

(2012) 01 MAD CK 0187

In the Madras High Court

Case No : Writ Petition No"s. 30418 of 2011 and 30463 of 2011 and M.P. No"s. 1 and 1 of 2012 and M.P. No. 1 and 2 of 2011

V. Devagi

APPELLANT

Vs

The Secretary to Government, Highways and Small Harbours
Department, Government of Tamilnadu, Secretariat, Chennai
600009 and Others
S.M. Elumalai Vs State of Tamil
Nadu

RESPONDENT

Date of Decision : 25-01-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21, 226, 32

Penal Code, 1860 (IPC) — Section 166, 353

Tamil Nadu Transparency in Tenders Act, 1998 — Section 11, 9(4)

Tamil Nadu Transparency in Tenders Rules, 2000 — Rule 12, 16, 18, 20

Citation : (2012) 2 BC 250

Hon'ble Judges : Vinod K. Sharmawrit, J

Bench : Single Bench

Advocate : A. Thyagarajan for Mr. E.C. Ramesh Mr. M.K. Raja in W.P. No. 30418/11 Mr. A.R.L. Sundaresan for Mr. B. Vijay in W.P. No. 30419/11 and Mr. M.K. Raja W.P. No. 30463/11, for the Appellant; A. Navaneetha Krishnan, Advocate General, assisted by Mr. R. Ravichandran, A.G.P., P. Karthikeyan, for R1 to R7, Mr. S. Arunkumar, Central Govt. Counsel for R8, Mr. V. Lakshminarayanan for R9 to R14 and Mr. S.R. Sunder for R20 to 24, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Vinod K. Sharmawrit

1. This judgment shall dispose of the following writ petitions, as the common question of law and facts are involved.

SL.No. W.P.No. Name of the petitioner

1 30418/2011 V.Devagi

2 30419/2011 B.Rama

3 30463/2011 S.M. Elumalai

2. For the sake of brevity, the facts have been taken from W.P.No. 30418 of 2011.

3. The prayer made in all these writ petitions is for issuance of writ in the nature of certiorari to quash the Proceedings in Tender advertisement No.

05/2011-2012/VA.Tho.A/date: 28.11.2011 on the file of the respondent No. 5, published in Dhinamalar dated 01.12.2011 and additional paper

publication in Dhinathanthi dated 10.12.2011 and all the acts done in furtherance of the impugned tender notice with consequential relief for

issuance writ in the nature of mandamus, directing the respondent No. 5, to receive the petitioner's tender and proceed further in accordance with

law.

4. The petitioner is the registered contractor with the State of Tamil Nadu and in the business of contract work for more than 4 years. The

petitioner completed many projects and has infrastructure and manpower to execute the Government projects.

5. The Divisional Engineer (Highways) called for tender for laying of Highway road in Villupuram district vide advertisement published in internet.

The respondent No. 5 thereafter cancelled tender process through internet and invited bids in person. The bid documents were agreed to be sold

on payment of Rs. 6,300/-(Rupees six thousand three hundred only) by way of bank draft per tender. In response to the advertisement issued in

newspaper Dinamalar, Dina Karan, etc., the petitioner approached the Divisional Engineer (Highways) for the purchase of tender schedule along

with security deposit to compete for 22 items. The petitioner took out a demand draft for a sum of Rs. 1,38,600/-(Rupees one lakh thirty eight

thousand and six hundred only).

6. The last date for receipt of tender fixed was 23.12.2011 by 3.00 p.m. It was also the condition that the tender document would be received on

23.12.2011 by 3.00 p.m. and opened at 3.15 p.m. in the presence of participants, as stipulated in the tender transparency Act and Rules framed

there under:

7. The respondent No. 5 refused to give the tender schedule inspite of payment by way of demand draft which forced the petitioner to file

W.P.No. 29095 of 2011 praying for writ in the nature of mandamus to direct the respondents to issue tender schedule. The writ was allowed and

direction was issued to the respondent No. 5 to issue tender schedule.

