IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY,THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

W.A.No. 2142 of 2012 IN WP(C).10699/2012

AGAINST THE JUDGMENT IN WP(C) 10699/2012 of HIGH COURT OF KERALA DATED 04-12-2012

APPELLANT:

TRT BUILDERS AND CONSTRUCTION (INDIA) PVT. LTD.
REPRESENTED BY ITS MANAGING DIRECTOR G SUNDARESAN

BY ADVS.SRI.K.ANAND (SR.)
SMT.LATHA KRISHNAN

RESPONDENTS:
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1. STATE OF KERALA,
   REP.BY SECRETARY PUBLIC WORKS DEPARTMENT SECRETARIAT
   THIRUVANANTHAPURAM 695 001.

2. THE SUPERINTENDING ENGINEER,
   PWD ROADS AND BRIDGES, SOUTH CIRCLE, TRIVANDRUM 695 001

3. KERALA STATE CONSTRUCTION CORPORATION LTD,
   P.B NO 30/1521A, NORTH SIDE OF RAILWAY BRIDGE,
   PONNURUNNI, VYTTILA, COCHIN 682 019,
   REPRESENTED BY ITS MANAGING DIRECTOR.

R1-R2 BY ADV. SRI.K.A.JALEEL, ADDL. ADVOCATE GENERAL
R BY SPL. GOVERNMENT PLEADER SRI.T.TMOHAMOOD
R BY SRI.M.V.THAMBAN, SC., KSCC LTD.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 03-07-2015, ALONG WITH WA. 2156/2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'CR'

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

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Writ Appeal Nos.2142 & 2156 of 2012

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Dated this the 3rd day of July, 2015

JUDGMENT

Antony Dominic, J.

Petitioners in W.P.(C)10699/12 and 11666/12 are the appellants. The writ petitions, raising common issues, were heard together and were disposed of by a common judgment. For the same reason, these writ appeals were also heard together and are being disposed of by this common judgment, treating writ appeal 2142/12 as the leading case.

2. W.A.2142/12 arises from the judgment in W.P.(C)10699/12. The appellant and the third respondent, a Government company, responded to Ext.P2 tender notice. The contract was ultimately awarded to the third respondent, extending them the benefit of Ext.P3 Government Order whereby the Government declared that the third respondent is pre-qualified to undertake civil works put to tender by State Government Departments except National Highway works and Central Government sponsored works and Exts.P4 and P5, which allowed them a price preference of 10% on the lowest quoted rate. In the said circumstances,

the writ petition was filed challenging Exts.P3 to P5 and consequently to quash the award of work to the third respondent. In the judgment under appeal, the learned Single Judge upheld the Government Orders and the work awarded to the third respondent and dismissed the writ petition. On the same reasoning, Writ Petition 11666/12 was also dismissed, against which W.A.2156/12 is filed.

3. We heard the counsel for the appellants, learned Government Pleader and the Standing Counsel appearing for the third respondent.

4. In so far as Exts.P4 and P5 Government Orders dated 28.4.1988 and 7.8.1997 allowing price preference of 10% on the lowest quoted rate are concerned, subsequently by G.O.(P)14/2015/Fin. dated, 13.1.2015 the Government have ordered that the price preference enjoyed by the third respondent will be allowed only to works directly executed by the Corporation, without the involvement of subcontractors. In that view of the matter, we do not think that the price preference that is now given by the Government to the third respondent can be successfully assailed by the appellants and no arguments on that issue were also addressed before us. Similarly,

having regard to the long lapse of time, we are also not probing into the legality of the award of works, which were under challenge.

5. In such circumstances, the arguments raised before us were confined to the validity and scope of Ext.P3 Government Order dated 12.2.92 whereby the Government declared the third respondent pre-qualified for the works mentioned therein. According to the appellants, this Government Order declaring the third respondent pre-qualified, is violative of Article 14, being arbitrary and discriminatory in nature. To support this contention, counsel for the appellants relied on judgments of the Apex Court in ***Ramana Dayaram Shetty v. the International Airport Authority of India and others [AIR 1979 SC 1628]***, ***Kasturi Lal Lakshmi Reddy Represented v. State of Jammu and Kashmir [AIR 1980 SC 1992]*** and ***Union of India and others v. Hindustan Development Corporation and Others (1993) 3 SCC 499.*** Counsel also submitted that the Government Order was issued taking note of the expertise and the equipments that were available with the third respondent. According to him, the admitted case of the third respondent is that they are no longer having any equipments and every work awarded to them is got executed through their sub contractors.

