

(1997) 11 KL CK 0006

In the High Court Of Kerala

Case No : W.A. No's. 1272, 1305/97 and O.P. 12811/97

State of Kerala and Others

APPELLANT

Vs

P.K. Ramachandran and Others

RESPONDENT

Date of Decision : 10-11-1997

Acts Referred:

Constitution of India, 1950 — Article 139, 14, 226

Citation : (1997) 2 KLJ 632

Hon'ble Judges : U.P. Singh, C.J;S. Sankarasubban, J

Bench : Division Bench

Advocate : M.K. Damodaran, for the Appellant; Chandrasenan and K. Ramakumar, for the Respondent

Final Decision : Dismissed

Judgement

S. Sankarasubban, J.—The question raised for consideration in these Writ Appeals and the Original Petition being similar they have been heard together and are being disposed of by this common judgment. Since long, the High Court of Kerala had been experiencing acute shortage of space and lack of accommodation in its existing building. It was therefore decided to construct a new multistoreyed complex. This was approved by the Government of Kerala and administrative sanction was given in November, 1993. Detailed estimates were prepared. The site proposed for the new High Court Complex is the Ram Mohan Palace compound itself on the eastern side of the existing High Court building. The major portion of the area in which the new High Court Complex is planned to be constructed was being occupied by offices connected with the High Court and Advocate General's office. These offices were thus required to be shifted and the site was to be cleared before the construction could start. In the situation, the construction of the entire building complex could not be started as a whole and the construction was thus taken up in the available space. For the purpose of construction, the building was divided into 11 blocks, viz., block A to H. These blocks were further divided into 6 works as follows:

- 1) A and I block
- 2) B block
- 3) C block
- 4) D and E block
- 5) F, G and H block
- 6) J and K block.

2. Initially, willingness was invited from the qualified contractors to be selected for the work. As a result of this, 10 contractors were pre-qualified for the purpose of the construction of the High Court buildings. The persons selected as pre-qualified contractors were:

1. Basheer Puthiyadethu, Engineering Construction, Muttom, Aluva, Pin-683 106, Phone: 622895, 626173.
2. M/s. George Mathew Cheriyan, Varkey 38/541, S.A. Road, Kochi-682 016, Phone: 315077 and 315099, Fax No. 314792.
3. Iscon Engineering Pakil, Jawaharnagar, Thiruvananthapuram-41, Phone, 63378, 62631, 62187.
4. P.I. Varghese, Contractor, Palal House, Near P.T.P. Nagar, Vattiyoorkavu P.O., Trivandrum-13, Phone Off: 362072 Res: 360654.
5. R.D.S. Project Ltd., Raiyaan Complex, M.G. Road, Padma Junction. Cochin-35, Phone: 351985, 373834.
6. ASIAN Techs Ltd. XXXVIII/665, P.B. No. 3512, M.G. Road, Cochin-35, Kerala, Phone: 368226, 35508, 354705 (all of Cochin)
7. Noble Tech Engineering Private Ltd. No. XXXII/1181, Palarivattom, Cochin 682 025, Phone: 343535, 346571, 333656.
8. Sri. P.T. Mathai, Govt. Contractor, Parappadethil, Mulanthuruthy P.O., Phone: 740339, 316625.
9. K.V. Joseph, M/s. K.V. Joseph & Sons. Engineering Contractors, Edappally, Cochin-24, Phone: 344062.
10. P.K. Ramachandran, Engineering Contractor, Deepa Mandir, Karuvelippady, Cochin-6.

After the qualified contractors were selected, tenders were invited by the Superintending Engineer for the construction of 4 blocks, grouped in 3 works; i.e., (1) Block B (2) Block C and (3) Block J & K. After receipt of the tenders for the above blocks the works were allocated to the following contractors:

- 1) I. Basheer - Block B

2) P.T. Mathai - Block C

3) M/s. K.V. Joseph and sons - Block J & K.

The construction for the above blocks were thus started and according to the authorities, a satisfactory progress was recorded.

3. After the allocation of works in the aforesaid blocks, the third respondent/ Superintending Engineer took steps to get the old existing buildings vacated and demolished for clearance of the site upon which the remaining 7 blocks of the complex were to be constructed. When the formalities regarding the clearance of the site were completed, the remaining 7 blocks of the High Court Complex were also put to tender into 3 works; (1) A & I block (2) D & E block and (3) F, G & H block. Tenders were invited for the above three works and the last date for receiving the tenders was 10.1.1997 and the tenders were to be opened on that day itself at 4.30 P.M. When the tenders were opened, it was found that the following were the lowest tenderers: For A & I block P.I. Varghese, viz., first respondent in W.A. No. 1305/97 was the lowest tenderer with 84% above the estimated rate. With regard to D & E block, the lowest tenderer was M/s. R.D.S. Project viz., petitioner in O.P. No. 12811/97, quoting 82% above the estimated rate and for F, G & H block, M/s. Noble Tech Engineering Private Ltd. was the lowest tenderer, quoting 83% above estimate rate.

