

Sunitha Joy Vs. State of Kerala

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Court : Kerala

Decided On : Jan-30-2013

Judge : Honourable Mr.Justice a.M.Shaffique

Appellant : Sunitha Joy

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE WEDNESDAY, THE 30TH DAY OF JANUARY 2013 10TH MAGHA 193 WP(C).No. 12610 of 2012 (A)

----- PETITIONER(S): ----- SUNITHA JOY, AGED 3 YEARS, "SOUHRUDAM", PERUMGUZHI P.O., THIRUVANANTHAPURAM. BY ADVS.SRI.BLAZE K.JOSE SMT.N.DEEPA
RESPONDENT(S): ----- 1. STATE OF KERALA, REPRESENTED BY PRINCIPAL SECRETARY, PUBLIC WORKS DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001.

2. CHIEF ENGINEER, PUBLIC WORKS DEPARTMENT (NATIONAL HIGHWAYS), SOUTH CIRCLE, THIRUVANANTHAPURAM-695033.

3. SUPERINTENDING ENGINEER, PUBLIC WORKS DEPARTMENT (NATIONAL HIGHWAYS), SOUTH CIRCLE, THIRUVANANTHAPURAM-695033.

4. ANILKUMAR.B., S/O.A.V.BHARGAVAN, JANAK, ATTINGAL, THIRUVANANTHAPURAM-695121. * ADDL.R5 IMPEADED 5 K.RAVEENRAN, TC 15/1171, CHITRAM, MOOLAVILAKAM, KUNNUMKUZHY, THIRUVANANTHAPURAM-695037. * ADDL. R5 IS IMPEADED AS PER ORDER DTD.12/2/2013 IN IA.NO.12006/12. R1 BY ADV.SMT.ROSE MICHAEL, GOVERNMENT PLEADER ADDL.5 BY ADV. SRI.P.A.AHAMMED ADDL.5 BY ADV. SRI.THOUFEEK AHAMED R4 BY ADV. SRI.K.B.PRADEEP THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30-01-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: AS WP(C).No. 12610 of 2012 (A) APPENDIX PETITIONER(S) EXHIBITS: EXHIBIT-P1: A TRUE COPY OF THE NOTICE OF TENDER NO.TN(G) 555/2011 DATED 07 1.2012. EXHIBIT-P2: A TRUE COPY OF THE JUDGMENT IN WPC 7703/09 DATED 11 3/2009. EXHIBIT-P3: A TRUE COPY OF THE ORDER IN COMPLAINT NO.549 OF 201.DATED 28 3/2012 OF THE HON'BLE LOK AYUKTA. EXHIBIT-P4: A TRUE COPY OF THE ORDER NO.10075/H2/12/PWD DATED 26 04/2012 ISSUED BY THE 1ST RESPONDENT. EXHIBIT-P5: A TRUE COPY OF THE NOTICE INVITING TENDER DATED 2 5/2012 PUBLISHED IN THE HINDU DAILY DATED 10 5/2012. EXHIBIT-P6: A TRUE COPY OF THE JUDGMENT IN WPC 485.OF 201.DATED 8 08/2012. EXHIBIT-P7: A TRUE COPY OF THE ORDER NO.NH-14019/4/2008-P&M DATED 27 4/2008. RESPONDENTS' ANNEXURES & EXHIBITS: ANN.1: A TRUE COPY OF THE CIRCULAR DATED 1 8/2012. EXHIBIT-R3(A): A TRUE COPY OF THE STAY ORDER GTRANTED BY THE KERALA LOK AYUKTA ON 6/3/2012. EXHIBIT-R3(B): A TRUE COPY OF THE INTERIM ORDER DATED 28 3/2012. EXHIBIT-R3(C): A TRUE COPY OF THE PETITION DATED 23 3/2012. EXHIBIT-R3(D): A TRUE COPY OF THE REPORT. EXHIBIT-R3(E): A TRUE COPY OF THE CHIEF ENGINEER'S LETTER NO.NH1D2- 265/2011 DATED 2 4/2012. EXHIBIT-R3(F): A TRUE COPY OF THE LETTER NO.W3D1-1613/2012 DATED 13 4/2012. /TRUE COPY/ P.A.TO JUDGE AS A.M.SHAFFIQUE, J * * * * * W.P.C.No.12610 of 2012 ----- Dated this the 30th day of January 2013

