

(2016) 03 MAD CK 0271

In the Madras High Court

Case No : W.P.(MD). Nos. 2344 and 3983 of 2016 and W.M.P.(MD). Nos. 2069, 3577 and 2999 of 2016.

M/s. S.P. Agencies

APPELLANT

Vs

Managing Director, Tamil Nadu Warehousing Corporation and
another

RESPONDENT

Date of Decision : 23-03-2016

Acts Referred:

Citation : (2016) 4 MLJ 324

Hon'ble Judges : B. Rajendran, J.

Bench : Single Bench

Advocate : M. Ajmalkhan, Senior Counsel, for the Appellant; K. Chellapandian Addl. Advocate General assisted by M. Rajarajan Govt. Advocate and A. Irudhyaraj, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B. Rajendran, J. - The Writ Petitions have been filed by the petitioner firm questioning the contract awarded to the second respondent herein, by the first respondent.

2. By consent of all the parties, both the Writ Petitions are taken together and decided by a common order, as the issue involved in this Writ Petition is interconnected to each other.

3. Originally the petitioner has moved a Writ Petition in W.P.(MD).No.2344 of 2016 praying for a Writ of Mandamus directing the first respondent to consider the representation of the petitioner dated 24.01.2016 on the issue about the disqualification of the second respondent to participate in the tender and defer the finalisation of the contract/tender regarding the appointment of handling and transport contractor for Tirunelveli Warehouse till such time a decision is taken on the petitioner's representation dated 24.01.2016.

4. The short facts as narrated in W.P.(MD).No.2344 of 2016 are as follows:-

4.1. The first respondent invited tenders under two bid system for appointment of handling and transport contractors for clearing commodities at rail heads and transport to warehouses and vice versa for a period of two years from the date of award of contract. The tender notice was in respect of 10 "Grade A", 1 "Grade B", "3 Grade C" and 21 "Grade D" warehouses of Tamil Nadu warehousing corporation. The tenderer should be in possession of the required number of road worthy lorries with valid permit in tamil nadu and fitness certificate. Further, the tenderer should not be blacklisted or debarred by the Corporation or by any department of Central or State Government or by any other Public Sector undertakings.

4.2. As per the terms of tender, all the tenderers are required to give self declaration, declaring that he/she had not been blacklisted either by the Corporation or by any department of Central or State Government. The petitioner along with the other tenderers participated in the auction conducted by the first respondent. According to the petitioner, despite the fact that the second respondent had been blacklisted by the first respondent in the year 2005 and that the order blacklisting the second respondent had not been revoked till date, she participated in the tender by giving a false declaration and furnishing false self certificate. The second respondent knowing full well that the nine lorries which are referred to in the Writ Petition has been leased out to the petitioner for the period upto December 2016, seems to have obtained fresh lease deeds recently in respect of the same lorries and produced the documents in proof of her eligibility in terms of the tender conditions. As per the tender notice, the last date for receipt of the tender was fixed on 27.11.2015 and the opening of technical bid was fixed on the same date at 3.30 a.m.

4.3. Due to administrative reasons, the opening of technical bid was postponed to 23.12.2015 at 11.00 a.m. Though one of the partners of the petitioner and its authorised representative was present at the time of opening the technical bid, the serious irregularity and the ineligibility of the second respondent was not noticed by him. The petitioner came to know that the second respondent had produced the lease deeds in respect of the same lorries which had been leased out to the petitioner earlier. Stating all these facts, the petitioner sent a representation on 24.01.2016 followed by another representation dated 25.01.2016 to the Secretary (Cooperation Food and Consumer Product Department) of Government of Tamil Nadu. Since it did not evoke any response, the petitioner filed a Writ Petition in W.P.(MD).No.2344 of 2016.

5. Pending such Writ Petition, an order of interim injunction was granted by this Court in W.M.P(MD).No.2069 of 2016 in W.P.(MD).No.2344 of 2016.

