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Court : Kerala

Decided On : Mar-30-2012

Judge : Babu Mathew P. Joseph

Appeal No. : W.P.(C) No. 36874 of 2004

Appellant : C. Sadanandan

Respondent : The Chief Engineer, National High Ways, Thiruvananthapuram and Others

Judgement :

1. The petitioner is a registered contractor. The third respondent, as per Ext.P1 tender notification dated 20.12.2002, invited tenders for the collection of toll from the vehicles passing through Arappuzha Bridge on NH-17 across Chaliyar River at Kozhikode. The period for the collection was from 1.4.2003 to 31.3.2004 or upto 31.3.2004 from the date of handing over of the right or upto the date of service of notice terminating contract. The last date for submitting tender was 23.1.2003 and 4.30 p.m. on that day was fixed for opening the tenders. Ext.P2 is the forwarding slip to accompany the tender.

2. Pursuant to Ext.P1, the petitioner and 15 others submitted their tenders. The amount offered by the petitioner was the highest. The 2nd, 3rd and the 4th highest

offers were that of the respondents 4, 5 and 6 respectively.

3. Form No.83 containing the terms and conditions formed part of the tender. Ext.P3 is some of the relevant portions of Form No. 83. As per Clause 12 of Form No.83 and as stipulated in Exts.P1 and P2, the firm period of the tender was four months. During that period, the successful tenderer was not free to withdraw his tender as provided in Clause 12 of Form No.83. Certain special conditions, as provided in Ext.P4, were also made applicable to the tender. As per the first special condition, the successful tenderer should execute an agreement for the tender fulfillment of the contract within seven days of receipt of the acceptance of the tender. He has also to deposit the amount as stipulated in that provision. Form No.83 also contains similar provisions. Acceptance and approval of tender are conditions precedent for the commencement of work.

4. The petitioner heard nothing regarding the acceptance and approval of his tender from the third respondent after submitting his tender till 31.3.2003. He had received, on the afternoon of 31.3.2003, Ext.P5 registered letter dated 24.3.2003 from the third respondent directing him take over charge of Arappuzha Bridge toll booth at 'O' hours on 1.4.2003 after executing the agreement. It was also directed that before executing the agreement a security of Rs.2,77,000/- should be deposited for the fulfillment of the contract. Even though Ext.P5 was dated 24.3.2003, it was posted only on 29.3.2003. Ext.P6 is a copy of the envelope in which Ext.P5 was sent. Ext.P6 shows the seal with the date 29.3.2003. 29.3.2003 was a Saturday. 30.3.2003, being a Sunday, was a holiday. Hence, the petitioner received Ext.P5 only on 31.3.2003. He had also received a phonogram on that day. In such a circumstance, explaining the difficulties to comply with the directions contained in Ext.P5 and requesting for two weeks time, the petitioner sent Ext.P7 letter to the third respondent on 1.4.2003. Thereafter, the petitioner was served with Ext.P8 letter dated 7.4.2003 issued by the third respondent directing him to deposit the security amount and to execute the agreement as also to take charge of the toll booth within three days of the receipt of that letter. He had received Ext.P8 only during the last week of April, 2003. He had requested for the orders accepting and approving his tender. He was informed by the third respondent that they were yet to come and he would be intimated on receipt of the

same. He heard nothing on the matter thereafter.

5. While so, to his dismay, the petitioner received Ext.P9 order dated 20.6.2003 of the third respondent terminating the contract in favour of the petitioner for the said work and forfeiting his Earnest Money Deposit (E.M.D.) to Government. Ext.P9 was passed without hearing the petitioner. The petitioner had preferred Ext.P10 objection dated 27.6.2003 to Ext.P9. He stated in it that his tender was yet to be approved. The firm period expired on 23.5.2003. He did not want to keep his tender open any further and withdrew the same. He also requested the third respondent to return his E.M.D. of Rs.35,400/-.

6. The Public Works Department was collecting the toll from 1.4.2003. Before that, one Sri. C. Abdul Basheer was collecting the toll. By the collection, the Department was getting more income than that of the previous year. While so, on 1.1.2004, the right to collect toll was given to the sixth respondent who was the fourth highest tenderer.

