

(2021) 01 KL CK 0431

In the High Court Of Kerala

Case No : Writ Appeal No. 1568, 1577, 1589 Of 2020

Principal Chief Conservator Of Forest (Planning And
Development) Forest Headquarters And Ors

APPELLANT

Vs

Suresh Mathew And Ors

RESPONDENT

Date of Decision : 19-01-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2021) 01 KL CK 0431

Hon'ble Judges : S. Manikumar, CJ;Shaji P. Chaly, J

Bench : Division Bench

Advocate : Sandesh Raja, M.C. John, Manu Ramachandran, M. Kiranlal, T.S.
Sarath, R. Rajesh, Sameer M Nair

Final Decision : Dismissed

Judgement

Shaji P. Chaly, J

1. The above appeals are filed by the Chief Conservator of Forests and the other forest officials challenging the common judgment of the learned

single Judge dated 16.11.2020 in W.P.(C) Nos. 24241, 24075, and 22944 of 2020, whereby the learned single Judge allowed the writ petitions and held

that cancellation of earlier tender and the action of retendering the same work again is illegal and uncalled for, and accordingly the order dated

12.10.2020 and re-tender notification dated 31.10.2020 were set aside and it was further declared that the petitioners in W.P.(C) Nos. 24075 and

24241 of 2020, who have been granted renewal of licence, should be treated as qualified to participate in the earlier tender pursuant to the renewal of

their A class licence. Consequently, the appellants were directed to proceed with the e-tender dated 25.05.2020 and award the work to the eligible

tenderer at the earliest. It is, thus, challenging the legality and correctness of the said judgment, the appeals are filed.

2. Brief material facts for the disposal of the appeals are as follows:

The Divisional Forest Officer, Konni issued an order dated 12.10.2020 cancelling an earlier e-tender notification dated 25.05.2020 for final tree felling

works of 1954 Nellidappara in South Kumaramperoor Forest Station under Konni Range in Konni Forest Division and decided to float a tender afresh.

The writ petitioners were participants in the earlier e-tender notification dated 25.05.2020 and according to them, the action of the appellants to

retender the work after cancelling the earlier tender was an arbitrary and illegal action. In fact, the Principal Conservator of Forests issued a circular

dated 29.02.2020 in regard to the renewal of registration of A class contractors, wherein it was stipulated that A class registered contractors, who

have not participated in any of the tenders notified by the Department for timber extraction during the last financial year, are not eligible to get renewal

of the A class registration.

3. On the basis of the said circular, the registration of the petitioners in W.P.(C) Nos. 24075 and 24241 of 2020 were not renewed. However, the

appellants have floated the e-tender dated 25.05.2020 for the work in question. The said petitioners, being aggrieved by the said action, have

approached this Court by filing W.P. (C) Nos. 11854 and 12389 of 2020 respectively challenging the aforesaid circular dated 29.02.2020, in which

interim directions were sought to permit them to participate in the e-tender dated 25.05.2020. A learned single Judge of this Court granted interim

orders permitting the said petitioners to participate in the tender proceedings provisionally. To put it short, as per common judgment dated 28.09.2020,

the said writ petitions were finally allowed setting aside the impugned orders declining renewal of registration of the petitioners and directing the

authority to reconsider their applications for renewal of registration on merits de hors the circular dated 29.02.2020. Anyhow, the Divisional Forest

Officer cancelled the e-tender dated 25.05.2020 as per an order dated 12.10.2020 and floated fresh tenders for the same work on 31.10.2020. It is,

thus, challenging the said orders, the writ petitions were filed.

4. The basic contentions raised by the writ petitioners were that the cancellation of e-tender dated 25.05.2020 was arbitrary and unreasonable, that the

order dated 12.10.2020 was passed without any bona fides and with mala fide intentions or under the instructions of higher officials of the Forest

Department. It was also submitted that the act of cancelling the e-tender immediately after the judgment with regard to the renewal of registration of

the two writ petitioners would show that the intentions of the Department officials are unfair. According to the writ petitioners, no proper and genuine

reasons were shown in the cancellation order and even though it is stated that complaints were made by other persons expressing their inability to

participate in the e-tender, there were no such complaints filed by any affected persons. It was also contended that the reasons assigned in the

cancellation order dated 12.10.2020 are all a ruse to cancel the earlier tender with mala fide intentions and therefore arbitrary.

