

(2021) 09 KL CK 0071

High Court Of Kerala

Case No: Writ Petition (C) No.15259 Of 2021

Shri.G.Balakrishnan Nair

APPELLANT

Vs

State Of Kerala XXXXXXXXXXXX
XXXXXXXXXX

RESPONDENT

Date of Decision: Sept. 14, 2021

Acts Referred:

- Constitution Of India, 1950 - Article 226

Hon'ble Judges: P.B.Suresh Kumar, J

Bench: Single Bench

Advocate: S.Sreekumar, P.Martin Jose, P.Prijith, Thomas P.Kuruvilla, R.Githesh, Ajay Ben Jose, Manjunath Menon, Sachin Jacob Ambat, Harikrishnan S, Princy Xavier, K.Jaju Babu, Brijesh Mohan, Resmi G. Nair

Final Decision: Dismissed

Judgement

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P.B.Suresh Kumar, J

1. In terms of Ext.P1 tender notice, the third respondent invited online bids for executing a work for removal of earth deposited during flood from

'varattar' and 'Adhipamba' rivers in Pathanamthitta District. Both petitioner and the fourth respondent submitted bids pursuant to Ext.P1 tender notice.

The bid submitted by the fourth respondent was the highest. Though the rate quoted by the fourth respondent was Rs.501/- per cubic meter, on

negotiation, the fourth respondent raised his offer to Rs.684/- per cubic meter. On 02.06.2020, the third respondent awarded the work to the fourth

respondent and directed him to furnish the security deposit namely Rs.2,19,65,800/-in the manner prescribed and execute the agreement in stamp

paper worth Rs.4,39,400/-within 14 days without fine and within 24 days with fine. Ext.P5 is the selection notice issued by the third respondent to the fourth respondent in this regard. The fourth respondent did not furnish the security deposit within the time stipulated in Ext.P5 selection notice. Instead, on 25.09.2020, he submitted a representation to the third respondent seeking orders enlarging the time fixed for furnishing the security deposit and execution of the agreement in the light of the restrictions imposed by the Government for preventing the spread of Covid-19 pandemic. On the basis of the request made by the the fourth respondent, the third respondent granted time to the fourth respondent till 26.10.2020 for furnishing security deposit and execution of the agreement. Ext.R3(a) is the communication issued by third respondent in this regard on 21.10.2020.

2. It appears that the third respondent entertained a doubt in the meanwhile as to the amount of the security deposit to be furnished by the fourth respondent, and after clearing the said doubt, the third respondent issued Ext.P6 communication to the fourth respondent on 30.10.2020 stating that the amount of the security deposit to be furnished by him is Rs.4,39,31,500/-. In terms of Ext.P6 communication, the third respondent directed the fourth respondent to furnish the security deposit and execute the agreement within seven days from the date of receipt of the said communication. The fourth respondent did not execute the agreement within the time stipulated in Ext.P6 communication as well. Instead, as the security deposit was doubled, on 23.12.2020, the fourth respondent preferred a representation to the third respondent seeking permission to furnish the security deposit in instalments. Ext.R4(f) is the representation submitted by the fourth respondent in this regard. Ext.R4(f) representation was rejected by the third respondent on 24.03.2021.

3. In the meanwhile, on 11.02.2021, the petitioner submitted Ext.P7 representation to the third respondent requesting the third respondent to award the work to him pointing out that since the fourth respondent has not furnished the security deposit and executed the agreement within the time stipulated in Ext.P5, the work ought to have been awarded to the petitioner. On the same day on which the request of the fourth respondent to furnish the

