
(2002) 07 KL CK 0025

In the High Court Of Kerala

Case No : W.A. No. 966/96 and O.P. No. 4921/97

Abraham Sebastian

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-07-2002

Acts Referred:

Citation : (2002) 3 ILR (Ker) 178

Hon'ble Judges : B.N. Srikrishna, C.J;G. Sivarajan, J

Bench : Division Bench

Advocate : K. Sudhakaran and A.N. Rajan Babu, for the Appellant; K. Vatsalan, Government Pleader, for the Respondent

Judgement

B.N. Srikrishna, C.J.—These two are connected matters and can be conveniently disposed of by a common judgment.

2. The appellant in W.A. No. 966 of 1996 is a Government contractor. The respondents are (1) State of Kerala, (2) The Chief Engineer, Harbour Engineering Department, Thiruvananthapuram, (3) The Superintending Engineer, Harbour Engineering Department, North Circle, Kozhikode and (4) The Executive Engineer, Harbour Engineering Division, Kozhikode-32.

3. On Vth July, 1981, the respondents issued a public advertisement inviting tenders from registered contractors having "A" class licence for executing certain work for the development of the Beypore Port construction of breakwaters. The appellant submitted his tender on 21st August 1981. The probable amount of contract was Rs. 24,23,79,991 and the earnest money to be deposited was Rs. 50,000. The tender submitted by the appellant on 21st August, 1981, was the lowest as the appellant quoted 15.90 per cent below the estimate rate. The second lowest tenderer had quoted 25 per cent above the estimate rate.

4. On 16th September 1981, the appellant's tender was accepted and an acceptance letter was sent, vide Ext. P-I. By this letter, the appellant was called upon to execute a formal agreement on stamp paper and he was also informed

that failure to do so would make, the earnest money deposit liable to forfeiture and lead to cancellation of the proposed contract and make him liable to pay the Government the entire loss that may be caused to the Government by retender or rearrangement of the work or otherwise consequent on the failure of the appellant to execute the agreement or execute the work as provided for in Clause 13 of the notice inviting tenders.

5. On 29th September, 1981, by letter, Ext, P-2, the appellant informed the third respondent that he had committed a mistake, as due to inadvertence he had quoted 12.90 per cent below the estimate rate while it was his intention to quote 12.90 per cent above the estimate rate. He also contended that he had come to the conclusion that even a rate 12.90 per cent above the estimate rate is not at all worth considering in the present labour rates, cost of material, higher charges of machinery, fuel prices, etc. He also said that the bank facilities which he was hoping to get within a reasonable period would also be delayed considerably because of reasons beyond his control. In these circumstances, the appellant maintained that he was not in a position to enter into an agreement with the department for the execution of the above under the terms and conditions stipulated in the tender schedule. He, therefore, requested that he may be relieved of the responsibility of carrying out the work as per tender and the earnest money deposit be refunded.

6. On 30th September, 1981, the third respondent by his letter (Ext. P-3), informed the appellant that his plea that by mistake he had quoted 12.90 per cent below the estimate rate could not be accepted. The appellant was called upon to execute the agreement within the time limit specified in the letter of the department, failing which, he was informed that the work would be arranged otherwise at the full risk and cost of the appellant without any further notice,

7. On 12th October, 1981, the third respondent by his letter (Ext. P-4) informed the appellant that the earnest money deposit of Rs. 50,000 was forfeited to the Government under Clause 13 of the notice inviting tenders, that the work would be rearranged at the risk of the appellant in terms of the tender condition vide Clause 13 of the notice inviting tenders and "as per the rules in force". He also stated that all losses to Government on account of the rearrangement of work would be recovered from the appellant as arrears of revenue by proceedings under the Revenue Recovery Act or otherwise.

8. As a matter of fact, the respondents did not retender the work, but gave it to the second lowest tenderer, who had quoted 25 per cent above the estimate rate.

9. On 25th November, 1983, the State Government made an order blacklisting the appellant for a period often years and also directing initiation of revenue recovery proceedings for recovering losses said to have been suffered by the Government to the tune of Rs. 91,36,199. There was also a direction that all Government Departments should take necessary action to withhold all payments due to the appellant including the earnest money deposit and securities furnished

by him for various other works.

