
(2008) 04 MAD CK 0124

In the Madras High Court

Case No : Writ Petition No. 2301 of 2008 and M.P. No's. 1 and 2 of 2008

Ion Exchange Waterleau Ltd.

APPELLANT

Vs

The Commissioner, Madurai Municipal Corporations

RESPONDENT

Date of Decision : 28-04-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21, 226, 227

Citation : (2008) 3 CTC 675 : (2008) 5 MLJ 665

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : R. Muthukumarasamy for S. Ramasubramaniam and Associates, for the Appellant; M. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

V. Dhanapalan, J.—This writ petition has been filed seeking a writ of mandamus forbearing the respondent and its officers from proceeding further with any action or work in regard to the tender bearing no. Bid No. 11/2008 dated 12.01.2008 for establishment of Sewerage Treatment Plants at Avaniyapuram and Sakkimangalam at Madurai, without considering the Financial Bid of the petitioner.

2. The petitioner's case, in brief, can be stated like thus:

2.1 The petitioner which is a Company registered under the Indian Companies Act, 1956, was formed as a Joint Venture company in pursuance of a Memorandum of Understanding dated 19.11.2005 executed between Waterleau Global Technologies, Belgium and ION Exchange India Limited, India who hold equal shares in the petitioner company and who are the only constituents and promoter of the petitioner company.

2.2 While Waterleau Global Technologies which is a global company with its presence in Europe, Middle East, Africa, Asia and Russia, is in the business of design, engineering, fabrication, procurement and operation of water and waste

water, air and off-gas, manure, bio-solid and waste treatment installation, ION Exchange India Ltd. specialises in the business of design, manufacture, installation, operation of water and waste water treatment plant, etc. and is the owner of trade marks Indion and Zero-B in the field of water treatment.

2.3 While so, the respondent had come out with a tender notification dated 12.01.2008 inviting bidders for designing, providing, constructing, erecting and commissioning start-up and performance run followed by five years of Operation and Maintenance of 125 MLD capacity Sewage Treatment Plant and 45.7 MLD capacity Sewage Treatment Plant (STP) based on Cyclic Activated Sludge Process/ Sequential Reactor Process at Avaniyapuram and Sakkimangalam, Madurai on DBOT basis.

2.4 The petitioner, with a view to submit its tender for the works referred to above, entered into a Joint Venture agreement dated 26.02.2008 with one Tecton International Engineering Construction Company Pvt. Ltd., a subsidiary of Tecton Engineering and Construction LLC, U.A.E., so that the best of the talents and expertise can be pooled in as consortium and the said consortium could get the order from the respondent. Accordingly, the petitioner company, being the lead partner, submitted its bid on 27.02.2008 which is the last date for submission of tenders, together with a detailed write-up explaining about itself and its constituent partners and also enclosing the required documents as per the tender notification.

2.5 On the same day, i.e. 27.02.2008, the technical bids submitted by five companies including the petitioner company were opened and while petitioner was awaiting the opening of Financial Bids, it had been thrown out at the initial stage while four other bidders were called for opening of their Financial Bids on 11.03.2008.

3. To put it summarily, the main case of the petitioner is that though its constituent partners and Joint Venture partner are leading global players in the field of erection and installation of STP and it has satisfied Section 2 of the bid document which prescribes the qualification for the two works, its Technical Bid has not been considered by the respondent and consequently, it has not been called for opening of the Commercial Bids and hence, this writ petition.

4. The respondent has filed counter affidavit mainly contending that:

a Tamil Nadu Water Investment Company (TWIC) was appointed as the Consultant for Bid Processing Management for the two works and in addition, an Evaluation Committee consisting of several experts was also constituted to select the lowest bidder;

b the Technical Bids of all the five bidders were opened and the same were evaluated by the Consultant and the Evaluation Committee from 03.03.2008 to 05.03.2008 on the basis of details furnished by them in the bid documents and with reference to qualification and other conditions prescribed in the tender

documents and the Evaluation Committee submitted its report on 07.03.2008;

c as per the report, the petitioner did not satisfy the qualification criterion, i.e. Section 2.2 of the Bid Document which specifically states that experience relating to works executed in any State or Central Government Departments / Boards / Undertakings/ Corporations, Municipalities, Municipal Corporations and Urban Development Authorities alone would be considered;

