

(2011) 02 MAD CK 0366

In the Madras High Court

Case No : W.A. (MD) No. 249 and 13949 of 2010

T. Mathias and J. Tamil Selvan

APPELLANT

Vs

M. Krishnakumar, The Chief Engineer, Public Works
Department (Water Resource Organisation), The
Superintending Engineer, Public Works Department, (Water
Resource Organisation), The Chairman and Tender Award
Committee

RESPONDENT

Date of Decision : 23-02-2011

Acts Referred:

Tamil Nadu Transparency in Tenders Rules, 2000 — Rule 15(2)

Citation : (2011) 4 MLJ 43 : (2011) 6 RCR(Civil) 1954

Hon'ble Judges : R. Subbiah, J;N. Paul Vasanthakumar, J

Bench : Division Bench

Advocate : M. Ajmal Khan, in W.A. No. 249/2010 and R. Karthikeyan, in W.P. No. 14949/2010, for the Appellant; N. Rajan, for Respondent 1, C. Raja Kumar in W.A. No. 249/2010 and R. Janakiramulu, Special Government Pleader for Respondents 2-4, for the Respondent

Judgement

R. Subbiah, J.—The writ appeal is directed against the order, dated 16.11.2009 passed in W.P (MD) No. 7447 of 2009 whereby the

learned single Judge allowed the writ petition filed by the first Respondent in this appeal by quashing the impugned order dated 06.03.2009.

Aggrieved over the same, the present appeal has been filed by the third party after obtaining leave from this Court.

2. The questions that fall for consideration in this writ appeal is that whether the conditions stipulated in the tender notification to furnish the names

of key personnel at the time of the evolution of the pre-qualification bid is mandatory in nature or directory in nature and whether the second

Respondent namely, the Superintending Engineer is a competent authority to

pass the impugned order.

3. Brief facts which are necessary to decide the issue involved in this appeal are as follows:

a) It is the case of the first Respondent that he was the P.W.D. Contractor. He had completed civil works allotted to him by the P.W.D Tender

Award Committee. He had executed so many anti sea erosion works in Kanyakumari, Tuticorin and Tirunelveli Districts during the years 1984 to

2009. His tender for the construction of rubble mound sea wall at Rajak Kamankala mthurai for 1100m in Agasteeswaram Taluk, Kanyakumari

District has been accepted by the Tender Award Committee for a total value of Rs. 1,43,98,169/-. He has completed the allotted work to the

satisfaction of the Respondents within the period of six months against the agreement period of 12 months.

b) While so, on 02.02.2009, the Superintending Engineer, the third Respondent herein for and on behalf of the Government of Tamil Nadu issued

a tender notification vide No. 10SE/TBC/TNY/2008-2009 for the construction of Groyne (Balance work) at Enayamputhenthurai in Vilavancode

Taluk, Kanyakumari District. Based on the said notification, he submitted the tender application in a sealed cover along with another cover

containing 15 documents as the proof of prequalification. Apart from the first Respondent another person who had participated in the tender was

the Appellant herein. On the same day, at about 3.30 p.m., the third Respondent opened the sealed cover containing documents to verify the

prequalification in the presence of his representative namely, Parameshwaran. Another prequalification cover of one Mathias, the Appellant herein

was also opened at that time.

c) Subsequently, on 27.02.2009, the first Respondent sent a notice to the third Respondent informing that he was fully qualified for the tender and

requested him to accept his pre-application documents for the effective participation in the tender. But the first Respondent was informed by the

third Respondent by letter dated 06.03.2009 that the pre-qualification application was not approved by the second Respondent by endorsement

dated 24.02.2009 since the first Respondent pre-qualification application was not satisfied. The first Respondent was also informed that he has not

produced all documents regarding key personnel available with him and during

scrutiny it was found that the first Respondent had produced false documents regarding key personnel.

d) It is the contention of the first Respondent that he had approved the very same key personnel for the very same work at

Rajakkamankalamthurai and they have attended the work up to the completion of the same. Since the first Respondent did not have any contract

work, the key personnel are having some other appointment with other contractors. When the first Respondent had seen tender notification in the

newspaper, immediately he contacted the key personnel and asked their willingness and sent consent letter on post and the same has been

enclosed by him with his pre-qualification application.

