

Lowest Bidder Doesn't Enjoy Indefeasible Right To Be Awarded Contract, Can't Approach Court Against Tender Cancellation For Valid Reasons: Kerala HC

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

T.R. RAVI, J.

W.P.(C)No.3228 of 2022; 16 November, 2022

OMASSERY LABOUR CONTRACT CO-OPERATIVE SOCIETY versus MUKKAM MUNICIPALITY

Petitioners by Advs. Bsri Abu Joseph Kuruvathazha, K.S. Archana, Mohammed Shafi K., M.G. Sreejith

Respondents: by Advs. Suresh Kumar Kodoth, P.T. Abhilash.

JUDGMENT

The petitioners who are contractors participated in a tender floated by the 3rd respondent for various works. There is a serious dispute as to whether the invitation was for 29 works or for 22 works. According to the petitioners, as per Ext.P1 list published by the 3rd respondent invitations were called for 29 works. The last date fixed for the submission of bids was 10.11.2021. The petitioners have produced the receipts issued to them for the purchase of tender documents. The 1st petitioner remitted the fee for participation in 20 bids, the 2nd petitioner in 5 bids, the 3rd petitioner in 10 bids, and the last petitioner in 8 bids. According to the petitioners, at the meeting of the second respondent held on 24.11.2021, it was noticed that the bids submitted by the petitioners were free of defects and were decided to be accepted after conducting appropriate negotiations. The 3rd respondent was authorised to negotiate with the contractors. Ext.P6 is the minutes of the meeting that is stated to have been held on 24.11.2021. Subsequently, in the meeting of the second respondent held on 20.12.2021, the complaints submitted by several bidders that only 22 works detailed in Sl.Nos.1 to 22 in Ext.P1 were notified and that tenders were received for 7 works, i.e. works shown against Sl.Nos.23 to 29, even without notification, was considered and it was decided to cancel the approval for the said works. Ext.P8 is the minutes. It is stated that notices were issued by the 3rd respondent to the petitioners who are the lowest bidders with respect to the works for which the tenders were cancelled and that the petitioners submitted their objections. According to the petitioners, the notification contained 29 works, and that was the reason why tender papers were requested for and obtained as evidenced by the receipts issued. According to them, the reason stated for cancellation is erroneous and baseless, and they requested to recall the decision to cancel and to enable them to execute agreements for the works bearing Sl.Nos.23 to 29, shown in Ext.P1. On getting information that the respondents will be retendering the works shown against Sl.Nos.23 to 29 in Ext.P1, the petitioners filed the writ petition challenging the cancellation of tenders.

2. On 4.2.2022, this Court admitted the writ petition and ordered that further proceedings for retender will be subject to the result of the writ petition. The petitioners filed I.A.No.1 of 2022 producing Ext.P19 as an additional document and prayed for the stay and operation of further proceedings pursuant to Ext.P19, pertaining to the works bearing Sl.Nos.15 to 21, which are the subject matter of the writ petition. The counsel for the respondents opposed the prayer since the retender was only a consequence of the withdrawal from the earlier tender process. Taking note of the earlier order dated 4.2.2022, this Court by order dated 15.2.2022 rejected the prayer for a stay of the retender process.

3. Respondents 1 and 2 filed a counter affidavit, contending that the writ petition is not maintainable and that there is no violation of any statutory right of the petitioners or infraction of any vested right in relation to a contract. It is contended that the tender was cancelled for valid reasons and no formal agreements had been entered into with the petitioners, and hence no indefeasible right has been vested in the petitioners. According to respondents 1 and 2, the tender process was for 22 items of work shown against Sl.Nos.1 to 22 in Ext.P1. It is

stated that when the list of works was presented for approval on 24.11.2021, the 3rd respondent had added seven more items as items 23 to 29. It is stated that the Council, without noticing the manipulation and foul play, approved the entire work subject to negotiation, as per Ext.P6 resolution. It is further stated that the manipulation came to the notice of the Council on receiving complaints from other contractors who had participated in the tender regarding items 1 to 22. It is in these circumstances that it was decided to cancel the tender regarding items 23 to 29 as per Ext.P8 minutes. It is stated that Ext.P8 has to be seen as a corrective measure. It is further stated that the 3rd respondent had without any authority issued notices Ext.P9 to P11 to the petitioner. It is submitted that there was no reason or justification for such notices calling upon the petitioners for their objections since the Council had already validly taken a decision to cancel the tender and retender the works shown against Sl.Nos. 23 to 29. It is also submitted that Exts.P16 to P18 representations have not been received in the offices of the 1st and 2nd respondents. The affidavit also says that action has been initiated against the 3rd respondent and disciplinary action has been recommended against the 3rd respondent. It is submitted that even though retender was notified on 28.1.2022, the 3rd respondent, presumably to help the petitioners, delayed the uploading the tender notice on the website and it was only after the Chairman had issued a letter on 31.1.2022 that the same was uploaded on 10.2.2022 by the 3rd respondent. It is alleged that the petitioners and the 3rd respondent are acting in collusion.

