

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

WP(C).No.881 of 2015 (I)

PETITIONERS:

1. **DR.RAJU MATHEW,EDATHALA HOUSE,
RAMALLOR,KOTHAMANGALAM.**
2. **SEBASTIAN K.KURIAN,PROPRIETOR OF
M/S.MACHINE LAND,PMC/VII/C-20,21,
VEGETABLE MARKET SHOPPING COMPLEX,
PERUMBAVOOR-683 542.**

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

RESPONDENTS:

1. **STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO THE GOVERNMENT,
DEPARTMENT OF PORTS,THIRUVANANTHAPURAM-695001.**
2. **DIRECTOR OF PORTS,DIRECTORATE OF PORTS,
VALIATHURA,VALLAKKADAVU.P.O.
THIRUVANANTHAPURAM-695 008.**

R1-R2 BY GOVT.PLEADER SRI.JOSEPH GEORGE.

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 29.1.2015 THE COURT ON 25-02-2015, DELIVERED THE FOLLOWING:**

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WP(C).No.881 of 2015 (I)

APPENDIX

PETITIONER'S EXHIBITS:

**EXT.P1-TRUE COPY OF TENDER NO.PD/DOP/C1/15/2014-15/SN PRINTED FROM
HTTP://ETENDERS.KERALA.GOV.IN.**

**EXT.P2-TRUE COPY OF PROJECT CONCEPT, INFORMATION & INSTRUCTIONS
TO BIDDERS AND ANNEXURES, OF EXT.P1, PRINTED FROM
HTTP://ETENDERS.KERALA.GOV.IN.**

**EXT.P3-TRUE COPY OF MALAYALA MANORAMA NEWSPAPER OF 31ST
DECEMBER 2014, WHEREIN DETAILS OF EXT.P1 IS PUBLISHED.**

**EXT.P4-CORRIGENDUM TO EXT.P1 DATED 26.12.2014 PRINTED FROM
HTTP://ETENDERS.KERALA.GOV.IN**

RESPONDENT'S EXHIBITS:

EXT.R2(a):TRUE PHOTOCOPY OF G.O (MS)71/2014/F & PD DATED 15.12.2014.

//TRUE COPY//

P.S. TO JUDGE

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C.R.

P.R. RAMACHANDRA MENON, J.

W.P.(C) No.881 of 2015

Dated this the 25th of February, 2015

JUDGMENT

Exts.P1 to P3 tender proceedings, floated by the 2nd respondent, in connection with awarding the work of 'Ponnani Port Drudged material purification - Extraction of construction graded sand removing all impurities and processing of byproducts - selection of agency through '**Swiss Challenge Method**'" are under challenge in this writ petition.

2. The main ground of challenge is that, the modalities prescribed for adopting '**Swiss Challenge Method**', particularly the guidelines evolved by the Apex Court as per the decision reported in **(2009) 7 SCC 462 (Ravi Development Vs. Shree Krishna Prathisthan)**, have not been followed and that an adverse clause has been incorporated in the tender for providing compensation to an extent of Rs.25,00,000/- (Rupees Twenty five lakhs only) to the original propounder of the project, if the bid to be quoted by the others like petitioners comes to be

accepted. Despite Ext.P2 tender being an 'International competitive bidding', very short time frame was given to participate in the process and that undue advantage and preferential treatment are sought to be extended to the propounder of the project, whose particulars have not given in the tender documents, nor is there any detail with regard to the particulars of the project and the study/analysis made by the respondents in fixing the compensation payable.

3. The first petitioner is an A-Class registered contractor having sufficient experience, doing major Government contract works for more than two decades and the 2nd petitioner is stated as a Trader in heavy industrial machinery, also having experience in trading of river sand and undertaking Central Government contracts and other related activities.

