

(1983) 10 KL CK 0019
In the High Court Of Kerala
Case No : O.P. No. 6676 of 1983-L

T.M. Abraham and Another	Vs	APPELLANT
State of Kerala and Others		RESPONDENT

Date of Decision : 05-10-1983

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1984 Ker 42

Hon'ble Judges : P.C. Balakrishna Menon, J

Bench : Single Bench

Advocate : M.A. George, for the Appellant; A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

P.C. Balakrishna Menon, J.—This original petition filed by the 1st petitioner is to quash the proceedings of respondents 1 and 2 the State of Kerala and the Superintending Engineer, Public Health Circle, Cochin, awarding a contract to the 3rd respondent for the work referred to as "the Industrial Water Supply Scheme to Ambalamugal Construction of Overhead Water Tank and Treatment Plant and Allied Works at Choondy", and also to issue a writ of mandamus directing the 1st and 2nd respondents to award the contract to the 1st petitioner or in the alternative to issue a direction to make a proper choice of the person for the award of the contract in the interest of the State and in public interest. The 2nd petitioner got himself impleaded later as per orders of this Court dated 30-8-1983 in C. M. P. No. 22232 of 1983.

2. Both the petitioners are Contractors registered as A class with the Public Health Engineering Department of the Government of Kerala. For the construction of an overhead water tank, treatment plant and allied works in connection with the industrial water supply scheme to Ambalamugal, the 2nd respondent, the Superintending Engineer, Public Health Circle, Cochin, invited tenders from registered A class Contractors as per notification published in the Veekshanam dated 15-5-1983 and the Mathrubhumi and Indian Express dated

19-5-1983. Tender was to be submitted in proper form accompanied by an earnest money deposit of Rs. 23,000/- to reach the 2nd respondent on or before 6-7-1983. Tenders received were opened at 4.30 p. m. on 6-7-1983 in the presence of the tenderers and their agents, and it was found that the 8 tenders received varied in the rates quoted between 28.9% and 200% above the average estimated rates. Two of the tenders were invalid for want of earnest money deposit. The 1st petitioner had quoted 87% above the estimated average rates and the 2nd petitioner had quoted 64% above average. The tenders submitted by the petitioners were accompanied by covering letters with special conditions for carrying out the work. Both the petitioners were asked to produce proof of experience and they were also required to state whether they were prepared to relax the special conditions. Ext. P-2 dated 18-7-1983 is a letter by the 1st petitioner addressed to the 2nd respondent as per which he withdrew the special conditions suggested. Ext. A. P-2 dated 18-7-1983 is a similar letter by the 2nd petitioner withdrawing the special conditions. The 2nd respondent entered into negotiations with the petitioners and others and the petitioners were asked to furnish further details regarding their experience and qualification to carry out the work in connection with the construction of the overhead tank and allied work for the water supply scheme. The 1st petitioner on 19-7-1983 as per Ext. P-3, gave a letter giving details of his experience and offering to reduce the rate to 58% above the average estimated rates. The 2nd petitioner also as per Ext. AP-3 gave further details relating to his qualification and experience to carry out the work. Along with Ext. AP-3 the 2nd petitioner produced some documents to show that he was a partner of M/s. Varghese K. Pulayath and Company who are also contractors registered as A Class with the P. H. E. D. The 3rd respondent who had not submitted any tender in pursuance to the tender notifications issued by the 2nd respondent gave a quotation on 19-7-1983 to carry out the work at 67.5% above the estimated average rates. The 2nd respondent later by Ext. R-3 (a) letter dated 21-7-1983 requested the 3rd respondent to reduce the rates and indicated that his partner Sri. Abu Mathew had quoted 63.5% above the estimated average rates. The 3rd respondent as per Ext. R-3 (b) letter of the same date gave a revised offer reducing the rate to 63.5% above the average estimated rates mentioned in the tender notification. The petitioners submit that the contract to carry out the work is settled between the 1st and 3rd respondents at the rate quoted as per Ext. R-3 (b). The action of respondents 1 and 2 in giving the contract to the 3rd respondent is opposed to Article 14 of the Constitution. The choice of the 3rd respondent is arbitrary and the petitioners had no opportunity to compete with the 3rd respondent giving a reduced rate for the work to be carried out in connection with the scheme. The petitioners also allege mala fides on the part of the 2nd respondent in having been instrumental in bringing about the contract between the 1st and the 3rd respondents to carry out the work. Relief is sought for in this original petition on the ground of mala fides as well as on the ground of violation of Article 14 of the Constitution in arbitrarily choosing the 3rd respondent for the contract to carry out the work. All the respondents have filed counter-affidavits denying the allegations contained in

