

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 4TH DAY OF MARCH 2015/13TH PHALGUNA, 1936

WA.No. 540 of 2015 () IN WP(C).881/2015

AGAINST THE JUDGMENT IN WP(C) 881/2015 of HIGH COURT OF KERALA
DATED 25-02-2015

APPELLANT(S):

DR.RAJU MATHEW, EDATHALA HOUSE,
RAMALLOOR, KOTHAMANGALAM - 686 691

BY ADVS.SRI.P.THOMAS GEEVERGHESE
SRI.TONY THOMAS (INCHIPARAMBIL)

RESPONDENT(S):

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1. STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO THE GOVERNMENT,
DEPARTMENT OF PORTS, THIRUVANANTHAPURAM
 2. DIRECTOR OF PORTS,
DIRETORATE OF PORTS,
VALIATHURA,
VALLAKKADAVU P.O.,
THIRUVANANTHAPURAM - 695 008

GOVT. PLEADER SMT. GIRIJA GOPAL

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
04-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ASHOK BHUSHAN , Ag. CJ,
&
A.M.SHAFFIQUE, J.

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W.A. No. 540 of 2015
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Dated this the 4th day of March, 2015

JUDGMENT

Shaffique, J.

Petitioners in Writ Petition No. 881/2015 are the appellants in this Writ Appeal. They are challenging the judgment dated 25-2-2015, of the learned Single Judge in the above Writ Petition. First Petitioner claims to be an “A” class registered Contractor of the Kerala Public Works Department and the 2nd petitioner is a merchant in heavy industrial machinery. Their challenge was to Clause 4 in Ext. P2 tender conditions which directs the successful bidder i.e. the “Best Bidder” who has quoted the best bid to pay compensation of an amount of Rs. 25 lakhs

to M/s. Global Trading Company. Clause 4 in Ext. P2 reads as under:

“Clause 4: As explained, if GTC does not match the winning bid, a compensation amount of Rs. 25 lakhs only, will be given to GTC by the party who has quoted the best bid and is the chosen “Best Bidder”. All interested bidders participating in the tender thus unambiguously undertake to pay the compensation amount to M/s. Global Trading Company, if their bid is the winning bid and GTC does not match the winning bid”.

2. It is, inter alia, contended that the aforesaid clause is arbitrary and illegal, and, therefore, it is liable to be set aside.

3. The short facts involved in the above Writ Petition would disclose that the 2nd respondent called for tenders for the work of “Ponnani Port dredged material purification, Extraction of Construction graded sand removing all impurities and processing of the by-products, Selection of Agency through “Swiss Challenge Method”. Ext. P1 is the e-tender. According to the petitioners, though the petitioners were interested in submitting tender, on account of the restrictive clause mentioned in clause 4, by which the successful tenderers will have to pay certain amount to GTC, hence, the petitioners could

not submit the tender and they had challenged the tender conditions. It is stated that the particulars regarding payment of Rs. 25 lakhs in favour of GTC, is without legal competency or authority, and there is no method to quantify the amount spent by GTC. No details have been furnished in the tender, and therefore, the tender is floated without taking into consideration the actual state of affairs and no materials have been given to the tenderers and under what circumstances, such a condition has been incorporated.

4. Counter affidavit has been filed by respondents, inter alia, stating that the concept of "Swiss Challenge" is incorporated in Ext. P1 and the details were explained in Ext. P2 request for Proposal published by the Government of Kerala. According to them, Swiss Challenge System is a new bidding process to help private sector initiative in core sector projects, where the Government have not envisioned any development projects or proposals. The said method gives an option to a

private player to suo moto identify a project and approach the Government. The proposals are thus unsolicited. On obtaining proposal from the proponent, the Government seeks tenders/proposal from other private players pursuant to which a bidding process is held based on standard rules followed by the Government. Once the bidding process is complete, the proponent is given a chance to better his original bid or match up to the winning bid, i.e. the proponent has the right of first refusal. Thereafter, the award is given to the proponent. On his refusal, the award goes to the next bidder.

