

(2001) 01 KL CK 0061

In the High Court Of Kerala

Case No : O.P. No's. 29222 of 2000-D and 31544 of 2000-E

K. Moideenkutty Haji

APPELLANT

Vs

Superintending Engineer, P.W.D. and Others

RESPONDENT

Date of Decision : 05-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 299

Citation : AIR 2001 Ker 294

Hon'ble Judges : M. Ramchandran, J

Bench : Single Bench

Advocate : R.M. Sreedharan, N. Unnikrishana and M. Lalitha Nair, for the Appellant; Govt. Pleader, V.V. Nandagopal for Respondent Nos. 1 and 2 and T.P. Kalu Nambiar, for the Respondent

Final Decision : Allowed

Judgement

M. Ramchandran, J.—The above Original Petitions were jointly heard, in view of the nature of reliefs prayed for by the petitioners. The petitioners inter alia challenged the award of contract by the Public Works Department of the State in favour of a Co-operative Society, and has also challenged the constitutionality of the Government Order, which facilitated the Department to award contracts to Labour Contract Co-operative Societies incidental issues had also arisen. The brief facts for the purpose of deciding the matter are narrated hereunder :

2. The petitioner in O.P. No. 29222 of 2000 is an A Class registered P.W.D. Contractor, with substantial experience. The Superintending Engineer, P.W.D. Roads and Bridges, North Circle, Kozhikode [1st respondent) had issued a pre-qualification-cum-Tender Notice on 20-6-2000 calling for bids for the work of improvement of a road. The estimated cost as notified was Rs. 236 lakhs. Pre-qualification documents and tender forms were to be furnished along with Earnest Money Deposit or furnished along with Earnest Money Deposit of Rs. 50,000/-. The specification of tender as per the notice was:

"A Class contractors/firms registered with the State P.W.D. having experience in the construction works of similar nature and who consider themselves capable of constructing the project should obtain pre-qualification documents and tender schedule of the above project from the office of the undersigned from any working day from 18- 7-2000 to 25-7-2000 between 10.15 a.m. and 5.15 p.m. on payment of Rs. 4,000/- + S.T. in cash."

The petitioner satisfied the norms and quoted a rate of 24.99% below the PAC. Two other contractors also quoted below the PAC, but rates were higher. The third respondent-Society quoted 5% above the PAC. But the first respondent had preferred the Society for awarding the work, on the basis of Ext. P3 Government Order dated 13-11-1997, and decided to give such work to the Society at 14.99% below the PAC. This is the-subject matter of challenge. As pointed out earlier, the Government Order is also attacked.

3. In O.P. No. 31544/2000, the petitioner's quotation for a work specified in Ext. P1 was 2.1% below the PAC amount of Rs. 44 Lakhs, All the other tenderers, including the Labour Contract Society (3rd respondent) had quoted prices higher than the PAC, but in this case also, overlooking the petitioner the society had been preferred, for a price of 9% above the PAC. This again was due to the mischief of the self-Government order dated 13-11-1997. It had been provided in the order that if a Labour Contract Society was among the tenderers, irrespective of their quotation, if they were willing to take up the contract, it had to be awarded to them at 10% above the lowest quoted rate. The conduct of the first respondent and the vires of the Government Order is therefore questioned.

4. Mr. K. Chandrasekharan, Senior Counsel had appeared on instructions, on behalf of the petitioner in O.P. No. 29222 of 2000. Mr. T.M. Sreedharan had appeared for the petitioner in O.P. No. 31544/2000. Mr. T.P. Kelu Mamblar. Senior Counsel had addressed the Court on behalf of the Labour Contract Society. I had heard the learned Government Pleader Sri Suresh Babu as well. Every one of the points urged in the Original Petitions and the Counter-affidavits had been elaborately referred to and the counsel had also made reference to the catena of decisions of this Court as also the Supreme Court. The petitioner's argument could be summarised as covering the following points :

1. As the highest tender, the petitioners were entitled to preference;
2. Fairness demanded that for rejection of their claims proper reasons were to be there on record.
3. The tender never referred to any preference to a Labour Contract Society.
4. Subsequent introduction of the above condition was inadmissible and vitiated the selection.
5. The Government order was not to be adopted for preferring the Society, it was not binding.

6. The Government Order interfered with the principles of equality; it affected the fundamental rights of the petitioners.

7. Even if the order was valid, it had no application to either of the contracts and preference sought to be given to the society was misconceived.

8. Preference shown to the society caused loss to public exchequer, and therefore was against public interest.

9. In any case, the third respondent Society, in view of the magnitude of their operations, did not deserve to be included within the purview of the Government Order.

