

(2008) 02 MAD CK 0114

In the Madras High Court

Case No : Writ Petition No's. 36006 and 36013 of 2007 and 44 of 2008

R. Kumar and R.K. Construction

APPELLANT

Vs

The Chief Engineer

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Citation : (2008) 3 MLJ 173 : (2008) WritLR 339

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : R.N. Amarnath, in W.P. Nos. 36006 and 36013/2007 and C. Uma, in W.P. No. 44/2008, for the Appellant; S.N. Kribanandham, for the Respondent

Final Decision : Dismissed

Judgement

V. Dhanapalan, J.—Writ Petition No. 36006 of 2007 has been filed, praying for issuance of a writ of certiorari, to call for the records of the respondent relating to Tender Notification, dated 29.10.2007, issued in Specification No. CE/MTPS/SE/P&A/MM/AEE2/O.T. No. 577/2007-2008 and quash the same.

2. Writ Petition No. 36013 of 2007 has been filed, praying for issuance of a writ of certiorari, to call for the records of the respondent relating to the Tender Notification, dated 06.11.2007, issued in Specification No. CE/MTPS/SE/P&A/MM/AEE2/O.T. No. 584/2007-2008, and quash the same.

3. Writ Petition No. 44 of 2008 has been filed, praying for issuance of a writ of certiorarified mandamus, to call for the records of the respondent, pertaining to the tender for Supply of Broad Gauge Railway Track Materials to Mettur Thermal Power Station, having reference Specification No.

CE/MTPS/SE/P&A/MM/AEE2/O.T. No. 591/2007-2008, dated 28th November, 2007, and quash the same in so far as Clause 4-provisions 1

to 3 of the Bid Qualification Requirement and consequently direct the respondent to call for fresh tenders for the above said project, setting out

reasonable Bid Qualification Requirement commensurate with the project.

4. Since all these Writ Petitions relate to a common issue, they are being disposed of by a common order.

5. According to the petitioner, he is the Managing Partner of M/s. R.K. Constructions, which deals with execution of various construction works,

more particularly, laying of railway track works and supply of materials for railway works. The Unit has carried out various works for the Railways

and obtained a certificate of appreciation, by the Department. Further, the Unit is engaged in the business of contracting railway materials for more

than seven years having a turnover of around 10 crores and has recently got the single supply order, dated 22.06.2007, through a tender from

Southern Railway for a proposed supply of railway track materials 50 mm hard granite stone ballast for a total value of Rs. 2,70,00,000/-. While

so, the respondent has issued a Tender Notice on 29.10.2007, calling for sealed tenders for supply of Broad Gauge Railway Track Materials to

Mettur Thermal Power Station. The said tender is two part system with technical bid and price bid. The tender notice stipulates certain conditions

for bid qualification, which are totally arbitrary, illegal and against law inasmuch as the same have been incorporated only to accommodate the

persons with vested interest. Further, no transparency is followed in the tender process which would be evident from the fact that even the list of 5

items required to be supplied has not been furnished nor the list in Annexore II & A is published or furnished to anybody. The irregularity

committed by the respondent in calling for the tenders for a project containing the terms and conditions would cause irreparable loss to the State

exchequer and is gravely prejudicial to public interest by deliberately eliminating competition by imposing arbitrary qualification requirement for

participating in the tender, on account of which the petitioner and similarly placed persons are unable to qualify for the bid. Hence, the entire tender

process is vitiated by malafide only to facilitate or accept the tender from particular individuals. Hence, he has filed these Writ Petitions, for the

relief stated above.

6. The respondent has filed a counter, stating that 3 kms. Railway Track running from Karumalaikudai to Mettur Thermal Power Station is being

maintained by the Tamil Nadu Electricity Board exclusively for the purpose of transporting coal from Chennai Harbour to Mettur Thermal Power

Station by Railways. The Department of Railways informed that the Railway Track laid during 1980 was badly worn out and damaged and

instructed the Board to rectify the damages and to renew the tracks. As the Department of Railways threatened, to discontinue the service if the

repair works are not attended to immediately, Mettur Thermal Power Station took up the matter with the Board and, on 23.09.2006, the Board

approved the proposal to renew the railway track in a phased manner so as to ensure quality of the railway track for better performance and

safety. The tender notice was issued for supply of Broad Gauge Railway Track Materials and the notice in the Specification Open Tender No.

