(2009) 10 MAD CK 0184

In the Madras High Court

Case No : Writ Petition No. 21173 of 2008 and M.P. No''s. 1 and 2 of 2008

Rarefield Engineering Pvt. Limited APPELLANT

Vs

The Chairman, Chennai Port Trust, The Member Secretary/ Chief Engineer, Fishing Harbour Management Committee and Startek Shipyards Pvt. Limited RESPONDENT

Date of Decision : 14-10-2009

Acts Referred:

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

Citation : (2009) 8 MLJ 1700

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : K.M. Vijayan, SC for S. Venkateswaran, for the Appellant; R. Karthikeyan, for RR1 and 2 and S. Natarajan, for R3, for the Respondent

Judgement

S. Nagamuthu, J.—Chennai Fishing Harbour Management Committee, Chennai Port Trust (2nd respondent herein) invited sealed tenders under two cover system for Licensing of the Slipway Complex for Operation and Maintenance at Chennai Fishing Harbour, Royapuram, Chennai on annual license basis from the firms and companies having a minimum experience of three years in building/ repairing the boats, trawlers, tugs, naval/coast guard and other vessels or operating such type of slipway or dry docks and having DG Shipping Registration Certificate and average annual turnover of not less than Rs. 3.00 crores in the last three years. The Firms/Companies can also quote for this tender as "Joint Venture" . Initially, the license period will be for 7 years and it is extendable for another 3 years on satisfactory performance. The departmental minimum reserve price (license fee) as mentioned in the Tender Notification is Rs. 7.62 lakhs + service tax per month. The license fee shall be payable every month. The last date for submission of tenders was 18.03.2008. The completed tenders would be opened on the same day.

2. In pursuance of the same, the petitioner, 3rd respondent and yet another firm

namely, M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District submitted sealed tenders in time. The Technical Bids were opened on 18.03.2008 and the documents produced by the tenderers were scrutinised by the Superintending Engineer (P&D). He prepared an evaluation statement along with note to the tender committee. The documents were placed before the Tender Committee. The committee, in its meeting held on 11.04.2008, pre-qualified two bidders viz., the petitioner and the 3rd respondent. The 3rd bidder viz., M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District had not produced necessary certificate showing the experience. Subsequently, necessary documents were submitted by the said firm. Thereafter, in the Tender Committee meeting held on 30.06.2008, the Committee recommended that all the 3 bidders viz., the petitioner, the 3rd respondent and M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District may be considered for pre-qualification for licensing. The same was approved by the Chairman of Chennai Port Trust. In the mean while, the petitioner had submitted two written objections regarding the eligibility of the 3rd respondent. But, they were not considered.

3. Finally, the price bids of all the three tenderers were opened on 11.07.2008, and the price quoted by each tenderer was found as follows:

Sl. No.

Name of the firm

Quoted value per month

% excess + or -

Rank

1

M/s. Startek Shipyard (3rd Respondent)