d in addition to the above, the petitioner had failed to satisfy the conditions stipulated in Clauses (a) to (e) of Section 2.2 of the Bid Document and as such, since the petitioner or the petitioner's Joint Venture partner did not have the requisite experience as stipulated in Section 2.2 of the Bid Document, its Technical Bid came to be rejected inasmuch as it was a non- responsive one;

e that apart, as per the report of the Evaluation Committee, the documents submitted by the petitioner pertain only to foreign companies which have mainly carried out water treatment alone and not any work on sewerage treatment;

f after a detailed study, the petitioner has been rightly found as dis-qualified and in fact, the Evaluation Committee has now recommended two bidders, viz., Ramky Infrastructure Limited and VA-Tech Wagbag Ltd. whose Financial Bids have already been opened and the process of negotiation is going on and any delay in the finalisation of tender will only drag on the project completion.

5. Mr. R. Muthukumarasamy, learned Senior Counsel appearing for the petitioner, in his first limb of argument, has contended that the respondent has rejected the petitioner's Technical Bid without considering the fact that the petitioner's constituent viz., Waterleau Global Technologies, Belgium satisfies all the three eligibility criteria specified in Clauses (a) to (c) in Section 2.2 of the Bid Document. In this context, it is also his contention that without taking note of the said constituent's experience in the field of construction of STP for a value of Rs. 30 crores in Nanning, Belgium and Macau, the respondent is estopped from rejecting the petitioner's case on the ground that it has not satisfied the qualification criterion prescribed in Section 2.2(c) of the Bid Document. As regards the main provisions of Section 2.2 of the Bid Document, it is the vehement contention of the learned Senior Counsel that nowhere in the said Section, it has been stipulated that similar works have to be executed in a Government sector in India and when that being the position, the experience of the petitioner's constituent in construction of a STP at Nanjing cannot be lost sight of. To put it otherwise, he has argued that inasmuch as the words "in India" are not found in Section 2.2 of the Bid Document, the terms of the tender should be read as they stand without adding or deleting any word/s and as such, the experience of the petitioner's constituent i.e. Waterleau Global Technologies in the Government sector across the world satisfies the provisions contained in Section 2.2 of the Bid Document. In this context, by relying on the judgment of the Supreme Court reported in *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, he has argued that the respondent has grossly erred in not taking into

account the experience of the petitioner's constituent and considering only the experience of the Joint Venture partner.

6. The next limb of argument advanced by the learned Senior Counsel for the petitioner is that the petitioner stands on a better footing than the other four bidders whose Technical Bids have been cleared for the reason that they do not satisfy Clause (c) of Section 2.2 of the Bid Document and they fulfil only Clause (d) of the said Section which is only an alternative to Clause (c) whereas the petitioner, through its constituent Waterleau Global Technologies has satisfied Clause (c) of Section 2.2 which is the principal clause.

7. In support of his contentions, the learned Senior Counsel appearing for the petitioner has relied on the following decisions:

i New Horizons Limited and Another Vs. Union of India (UOI) and Others, (2 Judge Bench) (paras 6, 12, 19, 20, 21, 22, 23, 38, 39)

The offers were considered by the Tender Evaluation Committee. The offer of respondent 4 was accepted. The Assistant General Manager (OP), Department Telecommunications, Telecom District, Hyderabad, by his letter dated 3-8-1993, informed NHL that its offer could not be considered. The said letter did not indicate the reason for non-consideration of the offer of the NHL. The appellants filed a writ petition in the Delhi High Court under Articles 226 and 227 of the Constitution of India seeking a writ, order or direction in the nature of certiorari for quashing the award of contract by respondent 3 to respondent 4 for the printing, binding and supply of telephone directories for Hyderabad and also a writ, order or direction in the nature of mandamus directing respondent 3 to accept the tender offer of the appellants. In the counter-affidavit filed in reply to the said writ petition filed on behalf of respondents 1 to 3, the reason for non-consideration of the offer of NHL was disclosed. It was stated that the offer of NHL was not considered because the appellants did not submit any evidence to show that they have in their name undertaking compiling, printing and supply of telephone directories for large telephone systems with the capacity of more than 50,000 lines. In this regard, it may be mentioned that in their tender offer, NHL had mentioned that:

i NHL is a joint venture company established by Thomson Press (India) Limited (TPI), Living Media (India) Limited (LMI), World Media Limited (WML) and Integrated Information Pvt. Ltd. (IIPL) a wholly-owned subsidiary of Singapore Telecom wherein 60% of shares are held by Mr. Aroon Purie, TPI, LMI, WML and other companies in the same group and 40% of shares are held by IIPL;

ii The joint venture has received approval of the Government of India and is currently in operation:

iii NHL has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information; and

iv In addition to its projected strength, NHL New Horizons Limited and Anr. v. Union of India and Ors. has access to the benefit of the complete resources and strength of its parent/owning companies, each of which is a recognized market leader.

