
(1998) 10 KL CK 0022
In the High Court Of Kerala
Case No : O.P. No. 6480 of 1998-U

V. Sivakumar

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Kerala Municipalities Act, 1994 — Section 276, 58

Citation : AIR 1999 Ker 49 : (1999) 1 ILR (Ker) 438

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : Mohammed Nias, C.P, for the Appellant; C.E. Unnikrishnan, Govt. Pleader, P.C. Chacko and Ashok M. Cherian, for the Respondent

Final Decision : Allowed

Judgement

P. Shanmugam, J.—Petitioner as an offer or for collection of taxes for lamp post advertisements has filed this Original Petition seeking to quash Ext. P4 proceedings of Corporation of Kochi and for a direction to conduct an auction or invite tenders for awarding the right to collect taxes for the year 1998-99. He has also prayed for a direction to the 2nd respondent Corporation not to award the right to collect taxes to the 3rd respondent.

2. Brief facts leading to the filing of the Original Petition are as follows : The Corporation of Kochi (hereinafter referred to as the "Corporation" farms out the collection of tax on advertisement within the territorial limits of the Corporation from year to year. For the previous year i.e. from 1-4-97 to 31-3-98, the right to collect advertisement taxes was given to the 3rd respondent by inviting tenders on 26-2-97. On enquiry by the petitioner he was informed that for this year also, it will be tendered or auctioned in the month of January or February as usual for the previous year. However, the Corporation decided to give the right to the 3rd respondent by private negotiation by increasing the previous year's kist amount by 10% without inviting tenders or public auction. The request of the 3rd

respondent dated 6-2-98 for renewal of the contract was accepted for Rs. 12,22,222/- higher by 10% on 7-3-98 overruling the objection of the Secretary of the Corporation indicating that auction was the correct procedure to be adopted. On coming to know of these developments, petitioner submitted a representation dated 26-3-98 expressing his willingness to take the right at the rate of Rs. 15 lakhs, before the 3rd respondent remitted the security deposit and entered into the contract. In the representation, he also requested to cancel the unlawful action in entrusting the right of collection to the former contractor without any tender. Since no action was taken on the said representation, petitioner filed this original petition on 31-3-98.

3. This Court in C.M.P. 11580/98 on 1-4-98 passed the following order :

"Government, pleader takes notice on behalf of first respondent. Sri P.G. Chacko. Standing Counsel for Cochin Corporation takes notice on behalf of second respondent. Notice by special messenger to third respondent. The second respondent will file a statement regarding the circumstances under which the normal practice of auctioning the right is departed and the same has been allotted to the third respondent by private negotiation. The grant of any right to the third respondent will be subject to the result of the O.P. If no agreements are executed so far, this will be mentioned in the said agreement."

4. Notice by special messenger was ordered for a hearing on 3-4-98. Though service was complete on the 3rd respondent and in spite of several adjournments and postings, 3rd respondent has chosen not to appear and defend the case,

5. A counter-affidavit has been filed on behalf of the 2nd respondent Corporation. It is stated therein that the Standing Committee of the Corporation considered the application of the 3rd respondent dated 6-2-98 for renewal of the contract for the year 1998-99 and the Standing Committee considered the same and by resolution No. 14 dated 9-2-98 Council resolved to renew the contract by enhancing the rate by 10% than that of the previous year. The resolution was communicated to the 3rd respondent pursuant to which he had remitted an amount of Rs. 3,14,815/- towards security deposit on 31-3-98 and preliminary requirements of contract were made. According to the Corporation, the award of contract is discretionary and it was exercised lawfully in the best interest of the revenue. It is also stated that the 2nd respondent has taken into account the antecedents of the contractor concerned. It is further stated that the petitioner had already disqualified himself to be considered for the award of contract by his conduct of 6-3-98 wherein he withdrew from his agreement in reference to hoardings on Sodium Vapour Lamps in the year 1997 for economic reasons. It is stated that the contract to the 3rd respondent had already been awarded by the time Ext. P5 representation was received and prayed for the dismissal of the Original Petition.

6. Petitioner has filed a reply affidavit stating the circumstances under which he was forced to withdraw the earlier offer in reference to the hoardings in the year

1997, According to the petitioner, 2nd respondent took 5 months to issue a confirmation letter to the tender submitted by him. Therefore, he had no other alternative but to withdraw from it, as he was put to monetary loss and hardship. For this contract, he has reiterated his offer of Rs. 15 lakhs. It is further stated specifically that for the previous period the enhancement was 20% by negotiation when there were no offers. But in this case, the enhancement was only 10% and the same was unlawfully accepted on the offer made by the 3rd respondent. For the reasons stated, it is submitted that the action of the Corporation is mala fide, arbitrary and discriminatory and the Corporation acted against the interest of the general public and has incurred much financial loss.