Rs. 12,40,000

(+) 62.73%

1

2

M/s. KEI RSOS Maritime

Rs. 11,22,500

(+) 47.31%

2

3

M/s. Rarefield Engineers

Rs. 11,11,000 + Service Tax

(+) 45.80%

3

4. The petitioner submitted letter dated 17.07.2008 claiming that the license fee quoted by them is the highest bid and therefore contract should be awarded to the petitioner. According to the petitioner, it had quoted Rs. 11,11,000/- per month + Service Tax which works out to Rs. 12,48,319/- ; whereas the 3rd respondent had quoted only Rs. 12,40,000/- inclusive of service tax. In the said letter, the petitioner referred to various clauses in the tender documents, more particularly, Page 3 of Volume-II of the Price Bid and Clause 14.3 in Volume-I. The Superintending Engineer brought the said objections to the notice of the Committee and prepared a note on 22.07.2008 and placed the papers before the Tender Committee pointing out the objections raised by the petitioner as stated above. Since the respondents 1 and 2 could not decide as to whether the amount quoted by the 3rd respondent is "exclusive of service tax" or "inclusive of service tax" in terms of the tender conditions, the Committee thought it fit to get legal opinion. Mr. R. Karthikeyan, learned Advocate, gave legal opinion on 11.08.2008 , wherein he opined that what was quoted by the 3rd respondent would be exclusive of statutory dues. He had further pointed out that the department can be specific and more careful in future as to the words to be used in the tender. He further proceeded to opine that the department instead of complicating, can use the following: "Whether the license fee is exclusive or inclusive of tax". It is based on the said legal opinion, the Committee decided that the license fee quoted by the 3rd respondent was exclusive of service tax and so the 3rd respondent was the highest bidder. Accordingly, the Committee recommended for awarding contract and the same was approved by the 1st respondent and finally the contract was awarded in favour of the 3rd respondent. Challenging the same, the petitioner has come forward with this writ petition.

5. Though several grounds have been raised in the writ petition , the crux of the contentions of the learned senior counsel appearing for the petitioner can be summarised as follows:

(i) The 3rd respondent was not technically qualified in as much as the 3rd respondent did not have the required experience as well as D.G. Shipping Registration certificate as per the general conditions of tender and so the technical bid submitted by the 3rd respondent ought to have been rejected.

(ii) The objections raised by the petitioner in respect of technical qualification of the 3rd respondent put in writing on two occasions were not at all considered by the respondents 1 and 2.

(iii) In the price bid, a tenderer, as per the conditions, was required to mention the license fee which includes service tax also.

(iv) The petitioner had quoted a sum of Rs. 11,11,000/- per month + service tax; where as the 3rd respondent had quoted Rs. 12,40,000/- which includes service tax. If service tax as on the crucial date is calculated, it works out to Rs. 1,37,319/- thereby making the bid of the petitioner at Rs. 12,48,319/- whereas the license fee quoted by the 3rd respondent including service tax was only Rs. 12,40,000/-. The price quoted by M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District was Rs. 11,22,500/-inclusive of service tax as claimed by the said firm itself. Comparatively, since the petitioner was the highest bidder, the contract should have been awarded only in favour of the petitioner.

(iv) The whole exercise was done by the respondent only to favour the 3rd respondent and that is the reason why the objections raised by the petitioner regarding the Technical Qualification of the 3rd respondent were not considered and in an arbitrary manner the technical qualification of the 3rd respondent was accepted and again, though the petitioner was the highest bidder, in an arbitrary manner , the 3rd respondent was declared as the highest bidder and contract was awarded in his favour. Thus, the awrad of contract in favour of the third respondent is arbitrary, unreasonable and discriminatory.

(v) Though already the contract has been awarded in favour of the 3rd respondent, since it is a service contract for a period of 7 years and extendable for another 3 years, the writ petition has not become infructuous.

6. The contentions of the respondents 1 and 2 are as follows:

(i) The 3rd respondent submitted the tender documents as a joint venture firm with yet another firm known as M/s. T.M. Brothers, Kolkatta, West Bengal. The joint venture partner M/s. T.M. Brothers, Kolkatta had DG Shipping Registration Certificate for ship repair up to 31.05.2009. The joint venture agreement between the said T.M. Brothers and the 3rd respondent was also submitted. According to the respondents 1 and 2 , it is not necessary that the lead partner of the joint venture should have the DG shipping registration certificate and it is suffice if the joint venture partner other than the lead partner possesses the said DG shipping registration certificate.

(ii) Insofar as experience is concerned, the 3rd respondent has got more than three years of experience in the field. Since the 3rd respondent satisfied all the tender conditions in respect of technical qualification, the technical bid of the 3rd respondent was rightly accepted and there is no arbitrariness in the same.

