(2014) 01 KL CK 0006

In the High Court Of Kerala

Case No : W.A. Nos. 1338, 1354 of 2013 and W.P. (C) No. 21923 of 2013

Green Track Engineers and Construction (M/s.), Karunagappally — APPELLANT

Vs

Kerala Minerals and Metals Ltd. and Others — RESPONDENT

Date of Decision : 15-01-2014

Acts Referred:
Constitution of India, 1950 — Article 14, 19(1)(g), 21, 226

Citation : AIR 2014 Ker 70 : (2015) 2 BC 90 : (2014) 1 KHC 366

Hon'ble Judges : M.L. Joseph Francis, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : Grashious Kuriakose, Senior Advocate, N. Nandakumara Menon, Senior Advocate, M.K. Damodaran, Senior Advocate and George Mathews, Advocate for the Appellant; K. Anand, Senior Advocate, P. Santhalingam, Senior Advocate, Latha Krishnan and S. Sharan, Advocate for the Respondent

Judgement

K.T. Sankaran, J.—The Kerala Minerals and Metals Ltd., (hereinafter referred to as the ''KMML''), which is a Government of Kerala Undertaking, invited sealed competitive tenders from experienced contractors for the work of excavation and transportation of mineral sand from Kovilthottam area of the company for a period of one year. Tender notice dated 21/02/2013 was published in two Malayalam dailies on 24/02/2013. The tender notice showed that tender forms could be had from the office of Dy. General Manager (MS) of KMML on any working day from 04/03/2013 to 14/03/2013. Duly filled up tender alongwith EMD of Rupees Two lakhs was to be submitted before 2 pm on 15/03/2013. The tender notice also provided that the Commercial part of the tender would be opened at 2.30 pm on 15/03/2013. Three tenders were submitted. They were by (1) M/s. Deepthi Transport Services; (2) M/s. TVK Constructions; and (3) M/s. Green Track Engineers and Construction (hereinafter referred to as ''Deepthi'', ''TVK'' and ''Green Track'' respectively). The commercial part of the tender was opened on 15/03/2013 and it was found that ''Deepthi'' and ''TVK'' could be considered as qualified. In respect of the tender submitted by ''Green Track'', various discrepancies were noticed and therefore legal opinion was sought. On the basis of the legal opinion, the tender submitted by ''Green Track'' was rejected.

2. ''Green Track'' filed WP (C) No. 9984 of 2013 for the issue of a writ of certiorari or any other appropriate writ, order or direction to quash the order of ''KMML'' leading to the acceptance of the tender submitted by ''TVK'' and to declare that the non-acceptance of the tender submitted by ''Green Track'' was illegal, arbitrary and unjustifiable. There is also a prayer for the issue of a writ of mandamus directing ''KMML'' to accept the tender submitted by ''Green Track''. It is stated in the Writ Petition filed by ''Green Track'' that they submitted tender in the prescribed form along with the required earnest money deposit and solvency certificate. They quoted the rate of Rs. 350/- per metric tonne, while ''TVK'' quoted the rate of Rs. 410/- per metric tonne and ''Deepthi'' quoted Rs. 413/- per metric tonne. On 15/03/2013, ''Green Track'' was told by the officials of ''KMML'' that the commercial bid of ''Green Track'' was in order and the price bids would be opened on 03/04/2013. A representative of ''Green Track'' was present before the first respondent when the price bids were opened. However, on that day, he was told that the tender submitted by ''Green Track'' was rejected. ''Green Track'' filed a representation dated 04/04/2013 before ''KMML'' seeking to review its decision rejecting the tender. It is alleged in the Writ Petition that some of the top ranking officers of ''KMML'' colluded with ''TVK'' and acted in an arbitrary manner which is detrimental to the best interest of ''KMML'' and the public. The rate quoted by ''Green Track'' was the lowest and still the contract was awarded to ''TVK'' who quoted a much higher amount of Rs. 410/- per metric tonne.

3. WP (C) No. 10095 of 2013 was filed by one Renjith Babu to quash the proceedings accepting the tender of ''TVK'' and to issue a writ of mandamus commanding KMML to invite a fresh tender for the work in question. There is also a prayer to issue a writ of mandamus commanding ''KMML'' to consider Ext. P6 representation dated 05/04/2013 submitted by Renjith Babu.

