

(1986) 09 KL CK 0024

In the High Court Of Kerala

Case No : W.A. No"s. 506 and 512 of 1986

Manual Thomas and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 03-09-1986

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1987 Ker 262

Hon'ble Judges : V.S. Malimath, C.J;V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : K. Ramakumar and T.R. Govinda Wariyar, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran Nambiar, J.—Construction of the new Legislative Assembly Complex, conceived as early as 1978, and costing over six hundred lakhs, is now entrusted to a State Public Sector Undertaking, the Kerala State Construction Corporation, in preference to two private firms. Aggrieved, the two firms approached this Court under Article 226 of the Constitution in two separate writ petitions. The writ petitions were dismissed in limine by two learned Judges, holding that there is no legal grievance for redressal under Article 226 in this claim, essentially contractual in nature. These two appeals have been filed against these two decisions.

2. Initially, we issued notice to the respondents regarding admission of the writ appeals with a direction to the State to furnish, in particular, information as to whether the Construction Corporation was given the contract pursuant to any policy decision of the Government and if so, relevant materials along with the reasons that persuaded the Government to adopt such policy should be made available to the Court. Pursuant to this notice, the State and the Construction Corporation appeared and filed counter affidavits and produced relevant material. It was necessary to allow the appellants to file fresh affidavits and produce

additional documents in support of their stand. In the circumstances, we decided to admit the appeals and hear both the parties. We have heard the counsel on both sides and allowed them to file the necessary affidavits and documents in support of their rival contentions. The facts that emerge from the pleadings and materials available before this Court are these.

3. In 1978, the Government decided to set up a separate complex to house the Legislative Assembly and the Speaker was of the view "that the construction of the Complex should rest in a body responsible to the Legislature" and that all stages of construction should rest with that committee. The then Chief Minister agreed with this suggestion and on 24-8-1978, the Speaker, Kerala Legislative Assembly constituted a committee of 11 persons "to consider and take decisions on all matters relating to the construction of the new Legislative Assembly Complex proposed to be constituted" and ordered that the expenditure on this account was to be "debited to the State Legislature. The Committee consisted of the following persons : --

- "1. Speaker (Chairman)
2. Deputy Speaker.
3. Chief Minister.
4. Minister, Finance and Law.
5. Minister, Public Works and Sports.
6. Minister Home.
7. Leader of Opposition.
8. Chief Whip.
9. Sri EM.S. Namboothiripad.
10. Sri K. Chandrasekharan.
11. Sri R. S. Unni."

4. The Government issued the necessary orders on the same date. The Committee was later reconstituted in 1980 with six members as shown below : --

- "1. Speaker (Chairman) Members :
2. Chief Minister.
 3. Minister (Home)
 4. Minister (Finance and Law)
 5. Minister (P.W.D.)
 6. Leader of the Opposition."

5. This High Level Committee met on 8-5-1985 when the Speaker, presided and the Chief Minister and the Deputy Chief Minister among others attended. It was noted that "the legislature building has to be completed on a time bound programme maintaining the unique Architectural concept and design and it would be desirable to prescribe special conditions while inviting tenders for the work". It was decided, therefore, "pre-qualification registration may be obtained from agencies who have undertaken the construction of buildings costing Rs. 150 lakhs and more" and "that the scrutiny and approval , of the tenders will remain with the committee."

6. Pursuant to this decision, the Government published a pre-qualification tender notification dated 10-5-1985 stating, among other things, thus : --

"pre-qualification registrations are invited from reputed, experienced and financially capable contractors/agencies for pre-bid selection for undertaking the construction of the proposed Assembly Building. Contractors/ Firms who have carried out building construction worth more than Rs. 150/- lakhs per single multistoreyed R.C.C. building alone need apply..."

7. The appellants (the two firms), and the Kerala State Construction Corporation (the 4th respondent) and others applied. The High Level Committee met on 16th Jan. 1986 when the Speaker presided and the Chief Minister, the Minister for Finance and Law, the Minister for Home, the Government Chief Whip and others attended. "Considering the experience of the firms in carrying out major building works and also their reputation", the Committee decided to invite tenders from the two appellant firms and others. The Committee also decided, "that, being public undertakings, tenders may be invited from the State Construction Corporation" and two other Corporations. It was also decided that the tenders received will be scrutinised by a Committee consisting of the following persons who had also the power for "proper negotiations".

"1. Chief Secretary (Chairman).

2. Secretary, Legislature.

3. Finance Secretary.

4. Secretary, P.W.D.

5. Chief Engineer, (Legislature Complex).

6. Shri Titty George, Chief Engineer (Roads and Bridges)

7. Chief Architect."

The recommendations of this tender Committee also have to be submitted to the high level committee for approval. The appellants and the 4th respondent were thus both "included in the list of contractors qualified for submission of tenders" as is also seen from the communications sent to them individually on the same date, 24-1-1986.

8. A tender notification followed. Tenders were invited, giving particulars of the details required and stressing that all other conditions prevailing in the Kerala P.W.D. would be applicable. The appellants and the 4th respondent and others submitted tenders. Both the appellants quoted the same rate 46% excess over the estimate less departmental materials while the 4th respondent quoted 65% on the same basis. The first respondent states that these three had submitted "the lowest tenders from among the private firms and the State Government Enterprises". The tender Committee negotiated with the three firms and the final reduced offers were as follows : --

Appellant in W.A. No. 506/86 39.26% (excess over estimate less cost of material)

Appellant in- 38.70% (do.)

W.A. No. 512/86 4th Respondent 59% (do.)

9. The High Level Committee next met on 30-6-1986, and considered the offers along with the recommendation of the tender committee and decided to entrust the execution of the project to the 4th respondent. The reason is stated in para 8 of the counter affidavit thus : --

"It was agreed at that meeting that in respect of such a unique and prestigious project, quality of construction and speedy execution are to be the guiding criteria and not necessarily the cost of construction as offered by the contending tenderers, taking into consideration the fact that the Kerala State Construction Corporation Limited is a fully Government owned company, which is manned by experienced Engineers of the Public Works Department as also other State Government undertakings and also the fact that the Government has effective control over all the stages of the execution of the project. The committee decided to entrust the project to the Kerala State Construction Corporation Limited, if they are agreeable to undertake the same....."

This is seen from the minutes of the meeting (Ext. RI(g)). It is also stated in the counter affidavit thus : --

"It is further submitted that the award of the work of the project to Government owned undertaking ensures promptness of execution, quality of the work, engagement of technically qualified personnel of vast experience at all levels almost nullifying the prospects of disputes and possible litigations and consequent delay in addition to the fact that any profit which may accrue to the Government owned undertaking would not enure to the advantage of private parties but would only contribute to public interest."

After deciding to give the contract to the 4th respondent-Corporation, it was decided to fix its rate not exceeding 10% above the lowest quoted tender. Thus the rate was reduced from the offered rate of 59% to 56%.

10. On the basis of the decision of the High Level Committee the Government

ordered on 18-7-1986 that the work of the construction of the Assembly building of the Legislative Complex is awarded to the 4th respondent subject to certain special stipulations also.

11. On these facts, it is contended that while the Government have the freedom of choice in making contracts, it cannot adopt any arbitrary or discriminative policy and take decision which is plainly violative of Article 14 of the Constitution. It is also contended that the 4th respondent should not have been allowed to submit tender as it did not satisfy the pre-tender qualifications and that in any case, a price preference given to the 4th respondent and a favoured treatment meted out to that firm were unjustified and unwarranted in law. Decisions of the Supreme Court right from *K.N. Guruswamy Vs. The State of Mysore and Others*, and leading to the International Airport Authority's case in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and the latest decision in *Harminder Singh Arora Vs. Union of India (UOI) and Others*, were relied on by both sides.

12. The settled position on the basis of the Supreme Court decisions seems to be these. It is open to the Government, as it is to a private party, to enter into contracts with private individuals, firms or agencies. But this freedom of the Government is not uncanalised or unrestrained; it is subject to the constitutional discipline under Article 14. The Government can lay down reasonable, rational, relevant and non-discriminatory norms and standards for entering into contracts with third parties. There is no violation of Article 14 simply because one person is chosen in preference to another for the choice is left to the Government and the government is at liberty to reject any bid and is not bound to accept the highest bid. The choice of the person to whom the contract is granted has to be dictated "by public interest and must not be unreasoned or unprincipled". The choice cannot be "arbitrary or fanciful". If the Government chooses to invite tenders, the tender qualifications and conditions control the choice to be made. The process of awarding a contract by inviting tenders can itself be altered by a change in policy. As long as the tender process is not terminated or abandoned, the tenders will have to be adjudged on their own intrinsic merits and one tenderer may be chosen in preference to another on "considerations which render it reasonable and in public interest to do so."