(iii) In respect of price bid, according to the tender conditions, a tenderer is required to quote the license fee which does not include the service tax. The service tax is to be paid independently on the license fee. The price quoted by the 3rd respondent viz., Rs. 12,40,000/- is only towards license fee which does not include the service tax. Since objection was raised in this regard by the petitioner, legal opinion was obtained and based on the opinion given by the legal expert, it was concluded that the price quoted by the 3rd respondent was only license fee exclusive of service tax. That is how the 3rd respondent was declared as the highest bidder and contract was awarded in which also there is no arbitrariness or favouritism.

7. The contentions of the 3rd respondent are almost similar to that of the respondents 1 and 2. According to him also, the 3rd respondent has got sufficient qualification as per the tender conditions in the matter of experience. The 3rd respondent also stated that as per the tender conditions, it is not necessary that the lead partner of the joint venture should have DG shipping registration certificate and it would be sufficient if the other partner posseses such DG shipping registration certificate.

8. In respect of the price bid, it is contended by the 3rd Respondent that the tender conditions are clear and unambiguous which require to quote licence fee alone in the price bid exclusive of service tax. That is the way in which the tender conditions were plainly read and understood and thus the price quoted by the 3rd respondent was exclusive of service tax and thus, the 3rd respondent was the highest bidder.

9. It is further submitted that though interim order was sought for in this writ petition, since no interim order was granted, the contract has been awarded to the 3rd respondent and he has been doing the job and therefore, at this length of time, no interference is called for.

10. I have heard the learned senior counsel appearing for the petitioner, learned Counsel appearing for the respondents 1 and 2 and the learned Counsel appearing for the 3rd respondent. The learned Counsel appearing for the respondents 1 and 2 has produced the entire files relating to the issues consisting of five volumes and I had the benefit of going through the same thoroughly.

11. Let me, at first, consider the issues regarding the technical bid. Before going to the facts of the case, it would be useful to extract the relevant clauses of terms and conditions of the tender relating to technical bid.

12. Clause 3 to the Instructions to the Tenderers (Section-1) is as follows:

3. Eligible Tenderers:

3.1 This tender is being invited on the ''Two-Cover System and is open to all firms/companies having the following eligibility criteria.

1) a minimum experience of three years in building/repairing boats, tugs, naval/ coast guard and other vessels or operation a slipway/dry dock and

2) Having valid D.G. (Shipping) registration certificate for building, repairing of boats, tugs and other vessels or operation and maintenance of slipway/dry dock and

...

The firms who submit their bids will be qualified for the work based on the information provided by them in respect of their financial capacity and experience. For this purpose, the tenderers are required to submit the relevant information in cover-I in the proforma enclosed with the tender documents along with the relevant documentary evidence in original or notarized. The failure, if any, in production of required documents will render the tender as non responsive and liable for rejection. The details so submitted will be evaluated critically and the Cover II (price bid) of only those firms who qualify under cover I will be opened and other offers will be returned unopened.

3.4 Joint Venture:

Tenders submitted by a joint venture of two or more firms, as partners shall comply with the following requirements:

...

(c) the lead partner shall possess the required minimum experience. The registration certificate from D.G. Shipping and annual turn over may be with any one of the JV partners;

13. A reading of Clause 3.1 as extracted above would make it manifestly clear that there shall be a minimum experience of three years in building /repairing boats, tugs, naval/coast guard and other vessels or operating a slipway or dry dock, besides D.G. (Shipping) registration certificate.

14. Admittedly, the 3rd respondent does not possess D.G. (Shipping) registration certificate. But, it claims to have more than three years of experience. It is the contention of the 3rd respondent that it is suffice that the Joint Venture partner possesses D.G. (Shipping) registration certificate. Admittedly, the Joint Venture partner has D.G. (Shipping) registration certificate. Thus, according to the 3rd respondent, he is qualified. But, the petitioner would contend that the lead partner should possess D.G.(Shipping) registration certificate. It is the further contention that the 3rd respondent does not have required experience. In my considered opinion , a close reading of Clause 3.4 (c) of the Instructions to the Tenderers would make it abundantly clear that D.G. Shipping Registration Certificate is not at all required for the leading partner.