An overview of each of the parent companies, namely, TPI, LMI, WML and IIPL was also given in the tender offer.

...In the counter-affidavit, it was also stated that the royalty and other aspects of the tender were not considered since the appellants did not meet the primary requirement of experience as above.

...In Tata Cellular, 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.

The validity of the action of the Tender Evaluation Committee in not considering the tender submitted by NHL has to be considered in the light of the aforementioned principle 5 as laid down in Tata Cellular. In other words, what has to be seen is whether the refusal by the Tender Evaluation Committee to consider the tender of NHL on the ground that the condition regarding experience as laid down in the tender notice was not fulfilled can be regarded as arbitrary and unreasonable.

The requirement with regard to experience, as stated in the advertisement dated 22.4.1993 for inviting tenders, as noticed earlier was in the following terms:

The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field.

The requirement of experience was, however, differently worded in the notice for inviting sealed tenders dated 26.04.1993 which was attached to the tender documents which prescribes the conditions to be fulfilled for submission of tenders and wherein it was stated as under:

The successful tenderer will also submit copies of telephone directories printed and supplied by them to the telephone systems of capacity more than 50,000 lines as credentials of his past experience.

...The use of the expression "successful tenderer" instead of the expression "tenderer" in paragraph 12, therefore, indicates that the documentary proof, by

way of credentials of past experience, has to be submitted after the tender has been considered and is found suitable for acceptance by the concerned authorities. This would mean that the past experience is a matter which is to be considered after the tender has been examined and evaluated and the tendered whose tender is found acceptable is required to submit documentary proof regarding his past experience. In other words, a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience.... There is no similar provision for excluding from consideration a tender on the ground of failure to furnish with the tender the required material by way of credentials of past experience. . . . The decision of the Tender Evaluation Committee to exclude the tender of NHL from consideration was, therefore, not warranted by the terms and conditions for submission of tender as contained in the notice for inviting sealed tenders dated 26.4.1993.

Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22.4.1993 inviting tenders is a condition about the eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only....

Seeing through the veil covering the face of NHL it will be found that as a result of reorganisation in 1992 the Company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr. Aroon Purie hold 60% shares and the Singapore-based company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The Company is in the nature of a partnership between the Indian group of companies and the Singapore-based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL).

On behalf of the respondents reliance has been placed on the decision of the Delhi High Court in *Paharpur Cooling Towers Ltd. v. Banbalgon Refinery and Petrochemicals Ltd.* wherein it has been held that the expression "tendered should possess such experience" would mean the experience of the tenderer itself and not that of its collaborator. It has been pointed out SLP (C) No. 1484 of 1994 filed against the said judgment has been dismissed by this Court by order dated 28.1.1994. It has been argued that on the same logic the experience of a shareholder would not be included within the expression "experience of the tenderer". We fail to appreciate the relevance of this judgment. There can be no comparison between a collaborator who has no stake in the business of the company and a constituent of a company, such as NHL, constituted as a joint venture, wherein the constituents in the joint venture have a substantial stake in the success of the venture.

ii Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, (2 Judge Bench) (paras 36 & 38)

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 Tamil Nadu*, 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/HEDC 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.

When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

8. Conversely, Mr. M. Suresh Kumar, learned Standing Counsel for the respondent has contended that the heavy reliance placed by the learned Senior Counsel for the petitioner on the judgment of the Supreme Court in the *New Horizons* case can hardly be of any help to the petitioner inasmuch there was no two-cover

