

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

CA/CPA 133/2019

**PHC (Colombo) Case No.
HCWA 06/2018**

In the matter of an Application for
Revision under and in terms of Article 138
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

1. M.M.U. Maduranga,
"Sellika", Godauda, Kottegoda.
2. K.K. Vijitha,
No. 64, Avissawella Road, Ranala.
3. R.A.R. Pushpakanthi,
No. 554/4, Walihinda Gardens,
Walihinda, Kaduwela.
4. R.M.N.P. Rathnayaka,
No. 43/2, Gampanguwa,
Wellawaya.
5. C.V. Wanniyarachchi,
No. 155/1, Thalahena, Malabe.
6. R.A.U.L. Rupasinghe,
No. 250/85, Laksiri Gardens,
Jalthara Road, Ranala.
7. J.A.K. Jayalath,
No. 109/2, Abulgama, Ranala.
8. O. Priyantha,
No. 100/3, Abulgama, Ranala.

PETITIONERS

1. Thusitha Kularathna,
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.

RESPONDENTS

AND NOW BETWEEN

1. M.M.U. Maduranga,
"Sellika", Godauda, Kottegoda.
2. K.K. Vijitha,
No. 64, Avissawella Road, Ranala.
3. R.A.R. Pushpakanthi,
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No. 89, "Ranmagapaya",
Kaduwela Road, Battaramulla.

RESPONDENTS-RESPONDENTS

Before: M. T. MOHAMMED LAFFAR, J. and
K. K. A. V. SWARNADHIPATHI, J.

Counsel: Shantha Jayawardena with Hirannya Damunupola for the
Petitioners

I. H. R. Kumara, instructed by Nimal Rajapakse for the
Respondent-Respondents

Argued on : Disposed by way of written submissions

Written Submissions on : 26.01.2024 (by Petitioner-Petitioners)
26.02.2024 (by Respondent-Respondents)

Decided on: 02.05.2024

MOHAMMED LAFFAR, J.

The Petitioner has invoked the revisionary jurisdiction of this court seeking to set aside the Judgment dated 22.10.2019 of the Provincial High Court of the Western Province Holden in Colombo in Case No. HC WA 06/18 (marked 'F') whereby the Petitioner is seeking an Order in the nature of a Writ of *Certiorari* quashing the decision of the Respondents determining the price of a route permit of the bus route Gampaha - Nugegoda, via Kottawa Inter-Change (Luxury) (Route Number EX-01-200/138/1) as Rs. 10,000,000/=; an Order in the nature of a Writ of *Mandamus* directing the Respondents to fix the price of a route permit of the bus route Gampaha - Nugegoda, via Kottawa Inter-Change (Luxury) (Route Number EX-01-200/138/1) as Rs. 8,000,000/= and an Order in the nature of a Writ of Prohibition prohibiting the Respondents from charging the Petitioners-Petitioners more than Rs. 8,000,000/= for a route permit of the bus route Gampaha-Nugegoda, via Kottawa Inter-Change (Luxury) (Route Number EX-01-200/138/1).

It is submitted that on 15.11.2017, the 4th Respondent Authority published a newspaper advertisement (marked P3 attached to the Petition marked as 'A') inviting tenders for passenger service permits, in respect of 102 routes within the Western Province, including the bus route Gampaha - Nugegoda, via Kottawa Inter-Change (Luxury) for Route Number EX-01-200/138/1. Upon the payment of the required deposits stipulated in the notice, the Petitioners were issued with the tender forms and applicable Guidelines for the tender procedure (marked as P4 in the Case Record marked as 'X'). According to the said advertisement there were 8 vacancies. Thereafter, the Petitioners tendered their respective bids for the said bus route.

When the bids were opened it had been revealed that H. R. Suranjith had tendered the highest bid of Rs 10,000,000/= and the other of the bids including that of the Petitioners were respectively as follows;

#	The Bidder	The Bid
1	H. R. Suranjith	Rs. 10,000,000/=
2	L. J. J. Perera	Rs. 9,998,790/=
3	L. J. Alwis	Rs. 9,729,075/=
4	N. D. B. Vitharana	Rs. 9,000,000/=
5	D. A. P. Dissanayaka	Rs. 8,178,000/=
6	1 st Petitioner	Rs. 8,000,000/=
7	2 nd Petitioner	Rs. 7,800,600/=
8	C. V. Wanniarachchi (1st Bid of the 5th Petitioner)	Rs. 7,733,000/=
9	3 rd Petitioner	Rs. 7,687,550/=
10	4 th Petitioner	Rs. 7,600,900/=
11	5 th Petitioner	Rs. 7,233,000/=
12	6 th Petitioner	Rs. 7,233,000/=
13	W.D.N. Sepala	Rs. 7,233,000/=
14	W.D.N. Sepala	Rs. 7,233,000/=
15	K. P. C. Dc Silva	Rs. 7,233,000/=
16	7 th Petitioner	Rs. 7,233,000/=
17	8 th Petitioner	Rs. 7,222,000/=

