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**(2012) 03 KL CK 0281**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) . No. 2234 of 2012**

Cherian Varkey Construction Co. (P) Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision : 01-03-2012**

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation : (2012) 2 KLJ 490**

**Hon'ble Judges : V. Chitambaresh, J**

**Bench : Single Bench**

**Advocate :** K.L. Varghese, Santha Varghese, Rahul Varghese and Ranjith Varghese, for the Appellant; C.S. Dias (SC), Ram Mohan G., G.P. Shinod and Manu V., for the Respondent

**Final Decision : Dismissed**

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## **Judgement**

V. Chitambaresh, J.—The Southern Railway ("the Railway" for short) invited bids for the award of contract in connection with the doubling of track between Haripad and Ambalapuzha. Only four bidders qualified in the credential bid and the fourth respondent was declared successful in the financial bid. The petitioner who qualified in the credential bid challenges the acceptance of the bid tendered by the fourth respondent. The core of the contentions of the petitioner is that the Railway should punctiliously and rigidly enforce the conditions in the bid document. The petitioner asserts that the bid tendered by the fourth respondent was incomplete and defective. The writ petition is filed for such a declaration and for a writ in the nature of mandamus directing the Railway to award the contract in favour of the petitioner who is the next lowest bidder. The bid document essentially contains four parts, viz., preamble, price bid submission sheet, offer sheet (summary sheet) and annexures (A, B, C, D & E). It is a conceded fact that the fourth respondent omitted to fill up the particulars elicited in the offer sheet. This according to the petitioner is fatal and should have entailed in the rejection of the bid tendered by the fourth respondent. The petitioner relies on the

following clauses in Ext.P2 bid document to buttress its contention:

2.1 Tenderer shall note that they are required to quote a single %age above/PAR/ below for each individual annexure separately in the respective column/space provided in the Offer sheet. Tenderers shall not quote their rates at any other place other than the offer sheet.

7.18 The Tenderer shall submit the Techno-Commercial Bid and Price Bid along with the relevant submission sheets in accordance with Annexure-I & Annexure-XIII respectively. These forms/sheets must be completed without any alterations to their format and no substitutes shall be accepted. All blank spaces shall be filled in with the information requested.

(emphasis supplied)

The petitioner also relies on note (ii) in the offer sheet which is as follows:

ii) Tenderers shall note that the percentage rate for the various Annexures of Tender schedule is to be quoted in offer sheet only. No cognizance will be taken for rates quoted at any other place.

(emphasis supplied)

2. The Railway as well as the fourth respondent on the other hand maintain that the omission to fill up the particulars in the offer sheet is inconsequential. This is particularly so since the amount quoted by the fourth respondent is discernible from the various annexures. The offer sheet only indexes the total amount quoted in the various annexures to the bid document. The filling up of the particulars in the offer sheet is not an essential condition in order to result in the rejection of the bid for failure. The Railway relies on the following clauses in Ext.P2 bid document to justify their action in accepting the bid:

2.0 The tender schedule is split into various annexures covering all the items pertaining to particular activity. In the various annexures of Tender Schedule quantity and unit rates and thereby the amount against each item have been indicated. From this, cost price of each Annexure of Tender schedule has been worked out and indicated in the summary sheet. The Tenderer shall quote rates as percentage above/below/at par for each schedule in the summary sheet in both figures and words. If no percentage as above, below or par is indicated for any particular schedule, the same will be considered as percentage at par.

7.19 In the Tender Schedule (Packet -2" Price Bid), quantity and unit rates and thereby the amount against each item have been indicated. From this, cost price of each Annexure of Tender Schedule has been worked out and indicated in the offer sheet. The Tenderer shall quote rates as percentage above/below/on par for each schedule in the offer sheet. If no percentage as above, below or par is indicated for any particular schedule, the same will be considered as quoted at par.

