

(2011) 06 MAD CK 0472

In the Madras High Court

Case No : Writ Petition No. 8090 of 2011

Uflex Limited

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 29-06-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226

Tamil Nadu Transparency in Tenders Rules, 2000 — Rule 17, 17(1), 17(2)

Citation : (2011) 7 MLJ 938

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : AR.L. Sundaresan for K.J. Rebello and S. Elambharathi, for the Appellant; A. Navaneetha Krishnan, General for M.C. Swamy, Spl. Govt. Pleader and P.S. Sivashanmuga Sundaram, Addl. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

V.Dhanapalan, J.—When the Miscellaneous Petitions are listed for hearing, with the consent of the learned Counsel on either side, the main Writ Petition itself is taken up for disposal.

2. This Writ Petition has been filed for issuance of a writ of certiorari, to call for the records of the second Respondent of the Corrigendum issued in its Tender bearing No. 1/2011 for production and supply of Polyester Hologram Excise labels on Turnkey basis and quash the same as being arbitrary, irrational and against public interest and is violative of Article 14 of the Constitution of India and the provisions of Tamil Nadu Transparency in Tenders Act, 1998, in short, "the Act" and the Rules framed thereunder, in short, "the Rules" in so far as the changes mentioned in corrigendum with reference to three years experience each for conventional in Master Origination from 2D/3D and dot-matrix system separately.

3. Facts:

3.1. The Petitioner is a Public Limited Company and leading manufacturer of security Hologram and Holographic films in India. It is a part of Rs. 2,500 crore group. It is a supplier of High Security Hologram to Uttar Pradesh Excise Department, Allahabad; Meghalaya Excise Department, Shillong; and Sikkim Excise Department, Gangtok, in huge quantity around 16 to 18 crores per month. It is having comprehensive manufacturing facility for manufacturing High Security Holograms. It has a Master Origination Lab of resolution from 6,000 DPI to 1,20,000 DPI with single premises under one roof. The affixation of holographic labels and procuring the same by inviting tenders was started by the Government from the year 1998.

3.2. The second Respondent issued a tender notification by Notification No. 1/2011 on 18.02.2011, specifying the technical specification which is required in the hologram labels. In Sub-clause (4) of Part 4 of the tender document, the second Respondent specified a condition that the tenderer should have at least three years experience in the field of manufacture of hologram with Master Origination. The said condition was later modified by issuance of Corrigendum on 14.03.2011. When the last date for submission of tenders was 23.03.2011, the second Respondent hastily on 14.03.2011 uploaded in its website the impugned corrigendum, wherein the tender condition mentioned in Part-4, Sub-clause (4) with reference to experience was changed, adding that the tenderer apart from having a minimum of three years of experience in the field of manufacture of hologram should also have three years each for conventional Master Origination from 2D/3D and dot-matrix system separately, which is highly irrational and arbitrary. By a letter dated 17.03.2011, the Petitioner requested the second Respondent to waive the conditions imposed in the impugned corrigendum, but he has not received any reply till date. Hence, this Writ Petition.

4. Respondents have filed a counter, stating as follows:

The procedure of affixing Excise Adhesive Labels is aimed at for actual accounting and collecting of excise revenue under the Indian Made Foreign Spirit supplies and arresting illicit flow of liquor in the State. Therefore, excise labels are affixed on all the liquor bottles manufactured by the distilleries as well as those imported by Tamil Nadu State Marketing Corporation Limited from other States. Excise labels are procured on turnkey basis by calling for tenders. The contract period of the existing supplier is up to 30.04.2011. Therefore, a fresh tender was notified on 18.02.2011, calling for tenders from prospective bidders for the production and supply of Polyesterised Hologram Excise Labels. Some of the prospective bidders have sought for clarifications regarding the specifications of the hologram excise labels notified in the tender. Since the specifications of the hologram excise labels are approved by a Tender Specification Committee consisting of experts in the field of holography from Indian Institute of Technology, Chennai, Anna University, Indian Institute of Packaging, Forensic Science Department and also the Managing Director, Tamil Nadu State Marketing Corporation Limited, constituted for this purpose by the Government, the

