

(2010) 10 MAD CK 0191

In the Madras High Court

Case No : Writ Petition No. 4119 of 2010

Sam Turbo Industries Limited

APPELLANT

Vs

The Tamil Nadu Electricity Board and Others

RESPONDENT

Date of Decision : 08-10-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Tamil Nadu Transparency in Tenders Act, 1998 — Section 10, 10(3), 16, 9

Tamil Nadu Transparency in Tenders Rules, 2000 — Rule 28

Citation : (2010) 10 MAD CK 0191

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : Rahul Balaji, for the Appellant; A. Selvendran, for R1 to R3 and R6 and A. Manimaran, for R5, for the Respondent

Final Decision : Dismissed

Judgement

V. Dhanapalan, J.—By consent of the learned Counsel on either side, this writ petition is taken up for final disposal.

2. This writ petition is filed to call for the records of the respondents 1 to 3 comprised in indent dated nil. 01.2010 issued by the 6th respondent and all connected proceedings and invoices in relation to procurement of ash slurry disposal pumps for the North Chennai Thermal Power Station of the TNEB from the 4th respondent company either directly or through any person including the 5th respondent and quash the same as arbitrary and illegal being contrary to the provisions of the Tamil Nadu (Transparency of Tenders) Act, 1998 and consequently direct the respondents to strictly comply with the provisions of the Tamil Nadu (Transparency of Tenders) Act, 1998 and carry out procurements of Ash Slurry Disposal Pumps only by way of open tenders.

3. The case of the petitioner as put forth in the affidavit would run thus:

(i) The petitioner is the market leader in the area of manufacture of ash slurry

pumps and chemical pumps, which have a niche and specialized market. Ash slurry pumps are essential in units that use coal as a thermal fuel. The large quantities of ash generated is pumped as slurry. The petitioner is a pioneer in India in that field and has a 80% share of the market in this category. It designs, manufactures and services pumps for the essential industries in India and abroad. Since 1972, it has built a reputation of blending craftsmanship with mass production, techniques with innovation, quality and quantity and it is widely acknowledged as a leader in its industry and continue to combine innovative designs and materials with most advanced manufacturing techniques to ensure quality and quantity. It has its corporate office, captive steel foundry and manufacturing plants at Coimbatore.

(ii) The company's product range includes both horizontal and vertical centrifugal pumps, with closed and open impellers. These pumps form an integral part of Chemical, Petrochemical, Paper, Refineries, Basic Metals, and Fertilizers Industries and Thermal Power Stations. The petitioner has a captive steel foundry with a capacity of 400 m.t./month producing materials conforming to IS, ASTM, JIS, AFNOR and BS, guaranteeing quality control standards for its products. Its pumps are approved by leading consultants/inspection agencies like the UHDC, Jacob's H and G, Development Consultants, Lurgi, NTPC, FCDO, PDIL, Mecon, KPG, TOYO, TCE, Desien, Dastur Co., etc. The petitioner states that it has been consistently improving the technology in its pumps and its new generation pumps are manufactured using the latest available technology with substantially increased performance and at reduced costs, both capital and running. It is the single largest supplier of Ash Slurry Pumps to the TNEB and supplies pumps to various State Electricity Boards, NTPC, etc.

(iii) The petitioner received information that the 1st respondent Board is in the process of finalizing purchase of four numbers of Ash Slurry disposal pumps at North Chennai Thermal Power Station. The petitioner was expecting that as is the normal procedure, tenders would be floated for the said purpose considering the compulsory mandate in this regard imposed by the Tamil Nadu (Transparency in Tenders) Act, 1998. While so, upon enquiries being made, the petitioner was given to understand that the orders were to be placed on a proprietary basis to a single manufacturer. The petitioner is not aware of the reasons for such a decision, but, it does appear that the officials have failed to embark upon procurement in a manner that is impermissible in terms of the Act.

(iv) The petitioner was informed that the respondents, in a wholly, arbitrary and illegal manner, were seeking to raise an indent for procurement of four numbers of Ash Slurry Disposal Pumps, on what is referred to as "Proprietary Basis" which essentially means that there would be no open tender. The petitioner came to now about this, upon being provided with certain shocking developments evidenced by the correspondence between the officers of the 1st respondent Board, which came into the possession of the petitioner herein. It was evident from an indent of January 2010 that the respondent had already taken a decision

and was seeking to place orders in respect of the Ash Slurry Disposal Pumps.

