

**(2005) 03 MAD CK 0074**  
**In the Madras High Court**  
**Case No : Writ Petition No. 986 of 2005**

|                                                |    |            |
|------------------------------------------------|----|------------|
| The River Water Products                       | Vs | APPELLANT  |
| The Southern Railway and Eastern Aqua Minerals |    | RESPONDENT |

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**Date of Decision :** 23-03-2005

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2005) 03 MAD CK 0074

**Hon'ble Judges :** Prabha Sridevan, J

**Bench :** Single Bench

**Advocate :** AR. L. Sundaresan, for the Appellant; V. Radhakrishnan and P.R. Raman Associates for Respondent Nos. 2 and 3, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Prabha Sridevan, J.—By consent, the main writ petition itself is taken up for hearing.

2. The disappointed tenderer has filed the above writ petition. A tender was called for by the Southern Railway for effecting supplies of packaged drinking water at Chennai Central and other railway stations. The petitioner had been awarded the contract earlier and according to the petitioner, they have been providing good service to the satisfaction of the Railways.

3. A tender notification was issued by the Southern Railway on 10.11 .2004 calling for tenders from the public. The period of the contract was one year from the date of the issue of the order. The last date and time for submission of the tender form was 10.11.2004 before 14 30 hours. The terms of the conditions of the open tender provided that the tender has to be submitted in two packets - Packet "A" and Packet "B" - Packet "A" containing the technical bid and Packet "B" containing the financial bid. Clause 6 of the terms and conditions prescribes the contents of the two packets as follows :-

"Packet "A" shall contain the following :

1. Offer letter complete as per prescribed format.
2. Cash receipt obtained for the remittance of EMD.
3. In the case of a partnership firm, the copy of the partnership deed along with the copy of the certificate of registration issued by the competent authority.
4. Tenderers Credential as for qualifying criteria in prescribed form.
5. Details regarding the technical competence and experience.

Under no circumstances should Packet "A" contain the rate offered. If violated, tender shall be summarily rejected.

Packet "B" should contain only the financial bid.

Those who qualify in Packet "A" alone will be invited for the opening of Packet "B". Financial bids shall contain the net rate for per unit quantity of container size as specified in tender notice, which shall be inclusive of all taxes/charges viz. excise duty, sales tax, freight, octroi duty if any or any other tax leviable by the state/ central governments. "The rate should be quoted both in figures and words".

4. The Tender Form (Credential Bid) - Packet "A" , which is required to be submitted by the tenderers, enumerates the documents to be enclosed along with Packet "A". The eligibility criteria information and certificates that should be enclosed by the tenderers included, as seen from Clause 8-C, the financial standing and track record of the company (vide Solvency Certificate obtained from Nationalized Bankers). This is the only certificate which falls for consideration in the present writ petition.

5. When the petitioner submitted their tender on 10.11.2004, they enclosed the Solvency Certificate issued by the Karur Vysya Bank since according to the affidavit filed in support of the writ petition, the petitioner was unable to obtain the Solvency Certificate from a nationalized bank. All the tenders were opened on 10.11.2004 itself, as seen from the tender notification. The tender notification also indicates that those who qualify in Packet "A" alone will be invited for the opening of Packet "B". Packet "B" was opened on 11.1.2005. The petitioner had, in the mean time, obtained a Solvency Certificate from the State Bank of India and submitted it to the first respondent along with their letter dated 3.1.2005, requesting the first respondent to take the same into consideration before finalizing the contract. When the petitioner learnt that their name was not under the shortlisted tenderers, they approached this court with this writ petition and obtained interim orders.

