

Kerala High Court

T.T.Sunny vs The State Of Kerala on 11 December, 2020

WP (C) .No.19703 OF 2020 (K)

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

FRIDAY, THE 11TH DAY OF DECEMBER 2020 / 20TH AGRAHAYANA, 1942

WP (C) .No.19703 OF 2020 (K)

PETITIONER/S:

T.T.SUNNY
AGED 76 YEARS
P.W.D COTRACTOR, THANDEKKATTU HOUSE, MEENANGADI
P.O, WAYANAD DISTRICT PIN 673 591

BY ADV. SRI.GEORGE MECHERIL

RESPONDENT/S:

- 1 THE STATE OF KERALA
REPRESENTED BY ITS SECRETARY TO GOVERNMENT, PUBLIC
WORKS DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM ,
PIN 695 001
- 2 THE CHIEF ENGINEER,
PUBLIC WORKS DEPARTMENTS (ROADS AND BRIDGES)
THIRUVANANTHAPURAM PIN 695 001
- 3 THE SUPERINTENDING ENGINEER,
PWD ROADS (NORTH CIRCLE)
P.W.D COMPLEX, MANAMCHIRA, KOZHIKODE, PIN 673 001
- 4 SAJI MATHEW,
P.W.D CONTRACTOR, 5TH MILES, MANANTHAVADY, WAYANAD
DISTRICT, PIN 670 645

BY ADV. SRI.ABRAHAM MATHEW (VETTOOR)

BY ADV. SRI.ANIL ABHEY JOSE

OTHER PRESENT:

SRGP.SRI..K.V.MANOJ KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON

11.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
W.P.(C) No.19703 of 2020

P.V.ASHA, J.

W.P.(C) No.19703 of 2020

Dated this the 11th day of December, 2020

JUDGMENT

Petitioner, who is an A Class Contractor, has challenged Ext.P8 order alleging that the 2nd lowest bidder on 08.09.2020 was awarded the work without cancelling the selection notice issued to him and the same is in violation of clause 2009.6 of PWD Manual.

2. The 3rd respondent-the Superintending Engineer, PWD (Roads) North Circle issued a notice inviting tender for the work of 'providing BM&BC to Thalassery-Baveli Road KM/86/000 to 96/000 in Wayanad District'. Petitioner submitted his bid on 18.05.2000. As he was the successful bidder-L1, the 3rd respondent issued Ext.P1 selection notice to the petitioner on 11.06.2020 accepting his tender at Rs.4,31,69,527.76/- and directed him to report for executing the agreement within 14 days. Petitioner was directed to produce stamp paper worth Rs.43,200/- and remit a sum of Rs.21,58,500/- towards performance guarantee, 50% of which should be in the form of treasury deposit and to W.P.(C) No.19703 of 2020 start the work within a further period of one week on getting necessary instructions from the Executive Engineer. He was also informed that a further extension by 10 days, would be given on payment of fine of 1% of the PAC subject to a minimum of Rs.1,000/- and maximum of Rs.25,000/- and that in case he fails to execute the agreement within the said 24 days, the proposed contract would be cancelled forfeiting the earnest money deposit (EMD) and the work would be awarded to the next lowest tenderer and that the risk involved would be realised from the petitioner.

3. Petitioner thereupon submitted Ext.P2 letter dated 29.06.2020 informing the 3rd respondent that as he is aged 75 years, he was not in a position to travel in view of the restrictions on account of Covid-19 pandemic. He stated that he was ready to commence the work without executing the agreement, in view of the prevailing circumstances. He requested for extension of time for execution of agreement without payment of fine and permission to commence the work, after issuing selection notice.

4. The 3rd respondent, as per Ext.P3 letter dated 06.07.2020, informed the petitioner that permission to commence the work without executing agreement can be given W.P.(C) No.19703 of 2020 only by Government. Pointing out the emergency involved in the matter for completing the work, petitioner was asked to come over directly to the office, for executing the agreement, without halting or going any where else, in the midst of his journey, reminding him that the last date for executing the agreement is 06.07.2020 and that the last date for the same with payment of fine is 16.07.2020. He was asked to take emergent steps for executing the agreement after producing the