system in the said case which is not so in the instant case. Countering the submission made by the learned Senior Counsel appearing for the petitioner that the petitioner has satisfied the criteria in Section 2.2 of the Bid Document, the learned Standing Counsel appearing for the respondent has contended that when it has been clearly specified in the invitation for bid that it is a National Competitive Bidding, the petitioner is estopped from claiming that its constituent has got the requisite qualification by its works overseas whose qualification has to be taken into account. In other words, by pointing out the terms "National Competitive Bidding" used in the Invitation for Bid, he has argued that the said terms would only mean works carried out in India and in case, the respondent was desirous of inviting bids from global players, the terms would have been worded as "International Competitive Bidding" instead of "National Competitive Bidding". The reasoning given by him in this regard is that Section 2.2 has been framed taking into account the environmental condition of the city of Madurai and as such, the environment prevailing in other countries may not be the same as the one prevailing in our country. Thus, it is his strong contention that when the petitioner has not fulfilled Section 2.2 of the Bid Document, there is no necessity to evaluate the petitioner's fulfilment of Section 2(a) to 2(c). In nutshell, the learned Standing Counsel has contended that once the petitioner has not satisfied the Technical Bid, the question of considering his Financial Bid does not arise. In his last limb of argument, while countering the argument advanced by the learned Senior Counsel appearing for the petitioner that there is only one technology provider for all the other four companies and as such, Section 2.2 only paves way for monopoly, he has pointed out that this aspect has not been pleaded in the writ petition and finds place only in the arguments of the learned Senior Counsel appearing for the petitioner and hence, it has to be brushed aside for the reason that it is a settled law that terms of tender cannot be questioned.

9. Strong reliance has been placed by the learned Standing Counsel for the respondent on the following judgments:

i. Pasumpon v. Vaigai Van Urimaylargal Ottunargal Sangam represented by its President, Mr. S.M. Mohammed Rabeek Raja, Palam, Station Road, Madurai and Anr. 2006 (3) CTC 810 - a Division Bench judgment of this Court (para 12)

From the above decisions of the Hon'ble Supreme Court, we could deduce that any award of contract, whether it is by a private party or a public body or a State in their commercial transaction the concerned body can choose its own method to arrive at its rates to be charged for the terms to be fixed. The scope of interference with such fixation of rates and terms is very limited and borrowing the expression of the learned Judges of the Supreme Court themselves that only in extreme cases where it is demonstrated that extreme arbitrariness or the decision is based on mala fides or in case of hostile discrimination, the Writ Court exercising its discretionary power under Article 226 of the Constitution of India, could be invoked. It has also been held that even when some defect in the

decision making process is found, the Court should act with great caution and should not interfere in a casual manner. It has also been held in the above decisions that public interest should be paramount and the Writ Court should always keep in mind the larger public interest in order to decide whether any interference is called for.

ii Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, :

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

iii Tata Cellular v. Union of India and Ors. (1994) 6 SCC 651 (3 Judge Bench), (paras 77 and 94 and 151):

The duty of the Court is to confine itself to the question of legality. Its concern should be:

- 1 Whether a decision-making authority exceeded its powers?
- 2 Committed an error of law,
- 3 committed a breach of the rules of natural justice,
- 4 reached a decision which no reasonable tribunal would have reached or,
- 5 abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

i Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

ii Irrationality, namely, Wednesbury unreasonableness iii Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind, Lord Diplock refers specifically to one development,

namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention?

The principles deducible from the above are:

- 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 of quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- 6 Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

In the above two cases, we are obliged to interfere on the ground of arbitrariness and violation of the principle of natural justice confining ourselves to the doctrine of judicial restraint, however, by the application of permissible parameters to set right the decision-making process.

iv Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,

Hence entertaining a writ petition and passing any interim orders in such petitions, the Court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the Court should intervene.

v Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another,

The principles which have to be applied in judicial review of administrative decisions especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular v. Union of India. It was observed that the principles of judicial review would apply

to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. 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.

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

vi *A. Gopal Vs. Airports Authority of India*,

These are all basically administrative and policy decisions and it is not for this Court to sit in appeal over such decisions vide *Tata Cellular Vs. Union of India*, . It has been held repeatedly by the Supreme Court that this Court cannot interfere with administrative and policy decisions unless there is violation of the statute or it is shockingly arbitrary in the *Wednesbury* sense vide *Tamil Nadu Electricity Board v. Tamil Nadu Electricity Board Engineers Association* (2005) 1 MLJ 507 , in which the aforesaid decisions are referred to in detail. In our opinion, there is no violation of any statute nor can it be said that the tender condition was shockingly arbitrary. The Court must exercise judicial restraint in such matters vide *Rama Muthuramalingam, State Propaganda Committee Member Vs. The Deputy Superintendent of Police and Others*, . There is no force in this appeal. The writ appeal is dismissed. . . .

10. I have given careful consideration to the arguments advanced on either side and have also perused the materials available on record besides paying careful attention to the judgments relied on by the counsel in support of their contentions.

