
(2021) 03 KL CK 0343

In the High Court Of Kerala

Case No : Writ Petition (C) No. 2938 Of 2021

Reliance General Insurance Company Ltd

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 29-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2021) 03 KL CK 0343

Hon'ble Judges : P.V. Asha, J

Bench : Single Bench

Advocate : E.K. Nandakumar, M. Gopikrishnan Nambiar, K. John Mathai, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham, Raja Kannan, Nayanpally Ramola, K.V. Manoj Kumar

Final Decision : Dismissed

Judgement

1. Ext.P23 order of Government revoking the award of contract to the petitioner is under challenge in this Writ Petition. The petitioner has sought for a declaration also to the effect that the conditions stipulated by the Government in Ext.P27 invitation for request for proposal (RFP) for implementing Medical Insurance Scheme for State Employees and Pensioners (MEDISEP) would not apply to it.

2. The Government had as per Ext.P1 notification dated 01.01.2019 invited RFP for implementation of MEDISEP for State Government employees and pensioners. The scheme was envisaged for providing cashless treatment facility to the State Government employees, pensioners and family pensioners, etc., through an insurance company and a network of empanelled hospitals in accordance with the criteria fixed by the Government. It was provided that the proposal shall remain valid for 180 days after the deadline for submission. It was also provided that the successful participant shall enter into an agreement within seven days of receipt of the order of acceptance of proposal. Annexure II provided for the empanellment guidelines. As per Ext.P2 letter dated 27.02.2019 the Government

accepted the bid submitted by the petitioner at an annual premium of Rs.2992.48 per family. Thereupon, the petitioner as per Ext.P3 letter dated 06.03.2019 accepted the award and requested for confirmation on the start of the policy, finalisation of package rates, etc., at the earliest, stating that the petitioner would be turning down other opportunities. Thereafter, in the meeting held on 14.03.2019 as per Ext.P4 minutes, a time line was fixed for each steps to be undertaken by the petitioner as well as the respondent for the period from 23.03.2019 to 10.04.2019. As per Ext.P6 letter dated 27.04.2019, the Government awarded the contract to the petitioner. It is stated that, in the meanwhile, the respondent had approved the logos prepared by the petitioner for the scheme and the petitioner had sought for clarifications over the discrepancies found in the data shared by the respondent with respect to the details of the beneficiaries: there had been various correspondence between the petitioner and the respondent through emails like Exts.P7 to P9 and that the respondent had, while acknowledging the discrepancies as per Ext.P8 email dated 21.05.2019, requested the petitioner to upload the data in the portal created by it for the scheme, for updation of the details of beneficiaries and the petitioner had uploaded the same accordingly. As per Ext.P10 proceedings, the Government decided to constitute a committee with the Additional Secretary, Finance (Health Insurance) Department, Joint Director, State Nodal Cell (MEDISEP) and Medical Officer, State Nodal Cell (MEDISEP), for taking decisions on the utilisation of the funds from the corpus and laying down the procedure to be followed for implementation of the scheme. It is stated that the petitioner had been diligently working on empanellment of hospitals for implementing the MEDISEP. According to the petitioner, the difference in package rate approved by the respondent under the scheme and the rate demanded by several of the hospitals it approached were almost double and therefore the petitioner was unable to empanel certain super specialty hospitals. It is stated that in the meeting held with both the parties on 11.07.2019, as per Ext.P11 minutes, the respondent had acknowledged the existence of the discrepancies and had assured to hand over the rectified data to the petitioner on 15.07.2019 and it had acknowledged the difference in the packages approved in the tender and the rate prescribed by certain hospitals. It is stated that even after the petitioner furnished the details regarding the portal established by it, the respondent had not furnished the rectified data despite repeated requests; even then the petitioner continued to work on implementation of the scheme. Despite this, the Government as per Ext.P15 letter dated 29.07.2019 informed the petitioner that it was not taking required steps for empanellment. The petitioner thereupon, as per Ext.P16 e-mail, informed the respondent that it had already empanelled 15 out of total 24 private Medical College Hospitals in Kerala and was taking steps for requisite number of empanelled hospitals. It is pointed out that even thereafter the agreement for starting the scheme was not finalised and that in the draft agreement, which was circulated on 29.07.2019 as per Ext.P17 mail, there were several deviations which the petitioner had pointed out as per Ext.P18 e-mail. Thereafter on 01.08.2019, the respondent as per Ext.P19 letter

