

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 12TH DAY OF FEBRUARY 2015/23RD MAGHA, 1936

WP(C).No. 6581 of 2014 (W)

PETITIONER(S) :

K.M.RAJA, AGED 48 YEARS,
S/O. MUHAMMED HANEEFA, RIYANA MANZIL, PUZHAVATHU
CHANGANACHERRY, KOTTAYAM DISTRICT-686 101.

BY ADV. SRI.K.K.JAYARAJ NAMBIAR

RESPONDENT(S) :

PATHANAMTHITTA MUNICIPALITY,
MUNICIPAL OFFICE, PATHANAMTHITTA-689 645
REPRESENTED BY ITS SECRETARY.

R BY SRI.V.K.SUNIL(S.C)

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
12-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

P1 : COPY OF THE RE-AUCTION NOTICE NO.R2-3074/06 VO.2 DTD.9.6.2010
PUBLISHED BY THE RESPONDENT FOR AUCTIONING THE ROOMS IN THE BUSINESS
COMPLEX.
P2 : COPY OF THE NOTICE NO.R2-3074/06 VO.II DTD.22.9.2011 GIVEN TO
THE PETITIONER BY THE RESPONDENT INTIMATING THAT THE AUCTION IS
CONFIRMED IN HIS NAME.
P3 : COPY OF THE LETTER DATD.26.9.2011 SUBMITTED BY THE PETITIONER
BEFORE THE RESPONDENT REQUESTING TO PROVIDE FACILITIES WHICH WERE
FOUND SHORT IN THE AUCTIONED HALL.
P4 : COPY OF THE RECEIPT NO.0000605 DTD.17.9.2011 FOR RS.50,000/-
ISSUED BY THE RESPONDENT FOR THE REMITTED BY THE PETITIONER.
P5 : COPY OF THE RECEIPT NO.0001120 DTD.27.9.2011 FOR RS.10,00,000/-
ISSUED BY THE RESPONDENT FOR THE REMITTANCE MADE BY THE PETITIONER.
P5(A): COPY OF THE RECEIPT NO.003790 DTD.28.11.2011 FOR
RS.10,00,000/- ISSUED BY THE RESPONDENT FOR THE REMITTANCE MADE BY
THE PETITIONER.
P6 : COPY OF THE RECEIPT NO.0019493 DTD.5.11.2012 FOR RS.10,00,000/-
ISSUED BY THE RESPONDENT FOR THE REMITTANCE MADE BY THE PETITIONER.
P7 : COPY OF THE LETTER DATD.29.9.2011 ISSUED BY THE RESPONDENT
INTIMATING THE PETITIONER THAT THE FACILITIES REQUESTED AS PER EXT.P3
LETTER WOULD BE PROVIDED UPON REMITTANCE OF THE DEPOSIT AMOUNT.
P8 : COPY OF THE NOTICE DTD.21.11.2012 ISSUED BY THE RESPONDENT
DIRECTING THE PETITIONER TO REMIT THE BALANCE DEPOSIT AMOUNT WITHIN 7
DAYS.
P9 : COPY OF THE LETTER DTD.28.11.2012 SUBMITTED BY THE PETITIONER
BEFORE THE RESPONDENT REQUESTING TO COMPLETE THE WORK FOR PROVIDING
THE FACILITIES IMMEDIATELY.
P10: COPY OF THE REPLY GIVEN BY THE RESPONDENT ON 7.12.2012 TO THE
PETITIONER DIRECTING TO USE TUBE WELL WATER FOR THE BUSINESS PURPOSE.
P11: COPY OF THE LETTER DTD.11.4.2013 SUBMITTED BY THE PETITIONER
BEFORE THE RESPONDENT REQUESTING TO COMPLETE THE WORK FOR PROVIDING
FACILITIES FOR DOING BUSINESS.
P12: COPY OF THE LETTER DTD.7.11.2013 SUBMITTED BY THE PETITIONER
BEFORE THE RESPONDENT REQUESTING TO COMPLETE THE WORK FOR PROVIDING
FACILITIES FOR DOING BUSINESS.
P13: COPY OF THE PHOTOGRAPH SHOWING THE INAUGURAL FUNCTION CONDUCTED
BY THE LOCAL MLA ADVOCATE K.SIVADASAN NAIR FOR THE EXHIBITION OF
VILLAGE INDUSTRY IN THE ROOM BID IN AUCTION BY THE PETITIONER.