8. It is the case of the petitioner that inspite of the order passed by this Cort, tender schedule was not issued till the threat of contempt proceedings was issued.

9. It is pleaded case of the petitioner, that the respondent No. 5 thereafter refused to accept the tender and also refused to issue acknowledgment of receipt of tender. The petitioner therefore sent the tender application duly filled in by Speed Post, along with security deposit and fulfilled all other necessary requirements. The petitioner also attached with the tender schedule, a demand drafts for a total sum of Rs. 4,21,700/-(Rupees four lakhs twenty one thousand and seven hundred only) drawn on Corporation Bank, dated 21.12.2011by way of 22 differential demand drafts, for 22 items of works.

10. That the respondent No. 5 refused to receive the tender. It is pleaded that Postman was not allowed to enter the premises to deliver the tender application. It is alleged tht on the date of opening of tender, the entire place was surrounded by ruling party men and local politician supported by the police officials, to prohibit the bonafide bidders from submitting tender with object to help the ruling party men.

11. The case of the petitioner is that no fair procedure has been followed in the entire tender process, and that the tender process was stage managed as eye wash to show that the tender was awarded in fair and lawful manner. The whole process is stated to be arbitrary and thus illegal.

12. The case of the petitioner is that this action of the respondents was widely published in all newspapers circulated in the area and there was also agitation against the act of the respondents.

13. That as per the Tender Transparency Act and rules framed therein, in a public tender, the bids are to be opened in the presence of all the participants at the time and the date fixed in the Tender advertisements. The respondents are alleged to have violated the provisions of statute and rules.

14. That the Divisional Engineer (Highways) failed to discharge the duties as per the statute and refused to receive the tender application only to select ruling party contractor to execute the tender.

15. It is also the case of the petitioner that the respondent No. 5 committed offences, under Sec. 166, 353 I.P.C. by forcibly obstructing the postman from performing his duty of delivering the posts.

16. The petitioner also impleaded the postal department, as party by terming it as an agent of the petitioner as also that of the respondents.

17. On the pleadings referred to above, the petitioner challenged the tender process and also grant of contract to the respondents No. 4 to 24, on the ground that the procedure adopted is illegal, arbitrary and against rule of law.

18. The allotment of tender to the respondents No. 4 to 24, is also challenged being contrary to the rules and procedure contemplated under the Tamilnadu Tender Transparency Act and rules framed therein.

19. One of the ground raised by the petitioner is that the respondent No. 5, committed offences punishable under Sec. 166, 353 of I.P.C. The stand taken by the petitioner is that the bidder selected by the respondent No. 5 had quoted a price much more than the upset price, in any case, is guilty of having caused financial loss to the Government by accepting bids at higher rate.

20. In the reply affidavit, the stand of the petitioner is that under Rule 18 of the Tamilnadu Transparency in Tenders Rules, 2000, it is the duty of the inviting authority to ensure that adequate arrangements are made for the proper receipt and safe custody of the tenders at the place indicated for its receipt. The petitioner has relied upon the endorsement made by the postal authority to establish the irregularities of the respondent No. 5.

The returned tender document shows that the endorsement of the postman showing that he had visited the office of Divisional Engineer (Highways) to deliver the Tapal on 22.12.2011 at 11.30 a.m., 2.00 p.m., 2.50 p.m. and 3.50 p.m.

21. It is also recorded that when he visited the office, there was no one in office except Office Assistant, who refused to receive the tender document, on the plea that it can be received by the higher officers only. This incident took place at 11.30 p.m. whereas, at 2.00 p.m., there was nobody in the office, and that a gang of person prevented, him from delivering the tender document. At 3.50 p.m. three postmen accompanied the petitioner, and when attempt was made to deliver the tapal, a gang of 20 people threatened and pushed them outside the office. The matter was

reported to the higher officials by the postman on that very day.

