

State of Kerala Vs. Anoop Kumar

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Court : Kerala

Decided On : Jun-14-2005

Reported in : AIR2005Ker276; IV(2005)BC302; 2005(3)KLT904

Judge : Rajeev Gupta, C.J. and; K.S. Radhakrishnan, J.

Appeal No. : W.A. Nos. 942, 943 and 944/2005

Appellant : State of Kerala

Respondent : Anoop Kumar

Advocate for Def. : S. Krishnamoorthy,; George Poonthottam,; G.S. Reghunath

Advocate for Pet/Ap. : Roy Chacko, Sr. Government Pleader

Disposition : Appeal allowed

Judgement :

K.S. Radhakrishnan, J.

1. These Writ Appeals have been preferred by the State of Kerala represented by Secretary to Government, Public Works Department (National Highway), Thiruvananthapuram and the Superintending Engineer, aggrieved by the common interim order, passed by the learned Single Judge on 8.4.2005 by which learned Judge directed the appellants to issue tender forms to all those who intend to bid

without insisting on the condition that tender schedule would be issued only to those who have a minimum of one year experience in the same nature of work, worth Rs. 25 lakhs for a single work for the last three years preceding the date of tender. Later another learned Judge modified the interim order on 30.5.2005 stating as follows:

'It is true, it is for the Government to fix the conditions for award of contract. But, this Court can definitely interfere with such conditions, if they are shown to be irrational and will not serve the purpose for which they are introduced. The admitted purpose for which the impugned condition was imposed, was to safeguard the revenue of the State. I feel that the condition to give bank guarantee for the tender amount will better safeguard the interest of the revenue. Further, the past experience of the contractor committing breach of contract can have nothing to do with his capacity to pay the amount due to the Government'.

Learned Judge therefore directed the appellants to issue tender forms to the petitioners who are ready to give bank guarantee for the bid amount. Learned Judge also made it clear that the bank guarantee for Rs. 15 lakhs alone need be given for making the bid and the Bank guarantee for the balance amount need be given only when the work is awarded. Appellants are aggrieved by the modified interim order as well. When the Writ Appeals filed against the interim order came up for hearing we have called for the Writ Petitions itself and on consent of parties we heard all the Writ Petitions.

2. Public Works (National Highway) Department of the Government of Kerala published tender notice dated 11.3.2005 for awarding the work of 'National Highway 47 Toll Collection of Akkulam Bridge in Thiruvananthapuram-Neyyattinkara Bypass'. The E.M.D. to be deposited by the applicant is 4,31,000/- and cost of tender documents is Rs. 2,000 + ST + AST. Last date of receipt of the tender was 29.3.2005. Among the various conditions we are concerned with the following condition.

The tender schedule will be issued only to those who have a minimum of one year experience of the same nature of work, worth Rs. 25.00 lakhs (Twenty five lakhs only) for a single work within the last three years, preceding the date of tender.

The certificate from the competent authority shall be produced for issue of tender documents.

Writ petitioners are primarily aggrieved by the above conditions for the issue of tender documents. Petitioners submit that the above mentioned condition has been stipulated so as to avoid competition and that would not serve the object sought to be achieved by the Department. Counsel submitted that the condition that the tender documents would be given only to those persons who have experience of minimum one year of the same nature of work, worth Rs. 25 lakhs is an unreasonable condition and would not stand to reason. Counsel submitted that if the purpose of the stipulation is to safeguard revenue of the State, the condition to give Bank guarantee for the tender amount would better serve the interest of the Revenue.

3. Senior Government Pleader appearing for the State, on the other hand, contended that the Government have incorporated the above conditions by gaining experience from the past conduct of work and due to the loss sustained by the Department. Counsel submitted that the conditions stipulated cannot be termed as unreasonable or arbitrary so as to be interpreted by this Court especially in the absence of any allegation of ill-motive or mala fide against the Department.