the original petition. According to the respondents the work in connection with the water supply scheme was of an emergency character required to be carried out within a very short time. The Government as per G. O. Ms. 87/83/LA & SWD dated 1-7-1983 marked as Ext. R-2 (a) had constituted an "Empowered Project Implementation Committee" with the Commissioner and Special Secretary, Industries Department as Chairman and the Secretary, Finance-Expenditure, the Superintending Engineer in charge of the project, a representative of the, Cochin Refineries Ltd., and a nominee of the Government of India as members for the purpose of managing the project implementation with utmost speed. Ext. R-2 (a) G. Order refers to the discussion that the Member, Planning Commission and Secretary Department of Petroleum, Government of India, had with the Chief Minister and the Minister for Irrigation on 21-6-1983 relating to the problems connected with the expansion of the Cochin Refineries Ltd., and the decision taken to implement the water supply project, Ambalamugal on an emergency basis and it was for that purpose that the Empowered Project Implementation Committee had been constituted. Of the eight tenders received on 6-7-1983, it was found two were defective and could not be considered for entrustment of the work. On a consideration of the merits of the other tenderers, none of them was found to have the requisite experience for the erection of overhead water tanks and allied works. The matter was reported by the 2nd respondent to the Empowered Committee and the Committee at its meeting held on 8-7-1983 directed the 2nd respondent to contact parties having experience in this particular line of construction and obtain quotations from them.

3. The learned Additional Advocate General, appearing on behalf of respondents 1 and 2 placed before me the files relating to the proceedings of the Empowered Committee at its meeting held on 8-7-1983. The meeting was attended to by the Commissioner, and Secretary, Industries Department, Secretary, Finance-Expenditure, a nominee of the Cochin Refineries Ltd., a nominee of the Government of India and the 2nd respondent. The Executive Engineer, P. H. E. D. was present on special invitation. The Deputy Secretary, Department of Petroleum and the Managing Director of the Cochin Refineries Ltd., also attended the meeting. Ext. R-2 (b) is an extract of the proceedings of the meeting of the Empowered Committee held on 8-7-1983. Ext. R-2 (b) shows that the Superintending Engineer informed the Committee about the tenders received and on a preliminary examination it was found that none among the tenderers had experience in constructing overhead tanks. The Committee decided that as time was of utmost importance the contract should be awarded only to a reliable person having adequate experience in similar construction work. Accordingly, the Superintending Engineer, was directed to contact parties and obtain quotations if it is found that none among the tenderers had previous experience in the construction of overhead tanks. The Superintending Engineer was required to place his recommendation before the Committee at its next meeting fixed to be held on 23-7-1983. It was on the basis of this decision of the Empowered Committee that the 2nd respondent asked for further details of experience and