10. A show cause notice was issued to the appellant, vide Ext. P-6, calling upon him to furnish an explanation or reason why revenue recovery proceedings should not be taken against him for recovering Rs. 91,36,199, which was said to be the loss suffered by the State Government due to failure of the appellant to execute the contract. The appellant challenged Ext. P-6 show cause notice by filing O.P. No. 1739 of 1984. The said Original Petition was disposed of by a judgment of a learned single Judge dated 1st March, 1984 (Ext. P-7) holding that the order issued against the appellant without giving him an opportunity of hearing or representation was *prima facie* bad. However, the learned single Judge was of the view that there was no need to quash and set aside the impugned order, on the statement made by the Government Pleader the orders at Exts. P-5 and P-6 would be treated as notices proposing blacklisting and recovery of loss for the inaction on the part of the appellant, that the appellant would submit his representation within a stipulated period on answer to show cause notices and that, after consideration of the representation made by the appellant, the departmental authorities would pass appropriate orders therein without being inhibited by the conclusions already arrived at by the impugned orders.

11. On 12th April, 1984, the appellant filed his detailed objections vide Ext. P-8. One of the contentions urged in paragraph 3 of Ext. P-8 was that the department had accepted the second lowest tender at the rate quoted by the tenderer without further advertisement or calling for tenders. He reiterated this in paragraph 8 of Ext. P-8 urging that there should have been a retender after rejecting his tender and accepting another tender. He also raised certain other contentions on the merits which are not very relevant at this point of time.

12. A fresh Order dated 22nd October, 1984 was made by the State Government, vide Ext. P-9. By this order, the State Government revised its earlier orders and made the following orders:

"(a) Revenue recovery proceedings already taken against the appellant shall be withdrawn for the time being.

(b) The actual loss will be determined after the work is completed in all aspects and assessing the position.

(c) The earnest money deposit amount of Rs. 50,000 will be retained with the department till a final decision is taken in the matter.

(d) The period of blacklisting is reduced to 5 years against ten years."

The appellant appealed against this order of the State Government to the Minister concerned. But according to the appellant, no action was taken on the appeal which, presumably, is still pending. By letter dated 9th November, 1993 the appellant requested the respondents for releasing the earnest money deposit of Rs. 50,000 which was retained by them.

13. On 5th January, 1994, the fourth respondent addressed a letter (vide Ext, P-10) and claimed that the department had incurred a loss of Rs. 1,44,39,777 and called upon the appellant to remit the said amount within 20 days of receipt of the letter, failing which revenue recovery proceedings would be initiated against him. Being aggrieved thereby, the appellant moved O.P. No. 1822 of 1994 before this Court. The said Original Petition was dismissed by the learned single Judge. Being aggrieved thereby, the appellant is before this Court by his appeal, W.A. No. 966 of 1996.

14. Pending W.A. No. 966 of 1996, the State Government made an order on 12th February, 1997, by which the department claimed to have reassessed the loss suffered, which is shown as Rs. 91,36,199 and called upon the appellant to pay the said amount with 12 per cent interest from 5th January, 1994, failing which revenue recovery action was threatened against him. The appellant challenged the said order by his O.P. No. 4921 of 1997 in which the said order is exhibited as Ext. P-13.

15. The first question that needs to be considered is, whether the respondents could have claimed damages against the appellant in the matter of his failure to execute the agreement as required under the terms of the contract. Clauses(3) and (13) of the notice inviting tender are material and read as under:

"3. All works shall be done in conformity with the specifications and conditions of contract in force in the Harbour Engineering Wing which are identical to those in force in Public Works Department (Kerala). In case of schedule rate contract tenderers must quote their own rates specifically for each item without reference to the departmental estimates or the current schedule of rates and for percentage rate contract only a single rate as an overall percentage above or below or at the rate, given in the schedule by a single entry at the bottom of the schedule under the head quoted rate may be made. The rates quoted shall be inclusive of ones, covering all the operations contemplated in the specifications and tender schedules and all incidental work necessary for such operations, such as shoring, bailing, form work, scaffolding, etc. The rates quoted shall be inclusive of sales tax.

(a) When tenders are delivered based on contractor's alternate designs such tenders should be accompanied by a schedule of quantities of materials to be used for each item of work with complete detailed specifications and data. In such cases the benefit of any savings in the quantities of materials actually used up under each item of work during execution will accrue to the department.

(b) The overall percentage rate accepted and specified in the agreement shall not be varied on any account whatever.

