

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

In the matter of an application under and
in terms of Article 17 and Article 126 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

SC FR Application No. 91/2018

1. W.A.A.S. Darmasiri,
No. 266/2,
Kosgahagoda,
Boralu Wewa.
2. H. R. Suranjith,
No. 97 ½, Brukkwaththa,
Hewagama,
Kaduwela.
3. M.M.U. Maduranga,
“Sellika”, Godauda,
Kottegoda.

Petitioners

-Vs-

1. Thusitha Kularathna,
Chairman,
Western Province Provincial Road
Passenger Transport Authority,
No, 89, “Ranmagapaya”,
Kaduwela Road,
Battaramulla.
- 1A. Prasanna Sanjeewa,
Chairman,
Western Province Provincial Road
Passenger Transport Authority,
No, 89, “Ranmagapaya”,
Kaduwela Road,
Battaramulla.
2. Prasanna Kumara Madawala,
Acting Deputy General Manager
(Finance),

Western Province Provincial Road
Passenger Transport Authority,
No. 89, “Ranmagapaya”,
Kaduwela Road,
Battaramulla.

3. Jagath Perera,
General Manager,
Western Province Provincial Road
Passenger Transport Authority,
No. 89, “Ranmagapaya”,
Kaduwela Road,
Battaramulla.
4. Western Province Provincial Road
Passenger Transport Authority,
No. 89, “Ranmagapaya”,
Kaduwela Road,
Battaramulla.
5. Hon. Attorney General,
Attorney General’s Department,
Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC., J.
E.A.G.R. Amarasekara, J.
Janak De Silva, J.

Counsel: Shantha Jayawardena with Hirannya Damunupola for the Petitioners.
Kuwera de Zoysa, President’s Counsel with Ameer Maharooof and Ms. U.
Abeyrathne for the 1st, 2nd, 3rd and 4th Respondents.
Ms. Indumini Randeny, State Counsel for the Hon. Attorney General.

Written Submissions: 12.03.2021, 15.03.2021 and 03. 01.2022

Argued on: 01.11.2021.

Decided on: 24.10.2023.

Judgement

Aluwihare, P.C, J.

- 1) On 11th March 2018, this court granted leave to proceed in this matter for the alleged violation of Articles 12(1) and 14(1)(g) of the Constitution. Before addressing the actions alleged to be violative of the said Articles, I wish to set out the factual background of this case.

- 2) On 15th November 2017, the Western Province Provincial Road Passenger Authority (hereinafter referred to as the 4th Respondent) published a newspaper advertisement (marked as 'P3') inviting tenders for passenger service permits for 102 routes within the western province. In response, the Petitioners, who were interested in Item no. 92 (the Kadawatha-Moratuwa route permit for luxury buses via the Southern Expressway) paid the required deposits as stipulated in the notice and procured tender forms and applicable guidelines (marked as 'P4'). According to the advertisement the minimum bid for the mentioned route permit was set at Rs.800,000/= and 4 slots were available for the route.

- 3) Thereafter, the Petitioners placed bids for the mentioned route within the stipulated time in the following amounts:
 - 1st petitioner – Rs. 7,500,000
 - 2nd petitioner – Rs. 7,000,000
 - 2nd petitioner – Rs. 6,500,000
 - 3rd petitioner - Rs. 6,000,000

- 4) When the bids were opened on 7th December 2017 at around 1.30 p.m. the Petitioners became aware of the placement of the highest bid of Rs. 8,500,000 for the same route by one N. D. B. Vitharana (marked 'P9'). The Acting General Manager of the 4th Respondent (hereinafter referred to as the 2nd respondent) informed said Vitharana, by a letter dated 22nd December 2017 (marked 'P10'), that the Procurement Committee had decided to award him a permit for the said bus route and that he is required to pay the full bid amount of Rs.

8,500,000 or a minimum of 50% of the said amount, in terms of Clause 14.1 of the Guidelines on or before 3rd January 2018.