4. It was found that the quoted rates of the lowest tenderers could not be accepted and the Superintending Engineer proposed negotiation with them and issued letters for negotiation on 17.1.1997. As a result of the negotiation, the rates came down to 79% for all these blocks. The Superintending Engineer considered these letters, but rejected the same on 28.1.1997, since it was found that the rate was very high. On 28.1.1997, the third respondent issued a re-tender notice to all the 10 pre-qualified contractors. Pursuant to the above notification, three persons quoted for A & I block, two persons quoted for D & E block and two persons quoted for F, G & H block. The lowest tenderers were; (1) A & I block - P.I. Varghese, the first respondent in W.A. No. 1305/97 with 78% above the estimated rate, (2) D & E block - M/s. R.D.S. Project, petitioner in O.P. No. 12811/97 with 78-5% above the estimated rate and (3) F, G & H block - M/s. Noble Tech Engineering Private Ltd. with 78% above the estimated rate. Thereafter, the Superintending Engineer, on 17.2.1997 issued letters for negotiation with the aforesaid lowest tenderers. The Superintending Engineer received consent letters from the above three lowest tenderers reducing their rate to 77% above the estimated rate. The above tenders with negotiated rate obtained from the lowest tenderers were submitted to the Chief Engineer by the Superintending Engineer on 26.2.1997. On 4.3.1997, the Chief Engineer wrote to the Superintending Engineer to have further negotiation with the lowest tenderers. P.I. Varghese reduced his rate for A & I block to 75% by his letter dated 5.3.1997 and he also gave reasons in his letter that further reduction was not possible because (1) there is insufficient working space for the speedy execution of the work, (2) controlled working time and other restrictions and (3)

prestigious and time bound procedure for the work. Similar letters were issued by M/s. R.D.S. Project and M/s. Noble Tech Engineering Private Ltd. reducing their rate to 75% for the respective block and further stated that no further reduction was possible. On 23.3.1997, the Chief Engineer considered all these tenders and rejected them since they were found to be very high. The Chief Engineer then thought that it will not be feasible to call for tenders again. He directed the Superintending Engineer to obtain quotations from the three pre-qualified existing contractors, who were already carrying the work in the respective blocks, viz., block B, block C and block J & K.

5. Pursuant to the direction of the Chief Engineer, the Superintending Engineer invited quotations from the three pre-qualified contractors (hereinafter called "the existing contractors") on 23.3.1997. The following quotations were received: (1) I Basheer quoted 67.5% above the estimated rate for block A & I (2) P.T. Mathai quoted 68.5% above the estimated rate for block D & E (3) M/s. K.V. Joseph & Sons quoted 67.5% above the estimated rate for block F, G & H. The Superintending Engineer forwarded these quotations to the Chief Engineer on 29.3.1997. On 31.3.1997, the Chief Engineer negotiated with the afore-said three contractors. As a result of the negotiation, the contractors reduced the rate to 65% above the estimated rate in respect of all the works. Thereafter, on 1.4.1997 the Chief Engineer forwarded the quotations obtained from the three contractors to the Government Tender Committee. On 8.5.1997, the Government Tender Committee met and recommended that the work be awarded to the three contractors selected by the Chief Engineer at 55% above estimated rate, if they were agreeable. The Tender Committee thereafter forwarded its recommendation to the Government for award the work. It is at this juncture that on 27.5.1997 when the recommendation of the Tender Committee was pending before the Government, one of the pre-qualified contractors P.K. Ramachandran filed O.P. No. 8807/97 before this Court. According to him, he was one of the pre-qualification contractors. The existing contractors, who had been now selected for the award of the work, did not submit any tenders for the blocks in question. He submitted that he was never called for negotiation, though he happened to be the second lowest tenderer for two works, viz., the construction of block A & I and block D & E. He gave a representation to the Superintending Engineer requesting that he may be given an opportunity to give his quotation for the work before finalising and awarding the work on the basis of the negotiated quotation. The representation is dated 15.4.1997. According to him, he ought to have been given a chance for giving his rate on negotiation. Hence, he prayed for a writ of mandamus directing the respondents to give him an opportunity to quote his rates on negotiation for the construction of block A & I, block D & E and block F, G & H of the multistoreyed building for the High Court before finalising the negotiated quotation by the Tender Committee and the second respondent.

6. The main contention taken by the petitioner in O.P. No. 8807/97 was that the respondents cannot arbitrarily pick and choose the existing contractors and if an opportunity was to be given, it was to be given to all the pre-qualified

contractors. The respondents filed a statement in respect of the above Original Petition. After stating the facts referred to above, it was further stated by the respondents as follows:

It is submitted that the reduced rate at 75% above the estimated rate were also found to be on the higher side by the Chief Engineer and therefore he rejected all the tenders.

