

K.V. Joseph and Sons Vs. Surya Constructions

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Court : Kerala

Decided On : Dec-15-2004

Reported in : AIR2005Ker159; II(2005)BC438; 2005(1)KLT236

Judge : K.S. Radhakrishnan and; M.N. Krishnan, JJ.

Acts : [Contract Act, 1872](#); [General Clauses Act, 1897](#) - Sections 27; Evidence Act - Sections 114

Appeal No. : W.A. Nos. 1461 and 1543 of 2004

Appellant : K.V. Joseph and Sons

Respondent : Surya Constructions

Advocate for Def. : K. Babu Thomas, Adv.,; P.C. Iype, State Attorney and; T.

Advocate for Pet/Ap. : Abraham Vakkanal,; Saji Kuriachan,; M.R. Nandakumar

Disposition : Writ appeal allowed

Judgement :

K.S. Radhakrishnan, J.

1. The third respondent in the Writ Petition, the Superintending Engineer, Project Circle, Muvattupuzha issued a notification inviting pre-qualification and price bids for the work of MVIP-constructing Madakkathanam Minor Distributary from Ch.O m

to 3765 m including flume, cut and cover, CD works etc. Notification was issued on 16.10.2003. The last date of submission of tender document was fixed as before 3 p.m. on 4.5.2004. Several persons submitted their tenders including the additional 4th respondent. Tender notification stipulated that the tender documents should be submitted through registered post. Writ Petitioner had sent the tender documents through registered post only on 5.5.2004. Since the tender documents were not received before 3 p.m. on 4.5.2004 by registered post the same was not considered.

2. The pre-qualification committee in the meeting held on 14.5.2004 and 17.5.2004 rejected the pre-qualification documents sent by the writ petitioner since it was received late. Four other contractors including the additional 5th respondent have submitted the tender documents in time. Qualified contractors were informed by the office of the third respondent the date of opening of the price bid as 2.6.2004 vide his letter dated 31.5.2004.

3. Writ petitioner in the meantime, had filed the present Writ Petition on 31.5.2004 seeking a writ of mandamus directing the respondents 2 and 3 to consider the prequalification and price bids submitted by the petitioner along with other bids. A declaration has also been sought for declaring that the respondents are bound to receive the prequalification and price bid sent through courier. Other consequential reliefs were also sought for. Petitioner has averred in paragraph 2 of the Writ Petition as follows:

'On 16.10.2003, the 3rd respondent-issued notice inviting prequalification and price bids for the work of 'MVIP constructing Madakkathanam Minor distributary from Ch.O m to 3765 m including flume, cut and cover and CD. works, except aqueduct and flume between Ch. 690 m to 1522 m, with estimate cost of Rs. 2,79,61,146/-. The last date of submission of prequalification and price bids was upto 4.5.2004 by registered post. On 4.5.2004 unexpected postal holiday occurred. The petitioner sent prequalification and price bid documents to the 3rd respondent with a covering letter dated 3.5.2004, through DTDC Courier Service, Muvattupuzha, on 4.5.2004'.

It is also averred in paragraph 6 of the Writ Petition as follows:

'The respondents illegally ignored the prequalification and price bids submitted by the petitioner, for the work in Ext.P1 presumably due to non-receipt of the same sent through courier service on 4.5.2004, notwithstanding the fact that 4.5.2004 was a postal holiday and delivery of the same on 5.5.2004 by speed post. Unless the prequalification and price bids submitted by the petitioner are also considered for award of contract for the work in Ext.P1, the fundamental rights of the petitioner to participate in the tender would be illegally deprived.'

Counter affidavit has been filed by third respondent stating as follows:

'The averment of the petitioner that he had submitted tender documents through courier service to the Office of the 3rd respondent on 4.5.2004 is absolutely wrong and is a fabricated story put forward for the purpose of following this W.P. No such courier baggage is received in the 3rd respondent's office on 4.5.2004 or subsequent days. If the last date, 4.5.2004 was a holiday, naturally the petitioner could have submitted the tender form on the next immediate working day that is, on 5.5.2004. He did not care to submit the application on the next day also. Without submitting the application now he alleged that he had submitted application through the courier service. The notification itself was very clear about the mode of submission of application which clearly states that the application should be submitted through registered post'.

Writ Petitioner then submitted a reply affidavit refuting the above statements made by the third respondent. It is stated in the affidavit that the courier service boy had tried to deliver the tender documents to the Office of the 3rd respondent on 4.5.2004 twice, but 3rd respondent refused the same since it was sent through courier. The affidavit of the courier boy was also filed. Due to conflicting stand taken by both sides and after having felt that the affidavit submitted by the 3rd respondent is not correct on facts the learned Single Judge felt that the matter required further probe. The learned Judge therefore appointed an Advocate Commissioner to find out the correct facts. Advocate Commissioner was directed to examine the 3rd respondent and the courier boy who served the tender documents on the office of the 3rd respondent on 4.5.2004. Third respondent was examined and cross-examined before the Commissioner. So also the courier boy.