(v) According to the petitioner, the entire process appears to have been flawed inasmuch as the very order was pushed through by the officials of the respondent Board, as if it was in terms of the budgetary provisions meant for Ash Slurry Disposal Pump spares in 2009-2010. Therefore, while budgetary approval has been obtained for spares, the respondent had sought to place fresh orders for pumps, thereby, indulging in an unauthorized action. Immediately, on coming to know about the same, it appeared that the respondent's officials had already decided to favour the 4th respondent for reasons best known to them and had in fact to claim that it was a bonafide decision conducted certain tests in respect of the pre-existing pumps by comparing the pumps supplied by the petitioner with that of the 4th respondent company herein, behind the back of the petitioner and without following any of the mandatory tests procedure protocols. Therefore, the various thermal power stations were called upon by the 1st respondent Board to prepare and forward test reports. Significantly, as would be evident from the test reports, even the testing done in this fashion demonstrated that the petitioner's pumps were performing in a trouble free manner and in two out of three thermal stations, the petitioner's products were considered superior and even in the third Thermal Station, the performance of petitioner's products were considered superior. But still, a report favouring the procurement of the products of the 4th respondent was prepared. The fact remains that the performance of the petitioner's products stands far ahead that of the fourth respondent's products.

(vi) The petitioner, being the largest supply of slurry pumps to the respondent Board and having enjoyed a long relationship, thought it fit not to precipitate the issue and therefore issued a letter dated 13.02.2010 specifically setting forth the fact that it was impermissible to proceed with purchasing pumps without calling for tenders. The petitioner also pointed out that in any event a comparison between the pumps would be wholly inappropriate for the purpose of determining the efficiency of pumps, since the petitioner's pumps which are being used by the respondent Board are of varying ages, viz., some are in the age group of 5 and 10 years. It is further relevant to state that many of the pumps are being used with new spares and some with spares which may require replacement. The comparative pumps of the other manufacturer i.e., the 5th respondent were brand new and had been installed only a few months prior to the testing. In addition to the same, the present generation pumps of the petitioner are entirely different and therefore, it may be inappropriate to compare the petitioner's old pumps with new pumps or another make to determine the comparative superiority and place orders on that basis.

(vii) Furthermore, the testing has to be done by following standard testing procedures, with appropriate testing equipments, including determining flow rate, discharging rate, power consumption using flow meters and other testing equipments. Furthermore, it would not be appropriate to compare a new pump

with an older one that had replaced spare parts. By the very nature of things, the efficiency would be different. In any event, the petitioner is quite confident that even their older pumps are superior to the new pumps both in procurement and running costs that have been supplied by other manufacturers. The petitioner states that a testing conducted by a third party expert would clearly prove that. The petitioner pointed out that such procurements would be detrimental to the interest of not only the petitioner but equally, if not more, detrimental to the various other pump manufacturers who would be in a position to participate in a tender in the event of its being open tender and the respondent Electricity Board would be suffering from huge financial loss by resorting to inappropriate procurement. Left with no other alternative efficacious remedy, the petitioner is before this Court.

4. A counter affidavit has been filed on behalf of respondents 1, 2, 3 and 6. In the counter, the 2nd respondent has stated that the tender with Specification No. SE/Th.P/04/2008-09 is floated for procurement of 4 numbers of Ash Slurry Disposal Pumps for North Chennai Thermal Power Station under single tender proprietary basis. He would state that generally, in thermal stations, ash is being evacuated from the boiler by two means, such as Fly ash and Bottom ash. The Bottom ash is disposed to ash dyke in the form of slurry after mixing with sea water. Ash slurry pumps are used to evacuate the ash slurry mixture to ash dyke. In NCTPS, each unit has six numbers of Ash Slurry Disposal pumps and totally, 18 pumps are available. As these pumps are handling ash slurry mixture, it is prone to corrosion and erosion and there exists necessity to change periodically to avoid hindrance in ash slurry evacuation to ash dyke as the failures if any of these pumps will directly, increase the alarming slurry level in trench which in turn stops the scrapper feeders, in building up of ash inside the boiler, leading to load reduction and loss of power generation.

