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W.P.Nos.11645 & 11941 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 13.05.2022

PRONOUNCING ORDERS ON : 01.06.2022

Coram:

THE HONOURABLE JUSTICE MR.G.R.SWAMINATHAN

W.P.Nos.11645 & 11951 of 2022
and W.M.P.Nos.11115, 11372 & 11375 of 2022

W.P.No.11645 of 2022

M/s.KTV Health Foods Pvt Ltd.,
Represented by its Managing Director
K.T.V.Kannan, 7/3, Arul Nagar Salai
Kodungaiyur, Chennai 600 118.

... Petitioner

-Vs-

Tamil Nadu Civil Supplies Corporation
Represented by its Managing Director
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.

... Respondent

Prayer in W.P.No.11645 of 2022: Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of Mandamus forbearing the Respondent from opening the petitioners Bid and allotting any quantity for supply of Palmolein pursuant to the tender Notification bearing NIT No. BS3/ 7170/ 2022 dated 04.04.2022 TNCSC/ 22-23/ ET- 01.

For Petitioner : Mr.Mani Sundargopal

For Respondent : Mr.R.Shunmugasundaram, Advocate General
Assisted by Ms.A.G.Shakeenaa
Standing Counsel



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सत्यमेव जयते
W.P.No.11951 of 2022

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M/s.Ruchi Soya Industries Limited
Rep.by its Authorised Signatory
R.Venkatraman, S/o C.Ramalingam
40-41, East Mada Church Road
Royapuram, Chennai 600 013.

... Petitioner

..Vs..

1.State of Tamil Nadu
Rep.by the Principal Secretary
Cooperation, Food and Consumer Protection
Department, St.George Fort, Chennai.

2. Tamil Nadu Civil Supplies Corporation
Represented by its Managing Director
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.

... Respondents

Prayer in W.P.No.11951 of 2022 : Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of Certiorari calling for the records relating to the Short E Tender by the 2nd respondent dated 21.04.2022 in Nit No. BS3/7170/2022 dated 04.04.2022 TNCSC/ 22-23 / ET-01 quash the same.

For Petitioner : Mr.AR.L.Sundaresan, Senior Counsel
for Ms.A.L.Gandhimathi

For Respondent No.1 : Mr.R.Shunmugasundaram, Advocate General
Assisted by Mr.D.Ravichander,
Special Government Pleader

For Respondent No.2: Mr.R.Shunmugasundaram, Advocate General
Assisted by Ms.A.G.Shakeenaa, Standing Counsel



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COMMON ORDER

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The Tamil Nadu Civil Supplies Corporation issued notification dated 04.04.2022 for the supply of 2,00,000 nos. of one litre Fortified RBD Palmolein oil pouches. The tender date was fixed as 21.04.2022. The writ petitioners applied in response thereto. The specific stand of the petitioners is that the price bids were not opened on 21.04.2022 but only on 28.04.2022 at 04.58 p.m. In the interregnum period, ie., on 27.04.2022, the Government of Indonesia imposed a ban on export of Palmolein oil and other products. Citing this as a *force majeure* event, the petitioners seek nullification of the entire tender process.

2. The learned Senior Counsel appearing for the writ petitioner in W.P.No.11951 of 2022 and the learned counsel for the petitioner appearing for the writ petitioner in W.P.No.11645 of 2022 reiterated the contentions set out in the affidavits filed in support of the respective writ petitions and called upon this Court to invoke Section 56 of the Indian Contract Act, 1872 and allow these writ petitions.

3. Per contra, the learned Advocate General appearing for the respondents submitted that no case for interference has been made out. He would point out that the tender notification provides for arbitral remedy and that therefore the writ petitions are not maintainable. He also would contend that since the issue arises out of a commercial contract, this Court may not permit the petitioners to avail the public law remedy. He



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would also state that the respondents have not committed any illegality and that the offer made by the petitioners must be valid for a certain period and that the tenders have been opened well before the expiry of the offer period. He harped on the fact that the petitioners did not chose to send any communication before opening of the tenders. They chose to wait till the tenders were opened and only thereafter filed the present writ petitions. He characterised the petitioners as fence-sitters and called upon this Court to dismiss the writ petitions.