6. Under the above said circumstances, the petitioner moved another Writ Petition in W.P.(MD).No.3983 of 2016 praying for a Writ of Certiorarified Mandamus calling for the records relating to the impugned proceedings of the 1st respondent in RC 4019/2015/G1 dated 29.01.2016 and quash the same as illegal and consequently direct the respondent to consider the candidature of the

petitioner by treating the petitioner as L1 for award of the Handling and Transport contract for the Tirunelveli Warehouse of the 1st respondent Corporation for the contract period 2015-17. The facts found in W.P.(MD).No.2344 of 2016 is akin to the Writ Petition in W.P.(MD).No.3983 of 2016. In fact, the second Writ Petition is a consequential Writ Petition.

6.1. By the said impugned order dated 29.01.2016, the second respondent rejected the objections as regards the disqualification of the second respondent, holding that the second respondent to be qualified stating inter alia that there is no condition in the H and T tender document that the lease lorries registered to one particular contractor should not be leased to any other contractor and also that the nine lorries shown by the second respondent have not been shown by the petitioner in the application of the petitioner and therefore, the fact that the said vehicles were already leased out to the petitioner is of no consequence. It is further stated in the impugned order that the debarment (blacklisting) of the second respondent has not been communicated to the first respondent by the Tamil Nadu Civil Supplies Corporation, Chennai and therefore, the objection submitted by the petitioner was rejected and the petitioner would be treated as L2 and the second respondent would be treated as LI. The second respondent has been blacklisted by the first respondent through his order dated 29.04.2005, which has not been revoked till today.

6.2. It is further averred that the ineligibility of the second respondent is patent and clear as a script in the wall, as the impugned order, having been passed during the pendency of the Writ Petition in W.P.(MD).No.2344 of 2016 and the currency of the interim order only fortifies the claim of the petitioner that the second respondent is bent on favouring the second respondent, who is sought to be given the contract despite her ineligibility. Further, he submitted that during the currency of the interim order dated 02.02.2016, the present impugned order has been passed on 29.01.2016. Hence, he prayed for quashing of the order dated 29.01.2016.

6.3. In support of his contention, the learned Senior Counsel relied on a judgment reported in CDJ 2005 DHC 603, M/s.UEE Electrical Engineers Pvt Ltd v. Delhi Jal Board and Another.

7. The second respondent has filed a detailed counter affidavit inter alia stating that the representation of the petitioner dated 24.01.2016 was considered and passed a speaking order dated 29.01.2016, which is signed on 08.01.2016. Therefore, the Writ Petition in W.P.(MD).No.2944 of 2016 has become infructuous, even before filing of the Writ Petition. He would further contend that the petitioner submitted bids for 2 Grade A Tirunelveli Warehouse. The petitioner submitted bids for 2 Grade A Warehouses (Tirunelveli and Villupuram) and 1 Grade B Warehouse (Vellore). The technical bids of tenderers were opened on 23.12.2015. The petitioner and the second respondent were declared to be technically qualified in the bid for the above-said Grade A Tirunelveli warehouse on 18.01.2016. The price bids of the bidders were opened on 22.01.2016. The

petitioner was the lowest rate bidder (L1) and the petitioner was (L2) in respect of the Grade A Tirunelveli Warehouses. The second respondent quoted 133% rate above the schedule of rate as against 172% quoted by the petitioner. The petitioner did not make any objection as regards disqualification during the tender process. But, having failed to become L-1, the petitioner has now chosen to file the Writ Petition with unclean hands and it has been filed with an ulterior motive and also stalled the movement of essential commodities.

7.1. As regards the first contention of the petitioner that the second respondent was blacklisted in the year 2005, though the second respondent was blacklisted in the year 2005, subsequently, the second respondent participated in the tender of the Tamil Nadu Civil Supplies Corporation for the period of 2014-2015. Therefore, the award of contract to the second respondent would show that the order of blacklisting is not in force. As per Clause 8(g) of the tender document of the Tamil Nadu Civil Supplies Corporation, the blacklisting of a Contractor will be in effect for five years. Therefore, the order of blacklisting comes to end in the year 2010.

