

C. Sivanandan Vs. State of Kerala and ors.

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Court : Kerala

Decided On : Apr-18-1995

Reported in : AIR1995Ker354

Judge : B.N. Patnaik, J.

Acts : [Evidence Act, 1872](#) - Sections 78; [Constitution of India](#) - Articles 226 and 299

Appeal No. : O.P. No. 3053 of 1995-L

Appellant : C. Sivanandan

Respondent : State of Kerala and ors.

Advocate for Def. : M. Hemlatha, G.P.,; M. Pathrose Mathai and; K.M. Joseph

Advocate for Pet/Ap. : E. Subramoni and; R. Ramadas, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

B.N. Patnaik, J.

1. The petitioner, who is an 'A' Class contractor, has prayed for issue of a direction to respondents 3 to 7 to supply tender forms to him so as to enable him to

participate in the process of submission of tenders and quote his rates and to consider his tenders in a just and fair manner by quashing Exts. P7 to P9 letters by which his pre-qualification application was rejected. He has also prayed that the selection of eight contractors at the pre-qualification stage to undertake various works should also be quashed.

2. The petitioner states that he is a P.W.D. Contractor and had completed a number of major works successfully. Respondents 5 to 7, who are Superintending Engineers of Kallada Irrigation Project, invited pre-qualification applications in January, 1994 for the following works :--

(i) Formation of Oachira Distributory from Ch.0 to 4735 m including CD works-Part I 0m to 154 0m. The estimate cost of the work was 105 lakhs.

(ii) Formation of Oachira Distributory from Ch. 154 0m to 4735 m including all CD works. The estimate cost of work was 183 lakhs.

(iii) Formation of Manku/hi Distributory from Ch. 0m to 438 0m including CD works. The estimate cost of the work was 230 lakhs.

(iv) Dam at Parappar -- Construction of auxiliary spill-way, stilling basin, leading channel, bridges and extension of left side training wall from 135 m to 435 m. The estimate cost of the work was 812 lakhs.

(v) The work of Kallada Irrigation and Tree crop development project -- formation of Pallimon Distributory from Ch. 0m to 700 0m including CD works. The estimate cost of the work was 248 lakhs.

(vi) Formation of Pallimon Distributory from 700 0m to 1321 0m including CD works. The estimate cost of the work was 248 lakhs.

(vii) Formation of Boothakkulam Minor Distributory from Ch. 0m to 335 0m and sub-minor from Ch. 0m to 345 m including CD works. The estimate cost of the work was 80 lakhs.

(viii) Formation of Nellimughal Distributory and CD works. The estimate cost of the work was 106 lakhs.

The pre-qualification application was required to be furnished in Ext. P 1 form. The details required to be furnished in the pre-qualification application include :

- i. The financial capacity of the applicant.
- ii. Details of the staff pattern
- iii. Proposed plant and machinery to be deployed
- iv. Project in progress; and v. The project completed.

The petitioner has furnished all the necessary details including the certificate from the Executive Engineer, solvency certificate from the Federal Bank and other details about the staff pattern, plant and machinery to be deployed.

3. There were altogether 140 applicants for the above mentioned 8 items of work. But, it is contended that respondents 3 to 7 selected eight contractors of their own choice, who are not competent to execute the said works and rejected the application of the petitioner. The petitioner filed O.P. No. 7751 of 1994 in this Court challenging the action of the respondents. This Court, by judgment dated 14-6-1994 (Ext. P 6), directed the respondents that in case the petitioner's application is rejected, the matter may be intimated to him. It was submitted by the learned Government Pleader that by then the applications received relating to the eight items of work had not been finally considered by the authorities. Pursuant to Ext. P6 judgment, the respondents intimated by Exts. P7, P8 and P9 letters dated 18-2-1995 that his name was not included in the list of pre-qualified contractors to participate in the tender for the aforesaid works under items 4, 5 and 6. It is further contended that in selecting only eight persons for the execution of the eight items of work, the intention of the respondents is to allot one item of work to each of the 8 selected applicants after arbitrarily eliminating all other applicants at the pre-qualification stage. The above selection has been secretly made by the respondents and the exclusion of the petitioner, who is more competent and qualified than them, is unjustified and mala fide. The petitioner further states that he has been pre-qualified by reputed institutions like the Greater Cochin Development Authority, Trivandrum Development Authority, and the International