security deposit in instalments was rejected, the third respondent gave Ext.P8 communication to the petitioner requiring to intimate the third respondent as to whether the petitioner is prepared to undertake the work at the rate of Rs.684/- per cubic meter quoted by the fourth respondent. In response to Ext.P8 communication, the petitioner submitted Ext.P9 willingness to execute the work at the rate quoted by the fourth respondent. No action was, however, taken on Ext.P9 willingness furnished by the petitioner. The petitioner, in the circumstances, preferred a representation to the Chief Minister of the State complaining about the inaction on the part of the third respondent in awarding the work to him. Ext.P11 is the representation submitted by the petitioner to the Chief Minister. It appears that the said representation has been forwarded to the office of the third respondent and in the light of the same, the third respondent has informed the petitioner that appropriate decision as regards the claim of the petitioner will be taken by the second respondent soon. Ext.P12 is the communication issued by the third respondent in this regard. The writ petition is filed immediately thereafter seeking directions to respondents 2 and 3 to enter into necessary agreement with the petitioner for execution of the work. The case set out by the petitioner in the writ petition is that insofar as the highest bidder has not executed the agreement within the time initially stipulated and later enlarged, the petitioner who is the second highest bidder in the bid process ought to have been awarded the work.

4. On 30.07.2021, this Court directed the parties to maintain status quo as regards the work..

5. A statement has been filed on behalf of the third respondent pointing out that since the fourth respondent has not furnished the security deposit and executed the agreement despite having been given sufficient time, the second respondent, the Chief Engineer of the department has placed the matter before the Government for appropriate decision in this regard, and on 14.07.2021, the Government issued Ext.R3(c) communication to the second respondent directing him to give seven more days to the fourth respondent to furnish the security deposit and execute the agreement. It is stated on behalf of the third respondent that Ext.R3(c) communication was brought to the notice of the fourth respondent on 16.07.2021, and in the light of the

said communication, the fourth respondent ought to have furnished the security deposit and executed the agreement on or before 23.07.2021. It is stated on behalf of the third respondent that on the next working day, the fourth respondent requested the third respondent to grant 15 days time more to furnish the security deposit pointing out his inability to obtain bank guarantee for the huge sum of money in that short span of time as the banks are not functioning on regular basis due to the restrictions imposed by the Government for the prevention of the Covid-19 pandemic. It is also stated on behalf of the third respondent in the statement that immediately thereafter on 04.08.2021, the fourth respondent completed the formalities for execution of the agreement including furnishing of the security deposit and the agreement was not executed by the department with the fourth respondent in the light of the interim order passed by this Court in the meanwhile on 30.07.2021. It is also stated in the statement that having regard to the disruptions caused to the normal life on account of the pandemic, insofar as the fourth respondent has completed all the formalities relating to the execution of the agreement, the department does not find any impediment in entering into the necessary agreement with the fourth respondent for execution of the work.

6. A counter affidavit has been filed by the fourth respondent stating, among others, that though he was informed in terms of the selection notice that the amount of security deposit to be furnished by him for the work is Rs.2,19,65,800/-, the same was revised later to Rs.4,39,31,500/- in terms of Ext.P6 communication issued on 30.10.2020, at a point of time when the Government was considering the question of reducing the security deposits to be furnished by the contractors for similar works in the wake of the pandemic; that he was therefore, advised to wait until the Government takes a decision in this regard and while so, on 07.01.2021, in terms of Ext.R4(g) order, the Government reduced the security deposit to be furnished for similar works substantially; that in the light of Ext.R4(g) order of the Government, the department themselves sought clarification from the Government as to the security deposit to be furnished by him for the subject work, and that it was while the said request for clarification was pending

consideration before the Government that the Government has issued Ext.R3(c) communication. It is also stated by the fourth respondent in the counter affidavit that since no decision was forthcoming from the Government on the issue relating to the quantum of security deposit to be furnished by him and since the Government has issued Ext.R3(c) decision in the meanwhile, he decided to furnish security deposit in tune with Ext.P6 communication and it is on that basis that he has furnished security deposit for the work. It is also stated in the counter affidavit that the delay of a few days in complying with the direction contained in Ext.R3(c) was due to the delay caused by the bank in providing the bank guarantee sought by him as the banks were not functioning on regular basis then due to the restrictions in connection with the pandemic. It is also mentioned by the fourth respondent in the counter affidavit that the rate quoted by the petitioner for the work is less by Rs.16,44,21,939/- when compared to the rate quoted by him.

