

(2010) 11 KL CK 0166

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 28113 of 2009 (H)

Government Electrical Contractors

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 19-11-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21

Citation : (2011) 2 BC 403

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : T. Krishnan, Unni SR, for the Appellant; No Appearance, for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J. 1. These writ petitions are filed by the respective Associations of Government Electrical Contractors, aggrieved by the circulars issued by the Government changing the procedure for tender of civil and electrical works under the Government, which according to them, is in violation of the provisions of P.W.D. Manual as well as Article 14 of the Constitution. W.P. (C) No. 30556/2009 is treated as the leading case and the exhibits are referred to as marked therein.

2. The grievance raised by the Petitioners in a nutshell are the following: The members of the Associations are electrical contractors. As per the procedure prescribed under the P.W.D. Manual and Code and the practice which was being followed throughout, electrical and civil contracts would be tendered separately. Assessment of the requirements of electrical works can only be determined on completion of the structure of the building. Earlier, as soon as the structure of a building is about to be completed, electrical wing of the P.W.D. would invite tenders for carrying out the electrical work. It was insisted that the electrical contractors should have registration with P.W.D. and must be having a licence granted by the Electrical Inspectorate of the State Government. By Ext.P1, the

Government envisaged composite tender for both civil and electrical works and stipulated that all civil works and electrical works should be tendered simultaneously and the electrical work carried along with the civil works. The Petitioners have raised certain complaints in the matter and it is averred in the writ petition that the second Respondent convened a meeting of the Superintending Engineers and Executive Engineers and discussed the advantages and disadvantages of simultaneous tendering. A letter was thereafter forwarded to the Government as per Ext.P2 detailing both advantages and disadvantages. It is further averred that without considering anything, by Ext.P3 circular the system was changed by the Government whereby freedom was given to the civil contractor to submit a single tender and to engage an electrical contractor for all building works where the estimate amount exceeds Rupees One Crore, who will be persons or agencies who have approved licence from Electrical Inspectorate. It was also specified that registration of electrical contractors/electricians with PWD would not be a precondition. It is a contention of the Petitioner that as a result thereof, the tendering of electrical contracts will be the monopoly of civil contractors which is against the provisions of the P.W.D. Manual.

3. After this Court passed the interim order on 28.10.2009, another circular was issued as per Ext.P6, stipulating that registration of electrical contractors / electricians with P.W.D. will be a precondition for carrying out electrical works in P.W.D. Licence from Electrical Inspectorate alone will not be sufficient. This Court considered the matter subsequently and passed an elaborate interim order on 28.1.2010 whereby Respondents 1 and 2 were directed to consider the grievance raised by the Petitioners regarding the possible exclusion of electrical contractors from the tendering process. Again, Ext.P8 circular has been issued. The Petitioners contend that the aspects directed to be considered by this Court as per the interim order have not been considered and Ext.P8 is only a reiteration of Ext.P6. It is further stipulated in Ext.P8 that the civil contractors who take up PWD works will indicate the names of electrical contractors and proof of their registration with PWD and electrical inspectorate. It is also mentioned that only registered electrical contractors will be considered for electrical works. It is pointed out that the main grievance raised by the Petitioners have not been considered at all in the light of the disadvantages pointed out in Ext.P2 and as directed by this Court. The Petitioners therefore challenge Exts.P3, P6 and P8 circulars. The averments in W.P.(C) No. 28113/2009 are also of similar nature.

4. Shri Devan Ramachandran, learned Counsel for the Petitioners vehemently contended that in the light of the stipulations made in the above circulars, the choice of electrical contractor is left with the civil contractor and selection will be at his whims and fancies. The electrical contractors have no role to play and their fate entirely depends upon the volition of the civil contractor. It is therefore pointed out that the civil contractors are getting a monopoly over the electrical contracts also. It is pointed out that this will effectively deny the right of electrical contractors to have a level playing field. Their fundamental right to compete for the electrical contracts is really affected. It is further pointed out

that the whole thing is violative of Article 14 of the Constitution of India and it will result in the total absence of competition among the electrical contractors. Learned Counsel for the Petitioners relied upon the principles stated by the Apex Court in *Rashbihari Panda etc. Vs. State of Orissa*, *Jespar I. Slong v. State of Meghalaya* and *Ors.* (2004) 11 SCC 485, *Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others*, and *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*,

5. Importantly, it is pointed out by the learned Counsel for the Petitioners that the directions issued by this Court in the interim order dated 28.1.2010 have not been considered at all by the Government when Ext.P8 circular was issued purportedly after considering the points discussed in the interim order of this Court. It is pointed out that the defects that are evident in Exts.P3 and P6 are writ large in Ext.P8 also. These contentions have been supported by Shri K.B. Pradeep, learned Counsel appearing for the Petitioner in W.P.(C) No. 28113/2009.