requested the petitioner to provide 25% hike in the surgical package. It is stated that the petitioner had as per Ext.P20 letter dated 08.08.2019 informed that such a rate was not covered by the terms of RFP. Thereafter, as per Ext.P21 email dated 10.08.2019 the petitioner requested for approval for uploading the enrollment data in order to generate health cards, in which the number of employees, the number of pensioners, their dependents etc. were to be furnished. It is stated that the respondents did not furnish the rectified data even thereafter; in the meeting held on 20.08.2019, the respondent had informed that they are not going ahead with the scheme. Thereupon, as per Ext.P22 letter dated 22.08.2019 the petitioner informed the Government about the time and effort it had taken by deployment of resources and development of infrastructure for the smooth launch of the scheme, furnishing the details. Reminding that the validity period of 180 days after deadline of submission, prescribed in the RFP, was over, the petitioner stated as follows:

"As in fact, there appears no prospect of the scheme getting launched and the stipulated period to mutually agree on extension has lapsed, we are constrained to hold back further hospital empanelment, suspend the call center operations and stop generation of health cards for the intended beneficiaries."

3. On the very same day the Government issued Ext.P23 letter dated 22.08.2019, informing the petitioner that it has decided to revoke the award of contract issued to it for implementation of MEDISEP as the petitioner failed to fulfill the empanellment criteria in all the 3 categories as per the RFP conditions. Thereafter, while returning the data of beneficiaries along with Ext.P24 letter dated 26.12.2019, the petitioner informed the Government that since a direction to discontinue the scheme was notified, the smooth launch of the scheme could not take effect though the petitioner had invested substantial time, effort in deploying resources and development of infrastructure for the same, as pointed out in Ext.P22 letter and that the scheme could not be launched, owing to several constraints entirely beyond its control and lack of administrative go ahead. It was stated that there were no non-fulfillment of obligations on the part of the petitioner. According to the petitioner, Ext.P23 order was issued at a time when the petitioner had empanelled 120 network hospitals. It is stated that when the 180 days' validity period of the proposal prescribed in Ext.P1 had expired on 10.08.2019, there was no question of any revocation on a subsequent date. It is stated that the Government had called for fresh RFP as per Ext.P25 notification on 15.10.2020 for implementing MEDISEP and the petitioner had submitted its bid. But the respondent cancelled the same as per Ext.P26 notice stating that it has to incorporate specific clause to protect the larger public interest. Thereafter, as per Ext.P27 notification dated 22.01.2021, RFP was again invited from eligible entities for implementation of MEDISEP on 5 lakhs State Government Employees and 5 lakh pensioners and their eligible dependants with effect from 01.04.2021. Bid submission date was fixed as 06.02.2021. In Clause x of Ext.P27 notification of RFP, the following condition was stipulated:

"x. The Insurance company should not have been banned or blacklisted by Govt. of Kerala or any other State Government from conducting such businesses owing to the defaults in execution of such schemes. The insurer should give an undertaking to this effect."

The petitioner found that the aforesaid clause in Ext.P27 is intended to target it and to ensure that it is not permitted to participate. The petitioner therefore filed this Writ Petition challenging Ext.P23 revocation pointing out that the same was issued in violation of the principles of natural justice and it was in effect a ban/blacklisting against the petitioner, without hearing it, as the petitioner was being excluded from participating in the tender. Thereupon, the petitioner submitted Ext.P28 letter seeking permission to participate in the tender. The Writ Petition is filed thereafter pointing out that there was no lapse on the part of the petitioner in revoking the award of contract by the respondent.

4. The respondent filed a counter affidavit. According to the respondent, the Writ Petition is not maintainable as the petitioner, who is a proposed bidder, does not have any fundamental right to carry on business with the Government. It is stated that challenge against Ext.P23 revocation is highly belated and that the petitioner had already accepted the revocation and abstained from challenging the same. It is stated that the respondent had already notified the package rates and hospital requirements, in the RFP dated 01.01.2019 as also in its corrigendum; therefore, the petitioner could have empanelled super specialty private hospitals. As per the empanellment guidelines -Annexure II to the RFP, all the secondary and tertiary public hospitals and super specialty institutions including RCC, MCC, CCC and SCTIMST, all Government Medical Colleges, District and General Hospitals, Women & Child Hospitals shall be automatically included in the provider network. It is stated that the scheme is intended to provide medical/surgical treatment to the beneficiaries for which participation of good profile popular hospitals is the most important and foremost factor. The respondent has the responsibility to ensure that its subjects are served with a worthy scheme and to see that those paying the premium are availing treatment from Hospitals which meet the required quality and standard. It is stated that the respondent had held discussions with prominent hospitals and its feed back was intimated to the petitioner on 29.07.2019. It is stated that as per the corrigendum to RFP an addition was made to Annex.1 to the effect that insurer shall have the discretion to reduce the package rates provided they can ensure hospital empanelment as per the guidelines specified; however enhancement of package rates is allowed limiting the same to a maximum of 25% over the listed rates, that too, only in the case of surgical procedures. It is stated that Ext.P1 was published on 01.01.2019; last date for submission of proposal was extended to 11.02.2019; the period of 180 days provided in RFP expired on 08.08.2019. The petitioner had not complied with the empanellment guidelines as on that date. It is stated that in Ext.P22 the petitioner has admitted its failure to comply with the empanellment conditions while stating that it was ready to implement the scheme with the modified terms and conditions, that too, with revised rates