e) The first Respondent has filed writ petition in W.P. No. (MD) No. 2314 of 2009, challenging the endorsement dated 24.02.2009 made by the

second Respondent in the evolution report, dated 23.02.2009, culminating in the letter of the third Respondent, dated 06.03.2009 and to direct

the third Respondent to permit him to take part in the price bid.

f) In the said writ petition the first Respondent raised the following grounds:

i) The requirement of indicating the names of key personnel with their address, qualification and consent are not clearly stated in the tender

notification as envisaged under Rule 15(2) of the Tamil Nadu Transparency in Tender Rules, 2000.

ii) Even assuming such requirement is indicated in the tender document, it cannot be treated as a mandatory condition since the personnel can be

appointed and changed at any time during the execution of contract. The second Respondent is only a tender inviting authority but he has prepared

an evaluation report setting out the details regarding the experience, financial capacity, past performance, possession of construction equipments,

key personnel and cash credit facility etc., of the two bidders in a tabular column. In column 6, the second Respondent has indicated that the first

Respondent was not qualified with a reason that he has not produced bogus documents. Based on the said evaluation report only, the second

Respondent has made an endorsement stating that the first Respondent was disqualified since he is only the tender accepting authority, therefore,

the second Respondent did not apply his mind independently.

g) In the counter affidavit filed by the official Respondents, it has been stated that the disqualification of the writ Petitioner is for having produced

bogus consent letters and false information. Had the evolution report been challenged by the first Respondent the fraud committed by him might

have been established. In the said counter affidavit, it is admitted that the Superintending Engineers only a Tender Inviting Authority as per G.O.

Ms. No. 222Public Works (G2) Department, dated 08.04.1999. The second Respondent Chief Engineer as soon as drawing the evaluation

report from the Tender Scrutiny Committee sent the pre-qualification application with the evolution report for examination and modification if any

to the first Respondent on 23.02.2009 as per G.O. Ms. No. 222 Public Works (G2) Department, dated 08.04.1999 and after satisfying with the

value of work mentioned as against the first Respondent awarded the contract in favour of the Appellant.

4. On consideration of the evidence on both sides, the learned single Judge allowed the writ petition finding that the conditions found in the tender

notification with regard to the furnishing of names of key personnel is mandatory condition at the time of evolution of the pre-qualification bid but it

would be mandatory at the time of execution of work and it has been made by the incompetent authority and no decision has been taken by the

second Respondent and no reasons have been recorded in the order of rejection.

5. The main contention of the learned Counsel for the Appellant is that the condition of furnishing of names of key personnel is mandatory in nature.

In support of his contention, he relied upon the Rules governing tender conditions wherein it has been stated as follows:

Documents to be produced:

i. Attested xerox copy of the R.C. Books for the Machineries/Vehicles owned by the applicant.

ii. Sworn in Affidavit and Chartered Accountant's Certificate stating the details of equipments, tools and plants available with the applicant with

make year of purchase, capacity, present working condition of the equipment etc.,

iii. If the Tools and plants are proposed to be taken on lease or already on lease with the applicant, the source, from which the Tools and plants

have been taken on lease or proposed to be taken on lease with proof, should be

furnished in addition to the particulars in item-ii.

Learned Counsel for the Appellant further submitted that the wordings found in the said clause spell out a clear meaning of furnishing of names of

key personnel as mandatory. In support of his submissions, he also relied upon the following judgments:

i) In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ;

ii) In Dr. M. Vimala v. Tamil Nadu Public Service Commission reported in 2006 (3) CTC 449;

iii) In PSEB and others v. Bhatia International Ltd., reported in 2008 STPL (LE) 39773 SC and

iv) In M/s. Nandhini Delux v. , the Government of Andhra Pradesh reported in CDJ 2006 APHC 163 and

v) In M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others,

6. Per contra, learned Counsel for the first Respondent submitted that furnishing of the names of key personnel is not a mandatory condition. In

support of his contention, he has invited the attention of this Court to the additional condition in Clause 6 and submitted that there is a provision for

imposing a penalty on the contractor in case of default on the part of the contractor. When there is a provision for imposing penalty, the condition

imposed in the contract cannot be said to be mandatory in nature. Further, the learned Counsel for the first Respondent submitted that the terms of

tender are not open to judicial scrutiny and the Court would interfere only if there is arbitrariness or male fide, but in this case none of the grounds

has been made out for interference. In support of his contentions, learned Counsel for the first Respondent relied upon the following judgments.

i) In U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, ;

ii) In Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another, and

iii) In Ion Exchange Waterleau Ltd. Vs. The Commissioner, Madurai Municipal Corporations,

7. We have heard the learned Counsel on either side and perused the materials available on record.

8. The question whether the Rule is mandatory or directory has to be seen only

from the wordings embodied in the relevant provision. The Rule 15(2) of the tender rules reads as follows:

Rule 15 (2)

The qualification criteria in terms of the required experience, available manufacturing and construction capacity, technical and other manpower and financial status shall be clearly stated in the tender documents.