7. Heard the learned Senior Counsel for the petitioner, the learned Government Pleader as also the learned Senior Counsel for the fourth respondent.

8. The learned Senior Counsel for the petitioner submitted that in Ext.P5 selection notice, it is categorically mentioned that if the fourth respondent does not execute the agreement within the time stipulated therein, the work will be awarded to the second highest bidder. According to the learned Senior Counsel, admittedly the fourth respondent has not executed the work within the time stipulated in Ext.P5 selection notice. It is argued by the learned Senior Counsel therefore, that the third respondent ought to have awarded the work to the petitioner as he was the second highest bidder in the bid process. It was also argued that at any rate, since the fourth respondent has not furnished the security deposit for the work and executed the agreement within the time stipulated by the Government even in Ext.R3(c) direction issued by the Government, the work should have been awarded to the petitioner. It was further argued that insofar as the petitioner has agreed to execute the work at the rate quoted by the highest bidder, the fourth respondent, there was absolutely no justification for the third respondent in not awarding the work to the petitioner. It was all the more so, according to

the learned Senior Counsel, since the work in question was one to be executed on an emergent basis.

9. The learned Government Pleader has pointed out that insofar as the fourth respondent has completed all the formalities in connection with the execution of the agreement pursuant to Ext.R3(c) direction issued by the Government, though there is delay of a few days in complying with the said direction, there is no impediment for the department in entering into the agreement with the fourth respondent for execution of the work. It was also pointed out by the learned Government Pleader that but for the interim order passed by this court on 30.07.2021, the department ought to have been entered into the agreement with the fourth respondent for execution of the work.

10. The learned Senior Counsel for the fourth respondent reiterated the stand of the fourth respondent in the counter affidavit filed in the matter. It was emphatically argued by the learned Senior Counsel that in the light of Ext.R4(g) order of the Government, the fourth respondent was not liable to furnish security deposit to the tune of Rs.4,39,31,500/- for the subject work and it was with a view to complete the work at the earliest point of time that he has decided to comply with the direction of the Government contained in Ext.R3(c) communication. It was argued by the learned Senior Counsel that in cases of this nature, the officers of the Department would be well within their powers in granting time for execution of the agreement for works, if the contractors concerned are willing to execute the work on the same terms and conditions offered by them. The learned Senior Counsel has relied on the decision of the Apex Court in *Bharat Coking Coal Ltd. v. AMR Dev Prabha*, (2020) 16 SCC 759, in support of the said point urged by him.

11. I have perused the pleadings of the parties and considered the contentions put forward by their learned counsel.

12. As noted, the security deposit directed to be furnished by the fourth respondent in terms of Ext.P5 selection notice dated 02.06.2020 was only Rs.2,19,65,800/-. Ext.P6 communication of the third respondent indicating the revised security deposit of the work namely, Rs.4,39,31,500/- was issued to the fourth respondent only on 30.10.2020. The specific case of the fourth respondent is that though he was prepared to furnish the security deposit

in terms of Ext.P5 selection notice and execute the agreement for the work on 30.06.2020, he was not permitted to do so by the third respondent on account of the doubt entertained by him as to the security deposit to be furnished by him for the subject work. The fact that the fourth respondent has purchased the stamp paper required for executing the work on 30.06.2020 is evidenced by Ext.R4(d), the copies of the stamp paper. Ext.P6 communication and Ext.R4(d) stamp papers probablise the case of the fourth respondent that he has made all arrangements for execution of the agreement for the work before 30.06.2020. Again, as noted, the revision of the security deposit for the work was to the tune of almost Rs.2.2 crores.