It is submitted that due to the process of repeated tender much time had already been lapsed and therefore in order to avoid further delay and keeping in view the main problem of lack of space for fresh contractors coming into area, the Chief Engineer directed that the negotiation be carried on with the 3 existing contractors and quotations obtained from them. This was done because 3 existing contractors who had the advantage of working space with them and they also had the infrastructural facilities at site. It is submitted that this process for obtaining negotiated quotations is strictly in accordance with paragraph 15.7.16 and 1.8 of the Kerala Public Works Department Manual.

The statement further stated that as a result of the process of negotiation and reduction of the quotation to 55% above the estimated rate an amount of Rs. 270 lakhs has been reduced from the lowest quoted rate in the second tender. According to the respondents, the procedure followed by the Department is in accordance with the provisions of the Public Works Department Manual. It was further stated that since the petitioner was only the second lowest tenderer, it was not necessary to negotiate with him before the tenders were rejected. It was further stated in paragraph 15.7.16 of the Public Works Department Manual that the Chief Engineer is competent to award a work through negotiated quotation to any contractor even without a tender. In the circumstances of the case and in the light of the fact that the lowest tenderer had already communicated that they will not be able to reduce the quotation, the Department approached the existing contractors and that there was nothing illegal in have negotiating with the existing contractors. Since, the petitioner's tender had been rejected already, it was not necessary to consider Ext.P3 representation filed by him.

7. O.P. No. 8807 of 1997 was heard and judgment was reserved on 5.6.1997. Thereafter, counsel for the petitioner in O.P. No. 9489/97 submitted before the learned single Judge about the filing of the above Original Petition and prayed that the above Original Petition may also be heard before taking a decision in O.P. No. 8807/97. On 12.6.1997 O.P. No. 9489/97 came for admission. The learned single Judge heard the Original Petition and posted it along with O.P. No. 8807/97 for judgment.

8. O.P. No. 9489/97 is filed by one of the pre-qualified contractors, viz., Sri. P.I. Varghese. He was the lowest tenderer for block A & I on both the occasions when the tenders were submitted. During the first occasion his tender was 84% above the estimated rate and by subsequent communication, it was reduced to 79%. But the tender was rejected by the Superintending Engineer, as he found that the

rate was very high. In the second tender notification, he quoted 78% above the estimated rate for block A & I and became the lowest tenderer. He was called for negotiations and he reduced the rate to 77% above the estimated rate by his letter dated 21.2.1997 and on further negotiations, he reduced the rate to 75% above the estimated rate by his letter dated 5.3.1997 and informed that it was not possible for him to reduce further due to certain conditions mentioned in the letter. Thus, his second tender was also rejected. According to the petitioner, in pursuance to a letter dated 4.3.1997 of the Chief Engineer, he communicated his willingness to reduce the rate by 16% thereby confirming the rate as 59% above the estimated rate. He further stated that he submitted the tender along with the requisite Earnest Money. According to him, he had been in constant touch with the second and fourth respondents to ascertain the fate of the tender. When the petitioner met the second respondent, he was told by the second respondent that for the current year the allotment for carrying out the construction of the buildings for the State Judiciary is only Rs. 2 crores and that there was no chance of the tenders being considered. Further he submitted that on coming to know that negotiations were going on with the existing contractors, he submitted a quotation on 5.4.1997 reducing the rate to 57% above the estimated rate. But his quotation was not forwarded to the Tender Committee. He also raised the contention that as a pre-qualified contractor, who had submitted his tender earlier, the authorities should have called him for negotiation and that the respondents had committed an illegality by inviting only the three existing contractors for negotiations. He further urged that everything was done in a secret manner by the respondents. Hence, he prayed for examining the legality and propriety of the procedure adopted for selecting the three contractors and also he prayed for a direction to the State to negotiate with all the pre-qualified contractors.

9. As already stated, the learned single Judge had reserved the judgment in O.P. No. 8807/97. Thereafter, the learned single Judge heard O.P. No. 9489/97 and the common judgment was delivered in both these cases on 3rd July, 1997. Government files were made available before the learned single Judge. After considering the various aspects, the learned single Judge in paragraph 14 at page 41 of the judgment held as follows:

Prima facie it would appear that the entire process of selection of the contractors for awarding the work is in tune with the procedure provided in para 15.7.16 of the Manual and the Government orders constituting the Government Tender Committee. But then the only question to be considered is as to whether the respondents were justified in inviting only the existing three contractors who have never submitted their tenders pursuant to Exts.P1 and P2 notices. In other words, the question to be considered is as to whether the respondents were justified in ignoring/not inviting the other pre-qualified contractors who has submitted their tenders pursuant to Exts.P1 and P2 particularly the petitioners.

Further, the learned single Judge held he follows:

Assuming that para 15.7.16 of the P.W.D. Manual gives absolute power on the second respondent subject to approval by the Government to allot the work to a person selected by him, still such power cannot be exercised by him in an arbitrary manner by picking and choosing anyone of the contractors to his ipse-dixit without observing the principles of natural justice and the well settled principles of fair play in action.