5. The learned single Judge, taking into account the rival submissions and various facts and figures, was of the firm opinion that the reasons assigned

by the Divisional Forest Officer in the cancellation order are not sustainable in law and therefore, the same is liable to be interfered with. In order to

have a proper appreciation of the issues raised in the appeals, the observations, findings and conclusions in the impugned common judgment would be

relevant and they are as follows:

10. When the earlier tender proceedings were pending, the petitioners in W.P.(C) Nos.24075/2020 and 24241/2020 filed W.P.(C) Nos.11854/2020 and

12389/2020 respectively seeking inter alia to permit them also to participate in the tender proceedings, since the rejection of their application for

renewal of registration was illegal. Finding prima facie case in the writ petitions, this Court passed interim orders directing the respondents to permit

the petitioners also to participate in the tender proceedings. This Court ultimately found that rejection of their applications for renewal of registration, is

illegal. It is when the applications of the petitioners were being processed for grant of renewal of licence pursuant to the orders of this Court, that the

DFO has cancelled the earlier e-tender.

11. One of the reasons given by the DFO for cancelling the e-tender is that some other contractors had complained that they could not participate in

the tender due to Covid 19 transportation restrictions. This ground appears to be incorrect and unsustainable. Firstly, in the earlier round of litigations

wherein the tender in respect of the work was involved, the respondents had no

case that there are complaints from contractors, of any denial of opportunity to participate. Secondly, the tendering process adopted earlier also was e-tender and therefore transportation restrictions if any consequent to Covid 19, cannot affect the tender proceedings.

12. Another reason stated by the DFO for cancellation of the earlier tender proceedings, is that final felling of mature teak plantation and its re-planting work are time bound operations. Once there is delay, it would affect establishment of new plantation. One fails to understand as to how a re-tendering process abandoning the existing tender process, would expedite the re-planting work. If anything, it would cause only further delay.

13. The DFO has further stated that the model code of conduct with respect to elections to Local Self Government Institutions is impending and hence tender procedure has to be in place at the earliest. When already the tender proceedings were in place, the DFO ought not have cancelled the same without concrete reasons, ostensibly to beat the model code of conduct.

14. Another reason extended by the DFO is that since a good number of cases were filed among the participating contractors, at present there is an atmosphere of healthy competition among them, which would be beneficial to the Government in the recent proceedings. This reasoning is hypothetical and unacceptable in the facts of this case.

15. This Court in the earlier round of litigations, directed the respondents to consider the tenders of the petitioners in W.P.(C) Nos.24075/2020 and 24241/2020, provisionally and held that rejection of their applications for renewal of licence is illegal. The petitioners approached this Court to establish their right to participate in the tendering process for the work in question. The writ petitions ended in their favour. It is now conceded that petitioners have been granted renewal of A class registration subsequently.

16. Going by the impugned order dated 12.10.2020, it is seen that in the tender proceedings which are cancelled by the order impugned herein, the lowest tenderer has quoted an amount 12.67% below the estimated rate, which should be treated as a reasonably good offer for the respondents.

There is no guarantee that in the re-tendering process, tenderers would quote lesser amounts.

17. There were sufficient participants in the earlier tender proceedings. There is nothing on record to show that there have been any serious

complaints regarding the e-tender proceedings initiated earlier. In the earlier tender proceedings, offers have been received to do the work at rates

lesser than the estimated rate. Even according to the tendering authority, expeditious implementation of the project is imperative.

18. In the circumstances of the case, this Court is of the opinion that cancellation of earlier tender and the action of re-tendering the same work again,

is illegal and uncalled for. The impugned order dated 12. 10.2020 and re-tender notification dated 31.10.2020 are therefore set aside. It is declared that

the petitioners in W.P.(C) Nos. 24075/2020 and 24241/2020 who have been granted renewal of license should be treated as qualified to participate in

the earlier tender pursuant to the renewal of their A Class license. The respondents are directed to proceed with the e-tender dated 25.05.2020 and

award the work to the eligible tenderer, at the earliest.â??