13. Before commencing work or within a week after the date when the acceptance of the tender has been intimated to him, the tenderer shall deposit a sum sufficient to make up the balance of 4 percent of the probable value of contract which together with the amount of earnest money deposited shall be

treated as security for the proper fulfillment of the same and shall execute an agreement for the work in the P. W. Schedule form. If he fails to do this or in the case of P.W. contracts maintain a specified rate of progress (to be specified in each case in the tender schedule) the earnest money and security deposit shall be forfeited to Government and fresh tenders shall be called for, or the matter otherwise disposed off. If as a result of such measures due to the default of the tenderer to pay the requisite deposit, sign contracts or take possession of the work any loss to Government results, the same will be recovered from him as arrears of revenue, but should it be a saving to Government, the original contractor shall have no claim whatever to the difference. Recoveries on this or any other account will be made from the sum that may be due to the contractor on this or any other subsisting contracts or under the Revenue Recovery Act, or otherwise the Government may decide."

In addition thereto, Clauses 15.9.6 and 15.9.7 of the Kerala P.W.D. Manual are relevant and they read as under:

"15.9.6. If after the selection notice is issued, the selected contractor fails to deposit the required security and or fails to sign the contract agreement, then action should be taken against the contract as provided for in the tender notice and in the rules regarding registration of contractors.

15.9.7. In cases as outlined above when the selected contractor fails to deposit security and/or execute agreement, a registered notice should be sent to him indicating the penalties to be inflicted and the award of the contract withdrawn. The officer competent to decide the contract may then negotiate with the next two lowest tenderers whose earnest money have been retained whether any of them is willing to take up the work on the same terms and conditions and rates are given by the lowest tenderer. If any of them agrees, the contract may be awarded to that tenderer after getting a format letter from him accepting the terms and conditions and rates as given by the lowest tenderer. If both the tenderers agree, the contract should be concluded with the second lowest on the above terms. If neither of the two tenderers agree to accept the terms and conditions and rates of the lowest tenderer, the work should be retendered."

16. By reason of Clause (3) of the notice inviting tender, which has become incorporated into the contract between the parties, it was agreed that all works shall be done in conformity with the specifications and "conditions of contract" in force in the Harbour Engineering Wing which are identical to those in force in Public Works Department (Kerala). Clause (13) of the notice inviting tender makes it clear that in case there is a failure by the successful tenderer to execute the work, the earnest money deposit and security deposit shall be forfeited to the Government and fresh tenders shall be called for, or the matter otherwise disposed off. Finally the loss, if any, to the department as a result thereof, would be at the risk of the successful tenderer and liable to be recovered by the proceedings under the Revenue Recovery Act.

17. Subject to any special terms that might be incorporated in a particular contract, P.W.D. Manual is a set of guidelines which is binding on the State Government. That is the reason why the Clauses 15.9.6. and 15.9.7. specifically provide the procedure which the authorities should follow to render the work. A Division Bench of this Court in *Aniruddan v. Government of Kerala* 1999 (3) KLT I has taken the view that a citizen is entitled in law to insist that the State will go by the procedure which it has laid down and that the terms of the P.W.D. Manual are binding on the State Government. This is clear even by a reference to Clauses 3 and 13 of the notice inviting tender. In a situation where the successful tenderer fails to execute and perform the agreement, Clause 15.9.7. of the P.W.D. Manual requires the following to be done:

"The officer competent to decide the contract may then negotiate with the next two lowest tenderers whose earnest money have been retained whether any of them is willing to take up the work on the same terms and conditions and rates as given by the lowest tenderer. If any of them agrees, the contract may be awarded to that tenderer After getting a formal letter from him accepting the terms and conditions and rates as given by the lowest tenderer. If both the tenderers agree, the contract should be concluded with the second lowest on the same terms. If neither of the two tenderers agree to accept the terms and conditions and rates of the lowest tender, the work should be retendered."

18. In our view, the provisions in Clause 15.9.7. of the P.W.D, Manual provide a binding guideline for the executive officers to proceed in a matter, so that a work is not arbitrarily given to a person who has quoted very high rates. This is to safeguard the interest of the State Government and to ensure that, if possible, the work is executed at the same rates as quoted by the lowest tenderer which had been accepted. It is only in the case, where despite best efforts it is not possible to execute the work at the same rates quoted by the lowest tenderer, the question of retendering would arise. It is only after this procedure is followed that it will be possible for the State Government to say that it had incurred loss as a result of the failure of the lowest successful tenderer. Then alone would it be possible to impose the liability on the unsuccessful and unwilling lowest tenderer.