After considering the various aspects, the learned single Judge further said:

The decision of the Government Tender Committee to recommend the quotations of the existing three contractors with a further reduction of the rate from 65 to 55 per cent to Government for their decision has to be viewed in the said background. As already stated, the three existing contractors in their quotation had offered to do the works in question only at 65% above the estimated rate and they also stated the reasons for their inability to reduce the rates further. This being the position, it is beyond one's comprehension the circumstances under which the Government Tender Committee took the decision to recommend the three existing contractors who submitted negotiated quotations to do the work at 65% above the estimated rates for awarding the work to them alone at 55% above the estimated rate ignoring the request made by the two petitioners when at least one of them undertook to do the work at 57% above the estimated rate. If the quotations made by the three existing contractors were not acceptable, the Government Tender Committee should have invited the three existing contractors and at least two petitioners whose representations were before the Tender Committee, for discussion and finalisation of the quotations instead of imposing a rate unilaterally fixed by the Committee on the three existing contractors.

Finally in paragraph 17 of the judgment, the learned single Judge directed as follows:

Accordingly I direct the first respondent Government to consider the case of the two petitioners also before taking a final decision on the recommendations of the Government Tender Committee in the matter of award of work in respect of A & I, D & E and F, G & H blocks. This is particularly for the reason that they have offered to do the work far below the rate recommended by the Government Tender Committee. If the Government thinks that the petitioners must also be given an opportunity, it is open to the Government to remit the matter back to the Government Tender Committee and direct the Tender Committee to invite further offers from the existing three contractors and the two petitioners and to finalise the same after discussion with them if found necessary in the matter.

The aforesaid judgment has been challenged in these two Writ Appeals.

10. W.A. No. 1272/97 is filed against the judgment in O.P. No. 8807/97 while W.A. No. 1305/97 is filed against the judgment in O.P. No. 9489/97. After the disposal of the above two Original Petitions, O.P. No. 12811/97 was filed by one John K. Manavalan, who is the Director of M/s. R.D.S. Project Limited. M/s.

R.D.S. Project Limited was the lowest tenderer for D & E block in the first and second tenders. In the second tender, originally they quoted 78.5% above the estimated rate. Subsequently, by consent letter dated 28.2.1997, it was reduced to 77%. Thereafter, by letter dated 6.3.1997, the rate was reduced to 75% above the estimated rate and further expressed its unwillingness not to reduce the rate further. Similar contentions were raised in the Original Petition. In the Original Petition, he has prayed that his case also be considered for the construction of block D & E.

11. We heard the learned Advocate General for the appellants in the Writ Appeals, Shri. S. Chandrasenan learned counsel for the respondent in W.A. No. 1272/97, Shri. K.L. Narasimhan learned counsel for the first respondent in W.A. No. 1305/97, Shri. P.N.K. Achan learned counsel for the third respondent in the above appeal and Shri. K. Ramakumar learned counsel for the petitioner in O.P. No. 12811/97.

12. Learned Advocate General, who appeared for the appellants, contended that the learned single Judge went wrong in directing the Government to consider the quotations of the petitioners in the two Original Petitions, against which the appeals have been filed. According to him, there was nothing wrong in the procedure adopted by the Chief Engineer. The tenders were invited twice for the work. On both these occasions, the lowest tenderers were called for negotiations. But even the negotiated rate quoted was very high. Hence, all the tenders were rejected. Further, in the letters sent by the lowest tenderers, they had expressed their reluctance to reduce the rates further. The learned Advocate General also referred to the letters dated 5.3.1997, 6.3.1997 and 10.3.1997 written by (1) P.I. Varghese (2) M/s. R.D.S. Project Limited and (3) M/s. Iscon Engineers to the Chief Engineer, Buildings & Local Works, Trivandrum. They have given identical reasons as to why the rates cannot be reduced further. The main reasons stated are (1) there is insufficient working space for the speedy execution of the work, (2) controlled working time and other restrictions and (3) prestigious and time bound procedure for the work. The Chief Engineer thought that the above reasons would not be faced by the existing contractors. He directed the Superintending Engineer to get negotiated quotations from the existing contractors. This is not opposed to law or to the principles of natural justice.

13. The learned Advocate General invited our attention to Clause 15.7.16 of the Public Works Department Manual, which reads thus:

If all tenders received in response to a notification disclose very high rates or are otherwise unsatisfactory, the competent authority should examine whether fresh tenders may be invited for the work and if so proceed accordingly. If he feels that fresh tenders may not have a better response, or that the time available will not permit fresh tenders being invited, he may allot the work to a contractor selected by him with the sanction of the immediate superior authority at rates not exceeding his powers of acceptance in regard to excess over estimates (P.W.D Code, Article 139 - Note 2). The same procedure may be adopted in case no

tenders are received for a work.

The learned Advocate General contended that the above clause gives discretion to the competent authority to award the contract to a contractor whom he chooses. The Chief Engineer selected the existing contractors because they were already pre-qualified for the work and were carrying the contract work in other blocks, so that the inconvenience expressed by the other contractors will not stand in the way of the existing contractors. Further, he contended that the Chief Engineer had only requested to contact the existing contractors initially and when it was found that the negotiation with the existing contractors would not give any fruitful result, he directed the Superintending Engineer to approach all the pre-qualified contractors. This power had been exercised by the Chief Engineer strictly in accordance with Clause 15.7.16 of the Public Works Department Manual. The learned Advocate General stressed the fact that the entire construction work with regard to the above blocks got held up because of the delay in tendering the contract. It was also brought to our notice that the Chief Engineer found collusion among the lowest tenderers. This was also the reason for the Chief Engineer to negotiate with the existing contractors. He further submitted that in the present case even though the tenders could be accepted by the Superintending Engineer or the Chief Engineer, because the amount quoted was more than 55% of the estimated cost, consent of the Government had to be obtained. So, the Chief Engineer filed the papers of the negotiated contract before the Tender Committee. The Tender Committee, after discussion, felt that 55% above the estimated rate would be reasonable. Thereafter, the papers were sent to the Government. When the papers were with the Government, the representations filed by some of the pre-qualified contractors reached the Government and the Government wanted the opinion of the Advocate General in the matter. The learned Advocate General in the matter. The learned Advocate General, on considering the entire matter, opined that there was nothing wrong in awarding the work to the existing contractors. Then the Advocate General contended that it was not as if the Government did not take into consideration the representation filed by some of the pre-qualified contractors. The learned Advocate General further contended that the procedure adopted by the learned single Judge in giving an opportunity to the two contractors, who had filed the Original Petitions, to submit their quotations afresh in court, was not at all correct. He submitted that the submission of tenders and acceptance of the same were the duties of the Public Works Department and that power could not assumed by the Court itself. If the court found that the process of selection was not proper, then the better thing would have been to invite tenders from the existing contractors. It was not to be confined to two contractors, who had filed the Original Petitions. Further, he contended that the learned single Judge also did not find anything against the adoption of the procedure envisaged by Clause 15.7.16 of the Public Works Department Manual and in that view of the matter, the Original Petitions did not call for any interference.

14. Shri. S. Chandrasenan appearing for the petitioner in O.P. No. 8807/97

contended that the Chief Engineer and the Superintending Engineer acted arbitrarily in the matter. He highlighted the fact that none of the existing contractors had tendered for the works for which negotiations were entered into by the Chief Engineer. The petitioner was in the better position as he had tendered for the the work twice. Merely because he was not the lowest tenderer, there was nothing in preventing the Chief Engineer negotiating with him. The petitioner further complained that his representation Ext.P3 was not placed before the Government Tender Committee by the Chief Engineer and this was done deliberately as the Superintending Engineer and the Chief Engineer were against him even from the outset.

15. Shri. K.L. Narasimhan appearing for the petitioner in O.P. No. 9489/97 adopted the same argument as that of Shri. Chandrasenan. According to him, the discretion conferred on Clause 15.7.16 of the Public Works Department Manual was not properly exercised by the Chief Engineer. He also contended that if the competent authority was the Superintending Engineer, then the Superintending Engineer should have taken an independent decision as to whether the work should be awarded without any tender. He highlighted the fact that his client had submitted a tender for the work quoting 75% above the estimated rate. Hence that quotation should have been considered by the Chief Engineer and forwarded to the Tender Committee. He cited the decisions of the Supreme Court in *Mehtab Singh & others v. State of Haryana* - (1994) 6 SCC 65 - and *Asia Foundation & Construction Ltd. v. Trafal Gar House Construction (I) Ltd. and Others* - (1977) 1 SCC 738 - for driving home his contention that the award of contract should not be arbitrary.

16. Shri. K. Ramakumar learned counsel appearing for the petitioner in O.P. No. 12811/97 advanced the same argument. His client was one of the lowest tenderers and hence negotiation should have been made with his client also. Shri. P.N.K. Achan learned counsel appearing for the additional second respondent contended that his client was one of the lowest tenderers and hence the Government should be directed to consider the case of his client also. The learned Advocate General produced before us the relevant files for our perusal.

17. Before going into the question in issue, it is necessary to inform ourselves about the jurisdiction of this Court with regard to judicial review while reviewing the contractual powers by Government bodies. Judicial review is not an appeal from a decision but review of the manner in which a decision was made. As was held by Lord Brightman in *Chief Constable of North Wales Police v. Evan* 1982 (3) All. E.R. 141 - Judicial review is not concerned with the decision but the decision making process. An application for judicial review is not an Appeal. In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, - the Supreme Court held as follows:

In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art. 14 of the Constitution of India of which non arbitrariness is a significant facet.

A public authority possesses powers only to use them in public good. It imposes the duty to act fairly and adopt a procedure which is fair play in action. With regard to the exercise of the discretion in contractual matters, the Supreme Court held in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, - as follows:

In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts keeping an eye on the augmentation of the review.....It is not possible for the court to question and adjudicate every decision taken by an authority While judging the constitutional validity of executive decisions, the courts must grant certain measure of freedom of "play in the joints" to the executive. The State need not enter into any contract with anyone but if it does so it must do so fairly without discrimination and without unfair procedure.