Airport Authority of India. The Superintending Engineer, P.W.D. Roads and Bridges, South Circle, Thiruvananthapuram has also pre-qualified the petitioner for the work of construction of a new bridge at Enath across Kallada river. This is for the first time that pre-qualification is introduced in works connected with the Kallada Irrigation Project. So far works amounting to Rs. 520 crores have already been completed in Kallada Irrigation Project and all the above works were awarded after inviting open tenders. The respondents have split up the works into 8 and have introduced the pre-qualification system only to award the works to persons of their choice on extraneous considerations. The selection has been made by the respondents without considering the merits of each of the applicants. No criteria were prescribed for pre-qualification and no such objective criteria were adopted in the selection process. The exclusion of other eligible candidates will restrict the competition which will lead to quoting of such higher rates than the estimated rates by the pre-qualified applicants. Such a procedure is being adopted to confer an illegal benefit to those eight favoured persons. This will ultimately be an additional burden on the State Exchequer. It is also contended by the petitioner that the action of the respondents in excluding him from the field of consideration and secretly selecting eight persons is arbitrary and unreasonable and violative of Article 14 of the Constitution,

4. After the counter-affidavit was filed by the respondents, the petitioner has further stated that the persons selected are not better qualified than him to do the work. His application is said to have been rejected on the ground that the turnover for the last five years has not been furnished along with the pre-bid documents and also on the ground that he had executed only road works during the last five years. It is contended that the petitioner has furnished the balance sheet and Income-tax clearance certificate along with his pre-qualification application, which would show the actual turnover. He has executed many works under the P.W.D. Roads Division, Pathanamthitta at a cost of Rs. 77 lakhs during the financial year 1993-94 and an amount of Rs. 40 laks is pending payment for the work already executed by him up to 30-12-1993. The petitioner has also executed canal works amounting to Rs. 321 lakhs under the Kallada Irrigation Project during the year 1988. Though all these matters have been stated in the application, yet the respondents did not consider the above facts and documents produced by him. He

has also narrated the conduct of the respondents in accepting the tenders of respondents 8, 9 and 10 to show that the whole transaction is tainted with arbitrariness, unreasonableness and unfairness.

5. In the counter-affidavit filed by the 5th respondent on behalf of respondents 3 to 7, it is stated that the petitioner has suppressed material facts from the knowledge of this Court. In the notice inviting tenders for the above works, following two conditions were included :

- i. Contractors should be experienced and capable in executing similar works.
- ii. Contractors should be qualified in undertaking and completing similar works costing at about Rs. 4 crores previously. Experience in constructing dam, spillways etc., is desirable.

The petitioner had not furnished any details regarding experience about the works of dam or spillway. He did not furnish any details of the cost of works carried out during the last five years, as required to be mentioned in the application. His experience as shown in the pre-qualification bid was only 12 years. The approximate cost works in hand was stated as Rs. 5 lakhs only. From the details furnished by him, it is very clear that he is not qualified for carrying out the work. The only work of similar nature executed by the petitioner had been completed before 5 years. He has not executed canal works for the last 5 years. The turnover during the last 5 years has not been furnished in the pre-bid documents. The canal work which he claims to have done was undertaken in the year 1982. Although it was stipulated that the work should be completed within 18 months, yet the petitioner took six years to complete the same. Since 1988 he has not undertaken any such work. One of the requirements of the pre-qualification to do this type of work is that the applicant should have done such work during the five years preceding the application. He has also not done any spillway work or dam work. He had undertaken only road works during the past 5 years. The allegation that the selection was made in favour of eight persons of their choice or that it was done in an unfair manner, is totally false. The decision for pre-qualifying the contractors was taken for the works under items 4, 5 and 6 of the aforesaid works and not all the eight items. There were 19 applicants for the work under item No. 4

