

(2016) 12 KL CK 0021

In the High Court Of Kerala

Case No : WA.No. 2400 of 2016 (Against The Judgment in WP(C) 27142 of 2016 Dated 27-10-2016)

M/s. Kerala Feeds Limited

APPELLANT

Vs

Parumala Transport

RESPONDENT

Date of Decision : 08-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) AIR(Kerala) 20

Hon'ble Judges : Mr. Mohan M. Shantanagoudar, C.J. and Mr. Sathish Ninan, J.

Bench : Division Bench

Advocate : Sri. Vakkom N. Vijayan, Advocate, for the Respondent No. 2; Sri. P. Ramakrishnan, Advocate, for the Respondent No. 1; Sri. Joseph Kodianthara, Sr. Advocate, Sri. V. Abraham Markos, Sri. Abraham Joseph Markos, Sri. Isaac Thomas, Sri. Haran Thomas George an

Final Decision : Allowed

Judgement

Mr. Mohan M. Shantanagoudar, C.J. - The judgment dated 27.10.2016 passed in W.P.(C) No.27142 of 2016 is challenged in this appeal by the 1st respondent therein.

The said writ petition was filed by the 1st respondent herein seeking to quash the stipulation in Ext.P8 tender notification that a tenderer should own minimum of 30 trucks manufactured on or after July 2006 having goods carriage permit for carrying un-hazardous goods. Certain other reliefs were also sought for.

The learned Single Judge having found that there is no justification in imposing such a condition in the tender notification, set aside the said condition incorporated in Ext.P8 tender notification. The learned Single Judge has concluded that such a clause found in the tender notification is illegal and arbitrary.

2. We have heard the learned counsel on both sides and perused the records.

3. The writ petitioner/1st respondent herein is aggrieved by the following clause in Ext.P8 tender notification dated 22.7.2016 :-

"..... The tenderer should own a minimum of 30 (Thirty) trucks (Backhoe loaders/Tankers/Tippers/LPG Gas Cylinder Carriers/JCBs/Hydraulic excavators/ Container trailers and carriers without platform are not permitted) of at least 9 MT capacity manufactured on or after July 2006, having valid goods carrier permit for carrying all kinds of unhazardous goods in their own name in Kerala as on 21.07.2016. The trucks should be registered in Kerala. The price bid should contain the rate quoted in the format."

According to the writ petitioner, there is no rationale behind stipulating the aforementioned condition in the tender notification, having regard to the nature of work to be carried on by the successful tenderers, if the work is allotted in their favour.

4. The appellant is a Government of Kerala undertaking. In order to transport finished products (cattle feed) from their plants to the southern and northern regions of Kerala State and parts of other States, they invited tenders from competent and experienced transport contractors with sound financial capacity. Certain other clauses were inserted in the tender notification, of which, we are not concerned.

The question to be decided is as to whether the aforementioned condition stipulated in the tender notification needs to be interfered or not while exercising jurisdiction under Article 226 of the Constitution of India.

5. The law is so well settled that the terms of the invitation to tender are not open to judicial scrutiny as the same falls within the realm of contract. The Government or the authorities must have a free hand in settling the terms of the tender. The court is not expected to consider itself as an expert to substitute the commercial wisdom of the tender inviting authority with its own. The authority should have reasonable play in its joints. The court would interfere with the administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias. The courts are not to substitute its own terms in the tender on the opinion that some other terms in the tender would have been fair, wiser or logical. The wisdom or the sagacity of the authority in imposing the conditions is not liable to be interfered with in a writ proceedings unless it is shown that the condition is arbitrary or discriminatory. The terms of the notice inviting tender are not open for judicial review unless they offend Article 14 of the Constitution of India. The condition in the tender notice under challenge in this writ petition specifies certain pre qualifications in respect of eligibility. The authority in its commercial wisdom felt it appropriate to include such a condition. It would not be open for this Court to sit in judgment over the incorporation of such a condition. Consequent on the inclusion of the condition relating to qualification, certainly, the writ petitioner as well as many others are bound to be left out of consideration. However, in the business interest of the authority, it is within their

wisdom to incorporate necessary conditions in the tender to protect its interests. Unless the action of tendering authorities are found to be malicious and vitiated by misuse of its powers, tender conditions are unassailable. The terms of invitation to tender, being in the realm of contract, cannot be open to judicious scrutiny. However, the action of the authority must definitely be free from arbitrariness unaffected by bias or actuated by malafides.