15. The learned Counsel for the respondents 1 and 2 as well as the learned Counsel for the 3rd respondent would submit that it is not like a driving license issued under the Motor Vehicles Act without which one cannot gain experience in driving. The learned senior counsel for the petitioner is not in a position to demonstrate as to how D.G. Shipping registration certificate is sine-quo-non to gain experience in the matter of building/repairing the boats, trawlers, tugs, naval/coast guard and other vessels or operating such type of slipway or dry docks. Thus, I find no material on record to hold that to gain experience D.G. (shipping) registration certificate is necessary. As it is rightly pointed out by the learned Counsel for the respondents 1 and 2 as well as the learned Counsel for the 3rd respondent, it would be suffice that the partner of Joint Venture firm has got such D.G. Shipping Registration Certificate. In this regard, I am inclined only

to reject the contention of the petitioner.

16. Nextly, the contention regarding the minimum experience needs to be considered. A perusal of the records would go to show that along with the tender documents, the 3rd respondent had produced as many as 3 documents to show its experience in the field, besides few other documents relating to the work under progress. They are as follows:

(1) Construction of 3 Nos. of cutter suction dredgers for Mazagon Dock Limited, Mumbai for a value of Rs. 1575 lakhs during 28.02.2003 to 15.03.2004

(2) Design, construction of 2 Nos. of cutter suction dredger for Gujarat Maritime Board, for avalue of Rs. 1067 lakhs during 30.07.2004 to 30.10.2005

(3) Overhauling and trials of Schhottle Hydraulic unit for Naval Dock Yard, Mumbai for a value of Rs. 30 lakhs during 2005.

17. The tender committee consisting of experts was satisfied with the same and that is how they have concluded that the 3rd respondent satisfies the experience norms prescribed in the tender conditions. The learned senior counsel appearing for the petitioner has not contended before this Court that any of the certificates produced by the 3rd respondent is either doubtful or false. When an expert body, on evaluation, has accepted such certificates, this Court hardly finds any reason to doubt the correctness of the said conclusion. The learned senior counsel appearing for the petitioner is also not able to explain as to how the conclusion arrived at by the expert committee is either unreasonable or arbitrary. Therefore, I am of the view that the 3rd respondent has satisfied all the requirements of the tender conditions and so, I reject the contentions of the petitioner in this regard.

18. It is, of course, true that on two different occasions objections were raised by the petitioner regarding the eligibility of the 3rd respondent. The first one was misunderstood by the respondents 1 and 2 as though it was a clarification sought for. It should be noticed that if any clarification in respect of terms and conditions of the tender is required by any intending tenderer that should be asked for 10 days prior to the last date for receipt of tenders. The first letter raising objection regarding the eligibility of the 3rd respondent was submitted subsequent to the last date for submission of the tenders. The said letter cannot be construed to be a letter calling for clarification. A reading of the said letter would go to show that it contains only objection regarding the eligibility of the 3rd respondent. However, the respondents 1 and 2 have failed to consider the same properly.

19. The 2nd letter of objections was sent on 08.07.2008 by the petitioner, by which time, the tender had already been opened. Assuming that the objections were considered, that would not have altered the ultimate conclusion arrived at by the respondents 1 and 2 in respect of eligibility of the 3rd respondent. Therefore, on the ground of non consideration of the objections of the petitioner, I am not inclined to interfere with the decision of the respondents 1 and 2 with regard to eligibility of the 3rd respondent.

20. Now, let me move on to the issues regarding the price bid.

21. Section 1 of Clause 1 (vii) of the Instructions to the Tenderers provides as follows:

The licence fee per month (at the rate quoted by the successful tenderers per month) shall be remitted by the licensee regularly on or before 25th day of the preceding month for the monthly license fee of the succeeding month without fail.

22.1. Clause 14.2 of the Instructions to the Tenderers provides as follows:

No change in the price proposal submitted will be allowed after opening of tender.