13. In *V. Punnen Thomas Vs. State of Kerala*,), Mr. Justice Mathew observed thus : --

".....The Government is not and should not be as free as an individual in selecting the recipients for 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..."

This was expressly approved in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, at P. 1637 : (1979) 3 SCC 489 at P. 505,

Bhagwati, J. (as his Lordship then was) proceeded to state: --

"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 norms which is rational and non-discriminatory."

14. In *State of Uttar Pradesh and Others Vs. Vijay Bahadur Singh and Others*, Chinnappa Reddy J., speaking for the Bench held thus : --

"There is no reason why the power vested in the Government to refuse to accept the highest bid should be confined to inadequacy of bid only. There may be a variety of good and sufficient reasons, apart from inadequacy of bids, which may impel the Government not to accept the highest bid. In fact, to give an antithetic illustration, the very enormity of a bid may make it suspect. It may lead the Government to realise that no bona fide bidder could possibly offer such a bid if he meant to do honest business. Again the Government may change or refuse its policy from time to time and we see no reason why change of policy by the Government, subsequent to the auction but before its confirmation, may not be a sufficient justification for the refusal to accept the highest bid. It cannot be disputed that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest. If the Government has the power to accept or not to accept the highest bid and if the Government has also the power to change its policy from time to time, it must follow that a change or revision of policy subsequent to the provisional acceptance of the bid but before its final acceptance is a sound enough reason for the Government's refusal to accept the highest bid at an auction."

15. And in the latest decision in *Harminder Singh Arora Vs. Union of India (UOI) and Others*, , Justice R. B. Misra speaking for a three member Bench, referred to all the relevant decisions and held thus : --

"In the instant case, the instrumentalities of the State invited tenders for the supply of fresh buffalo's and cow's milk and, therefore, this case has to be decided on the basis of bid by the tenderers. There was no question of any policy in this case. It is open to the State to adopt a policy different from the one in question. But if the authority or the State Government chooses to invite tenders then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid of respondent 4 although it was much higher and to the detriment of the State. The High Court, in our opinion, was not justified in dismissing the writ petition in limine by saying that the question relates to the contractual obligation and the policy decision cannot be termed as unfair or arbitrary. There was no question of any policy decision in the instant case. The contract of supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder he should have been granted the contract to supply, especially, when he has been doing so for the last so many years."

16. Bearing these principles, in mind, applying them to the special facts of this case, we have no hesitation to uphold the decision of the Government and reject the contentions of the appellants.

17. In this prestigious venture of constructing a new legislative complex, the first step in the right direction was made eight years back when a high level committee, a body charged with the control of the construction and answerable to the legislative Assembly was constituted with the Speaker, the Chief Minister, the leader of the opposition, the Ministers of Finance, Law and Home and others as its members. The association and participation of these high dignitaries of both the legislative and executive wings of the Government, a practical adherence to lofty democratic principles, ensures a fair deal in public interest and ruled out bias and favouritism on any account at any stage. The decisions to be taken in respect of the contract were thus not left to one individual or to some officers, but to a very responsible group of top representatives of the people who had also the administrative and technical advice of the officers at the highest level. There was thus a policy formulated even at the outset, long before tenders were thought of, laying down reasonable and rational standards for entering into contracts for the construction of this complex. The involvement of the Speaker, the Chief Minister and the leader of the opposition in the high level committee is itself a strong indication infusing confidence in the minds of the public that there shall be a fair deal at every stage of the contract. This important aspect thus stands out in our analysis of facts and our decision on the question whether there has been any discrimination as alleged.

18. We have also to note that the Committee demanded certain standards/ qualifications as minimum requirements to submit tender forms. The fixation of pretender qualifications and elimination of persons who did not satisfy those conditions do not admit of any challenge. The committee was competent to fix norms for eligibility to contract and the norms fixed also pass the permissible test of reasonableness. In fact, a challenge made to the "pre-registration qualification" by Builders Association of India in a writ petition, O.P. No. 6069 of 1985, was already rejected by a learned single Judge.

19. When considerable pains are taken to streamline the process of giving the contract for the construction of this complex, when best attention is bestowed to the minutest details, when the selection process is itself entrusted to the highest dignitaries of both the executive and legislative wings, when pretender qualification is fixed to weed out the unsuitable and the unfit, when the claims and credentials of every tenderer have to be scrupulously considered, a policy which prescribes this procedure cannot be challenged as unreasonable or violative of Article 14 of the Constitution.