4. I carefully considered the rival contentions of both sides and went through the materials on record. Let me take up the preliminary objections first. It is true that Clause 23 of the tender notification provides for arbitral remedy. It is again true that the subject matter pertains to a commercial contract. The objections however stand overruled in view of the ratio laid down in **“U.P. Power Transmission Corporation Ltd., -Vs- CG Power & Industrial Solutions Limited (2021) 6 S.C.C.15”**. The Hon'ble Supreme Court categorically held that the existence of an arbitration clause does not debar the court from entertaining a writ petition and that relief under Article 226 of the Constitution of India may be granted in a case arising out of a contract. Of course, the High Courts usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. But in this case, there are no disputed questions of fact. Since the respondent Corporation is a State instrumentality, and since the petitioners complain of violation of statutory procedure, I am inclined to consider the case on merits.



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5. Section 8 of the Tamil Nadu Transparency in Tenders Act, 1991 is as follows:

“8. Opening of Tender.- *The Tender Accepting Authority or any other officer authorised by it, shall open the tenders in the presence of tenderers present and who have submitted tenders in such time and in such place as may be specified in the tender document.”*

Rule 21 of the Tamil Nadu Transparency in Tender Rules, 2000 is as follows:

" 21. Opening of tenders.-

(1) All the tenders received by the Tender Accepting Authority shall be opened at the time specified in the Notice Inviting Tenders and in cases where an extension of time for the submission of tenders has been given subsequent to the original Notice Inviting Tenders in accordance with sub-rule (5) of Rule 18 at the time so specified subsequently. “The e-submitted tenders may be permitted to be opened by a Tender Inviting Authority or a member of the Tender Scrutiny Committee from their new location if they are transferred after the issue of Notice Inviting Tender and before tender opening and where the new incumbent is yet to obtain his digital signature certified.

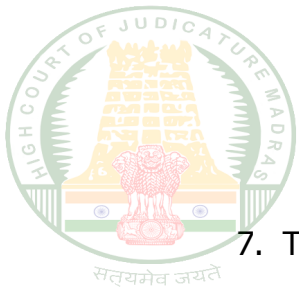
(2) The time specified for the opening of tenders shall be immediately after the closing time specified for the receipt of tenders allowing a reasonable period, not exceeding one hour, for the transportation of the tenders received to the place they are to be opened in the presence of the tenderers who choose to be present.

(3)The tenders will be opened in the presence of the tenderers or one representative of the tenderer who chooses to be present.”



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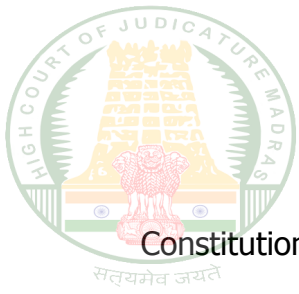
6. Section 8 as well as Rule 21(1) contain the expression 'shall'. It has been held time and again that the use of the word 'shall' is itself not conclusive of the question whether a provision is mandatory or directory (**Sharif-ud-Din -Vs- Abdul Gani Lone reported in 1980 (1) SCC 403**). I need not go into the question if Section 8 read with Rule 21(1) is to be construed as mandatory or directory. Clause 8 of the tender notification categorically states that the short e-tenders received upto 11.00 a.m. on 21.04.2022 will be opened by the Managing Director, Tamil Nadu Civil Supplies Corporation or any other authorised officer at 11.30 a.m. on 21.04.2022. Admittedly, the tenders were not opened at the time mentioned in the tender notification. The tenders were opened only on 28.04.2022 at 04.58 p.m. The conduct of the respondents was thus not in consonance with the aforesaid statutory provision read with the relevant tender clause. There is again no dispute that on 27.04.2022, the Government of Indonesia had announced a ban on export of RBD Palmolein and other palm products. When the petitioners submitted their tender on 21.04.2022, such an event was not foreseen by any of the parties. I take judicial notice of the fact that the Indonesia is a major supplier of Palmolein and therefore the ban order imposed by the said exporter itself has momentous consequences on the market. This is clearly a supervening event. This had taken place before the opening of the tenders. The second respondent had also considerably delayed opening the tenders. The tender requirement as regards opening was not adhered to. As per Rule 20-A, the tenderers could not have withdrawn the tenders also after submitting the tender.