5. Sri Nambfar refuted the allegations and canvassed for a position that the work covered by the notices were commercial work, and not statutory contracts, and therefore the Original Petitions were not maintainable. It was further urged that it did not come with grace from the petitioner, that the Government order was not relevant, and the tender notification sufficiently clarified the position, he also submitted that awarding of contract to a Co-operative society was in public interest, and the position had been upheld by various decisions. He had also pointed out that the Government Order was presumed to be known by all concerned, and it incorporated a sound policy, and was valid in all respects.

6. From a reading of Ext. P3 order, I do not think I would be justified in accepting the case of the petitioners that it is an order in any way interfering with the fundamental rights of the petitioners. Initially issued in 1974, it had been revised from time to time to reach its present form. The order proceeds on the basis that specified Labour Contract Societies get a preference in the public works of simple nature, on a priority, and ignoring the lowest quotation received, if the Society is prepared to accept the work by agreeing for carrying out the work on a 10% increase than the lowest quoted rates, the work has to be awarded to them.

7. As pointed out by this Court in O.P. No. 26380 of 1998, as Government have got a purpose in issuing the order, it could not be said to be illegal. It is submitted that irrespective of Society's quoted price, their presence spelt preference, if the G.O. was upheld. Submission of quotation alone was sufficient to award them the works, as they could take the job if they offered 10% higher rate than any other tender. But, since such benefits are extended to a Co-operative Society, by way of a policy, I am not prepared to hold that the order perpetrates discrimination. The Government might have in mind that awarding of the contract automatically ensured work to a sizeable section of unorganised sector, and the profits went to them directly, and the unemployment situation stood solved at least to such extent. In the absence of a better method of Selection, I am not prepared to set aside Ext. P3 order. In the matter of awarding the contracts, Government was competent to impose conditions, and it is beyond the scope of jurisdiction of this Court to comment upon the tender conditions laid down from time to time.

8. The question to be considered at this point is whether the first respondent was justified in relying on the Government Order, and if it had application, whether in the two cases at hand, the order had any impact so as to defeat the claims of the petitioners. In this respect, I may first examine whether the existence of the order ipso facto and automatically compelled absolute exclusion of others. It is found that the right as conferred is not absolute even if in every contract the norms prescribed by the G.O. were applicable, The expression used in Clause 7 of Ext. P4 order is :

"The following types of works may be entrusted to the Labour Contract Co-operative Societies as per this order :

- (a) Earth works of all types, simple masonry works relating to minor and medium irrigation projects and construction of roads;
- (b) Simple building works like construction of school buildings, hostels etc.;
- (c) Maintenance and minor repairs of Roads and Buildings;
- (d) Supply in bulk quantities of building materials, stones, stone blast and sand;
- (c) Other items of works not involving skilled labour;
- (f) Where skilled work and unskilled works are combined, the work will be awarded at the discretion of the work awarding authority."

These were works of simple nature, where an element of extra skill were not to be exhibited. By the very terms, there was discretion given to the awarding authority and the petitioners apparently are under a misapprehension that the terms were rigid and required absolute obedience.

9. Now the first part of the second limb of the arguments may be taken notice of. That is whether in respect of the two contracts, the Superintending Engineer was entitled to take cover of the order. The petitioners submitted that they were Unaware of the existence of the above order and it was a condition suggested at a later occasion. Reference is made by them to the tender notification (Ext. P1). The last paragraph of the notification was to the following effect:

"All other conditions prevailing in P.W.D. regarding the pre-qualification bids and tender documents will remain unchanged and are equally applicable to this work also. The condition mentioned in the G.O. (P) 81/97/ PW&T dt. 19-8-1997 will be applicable to this tender also."

The number of the Government order dated 19-8-1997 is given differently, but this can obviously be a mistake. But that is not the basis of the dispute. Petitioners argue that the conditions specially made applicable are those conditions regarding pre-qualification bids and tender documents, and they are stated as unchanged. Apart from this, the specific order is the one dated 19-8-1997. There is not even a distinct reference to G.O. (MS) 135/97 dated 13-11-1997, which is found to be issued by the Department of Co-operation. The

petitioners point out that if specific reference was made to Ext. P3 they would have avoided the invitation altogether and would not have spent time, money and energy on such hopeless pursuits.