Ext.R4(g) order of the Government indicates that in the wake of the Covid-19 pandemic, on 13.5.2020, the Government of India requested the State Governments to relax the terms of security deposits to be furnished by the contractors in respect of procurements and it is in the light of the said request of the Central Government that the said order has been issued by the Government. In other words, Ext.R4(g) would probablise the case of the fourth respondent that Ext.P6 communication was issued at a point of time when the Government was examining the question of relaxing the terms of security deposits to be furnished by the contractors in respect of procurements. It is seen that it is in the said circumstances, the fourth respondent preferred Ext.R4(h) representation before the third respondent requesting him to revise the security deposit to be furnished by the fourth respondent in tune with Ext.R4(g) order of the Government. It is also seen that it is having convinced that there is merit in the request made by the fourth respondent in Ext.R4(h) representation, the second respondent placed the matter before the Government in terms of Ext.R4(j) communication for a decision as to the security deposit to be furnished by the fourth respondent. Exts.R4(g), R4(h) and R4(j) documents would probablise the case of the fourth respondent that the agreement for the subject work could not be executed by him on account of the doubt entertained by the officials of the department as to the quantum of the security deposit to be furnished by him. It is further seen that it was while Ext.R4(j) request made by the second respondent before the Government was pending consideration, the Government issued Ext.R3(c) communication directing the department to forfeit the

earnest money deposit furnished by the fourth respondent if he does not complete the formalities regarding the execution of the agreement within

seven days. As seen from the materials on record, pursuant to the said direction, the fourth respondent has furnished the security deposit in tune with

Ext.P6 communication. Of course, there was a delay of nine days in complying with the direction contained in Ext.R3(c) communication. In a case of

this nature, as rightly contended by the learned Senior Counsel for the fourth respondent, the department is well within its power in granting

enlargement of time, and I do not, therefore, find any impropriety or illegality in the stand taken by the department that they would have entered into

the necessary agreement with the fourth respondent but for the interim order passed by this Court on 30.07.2021, especially when the petitioner has no

case that the stand aforesaid of the officials is vitiated by malice. I am fortified in this view by the decision of the Apex Court in Bharat Coking Coal

Ltd. Paragraphs 46 and 47 of of the said judgment read thus:

46. With regard to other allegations concerning condonation of Respondent 6's delay in producing guarantees, we would only reiterate that there is no prohibition in

law against public authorities granting relaxations for bona fide reasons. In Shobikaa Impex (P) Ltd. v. Central Medical Services Society, it has been noted that:

(SCC p. 243, para 20)

“20. The State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a

relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some

defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in

furtherance of public interest and not merely on the making out of a legal point.”

47. Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the

tender at the behest of an unsuccessful bidder. This is because notice must be kept of the impact of overturning an executive decision and its impact on the larger

public interest in the form of cost overruns or delays.

13. Be that as it may, in a case of this nature, of course, the department would be well within its power to award the work to the second highest bidder, if the highest bidder does not furnish the security deposit and execute the agreement within the time stipulated. But that does not mean that the failure on the part of the highest bidder in furnishing security deposit and executing the agreement within the time stipulated would confer a right on the second highest bidder to get the work awarded to him. In other words, even if there is failure on the part of the highest bidder in furnishing security deposit and executing the agreement on receipt of selection notice, the same does not confer any right to the second highest bidder to claim that the work shall be awarded to him. Identical is the stand taken by this Court in *Rajesh C. v. District Collector*, 2012 (2) KHC 185 and the Calcutta High Court in *Sarbangapur Fishermen's Co-operative Society v. State of West Bengal*, 2018 SCC Online Cal 8094. It is all the more so since it is trite that the bidders participating in the tender process have no right other than the right to equality and fair treatment in the matter of evaluation of the competitive bids offered by the interested persons in response to notice inviting tenders in a transparent manner and free from any hidden agenda [See *Meerut Development Authority v. Assn. of Management Studies*, (2009) 6 SCC 171].

The writ petition, in the circumstances is without merits and the same is, accordingly, dismissed.