

(1999) 10 MAD CK 0016

In the Madras High Court

Case No : Writ Petition No's. 16215 and 16264 of 1999

LKP Merchant Financing Ltd., 608A, Spencer Plaza, 769
Annasalai, Chennai-2 and another

APPELLANT

Vs

Airport Authority of India, International Airport Division,
Chennai Airport. Chennai- 27 and another

RESPONDENT

Date of Decision : 06-10-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1999) 3 CTC 525 : (2000) 1 MLJ 24 : (2000) WritLR 179

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : Mrs. Malini Ganesh, for the Appellant;

Judgement

1. The petitioners have filed the above writ petitions seeking to issue a writ of mandamus directing the respondents to withdraw and cancel the

condition contained in para 4(a) of the notice inviting tender dated 13.9.1999 and issue a fresh notice inviting tender for the purpose of allotting

money exchange counters at Chennai which shall not include the said condition.

2. The petitioners are carrying on business as money changers under valid licences given by the Reserve Bank of India at various places including

Chennai. Till recently, according to the petitioner, the money changers/authorised dealers are permitted to operate money exchange counters at

airports by private treaty. For the first time, the Airport Authority of India, Chennai, the 1st respondents invited sealed tenders in the prescribed

form from reputed authorised money exchange agencies, nationalised and Foreign Bank for setting up and operation of Money Exchange Counters

at 6 locations in Anna International Terminal and one location in the Departure

Area of KDT. In the tender notice itself it is stated that the parties who are participating in the tender should possess minimum experience of 5 years of operating Money Exchange Counter at

Ports/Railways/Airports. Under clause 5 of the said notice it is also stated that the tender documents will be given only if the tenders fulfil the eligibility criteria mentioned therein.

3. The petitioners having aggrieved by clause 4(a) and 5 of the said notice, have filed the above writ petitions saying that by inclusion of the said

conditions, they have become ineligible to get even the tender form. According to the petitioners, such clause has been introduced only to favour a

few existing operators to the exclusion of others under the guise of inviting tenders, and the impugned condition is totally abuse of not only the

process of tender but also the power vested in the authorities to provide facilities to the public within the airport area and obtain proper revenue for

the respondents. Having called for open tenders, according to the petitioner, such restrictions should not be allowed to exist, as it is tainted with

mala fides and it is clear abuse of power. It is also stated that there is no nexus to achieve the object for which the tenders are called for.

4. The learned counsel appearing for the petitioners has also brought to my notice that the Bombay High Court, while challenging the similar

conditions in the tender notice, has granted an interim order in W.P.No.2036 of 1999 restraining the respondents from opening the sealed tenders

or taking any further action until 1st September 1999 unless otherwise directed by the Court, and that order was passed pending the admission of

the writ petition.

5. The only question in these cases is whether the tender conditions down in clause 4(a) of the tender notice are sustainable in law.

6. To appreciate the same, it is beneficial to extract the said clauses which are as follows:

4(a) the prospective agencies/Banks should possess minimum experience of 5 years of operating Money Exchange counter at Ports/Rail

ways/Airports and should possess valid licence from Reserve Bank of India to conduct the Money Exchange business at the Airport.

(b) The tenderer should possess minimum experience of 15 branches including branches in India and abroad.

(c) The tenderer participating in the tenders for International Airports viz. IGI/ Mumbai/Chennai/Calcutta/Trivandram Airports should have minimum annual turnover of Rs. 50.00 crores during the last financial year.

(d) The tenderer must submit the satisfactory documents in support of their claim of fulfilling requirements at para 4(a) to (c) above.

5. Tender documents containing full details, including terms and conditions of the contract, can be obtained from the Office of the Sr. Commercial

Manager, AAI (IAD), Chennai Airport, Chennai-27 on payment of Rs. 500 in cash (Non-refundable) upto 1.10.99 alongwith an application

supported by proof of fulfilling eligibility criteria".

7. The learned counsel appearing for the petitioners has submitted that when the respondents has taken a policy decision to call for open tenders,

they should have given an opportunity to all the licensed Money Exchangers like the petitioners, who are also reputed Money Exchangers, without

insisting the said conditions as extracted above. The learned counsel has further submitted that the said conditions have been introduced only to

help a few persons who alone are having such experience as mentioned in clause 4(a) of the said conditions. According to her, such a condition as

mentioned in clause 4(a) of the said tender notice is not only arbitrary but also misuse of powers and so this Court has to struck down such a

condition. The learned counsel in support of her submission has relied on the decision in Tata Cellular Vs. Union of India, .

8. I am not able to accept the said submission of the learned counsel. It is well settled that the scope of judicial review is very limited in the nature

of contracts. As stated by Lord Scarman in Nottingham-shire Country Council v. Secretary of State for the Environment, 1986 A.C, 240, , 1986

All. E.R. 199, proclaimed:

-"Judicial review" is a great weapon in the bands of the judges; but the judges must observe the constitutional limits set by our parliamentary

system upon the exercise of this beneficial power.

9. Even in the decision in Tata Cellular Vs. Union of India, , Their Lordships of the Apex Court summarised the scope of Judicial review, as

follows:

113. 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. (Italics supplied)
- (5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other 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 increase and unbudgeted expenditure.
- Even in paragraph 85 of the said decision, the learned Judges have further held as follows:
- It cannot be denied 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.

10. Further, in the decision in *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others*, , the Apex Court has held as follows:

...We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice.