7. The E.M.D. of the unsuccessful tenderers will be refunded immediately after tabulating the tenders keeping only the earnest money of the first three highest tenderers. The E.M.D. of the remaining two unsuccessful tenderers will be refunded within a week. These are provided under Clause 51 of Form No.83. A portion of Form No.83 containing Clause 51 is produced as Ext.P11. Ext.P12 is a portion of Form No.83 which shows that Clause 18 provides for refund of E.M.D. of the unsuccessful tenderers within a week. In spite of the existence of these provisions, E.M.D. of the sixth respondent, the fourth highest tenderer, was not returned within the prescribed time in order to facilitate awarding work to him. The authorities were so keen to award the work to the sixth respondent. Even though fresh tenders were to be invited in January, 2004 for collection of toll for the period 2004-2005, the same was not done so as to enable the sixth respondent to continue the collection of toll.

8. The third respondent, by issuing Ext.P13 order dated 17.6.2004, demanded an amount of Rs.6,56,793/- from the petitioner towards the alleged loss sustained by the Government. Ext.P13 was also passed without notice to the petitioner. The Government has not suffered any loss. The petitioner has preferred a

representation before the concerned Minister requesting to give up the demand in Ext.P13 and for returning his E.M.D. The third respondent has again issued Ext.P14 letter dated 3.11.2004 directing the petitioner to remit the amount demanded and also intimating that the District Collector, Kozhikode would be requested to initiate recovery proceedings against him if he did not comply with the demand. The demand so made by the third respondent is without any authority of law and illegal. The petitioner is not bound to comply with the same. Aggrieved by the demand so made by the third respondent, the petitioner has preferred this Writ Petition.

9. The third respondent has contested the case by filing a counter affidavit. Exts. R3(a) to (g) documents are also produced along with the counter affidavit. The petitioner has filed a reply affidavit. The respondents 4 to 6 have not contested the matter.

10. The third respondent, in his counter affidavit, has disputed or denied the averments made by the petitioner. It is stated, inter alia, in the counter affidavit as follows:- The tenders received from the tenderers were opened at 4.30 p.m. on 23.1.2003 in the presence of the petitioner and other tenderers. The amount offered by the petitioner was the highest and therefore the tender submitted by the petitioner was accepted and the petitioner was informed of that fact then and there. The petitioner was directed to execute the final agreement as per the tender conditions immediately. However, the petitioner did not execute the final agreement and therefore the third respondent issued Exts.P5 communication dated 24.3.2003 by registered post to the petitioner. In addition to that a phonogram was sent to the petitioner and that was also accepted by him. Since there was no response from the petitioner, another notice dated 8.5.2003 was issued to him and he refused to accept the same. Ext.R3(d) is a copy of that letter dated 8.5.2003. Copy of the envelope in which Ext.R3(d) was sent and the acknowledgment card are produced as Ext.R3(e). Since the petitioner failed to execute the final agreement, the third respondent was constrained to proceed against the petitioner and to make alternative arrangements for collection of toll. The third respondent initiated steps to negotiate with the respondents 4 to 6 for entrusting the work to them as they were the highest 2nd, 3rd and 4th tenderers.

The fourth and fifth respondents did not respond to the steps taken by the third respondent and hence the proposal of the sixth respondent was forwarded to the higher authority for approval. As per the terms and conditions set out in Form No.83, the contractor should make security deposit and execute final agreement before commencing the work or within a week from the date when the acceptance of the tender has been intimated to him. In the event of any failure, his E.M.D. is bound to be forfeited. The entire loss that may be caused to the Government can be recovered by resorting to the provisions of the Revenue Recovery Act. It is evident from the preliminary agreement executed by the petitioner that the loss suffered by the Government can be recovered from the contractor. In the present case, the petitioner failed to execute the final agreement with the Government and therefore the Public Works Department was constrained to make rearrangement of the work at the risk and cost of the contractor. The Government suffered loss in the rearrangement and that loss was assessed by the competent authority.