It is observed that as per Clause 4.2.9 of the Instructions to Tenderers marked P4, when Tenders are called for two or more route permits for the same route, the first route permit should be awarded to the highest bidder at his bid price, **which shall be the route permit price for all purposes of that Tender**, and the remaining route permits should be awarded to the bidders who have placed the next highest bid prices.

Based on the bids received, the route permit had been fixed at Rs. 10,000,000 being the value of the highest bid received.

It is brought to the attention of this court that H. R Suranjith (bid #1) who quoted the highest bid had thereafter not accepted the award of the tender and he has not made the payment in terms of letter marked as 'P13' dated 22.12.2017. It is also submitted by the Petitioners that 5 more bidders who submitted their respective bids at the positions of 2, 3, 4, 5, 13, 14, 15 had also failed to comply with their respective letters sent by the 4th Respondent Authority and had failed to comply with the guidelines marked P4, and thus have not accepted the award of the tender. In this context, it the position of the Petitioners that the route permit must be fixed at Rs. 8,000,000 being the highest price of the awards that had been rightfully acted upon.

However, the Respondents submit that Clause 7.1 of the Instructions to Tenderers (Tender Guidelines) marked P4, provides that upon the tender opening, an initial analysis is conducted to ascertain if the tender applications have been submitted in accordance with the tender conditions and any tender application that has not been prepared in accordance with the tender conditions will be rejected by the 4th Respondent Authority and other valid bids are considered at the stage of tender evaluation. Clause 8.1 of the Instructions to Tenderers stipulates that the selected applicants should be informed that their bids have been accepted by a letter of award. It is submitted that the letters dated 22.12.2017 marked P13, P14 and P15 are such letters of award issued thereafter. Thus, only the bids that are considered valid, i.e., the tender applications that deemed to have been prepared and submitted in accordance with the tender conditions, are considered at the stage of tender evaluation and the selection. The said letters marked P13, P14 and P15 state that the Procurement Committee of the 4th Respondent Authority has decided to award route permits for passenger transport at the approved permit charge of Rs. 10,000,000/-.

While it is noted that the said H.R. Suranjith did not pay 50% of the approved permit charge of Rs. 10,000,000/- on or before 3rd January 2018 at no stage had the said H.R. Suranjith revoked his bid prior to or after the issuing of the letter of award marked P13.

The 1st and 2nd Petitioners have unconditionally accepted the route permit price of Rs. 10,000,000/- by paying a sum of Rs. 5,000,000/- each, being the 50% initial payment as per Clauses 11.1 and 14.1 of the said Instructions to Tenderers.

It is also submitted by the Respondents that the Procurement Committee of the 4th Respondent and/or the Respondents do not have any power to reduce the route permit price once it is unconditionally accepted by a bidder by making the 50% initial payment.

It is also pertinent to note that the 1st, 4th, 5th and 7th Petitioners have now transferred their route permits to third parties.

Attention of court is drawn towards the Fundamental Rights Application No. Sc (FR) 91/2018 which was dismissed by the Supreme Court by Judgment dated 24h October 2023 where the court observed as follows:

“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] 9

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. 231]"

In this instance it is observed that while the route permit was fixed at Rs. 10,000,000 the contented value prayed for at Rs. 8,000,000 is not at an excessive variance. Thus, even at the said price difference being 25% higher; in the backdrop of the guidelines/instructions, this court observes that there is no necessity for the price to be revised by the 4th Respondent as it is not excessively higher in the backdrop of the due process having being rightfully followed.

This court sees no illegality and/or procedural impropriety in the conduct of the Respondents as more fully analysed hereinabove. Therefore, I see no exceptional or special circumstances to invoke the revisionary jurisdiction of this court in order to revise or set aside the judgement of the learned High Court.

Application dismissed

JUDGE OF THE COURT OF APPEAL

K. K. A. V. SWARNADHIPATHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL