set of papers clearly shows that there was no Tax Deduction at Source for the abovesaid work. Therefore, the work done for the private party, for which TDS is not made, cannot be reckoned and treated as a requisite pre-condition document. As such, there is non-fulfilment of condition by the petitioner with regard to the production of TDS Certificate.

10. Coming to the other document produced by the petitioner dated 07.01.2010, it is to be stated that as per the Notice Inviting Tender, phase/part completion of the scope of work in a contract shall not be considered and the work should have been completed on or before 30.04.2010, for issuance of tender document. As a matter of fact, the work under the said document was completed on 30.06.2010 i.e., after the due date stipulated in the Notice Inviting Tender. It also shows that even on 11.06.2010, which was the last date for submission of applications for issuance of tender forms by the contractors, the said work was in progress and not completed. Hence, the document produced by the petitioner was not considered for issuance of tender document, as the same was not a completion certificate at all.

11. Since the abovesaid two documents were not in compliance with the Notice Inviting Tender conditions, the petitioner was found not eligible for issuance of tender documents to participate in the tender and accordingly he was not issued with the tender forms. Therefore, the action of the respondent authorities in not issuing tender forms to the petitioner cannot be found fault with, whereby the communication of the third respondent to the petitioner dated 11.06.2010 in W.P. No. 15190 of 2010, holding that the document of the petitioner dated 04.10.2008 evidencing undertaking a work contract worth Rs. 21,60,550/- has not been supported by Tax Deduction at Source Certificate and that the other document dated 07.01.2010 was not falling within the conditions of Notice Inviting Tender and also the other letter dated 19.07.2010 to the similar effect in W.P. No. 17402 of 2010 and rejecting the applications of the petitioner for issuance of tender forms are perfectly in order. The decisions cited by the learned Counsel for the petitioner have no application to the facts of the present case.

12. In matters involving public interest, normally, the power of this Court in a challenge to the award of contract is limited. The Court must be satisfied whether there is some element of public interest involved in the tender. The stake involved in this case is heavy and the individual cannot take advantage of the award of contract, but this Court has only the power of judicial review of the decision making process. In the instant case, it is evident that the documents furnished by the petitioner shall not satisfy the requirements of the Tender Notification. Though this is the matter to be determined by the decision making authority and the power of judicial review is very limited, the law laid down by the Supreme Court is clear in *Tata Cellular v. Union of India* 1994 (6) SCC 651,

that the power of judicial review is available to the Court in case the decision made by the authority is arbitrary or not in conformity with the terms and conditions. The Supreme Court, in Tata Cellular case, has held that it was obliged to interfere on the ground of arbitrariness and violation of principles of natural justice, confining itself to the doctrine of judicial restraint, however, by the application of permissible parameters to set right the decision-making process. In this case, in the absence of any arbitrariness in the action of the respondents or violation of principles of natural justice, this Court is not inclined to countenance the prayer sought for by the petitioner.

13. Writ Petitions, therefore, fail and are dismissed. No costs. Consequently, the connected M.P. Nos. 1 and 2 of 2010 are closed.