10. The counter-affidavits filed by the third respondent and the Government proceed on the basis that the Government Order was well known and accepted in the relevant circles, and being experienced contractors, the petitioners are presumed to have known about it. But I find difficulty in accepting the above proposition. Ext. P3 was an order extending preferential terms and conditions to Labour Contract Societies. The relevant clause which mandates giving of such work is Clause 8 (b) (i) extracted herein below :

"When the lowest tender is from a private contractor, the Labour Contract Co-operative Society will be awarded the work at 10% above the lowest tender, if the Society is willing to do the work. The work awarding Authority should ascertain the willingness of the Labour Contract Society in writing,"

The nature of work and whether it was classified as one which could be entrusted to a Labour Contract Society was within the exclusive knowledge of the Government. Ext. P3, as referred to earlier, differentiated between a work which was simple, and another which was skilled. Therefore, when quotations were invited, it was incumbent on the part of the Government authorities to specify that such work was of such a category as was likely to be awarded to a Labour Contract Society. The Department had all the dates with them, and the worth of the work was already an assessed matter, as was evidenced by the PAC. Invitation of tenders without disclosing the intention to award such work to the Labour Contract Society was therefore an exercise which could not be characterised as fair. It did not serve the avowed objective of the Government order. Therefore, it is to be assumed that the attempt to cordon off the above two works to the Co-operative sector, we should find was a decision taken at a later point of time. Shri Chandrasekharan is therefore right when he submits that it is a condition that has been brought into being after the tender notice was issued, and tenders were received. Government will have occasion to issue orders on various subjects and in various situations, but it may not be possible for every one to keep abreast of such orders unless they are appropriately notified. Ext. P3 is described as one in the category of G.O. (MS), the expanded form of MS being manuscript. It is not notified or gazetted, and as pointed out by the petitioners, is issued by the Department of Co-operation. Sri Nambiar pointed out that Ext. P1 notice specifically referred to the application of all other conditions prevailing in PWD as automatically being expressly made applicable. But the conditions prevailing in PWD regarding the pre-qualification bids and tender documents were alone made applicable to the work. Ext. P3 could not at all be treated as one coming within the above. The specific reference to a Government order also leads to a conclusion that general orders in the nature of Ext. P3 was not in contemplation, in the above circumstances, since the import of Ext. P3 was an additional condition, it has to be treated as a variation of the

original conditions of the tender, and preference sought to be given to the third respondent on the strength of Ext. P3 is unsupportable. Proceedings whereby the contract is awarded to the third respondent notwithstanding their offers were also disadvantageous to the Government, and therefore is illegal. As there has been no adverse remarks as against the petitioners, and they have been sidelined only because of the impact of Ext. P3, the respective contract works are to be awarded in favour of the petitioners who have quoted the lowest price and agreements finalised. 11. Another aspect concerning the second limb of arguments also is to be noticed, Even if Ext. P3 was automatically applicable, in the cases at hands, the third respondent could not have been given the privilege, as emanating from the above order. In respect of the work referred to Ext. P1 in O.P. No. 29222/2000, especially there is thus an added reason for interfering with the proceedings. The probable amount of contract (PAC) is shown as rupees two crores and thirtyfive lakhs. Ext. P3 does not at all visualise for reserving a contract of such magntiude for the Society. Even though it is well settled that the lowest tenderer may not be eligible to claim award of contract for that sole reason alone, in the present case pleadings do show that the third respondent is given priority solely on the basis of Ext. P3, Work was offered to them at rates 10% higher than the lowest quotation, but I am afraid this is not permissible at all on the face of the recitals in Ext. P3. Clause 6 of Ext. P3, so as to get advantage of the order sets limit to items of work. For easy reference, Clause 6 is extracted herein below, with the foot notes ;

"(6) the limits up to which a particular item of work entrusted to the societies and the total value of works a society may have on hand at any time will be regulated as follows :

Class of Society Limit for each item work Maximum valu of works on hand at a time. Audit classification Average Number of members employed by the Society at least 20 days in one year for the last three years or last year.

A Class Rs. 10 lakhs Rs. 50 lakhs A or B 150

B Class Rs. 5 lakhs Rs. 25 lakhs A or B 100

C Class Rs. 2 lakhs Rs. 10 lakhs B or C 25

NOTE:

(1) The estimated cost will be reckoned for purposes of assessing the maximum cost of works which a Society is allowed to take up. While submitting tenders, each Society should furnish a certificate showing the cost of works they have on hand duly countersigned by the Assistant Registrar of Cooperative Societies (General) concerned of the Co-operative Department. The certificate should also indicate that the tenders already awarded to the Society have not been sub-let.

(2) The Labour Contract Co-operative Societies will be at liberty to take up works as any other private contractor on the basis of the tenders submitted by them without availing themselves of the concessions contemplated in this G.O. The

cost of works so undertaken will not be taken into account while reckoning the maximum costs of works on hand at any time for purposes of entrusting the work at concessional rates."