qualifications of the petitioners and other tenderers and also negotiated with the 3rd respondent Sri. Varghese K. Pulayath and other contractors of repute. It was in this connection that the 2nd respondent obtained further clarification relating to the qualifications and experience of the petitioners and other tenderers. He had also on 19-7-1983 received a quotation from the 3rd respondent. Sri. Varghese K. Pulayath had given a letter to the 2nd respondent stating that in case the contract is settled in favour of the 2nd petitioner he is prepared to take him as a partner of the firm Varghese Pulayath & Company. The further clarifications received from the tenderers and the quotation received from the 3rd respondent were placed before the meeting of the Empowered Committee held on 23-7-1983. This meeting was attended to by the Secretary Industries Department, the Secretary Finance-Expenditure a nominee of the Cochin Refineries Ltd., the Deputy Secretary Department of Petroleum as the nominee of the Government of India, the Chief Engineer, Public Health Engineering Department, the 2nd respondent and the Special Secretary, Local Administration and Social Welfare Department Sri. P. C. George of Engineers India Ltd., who was at the first meeting the nominee of the Government of India was also present on special invitation. Ext. R-2 (c) is a copy of the proceedings of the meeting of the Committee held on 23-7-1983. Ext. R-2 (c) shows the following facts, were considered at the meeting. Of the persons who had submitted tenders, it was seen that none of them had experience in the particular line of work required, to be executed. The 2nd respondent had asked the tenderers to give in writing the details of their experience in similar work and details of tools and plant shuttering and staging materials available with them. They were also given a chance to reduce the quoted rates. The 2nd respondent in pursuance to the authorisation given to him as per Ext. R-2 (b) had contacted three other contractors including the 3rd respondent and Varghese K. Pulayath who had experience in the construction involving overhead tanks and had requested them to submit quotations in sealed covers before 19-7-1983. The six tenderers were also contacted and revised quotations were received from four of them including the petitioners. Ext. R-2 (c) shows that the Committee decided that no party without previous experience in the construction of overhead tanks and without having ready access to shuttering and other materials need be considered for awarding the contract. Since none of the tenderers had previous experience in the construction of overhead tanks, the Committee decided that the tenders received cannot be accepted. The petitioners were thus eliminated for the reason of lack of experience in construction work in connection with overhead tanks. Paragraph 4 of Ext. R-2 (c) shows that among the five contractors contacted by the 2nd respondent Sri. Varghese K. Pulayath and the 3rd respondent submitted quotations before the specified time on 19-7-1983. Sri, Varghese K. Pulayath quoted 64% and the 3rd respondent originally quoted 67.5% above the estimated rates. The 3rd respondent had subsequently submitted his willingness to reduce the rates to 63.5% above the estimated average rates. These two persons were also required to furnish details of other work done as well as the availability of materials with them for undertaking the work. From the

information furnished by Sri. Varghese K. Pulayath it was seen that the works undertaken by him earlier were comparatively small except for three items of work costing between rupees twenty three lakhs and Rs. twenty lakhs. It was also reported that he is presently engaged in the construction of an overhead tank at Trichur and all the shuttering and other materials at his disposal are required for the work at Trichur. The 3rd respondent was found to have wider and longer experience and had successfully undertaken the construction work of overhead tanks and treatment plants for the Public Health Engineering Department for its Thiruvalla Water Supply Scheme. In view of the urgency of the situation and the need to entrust the work to a contractor having sufficient experience and capacity to ensure timely completion of the work the committee decided that the contract should be awarded to the 3rd respondent, who had also agreed to reduce the rate to 63.5% above the estimated average rates. The Superintending Engineer was directed to contact the 3rd respondent again and ascertain the possibility of a further reduction in rates and report to the Committee at its meeting to be held on 28-7-1983. That meeting was attended to by the Commissioner and Special Secretary, Industries Department, the Secretary Finance Expenditure, the Chief Engineer, P. H. E. D., the 2nd respondent, the Managing Director of the Cochin Refineries Ltd. and a representative of the Engineers India Ltd., who was formerly the nominee of the Government of India. Ext. R-2 (d) is the extract of the proceedings of the meeting of the empowered committee held on 28-7-1983. Ext. R-2 (d) shows that the Superintending Engineer had informed the Committee that in pursuance to the decision of the Committee at its meeting held on 23-7-1983 he had held discussions with the 3rd respondent regarding reduction of rates, the 3rd respondent was not agreeable for any further reduction and the Committee decided to award the contract to the 3rd respondent at 63.5% above the estimated rates.

4. Subramonian Poti, J. (as he then was) in the decision reported in *Challappan v. Executive Engineer* (1979 K LT 53) stated thus at page 55 :

"3. When the State enters into a contract with the citizen the rights of the parties to the contract are determined solely on the terms of the contract and the remedies available for breach of contract to either of the parties would be in terms of the contract. In the matter of entering into contractual relations the State is exercising its executive power and the provisions of Part III of the Constitution impose certain restrictions in the matter. It is not open to the State to pick and choose the persons with whom it proposes to enter into a contract. In other words, the exercise of such executive power at the stage prior to the entering into a contract is liable to be examined by a Court with a view to see whether there is an infringement of the fundamental rights guaranteed to a citizen. All citizens must have similar opportunity to propose entering into contract with the State. But when a contract is entered into the position of the citizen who enters into a contract with the State is just that of any other contracting party. He cannot complain of violation of Article 14 in the matter of

execution of the contract."

