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Court : Kerala

Decided On : Dec-04-1998

Reported in : AIR1999Ker122

Judge : P.A. Mohammed and; D. Sreedevi, JJ.

Acts : Constitution of India - Article 299

Appeal No. : W.A. No. 1765 of 1998-B

Appellant : Kaikkara Construction Company

Respondent : Superintending Engineer, Harbour Engineering Project Circle, Kollam and ors.

Advocate for Def. : Govt. Pleader Poulose for; K. Chandrasekharan, Sr. Adv. and; S.A. Razak, Adv.

Advocate for Pet/Ap. : T.P. Kelu Nambiar, Sr. Adv. and; V. Philip Mathews, Adv.

Disposition : Appeal allowed

Judgement :

Mohammed, J.

1. The main dispute involved in these appeals relates to the award of contract work for the second stage construction of breakwaters for the Thangassery Fishery Harbour Project. The contract was awarded to the existing contractor M/s. Kaikkara Construction Company who was one of the pre-qualified contractors participated in the tender for first stage of the work in respect of the same project.

2. These two writ appeals arose from the judgment of the learned single Judge in O.P. No. 6242 of 1998 declaring Ext. P7 decision of the Superintending Engineer, Harbour Engineering Project Circle, Kollam as illegal. The decision was that 'M/s. Top Constructions' was the sub-contractor of M/s. Paily Pillai and Sons and the tender documents in relation to IInd Stage work of the Project would be issued only to the pre-qualified contractors of Thangassery Fishery Harbour-- construction of breakwaters. W.A. No. 1765 of 1998 is filed by the fifth respondent in the writ petition; M/s. Kaikkara Construction Company and W.A. No. 2118 of 1998 is filed by the Superintending Engineer and others, respondents 1 to 4.

3. For the sake of convenience we refer to the parties in these appeals as described in the writ petition. The petitioner is a registered contractor and he applied for the tender documents in respect of the contract work of Thangassery Fishery Harbour Project-IInd Stage. The first stage of the work was tendered in the year 1991 and therewas a pre-qualification tender in which the petitioner did not participate. After pre-qualification test the fifth respondent was accepted as the successful tenderer for the First Stage of work. During the course of the execution of the said work the Government decided to improve the facility of the harbour by shifting the location of leeward breakwater and extending the length of the main breakwater by 415 mts. As a result of this decision the operational area of harbour was increased to 2.5 km. against the original area of 1.5 sq. km. The fifth respondent had completed 1,685 mts. length of main breakwater and the leeward breakwater by 30-11-1997. The petitioner sent an application dated 25-9-1997 requesting the first respondent to issue tender documents in respect of the work of Thangassery Fishery Harbour Project -- IInd stage construction of breakwaters from 1,685 to 2100 mts. Along with the said application a draft for Rs. 1,000/- in favour of the first respondent was also sent. However, the first respondent issued tender documents to the fifth respondent and three other contractors ignoring the

request made by the petitioner. The last date fixed for submitting the tender was 9-10-1997. Thereafter the petitioner filed Ext. P6 representation dated 25-9-1997 before the third respondent the Chief Engineer requesting to interfere in the matter of awarding contract for TFHP II stage construction works. However the first respondent by Ext. P7 dated T2-3-1998 rejected the petitioner's request for the issue of tender documents and he was informed that tender documents would be issued only to the pre-qualified contractors who had been allowed to participate in the first stage of the construction work.

4. The learned single Judge after admitting the writ petition, O.P. No. 6242/98, rejected the interim prayer directing the respondents not to proceed with the contract work. But the Court has observed that the award of the work in favour of the fifth respondent would be subject to the result of the original petition. As against the said order dated 6-4-1998 in C.M.P. No. 11099/98 the petitioner filed W.A. No. 1998 before the Division Bench. Along with the writ appeal C.M.P. No. 2114 of 1998 was also filed for interim orders. The Division Bench after considering the case ordered that the construction of the work by the fifth respondent was purely subject to thefinal result and it was at the risk of the fifth respondent. Ultimately the learned single Judge passed the impugned judgment on 14-8-1998 allowing the writ petition and declaring Ext. P7 illegal. The learned Judge while so ordering observed that as the tender in respect of the second stage work had not been published inviting tenders, award of that work in favour, of fifth respondent was illegal.