7. I have heard the counsel for the petitioner and the Standing Counsel for the Corporation.

8. The matter relates to the award of right to collect tax on advertisements within the territorial limits of the Corporation. Section 276 of the Kerala Municipalities Act, 1994 states that the Secretary may farm out the collection of any tax on advertisement for any period not exceeding one year at a time on such terms and conditions as may be provided for by the bye-laws. It is admitted that there are no bye-laws made as on date. The procedure followed during the previous years would show that normally it is done by calling for tenders. For the years 1995-96 and 1997-98 it was by open tender. As there are no offers in the year 1996-97 alone the kist amount was fixed by enhancing 20% to the previous years. The particulars of the contract for the previous years for the same right are given below :

Period

Kist amount

Method of award

1995-96

Rs.6,87,000/-

By tender

1996-97

Rs. 6,24,400/-

By negotiation. enhancement 20%

1997-98

Rs.11, 11,111/-

By tender

1998-99

Rs. 12,22,222/-

By negotiation, enhancement 10%

The stand of Corporation that it is the discretion of the Corporation to decide whether they should award the contract by public auction or by private negotiation cannot be accepted on the face of it. The public authority functioning under the Act, should conduct their business transparently and in the interest of the public. In this case, the decision of the Corporation, which according to them is discretionary, is neither in the public interest nor there is any transparency. The Corporation has deviated from the previous practice of awarding the contract by tender and enhancing the rate by 20% if there are no offers. In this case, they have gone in for a private negotiation and enhanced the rate only by 10%. This is in spite of the objection by the Secretary of the Corporation who is competent u/s 276 of the Act to farm out the collection of tax, stating that the proper procedure is only by tender. The Corporation by overruling this valid objection of the Secretary who is the competent authority u/s 276 of the Act with no justifiable reason, has exercised the discretion erroneously in such a way as to cause loss to the Corporation and against the public interest. It could be further seen that the petitioner had immediately on coming to know of the attempt to award the contract submitted a representation dated 26-3-98 much prior to the conclusion of the contract. In that representation, he had clearly stated that he is interested in taking out the right and offered to take the right for Rs. 15,00,000/-. Petitioner was not given any opportunity before finalising the contract. On the contrary, in disregard of this offer proceeded to finalise the contract on 31-3-98.

9. Learned Standing Counsel for the Corporation submits that the rights of the 3rd respondent has been concluded on 31-3-98 and that petitioner's performance in reference to some other contract was not satisfactory and hence they have decided not to accept the offer of the petitioner. This O.P. was filed on 31-3-98 and by the interim order it was made clear that any right to the 3rd respondent will be subject to the result of the Original Petition. The Corporation cannot take advantage of their own wrong to say that the 3rd respondent's right has already been concluded.

10. The stand of the learned counsel for the Corporation that the 3rd respondent's right is concluded would only show that the Corporation is defending his cause. The contract was not concluded on 26-3-98 when petitioner had offered much higher amount. Assuming that the contract had been concluded if it can be shown that the agreement is opposed to public policy and hence unlawful, it will be open to the Corporation to rescind the agreement. But they cannot rest their case on the plea of the right of the 3rd respondent who had chosen not to defend the case. This only strengthens the allegation of the petitioner of collusion and mala fides.

11. From the stand of the Corporation taken before me. I am of the view the

Corporation is more interested in safeguarding the interest of 3rd respondent than the Corporation for the following reasons :

(a) There is no concluded contract till 31-3-98 and even thereafter.

(b) While taking due regard to the antecedents of the concerned contractor, the alleged complaint against the petitioner alone was taken and not against the 3rd respondent.

(c) The stand in the counter in paragraph 4 is that by 31-3-98 only preliminary requirements of contract were complied and hence the Corporation had the liberty to consider the case of the petitioner.

(d) No mention of confirmation of conclusion of contract and its particulars so as to disentitle the Corporation from reconsidering the award.

12. There is no acceptable explanation for adopting a policy of private negotiation to award the contract especially when it is pointed out by the competent authority that it must be by tender. Even assuming that it can be by private negotiation, fairness demands that the petitioner ought to have been given similar treatment and there is clear discrimination shown by the Corporation. While every right like allotment of shops, markets, stalls and other contracts are awarded based on tender in previous year, the burden to prove the arbitrariness is discharged shifting the onus on the Corporation to justify their action fair and reasonableness.

13. The argument of the learned counsel for the Corporation is that while awarding the contract, the Corporation had taken into account the antecedents of the concerned contractor. In so far as the petitioner is concerned, there is no written communication in response to Ext. P5 representation to the effect that his offer has not been accepted because of his antecedents till date. Therefore, it is clear that the reason now put forward in paragraph 9 of the counter to the effect that the representation is not liable to be considered can only be termed as an afterthought. In the counter, contrary to the argument, nowhere it is stated that the petitioner was disqualified from consideration. Nothing prevented the Corporation to respond to the offer by rejecting it before concluding the contract with 3rd respondent. It is settled law that the impugned decision cannot be supported by grounds other than stated thereunder and by counter-affidavit. Learned counsel for the petitioner justified the petitioner's earlier withdrawal in reference to hoardings, viz., the inordinate delay in giving a letter of confirmation after 5 months of this offer. It is further stated on behalf of the petitioner that while the Corporation took 5 months to issue a confirmation letter in his case, in this case the Corporation has shown undue haste in accepting the offer of the 3rd respondent within few days of the decision and completed transaction on 31-3-98. It is further alleged on behalf of the petitioner that the 3rd respondent had influence over the 2nd respondent and only because of the collusive nature, the contract was awarded and therefore it is mala fide. In support of this allegation, it is stated specifically in paragraph 3 of the Original Petition that