20. When both the appellants and the 4th respondent were thus tenderers adjudged to be qualified by the high level committee, and when the claims of both the tenderers were considered by that committee and the committee recommended and the Government decided to give the construction contract to

the 4th respondent and gave the reasons for granting the contract in favour of this public sector Corporation, there are no sufficient materials for a judicial intervention to set aside the contract and quash the decision of the Government.

21. No mala fides are alleged against the " high level committee. None could be alleged either. The policy laid for the guidance of the committee is also unassailable.

22. The tender clause expressly provided that there is no undertaking that the lowest or any particular tender would be accepted and that the authority granting the contract reserved the right to reject any tender without assigning any reason. Let it be clear as

"Hudson's Building Contracts" says "such a reservation is only an excess of caution, for advertising for or inviting tenders is a mere attempt to ascertain whether an offer can be obtained within such a margin as the building owner is willing to accept". But, even then, this provision does not clothe the authority to reject any tender arbitrarily or capriciously as there is a constitutional supervision under Article 14 over every State action concerning the public.

23. The nature of the contract is also a relevant fact and we are concerned in this case with a building contract, not a contract for a sale or purchase of goods or the supply of any article. In building contracts there is an agreement to work and perform service at a certain price or rate and there is thus the element of personal service. Naturally a building contract "affords reasonable protection to the employer's interest both in regard to price and the quality of work", seeks to "achieve speedy and economical completion of the project", and insists that "the work as carried out conform in detail to the design" and that "the materials and workmanship shall be of a proper standard or quality" and the employer to a substantial degree depends on the skill and judgment of the contractor (G.T. Gajria -- Law Relating to Building and Engineering Contracts in India -- Third Edition). When a stately building complex had to be constructed, within a time bound schedule, and the Government decides to entrust the work to a known Contractor, a . Contractor in the public sector a Corporation created for the specific purpose of constructing "works and conveniences of all kinds including buildings", it cannot be held that the choice was arbitrary and fanciful. The special control which the Government have over this Corporation, and the averments specifically mentioned in the counter-affidavit and adverted to in the earlier paragraphs speaks of cogent and convincing reasons for the preference of the Public Sector Corporation to the private firms. The reasons stated in the counter-affidavit for granting the contract to the 4th respondent Corporation are sound and acceptable for the purpose of this case and rule out any hostile discrimination attracting the vice of Article 14. The Government have thus chosen one of the tenderers in public interest and for good and sound reasons and the Government thus did "abide by the results of the tender" the tender process not having been terminated or abandoned. The tenders of the appellants and the 4th respondent were adjudged on their own intrinsic merits.

24. It has to be remembered as Professor Wade puts it, "the most conspicuous use of public Corporations as vehicles for the Government's involvement in industry". In one of the decisions of this Court in *Mrs. Moni Senan and Another Vs. State of Kerala and Others*,) it was observed thus : -

"The concept of public corporation is the living language of modern administration. The corporation owned and controlled by the State may be an independent legal entity, but still, an instrumentality of the State. Its creation may be on administrative necessity but never an executive luxury. It has freedom of action not possessed by civil servants, but freedom of choice controlled by the restraints of public accountability."

That the Government have a close and direct control over the functioning of this Corporation is evident from Article 42 of the Articles of Association which reads thus : --

"42.(i) Notwithstanding anything contained in any of these articles, the governor may from time to time, subject to the provisions of the Act, issued such directives or instructions as he may deem necessary in regard to the conduct of the business and affairs of the Company and in like manner, may vary or annul any such directives. The Directors shall give immediate effect to such directive(s) or instruction(s).

(ii) The Governor may give directives to the Company as to the exercise and performance of its functions in matters involving the national security or substantial public interest and ensure that the Company gives effect to such directives.""

25. The 4th respondent-Corporation is a Government owned Company and we cannot find fault with the grant of a contract in its favour, exercising jurisdiction under Article 226 of the Constitution,

26. It is, however, necessary to advert to one or two contentions pressed for our acceptance by the appellants. It was contended that the 4th respondent did not satisfy the qualifications prescribed for pretender registration and it was therefore wrong to have allowed the 4th respondent to submit tenders. This contention is based on the fact that the pre-qualification tender notification stated that the contractors/firms who have carried out building construction worth more than Rs. 150A lakhs per single multistoreyed R.C.C. building alone need apply and that the 4th respondent did not construct any single building worth more than Rs. 150A lakhs, though they have constructed buildings worth more than that amount and even though they would have undertaken to construct buildings of greater value. This contention is not acceptable for more than one reason. When the 4th respondent participated as a tenderer and the tenders were opened in the presence of the parties, the appellants knew that the 4th respondent was allowed to be a tenderer and still they did not object to his tenders on that ground. The appellants, then thought, that as the 4th respondent's tender amount was higher, the appellants had a better chance than

the 4th respondent and therefore it did not matter whether the 4th respondent was allowed to submit its tender or not. When once their tenders were rejected, they raised this objection then, The appellants were therefore sitting on the fence and cannot be allowed to raise this contention now.