Therefore, according to the counsel, the very premise on which Ext.P3 order was issued no longer survives.

6. On the other hand, the learned Government Pleader and the Standing Counsel for the third respondent unanimously contended that the third respondent being a public sector undertaking of the Government of Kerala is entitled to be preferred in the matter of awarding contracts and that such preference has been accepted by this Court in its judgment in ***Niodigital (P) Ltd. v. State of Kerala and others [ILR 2010 (4) Kerala 462]***. Counsel also contended that the third respondent is now executing work on the basis of the Memorandum of Understanding entered into with their empanelled sub contractors.

7. We have considered the submissions made. As we have already stated, the issue that survives to be considered in these cases is the validity and scope of Ext.P3, the Government Order dated 12.2.1992. This Government Order refers to G.O.(MS)No.52/87/PW&T dated 7.7.87, whereby the Government introduced the system of pre-qualification in the matter of award of works to contractors. For a

better understanding of Ext.P3 Government Order, it is extracted herein for reference:

> *"In the G.O. read as 1st paper above, pre-qualification of Contractors was adopted in the State P.W.D. The Managing Director, Kerala State Construction Corporation Ltd. in his letter read as 2nd paper above has requested Government to exempt the Corporation from applying for pre-qualification for each work in view of their experience in construction works expertise and the equipments available with the Corporation.*
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> *Government after detailed examination of the matter are pleased to declare the Kerala State Construction Corporation Ltd. as "pre-qualified to undertake the 'Civil Works put to tender by State Government Departments (Except National Highway Works and Central Government sponsored works requiring scrutiny and approval of Government of India). State Public Undertakings and local bodies in cases where the pre-qualification system is adopted for the execution of works."*

8. Reading of Ext.P3 Government Order shows that the third respondent had made a request to the Government to exempt it from applying for pre-qualification for each, work and this was in view of its experience and expertise in construction works and the equipments that were available with the Corporation. Considering these factors, by Ext.P3 order the Government declared the third respondent pre-

qualified to undertake Civil Works put to tender by the State Government Departments, Public Sector Undertakings and local bodies. The pleadings in the writ petition and the affidavits filed show that although the works awarded to the third respondent were initially executed by the third respondent itself utilizing its own expert manpower, plant and machineries, after 1990, the third respondent has switched over to piece rate contract system and since 1998, it has adopted sub contracting system. Phasing out of equipments and manpower shortage are the reasons stated for taking such a policy decision. This is admitted in the affidavit dated 11th June 2012, where it has been stated thus:

> *"No other agencies in the construction field in Kerala can claim the credit of having this much machinery to execute the works till 1990. <u>These plant and machineries were phased out gradually by the Corporation since the Corporation had switched over to sub-contract system from piece work contract system from 1998 onwards. At present the Corporation does not have any machineries as the method of execution of work was being changed in the passage of time in consonance with the policy of the Corporation to compete with private contractors and for the speedy and quality execution of work.</u> The said policy was taken to avoid sustaining of loss to the Corporation for various reasons including the delay in getting payment of work*

done from the client department, shortage of skilled labours etc."

(emphasis supplied)

9. In the affidavit, the third respondent has also explained the manner in which the sub contractors are enlisted by it, by stating thus:

> "*In so far as the sub contract is concerned the work is done through the A class registered contractors from the panel of contractors having good track records, financial background and possessing required plant and machineries to carry out major works. Such panel of contractors is prepared and revised every year by issuing notification and inviting applications. The final list is approved by the Board of Directors only after circulating the list among the Chief Engineers in State and after obtaining their concurrence. Such panel is revised every year after inviting fresh application. Preparation of the panel of contractors getting works done through them is the policy decision of the Corporation. The above system has been found very successful especially in speedy executing and maintaining the quality of works. The direct execution of the work (piece work system) by the Corporation has been dispensed with from 1998 onwards. It is also worth mentioning here that same procedure is followed by similarly situated government agencies.*"

10. It is in the above factual background that we have to consider the prayer of the appellants to quash Ext.P3, Government Order dated 12.2.1992 declaring, the third respondent pre-qualified for the works of the nature mentioned therein. Admittedly, the third respondent is a