4. The petitioners came across a tender published in the Government Website in connection with the above project, particulars of which have been extracted and produced as Ext.P1. The petitioners, being desirous of participating in the tender, downloaded the relevant documents and a copy of the downloaded file is produced as Ext.P2. According to the

petitioners, Ext.P2 tender was published in the newspaper (Malayala Manorama daily) only on 30.12.2014 and the 'pre-bid meeting' was scheduled to be held on the very next day, ie. on 31.12.2015, as evident from Ext.P3. Clause 2 of Ext.P2 deals with the tender floated in terms of '**Swiss Challenge Method**', whereas Clause 4 of the very same document prescribes the compensation payable to the original propounder of the project to an extent of Rs.25,00,000/- (Rupees Twenty five lakhs only), if the original propounder (M/s. Global Trading Company) fails to match the winning bid to be quoted by the successful bidder, if any. The security bid for participating in Ext.P2 tender was originally fixed as Rs.25,00,000/- (Rupees Twenty five lakhs only), which was subsequently reduced to Rs.8,00,000/- (Rupees Eight lakhs only) as per Ext.P4 corrigendum dated 26.12.2014. It is contended that the entire bidding process is devised and defined with malafide intent, to favour a particular Company without any justification and denying a level-playing field to other eligible participants. The petitioners also contend that, Ext.P2 tender has been floated also in violation of the provisions of the Kerala Protection of River Banks and Regulation of Removal of

Sand Act, 2001, in so far as the tender, though invited in a Minor Port, dredging of sand nevertheless is to be conducted in a river.

5. A Counter Affidavit has been filed on behalf of the 2nd respondent referring to the sequence of events and the modalities of the '**Swiss Challenge Method**'. It is pointed out that, Ext.P1 is a global tender issued on-line, inviting competitive bids for extraction of "construction-grade sand" by removing all impurities and processing of the byproducts - selection of agency through '**Swiss Challenge Method**'. Ext.P3 is only an abstract of tenders published between the period from 22.12.2014 to 28.12.2014 by various Departments under the Government of Kerala. As per Ext.P3, it was clarified that the details of tenders were available at the concerned Officer and address of the Website was also furnished vide Ext.P3. It is pointed out that, there is absolutely no merit in the case put up by the petitioners with reference to the date of publication of Ext.P3, referring to the pre-bid meeting scheduled on the next day. As a matter of fact, the e-tender was published as early as on **24.12.2014** in the Website of the Government and as per Ext.P4, the time proposed for the 'pre-bid meeting' scheduled on 31.12.2014 was

changed from 11.30 am to 10.30 am at the same venue. It is stated that, participation in the 'pre-bid meeting' is never mandatory, but optional. Advantages of the '**Swiss Challenge Method**' are highlighted in the Counter Affidavit, stating that it is a new bidding process to help the private sector initiative in core sector products, which gives an option to the private player to suo motu identify a project and approach the Government with unsolicited proposals. On obtaining such proposals and after considering the advantages/feasibility, the Government seeks tenders/proposals from the other private players, pursuant to which a bidding process is held, based on the standard rules prescribed by the Government. On completion of the bidding process, the original propounder is given a chance to match his proposal with the winning bid, with liberty to the original proposer, to have the **right of first refusal**. On his refusal, the award goes to the highest bidder, who in turn has to meet the prescribed cost/compensation to be paid to the original propounder in respect of the studies and various steps taken by the propounder which led to the project report. Validity of the '**Swiss Challenge Method**' is stated as upheld by the Apex

Court in **(2009) 7 SCC 462** (cited supra) and that it is beneficial to the Government, in as much as the Government does not lose any revenue, as it is still getting the highest possible value. It is pointed out that '**Swiss Challenge Method**' was adopted in a number of Countries, by various States in India and many a Public Sector undertaking including the Cochin Port Trust.