and 29 applicants for the works listed as 5 and 6. Five contractors were selected for the work under item No. 4 and seven contractors were selected as qualified contractors for the works under item Nos. 5 and 6. It is therefore clear that in all 12 contractors were selected as qualified contractors for only three items of work. The allegation of the petitioner that only 8 contractors were chosen for 8 items of work, is baseless. Of the 8 items only 3 items have been finalised and the other items have not yet been finalised. The respondents have no intention to allot any work to any particular individual. It was done by taking into consideration of the experience, financial capacity, details of staff pattern, machineries and plants, works in progress and works completed by them. The petitioner was not found to be qualified for carrying out the works under items 4, 5 and 6 and as such he was intimated about this in pursuance of the judgment of this Court. In accordance with the Government decision to introduce the pre-qualification system of selecting contractors to be eligible to submit tenders for works costing more than Rs. 50 lakhs, this system was also introduced in respect of this project. From the list of pre-qualified contractor's as furnished in the counter it is clear that the respondents have not hand picked any person for allotting the work. The selection of pre-qualified contractors was strictly made in accordance with the conditions laid down in the notification and no discrimination was made in the selection of the applicants. The selection was made on the basis of merit and in a fair and proper manner. The applications were scrutinised by a committee of three Chief Engineers who are experts in this field. After scrutinising the applications, 12 contractors were selected as pre-qualified contractors. After tenders were invited, respondents 8, 9 and 10 were awarded the contract work as their quotation was the lowest. The pre-qualification Tender-Tabulation Statement has also been appended as Ext. R5(d) showing the informations furnished by each applicant in respect of the relevant matters as specified in the notification. From the Tabulation Statement, it is contended, it would appear that the petitioner has failed to furnish the required information on some vital matters so as to consider his eligibility as a qualified contractor to submit the tender for the said works.

6. The 8th respondent has filed a counter-affidavit dated 6-3-1995 and a supplementary counter-affidavit dated 20-3-1995. Respondents 9 and 10 have filed a separate counter-affidavit dated 13-3-1995. It is contended by them that the

petitioner having failed to satisfy the pre-qualification requirements and conditions, including the execution of similar works of the amount of Rs. 4 crores, the application of the petitioner was rightly rejected by the screening committee. While refuting the allegation of mala fides, unfairness and unreasonableness or favouritism, they have stated that their previous experience, financial status and capacity to take up the present works are far superior to that of the petitioner. They have raised more or less similar contentions in their counter-affidavits as that found in the counter-affidavit filed by respondents 3 to 7.

7. Learned Government Pleader has produced the pre-qualification application forms of the petitioner as well as respondents 8, 9 and 10 and other relevant documents to show that after due scrutiny of the applications the petitioner was found to be ineligible to participate in the tender bid.

8. At the outset, it may be noted that the decision of the authorities to eliminate unqualified contractors by screening their applications before they are allowed to participate in the tender bid for the works in question is purely one of administrative in nature. There is no doubt, at this stage, that the applications of the contractors were scrutinised by an expert committee consisting of three experienced Chief Engineers. In *State of M.P. v. Nandlal Jaiswal*, (1986) 4 SCC 566 : (AIR 1987 SC 251), it is laid down that there must be specific pleadings regarding mala fides on the basis of which Court can arrive at its conclusion. Mere use of words such as 'mala fide', 'corruption' and 'corrupt practice' is not enough. It is necessary to give full particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. In absence of such allegations in the pleadings, Court cannot make any observations in regard to mala fides.

9. The petitioner has not specifically averred as to how all the Chief Engineers acted in mala fide manner to his prejudice. However, he has produced copies of some news paper reports and an article published in a Malayalam daily a speech of an M.L.A. in the Assembly in which allegation of corruption in the process of selection of contractors and award of contract works in question has been made,

and a demand for vigilance probe or judicial enquiry has also been made. They are Exts. P 23 to P 33. But no vigilance probe or judicial enquiry was ever done. Authorship of newspaper reports is not known. The truth of the allegation made by the M.L.A. was not verified. No authenticity to the said allegations can be inferred. Hence, no reliance can be placed on them. Such allegations are easier said than proved.