5. The main benefits of the projects has been stated in the counter affidavit which reads as under:-

- It encourages greater private participation for Public Project i.e. augments Public Private Partnerships and enables innovative ideas to take shape.
- It facilitates infrastructure development and encourages greater Private Participation for Public Projects i.e. augments Public Private Partnerships.
- Certainty of success under this methodology is ensured as at least once willing private partner is available right from

the beginning.

- The Project proponent does a detailed feasibility and financial analysis of resulting in better project structuring. The initial structuring by the project proponent brings in efficiency and better understanding of financial implication resulting in development in economy sustainable model.
- The identification of timeless, identification of risks and their allocation along with transparent bidding criteria becomes easier for the authority as the project preparation is done in a more professional manner.
- Time and cost saving on pre-project activities and feasibility studies whereas in other methodology of PPP models, these studies have to be conducted in advance by the authority.
- Benchmarking of project costs, revenues and returns through undertaking necessary technical and financial studies before the bidding stage.
- It reduces burden on government to the extent of identifying new projects, appointing consultants and inviting bids.
- It can be a cost effective if planned and implemented well”.

6. Further it is stated that the Apex Court has considered the validity of Swiss Challenge System in Ravi Development v.

Sreekrishna Prathisthan and Others - 2009 (7) SCC 462 and had approved the said method. In paragraph 6 of the counter affidavit, it is stated that M/s. Global Trading Company had submitted a proposal before the State Government while convening "Emerging Kerala Event" held during September, 2012. They have submitted a detailed project report, which was considered in detail by the Directorate of Ports and the proponent intimated the Government that Company has applied for getting patent for the project. It is a new idea in the field of purification of dredged sand from water bodies including saline water bodies.

7. It is in the said background, after taking into consideration the various parametres, including the judgment of the Hon'ble Supreme Court, a detailed project report mooted by the Global Trading Company was approved by the Government as per Government Order dated 15-12-2014 which is produced as Ext. R3.

8. The learned Single Judge after elaborately considering the matter, rejected the claim of the petitioners and, accordingly, dismissed the Writ Petition. However, in paragraph 25, the learned Single Judge made certain observations with reference to the implementation of the project.

9. The appellant is aggrieved by the dismissal of the Writ Petition. It is inter alia contended that the petitioners though having not submitted their tender has locus standi to challenge the tender conditions.

10. Having heard the learned counsel for the appellants, we are of the view that, only certain limited grounds are available for challenging the tender conditions. It has been held by the Supreme Court in *Tata Cellular v. Union of India* - AIR 1996 SC 11 that under normal circumstances, the tenderer is not entitled to challenge the tender conditions unless the conditions are arbitrary and discriminatory. This is an instance where the

Government had adopted a new method of tendering process by which enterprenures who had ideas are permitted to submit their proposal, after conducting a detailed study in any matter, as the case may be. This is an instance where the Global Training Company has mooted a proposal for which they have indicated various measures to dredge sand and purify the same from certain areas. The original idea vest with the project proponent and after the proposal is submitted and approved, Government calls for tenders and if it is found that another person becomes the highest bidder, and project proponent cannot match the rate, he will have to pay certain amount to the project proponent. This is to enable the project proponent to get paid for the work they have done for preparation of project report and mootng the idea.

Under such circumstances, we do not think that the fixation of an amount to be paid to the project proponent by the Government in the tender in any way is arbitrary or

discriminatory. Hence, the learned Single Judge was justified in rejecting the plea of the petitioner. We do not find any grounds to interfere with the judgment of the learned Single Judge.

Accordingly, this Writ Appeal is dismissed.

Sd/- ASHOK BHUSHAN ,
Ag. CHIEF JUSTICE

Sd/-A.M.SHAFIFIQUE,
JUDGE

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P.S.toJudge