It is useful to refer to the following observation of Supreme Court in *Tata Cellular Vs. Union of India*, :

- (1) The right to choose cannot be said to be arbitrary power. If the said power is exercised for collateral purposes the exercise of that power will be struck down.
- (2) The term of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by a process of negotiation through several tiers. More often than not such decisions are made qualitatively by experts.
- (3) The Government must have the freedom of contract. A fair play in the joints shall be allowed.
- (4). The court is not concerned whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which these decisions have been taken.

18. In the present case, we are concerned with the award of contract for the blocks, A & I, D & E and F, G & H of the new High Court Complex. With regard to the remaining four blocks, the process of acceptance is over and now the respective contractors are doing the construction work. So far as blocks A & I, D & E and F, G & H are concerned, tenders were invited initially on 10.1.1997. The lowest tenders for all these blocks were 84%, 82% and 83% above the estimated cost. By negotiation, this was reduced to 79%. But the Chief Engineer found that this rate was high and rejected all these tenders. There was a retender on 28.1.1997. In the retender also the lowest tenders were 78%, 78.5% and 78% above the estimated rate. By negotiation this was reduced to 77%. These negotiated rates were submitted to Chief Engineer, who again further negotiated with the lowest tenderers. By further negotiation, the rate was reduced to 75% above the estimated rate. It is pertinent to note that by letters dated 5.3.1997, 6.3.1997 and 10.3.1997, the lowest tenderers had informed the

Chief Engineer that it was not possible for them to reduce the rate further. They had further informed the Chief Engineer that they were compelled to do so because of the lack of working space, prestigious nature of the construction and the time involved in the construction. On receipt of these letters, the Chief Engineer was required to go into the feasibility of inviting tenders. He found that the quotations received on both the occasions were very high. The time was running out. The complex had to be built up without delay. He also smelt collusion among the contractors who had quoted the lowest rates. In these circumstances, the Chief Engineer thought of resorting to clause 15.7.16 of the Public Works Department Manual. According to this clause, if the competent authority feels that the tenders received in response to a notification disclose very high rates or are otherwise unsatisfactory, he should examine whether fresh tenders may be invited for the work and if so proceed accordingly. If he feels that fresh tenders may not have a better response, or that the time available will not permit fresh tenders being invited, he may allot the work to a contractor selected by him. Thus, a discretion is conferred on him to award the work by not resorting to tenders. This is available only if the competent authority finds that fresh tenders may not have a better response or that the time available will not permit fresh tenders. On perusing the files, we got convinced that the Chief Engineer was satisfied that fresh tenders will not have a better response, He was also compelled to take a decision in view of the fact that the time for construction was running out and that cost of the building was also going up and in case nothing was done without delay, it may cause great hardship for the purpose of construction.

19. Along with C.M.P. No. 3735/97 in W.A. No. 1272 of 1997 the appellants produced the letters sent by M/s. R.D.S. Project Ltd. M/s. Iscon Engineering and Shri. P.I. Varghese, who were the lowest tenderers in the tender. P.I. Varghese stated that he was not in a position to reduce the rate further. He also stated that there was insufficient working space for the speedy execution of the work. Similarly, M/s. R.D.S. Project Ltd. and M/s. Iscon Engineering also referred to insufficiency of space at the site. The Chief Engineer also took into consideration the uniformity in the reduced rates and he suspected a collusion between the lowest tenderers. He was of the opinion that even if a retender was ordered it was not going to have a fruitful result. In these circumstances, the Chief Engineer decided to resort to the above Clause, by selection a suitable contractor in the circumstances of the case. We don't find anything wrong in the Chief Engineer resorting to the above provision.

20. The next question is whether the Chief Engineer was right in negotiating with the existing contractors initially or whether he ought to have negotiated with all of the pre-qualified contractors. A reading of Clause 15.7.16 of the Public Works Department Manual shows that a discretion is given to the competent authority to allot a work to a contractor selected by him. Of course, when the power of selection is given to a competent authority, in this case of Chief Engineer, we cannot presume that in exercising the power of selection he would not take into

account all the necessary factors to see that the construction is done promptly and that the revenue does not loose heavily. The learned Advocate General submitted that the "contractor" mentioned in the above Clause is to be restricted to pre-qualified contractors. The Government authority cannot travel outside and choose any contractor who has not been pre-qualified for the same.

21. So, the question is whether in the facts and circumstances of the present case Chief Engineer could have called all the pre-qualified contractors for negotiation or such of them who could be considered to be productive and useful in the circumstances. This is a discretion conferred on the Chief Engineer. The Chief Engineer, after review of the various negotiations which he had with the tenderers and their inability to quote a lower rate because of the lack of space on the existing sight and the prestigious nature of the construction in a time bound period, which impelled the tenderers to quote a high rate, acted in good faith and in public interest. It was further considered that in so far as the existing contractors are concerned, the difficulties posed by others such as lack of space, the time factor the prestigious nature of construction will not stand against the existing contractors. The Chief Engineer's note (Page 9 of file No. PL (5) 4232/Jud/94 Part IV) is worth to be noticed:

The tenders were rejected from this office as the rate was very high.