5. Counsel for the appellant in both the appeals contend what is involved in this case is not a new contract but an extension of the existing work. Since it is only an extension of the existing work 9 pre-qualified tenderers were asked to submit tenders. That is why the petitioner who was not a pre-qualified contractor who participated in the first stage of the work was not given the tender documents. It is for the Government to decide whether the contract in question is an extension of the existing contract or a new contract. That being so, the power and authority of the Government to decide this question cannot be assailed by any person who wanted to submit tender documents. In this context it is worthwhile to refer to Annexure VIII minutes of the meeting of the Expenditure Finance Committee to

consider the sanctioning of the Thangassery Fishing Habour Stage II, Kerala, held on 22nd Feb. 1994 under the Chairmanship of Secretary (Expenditure), Ministry of Finance, in Committee Room No. 169-C, North Block, New Delhi. It inter alia provides that the whole proposal should be 'called as an integrated project and not termed as Phase I and Phase II'. This underlying decision of the Government of India regarding the nature of the Project necessarily supplies a cogent idea as to the nature of the contract, i.e., that it is an extension of the existing contract work. The said decision is not a subject of judicial review at the hands of the person who wants the benefit by obtaining a contract out of such decision. The principle of procedural fairness operates in the field of giving the tender or awarding the contract and not in the realms of taking decision by the Government to treat the award of contract as an extension of existing contract, H.W.R. Wade in administrative Law stated; 'Contracts may also be used as an administrative device in order to enforce some policy.'

6. It is further pointed out that the question whether the work relating to the second stage isa continuation of the existing work or altogether a different contract turns out to be a disputed question of fact and hence the petitioner is not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution. What the petitioner wants to establish is that the contract in question is a new contract. The object of Article 226 is the enforcement and not the establishment of a right as observed in Shri Sohan Lal v. Union of India, AIR 1957 SC 529 : (1957 All LJ 682). Therefore the disputed question of fact is not investigated in a proceeding under Article 226. (See The Union of India v. Ghaus Mohammad, AIR 1961 SC 1526 : (1961 (2) Cri U 703), Bokaro and Ramqur Ltd. v. The State of Bihar, AIR 1963 SC 516, and Mahand Moti Das v. S.P. Sahi, AIR 1959 SC 942). The attempt of the petitioner is to create a remedy under Article 226 by establishing a fact which is disputed. If it is a new contract of course the observance of the condition in relation to the publication of the tender among the general public may be relevant. However, it has to be specifically understood the underlying situation where only nine pre-qualified contractors who participated in the first stage of the work alone were supplied with the tender documents. That is because the present work is not a new contract but an extention of the existing contract as envisaged by the Government in the decision taken in relation thereto.

At the first stage of the work as per theproceeding of the Chief Engineer, Harbour Engineering Department dated 24-4-1991 (Annexure III) nine contractors were approved as pre-qualified for the work. In the pre-qualified list ofcontractors fifth respondent M/s. Kaikkara Construction Company was listed as number 5 andM/s. Paily Pillai & Sons as 9. The petitionerM/s. Top Constructions was not an applicant forthe pre-qualification test. Therefore the tenderdocuments, were issued only to nine pre-qualifiedtenderers in view of Annexure III and this wouldsufficiently establish that the disputed work as anextension of the existing work and not a newcontract. No right can therefore be built up onalleging that the disputed work is altogether anew contract work.

7. On behalf of the appellants in both appeals it was contended that the petitioner has ho legal right to challenge the decision taken by respondents 1 to 3. A legal right, of course, means anylegally enforceable right. It must be an existing right as observed by the Supreme Court in State of Punjab v. Surja Prkash Kapur, AIR 1963 SC 507 and State of Orissa v. Ram Chandra Dev, AIR 1964 SC 685. We have herein before found that the petitioner was not an applicant for the pre-qualification tender as evidenced from Annexure III. Subsequent acquisition of qualification will not confer on him any right to apply for tender documents or to participate in the tender. The petitioner has no doubt produced documents to show that he is eligible to participate in the pre-qualification tender, if such tender is notified for the second stage of work treating it as a new work. What is relevant is not the subsequent acquisition of qualification but eligibility to apply pursuant to the publication of pre-qualification notification as revealed from Annexure II dated 1-3-1991. The petitioner was not eligible to apply for pre-qualification tender as on I- 3-1991 inasmuch as he was only a sub contractor of M/s. Paily Pillai & Sons as found in Ext. P7. The legal right includes contractual right as observed by the Supreme Court in Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B., AIR 1962 SC 1044 but such a right is not available to the petitioner for he was not a participant in the pre-qualification tender made in the year 1991. Further even assuming that the petitioner was the lowest tenderer, the law does not confer on him any existing or enforceable legal right.

