

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 30TH DAY OF NOVEMBER 2015/9TH AGRAHAYANA, 1937

WA.No. 2399 of 2015

AGAINST THE JUDGMENT IN W.P.(C).NO.28936/2015, DATED 28-10-2015

APPELLANT(S)/PETITIONER :

**S.ABDUL SHUKOOR, AGED 40 YEARS,
SARABIYODA HOUSE, AGATTI ISLAND,
UT OF LAKSHADWEEP-682 553,
UNLOADING/STEVEDORING CONTRACTOR, AGATTI**

**BY ADVS.SRI.M.P.KRISHNAN NAIR
SMT.RAJESWARI KRISHNAN
SMT.SEEMA KRISHNAN**

RESPONDENT(S)/RESPONDENTS :

- 1. THE ADMINISTRATOR, UT OF LAKSHADWEEP,
KAVARATTI-682 555.**
- 2. THE DIRECTOR, DIRECTORATE OF PORT,
SHIPPING & AVIATION UT OF LAKSHADWEEP, KAVARATTI-682 555.**
- 3. THE DEPUTY COLLECTOR,
AGATTI ISLAND, UT OF LAKSHADWEEP-682 553.**
- 4. SHRI NOUSHAD C.
S/O.KUNHIKOYA B., CHEMMATHODA HOUSE,
AGATTI ISLAND-682 553, UT OF LAKSHADWEEP.**
- 5. SHRI SHARAFUDEEN D.L.,
DARIVINODA HOUSE, AGATTI ISLAND-682 553,
UT OF LAKSHADWEEP.**
- 6. SHRI DAVOOD C.K.
CHERIYANKKADE HOUSE, AGATTI ISLAND-682 553,
UT OF LAKSHADWEEP.**

R1 TO R3 BY ADV. SRI.S.RADHAKRISHNAN, S.C

**THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 06-11-2015,
ALONG WITH WA.NO.2415/2015 & W.P.(C).NO.33634/2015, THE COURT
ON 30-11-2015 DELIVERED THE FOLLOWING:**

ASHOK BHUSHAN, CJ

&

A.M.SHAFFIQUE, J.

W.A.Nos.2399 & 2415 of 2015
and W.P.C.No.33634 of 2015

Dated this the 30th day of November 2015

J U D G M E N T

Shaffique, J

These appeals have been filed by the petitioner in the writ petitions challenging the judgment dated 28/10/2015 in W.P.C.Nos.28936/2015 & 29720/2015. With reference to the very same subject matter, a public interest litigation has been filed as W.P.C.No.33634/2015 which is also heard and decided along with these appeals.

2. The writ petitions were filed by two natives of Agatti island of the Union Territory of Lakshadweep. Their challenge is with reference to Ext.P1 tender notice issued by the Lakshadweep Administration calling for tenders for providing service of loading/unloading/stevedoring, mooring/de-mooring, berthing/de-berthing, derrick operation and rigging, winch operation, shifting of cargo, hatches cleaning works in relation to Government ships at Lakshadweep islands. The period of contract is two years for

cargo ships and passenger ships which are coming to Agatti Island. According to the petitioners, notice inviting tender dated 26/06/2015 was invalid on account of three specific reasons. One is that the tender has restricted contractors from submitting tender to all ships- passenger/cargo in ten islands by restricting tender for either cargo ships or for passenger ships. Secondly, it is contended that there is deliberate and wilful exposure of a mandatory clause which is contained in the normal tender forms that the tender has to be submitted by a contractor having experience of a specified number of years. The experience certificate has to be affirmed and signed by an Executive Magistrate of the respective island. Thirdly, it is contended that the quantum of work has been substantially reduced to help interested persons to submit tender with lesser earnest money deposit and less amount as security deposit. According to the petitioners, the conditions that had been in existence for the last 15 years were unilaterally changed which was for the purpose of helping certain section of the people in the islands. Petitioners have approached the competent authorities and explained the illegality and irregularity. But since they did not take any action

in the matter, the writ petition was filed.

3. Statement has been filed by respondents 1 to 3 in W.P.C.No.28936/2015 inter alia stating that petitioner has participated in the tender. There were 23 bidders, out of which five eligible bidders have quoted for stevedoring and related works of cargo ships at Agatti and petitioner is one among the bidders. The Tender Evaluation Committee held on 18/08/2015 recommended award of the work to the lowest bidder. The petitioner was the second lowest. It is further stated that the department was facing difficulty in timely clearing the ships with a single contractor. There are 26 different ships which include 17 passenger ships/vessels, 5 cargo barges, 2 bollard tugs and two oil barges. Whenever a passenger ship and cargo ship call at an island on the same day, the cargo ship is usually kept idle to attend the passenger ship due to which the cargo transportation to the islands are badly affected. It is stated that the Lakshadweep administration have appointed two contractors at Kavaratti, Amini, Kadmat & Kiltan and they have been able to clear the ships in time subject to availability of other infrastructure facilities like dumb barges, tugs etc. It is taking

into consideration the aforesaid facts that it was decided to have two separate contractors and therefore clause-I of the terms and conditions was incorporated.

4. The Department had deleted the clause regarding condition of experience to have more competition in the field. This is to avoid concentration of the work on the same bidders. According to the respondents, it is done with the intention to improve the transparency and competition of bidders without upsetting the departmental works. It is therefore contended that there is no reason to challenge the tender conditions.