The consideration of the tenders and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open.

While a bona fide error or error of judgment would certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the

authorities concerned...".

11. Even the Division Bench of this Court in the decision in *Veeraraghavan v. The Tamil Nadu Slum Clearance Board*, 1999 (III) M.L.J. 274,

following number of decisions, also has held as follows:

If we go by this dictum, if the procedure is transparent, fair and open, and conditions of acceptance is also stated in the tender form, scope of

judicial interference is Nil".

From the abovesaid decisions, it is very clear that judicial review though a great weapon in the hands of the Judges, it can be used only within the

limitations set out in various dictums of the Apex Court. It is well settled that judicial review is concerned not with the decision but with the decision

making process. The court also cannot usurp the powers of the executive under the guise of preventing abuse of power.

12. In the present cases, the petitioners have come forward with the plea that the qualification is prescribed by abusing of power and to help a few

existing operators to the exclusion of others. Similar argument was raised before the Division Bench of this Court, in the judgment in *W.A.No. 920*

of 1997, dated 31.7.1997, but the Division Bench rejecting the same, has held as follows:

We find no force in the contention of the learned counsel for the appellant. Some liberty has to be given to the State or the Authorities to choose

as to from which source, in their best administrative experience, the required articles should be purchased in the public interest. The mere fact that

the Authorities thought that the best interest of the public and the State that a particular source by resort to tender, does not take away the right of

life of others. No mandamus can issue to the State that they should function in a

particular fashion or make purchases of particular goods, only from a particular source or debar other sources from participating in the tender especially when no statutory provisions have been violated"".

13. Even in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , the Apex Court has held as follows:

26. In the present case it was submitted that the terms and conditions of the tender specified the requisite qualifying criteria before a person could

offer a tender. The criteria which were so laid down could not have been relaxed because such a relaxation results in a denial of opportunity to

others. In support, the respondents relied upon *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . In that case, the

Court had held judicial review as a check on the exercise of arbitrary powers by the State and as a check on its power to grant largess. The Court

also observed that when the exercise of discretion is structured in terms of the tenders which have been invited the discretion must be exercised in

accordance with the norms so laid down. The same view has been taken by this Court in *Premium Granites and Another Vs. State of Tamil Nadu*

and *Others*, , where this Court observed that where rational non-discriminatory norms have been laid down for granting of tenders, a departure

from such norms can only be made on valid principles. These principles enunciated by this Court are unexceptional.

27. In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s.

Raunaq International Ltd is on valid principles looking to the expertise of the tenderer and his past experience although it does not exactly tally with

the prescribed criteria. What is more relevant, M/s. *TVR Construction Ltd.* who have challenged this award of tender themselves do not fulfil the

requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does

not fulfil the requisite criteria can be relaxed both for M/s. *Raunaq International Ltd.* and M/s. *TVR Construction Ltd.*, it is clear that the offer of

M/s. *Raunaq International Ltd.* is lower and it is on this ground that the board has accepted the offer of M/s. *Raunaq International Ltd.* We fail to

see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than

the offer which has been accepted. It is also obvious [hat by stopping the performance of the contract so awarded, there is a major detriment to the public because of construction of two thermal power units, each of 210 MWs., is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a larger number of people. In the present case there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s. Raunaq International Ltd."".

14. This Court in S.P. Natarajan and another v. The Chief Engineer, Highways & Rural Works Department, Chennai -5 and another, W.A.Nos.

202 and 203 of 1999, by order dated 12.2.1999, has held that there should be a condition of pre- qualification in respect of contract and only on

satisfying those pre-conditions, the contractor would be allowed to take part in the tender proceedings.

15. P.D. Dinakaran, J., in the order passed in W.P.No. 10482 of 1999, dated 12.7.1999, following the abovesaid decision in W.A.Nos. 202 and

203 of 1999, upheld the pre-condition in the tender to the effect that the contractor who intend to offer the tender should own the machinery by

themselves, on the basis of terms of invitation to tender cannot be open to judicial scrutiny.

16. Even in Tata Cellular Vs. Union of India, the Apex Court has held in paragraph 113 (4) that the terms of the invitation to tender cannot be open to judicial scrutiny.

17. The norms prescribed regarding qualification cannot be said to be arbitrary and the same have been prescribed only with a view to get

experienced persons. This Court cannot sit on appeal on the decisions of the respondents. Merely because the petitioners could not participate in

the tender, the condition cannot be set aside. The petitioners would get a right to participate, only if they are qualified as prescribed in the tender conditions.

18. As held in the decisions of the Apex Court and also the decision of the Division Bench of this Court, this Court cannot interfere with the

jurisdiction of the respondents in fixing the terms and conditions, and the same is not open to judicial scrutiny.

19. The learned counsel appearing for the petitioners has vehemently pressed the fact that the Bombay High Court has granted interim order,

pending admission of the writ petition, as stated above, and so this Court has to follow the same. I am not able to accept the said submission. The

said writ petition has not even been admitted, and, pending admission of the writ petition, some interim order has been granted. Now, I am passing

the orders in the present cases on the basis of the decided cases of the Apex Court and of this Court.

20. For the foregoing reasons, I reject the argument of the learned counsel appearing for the petitioners, in this respect. Accordingly, these writ

petitions are dismissed. No costs. Consequently, W.M.P.Nos. 23453 and 23513 of 1999 are also dismissed.