5. The argument of the learned counsel Sri M A. George is that in the matter of choosing the contractor for awarding the contract the 1st respondent at the instance of the 2nd respondent had picked and chosen the 3rd respondent overlooking the lawful claims of the petitioners and other qualified tenderers. On the facts adverted to above, it cannot be said that the petitioners and other tenderers had been discriminated against. The work involved required to be executed on an emergency basis. It was for that reason an Empowered Committee was constituted with a nominee also of the Government of India for the implementation and speedy execution of the work. At the meeting held on 23-7-1983 when it was resolved to entrust the work on contract to the 3rd respondent the Chief Engineer, Public Health Engineering Department was also present. All the tenderers were contractors registered with the P. H. E. Department. The 2nd respondent as well as the Chief Engineer apparently had occasion to know their experience and competency to execute the particular work of erection of an overhead tank, treatment plant and allied works. Apparently, that work required specialised knowledge and experience. What shall be the specialised knowledge and experience required of a contractor to undertake such work is not for this Court to decide. The Chief Engineer and the Superintending Engineer were present at the meeting of the Committee held on 23-7-1983 and a decision was taken after due deliberation. The Supreme Court in the decision in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*,) stated thus at page 1999 :

"If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid." It is further stated at page 2000 :

"The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the Court would have to decide whether the action of the Government is reasonable

and in public interest. But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the Court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the Governmental action. This is one of the most important functions of the Court and also one of the most essential for preservation of the rule of law."

Referring to the decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, it is stated at page 2001 :

"It is now well settled as a result of the decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well settled that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant."

On the facts of the case adverted to above, it is clear to my mind that the action of the Government in choosing the 3rd respondent to entrust the work on contract is not in any way arbitrary. The work involved is of an emergency nature required to be carried out and concluded on a time-bound basis. Tenders were called for but none among the tenders received was found acceptable. The tenderers were found lacking in experience, for the specialised nature of the work to be entrusted to them. The Empowered Committee constituted for the speedy implementation of the work had after due deliberations directed the 2nd respondent to contact other qualified contractors and after negotiations with them, two alone submitted quotations of whom one was involved in a similar work elsewhere, which would involve the requirement of the equipments such as the shuttering materials etc. for the work he is executing. The 3rd respondent was found to be competent. The Empowered Committee consisting also of

qualified technical personnel after due deliberations decided to settle the contract on the 3rd respondent. It cannot be said that the petitioners were eliminated without due consideration of their qualification and competency to execute the work. They were considered by the Empowered Committee specially constituted for the speedy implementation of the work. The allegation of mala fides against the 2nd respondent has not been made out in this case. It was his duty to report to the Empowered Committee of his objective assessment of the competency of the petitioner and other tenderers who had submitted tenders to execute the work. It was also his duty to negotiate with the 3rd respondent and others as required by the Empowered Committee and to report to the Committee of the results of such negotiations. The work had to be carried out on an emergency basis and could not brook any delay is clear from Ext. R2 (a) Government order constituting the Empowered Committee. The case of arbitrary discrimination against the petitioners and violation of Article 14 of the Constitution is also not made out in this case.

6. Learned counsel for the petitioners Sri George relies on the decision of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, wherein it is stated at page 1650 as follows :

"34. It is therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondents, but was bound to conform to the standard or norm laid down in para 1 of the notice inviting tenders which required that only a person running a registered IInd Class Hotel or Restaurant and having at least 5 years" experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by the 1st respondent was discriminatory having no just or reasonable delation to the object of inviting tenders, namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd Class Restaurant at the Airport. Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd Class Restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to award the contract to the 4th respondents who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents. When the 1st respondent entertained the tender of the 4th respondent even though they did not have 5 years" experience of running a IInd Class Restaurant or Hotel, it denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years" experience of running a IInd Class Restaurant, but who were otherwise competent to run such a Restaurant

and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility was clearly discriminatory, since it excluded other persons similarly situated from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

The present case is not similar to the case in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, The passage quoted above shows that the tender notification had prescribed the qualifications and the 4th respondent selected did not have the requisite qualification. It was in that context that the Supreme Court made the above observations. The principle quoted above has no application to the present case.

7. The result is the original petition fails and is dismissed, in the circumstances, without any order as to costs.