22. The writ petition was opposed by the respondents by taking a stand that tender application was not received by the respondent No. 5 on

23.12.2011 before 3.00 p.m. Whereas the tender application from the petitioner was infact received only on 26.12.2011 at 1.15 p.m. and thus,

the same was returned to the petitioner by registered post.

23. The stand of the respondents in the counter is that the respondents have to execute the work of construction of new projects and repairing

other district roads given by the Construction and Maintenance Wing, Highways department, and work is to be completed before March 2012

without any lapse, as the Grant-in Aid for maintenance of roads would lapse after 31.03.2012.

24. It is however, not disputed that respondent No. 5 had called for tender relating to laying of Highway roads in Villupuram district as per

Tamilnadu Transparency Tender Act. It is also not disputed that the petitioner had filed writ petition in this Court for mandamus, to direct the

respondent No. 5 to give tender application to the petitioner for submitting it before the date fixed.

25. It is admitted that the petitioner was given tender documents, but it is the stand of the respondents that the tender documents were not received

upto 23.12.2011 till 3.00 p.m. The stand of the respondent No. 5 is that all the tender applications were to be dropped in the tender box placed

inside the premises upto 23.12.2011 before 3.00 p.m. and could be received by post or courier before the stipulated date.

26. It is also the stand of the of the respondents that on 23.12.2011, the Sub Inspector of Police, New Town Police station, Cuddalore was

requested to send police officials inside the premises of the respondent No. 5 to help the contractors to place their applications inside the tender

box without any hindrance. The stand of the respondent No. 5 in the counter therefore is that he did not refuse to receive the tender application.

27. In para 16 of the counter, the stand taken by the respondent No. 5 is as under:

S.No. Date Contractor Letter No. Estimate rate

quoted

28.12.2011 Tmt. S. Sarjojini, No. 18, 4th O.Pa.pa.77/201 Rs. 18,56,572/

1 Street, Jeyapuram, Tindivanam. 1-2012/JDO-1

28.12.2011 Tmt. S. Sarjojini, No. 18, 4th O.Pa.pa.78/2011 Rs. 21,88,302/

2 Street, Jeyapuram, Tindivanam. -2012/JDO-1

3 28.12.2011 Thiru K. Ekamabaram, O.Pa.pa.79/2011 Rs. 22,19,294/

Keetachithamoor (Village), -2012/JDO-1

S.No. Date Contractor Letter No. Estimate rate

quoted

Thenkottipakkam (P.O.),

28.12.2011 Thiru N. Bakthivachalam, No. O.Pa.pa.80/2011 Rs. 22,60,337/

55/38, Doctor Vahab Nagar, -2012/JDO-1

Marakanam Road, Tindivanam

4 604 001, Villupuram Dist.

28.12.2011 Thiru N. Bakthivachalam, No. O.Pa.pa.81/2011 Rs. 22,78,544/

55/38, Doctor Vahab Nagar, -2012/JDO-1

Marakanam Road, Tindivanam

5 604 001, Villupuram Dist.

28.12.2011 Thiru A. Mohanraj, Main road, O.Pa.pa.82/2011 Rs. 22,57,185/

Panchamadevi, Vallavanoor -2012/JDO-1

6 (P.O.), Villupuram Dist.

28.12.2011 Thiru A. Mohanraj, Main road, O.Pa.pa.83/2011 Rs. 23,67,157/

Panchamadevi, Vallavanoor -2012/JDO-1

(P.O.), Villupuram Dist.

7

28.12.2011 Thiru A. Mohanraj, Main road, O.Pa.pa.84/2011 Rs. 22,50,100/

Panchamadevi, Vallavanoor -2012/JDO-1

8 (P.O.), Villupuram Dist.