Government Company, owned by the State Government. The works in relation to which it is declared to be pre-qualified are the civil works tendered by State Government Departments, (except National Highway works and Central Government sponsored works requiring scrutiny and approval of the Central Government), State Public Undertakings and local bodies. In other words, pre-qualification declared in Ext.P3 is meant to be to the advantage of the third respondent only in respect of the works tendered by the State Government, State Public Sector Undertakings and Local bodies. In our view, when the Government, its public sector undertaking or local bodies are tendering works, the awarder concerned has the entitlement to determine the norms to pre-qualify the tenderers to decide on their eligibility to compete for the work. Once that entitlement of the awarder is conceded, nothing prevents Government from exempting a Government Company, from pre-qualification and that too when the Government is satisfied that the beneficiary, the third respondent, has the expertise to undertake the work and also the manpower and necessary equipments available at its disposal. In such a situation, a declaration made by the Government in Ext.P3 that the third respondent will stand pre-qualified in respect of the works, the nature of which is also mentioned in Ext.P3, as such, cannot be said to suffer from any discrimination or arbitrariness as is sought to be made out by the appellants.

11. At the same time, the background in which Ext.P3 order was issued is that in view of its experience in construction work, and the availability of manpower and equipments, the third respondent had made a request to the Government to exempt it from applying for pre-qualification for each work tendered by the State Government, Public Sector Undertakings and Local Bodies. It was accepting this request and taking note of the expertise and availability of equipments and manpower that the Government made the declaration as contained in Ext.P3. This is evident from Ext.P3 itself. As admitted by the third respondent itself in the affidavits filed before this Court, the relevant portion of which has been extracted above, that position continued only till 1990. The plant and machineries acquired by the third respondent were thereafter phased out gradually. Initially, the third respondent switched over to piece rate contract system and from 1998, again, switched over to sub contracting the work. It is also the admitted case

that the entire works awarded to the third respondent since then are being executed by sub contractors.

12. The method by which the sub contractors are empanelled by the third respondent is also explained in its counter affidavit, which has been extracted by us in the previous part of this judgment. However, the method by which the sub contractors are chosen for award of work is not stated anywhere in the affidavits filed. Ext.R3(e) is the list of works executed by the third respondent through sub contractors. This list contains the details of the completed works through sub contractors during the period 2002-2012. This list shows that 75 works awarded to it were sub contracted by the third respondent. Third respondent does not have a case that during the said period, it has undertaken or executed any other work by itself. The appellant has produced the specimen of the Memorandum of Understanding (MOU) entered into between the third respondent and its sub contractors, the relevant clauses of which read thus:

> *" That the whole work shall be executed by Shri. . . . . entirely at his own risk and cost and consequences. Shri. . . . . shall have to compensate KSCC for any financial, contractual and / or any other obligation*

and / or any other liquidated damages as may be imposed by the Client Department.

1. Shri . . . . will bear all preliminary expenses such as cost of tender form, detailed design, drawing, studies preparation of tender etc.

2. That all the Plants, Equipments, Manpower, Working Capital funds and all other resources that are required for the project shall be arranged and deployed by Shri. . . . . at his own cost and risk.

3. Shri. . . . . agrees that he shall reimburse cost of all insurance policies as required to be taken by KSCC as per the contractual obligations.
4. Shri. . . . . shall be exclusively responsible to KSCC for the execution, performance, perfection and completion of the work as per the schedule of work given by the Client Department.

5. In case of any default by Shri. . . . . in the execution, completion or performance of any part of the contract works and in the event of the Client Department bringing any action or claim in respect of the contract, Shri.. . . . . .shall be solely responsible for the same and . . . . undertakes to indemnify and keep KSCC harmless against all such actions, claims, losses, damages or costs that may be incurred or imposed by Client Department.

6. The representatives of both KSCC and . . . . hall review the progress of the work and necessary decisions for execution of the work once in a month.

7. Every bill payments received from the Client Departments (Less cost of Departmental Materials if any) will be made over to . . . . . . after deducting 5%

upfront frees and statutory deductions and further 90% of the balances and such amount will be released within to two days. The 10% retained as above will be released within 7 days.

8. KSCC also agree to transfer 95% of Mobilization Advance received from Client department on account of this work to . . . . . . on production of requisite Bank Guarantee. For any advance payments . . . . . shall arrange Bank Guarantee for the equivalent amount and interest at the rate of 9% per annum will be charged on such advance until the advance is recovered fully.

9. KSCC agrees to return BG equivalent for the advance payment recovered from part bills.

10. Shri. . . . . agrees that he will be exclusively responsible for the VAT,duties, Cess, Taxes, royalties and excise duty and all other legal and statutory recoveries etc. if any in connection with the work imposed by Client Department as per prevailing rules from time to time Shri. . . . . . . also agrees to produce necessary clearance certificate from the sales tax department, on production of which no deduction shall be effected towards VAT from their running bills, unless otherwise specified in the certificate.