requests for clarification received from prospective bidders were referred to the Tender Specification Committee. The issues required to be clarified were discussed and finalised by the Committee and Corrigendum was issued on 14.03.2011 in the State Government website www.tenders.tn.gov.in. The corrigendum issued was also communicated to all the prospective bidders who purchased the tender document from the office of the second Respondent. In the meantime, two other prospective bidders filed writ petitions before this Court and obtained an order of interim injunction on 11.03.2011, restraining the Respondents from receiving bids or opening them in any manner. However, on a special mention made by the Learned Advocate General on 22.03.2011, this Court modified its earlier order on 23.03.2011 to the effect that "the Respondents shall be entitled to receive the tenders by declaring the last date for submission of tender forms as 01.04.2011 by issuing necessary notification. However, it is made clear that the Respondents are entitled to only receive the tenders up to 01.04.2011 and shall not proceed further". That being so, the Petitioner has now approached the Court with a prayer to quash the Corrigendum issued by the second Respondent in the tender notification No. 01/2011, which prayer of the Petitioner deserves No. merit and to be rejected ab initio.

5. Mr. AR.L.Sundaresan, learned Senior Counsel for the Petitioner, would contend that the addition of condition in the impugned corrigendum of the second Respondent issued in Tender Notification No. 1/2011 for production and supply of Polyester Hologram Excise Label on turnkey basis so far as specifying three years experience on 2D/3D conventional Master origination and Dot-matrix system separately is irrational, illegal and arbitrary and violative of the fundamental right of the Petitioner under Articles 14 and 19 (g) of the Constitution, as the Master origination is only a one time process and once the Master is generated the same shall be used for further creation of subsequent copies. He would also contend that the Petitioner possesses necessary experience in manufacturing holograms as sought in the original condition and with a view to exclude the Petitioner from competing in the bid, the impugned corrigendum has been issued and, in addition the conduct of the second Respondent in not replying to the clarification sought by the Petitioner is violative of Rule 17 (2) of Tamil Nadu Transparency of Tender Rules, 2000, and a pointer to the fact that the act of the second Respondent is mala fide and arbitrary. The learned Senior Counsel would strenuously contend that the action of the Respondents in changing the original condition prescribing the experience for a period of three years in master origination by way of a corrigendum is only to defeat the object of the Act and with an arbitrary exercise of power and actuated with mala fide intention to disentitle the Petitioner to participate in the tender process. He would further contend that the object of the Act is to enlarge the scope of competitiveness among the qualitative persons to participate in the bid with more transparency in the tender process and now the action is only to reduce the scope of more participation as the corrigendum imposes very stringent condition of three years experience each in conventional Master Origination from 2D/3D and dot-matrix

system separately and, therefore, the power of Judicial Review is available to this Court to interfere with the said action of the Respondents. In support of his contentions, the learned Senior Counsel would cite the following authorities:

(i) *Ion Exchange Waterleau Ltd. Vs. The Commissioner, Madurai Municipal Corporations*, , wherein this Court has held as follows:

19. Needless to say, it is a settled principle that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical....

(ii) *Tata Cellular Vs. Union of India*, , wherein the Supreme Court has held as under:

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be No. question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

73..... The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

6. On the other hand, Mr. A.Navaneetha Krishnan, learned Advocate General, appearing for the Respondents, would contend that the power of judicial review

is very limited and, in contractual transactions, there is No. scope to interfere with the tender process, which is in accordance with the rules and the Act. He would further argue that as per Rule 17(1) of the Rules, the authority has got power to make any changes, modifications or amendments to the tender documents by way of corrigendum and, therefore, the act of the Respondents in issuing corrigendum modifying the experience clause in the tender document is fair and reasonable and cannot be faulted with. The learned Advocate General would rely on the following decisions:

(i) P.Ramadas v. Materials Management Division, ONGC, 2011 CIJ 93, wherein this Court has held as under:

15. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. When the power of judicial review is invoked in matters relating to tenders or award of contracts, it has to be checked whether choice or decision is made lawfully and the decision is sound. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration of error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. Therefore, restraint under judicial review is always limited to this Court and it has to be invoked rarely and hesitantly under Article 226 of the Constitution of India.