11. The claim of the petitioner that he has submitted Ext.P7 dated 1.4.2003 to the third respondent seeking time to execute the work is not correct. The office of the third respondent did not receive Ext.P7. The petitioner received the letter issued by the third respondent directing him to remit Rs.2,77,000/- towards security deposit and execute the agreement on stamped papers. However, the petitioner, with mala fide intention, evaded execution of agreement and deposit of security amount. The contention of the petitioner that the tender submitted by him was not accepted by the competent authority is not correct. The reserve price fixed for the contract was Rs.8,48,990/- and the amount offered by the petitioner was Rs.1800180/-. As the amount offered by the petitioner was higher than the reserve price fixed, the third respondent was competent to accept the tender and there was no necessity to forward the same to the higher authority or to the Government for approval. Ext.R3(a) is a copy of Form No.83 containing the terms and conditions. Ext.R3 (c) is a copy of the preliminary agreement.

12. Learned counsel for the petitioner contended that no binding agreement had been entered into between the petitioner and the Public Works Department in respect of collection of toll in question and the petitioner had withdrawn his tender after the expiry of the firm period. The Government has not accepted or approved

the tender submitted by the petitioner. Unless and until it was accepted or approved by the Government, no final agreement could be executed by the petitioner and the Public Works Department. If the tender of the petitioner was accepted, the selection notice should have been issued by registered post as provided under the Kerala P.W.D. Manual. Specific award of work to the petitioner is also mandatory before commencing the work. But, in this case, the selection notice or award of work were not issued to the petitioner. The contention of the third respondent that the amount offered by the petitioner was higher than the reserve price fixed by the Department and hence the third respondent was competent to accept the tender and there was no necessity to forward the tender to the Government for approval cannot be accepted because such an approval by the Government is necessary, he further submits. He has relied on Ext.R3(g) order issued by the Government accepting the tender submitted by the sixth respondent in this case. The amount quoted by the sixth respondent was also much higher than the reserve price fixed. He has also relied on Exts.P15 to P17 in support of his contention that acceptance or approval of the tender by the Government is required before executing final agreement and commencing work.

13. Learned Government pleader, based on the averments made in the counter affidavit, contended that no such acceptance or approval was required in this case and a binding contract had already been entered into between the petitioner and the Public Works Department for execution of work. But, the petitioner violated the conditions of contract and hence the third respondent was entitled to proceed against him for recovering the loss suffered by the Government. Therefore, according to him, the contentions of the petitioner are not tenable.

14. Whether a valid and binding contract had been entered into between the petitioner and the Public Works Department and whether the petitioner committed breach of contract are matters in dispute in this case. These disputes can be resolved only based on evidence on various facts. The petitioner and the third respondent have raised disputed questions of facts. This Court does not propose to go into such disputed questions of facts especially in view of the directions going to be issued in this judgment.

15. Learned counsel for the petitioner submitted that the third respondent is incompetent to issue Ext.P9 order forfeiting the E.M.D. of the petitioner and Exts.P13 and P14 orders fixing a loss of Rs.6,56,793/- and directing to remit the same. Violation of any of the conditions of contract did not arise in this case as there was no concluded contract entered into by the petitioner with the Government. Even assuming that a binding contract was entered into between the petitioner and the Government, the third respondent cannot issue orders like Exts.P9, P13 and P14 because the terms and conditions applicable do not permit him to exercise such a power. The third respondent is a party to the alleged agreement. A party to an agreement cannot be allowed to sit as arbiter and decide his own case, he further submits. He has drawn my attention to the ruling of the Supreme Court in **State of Karnataka v. Rameshwara Rice Mills, Thirthahalli** (AIR 1987 SC 1359). The Supreme Court in that decision laid down as follows:-

.....we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot bean arbiter in his own case. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract.....

