

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

WA.No. 2551 of 2015 () IN WP(C).15636/2015

AGAINST THE JUDGMENT IN WP(C) 15636/2015 of HIGH COURT OF KERALA DATED
05-10-2015

APPELLANT/PETITIONER IN WPC 15636/15:

INFANT THOMAS,
MATTEL HOUSE, MACHIPLAVU, ADIMALY
IDUKKI.

BY ADV. SRI.P.P.JACOB

RESPONDENTS/RESPONDENTS IN WPC 15636/2015.:

1. THE STATE OF KERALA
REPRESENTED BY PRINCIPAL SECRETARY TO GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM-695001.

2. THE CO-ORDINATION COMMITTEE,
STATE DE-CENTRALIZATION, PLANNING COMMITTEE
REPRESENTED BY ITS SECRETARY, SECRETARIAT
THIRUVANANTHAPURAM-695001.

3. THE CHIEF ENGINEER
LOCAL SELF GOVERNMENT DEPARTMENT, REVENUE COMPLEX,
3RD FLOOR, PUBLIC OFFICE BUILDING
THIRUVANANTHAPURAM-695033.

4. THE DIRECTOR OF PANCHAYATH
OFFICE OF THE DIRECTOR, THIRUVANANTHAPURAM-695033.

5. BABU GEORGE
THEKKEDATH VALAVUKAYATHIL, KALAYOOR P.O.
PATHANAMTHITTA-689645.

BY SR.GOVERNMENT PLEADER SRI.P.I. DAVIS
BY SMT.M.U.VIJAYALAKSHMI

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 17-12-2015,
ALONG WITH WA. 2553/2015 & OTHER CONNECTED CASES, THE COURT
23.12.2015 DELIVERED THE FOLLOWING:

ASHOK BHUSHAN, CJ. & K. RAMAKRISHNAN, J.

.....
W.A.Nos.2551,2553,
2581, 2696, 2697,
2698 & 2708 of 2015
.....

Dated this the 23rd day of December, 2015

JUDGMENT

Ramakrishnan, J.

W.A.No.2551/2015 was filed by the petitioner in W.P.(C). No.15636/2015, while W.A.No.2553/2015 was filed by the fourth respondent in W.P.(C).No.15444/2015, W.A.No.2581/2015 was filed by the additional respondents 5 and 6 in W.P.(C). No.15444/2015 whereas W.A.No.2697/2015 was filed by the additional respondents 4 and 5 in W.P.(C)No.18954/2015. W.A.No.2698/2015 was filed by the additional respondents 4 and 5 in W.P.(C)No.20172/2015 while W.A.No.2696/2015 was filed by the petitioners in W.P.(C).No.22070/2015. W.A.No.2708/2015 was filed by a thirty party against the order in W.P.(C).No.15444/2015 with leave petition I.A.No.1615/2015 and leave was granted and I.A.No.1635/2015 was filed to condone the delay and since he was non party to the proceedings, delay was condoned and appeal was also heard and disposed of along with the above appeals.

2. W.P.(C).Nos.15444/2015 and 20172/2015 were filed by

the District Committee (Pathanamthitta) of Kerala Government Contractors' Federation. W.P(C)No.15636/2015 was filed by the resident of Adimaly, who is also a member of the Adimaly Block Panchayat. W.P.(C)No.22070/2015 was filed by the four petitioners, out of which petitioners 1 and 2 are permanent residents of Pathanamthitta and they are President and Member of Pathanamthitta District Panchayat respectively and petitioners 3 and 4 are residents of Thiruvananthapuram and Malappuram Districts and the President of Nemam Block Panchayat and Azhikode Block Panchayat respectively and they are also the President and Secretary of the Kerala Block Panchayat Association.

3. The common question in all these writ petitions is relating to validity of the Government Order issued directing e-tender to be followed for public work above ₹5 lakhs. Since in all these cases, the common question has to be decided and it was disposed of by a common judgment by the learned Single Judge also, we are disposing of all these appeals by a common judgment. For the purpose of convenience, we are referring

the parties as petitioners and respondents.

4. The case of the petitioner in W.P.(C).No.15444/2015 and W.P.(C).No.20172/2015 was that Local Self Government Institutions is trying to cancel the e-tendering which is implemented in certain panchayats over looking the directions of the judgment of this Court. They alleged that they are the registered associations having 200 members consisting of A class, B class and C class contractors. As per order dated 28.9.2013 Government took a decision to implement e-tender system in Local Self Government Institutions for all tenders worth ₹5 lakhs and above. This decision was challenged before this Court in W.P.(C)No.28179/2013 and connected cases and this Court by a common judgment dated 20.1.2015 dismissed the writ petitions holding that the Government is entitled to adopt any procedure for invitation of tender, evaluation, acceptance, measurement and payment etc and they are not entitled to challenge the policy decisions. It is also observed in that decision that if the Statute is silent about e-tendering process, definitely the Government can issue