17. The terms of the contract are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State and the power to refuse the lowest or any other tender is always available to the Government. The right to choose cannot be considered to be an arbitrary power. of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision making process, the Court has to necessarily exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will

prevail upon the individual's interest.

(ii) Ion Exchange Waterleau Ltd. Vs. The Commissioner, Madurai Municipal Corporations, , wherein this Court has held as follows:

19. Needless to say, it is a settled principle that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the decision in Tata Cellular case, the Constitution Bench of the Supreme Court has authoritatively held that the principle of judicial review in the matter of contract would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State and the power to refuse the lowest or any other tender is always available to the Government. The right to choose cannot be considered to be an arbitrary power. of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision-making process, the Court has to necessarily exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest.

7. I have heard the learned Counsel for the parties and also gone through the records.

8. Hologram is a recording of reflected light in an object. The security hologram contains holographic features of optical laser technology, which are embossed through a master shim on stamping foil of metalized polyester film. Holographic label is used for multiple purposes throughout the world, since it has got high security features. The Respondents have adopted a policy of procuring manufactured hologram labels with a view to supplying the same to Indian made Foreign Liquors (IMFL)/Beer manufacturers for affixing on their product within the State of Tamil Nadu. The Respondents are procuring the labels from time to time by inviting tenders. The tender would contain technical specifications for manufacture of required quantities of hologram labels during the term of the

contract and the same is required to be manufactured in a high security facility within the second Respondent department. The purpose of affixing hologram labels on the product is to ensure that there is No. duplication or manufacture of spurious products. In order to ensure that the Government of Tamil Nadu should not suffer revenue loss and also keeping in view that public should not be supplied with spurious products which endanger the lives of the public, and in public interest, the Government, through the Respondents, is procuring the hologram labels for its use in the products of liquor.

9. That being so, the Respondents have called for tenders vide Notification No. 01/2011, dated 18.02.2011, from prospective bidders for production and supply of Polyesterised Hologram Excise Labels. As per Part-4 of the Tender document, "the tenderer should have at least three years of experience in the field of manufacture of Hologram with master origination". Some of the prospective bidders have sought for clarifications regarding the specifications of the hologram excise labels notified in the tender. Since the specifications of the hologram excise labels are approved by a Tender Specification Committee consisting of experts in the field of holography from Indian Institute of Technology, Chennai, Anna University, Indian Institute of Packaging, Forensic Science Department and also the Managing Director, Tamil Nadu State Marketing Corporation Limited, constituted for this purpose by the Government, the requests for clarification received from prospective bidders were referred to the Tender Specification Committee. The issues required to be clarified were discussed and finalised by the Committee and Corrigendum was issued on 14.03.2011 in the State Government website www.tenders.tn.gov.in, substituting the experience clause to the effect that "the tenderer should have a minimum of three years experience in the field of manufacture of hologram and three years each for conventional master origination from 2D/3D and dot matrix system separately".

10. At this juncture, the only question that arises for consideration is, whether the Corrigendum issued by the Respondents, amending the experience clause, is in accordance with law ?

11. In this context, it is quite relevant to refer to Rule 17 of the Rules, which reads thus:

17. Clarification to tender documents.

(1) At any time after the issue of the tender documents and before the opening of the tender, the Tender Inviting Authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change to all those who have purchased the original tender documents and upload corrigendum for the information of those who have downloaded the tender documents from the website.

(2) In case any one tenderer asks for a clarification to the tender documents before 48 hours of the opening of the Tender, the Tender Inviting Authority shall ensure that a reply is sent and copies of the reply to the clarification sought shall

be communicated to all those who have purchased the tender documents without identifying the source of the query and upload such clarification to the designated website for the information of those who have downloaded the tender documents from the website, without identifying the source of the query.

12. From the above rule, there cannot be any iota of doubt that after issuance of the tender documents and before the opening of the tender, the Tender Inviting Authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change to all those who have purchased the original tender documents and upload corrigendum for the information of those who have downloaded the tender documents from the website.

13. Therefore, in this case, the Tender Inviting Authority, namely, the second Respondent after the issue of the tender documents and before the opening of the tender, is empowered to issue the corrigendum, amending or altering the experience clause, which is, accordingly, issued. Also, the said corrigendum issued is communicated to all the prospective bidders, including the Petitioner, who purchased the tender document from the office of the second Respondent and the same is uploaded in the website.