6. The Apex Court in the case of *Tata Cellular v. Union of India* [(1994) 6 SCC 651] spoke about the need to find a right balance between administrative discretion to decide the matters on the one hand, and the need to remedy any unfairness on the other. After discussing the matter, the Apex Court deduced the following principles :

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a reive of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides."

In the case of *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617] the Apex Court concluded that the award of contract, whether it is by private party or by public body or State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.

In the case of *Directorate of Education and others v. Educomp Datamatics Ltd. and others* [(2004) 4 SCC 19] the Apex Court, quoting the principles laid down in the cases of *Tata Cellular* and *Air India Ltd.* (supra), observed that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. The government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic

adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical.

In the case of *Michigan Rubber (India) Ltd. v. State of Karnataka* [(2012) 8 SCC 216] the Supreme Court observed that if the objector failed to establish that the criteria fixed by the authority were contrary to public interest, discriminatory or unreasonable, no interference is called for. It was held that the Government and their undertakings must have free hands in setting terms of the tender and only if they are arbitrary, discriminatory, mala fide or actuated by bias, would courts interfere. Nor would court interfere because it feels some other terms in the tender would have been fair, wiser or more logical. Scope of Court's interference, is very restricted and limited where State acts reasonably, fairly and in public interest since no person can claim a fundamental right to carry on business with Government. Therefore, interference by court is not warranted unless action of tendering authority is mala fide and is a misuse of statutory powers.

Same is the dictum laid down by the Apex Court in other judgments including the case of *Association of Registration Plates v. Union of India* [(2005) 1 SCC 679] and the case of *Jagdish Mandal v. State of Orissa* [(2007) 14 SCC 517].

7. Having regard to the aforementioned principles laid down by the Apex Courts consistently on the issue, we have examined the facts of this case in detail. The authority in this case thought it fit that criteria for obtaining tender for transporting the cattle feed should be at high standard and only those lorry owners who satisfy the eligibility criteria should be permitted to participate in the tender.

Taking into account the various aspects including the safety of perishable goods, its transportation and the value of goods to be transported to different parts of Kerala State as well as outside the State, the experienced persons of the appellant company must have revised the tender conditions and prescribed the above mentioned stringent clarified criteria. In our considered opinion, the respondent has failed to establish that such criteria fixed by the authorities were contrary to public interest and it is discriminatory or unreasonable.

8. Thus, it is not open for the Court to feel that some other terms in the tender would have been fair, wiser or more logical. Keeping in view the enormous work involved in transporting the cattle feed (finished goods) as early as possible to different parts of the State as well as outside the State, resort to trial and error method would prove hazardous. The right of the organisations concerned to get the most competent person, cannot be questioned. Thus, the appellant, M/s. Kerala Feeds Limited, has to eliminate lorry owners who have got lesser number of fleet who in the opinion of the appellant would not be in a position to cater to the needs of the appellant quickly and safely. The judgment formed by the authorities cannot be assessed by courts of law as an appellate authority.

9. It is a well settled law that the Organisation concerned, which invites tender is the best authority to decide its needs, while inviting tenders. It is needless to observe that the authorities would be guided by experts in the field and clauses will be framed in such a manner so as to transport finished cattle feeds to different places in tussle free atmosphere. If any problem arises in transporting the cattle feeds, naturally, not only the contractor but also the appellant Organisation will be answerable. Therefore, the Organisation will have to take utmost care in fixing stipulations in the tender notifications. It is not open for the intending bidders to say that one clause is unsuitable for them and therefore, it is illegal and arbitrary. As mentioned supra, this Court and various other High Courts including the Supreme Court have repeatedly made comments on the practise of court interfering in tender conditions. The courts have made clear that the Government and their undertakings must have free hands in setting terms of the tenders and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. Keeping in mind the aforementioned well settled position in law, the learned Single Judge ought to have evaluated the material on record.