All the three lowest tenderers stated in their negotiation letters that, they are not able to reduce the quoted rates further due to the shortage of space in the compound and also due to labour problems and cost of materials etc.

There is a special condition in the tender that all the contractors will not be allowed to Block entrance to J & K Block which is coming in the middle portion of all Blocks.

E.E. Buldg. Div. EKM already wrote that it is very urgent to arrange the works of these blocks, as the delay in the piling work of these blocks may affect the progress of the ongoing Block works.

In these circumstances, we can try to get negotiated quotations from the contractors, who are now working in this project to avoid further delay due to another tender. They may be forced to quote the lower rate considering the inconvenience which may happen due to other agencies. Also they are doing this work approximately 55% above E.R. comparing to 1996 S.R. which is about 20% below the present quoted rate.

If we are not getting a much better quotation, we can go for another Retender.

Thereafter, in the letter of the Chief Engineer, which is marked as Ext.R1(g) dated 25.3.1997, it was stated:

With reference to the above, I am to inform you that negotiated quotations may be invited from the pre-qualified contractors for the above work who are already working in this project. If favourable quotations are not obtained, fresh offers

may be invited from all the prequalified contractors once again.

Thus, The Chief Engineer did not restrict the selection to the existing contractors alone. If it was found that negotiations with the existing contractors did not result in favourable quotations, the Superintending Engineer was directed to get offers from all the pre-qualified contractors once again. As already stated, this discretion exercised by the Chief Engineer could not be said to be illegal or opposed to any law. 22. As stated in the aforesaid decisions of the Supreme Court, so far as the contractual matters are concerned, some play have to be allowed in the joints. The Chief Engineer was the best person to judge the circumstances and act in the best interest of the public. We cannot say that the policy adopted by the Chief Engineer was unconstitutional or illegal. Hence, we are of the view that there was nothing wrong in the Chief Engineer approaching the existing contractors for negotiations in the first instance to find out whether favourable quotations can be obtained.

23. The next question to be considered is as to who was the competent authority under Clause 15.7.16 of the Public Works Department Manual, so far as this case is concerned. Here, the tenders were invited by the Superintending Engineer. But the person who decided to negotiate the quotations under Clause 15.7.16 of the Manual is the Chief Engineer. The question is whether the Chief Engineer is competent to do so. In this context, it is better to have a view of the powers of the Chief engineer and the Superintending Engineer. These powers were changed with effect from 3rd June, 1997. But here we are concerned with the stage prior to June, 1997. According to the then existing procedure for invitation of tenders and execution of agreements, the Chief Engineer and the Superintending Engineer had unlimited powers with regard to the pecuniary limits. But with regard to the acceptance of the tender, the power of the Chief Engineer was limited to the acceptance of tender upto 35% excess of the estimated cost while that of the Superintending Engineer was limited to 25% excess of the estimated cost. So far as waiving of tender is concerned, the Chief Engineer has got power upto 50,000 while that of Superintending Engineer upto 25,000. In this case the estimated cost for the respective work was (1) for A & I block Rs. 7,54,16,163/- (2) for D & E block Rs. 7,52,73,187/- and (3) for F, G & H block Rs. 6,73,70,807/-. Thus, it was a case where tender could be invited either by the Chief Engineer or by the Superintending Engineer. Since the tenders submitted in the first as well as the second notifications exceeded 25% of the estimated cost, these tenders were referred to the Chief Engineer and the Chief Engineer rejected the same. The power under Clause 15.7.16 of the Public Works Department Manual only amounts to the waiving of the tender and resorting to negotiations. So far as that power is concerned, the Superintending Engineer has got power only upto 25,000/- and the Chief Engineer upto 50,000/-. Admittedly, in this case, the estimated cost was more than 25,000/- and hence the competent authority to deal with such things was the Chief Engineer. But since it exceed its power, the Chief Engineer has to get sanction of the higher authority, viz., the Government. In this view of the matter, we don't find anything wrong in

the Chief Engineer exercising the power under Clause 15.7.16 of the Public Works Department Manual. Even otherwise we think that since both the Chief Engineer and the Superintending Engineer have been given unlimited powers with respect to the invitation of tenders, there was nothing wrong in the Chief Engineer exercising the power. Hence, according to us, the Chief Engineer was the competent authority in exercising the power under Clause 15.7.16 of the Public Works Department Manual.

24. The next question is as to whether the representations submitted by the petitioners in the Original Petitions as well as the other pre-qualified contractors (excepting the existing contractors) should have been placed before the Government by the Superintending Engineer. Going by the P.W.D. Code according to us, it was not necessary for the Chief Engineer to consider the representations or the quotations submitted by the contractors with whom the Chief Engineer did not negotiate exercising his power under Clause 15.7.16 of the Public Works Department Manual, because they were out of the zone of consideration. But on a perusal of the files, we find that as a matter of fact, these representations were received by the Government and the Government asked the Superintending Engineer to forward his comments of the representations filed by the contractors and then finally decided that it was not necessary to consider their representations.

