

(2011) 03 MAD CK 0230
In the Madras High Court
Case No : Writ Petition No. 967 of 2011

Green Earth

APPELLANT

Vs

The Director of Research and Chairman, Purchase and
Technical Committee and The Associate Professor and Head/
Program Co-ordinator, Coastal Saline Research Centre

RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226

Tamil Nadu Transparency in Tenders Act, 1998 — Section 10, 10(1), 10(6), 12

Citation : (2011) 3 CTC 35 : (2011) 2 LW 703

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : R. Gandhi, for GMS Law Associates, for the Appellant; N. Jothi, for the Respondent

Final Decision : Allowed

Judgement

V. Dhanapalan, J.—This Writ Petition has been filed praying for issuance of a writ of certiorarified mandamus, to call for the records relating

to the proceedings of the first Respondent in No. Dr. VI/CSRC-RMD/NADP/Mini Portable Sprinkler/Cancellation of Tender/2010, dated

31.12.2010 and the consequential re-tender notification dated 31.12.2010 published in Thina Mani dated 02.01.2011 and consequently direct the

Respondents to place supply orders to the Petitioner for the supply of 100 numbers of mini portable sprinkler irrigation system pursuant to the

approval of contract by the second Respondent in ASP&H/CSRC/KVK/RMD/NADP/Mini Portable Sprinkler/Performance Security-Contract

Agreement/2010, dated 19.10.2010 and the contract agreement executed on 10.12.2010 between the Petitioner and the second Respondent.

2. According to the Petitioner, the company was established in the year 1996 involved in manufacture and sale of manual operated traveling

sprinkler otherwise known as Mini Mobiles Sprinkler which will be otherwise called Portable Traveling Sprinkler Irrigation System. The said

product is the new innovation and has become popular among farmers particularly in Tamil Nadu Agricultural University, Coimbatore. The first

Respondent has called for sealed tenders for supply of 100 Mini Portable Sprinklers with accessories under two cover system (technical and

price). Last date and time for receipt of bids was scheduled to be held on 16.08.2010 at 03.00 p.m. The date and time for opening of technical bid

was scheduled to be held on 16.08.2010 at 03.30 p.m. at the office of the first Respondent. The price bid was opened on 18.08.2010 and the

first Respondent by letter dated 02.09.2010 requested the Petitioner to appear before the Technical Committee for price bid negotiation on

06.09.2010. Pursuant to the satisfaction of technical bid and price, the second Respondent vide letter dated 19.10.2010 awarded the tender to the

Petitioner and a contract of agreement has been entered into between the Petitioner and the second Respondent to that effect on 10.11.2010. That

being so, the first Respondent has issued the impugned order 31.12.2010, canceling the tender awarded in favour of the Petitioner and causing

publication of the re-tender notification, dated 31.12.2010, which is not sustainable in law.

3. Respondents have filed a counter stating that the duty of the Respondents is to supply standard equipments to meet the purpose for which the

sprinkler is intended to be used by the farmers and hence the responsibility of the Respondents is to identify the correct and quality product.

Inasmuch as the Petitioner was not ready to supply the machines as per the specifications, the Respondents were forced to cancel the tender in

public interest. Since the Respondents have followed the procedure as per the norms prescribed in the tender conditions, there is no deviation on

their part to issue fresh tender notification. The writ Petitioner cannot fetter the Respondents with his inferior quality of machines, which do not

meet the specifications. Hence, the writ petition is liable to be dismissed.

4. Learned Senior Counsel for the Petitioner would contend that in the absence of a specific supply order the Petitioner is not able to effect supply;

the Petitioner has invested huge amount for purchasing the engines and for importing the accessories from Hong Kong based on the contract and

therefore the action of the Respondents in canceling the tender is highly arbitrary and totally unfair coupled with non-application of mind. In support

of his contentions, the learned Senior Counsel has relied upon the following decisions:

(i) LIC of India and Another Vs. Consumer Education and Research center and Others, :

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action

to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into

consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and

it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure

envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and

guided by the public interest.