8. Now let us examine whether a person applied for tender documents has any legal right which can be enforced in law. The Supreme Court in Tata Cellular v. Union of India (1994) 6 SCC651 : (AIR 1996 SC 11) dealt with manifold scope of judicial review in so far as the exercise of contractual powers by the governmental bodies. Since! the power of judicial review is not an appeal from the decision the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary certainly the Court would interfere. 'It is not the function of a Judge to act as super board or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.' However, the Supreme Court adopted the Wednesbury principle laid down in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB223) where Lord Greene M.B. said :

'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 1 .w and acting reasonably could have reached it.'

In paragraph 94 of the judgment in Tata Cellular's case, (AIR 1996 SC 11) supra the Court has laid down six principles in the matter of exercising power on contractual matters. Among them the fourth principle propounded is that 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 o negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

9. In Asia Foundation & Construction Ltd, v. Trafalgar House Construction (I) Ltd. (1997) 1 SCC 738 the Supreme Court further said that though the principle of judicial review cannot be denied so far as the exercise of contractual powers of the governmental bodies are concerned, but it is intended to prevent arbitrariness or favourtism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. However, the Supreme Court expressed its

opinion thus :

'We are of the considered opinion that it was not within the permissible limits of interference for a Court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the Court has not found any mala fides or favourtism in the grant of contract in favour of the appellant.'

That being the legal position, the Court cannot interfere with the decision of the governmental bodies in awarding contracts to a particular individual or body unless there are vitiating circumstances like malice, favouritism etc.

10. What is alleged in paragraph 3 of the writ petition is that the fifth respondent Kaikkara Construction Company and three other contractors to whom the tender documents were sold colluded and the fifth respondent quoted thelowest bid at Rs. 4.5 crores. It is further alleged in paragraph 5 of the writ petition that the Superintendending Engineer has abused his powers and Ext. P7 is not free from arbitrariness, not affected by bias or actuated by mala fides. The above allegation without any substantive proof will not constitute an allegation of malice or favouritism. Except the above bare statement there was no further pleading much less any proof in support of such allegation. The allegations of mala fide shall be specifically pleaded and the person or the authority against whom mala fide is alleged shall be told of such specific instances. Strict proof of allegation is necessary to hold that the exercise of power has been vitiated by mala fides. The Supreme Court in State of Bihar v. Shri P.P. Sharma JT 1991 (2)SC I 47 : (AIR 1991 SC 1260) held that mere assertion of mala fides is not sufficient. Mala fide or malice in law is not to be easily presumed. A party alleging these must satisfy the Court that there are such facts and circumstances on which malice could legitimately be presumed. It is arduous for this Court to say that on the materials on record that the exercise of power by the Superintending Engineer or other governmental authorities is actuated by malice in awarding contract work in favour of fifth respondent. The learned single Judge has no case that exercise of power has been vitiated by mala fides. The learned Judge held that the award of contract work without inviting tenders from public was illegal and hence the award in favour of the fifth respondent was set aside. As aforesaid in the absence of any vitiating

circumstances this Court cannot interfere with the decision of the governmental bodies in awarding contract to the fifth respondent.

11. The appellant in W.A. No. 1765 of 1998 has filed an affidavit in the writ appeal on 22 -9-1998; the contents of which are not controverted by the otherside. The following averments contained in paragraph 4 of the said affidavit have decisive force and hence they are reproduced hereunder.