6. Petitions were filed to vacate the interim order and the matter was heard.

7. Learned counsel for the petitioner submitted that there is really no difference between the Solvency Certificate issued by a nationalized bank and a scheduled bank, since all that the first respondent is concerned with is, regarding the

financial capability of the tenderers. Further, when before the date of opening of Packet "B" the petitioner had complied with all the terms and conditions and the eligibility criteria in letter and in spirit, the petitioner's Packet "B" should have also been opened and in the event of the petitioner quoting a competitive rate, their name should have been considered. Learned counsel referred to Clause 18 of the tender notification which reads as follows :-

"Normally the lowest technically acceptable offer (L-1) from the short listed parties should be acceptable. However, if the committee feels that it may not be possible for the lowest tenderer (L-1) to ensure smooth supply of required quantity of packaged drinking water on the entire railway, the tender committee may decide to give a counter offer to all the short listed parties and those parties who accept the lowest accepted rate will have to enter a price agreement with the Railways."

Learned counsel would, therefore, submit that, on what is obviously a minor technical deviation from the eligibility criteria, the petitioner should not be shut out from participating in the tender process. Learned counsel also referred to the decisions of the Supreme Court in *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, and *M/s. G. J. Fernandez Vs. State of Karnataka and others*, .

8. Learned counsel for the Railways submitted that whatever the objections the petitioner might raise, it is indisputable that when Packet "A" was opened, it was found that the petitioner's bid did not conform to the eligibility criteria as laid down in the tender notification. When the first respondent had made it clear that the tenderers should produce only the Solvency Certificate issued by nationalized banks and when admittedly the petitioner had not produced the same before the stipulated date, the petitioner cannot be heard to complain. Learned counsel relied on the decision of the Supreme Court in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, .

9. Learned counsel for respondents 2 and 3, whose names have been short-listed, would submit that the petitioner has made wild allegations regarding their lacking the necessary infrastructural facilities and hence, respondents 2 and 3 have enclosed documents in the typed set of papers to show that they have the necessary equipment to deliver the packaged drinking water that is the subject matter of the contract.

10. Though the capacity of respondents 2 and 3 to supply the items was questioned in the affidavit, learned counsel for the petitioner focussed his submissions only on the petitioner being denied the opportunity of having their bid considered only because they did not initially produce the Solvency Certificate issued by a nationalized bank.

11. The judgment reported in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, , lays down that the terms of the invitation to tender are not open to judicial scrutiny since they fall within the realm of contract and

that the Government must have a free hand of "reasonable play in its joints". No doubt, in the same judgment, the Supreme Court laid down that the courts will definitely interfere with such decisions if it is apparent that the decision is arbitrary, discriminatory, mala fide or actuated by bias.

12. In the two decisions referred to by the learned counsel for the petitioner, the contracts were awarded to tenderers who had not strictly complied with the tender conditions. In 1991 S.C.C. 1579, the Diesel Locomotive Works of the Indian Railways had awarded a contract to the appellant before the Supreme Court even though the appellant offered the earnest money by way of a banker's cheque obtained from a bank other than the State Bank of India, which alone was prescribed under Clause 6 of the tender notice. The appellant therein contended that the banker's cheque was as good as cash and therefore, there was no illegality in the tender being awarded to the appellant. The High Court had set aside the award made in favour of the appellant. However, the Supreme Court held that the Diesel Locomotive Works had the authority to waive the technical literal compliance of Clause 6 of the tender notice, especially when it was in its interest not to reject the said bid of the appellant, which was the highest. Similarly, in *M/s. G. J. Fernandez Vs. State of Karnataka and others*, , a tender was awarded by the Karnataka Power Corporation Ltd. to the Mysore Construction Company (MCC), though it had not complied with the time stipulation laid down in the tender notification. While awarding the contract to MCC, the Karnataka Power Corporation took note of the fact that the lacuna in furnishing the information had been set right subsequently by the tenderer before opening the price documents and since the Chief Engineer of the Corporation had come to the conclusion that all the pre-qualifying requirements had been met with by MCC, the Karnataka Power Corporation decided to overlook the lacuna. While concluding, the Chief Engineer, in his report, had also observed, "In future, it should be made clear that only pre-qualifying conditions would be mandatory." The Supreme Court held that when a party consistently and bona fide interprets the standards prescribed by it in a particular manner, courts should not interfere, though they may be inclined to read or construe the conditions differently.