11. Settlement of dispute: Any dispute in relation to or arising out of this MOU shall be resolved amicably between the parties. Unresolved disputes shall be resolved through Court law having Jurisdiction at Ernakulam.

12. That this agreement shall be terminated on the date that all obligations and liabilities to the Client Department as well as to all Third parties related to this contract, under this agreement have been discharged.

13. All incidental expenses for starting the job as well as its execution and commissioning is fully within scope of Shri. . .. . Shri. . . . . will establish a quality control laboratory and site office, with furniture and equipments, as directed by the employer/KSCC.

14. KSCC has informed Shri . . . . that all statutory requirements like labour license, PF, ESI and other statutory requirements as required to be complied by KSCC for the execution of this project under various Act shall be met by Shri . . . . agreed to comply all the statutory requirements as per Law to perform the contract on behalf of KSCC.

15. Shri. . . . . confirmed that he had thoroughly studied the Bid Documents and considered all the aspects.

16. That all the matters relating this agreement and the contract for the construction of the work resulting there from shall be regarded by the parties hereto as being confidential information and shall not be disclosed without mutual consent of other party, to any person or entity who or which is not a signatory to this agreement like other contractors or such interested agencies. Neither party shall at any time hereafter use any technical information (save and except that which is in the public domain), received or acquired from the other party hereto except for the purposes of fulfillment of the contract.

17. KSCC has informed Shri. .. . . that any further negotiation in rates with the Client Department will be done with mutual consensus.

> *18. Necessary certificates for availing excise duty exemption for the purchase of materials required for the work will be issued.*
>
> *19. The MOU is valid only for the work as may be awarded by the Client Department. On the work being awarded by Client Department to KSCC Ltd. a detailed agreement in line with this MOU will be drawn up between the parties hereto."*

13. Reading of the above provisions of the Memorandum proves that on the basis of the declaration of pre-qualification that is contained in Ext.P3, works are awarded to the third respondent and the entire works awarded to it, are entrusted to their sub contractors. These sub contractors, whose basic eligibility is only an A class registration, though are empanelled by the company, choice among them for entrusting the work is made, without any transparent method. This means that ample scope is left for manipulation and all consequent evils. Third respondent has not furnished any details of the manpower on its rolls or the nature of the supervision undertaken by it. Therefore, we are in the dark about the nature of supervision that they are capable of undertaking. Therefore, insofar as the claim that work is supervised by the third respondent is concerned, we are inclined to think that this

is only an empty claim. Thus only a namesake right of supervision is reserved by the third respondent and the entire contractual rights and obligations are farmed out to the sub contractors, who are chosen without following any acceptable norms, and the consideration in return is 5% of the contract receipt from the awarder.

14. In our view, when Ext.P3 was issued with the intention of making optimum utilisation of the manpower, expertise and equipments at the disposal of the third respondent, it could not have been in the contemplation or the intention of the Government that the pre-qualification declared should be of advantage to the third respondent for any works that are not executed by it. In fact that purpose and object no longer survives from the day the third respondent phased out its equipments and rendered itself incapable of executing works by itself. Further, by sub contracting the works awarded to it, on the basis of the pre-qualification declared in Ext.P3, the very purpose and object of Ext.P3 is defeated. In fact, in the situation prevailing, the Government itself should have issued an order similar to the Government Order dated 13.1.2015 confining price preference to works executed by the third respondent, referred to in

paragraph 4 above and should have confined the benefit of Ext.P3 also to the works executed by the third respondent itself. The situation now is that sub contractors who are only A class contractor, and whose eligibility is not assessed applying any pre-qualification norms and who are chosen at the will and pleasure of the third respondent, are executing the works awarded to the third respondent in return for the 5% recorded in the memorandum of understanding. In other words, the third respondent has reduced itself into a subcontracting agency. According to us, having regard to the background in which Ext.P3 has been issued and the terms contained in the said order, the benefit of Ext.P3 should be available to the third respondent only in respect of the works awarded to it and executed by itself. In other words, the third respondent cannot take advantage of Ext.P3 and subcontract the works awarded to it on that basis.

15. The judgment under appeal does not show that the issues were examined in the above perspective and therefore, while we agree with the learned Single Judge on the validity of Ext.P3 and without examining the validity of Exts.P4 and P5, we direct that the benefit of Ext.P3 Government Order will be available to the third respondent only

with respect to the works that are executed by itself and that such works shall not be sub contracted by the third respondent.

With these directions, these writ appeals are disposed of.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

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