when the respondent called for a fresh RFP; that would show that the petitioner wanted to back out from the scheme. It is stated that Ext.P23 was issued on account of the lapses of the petitioner in complying with the mandates in Ext.P1 and it had failed to fulfill the empanelment criteria in all the three categories as per the RFP conditions. It is stated that the respondent had as per Ext.R1(a)/Ext.P15 letter dated 29.07.2019 directed the petitioner to expedite the proceedings. It was followed by Ext.R1(b)/Ext.P19 letter dated 01.08.2019. The petitioner had as per Ext.R1(c)/P20 letter dated 08.08.2019 informed that it would not be in a position to implement the scheme. It is stated that Ext.P23 was issued solely for the breaches on the part of the petitioner. After accepting Ext.P23 order, as per Ext.P24 letter, the petitioner cannot be heard to challenge it when Ext.P27 was issued inviting RFP, for the purpose of challenging Ext.P27. On receipt of Ext.P23 the petitioner did not have any grievance and it had only expressed its interest to participate and implement the scheme in future with modified standard. Therefore, the petitioner ought to have submitted its bid after considering all the aspects notified in Ext.P1 and its corrigendum. It is stated that empanellment of specialty hospitals lacked comprehensive coverage and the same cannot ensure a proper access to patient care and it is not sufficient for smooth functioning of such a large health insurance program. It is stated that response from the beneficiaries was alarming when the list of hospitals provided by the insurer was uploaded in the website. It is stated that Ext.P26 tender notification inviting RFP had to be cancelled in order to incorporate specific clauses to protect larger public interest. Many changes were brought about in Ext.P27 tender notification in order to suit the changes in current health scenario ranging from sum insured to comprehensive coverage and packages and its rates. There were substantial changes in many heads including that of the benefits provided to the Government employees and pensioners, the medical facility provided, the rates for various procedures and other clauses in order to achieve the implementation of the scheme. It is stated that the modification of the provisions in RFP is the choice of the employer which is beyond judicial scrutiny. The implementation of the scheme for which steps were taken in 2019 is already delayed for two years on account of the lapses on the side of the petitioner contrary to public interest. The lethargy of the petitioner company has affected about 5 lakhs of employees and 5 lakhs of pensioners. It is further stated that the respondent cannot afford to further stalling of the project which is already stalled for 2 years and wants to avoid repetition of past experience. It is further stated that it is not inclined to specifically exclude anyone from conducting business with the respondent; it only wants to protect the larger public interest. The petitioner has no fundamental rights to submit bid or to get the project awarded to it. It is stated that when there was no concluded contract there was no question of notice or hearing before revocation of the award and therefore it cannot be said that there is any violalion of the principles of natural justice in issuing Ext.P23 order. It is stated that several notices were already issued to the petitioner, before the revocation; a meeting was convened and the petitioner itself had informed that they were not intending to continue with the

project. It is stated that the petitioner had not complied with the mandatory requirements till the expiry of the bid validity period. The lapse of 180 days was only on account of the failure on the part of the petitioner and the only option for the respondent was to invite new RFP. Therefore, the petitioner cannot have any belief that Ext.P23 revocation would be held against it. The respondent only wanted to safeguard the public interest to provide the best service provider. It is stated that the respondent was not blacklisted or banned the petitioner from any contact as per Ext.P27. If the petitioner satisfies the requirements in Ext.P27, it can participate and the conditions in Ext.P27 are applicable to all the insurance companies. Moreover, non participation in Ext.P27 does not disqualify or affect the participation in other RFP/bids. The petitioner, who had submitted its bid knowing all the implications of Ext.P1 RFP, cannot be heard to disown after it failed to comply with the provisions in Ext.P1.