4. In WP (C) No. 10095 of 2013 filed by Renjith Babu, he alleged the following among other. The petitioner was very much interested in participating the tender. As per the tender notification, tender forms were to be issued from 04/03/2013 to 14/03/2013. The petitioner went to the office of ''KMML'' to purchase tender form on 04/03/2013 itself. He frequently visited the office of ''KMML'' to purchase a tender form and he was informed that the tender date will be extended. ''KMML'' started issuing tender forms only on 11/03/2013. Renjith Babu, the petitioner, did not purchase the tender form since it was not possible for him to collect the details and to produce the documents required for pre-qualification before the last date fixed for submitting tender. Renjith Babu claims that he is a Government approved ''A'' class contractor and he has completed many prestigious projects of civil, mechanical and mining works for public and private undertakings, including the Government of Kerala. He has large infrastructure

facilities and machinery for doing big projects. Renjith Babu contended that as per the norms and regulations of ''KMML'', the tender proceedings should have at least thirty days'' time and the tender forms should be issued at least fifteen days before the last date for submitting the tender. The ''KMML'' commenced issuing tender forms only on 11/03/2013 with an intention of "ousting the competitive contractors other than the existing contractors". The existing contractors had got necessary information much in advance with respect to the documents required to be produced for pre-qualification. Renjith Babu submitted Ext. P2 representation dated 16/03/2013 to ''KMML'' to cancel the tender and to invite new tender giving opportunity to the competent contractors to participate in the bid. Only three tenders were submitted and all the three tender forms were issued on or after 11/03/2013. Two out of the tenderers are existing permanent contractors of ''KMML'' and the rates quoted by both of them were almost similar. The third tender submitted by another person was rejected for want of pre-qualification documents. It is also alleged that the rate quoted by both the existing contractors is higher by more than 50% of the existing rate. Renjith Babu also alleged that Sri. K. Radhakrishnan, Technician Grade II of ''KMML? is the son of the Managing Partner of ''TVK''. There was violation of Ext. P4 circular dated 09/09/2004 issued by ''KMML'' that relative of an employee should not normally be permitted to have business dealings with ''KMML''. Sri. Radhakrishnan, an employee of ''KMML'' was personally involved in the tender and he was a partner of ''TVK''.

5. In the counter-affidavit filed on behalf of ''KMML'' in WP (C) No. 9984 of 2013, the details were furnished regarding the grounds on which the tender submitted by ''Green Track'' was rejected. It was contended that ''Green Track'' did not satisfy the eligibility criteria in the tender conditions. In the counter-affidavit filed on behalf of ''KMML'' in WP (C) No. 10095 of 2013, it was contended that Renjith Babu, the petitioner, has no locus standi to challenge the tender proceedings since he did not even purchase the tender form. It was contended that "assuming without conceding that there were any humanly impossible conditions, the petitioner could have purchased the tender form and sought for appropriate release from the first respondent for satisfying such conditions". With regard to the mala fides alleged, ''KMML'' stated in the counter-affidavit thus:

Further Mr. Radhakrishnan, Technician Gr.II has resigned from the service of the company. Moreover, the father of Sri. Radhakrishnan is the contractor of the Company from 1981 onwards. Ext. P5 partnership is dated 18/12/2006 whereas the said Radhakrishnan who has ceased to be the employee is included as a partner and the amended partnership deed is also produced by the contractor.

6. A reply affidavit was filed by Renjith Babu, the petitioner in WP (C) No. 10095 of 2013, in which it was contended that ''KMML'' did not specifically deny the allegation that tender forms were issued only on 11/03/2013 and therefore, the allegation in the Writ Petition should be treated as admitted. It was also averred that Sri. Radhakrishnan resigned from ''KMML'' on 06/04/2013, after opening the

tender on 04/04/2013, after ensuring that he would be awarded the tender. That information regarding resignation of Radhakrishnan was received by Renjith Babu under the Right to Information Act and it was marked as Ext. P7. It was also alleged that after resigning from ''KMML'', Sri. Radhakrishnan had taken charge as the Executive Director of ''TVK''. Sri. Radhakrishnan attended the meeting for settlement of memorandum with the unions of ''KMML''. As per the standing procedures in ''KMML'', a tender for the work of such magnitude and nature as the present one has to be published in the official website of the company, but that was not followed in the present case. Ext. P8 application was submitted by Renjith Babu under the Right to Information Act for providing the details of approval of tender forms and also the copy of the approval. However, the Public Information Officer of ''KMML'' refused to give the details on the ground that cases are pending before the High Court.