RESPONDENT(S) ' EXHIBITS

-----: NIL

/TRUE COPY/

PS TO JUDGE.

DAMA SESHADRI NAIDU, J.

CR

W.P.(C).No. 6581 OF 2014

Dated this the 12th day of February, 2015

JUDGMENT

Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondent, apart from perusing the record. Since the issue lies in a narrow compass, this Court proposes to dispose of the writ petition at the admission stage itself.

2. The writ petition involves the question of enforcement of contractual terms. At the preliminary stage, this Court posed unto itself a question whether a public law remedy can come to the aid of the petitioner to enforce the terms of the contract, which is admittedly non-statutory in nature.

3. The facts in brief are that in response to Ext.P1 re-auction notice for auctioning rooms in the newly constructed 'Haji C.Meera Sahib Memorial Municipal Bus Stand Business Complex', the petitioner, having participated in the bid process, was declared successful to be the lessee of room

No.44 of the complex for his business purpose. Apart from monthly rent of Rs.65,823/-, the petitioner was required to deposit Rs.52,04,000/- towards refundable deposit, out of which the petitioner is said to have deposited Rs.30,50,000/- on different dates through Exts.P4,P5,P5(a) and Ext.P6. The lease period is said to be one year, renewable thereafter.

4. Since the petitioner had intended to establish a hotel in the building to be leased, on 26/9/2011 he submitted Ext.P3 letter requesting the respondent-Municipality to provide certain facilities which were found short in the building allotted to the petitioner. Instead of providing amenities as requested by the petitioner, the Municipality, allegedly in negation of the terms of the tender notification, has let out the hall for commercial purposes. According to the petitioner, to this day, even possession of the building has not been given to the petitioner. Under those circumstances, aggrieved by the inaction of the respondent Municipality in providing proper amenities to enable the petitioner to run his intended business, he has filed the present writ petition.

5. The learned counsel for the petitioner has strenuously

contended that the petitioner has substantially complied with the tender conditions, having paid Rs.30,50,000/- out of Rs.52,04,000/- refundable deposit. He has further submitted that, though a part of the amount deposited by the petitioner was treated as rent, as could be seen from Exts.P4 & P5, it is without even handing over the possession to the petitioner.

6. The learned counsel for the petitioner has also drawn my attention to condition No.2 of the auction conditions in Ext.P1 to contend that at the time of bidding, a party is required to specify the nature of business intended to be started;as such, the respondent Municipality has been fully aware of the nature of the business the petitioner has intended to have in the building. The learned counsel has contended that the petitioner has never challenged the tender conditions, but only seeks their enforcement. According to him, despite Ext.P3 letter of request from the petitioner, the respondent Municipality has remained insouciant.

7. Placing reliance on *Michigan Rubber (India) Limited v. State of Karnataka & Others*, [(2012) 8 SCC 216], the learned

counsel has submitted that the demised hall is within the municipal bus stand, where the hotel is quite essential. According to him, the establishment of a hotel there has a public purpose. By stretching the argument, the learned counsel would contend that to serve the said purpose of catering to the needs of the commuters in the bus stand, the respondent municipality is duty bound to adhere to the tender conditions and provide necessary amenities for the petitioner to commence his business. Eventually, the learned counsel has submitted that the contract is reciprocal but not unilateral; as such, it is essential for the respondent Municipality to honour the contractual terms. Accordingly, the learned counsel has urged this Court to issue a *mandamus* to the respondent Municipality to provide the necessary amenities to the petitioner.

8. *Per contra*, the learned counsel for the respondent Municipality has submitted that to handover possession of the building or a portion thereof, it is requisite that the petitioner ought to have paid the entire refundable deposit of Rs.52,04,000/-, but the petitioner has not complied with the said

precondition. The learned Standing Counsel has further submitted that the Municipality is expected to provide minimum amenities, over and above which, it is for the lessee to secure as per his business needs. The petitioner cannot, according to the learned standing counsel, expect the respondent Municipality to provide every amenity which has not been specified in the tender conditions so that he can carry on the business of his choice.