5. The petitioner filed a reply affidavit. The petitioner stated that the condition fixed in Ext.P27 was specifically intended to the petitioner with the mala fide intention of excluding it and it is clear from the fact that based on Ext.P25 RFP the petitioner had participated and that was cancelled for modifying the same to include the exclusion process. It has only sought for a declaration that the said clause does not apply to it. The petitioner stated that it was selected as the successful bidder in several prestigious projects of the Central and State Governments and it has got the highest enrollment of beneficiaries for the last several years in various schemes in the State. Pointing out Exts.P7 and P8 it is stated that the respondent had admitted the discrepancies in the data shared by it. It is stated that when the respondent did not take any steps to empanel any public hospitals and the petitioner cannot be asked to grant hike to certain hospitals and that the failure of the respondent to empanel reputed Government hospitals is attributable to the lack of administrative will on the part of the respondent. It is stated that the empanellment of hospital is an ongoing process in such schemes even after its launch. In the absence of any established breach, the revocation is illegal. As per Ext.P1 the agreement was to be signed within 7 days of receipt of the order communicating acceptance. Any insurance company cannot be expected to empanel all hospitals within 7 days' of receipt of the order communicating acceptance of proposal. There was no precondition that only good profile popular hospitals should be empanelled. The bid validity is for a period of 180 days from the last date of submission, which was 11.2.2019. The 180 days' period expired on 10.8.2019 i.e, even before the revocation. There was no time limit provided for empanellment of hospitals in the RFP. The respondent had informed the petitioner about the decision not to go ahead as evident from Ext.P22 and based on that the petitioner expressed its interest to implement the scheme in future. The petitioner had taken much effort for empanelling the hospitals, collecting the data etc. The suggestion made by the petitioner to implement the MEDISEP scheme after its validity, cannot be treated as admission of its failure. Pointing out Ext.P13 list of hospitals empanelled by the petitioner it was stated that several were included in it. It was stated that on

account of the failure of the respondent to empanel the Government hospitals, several of the private hospitals backed out and that the delay in implementation of the scheme which was approved by the Government in 2017 and was floated with RFP only in 2019, that too, with several shortcomings, was solely due to the respondent. After the period of 180 days of the last date of submission, the award became inconsequential as no agreement was executed within time. It is stated that Ext.P23 has the effect of blacklisting after the issuance of Ext.P27 RFP which prevented the petitioner from participating. It is stated that once Ext.P23 is found illegal, the conditions prescribed in Ext.P27 become inapplicable to the petitioner.

6. The learned Senior Government pleader filed a statement in answer to the reply affidavit. It is stated that when a bidder is not qualified, it cannot be said to be blacklisting. The petitioner had not submitted the list of empanelled hospitals, till the date of cancellation of the original award and that the petitioner had not enlisted the major specialty/super specialty hospitals. It is stated in para.7 as follows:

"The empanelment of specialty hospitals is poor, lacks comprehensive coverage and fragmented in nature. To illustrate the point, taking the example of four major specialty; Cardiology, Cardio Vascular, Neurology and Neurosurgery. In cluster 3, if we take Trivandrum District, Cardiology is provided in 7 hospitals, but cardiovascular and thoracic surgery is provided only in 2 hospitals and none of the hospital in city are providing all the three together. PRS is providing cardiology but not cardiovascular and cardio thoracic. Even in the 7 hospitals which is stated to provide cardiology, hospitals like Rukmani Memorial and India Trust hospitals are not known for such services. Whereas hospitals frequented by the patients in city like Cosmopolitan Hospital, Ananthapuri Hospital, BR Life, Meditrina, Al-Arif, KIMS are not in the list which is a key concern. Similarly, if we take neurology and neurosurgery same is the case. Neurosurgery is empanelled for only two hospitals one is Rukmoni Devi Hospital and the other is Dr.Somervell Memorial CSI Medical College & Hospital. Here also there is no good hospital in the city which are in the empanelled list and these two hospitals are not known for neurosurgery treatment. Further there are only three hospitals in the list which provides neurosurgery and no known hospital in the city is part of the current list.

Similarly, if we see Ernakulam District, Cluster 3, only one hospital is empanelled for Cardiology, Cardio Thoracic and Vascular surgery, Neurology and Neurosurgery (ie. , all four services). Cardiovascular and Thoracic surgery is empanelled for one hospital whereas neurosurgery is there in two hospitals. This is unacceptable taking into consideration that beneficiaries from Alappuzha, Idukki and other nearby districts will also be relying on Ernakulam for treatment considering the number of specialty and super specialty hospitals. But none of them are figuring in the list. Medical Trust Hospital, Lakeshore Hospital, Sunrise Hospital, Specialty Hospital, Lakshmi Hospital, Amritha Institute of Medical

Sciences, Lisy Hospital etc. in not figuring in the list. Even privae medical college Kolencherry is not part of the list."

Similarly, it was pointed out that in each of the district the condition was similar.

7. Sri. E. K. Nandakumar, the learned Senior Counsel, ably assisted by Ms.Ramola, appearing for the petitioner, relied on UMC Technologies Pvt. Ltd. v. Food Corporation of India [JT 2020 (11) SC 26], Vetindia Pharmaceuticals Ltd. v. State of Uthar Pradesh and another: [(2021) 1 SCC 804] , State of U.P v. Sudhir Kumar Singh & Ors: [2020 SCC online SC 847], etc. in support of their contentions.

8. Sri K.V.Manoj Kumar, the learned Senior Government Pleader, relied on Michigan Rubber (India) Ltd. v. State of Karnataka & Ors: [(2012) 8 SCC 216] ; Association of Registration Plates v. Union of India & Ors. [(2005) 1 SCC 697], Monarch Infrastructure (P) Ltd. v. Commr. Ulhasnagar Municipal Corpn. [(2000) 5 SCC 287], Meerut Development Authority v. Assn. Of Managements Studies [(2009) 6 SCC 171]; Bakshi Security & Personnel Services Pvt. Ltd. v. Devkishan Computed Private Ltd. & Ors. [(2016) 8 SCC 446]; State of U.P & Anr. v. Al Faheem Meetex Private Ltd. & anr. [(2016) 4 SCC 716] ; South Delhi Municipal Corpn. v. Ravinder Kumar & Anr. [(2015) 15 SCC 545]; Rajasthan Housing Board & Anr. v. GS Investments & Anr. [2007(1) SCC 477], Maa Binda Express Carrier & anr. v. North-East Frontier Railway & Ors. [(2014) 3 SCC 760], Rishi Kiran Logistics Private Ltd. v. Board of Trustees of Kandla Port Trust & Ors. [(2015) 13 SCC 233]; State of Jharkhand &Ors. v. CWE-Soma Consortium [(2016) 14 SCC 172]; Municipal Council, Neemuch v. Mahadeo Real Estate & Ors. [(2019) 10 SCC 738] ; Civil Appeal 2197/2020; judgment dated 4.5.2020 in W.P(c).No.26853/2019, judgment dated 14.01.2021 in W.A.No.82/2021 etc., opposing the reliefs prayed for in the Writ Petition.

9. The issue to be considered is whether Ext.P23 order requires interference by this Court. Based on Ext.P1 RFP, the bid submitted by the petitioner was accepted and contract was awarded to the petitioner. That contract is revoked as per Ext.P23 order stating that the petitioner did not comply with the conditions in Ext.P1 RFP. The petitioner has approached this Court, because of the conditions fixed in Ext.P27 RFP, based on which it is unable to participate in the tender/RFP because of Ext.P23. The revocation was ordered before execution of agreement between the parties. Ext.P23 would not indicate any disqualification which is likely to incur. It does not black list or ban the petitioner. According to the petitioner, it is subjected to blacklisting. Though both sides referred to a series of judgments, I was unable to find any of those judgments rendered in the circumstances similar to those in the present case. At the outset, I shall examine the case law relied on by both sides.

10. In the judgment in Vetinda Pharmaceuticals' case (supra) an order of black listing issued on 08.09.2009 challenged after about 10 years was rejected by the High Court on the ground of inordinate delay. Apex Court found that appellant

had been pursuing the matter with the authorities and Rajasthan Government was sitting over it leading to rejection of appellant's tender. It was found that the illegality and disproportionate nature of the order of black listing and non-involvement of any third party rights ought to have been considered by the High Court in its equitable jurisdiction. Seeing that there was nothing in the show cause notice issued to the appellant therein as to the intention to blacklist and also the consequences the appellant had been facing on account of an illegal action of black listing without giving any opportunity of hearing on it, the Apex Court observed that in the event of such an indication appellant could have resorted to appropriate proceedings. It was found that as the order of blacklisting was vitiated from its very inception itself and hence unsustainable, the delay was liable to be condoned. Hence the blacklisting was set aside.

11. I am of the view that the petitioner need not be non-suited merely on the ground of delay in challenging Ext.P23 order. An order passed on 22.08.2019 is challenged on 03.02.2021 within eighteen months, immediately when it came to know that it stands in the way of its participation in other tenders. Therefore, the matter requires consideration on merits.