7. The learned Single Judge dismissed the Writ Petitions filed by ''Green Track'' and Renjith Babu as per the judgment dated 5th August, 2013, which is under challenge in WA Nos. 1338 and 1354 of 2013 filed by ''Green Track'' and Renjith Babu respectively. The learned Single Judge held that Ext. P4 circular dated 09/09/2004 issued by ''KMML'', which was relied on by Renjith Babu in WP (C) No. 10095 of 2013, is not applicable to the tender invited as per Ext. P1 and it is something different "from the scope of the situation sought to be dealt with as per the said circular". The learned Single Judge also held that the circular is only an internal communication for the guidance of the company and it applies only to transporting contract. The circular is not applicable to the contract for excavation and transportation involved in the contract in question. The learned Single Judge also held that "the circular does not impose any ''total ban'' as such, but only places some restrictions with regard to the engagement of vehicles owned by the employees or members of their family". The learned Single Judge found that the hike in the rate was justifiable.

8. WP (C) No. 21923 of 2013 is a public interest litigation. That Writ Petition was filed by Anil Kumar and two others for the issue of a writ of certiorari to quash all the proceedings with respect to Ext. P1 tender notice and for the issue of a writ of mandamus commanding ''KMML'' to conduct re-tender. There is also a prayer to direct the State of Kerala to constitute a high level expert team consisting of Technical Experts, Auditors and Cost Accountants to conduct an impartial and independent enquiry into the lapses, maladministration and corruption in ''KMML'' in the matter of award of public contracts and to fix the responsibility and recover damages from the erring officials. In the alternative, the petitioners pray for conducting a vigilance enquiry in the matter of grant of public contracts in ''KMML''. The public interest litigation was filed after the disposal of the aforesaid Writ Petitions by the learned Single Judge.

9. Since common questions are involved in the two Writ Appeals and in WP (C) No. 21923 of 2013, all the cases were heard together.

10. Heard Senior Advocates Sri. N. Nandakumara Menon, Sri. Grashious

Kuriakose and Sri. M.K. Damodharan appearing for the appellants and the writ petitioners and Senior Advocate Sri. Santhalingam for the successful bidder and Senior Advocate Sri. Anand for ''KMML''.

11. The relevant files with respect to the award of contract was produced by ''KMML'' for our perusal.

12. Certain facts are not in dispute. They are the following:

(i) The contract in question involves excavation and transportation of a total quantity of 2,73,000 MT of mineral sand for one year. Per month, a quantity of 22,750 MT of mineral sand is expected to be excavated and transported.

(ii) The tender notice is dated 21/02/2013. It was published in Malayala Manorama daily on 24/02/2013. In the tender notice, it is stated that detailed tender forms could be had from the office of ''KMML'' on any working day from 04/03/2013 to 14/03/2013. The duly filled tender should be submitted along with EMD of Rupees Two lakhs before 2 pm on 15/03/2013.

(iii) Final approval for issuing tender forms was granted by ''KMML'' on 11/03/2013. The tender forms were issued only from 11/03/2013 onwards.

(iv) The commercial bid was opened at 2.30 pm on 15/03/2013.

(v) Three persons submitted tenders: (a) ''Green Track'' (Rs. 350/- per MT), (b) ''TVK'' (Rs. 410/- per MT) and (c) ''Deepthi'' (Rs. 413/- per MT).

(vi) The tender submitted by ''Green Track'' was rejected as they did not satisfy the pre-qualification conditions.

(vii) The price bid was opened on 04/04/2013.

(viii) In the negotiation with ''TVK'' they reduced the rate from Rs. 410/- to Rs. 393/-.

(ix) ''TVK'' was declared as the successful bidder.

(x) ''Deepthi'' was the contractor for the same work during the last six months before issuing the tender notice.

13. The Writ Petitions were filed by Renjith Babu and ''Green Track'' on 08/04/2013. An order of status quo was issued on 27/06/2013. The cases were posted on 02/07/2013 and they were heard on 04/07/2013 and judgment was reserved. The judgment was pronounced on 05/08/2013. However, the excavation work was commenced on 25/07/2013 and the work of transporting of sand was started on 01/08/2013. During the months of August and September, 2013, the successful bidder transported 39,500 and 41,000 MT of mineral sand respectively.