6. We have heard the learned Special Government Pleader for the Forest Sri. Sandesh Raja and the learned counsel for the respondents/writ

petitioners Sri. M.C. John, Sri. Manu Ramachandran and other learned counsel appeared for the respondents, and perused the pleadings and materials

on record.

7. The paramount common contentions raised by the appellants are that the judgment of the learned single Judge interfering with the order of

cancellation is illegal and against the settled principles of law, that the finding of the learned single Judge that the complaint of the contractors that they

could not participate in the e-tender due to transportation restrictions on the basis of the pandemic Covid-19 protocol cannot be a reasonable ground,

as the same was not raised in the earlier writ petitions, is incorrect and against the facts on record. According to the appellants, the earlier writ

petitions were filed specifically challenging the rejection orders issued by the Chief Conservator of Forests rejecting the registration of the petitioners

as A class contractors and the cancellation of the e-tender was never a subject matter in the earlier writ petitions and therefore, the said finding

rendered has no legal or factual basis.

8. That apart, it was contended that in accordance with the terms and conditions of the notice inviting tender, a bidder apart from submitting his e-

tender has to submit a tender as well the documents by speed post or registered post simultaneously within the time stipulated in the notice inviting

tender and due to the pandemic Covid 19 , many could not have done the same. It was also submitted by the learned Special Government Pleader that the contention that the finding in the impugned cancellation order is hypothetical is not at all true or correct, since sufficient reasons are assigned in the impugned order. It was also submitted that the learned single Judge was incorrect in substituting the reasons provided by the competent authorities while undertaking a judicial review exercising the powers under Article 226 of the Constitution of India. Other findings in the judgment as extracted above are also challenged in the appeal and have further relied upon the judgment of the Apex Court in *Michigan Rubber (India) Ltd. (M/s) v. State of Karnataka and others* (2012) 8 SCC 216], wherein it was held that interference by court in contract matters is not justifiable, unless action of tendering authority is mala fide, arbitrary or unreasonable. It was submitted that none of the requirements which are well settled in law for interference in contractual matters, like arbitrariness, illegality, unreasonableness, misuse of statutory powers etc. were established by the writ petitioners so as to justify interference of the writ court. Therefore, the sum and substance of the submissions were that merely because the writ court felt that no reasons are assigned in the order impugned, that will not amount to the legal requirements justifying interference with the floating of the tender after cancellation of the earlier one on 31.10.2020.

9. The learned Special Government Pleader has also submitted that since the tender was earlier invited during the peak period of the pandemic Covid-19, other eligible contractors could not participate in the contract. The learned Special Government Pleader has further invited our attention to the judgment of the Apex Court in *Jagdish Mandal v. State of Orissa and others* [(2007) 14 SCC 517].

10. On the other hand, the respective counsel appearing for the writ petitioners, have taken us through the cancellation order dated 12.10.2020 and submitted that even though it is stated in the cancellation order that some other contractors had complained that they could not participate in the e-tender due to the pandemic Covid-19 transportation restrictions, neither in the cancellation order nor in the writ appeal, documents are produced to substantiate the same, and according to the learned counsel, there were no such complaints from any contractors. It was also pointed out that apart

from one of the participants in the tender, all were from different places within the State of Kerala and they could successfully participate in the e-tender dated 25.05.2020 and had complied with all the mandatory requirements stipulated in the notice inviting tender including postal transmission of records, and therefore such a reason shown in the cancellation order is without any factual and legal foundation and intended to help some other contractors.

11. It was also submitted that there is no specific case for the appellants that any other persons, other than the 5 participants in the e-tender dated 25.05.2020, have submitted e-tender, but disabled them to submit the tender documents before the tender inviting authorities in contemplation of the requirements of notice inviting tender. Therefore, according to the writ petitioners, such a reason is shown only to cancel the tender, which itself is a highly doubtful circumstance with respect to the conduct of the appellants and, which, in turn, would be an arbitrary exercise of power. Learned counsel have also addressed arguments supporting the findings in the Judgment impugned. We have evaluated the rival submissions made across the Bar.