9. A reading of the said Rule would show that it is an amendatory duty on the part of the contractor, who is intending to participate in the tender to

produce the name of the key personnel.

10. Before confirming our opinion, with regard to the nature of the condition it would be useful to refer to some of the judgments relied upon by the

learned Counsel for the Appellant.

11. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the Hon'ble Supreme Court held thus:

7. Now it is clear from para (1) of the notice that tenders were invited only from "registered I Ind Class hoteliers having at least 5 years"

experience". It is only if a person was a registered I Ind Class hotelier having at least 5 years' experience that he could, on the terms of Para (1) of

the notice, submit a tender. Para (1) of the notice prescribed a condition of eligibility which had to be satisfied by every person submitting a tender

and if, in a given case, a person submitting a tender did not satisfy this condition, his tender was not eligible to be considered. Now it is true that the

terms and conditions of the tender form didn't prescribe that the tenderer must be a registered I Ind Class hotelier having at least 5 years"

experience nor was any such stipulation to be found in the form of the agreement annexed to the tender but the notice inviting tenders published in

the newspapers clearly stipulated that tenders may be submitted only by registered I Ind Class hoteliers having at least 5 years' experience and this

tender notice was also included amongst the documents handed over to prospective tenders when they applied for tender forms. Now the

question is, what is the meaning of the expression "registered I Ind Class hotelier", what category of persons fall within the meaning of this

description? This is a necessary enquiry in order to determine whether Respondents 4 were eligible to submit a tender. It is clear from the affidavits

and indeed there was no dispute about it that different grades are given by the Bombay City Municipal Corporation to hotels and restaurants and, therefore, there maybe a registered I Ind Class hotel but no such grades are given to persons running hotels and restaurants and hence it would be inappropriate to speak of a person as a registered I Ind Class hotelier. But on that account would it be right to reject the expression ""registered I Ind Class hotelier"" as meaningless and deprive Para (1) of the notice of any meaning and effect. We do not think such a view would be justified by any canon of construction. It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document ""and should be rather at the outset inclined to suppose every word intended to have some effectors be of some use"" To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. Now, here the expression used in Para (1) of the notice was ""registered I Ind Class hotelier"" and there can be no doubt that by using this expression Respondent 1 intended to delineate a certain category of persons who alone should be eligible to submit a tender. Respondent 1 was not acting aimlessly or insensibly in insisting upon this requirement nor was it indulging in a meaningless and futile exercise. It had a definite purpose in view when it laid down this condition of eligibility in Para (1) of the notice. It is true that the phraseology used by Respondent 1 to express its intention was rather inapt but it is obvious from the context that the expression ""registered I Ind Class hotelier"" was loosely used to denote a person conducting or running a I Ind Class hotel or restaurant. It maybe ungrammatical but it does not offend commonsense to describe a person running a registered I Ind grade hotel as a registered I Ind grade hotelier. This meaning is quite reasonable and does not do any violence to the language and makes sense of the provision contained in Para (1) of the notice. We must, in the circumstances, hold that, on a proper construction, what Para (1) of the notice

required was that only a person running a registered I Ind Class hotel or restaurant and having at least 5 years" experience as such should be

eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person

who did not have five years" experience of running a I Ind Class hotel or restaurant. The test of eligibility laid down was an objective test and not a

subjective one. What the condition of eligibility required was that the person submitting a tender must have 5 years" experience of running a I Ind

Class hotel as this would ensure by an objective test that he was capable of running a I Ind class restaurant and it should not be left to Respondent