14. Sri. K. Radhakrishnan was working as Technician Grade II in ''KMML''. As per the partnership deed, Sri. Radhakrishnan was a partner of ''TVK'' and Sri. T.V.

Kunjukrishnan, aged 82 years, was the Managing Partner. Sri. Radhakrishnan retired from the partnership on 18/12/2006. Sri. Radhakrishnan resigned from ''KMML'' on 06/04/2013, after the date of opening of commercial bid and price bid (15/03/2013 and 04/04/2013 respectively). The partnership of ''TVK'' was reconstituted on 08/05/2013. Sri. Radhakrishnan was inducted as Executive Director of ''TVK'' and he participated in the meeting with the unions of the company for arriving at a memorandum of settlement.

15. In clause (4) of Vigilance Circular No. 2/2011 dated 04/01/2011 (Ext. P8 in WP (C) No. 21923 of 2013) under the heading "inviting Tenders", it is provided thus:

Ensure adequate time for submission of offers.

A minimum time of 21 days, 30 days and 45 days should be given for limited, press and global tenders respectively. Time should be counted from the date of publication of tender notice.

16. Ext. P4 circular produced in WP (C) No. 10095 of 2013 reads as follows:

THE KERALA MINERALS AND METALS LIMITED

TP/PD/PL-55/04 9.9.2004

CIRCULAR

Sub: Involvement of Company employees in contract work arrangements of the company-reg.

......

It is reported that certain employees are getting involved directly or indirectly in the various contract works of the company for personal purposes. It is also indicated that with respect to hiring of vehicles etc. on contract in the company certain employees have provided vehicles which are in their own name or in the name of their family members etc. The above practice is highly detrimental to the interests of the company. It is informed that employees and their family members are prohibited from getting involved in any such activity connected with the business of the company. In case of business dealing with the company by any relatives of any employee the employee concerned should invariably inform the same to the company in writing. Violation of above instructions will be viewed very seriously.

Sd/- JT. GENERAL MANAGER (P&A) For MANAGING DIRECTOR

17. Ext. P4 circular was issued when it was reported that certain employees of ''KMML'' were getting involved directly or indirectly in the various contract works of the company for "personal purposes". Another reason indicated in the circular was with respect to hiring of vehicles on contract in the company, certain employees of the company had provided vehicles in their own name or in the name of their family members. ''KMML'' took the view that the said practice is

highly detrimental to the interests of the company and, therefore, the employees and their family members were prohibited from getting involved in any activity connected with the business of the company. On a fair reading of Ext. P4 circular dated 09/09/2004, we are of the view that the circular relates to all the business activities of ''KMML'' and it is not confined to transporting contract alone. The view taken by the learned Single Judge that the circular applies only to transporting contract and it does not apply to the contract of excavation and transportation of mineral sand is erroneous.

18. The observation made by the learned Single Judge that the circular does not impose any total ban as such, but only places some restrictions with regard to the engagement of vehicles owned by the employees or members of their family, also does not appear to be correct. Whether there is any total ban or not, the question to be considered is whether an employee of ''KMML'', namely, Sri. K. Radhakrishnan, had unfair business dealings to the detriment of the interests of ''KMML and the other tenderers other than ''TVK''.

19. From the facts narrated above, it is clear that Sri. K. Radhakrishnan, Technician Grade II of ''KMML'', who was in the service of the company till 06/04/2013, became the Executive Director of ''TVK'', the successful bidder, on 08/05/2013. It is also to be noted that the commercial bid was opened on 15/03/2013 and the price bid was opened on 04/04/2013, while Sri. K. Radhakrishnan was in service of ''KMML''. The contention put forward by the writ petitioners that Sri. K. Radhakrishnan was able to influence the higher ups in ''KMML'' to award the contract in favour of ''TVK'' is not unfounded. It is also relevant to note that the contract in question involves excavation and removal of 2,73,000 MT of mineral sand.