25. The following facts are seen from the files: The files were placed before the Special Secretary with the recommendations of the Tender Committee. The Special Secretary placed the same before the Minister (E & W), Minister (Finance) and the Chief Minister. The Minister (E & W) enquired whether there were any complaints from any contractors regarding the procedure adopted. Then it was told that there were complaints from P.K. Ramachandran, P.I. Varghese and M/s. Iscon Engineering. These complaints were discussed by the Tender Committee. A report was called from the Chief Engineer. Accordingly, the Chief Engineer sent his report stating that in the circumstances it was not necessary to consider the representations of the contractors. Thereafter, the Government requested the Advocate General to give his opinion on the matter. The Advocate General gave his opinion that the procedure adopted by the Chief Engineer was correct. On the advice of the Advocate General, the Minister (E & W), Minister for Finance and the Chief Minister endorsed the procedure adopted by the Chief Engineer. It was at this time that the Original Petition was filed before this Court. Thus, on a perusal of the files, it can be seen that whatever grievances the petitioner had raised had been considered by the Government after getting the report from the Chief Engineer as well as from the Advocate General. In such circumstances, it cannot be said that their representations should be further considered by the Government.

26. Another argument put forward was that the existing contractors had negotiated only for 65% above the estimated rate with the Chief Engineer and one of the contractors had even said that he was not willing to reduce his

quotation. Subsequently, the Tender Committee said that the quotation could be accepted if it was 55% above the estimated rate. Counsel for the petitioners submitted that the Tender Committee has no power to compel the contractor to reduce the rate. We don't think that such an argument has got any basis. The procedure adopted was quotation by negotiation. Since the value of the work was more than the Chief Engineer's limit, it has to be passed by the Government through Tender Committee. The Tender Committee is consisting of Commissioner and Secretary to Government, Public Works Department, Secretary, Finance Department, Chief Engineer, National Highways, Chief Engineer (Buildings & Local Works), Chief Engineer (Bridges & Roads), Chief Engineer (General) and Additional Secretary, Public Works Department. According to G.O.R.T. No. 281/93/PW & T dated 25.2.1993, all cases, where the tender amount is in excess of the powers of Chief Engineer, will be referred to the Committee for consideration and suitable recommendations/acceptance of the tender rates by the Committee. The Committee will take final decision in those cases where the estimated PAC is Rs. 50 lakhs and below. In all other cases where the estimated PAC is more than 50 lakhs and in cases where though the estimated PAC is less than 50 lakhs but contract PAC is more than 75 lakhs, the recommendations of the committee will be circulated to the Minister (Public Works), Minister for Finance and the Minister of the Administrative Department for approval and final orders. Thus under this Government Order, the Tender Committee is given power to give suitable recommendations regarding the acceptance of the tender rates. This power includes the power of the Committee to accept the quotations at a rate fixed by it. If the contractor is not agreeable for this, that is an end of the matter. Hence, we cannot say that the Tender Committee had no power for negotiation.

27. Petitioners in O.P. No. 8807/97 and O.P. No. 9489/97 adopted a strange procedure of filing their tender before the learned single Judge. From the judgment, it appears that the learned single Judge had opened the tender and was satisfied that the rates were below the rate recommended by the Tender Committee. We are considering this aspect, because counsel for the petitioners submitted that since their quotations were less than what was recommended by the Tender Committee, those quotations should also be forwarded to the Government. We don't approve the procedure adopted by the petitioners. This court was not the forum for submission of tenders and could not be made use of as a Post Office for transmitting the tenders submitted by the petitioners in court before the learned single Judge. The power under Article 226 of the Constitution is not an ordinary power. It is a special power vested in the High Courts under Article 226 of the Constitution. This power is used sparingly to meet the situations where injustice is caused to the aggrieved person. This power could not be misused by converting the writ court into a Department of P.W.D. for accepting tenders. That jurisdiction is vested with the authorities under the Public works Department. Merely because the writ petitioners filed tenders before the learned single judge while hearing writ petition, quoting a lower rate (after having come to know of the rates fixed by the Tender Committee) they could not

claim any valid right for consideration of such tenders and the learned single Judge should not have given such direction for consideration. On our anxious consideration of the entire matter in the facts and circumstances of the present case and after going through the relevant records, we are satisfied that the Chief Engineer acted fairly and in public interest in calling the three contractors to negotiate and carry the contract work. Since the matter is pending with the Government, it is for the Government to take a final decision of the recommendation of the Tender Committee. We direct the Government to take prompt and final decision in the matter preferably within a period of two weeks from the date of production of a copy of this judgment.

In the result, the Writ Appeals are allowed and the Original Petition is dismissed with the directions indicated above, but without any order as to costs.