(1998) 06 MAD CK 0034

In the Madras High Court

E.C. Bose and Co. (Paradip) Pvt. Ltd. APPELLANT

Vs

Tamil Nadu Electricity Board and Others RESPONDENT

Date of Decision : 11-06-1998

Acts Referred:

Citation : (1998) 3 MLJ 243

Hon'ble Judges : Shivaraj Patil, J

Bench : Single Bench

Judgement

Shivaraj Patil, J.—This appeal is by the plaintiff in C.S.No. 617 of 1997, aggrieved by the order dated 7.1.1998 made by the learned single

Judge in Original Application No. 635 of 1997 and Application Nos. 3693 and 3598 of 1997. Original Application No. 635 of 1997 was filed

seeking an order of injunction, restraining defendants 1 and 2 from in any manner further processing, evaluating, finalising and awarding the contract

which is the subject-matter of Tender Notification dated 20.8.1997 in Specification No. Coal-23 to any of the defendants, pending disposal of the

suit. Application No. 3693 of 1997 was filed by the Tamil Nadu Electricity Board to vacate the order of interim injunction granted on 27.10.1997

passed in O.A.No. 635 of 1997. Application No. 3598 of 1997 was filed by the third respondent for vacating the order of interim injunction

granted on 27.10.1997.

2. The learned single Judge, after hearing the parties, by the elaborate order under appeal, dismissed O.A.No. 635 of 1997 and allowed

Application Nos. 3598 and 3693 of 1997. In the result, the injunction granted earlier was vacated.

3. The facts which are considered necessary and relevant for the disposal of this

appeal briefly stated are the following: In this order we will refer

to the parties as arrayed in the suit for convenience and understanding. The plaintiff has filed the suit, C.S.No. 617 of 1997 for declaration that the

process, evaluation and finalisation of tenders by defendants 1 and 2 namely, the Tamil Nadu Electricity Board and the Chief Engineer of the said

Board is illegal, arbitrary, unconstitutional and contrary to the terms of the tender notification, for a mandatory injunction, directing the defendants 1

and 2 to call for fresh tenders for the award of the contract and also for permanent injunction, restraining them from finalising and awarding the

contract in pursuance of the earlier tender notification.

4. The plaintiff states that it is a private limited company having its Headquarters at Calcutta, incorporated under the Companies Act, 1956.

Defendant 1 through Defendant 2 published tender Notification No Coal-23 dated 20.8.1997 calling for tenders for movement and handling of

coal by Rail-cum-Sea route from various Collieries through the Load Ports of Haldia, Paradip and Vizag and Discharge Ports of Chennai and

Tuticorin and to the Thermal Power Stations at Ennore, North Chennai, Tuticorin and Mettur. The plaintiff and defendants 3 to 9 submitted their

tenders in response to the said notification. As per the notification, the closing date of sale of tender forms was fixed on 22.9.1997. A pre-bid

meeting for giving clarifications to the prospective tenderers was scheduled to be held on 23.9.1997 and the last date fixed for receipt of tenders

was on 1.10.1997. The tenders were to be opened on the same day. As per the notification, the bidders had been asked to submit their bids in

two sealed envelops, and ''A'' envelope was to contain bid qualification requirement, commercial terms including payment terms, liquidated

damages, schedule of deviations and any other information called for. Envelope ''B'' was to contain price bids. It was also stipulated that if

Envelope ''A'' were to contain any price bid, the entire tender would be rejected. The qualified bidders would be invited for discussion with the

officials of the Board and they would be informed of commercial terms acceptable to the Board. As per the notification, the tenders which were

not in prescribed form, tenders received after expiry date, tenders incomplete and evasive, tenders from the tenderer whose past performance was

not satisfactory, tender not in conformity with Board''s specifications, tender not meeting the bid qualification requirement, and tender from one

who has indicated the price bids in envelope ''A'' were liable to be rejected at the threshold. The plaintiff applied for the contract in respect of

Paradip Port. The third defendant is one of the tenderers who did not satisfy the bid qualification requirement. Most of the other defendants were

not qualified as per prescriptions and terms imposed in the tender notification. Ineligible bidders were allowed to participate in the tender, and post

tender qualifications had been conferred on certain bidders. There were infirmities and illegalities in the processing, evaluating and finalising of

contract by the Board. Hence, the plaintiff was forced to file the suit for the reliefs as stated above.