- 5) Clause 14.1 of the Guidelines denotes that a person who has been awarded a tender has to make an initial payment of 50% of the total bid price within 7 days. The above guideline is also presented as a Condition of Tender in Condition No. 09 of the Tender Form, where it is provided that any bidder who tenders his respective bid agrees to comply with Clause 14.1 of the Guidelines. Other relevant clauses of the Guidelines are as follows; As per Clause 4.2.9, when there are two or more vacant slots for the same bus route, the highest successful bidder is awarded the first permit and the second, third and other bidders (if any) would be awarded the permit for the bidding price of the 'highest successful bidder'. As per Clause 4.2.3, if a selected bidder fails to pay 50% of the price within 7 days, the bid is considered invalid. It is also settled that as per Clause 4.2.3, the tender is 'awarded' after the payment of 50% of the price. Clause 4.26 states that where the selected highest bidder withdraws/is removed, the Procurement Committee may award the tender to the second highest bidder within 3 months of the award of tender for the amount tendered by the former highest bidder who had either withdrawn or removed. As per Clause 4.2.7, where the second highest bidder does not consent to the permit charge of the former highest bidder, and the Procurement Committee is satisfied that the permit charge as per the former highest bidder is 'excessively high', the Procurement Committee may set an appropriate permit charge.
- 6) The 1st and 2nd Petitioners were informed by the 2nd Respondent that the Procurement Committee had decided to award the 1st Petitioner one route permit and the 2nd Petitioner two route permits for the highest price of Rs. 8,500,000 each, and that they were required to make payments before 3rd March 2018 (letters marked 'P11, P12, P13' respectively). Thereafter, the 3rd Petitioner received, on the 14th February 2018, a letter dated 9th February 2018 informing him that it had been decided to award him a route permit for the same route for Rs. 8,500,000. The 3rd Petitioner accepted the tender by paying 50% of 8,500,000 on 21st February 2018. It is important to note at this instance

that there were only 4 route permits available for awarding. Upon inquiry, the Petitioners become aware on or about the 14th February 2018 that N.D.B. Vitharana had not accepted the award of tender as he had purportedly not made the payment in terms of the Guidelines nor had a route permit been issued to him. The Procurement Committee had decided to grant the 3rd Petitioner a route permit consequent to Vitharana's failure to make the initial payment of the bid price.

- 7) It is the submission of the Petitioners that according to the Guidelines and Condition mentioned above, the non-payment of 50% of the bid price within 7 days by Vitharana renders his bid of Rs. 8,500,000 invalid and that as a result, his bid of Rs. 8,500,000 was not 'the highest bid price', and treating such invalid bid as a valid one and quoting such price for the procurement of a route permit to the Petitioners by the Respondents was unreasonable, irrational, arbitrary and illegal and amounts to an infringement of the Petitioner's Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution. It was further submitted that the aforementioned acts frustrated the legitimate expectation of the Petitioners that the route permits would be awarded in accordance with the guidelines issued by the 4th Respondent.
- 8) The submissions of the Respondents are primarily two-fold. First, that 1st and 2nd Petitioners unconditionally accepted the bid price of Rs. 8,500,000 as the permit charge by paying 50% of the price as required by Clauses 11.1 and 1.4 of the Guidelines, and as such their fundamental rights were not infringed. Secondly, that there is no provision in the Tender Guidelines for the automatic reduction of the route permit charge in the event that the highest bidder fails to make the initial payment, and therefore, the Respondents did not, in any event, have the power to reduce the permit charge once it was unconditionally accepted by a bidder by making an initial payment, and the Petitioners could not therefore, complain of the violation of their fundamental rights. Additionally, the Respondents also submit that they had acted in good faith, within the scope of powers entrusted to them by Clauses 4.2.6 and 4.2.7 of the Guidelines to determine the Highest Bid Price.

Was there a violation of Article 12(1) and/or Article 14(1)(g)?