20. As per the tender notification dated 21/02/2013, which was published in the newspaper on 24/02/2013, the tender forms should have been ready for issue from 04/03/2013 to 14/03/2013. However, it is an admitted case that final approval for issuing tender forms was granted on 11/03/2013 and tender forms were issued from 11/03/2013 onwards. This was clearly in violation of the tender notification. The contention raised by ''KMML that extension of time could be sought for, for furnishing the details in the tender form, is without any substance. There is no provision for extension of time for furnishing the details required to be furnished along with the tender. No tenderer would be entitled to, as of right, seek for extension of time. The contention put forward on behalf of ''KMML that approval was granted by the Managing Director to reduce the period for submitting tenders and therefore nobody could complain that they did not get sufficient time, is without merit. After publishing the tender notification in which it was informed to the prospective tenderers that the tender forms would be available from 04/03/2013 to 14/03/2013 thereby providing them twelve days'' time to submit the tender, ''KMML'' was not justified in reducing that period by issuing the tender forms only on 11/03/2013. The privilege provided to the prospective tenderers to avail twelve days'' time to collect all the necessary

details to be furnished in the tender form and to collect all the necessary documents to be produced along with the same cannot be unilaterally withdrawn by ''KMML'' to the detriment of the interests of the prospective tenderers. The file produced by ''KMML shows that a decision was taken by ''KMML'' that tender notice was to be published before 26/02/2013 and the tenderers should be provided time upto 15/03/2013 to submit tenders. It is also noted in the file that in order to finalise the tender and issue the work order by second week of April, to avoid stoppage of work, the tender period was reduced to twenty days. Normally the period to be provided was thirty days and it was reduced to twenty days. Still, the tender forms were issued only four days before the last date for submitting tenders. The procedure adopted by ''KMML'' was patently illegal. If the writ petitioners allege that such a procedure was adopted only to weed out eligible contractors and to favour some of the existing contractors, they cannot be blamed. ''KMML'' did not act fairly, which resulted in prejudice to the tenderers and loss to ''KMML'', that means, loss of public money. It is also relevant to note in this context that there was an increase by 59.26% in the total rate when compared to the existing rate. The files also would show that by such increase the estimated financial implication would increase from Rs. 7.45 crores to Rs. 12.55 crores. It was noted in the file that it would be better to invite re-tenders for getting a fair rate. However, the tender committee which met on 09/04/2013, recommended to the Managing Director for approval to negotiate the rates with the tenderer. Accordingly, ''TVK'' reduced their rate from Rs. 410/- to X 393/- per metric tonne. The undisputed facts would clearly indicate that by reducing the time for submitting tenders from twelve days to four days by issuing the tender forms belatedly, ''KMML'' stood to lose and the successful bidder got the contract at a very high rate than the existing rate. It is also relevant to note that ''Green Track'' quoted Rs. 350/- per MT and ''TVK'' quoted Rs. 410/- per MT, which was reduced to X 393/- per MT after negotiation. We are of the view that the proceedings by which the contract was awarded to ''TVK'' is vitiated by unreasonableness, arbitrariness and malice. We are also of the view that ''KMML'' acted so due to the influence exerted by Sri. K. Radhakrishnan, an employee of the company who later became the Executive Director of the successful bidder.

21. In Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others, the Supreme Court held thus:

16. The law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/ public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money deposit, etc. The award of government contracts through pubic auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in government procurement, to promote healthy competition among the tenderers, to provide for fair and

equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution.....

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18. The law is, thus, clear that ordinarily all contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well-known newspapers having vide circulation, so that all eligible persons will have an opportunity to bid in the bid (sic auction), and there is total transparency. In our opinion this is an essential requirement in a democracy, where the people are supreme, and all official acts must be actuated by the public interest, and should inspire public confidence.

22. In Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, , the Supreme Court held thus:

36. Standards applied by Courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a freestanding 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, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others, . Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to sub-serve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important

elements of the "rule of law" is legal certainty. 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.

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39. In Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, , the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/ benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law. In Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, , the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.

23. In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , a three Judge Bench of the Supreme Court held thus:

20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and

relevance.

21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well settled as a result of the decisions of this Court in E.P. Royappa Vs. State of Tamil Nadu and Another, and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory : it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.......The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination......

24. It is well settled that the Courts can scrutinise the award of contracts by the Government or its agencies in exercise of their power of judicial review to prevent arbitrariness or favouritism. However, there are inherent limits in the exercise of power of judicial review in such matters. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. (See Tata Cellular Vs. Union of India, and B.S.N.L. Ltd. and Another Vs. Bhupender Minhas and Others, .