5. One of the conditions notified in the specification of the Board was that the tenderers should have handled cargo of not less than five lakh tonnes

per annum in any of the Ports in India and the cargo could be bulk cargo other than coal also. The tenderers satisfying these requirements had to

submit certificates of experience in evidence of handling such quantity of coal per annum. The annual turnover of handling of bulk cargo was also

fixed for the above five ports separately and the highest annual turnover must be Rs. 15 crores, so far as Chennai Port Trust was concerned. It

was also specifically stated in the tender notification that support documents must be furnished along with tender in evidence of annual handling of

cargo and also the annual turnover. On 23.9.1997 a pre-bid meeting was held and clarifications had been issued by the officials of the Board to

various queries raised by the tenderers. The third defendant failed to satisfy the bid qualification requirements. The third defendant had not handled

five lakhs tonnes of cargo in any ports of India in any one previous year. The third defendant had only carried certain amount of bulk cargo as sub-

contractor for SPIC and it has not produced end user certificate for handling such prescribed quantity of bulk cargo. On a prior occasion, in the

year 1984 and 1985, the third defendant was entrusted with a ""contract of handling of coal for the Board and during that short period, its

performance was very poor and not satisfactory. Therefore, the third defendant should not have been allowed to participate in the tender.

Moreover, it has made mention of payment conditions in envelope ''A'' which is also contrary to the specification notification and its tender ought to have been rejected outright. Notwithstanding all these disqualifications, the Tamil Nadu Electricity Board is trying to award the contract to the third

defendant illegally.

6. The Board was likely to finalise the award of contract in a short period and, therefore, the plaintiff having filed the suit, filed Original Application

No. 635 of 1997 for grant of temporary injunction, restraining the Board from processing, evaluating and finalising the award of tender.

7. The learned single Judge on the presentation of the suit and applications, after hearing the learned Counsel for the plaintiff, granted a limited

injunction, restraining the Board from confirming the award of contract in respect of tender notification dated 20.8.1997. Notices had been taken

to the defendants. Defendants 1 and 2 i.e., the Board and its Chief Engineer entered appearance through their counsel and filed Application No.

3693 of 1997 raising various contentions and praying for vacating the temporary injunction granted ex parte. Defendants 1 and 2, in the said

application stated that the plaintiff had offered its bid for Paradip Port only and, therefore, it had no locus standi to challenge the entire process and

finalising of tenders. The terms and conditions are clearly mentioned in the tender notification and there was no vagueness or ambiguity. The Board

has followed proper procedure in short-listing the tenderers. No illegality had been committed and there was no arbitrariness or favouritism in

processing or awarding the contract. The plaintiff had participated in the tender process and it had not objected to the processing done by the

Board at any time. Having participated by submitting the tender, which has been properly processed by the Board, the plaintiff was estopped from

questioning the process made by the Board. The defendants will lose heavily if the contract is not finalised and awarded to the proper party and the

Board is paying higher rates to the present contractors and their terms are very much higher than the terms quoted by the bidders in the present

process. The plaintiff has not made out a prima facie case for granting injunction and the balance of convenience was also not in its favour. Huge

amount is to be saved by awarding the new contract to the parties quoting lowest rates. The application was filed by the plaintiff only to help the

present contractors. The bid qualification requirements were to be given in ''A'' envelope. The Board had got right to ask for any clarification for ascertaining the facts. The plaintiff-company itself was asked for furnishing certain particulars within the prescribed time. The third defendant had

satisfied the bid qualification requirements and so also defendants 4 to 8. The plaintiff did not participate in the pre-bid meeting held on 23.9.1997

and clarifications have been issued to all the bidders by way of a letter dated 29.9.1997. The tenderers should have handled five lakh tonnes of

bulk cargo per annum in any one Port in India and the annual turnover required for each Port is given in the notification. These requirements must

be ratified by any tenderer whose tender is to be processed by the Board. The third defendant had furnished particulars of handling bulk cargo and

it has also produced certificates from end users to the effect that in the year 1995-96 it had handled 5.05 lakh tonnes of bulk cargo. It has also

produced and user certificate from SPIC which however had not been taken into consideration. The third defendant''s handling of bulk cargo at

Chennai Port alone had been taken into consideration and it had handled more than 5 lakh tonnes of bulk cargo which Satisfied the bid

qualification requirements. It was not denied that the third defendant was a Contractor for handling, of coal for the Board for a limited period of six

months in 1984-85, but it was denied that its performance was not satisfactory during the, said period. The tender was given to another contractor

because his bid was found more favourable to the Board and that does not mean that the third defendant''s performance was unsatisfactory. The

Board was interested only in awarding the contract to the lowest tenderer who also satisfied the bid qualification requirements fixed by the Board.