6. With regard to the involvement of the original propounder M/s. Global Trading Company, it is stated that the project was identified by the said party, who submitted a proposal before the State Government while convening "**Emerging Kerala Event**" held during September, 2012. It was let known to the Government that the Company had applied for getting patent for the project and that, it was a new idea in the field of retrieval of dredged sand from water bodies, including saline water bodies. As per the '**Swiss Challenge Method**', a detailed project report cannot be published without permission of the proponent, but is added that the suggestions made by the Apex Court and referred to by the petitioners in Ground B of the writ petition have been fully given effect to. Reference is also made to paragraph 62 of the decision in **(2009) 7 SCC 462**

(cited supra), making it clear that the above suggestions were not exhaustive and that the State was free to incorporate any other clauses for transparency and proper execution of the Scheme. The detailed project report submitted by the original propounder M/s. Global Trading Company, was forwarded to the 1st respondent and after detailed study, the same was approved by the Government as per Ext.R2(a) order dated 15.12.2014. It was thereafter, that the tender was notified on 24.12.2014, starting the date of bid submission from 01.01.2015 and the end date as 14.01.2015. It is also pointed out that the petitioners did not choose to participate in the tender by submitting any bid, nor did seek for any clarification by participating in the 'pre-bid meeting' scheduled on 31.12.2014 or in any other manner. The particulars of the original propounder M/s. Global Trading Company have been given in paragraph 8 of the Counter Affidavit.

7. Heard the learned counsel for the petitioners and Mr. Joseph George, the learned Government Pleader on behalf of the respondents in detail.

8. Admittedly, the petitioners did not participate in the

tender pursuant to Exts.P1 to P3 and as such, the petitioner, prima facie, cannot be said as having any 'locus standi' to have filed this writ petition. But, it has to be noted that the petitioners are stated as more aggrieved with 'Clause 4' of Ext.P2 tender conditions, whereby compensation has been ordered to be paid to the original propounder of the project, if the said party fails to match the bid of the successful bidder. This allegedly casts an unconscionable burden/restriction upon the participant and as such, the question to be considered is whether the petitioner was virtually prevented from participating in the tender, because of incorporation of Clause 4, providing for compensation as above, if the same is not correct or sustainable in the eye of law.

9. Before proceeding further, the very concept of '**Swiss Challenge Method**' has to be considered and analysed to understand its scope. The said method is a bidding process to help private sector initiative in core sector projects. The '**Swiss Challenge Method**' will ensure that the Private Sector initiatives will be combined with a process to secure the best commercial advantage for the State. After securing the Project proposal from the Proponent to the satisfaction of the Government, an online

tender is floated for determining the commercial benefit that the State must secure from the project. The original proponent does not participate in the tender floated. The best market offer for the identified commercial parametre is secured through the tender process. Then the original proponent gets the right to match this offer and implement the project. If the proponent, does not match the offer of the best bidder, then the Government would award the project to the best bidder for execution and commercial exploitation. The Best bidder would however be liable to compensate the original Proponent for his ideas, efforts and expenses incurred, upon award.

10. With regard to the project background, intending to have it adopted for dredging of sand in the Ponnani Port, it is to be noted that availability of good quality sand for construction has been a burning issue in Kerala, for the last several years. On one hand, the brittle environmental balance of the State is threatened by illegal sand mining from rivers and quarries. At the same time, restrictions on sand mining and the resultant in adequate availability of good quality sand has become the biggest bottleneck, for the otherwise robust construction arena in

the State.

11. An excellent renewable source for sand is the dredged material obtained during regular maintenance, happening in fishing harbours and ports of Kerala. This dredged material contains 'saline sand', shells, pebbles and slurry. It needs to be purified, to yield in "construction-grade sand", after which it can be used as a good replacement to river sand. Salinity in sand has been scientifically proven, to be one of the biggest threats to safety for concrete based structures, especially since all regions in the State have seismic risk of varying levels. The saline content is highly corrosive to steel rods, the principal load bearer of concrete structures. Prevention of huge structural failures warrants serious steps to ensure that sand with saline content is not allowed for construction without scientific purification. It is stated that, the Directorate of Ports, Kerala deems to go for a pilot project at Ponnani Port, which is located in the estuary, where the river Bharatapuzha meets the Arabian Sea, in such a place where regular maintenance/dredging needs to be done. This dredged material, if purified scientifically, can yield good quality 'construction-grade sand' in a sustainable way.