14. Coming to the contention of the learned Senior Counsel for the Petitioner that though the Petitioner has made a representation on 17.03.2011 there is No. reply from the Respondents, it is to be stated that a reading of the said representation indicates that what is sought for is not a clarification as per Rule 17(2), but is an advice. Had any clarification been sought for by the Petitioner in the tender document, the Respondents would have cleared the same. When the Respondents discharge their duties as per the rules, the Petitioner cannot dictate terms to the authorities to do certain act to suit to his convenience. Hence, this contention fails.

15. The object of the Act is to eliminate irregularities by providing transparency in the process of tenders by ensuring transparency in the procurement procedure; maximise economy and efficiency in Government procurement; to foster and encourage effective participation by tenderers in the process of tenders; to promote healthy competition among tenders; to provide for fair and equitable treatment of all tenders; 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. As per this Act, the Tender Inviting Authority may make changes and amendments to the Tender documents before opening of tenders.

16. Since in this case the Tender Specification Committee has suggested for amendment of the experience clause to ensure qualitative procurement of Polyester Hologram Excise Labels to avoid duplication and manufacture of spurious products, the impugned Corrigendum was issued. That being the position, the contention of the learned Senior Counsel for the Petitioner that the

action of the Respondents in issuing Corrigendum is only to reduce more participation and to avoid the Petitioner from participating in tender process is to be rejected.

17. In matters of tenders, the duty of the court is to confine itself to the question of legality. Its concern should be: Whether the Tender Inviting Authority--

1 exceeded its powers,

2 committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which No. reasonable tribunal would have reached or,

5. abused its powers ?

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review are: (i) Illegality; (ii) Irrationality; and (iii) Procedural impropriety. Further, The principles deducible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are:

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

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

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

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

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative

sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the

administration and lead to increased and unbudgeted expenditure.

The above are the principles laid down by a Three Judge Bench of the Supreme Court in *Tata Cellular's* case cited above. In the very same judgement, the power of Judicial Review has been examined by the Supreme Court, wherein it has been held that if the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration of error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. Therefore, restraint under judicial review is always limited to this Court and it has to be invoked rarely and hesitantly under Article 226 of the Constitution of India.

18. Moreover, the terms of the contract are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The right to choose cannot be considered to be an arbitrary power. of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision making process, the Court has to necessarily exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest. This is the law laid down by this Court in the cases of *Ion Exchange Waterleau Ltd.* and *P.Ramadas*, cited supra.

19. On analysing the entire factors, it could be seen that the manner in which the decision making process undergone by the Respondents by inviting tender and thereafter issuing corrigendum for the purpose of achieving the technical specification from well experienced persons in the fields of conventional master origination and dot matrix system, taking into account the public interest and invoking Rule 17(1), by making proper changes, modifications or amendments to the tender document, is in a transparent manner and after following the procedure contemplated. In other words, the Respondents have scrupulously followed the provisions, rules and jurisdictional limit, while processing the tender and issuing corrigendum. At this stage, the Petitioner has challenged the

corrigendum, on the ground that the action of the Respondents is arbitrary and actuated with malice. In the given situation, in the absence of any arbitrary or colourable exercise of power or the action of the Respondents being tainted with mala fides, this Court is not inclined to exercise the power of judicial review under Article 226 of the Constitution to interfere with the tender making process undertaken by the Respondents, as the same is done in a transparent mode and keeping in view the object of the Act.

20. It is true, as contended by the learned Senior Counsel for the Petitioner, that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism and that the judicial power of review is exercised to rein in any unbridled executive functioning. In this case, as already stated above, as the Respondents have exercised their power only in accordance with the rules and, at the same time, there is No. illegality, irrationality and procedural impropriety in their action in issuing the impugned Corrigendum, this Court is restrained to interfere with the same.

21. In view of my discussion in the foregoing paragraphs, this Writ Petition has to be dismissed and, accordingly, it is dismissed, with a direction to the Respondents to go ahead with the tender process. No. costs. Consequently, the connected M.P. Nos. 2 and 3 of 2011 are closed.