executive orders permitting new procedure to be adopted which is a welcome gesture. It is also alleged in the petitions that the Government again as per order dated 7.5.2014 reiterated that e-tender should be adopted for all works costing ₹5 lakhs and above from the financial year 2014-15 specifically stating that non procurement of digital signature cannot be an excuse for waiving e-tender. Since there was an attempt to deviate from the above said decision of the Government, they filed the above writ petitions. It is seen from the judgment that when the case came up for hearing, an undertaking was given by the Government that for the financial year 2015-16, the above said order would be followed and on the basis of the said submission, W.P.(C).No.16477/2014 was disposed of by judgment dated 10.7.2014 directing the third respondent in those cases to follow the guidelines in the aforesaid Government Order from the next tender onwards. It is thereafter that the Government issued order dated 30.4.2015 stating that all public works worth ₹5 lakhs and above have to be implemented through e-tendering. This was insisted because

certain malpractices committed in implementation of the works entrusted to the beneficiary committee were brought to the notice of the Government. It is alleged in the petition that Kannur District Panchayat, Block Panchayats, Presidents' Association and Pathanamthitta District Panchayat expressed their difficulty in implementing e-tender method and the Convener of the State Decentralization Co-ordination Committee constituted a sub committee to consider the same and to the knowledge of the petitioners, sub committee reported that there is no necessity for deviation. He filed a representation dated 22.5.2015 before the Convener apprehending that Convener is likely to deviate from the same. It is on that background that W.P.(C) No.15444/2015 was filed seeking the following reliefs:

- i. To issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to strictly follow Ext.P5 with regard to the execution of public works under the Local Self Government Department.
- ii. Alternatively direct the 3rd respondent to consider

and pass appropriate orders on Ext.P8 with notice to the petitioner and further direct the respondents not to take any decision diluting the Ext.P5 before considering the objection filed by the petitioner as evidenced by Ext.P5 in the light of the subcommittee report that is to be submitted as per the direction in Clause No.2.5 in Ext.P7 in the next meeting that is to be held on 27.5.2015 or on any subsequent days.

iii. To award cost of these proceedings.

iv. To grant such other relief's that may be deemed just and proper by this Hon'ble Court.

5. In W.P.(C)No.20172/2015, it was alleged that without hearing the petitioner, the Convener is going to take a decision and they filed I.A.No.8551/2015 in W.P.(C).No.15444/2015 and the learned Single Judge by order dated 24.6.2015 interdicted the Convener of the State Decentralization Co-ordination Committee from taking any decision in violation of the order dated 30.4.2015. It appears that on 24.6.2015, the Convener took a decision in violation of the order to award works up to ₹15 lakhs without e-tendering and they are now trying to avoid e-tendering and already ten districts have implemented e-tendering in all panchayats and only some of the panchayats

expressed their difficulty and that was done with malafides. It was on that background that the writ petition was filed seeking the following reliefs:

i. To call for the records connected with case leading to Exts.P1 to P6 peruse Exts.P1 to P16 and quash Clause No.2.3 of Ext.P15, the same being illegal, unjust and violative of Exts.P1 and P5 Government order and P2 and P4 judgments of this Hon'ble Court.

ii. To issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents not to award any works of and above Rs. 5 lakhs except through e-tendering.

iii. To award cost of these proceedings.

iv. To grant such other reliefs that may be deemed just and proper by this Hon'ble Court.

6. W.P.(C)No.15636/2015 was filed by a resident of Adimaly, who is also a member of the Admaly block panchayat alleging that as per 73rd amendment of the Constitution, three tire Panchayat Raj System was introduced and as per Section 254 of the Panchayat Raj Act, the Government issued SRO

No.786/1997 whereby it was provided that the method of public work would be decided considering the possibility of executing the work through the beneficiary committee and priority should be given to such methods and if priority cannot be given, the reason must be specified in the decision of the panchayat. Following the above, the work having the estimate cost up to ₹15 lakhs is being executed through beneficiary committee and the work having the cost of above ₹15 lakhs would be executed by inviting tenders. Contrary to the same, Government issued two orders dated 21.4.2015 and 30.4.2015 directing the works up to ₹15 lakhs also should be conducted through beneficiary committee and work of ₹ 5 lakhs and above should be done only by inviting e-tenders. This is being challenged by the petitioner seeking the following reliefs:

i. Issue a writ of certiorari or any other writ, order or direction calling for the records leading to the issue of Ext.P1 & P2 and quash the same.

ii. Issue a writ of mandamus or other writ or order directing the respondents to follow the method of works being conducted having the estimate cost of up to Rs.15 lakhs

through the beneficiary committee and the estimate cost worth more than Rs.15 lakhs by invitation of tenders as provided by the Rules.

iii. Issue such other reliefs which may be deem fit and proper in the facts and circumstances of the above writ petition.

7. W.P.(C).No.22070/2015 was filed by the four persons, of which petitioners1 and 2 in that petition are permanent residents of Pathanamthitta District and they are also President and member of the Pathanamthitta District Panchayat, while petitioners 3 and 4 are residents of Thiruvananthapuram and Malappuram Districts and the President of Nemam Block Panchayath and Azhikode Block Panchayat respectively and they are the President and Secretary of Kerala Block Panchayat Association as well. They also challenged the direction of the Government to adopt e-tendering for works worth ₹5 lakhs and above seeking the following reliefs:

i. Declare that by virtue of Rules 3 and 13 of the Kerala Panchayat Raj (Execution of Public Works) Rules, 1997, the Panchayats have absolute discretion for implementation of development works and public works

through Beneficiary Committee in accordance with Rules 5 and 6 of the Rules without inviting tenders under Rules 8 to 10;