11. The main points emerging for consideration are as to whether the decision-making process of the Tender Accepting Authority is in accordance with law and whether there is any arbitrary exercise of power involved in evaluating the Technical Bid.

12. Before proceeding to deal with the matter, it would be useful to look into what has been stated in Section 2.2 of the Bid Document and the same reads thus:

Qualification criteria:

The tenderer shall have executed the minimum quantities of work as stated below. Experience relating to the works executed in any State/Central Government Departments, or State/Central Undertakings/Boards, Corporations, Municipalities and Municipal Corporations, Urban Development Authorities will only be considered. The past performance of the tenderer is established from record of successful execution and completion of similar type of works in time and in workman like manner. For this purpose testimonials etc. from clients for whom the applicant had executed similar type of works during the past five years and having present worth equal to or higher than minimum amount indicated below will have to be submitted by the tenderer and where necessary reference will be made to previous clients. Tenderers are expected to furnish past performance data for the works referred by them and indicated in this Bid Document. Said similar works executed during the past five years i.e. not earlier than April-2002 shall satisfy the following requirements;

a) The tenderer or in the case of Joint Venture the Lead Partner or anyone of the JV partners, shall have a minimum annual turnover of Rs. 50 crores @ 2007-2008 price level in any two years over the preceding five years, i.e. (specified financial years) not earlier than April 2002. (Weightage factor of 5% per year shall be given for previous years).

AND

b) The tenderer or in the case of Joint Venture the Lead Partner or anyone of the JV partners shall have executed, completed and commissioned successfully at least one similar type of work or works i.e. Construction of STP with Activated Sludge Process/Cyclic Activated Sludge Technology/Sequential Batch Reactor Process/Extended Aeration during the last five years i.e. Not earlier than April 2002. The value of said works executed, completed and tested successfully by the tenderer shall be minimum of respondents.30.00 crores @ 2007-08 price level. The present worth will be calculated based on weightage factor of 5% per year.

AND

c) The tenderer or in the case of Joint Venture, the Lead partner should have executed, completed, tested and commissioned successfully STPs with Cyclic Activated Sludge Technology/Sequential Batch Reactor Process of a capacity of

62.50 MLD in one contracts in the preceding five years i.e., not earlier than April 2002.

OR

d) If the tenderer or in the case of Joint Venture, the Lead partner does not meet the criteria mentioned at item (c) above, they shall enter into an MoU with a technology provider for Cyclic Activated Sludge Technology/Sequential Batch Reactor Process. The technology provider shall met the following criteria:

i) The Technology provider shall have provided necessary technical support for at least one plant of 62.50 MLD capacity with Cyclic Activated Sludge Technology/Sequential Batch Reactor Process, in India in the last five years, i.e. not earlier than April 2002.

e) The past experience certificate furnished by tendered should be signed by the Executive Engineer in charge of work and counter signed by the Superintending Engineer or an officer of equivalent rank. Any ambiguity in respect of financial standings and past experience or the certificates produced by the bidder, in respect of the bids received will be placed before the Tender Accepting Authority for its decision. The decision of the Tender Accepting Authority would be final and based on such decision, the price bids will become eligible for opening.

13. Apart from the above, it would also be necessary to look at the very caption and the first two paragraphs of the tender notification of the respondent which read as under:

GOVERNMENT OF TAMIL NADU MADURAI MUNICIPAL CORPORATION MADURAI
625 002, TAMIL NADU, INDIA NATIONAL COMPETITIVE BIDDING

1 Madurai Municipal Corporation (hereinafter referred to as MMC or Owner) invites Bids for Designing, Providing, Constructing, Erecting and Commissioning, Start-up trial run 3 months and Performance Run 12 months followed by 5 years of Operation and Maintenance of 125 MLD capacity Sewage Treatment Plant (STP) based on the Cyclic Activated Sludge Process/Sequential Batch Reactor Process at Avaniyapuram, Madurai on DBOT basis.

2 Madurai Municipal Corporation invites National Independent firms/Joint Ventures/Lead Partners of consortiums interested in the project to submit their bids.

