

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

WP(C).No. 1353 of 2015 (T)

PETITIONER(S):

**K.KARUNAKARAN SMARAKA PARAMBARAKATHA
THOZHILALIL KZHEMA SAHAKARANA SANGAM LTD.,
THOZHILALIL KZHEMA SAHAKARANA SANGAM LIMITED,
NO.C 1947, PALLIKKUNNUMBRAM, AZHEEKKODE,
KANNUR DISTRICT, REPRESENTED BY ITS PRESIDENT,
P.RAJEEVAN, S/O.NARAYANAN.**

**BY ADVS.SRI.BABU S. NAIR
SMT.SMITHA BABU**

RESPONDENT(S):

**1. THE DIRECTOR OF PORTS,
THIRUVANANTHAPURAM, PIN 695 001.**

**2. THE SENIOR PORT CONSERVATOR,
AZHEEKKAL PORT, KANNUR DISTRICT, PIN-670 009.**

*** ADDITIONAL R3 & R4 IMPLEADED**

**3. PAYYANNUR LABOUR CONTRACT,
CO-OP. SOCIETY LTD. C-1133,
REPRESENTED BY THE SECRETARY, SWARNALATHA C., CHALIL,
KANDOTH, KANNUR - 670 307.**

**4. KANNUR JILLA BUILDING MATERIALS-FURNITURE
MARKETING & MANUFACTURING CO-OPERATIVE SOCIETY,
REPRESENTED BY THE SECRETARY,
KANNUR JILLA BUILDING MATERIALS-FURNITURE
MARKETING & MANUFACTURING CO-OPERATIVE SOCIETY,
CHAKKARAKKAL, PO.MOWANCHERRY - 670 614,
KANNUR DISTRICT.**

*** ADDL.R3 AND R4 ARE IMPLEADED AS PER ORDER DATED 30.01.2015 IN
IA 1213/15 AND 1229/15 RESPECTIVELY.**

Msv/

WP(C).No. 1353 of 2015 (T)

* ADDITIONAL R5 IMPEADED

5. MAHATMA DRUDGING & CONSTRUCTION
WORKERS WELFARE CO-OP SOCIETY LTD., NO. C 1945,
MADAKKARA, P.O.IRINAVE, KANNUR - 670 301,
REPRESENTED BY ITS SECRETARY MOHAMMED RAMSY K.V.

* ADDL.R5 IS IMPEADED AS PER ORDER DATED 03.06.2015 IN IA 5329/15.

* ADDITIONAL R6 IMPEADED

6. AZHEEKAL THURAMUGHA VIKASANA CONSTRUCTION
AND GENERAL WORKERS WELFARE SAHAKARANA
SANGAM LTD., NO.C 1964, MOONU NIRATH,
P.O. AZHEEKODE, KANNUR - 670 009,
REPRESENTED BY ITS SECRETARY K.DEVARAJAN.

* ADDL. R6 IS IMPEADED AS PER ORDER DTD. 9.11.2015 IN IA.5350/2015.

* ADDL. R7 IMPEADED

CHALIYAR LABOUR CONTRACT CO-OPERATIVE SOCIETY LTD.
NO.D 3118, KODAMPUZHA ROAD, PETTA, FEROOK P.O.,
KOZHIKODE DISTRICT, REPRESENTED BY ITS
PRESIDENT ABDUL WARIS, S/O.MARAKKAR.

* ADDL. R7 IS IMPEADED AS PER ORDER DTD. 9.11.2015 IN IA.12256/2015.

R1 & R2 BY SENIOR GOVERNMENT PLEADER SRI.ABDUL SALAM
R3 & R4 BY ADV. SRI.KALEESWARAM RAJ
R5 BY ADV. DR.K.P.PRADEEP
R7 BY ADVS. SRI.K.MOHANAKANNAN
SMT.A.R.PRAVITHA

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
13-10-2015, ALONG WITH WPC. 28209/2015, THE COURT ON
09-11-2015, DELIVERED THE FOLLOWING:

msv/

WP(C).No. 1353 of 2015 (T)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1 - TRUE COPY OF THE JUDGMENT DATED 15-7-2014 IN WPC.NO.25772/2013 & CONNECTED CASES OF THIS HON'BLE COURT.

EXT.P2 - TRUE COPY OF THE JUDGMENT DATED 24-11-2014 IN WPC.NO.28729/2014 OF THIS HON'BLE COURT.

EXT.P3 - TRUE COPY OF THE TENDER FORM ISSUED BY THE FIRST RESPONDENT FOR MANUAL DRUDGING.