ii. Declare that Exts.P1, P2 and P4 to P12 have no application when then Panchayat decides to execute development, public works through Beneficiary Committee in accordance with Rules 3 and 13 of the Kerala Panchayat Raj (Execution of Public Works) Rules, 1997;

iii. Issue a writ of certiorari or any other appropriate writ order or direction calling for the records leading to Exts.P1, P2 and P4 to P12 and quash the same to the extent they interfere with the discretion of the Panchayats in executing development public works through Beneficiary Committee in accordance with Rules 3 and 13 of the Kerala Panchayat Raj (Execution of Public Works) Rules, 1997 up to an estimated cost of Rs.15 lakhs as permitted under Ext.P14;

iv. Issue such other and further reliefs as this Hon'ble Court deem fit and proper in the facts and circumstances of the case.

8. W.P.(C).No.18954/2015 was filed by the President of Kaviyoor Grama Panchayat. He had submitted in the petition that

when Government Order dated 28.9.2013 directed the Local Self Government (EW) Department to implement e-tendering for all tenders of ₹ 5 lakhs and above, that was challenged in W.P. (C).No.31787/2013 and connected cases and that was repelled by this Court and as per notification dated 30.4.2015, it was clearly stated that only those works which are below ₹ 5 lakhs would be done through beneficiary committee and above ₹5 lakhs, e-tendering method will have to be adopted. It is understood that there are attempts to deviate from this. So in order to avoid that, the present writ petition was filed seeking the following reliefs:

i. issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to strictly follow Ext.P7 with regard to the execution of public works under the Local Self Government Department.

ii. To direct the 3rd respondent to consider and pass appropriate orders on Ext.P11 with notice to the petitioner and further direct the respondents not to take any decision diluting the Ext.P7 before considering the objection filed by the petitioner as evidenced by Ext.P12 and P12(a) in the light of the subcommittee report that is to be submitted in the

next meeting, that is to be held on 24.6.2015 or any subsequent days;

iii. award the cost of this proceedings, and

iv. Such other reliefs that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

9. The learned Single Judge by interim order dated 6.7.2015 in W.P.(C).No.20172/2015 directed to keep the operation of 2.2 in Ext.P15 in that case, in abeyance for two weeks. Later it was clarified that the said order would not stand in the way of the Co-ordination Committee in taking a final decision in the matter. Later, as per interim order dated 22nd July, 2015 it was made clear that the interim order already passed shall not stand in the way of the Chief Engineer and the District Planning Committee in approving the proposals already submitted by the panchayat through proper channel. But it was made clear in the order itself that though it was open to the aforesaid committee to approve the proposal, no further action pursuant to the same should be taken without any further orders from this Court. It is also clarified in the order that permission

for approval was granted only to avoid the exigency of getting the proposals lapsed on account of delay and it was made clear that the same would not confer any special right on any of the parties. It is also seen from the judgment that as per order dated 28.9.2013 and 7.5.2014, the Secretary for Local Self Government (EW) Department has decided to adopt Central Public Works Department (CPWD) Data, Delhi Schedule of Rates (DSR). National Buildings Code Guidelines and Ministry of Road Transport and Highways (MoRTH) specifications in the Local Self Government Department and the same was implemented for the annual schemes from 2014-15. It is also seen from the impugned judgment that various guidelines have been issued in implementation of the above projects in the Local self Government Department as per Government Orders dated 28.9.2013 and 7.5.2014. Further Clause 14 of G.O. Dated 7.5.2014 (marked as Ext.P3 in W.P.(C).No.20172/2015) specifically states that e-tendering should be adopted for all works costing ₹5 lakhs and above from the financial year 2014-15 onwards.

10. After hearing the concerned counsel, learned Single Judge by a common judgment dismissed W.P.(C).No.15636/2015 and W.P.(C).No.22070/2015 and disposed of W.P.(C).Nos.15444/2015, 18954/2015 and 20172/2015 quashing Clause No.2.2 of Ext.P15 in W.P.(C)No.20172/2015 and directed the respondents to follow G.O.(Rt).No.1288/2015/LSGD dated 30.4.2015 which is marked as Ext.P5 in W.P(C).No.15444/2015 with regard to execution of public works under the Local Self Government Department. It is also directed that the respondents were directed not to award any works above ₹5 lakhs with regard to the execution of public works under the Local Self Government Department except through e-tendering. The above decision of the learned Single Judge in the common judgment is being challenged by the appellants in these appeals.

11. The appellant in W.A.No.2708/2015 was not a party to W.P.(C).No.15444/2015 and being aggrieved party, he filed the above writ appeal and we have granted leave to file appeal and after condoning the delay, the appeal was also decided to

be disposed of along with the other connected appeals.

12. Heard Sri.K. Jaju Babu, learned senior counsel appearing for the appellants in W.A.Nos.2696/2015, 2581/2015, 2697/2015 and 2698/2015 and Sri.P.P. Jacob, learned counsel appearing for the appellant in W.A.Nos.2551/2015 and 2553/2015 and Sri.S.Muhammed Haneef, learned counsel appearing for the appellant in W.A.No.2708/2015 and Sri. Raju Joseph, learned senior counsel appearing for the contesting respondents in these appeals and Sri. P.I. Davis, learned senior Government Pleader appearing for the State.