28.12.2011 Thiru M. Samraj, Vettaikaranpatti, O.Pa.pa.85/2011 Rs. 22,29,329/

Vallathi (PO), Chenji (TK), -2012/JDO-1

9 Villupuram (Dt.)

28.12.2011 Thiru M. Samraj, Vettaikaranpatti, O.Pa.pa.86/2011 Rs. 19,11,586/

Vallathi (PO), Chenji (TK), -2012/JDO-1

10 Villupuram (Dt.)

28.12.2011 M/s. Akshya Constructions, O.Pa.pa.92/2011 Rs. 17,09,842/

11 Cuddalore. -2012/JDO-1

28.12.2011 M/s. Akshya Constructions, O.Pa.pa.93/2011 Rs. 20,05,854/

12 Cuddalore. -2012/JDO-1

28.12.2011 M/s. Akshya Constructions, O.Pa.pa.95/2011 Rs. 19,04,828/-

13 Cuddalore. -2012/JDO-1

Further, agreements were executed by the 6th respondent to 6 nos. on 28.12.2011 as follows:

S.No. Date Contractor Estimate rate

quoted

28.12.2011 Thiru K. Ekamabaram, Keetachithamoor (Village), Rs. 22,19,294/

1 Thenkottipakkam (P.O.),

28.12.2011 Thiru N. Bakthivachalam, No. 55/38, Doctor VahabRs. 22,60,337/

Nagar, Marakanam Road, Tindivanam 604 001,

2 Villupuram Dist.

28.12.2011 Thiru N. Bakthivachalam, No. 55/38, Doctor VahabRs. 22,78,544/

Nagar, Marakanam Road, Tindivanam 604 001,

3 Villupuram Dist.

28.12.2011 Thiru A. Mohanraj, Main road, Panchamadevi, Rs. 22,57,185/

4 Vallavanoor (P.O.), Villupuram Dist.

28.12.2011 Thiru M. Samraj, Vettaikaranpatti, Vallathi (PO), Rs. 22,29,329/

5 Chenji (TK), Villupuram (Dt.)

28.12.2011 ThiruM.Samraj, Vettaikaranpatti, Vallathi (PO), Rs. 19,11,586/-

6 Chenji (TK), Villupuram (Dt.)

The respondents therefore prays that the writ petition being without any merit liable to be dismissed.

28. The learned Senior counsel for the petitioner vehemently contended that the proceedings with regard to acceptance of tender and subsequent

grant of work order to the private respondents deserves to be set aside, being

outcome of the arbitrary exercise of power, thus violating article 14 of the Constitution of India.

29. That the motive of the respondents, in not to allow the petitioner, to participate in the tender stood proved, as the petitioner was issued tender application form only after the direction of this Court.

30. That having failed to debar the petitioner to participate, by refusing the tender document, the respondent No. 5 adopted a novel method of not accepting the tender application and this fact has proved from the note of the postman on the letter sent.

31. In support of the contentions that the writ petition deserves to be ordered as prayed for, the learned Senior counsel for the petitioner placed

reliance on the judgment of the Hon'ble Supreme Court in the case of Reliance Energy Limited and Another Vs. Maharashtra State Road

Development Corporation Ltd. and Others, wherein it was held as under:

Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a

democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be

read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes

opportunity". Articles 21 and 14 are the heart of the chapter on fundamental rights. They cover various aspects of life.

Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC

in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of

level playing field". This doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept

in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the

said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest.

Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have

brought in the concept of "globalisation". Decisions or acts which result in

unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of reasonableness, then such an act or decision would be unconstitutional.

When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

In matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest.

Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid

down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above ""certainty"" is an important aspect of the rule of law.

32. The reliance was also placed on the judgment of the Division Bench of this Court in W.A.No. 511 of 2003 decided on 30.04.2003

(K.O.Periyakaruppan @ Balu vs. The Superintending Engineer, National Highways Division, Madurai 625 020) wherein the Hon''ble Division

Bench of this Court was pleased to lay down as under:

9. On a detailed reading of the report of the Advocate Commissioner, we are convinced that the conclusions of the Advocate Commissioner in the

light of the various circumstances referred to in his report as well as the materials laced before him, are acceptable. The further fact that right from

the beginning o the issuance of the tender schedules, the Appellant had to exert himself, only showed that the first respondent was hell-bent to

some how or other deprive the appellant of his opportunity to participate in the tender. We say so because even for the issuance of the tender

schedules, the appellant had to move this Court by way of a writ petition and only pursuant to the direction of this Court dated 7.1.2002, the

appellant was issued with the tender schedules in order to enable him to submit his rates. When the appellant was so much interested in

participating in the tender, who is admittedly a registered Contractor, eligible to participate in such tenders of the value prescribed, it is hard to

believe that the appellant was not showing due diligence in the matter of submission of the tender forms within the stipulated time limit. The efforts

taken by the appellant by moving a writ petition even for getting the issuance of the tender schedules was sufficient to demonstrate that the appellant

was very keen to participate in the tender. There is no reason to doubt his stand that he forwarded his tender schedules through speed post well in

advance in order to ensure that his tender documents are not rejected on the ground of belated submission of it. Further, there is no reason to

disbelieve the version of the persons employed by the second and third respondents who have no axe to grind against the first respondent and who

categorically stated to the effect that the tender schedules posted through speed post on 14.11.2002, were really delivered in the forenoon of

15.11.2002 itself and that the endorsement made in the delivery slips as ""3.30 p.m."" by the Clerk working in the Office of the first respondent was

deliberately made with some ulterior motive and with a view to deprive the appellant of his opportunity to participate in the tender notified on

7.10.2002.

33. The writ petition was vehemently opposed by the learned counsel appearing on behalf of the respondents, on the ground that this Court in

exercise of the writ jurisdiction cannot go into the disputed question of fact, the allegations of the petitioner that the tender documents were not

accepted stood specifically denied.

34. The case of the respondents is that once it is not admitted that the petitioner was prohibited by the respondents in submitting the tender

application, the petitioner has no locus standi to challenge the grant of tender, having not participated in the tender process.

35. In support of this contention, a reference was made to the affidavit of Office Assistant who was said to be present deposing therein that no

postman came to give the tender document, nor he refused to receive it as alleged in the affidavit filed by the petitioners.

36. In support of the contention that the writ petition is not competent, the learned counsel appearing for the respondents placed reliance on the

judgment of this Court in W.P.No. 15772, 15774, 15775 of 2011 and M.P.No. 2 to 2 of 2011, (K.Chandrasekaran and 2 others vs. The District

Manager, Tamil Nadu State Marketing Corporation Ltd. (TASMAC), Vasavi College Post, Erode District and 2 others, decided on 11.08.2011)

laying down as under:

8. Learned Advocate General would contend that there is no basis for alleging that the ruling party members have prevented the petitioners from

submitting their tender forms. He would further contend that the petitioners have come forward with the factual disputes and such disputed question

of fact cannot be decided in a writ petition. It is contended that only in the event of arbitrary exercise of power and adopting unfair procedure, the

tender process could be interfered by the court and as far as the case on hand is concerned, the rules and regulations have been scrupulously

followed by the respondents and as such, the question of arbitrariness not at all arises.

9. Learned Advocate General in support of his contentions, would place reliance on the following decisions:

[a] Daljit Singh Dalal (dead) through L.Rs., Vs. Union of India and others,

[b] Jetha Ram and Others Vs. State of Rajasthan,

[c] Meerut Development Authority Vs. Association of Management Studies and Another,

10. Mr. R. Thiyagarajan, learned senior counsel appearing for the respondents 2 and 3 in WP.No. 15772/2011 and for the 2nd respondent in

WP.No. 15774/2011 submits that the respective respondents are the successful tenderers and the petitioners have not made out any ground

warranting interference of this court. It is contended that the petitioners have come forward with the above writ petitions only by raising the factual

disputes and as such, this court cannot go into the disputed facts by invoking Article 226 of the Constitution of India. It is pointed out by the

learned senior counsel that if at all the petitioners are having grievance, it is open to them to prefer an appeal u/s.11 of the Tamil Nadu

Transparency in Tenders Act, 1998.

