
(2014) 07 KL CK 0212

In the High Court Of Kerala

Case No : WP(C). No. 4135 of 2014 (N)

Precision Infratech Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 3, 5

Citation : (2014) 07 KL CK 0212

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : C.C. Thomas, Senior Advocate, T.A. JOY and Praveen K. Joy, Advocate for the Appellant; Tom K. Thomas, Spl. Government Pleader, T. Sethumadhavan, Senior Advocate, Rajesh Sivaramankutty, Adv., T.A. Shaji, Senior Advocate and P. Shanes Methar, Advocate for the Respondent

Final Decision : Allowed

Judgement

A.M. Shaffique, J.—Petitioner in the above case challenges the pre-qualification of respondents 6 and 7 with reference to a work relating to fabrication, erection and replacement of 52 Nos. of Stainless Steel Ordinary Shutters and Hoisting Mechanism for 1st and 2nd phase for Kuttanad package-Modernisation of SWB (Salt Water Bund) at Thanneermukkam. The tender was invited by the Superintending Engineer (Mechanical), Irrigation, Ernakulam, as per e-tender dated 15/11/2013. The tenders were to be submitted by 05/12/2013. There were three tenderers, petitioner and respondents 6 and 7. The initial scrutiny is to consider the pre-qualification criteria. Ext. P7 is the minutes of the meeting of Pre-qualification Committee of Chief Engineers held on 28/01/2014. It is inter alia observed that the Committee considered the documents of the pre-qualification tenders and decided to pre-qualify the petitioner as they satisfied all the conditions as per the notice inviting tender (NIT). In respect of respondents 6 and 7, it was inter alia stated that since they submitted their documents as a consortium, it was decided to seek legal opinion from the Law Officer regarding the legal validity of awarding works to a Consortium. The Committee discussed

the matter in detail and decided to pre-qualify the 6th respondent based on the remarks of the Law Officer. In regard to the 7th respondent, it is observed that since one of the Consortium partner is a foreign company and they had produced an experience certificate of a single work issued by the Ocean County Utility Authority, New Jersey, the Committee decided to pre-qualify the bidder based on the remarks of the Law Officer. The petitioner's contention is that the very pre-qualification of respondents 6 and 7 was bad in law in so far as the respondents had not complied with the pre-qualification criteria by producing necessary documents as is required by a Consortium. Petitioner therefore submitted a representation before the Minister for Water Resources Department on 04/02/2014 inter alia stating the reasons as to why the pre-qualification carried out by the department has to be rejected. According to the petitioner, they alone have pre-qualified for the tender having all necessary experience and financial capability in accordance with the terms of NIT.

2. The main contention urged by the petitioner is that when the Committee decided to pre-qualify them, the Committee did not verify the documents produced by them to ascertain whether it is a proper Consortium formed which could undertake the work relating to the same. As per NIT specific provision had been made to enable a Consortium to submit their bid. Reference is made to Clauses 10.13 and 10.14 to indicate that any Consortium or Joint Venture if they want to participate in the tender have to submit certain documents in accordance with the specific provisions made under the said Clauses. It is inter alia contended that though the matter was referred by the Committee to the Law Officer, the Law Officer did not give any final opinion in regard to the validity or otherwise of the Consortium agreements or the documents produced by them. Whereas the Law Officer had only opined that the Consortium or Joint Venture is permissible. The Law Officer, however, referred the matter relating to the 7th respondent to the Government for a proper decision. It is pointed out that as far as the 6th respondent is concerned, their consortium agreement has several infirmities which were not taken into consideration by the Committee.

3. In addition to challenging the manner in which the Committee had pre-qualified respondents 6 and 7, it is inter alia contended that the Consortium of the 6th respondent included three parties out of which one of the parties M/s. Sivaswathy Constructions (P) Ltd. is stated to have their Registered Office at Puthukottai. It is inter alia contended that when verification was made through Registrar of Companies and other sources, it is found that the said Company's Registered Office is at Hyderabad and that apart, the Consortium agreement was signed by a person stated to be an authorised signatory. It is further contended that the Consortium agreement does not create any joint and several liability on all the Consortium partners as envisaged under the NIT.