28. In Kumari Shrilekha Vidyarthi v. State of U.P. this Court in para 22 pointed out that the private parties are concerned only with their personal

interest but the public authority are expected to act for public good and in public interest. The impact of every action is also on public interest. It

imposes public law obligation and impresses with that character, the contracts made by the State or its instrumentality: (SCC pp. 236-37, para 22)

It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited

and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely

contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is

arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its

obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case

irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

29. In *Food Corpn. of India v. Kamdhenu Cattle Feed Industries* (SCC at p. 76 in para 8) this Court held that:

the mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process.

In *Sterling Computers Ltd. v. M & N Publications Ltd.* (SCC at p. 464, para 28) it was held that even in commercial contracts where there is a

public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded. In *Union of India v.*

Graphic Industries Co. this Court held that even in contractual matters public authorities have to act fairly; and if they fail to do so approach under

Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution. The ratio in *General Assurance*

Society Ltd. v. Chandumull Jain, relied on by the Appellants that tests laid therein to construe the terms of insurance contracts bears no relevance

to determine the constitutional conscience of the Appellant in fixing the terms and conditions in Table 58 and of their justness and fairness on the

touchstone of public element. The arms of the High Court are not shackled with technical rules or procedure. The actions of the State, its

instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review

and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would be

circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between

the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and

circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law

remedy is now narrowed down. The actions of the Appellants bear public character with an imprint of public interest element in their offers

regarding terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure and

simple private law dispute without any insignia of public element. Therefore, we have no hesitation to hold that the writ petition is maintainable to

test the validity of the conditions laid in Table 58 term policy and the party need not be relegated to a civil action.

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

17. At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person

who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article

14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the

matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or

augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be

exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the

public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government

cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the

standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is

necessary for an administrative body functioning in an administrative sphere.

(iii) Sushila Chemicals Pvt. Ltd. and Another Vs. Bharat Coking Coal Ltd. and Others, :

20. It is settled by a series of decisions of this Court starting from *Shrilekha Vidyarthi v. State of U.P.*, that even in the domain of contractual

matters, the High Court can entertain a writ petition on the ground of violation of

Article 14 of the Constitution when the impugned act of the State

or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law.

21. In *Sterling Computers Ltd. v. M&N Publications Ltd.*, however, this Court held: (SCC p. 464, para 28)

28 ... Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a

public authority must be guided by relevant considerations and not by irrelevant ones.

Obviously, one such relevant consideration which Coal India Ltd. and BCCL as public authorities have to consider is whether continuation of

supply of coal to the Appellants may not lead to misutilisation or blackmarketing of the coal by the Appellants which is prohibited under FSA and

the policy decision of the Government considering the allegations made by CBI in the FIR on the basis of the reliable information received.

(iv) *Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others*, :

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed

question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a

case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the

Respondents, and should have proceeded to try the petition instead of relegating the Appellants to a separate suit.

17. The above judgment of *Gunwant Kaur*¹¹¹ finds support from another judgment of this Court in *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar*

Municipal Council, wherein this Court held: (SCC p. 587, para 13)

13. Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy,

dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

18. This observation of the court was made while negating a contention advanced on behalf of the Respondent Municipality which contended that

the petition filed by the Appellant Company therein apparently raised questions of fact which argument of the Municipality was accepted by the

High Court holding that such disputed questions of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise.

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur*¹¹ this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

27. In a recent decision in *Karnataka State Forest Industries Corpn. v. Indian Rocks*, while considering the similar issue, S.B. Sinha, J. speaking for the Bench reiterated thus: (SCC pp. 166-67, paras 38-39)

38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. (See *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*)

39. There cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless.

5. Per contra, the learned Counsel for the Respondents would contend that as the Petitioner had not offered the machines to the specifications given in the tender and also as there was inordinate delay in arrangement for the supply of the same in spite of notifications given in that regard, the tender for supply of Mini Portable Sprinkler irrigation system was canceled by the Respondents and that the Respondents cannot be held liable for the alleged procurement of engines by the Petitioner from foreign countries even

before the issue of supply order. To substantiate his case, the learned Counsel has relied upon the following authorities:

(i) Radhakrishna Agarwal and Others Vs. State of Bihar and Others, :

10. It is thus clear that the Erusian Equipment & Chemicals Ltd. case involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

(ii) Ion Exchange Waterleau Ltd. Vs. The Commissioner, Madurai Municipal Corporations, :

19. Needless to say, it is a settled principle that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise 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....