It has to be appreciated that these upper limits themselves were set in view of the recommendations of the Registrar of Cooperative Societies in November, 1997. The limit for each item of work for an A Class Society like the third respondent is stipulated as Rs. 10 lakhs. The maximum value of work at hand at a time is to be Rs.50 lakhs. Correspondent to the above, work of Ext. P1 was more than 4 times higher in value. In this context, what was to be followed was note 2, Societies like the third respondent could quote for works as any other private contractor, without availing concessions contemplated in the order. This was the situation at hand. In all probability, this might have been the situation in respect of Ext. P1 contract in the connected writ petition, since the certificate produced by the Society as Ext. R3 (c) shows that they are engaged in a work worth over Rs. one Crore. When the order says that the objective is to engage the workers Society at "concessional rates" the above has no relevance in the respect of the works concerned. Exts. R3(b) to R3(f) produced by them show that it is not a struggling establishment with hand to mouth existence, needing encouragement by concessions. When they claim that they have assets over Rs. ten crores, and annual turnover of about Rs. 3 crores including building, landed properties, quarrying sites and transport vehicles, they are definitely better than at least several other A class contractors. Perhaps they have grown by dint of hard work, and a protective atmosphere, but as rightly pointed out by Ext. P3, in major works, they have to compete with others on equal terms, and there is no logic in soliciting concessional rates.

12. I may also refer to the legal propositions that have been projected by either sides Sri Kelu Nambiar pointed out that when there is no prima facie irregularity in the award of contract, interference in exercise of the jurisdiction under Article 226 of the Constitution is uncalled for. Reference was made to Fertiliser Corporation Kamgar Union (Regd.). Sindri v. Union of India 1981 10 SCC 568 : (AIR 1981 SC 344) which laid down as follows :

"The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a Government Company has acted fairly, even if it has faltered in its wisdom, the Court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with norms of procedure set for it by rules of public administration."

The Senior Counsel also referred to a paragraph in Tata Cellular Vs. Union of India, to the following effect at page 25 of AIR :

"Judicial quest in administrative matters has been to And the right balance between the administrative discretion to decide matters and the need to remedy

any unfairness, such an unfairness is set right by judicial review."

The submission was that it was not in every case interference was warranted, but the attendant circumstances were also equally to be examined before upsetting an order. The learned counsel also referred to the *Wednesbury* unreasonableness as referred to in the *Tata Cellular Vs. Union of India*, as also the decision reported in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, . It was submitted that in that decision, the earlier decisions had been meticulously analysed, and the principles had been laid down that before interfering, the Court must be satisfied that there is some element of public interest involved. Adverting to the decision in *Kaikkara Construction Co. v. Govt. of Kerala*,, AIR 1999 Ker 122 it was also submitted that the judicial review was intended to prevent arbitrariness or favouritism, and to see whether the contract was awarded for collateral purposes. Decision of the Supreme Court in *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, also had been cited to high light the above proposition.

13. The counsel for the petitioners on the other hand had referred to the decision in *Harminder Singh Arora Vs. Union of India (UOI) and Others*, as also the decision in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, . It had been pointed out that the moment it was found that the award was given to a party on a basis which it did not originally proclaim, the conferment become tainted. Preference to a Co-operative Society was not a condition of tender. When admittedly this was the criterion which weighed automatically the award of the contract suffered from the basic error. It could not have been rectified, and the third respondent was being preferred for the only reason that it was a Co-operative Society and the price quoted was permitted to be streamlined so as to make it come within the ambit of the Government Order. Reference was also made to an unreported decision in O.P. No. 3149 of 1998, when it had been found that Ext. P3 had been referred to. But it is found that the decision proceeded on the peculiar facts of the case. The proposition as presented is not disputed by the respondent, but they stick on to the position that there was no variation of tender conditions. I have already found that preference sought to be given to a Co-operative Society could not be read in the tender notices as a governing condition. I have also found that in any view of the matter, the third respondent in view of its resources did not merit to be equated with Societies which were within the parameters of Ext. P3 order. As these aspects have been overlooked while the contract was awarded, the petitioners are entitled to succeed.

14. In the aforesaid circumstances, the selection of the third respondent was unmerited, it did not serve any public interest. I am not examining whether it worked out to a position violating the fundamental rights of the petitioners. The award also was to the disadvantage of public exchequer. As there are no allegations as against the petitioners, who quoted the lowest prices, it should be ensured that the respective works are to be awarded to them, without any delay.

15. The Original Petitions are allowed to the above extent. The parties will bear their respective costs.