4. Counter affidavit is filed by the 6th respondent inter alia contending that the allegations raised by the petitioners were absolutely false. The Consortium agreement has been executed in terms with Clause 10.14 and 10.15 of Ext. P1,

the NIT and after taking into consideration the documents produced, the Committee had pre-qualified the 6th respondent and hence there is no basis for the petitioner to challenge the same as the said decision is not actuated by any arbitrariness or illegality or favouritism as alleged by the petitioner. It is further contended that after pre-qualifying the 6th respondent, the price bid was opened and it was found that the price bid of the 6th respondent was 3.8 % below the Probable Amount of Contract (PAC), that of the petitioner was 13.5% above the PAC and that of the 7th respondent was 1.1% below the PAC. In so far as the 6th respondent is the lowest bidder, a letter dated 06/02/2014 was issued by the 5th respondent calling upon the 6th respondent to carry out the work on the terms and conditions stipulated therein and the 6th respondent was called upon to execute an agreement.

5. Counter affidavit is filed by the 3rd respondent supporting the stand taken by the Committee. It is stated that respondents 6 and 7 were pre-qualified and they had produced all necessary documents required for pre-qualification. They being Consortiums, the matter was referred to the Law Officer to verify whether the Consortium agreement can be accepted. After receiving the opinion of the Law Officer especially in regard to the fact that the 7th respondent had a foreign company as a consortium partner, a decision was taken to pre-qualify all the tenders. The price bids were opened 24 hours after the decision taken for pre-qualifying the tenderers. It is after opening the price bid that the petitioner sought to challenge the pre-qualification criteria of respondents 6 and 7. It is therefore submitted that there is absolutely no illegality or irrationality in the decision making process of the Committee and therefore there is no basis for the challenge made by the petitioners.

6. The short question to be considered in the above writ petition is whether the decision making process of the respondent authority is either arbitrary, irrational or illegal or not confirming with the provisions of the NIT.

7. The first argument is with reference to the fact that petitioner alone was pre-qualified. Perusal of Ext. P7 would show that the Committee had pre-qualified the petitioner but in respect of respondents 6 and 7 it is indicated that their pre-qualification will depend upon the verification report of the Law Officer. Apparently, the Law Officer was addressed to verify whether the consortium agreement is with reference to the provisions of the NIT.

8. Ext. R3(a) is the opinion given by the Law Officer. Perusal of the same apparently indicates that the consideration made is with reference to the bid submitted by the 7th respondent. It is inter alia stated that rejection of the tender would amount to violation of Article 14 of the Constitution of India and that the clarifications or directions referred to in paragraph 9 of the said opinion has to be sought from the Government before accepting or rejecting the bid submitted by the 7th respondent. That apart, it is mentioned that conditions to be imposed for considering and accepting a tender submitted by a Joint Venture/ Consortium shall be discussed and finalised by the Chief Engineer and the same

has to be submitted for approval to the Government. If Mary Matha company fails to comply with such conditions, the bid can be rejected. Apparently, no further steps were taken in that regard. Therefore, the Law Officer's opinion was basically concerned with the bid submitted by the 7th respondent.

9. No Counter affidavit is filed by the 7th respondent before this Court, though they were represented by Counsel.

10. As far as the 6th respondent is concerned, the main contention urged is with reference to their address as shown in the Joint Consortium agreement. This has been clarified by the learned Senior Counsel appearing on behalf of the 6th respondent by stating that even in the tender documents which they have submitted, it was indicated that the office at Puthukottai was a branch office and it was by mistake that in the Joint Consortium agreement the Registered Office is shown as Puthukottai. Reference was made to the details furnished along with the tender which would apparently indicate that Puthukottai was only a branch office. At any rate, this cannot be considered as a major defect in the tender documents.

11. The next contention urged by Sri. C.C. Thomas, the learned Senior counsel with reference to the Consortium agreement is that it does not contain any clause conferring on the Joint Venture partners joint and several liability as contemplated under Clauses 10.13 and 10.14 of the NIT. Clauses 10.13 and 10.14 inter alia states that the Joint Venture partners should give an undertaking that they will be jointly and severally liable to the employer for the performance of the contract. The Consortium agreement submitted by the 6th respondent is Ext. P11. Article 3 refers to participation wherein it is stated that all the parties agree that their respective financial participation in the Joint Venture shall be 34% for the party of 1st part, 33% for the party of 2nd part and 33% for the party of 3rd part. The first mentioned party namely Sree Krishna Engineers is the lead partner. Article 5 relates to joint and several liability. In Clause 5.1, it indicates that "The parties herein undertake that they are jointly and severally liable to the employer for the execution and completion of the Project on share basis agreed upon". This Clause, according to the learned senior counsel, is totally against the NIT and therefore the consortium agreement ought not to have been taken into account.