10. Both parties have submitted extensive arguments on the merit of their respective claims. In this context, it is pertinent to refer to some of the observations made by the Supreme Court in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 : (1994 AIR SCW 3344) regarding the limited nature of jurisdiction of the Court in such matters. In para 70 (of SCC) : (Para 85 of AIR) of the judgment, it is laid down as follows :

'It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.'

It is further observed in para 74 (of SCC) : (Para 90 of AIR) as follows :

'Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.'

'Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. Unless that restriction on the

power of the Court is observed, the Court will, under the guise of preventing the abuse of power be itself guilty of usurping power.' After referring to a number of decisions of the Supreme Court as well as those rendered by British and American Courts, the principles deducible from them have been laid down in para 94 (of SCC) : (Para 113 of AIR) of the judgment, as follows :

'(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.'

11. 'Wednesbury principle of reasonableness' to which reference has been made in principle (5) aforementioned is contained in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1947) 2 All ER 680. In that case Lord Greenc, M. R. has held that a decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review

proceedings where the Court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. In *Tata Cellular*, (1994) 6 SCC 651 : (1994 AIR SCW 3344), the Supreme Court has mentioned two other facets of irrationality (Para 99 of AIR) :

(1) It is open to the Court to review the decision-maker's evaluation of the facts. The Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld.

(2) A decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes.

The principles laid down in the aforesaid decision have been affirmed by the Supreme Court in *New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478 : (1995 AIR SCW 275). Based on these principles, the facts of this case required to be examined.

12. Applications in the prescribed form of which Ext. P 1 is a specimen copy, were invited from persons possessing the following qualifications :

1. The applicants should be (A) Class contractors/Firms with adequate number of technical personnel and should be registered under C.P.W.D./Kerala State P.W.D./ Irrigation Department. Original valid certificate is to be produced for issue of pre-qualification documents.

2. Experience in having done works of similar nature and should consider themselves capable of executing the Project.

3. Should possess required number of earth removing machineries, Power road rollers, Mixer Machines, Vibrators and such other equipments all in good working condition.

4. Should be financially solvent and sound.

13. In response to it, the petitioner as well as respondents 8, 9 and 10, who were awarded the contract, submitted their applications along with 136 others. Except

the petitioner none else whose applications were rejected made any complaint against it.

14. On a perusal of the pre-qualification applications duly filled in and submitted by the petitioner as well respondents 8, 9 and 10, it appears that the petitioner has not only failed to furnish the required information on vital matters but also found to have done no such work like construction of dam and spillways or construction of canals during the last five years. Respondent No. 8 has the experience of construction of dams and spillways and respondents 9 and 10 have also got the experience of the construction of canals. The following chart would show the informations supplied by the petitioner and respondents 8, 9 and 10 on essential matters regarding their financial status, experience and capacity to do the work:

PRE-QUALIFICATION TENDER -- TABULATION STATEMENTS

Name and Address

Working capital

Approx: value of work in hand

Cost of work executed during last 3 years

91-92

92-9.1

9.1-94

1

2

6

7

8

9

10

5.

K. N.Madhusoodanan, Govt. Contractor. Sree Niketan. Kalanjoor. (Respondent No. 9)

26.41 lakhs

300 lakhs

200.63

121.41

225.17

14.

K.N.Sathyapalan. Govt. Contractor.Charuvila Veedu. Edajjudan. P.O. (Respondent No. 8)

18845108.16

1900 lakhs

307 lakhs

4.10.22 lakhs.

6.

A. Ibrahimkutty, Valiyathu House, Puthenchanda P.O.Chhvara.-(Respondent No. 10)

64 lakhs

350 lakhs

99 lakhs

101.09 lakhs

186.44 lakhs

18.