The fourth defendant is the present contractor for handling of coal for Chennai and Tuticorin Ports and they are also qualified. Defendants 4 to 8

have also produced evidence for handling cargo showing the annual turnover as specified in the tender notification. The price bids were opened on

24.10.1997, Except the 8th defendant, nobody wanted any deviation and the 8th defendant also subsequently withdrew the deviation suggested by

him. The tender forms were sold by striking of ''H'' Schedule which was also initialed by the competent officer of the Board. A bidder, meeting the

annual turnover of Rs. 15 crores on bulk cargo, could quote for all the five ports. The plaintiff could sue only for damages and it could not demand

for awarding of contract. There is no prayer in the plaint that contract should be awarded to him. Hence, the interim injunction granted earlier had to be vacated.

8. The third defendant, after entering appearance, filed Application No. 3598 of 1997 more or less raising the similar contentions, as raised by

defendants 1 and 2 adding that it satisfied the bid qualification requirements, and that the plaintiff had not made out a prima facie case and the

balance of convenience also was not in its favour. Hence, the interim injunction granted earlier has to be vacated.

9. The 4th defendant filed a counter stating that the 3rd defendant did not process the requisite qualifications, that the 4th defendant had handled

60 lakhs tonnes per year, that defendants 1 and 2 have not strictly followed the tender conditions and that they cannot award contract to persons

contrary to the tender conditions; they ought not to have asked further clarifications from the third defendant. The third defendant had not offered

its bid for Chennai and Tuticorin Ports and allowing it to participate in the tender is illegal and, therefore, injunction granted earlier must be made

absolute and the Board may be directed to call for fresh tenders.

10. The 7th defendant also filed a counter stating that the Board committed illegality in awarding the contract to the third defendant and, therefore,

the injunction application made by the plaintiff may be allowed.

11. The 5th defendant filed a separate counter seeking direction to the Board to reject the tender of the persons who did not satisfy the bid

qualification requirements.

12. Defendants 1 and 2 filed a Reply Affidavit giving some more details about the dates and events. The plaintiff also filed a Reply Affidavit

reiterating the allegations made already in their applications.

13. The learned single Judge in the light of the rival contentions raised in the applications and in the counter affidavits and after hearing the learned

Counsel for the parties, passed the order under Appeal, dismissing the application filed for injunction by the plaintiff. Hence, the present appeal is

filed by the plaintiff aggrieved by the said order as already stated above.

14. Shri Shanthi Bhushan, learned senior counsel for the plaintiff urged that third defendant did not satisfy the Bid Qualification Requirements (for

short B.Q.R.) in that, it did not handle cargo of the Ports in India; it also did not satisfy the prescribed annual turnover of handling bulk cargo a specified in the tender notification; the supporting documents such as end users certificates were not produced along with the tender, and the

certificates and other documents produced by the third defendant relating to handling of cargo or the annual turnover were not proper; the tender

of the third defendant ought not have been considered by the Board in view of its past unsatisfactory performance; and its tender ought to have

been rejected as the envelope ''A'' contained elements relating to price bid which was evident after opening envelope ''A''.

15. The learned senior counsel made detailed submissions in support of the above contentions urged, taking us through the pleadings and the

documents placed on record. He also cited authorities to say that the learned single Judge did not apply the principles laid down by the Apex

Court in various decisions in dealing with the matter of granting or refusing interim injunctions. According to him the plaintiff made out a prima facie

case for grant of interim injunction having regard to the balance of convenience and irreparable injury that the plaintiff would sustain in the event the

interim injunction is refused.

16. Per contra, Shri Habibulla Badsha, learned senior counsel for defendants 1 and 2, in the first place, urged that the plaintiff has sought the relief

of declaration that the entire process of evaluation and finalisation of the tenders/ bids received pursuant to Tender Specification No. Coai-23 dated

28.8.1997 in the matter of movement and handling of coal by Rail-cum-Sea route from various Collieries are ex facie illegal, arbitrary, and

unconstitutional, for a mandatory injunction directing the defendants 1 and 2 to call for fresh tenders for the award of contract, and for a permanent

injunction restraining the defendants 1 and 2 from further processing, finalising and awarding the contract. There is nothing like confirmation of

awarding contract. The contracts were awarded to respondents/defendants 3 and 4, when there was no impediment having regard to the terms of

interim injunction order granted by the learned single Judge and as clarified by him. The plaintiff has not sought for awarding contract to him. If at

all, the plaintiff is now aggrieved by the awarding of the contract to defendants 3 and 4, a new cause of action has arisen and no relief can be

granted in the present suit. If that be so, the question of granting interim injunction does not arise. According to the learned counsel, the appeal itself is liable to be dismissed. We think it appropriate to deal with this contention at this stage itself.