4a. The 2nd respondent would further submit that the purchase of 4 numbers of Ash Slurry Disposal pumps at North Chennai Thermal Power Station is being made under single tender proprietary basis, which is as per Clause 16(b) of Tamil Nadu Transparency in Tenders Act, 1998. The Tamil Nadu Electricity Board, in adopting the Tamil Nadu Transparency in Tender Act No. 43 of 1998 has constituted an Expert Committee to decide and approve the spares, etc. in terms of the aforesaid provision of the said Act. The Committee consists of the following members:

1. Chief Engineer / Mechanical / - Representative of the Thermal Stations procuring entity
2. General Manager / Neyveli - One Technical Lignite Corporation representative of a State or Central Government organization dealing with similar procurement.
3. Professor / Indian Institute of - Representative from a Technology reputed Academic or Research Institution

The said Expert Committee will ordinarily meet once in a year to scrutinize and

approve the list of single source procurements, works or services put up by Chief Engineer of the Board pertaining to their respective areas of work.

4b. The spare of METSO make pump procured from the 4th respondent herein has long running hours than the SAM make, manufactured by the petitioner therein. Also, the cost of total expenditure incurred per year per pump for maintenance for the said METSO make pump is lesser (Rs. 17,704/-) when comparing SAM make pumps (Rs. 22,204/-). At present, in North Chennai Thermal Power Station, all the 18 pumps in service are SAM make. They have been in service since from the commissioning during the year 2001. As the pumps become aged, the expenditure incurred towards spares has increased and hence it is decided to change the pump itself.

4c. It is further stated that in Tuticorin Thermal Power Station, SAM as well as METSO makes Ash Slurry pumps are in service. The test report shows that the energy consumed by the METSO make pump is lesser than the SAM make pump. As the performance of the METSO make pump is considered superior than the SAM make pump and also cost of spares required for a SAM make pump is much higher than the cost of new pump. Based on the above, it is decided to procure METSO make pump which are having superior performance than SAM make pump. Hence, the feasibility of procurement from a Single Source was contemplated and in that process the matter was placed before the aforesaid Committee in terms of the Tamil Nadu Transparency in Tenders Act, 1998. The aforesaid Expert Committee was pleased to accord approval for the same. As approval of Expert Committee is already available and as the Board Level Tender Committee has powers up to Rs. 50/- lakhs for procuring the material under single tender proprietary from private sector, the procurement is being contemplated under single tender proprietary basis.

4d. It is also submitted that in North Chennai Thermal Power Station all the 18 pumps in service are supplied by the petitioner. The pumps were erected during the year 2001. From the date of commissioning, the spares are periodically replaced with the spares supplied by M/s. SAM Turbo Industries Limited under Single Tender Proprietary basis. A study showed that the cost of spares has reached above Rupees One Crore. The petitioner having availed the benefit of the single Tender Proprietary basis in terms of the aforesaid provisions of the Act is stopped to dispute that the Board cannot procure under the very basis he was all along enjoying. On this score alone, the writ petition is liable to be dismissed in limine as being a petition filed with a very motive of unjust enrichment besides being to prevent the Board from procuring healthy and durable pumps and materials from other than the petitioner.

5. On behalf of the 5th respondent, counter affidavit has been filed. The 5th respondent has stated that they are agent to the 4th respondent herein viz. M/s. Metso Minerals (India) Pvt. Ltd., Gurgaon, Haryana State. Their principal in Haryana is a giant in manufacture of equipments in crushing and screening, mineral processing, slurry pumps and bulk material handling for the past 60

years, whose equipments are comprehensive, cost effective and competitive. The slurry pumps of their principal are used in thousands of applications in Asbestos, Aluminium, Iron and Steel, Paper, coal and power industries throughout the country. Its customer list is endless and when compared to their principal, the petitioner's company is insignificant.