C. Sivanandan, Poovottuthadathil Veedu. Kayila. Mylode. P.O. Pooyappally. Kottarakkara. (Petitioner herein)

10 million

5 lakhs

Not furnished

Not furnished

Not furnished

15. On a bare look it would appear that respondents 8 to 10 have got better financial status, more experience in performing such type of works during the last 3 to 5 years. There is nothing on record to show that the information furnished by respondents 8 to 10 is either false or erroneous. The committee of Engineers, who screened the applications as experts, seem to have thoroughly scrutinised the applications of the applicants and have correctly tabulated the same as evidenced by Ext. R5(d). It is not for this Court to question their capacity or wisdom in coming to the conclusion that the petitioner as compared to the respondents is not qualified to undertake the job for which contract was awarded. In this case, the decision was arrived at after a detailed scrutiny and fact finding efforts. The decision was not arrived at by a single individual in the secrecy of his chamber. It was taken by a committee of experts whose integrity is beyond question. It is not possible to discern any mala fides or any improper or corrupt motive on the part of the committee in reaching the decision. There is always a presumption that the

government action is reasonable and in public interest and it is for the parties challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is 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, but where it is clearly satisfied in the regard, it would be its plainest duty under the Constitution to invalidate the governmental action.

16. This is not a case where respondents 3 to 7 conferred a huge benefit on respondents 8 to 10. This is not a case where the contract was awarded without affording any opportunity to others to compete for obtaining such contract. This is also not a case where the decision of the committee fails to satisfy the test of reasonableness and public interest. The 'reasonableness' in administrative law must distinguish between proper use and improper abuse of power. There is absolutely no material on record to show that by improper abuse of power the committee of expert Engineers took the impugned decision of rejection of the application of the petitioner.

17. On a study of all the materials produced before this court by the learned Government Pleader, I find that the court cannot come to a conclusion that the decision of respondents 3 to 7 is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. Since no unreasonableness in the decision of the committee is noticed, much less any mala fides, and no irregularity or illegality being pointed out in the manner in which the decision was made and in the absence of any arbitrariness, there is no reason why the correctness of the action taken by the committee in rejecting the petitioner's application should be interfered with.

18. Learned counsel for the petitioner has contended that while intimating the petitioner about the rejection of his application, by Exts. P7 to P9, no reason was mentioned nor communicated to him as to why it was rejected. In this context, he has relied upon the decisions reported in *Commr. of Police v. Gordhandas*, AIR 1952 SC 16 and *Mohinder Singh v. Chief Election Commr.*, AIR 1978 SC 851. In both the decisions, it has been pointed out that when a statutory functionary

makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. It is true that no reasons were given in Ext. P7 to P9 for rejecting the application of the petitioner. In this case, no statutory provision is involved and the committee of Engineers is not a statutory authority which took the decision. Moreover, the court in the earlier decision (Ext. P6) did not give any direction to mention the reasons for rejection of the petitioner's application. The decisions in Gordhandas's case, AIR 1952 SC 16 and in Mohinder Singh's case AIR 1978 SC 851 related to the question of not furnishing the reasons by a statutory rights of the parties. The present case is one of a matter relating to an administrative decision. Moreover, merely because no reason was given in Exts. P7 to P9 the administrative decision taken in this case cannot become bad only on that ground.

19. Learned counsel for the petitioner wanted the court to scrutinise the documents and in particular the applications submitted by the petitioner and respondents 8 to 10 in meticulous details. In fact, he argued at length regarding the materials and the information given by respondents 8 to 10 with a view to show that they are not better qualified than the petitioner. But, as has been rightly observed by the Supreme Court in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 : (1994 AIR SCW 3344) that the court is not empowered to enquire about the merit of the case. Its functions is to find out whether there was any arbitrariness or irrationality in arriving at the decision by the administrative body. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituted by its own decision. Since the present decision has been made qualitatively by the experts and in the absence of any evidence of unreasonableness in taking the decision, it will not be proper to go into the merits of the administrative decision.

20. For the reasons stated above, I find that the writ petition is devoid of any merit. It is, therefore, dismissed. The parties are directed to bear their costs.