12. Then the next question would be whether interference is required on Ext.P23 order of revocation. The judgment of the Apex Court in Vedanta was relating to a case where the order of black listing was under challenge. The contention as well as the finding is that show cause notice did not contain any such indication. It was in such circumstances that Apex Court set aside the order of black listing as it was passed in violation of the principles of natural justice. In the present case Ext.P23 does not order any blacklisting. It only revokes the award of contract.

13. In the judgment in UMC Technologies Pvt Ltd's case (supra), relied on by the learned Senior Counsel, the order passed by the Food Corporation of India terminating the contract with the appellant along with an order of blacklisting it for a period of 5 years was under challenge. The challenge against blacklisting alone was pressed before the Apex Court. On the basis of a competitive bid, appellant was appointed as the agency for conducting recruitment process to the post of Watchmen for a period of two years from 14.02.2017. In connection with the test conducted in April 2018, certain crimes were registered by the Police against persons who were found to have documents like question papers of that examination. After issuing show cause notice and obtaining explanation, the order of termination and blacklisting was issued. The appellant took the contention that the conditions of bid or contract did not provide for blacklisting and that the FCI did not have any authority to blacklist it. The contention of the FCI was that blacklisting was provided for in the bid document and that blacklisting was ordered after issuing show cause notice. The Apex Court found that a valid and unambiguous show cause notice indicating the intention of the authority and intimating the consequences thereof giving an opportunity to the contractor to show cause against the proposed blacklisting was absent in that notice and it did not fulfill the requirements. It was found that the show cause

notice had not mentioned anything even to give a hint to the appellant that even a proposal for blacklisting was contemplated. The Apex Court set aside the blacklisting for being violative of the principles of natural justice.

14. In the judgment in *Sudheerkumar Singh's case* (supra), the issue is related to cancellation of tender. Several investigations were conducted by the authorities before cancellation; but none of them were with notice or opportunity of hearing to the tenderers whose bid were accepted. The Apex Court, after referring to a series of judgments on scope of judicial review on contractual matters, concluded that as the cancellation of tender was challenged on alleged breach of *audi alteram partem* rule, it involved a public law element as the entire proceedings leading to cancellation of tender therein were done behind the back of the tenderer. The Apex Court upheld the judgment of the High Court, which had set aside the cancellation of contract on the ground of violation of principles of natural justice.

15. In the present case, Ext.P23 order itself does not refer to any black listing. There is no order as such against the petitioner incurring any disqualification on it for participating in future tenders. Disqualification arises only in Ext.P27 RFP, which does not refer to the petitioner particularly. A plain reading of Ext.P23 would only show that the award of contract is revoked for failure to comply with its conditions. Independent of Ext.P27 RFP, there is no disability. The petitioner did not have any complaint over it when it sent Ext.P24 letter, apparently in the absence of any indication as to the consequences.

16. Relying on the judgment in *Mohinder Sing Gill and another v. The Chief Election Commissioner, New Delhi and Others* : (1978) 1 SCC 465, the learned Senior Counsel had also argued that the respondent cannot be permitted to supplement the reasons stated in Ext.P23 order by filing counter affidavit and such explanations are not liable to be looked into. Law is well settled on this point as rightly contented by Sri. Nandakumar.

17. At the same time, it is also well settled as argued by Sri. K.V.Manoj kumar, the learned Senior Government Pleader, relying on a series of judgments, that scope of judicial review in contractual matters is very limited and that except in cases of arbitrariness, malafides, etc., interference is totally uncalled for. In the judgment in *Michigan Rubber (India) Ltd.'s case* (supra), the pre-qualification criteria fixed and notified by Karnataka Transport Corporation while inviting tenders for supply of tyres, tubes and flaps was the issue which arose for consideration. Allegation was that the same was incorporated in order to exclude the petitioner. The Apex Court after analysing a catena of judgments, held that it is a matter entirely within the domain of tender inviting authority and not liable to be interfered with. I shall examine the judgments cited by the Learned Senior Government Pleader.

18. In *Assn. of Registration Plates v. Union of India*: (2005) 1 SCC 679, a three Judge Bench considered a case where it was alleged that notices inviting tenders

(NITs) for supply of high security registration plates for motor vehicles, were issued stipulating tailor-made conditions to favour companies with foreign collaboration and to exclude the indigenous manufacturers from the tender process. It was held that tender conditions are unassailable unless the action of tendering authority is found to be malicious and in misuse of its statutory powers. The Apex Court held that certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. While reiterating that Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure, it has held that the Government has to act reasonably, fairly and in public interest in awarding contract; at the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest.