13. The common contention of all the appellants in these appeals was that as far as Panchayats are concerned, Panchayats were given discretion to allot the works to be executed either by the beneficiary committee or by the Panchayat itself or through contract basis. By virtue of the Government Orders, the right of the Panchayat to exercise their discretion to allot the work to be adopted by the methods provided under the Statue has been curbed. Further, according to the senior counsel Sri. K.Jaju Babu, the decision relied on by

the learned Single Judge do not consider the question of power of the Panchayat regarding the work to be done through the beneficiary committee. So, according to the learned counsel, the learned Single Judge was not justified in rejecting the prayers of the appellants as that will amount to usurping the power of the Panchayat by the Government, which is not contemplated by the Statue.

14. Sri. P.P. Jacob and Muhammed Haneef supported the submission of senior counsel Sri. K. Jaju Babu. They also submitted that if such a procedure is adopted, then it will cause hardship to the Panchayat and huge amount will be lapsed and no work can be done through the beneficiary committee.

15. On the other hand, senior counsel Sri. Raju Joseph submitted that the Government has got power under section 189 of the Panchayat Raj Act to issue necessary guidelines regarding implementation of certain projects funded by the State Government and the Central Government and it is on the basis of that the Government has decided to issue circulars directing the Local Self Government Institutions to execute the

work of estimate of ₹5 lakhs and above by e-tendering in order to maintain transparency in the transaction and to avoid corruption. Except certain panchayats, all other Local Self Government Institutions in Kerala have implemented the direction and the Panchayats never objected the same and only certain persons who are really beneficiaries of executing work through beneficiary committee have come up with this writ petition. He had also submitted that the Co-ordination Committee had by their decision dated 23.5.2015 found that allotting work estimate of more than ₹5 lakhs should be done by resorting to e- tender and Local Self Government Institutions are not to be exempted from this. Further, it is submitted that another notification dated 17.11.2015 was issued by the Government reiterating the stand in this regard.

16. Learned Senior Government Pleader also submitted that the Government has got power to give guidelines by issuing executive orders in respect of financial matters and that power cannot be curtailed.

17. The points that arise for consideration are:

(i) Whether the Government has power to issue direction to implement public works worth on or above Rs. 5 lakhs to be done through e-tender?

(ii) Whether the direction so issued by the Government is against the Statute and amount to intrusion into the powers of the Panchayat as contended by the appellants?

(iii) Whether the common judgment of the Single Judge suffers any infirmity requiring interference in these appeals?

18. At the outset, it may be mentioned that Government had decided to execute public work over and above the estimate of ₹5 lakhs to be done through e-tender. This was made applicable to Local Self Government Institutions as well. None of the Panchayats in their official capacity have challenged the decisions of the Government in this regard. Some of the appellants are though claim to be member and President of the District and Block Panchayats, they did not challenge the same in their official capacity but in their individual capacity alone. The other contesting parties are the Contractors or some of

the members of the Association of the Contractors. The main contention raised by the counsel for the appellants in all these cases was that as far as Panchayat is concerned, they have been given right to execute the work of the Panchayat by three methods namely through beneficiary committee or by the Panchayat itself or by contract basis by calling for tenders. The gist of the submission is that, as far as possible, works will have to be done through beneficiary committee and if it not to be allotted to the beneficiary committee, the reason must be stated by the Panchayat for the same and by virtue of the restrictions imposed, the power of the Panchayat has been curtailed which is against the Statue, is the main contention raised. But it may be mentioned here that, on going through the allegations in the writ petitions which are supporting the e-tendering method for work above ₹ 5 lakhs will go to show that the Government has taken a decision in this regard to avoid corruption in implementing the schemes of the Government by its instrumentalities including Local Self Government Institutions and to maintain transparency in the transactions. It is also

seen from the allegations that such a stand was taken by the Government when it was brought to the notice of the Government that the works allotted to the beneficiary committee itself are not being done properly, large scale corruption is noticed in executing the work and this is being done under benami names as well through some contractors. It is on that background that the Government had decided to issue the circular to implement e-tendering method for all public works to be conducted by the State instrumentalities including Local Self Government Institutions as mentioned above.

19. It is fairly conceded by the counsel for the appellants that Government has got power to issue circulars and issue guidelines and they do not want to curtail the power of the Government in this regard, but at the same time, this Court by virtue of the judgment or direction should not curtail the power of the Government to enhance the financial limit in respect of which e-tendering has to be adopted as well.

20. It is also a settled law that as regards the financial policy of the Government is concerned or any policy decision

taken by the Government in respect of handling of public money by its instrumentalities including Local Self Government Institutions, the court should not sit in judicial review of that aspect and interfere with the policy of the Government unless the court is satisfied that it is arbitrary, discriminatory, malafide and unconstitutional and it was against reasonableness mentioned in the decision in this regard (see **State of Punjab v. V.K. Khanna** (AIR 2001 SC 343) and **Directorate of Education v. Educomp Datamatics Limited** (2004 (4) SCC 19)). It is also settled law that the Government can exercise its executive power under Article 162 of the Constitution of India to issue orders which are not covered by the Statute as decided in **Rai Sahib Ram Jawaya Kabur & Others v. State of Punjab** (AIR 1955 SC 549).