17. On the date when the suit was filed, the relief sought for and the prayer made in the injunction application were very much available for

consideration. Any subsequent events or developments during the pendency of the proceedings can be taken note of by the Court and the reliefs

could be moulded in the interest of justice. Even otherwise it is always open to the parties to seek for necessary amendment of pleadings. Having

regard to the facts and circumstances of the case, and that we are only dealing with the appeal arising out of an interim order, we are unable to

accept the contention of the learned senior counsel for the defendants 1 and 2 in this regard. Hence we reject it.

18. The learned senior counsel went on to submit that the plaintiff had offered its bid only for Paradip port and it had no locus-standi to challenge

the entire process or finalising of tenders in regard to the remaining ports; the Board did follow proper procedure in short-listing the tenderers; no

illegality had been committed, and there was no arbitrariness or favouritism in processing or awarding the contract; the plaintiff participated in the

tender process and it had not objected to the processing done by the Board at any time; the Board was satisfied on the basis of the materials

placed that the third defendant fulfilled the B.Q.R., and was eligible for consideration in the matter of awarding contract; the prices offered by the

defendants 3 and 4 were lowest, and huge amount could be saved by awarding contract, to third defendant which is in the public interest;

defendants 4 and 7 were the previous contractors who were getting much higher rate for the previous period; in case the injunction order had not

been vacated the Board would have been put to great financial loss; the plaintiff is serving the interest and cause of the previous contractors who

are handling the movement of coal at a very high rate; the third defendant satisfied the tender conditions even taking into considerations the

clarifications issued. At any rate it cannot be said that the exercise of jurisdiction by the learned single Judge in dismissing the application for grant

of injunction made by the plaintiff was either perverse, capricious, or arbitrary so as to call for interference in this appeal having regard to the

settled position in law in such matters.

19. Shri A.L. Somayaji, learned senior counsel for the third defendant submitted that he would adopt the arguments of Shri Habibullah Badsha,

learned senior counsel for defendants 1 and 2. He further pointed out, referring to various certificates and documents produced by third defendant,

as to how third defendant satisfied the B.Q.R., and that the plaintiff had not come to Court with clean hands. He also submitted that the previous

contractors i.e., defendants 4 and 7 are somehow interested to continue the carrying out of the work so as to make money at the higher rates given

to them; and awarding of contract to third defendant was in the public interest and no case of any mala fides or favouritism was made out by the

plaintiff.

20. Shri Mohan Parasaran, learned Counsel for fourth defendant submitted that the certificates and documents produced by third defendant to

satisfy B.Q.R. were vague and they were not issued by the competent persons. According to him the contract could not be awarded to defendant

No. 3. He pointed out to the affidavit filed by fourth defendant in this regard. He also cited few authorities in support of his submissions, and took

me through various documents and pleadings, to say that the third defendant was not eligible to award of contract, and defendants 1 and 2 were in

favour of awarding contract to third defendant.

21. Shri R. Thiagarajan, learned Counsel for seventh defendant also made submissions opposing awarding of contract to third defendant, and cited

few decisions in support of his submissions.

22. We have carefully considered the submissions made by the learned Counsel for the parties.

23. In view of the fact that the learned single Judge, in his elaborate order under appeal, has narrated the facts succinctly in sufficient details, and

has referred to number of authorities of the Apex Court, in paragraphs 15 to 22 many of which are cited before us again, it may not be necessary

for us to repeat them again and burden this Judgment further. But however, while appreciating the contentions, we have definitely kept in mind the

principles stated in various decisions and the settled positions of law flowing from the said decisions, including few more decisions cited by the

learned senior counsel before us.

24. In this appeal, having regard to the scope of it, in the light of the well settled

principles, we have to only see whether the discretion exercised by

the learned single Judge in the order under appeal is perverse, capricious, or arbitrary, so as to interfere with it.

25. Defendants 1 and 2 issued tender Notification-Specification No. Coal-23 dated 20.8.1997 inviting tenders in two part system for movement

and handling of coal by rail-cum-sea routes from various collieries of Eastern Coalfields Limited, Bharat Coking Coal Limited and Mahanadhi

Coalfields Limited through the Load ports of Haldia, Paradip and Visakhapatnam, and discharge ports of Chennai and Tuticorin to the Thermal

Power Stations at Ennore, North Chennai, Mettur and Tuticorin as detailed in Sections III to VII of this specification with schedules and formats

duly filled in as specified.