12. It was in the above background that the project was identified by a private investor M/s.Global Trading Company, who proposed to erect a Purification Plant through their own finances in September, 2012 in the "Emerging Kerala Event". Various aspects involved were subjected to meticulous analysis and the same was submitted before the Government for consideration. It was after considering the above proposal, that necessary approval was given by the Government as per Ext.R2(a) G.O. dated 15.12.2014, in turn leading to Exts.P1 to P3 tender notifications.

13. In so far as the Directorate of Ports is concerned, it is to be noted that the investor will not be given any financial assistance or supporting infrastructure at any stage of implementation of the project. The Directorate will only facilitate for smooth functioning of the project and will be responsible for facilitating **manual dredging** and shall undertake the supervision effectively. Upon awarding the project, an agreement will be executed (termed as concession agreement) to execute the project, in order to define the respective rights and obligations with regard to the project work. Within 30 days from

the date of issuance of 'Letter of Award' (LOA) by the Directorate of Ports, the proposed erector (original propounder M/s. Global Trading Company or the best bidder, as the case may be) should submit a deposit in the form of Bank guarantee from a scheduled Bank operating in India for the value of Rupees Ten Millions. The salient features/benefits of the project as above have been given in paragraph 4 of the Counter Affidavit filed on behalf of the 2nd respondent, as extracted below:

- *"It encourages greater private participation for Public Project ie., augments Public Private Partnerships and enables innovative ideas to take shape.*
- *It facilitates infrastructure development and encourages greater Private Participation for Public Projects ie augments Public Private Partnerships.*
- *Certainty of success under this methodology is ensured as at least one 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.*

In approved Swiss Challenge method, upon selection of successful bidder other than the proposal initiator, the agency shall cause/arrange to reimburse to the proposal initiator, the cost of Detailed Project Report as determined and recover the same from the successful bidder."

It was after considering the various aspects including the 'plus and minus' points that approval was granted to the project by the Government as per Ext.R2(a) dated 15.12.2014, subject to following conditions:

"1. Revenue sharing will be in the ratio 65:35, with 35% of Revenue realisable payable to Government on quarterly basis.

2. Raw material will be provided by Government free of cost

3. Director of Ports shall devise a secure, transparent and reliable arrangement to monitor the quantity of raw materials delivered to the project.

4. Assessment of the sales revenues based on the

raw material taken delivery as input and assuming a 92% recovery rate based on the actual sales.

5. The market value of the sales per tonne shall not less than the statistical price date maintained by the Department of Economics and statistics or in the absence of which that Department shall be requested to provide a market valuation certificate per tonne of the output.

6. The Environmental risks of the processing, production and marketing will have to be borne by the entrepreneur.

7. The entrepreneur shall satisfy all regulatory compliance needed from the relevant authorities of the State and Central Government.

8. Government will be free to review the revenue sharing ratio at the end of five years, should the entrepreneur like to continue the project.

9. The entrepreneur shall enter into a legal agreement with Government."

14. The concept of '**Swiss Challenge Method**' is not alien to the Indian context. Acceptability of the said scheme is evident from the verdict passed by the Apex Court in the decision reported in **(2009) 7 SCC 462** (cited supra), wherein the 'right of first refusal' is conferred upon the project propounder, who has to match the bid, to be quoted by the others/successful bidder, if any. But there is a case for the petitioners herein, that the scope of paying 'compensation' by the successful bidder, to the project propounder, was not a subject matter of consideration before the

Supreme Court in **(2009) 7 SCC 462** (cited supra). It is contended that such a restriction as in the form of 'Clause 4' of Ext.P2 can only be regarded as an unreasonable restriction, which barred the way of the petitioners in participating in the bid.