14. From an analysis of the records available, it is seen that the respondent Corporation had issued a tender notification dated 12.01.2008 inviting bids for establishment of STP at Avaniyapuram and Sakkimangalam, Madurai. The bids invited were of two types, viz., Technical Bid and Financial Bid. The last date for submission of filled in tenders was announced as 27.02.2008 and that was the date when the Technical Bid was to be opened and evaluated. The Technical Bids of five tenderers were opened and evaluated and the petitioner was found ineligible inasmuch as it has not complied with Clause 2.2 (a) to (e) for the

reasons that:

it is not the Lead Partner and it is only the Joint Venture Partner who has submitted annual turnover figures for three years and that too, the annual turnover has exceeded Rs. 50 crores only once as against twice;

the petitioner has not furnished any document to show that it has performed similar type of work in India during the last five years;

the Lead Partner has not submitted any proof evidencing execution and commissioning of STPs of a capacity of 62.50 MLD in one contract;

No document has been furnished by the petitioner to prove that the Technology Provider chosen by it has provided necessary technical support for at least one plant of 62.50 MLD capacity with Cyclic Activated Sludge Technology/Sequential Batch Reactor Process in India; and

Experience Certificate duly signed by the Executive Engineer in charge of work and countersigned by the Superintending Engineer has not been furnished by the petitioner;

15. While it is the case of the petitioner that the experience and expertise of its constituents and the Joint Venture partner have not been given their due credence by the respondent as per the provisions contained in the Tamil Nadu Transparency in Tenders Act, 1998 / Tamil Nadu Transparency in Tender Rules, 2000, the specific stand taken by the respondent is that no document whatsoever has been submitted to show that either the petitioner or its constituents or the JV partner has performed any similar work in India.

16. While deciding the case on hand, it is to be noted that the very object and purpose of the tender issued by the respondent Corporation is to have an underground drainage system for the city of Madurai at a total cost of Rs. 229.36 crores. This project is taken up by the respondent Corporation with the assistance of Union of India under the JnNURM Scheme. Taking into account the approximate population of the Madurai city as 11 lakhs and after analysing the feasibility of the project, the respondent Corporation had decided to invite tenders on National Competitive Bidding basis to execute the work of Designing, Providing, Constructing, Erecting and Commissioning, Start-up and Performance Run 12 months followed by 5 years of Operation and Maintenance of 125 MLD capacity STP based on the Cyclic Activated Sludge Process/Sequential Batch Reactor Process at Avaniyapuram, Madurai on DBOT basis. Accordingly, the respondent Corporation invited national independent firms/Joint Ventures/Lead Partners of consortiums interested in the project to submit their bids. According to the qualification criteria prescribed in Section 2.2 of the Bid Document, the tenderer should have experience relating to the works executed in any State/Central Government Departments, or State/Central Undertakings/Boards/Corporations, Municipalities and Municipal Corporation and Urban Development Authorities. The past performance of the tenderer is established from record of

successful execution and completion of similar type of works in time and in workman like manner. For this purpose, testimonials, etc. from clients for whom the applicant had executed similar type of works during the past five years will have to be submitted by the tenderer. Further, the tenderers are expected to furnish past performance data for the works referred by them and indicated in the Bid Document. Similar works executed during the past five years i.e. not earlier than April 2002 shall satisfy the requirements. The tenderer or in the case of Joint Venture, the Lead Partner or anyone of the JV partners shall have a minimum annual turnover of Rs. 50 crores @ 2007-2008 price level in any two years over the preceding five years. It is also indicated that the weightage factor of 5% per year shall be given for previous years. The tenderer or in the case of Joint Venture, the Lead Partner or any one of the Joint Venture partners shall have executed, completed and commissioned successfully, at least, one similar type of work or works i.e. construction of STP with Activated Sludge Process/Cyclic Activated Sludge Technology/Sequential Batch Reactor Process/Extended Aeration during the last five years and that value shall be Rs. 30 crores calculated with 5% weightage. Another requirement is that they should have executed, completed, tested and commissioned successfully STPs with Cyclic Activated Sludge Technology/Sequential Batch Reactor Process of a capacity of 62.50 MLD in one contract in the preceding five years or in the alternative, if they do not meet the criteria just referred to above, they shall enter into an Memorandum of Understanding with a Technology Provider for Cyclic Activated Sludge Technology/Sequential Batch Reactor Process. The Technology Provider shall meet the requirements like technical support for at least one plant of 62.50 MLD capacity with Cyclic Activated Sludge Technology/Sequential Batch Reactor Process in India in the last five years i.e. not earlier than April 2002. That apart, a specific requirement has been stipulated in item (c) of the qualification criteria i.e. past experience certificate furnished by the tenderer should be signed by the Executive Engineer in charge of the work and countersigned by the Superintending Engineer or an officer of equivalent rank and any ambiguity in respect of financial standings and past experience or the certificates produced by the bidder, in respect of the bids received will be placed before the Tender Accepting Authority for its decision and the decision of the Tender Accepting Authority would be final and based on such decision, the price bids will become eligible for opening.