21. Section 189 of the Kerala Panchayat Raj Act reads as follows:

**189.General Power of Government to issue
guidelines and to conduct enquiry:- (1)**
Notwithstanding anything contained in this Act, the

Government shall have the power to issue general guidelines to the Panchayats in accordance with the National and State Policies in matters such as finance, maintenance of accounts office management, formulation of schemes, selection of sites and beneficiaries, proper functioning of Grama Sabha, welfare programmes and environmental regulations and the Panchayats shall comply with such directions.

(2) If there is any default in the implementation of schemes or maintenance of accounts or complaint is received in the matter, Government may arrange for enquiry into the matter and the Panchayat shall co-operate with such enquiry.

(3) After such enquiry, Government may take such action as is necessary and permissible under this Act."

22. It is seen from the above section that a general power has been given to the Government to issue general guidelines to the Panchayats in accordance with the National and State Policies in matters such as finance, maintenance of accounts, office management, formulation of schemes, selection of sites and beneficiaries, proper functioning of Grama Sabha, welfare

programmes and environmental regulations and Panchayats have to comply with such directions. So this gives power to the Government to monitor and supervise the Panchayats taking into account the general standard prescribed by the National and State Policies in respect of finance and other matters mentioned in the section.

23. Further Rule 3 of the Kerala Panchayat Raj (Execution of Public Works) Rules, 1997 deals with procedure and execution of public works by the Panchayat, which reads as follows.:

“3. Procedure and execution of public works:-

(1) The Panchayat shall prepare a priority list of the public works intended to be executed in a Panchayat by including in the scheme or otherwise, at the beginning of a financial year.

(2). The rough cost estimate of each public work intended to be executed shall be prepared accordingly.

(3). Subject to sub-rule (1) of Rule 6, the Panchayat shall decide how to execute each public work; whether on contract basis, or directly by the Panchayat or through the beneficiary committee and that shall be made clear while

administrative sanction is given.

(4) The Panchayat may decide whether a public work may be executed through contractors if such public work involves technicality, machinery to be used and required the supervision of experts or directly by the Panchayat if it can be executed urgently and profitably by using local materials or through beneficiary committee if it can be executed by the participation of beneficiary committee:

Provided further that the execution of public works according to the scheme formulated by the Central or State shall be subject to the guidelines issued by the Central Government or the State Government in this regard.

(5) If the Panchayat is convinced that a contract that may be fixed for any public work is having inordinate rate or the contract period is longer and if such work can be executed at a lower cost, directly by the Panchayat or through the beneficiary committee, the Panchayat may so decide.

(6) The manner in which a public work is decided to be executed, the reason for such a decision shall be specified in the decision of Panchayat.

Explanation:- If a patasekhara committee or a

parent teacher association or any other similar committee is functioning in a Panchayat and in the case of a public work connected with it, such committee may be considered as a beneficiary committee”.

24. Rule 2(e) of the said Rules defines “Beneficiary Committee” which means a committee, elected under sub rule (2) of Rule 13 by the people of the area who get the benefit due to implementation of public work.

25. Rule 13 of the said Rules deals with execution of work through beneficiary committee which reads as follows:

13. Execution of work through the beneficiary committee:- (1) In the case of works executed through a beneficiary committee, the procedures laid in Rules 8,9 & 10 shall not be followed, but the procedures in the sub-rules (2) to (6) of this rule shall be followed.

(2) [The Officer of the Panchayat who is in charge of the public works (Executive Officer) as authorised by the Panchayat, shall subject to the general guidelines of the Government and after giving notice to all the beneficiaries concerned, convene a meeting of the people of the locality who are beneficiaries due to the implementation of the works which

shall be presided over by the Panchayat member of the said locality and the meeting shall] elect a beneficiary committee and there shall be an Executive Committee thereof consisting of not more than 15 members and not less than 7 members of which one third shall be women and there shall be a convener, for the executive committee:-

Provided that a member of a Panchayat shall not act as a convener or member of the beneficiary committee or its Executive Committee.

(3) The total expenditure of the work executed by the beneficiary committee shall not exceed the amount in the estimate prepared under Rule 6.

Provided that if the Panchayat considers that the total cost exceed the estimate cost due to the expenditure on execution of work, subscription towards the Construction Workers' Welfare Fund, various items of taxes, and the increased rates of local price of materials and labour charges, Panchayat has the power to give such excess expenditure not exceeding 5% of the estimate cost to the beneficiary committee:

Provided further that, the Panchayat shall obtain the previous sanction of the technical committee specified under sub-rule (1) of Rule 5 where the excess over the estimate is

more than five per cent.

(4) The Executive Committee Convener of the Samithi shall enter into an agreement with the Panchayat in conformity with the decision of the Government for due performance and completion of work undertaken by the beneficiary committee. A bond [signed by the members of the executive committee] shall be given to the Panchayat by entrusting the convener to enter into such agreement, by agreeing the right to complete the work at their risk, if the execution and completion work is not satisfactory, directly by the Panchayat or through the contractor and by agreeing to realise jointly and severally from the members of the beneficiary committee including the convener the loss sustained by the Panchayat.