15. Considering the above contention, the scope of working of the system of '**Swiss Challenge Method**' has to be analysed. Working of '**Swiss Challenge Method**' as made available through 'Wikipedia' is to the following effect:

“The system basically works on two different patterns, its up to the government to decide as to which one they want to adopt. The two main ways are as follows:

1. The government can either purchase the intellectual property rights for a project concept from the proponent or then award the project through a competitive bidding process in which no bidder has a predefined advantage.
2. The government can offer the original proponent an advantage in a competitive bidding process. In this case the government should create rewards that satisfy the original proponent while still allowing a truly competitive process.”

16. The suggestions made by the Apex court as per the decision reported in **(2009) 7 SCC 462** (cited supra) are in the following terms:

“In order to avoid such ill effects the State Government is suggested to consider the following aspects:

1. The state/Authority shall publish in advance the nature of Swiss Challenge method and particulars;

2. Publish the nature of projects that can come under such method;

3. Mention/notify the authorities to be approached with respect to the project plans;

4. Mention/notify the various fields of the projects that can be considered under the method;

5. Set rules regarding time-limits on the approval of the project and respective bidding;

6. The rules are to be followed after a project has been approved by the respective authorities to be considered under the method;

7. All persons interested in such developmental activities should be given equal and sufficient opportunity to participate in such venture and there should be healthy inter se competition amongst such developers.

The State is free to incorporate any other clauses for transparency and proper execution of the scheme. The State Government is suggested to frame regulations/instructions on the above lines and take necessary steps thereafter in future."

17. In response to the submission from the part of the petitioners that the suggestions made by the Supreme Court have been given a 'go bye', the version of the respondents as specifically raised in the Counter Affidavit and also submitted across the Bar is that all the suggestions have been considered and given effect to the appropriate extent, also adding relevant Clauses as permitted by the Apex Court, while notifying Exts.P1/P2 tenders. It is also brought to the notice of this Court

that, guidelines have been issued under '**Swiss Challenge Method**' by the **Karnataka Government** regarding cost reimbursement, to be given to the original propounder by the successful bidder is provided. The relevant Clauses made available to this Court read as follows:

"4.14 If the Proposal initiator declines to match the superior counter proposal, then the applicant that has made the superior proposal would be selected as the concessionaire.

4.15 Upon such selection as in step 4.14 above of successful bidder other than the Proposal Initiator, GoK/GoK Agency concerned shall cause/arrange to reimburse to the Proposal Initiator, the cost of DPR as determined above and recover the same from the successful bidder."

18. Similarly, in the case of guidelines issued by the **Madhya Pradesh Government** under '**Swiss Challenge Method**', the tendering process is given under Clause 4.7, which is to the following effect:

"4.7 Tendering process

The tender shall be released by the authority, and bidders shall be requested to quote counter proposals. The bidders shall furnish all the documents that are required and as quoted in the bid document.

The counter proposals received shall be evaluated by the authority and ranked along with the project proponent's proposal.

If the competitive bidding process results in a best financial offer from the interested bidder, then the project proponent shall be given an opportunity to match the counter proposal within the specified time frame and the contract shall be awarded to the project proponent.

If the project proponent declines to match the counter proposal, then the contract shall be awarded to the bidder who had submitted the best financial offer.

Upon such selection of successful bidder other than the project proponent, the authority shall reimburse the cost the preparation of DPR to the project proponent as determined in the bid document which shall be recovered from the successful bidder.

In case the authority does not receive any bid against the floated tender, then the contract may be awarded to the project proponent."

19. It is stated that, though the State of Kerala has not formulated separate set of guidelines with regard to the '**Swiss Challenge Method**', there is nothing wrong in adopting the course stipulated under similar guidelines formulated by the State of Madhyapradesh or the Government of Karnataka, more so in the light of the observations made by the Apex Court in paragraph 62 of the decision in **(2009) 7 SCC 462** (cited supra), enabling the State to prescribe such other yard sticks as well. This Court does not find anything arbitrary or illegal in such course.