17. In this case, it is seen that in response to the tender notification, five bidders have participated in the tender proceedings, viz., (i) Ramky Infrastructure Limited, (ii) Ion Exchange Water Leau with Joint Venture partner Tecton International Engineering Construction Company Limited, Chennai-18, (iii) Hindustan DORR Oliver Limited with Enviro Control Associates Pvt. Limited as Joint Venture, (iv) Gharpure Engineering and Constructions (P) Ltd. Pune with United Phosphorous Limited Valsad as Joint Venture and (v) VA- Tech Wabag Limited, Chennai - 18. While evaluating the Technical Bids submitted by the above firms on the basis of the details furnished by them in the Bid Documents

with reference to the above qualifications and other conditions prescribed in the tender documents, it is seen that the Tender Evaluating Authority has awarded marks as per the procedure prescribed in the tender document. It is further seen that the tender submitted by the petitioner together with its Joint Venture partner Tecton International Engineering Construction Company Limited was also evaluated and the entire process was videographed. In the process of evaluation, it was noticed that the petitioner did not have the necessary qualification criteria as prescribed in the Bid Document and has not satisfied the condition prescribed in qualification criteria in Section 2.2 as stated supra and has also not satisfied the requirements u/s 2.2 (a) to (e) of the tender conditions. In respect of minimum annual turnover of Rs. 50 crores at 2007-2008 level in any two years from April 2002, it was found that the Joint Venture partner of the petitioner has submitted documents for three years, i.e. 2003-2004, 2004-2005 and 2005-2006 and the annual turnover exceeds Rs. 50 crores only in the year 2005-2006. In respect of the requirement u/s 2.2(b) stipulating that one similar type of work or works should have been carried out by the tenderer the minimum value of which shall be Rs. 30 crores @ 2007-2008 price level, it was found that no satisfactory document has been furnished as proof. Further, the requirement stipulated in Section 2.2(c) that the tenderer or in the case of Joint Venture, the Lead Partner should have executed, completed, tested and commissioned successfully STPs with Cyclic Activated Sludge Technology/ Sequential Batch Reactor Process of a capacity of 62.50 MLD in one contract in the preceding five years also has not been satisfied by the petitioner by production of any proof. Similarly, as respects the requirement u/s 2.2(d), i.e. the Technology Provider shall have provided necessary technical support for at least one plant of 62.50 MLD capacity with Cyclic Activated Sludge Technology/ Sequential Batch Reactor Process, the petitioner has not furnished any document to that effect. Likewise, the experience certificate signed by the Executive Engineer in charge of work and countersigned by the Superintending Engineer as mandated u/s 2.2(e) also has not been furnished by the petitioner. Thus, it appears that the Tender Accepting Authority, finding that the qualification criteria prescribed in Section 2.2 (a) to (e) of the Bid Document have not been fulfilled by the petitioner, has rejected its Technical Bid.

18. The learned Senior Counsel appearing for the petitioner contended that the work executed by the petitioner in construction of STP at Nanjing, Belgium has not been evaluated properly. In this regard, one factor which should be taken cognizance of is that in Section 2.2 of the Bid Document, it is specifically stipulated that the tenderer should have carried out similar type of work in any State or Central Government Departments / Boards / Undertakings/Corporations, Municipalities, Municipal Corporations and Urban Development Authorities. Moreover, a cursory reading of the tender notification would make it clear that it is a National Competitive Bidding and not an international one. A relevant bone of contention raised by the learned Standing Counsel for the respondent Corporation is that the qualification criteria have been framed taking note of the

environmental condition and as such, the environment prevailing in other countries may not be the same as the one prevailing in our country and for this reason, the experience of the petitioner in foreign countries though in the required filed, can hardly be of any assistance to it. I find a certain force in this argument advanced by the learned Standing Counsel for the reason that only those national independent firms/Joint Venture and the Lead Partners of consortiums, knowing the actuality of the local situation will be able to carry out the project of the respondent Corporation. Thus, admittedly, in the absence of any work executed by the petitioner in India in any of the State or Central Government Departments / Boards / Undertakings/ Corporations, Municipalities, Municipal Corporations and Urban Development Authorities, it can safely be held that the respondent has not done anything arbitrary in the process of rejecting the petitioner's Technical Bid. That apart, as against the requirement of having annual turnover of Rs. 50 crores in any two years from April 2002, the petitioner's JV partner has shown turnover exceeding Rs. 50 crores only in one year. Thus, in view of these reasons, it can not at all be construed that the decision-making process of the tender inviting authority is faulty inasmuch the respondent Corporation has acted only in accordance with the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules made thereunder and the Tender Notification.