25. As held in Jagdish Mandal Vs. State of Orissa and Others, , before interfering with tender or contractual matters in exercise of the power of judicial review, the Court should pose to itself the following questions: (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or (ii) Whether the process adopted or decision made is so arbitrary and irrational that the Court can say that ''the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached''; (iii) Whether public interest is affected. These principles were followed in Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, and Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, .

26. Learned Senior Counsel appearing for ''TVK'' and KMML" contended that the petitioners in WP (C) No. 21923 of 2013 (the public interest litigation) cannot pray for re-tender since the petitioners therein did not participate in the tender. The counsel relied on the decision of the Supreme Court in Villianur Iyarkkai Padukappu Maiyam Vs. Union of India (UOI) and Others, . In that case, neither the persons who had participated in the selection process nor any other person

interested had come forward to challenge the selection procedure adopted by the Government or selection of respondent No. 11 as Developer of the Pondicherry Airport. The Supreme Court in that judgment relied on the decision in BALCO Employees Union (Regd.) Vs. Union of India and Others, , wherein it was held that the public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. In BALCO Employees Union (Regd.) Vs. Union of India and Others, it was held thus:

88. It will be seen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to Court due to some disadvantage. In those cases also it is the legal rights which are secured by the Courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a Court of law, but, a public interest litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the Court is satisfied that there has been violation of Article 21 and the persons adversely affected are unable to approach the Court.

27. Sri. M.K. Damodaran, the learned Senior Counsel appearing for the petitioners in the public interest litigation submitted that the prayer in the Writ Petition includes a prayer to conduct an impartial and independent enquiry by the State of Kerala with respect to the lapses, maladministration and corruption in ''KMML'' in the matter of awarding of public contracts and to fix responsibility and to recover damages from the erring officials. There is also an alternative prayer to conduct a vigilance enquiry in the matter of grant of public contracts in ''KMML. The learned Senior Counsel also submitted that the averments in the Writ Petition would justify the institution of a public interest litigation.

28. Relying on the decision of the Supreme Court in The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, , it was contended by the learned Senior Counsel for ''KMML'' that the settled legal proposition is that matters or disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. The writ Court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. On a perusal of the facts of the case in The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, , it can be seen that the decision is not applicable to the facts of the present case.

29. In Meerut Development Authority Vs. Association of Management Studies and Another, , the Supreme Court held thus:

26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

30. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , the Supreme Court held thus: 7.......But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, is corporations, instrumentalities and agencies have the public duty to be fair to all concerned. 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.

From the facts narrated above, it is clear that ''KMML'' did not adhere to the tender conditions. The intending tenderers were denied of an opportunity to participate in the tender and to submit the tender forms along with necessary documents, details and data, it would appear that ''KMML'' was not interested in getting maximum number of bids so that the contract could be awarded at a reasonable rate. They were interested in choosing either of the existing contractors and in that process they chose ''TVK'', though the rate quoted by them was very high when compared to the rate quoted for the previous year. ''Green Track'' quoted the lowest rate. But their bid was not accepted and they were eliminated on opening the commercial bid. Specific averments were made by Renjith Babu that he did not think it fit to get the tender form since there was no sufficient and reasonable time to submit the tender incorporating the necessary details. Monetary stake involved is very high and ''KMML'' accepted the tender of ''TVK'' at a rate more than 50% above the existing rate, thereby ''KMML'' chose to spend crores of rupees more. This was pointed out by the officials of ''KMML'', but that was apparently not accepted. We are of the view that the award of the work in favour of ''TVK'' is vitiated by mala fides, unreasonableness and arbitrariness. It was to favour the successful tenderer. In the larger public interest, the Court would not be justified in accepting the contention of ''KMML''. For the aforesaid reasons, we allow the Writ Appeals, set aside the judgment of the learned Single Judge and allow WP (C) Nos. 9984 and 10095 of 2013. Since the aforesaid Writ Petitions are allowed, we are of the view that, for the time being, it is not necessary to consider on merits WP (C) No. 21923 of 2013. All the contentions put forward by the petitioners in WP (C) No. 21923 of 2013 are left open and the petitioners would be entitled to approach this Court as and when occasion arises.