

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

WA.No. 1673 of 2015 () IN WP(C).8482/2015

AGAINST THE JUDGMENT IN WP(C) 8482/2015 DATED 10-07-2015

APPELLANT(S)/3RD RESPONDENT:

SHAJI
S/O. RAJAN, MANIYATTIL HOUSE,
KAKKANADU.P.O., ERNAKULAM DISTRICT.

BY ADVS. SRI. T.A. SHAJI (SR.)
SRI. P.M. ZIRAJ
SMT. NAMITHA JYOTHISH
SRI. V. VINCENT DIDACOSE
SRI. DARSAN SOMANATH

RESPONDENT(S)/PETITIONER & RESPONDENTS 1 AND 2 IN THE W.P[C]:

1. V.M. ZAKKEER BABU, AGED 41 YEARS
VALLRAKODATH HOUSE, MUTTOM,
THAIKKATTUKARA.P.O., ALUVA-683 106.
2. CORPORATION OF COCHIN
ERNAKULAM, PIN-682 011,
REPRESENTED BY ITS SECRETARY.
3. THE SECRETARY
CORPORATION OF COCHIN,
ERNAKULAM, PIN-682 011.

R1 BY SRI. DEVAN RAMACHANDRAN
R2 & 3 BY ADV. SRI. V.E. ABDUL GAFOOR

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 04-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SOU.

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

W.A. No. 1673 of 2015

Dated this the 4th day of November, 2015

JUDGMENT

Shaffique, J

Third respondent in W.P(C). No.8482 of 2015 has filed this appeal challenging judgment dated 10.7.2015, by which learned Single Judge allowed the writ petition filed by the first respondent herein quashing clause 8 of notice inviting tender (Ext.P6) and directing the Corporation of Cochin to accept the writ petitioner's bid and award the work after considering compliance with other conditions in the notice inviting tender.

2. The short facts involved in the writ petition discloses that the first respondent who is hereinafter referred to as the petitioner, filed the writ petition challenging Clause 8 of Ext.P6 tender contending that the said clause is arbitrary, irrational and unworkable. It is also contended that the said clause had been incorporated for the purpose of giving an upper hand to the appellant herein who is the existing contractor.

3. Counter affidavit has been filed by the appellant in I.A. No.6646 of 2015 by which it was inter alia contended that the Corporation was justified in incorporating the said condition

and it is for the Corporation to decide the conditions to be incorporated in the notice inviting tender.

4. A statement has been filed by the Corporation indicating that the conditions at Clause 8 is incorporated considering alarming increase in the quantum of waste which the corporation has to handle on a day to day basis. The Corporation is collecting 200 tons of waste per day. The waste collected from the Cochin Corporation is to be transported to the Bhramapuram Plant, which is 22 Km away from the city. The Corporation requires 30-40 Tipper lorries for the aforesaid purpose and therefore a pre-condition had to be imposed in the notice inviting tender that a tenderer should possess necessary vehicles and the financial capability would be such that they should be capable to comply with the terms of that contract.

5. Learned Single Judge after hearing the rival contentions, formed an opinion that the stipulation regarding the availability of 20 tipper lorries for the previous 2 years is actually a smokescreen to sideline participants like the petitioner. That apart, it is observed that the stipulation that the tenderers ought to have executed the work to the tune of Rs. 2 Crores is without any basis as the said condition in the

tender will not achieve the object which is sought to be achieved.

6. Heard learned Senior counsel Sri. T.A. Shaji for the appellant, Sri. Devan Ramachandran appearing for the petitioner and the learned counsel appearing on behalf of the Corporation, Sri. V.E. Abdul Gafoor.

7. Having regard to the nature of contentions raised, the question to be considered is whether the learned Single Judge was justified in quashing Clause 8 of Ext.P6 tender. Clause 8 of Ext.P6 tender reads as under :

“The tenderers should have supplied a minimum of 20 tipper lorries continuously for 2 years or more, to Government, Semi Government Institutions and should have executed works with to the tune of more than 2 crore.”

8. The work which is sought to be awarded by notice inviting tender is supply of tipper lorries of ten tons capacity for transportation and removal of garbage from the eastern and western side of Cochin Corporation to Bhramapuram Plant as instructed by the Corporation. It is in dispute that the requirement of 20 number of vehicles and financial capability of the tenderer are important factors to be taken into consideration by the Corporation for the purpose of awarding work. It is for the awarder of the work to decide the terms and

conditions in the notice inviting tender. The only question is whether such condition arbitrary, irrational or *malafide* as held by the Supreme Court in **Tata Cellular Ltd. Vs. Union of India** [(1994) 6 SCC 651]. Therefore the only question to be looked into is whether the tender condition is arbitrary, irrational or malafide and is intended only to exclude persons like the petitioner.

9. Learned Single Judge formed such an opinion and indicated that what is required was only to show the experience of the tenderer and it is not necessary to insist for requirement of 20 tipper lorries for a period of two years and tenderer should execute the work with Government, Semi Government institutions to the tune of about two crores.

10. Learned counsel for the appellant would submit that it is for the awarder to decide the terms and conditions of tender and clause 8 does not suffer from any infirmity, in so far as the Corporation has taken a conscious decision to insist on such requirement of tipper lorries as well as experience and also financial capability of the tenderer. Learned counsel fairly concedes that for the last five years appellant is carrying on the aforesaid work. No doubt, appellant may have the qualification criteria as prescribed in clause 8 of the Tender. But the

Corporation should also see that other tenderers are also permitted to participate in the tender and when learned Single Judge has held that tender conditions in clause 8 is too harsh and several tenderers are kept out of the field to participate in the tender process, we do not think that we should exercise the appellate jurisdiction and interfere with the same.

11. However, it is always open for the Corporation to incorporate such conditions in the tender to understand the capability and financial capacity of the tenderer to provide necessary vehicles for transportation of the garbage. The financial capability as well as the experience of the contractor could be understood by incorporating necessary conditions other than incorporating such harsh conditions like Clause 8.

12. Learned counsel for the appellant however would submit that learned Single Judge was not justified in directing that the writ petitioner's tender is to be considered. Of course, while quashing a particular clause in the tender, the normal procedure was to direct the awardee of the work to go for re-tender. But in the facts of the present case, since the learned Single Judge had already issued necessary directions in that regard and thereafter the Corporation has taken a conscious decision to award the work on an adhoc arrangement to the

petitioner, we do not think there is any requirement to set aside the said direction as matters stand now.

13. We are also informed by the learned counsel appearing for the Corporation as well as Sri. Devan Ramachandran, learned counsel for the petitioner that the rate quoted by the petitioner was much below than the rate quoted by the appellant and that the petitioner is carrying on the contract without any default for the last 3¹/₂ months.

In the result we do not intend to interfere with the judgment of learned Single Judge. We only observe that the Corporation will be entitled to take appropriate decision to proceed with the work awarded in favour of the petitioner or to re-tender the work as per the requirement of the Corporation.

The writ appeal is disposed of as above.

Sd/-
ASHOK BHUSHAN
CHIEF JUSTICE

Sd/-
A.M.SHAFIQUE,
JUDGE