'4. The balance work was awarded to the appellant in continuation of the original work. The work started on 12-3-1998. A mobilisation advance of Rs. 50 lakhs was received from Government. The amount was sanctioned by Government on 31-3-1998. Part bill was submitted to the Department on 30-3-1998 in respect of the portion of the work completed till then. The bill washonoured by the Department. Till now, for thework done so far, the appellant has received anamount of Rs. 1 crore 50 lakhs from the Department. About 30 per cent of the work is over. Theappellant has invested about Rs. 3 crores for theproper functioning of the company. The investment was in the purchase of machinery, cranes,compressor, concrete mixing plant, tripper lorries etc. 150 workers are engaged every day.They include workers from Tamil Nadu andKarantaka who are experts in the particular fieldof work; and they have been given an advance ofRs. 25,000/- each. The appellant has taken a loanof Rs. 50 lakhs from the South Indian Bank onhigh interest rate. A stage has reached now wherethe work cannot be stopped abruptly. If it is sodone, the work already done will be destroyedand washed away by sea waves. That is onaccount of the nature of the work. The loss wouldbe heavy both for the appellant and for the Department, and also for the Government. Nobodyelse will be able to continue the work. The workhas been continuously going on from 12-3-1998onwards. There was no stay order. The contesting respondent, namely the 5th respondent herein,had filed a Writ Appeal against the dismissal ofhis petition for stay. That was W.A. No. 801 of1998. That writ appeal was moved in the vacationCourt. Though the writ appeal was admitted, nointerim order was granted. The interim directionssought for in the writ appeal, namely to direct therespondent not to proceed any further with thecontract and consequential constructions andtransactions in respect of the work was not given.The petition for direction was dismissed. Thework is proceeding by virtue of the interim

orderpassed in the present writ appeal, namely W.A.No. 1765 of 1998.'

12. In Tata Cellular's case (1994) 6 SCC651 : (AIR 1996 SC ll)'the Supreme Courtobserved i 'Quashing decisions may imposeheavy administrative burden on the administration and lead to increase and unbudgeted expenditure.' In this context the following averments contained in the statement filed by theSuperintending Engineer, Thangassery FishingHarbour Project, Kollam before this Court on 11-11-1998 are relevant :

'The extension work of the breakwater of 415 M is continued by providing 3 layers of granitestone and one layer of concrete tetrapods (weighing 8 T.). For the extended portion of the breakwater i.e. 70 M length, the armouring using tetrapods and re-arrangement of armour layers have to be carried out. Any delay in the protection work will cause serious damage to this length and the work and the layers will be carried inside by the defracted way . This will automatically come into the entrance chanel (width 33 M) causing irreparable loss to the Government. At present this area is having a depth ranging from 9 to 10 M which is the safest depth available for any fishing vessel or to a medium size cargo ship. If this breach happens this will completely damage the entrance and affect the project development and future avenues to the port operation and also to the loss of Rupees 21 crores expended by the State and Central Government as on this date including the 2 crores expended for the extension of main breakwater 70 M length.'

It has to be observed that the project work wassponsored by the Government of India and therefore the time frame stipulated should be strictlyadhered to; otherwise there will be every possibility of lapsing the central assistance. The District Collector, Kollam has prepared a projectreport for the rehabilitation of the 224 familiesaffected by the sea erosion during 1993 to 1994based on the instruction from the Estimate Committee (Government of Kerala). The land for therehabilitation was proposed at shore area at thefoot of leeward breakwater as the fishermenvillages are densely polulated. The Governmentof Kerala have sanctioned a separate scheme forproviding permanent settlement to the affectedfamilies, by the sea erosion during the year 1993-94. As the scheme was given top priority by theGovernment the delay in implementation was tobe

avoided. The aforesaid statements of the Superintending Engineer are not in dispute. Thisbeing the practical position we refuse relief to thepetitioner on the ground of public interest. Thusit cannot be proper or justifiable for this Court tounsettle the above position, at this distance oftime.

13. What is urged by the fourth respondent Government of Kerala, the appellant in W.A. No. 2118/1998 is that stoppage of work would lead to non-completion of the whole integrated project. The apprehension of the Government is thatinasmuch as the learned single Judge has declared Ext. P7 illegal retendering of the second stage of the project may be necessary after cancelling the work already given to the fifth respondent. Such a process would result in abandoning the project itself which would be a national waste, so argued by the counsel. As observed by the Supreme Court in Asia Foundation & Construction's case (1997) I SCC 738) the direction of rebidding in the circumstances of that case, instead being in the public interest, would be grossly detrimental to the public interest. The apex Court further said ;

'We cannot lose sight of the fact of escalation of cost in such project on account of delay and the time involved and further in acoordinated project like this, if one component is not worked out the entire project gets delayed and the enormous cost on that score if rebidding is done.'