22.2. Clause 14.3 of the Instructions to the Tenderers provides as follows:

The amount quoted by the tenderer in the price proposal shall be the license fee (sic) one calendar month or part thereof after Octroi, Customs duty, Excise duty, Service tax, VAT or any other duties, taxes or charges whatsoever payable on the performance of the contract. The amount quoted shall be firm and not subject to variation for any reasons whatsoever.

23. What is "license fee" has not clearly been defined in the above clause.

24. In the Memorandum of tender for licensing , in Clause 2(a), the term "license fee" has been defined as follows:

2(a) License fee for operation and maintenance of slip way Complex: Minimum Reserved price is Rs. 7.62 lakhs / calendar month / part thereof (Rupees Seven lakhs and sixty two thousand only) + service tax fixed by the statutory authorities from time to time.

2(b) License fee - For the additional land outside the slipway complex if required: Rs. 3225/100 sq m+ service tax or part thereof per calendar month or part thereof for the land to be licensed outside the limit as indicated in the drawing to be developed and new compound wall to be constructed after dismantling the existing compound wall by the licensee. The development cost shall be borne by the Licensee.

25. A plain reading of the above clause would make one to have the understanding that license fee means, fee offered more than the reserve price + service tax (i.e.) the amount to be quoted shall include service tax also.

26. Section 3 of Clause 3 of the Instructions to the Tenderers (General Instructions) speaks of licence fee, which runs as follows:

3. The tenderer/Licensee shall quote the monthly fee they intend to offer. For this purpose, it may be noted that the reserve price fixed is Rs. 7.62 lakhs per calendar month or part thereof for a period of 7 years payable by Licensee

3.a. The license fee have to be paid at quoted rate along with service tax as fixed from time to time by the statutory authorities.

27. A reading of the above clauses 3 would make one to have an impression that what is to be quoted in the price bid is only fee offered above, the reserve price, which does not include service tax. A close reading of Clause 3 (a) above would show that license fee have to be paid along with service tax. This would indicate that license fee does not include service tax.

28. Again, in the Proforma of Price Bid Proposal Clause (i) is as under:

(i) LICENSE FEE:

License fee Rs. ___ (Rupees___) per calendar month or part thereof;

(ii) ....

(iii) ....

(vi) ....

(v) ....

Note:

1. The Reserve Monthly License fee is Rs. 7.62 lakhs + service taxes per calendar month or part thereof.

2. The Tenderer shall quote the monthly license fee more than the reserve monthly license fee, both in figures and words, legibly in the spaces specified above.

3. The rates quoted lower than "Reserve Monthly License Fee" shall be treated as "INVALID" and such offers will be "REJECTED".

29. A reading of Note No. (1) above, would again indicate that the monthly license fee will include service tax also.

30. It is contended by the learned senior counsel appearing for the petitioner that all the above clauses, if read plainly, would go to mean only that the price to be quoted in the price bid is inclusive of service tax also or in the alternative, service tax should be separately mentioned. He would further submit that so far as the price quoted by the petitioner is concerned, he had mentioned the offer above the reserve price and the service tax separately. The amount of Rs. 11,11,000/- mentioned by the petitioner according to the learned senior counsel, would mean the fee offered above the reserve fee and he has also agreed to pay service tax which, if calculated at the prevailing rate, would work out to Rs. 1,37,319/- and the total amount of license fee, if calculated as mentioned above would be Rs. 12,48,319/-. Since the 3rd respondent had quoted only Rs. 12,40,000/- which included service tax also, the 3rd respondent''s offer should have been rejected by the respondents 1 and 2.