(emphasis supplied)

3. I have heard Mr. K.L. Varghese, Senior Advocate instructed by M/s. Rahul Varghese and Ranjith Varghese, Advocates on behalf of the petitioner. I have also heard Mr. C.S. Dias, Advocate on behalf of the Railway and Mr. Ram Mohan. G., Advocate on behalf of the fourth respondent.

4. The Supreme Court has laid down the test in *Kanhaiya Lal Agrawal Vs. Union of India (UOI) and Others*, wherein it is succinctly held as follows:-

It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of noncompliance thereto. If non fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in *G.J. Fernandez v. State of Karnataka*.

(emphasis supplied)

The above decision which relies on *M/s. G. J. Fernandez Vs. State of Karnataka and others*, has been quoted with approval in *Indian Railway Catering and Tourism Corporation Limited and Another Vs. Doshion Veolia Water Solutions (P) Limited and Others*, .

5. The Supreme Court has also in *B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others*, held that strict compliance of essential conditions should be adhered to. The award amount in the instant case exceeds 20 crores and hence the decision in *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, may be relevant wherein it is observed as follows:

In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a causality.

6. Necessarily my endeavour should be to find out as to whether the filling up of the particulars in the offer sheet is an essential condition of the bid or not. This in turn would depend on the question as to what would be the consequence of not filling up the particulars in the offer sheet. The filling up of the particulars in the offer sheet would be an essential condition only if it entails in rejection for non-compliance. Otherwise it is a collateral term of the bid and its insistence may not be very material to decide substantial compliance. The offer sheet and summary sheet are one and the same going by the description in Part E of Ext.P2 bid document. Clause 2.0 implies that the bid will be considered as percentage at par if no percentage as above, below or par is indicated in the offer sheet.

Similarly Clause 7.19 indicates that the rates quoted will be considered at par if no percentage as above, below or par is indicated for any particular schedule in the offer sheet.

7. What is the consequence in the fourth respondent not indicating percentage as above, below or par for any particular schedule in the offer sheet ? The consequence is only that the price quoted by the fourth respondent would be treated at par with the railway cash value indicated in the offer sheet. This assumes importance since the fourth respondent has quoted 6.45% below the railway cash value as is discernible from the annexures to Ext.P2 bid document. Note (ii) in the offer sheet means that no cognizance will be taken for the rates quoted elsewhere and not that no cognizance will be taken of the bid tendered. A reasonable interpretation would mean that no cognizance will be taken for the rates if the bidder had quoted above the railway cash value. The offer sheet only reflects the rates as percentage above/below/on par for each schedule and indexes the total amount given in the annexures. I have therefore no hesitation to hold that filling up of the particulars in the offer sheet is not an essential condition which should entail in the rejection of the bid.

8. I should also bear in mind that the Court should be slow to interfere with the award of contract when no element of public interest is involved. The Supreme Court in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, has held as follows:

When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation.

Again the Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, has held as follows:

Even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

The afore quoted decisions and the decision in *Tata Cellular Vs. Union of India*, were referred to in *Jagdish Mandal Vs. State of Orissa and Others*, when the Supreme Court observed as follows:

When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are

essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interests at the cost of public interest, or to decide contractual disputes.

(emphasis supplied)

9. I must immediately note that the petitioner had quoted Rs. 24,77,28,328/- whereas the fourth respondent had quoted Rs. 22,11,39,058A for the contract. Thus the petitioner had quoted above and the fourth respondent had quoted below the railway cash value of Rs. 22,35,80,946/- as is reflected in the offer sheet. There is a difference of Rs. 2,65,89,270/- between the rates quoted and the Railway would stand to gain if the bid tendered by the fourth respondent is accepted. The action of the Railway in treating the one tendered by the fourth respondent as a substantially responsive financial bid will only advance public interest. No malafides has been alleged on the part of the Railway and the writ petition only reveals a tiff between two bidders on technical grounds. I decline jurisdiction under Article 226 of the Constitution of India and dismiss the writ petition however with no order as to costs.