5a. The 5th respondent responded to the impugned single tender proprietary basis with specification No. SE/Th.P/04/2008-09 for procurement of 4 numbers of ASH Slurry disposal pumps for North Chennai Thermal Power Station (NCTPS), Athipattu, Chennai 600 120 (Thiruvallur District). He would further submit that wherever huge boilers are used to generate steam for multiple purposes, coal is used mainly to achieve highest temperature with the result fly ash and bottom ash are yielded as a waste. The fly ash would be sent out to sky through chimney. The bottom ash cannot be removed manually, due to hot temperature situations that surround the boiler. Hence, (sea) water is projected to carry away the said ash from the bottom as slurry, a semi liquid mixture of fine particles, and water, thin mud etc and slurry pumps are used to extract it to the ash dyke (artificial water can course) to be discharged to sea which is essential and periodical and pure water can be pumped out through suction, but a semi solid mixture needs innovative and complex propellers like those used in viscous liquids.

5b. It is also stated in the counter that in Thoothukudi Thermal Power Station, the pumps supplied by M/s. SAM Turbo Industries Ltd., Coimbatore and M/s. METSO Mineral (India) Ltd., Gurgaon (Haryana), the 5th respondent's principal, are used and it is learned that their pumps have run for long time without interruption and the cost per pump per year for their pump is lower and energy consumption is also low. As the 18 pumps supplied by the petitioner Company at Thoothukudi in 2001 onwards became worn-out since commissioning, the 5th respondent was invited to replace them with new, cheaper and innovative pumps, as their pump's cost would be lesser than the cost of re-conditioning the old pumps by using the vicissitude of times, instead of wailing with obsolete technology.

5c. According to the 5th respondent, admittedly, the petitioner's pumps are worn out and needing fervent maintenance and fed-up with, the customer is longing for a change over to their pumps as at Thoothukudi, they perform excellently. Actually, the petitioner's pumps are causing loss to TNEB, as they require continuous and rigorous maintenance. Hence, the respondent prays for dismissal of the writ petition.

6. To the above counter affidavits, the petitioner has filed a reply affidavit stating that the respondents have made a blatant violation of the mandatory provisions of the Tamil Nadu (Transparency in Tenders) Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000. The impugned action of the respondents in seeking to procure ash slurry disposal pumps on a single tender basis from the 4th respondent is in clear violation of not only the Act and Rules, but also, the

approval of the Expert Committee that they claim to form the basis for making such procurement. Section 16 of the Act provides for the exceptional circumstances, wherein Sections 9 and 10 shall not apply to procurements. It appears from the counter affidavit that, the respondent TNEB has sought to rely upon Section 16(b) of the Act for justifying its decision to procure the ash slurry disposal pumps from a single source viz., the 4th respondent.

6a. A mere reading of Section 16(b) clearly exhibits that the procurement from a single source can arise only upon satisfaction of conditions stipulated therein and admittedly none of the conditions set out therein are satisfied. The present procurement of ash slurry disposal pumps does not relate to supply where, the suppliers have exclusive right in respect of the goods and there is no reasonable alternative or substitute since from the very nature of the procurement, the ash slurry pumps are available from several manufacturers and the 4th respondent cannot be stated to have exclusive right in respect of the procurement and there being no reasonable alternative or substitute. The other conditions viz., that the goods, equipments or technologies from a supplier or contractor, determines that additional supplies must be procured from that specific supplier for reasons of standardization and compatability also does not arise since from a reading of the counter affidavit and the manner in which the ash slurry disposal pumps are put to use, it is not necessary that pumps have to be procured only from a specific supplier.

6b. It is further stated that in the counter affidavit, the respondents are entirely with an ulterior motive, seeking to benefit and promote the 4th respondent in blatant misuse and abuse of the State power. The respondents appear to have embarked upon an exercise to financially benefit the 4th respondent in a calculated manner by trying to create records that would justify single procurement though the power for the same is not available. It is further stated that the methodology adopted for resorting to such single source tender clearly exhibits an attempt to benefit the 4th respondent at the cost of the petitioner and such an arbitrary and malafide action ought to be seriously deprecated as it seeks to shake the very foundation of ensuring the transparency in procurement by public bodies. The claim of the respondents that the Board-level tender committee has powers up to Rs. 50 lakhs for procuring material under single tender proprietary basis from private sector is also wholly untenable and contrary to the express provisions of the Act.