31. In contrast, it is the contention of the learned Counsel appearing for the 3rd respondent that if the above clauses are plainly read, it would go a long way to

clearly indicate that the tenderers are required to quote only license fee and not service tax, because service tax is to be paid separately on the license fee. He would further submit that Rs. 12,40,000/- quoted in the price bid by the 3rd respondent refers only to license fee and it does not include service tax. He would further add that service tax cannot be included with the license fee, because license fee is paid to the Port Trust; whereas service tax is paid to the some other authority. Since, Rs. 12,40,000/- quoted by the 3rd respondent was the license fee in terms of the above clauses and since the same was the highest offer, the respondents 1 and 2 rightly accepted the same, it is contended.

32. Admittedly, based on his understanding of the above clauses relating to license fee, the petitioner raised objection in writing on more than one occasion. A perusal of the records would go to show that the objections were considered by the tender committee consisting of experts. The committee was of the view that whether the license fee to be quoted in the price bid includes service tax or not, is a matter to be interpreted only by a legal brain. Thus, the tender committee could not come to a clear conclusion on this aspect. Therefore, the matter was referred to Mr. R. Karthikeyan, the standing counsel for Chennai Port Trust. The standing counsel gave his opinion on 11.08.2008, which is found at page No. 116 (volue.10) of the files produced by the respondents 1 and 2 wherein he has opined as follows:

The Querist Chennai Port Trust has forwarded this Opinion as Clause 14.3 of the Tender documents reads "The amount quoted by the tenderer in the price proposal shall be the license fee one calendar month or part thereof after Octroi, Customs duty, Excise duty, Service tax, VAT or any other duties, taxes or charges whatsoever payable on the personnel, material, et., which will be utilised by the tenderer in the performance of the contract. The amount quoted shall be firm and not subject to variation for any reasons whatsoever". "Further, if the provision of value added taxes is applicable to the lease as a supplement to the existing sales tax provisions, the same shall be to the account of the License and FHMC neither reimburse nor claim any difference on account of the same.

It is to be pointed out that Clause 14.3 would say the proposal shall be the license fee (sic) one calendar month or part thereof after octroi, customs duty, excise duty etc. Further in Vol. I of the Tender document also says the Reserve month license fee is Rs. 7.62 lakhs + service taxes per calendar month or part thereof.

Therefore, in view of the above, I am of the opinion, that license fee after octroi, customs duty and other taxes would mean that after quoting the license fee other duty, taxes should be quoted and in other words the tenderer ought to have quoted license fee exclusive of the statutory dues. The same also can be brought to the notice of the tenderers in the tender committee meeting.

It is also to be pointed out that the department can be specific and more careful in the future as to the words used in the tender. The department instead of complicating can use the following "Whether the license fee is inclusive of exclusive of taxes" to avoid unnecessary complications.

33. It is based on the said opinion, the respondents 1 and 2 ultimately concluded that the price quoted by the 3rd respondent is exclusive of service tax.

34. From the arguments advanced and perusal of the records, one thing is very clear that is, the respondents 1 and 2 and the tender committee were not able to decide on their own as to whether the price to be quoted in the price bid is inclusive of service tax or exclusive of service tax. As I have already stated, a reading of the above clauses would not make any one to form a single opinion, since it is capable of being understood in more than two different ways as it is sought to be made by the petitioner on one side and the 3rd respondent on the other side. Even the respondents 1 and 2 were also not in a position to clearly understand as to what the tender documents convey as to whether the price to be quoted is inclusive of service tax or exclusive of service tax. That is the reason why, unable to decide on the objection raised by the petitioner, they have referred the matter for legal opinion. The legal expert Mr. R. Karthikeyan, in his opinion dated 11.08.2008 has also stated that the department can be specific and more careful in future as to the words to be used in the tender and the department, instead of complicating , can use the following namely, whether the license fee is inclusive or exclusive of tax to avoid unnecessary complications. Thus, the legal expert who gave the opinion was also of the view that the words used in the tender documents in respect of definition of license fee were dubious in nature and capable of being understood in different ways. Thus, as it is rightly pointed out by the learned senior counsel for the petitioner, the petitioner has understood the same in one way viz., the price to be quoted in the price bid is inclusive of service tax. Similarly, as rightly pointed out by the learned Counsel for the 3rd respondent, the 3rd respondent has understood the tender conditions in his own way to say that the price to be quoted in the price bid is exclusive of service tax. In my considered opinion, this Court cannot find fault with either of them. When the author of the tender namely, the respondents 1 and 2 and the tender committee consisting of experts were not in a position to understand the above clauses in one particular definite way, this Court cannot find fault with either the petitioner in respect of the way in which he has understood or the 3rd respondent regarding the way in which he has understood the tender conditions. Therefore, as contended by the petitioner, he has quoted the price above the reserve price + service tax separately in the way in which he has understood the terms and conditions of the tender. Similarly, the 3rd respondent has quoted the license fee, which according to him is exclusive of service tax (i.e.) in the way in which he has understood the tender conditions. Similarly, a perusal of the page 141 of Volume II of the file would show that the 3rd tenderer M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District had understood the tender conditions in yet another way. It had sent a letter to the Chief Engineer , Chennai Port Trust on 16.08.2008 which contains the following:

We had participated in the above mentioned tender and had quoted Rs. 11,22,500/- per month including service tax. The commercial bid was opened on 11.07.2008. So far we have not received any information of the status of the award.

We therefore request you to please inform us as to whom the lease contract has been awarded.

35. Admittedly, M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District quoted at Rs. 11,22,500/- as license fee in the price bid as it was quoted by the 3rd respondent at Rs. 12,40,000/- The above letter would go a long way to show that M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District had understood the above clauses in the third way (i.e.) the price to be quoted shall be inclusive of service tax also. Thus there are three interpretations made in the way in which three tenderers have understood the above clauses. According to the petitioner, the amount to be quoted as license fee shall include service tax. However, service tax is to be separately mentioned. According to the 3rd respondent, amount to be quoted as license fee shall not include service tax. But, according to M/s. KEI-RSOS Maritime Limited, Thirukadayur, Nagapattinam District the amount to be quoted shall include service tax. Thus, three tenderers have understood and interpreted the clauses in three different ways. It is, therefore, crystal clear that the terms and conditions incorporated in the tender documents, as extracted above, are highly confusing and susceptible to more than one interpretation or understanding. Having come to the said conclusion, this Court has to find as to what is the next course to be adopted as per the settled law.

36. The learned senior counsel for the petitioner relies on a judgement of the Hon''ble Supreme Court in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, , wherein the Hon''ble Supreme Court had an occasion to deal with the law in respect of a contract where there is legal uncertainty in understanding the terms and conditions of tender. In para 36 of the said judgement the Hon''ble Supreme Court has held thus:

Standards applied by courts in 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 refers to "right to life. It includes "opportunity". In our view, as held in the latest judgement of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N., Articles 21/14 are 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/HDEC 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 sub-serve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled license 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)....

...There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated 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.

37. After making the above observation, the Hon''ble Supreme Court proceeds to refer to the judgement in Union of India (UOI) and Another Vs. International Trading Co. and Another, , wherein , the Hon''ble Supreme Court in para 15 has held thus:

15. ...The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose....

...A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle of emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

38. After extracting the above, in para 38 of the said Judgement (Reliance Energy''s case cited supra) the Hon''ble Supreme Court has held thus:

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.

39. In the case on hand, as I have already concluded, the terms and conditions indicated in the tender documents did not have certainty as they are capable of being understood in more than two different ways. Surely, the said uncertainty