Ext.R3(c) preliminary agreement shows that the third respondent is the other party in that agreement. Neither in this agreement nor in Form No.83 any specific power is provided for the third respondent to issue orders like Exts.P9, P13 and P14. Clause 3 of Ext.R3(c) preliminary agreement is relevant in this regard which reads as follows:-

If the contractor does not come forward to execute the original Agreement after the said work is awarded and Selection notice issued in his favour or commits breach of any of the conditions of the contract as stipulated in clause 13 of the notice Inviting Tenders as quoted above within the period stipulated these the Government may rearrange the work otherwise or get it done departmentally at the risk and cost of the Contractor and the loss so sustained by the Government can be realised from the Contractor under the Revenue Recovery Act as if arrears

of land revenue as assessed, quantified and fixed by an adjudicating Authority consisting of the Secretary (Public Works), Chief Engineer (Arbitration), Chief Engineer (Administration) or any other Officer or Officers authorised by Government in this behalf taking into consideration the prevailing Public Works Department rates and after giving due notice to the contractor. The decisions taken by such Authority Officer, or Officers shall be final and conclusive and shall be binding on the Contractor.

(emphasis supplied)

Therefore, the third respondent is incompetent to forfeit the E.M.D. of the petitioner or to issue Exts.P13 and P14 orders fixing the loss sustained by the Government and directing the petitioner to remit the same for different reasons. The third respondent is a party to Ext.R3(c) preliminary agreement. Being a party to that agreement, the third respondent cannot decide his own case. Interests of justice, equity and fair play demand that the disputes regarding breach of conditions shall be adjudicated by an independent person or body and not by the third respondent. Clause 3 of the preliminary agreement specifically provides for an adjudicating authority consisting of Secretary (Public Works), Chief Engineer (Arbitration), Chief Engineer (Administration) or any other officer or officers authorised by the Government for assessing, quantifying and fixing the loss sustained by the Government. When such an adjudicating authority is specifically provided, the third respondent is incompetent to assess, quantify and fix the loss sustained by the Government.

16. Learned counsel for the petitioner contended that the adjudicating authority so provided in the preliminary agreement also cannot assess, quantify and fix the loss sustained by the Government as they are also functionaries under the Government. Such an argument advanced by the learned counsel for the petitioner is far-fetched. The petitioner has submitted his tender along with Ext.R3(c) preliminary agreement. If such an adjudicating authority provided for assessing, quantifying and fixing the loss sustained by the Government was not agreeable to the petitioner he should not have submitted his tender. After submitting his tender along with Ext.R3(c) preliminary agreement, now the

petitioner cannot turn around and contend that the adjudicating authority cannot assess, quantify and fix the loss sustained by the Government. Such an authority provided in the preliminary agreement is quite competent to assess, quantify and fix the loss, if any, sustained by the Government. When such a mechanism is provided in the preliminary agreement, that authority has to assess, quantify and fix the loss, if any, sustained by the Government.

17. Clause 3 of the preliminary agreement also stipulates that such loss shall be assessed, quantified and fixed only after giving notice to the contractor. Here, Ext.P9 order forfeiting the E.M.D. of the petitioner has been issued by the third respondent without issuing notice to him or hearing him. Similarly, before issuing Exts.P13 and P14 orders by the third respondent fixing the loss sustained by the Government, neither a notice has been issued to the petitioner nor he was heard. Therefore, Ext.P9 order to the extent it forfeits the E.M.D. of the petitioner and Exts.P13 and P14 orders passed by the third respondent cannot stand in the eye of law for different reasons already stated. They are liable to be quashed but, without prejudice to the right of the Government to realise the loss, if any, sustained from the petitioner as provided in Clause 3 of Ext.R3(c) preliminary agreement. If the Government moves the adjudicating authority for assessing, quantifying and fixing the loss, if any, sustained, the adjudicating authority can decide the same. Such a decision can be taken by the adjudicating authority only after considering the rival contentions of both the sides. This Court has not gone into those matters or entered any finding on them. The contentions of both the sides are left open. Both the sides are free to raise all their contentions before the adjudicating authority.

In the result, Ext.P9 order to the extent it forfeits the E.M.D. of the petitioner to the Government and Exts.P13 and P14 orders are quashed but, without prejudice to the right of the Government to move the adjudicating authority if they want to assess, quantify and fix the loss, if any, sustained and, if so moved, the adjudicating authority has to follow the directions contained in this judgment.

This Writ Petition is allowed as above.