19. In the present case, we notice that no such attempt was made by the respondents. We will assume that the respondents were justified in declining the request of the appellant to treat his quoted rates as 12.9 per cent above the estimate rates. But then, by the same token, they should have acted in accordance with the procedure prescribed in Clause 15.9.7. of the P.W.D. Manual, Obviously, they did not do so. They awarded the contract in favour of the second lowest tenderer who had quoted 25 per cent above the estimate rates. There was no justification for doing so. Hence, we are unable to agree with the learned Government Pleader that the losses incurred by the State Government were solely attributable to the breach of the appellant. If the State Government chooses arbitrarily to award the contract to someone at a very high rate, the State Government would not be justified in imposing the consequent burden of

loss on the shoulders of the lowest tenderer who has backed out.

20. The learned single Judge has taken the view that, after the judgment O.P. No. 1739 of 1984, it was not open to the appellant to question the right of the State Government to assess the damages if any. The learned Government Pleader attempted to sustain the judgment of the learned single Judge by contending that, in any event, the decision in O.P. No. 1739 of 1984 was rendered on 1st March, 1984 on and therefore, State Government's order consequent upon the judgment which was made on 22nd October, 1984 could not have been challenged by the Original Petition filed in the Year 1994. In our judgment, the contention has no merit. AH that the judgment in O.P. No. 1739 of 1984 did was to treat the order impugned in the petition as a show cause notice and give an opportunity to the appellant to make a representation there against with liberty to the State Government to make fresh appropriate orders in accordance with law. The State Government made the order dated 22nd October, 1984, vide Ext. P-9. A perusal of the order ext. P-9, shows that the actual loss which the Government had to suffer because of the backing out of the appellant could be assessed only after the completion of the work and till then no revenue recovery proceedings could be initiated against the appellant. Ext. P-9 order further states that the period of blacklisting the appellant was reduced to five years from ten years. We see no reason why the appellant should have challenged this order in the year 1994. In our judgment, the appellant was fully justified in waiting for quantification of his liability before rushing to court. The order quantifying his liability has been issued only on 5th January, 1994 (Ext. P-10). The present Original petition has been filed within short time thereafter and cannot, therefore, be barred by laches as urged by the learned Government Pleader.

21. The judgment in O.P. No.1739 of 1984 decided no issues. Instead of quashing the orders impugned on the ground of violation of principles of natural justice, it merely treated, the order as a show cause notice and further gave liberty to the State Government to make fresh orders. It is not as if the appellant agreed at any time that whatever was decided by the State Government was acceptable to him; nor does the judgment in O.P. NO. 1139 of 1984 say so. It appears to us that there may be justification on the part of the respondents to forfeit the earnest money deposit of Rs.50,000 because it is clearly provided so in the notice inviting tenders. In our view, the respondents have not followed the binding procedure prescribed in Clause 15.9.7. of the P.W.D. Manual. The other alternative for them was to sue the appellant for alleged damages, in which case it would have been possible for him to raise all open defences. Proceeding against the appellant by way of revenue recovery proceedings is unjustified.

22. As far as the fact, in O.P. No. 492-1 of 1997 are concerned, the action taken by UK; State Government there would also be bad for reasons which we have adumbrated above.

23. The learned counsel for the appellant relies on the judgment of a learned

single Judge in O.P. No. 3814 of 1988. In somewhat similar circumstances, the learned single Judge therein, was pleased to set aside the order of the State Government on the ground that it was not shown as to how the contract was given to a person who had quoted 25 per cent above the estimate rates in spite of the procedure prescribed.

24. In the result, we set aside the judgment of the learned single Judge in O.P. No. 1822 of 1994 and quash and set aside Ext. P-10 order dated 5th January 1994 We also allow O.P. No. 4921 of 1997 and quash and set aside the order dated 12th February 1997, Ext, P-13 therein;

25. Notwithstanding the quashing of all the concerned orders, it shall be open to the State Government to recover the loss, if any, suffered by them by suing the appellant in a court of law, if permissible under law.

Appeal and Original Petition are accordingly allowed.