13. In *Tata Cellular Vs. Union of India*, , the Supreme Court held as follows :-

"Administrative Law- Judicial review - Scope - Govt. contracts - Tenders - State decision/ action on must be in consonance with Art.14 - Only the decision-making process and not the merits of the decision itself is reviewable as court does not sit as appellate court while exercising power of review - Decision / action when open to review - Test - While court cannot interfere with Govt.'s freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, but whether the decision/ action is vitiated by arbitrariness, unfairness, illegality, irrationality or "Wednesbury unreasonableness" i.e. when decision is such as no reasonable person on proper application of mind could take or procedural impropriety, can be looked into by court - Test is whether

wrong is of such a nature as to require intervention - If so court would set right the decision-making process - But it would not substitute its own opinion for that of experts - Constitution of India, Arts.226, 32, 136, 14, 298 and 299 - Govt. contracts.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasiadministrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides."

In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , it was held as follows :-

"Court's interference when called for - State can choose its own method - But it should comply with the norms, standard and procedure - Price need not always be the decisive factor - Decision has to be on the basis of overall view of the transaction after weighing various relevant factors and having regard to commercial viability.

14. The decision as such is basically not justiciable and judicial review in this regard is not an appeal from a decision but only a review of the manner in which the decision was made as observed in *Chief Constable of the North Wales Police v. Evans* 1982 3 All E.R. 140.

"Judicial review, as the words, imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord.53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretion properly vested in them by law and to substitute the

courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p.1160)."

15. In the judgment in *Tata Cellular v. Union of India* cited supra, the Supreme Court deduced the following principles :-

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasiadministrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. ....

The hidden criteria in this case cannot be said to have been evolved as tailor-made to suit some other bidders and knock off others. In a technical matter like this where the Government of India is embarking upon new communication scheme with advance technology all the criteria cannot be postulated in the beginning itself. Where the Committee of Experts thought certain criteria have to be evolved in order to subserve the interest of the scheme it is not necessary to have all of them set out in the beginning itself."

16. In *Chairman-cum-Managing Director, T.N. Tea Plantation Corporation Ltd. v. Srinivasa Timbers* 1999 (3) RAJ. 495, it was held as follows :-

"It is well settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof. This onus is not discharged only by raising a doubt in the mind of the Court, but by satisfying the Court that the authority or the body which had been vested with the power to take decision, has adopted a procedure which does not satisfy the test of Article 14 of the Constitution of which is against the provisions of the statute in question or has

acted with oblique motive or has failed in its function to examine each claim on its own merit on relevant considerations ....."

17. In this case, if the first respondent had thought it fit to accept the bid of the petitioner on the ground that the belated submission of the Solvency Certificate from a nationalized bank did not really matter, this Court would not have interfered unless some mala fides vitiated the said action. Similarly, we cannot compel the first respondent to accept the bid of the petitioner especially when the petitioner had admittedly failed to comply with the eligibility criteria before the stipulated date. The fact that the Solvency Certificate was produced on 3.1.2005 and the bids were opened on 11.1.2005 does not help the petitioner. The petitioner had about 45 days to produce the Solvency Certificate as per the tender conditions. On the date when Packet "A" was opened, the petitioner's bid stood disqualified. The petitioner was thereafter not entitled to have their Packet " B" opened because they had not complied with the requirement of Solvency Certificate from a nationalized bank. Whether the Solvency Certificate issued by a scheduled bank is as good as the Solvency Certificate issued by a nationalized bank is not for me to decide. The conditions are laid down by the first respondent and the tenderers knew fully well the conditions when they participated in the tender process. The petitioner has not been able to show that the decision-making process has been vitiated by bias, mala fides, illegality or impropriety.

18. For all these reasons, no grounds are made out to grant the relief sought for in the writ petition. The writ petition is, therefore, dismissed. No costs. Consequently, W.P.M.P. No. 1116 of 2005 and W.V.M.P. No. 541 of 2005 are closed.