19. In *Meerut Development Authority v. Assn. Of Managements Studies* [(2009) 6 SCC 171] the Apex Court considered a case where the tenderer claimed award of work on the ground of his highest bid. The Apex Court considered and discussed the nature of rights of a bidder. It was held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Judicial review would be available only in cases where it is established that the terms of the invitation to tender are so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

20. In *Monarch Infrastructure (P) Ltd. v. Ulhasnagar Municipal Corpn*: (2000) 5 SCC 287, the Apex Court discussed the scope of judicial review on tender process, the award of contract, etc. and summed up the legal position as follows:

"(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons."

21. In *State of U.P & Anr. v. Al Faheem Meetex Private Ltd. & anr.* [(2016) 4 SCC 716], the issue under consideration was relating to interference of the High Court over the decision of the bid evaluation of Committee of a Municipality to re-tender. Tenders were invited for construction, etc. of a slaughterhouse. After selection was made by the bid evaluation committee for recommendation as Developer, the Finance Department of Government in separate proceedings found that there were some procedural irregularities in the process. Based on such findings the bid evaluation committee decided to re-tender. The High Court

interfered with the said decision. The Apex Court found that when procedural irregularities were found even before recommendation of the BEC reached the authorities for their approval and when the EBC had reviewed its decision to re-tender on being convinced of the defect, such a decision cannot be said to be unfair, mala fide or based on irrelevant considerations. It was also found that the tendering authority has the right to accept or reject any bid and even to annul the whole bidding process and therefore, the High Court was not justified in interfering with such a decision of BEC. It was found that no notice was necessary to the appellant as held by the High Court, as no right had accrued to the respondent when the decision-making process had not reached any finality and when there was no acceptance of the bid by the competent authority.

22. In *South Delhi Municipal Corpn. v. Ravinder Kumar & Anr.* [(2015) 15 SCC 545], the case was related to cancellation of tenders invited by Delhi Municipal Corporation for a number of works. Though 2 contractors -the respondents, were found successful in the financial bid, work order was not issued and Corporation invited fresh tenders, cancelling the first tender. The High Court interfered with the said decision. The Apex Court found that Government being guardian of public finance, it has the right to refuse the lowest or any other tender bid provided, its decision is neither arbitrary nor unreasonable. The appellant Corporation's decision in cancelling its earlier tender is not in violation of Article 14 of the Constitution of India, as the High Court did not find any mala fide intention on the part of the appellant Corporation to favour someone in taking such decision. The appellant Corporation's decision in cancelling the earlier tender notice vide corrigendum dated 30-11-2012 and then issuing a subsequent tender notice dated 13-12-2012 inviting fresh bids from eligible persons for the same works was with a bona fide intention to get better and reasonable rates from the bidders for the execution of the works and not to show favouritism in favour of any bidder.

23. In *Rajasthan Housing Board & Anr. v. GS Investments & Anr.* [2007(1) SCC 477 (page 482)] also, the issue was relating to cancellation of tender. The appellant Board published a notice for auction of commercial plots. The highest bid was of the respondent. On publication of news items relating to large scale bunking in the auction for price far below market value, State Government issued orders staying further proceedings and thereafter ordered suspension of the officers under the Board involved in the process. Thereafter, after obtaining report from Financial Commissioner the State Government disapproved the auction and ordered fresh auction. The Apex Court reiterated the dictum laid down in the judgment in *Laxmikant v. Satyawan*: (1996) 4 SCC 208, that even if the public auction had been completed, no right is accrued to the highest bidder, till the confirmation letter had been issued to him. It was held that as per settled legal position, the respondent did not acquire any right to claim that the auction be concluded in its favour.

24. In *Maa Binda Express Carrier & anr. v. North-East Frontier Railway & Ors.*

[(2014) 3 SCC 760], the Railway invited tenders for the grant of a three year lease of space in a train. Though the appellant, who offered the highest sum for the proposed lease, was the highest bidder, the railway administration cancelled the tender on account of technical and administrative reasons. Inasmuch as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court.

25. The judgments referred to by either side would show that the tender made qualifications in tender conditions can be interfered with if it is substantiated that those are to favour a particular tenderer and to exclude others. In the present case, there is no challenge to the tender conditions. The judgments cited by either side would show that none of them relate to a case where the cancellation of a letter of intent/award of contract before entering into a contract results in disqualification for participating in future tenders.