That being the position, we cannot approve the conclusion of the learned single Judge which may ultimately result in rebidding of the tender in relation to the second stage of the work.

14. The Government of Kerala as per G.O. Ms. 35/97 dated 28-10-1997 passed an order stating that the Ministry of Agriculture, Government of India conveyed their administrative approval for the construction of Thangassery Fishing Harbour, Stage II at an estimated cost of Rs. 569.50 lakhs under the centrally sponsored plan scheme for the provision of landing and berthing facilities for fishing crafts at minor Ports. Therefore, for arranging the extended length of 415 M main breakwaters the possibility of executing the work through fifth respondent at the agreed rate was ascertained. In reply the fifth respondent expressed their unwillingness to execute the work at the originally agreed rate. The Harbour

Engineering Department could not insist the contractor to execute the balance reach since the quantum of work to be done exceeded the maximum excess limit of 25%, since the same would be against the terms of agreement executed between the Department and the fifth respondents. In the above circumstances the Department issued notice to the nine contractor firms who were pre-qualified in view of Annexure III order. As per letter No. D1-1396/95/SE dated 11-9-1997 short tender notices were issued to the nine pre-qualified contractors. In response to the above tender notice five contractors submitted theirlowest offer for the construction of balance 415 mts. length of main breakwater. These tenders were scrutnised by the tender committee constituted by the Government of Kerala and evaluated the merits and demerits. Annexure V is the order of the Government dated 23-2-1998 containing its decision. (It also shows that the contract PAC comes to Rs. 12,22,79,167/-) By the said order the Government approved the lowest offer made by the fifth respondent. Their quoted rate is 52% above the estimate rate. On negotiation by the Superintending Engineer, the contractor reduced the rate to 51% above the estimate rate. The estimate PAC of the work is Rs. 8,09,79,581/-. The Tender Committee of Fisheries Department held (sic) on 16-11-1997 considered the tender. Considering the present rate of petroleum products, cost of materials, labour charges etc. the committee found that the rate quoted by the fifth respondent is reasonable. The committee therefore recommended to accept the tender of the fifth respondent at 51% above estimated PAC. The Government after examining the matter approved the tender of the fifth respondent on negotiation. What is revealed from the above order is that the tender was given in favour of fifth respondent on negotiation because fifth respondent'soriginally quoted rate of 52% above the estimate rate on negotiation was reduced to 51%.

15. While dealing with public whether by way of accepting tenders or awarding contracts or issuing quotations the State cannot act arbitrarily at its sweet will and like a private individual deal with any person it pleases. Its action must be in conformity with standards or norms which are not arbitrary, irrational or irrelevant. It is however well settled that certain measure of 'free play in joints' is necessary for an administrative body functioning in an administrative sphere. (See Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 : (AIR 1979 SC 1628), Kasturilal Lakshmi Reddy v. State of Jammu and Kashmir, (1980)

4 SCC 1 : (AIR 1980 SC 1992), Sterling Computers Ltd. v. M. & N. Publications Ltd. (1993) 1 SCC 445 : (AIR 1996 SC 51) and Rukmini Amma Saradamma v. Kallyani Sulochana (1993) I SCC 499 : (AIR 1993 SC 1616). In view of the principles laid down in the aforesaid decisions the action of the Government cannot be characterised as arbitrary and discriminatory.

16. It is pointed out that in substance what is involved in this case is a policy decision taken by the Government. The decision is that the II stage of the work is not a new contract but an extension of the existing contract. In Shri Sitaram Sugar Co. Ltd. v. Union of India, AIR 1990 SC 1277 the Supreme Court observed thus at page 1299 :

'Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the 'feel of the expert' by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings, satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the finding of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land.'

(See also : Indra Sawhney v. Union of India, AIR 1993 SC 477 : (1993 Lab IC 129) and Delhi Cloth and General Mills Ltd. v. S. Paramjit Singh, AIR 1990 SC 2286. Pursuant to the above decision the contract was executed between the fifth respondent and the State of Kerala, and this is authorised under Article 298 of the Constitution which provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for the purposes provided therein. Article 299(1) provides that all contracts made in the exercise of the executive power of the Union of State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurance of property made in the exercise of that power shall be executed on behalf of the President or the Governor as the case may be.