(5) In the case of work executed by the Panchayat through the beneficiary committee, there shall be no binami transactions and if the binami transactions are revealed, the contract entered into by the convener of the Executive Committee of the beneficiary committee under sub-rule(4) shall be set aside at the risk of the beneficiary committee and the work shall be completed either by the Panchayat directly or through contractor and the persons responsible for the binami transactions shall be held liable for the misuse of

Panchayat fund.

(6) Convener of the Executive Committee of the beneficiary committee shall keep in writing the details of quality, quantity and price of goods and materials, number of labourers, wages and connected details of the work and entrust it to the Secretary of the Panchayat on completion of work.

(7) An amount of 25% of the estimate or [Rs.1,00,000 (One lakh)], whichever is less may be given in advance to the Convener of the Executive Committee of the Panchayat Committee and interim payment may be sanctioned in proportion to the work executed and proportionate portion of advance may be deducted from it and the interim payment and the remaining portion of advance amount shall be deducted from the final bill."

26. Rules 8, 9 and 10 deals with the procedure to be followed by the Panchayat in respect of works to be done by them or by calling tender, which reads as follows:

"8 Invitation of Tenders:- (1) Upon the orders of the President, the Secretary or any other officer authorised by the Panchayat, shall invite tenders for execution of public work if the Panchayat has decided to execute it through a contractor:

Provided that, for works of which the estimated cost does not exceed rupees five thousand and for works of an emergent nature to be executed under sub-section (5) of Section 156, tender may not be invited compulsorily and the execution of such works shall be arranged by short notice quotation or by the Panchayat directly.

(2) Notwithstanding anything contained in sub-rule (1) every works of which estimated cost is Rs.70 lakhs or more pre-qualification tender shall be invited compulsorily and for this purpose a panel of contractors shall be prepared by the Panchayat with the sanction of the technical committee specified under sub-rule (1) of Rule 5 and tender shall be invited only from such contractors included in that panel.

(3) There shall be no condition for securing supply of steel, cement, etc., by the Panchayat to the contractor, for a tendered work and the contractor shall purchase and utilise them and the concerned Engineer shall satisfy the quality of the materials by testing them:

Provided that, for reason to be recorded, if the construction materials are supplied by the Panchayat, its cost shall be realised from the contractor in accordance

with the rules in force in the Public Works Department.

(4) The liability to pay the taxes, subscription towards the Construction Workers Welfare Fund etc., shall be on the contractor.

9. Publication of tender notice:- (1) The notice inviting tender shall be published on the notice board of the Panchayat office, offices of the Public Works Department of the Government in the Panchayat area and in other offices which may deem necessary

(2) The notice inviting tenders published under sub-rule (1) shall include the following particulars, namely:-

- (i) the name and details of work;
- (ii) The time within which the work shall be completed;
- (iii) Rough estimate amount;
- (iv) Place from which tender form can be obtained;
- (v) Last date and time of acceptance of tender;
- (vi) To whom tender shall be submitted;
- (vii) Appointed time and place where scrutiny of plan, estimate and conditions of contract can be made;
- (viii) Details as to whether actual cost of the work to

be recorded or fixed percentage excess or below
or over the estimated rate to be recorded or
separate rates for each item or work included in
the estimate shall be stated in the tender;

(ix) Time at which and place where tenders shall be
opened;

(x) The amount of earnest money deposit along with
the tender and if the tender is accepted the amount
of security deposit to be remitted;

(xi) The Panchayat reserves the right to reject any tender
or all tenders without assigning any reason.

(3) The precise form of the tender notice shall be
published in the newspaper in the following manner,
namely:-

(a) in the case of works of which the estimate cost
comes between rupees one lakh and rupees ten lakhs, in
a daily having wide circulation in the Panchayat area and
if necessary, in other dailies, by giving not less than ten
days time.

(b) In the case of works of which the estimate cost
comes between rupees ten lakhs and rupees fifty lakhs, in
two Malayalam dailies having wide circulation all over the
State, compulsorily and if necessary, in other dailies, by

giving not less than twenty days time.

(c) In the case of works of which the estimate cost exceeds rupees fifty lakhs, in two Malayalam dailies having wide circulation all over the State and in an English daily having wide circulation in national level compulsorily and if necessary, in other dailies, by giving not less than twenty days time.

10. Acceptance of tenders:- (1) Sealed tenders shall be submitted before the officer who has issued tender notice, Postal tenders can also be sent in the manner as specified by the Government.

(2) Along with the tender, there shall be the earnest money as stated in the tender notice, which may be submitted in cash or in the form of National Savings Certificate or any other bond as specified by the Government.

(3) A preliminary agreement in the proforma as specified by the Government shall be enclosed with the tender for the work of which the estimated cost exceeding rupees fifty thousand.

(4) Tender rates in the tender shall be recorded both in figures and in words.

(5) The list of cash received as earnest money and

other documents shall be kept by the officer who receives the tender.

(6) The tenders in sealed covers shall be kept in sealed box under the direct safe custody of the officer who received the tender, until they are opened and they shall be opened by the above officer at the time appointed in that behalf, in the presence of such of the contractors of their agents who have submitted the tenders.

(7) Corrections, if any, made and authenticated by the tenderer in each tender shall be serially numbered and initialled against them by the officer who opens the tender. If there are unauthenticated correction, that correction shall be noted in the tender.

(8) The officer who opens the tender shall put his signature in the tender by recording in his own handwriting both in words and figures the percentage of tender rate recorded by the contractor.