ADDL. EXT.P4 - TRUE COPY OF THE ORDER DTD.13.1.2015 PASSED BY THE FIRST RESPONDENT AS NO.C3-5288/2014/DP.

RESPONDENT(S)' EXHIBITS:

EXT.R6(a): TRUE COPY OF THE GO (MS) NO.17/2010/F & PD DTD.18.3.2010.

EXT.R6(b): TRUE COPY OF THE GO (MS) NO.29/2012/F & PD DTD.13.4.2012.

EXT.R6(c): TRUE COPY OF THE GO (MS) NO.54/2013/F & PD DTD.16.8.2013.

EXT.R6(d): TRUE COPY OF THE TENDER FORM DTD.17.8.2013 IUED BY THE CONSERVATOR OF PORT.

EXT.R6(e): TRUE COPY OF THE COMMUNICATION NO.1199/14-1 DTD.24.1.2015 ISSUED BY THE PUBLIC INFORMATION OFFICER, AZHIKKAL PORT.

EXT.R6(f): TRUE COPY OF THE COMMUNICATION NO.861/14 DTD.10.11.2014 ISSUED BY THE PUBLIC INFORMATION OFFICER, AZHIKKAL PORT.

EXT.R7(a): TRUE COPY OF THE JUDGMENT IN WRIT PETITION (C) 15835/2015 DTD.3.6.2015.

EXT.R7(b): TRUE COPY OF THE ORDER NO.A1-2353/15 PASSED BY THE PORT OFFICER, KOZHIKODE DTD.20.6.2015.

//TRUE COPY//

P.S.TO JUDGE

Msv/

A.MUHAMED MUSTAQUE, J.

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**W.P.(C).Nos.1353/2015 & 28209/2015**  
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Dated this the 9th Day of November, 2015

J U D G M E N T

These writ petitions pertain to manual dredging in Azhikkal Port. Both the writ petitions confine to clause 9(a) of the Open Tender Form issued for manual dredging.

2. The tender was invited for the year 2014-15. There were series of litigations in respect of dredging in Azhikkal Port. The facts now remain, dredging activities are being carried out by the Co-operative Societies since 2011 without there being a finality to the tender process for each year.

3. The Government Order, G.O.(MS).No.29/2012/F&PD, dated 13/04/2012 fixed the norms in addition to the existing norms on manual dredging. The main criteria are extracted hereunder:

- “1. The office and area of operation of the Co-operative Society as per its bylaw should be within 10 Kms radius of the Port limits.
2. At least 90% of the members of the society should be fully involved in the activity of manual dredging in the

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port limits and directly experienced in manual dredging, being traditional sand dredging workers of the area and manual sand dredging for all the members.

3. All the members of the Co-operative Society should be local residents who are traditionally making their living by manual dredging. An identity card should be obtained and produced by these traditional sand workers from the local authorities.
4. Only the members of the society are permitted in the manual dredging and related works (loading and unloading, purification, cleaning works etc.) within the port limits. The non members are engaged for the work after getting the permit and the Co-operative Society acts as an employer, then the permit will be cancelled without notice.
5. One of the main objectives of the society should be manual dredging by which the members of the Co-operative Society earn their main livelihood.
6. The date of registration/modification of bylaw etc. of the society shall be at least 30 days before the date of quotation notice.”

4. The stipulation in the Open Tender Form, clause No.9(a) and clause 17 of the Special Conditions appended therein stipulate preference to the Co-operative Societies having experience in manual dredging.

5. This is being challenged, stating that experience to the Co-operative Societies is against the norms prescribed by the Government in

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G.O.(MS).No.29/2012/F&PD, dated 13/04/2012. The above Government Order is produced as Ext.P2 in W.P(C).No.28209/2015. It prescribes norms for the Co-operative Societies.

6. According to the petitioners, the conditions in the Open Tender Form prescribing experience for the Co-operative Societies are against the provisions stipulated in the Government Order dated 13/04/2012. The Government Order does not contemplate any experience by the Co-operative Societies.

7. It is to be noted that in evaluation method, the experience of Co-operative Societies will be evaluated with 5 marks out of 15. Therefore, experience is a matter for evaluation.

8. Essentially, the petitioners raise two grounds of challenge against stipulation, namely, (i) the stipulation as above in the tender form is against the Government Order and (ii) the stipulation is arbitrary for the reason that it would monopolize dredging work at Azhikkal Port to the Co-operative Societies, who are carrying out operation on interim measures, till the tender process is finalised.

9. The petitioners, point out that the operation of dredging by the Co-operative Societies on interim measures for the last several years are illegal and they are taking advantage of such stipulation.