12. On the other hand, Sri. Sethu Madhavan, learned Senior Counsel for the 6th respondent supported the stand taken by the Committee and indicated that the aforesaid clause was sufficient enough to conclude that there is a joint and several liability on the consortium partners.

13. Having regard to the nature of joint and several liability required for a major project, I do not think that the joint venture agreement produced as Ext. P11 with reference to the 6th respondent will not confer upon the respondent authority to treat the same as a joint and several liability of the Consortium partners with reference to the performance of the contract. By virtue of Article

5.1 of the Consortium agreement, they have limited their obligation to the percentage of investment they have made, that is on share basis which is again stated in Article 3. Therefore, they have confined their liability only to that extent. This aspect of the matter has not been considered by the Committee while pre-qualifying the 6th respondent. That itself clearly indicates that the decision making process was not in accordance with the terms of the tender conditions. If the tender is not in accordance with the procedure prescribed as per the NIT, the Committee ought to have verified the same and arrived at an opinion by itself. Such an exercise is not seen done in this case. Even though the matter was referred to the Law Officer as well, the opinion of the Law Officer does not indicate a reference to the validity or otherwise of the Consortium agreement. Under such circumstances, I am of the view that the Consortium agreement executed by the 6th respondent is not in conformity with the NIT and therefore the Committee ought not to have to accept the same.

14. Sri. Sethu Madhavan, learned Senior Counsel relied upon the judgment of the Supreme Court to indicate that unless the decision taken is arbitrary or illegal, this Court should not interfere in the decision making process. In *Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another*, wherein the Apex Court held as under:

20. In *Air India Ltd. v. Cochin International Airport Ltd.* this Court held that the award of contract was essential in commercial transactions which involves commercial consideration and results in commercial decision. While taking such decision the State can choose its own method on terms of invitation to tender and enter into negotiations. The following passage from the decision is apposite: (SCC pp. 623-24, para 7)

7.... The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are 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. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. 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.... 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.

21. To the same effect is the decision of this Court in *Master Marine Services (P) Ltd. v. Metcalfe & amp; Hodgkinson (P) Ltd. and Jagdish Mandal v. State of Orissa* where this Court laid down the following tests for judicial interference in exercise of power of judicial review of administrative action: (*Jagdish Mandal* case, SCC p. 531, para 22)

22.... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, 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

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached".

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.

Reference is also made to *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, wherein Supreme Court has laid down a similar proposition.

15. True that the proposition of law is well settled, but when it is found that the pre-qualification documents produced by one of the tenderers have not even been properly verified by the tender committee, it may not be possible for this Court to shut its eyes on such grave infirmities. This is a contract involving huge amounts and one of the basic features of permitting a consortium or a Joint Venture is on their undertaking that they will comply with the terms of the contract, they will perform the contract and they will be jointly and severally liable for any breach of the terms and conditions of the contract. Even though the lead partner may agree on the joint and several liability clause, that will not suffice. Lead partner alone signs the contract with the respondent authority. Later on, when an issue may arise regarding joint and several liability of other partners, it may be a situation where the respondent authority will be faced with the present Consortium agreement, which provides limitation on their liability.

16. Hence, I am of the view that there is clear illegality on the part of the respondent authority in pre-qualifying the tender of the 6th respondent. As far as the 7th respondent is concerned, the opinion of the Law Officer was not taken into consideration and thereafter the price bid was opened. The entire procedure appears to be done in a hasty manner which should have been avoided by the

respondent authority.

Under such circumstances, I am of the view that this is an instance where this Court should interfere with the aforesaid pre-qualification of respondents 6 and 7. Accordingly the writ petition is allowed setting aside the pre-qualification of respondents 6 and 7 and the respondent authorities are directed to reconsider the whole issue and take a final decision in the matter.