7. Learned Counsel for the petitioner would contend that the impugned action of the respondents in seeking to proceed further by placing orders directly without following the procedure established under the Tamil Nadu (Transparency in Tenders) Act is a gross abuse of power and any matters relating to State, it is mandated that the tender procedure is followed except in certain exceptional circumstances and the present procurement does not satisfy any of the said grounds and therefore, it is liable to be set aside. He would state that it may be inappropriate to compare the petitioner's pumps with parts in service for long

time with brand new pumps of another make to determine the comparative superiority and place orders of that basis. He would also submit that procurements would be detrimental to the interest of not only the petitioner but equally, if not more, detrimental to various other pump manufacturers who would be in a position to participate in a tender in the event of its being open tender and the respondent Electricity Board would be suffering from huge financial loss by resorting to inappropriate government and therefore, the impugned action is against public interest.

7a. Learned Counsel for the petitioner, in support of his case has relied on the following:

(i) a decision of the Supreme Court reported in Ram and Shyam Company Vs. State of Haryana and Others,

18. The position that emerges is this. Undoubtedly Rule 28 permits contract for winning mineral to be granted by the Government by auction or tender. It is true that auction was held. It is equally true that according to the State Government, the highest bid did not represent the market price of the concession. It is open to the State to dispose of the contract by tender. Even here the expression "tender" does not mean a private secret deal between the Chief Minister and the offerer. Tender in the context in which the expression is used in Rule 28, means "tenders to be invited from intending contractors". If it was intended by the use of the expression "tender" in Rule 28 that contract can be disposed of by private negotiations with select individual, its validity will be open to serious question. The language ordinarily used in such rules is by public auction or private negotiations. The meaning of the expression private negotiations must take its colour and prescribe its content by the words which precede them. And at any rate disposal of the State property in public interest must be by such method as would grant an opportunity to the public at large to participate in it, the State reserving to itself the right to dispose it of as best subserve the public weal. Viewed from this angle, the disposal of the contract pursuant to the letter by the fourth respondent to the Chief Minister is objectionable for more than one reason. The writer has indulged into allegations, the truth of which was not verified or asserted. The highest bidder whose bid was rejected on the ground that the bid did not represent the market price, was not given an opportunity to raise his own bid when privately a higher offer was received. If the allegations made in the letter influenced the decision of the Chief Minister, fair-play in action demands that the appellant should have been given an opportunity to counter and correct the same. Application of the minimum principles of natural justice in such a situation must be read in the statute and held to be obligatory. When it is said that even in administrative action, the authority must act fairly, it ordinarily means in accordance with the principles of natural justice variously described as fair play in action. That having not been done, the grant in favour of the fourth respondent must be quashed."

(ii) a First Bench decision of this Court reported in S. Selvarani Vs. The

Commissioner, Karaikudi Municipality and Another,

6. The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public-auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality, with all relevant details such as date, time and place of auction, subject-matter of auction, estimated cost, Earnest Money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is available from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed and such contracts may be awarded through "private negotiations". (See *Ram and Shyam Company Vs. State of Haryana and Others*,).

12. Learned Counsel then drew our attention to the provisions of Section 10(3) of the Tamil Nadu Transparency in Tenders Act, 1998. In this connection, we would like to observe that no statute can prevail over the Constitution of India. According to the theory of jurisprudence of the eminent jurist Kelsen (the Pure Theory of Law), in every country there is a hierarchy of laws and the general principle is that if there is conflict between two laws one in the higher layer of the hierarchy and the other in the lower rung, then the law in the higher layer will prevail. In our country, the hierarchy of laws is as follows:

1. Constitution of India;
2. Statutory Laws - made either by Parliament or by the State Legislatures;
3. Delegated Legislation, which may be in the form of Rules or Regulations made under a statute, etc.
4. Executive instructions or Administrative Orders, viz. Government Orders, etc.