- 9) The Petitioners contend that the payment of 50% of the bid price within 7 days is a 'condition precedent' to the acceptance of the offer made by the respective bid, in accordance with Clause 14.1 of the Guidelines and the letter issued to N.D.B. Vitharana by the Respondents. The letter states that the tender will be issued once the initial payment has been made. There can be no doubt therefore, that the N.D.B. Vitharana's tender bid was, in fact, invalid. The questions which remain then, are whether the 'highest bid price' could be that of an invalid bid and whether the setting of the bid price for the Petitioners at the price of an invalid bid is contrary to the Tender Guidelines and in violation of Article 12(1) regardless of whether the Petitioners had 'unconditionally accepted' the bid price of Rs. 8,500,000 by paying the initial payment of 50%.
- 10) I shall first deal with the contention by the Respondents that the Petitioners cannot complain of the violation of Fundamental Rights after making the initial payment of 50% and 'unconditionally accepting' the bid price. If the court were to find in favour of this contention, any bid, regardless of the authenticity of such bid would be considered valid and could thereby be construed as the 'highest bid'. Put simply, any unrealistically bloated bid aimed at escalating tender prices would be set as the price for each succeeding bidder regardless of whether such bid proves successful. That would, in my opinion, defeat the purpose of the tender process. Furthermore, to address the argument of the Respondents that the Petitioners could have prevented themselves from 'unconditionally accepting' the bid by not making the initial payment of 50% of the bid price, I find that it simply cannot be incumbent upon the bidders to determine the authenticity of the highest bidder prior to making the initial payment. The petitioners were not made aware of N.D.B Vitharana's failure to make the initial payment by the Respondent Authority and therefore acted under the information supplied at the time to make their bids. In fact, as pointed out by the learned counsel for the Petitioners at the hearing of this petition, the fact that the Petitioners immediately paid 50% of the highest bid price upon being informed of the highest bid price by the Respondents reveals

the *bona fides* of the Petitioners as they would only have been able to withdraw from the tender process if they were colluding. However, regardless of the corresponding arguments, the absurdity noted above could be avoided by the Procurement Committee considering the reasonability of setting an unsuccessful highest bidding price as the permit charge under Clause 4.2.6 read with Clause 4.2.7 of the Tender Guidelines.

11) While it is true that the Guidelines do not contain any provision for the reduction of price in the event of the highest bid proving unsuccessful, Clause 4.2.7 provides that where the successive bidders do not consent to paying the former permit charge and the Procurement Committee is of the opinion that the highest bid is excessively high, they may grant the route permit at a bid price deemed appropriate. The Petitioners submit that the Respondents had in a similar situation, in respect of the Nittambuwa-Moratuwa bus route, acted under this clause to consider the second highest successful bidder as the highest successful bidder after the former highest bidder did not make the payment within the stipulated time. In light of the Respondent's decision to reduce the bid price in that instance, and failure to do so in the present case, the Petitioners allege that they have been discriminated and such treatment violates equal protection guaranteed to them by Article 12(1).

12) The Respondents, in response, submit that the reason for the such consideration in the grant of route permits for the Nittambuwa-Moratuwa is that the highest bidder's price (Rs. 8,600,000) was 129% higher than the second highest bidder's bid price (Rs. 3,755,500). In that instance, the Procurement Committee, upon being informed by the successive bidders that the permit charge was excessively high and being requested that the permit price be offered at the second highest bid price, decided the amount to be excessively high. The meeting minutes of the Procurement Committee (marked 'R15') reflect the above reasoning. The Respondents submit that in the present case, the highest bidder's price (Rs.8,500,000) was only 13.33% higher than the second highest bidder's price (Rs. 7,500,000). The Respondents submit that the Procurement Committee did not consider this disparity 'excessively high'.

13) The Petitioners have produced no material before this court which indicates *mala fides* on the part of the Procurement Committee and the Respondent Authority. Neither have the Petitioners adduced any material substantiating the claim that the Respondents exercised their discretion in a manner that is abusive of such power, or contrary to law. It must be stated that although discretion should be exercised equitably, discretion itself is subjective in that every decision is subject to related circumstances and facts. The Right to Equality enshrined in Article 12(1) is violated in administrative matters where procedural fairness is deprived. His Lordship Justice Raja Fernando succinctly stated this court's view on the application of Administrative Guidelines and their relation to fairness and equality in **Samaraweera v. The People's Bank and Others** [2007] 2 SLR 362.

"It is my view that all circulars and other guidelines must be applied fairly and equally to all persons to whom they apply." [p. 370]

14) The Procurement Committee's adherence to the Tender Guidelines must therefore be assessed bearing in mind the discretion the Guidelines themselves confer upon the Committee to determine the Tender Charge. It is not reasonable nor equitable that the Procurement Committee be expected to dole out the same treatment in every Tender process without regard or care for the fact that it has been vested with the discretion to vary its procedure depending on the specific circumstances, taking into account the financial effect that such uniform treatment may bear on the authority and bidders. A variation in the manner in which discretion is exercised cannot, by itself, translate to discriminatory treatment in violation of Article 12(1) as 'discretion' inherently embodies the dependence of decision making on circumstance.