26. The main controversy centres around the satisfaction of B.Q.R. by third defendant. It would be appropriate to extract Clause 4 of Section I of

the Tender Notification, which reads:

4. Bid Qualification Requirement (B.Q.R.):- The tenders should have handled cargo not less than 5 (five) lakh tonnes per annum in any of the ports

in India. Cargo can be any bulk cargo, other than coal also. Certificate of experience for having handled the cargo shall be produced.

The annual turn over on handling of bulk cargo shall be as indicated below:

Haldia - Rs. 10.0 Crores

Paradip - Rs. 12.5 Crores

Vizag - Rs. 12.5 Crores

Chennai - Rs. 15.00 Crores

Tuticorin - Rs. 2.5 Crores.

Supporting documents on this shall be enclosed.

Clause 6 Of Section I of the tender Notification enumerates as to under what circumstances a tender would be rejected immediately. For the

purpose of this case, relevant items under Clause 6 are (h), (m), (n) (p) and (q).

27. Clause 12 of Section I enables the tenderers to seek clarification on any of the clauses in the Specification to clear doubts before submission of

the tender. For that purpose a pre bid meeting was conducted at 11.00 a.m. on 23.9.1997. Clause 17 (e) reserved the right to the Board to relax, waive, or modify any of the conditions stipulated in the Specification, wherever deemed necessary in the best interest of the Board. The tenure of

the contract is for a period of three years from 1.11.1997 or from the date of award of the contract, or for a lesser period till the Ennore Satellite

Port comes into operation.

28. 10 tenders were received in response to the Tender Notification including that of defendants 3 to 9. Two other firms who had given tenders

have also filed impleading applications in the suit. After processing, evaluation and finalisation of tenders the contract for movement and handling of

coal from various collieries through the load ports of Paradip, Haldia and Vizag and discharge ports of Chennai had been allotted to third

defendant, and the discharge port of Tuticorin is allotted to fourth defendant as noticed by the learned single Judge in paragraph 23 of the order

under appeal. The learned single Judge had granted a limited ex parte injunction on 27.10.1997 restraining the Board from confirming the Award

of Contract.

29. The learned single Judge has also noticed in the same paragraph that though the plaintiff had stated that the fourth defendant also suffered from

some disqualification by failing to meet the specification of the tender Notification, no argument was advanced, and no attempt was made to show

that the fourth defendant should not have been awarded contract for movement and handling of coal at Tuticorin port. It is to be stated here itself

that the plaintiff had given its tender only in respect of Paradip port. In other words, if at all he could make grievance, it could only be in respect of

awarding of contract relating to Paradip port. It is not a public interest litigation raised by the plaintiff. The suit is filed to serve its purpose.

30. A pre-bid meeting was convened on 23.9.1997 at the instance of the Electricity Board as indicated in Clause 12 of Seal of the Tender

Notification, which was attended to by the intending tenderers, and they sought for clarifications with regard to certain specifications. Officials of

the Board gave clarifications to the persons who attended the meeting. All the clarifications in writing were communicated to the prospective

tenderers by communication dated 29.9.1997 which clarifications formed part of the tender specifications. As per the said communication, the

following clarifications were made besides others:

(i) that the tenderer should have handled not less than five lakh tonnes in any one port of India, but not necessarily in all the five ports mentioned;

(ii) A bidder meeting annual turnover of Rs. 15.00 crores of bulk cargo specified for Chennai Port can quote for any numbers less than 5, or all the

5 ports;

(iii) It was also clarified that with regard to the proof for annual turnover it was enough if certified copies of financial documents supporting the

B.Q.R. were enclosed and not the entire annual report;

(iv) In addition to audited balance sheet in proof of meeting the annual turnover requirement, end users certificates indicating the quantity of bulk

cargo handled for the end user had also to be furnished;

(v) The specified handling turnover may be, at any port in India by doing composite work;

(vi) The tonnage handled should be in respect of combined operations like stevedoring, shore handling, intra-port transportation, wagon loading

and unloading etc. and not a portion thereof; (vii) Road movement from Port also to be included in handling of the cargo;

(viii) All the points raised in the pre-bid meeting and also given in writing to different contractors and clarifications given by the Board will form part

and parcel of the tender;

(ix) The certificate from the end users for having handled the quantity, and their performance, had to be accompanied with the tenders.

In this view, we have to consider as to whether the third defendant satisfied the B.Q.R.