6. A detailed consideration of the circulars starting from Ext.P1 is therefore necessary. In Ext.P1 it was proposed that all civil works and electrical works should be tendered simultaneously and electrical works carried along with the civil works. The object is to avoid damage to the buildings while executing the electrical works after the entire civil works are completed. It is also envisaged so as to avoid delay in opening of the building for use. The Chief Engineer, P.W.D. Buildings and Local Works, in Ext.P2 letter addressed to the Government, has pointed out certain advantages and disadvantages if the system of awarding the contracts is altered. It was noticed that there will not be proper competition for the electrical part of the work and the Government may lose substantially due to this. Only limited number of electrical contractors will be involved when the composite tender is adopted. In the long run many of the electrical contractors may vanish who are not being supported by the civil contractors from the field. The completion time of major civil work projects takes 3 to 4 years, whereas the wiring and fixing of electrical installation is required only within the last six months of the building contract. During the period, the cost structure of electrical installation, its technology, model and pattern etc. will change due to the speedy advancement of technology, especially in electrical field. So proper updated completion of electrification work may not be achieved if the civil and electrical works are simultaneously arranged early.

7. As per Ext.P3, after re-examining all matters pertaining to the subject the Government issued the following directions: "For all building works where the estimate amount exceeds Rs. 1 crore, both civil and electrical works would be tendered together as a single tender. The contractor who is awarded the work will engage only those persons/agencies who have approved licence from Electrical Inspectorate to carry out the electrical works. Registration of electrical contractors/electricians with PWD would not be a precondition. Only licence from Electrical Inspectorate would be mandatory." By the interim order dated 28.10.2009 the latter stipulation in Ext.P3 indicating the persons to be engaged

was stayed. Thereafter, when Ext.P6 was issued, the only modification is that registration of electrical contractors/electricians with PWD will be a precondition for carrying out electrical works in PWD, altering the earlier one that anybody having licence from the Electrical Inspectorate can be engaged.

8. Ext.P8 is the result of the deliberations after the interim order dated 28.1.2010 was issued. The additional stipulations are contained in clauses 2.2 and 2.3 therein. It will show that the civil contractors will have to indicate the names of electrical contractors and proof of their registration with PWD and electrical inspectorate. The registered electrical contractors will have to be considered. Practically, the conditions of Ext.P3 as modified by Ext.P6, have been reiterated.

9. Learned Govt. Pleader Smt. N. Sudha Devi submitted that in the light of Ext.P8 circular, the Government will be able to examine the credentials of the electrical contractors at the time of submission of tender and that will ensure a proper tendering process. It is pointed out that the Government had to adopt the circulars in the light of the fact that there is gross delay in completing the buildings after the civil works are completed and to avoid any damage to the building.

10. The object sought to be achieved by the change of process by inviting composite tender, is stated in para 2 of the counter affidavit. It is pointed out that there is a general complaint among the various departments that the civil and electrical works are not arranged simultaneously and the electrical works of certain buildings are not arranged even after completion of the civil works. This has led to splitting and cutting of open walls already plastered and drilled and wiring activities carried out to the building. This tendency causes damage to the building and delayed the functional use of the building even for years. There is lack of proper co-ordination between the civil engineers and electrical engineers at various levels. The same object and purpose is reiterated in the additional counter affidavit also. But the additional counter affidavit does not answer the various contentions raised by the Petitioners that the electrical contractors will be totally excluded from the scene and there will be a monopoly of the civil contractors. How the same can be prevented and how proper level playing field can be provided to the electrical contractors, have not been explained in the counter affidavit. No amendment to the PWD Manual has also been made so far.

11. Chapter XX of the P.W.D. Manual contains detailed provisions with regard to electrical works in Government buildings, design, execution and maintenance. It is provided in para 20.5.1 that the electrification works in Government buildings should be arranged only through licensed electrical contractors registered in the department. Para 20.6.1 provides for invitation of tenders. The other detailed provisions are there for supervision and measurement etc. The Petitioners are also relying upon Clause 49 of the KSE licensing board rules which stipulates that "every contract for electrical installation work undertaken by a licensed electrical contractor shall be in writing and the licensed contractor shall be responsible for

the quantity and quality of the materials used. The supervisor and wiremen shall be held responsible jointly or severally for the quality of workmanship." This is relied upon to show that under the new system, in case of any adverse contingencies, the Government will be prevented from fastening the responsibility on the electrical contractor as he is not the person who has entered into the contract either with regard to the quality or quantity of the materials used as well as defaults in execution of the work. Various arguments raised by the parties were considered by this Court while passing the interim order dated 28.1.2010 which order has been confirmed by the Division Bench in W.A. No. 176/2010.