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. In the decision in Tata Cellular case, the Constitution 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 favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. 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 is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest.

20. The learned Senior Counsel appearing for the petitioner has placed heavy reliance on the decision of the Supreme Court in the New Horizons case wherein it was categorically held that the validity of the action of the Tender Evaluation Committee in not considering the tender submitted by the tenderer has to be considered in the light of the principle laid down in Tata Cellular case. Here, what is to be considered is, when the condition regarding previous experience in the tender notification was not fulfilled, whether the action of the Tender Accepting Authority in rejecting the petitioner's Technical Bid, can be regarded as arbitrary and unreasonable. In this regard, it is to be noted that the tenderer has been required in Section 2.2(b) of the Bid Document to substantiate his previous experience with documentary proof and also to furnish credentials in the said field. In New Horizons case, it was held that a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience and that when the tenderer fails to furnish with the tender, the required material by way of credentials of the past experience, the decision of the Tender Evaluation Committee to exclude the tender from the consideration was therefore not warranted by the terms and conditions for submission of the tender as contained in the tender notification. Whereas, in the instant case, admittedly, there is a specific clause, viz., Section 2.2(b) of the Bid Document which requires the tenderers to have the past experience in similar work. In other words, in New Horizons case, though the Supreme Court has held so as stated above, it should be seen that there was no specific clause in the tender notification to the effect that the tenderer should have past experience which is not so in the case on hand inasmuch as, there is a specific clause to that effect, as referred to earlier. Thus, while giving anxious consideration to the ruling of the Supreme Court in New Horizons case, I am of the considered view that the facts and circumstances involved in this case are not akin to those in New Horizons case and as such, the said decision can, in no way, be of any help to the petitioner. Similarly, though it is held by the Supreme Court in the Reliance Energy case relied on by the learned Senior Counsel appearing for the petitioner that the doctrine of "Level Playing Field" is entitled to be invoked, it is clarified in the very same judgment that the said doctrine is subject to public interest and in this case, as the petitioner has not fulfilled the qualification criteria prescribed in Section 2.2 (a) to (e) of the Bid Document, it is not entitled to claim the benefit of the doctrine of "Level Playing Field" the reason being that the aspect of public interest is very much involved in the matter. In such view of the matter, this judgment also can be of no avail to the petitioner for the reason that the petitioner has failed to satisfy the requirements prescribed in Section 2.2 (a) to (e) of the Bid Document.

21. Further, the purpose of accepting the Consortium Bidding is that in modern

commercial tenders where varied fields of expertise are required, a single party may or may not possess all the requisite qualifications and therefore, Consortium Bidding is permitted. In that, the members of the Consortium may collectively bring with them, their varied expertise into the tender bid. Whenever Consortium Bidding is done, it is necessary, at least for any one of the constituents of the Consortium, to satisfy each of the tender qualifications. The term "Consortium" literally means a combination of several companies, banks, etc. for a common purpose. In the case of a Bidding Consortium, the Lead Developer/Lead Consortium Member shall be that Consortium Member vested with the prime responsibility of developing the project. The Lead Consortium Member shall necessarily make the maximum entity contribution in the project among the consortium members. As long as the norms are clear and properly understood by the decision-maker and the bidders satisfy the requirements, then, there is no difficulty in accepting Consortium Bidding.

In the light of the the settled proposition as made in the Tata Cellular case and New Horizons case and from an analytical and pragmatic approach to the conclusion of the respondent in rejecting the petitioner's Technical Bid, keeping in mind, the various factors such as the qualification criteria and the fact that the subject tender is a National Competitive Bidding and also the fact that neither the petitioner nor its constituents has satisfied any of the requirements stipulated in Section 2.2 (a) to (e) of the Bid Document, I do not find any perversity or arbitrariness in the decision-making process of the Tender Accepting Authority in rejecting the petitioner's Technical Bid. As such, this writ petition which is bereft of any merit has to face dismissal and it is accordingly dismissed. However, there is no order as to costs. Consequently, connected Miscellaneous Petitions are closed.