4. Government in the statement filed in the Writ Petitions as well as in the grounds taken in the appeal have explained the reasons why Government were prompted to incorporate that condition. It is stated as follows:

'The right of collection of toll was first tendered during 4/04 as requested by the Executive Engineer, NH Division, Thiruvananthapuram and was awarded to Sri. G. Biju for an amount of Rs. 88,88,888/- and he has executed the agreement, vide agreement No. 2/SENH/SC/2004-05 dated 31.5.2004. The contractor failed to remit the monthly instalments as per agreement conditions. Hence the contract was terminated and the toll collection was arranged, departmentally. The departmental collection become difficult due to lack of sufficient staff and technical reasons....

The work was retendered for the balance period and the work was awarded to the contractor Viswambara Das for an amount of Rs. 61,11,000/- (monthly collection was fixed at Rs. 9,40,154/-). The above contractor also failed to remit the monthly instalments in time and the contract was terminated and the toll collection was arranged on quotation basis by the Executive Engineer, NH Division, Thiruvananthapuram. The Chief Engineer has directed to arrange the work on tender basis, by stopping the collection on quotation basis.'

It is pointed out by the Department that the above two tenderers had failed in the execution of work solely due to their inefficiency, and inexperience in the field of toll collection. Fresh notification was therefore published and tenders were invited and tender forms were issued only to those who have produced solvency certificate for Rs. 15 lakhs and a previous experience in carrying out the same nature of work, for an amount of 50% of the estimated PAC based on the prevailing collection per year. Such a tender condition was not there in the previous tender notice, hence inexperienced persons undertook the work. On termination of the work, security deposits had to be forfeited to Government and necessary revenue recovery proceedings were initiated against the defaulters. Later it was noticed that the above two tenderers have no assets and no income from which recovery of loss could be effected. Department therefore felt that only those persons who have minimum period of one year experience worth Rs. 25 lakhs of single work within the last three years preceding the date of tender would be eligible to get tender documents. The condition was stipulated not only to save the revenue but also to see that only persons who have got some experience alone would apply. Learned Single Judge in the subsequent order felt that the condition to furnish bank guarantee for the amount would safeguard the interest of the revenue. State is interested not only in the revenue but also to see that toll collection be effective and persons should have sufficient experience in undertaking similar nature of work.

5. We are of the view, this Court in writ jurisdiction is not justified in substituting its wisdom by stipulating a condition which it thinks fair and reasonable. We may in this connection refer to the recent decision of the Apex Court in Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors., 2004 (3) KLT (SC)(SN)

75 : (2004) (4) SCC 19. Apex Court examined the scope of judicial review with regard to the conditions stipulated in the tender notification and held as follows:

'It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide '.

We may also refer to another decision in *Association of Registration Plates v. Union of India and Ors.*, : AIR 2005 SC469 , wherein the Apex Court was dealing with the scope of judicial review with regard to pre conditions or qualifications of inviting tenders. The Court held that the conditions stipulated in the notice for awarding the work of supply of high security registration plates regarding certain level of experience, temporal and geographical and turnover in manufacture of registration plates in immediately preceding year did not discriminate against indigenous manufacturers. The Apex Court held that in a case where there is no material on record to infer any mala fide design on the part of the tendering authority to favour parties, court shall not hold that the terms and conditions are discriminatory merely because a few manufacturers did not qualify to submit tenders.

6. We are of the view, so far as this case is concerned, there is no allegation of mala fide raised or proved by the petitioners apart from mere statement that stipulation of such a condition is only to favour a few. No details have been furnished by the petitioners to establish the contention. We find there are six applicants who have already satisfied the tender conditions and therefore it cannot be contended that the Department is attempting to favour one applicant. In such

circumstances we find no reason to grant any reliefs to the petitioners in the Writ Petitions and the Writ Petitions would stand dismissed. Consequently interim order passed by the learned Single Judge would stand vacated. Appeals filed by the State would stand allowed.

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