31. The plaintiff vehemently contended that the third defendant had not done movement and handling of coal of five lakh tonnes in any port of India

in any year in the past and therefore its tender ought to have been rejected. Defendants 1 and 2 in the counter filed by them before the learned

single Judge stated that the third defendant had handled the movement of coal to an extent of five lakh tonnes per year relating to 1996-97.

Defendants 1 and 2 having seen the documents produced by the third defendant were satisfied that the third defendant met the B.Q.R. in regard to

handling of five lakh tonnes of coal in the year 1996-97 at Chennai Port itself. The learned single Judge, in paragraph 26 of the impugned order has

clearly stated that the tender submitted by the third defendant were produced before him after giving a copy of the same to the learned Counsel for

the plaintiff.

32. The learned Judge has recorded that the tender had been given in a specified form and that the third defendant had stated that they had

enclosed a certificate issued by a qualified chartered Accountant which would establish that they had a turnover of 103.86 Crores during 1995-96,

and Rs. 46.88 crores during 1996-97 in handling of bulk cargo, and that, very well satisfied the requirement for quoting for all the five ports

indicated in the tender. As per the tender specification, in Schedule ''C'', experience in handling bulk cargo was stated. The learned single Judge

found that the third defendant had attached certificates from the end users as a proof for the quantity handled. The learned single Judge found that

the third defendant satisfied the B.Q.R. in regard to handling of bulk cargo as well as annual turnover.

33. Apart from handling of bulk cargo of five lakh tonnes in the year 1996-97 at Chennai Port itself, third defendant had handled bulk cargo of

fertilizers regarding which documents also were produced to support the same. The plaintiff raised controversy that handling of bulk cargo of

fertilisers could not have been taken into consideration. Whether it could be taken into consideration or not, in the light of tender specifications,

read with the clarifications, the Board did not take into consideration handling of bulk cargo of fertilisers by the third defendant.

34. In regard to end users certificate furnished by the third defendant, details of which are given in paragraph 26 of the impugned order, the

contention of the plaintiff was that the firms which have given certificates were not the end users; they were issued on the same date, and the

language of the certificates was almost same, and as such, those certificates did not satisfy the requirements of B.Q.R. In paragraph 28 of the

impugned order the learned single Judge, dealing with the certificates given by M/s. Alagendran Exports Private Limited, has stated that it has given

the certificate that the third defendant had been handling contract (C & F, Stevedoring, Shore handling, Wagon/Truck loading) for their bulk coal

shipments at Chennai Port, and the quantity handled by the third defendant for 1996-97 was 37,661 M.Ts. For the purpose of third defendant, the

said Alagendran Exports Private Limited was the end user for transporting the coal. The coal was intended by them in bulk and they as dealers

have sold the said quantity to various persons. The said Alagendran Exports Private Limited, after receiving the bulk cargo transported through the

third defendant, has sold the same to various persons in accordance with their requirements. It was not possible to trace all those persons as end

users to get certificates. In respect of Kirloskar Ferrous Industries Limited, it was pointed out that the operation of the cargo was handled by third

defendant and carried in trucks on road. The learned single Judge found that there was nothing wrong in acting upon the end users certificates by

the Board.

35. It was also ""Contended on behalf of the plaintiff that the entire quantity mentioned by the third defendant could not be taken into consideration

because a portion of the coal had been handled by third defendant not by rail route but by road, which had to be excluded. Looking to the tender

specifications and the clarifications given at the meeting convened by the Board on 23.9.1997 as stated in the communication dated 29.9.1997, the

learned single Judge did not accept the contention of the plaintiff for the reasons stated in paragraph 27 of the impugned order, with which we

agree. We may point out that the plaintiff offered his tender looking to the tender specifications and also the clarifications as stated in the meeting

held on 23.9.1997 and in the communication dated 29.9.1997. Prima facie later, it was not open to the plaintiff to contend that the handling of coal

by road should be excluded.

36. The other contention is that the performance of the third defendant in the past was unsatisfactory, and as such his tender should not have been

considered. It was stated that the third defendant was previously given a contract of handling coal by the Electricity Board for the period from

November, 1984 to March, 1985 and even during that short period its performance was far from satisfactory. This allegation was not

substantiated prima facie The Board did not say that the performance of the third defendant during that period was satisfactory or not. It did not

complain in respect of the past performance of the third defendant. During the period between 1984-85, which was long back, it was stated that

the work was given to third defendant for a short period as a temporary arrangement, and after negotiations the subsequent contract was not given to the third defendant because another contractor had quoted a lesser rate which was naturally accepted by the Board. The learned single Judge

found that there was absolutely no evidence or proof in support of the complaint that the past performance of the third defendant was not

satisfactory.