6. I have heard the learned Counsel for the parties and also gone through the records as well as the decisions relied upon.

7. On going through the records, what transpires is that as per the tender conditions, the Petitioner has deposited the bid security of Rs. 15,000/-

and appeared before the first Respondent on 16.08.2010 at the opening of bids and having been satisfied with the technical know-how of the

product of the Petitioner, the first Respondent has expressed his intention of awarding contract to the Petitioner, subject to the satisfaction of price

bid. The price bid was opened on 18.08.2010 and the first Respondent, by his letter dated 02.09.2010, requested the Petitioner to appear before

the Technical Committee for price bid negotiation on 06.09.2010. Accordingly, the Petitioner appeared before the Technical Committee for price

bid negotiation and after negotiation, it was agreed to accept the price at Rs. 23,000/- per unit. Pursuant to the satisfaction of technical bid and

price, the Petitioner has been awarded with the tender and a contract entered into between the parties on 10.11.2010, after execution of all

requisite documents.

8. The Petitioner having been awarded with the contract and after execution of all the requisite documents for placing the supply order, and also

being ready to perform his part of the contract as promised as has been executed in the contract agreement, the Respondents are stopped from

going back on their promise and as such the impugned order of cancellation of tender is hit by the doctrine of promissory estoppels. In other

words, having signed in the contract and been satisfied with the compliance of tender conditions, the Respondents have no other option except to

place the supply order as per the terms of contract. However, to the shock and surprise of the Petitioner, the second Respondent by letter dated

14.12.2010 came out with an allegation that the demo machine supplied originally was heavier in weight and despite further requisition for supply

of another demo machine, it was not supplied and that the Petitioner was delaying to implement the project and therefore any further delay would

lead to stern decision by the authority concerned to stop the purchase without any notice.

9. To examine the above issue in question, it is relevant for this Court to look into the provisions u/s 10(1) of the Tamil Nadu Transparency in

Tenders Act, 1988, which are as under:

10. Evaluation and acceptance of tender.- (1) The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into

consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the

tenders in accordance with the procedure and criteria specified in the tender

document.

Further, Clause (6) of the Act provides that if the Tender Accepting Authority proposes to accept the tender as per the provisions of this section,

he shall pass orders accepting the tender together with reasons for such acceptance. Also, the right of the Respondent for rejection of the tender is

provided u/s 12 of the Act, which reads as under:

12. Right to reject tender.- (1) After negotiation with the tendered and before passing order accepting a tender as under Sub-section (6) of

Section 10, if the Tender Accepting Authority decides that the price quoted by such tendered is higher by the percentage as may be prescribed

over the schedule of rates or prevailing market price, he shall reject the tender.

Clause (2) provides that the Tender Accepting Authority, before passing the order accepting a tender, may also reject all the tenders for reasons

such as changes in the scope of procurement, new technologies or substantial design changes, lack of anticipated financial sources, Court orders,

accidents or calamities and other unforeseen circumstances.

10. In the instant case, the proceedings of the first Respondent dated 02.09.2010 would indicate that the price bid of the Petitioner for purchase of

Mini Portable Sprinkler with accessories was opened on 18.08.2010. Therefore, the Petitioner was asked to appear before the Technical

Committee for price bid negotiation on 06.09.2010. Further, after analysing all the factors, the second Respondent in his order dated 19.10.2010,

informed the Petitioner that his rate of Rs.23,000/- (Rupees Twenty Three Thousand only) per unit of Mini Portable Sprinkler Irrigation system

quoted in his acceptance letter had been approved by the Purchase Committee in the price bid negotiation held on 06.09.2010 and the Petitioner

was further directed to issue the performance security for a sum of Rs. 1,15,000/-. In addition, the agreement to the conditions prescribed in the

format enclosed was also asked to be sent to the office duly signed by the Petitioner so as to proceed further for purchase of the sprinkler system.

Pursuant to that, the Petitioner fulfilled all the requirements and entered into an agreement. Thereafter, the Respondents had to consider issuance of

the order as per Section 10(6) of the Act. On the contrary, the second Respondent issued the show cause notice, dated 14.12.2010, making

certain unnecessary allegations.