20. Incidentally, it is to be noted that, the concept of e-tendering was implemented in various works with regard to the Local Self Government Institutions and such a process was subject to challenge in several writ petitions filed before this Court, mainly contending that, in so far as no specific rule enabling such a course for tendering was there, it was not liable to be implemented. After referring to the Kerala Panchayat Raj (Execution of Public Works and Purchase of Materials) Rules, 1997 as well as the Kerala Panchayat Raj (Execution of Public Works and Purchase of Materials) Rules, 1997 containing similar provisions, the contention of the said petitioners was repelled. The learned Judge arrived at a clear finding as per the common judgment dated 20.01.2015 in WP(C) No.28179 of 2013 and connected cases, that there was nothing wrong in adopting the 'e-tendering process' and opined that that it was a completely transparent approach, with intent to avoid any form of malpractice in invitation of public tenders or carrying out work measurement, payment etc. The learned Judge also observed that, even assuming that there was no specific rule in this regard, the Government could very well exercise its executive power

under Article 162 of the Constitution of India to issue orders, which are not covered by the statute. Coming to the case in hand, Ext.R2(a) is the relevant G.O. dated 15.12.2014, granting approval to the '**Swiss Challenge Method**' of tender and as such, the contention raised by the petitioners herein, challenging the said course and procedure is not liable to be entertained.

21. With regard to the contention of the petitioners, as to alleged infringement of the provisions of the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 (as raised in ground (J) of the writ petition) extraction of sand from any river is not the primary objective behind the tender. Extraction of sand in the instant case is rather incidental, in connection with the necessity to maintain the port and the port area for facilitating easy and trouble free navigation to the vessels. The port area herein is the spot where the river 'Bharathappuzha' joins the sea and the activities are being pursued at the river mouth. It is in the said process, that the sand is being excavated and as a matter of policy, the Government has decided to dredge the same manually and not deploying any mechanical device. It is stated that the same is

applicable in the case of '**Swiss Challenge Method**' as well. After retrieval of the sand, because of the salinity contained, the sand has to be properly treated, before the same is put to use for construction purposes. The project propounded by M/s.Global Trading Company is stated as a novel device in this regard, to provide "construction-grade sand", once it is dredged out and it is in this regard that appropriate sharing of profit is stipulated, agreeing to satisfy revenue payable to the State, without any investment from the part of the Government. This being the position, this Court does not find any merit in the contention raised by the petitioners with reference to the alleged infringement of the Kerala Protection of River Banks and Regulation of Removal of Sand Act as well.

22. With regard to the compensation stipulated as payable under Clause 4 of Ext.P4 tender conditions, it cannot be said as a barrier placed on the way of the petitioners in participating the bid. As mentioned already, the scheme/concept of '**Swiss Challenge Method**' itself envisages the project propounder/private party to identify a particular project, conduct study and evolve the project, feasibility of which is to be substantiated. It was after

considering the said project proposal, that the same was recommended by the Directorate of Ports, which in turn was accepted and approved by the State Government vide Ext.R2(a). Here, quite a lot of investment has already been made by the project propounder and it is taking note of the said fact, that the right of first refusal is conferred upon the project propounder under the '**Swiss Challenge Method**'. Once the tender is notified and if a person, who participates in the bid becomes successful, a chance is given to the project propounder to match the former's bid and if the project propounder fails, then the work is awarded to the highest bidder. It is in the said circumstances, that the 'cost factor' already incurred by the project propounder (consolidated sum already quantified and notified) is stipulated to be paid to the said party, as no further study is required either by the Government or by the bidder, with regard to the project to be implemented and no expense does require to be incurred under this head. This amount, which is already specified and notified (Rs.25 lakhs) could be reckoned as the basic payment to be effected, if the participant becomes successful; which is made known to everybody including the petitioners. As such, it is open

for the petitioners to have included the said figure in the bid to be quoted and if the project propounder fails to meet the said target, the work would have been awarded to the petitioner/highest bidder. As such, absolutely no prejudice has been caused to anybody because of Clause 4 of Ext.P2 and hence it can't be said that the said Clause prevented the petitioners from participating in the bid. The contention the contrary stands repelled.