10. It is the case of the 1st respondent herein that earlier the appellant had invited Ext.P5 tender notification for the same purpose on 28.3.2016. At that point of time, the relevant clause reads thus :-

"..... The tenderer should own a minimum of 15 (Fifteen) trucks (Backhoe loaders/Tippers/JCBs/Hydraulic excavators/Container trailers and carriers without platform are not permitted) of at least 9 MT capacity manufactured on or after 01.01.2007, having valid goods earlier permit in their own name in Kerala as on 26.03.2016. The trucks should be registered in Kerala. The price bid should contain the rate quoted in the format."

Subsequently, a Corrigendum came to be issued for changing the aforementioned clause to certain extent, which reads thus :-

"..... The tenderer should own a minimum of 15 (Fifteen) trucks (Backhoe loaders/Tippers/JCBs/Hydraulic excavators/Container trailers and carriers without platform are not permitted) of at least 9 MT capacity manufactured on or after 01.03.2001, having valid goods earlier permit in their own name in Kerala as on 26.03.2016. The trucks should be registered in Kerala. The price bid should contain the rate quoted in the format."

The said tender notification was questioned by the writ petitioner before this Court earlier in W.P.(C) No.15228 of 2016, which came to be allowed on 11.7.2016 as per Ext.P7 judgment.

At that point of time, the writ petitioner had challenged a different clause stipulated in the tender notification. The aforementioned clause was not touched by it, inasmuch as it was not aggrieved by the aforesaid condition. This Court, in

the said writ petition, set aside one of the tender conditions (of which, we are not concerned while deciding this writ appeal) and directed the appellant to issue fresh tender notification. Subsequent to the disposal of the said writ petition, Ext.P8 notification came to be issued on 22.7.2016 inviting fresh tenders. At the time of issuing fresh E-Tender notice, certain stringent conditions were imposed by the authority, making it mandatory that "the tenderer should own a minimum of 30 trucks of at least 9 MT capacity manufactured on or after July 2006 having valid goods carrier permit for carrying all kinds of unhazardous goods in their own name in Kerala as on 21.7.2016".

The new stipulation mandates that "the tenderer should own a minimum of 30 trucks of at least 9 MT capacity manufactured on or after July 2006 having valid goods carrier permit for carrying all kinds of unhazardous goods". In Ext.P5 notification, the condition stipulated was that "the tenderer should own a minimum of 15 trucks and that the vehicles, which are manufactured after 2001 could also be employed". The said condition is altered to certain extent in order to suit the purposes of the organisation which invited tenders.

We do not find any reason to suspect foul play on the part of the authorities in imposing stringent conditions. In this context, it cannot be said that the subsequent condition imposed is unreasonable or motivated. As mentioned supra, it is open for the authority to decide as to which condition suits them for getting the work done.

11. Since the feeds manufactured by the appellant have to be transported to various places quickly, inside as well as outside the State, they need more vehicles owned by a single person and they also need new vehicles in order to avoid breakage of vehicle during transit. If the feeds (finished products) are not utilised within the time frame, then the feed may lose its efficacy. Hence, the tenderer cannot insist the tender inviting authorities, conditions, which are suitable for them. On the other hand, it is for the tender inviting authority to decide which clause is suitable for them.

We do not find any arbitrariness or mala fides, or that the action of the authority is discriminatory or actuated by bias. On the other hand, we find that the decision taken by the authority appears to be fair, wiser and logical.

In view of the same, we are of the opinion that the judgment of the learned Single Judge is liable to be interfered with. Hence, the same stands set aside and the appeal is allowed.