requisite documents in accordance with law, pointing out that none of the requisite documents were produced so far. Thereafter, on 04.08.2020, petitioner, as per Ext.P4 letter, again informed the 3rd respondent that he was not in a position to travel for executing the agreement, on account of Covid-19 protocol, since he was aged 75 years and requesting to extend time without liability to pay fine. Thereupon, the 3rd respondent as per Ext.P5 letter dated 12.08.2020 informed the petitioner that since he failed to produce any of the documents necessary for executing the agreement despite the repeated letters issued to him, he would be removed from the work at his risk and cost in case he fails to take emergent steps within 7 days of receipt of that W.P.(C) No.19703 of 2020 notice, for executing the agreement after producing the relevant documents and paying fine in accordance with law and that the work would be re-arranged in accordance with law. As per Ext.P6 letter dated 21.08.2020 petitioner informed the 3rd respondent that in order to remit the security deposit he had to approach the Bank personally; despite his several attempts he could not go there, since he is aged 76 and since he was denied entry in the Bank due to rise in temperature. He therefore requested to permit him to commence the work. It is stated that petitioner thereafter addressed the 3rd respondent in Ext.P7 letter dated 09.09.2020, stating that he was sending his son to the office with the requisite stamp paper and treasury deposit receipt and requesting to entrust with him the prepared agreement for execution stating that he would return it after execution. He also stated that he had already initiated steps for commencing the work. Along with the letter Ext.P7, petitioner has produced copies of the Treasury Savings Bank Term Deposit receipt for a sum of Rs.1,080,000.00 valid upto 09.09.2023; a bank guarantee issued by the Federal Bank for a sum of Rs.10,79,250/- valid for the period from 09.09.2020 to 08.09.2023, an W.P.(C) No.19703 of 2020 order dated 02.09.2020 passed by the Chairman of the District Disaster Management Authority, Wayanad, declaring Meenangadi Grama Panchayat, where he resides, as a containment zone from 03.09.2020 onwards and a medical certificate dated nil wherein petitioner was advised not to socialize at least for a period of 4 months from May 2020, during the pandemic, stating that he is suffering from chronic obstructive pulmonary disease. It is stated that thereafter petitioner received Ext.P8 letter dated 16.09.2020 of the 3rd respondent by which the stamp paper, security deposit and bank guarantee furnished by him on 11.09.2020 were returned. It was stated therein that since the petitioner failed to execute the agreement and failed to produce the requisite documents, deposits, etc. within the time granted to him despite repeated letters, negotiation was made with the 2nd lowest tenderer when he agreed to execute the work at the rate quoted by the petitioner and selection notice was issued to him on 09.09.2020 and he has already executed agreement on 09.09.2020. Petitioner was informed that the earnest money deposit would be forfeited in accordance with rules. This Writ Petition, challenging Ext.P8 letter, was filed on W.P.(C) No.19703 of 2020 22.09.2020 alleging that the selection notice was issued to the 2nd lowest bidder without issuing any order cancelling the selection notice issued to petitioner and hence it was in violation of clause 2009.6 of PWD Manual. The contention of the petitioner is that without cancelling the selection notice issued to him negotiation was not liable to be made with L2 and the selection notice issued to L2 and execution of agreement with him are illegal and therefore he should be allowed to execute agreement and commence the work.

5. The 3rd respondent filed a statement, according to which, the petitioner did not come forward to execute the agreement within the prescribed time. It is stated that as per Ext.P1 selection notice issued on 11.06.2020, the petitioner was asked to produce the required stamp paper and security

within 14 days; he was informed that a further 10 days' time would be granted with fine, for executing the agreement. It was also stated therein that in the event of failure to execute the agreement within the permitted time, the proposed contract would be cancelled and work would be awarded to the next lowest tenderer. It is stated that all these conditions are stipulated in Annexure R3(a) preliminary agreement also, which was signed and submitted W.P.(C) No.19703 of 2020 by the petitioner, along with the tender document. In the selection notice dated 11.06.2020 the petitioner was asked to produce the required stamp paper and security within 14 days. He was granted another 10 days' time clearly stating therein that failure to execute the agreement within the prescribed time would result in awarding the work to the next lowest tenderer. The petitioner did not execute the agreement either within the first 14 days or in the next 10 days. As per Ext.P1 selection notice itself, the proposed contract was to be cancelled in that event, forfeiting EMD and the work would be awarded to the next lowest tenderer and the risk involved due to it would be realized from the petitioner. It is stated that when the original 14 days expired on 25.06.2020, the petitioner sent Ext.P2 letter dated 29.06.2020 seeking further time for signing the agreement. The petitioner requested for permission without executing the agreement. Despite Ext.P3 letter dated 06.07.2020 issued to him, after more than one month, on 04.08.2020, he requested for further time for signing the agreement as per Ext.P4 letter. Though the said letter was replied as per Ext.P5 letter specifically stating that his selection would be cancelled in case he failed to execute W.P.(C) No.19703 of 2020 the agreement within 7 days and that the work would be re- arranged, the petitioner did not come forward. Without complying with the requirements in the selection notice and preliminary agreement, he sought further time in Ext.P6 letter dated 21.08.2020. The 3rd respondent stated that though the reason stated by the petitioner for not executing the agreement is Covid Pandemic, there was no complete lock down and about 45 agreements were signed and executed during the said period by the respective bidders including persons aged above 70 years. It is stated that in Ext.P8 letter the petitioner was informed that on account of the failure on the part of the petitioner, 2 nd lowest bidder was consulted and he agreed to execute the work at the rate quoted by L1 - the petitioner, and selection notice was issued to the 2nd lowest bidder on 08.09.2020 and he has signed the agreement on 09.09.2020. It is further stated that before seeking willingness of L2, Ext.P1 selection notice issued to the petitioner was cancelled as per Annexure R3(b) proceedings dated 07.09.2020, in accordance with clause 2009 of PWD Manual. It is stated that the work was delayed on account of the lapses on the part of the petitioner.