After perusing the Commission Report as well as the oral evidence adduced by the parties learned Single Judge concluded as follows:

'I am inclined to belief the version of the petitioner that it tried to deliver the bid through the employee of the Courier Service. Further, I feel that the discrepancies in the statement of the employee of the Courier Service will lend credence to his version. If he was a tutored witness, he would have recognised the 3rd respondent and he would have tried to be consistent in everything. So, the contention of the 3rd respondent that the cover containing the bid of the petitioner was not served in his office, cannot be accepted'.

Learned Single Judge placed reliance on the decision in Raveendran v. State of Kerala, 2003 (1) KLT 1006, took the view that service by courier would be a sufficient mode of service. Holding so, learned Single Judge directed the 3rd respondent to consider the petitioner's bid also. The State as well as additional 4th respondent are aggrieved by the judgment of the learned Single Judge as well as the procedure adopted by the learned Single Judge in the disposal of the Writ Petition as well as the various observations and findings contained therein and have filed these appeals.

4. Counsel appearing for the appellant in W.A.No. 1461 of 2004 Sri. Abraham Vakkanal and Sri.P.C. Iype, State Attorney who appeared in WA No. 1543 of 2004 took us elaborately through the pleadings of the parties as well as the evidence adduced by 3rd respondent and also the oral evidence adduced by the courier boy. We need delve into that exercise only if we hold that service by courier would be a substitute for service by sending tender documents through registered post. Learned Single Judge mainly relied on the decision in Raveendran 's case (supra) to hold that it is also a recognised mode of service. Justice Cyriac Joseph who wrote the judgment in Raveendran's case passed the following interim order dated 5th August, 2004 in this case which we extract below.

'In the tender notice for pre-qualification and award of work (Annexure A1) under the 'conditions' it was specifically stated that the pre-qualification documents and the tender should be sent by registered post so as to reach in the office of the Superintending Engineer before 3 p.m., on the date fixed for last date of receipt. It

was specifically stated that courier would not be accepted. It was also stated that the pre-qualification documents and tender documents received after the time notified would not be considered under any circumstances and that the tenders received after the stipulated date and time due to postal delays or any other reasons would not be considered.....Though learned counsel for the first respondent brought to our notice the decision of this Court in Raveendran v. State of Kerala, 2003 (1) KLT 1006, there is nothing to indicate in the said judgment that in that case there was a specific condition in the tender notice that tenders through courier/directly will not be accepted. At any rate, in the said judgment this Court did not consider or take into account the effect of such a condition prohibiting the submission of tenders through courier service. Therefore, prima facie, the fact situation is different in the present case'.

In that case the Original Petition was filed by one Raveendran praying for a direction to the Project Officer, N.H. (ADB) Circle, Edappally, Ernakulam not to award the third work notified in Ext.P2 therein stating that by entertaining the tender received in . violation of the conditions stipulated in Ext.P2 would be illegal. Learned Single Judge found no merit in the contentions and dismissed the Original Petition. While holding so, the learned Single Judge felt that delivery of instruments by courier is part of the daily life and if the contention of the petitioner is accepted and the tender of the third respondent is directed to be rejected, it may amount to absolute unreasonableness. Further it was also held by the learned Single Judge that the petitioner has not established as to what is the nature of prejudice that he has suffered therefrom. Further it is also observed that the advertisement for delivery by registered post need not be understood as laying down any exclusive method of submission of documents. The reasoning of the learned Single Judge was not interfered with by the Division Bench stating as follows:

'It is true that the terms and conditions stipulated in the tender notice should be adhered to in considering the tenders submitted by the bidders. But the question arising in this case is whether the submission of tender by courier is qualitatively different from submission of tender by registered post for the purpose of achieving the object sought to be achieved by incorporating the above mentioned condition

in Ext.P2 tender notice. Learned counsel for the appellant could not point out any such qualitative difference in the submission of tender by courier. The stipulation to send the tender by registered post is for avoiding or preventing any manipulation with regard to the date, time and manner of receipt of tender. The said object can be achieved by receiving tender by courier also. Therefore we are not prepared to hold that by accepting a tender submitted through courier, second respondent has deviated from the conditions mentioned in Ext.P2, so as to warrant interference by this Court Under Article 226 of the Constitution'.