The Tamil Nadu Transparency in Tenders Act, 1998 being a State Legislation falls under category (2) above and therefore the provisions of Section 10(3) of the said Act cannot override or prevail over the provisions of Article 14 of the Constitution, which is in the highest layer in the hierarchy mentioned above. Hence, the provisions of Section 10(3) of the said Act can only be interpreted in the manner in which we have mentioned above, viz. that contracts by the State, its corporations, instrumentalities and agencies must be normally granted

through public-auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality so that every eligible persons may bid in the auction. This alone will ensure the compliance of Article 14 of the Constitution. It is only in rare and exceptional cases, as mentioned above, that this rule may be departed and contracts may be awarded through private negotiations.

(iii) yet another decision of this Court reported in *Madras Security Printers and Rosemerta Technologies Pvt. Ltd. Vs. State of Tamil Nadu, The State Transport Authority and The Deputy Transport Commissioner*,

33. The object of the enactment is to foster and encourage effective participation by tenderers in the process of tenders; to promote healthy competition among tenderers; to provide for fair and equitable treatment of all matters relating to tender processes by providing transparency in such matters and also to promote the integrity of the process of tenders and to promote fairness and public confidence in the processing of tenders by ensuring transparency in the procedure relating to procurement.

8. Learned Counsel for the respondents would submit that the 5th respondent is the agent of the fourth respondent herein viz. M/s. Metso Minerals (India) Pvt. Ltd., Gurgaon, Haryana State, which is a giant in manufacture of equipments in crushing and screening, mineral processing, slurry pumps and bulk material handling for the past 60 years, whose equipments are comprehensive, cost effective and competitive and that their slurry pumps are used in thousands of applications in Asbestos, Aluminium, Iron and Steel, Paper, coal and power industries throughout the country and when compared to its products, the products of the petitioner company are inferior in quality and hence, the action of the respondents cannot be found fault with.

9. I have heard Mr. Rahul Balaji, learned Counsel appearing for the petitioner; Mr. A. Selvendran, learned Counsel for respondents 1 to 3 and 6 and Mr. A. Manimaran, learned Counsel for the 5th respondent and also gone through the records.

10. The one and only point that arises for consideration in this writ petition is, whether the action of the respondents in raising an indent for procurement of 4 Nos. of Ash Slurry Disposal Pumps for the North Chennai Thermal Power Station of the Tamil Nadu Electricity Board from the fourth respondent company is justified?

11. To decide the above point, the relevant provisions are Sections 9, 10 and 16 of the Tamil Nadu Transparency in Tenders Act, 1998, which read as under:

9. Functions of the Tender Inviting Authority:

(1) The Tender Inviting Authority shall invite tenders in the form of a notice containing such particulars as may be prescribed.

(2) The Tender Inviting Authority shall communicate the notice inviting tenders to the Bulletin Officers according to the value of the procurement and within such time as may be prescribed, so as to publish the same in the appropriate Tender Bulletin.

(3) The Tender Inviting Authority shall also publish the notice inviting tenders in Indian Trade Journal and in daily newspapers having wide circulation depending upon the value of the procurement prescribed.

(4) The Tender Inviting Authority shall apply the schedule of rates and tender documents in such manner and in such places as may be prescribed to every intending tenderer who has applied for such document.

10. Evaluation and acceptance of tender.-

(1) The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the tenders in accordance with the procedure and criteria specified in the tender document.

(2) After evaluation and comparison of tenders as specified in Sub-section (1), the Tender Accepting Authority shall accept the lowest tender ascertained on the basis of objective and quantifiable factors specified in the tender document and giving relative weights among them.

(3) Notwithstanding anything contained in Sub-section (2), if the Tender Accepting Authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or the schedule of rates, he may negotiate for a reduction of price with that tenderer.

(4) If at any time before the acceptance of tender, the Tender Accepting Authority receives information that a tenderer who has submitted tender has been banned by any procuring entity, he shall not accept the tender of that tenderer even if it may be the lowest tender.

(5) In case where two or more tenderers quoted the same price, the Tender Accepting Authority shall split the procurement among such tenderers taking into consideration the experience and credentials of such tenderers. Where such splitting is not possible or could not be done equally, he shall record reasons for the same.