7.2. As far as the second contention of the petitioner that out of 25 leased lorries produced by the second respondent in respect of Grade A Tirunelveli Warehouse, 9 lorries were leased to the petitioner in July 2013 and the lease agreement is valid till December 2016 and that the petitioner entered into lease agreement with the owners of the nine lorries before the expiry of the lease agreement pertaining to nine lorries entered into between the petitioner and the owners thereof in 2013. In the list of 25 leased lorries produced by the petitioner for the Grade A Tirunelveli Warehouse for the current tender for the year 2015-2017, the subject matter of nine lorries, which are referred to the Writ Petitions, leased to the second respondent was not included. The first respondent Corporation made a physical verification of 15 owned lorries and 25 leased lorries of the petitioner and nine in respect of the Grade A Tirunelveli Warehouse on 08.01.2016.

7.3. At the time of verification, the petitioner was also present and did not choose to make any objections, but, raised objections belatedly through a representation dated 24.01.2016. Hence, the waiver and acquiescence of the petitioner is self-evident as to the production of nine leased lorries by the second respondent which were allegedly leased to the petitioner in the year 2013. The dispute as regards that the subject nine lorries are leased out to the petitioner also is not the subject matter of the issue in question, as it is the dispute between the petitioner and the lessee. Further, the report of the Tamil Nadu Civil Supplies Corporation in their letter dated 05.01.2016 categorically stated that the second respondent have not been blacklisted for the past three years prior to 31.12.2015. The petitioner also made a declaration that she was not blacklisted at any point of time by TNCSC or any other Department though the petitioner was blacklisted in the year 2005. Further, as per Clauses 5 and 6 of the Declaration Form in Appendix III of the tender document that the tenderers are

required to make a declaration either under Clause 5 or under Clause 6. In view of the interim order of this Court, it gives room for huge loss to the exchequer.

7.4. Lastly, he would contend that it has been repeatedly held that the Court shall not interfere with the decision made by the authority unless violative of Article 14 is demonstrated. Therefore, he prayed for the dismissal of both the Writ Petitions.

7.5. In support of the contention of the learned Counsel appearing for the second respondent, he relied on a judgment made in Vishnu Electricals, Kundrathur, Chennai v. Tamil Nadu Generation and Distribution Corporation Ltd, (2015) 8 MLJ 287 to state that the judicial review in the matter of contractual matters is rather limited.

8. Heard all the parties and perused the materials available on record.

9. The main contention of the learned Senior Counsel is that neither the official respondent has taken into account the fact of blacklisting the second respondent is taken into account nor the declaration made by the second respondent and therefore, on the fact of it, it is violation of the tender conditions, consequently, the first respondent could not have been permitted, the second respondent to participate in the auction. Earlier, the petitioner made a representation dated 24.01.2016. When it was not considered, he sought for a direction from this Court to consider the said representation. Even before filing of the Writ Petition, the official respondent has considered the representation of the petitioner and rejected the allegations of the petitioner. Therefore, the Writ Petition in W.P. (MD).No.2344 of 2016 has become infructuous, of course, there is a dispute whether it was passed on 29.01.2016 or 08.02.2016.

9.1. The fact remains that when the order is passed by the first respondent negating the claim of the petitioner, virtually, the petitioner has no locus standi to maintain the Writ Petition, but, due to the interim order granted by this Court, the further course of action of the first respondent is stalled. In any event, the Writ Petition in W.P.(MD).No.2344 of 2014 has become infructuous.