12. The subject issue revolves around the order of cancellation dated 12.10.2020, wherein it is clearly specified that there were only 5 participants in the e-tender dated 25.05.2020. The tender was opened, and the tenderer namely, Kottakkal Timbers, one of the writ petitioners, was the lowest bidder with 12.67% below the estimated rate of contract. The other two writ petitioners, namely Suresh Mathew and Bose Thomas, have quoted 8.90% and 14.20% above the estimate rate. It is also stated in the said order that as on the date of submission of the tender, M/s. Kottakkal Timbers, the lowest bidder, Sri. Suresh Mathew, the second lowest bidder and Sri. Bose Thomas, the third lowest bidder, were not having valid registrations, and it was not sure whether the renewing authority will decide to renew the licence. Anyhow, during the pendency of the writ petitions, the licences were renewed and the bid submitted by the said writ petitioners were processed on the basis of the directions issued by this Court to do so. It is also clear from the order that the tender inviting authority was satisfied that the registration of the lowest tenderer and second lowest tenderer were likely to be renewed by the competent authority and he was also of the opinion that it was against the

principles of natural justice to refuse their bids on the presumptive ground that they were not eligible on the date of submission of the tenders. The reasons assigned in the impugned cancellation order was analysed by the learned single Judge in the said backdrop and it was, accordingly, found that the reasons assigned cannot be sustained. The reasons assigned in the order of cancellation are as follows:

3. Some other contractors had complained that they could not participate in the e-tender due to Covid-19 transportation restrictions. Their grievances need proper redressal.

4. Final felling of a mature Teak Plantation and its replanting are time-bound silvicultural operations which once delayed affects establishment of the new plantation. Thus the works should commence soon.

5. The Model Code of Conduct (MCO) with respect to the election to Local Self Government is impending. Hence tender procedure, if any, has to be placed at the earliest.

6. Since a good number of cases were filed among the participated contractors, at present there is an atmosphere of healthy competition among them which is expected to be beneficial for safeguarding Government interest and the lowest bid in all likelihood is expected to come down further if re-tendered.

7. The plantation is in an easy terrain of manageable extent and hence there could be better participation and healthy competition if re-tendered.

8. As per Go (Rt) No. 394/2018/For, dated 01.09.2018, the Government order dealing with the financial delegation of powers, the Divisional Forest

Officer can accord sanction for tender excess upto 10% above the estimate rate.

9 As per clause 3 of the e-tender notice in English the bidding authority reserves the right to modify/cancel, any/all bids without assigning any reason.

Clause 27 of e-Government procurement notice inviting tender for works puts in explicit terms that the tender inviting authority or other sanctioning

authority reserves the right to reject any tender or all the tenders without assigning any reason therefor.

13. In our considered opinion, on an analysis of the findings made by the learned single Judge, we see that even though the expressions 'arbitrary'

and 'unreasonable' are not employed by the learned single Judge in the

judgment, it is clear that it was after entering into the requisite findings leading to arbitrariness, the writ petitions were allowed and the impugned cancellation order was quashed. We also find force in the argument advanced by the learned counsel for the writ petitioners that one of the reasons shown in the cancellation order that there were complaints from eligible contractors on their failure to participate in the e-tender is a baseless contention, since it was an e-tender. In order to substantiate the said contention, there should have been participation in the e-tendering process by any other eligible contractors.

14. We also do not find any basis in the arguments of the learned Special Government Pleader that the bid documents had to be submitted physically, in view of the stipulation contained in the notice inviting tender, and it was not possible due Covid 19 restrictions, for the reason that such a requirement arises only if any eligible contractor participated in the e-tendering process. In order to establish as to whether any eligible contractor participated in the e-tender, no documents were produced, and if such a situation had arisen, there would have been substantive documents available with the tender inviting authority and having not produced any such evidence, it can only be legally presumed that there were no such incident to support the stand adopted by the appellants. Therefore, we are of the clear opinion that the fundamental reason assigned in the cancellation order that there were complaints from the eligible contractors expressing their inability to participate in the e-tender, has no factual and legal foundation and cannot be sustained under law, and thus it can only be termed as an arbitrary and illegal act. If there is no conclusive proof for participation of any other eligible contractors in the e-tendering process, the contention advanced by the appellants that many contractors could not participate due to restriction in transportation facilities is a hollow and baseless argument. Which thus means, without submitting e-tender, nobody can submit the tender documents physically before the tender inviting authorities, which is quite clear and evident from the notice inviting tender, which specifies that the tender documents should reach the Department on or before the bid opening time and date, failing which the bid is liable to be rejected. Therefore, Such a requirement can only be understood as an additional requirement to the submission of the e-tender by the willing and eligible contractors.