37. Yet another objection of the plaintiff to accept the tender of the third defendant was that after opening the ''A'' envelope, which contained the

element relating to price bid, its tender ought to have been rejected. It is true that as per the tender specification, if any of the bidders indicate the

price in envelope ''A'', it would not be read out, and it would be rejected, and that envelope ''B'' alone should contain the price bids which would

be opened only subsequently. The plaintiff pointed out that envelope ''A'' of the third diffident contained a condition that payment should be made

within 30 days after presentation of the bills with the Board, and this according to the plaintiff amounted to disclosing of bid price and therefore the

tender should have been rejected. Sub-clause (b) of Clause 2 (i) of Section I of the tender specifications provided for inclusion of commercial

terms including payment terms in envelope ''A''. The said clause reads:

2.0. Tenders should be sent as detailed below:

2. (i) The bidders shall submit their bids in two envelopes at the same time on or before the notified date and time fixed for the submission of the

tender.

The first envelope, called Envelope-A and superscribed as Envelope-A shall contain:

(a)....

(b) Commercial terms, including payment terms, liquidated damages, guarantee and other commercial matters.

(c)....

(d)....

Nowhere in envelope ''A'' the third defendant had given the price bid. Thus as rightly held by the learned single Judge, there was no indication of

price bid in envelope ''A'' by third defendant, and as such that was not a ground available for rejection of the tender of the third defendant.

38. The learned single Judge also did not find, and rightly so in our opinion, that

there was no merit in the contention that the third defendant did not

give informations in Schedules ''C and ''H''. Schedule ''C'' related to tenderer''s experience in bulk cargo handling. The learned single Judge has

found that it was duly filled up. As far as schedule ''H'' is concerned, it was struck off before the tender specifications were issued. The tender

specifications produced by the plaintiff itself would show that schedule ''H'' had been struck off and signed by a competent officer of the Electricity

Board. The learned senior counsel for the plaintiff urged that though schedule ''H'' was struck off, relevant clause in the tender specification was not

deleted. In our view, this contention does not advance the case of the plaintiff in any way, as it itself has accepted the tender specification in which

schedule ''H'' was struck off. Thus we find the plaintiff did not make out any prima facie case for grant of injunction.

39. The contracts in question are high value contracts. Obviously there is keen competition. In such matters the Courts have to essentially keep in

mind the public interest as paramount. The defendant Board on satisfaction that the third defendant and fourth defendant met the B.Q.R. and taking

into consideration the low rates offered by defendants 3 and 4, if have awarded the contract to them, in the light of what is stated above, prima

facie no fault can be found with the third defendant, having regard to the balance of convenience also.

40. As observed by the learned single Judge in paragraph 23 of the order under appeal, defendants 4 and 7 were the contractors who were

executing the jobs entrusted to them, charging at the rate of Rs. 240 per tonnes as on the date of filing the suit, and the fourth defendant itself has

quoted at the rate of Rs. 160 per M.T. in response to the present tender Notification which has been accepted by the Board as far as Tuticorin

port is concerned. The third defendant has been awarded contract for Paradip, Haldia, Vizag and Chennai ports at the rate of Rs. 135 per M.T. as

offered by the third defendant itself in response to the present tender notification. Approximate savings by engaging new contractor for Haldia,

Paradip, Vizag and Chennai ports as given by third defendant is as follows:

Sl. Name of Port Period Quantity Previous Present Differ- Savings

No. handled Cont. cont. ence, in Rs. in

M.T. rate/ Rate/Tonne. handling, lakhs

tonne

Rs.P. Rs.P. Rs.P.