27. Moreover, the minutes of the high level committee (Ext. R1(b)) show that the decision was to require registration of agencies who have undertaken the construction of buildings costing Rs. 150 lakhs or more. There is no dispute that the 4th respondent satisfied this requirement. The use of the word singular, "building" in the pre-tender notification instead of the plural "buildings" as seen from the minutes of the meeting and the substitution of the word "carried out" in the notification for the word "undertaken" in the decision cannot be pressed into service in this Court for a judicial discretion to be exercised in favour of the appellants, for that would be, to rest on technicalities ignoring the substance of the qualifications.

28. It is relevant to note that the 4th respondent has been given contracts by the Government of India also and they "were appointed for the execution of the CPEZ works" (Cochin Export Processing Zone Authority) in this State. They have stated in the affidavits filed in this Court about their preeminent qualifications and experience in the field. In the circumstances, the contention that they were not qualified to be tenderers cannot be accepted. It is noteworthy that the appellants and the 4th respondent were served with similar orders of the same date accepting all the three as qualified tenderers.

29. The other contention advanced was that the 4th respondent was given a price preference and there was no mention of any such preference in the tender notification and thus the decision in favour of the 4th respondent was opposed to the principles in *Harminder Singh Arora Vs. Union of India (UOI) and Others*, . It was further stated that even if 10% price preference could be given, the 4th respondent was given preference in excess of this percentage.

30. It has to be noted, as would be seen from the minutes of the high level committee, dated June 30, 1986, as also the counter-affidavit of the State, that the 4th respondent was not chosen because of any price preference and this price preference did not tilt the scales in favour of the 4th respondent. The price preference was not a factor when the decision to award a contract in favour of the 4th respondent was made. The decision to award the contract to the Corporation was made, as stated already, on other intrinsic evidence and materials. Once, the decision was taken to give the contract to the 4th respondent the Committee then considered whether their offer could not be brought down. They then fixed the rate giving a 10% price preference from the lowest tenderer. The facts of this case are thus different from *Arora's* case. The price preference was thus not a consideration which weighed with the Committee and the Government to award the contract to the 4th respondent, as it was expressly stated in the relevant minutes "quality and speedy execution are to be preferred to cost".

31. The contention that the 4th respondent was given the contract at a rate more than 10% price preference has to be rejected in the light of the statements in para. 12 of the counter-affidavit of the 1st respondent which read thus : --

"It is respectfully submitted that the work in question was awarded to the Corporation at 56% (limited) above estimate less cost of departmental materials resulting in an over all excess of 39.02%. The appellant in W. A. 502 of 1986 was M/s. Silpi Construction Contractors who had offered lowest rate viz., 38.70% above the estimate less cost of departmental materials resulting in an over alt excess of 26.97 per cent. Therefore it can be seen that the award of the work to the Corporation is only within 10% excess above the lowest quoted rate."

32. It was also contended by the appellant in W. A. No. 506 of 1986 that the 4th respondent had a dismal record having abandoned several contracts before completion and gave specific instances in support. Additional affidavits have been filed by the 4th respondent stating the circumstances under which a few of the many contracts undertaken by them could not be completed for no fault of the Corporations, and for reasons beyond their control, it is not possible to accept this contention of the appellant also.

33. It is, therefore, not necessary to consider the contention whether there was a change of policy to award the contract in favour of a public sector undertaking, though we are persuaded to accept that contention also. We hold that there was no arbitrariness in the award of the contract to the 4th respondent and the decision so made is not vitiated which calls for any interference by this Court.

34. Lastly, it was contended that the constitution of the high level committee itself was not legal and not sanctioned by law. This contention was not raised in the original petitions or before the learned single Judges and therefore cannot be allowed to be raised in these writ appeals. If in awarding a contract the Government considered it advisable to have detailed discussions with a Committee appointed for the purpose, it cannot be contended that the constitution of the Committee is not legal or that statutory provision is required to constitute such Committees.

In the result, we find no merit in these writ appeals and they are dismissed; but in the circumstances of the case no costs.