Therefore all governmental function by virtue of the provisions contained in Articles 298 and 299 including the making of contracts with a private individual or body shall be fair, just and reasonable. Though the State or any of its instrumentalities is free to enter into any contract with any person its action would offend Article 14 if it acts arbitarily, e.g. in the matter of acceptance of tenders. (See : R.D. Shettty v. International Airport Authority of India, AIR 1979 SC 1628,Shri Harminder Singh Arora v. Union of India, AIR 1986 SC 1527, Sachidanand Pandey v. State of W.B., AIR 1987 SC 1109 and Haji T.M. Hassan Rawther v. Kerala Finance Corporation, AIR 1988 SC 157. At the same time, the following observation of the Supreme Court in Kasturi Lal Lakshmi Reddy v. The State of Jammu and Kashmir, AIR 1980 SC 1992 is very relevant (at page 2001) :

'But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest.'

17. Annexure V referred to above is an order passed by the Executive Head of the Government on 23-2-1998 awarding contract work to the fifth respondent on negotiation. The question is whether such an order has been properly challenged or questioned in the present proceeding. In the writ petition petitioner did not challenge Annexure V. What is challenged is only Ext. P7 letter issued by the Superintending Engineer, Kollam on 12-3-1998. In the final analysis what we could see is that there was negotiation between the Government and the fifth respondent and as a result of that fifth respondent reduced the rate to 51%. Thus the contract was awarded on negotiation. That being the position, without specifically challenging the said decision of the Government the petitioner is not entitled to seek stoppage of the contract given to the fifth respondent on negotiation.

18. Even though the plea of re-tender and stoppage of the work which is being carried on by the fifth respondent cannot be accepted, certain grievances brought to our notice by the petitioner cannot totally be ignored. His case is that there is flagrant violation of the tender condition contained in Ext. P4 rules relating to P.

W.D. tenders. One of the requirements is that postal tender system would be adopted for all works exceeding the T. S. powers of the Executive Engineer. In the present case the allegation is that the postal tender system has not been adopted. Tenders were submitted by the five pre-qualified tenderers, directly to the office personally which according to the petitioner would result in unhealthy practices. The safest method would have been thepostal tender as provided in Ext. P4. He further alleges that there is violation of Clause (xv) of Ext. P4 that is to say, the contractor who quotes very low rates will remit performance guarantee with a view to curb the tendency to quote low rates and execute the work unsatisfactorily. The further case of the petitioner is that favouritism has been shown to fifth respondent in awarding the contract in his favour and unusual procedure has been adopted by the first respondent to obtain undue enrichment by fifth respondent. It is also alleged that the fifth respondent and other three contractors to whom the tender documents were sold colluded and fifth respondent quoted the lowest bid at Rs. 4.5 crores above the estimated PAC of Rs. 8 crores. Departmental estimate for second stage of Thangassery Fishing Harbour Project was based on the revised P.W.D. Schedule rates as on 1-7-1996. As the tender forms were issued and submitted without following the postal system the fifth respondent and other three contractors submitted tenders collusively and hence there was no competition at all. As such fifth respondent was able to take advantage of its proximity with all concerned as the contractor for the existing work for the first stage of the project. In this context it is apt to recall the offer made by the petitioner to submit competitive tender at a substantially low rate from the 52% above the departmentally estimated cost.

19. As far as the award of contract relating Co first stage of the work in favour of the fifth respondent the petitioner has made certain allegations. Ext. P8 order of the Government dated 6-12-1995 relates to the completion of balance work regarding the first stage of the project. The High Level Committee constituted by the Government considered the claim of the fifth respondent for the completion of balance work in view of the report of the Chief Engineer, Harbour Engineering Department for early completion of the first stage of work. Accordingly the contractor was allowed 75% increase above the 1990 schedule of rates for the balance work after 7-11-1994 (firm period) on the condition that the contractor will

execute and complete the balance work on or before 31-12-1996. In view of this concession in the first stage and procedural flows in the second stage, the State has suffered inconceivable injury. Therefore the intervention of this court is sought as it involves an element ofpublic interest. Any member of the public having constitutional or fundamental duty can plead, for judicial redress of public injury, no matter he receives reliefer not. We have denied the relief to the petitioner on consideration of paramount public interest. That does not mean when there is any flagrant violation of procedure or undue favouritism the persons responsible for public injury should go unpunished or loss sustained should remain unrecovered. To attain these objectives the court is always powerful. W. Friedman in 'Law in a Changing Society' while discussing the protection of public interest said :

'Intervention on behalf of the public is not allowed to press private interests but only to vindicate the broad public interest relating to a licensee's performance of the public trust inherent in every licence.'

