
(2010) 09 KL CK 0058
In the High Court Of Kerala
Case No : W.A. No. 742 of 2010

Biodigital (P) Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 20-09-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2010) 09 KL CK 0058

Hon'ble Judges : K. Surendra Mohan, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : K.P. Satheesan and K.K. Gopinathan Nair, for the Appellant; I.V. Pramod, Government Pleader for Respondents 1 and 2 and V. Krishna Menon, for 3rd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—Appeal is filed against judgment of the learned Single Judge declining to interfere with the award of contract for supply of machinery by the Government of Kerala to third Respondent which is a Central Government undertaking in preference to the Appellant. We have heard Counsel appearing for the Appellant and Standing Counsel appearing for the third Respondent.

2. The second Respondent herein which is the Director of the Animal Husbandry Department of the State Government, invited tenders for purchase and installation of Freeze Dryer for the financial year 2009-2010. Three tenders were received and out of which, one tender was rejected. The remaining two were submitted by the Appellant as well as the third Respondent. When tenders were opened, Appellant's was the lower of the two bids. However, the second Respondent decided to negotiate with the Appellant for reduction of price and Appellant vide Ext. P-7 still lowered the price to Rs. 2,32,00,000. The third Respondent which is a Central Government Company reduced the price by a further sum of Rs. 5.6 lakhs. Second Respondent referred the matter for decision

by the Government and the Government vide Ext. P-9 accepted the tender of the third Respondent which was lower from Appellant's by Rs. 5.6 lakhs. It is against the award of this contract to third Respondent the Appellant filed Writ Petition contending that the Appellant was unaware of the negotiation that was going on between the second Respondent and the third Respondent and if one more opportunity was given, Appellant would have reduced the price further. So much so, the award of contract is arbitrary and in violation of Article 14 of the Constitution of India, is the case of the Appellant. The learned Single Judge after considering the Appellant's claim and various decisions relied on by him held that the award of contract to third Respondent by the Government is neither arbitrary nor in violation of Article 14 of the Constitution or in other words, it is a fair deal warranting no interference by the court. It is against this judgment appeal is filed by the Appellant raising the very same contentions and by relying on the very same decisions that were raised before the learned Single Judge.

3. Counsel for the Appellant submitted that when the tenders were opened, the lowest of the bids was that of the Appellant's and in the normal course Appellant should have been awarded the contract. He submitted that when further opportunity was granted to reduce the price, it should have been granted in such a way that both Appellant and third Respondent got an opportunity to go on reducing the price to the lowest possible. The further contention raised by the Appellant is that there is nothing in the tender condition to indicate that the third Respondent being a Central Government Company is entitled to any preference or priority or weightage. In principle we agree with the contention of the Appellant's Counsel that if price is to be negotiated from the quoted price, equal opportunity should have been given to both the parties and probably a bargaining would have been better achieved by calling both Appellant and the third Respondent together and asking them to go on reducing the price on competitive basis so that the lower of the two could have been accepted. However, in this case what is clear is that second Respondent requested both Appellant as well as the third Respondent to reduce the price and without any contest both of them gave the minimum amount for which they could execute the work. The Appellant's happened to be Rs. 5.6 lakhs above the offer made by the third Respondent and consequently contract was awarded to third Respondent. Counsel for the third Respondent submitted that Appellant's allegation of denial of equal opportunity is incorrect inasmuch as Appellant vide Ext.P-7 gave revised quotation, with reference to which the revised quotation given by the third Respondent was considered and the price bid by third Respondent was admittedly lower than the Appellant by Rs. 5.6 lakhs, which led the Government to award the contract in favour of third Respondent.

4. In the decision relied on by the Appellant in *Harinder Singh Arora Vs. Union of India (UOI) and Others*, the Supreme Court held as follows:

Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of

largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

In the decision relied on by the Appellant in *State of Maharashtra Vs. Manubhai Pragaji Vashi and others*, , the Supreme Court held mat:

The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14, if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

5. What is clear from the above decisions of the Supreme Court is that even in the matter of awarding contract the Government should act fairly and reasonably and the decision should not be whimsical or arbitrary. However, it is a settled position that Government need not always be concerned with the cost in the award of contract. In other words, even by spending a little more, the Government should ensure that the purpose for which the contract is awarded is fully achieved to it's satisfaction. In this particular case we notice that the Appellant is a Private Company located in Delhi, whereas third Respondent is a fully owned Central Government Undertaking located in Trivandrum i.e. within the State where the supply of the machinery and it's servicing have to be made. In the first place, in our view, a Private Company and a fully owned Central Government Undertaking does not stand in equal footing, while considering award of a contract by the Central Government or even the State Government. A Government Company's decision is always controlled by it's Board which is constituted by the Government. Therefore, a Government Department awarding a contract to a Government Company can always expect that contract will be executed in terms of the tender conditions irrespective of the financial results of the same for the awardee namely, the Government Company. In other words, chances of breach of contract by a Government Company is rather nil, whereas chances of breach of contract by a Private company as a contractor cannot be overruled. Secondly, in the award of contract normally Government considers financial gains inasmuch as the lowest of the tenders should be accepted. However, in this case it is to be noted that the awardee preferred by the Government over the Appellant is a Central Government Company and the Government while awarding the contract very well knows that the profit if any in the contract will go to Government Company, which in turn reaches the Government as dividend. So much so, in regard to award of a contract to a fully owned Government Company, we feel Government need not be over sensitive about the contract amount as the cash flow is from itself to Anr. agency of the Government. We, therefore, feel that even if Government Orders or tender conditions do not provide for any preference to a Government Company in the

award of contract by the Government, still it is open to the Government while awarding the contract to favour such a contractor as the risk of breach of contract is less and actually there will be no financial loss to the Government, even if the contract amount is higher than the lower price quoted by a private contractor. In this case we notice that a fair procedure is adopted by second Respondent by calling for revised quotations from both the parties, the Appellant and third Respondent, whereunder the third Respondent's tender happened to be the lower and so much so, contract is awarded to them, not merely because third Respondent is a Government Company, but because it's bid is the lower one. We, therefore, find no merit in the Writ Appeal and, therefore, dismiss the same.