11. I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scrutinised the entire

materials available on record and perused the affidavit filed by the petitioner and the counter filed by the 3rd respondent.

12. At the outset, it is to be stated that the petitioner have come forward these petitions mainly raising certain disputed facts. It is highlighted by the

learned counsel for the petitioners that the petitioners have not been furnished with the tender forms and as a result, they have to approach this

court for getting the tender forms and even after getting the tender forms, they have been prevented from submitting the same. It is seen that on an

earlier occasion, the petitioners along with other persons numbering 35 have approached this court for a direction to the respondent therein to

furnish the tender forms in WP.Nos.14740 to 14744 and 14883/2011 and this court had directed the respondent to furnish the tender forms. It is

not disputed by the petitioners that they have been furnished with the tender forms. But the only grievance of the petitioners is to the effect that they

were prevented from submitting the same. The learned counsel for the petitioner took enormous pain to contend that not even a single officer was

present at the premises for receiving the tender forms. But, on the other hand, it is specifically stated in the counter that a tender box was kept in

the said premises and the tenderers were free to make their applications in the tender box. Added to the said factor, it is seen from the counter that

totally 649 applications were sold right from the date of publication, i.e., from 11.06.2011 through the leading Tamil dailies, viz., Dinathanthi and

Dinamalar. Thereafter, 540 applications were received in total from the tenderers and out of 540, 218 applications were selected based on the

price quoted by the tenderers. Therefore, it cannot be contended that the petitioners have not been served with tender forms or prevented from

submitting the same. It is needless to state that the petitioners could have sent the tender forms even through post or through courier or in person.

But, they have not adopted any of the above said methods for submitting their tenders. On the other hand, they claim that they have been issued

with the tender forms belatedly and thereafter, they have been prevented from submitting the same. The allegations of the petitioner to the effect

that they have been prevented by the members of the ruling party is purely a question of fact and the same cannot be gone into by this court in

these writ petitions by invoking the power under Article 226 of the Constitution of India.

13. Learned Advocate General has rightly placed reliance on the decision of the Hon"ble Apex Court reported in Daljit Singh Dalal (dead) through

L.Rs., Vs. Union of India and others, for the propositions that the disputed question of fact cannot be gone into in a writ petition.

14. This court is also not able to find any violation or contravention of Section 9[4] of the Act and Rules 12, 16, 18 and 20 of the Rules, 2000.

The respondents have clearly and categorically stated about the procedure followed right from the issuance of the notification, tender publication

and following the other procedures for receiving the tenders and considering the same. It is seen that the prescribed time as contemplated under

Rule 20 and other rules have been followed. It is needless to state but for affording such time, it is not possible for 540 persons to submit their

tenders and the petitioners have not produced any material to establish that the 1st respondent has exercised his power arbitrarily or not conducted

the tender in a fair manner.

15. At this juncture, it is relevant to refer the decision of the Hon''ble Apex Court regarding the scope of judicial review in awarding the tender in

Tata Cellular Vs. Union of India, . The Hon''ble Apex Court acknowledged that the principles of judicial review can apply to the exercise of

contractual powers only with a view to prevent arbitrariness or favouritism. The Apex Court in the same decision has held that there are inherent

limitations in the exercise of that power of judicial review. The Hon''ble Apex Court by upholding that the right to choose cannot be considered as

an arbitrary power set out 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.

5] The Government must have freedom of contract.

16. In Centre for Public Interest Litigation V. Union of India reported in ((2008) 8 SCC 606), the Hon''ble Apex Court has held as follows :

Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the

court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the court would interfere.

It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the

administrator.