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10. The learned Government Pleader justifies the above stipulation, prescribing experience for the Co-operative Societies in the Open Tender Form. It is submitted that the experience of the Co-operative Societies is important while awarding right of sand dredging.

11. The learned counsel for the party respondent also supported the stand of the Government.

12. It is to be noted that the contract is for manual dredging. The Government has given thrust in awarding contract as per the norms to the Co-operative Societies which composed of 90% of manual dredging workers. It does not refer to any experience of Co-operative Societies. The intention of the Government in providing a stipulation as above is to protect the avocation and livelihood of persons engaged in manual dredging. It is also equally important to note that the area of operation of Co-operative Societies should be within 10 kms radius of the Port limits. If experience is reckoned, no members of the Co-operative Societies, who are engaged in manual dredging, would be able to form a new Society. It is equally important to note that no other Co-operative Societies beyond the operation of 10 kms. of the Port limits would be entitled to take part in the tender process.

13. In the light of the above facts and circumstances, this Court is of the view that any prescription of experience by the Co-operative

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Societies, would result in denial of the benefit of the Government Order. The Government has given freedom to Co-operative Societies composed of 90% of manual dredging workers operating within 10 kms radius to take part in the tender process. If experience is reckoned, it would restrict and monopolize the manual dredging to the limited extent of the Co-operative Societies, who are already in the field. The Government never intended such a situation while fixing the norms. The Government, in fact, want to encourage formation of Co-operative Societies by the manual workers.

14. It is also to be noted that from the year 2011 onwards, tender process has not been finalised. Thus, it means that those who are able to continue with the activities since the year 2011 onwards, without open and transparent manner of selection, will be in an advantageous position.

15. Normally, this Court while exercising the power of judicial review cannot substitute the wisdom of prescribing eligibility or norms by the State Instrumentality for awarding the contract. The Hon'ble Supreme Court in **Tata Cellular v. Union of India [AIR 1996 SC 11]**, enumerated principles relating to judicial review in relation to contractual matters. In para.94 of the aforesaid judgment, the Hon'ble Supreme Court classified scope of judicial review as follows:

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“Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decision have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the ground 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.”

16. The Port Director cannot fix a criteria to deprive the benefit of the Government Order. Further, assuming that such criteria is fixed to supplement Government Order, unless a fair opportunity is given to all in a 'closed group' entitled for award of work, any such prescription would become anathema to fairness. Thus, fixation of criteria was irrational as it is repugnant to the Government Order. The Port Director can fix criteria only in consonance with the Government Order to supplement the same and not in derogation of the norms in the Government Order.

17. Where there is a competing interest involving individual interest and State interest, the Court has to weigh the option. The Court normally inclines to protect individual interest unless the State interest

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would have an overriding public interest. Absolutely nothing is placed before this Court to demonstrate overriding public interest in prescribing experience of the Society for award of the contract. In such a situation, the court must step into protect individual interest of manual dredging workers collectively available them to form a Society.

18. In this case, it has to be noted that the operational limit of the Co-operative Societies to take part in the tender process is within 10 kms radius of the Port. No Co-operative Societies outside that limit can take part. Necessarily, this would result in denial of forming of a new Society by persons, who are engaged in manual dredging within the area. The Port Director ought to have considered that any fixation of experience would result in monopolizing the 'Right' to Societies already in the field. This, in fact, was a relevant factor which ought to have been considered in the light of the object of the Government Order. Any failure to take into account a relevant factor, certainly points at the unreasonableness of the criteria.

19. The object of giving preference to the Co-operative Societies, which comprise of 90% of the members of manual dredging, is with the intention to protect the rights of individual members. By giving effect to the experience of the Co-operative Societies, rights of the individual members have been obliterated, by giving precedence and preference to the Co-operative Societies. Further, the peculiar facts would also show that

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any stipulation would only give advantage to the existing Co-operative Societies, who are continuing from the year 2011 without any open invitation. In such circumstances, this Court does not hesitate to hold that clause 9(a) in Open Tender Form and clause 17 in the special conditions therein are liable to be set aside. Accordingly, the condition is set aside to the extent of prescribing experience of the Co-operative Societies. The official respondents are directed to finalise the evaluation in the light of the above within a period of one month from the date of receipt of a copy of this judgment excluding evaluation of experience of Societies.

The writ petition is disposed of as above. No costs.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

09/11/2015

After pronouncement of the judgment, the learned counsel for the party respondents submitted that there are certain other litigations pending before this Court in respect of the allotment of dredging rights in Azhikkal Port. Any award of the contract pursuant to evaluation would depend upon the outcome of those cases.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

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