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7. The question is whether the petitioners' tenders can be said to constitute "standing offers" so as to bind them the moment the tenders were opened and accepted by the respondent Corporation. Such would have been the case if the opening of the tenders had taken place as per the tender notification. The opening of the tenders was delayed by a full seven days. I have already observed that the petitioners cannot be blamed for not withdrawing their tenders because of the statutory prohibition. Before the opening of the tenders, something fundamental had taken place. The adverse development in the form of ban on exports by the Indonesian Government goes to the root of the matter. It had a direct bearing not only on the price aspect but also the very availability of the commodity in quantities as sought for. Had the petitioners known about the ban order, they would obviously not have offered the terms set out in their tender documents. One can come to such a conclusion by applying an objective test. The tender inviting authority having failed to open the tenders at the notified time cannot now insist that the tender process must be taken to its logical conclusion after occurrence of the supervening events that fundamentally altered the market situation.

8. The Hon'ble Supreme Court in the decision reported in **(2004) 3 SCC 214 (Jamshed Hormusji Wadia vs Board Of Trustees, Port Of Mumbai)** held that the State and its authorities including instrumentalities of States have to be just, fair and reasonable in all their activities including those in the field of contracts. Even while playing the role of a landlord or a tenant, the State and its authorities remain so and cannot be heard or seen causing displeasure or discomfort to Article 14 of the

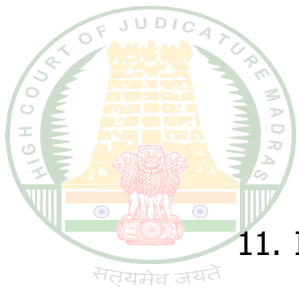


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Constitution of India. A State cannot be seen to be indulging in rack-renting, profiteering and indulging in whimsical or unreasonable evictions or bargains. The validity of their actions in the field of landlord-tenant relationship is available to be tested not under the rent control legislation but under the Constitution. The rent control legislations are temporary, if not seasonal; the Constitution is permanent and all time law.

9. In *Bharat Petroleum Corpn.Ltd vs. Maddula Ratnavalli [(2007) 6 SCC 81]*, it was held that where an entity is a State within the meaning of Article 12 of the Constitution of India, it is enjoined with a duty to act fairly and reasonably. The State acting whether as a landlord or a tenant is required to act bonafide and not arbitrarily, when the same is likely to affect prejudicially the right of others. A statute must be construed justly. An unjust law is no law at all. A statutory order or discretion exercised by a statutory authority must be tested on the anvil of the constitutional scheme. The action on the part of the State must be reasonable even in contractual matters.

10. Applying the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions, I hold that the terms of the tender notification must be interpreted under the scanner of Article 14 of the Constitution of India. What applies to the landlord-tenant relationship equally applies when State or State instrumentality is the tender inviting authority.



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11. If I decline to interfere, the consequences will be monstrous and inequitable.

The respondent Corporation cannot be allowed to take advantage of the unfortunate situation in which the petitioners are finding themselves. The principles of fairness and reasonableness are very much applicable to the facts of these cases. The following circumstances viz., (1) the supervening event has had a significant effect (2) the petitioners could not reasonably have contemplated the same at the time when they made the offer and (3) it would be unjust to require them to stand by their offer, lead me to the conclusion that the petitioners have clearly made out a case for grant of relief. Accordingly, the impugned tender process is quashed and both the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

01.06.2022

Internet: Yes
Index: Yes/No
KST

To

- 1.The Principal Secretary to Government
State of Tamil Nadu
Cooperation, Food and Consumer Protection
Department, St.George Fort, Chennai.
2. The Managing Director
Tamil Nadu Civil Supplies Corporation
Represented by its Managing Director
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.



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G.R.SWAMINATHAN,J.
KST

Pre-Delivery Order in
W.P.Nos.11645 & 11951 of 2022

01.06.2022