23. Coming to the plea, as to the shortage of time, with reference to Ext.P4 notice published on 30.12.2014 specifying the 'pre-bid meeting' on 31.12.2014 and the lack of opportunity, it has to be noted that the bid was published not on 30.12.2014, but on 24.12.2014, as discernible from Ext.P1. As per Ext.P4, the information furnished was only with regard to the change of time of the pre-bid meeting scheduled on 31.12.2014, from 11.30 am to 10.30am and that is all. That apart, 'pre-bid meeting' is not at all mandatory, which on the other hand is optional and the petitioners were free to have decided whether they should take part in the pre-bid meeting or not and to have had further clarification with regard to the bid or the conditions, if any doubt

was there. Admittedly, the said pre-bid meeting was never attended to by the petitioners. That apart, Ext.P1 produced by the petitioners itself reveals that the said document was downloaded by the petitioners at 9.55 am, on 09.01.2015. As revealed from Ext.P1, the bid submission started from 01.01.2015 at 9a.m. and the last date was 09.01.2015 at 6.55p.m., also specifying the bid opening date as 14.01.2015 at 11.30 a.m.. There was sufficient time for the petitioners to have participated in the bid, if there was any genuine interest. After having chosen to opt out, the petitioners cannot be heard to say that the tender condition is bad in some or other respect. It has been made clear by the Apex Court on many a time that the scope of judicial scrutiny, with regard to the matters involving contracts/tender, is quite limited and the role of the Court is only to examine the 'decision making process'. Merely for the reason that the condition/terms of the tender could have been stipulated in some other words or by incorporating such other terms, it is not a ground to interfere with the tender process and substitute the terms by that of the Court, which comes exclusively within prerogative of the awarder of work. This Court finds support from

the dictum laid down by the Apex Court in **(2009) 7 SCC 462** (cited supra) in this regard.

24. In the above facts and circumstances, this Court finds that there is absolutely no merit or bonafides in the writ petition. None of the grounds raised in support of the same is tenable. The writ petition fails. It stands dismissed accordingly.

25. However, before parting with the case, this Court would like to mention that the main object projected from the part of the respondents in adopting the '**Swiss Challenge Method**' is to implement the project/scheme also with intent to make available "construction-grade river sand", because of the scarcity of the commodity in the market due to various reasons including the restrictive measures imposed and the increasing need because of the ongoing constructions/developmental activities. By adopting the present exercise, the State is also benefitted without any investment procuring revenue to the prescribed agreed extent. The work is given exclusively to the project propounder/successful bidder for implementation of the project, with the above object of procuring "construction-grade sand" after desalination and removal of all impurities. As such, there is

a duty for the State/respondents to ensure that the product is "construction-grade sand", free from salinity and other impurities, lest, the general public/the customers should be put to peril/disadvantageous position. As it stands so, while finalising the bid and executing the agreement in between, proper/sufficient clause shall be incorporated to ensure that, it will be the sole responsibility of the project propounder/highest bidder to meet the quality of the "construction-grade sand", free from salinity and impurities, before the same is put into the market and if at all any claim, loss or liability is incurred from any corner in this regard, it shall be fully satisfied by the project propounder/successful bidder to the extent it is legally payable.

**P.R. RAMACHANDRA MENON,
JUDGE**

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The second sentence of the 20th paragraph of the judgment dated 25.02.2015 in W.P.(C) No.881/2015 is corrected and substituted as per order dated 25.05.2015 as follows:

"After referring to the Kerala Panchayat Raj (Execution of Public Works and Purchase of Materials) Rules, 1997 as well as other relevant rules, containing similar provisions, the contention of the said petitioners was repelled."

Sd/-
Registrar (Judicial)