In the Raveendran's case this Court felt it unnecessary to interfere with the decision taken by the Project Officer in accepting the tender documents received by courier. Since the appellant in that case could not point out any such qualitative difference in submission of tender by courier and through registered post. Counsel for the appellant in this case, in our view could point out the qualitative difference in the submission of tender through registered post as well as tender by courier. The appellant has stated as follows:

'No sanctity can be given to service by private courier, but it can very much be attributable to postal department. There is no law governing the private courier service. They are not controlled by any governmental authority. They are not governed by Rules or statutory provisions. As in the case on hand, if irresponsible persons are sent for service of articles by courier, this type of calamities would arise. So the wisdom of the authorities in prohibiting submission of tender by courier, is understandable to avoid controversies and it is to be acclaimed as a right step. There is qualitative difference between the two. Hence there cannot be a generalisation that object sought to be achieved by service by registered post, is achieved by private courier service'.

5. The process of sending tender documents through private courier service and through registered post through postal department are qualitatively different. Postal department is a Central Government agency which is governed by statutory rules and regulations. Mode of service through registered post has been recognised by various statutes, Central as well as State. It has got its statutory recognition Under Section 27 of the [General Clauses Act, 1897](#) also Section 27 of

the General Clauses Act stipulates that where any Central Act or Regulation authorizes or requires any document to be served by post, then, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document. According to the Post Office Act and Rules and the Posts and Telegraphs Manual, when a registered letter is handed over to the receiving Post Office, it is the official duty of the postal authority to make delivery thereof to the addressee. Consequently, it is legitimate to expect that a registered letter would be delivered in normal course to the addressee as that is the official and normal function of the Post Office. Once the article is delivered to the Post Office, it remains with it unless it is delivered to the addressee or returned to the sender and there is no scope for any person to intermeddle with the letter. When the letter is refused by the addressee, an endorsement thereon is made by the postman and he does so in discharging of his duties. Taking into consideration the manner in which the Post Office deals with a registered letter, the endorsement on a returned unopened envelope of refusal raises a presumption that an attempt was made to deliver the notice to the addressee and he refused to sign the receipt. The presumption of delivery which arises Under Section 27 of the General Clauses Act is in such cases strengthened by the presumption which arises Under Section 114 of the Indian Evidence Act. The presumption arising Under Section 114 relates to an official act being done in a regular manner. As we have already indicated, several statutes have recognised the service of notice by registered post is safe and sure mode of service.

6. Section 153 of the Customs Act, 1962 states that any order or decision or any summon or notice issued under the Customs Act shall be served by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent. Under Section 33(1)(b) of the Motor Vehicles Act, 1939 and the later 1988 Act has also recognised the service of notice by registered post. Such a mode of service is also recognised by Civil Procedure Code as well as the provisions of the Rent Control Act. We need not multiple the examples. Suffice it to say that notice send by registered post is a well recognised and well accepted method of service in our country compared to courier service. Such a mode of service cannot be equated with a courier service run by a private courier agency. We have therefore no hesitation to hold that there

is qualitative difference in the matter of sending, tender documents through registered post compared to that of a courier service.

7. We may point out, so far as this case is concerned, it is the admitted case that tender documents should have been submitted through registered post which was the mode of service of tender document prescribed in the tender notice. There is controversy whether tender notice No. DB 1/03 was part of the tender document. It is stated in the said tender notice No. DB 1/03 that the tenders received after the stipulated date and time due to postal delays or any other reason will not be considered and that the department shall not be responsible for postal delays. Further it was also stipulated that tender through courier service/directly will not be accepted. We have reason to accept the stand of the State Government that this tender notice No. DB 1/03 formed part of the tender documents. In our view it is the admitted case of the parties that tender notice stipulated that tender documents be submitted through registered post. Admittedly documents were not sent by the writ petitioner through registered post before 4.5.2004 by courier even conceding the case of the petitioner. Since the notification specifically stipulates that tender documents would be received only by registered post we find no illegality in the action taken by the third respondent in not accepting the tender document through courier which is not a mode of sending tender documents to the office of the 3rd respondent.

8. We may, hasten to add Raveeridran's case was decided by the Division Bench since counsel could not point out any qualitative difference in the matter of submission of tenders by registered post compared to that of courier. In the absence of those materials case was decided by the Division Bench. Since sufficient materials have been placed before us this case could be distinguished on facts with Raveendran's case. Consequently there is no necessity of referring this case to a Larger Bench. Writ Petitioner has not attributed any illmotive as against third respondent. No allegation of mala fide have been alleged or proved: True that there is some contradiction in the facts stated as well as the oral evidence tendered by the third respondent which led the Single Judge issuing a commission to examine the third respondent and the courier boy. In the absence of any allegation of mala fide or illmotive in the Writ Petition, we find no reason to

further probe into those factual details. The observation of the learned Single Judge that the attempt of the third respondent would amount to perjury in our view, is not called for since there is no allegation of ill, motive or mala fides attributed as against the third respondent in the Writ Petition.

Under such circumstance both the Writ Appeals would stand allowed and the judgment of the learned Single Judge would stand set aside.

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