9. In the alternative, the learned Standing Counsel has also contended that the contract is non-statutory in nature and for the alleged enforcement of its terms, the petitioner has an efficacious alternative remedy by approaching a competent civil court, especially given the disputed questions of fact the adjudication involves. Referring to the decision relied on by the learned counsel for the petitioner, the learned Standing Counsel would contend that, in fact, the Hon'ble Supreme Court therein has categorically fixed the parameters of public law review in contractual matters. Summoning up his submissions, the learned Standing Counsel urges this Court to dismiss the writ petition.

10. Indeed, it is not in dispute that the contract is non-

statutory in nature. It is pertinent that the petitioner, as has been fairly submitted by the learned counsel for the petitioner, has laid no challenge against any of the tender conditions as arbitrary, offending the principles of fairness in terms of Article 14 of the Constitution. The petitioner's singular grievance is that the respondent Municipality has not provided proper amenities, which according to the learned counsel for the petitioner, amounts to violation of the contractual terms as have been incorporated in Ext.P1 tender notification.

11. It is the usual practice in any public tendering that, apart from the rudimentary conditions contained in the tender notification, the successful bidder, on fulfilling the preliminary preconditions such as remitting the refundable deposit, etc., needs to enter into bilateral contract specifying all other terms and conditions. After entering into such contract, if there is any violation thereof, the aggrieved person is at liberty to take recourse to any suitable legal measure such as approaching a competent civil court or invoking provisions of the Arbitration & Conciliation Act 1986, if it has been provided for.

12. In the present instance, the entire contract seems to be at a nascent stage. The petitioner has not even fulfilled his preliminary obligation of depositing the refundable advance. At any rate, the petitioner himself has gone on record saying that so far possession has not been delivered to him. In the absence of any possession having been delivered to the petitioner, the question of providing any amenities, if it were to be assumed that there existed an obligation on the part of the Municipality, does not arise.

13. In the alternative, it is to be seen that what the petitioner has been insisting on is the provision of certain amenities based on what has been described by the learned counsel as the 'implied conditions'. The issue of implied conditions and their enforcement thereof are, at best, issues of disputed facts. Under those circumstances summary remedy under Article 226 of the Constitution cannot be a proper remedy to enforce the contractual terms.

14. Indeed, it is not a question of inherent lack of jurisdiction, but that of self-imposed restrictions that the

Constitutional Courts have been loath to adjudicate on contractual matters, especially of non-statutory nature. All though, the Hon'ble Supreme Court has consistently held that once the aggrieved person has an efficacious alternative remedy, Article 226 of Constitution of India could not, as a matter of policy, be taken recourse to. Appropriately, in *Michigan Rubber* case (supra) cited by the very learned counsel for the petitioner, the Hon'ble Supreme Court, having surveyed the case law obtaining on that point by that time, has summarized the principles of adjudication involving the tender notifications. It is instructive to extract the summary of the principles as contained in paragraphs 23 & 24 thereof:

“23. From the above decisions the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards

and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work ; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say:

"the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" ? And

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

15. Very pertinently, while dismissing the Civil Appeal, the

Hon'ble Supreme Court has further held this:

"35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide. "

16. Putting the whole issue in perspective, this Court is of the considered opinion that what has been sought to be canvassed by the petitioner before this Court is purely a contractual dispute, for redressal of which, the petitioner has an efficacious alternative remedy.

17. I am, therefore, of the opinion that the petitioner is at liberty to take recourse to such remedies as are available to him either under contract law or common law. In such an event, the issue has to be adjudicated upon by the forum concerned uninfluenced by any of the observations made herein, for those observations, if any, have been made only to aid the discussion while disposing of the writ petition.

With the above observations, this Court dismisses the writ petition. No order as to costs.

Sd/-

**DAMA SESHADRI NAIDU,
Judge.**

dpk

/True coy/ PS to Judge.