12. The main grievance raised is that the composite tender will result in monopoly to the civil contractors for electrical contracts to the exclusion of the electrical contractors. The interim order was passed after Ext.P6 circular was issued by the Government. This Court directed the Government to consider the grievance raised by the Petitioners. Paragraphs 10 and 11 of the said order contains various observations and directions which are extracted below:

10. But as pointed out by the learned Counsel for the Petitioners, monopoly by civil contractors in the field with the total exclusion of electrical contractors, has to be avoided. The circular Ext.P6 is not exhaustive in this regard. A reference to Ext.P2 report made by the Chief Engineer shows that both advantages and disadvantages of the proposed system have been detailed therein. One of the main disadvantage pointed out is that there will not be proper competition for the electrical part of the work and only limited number of electrical contractors will be involved when the composite tender is adopted. It is also specified that in the long run many of the electrical contractors may vanish who are not being supported by the civil contractors from the field. It is evident that even going by Ext.P6, unless electrical contractors are supported by civil contractors, they will not be able to participate in the tendering process. This aspect requires appropriate consideration at the hands of the Government, since the stipulations contained in P.W.D. Manual are elaborate. Of course, Ext.P6 contains a change of policy.

11. Therefore, while modifying the interim order allowing the Government to proceed with the finalisation of the tender which have been notified already, there will be a direction to the first and second Respondents to consider the grievances raised by the Petitioners regarding the possible exclusion of electrical contractors from the tendering process, especially in the light of the report Ext.P2 and evolve such conditions, even by including relevant clauses in the P.W.D. Manual, to avoid monopoly for civil contractors and allay any fears of exclusion of registered electrical contractors from tendering the electrical work. The counter affidavit now filed, has not elaborated on this aspect. It is open to the first Respondent to bring in a further circular in this regard. A counter affidavit explaining these aspects will be filed within six weeks, after considering various matters as directed above.

Therefore, the Government was specifically directed to consider the grievance regarding the possible exclusion of electrical contractors from the tendering process, especially in the light of Ext.P2 report, to avoid a monopoly for civil contractors and allay any fears of exclusion of registered electrical contractors from tendering electrical work. The Division Bench in W.A. No. 176/2010 filed against the interim order, also observed thus in para 3:

In the meanwhile, it is also to be observed that the grievance raised by the Petitioner regarding the possible exclusion of electrical contractors from the tendering process, being a general issue, can be raised before the Government. The grievance, according to the Appellant, is that by giving a combined contract for both civil and electrical work to the exclusion of the electrical contractor may result in monopoly for civil contractors. This is an aspect which has to be considered in the writ petition, after counter affidavit explaining this aspect is filed, within the stipulated time, as ordered by the learned Single Judge.

13. Ext.P8 circular evidently shows that none of these concerns have been answered by the Government. The Government has only reiterated the conditions in Exts.P3 and P6 with only a slight modification. The main grievance remains unaddressed even now.

14. With regard to the aspects concerning creation of monopoly in contracts in favour of a group, a Constitution Bench of the Apex Court in *Rashbihari Panda etc. Vs. State of Orissa*, considered a like issue. The facts of the case show that the Government invited offers for advance purchase only from purchasers during previous year who had carried out their obligations to the satisfaction of the Government in preference to open competition. It was held that the action of the Government was violative of Articles 14 and 19 of the Constitution of India. Paragraphs 18 and 19 laid down the principles thus:

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous wpc 28113 & 30556 of 2009 13 year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is *ex facie* arbitrary: it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year

carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in *Akadasi Padhan Vs. State of Orissa*, protected by Article 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6).

It was held that the scheme will benefit only a limited class of persons and it will exclude traders in Kendu leaves from carrying on their business.

15. The decision of the Apex Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, laid down the test to avoid arbitrariness and discrimination when the Government enters into contracts. The Apex Court laid down thus in para 12:

It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, 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 norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

The Apex Court relied upon the observations in *V. Punnen Thomas Vs. State of Kerala*, which was in the following terms:

The Government, is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

16. The decision of the Apex Court in *Jespar I. Slong Vs. State of Meghalaya and Others*, also reiterates the said legal principles in para 19 thus:

It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or

restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. (See para 7 of Hindustan Development case.) The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted.