26. In *Rishi Kiran Logistics (P) Ltd. v. Kandla Port Trust*: (2015) 13 SCC 233, the decision of the Port Trust to re-tender was under challenge. The Port Trust issued notice inviting tenders in the year 2005 to allot its plots on lease for 30 years for putting up the construction of liquid storage tanks. On qualifying in the technical bid, the Port Trust issued Letter of Intent to the successful bidders including the appellant on 7-1-2006 stating that the formal letter will be issued to after the receipt of CRZ clearance. As CRZ clearance was received only in 2010 after the lapse of more than 5 years of the NIT, the Port Trust decided to cancel the tender. That decision was challenged before the High Court, inter alia, contending that as a concluded contract was arrived at between the parties on issuance of LI to the successful bidder, it was not permissible for the Port Trust to terminate the tender process. The High Court found that there was no arbitrariness; there was no arbitrariness and there was no concluded contract. The Apex Court found that larger public interest demanded fresh tender process, in view of the time lag, in order to collect more revenue, in tune with the prevailing market rate. Apart from that it was held that when a public body takes a decision that it need not go further ahead with the tender process, the Court shall not, in judicial review, sit in judgment over it except when the decision is taken without any reasons to support it. In that case it was found that there were sufficient reasons. The Apex Court after reiterating the dictum laid down in *Meerut Development Authority's* case, regarding the rights if any of a bidder, further reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide. It was also reiterated that judicial review on administrative action shall be confined to illegality, irrationality, namely, *Wednesbury* unreasonableness and procedural impropriety.

27. In *Municipal Council, Neemuch v. Mahadeo Real Estate*: (2019) 10 SCC 738, the issue arose after the respondent deposited 25% of the bid amount on

acceptance of its bid by the Municipality pursuant to notification inviting tender for allotment of land on lease for 30 years, which was published in 2 dailies. Based on objections raised, on finding violation of procedure prescribed in the Municipalities Act including prior approval from Government and proper publication in three national dailies, directions were issued to cancel its proposal and proceed for re-tender. The High court allowed the writ petition of the respondent. A three Judge Bench of the Apex Court approved the dictum laid down in *Tata Cellular V Union of India*: (1994) 4 SCC 651 and held as follows:

"14. It could be seen that the scope of judicial review of an administrative action is very limited. Unless the Court comes to a conclusion that the decision-maker has not understood the law correctly that regulates his decision-making power or when it is found that the decision of the decision-maker is vitiated by irrationality and that too on the principle of "Wednesbury unreasonableness" or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision-making process. It is also equally well settled that it is not permissible for the Court to examine the validity of the decision but this Court can examine only the correctness of the decision-making process.

28. The dictum laid down in the judgment in *W.B. Central School Service Commission v. Abdul Halim*: (2019) 18 SCC 39 on the scope of interference under Article 226 in an administrative action was reiterated as follows:

"16. It could thus be seen that an interference by the High Court would be warranted only when the decision impugned is vitiated by an apparent error of law i.e. when the error is apparent on the face of the record and is self-evident. The High Court would be empowered to exercise the powers when it finds that the decision impugned is so arbitrary and capricious that no reasonable person would have ever arrived at. It has been reiterated that the test is not what the Court considers reasonable or unreasonable but a decision which the Court thinks that no reasonable person could have taken. Not only this but such a decision must have led to manifest injustice."

29. In the present case the reason stated by the respondents for cancellation of contract is stated to be the failure on the part of the petitioner to comply with the terms of Ext.P1 read with the corrigendum. This Court is not expected to delve into and evaluate those reasons or into the correctness of the reason and into the sufficiency or otherwise of the same and find out whether the failure if any could have resulted in cancellation. It is also pertinent to note that there was no concluded contract between the parties as the parties had not entered into any agreement.

30. The grievance of the petitioner is in effect on the conditions imposed in Ext.P27, though the petitioner does not challenge the same. In fact the petitioner has readily accepted the cancellation. The contention relating to arbitrariness is raised only on account of the conditions fixed in Ext.P27. Ext.P23 order only

revokes the award of contract, on failure to comply with the conditions in Ext.P1 RFP and its corrigendum.

31. In the above circumstances, I am of the considered view that Ext.P23 order does not warrant any interference by this Court under Article 226 of the Constitution of India. It is made clear that this judgment will not stand in the way of the petitioner for invoking any other remedies available or in the respondent for considering the grievance of the petitioner.

The Writ Petition is dismissed accordingly.