17. A Division Bench of this court in its decision in M. Vasudevan Vs. The Chief Executive Officer, Chennai Metropolitan Development Authority,

D. Jayakumar and Genguva Rajan, has followed the Hon''ble Apex Court's decision in Sterling Computers Limited and Others Vs. M and N

Publications Limited and Others, , wherein, it was held by the Supreme Court vide paragraph 12 as follows :

Under some special circumstances a discretion has to be conceded to the

authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bonafide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

18. The Hon''ble Apex Court in yet another decision reported in Daljit Singh Dalal (dead) through L.Rs., Vs. Union of India and others, has held as here under:-

8. There are thus several disputed questions of fact. We also fail to see any public interest involved in this petition. The disputes raised by the petitioner being factual disputes, cannot be examined in a writ petition under Article 32 of the Constitution. The petition is, therefore, dismissed with no order as to costs.

19. In view of the principle laid down by the Hon''ble Apex Court in the decision cited supra and in view of the aforesaid reasons, this court is constrained to dismiss the writ petitions as devoid of merits. No costs. Consequently, connected miscellaneous petitions are also dismissed."" 37

The reliance was also placed on the judgment of this Court in W.P.No. 1301 of 2010 (G.Thiruvengadam vs. District Collector, Krishnagiri District and 7 others, decided on 19.03.2010) wherein this Court was pleased laid down as under:

11 Admittedly, there is a correction in the tender documents and the same is initialled by the petitioner''s brother. Whether the petitioner''s brother was forced to correct the amounts and made to initial the corrections at the instance of certain other persons, are the disputed questions of fact as per the contentions of the petitioner, second respondent, and also that of the learned counsels appearing for the petitioner as well as respondents.

To ascertain the correct fact and to know whether there was police protection during the relevant time, the learned Government Advocate was

directed to get report from the police official. The learned Government Advocate produced the report of the Sub Inspector of Police, Town Police

Station, Krishnagiri dated 5.3.2010, which is extracted hereunder: & quot:

Subsequent to the receipt of letter bearing No. 4715/Tpt./2009 dated 18.01.2010 from the General Manager, Dharmapuri District Coop. Milk Producers Union Ltd. Krishnagiri, we have deputed 6 (six) constables for bandobust to conduct milk tanker transport tender held on 20.01.2010. The constables deputed for, were discharging their duties and the tender was conducted peacefully without any untoward incidents. & quot: From the perusal of the above report it is evident that six constables were deputed for giving bandobust to conduct milk tanker transport tender held on 20.1.2010 and they were on duty and that the tender was conducted peacefully without any untoward incident. In the light of the said report given by the police authority and as there is no contra material available other than the version of the petitioner in the affidavit in support of the writ petition, I am not in a position to accept the contention of the learned counsel for the petitioner with regard to the alleged force employed on the petitioner's brother for making corrections in the tender documents and that he was forced to initial the said corrections.

12. The question as to whether the High Court is entitled to go into the disputed questions of fact in a writ petition filed under Article 226 of

Constitution of India, is well settled in law. (a) In *Arya Vyasa Sabha and Others Vs. The Commissioner of Hindu Charitable and Religious*

Institutions and Endowments, Hyderabad and Others, the view taken by the High Court that disputed questions of fact are to be left open to be

decided before the Civil Court was upheld by the Supreme Court. (b) In the decision reported in *Rourkela Shramik Sangh Vs. Steel Authority of*

India Ltd. and Another, it is held that the disputed questions of fact could not be entertained in the writ proceedings. In paragraph 19, the Supreme

Court held as follows: & quot: 19. The question as to whether the workmen concerned had been continuously working for a period of ten years so

as to enable them to derive benefit of the judgment of this Court in *R.K. Panda and Others Vs. Steel Authority of India and Others*, was essentially

a question of fact.... & quot: In paragraph 22, the Honourable Supreme Court further held as follows: "": 22.....a disputed question of fact normally

would not be entertained in a writ proceeding. This aspect of the matter has also been considered by a Constitution Bench of this Court in *Steel*

Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front

Workers and Others etc. etc., ."" : (c) In Himmat Singh Vs. State of

Haryana and Others, the Honourable Supreme Court held that the statement of the appellant or the 5th respondent was correct or not could not

ordinarily be tested in writ proceedings and it is well known that in writ petition ordinarily such a disputed question of fact could not be entertained.