17. The decision of the Apex Court in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, laid down the concept of level playing field for all bidders while considering Articles 14 and 19(1)(g) of the Constitution of India. It was held in para 36 that "level playing field is an important concept while considering Article 19(1)(g)." It was also held that "Article 14 of the Constitution embodies the principle of "non-discrimination." However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, articles 21 and 14 are the heart of the chapter on fundamental rights. They cover various aspects of life." It was finally held therein that "Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional." With regard to the terms and conditions of tender, their Lordships laid down thus in para 38:

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field.

Thus, it is important to notice that there should be legal certainty in respect of the norms and bench marks and absence or lack of the same will violate the concept of level playing field.

18. Judged in the light of the above principles, the question to be considered herein is whether the circulars Exts.P3, P6 and P8 provide any level playing field for any electrical contractors. The system of inviting tender only through the civil contractor will effectively deny any opportunity to submit tender for electrical contractors independently. The civil contractor will have to name the electrical contractor, going by Ext.P8 circular. It is therefore entirely upto the civil contractor to quote the rates for execution of the work and name the electrical contractors. The chance of the electrical contractor getting any work entirely depends upon the volition of the civil contractor. The same will result in absence of any competition from among electrical contractors, as the contractors will not be able to compete for the work on their own by submitting the tender. Therefore, the prospect of civil contractors getting monopoly in the field is writ large. They can on their own whims and fancies, join along with any of the electrical contractors whom they name, in the tenders. Even though it is provided that registration of electrical contractor/electrician will be a precondition for

carrying out the electrical works in PWD, that alone will not help the electrical contractors to participate in the tender, as pointed out already. Thus, the same violates the concept of level playing field resulting in violation of Article 19(1)(g) of the Constitution, as held in Reliance Energy's case (supra). Article 14 will be attracted while testing the validity of a Government policy. On both counts the circulars are invalid and arbitrary and discriminatory.

19. Learned Govt. Pleader submitted that the Government or the officers will be examining the qualification of electrical contractors at the prequalification stage. Such examination is only restricted to the examination of the credentials of the electrical contractors pointed out by the civil contractor. Therefore, it cannot be said to be a legal norm providing for any level playing field for an electrical contractor. The system provided in the PWD Manual for the electrical contractor to submit the tender, has therefore been given a go-bye.

20. The object sought to be achieved by the government are two fold; to restrict the damage to the building when an electrical contractor executes the work; and to avoid delay. It may be a laudable object, but still the norms adopted to achieve the laudable object shall not result in any discrimination and any arbitrary standards adopted will result in the standard or norm being held as violative of the Constitution. Therefore, any good intention for the Government alone cannot make the provisions of the circulars valid and there should be legal certainty and vagueness in the norms will lead to discrimination.

21. Apart from that, the directions issued by this Court in the interim order dated 28.1.2010 and that of the Division Bench in W.A. No. 176/2010 have not been addressed while issuing Ext.P8 circular. The grievances raised by the electrical contractors have not been met, evidently. The fact remains that the electrical contractors will be disabled from getting any electrical work unless they are allowed by the civil contractor to join the composite tender. How to ensure a level playing field for the electrical contractor, is the moot question. The failure of the Government to address the questions will render Exts.P3, P6 and P8 invalid, especially since the directions by this Court have not been adhered to at all.

22. Learned Govt. Pleader raised an objection that the writ petitions have been filed by associations and the associations have no fundamental right. Of course, the fundamental right of the contractors are involved in the matter of acceptance of tenders. The association has filed these writ petitions with regard to the change of policy itself which were admitted and interim orders were passed, which resulted in issuing Exts.P6 and P8 circulars. Apart from that, there is failure on the part of the Government in considering the matter as directed by this Court in the interim order dated 28.1.2010 and that of the Division Bench in W.A. No. 176/2010. Therefore, the contention that the writ petitions are not maintainable, cannot be accepted.

23. Therefore, the writ petitions are allowed. Exts.P3, P6 and P8 are quashed. The Government is directed to reconsider the matter in the light of the findings

rendered above, after addressing the grievances raised by the Petitioners and after hearing them, within a period of three months from the date of receipt of a copy of this judgment. Till then, the system provided in Ext.P1 to tender civil works and electrical works simultaneously, will prevail. It is made clear that the quashing of Exts.P3, P6 and P8 will not affect the works already tendered during the pendency of the writ petitions based on them as well as pursuant to the interim orders passed by this Court. No costs.