(6) If the Tender Accepting Authority proposes to accept the tender as per the provisions of this section, he shall pass orders accepting the tender together with reasons for such acceptance.

(7) The Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers.

16. Provisions of this Act not to apply in certain cases.-

The provisions of Sections 9 and 10 shall not apply to procurement.

(a) during natural calamities and emergencies declared by the Government:

(b) available from a single source only from a supplier or cases in which a particular supplier or contractor has exclusive rights in respect of the goods or services or construction and no reasonable alternative or substitute exists or where the procuring entity having procured goods, equipment, technology from a supplier or contractor determines that additional supplies must be procured from that specific supplier for reasons of standardisation and compatibility with the existing goods, equipment or technology:

Provided that a committee of three experts consisting one technical representative of the procuring entity, one technical representative of a State or Central Government Organisation dealing with similar procurement and one representative from a reputed Academic or Research Institution or Non-commercial Institution having expertise in such line, declares it as single source procurement.

12. It is true, as per Section 9 of the Act, the materials have to be procured by the Tender Inviting Authority by calling for tenders in the form of a notice containing such particulars as may be prescribed and thereafter the tenders have to be evaluated and accepted as per Section 10.

13. It is significant to mention here that Sections 9 and 10 have to be read together with Section 16. Section 16(b) specifically states that the provisions of Sections 9 and 10 shall not apply to procurement of material if available from a single source only from a supplier or cases in which a particular supplier or contractor has exclusive rights in respect of the goods or services or construction and no reasonable alternative or substitute exists or where the procuring entity having procured a goods, equipment, technology from a supplier or contractor determines that additional supplies must be procured from that specific supplier for reasons of standardisation and compatibility with the existing goods, equipment or technology.

14. The proviso clause to Section 16(b) further states that procurement of materials through tenders is not necessary, if a committee of three experts consisting of one technical representative of the procuring entity, one technical representative of a State or Central Government Organisation dealing with similar procurement and one representative from a reputed Academic or Research Institution or Non-commercial Institution having expertise in such line, declares it as single source procurement.

15. Keeping the above provision in mind, if we take the present case into account, what transpires is that the three member expert committee, as provided for in the proviso clause to Section 16(b), consisting of Chief Engineer, Mechanical - representative of the procuring entity; General Manager, Neyveli

Lignite Corporation - technical representative of a State or Central Government Organisation, dealing with similar procurement and a Professor, Indian Institute of Technology - representative from a reputed Academic or Research Institution, in its meeting held on 11.08.2008 and 12.08.2008 has held that in respect of Ash Slurry Pump and its Spares; Make: Metso Denver Orion (250 X 200 F model); the fourth respondent, namely, M/s. Metso Minerals (India) Pvt. Ltd., Gurgaon, Haryana, is the single source company/contractor and it also remarked that the quality of the spares supplied by the said company will be good and dependability is more and they can minimize the breakdowns if they procure spares from the said company. The committee has also justified the fourth respondent, saying that it only can provide special type of material for spares that can give more running hours and spares can readily fit into the existing system without any alteration.

16. Only based on the report of the expert committee declaring the fourth respondent as the single source company/contractor and pursuant to the direction given by Chief Engineer, Mechanical, and the approval accorded by the Chairman, TNEB, the fourth respondent has raised an indent for procurement of 4 Nos. of Ash Slurry Disposal Pump Metso Denver Orion model 250x200 F on proprietary basis.

17. An analysis of the facts of the case and the manner of exercise contemplated u/s 16(b) based on the expert committee report as provided for in the proviso to the above Section makes it crystal clear that the authorities have exercised their power in the manner provided under law. Therefore, there is no infirmity or illegality in the action of the respondents in this regard. As such, the action of the respondents is perfectly justified and the same is in accordance with the provisions of the Act.

18. The judgments relied upon by the learned Counsel for the petitioner are concerned with tenders and questioning the tender process relating to public auction, whereas, in the instant case, the supply relates to single source contractor/company u/s 16(b) of the Act. Therefore, the said decisions have no relevance to the facts of the present case.

Writ Petition is dismissed. No costs. Consequently, connected M.P. Nos. 1 and 2 of 2010 are also dismissed.