(d) In yet another decision reported in (2007) 7 MLJ 687 (Food Corporation of India v. Harmesh Chand), the Supreme Court held as follows: &

quot; Since the facts were seriously disputed by the appellant and no factual finding could be recorded without consideration of evidence adduced

by the parties, it was not an appropriate case in which the High Court ought to have exercised its writ jurisdiction. The parties could have

approached a civil court of competent jurisdiction to adjudicate the matter."" :

38. The reliance was also placed on the judgment of this Court in W.P.No. 23088 of 2010 (Easun Products of India (P) Ltd. vs. The Chairman,

Tamil Nadu Electricity Board/ TANTRANSOCO,800, Anna Salai, Chennai 600002 Ltd. decided on 11.02.2011) and the decision of this Court in

W.P.No. 23120 of 2010 (K.Panchatcharam vs The Executive Engineer, Water Resources Organisation and The Assistant Executive Engineer,

decided on 10.02.2012).

39. There can be no dispute with the proposition, that this Court in exercise of writ jurisdiction cannot adjudicate the disputed question of fact.

40. The question for determination in this case is whether writ petition raises disputed question of fact or whether the defence raised by the

respondents deserves to be rejected, in view of documentary evidence on record in view of the peculiar circumstances of this case.

41. The record shows that there were only two bids for each tender, and work order is given to one of the two parties. The documents further

shows that contract given to Tmt.S.Sarojini is at 0.01 less than the quoted price. The tender application returned to the petitioner shows that the

offer was at 7% less than the estimated cost. Thus, there is glaring difference between the two offers, the contracts have been given at much higher

rates.

42. The question as to whether this writ petition raises disputed question of fact, is to be answered in negative, in view of the peculiar

circumstances of the case. The respondent No. 5 has not been able to give any

justification as to why the tender application was not sold to the petitioner, and it was only sold in pursuance to the direction given by this court, that the tender applications were supplied.

43. It cannot be believed that a person who approaches this Court to get tender application will not submit the tender within the stipulated time.

The stand of the petitioner is further fortified from the report of the postman.

44. It is well settled law that presumption has to be drawn that the official work has been done according to the procedure as stipulated by law

unless proved otherwise. Though an attempt was made by the respondents to file a counter to deny that the postman came to the respondent

office, but in view of the positive report of the postman giving the time of visit, the fact that the report was submitted to the higher authorities on the

same day, leaves no manner of doubt that the stand of the petitioner deserves to be accepted.

45. It is well settled law that though the Government has right to enter into the contract with any person but the State or its instrumentalities cannot

act arbitrarily as tender had to be judged on their own intrinsic merits in accordance with the terms and conditions of the tender notice. Har minder

Singh Arora Vs. Union of India (UOI) and Others,

46. Again, the Hon"ble Supreme Court in the case of Tata Cellular Vs. Union of India,) was pleased to lay down as under:

That standard of eligibility laid down in the notice of tender cannot be departed arbitrarily as such departure from standard will amount to denial of

equality of opportunity to those who feel bound by the standard of eligibility and therefore did not submit their tender. The relaxation of the

standard at the time of considering tender will amount to denial of opportunity to those who considered themselves ineligible.

47. The petitioners have successfully shown that the action of the respondents suffers from arbitrariness, unreasonableness and is unfair, thus, is hit

Article 14 of the Constitution of India, as the petitioners have been denied right of consideration to compete in the tender process.

48. The facts and circumstances of the case further shows that the respondents have not discharged their duty in accordance with the rules by

offering the tender at much higher rate, by denying right of participation to the petitioner in the tender.

49. For the reasons stated, the writ petitions are allowed. The tender as well as subsequent act of granting work order to respondents is quashed,

as it is thus proved that the acceptance of tenders of the private respondents was illegal.

50. The respondents are directed to take steps forthwith to notify fresh tender so as to utilise the grant before the stipulated period. Consequently, connected miscellaneous petitions are closed.