9.2. Coming to the Writ Petition in W.P.(MD).No.3983 of 2016, which is a consequential Writ Petition preferred challenging the order of the first respondent dated 29.01.2016 rejecting the representation of the petitioner. As rightly pointed out by the second respondent that as far as blacklisting is concerned even as per the typed set filed by the petitioner, the blacklisting was done in the year 2005. Whereas, the second respondent has produced the documents along with a Certificate issued by the respondent Corporation that prior to the award of contract, for the last three years, he has not been blacklisted. In fact, the very same Corporation, has awarded Contract to the second respondent for the year 2014-2015 and 2015-2017. Even otherwise, as per the submission of the learned Additional Advocate General, the blacklisting will continue for a period of five years and going by the contention of the petitioner, it will come to end in the year 2010 commencing from the year 2005. Thereafter, there is no embargo on

the part of the first respondent to place the contract in favour of the second respondent. Therefore, the contention of the petitioner that despite the fact the second respondent faces blacklisting, he has been awarded contract, is rejected.

9.3. The second contention raised by the learned counsel for the petitioner is that the subject number of nine lorries which is leased to him and the same expires by 31.12.2016, has not been taken into account by the first respondent. For the said contention, the learned Additional Advocate General through counter affidavit submitted that the petitioner who participated in the very same tender did not make any hue and cry nor did not mention those lorries in the application filed by him. Therefore, he was very well aware that those lorries are not available with him. Conveniently, he excluded those lorries and now questioning the contract awarded to the second respondent, the petitioner has filed the Writ Petitions. To sum up, having lost the main battle, he makes an attempt to thwart the contract being awarded to the second respondent in one way or the other, by filing frivolous Writ Petitions. Such practise should not be permitted to be encouraged or motivated by this Court.

9.4. Thirdly, insofar as the alleged false declaration made by the second respondent, it is useful to extract the relevant clause as found in the tender form issued by the respondent Corporation, which is as follows:-

"5. I/we do hereby declare that I/we/my firm/company/have/has not been blacklisted or otherwise debarred during that five years by the Tamil Nadu Warehousing Corporation or by any department of Central or State Corporation or by any other Pubic Sector Undertaking or by any other client for failure to comply with terms and conditions of any contract or for violation of any statute, Rule or Administrative instructions {*}

OR

6. I/we do hereby declare that I/we/my firm/company was blacklisted/debarred by (Given the name of the client) for a period of years which period has expired on..... (Furnish full details of the reasons for blacklisting/debarring and with the copy of communication in this regard) {*}

{*} strike out which ever is not applicable with full dated signature"

10. Citing the above clauses, it has been specifically explained that there is no false declaration as alleged by the petitioner and therefore, the second respondent will not fall under the category of blacklisting. Consequently, the order of the first respondent could not be found fault with on any of the grounds.

11. Be that as it may, in the matter of contractual matters, the scope of the interference of judiciary is remote. In this connection, a few decisions can be usefully referred to:-

11.1. In the case of Vijay v. State of Maharashtra, reported in AIR 2009 Supreme Court 1217, it is held that judicial review cannot be exercised by this Court with

respect to a contractual powers of Government or instrumentalities of the Government unless there is clear and cogent material made available to show that the decision made by the authorities is an outcome of bias and arbitrary exercise of power.

(ii) (Tejas Constructions and Infrastructure Private Limited v. Municipal Council, Sendhwa and another) reported in (2012) 6 Supreme Court Cases 464 it is held that any delay due to interference of this Court in contractual matters at the instance of the petitioner would vitiate the object with which the tender was flouted.

(iii) (Elektron Lighting Systems Private Limited and others v. Shah Investments Financial Developments and Consultants Private Limited and others) reported in (2015) (12) Scale 538 to contend that evaluating tenders and awarding contracts are essentially commercial functions of the State in which the principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, the Courts will not, in exercise of judicial power, interfere even if a procedural aberration or error in assessment or prejudice is shown to a tenderer. Such power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

12. If the decision relating to award of contract is bona fide and is in public interest, the Courts will not, in exercise of judicial power, interfere even if a procedural aberration or error in assessment or prejudice is shown to a tenderer. Such power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

13. For all the foregoing reasons and decisions cited supra, there is no merit in the contentions of the learned Senior Counsel and the Writ Petitions must fail and the order impugned in this writ petition is upheld.

14. Accordingly, both the Writ Petitions are dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.