(9). Details of tenders received shall be entered in the tender register and the signature of the contractors who were present at the time of opening of the tenders shall be obtained in the tender register.

(10) Opened tenders shall as soon as possible may be tabulated by the authorised officer and with the

remarks of the Panchayat Engineer it shall be placed before the competent authority for deciding which of the tenders shall be accepted.

(11) The authority who has accorded administrative sanction to the estimate under Rule 4 shall be the authority competent to decide which tender shall be accepted. Decision shall be taken not later than within ten days from the date of opening of the tender.

(12) Subject to sub-rule(14) the lowest tender shall be accepted for every public work:

Provide that where the competent authority, on a report to that effect by the Secretary endorsed by the Panchayat Engineer, is satisfied that it will not be desirable to accept the lowest tender, the next higher tender may be accepted by rejecting the lowest tender after recording the genuine reasons.

(13) A tender in excess of the estimated cost of a work shall be accepted only if a certificate is recorded by the Panchayat Engineer and the Secretary to the effect that the failure to obtain a tender within the estimated cost is not due to want of publicity for the tender notice and that no advantage is likely to be secured in inviting fresh tenders for the work.

(14) Notwithstanding anything contained in sub-rule (11) the previous sanction of the technical committee specified in sub-rule (1) of Rule 5 shall be obtained where the excess over the estimated amount is more than five per cent of such amount.

(15) The person whose tender is accepted shall deposit 5% of the amount of agreement as security deposit (including earnest money) and shall sign the agreement bond."

27. Rule 18 of the Kerala Panchayat Raj (Execution of Public Works) Rules, 1997 deals with Observance of Procedure in the Government Department, which reads as follows:

18. Observance of procedure in the Government

Department:- Save as otherwise expressly provided in these rules, the rules and methods adopted in the Public Works Department of Government in the matter of preparation of estimates and plans of works, invitation of tender, execution of work, payment for such works, system of accounting etc, shall be followed in respect of execution of public works.

28. Sub-rule (3) of Rule 13 imposes restriction on the

amount which shall not exceed the amount in the estimate prepared under Rule 6. It also put restriction regarding getting previous technical sanction specified under Sub-rule (1) of Rule 5 where the excess over the estimate is more than 5%. It is true that Rule 13 says that procedure laid down in Rules 8, 9 and 10 shall not be followed in cases where the work will have to be executed through beneficiary committee. That does not mean that the Government has no power to restrict the cost of works to be carried out through the beneficiary committee.

29. Further, senior counsel Sri. Raju Joseph has provided the report of the Co-ordination Committee constituted to consider and report on the issue related to e-tendering and execution of public works through beneficiary committee dated 23.5.2015. In that report, it has been found that there were large scale mal- practices and corruption in carrying out the public works through the beneficiary committee by the Panchayats and there is no method by which the transparency of the transaction being executed through beneficiary committee can be ensured and it was under that circumstances that the

Government issued G.O.(Ms)No.318/2013/LSGD dated 28.9.2013 prescribing the e-tender system in LSGD for all tenders worth ₹5 lakhs and above. Further, detailed guidelines for adoption of CPWD rate and e-tendering was issued vide G.O(Ms) No.74/2014/LSGD dated 7.5.2014 and when the Contractors' Union challenged these orders, this Court in W.P.(C). No.28179/2013 approved the procedure adopted by the Government in respect of invitation of tender, evaluation, acceptance, measurement, payment etc and the contractors have to comply with such stipulations. It is also opined by the committee that the Government has got power in this regard and the committee has considered all the facts and came to the following conclusions.

“The Committee considered all the facts mentioned above and came to the following conclusions.

(i) e-tendering is the best solution for ensuring transparency and protecting the financial interest of Local Governments.

(ii) The specific question of executing works costing Rs.5 lakhs and above through Beneficiary Committees was

considered by the Hon'ble High Court twice and rules against it. Any decision against the spirit of the order can be challenged in the court.

(iii) The intention of the Government, expressed through the Government Order dated 12.5.2015 of Information Technology Department is to resort to e-tender all works of all Departments and PSUs, costing Rs.5 lakhs and above Local Government are not exempted from this. In this circumstances a rethinking to enhance the limit of Beneficiary Committee works is not possible and feasible".

30. The Senior Government Pleader has also placed the order of the Government in GO(Ms)No.13/2015/ITD dated 12.5.2015 in which the Government had approved the decision taken by the APEX Committee for e-Governance, which reads as follows:

GOVERNMENT OF KERALA

Abstract

Information Technology Department - e-Procurement - Lowering e-Procurement slab to Five Lakhs - Decision of APEX Committee for e-Governance - Approve
- Orders issued.

INFORMATION TECHNOLOGY (b) DEPARTMENT

C.O.(Ms) No.13/2015/ITD Dated, Thiruvananthapuram , 12.05.2015

Read: 1. GO(Ms) No.20/2014/ITD, dated 28.5.2014.
2.Minutes of the meeting of Apex Committee for e-Governance held
on 24.2.2015.

O R D E R

“Government are pleased to approve the decision taken by APEX Committee for e-Governance that met on 24.2.2015 to lower the e-Procurement slab from Rupees Twenty Five Lakhs to Rupees Five Lakhs and order that all Government Departments/Boards/Public Sector Undertaking shall follow e-Government Procurement for all tenders above Rupees Five Lakhs with immediate effect. NIC shall include e-Payment Gateway in e-Procurement Solution of NIC to cover more banks in the e-Procurement System”.