there were several allegations against the 3rd respondent that he had collected exorbitant taxes than what is prescribed in Ext. P2 terms and conditions. Instead of collecting Section 4.20 for board size 0.5 sq.m. to 2.5 sq.m., he is unlawfully charging Rs. 180/- for one metre. The Corporation has chosen not to take any action for violation of the norms prescribed when complained. On the contrary, he was favoured with a further contract for one year by a mere enhancement of 10%. This specific allegation has not been denied by the Corporation in their counter. The allegation of mala fide and favouritism, is established in this case for the following reasons :

- (1) The right is awarded by private negotiation contrary to the practice of awarding by tender.
- (2) No reason for overruling the objection of the Secretary of the Corporation who is competent authority u/s 276.
- (3) The enhancement of 10% is also contrary to earlier increase by 20%.
- (4) No opportunity was given to the petitioner when he offered higher amount before finalisation in violation of the principles of natural justice and ex facie unequal treatment.
- (5) No reply given to the petitioner's offer and representation till date.
- (6) No counter denying the specific allegations of complaint against the 3rd respondent in the performance of contract for the previous year.
- (7) Corporation has deliberately avoided taking a specific stand as to the reasons for not accepting petitioner's offer. In one place it is stated that due regard to the antecedents of the contractor was taken note of and in another place it is stated that Ext. P5 is not liable to be considered. Whether the Corporation considered Ext. P5 at all is not clear.

14. Yet another contention of the Corporation is that as against the action of the Municipality, the petitioner can approach the Government u/s 58 of the Kerala Municipality Act against any action taken or order issued. Of course, this is an alternative remedy available to the parties against the Municipal authority. In the facts and circumstances of the case, the alternative remedy cannot be effective for the reason that action of the Corporation is mala fide and made in violation of the principle of natural justice against public interest and arbitrary. In the above circumstances, the remedy u/s 58 cannot be, in my view, an effective remedy.

15. In this context, a reference has been made to the judgment of the Supreme Court in *New India Public School and other etc. Vs. HUDA and others etc.*, . The Supreme Court held that when public authority discharges its public duty the word "otherwise" would be construed to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and not at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. In that case, the Supreme Court was dealing with the

provision for disposal of the land which enabled the authorities to allot or otherwise any land or building belonging to it on such terms and conditions as it made by the regulation provided. The provision "otherwise" was interpreted by the Supreme Court to the effect that it should be considered to be consistent with the public purpose.

16. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the Supreme Court laid down the law in this respect in the following words :

"..... where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, 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 standard or norms which is not arbitrary, irrational or irrelevant. The power of discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

17. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, the Supreme Court held that it can no longer be doubted that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy of any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

18. In *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, the Supreme Court has held that the public authority cannot act in a manner which would benefit a private party at the cost of the State in the absence of demonstrable considerations which justify such action in public interest. Unlike a private individual, the State cannot act as it pleases in the matter of giving largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. Their Lordships' observation is as follows :

"It must follow as a necessary corollary that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be not unreasonable and contrary to public interest. 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,"

In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, the

Supreme Court held that actions of public authorities are amenable to judicial review only to the extent that the State must act validly for discernible reason not whimsically for any ulterior purpose. Where any special right or privilege is granted to any public or statutory body on the presumption that it must act in certain manner such bodies must make good such presumption while acting by virtue of such privilege. Judicial review to oversee if such bodies are so acting is permissible. Their Lordships' further observation is relevant in this case, which reads as follows :

"Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, ; *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, : *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, : *Kasturi Lal Lakshmi Reddy v. State of J. and K.*, (1980) 4 SCC 1 : (AIR 1980 SC 1992) and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . Where there is arbitrariness in State action. Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14."

In *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, it was held that even though there is no legal right to enter into contract, any discrimination between persons desiring to enter into contract is breach of fundamental right enshrined in Article 14 of the Constitution of India. It was further held that the State which has the right to trade has also the duty to observe equality. The Government cannot exclude persons by discrimination. Their Lordships observed as follows :

"The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling. Where the blacklisting order involves civil consequences it casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion." Hence a person must be given an opportunity of hearing before his name is put on the black list."

The Corporations action in awarding the contract in question has clearly contravened the principles laid down by the Honourable Supreme Court.

19. For all these reasons. I am convinced that the petitioner has made out a clear case and Ext. P-4 decision of the Corporation is illegal, arbitrary, mala fide and colourable exercise of power. By selecting the 3rd respondent by private

negotiation, the Corporation has sacrificed not only the financial interest of the Corporation but also the guaranteed equal treatment to its citizens.

20. In the above circumstances, Ext. P-4 order is quashed and the 2nd respondent is directed to re-auction or invite tenders for the purpose of awarding the right to collect tax on the advertisement for the remaining period of 1998-99.

21. Original Petition is accordingly allowed.