5. Learned Single Judge after a detailed evaluation of the factual and legal issues involved in the matter, dismissed the writ petition.

6. W.P.C.No.33634/2015 has been filed by the petitioner seeking to quash the very same tender notice as being arbitrary, mala fide, illegal etc. The petitioner claims to conduct public interest litigations, had approached this Court contending that the substantial changes had been made in the tender conditions which requires sufficient experience for the contractors. Further, it is contended that experience is an essential requirement for any

contractor to carry on the work and if contractors without any experience are engaged for the above work, it will amount to high risk and danger to the travellers of Lakshadweep island as well as to the goods.

7. The short question to be considered in the writ petition is whether this Court, under Article 226 of the Constitution of India, should exercise judicial review of the tender conditions incorporated by the Lakshadweep Administration with reference to the aforesaid work.

8. The scope of judicial review to be exercised by Courts in respect of matters relating to invitation of tender is well settled by the Supreme Court in **Tata Cellular v. Union of India** [1994 (6) SCC 651]. It is held that while the Court cannot interfere with the Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, but the principles of judicial review would apply in order to prevent arbitrariness or favourism.

9. Therefore the only question to be considered is whether the tender quoted by the Lakshadweep Administration in the above case suffers from any such infirmities. Paragraph 77

of **Tata Cellular** (supra) is relevant which reads as under:

“77. The duty of the court is to confine itself to the question of legality. Its concern should be:

- 1. Whether a decision-making authority exceeded its powers?*
- 2. Committed an error of law,*
- 3. committed a breach of the rules of natural justice,*
- 4. reached a decision which no reasonable tribunal would have reached or,*
- 5. abused its powers.*

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

10. The main contention urged in the writ petition as well as in the appeal is regarding the deletion of a stipulation regarding experience for the work. In the tenders that have been quoted on earlier occasions, there was a clause which is extracted as under:

"The bidder should submit a declaration, as per Annexure - I along with this quotation. The declaration should be executed by the Contractor before Sub Division/Executive Magistrate of the respective islands and countersigned by the SDM/Deputy Collector."

11. Annexure I is with reference to his declaration that the contractor had previous contract experience for a specified number of years. Admittedly, the aforesaid provision had been deleted from the present tender. According to the Administration,

such a clause has been deleted to bring in more contractors and have more competition in the field. However, it is contended that the workers that are normally employed by any contractor would be experienced persons who are competent to do the said work. A perusal of the present tender conditions also discloses the following:

“10. The contractor will solely be responsible for ensuring safety of personnel employed by him/her. He/she will make arrangement for insurance of his labourers at his/her own cost.

11. The contractor shall provide the following minimum labourers suitable for the work. However, labourers should be engaged in such a way that the work should not be delayed.

- a. Supervisors/gang leader : 1*
- b. Crane Operator : 1*
- c. Slings : 4*
- d. Utility hands : 4*

12. The Contractor shall ensure that all persons engaged in work are suitable for the role that they are required to perform.

13. The contractor shall provide sufficient labourers for the works throughout day and night if required when the ship remains secured.

14. The contractor should ensure that children below 14 years are not engaged as labourers, and if found appropriate action will be taken against such contractor.

15. The supervisor appointed by the contractor shall be able to plan the lifting operations ensuring the integrity of the crane, the type of cargo and appropriate slings.

16. Suitable lifting accessories should be selected for cargo with sharp edges where there is a risk of the cargo causing damage to the slings or the slings causing damage to the cargo.

34. In case the contractor fails to undertake the work or violates any of the instruction given by the Director, Port Shipping & Aviation/Assistant Director (OP2)/Port Assistant from time to time, his contract will be liable to be cancelled and the EMD will be forfeited to Government. Such contractors shall also be debarred from future contract of the department."

12. On a perusal of these conditions, by itself would indicate that appropriate provisions are made in the contract to ensure that the assigned work is being done through experienced persons failing which it is possible for the Administration to cancel the contract. That apart, according to the Administration, only

the person who has undertaken the contract for the previous years alone have the experience as contemplated in the earlier tenders and it is to open up the competition that modification had been made in the present tender. Under such circumstances we do not think that deletion of such a clause would amount to any arbitrariness or irrationality on the part of the Administration.

13. Another contention urged is that there is restriction for submitting tender to passenger as well as cargo ships. This again is a policy decision of the Administration to distribute the work to separate contractors so that there shall not be any hold up for the work in any manner. This also being a policy decision, do not suffer from any arbitrariness. When the very intention of the Administration is to ensure more persons in the field of loading/unloading and other activities as tendered, we are of the view that the learned Single Judge was justified in not interfering with the conditions included in the tender.

14. It is apparent from the factual materials available on record that the tenders had been invited in public interest. Petitioners have not ventilated any grievance which could be considered by this Court by intervention to the tender conditions.

We do not think that any error has been committed by the learned Single Judge in dismissing the writ petitions.

We do not find any ground to interfere with the stipulations made in the tender notifications and therefore the writ appeals and the writ petitions are dismissed.

(sd/-)
(ASHOK BHUSHAN, CHIEF JUSTICE)
(sd/-)
(A.M.SHAFFIQUE, JUDGE)

True Copy

PA to Judge

jsr