JUDGMENT

This writ petition is filed by a person who had submitted his tender in terms of Ext.P1 notification issued by the Government calling for tenders for toll collection

at Akkulam Bridge in Thiruvananthapuram. It was a composite notification for Akkulam as well as Amaravila. The petitioner submitted his tender for Akkulam complying with the terms and conditions of the tender. Complaint of the petitioner is that despite the fact that there were three tenders, the tenders were not opened and the Government subsequently issued Ext.P4 order deciding to re-tender the said work. In Ext.P4 it was stated that the proceedings in terms of Ext.P1 tender notification of Akkulam-Kazhakkuttam bye-pass toll was stopped and the experience clause was deleted from the tender conditions and that bank guarantee and security deposit alone was insisted. W.P.C.No.12610 o

2. According to the petitioner, deletion of the condition regarding previous experience was arbitrary and mala fide act on the part of the Government which ought not to have been done by the Government as, on earlier occasions, the Government was keen to contend that experience in toll collection was a mandatory requirement for awarding the work of toll collection. When Ext.P4 came to be challenged and the petitioner sought for stay of further proceedings, this Court permitted the Government to proceed with the tender. But, by order dated 07/06/2012 it is observed that proceedings if any will be finalised only after getting orders from this Court.

3. When the re-tender was published, there was only one tenderer namely the 5th respondent. Government cancelled the said tender and again with the permission of the Court another tender was invited. There were three tenderers of which two did not even submit the necessary security deposit and again 5th respondent became the lone W.P.C.No.12610 o

3. tenderer and when permission was sought for by the Government to award the work to the 5th respondent, this Court passed an order dated 03/12/2012 directing the Government to file an affidavit as to why the tenders received as per Ext.P1 notification were not opened. Further this Court observed in the said order that the Government shall be entitled to initiate fresh re-tender process and since there was a statement that if any of the tenderers in terms of Ext.P1 notification requests for return of security deposit, the same shall be done expeditiously within a period of two weeks from the date of receiving such an application. It seems that the

petitioner had already obtained refund of security deposit.

4. No doubt, in terms with the interim order dated 03/12/2012, as matters stand now, Government have to proceed with the re-tender process.

5. Counter affidavit had been filed by the 1st respondent inter alia stating the reasons for issuing Ext.P4. W.P.C.No.12610 o

4. It is stated that at the request of the 5th respondent, the Government had considered the question to delete the condition of previous experience in the collection of tolls from the bridges in the State of Kerala and a policy decision had been taken which resulted in Ext.P4 tender and a general order had been passed in respect of future tenders regarding other bridges also which requires toll collection. In the affidavit filed by the 3rd respondent as directed by this Court, it is explained that since there was a stay granted by the Kerala Lok Ayuktha on 06/03/2012, bids could not be opened as the date for opening the bids was 13/03/2012 and since the stay of the Lok Ayuktha was vacated on 28/03/2012, time was extended up to 31/3/2012. It is, in the meantime that on 23/03/2012 the 5th respondent had submitted a representation to delete the condition of experience in the tender notification stating that more bidders could participate in the tender if that condition is deleted. It is, in pursuance of the said representation that a W.P.C.No.12610 o

5. report was called for from the concerned department and Ext.P4 came to be issued. As per circular dated 21/6/2012, the same condition had been extended to all toll collection centres of all bridges in the entire state.

6. Further it is stated that the bid submitted by the 5th respondent was in order and though it is less than the estimated amount, being for a limited period, it was possible for the Government to give the work to the 5th respondent. Additional 5th respondent has filed counter affidavit inter alia stating that he was the highest tenderer in the entire process and he is entitled to get the work awarded. The question to be considered is whether Ext.P4 is valid taking into consideration as to whether there is any arbitrariness or mala fides in issuing Ext.P4.