11. It is a settled legal position that when the contract is of two parts viz., technical bid and price bid, if the technical bid is evaluated and accepted and after price negotiation in the agreement entered into, it is not for the authority concerned to create some reason or other indicating that there is a problem of specification. If that be so, it could have been done at the stage of evaluation of technical bid because the technical bid is evaluated by the committee, having technical expertise, and such a position is clearly undergone by the Respondents in their tender process. However, they have taken a sudden decision to issue a show cause notice on the question of specification given in the tender. A perusal of the tender documents and other material would not give any documentary proof for such a specification, when the Petitioner tender is qualified for purchase of Mini Portable Sprinklers with accessories.

12. It is seen from the correspondence that regarding weight of the engine-pump, unnecessary delay can be avoided as explained in Appx-2 and if confirmation given on the specifications any one of the lighter engine pumps will be delivered or both as mentioned i.e., instead of C-12, V-12 weighing 15 kgs plus kgs pump mono block coming to 27.5 kgs can be ordered as it gives up to 30 meter head 60 litres discharge per minute. The Petitioner has indicated in the letter dated 18.12.2010 about this position that the company is not in a position to buy Honda Engine at additional cost of Rs. 6 lakhs if they have to supply the material within tender price and they have also indicated that any increase in the price is a loss to the State/Government/University.

13. It is true that the power of the writ court is confined to the question of legality or otherwise and the court does not have the expertise to correct the administrative decision and if a review of administrative decision is permitted, it would be substituting its own decision without necessary expertise which itself may be fallible. However, the decision must not only be decided by application of wednes bury principle of reasonableness but must be free from arbitrariness and not affected by bias or actuated by mala fide.

14. In Tata Cellular Vs. Union of India, , a three Judge Bench of the Supreme Court has authoritatively held that the principle of judicial review in the matter of contract would apply to the exercise of contractual powers by

Government bodies in order to prevent arbitrariness or favoritism.

However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review.

15. This Court, in the case of *Ion Exchange*, cited *supra*, has reiterated the position that the terms of the contract are not open to judicial scrutiny,

the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare

occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise 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 Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State and the power to refuse the

lowest or any other tender is always available to the Government. The right to choose cannot be considered to be an arbitrary power. Of course, if

the said power is exercised for any collateral purpose, the exercise of that power will be struck down. In a commercial transaction, the State can

choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit

such a relaxation. Even when some defect is found in the decision making process, the Court has to necessarily exercise its discretionary powers

under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes

to a conclusion and dissatisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public

interest will prevail upon the individual's interest.

16. In the case on hand, it is to be seen that the power exercised by the authority concerned in the light of the legal position as contemplated under

Sections 10 (6) and 12 of the Act would clearly indicate that the authorities concerned after accepting the technical bid and the price bid and at the

stage of issuing order of work to the Petitioner, for some technical reasons, have not issued the contract to the Petitioner, instead, they proceeded

to issue a show cause notice and the explanation submitted by the Petitioner is

the matter for concern.

17. It is to be stated that the original demo machine supplied by the Petitioner was purely a portable machine having ISI certification and having been satisfied with the same, the contract was awarded. It appears, pursuant to the said contract, the Petitioner has also invested huge amounts for procuring engines and other accessories, expecting the supply order to be issued as per the contract. In the given situation, to the utter dismay of the Petitioner, the first Respondent has unilaterally issued the order dated 31.12.2010, canceling the tender on the ground of not offering the machine by the Petitioner to the specifications given in the tender and issuing re-tender notification on the same day, which act of the Respondents, in my considered opinion, is illegal, arbitrary and uncalled for.

18. Though Clause 27 of the contract contains the provision for resolution of disputes arising between the parties either amicably or by referring to formal mechanisms specified in the Special Conditions of Contract, this Court, in the peculiar facts and circumstances as stated above and considering it as a rarest of rare occasion, is inclined to interfere with the arbitrary decision taken by the Respondents, in the light of the above stated legal position. Therefore, the impugned proceedings of the first Respondent dated 31.12.2010 and the consequential re-tender Notification dated 31.12.2010 dated 02.01.2011 are quashed, directing the Respondents to place supply order to the Petitioner for the supply of 100 numbers of mini portable sprinkler irrigation system, following the contract agreement entered into between the Petitioner and the second Respondent on 10.12.2010.

19. Writ Petition is allowed with the above direction. No costs. Consequently, the connected M.P. Nos. 2 and 3 of 2011 are closed.