When the court finds on the material available that the matter involves extreme public interest, it ipso facto gets the power to order enquiry or investigation, though no relief is granted to the petitioner as framed in the original petition. The petitioner further points out that he has been given Ext. P7 reply only after the commencement of the construction work by the fifth respondent. Ext. P7 dated 12-3-1998 is a reply given to the letter sent by the petitioner on 25-9-1997. The delay in sending this reply by the Executive Engineer, according to the counsel, is deliberate and collusive,

20. The above allegations raised by the petitioner deserve serious consideration at the hands of the governmental authorities who are answerable for public accountability. In Dutta Associate Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd., (1997) 1 SCC 53 the Supreme Court observed that the consideration of the tenders received and the procedure to be followed in the matter of acceptance of tender should be transparent, fair and open. The apex court further said :

'While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would ex-pose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to

appropriate penalties at the hands of the courts, following the law laid down by this court in Shiv Sagar Tiwari v. Union of India, (In re.Capt. Satish Sharma and Sheila Kaul).'

21. The Supreme Court in Tata Cellular'scase, (1994) 6 SCC 651 : (AIR 1996 SC 11), observed :

'In view of the foregoing, we thus reach the conclusion that Bharati Cellular could not claim the experience of Talkland. This conclusion has come to be arrived at on the basis of the parameters we have set out in relation to the scope of judicial review. We may reiterate that it is not our intention to substitute our opinion to that of the experts. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly this court would interfere.'

Finally the Supreme Court held that Bharati Cellular's claim based on Talkland's experience was incorrect and that Talkland's experience would have to be excluded and the matter should be reconsidered on a factual basis as on 20-1-1992. In the light of the above observations the Supreme Court further held that the claim of Tata Cellular would be reconsidered.

In the present case the position is some what different from that of Tata Cellular's case relied on by the petitioner. What we perceive here is that the allegations brought before us deserve serious consideration by the State inasmuch as it involves public interest. Now all those allegations are before this court for examination, no matter who brought them up. We cannot abandon them as baseless when we see some prima facie case for enquiry. In this context it must be recalled that this is a centrally sponsored scheme and Union of India has ear-marked sufficient funds for the construction of the Harbour Project. When public funds are utilised for specified purpose, extreme care and caution on the part of the governmental authorities are absolutely essential. A trivial mistake may sometimes result in inconceivable damage and loss to the Government. Thus the public interest is the underlying reason for us to act differently at a time one for denying relief and other for ordering enquiry.

22. In the result, the impugned judgment of the learned single judge is set aside in view of the reasons discussed herein above. Accordingly we do not propose to interfere with the award of contract work in favour of the fifth respondent as decided by the Government. However, we are constrained to direct the Government (fourth respondent in the O.P.) to conduct an enquiry and investigation into the allegations raised by thepetitioner. The petitioner is allowed to file a comprehensive representation before the fourth respondent in the original petition within a period of six weeks from the date of receipt of a copy of this judgment. They are also allowed to produce evidence in support of the allegations. While conducting the enquiry the fourth respondent shall afford reasonable opportunity of being heard to the petitioner and fifth respondent and also other interested persons. After the enquiry if the fourth respondent finds any material irregularity or procedural default in all matters connected with the award of contract relating to the first and second stage of the Harbour Project to the fifth respondent, then appropriate remedial action may be taken by the Government. Generally speaking, such remedial measures may include setting aside the contract or amendment or alteration in respect of the work remains to be done or award of compensation to the persons who suffered injury or damage. These measures are only illustrative but not exhaustive. It is for the Government to decide on upholding the principle of fairness and justice considering the circumstances of the case. Subject to the observations and directions given above, these writ appeals are allowed. In the circumstances of the case, no order as to costs.

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