15. Circumstances being so, the prime reason assigned for the cancellation of contract as extracted above becomes an arbitrary, unreasonable and illegal act on the part of the tender inviting authority. Merely because there is a likelihood of the rates being lowered, if successive tenders are invited, it cannot be a justifiable ground at all for cancellation of the contract, since we are of the firm opinion that, if that is to be taken as a valid reason, then there would not be any end to the tender inviting procedure. We also find from the judgment that it was on the basis of the urgency put forth by the appellants alone, the writ petitions were heard even without the filing of any statement or counter by the appellants, for the reason that the work as per e-tender is to be carried out on an emergent basis. If that be so, we are at a loss to understand as to how the situation of emergency pointed out by the appellants could be achieved by cancelling the e-tender and inviting fresh tenders, which in our opinion, undoubtedly protracts and retards and elongates the finalisation of the proceedings to a future date. To put it otherwise the reason so assigned is not at all a conducive and compatible one to justify the said reasoning of the tender inviting authority in the order impugned. Even though the learned Special Government Pleader has invited our attention to paragraph 19 of the judgment of the Apex Court in Jagadish Mandal (supra), we have no difference of opinion to the principles of law laid down by the Apex Court after conducting a survey of the earlier decisions on the point. For the sake of convenience and understanding the true import of the judgment, it is profitable to extract paragraph 22 of Jagadish Mandal (supra) and it reads thus:

â??22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made â??lawfullyâ? and not to check whether choice or decision is â??soundâ?. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be

invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. 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. Cases involving blacklisting or imposition of penal consequences

on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

So also is the case with *Michigan Rubber (India)* (supra) relied upon by the appellants.

16. But, to the facts and circumstances involved in the appeals at hand, according to us, the said principles cannot be employed to nonsuit the writ

petitioners. Moreover, the facts and circumstances involved in *Jagdish Mandal* were entirely different in regard to a defective tender submitted by a

participant and therefore, the principles laid down on the basis of such circumstances cannot be imported to have application to the facts and

circumstances involved in the appeals at hand. So also, it is a very well settled proposition in law that the principles of law evolved by the superior

courts can only be applied appropriately in a given circumstances, taking into

account the facts and circumstances involved in the case.

17. We have no doubt in our mind that in a writ petition seeking judicial review, certain restraints have to be followed by the court, bearing in mind the public interest, the commercial functions of the Government, the feasibility of the contract and the viability etc. However, we cannot forget the fact that if there is any patent arbitrariness in the matter of cancellation of a contract and that too after opening the bids submitted by the participants, a writ court shall step in to undo such arbitrariness and unreasonableness. That said, evaluating the principles of law laid down by the Apex Court in the judgments referred to supra, it is clear that the basic requirement of Article 14 of the Constitution of India is fairness in action by the State, non-arbitrariness in essence, and the substance is the heartbeat of fair play. It is also clear from the preposition of law laid down by the Apex Court that the attempt of a writ court in a contractual matter should only be to decipher as to whether the State has acted validly for a discernible reason and not whimsically for any ulterior purpose. Thinking so, we are in respectful agreement with the findings of the learned Single Judge on all counts.

18. On a consideration of the facts, law discussed above, the circumstances involved in the appeals at hand and the findings rendered by the learned single Judge, we have no hesitation to hold that the appeals are devoid of merits and the learned single Judge has exercised the discretion conferred under Article 226 of the Constitution of India properly, eloquently and in accordance with law.

Upshot of the above discussion is that writ appeals fail and accordingly they are dismissed.