"It is a Fundamental Rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time." [Wade & Forsyth, Administrative Law, 10th Edition, Oxford University press, p. 271]

His Lordship Justice Kodagoda, P.C., in **SC. FR. Application No. 256/17 (S.C Minutes of 11.12.2020)** between one W.P.S Wijerathne and the Sri Lanka Ports Authority stated the following regarding matters where discretion is exercised for matters of ‘selection’:

“...it is of critical importance that, discretionary authority is exercised by Executive and by administrative authorities in public trust, only for the purpose of securing the purpose for which such power had been conferred, for the best interests of the organization concerned, for the best interests of the State, and in overall public interest. Not adhering to these vital norms, can certainly result in an infringement of Article 12 of the Constitution...” [p. 23]

- 15) The Petitioners have resorted to a technical difference between an ‘invalid’ bid and a ‘withdrawn’ bid to substantiate their claim that the Respondent Authority could not have exercised their discretion under Clause 4.2.7, claiming that Clause 4.2.7 only pertains to ‘withdrawn’ bids. However, it is evident upon perusal of the Guidelines that Clauses 4.2.6 and 4.2.7 also apply to bids ‘removed’. It appears to me that an ‘invalid’ bid, invalidated by the Bidder’s failure to make initial payment, once removed from the bidding process would most certainly fall within the ambit of Clauses 4.2.6 and 4.2.7. The Respondents have submitted the vast numerical differentiation between 129% and 13.33% as the basis for differed treatment in the separate bidding processes and also noted that the Authority is duty-bound to consider *inter alia* the highest financial return from the bidding process. At no stage in the proceedings have the Petitioners impugned that the Guidelines themselves, or more specifically, Clauses 4.2.6 and 4.2.7 of the Guidelines to be violative of their Fundamental Rights. I cannot find any instance in which the Respondent Authority violated the above-quoted tenets. In my opinion, the discretion vested with the Procurement Committee was exercised within the scope of powers intended by the guidelines of the Tender Process, in a reasonable, indiscriminate manner not violative of the Right to Equality enshrined in Article 12(1) or the Right to engage in a lawful occupation enshrined in Article 14(1)(g) of the Constitution.

Were the Petitioners' Legitimate Expectations breached?

- 16) Whether an expectation is legitimate or not is a question of fact [*vide Harshani S. Siriwardena v Secretary, Ministry of Health and Indigenous 31 Medicine* (S.C.(Application) (FR) 589/2009 S.C. Minutes of 10-03-2011)]. In examining the existence of any legitimate expectation on the part of the Petitioners, I find the widely known opinion of Lord Diplock J., in the case of *Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374* referred to as the 'GCHQ' case, instructive.

"..., the prima facie rule of 'procedural propriety' in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason..."

- 17) From Lord Diplock's opinion, I find two aspects bearing relevance to the present case. First, that an expectation is legitimate wherein based on the relevant facts, the expectation rests on an assurance of past benefit or promise of future benefit. Secondly, that if one is to be denied a benefit or concession by an administrative body, the body may still be required to ensure a fair hearing where one would be permitted to explain why the benefit should not be withdrawn and why the discretion vested in the body should be exercised in one's favour. In the present case, Clause 4.2.6 read with Clause 4.27 of the Tender guidelines provides bidders an opportunity to raise a complaint against the setting of a permit charge based on a withdrawn or unsuccessful highest bid, and the Procurement Committee is vested with the discretion of determining whether the former highest bid is 'excessively high'. It is not argued before this court by the Petitioners that they were not provided with an opportunity to make their complaints about the bid charge known to the Procurement Committee. The submission of the Petitioners regarding Legitimate Expectations is that they had a legitimate expectation that the price of the route permit would be set 'in accordance with the Guidelines'. I cannot

find any instance in which the Respondents acted contrary to the Guidelines. Therefore, no Legitimate Expectation of the Petitioners had been frustrated.

Conclusion

In the circumstances, for the reasons set out above, I am of the view that the Petitioners have failed to establish a violation of their fundamental rights under either of the Articles of the Constitution (Article 12(1) and Article 14(1)(g)) under which leave to proceed was granted. Accordingly, the application is dismissed. I make no order as to costs.

Application dismissed.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court