1. HALDIA 15.12.97 to 1,80,797 25.41 21.70 3.71 6.71

31.12.97

Jan.98 3,14,001 "" "" "" 11.65

Feb.98 4,13,261 "" "" "" 15.33

March 98 upto

12.3.98 1,51,563 "" "" "" 5.62

Total 10,59,622 39.31

2. PARADIP -

(i) General 15,12.97-

Berth 31.12.97 1, 82, 168 219.19 180.40 38.79 70.66

Jan.98 4,07,038 "" "" "" 157.89

Feb.98 2,95,509 "" "" "" 114.63

Mar.98 upto

12.3.98 1,58,263 "" "" "" 61.39

Total 10,42,978 404.57

(ii) I.O.H.P. 15.12.97-

31.12.97 40,404 37.08 24.15 12.93 5.22

Jan.98 1,89,904 "" "" "" 24.55

Feb.98 1,62,949 "" "" "" 21.07

Mar.98 upto

12.3.98 71,577 "" "" "" 9.25

Total 4,64,834 60.09

3. VIZ AG 15.12.97-

31.12.97 2,14,835 206.73 165.75 40.98 88.04

Jan. 98 3,57,864 "" "" "" 146.55

Feb. 98 2,79,634 "" "" "" 114.59

Mar. 98

upto 12.3.98 2,18,135 "" "" "" 89.39

Total 10,70,468 438.67

4. CHENNAI 1.12.97

31.12.97 6,37,132 157.83 (ETPS)

78.75 79.08

159.46 (MTPS)

78.75 80.71 509.705

Av. 80.00

Jan.98 9,25,820 "" "" "" 740.656

Feb. 98 7,53,569 "" "" "" 602.855

Mar. 98 upto

12.3.98 4,10,185 "" "" 328.148

Total 27,26,706 2181.364

Grand Total: 3124.004 or say Rs. 31.24 Crores

As can be seen from the chart given above, there will be saving of Rs. 31,24 crores to the Board for a short period of 15.12.1997 to 12.3.1998.

The period of contract in question is three years. At that rate, for a period of three years, the saving for the Board, which again is in the public

interest, could be about Rs. 370 Crores, and if the old arrangement is to be continued the loss to the Board will be about Rs. 10.00 crores per

month.

41. Further the plaintiff had offered its tender only in regard to one port, viz., Paradip. It did not seriously challenge awarding of contract to fourth

defendant in regard to Tuticorin port. Fourth defendant is a previous contractor. The contentions of defendants 1 to 3 that the plaintiff is trying to

serve the interest of fourth defendant, prima facie cannot be said to be baseless. Of course these are matters that can be finally examined in the suit

itself. The contention of seventh defendant is also not to award contract in favour of third defendant, and it was admittedly the beneficiary of getting

higher rates. Perhaps the defendants 4 and 7 are interested in continuing to get higher rates by excluding awarding of contract to third defendant.

The plaintiff could make grievance at best only for awarding of contract in respect of Paradip port. But in view of the facts and circumstances of

the case, we have already found that the plaintiff did not make out any prima facie case. Under the circumstances the balance of convenience is

also not in favour of the plaintiff so as to grant injunction against third defendant.

42. The learned senior counsel for the plaintiff submitted that he had nothing much to say on the ground of mala fides. This being the position, the

Board was having some freedom in satisfying itself as to the B.Q.R. as to the past performance and experience of third defendant, even on

assumption that there was short-coming which was not material and which did not run contrary to the tender specifications or the clarifications

given, prima facie such a thing was even permissible as per Clause 17 (e) of Section I. Added to this, if at all the plaintiff succeeds in the suit, and

suffered any loss, it could be compensated in terms of money. Hence, it cannot also be said that the plaintiff would be put to irreparable injury or

loss.

43. One more contention urged by the learned Counsel for seventh defendant was that the learned single Judge, in the impugned order, had not

kept in view the settled principles of law, inasmuch as he has not stated as to whether the plaintiff had made out a prima facie case or not, in whose

favour the balance of convenience was, or whether any irreparable loss would be caused in case the injunction is not granted. Although the learned

single Judge has not specifically stated so in the impugned order in the same terms, in our view, the discussion made by the learned single Judge is

clear enough to indicate that he had kept in view the said principles in his mind in passing the order under appeal. Apart from this we have

ourselves considered all aspects of the matter and find no good reason to say that the discretion exercised by the learned single Judge in dismissing

the Application No. 635 of 1997 made for grant of injunction, and allowing Application Nos. 3598 and 3693 of 1997 filed for vacating the interim

injunctions by the impugned order, was either capricious, perverse of arbitrary, even assuming that some other view also could be taken by

drawing out inferences from the materials placed on record, in view of the settled position in law in dealing with such matters in appeals. We do not

think it also necessary to refer to the various decisions cited by the learned Counsel for the parties to highlight the principles laid down in support of

their respective contentions as there is no quarrel on the propositions of law laid down.

44. In'' the result, for the reasons stated and discussion made above, we find no merit in this appeal. Hence we dismiss the same, with no order as

to costs. We also make it clear that any observations made by the learned single Judge in the order under appeal, or in this Judgment of ours, are

confined only for the purpose of disposing of the interim applications, and they do not affect the merits of the respective contentions in the suit.