1 to decide in its subjective discretion that the person tendering was capable of running such a restaurant. If, therefore, a person submitting a tender

did not have at least 5 years" experience of running a I Ind Class hotel, he was not eligible to submit the tender and it would not avail him to say that

though he did not satisfy this condition, he was otherwise capable of running a I Ind Class restaurant and should, therefore, be considered. This

was in fact how Respondent 1 itself understood this condition of eligibility. When Respondents 4 submitted their tender along with their letter dated

January 24, 1977 and it appeared from the documents submitted by Respondents 4 that they did not have 5 years" experience of running a I Ind

Class restaurant, Respondent 1 by its letter dated February 15, 1977 required the Respondents 4 to produce documentary evidence to show that

they were ""registered I Ind Class hotelier having at least 5 years" experience"". Respondent 1 did not regard this requirement of eligibility as

meaningless or unnecessary and wanted to be satisfied that Respondents 4 did fulfill this requirement. Now, unfortunately for Respondents 4, they

had over 10 years" experience of running canteens but at the date when they submitted their tender, they were not running a I Ind grade hotel or

restaurant nor did they have 5 years" experience of running such hotel or restaurant. Even if the experience of Respondents 4 in the catering line

were taken into account from 1962 onwards, it would not cover a total period of more than 4 years 2 months so far as catering experience in I

Indgrade hotels and restaurants is concerned. Respondents 4 thus did not satisfy the condition of eligibility laid down in Para (1) of the notice and

in fact this was impliedly conceded by Respondents 4 in their letter dated February 26, 1977 where they stated that they had ""experience

equivalent to that of a I Ind Class or even 1stClass hotelier"". Respondents 4 were, accordingly, not eligible for submitting a tender and the action of

Respondent 1 in accepting their tender was in contravention of Para (1) of the notice

12. In M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , the Supreme Court has held as follows:

6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank Clause 6 of the tender

notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority

to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term

mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a

tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely

ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to

enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the

condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka a case dealing with tenders.

Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the

impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India but has failed to appreciate that the reported

case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting

upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted

to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact

before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment

demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two

clauses, the present case belongs.

13. The reading of the dictum laid down in the above judgments would show that whether the condition is mandatory or directory has to be seen

only from the wordings embodied in the concerned rule. In the instant case, the compulsion was created on the contractor to produce the names of

the key personnel.

14. Though a submission was made by the learned Counsel for the first Respondent that since there is a provision for imposing penalty in the case

of default on the part of the contractor in the norms for employment of technical assistance in the work, we are of the opinion that the said clause

has no relevancy in furnishing the particulars about the key personnel at the time of submitting the tender pre-qualification application. Therefore,

we are not inclined to accept the submissions made by the learned Counsel for the first Respondent in this regard. However, we find that the third

Respondent himself has admitted in his counter affidavit that he is only Tender Inviting Authority and only based on the endorsement of the second

Respondent dated 23.02.2009, he has rejected the tender of the first Respondent. In our considered opinion, the third Respondent's Tender

Inviting Authority can only forward the tender form to the second Respondent. In the instant case as contended by the learned Counsel for the first

Respondent based on the endorsement made by the second Respondent only rejection was made which resulted in issuing the impugned order

passed by the second Respondent who is not the competent authority, therefore, on that ground, the order is liable to be quashed.

15. We confirm the other finding of the learned single Judge that the order has been made by the incompetent authority and no decision has been

taken by the second Respondent and no reasons have been recorded in the order of rejection. We are not in agreement with the finding of the

learned single Judge that the condition is only directory and not mandatory. We are of the opinion that the liberty given by the learned single Judge

to the first Respondent to submit names of appropriate technical personnel to be employed by him within a period of three weeks is not valid. In

view of the above, we are setting aside the liberty given by the learned single Judge to the first Respondent in furnishing the documents. We direct

the appropriate authority to scrutinize the papers and proceed in accordance with

law.

16. Pending writ appeal, writ petition in W.P. (MD) No.14949 of 2010 is filed as PIL to direct the Respondents to cancel the tender notification,

dated 02.02.2009 02.02.2009 and do the tender work as a department work by P.W.D itself and complete the work on or before 31.5.2011 as

per G.O. Ms. No. 157, dated 01.03.2006.

17. The writ appeal is disposed of accordingly. In view of the disposal of the writ appeal, no direction is necessary in the writ petition and

accordingly, the writ petition is closed. No costs. Consequently, connected miscellaneous petitions are closed.