infringes the doctrine of "level playing field", which is an integral part of Articles 19(1)(g) & 14 of the Constitution. When objections regarding the understanding of the clauses with regard to license fee were made by the petitioner and when doubt arose in the minds of the respondents 1 and 2 and the tender committee in respect of the understanding of the same, the respondents 1 and 2 ought to have thought of providing level playing field to the intended tenderers so as to get more benefits to the organisation by cancelling the entire tender process and by inviting fresh tender by clarifying the above aspect. As I have already stated, at least, after the opinion of Mr. R. Karthikeyan, the legal expert, dated 11.08.2008, the respondents 1 and 2 would have thought of cancelling the entire tender process and to go for fresh tender so as to provide a level playing field for the players. Unfortunately, the same has not been done in this case. Thus, the act of the respondents in accepting the interpretation of the above clauses made by the 3rd respondent is illegal. The terms and conditions of any tender involving public contract should be made easily understandable by all the intending tenderers without any doubt. Of course, there is a clause in the tender conditions (i.e.) in case of any doubt regarding any of the clauses of the tender conditions, an intending tenderer is at liberty to call for clarification regarding the same within 10 days prior to the last date for submission of tenders. But, in this case, in respect of the price to be quoted neither the petitioner nor the 3rd respondent have sought for any such clarification, because, as pointed out by the learned Counsel on either side, the respective parties had no doubt in understanding the terms and conditions regarding the price to be quoted. As I have already stated above, each one has understood in his own way without carrying any doubt in his mind. For all these reasons, I have to hold that acceptance of the bid of the 3rd respondent and awarding of contract to the 3rd respondent is not sustainable under law.

40. The learned Counsel appearing for the respondents 1 and 2 would rely on a judgement in Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, to substantiate his contention that if only the terms and conditions of tender prescribing eligibility criteria are found to be arbitrary , discriminatory or actuated by bias, under the writ jurisdiction, this Court can interfere with the same. The learned Counsel would submit that though it may be possible for this Court to feel that some other terms would have been more preferable, on that ground the contract cannot be interfered with as the Government have got freedom to contract. In my considered opinion, the principles stated in the said judgement have got no application to the facts of the present case at all. In that case the Hon''ble Supreme Court has held that it was for the authority to set the terms and conditions of the tender and the courts should not interfere with the same, unless it is shown to be arbitrary or discriminatory or actuated by malice. Regarding this legal proposition, there can be no second opinion. But, in the case on hand, no challenge has been made in respect of the sufficiency or reasonableness of the terms and conditions. On the contrary, the award of contract is challenged on the ground of uncertainty of the terms and conditions

of the tender. Therefore, the principles stated in the above case are not applicable to the facts of the instant case and instead, the principles stated in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, alone are applicable.

41. Applying the law laid down by the Hon''ble Supreme Court in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, , I am of the view that awarding of the contract in favour of the 3rd respondent deserves to be set aside.

42. While setting aside the award of the contract, whether there can be a direction to the respondents 1 and 2 to award the contract in favour of the petitioner because he claims that his bid is the higher bid than that of the 3rd respondent needs to be considered.

43. In my considered opinion, if the interpretation of the clauses relating to price to be quoted in the price bid as made by the petitioner is accepted, certainly, the petitioner will be the highest bidder and so he is entitled for award of contract. On the other hand, if the interpretation made by the 3rd respondent is accepted, then, he shall be the higher bidder thereby entitled for award of contract. Since, I have held that both the interpretations can reasonably be had on going through the tender conditions and since I am inclined to set aside the awarding of contract in favour of the 3rd respondent only because of legal uncertainty , it is quite impossible to accept the interpretation made by the petitioner as the only correct interpretation and to direct the respondents 1 and 2 to award the contract in favour of the petitioner. In these circumstances, the only course left open is to direct the respondents 1 and 2 to go for fresh tender. Though, it is true that already contract has been awarded in favour of the 3rd respondent and he has been doing the work, that cannot be a ground to dismiss the writ petition, since, the contract period is for 7 years extendable by another 3 years.

44. In the result, the writ petition is partly allowed and the impugned proceeding of the Chennai Port Trust vide Ref. JDR/5869/07/E, dated 14.08.2008 awarding license for Slipway Complex for Operation and Maintenance at Chennai Fishing Harbour to the 3rd respondent is set aside, however with a liberty to the respondents 1 and 2 to go for fresh tender. Consequently, connected MPs are closed. No costs.