7. It is not in dispute that under normal circumstances court will not interfere with the conditions of tender unless it is shown to be arbitrary, illegal or actuated by mala fides. W.P.C.No.12610 o

6. 8. By Ext.P4, the Government had decided to proceed for re-tender in respect of Akkulam toll collection covered by Ext.P1 notification, without opening the tenders received in terms of Ext.P1. This apparently is based on the representation submitted by the 5th respondent to the Government and the Government after obtaining reports from the concerned department decided to delete the experience clause from the tender conditions and incorporated the condition of bank guarantee.

9. The question to be considered is whether the order issued at that point of time after inviting tenders in terms of Ext.P1 is valid or not.

10. Under normal circumstances, all tenders which were invited in terms of Ext.P1 ought to have been opened to find out as to who was the highest bidder for the work. There were admittedly three tenders and though the period of opening the tender was extended upto 31/3/2012, the same were not opened on the ground that there was an W.P.C.No.12610 o

7. interim order passed by the Lok Ayuktha. But the fact remains that three persons had submitted their tenders along with security deposit for the purpose of competing in the bid, whereas the 5th respondent was not in the field of consideration as he did not submit any tender apparently on account of the fact that he did not have the necessary experience. In all probability, the Government ought to have opened the tenders and failure to do so is not sufficiently explained. Though it is stated in the affidavit filed by the Superintending Engineer that there was interference by the Lok Ayuktha, the fact remains that the interim order was vacated on 28/03/2012 and after that period the tenders ought to have been opened. But, in the meantime there was a representation by the additional 5th respondent which turned out to be a reason for Ext.P4 coming into force. But, still, there is no reason why the tenders received in terms of Ext.P1 were cancelled by issuing Ext.P4. Apparently, it was at the instance of the 5th W.P.C.No.12610 o

8. respondent that such a change has been made by the Government. As a matter of fact, it is possible for the Government to change their policy, but the changes cannot be effected after inviting the tenders and after completing the tender process when it was ready to open the price bids and the contract awarded in favour of the competent person.

11. The fact that the Government had no contemplation for relaxing the tender condition is clear from the fact that on earlier occasions Government was keen to include the clause of experience as a condition in the tenders which is evident from the affidavit filed before the Lok Ayuktha itself. Until such time, that is until 28/03/2012, the stand of the Government was that experience was a pre-condition for awarding such works. That being the situation, relying upon the representation given by the 5th respondent, the policy which has been in existence for the last several years ought not to have been changed suddenly and especially in respect of a work for which tenders were W.P.C.No.12610 o

9. invited. Therefore the very re-tender process initiated by the Government after cancelling Ext.P1 tender, is clearly an arbitrary exercise of power and I have no hesitation to hold that it is actuated by mala fides in view of the fact that it is at the instance of the 5th respondent that such order came to be passed.

12. But, as matters stand now, the re-tender process did not result in the award of work and the petitioner had already received back his security deposit and there is no point in issuing directions to proceed with Ext.P1 tender. But, on my finding that Ext.P4 was bad in law, the 5th respondent cannot take any advantage of the re-tender process even if it is seen that he is the lone lowest tenderer for the second time.

13. But, my observation in this judgment shall not preclude the Government from proceeding with any tender process for the subsequent years if, as a policy matter, they continue to abide by Circular No.10075/H2/12/PWD dated W.P.C.No.12610 o

10. 21/6/2012. In the result, this writ petition is disposed of with the following directions: i) Ext.P4 issued at the time when tenders in respect of Ext.P1 notification was pending is bad in law. ii) Government is free to invoke the policy in

respect of Government Circular No.10075/H2/12/PWD dated 21/6/2012 for future tenders for the award of work from 2013-2014 onwards. iii) The 5th respondent shall not get any special right in view of the re-tender process which is declared to be bad in law. iv) The amount paid by the 5th respondent as Earnest Money Deposit and Bank Guarantee shall be refunded to him within a period of fifteen days from the date of receipt of a copy of this judgment. (sd/-) (A.M.SHAFIQUE, JUDGE) jsr W.P.C.No.12610 o

11. W.P.C.No.12610 o

12. W.P.C.No.12610 o

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