(BY ORDER OF THE GOVERNOR)

P.H. Kurian I.A.S

Principal Secretary to Government

To

All Additional Chief Secretaries/Principal Secretaries/Secretaries.
All Heads of Departments.
The Director, Kerala State IT Mission, Thiruvananthapuram.
The Additional Secretary, Ministry of Communication & Information
Technology, Department of Information Technology, Electronics Niketan,
6CGO Complex, New Delhi-110003 (with C/L)
The Principal Accountant General (Audit) Kerala, Thiruvananthapuram
The Accountant General (A&E), Kerala, Thiruvananthapuram
The Additional Secretary to Chief Secretary.
The Finance Department.

The Store Purchase Department.
The State Informatics Officer, NIC, Thiruvananthapuram.
Web & New Media, 1 & PRD (for uploading in the website)
Stock file/Office Copy.

Forwarded/By Order

Sd/-
Section Officer

31. Further, senior counsel, Sri. Raju Joseph, had also produced for our perusal G.O.(P) No.524/15/Fin dated 17.11.2015 issued by the Finance (Industries & PWB) Department reiterating the policy of the Government to adopt e-tendering for works above Rs.5 lakhs G.O.(P) No.524/15/Fin dated 17.11.2015, which reads as follows:

GOVERNMENT OF KERALA

Abstract

Finance Department - Implementation of E-tender for all public works above
Rs.5 lakhs - orders issued.

FINANCE (INDUSTRIES & P.W.D) DEPARTMENT

G.O.(P)No.524/15/Fin

Dated Thiruvananthapuram, 17/11/2015

Ref:- (1) G.O.(P) No.431/2015/Fin dated 29.9.2015.

(2) Judgment dated 5.10.2015 in Writ Petition Nos.15444,

15636,18954, 20172 & 22070/15 of the Hon'ble High Court of Kerala

O R D E R

“The Government have issued orders as per ref.no.1 exempting all public works by utilizing MLA fund upto Rs.15 Lakhs from the purview of electronic tendering. However the Hon'ble High Court of Kerala as per ref.no.2 has declared that all the public works under the Local self Government Department above Rs.5 lakhs should be implemented through electronic tender.

In the light of the judgment of the Hon'ble High Court of Kerala it is not proper to exempt the public works above Rs.5 lakhs from E-tendering. Hence it is ordered that the order as per ref.no.1 is withdrawn and all the works estimating Rs.5 lakhs and above shall be implemented only through e-tender.”

As ordered by the Governor

Dr.K.M. Abraham

Additional Chief Secretary (Finance)

32. It is clear from this that G.O.(P).No.431/2015/Fin dated 29.9.2015 by which the Government has decided to exempt e-tendering in respect of public works including utilizing MLA fund up to 15 lakhs from the purview of electronic work was withdrawn. It is true that it was on the basis of the order of this Court that the impugned order was issued. But the real

aggrieved persons on account of these Government Orders are the Panchayats. None of the Panchayats have challenged the act of the Government in issuing such orders stating that it will amount to usurping their power vested under the Panchayat Raj Act and thereby it is unconstitutional. The persons, who attacked the same are only persons claim to be affected parties namely the Contractors, who are not entitled to challenge the policy decision of the Government in implementing e-tendering in respect of public works involving public money. There is no bonafides on the part of the appellants in challenging the decision of the Government in implementing e-tender in respect of public works where the estimate is of ₹5 lakhs and above. It is clear from the recommendation mentioned above of the Co-ordination committee that this decision was taken by the Government to curb corruption and to ensure transparency in the utilization of public money in executing public works by its instrumentalities including Local Self Government Institutions and such power is vested in the Government in respect of Panchayats under section 189 of the

Kerala Panchayat Raj Act. It does not mean that the Government has no power in appropriate cases to enhance the limit. But that must be done by the Government with due care and caution and by proper application of mind and not by mere asking by some of the Panchayats or through some persons claim to be champions in the public cause to protect the interest of the public in executing the work through public instrumentalities. We are of the view that Government has got a duty to see that good, effective and corruption free Governance must be implemented and transparency is ensured in all public transaction for which public money is involved and implementing e-tendering in implementing public works as decided by the Government will only enhance that object and protect the interest of the public and that cannot be viewed as intruding into the power of the Panchayat as contended by the counsel for the appellants. So in view of the above discussions, we do not find any reason to interfere with the judgment passed by the learned Single Judge as the Single Judge has considered all the aspects and found that the intention of the Government

in issuing such circular is in the public interest and that does not call for any interference and rightly disposed of the writ petitions with directions as mentioned in the impugned judgment and we do not find any reason to interfere with the same.

So the appeals lack merits and the same are hereby dismissed.

Sd/-
ASHOK BHUSHAN,
CHIEF JUSTICE.

Sd/-
K. RAMAKRISHNAN,
JUDGE.

cl

/true copy/

P.S to Judge

W.A.Nos.2551,2553,
2581, 2696, 2697,
2698 & 2708 of 2015

W.A.Nos.2551,2553,
2581, 2696, 2697,
2698 & 2708 of 2015