4. The 3rd respondent who is the Assistant Engineer of the 1st respondent Municipality, filed a counter affidavit stating that Ext.P1 had been issued, and the seal and signature on both pages of Ext.P1 were endorsed by him. However, it is also stated that the 1st respondent is well within their power to cancel the tender and that no contractor can have any right merely because he is the lowest bidder.

5. On 18.3.2022, this Court directed the counsel for the 1st respondent to make available the records relating to the tenders notified on 2.11.2021 and 28.1.2022 and directed the parties to maintain status quo. The records were perused during the hearing of the writ petition. It is seen that after Ext.P6 resolution was passed on 6.12.2021, a complaint was received from one Muhammed Ashiq. Several other contractors have also submitted complaints regarding non inclusion of 7 items in the tender notice. This has led to Ext.P8 decision to cancel the approval regarding the 7 works and retender the works. The 3rd respondent was directed to notify the fresh tender with regard to the above-said works. Ext.P8 did not contemplate any notice being issued by the 3rd respondent to the petitioners, calling for their objections. In such circumstances, Exts.P9 to P11 notices was totally uncalled for as contended by the 1st and 2nd respondents.

6. In **Bharat Coking Coal Ltd. v. AMR Dev Prabha [(2020) 16 SCC 759]**, the Hon'ble Supreme Court examined the scope of judicial review in tenders. It was noticed that the settled law is that constitutional courts are concerned only with the lawfulness of a decision and not its soundness and that the courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Reference was made to the observation in **Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617]**, that plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. The Court further held that allegations of illegality, irrationality, and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. In **Tata Cellular v. Union of India [(1994) 6 SCC 651]**, the Hon'ble Supreme Court classified the grounds upon which an administrative action is subject to control by judicial review as illegality, irrationality namely Wednesbury unreasonableness, and procedural impropriety.

7. In **State of Punjab v. Mehar Din, [(2022) 5 SCC 648]**, the Hon'ble Supreme Court held that the consistent practice is that the superior courts should not interfere in the matters

of tenders unless substantial public interest was involved, or the transaction was mala fide. It was held that the courts should consider primarily the question whether there has been any infirmity in the decision-making process. In **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)**, [(2016) 8 SCC 622], the Hon'ble Supreme Court held that interference in matters relating to tender is permissible only if the decision-making process is mala fide or is intended to favour someone. It was also held that the decision should not be interfered with unless it is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. That is to say, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. The above decision has been followed by the Hon'ble Supreme Court in later decisions. [See **National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd.**, [(2022) 6 SCC 401] and **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.** [(2016) 16 SCC 818]. In **Michigan Rubber (India) Ltd. v. State of Karnataka** [(2012) 8 SCC 216], the Hon'ble Supreme Court succinctly stated the law thus:

“A court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached’? and
- (ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.”

8. In the case on hand, there is serious dispute as to whether the tender process had been initiated with respect to items 23 to 29. Even if the tender process had been initiated validly, there can be no dispute regarding the authority of the Municipality to cancel the process for valid reasons. It is contended, as well as seen from the records, that there were in fact complaints from other contractors who participated in the tender that the notification only included 22 items. It is after considering the complaints that the 1st respondent took the decision to cancel the tender process with regard to 7 items. The said decision can never be said to be arbitrary or without any material on record. So also, it cannot be said to be perverse or intended to favour some persons. There is no irrationality, illegality, unreasonableness or impropriety in cancelling the tender process and deciding to call for fresh tenders. The petitioners are not in any way prejudiced since they can participate in the fresh tender process. When the law does not recognise any indefeasible right in a lowest bidder to be awarded a contract, the petitioners cannot be heard to contend that they being the lowest bidders in a tender which was cancelled for specific reasons, are entitled to approach the Court under Article 226 of the Constitution for annulling the decision to cancel and request for directions to award the contract in their favour. The law laid down in the decisions referred above does not warrant the grant of the above relief to the petitioners. The writ petition fails and is dismissed.