591/07-08 was published in Daily Newspapers in Tamil Daily Malaimalar on 16.12.2007 and English Business Standard on 15.12.2007 and a

copy was displayed in the Notice Board of the respondent and in TNEB Website, which can be freely downloaded by anybody without paying

any cost, the said tender notice was also published in State Bulletin and the above said procedure was followed in all Open Tenders in two part

system, as per the Tamil Nadu Tender Transparency Act, 1998. Further, another tender bearing No. 571/07-08 was called for without any bid

qualifications and the petitioner had not chosen to participate in that tender and that the petitioner, having no required qualification to participate in

the said tender, has approached this Court with unclean hands.

7. The contention of the learned Counsel for the petitioner is three folded, viz., (i) the requirement that the tenderer should be a registered supplier

to TNEB or the Indian Railway for the railway track fitting is arbitrary (ii) the requirement that the bidder should have previously supplied the PSC

Sleepers and fitting for a minimum order value not less than Rs. 30.00 lakhs in a single order to TNEB/Indian Railways within the last three years is

illegal, and (iii) the requirement that the bidder should have an Annual Turn Over of not less than Rs. 2.7 Crore in any one of the last three financial

years is mala fide, since no uniform norms are being followed by TNEB in so far

as tenders for thermal stations are concerned.

8. In reply to the said contention, learned Counsel for the respondent would submit that Condition 4 (1) in the Tender Notice, stating that the

tenderer should be a registered supplier to TNEB/Indian Railway for Railway Track fitting and must produce current registration certificate duly

attested is well within the powers of the respondent Board and it is the prerogative of the tender calling authority to impose pre-qualifying condition

in the tender process and, therefore, the petitioner has no right to question the fixing of pre-qualification, as the respondent has got every right and

power to fix the pre-qualifications, to suit the standards and performance of the materials, to be supplied.

9. In support of his contention, learned Counsel for the respondent has relied upon the following decisions:

(i) Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, ;

In the said case, the Apex Court relied upon its earlier decision in Tata Cellular v. Union of India 1994 (6) SCC 651, wherein the point as to the

extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth and certain principles

have been deduced as under:

(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 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 increased and unbudgeted expenditure.

(ii) Another decision of the Supreme Court in the case of Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, :

10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle

down the terms of a tender as they are in the realm of contract, unless they are wholly arbitrary, discriminatory or actuated by malice....

(iii) Yet another decision of the Supreme Court in the case of Ekta Shakti Foundation Vs. Govt. of NCT of Delhi, :

While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit

the Court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the

Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. The scope of judicial enquiry

is confined to the question whether the decision taken by the Government is against any statutory provision or is violative of the fundamental rights

of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not

appear to be agreeable to the Court, it cannot interfere.

10. Following the principles and the ratio laid down by the Supreme Court in the above decisions, it can be stated herein that the terms and

conditions in the tender are prescribed by the Board bearing in mind the nature of contract and, in such matters, the authority, calling for the tender,

is the best judge to prescribe the terms and conditions of the tender. Further, the terms of the invitation to tender are not open to judicial scrutiny,

the same being in the realm of contract. The Board 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 may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government, merely because it feels that some other terms in the tender would have been fair, wiser or logical. The Board can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. In addition, in the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters.

10. Moreover, as rightly contended by the learned Counsel for the respondent, it is the prerogative of the tender calling authority to impose pre-qualifying condition in the tender process and, therefore, the petitioner has no right to question the fixing of pre-qualification, as the respondent has got every right and power to fix the pre-qualifications, to suit the standards and performance of the materials, to be produced. Also, while issuing the Tender Notices, the procedure, contemplated under the Tamil Nadu Tender Transparency Act, 1998, and the rules made thereunder were followed by the respondent and no hideouts were played. Therefore, the contention of the learned Counsel for the petitioner that with some oblique motive the eligibility criteria has been stipulated cannot be sustained. As such, the petitioners have not made out any ground, which warrants interference by this Court with the decision taken by the Board in making the Bid Qualification Requirements mandatory.

11. For the foregoing reasons, these Writ Petitions fail and they are dismissed. No costs. Consequently, the connected M.P. Nos. 1, 2 and 3 of 2007 in W.P. Nos. 36006 and 36013 of 2007 and M.P. Nos. 1 and 2 of 2008 in W.P. No. 44 of 2008 are closed.