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6. The 4th respondent, who was impleaded subsequently, has filed a counter affidavit pointing out that there is no illegality in the award of work to him. It is stated that he has already commenced the work. The 4th respondent has produced Exts.R4(a) to (k) letters collected under the Right to Information Act, according to which the petitioner has appeared in person and received orders and receipts, refund, etc, from various offices in Kozhikode and Wayanad on various dates in June 2020, August 2020 and September, 2020 between 03.06.2020 and 07.09.2020. He therefore states that the reason stated by the petitioner as to his inability to come out of his house is absolutely incorrect and that he was not sitting at his home, as claimed, due to the Covid-19 pandemic or the restrictions, as alleged by him. He has also pointed out that petitioner had never stated any of his ailments as a reason for extension of time and therefore his claim based on the medical certificate is

unsustainable. It is stated that Ext.P7 letter producing the stamp paper and security deposit was submitted only after the time stipulated by the 3rd respondent for executing the agreement was over and it was not necessary for the 3rd respondent to act upon the same. W.P.(C) No.19703 of 2020

7. The Writ petition was amended thereafter and Annexure R3(b) is also challenged. On direction from this Court, the Learned Senior Government Pleader has made available the files relating to the work which lead to Ext.P8 order.

8. According to the petitioner, the action of respondents 1 to 3 in issuing selection notice to the 4 th respondent before cancelling the selection notice issued to the petitioner is illegal and contrary to the provisions contained in clause 2009.6 and 2009.7 of the PWD Manual. It is also his case that the order Annexure R3(b) is not communicated to him even now. The learned counsel for the petitioner raised several other contentions also, though there are no pleadings in support of the same. It was argued that as long as the cancellation of his selection notice is not communicated to him any order passed to that effect would not bind on him. It was argued that the signature in each of the relevant documents is different. It is also stated that draft of the cancellation letter is not available in the note file. The learned counsel for the petitioner relied on the judgments in Bachhittar Singh v. State of Punjab: AIR 1963 SC 395, State of Punjab v. W.P.(C) No.19703 of 2020 Amar Singh Harika: AIR 1966 SC 1313, Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd: (2012) 6 SCC 384 etc in support of his contention that an order even if issued, if it is not communicated, would not be binding on the parties. Relying on the judgments in Dharmapal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati and Ors. : 2015 8 SCC 519 and Bassodill Pharmaceuticals Ltd. : 2020 (1) KLT SN 2 (SC) it is argued that before any adverse order is passed the person concerned should be heard. It was argued that the cancellation of the selection notice and awarding the work to the 4 th respondent was done without affording an opportunity of hearing to the petitioner and the same is in violation of the principles of natural justice.

9. On the other hand the learned Senior Government Pleader argued that contentions raised by the learned Counsel for the petitioner are not borne out by the pleadings and therefore are not liable to be answered. However referring to the records, he pointed out that the orders are issued by the Superintending Engineer himself and there is no difference in the signatures. The petitioner is raising allegations, referring to the W.P.(C) No.19703 of 2020 initials put by the Superintending Engineer. Adv.Manoj Kumar, learned Senior Government Pleader argued that there is no infirmity in the procedure adopted by the respondents. It was argued that there is no concluded contract between the petitioner and that despite the emergency involved in completing the work, the petitioner did not come forward to execute the agreement even after the extended period was over. It was pointed out that the cancellation was effected after he was given advance information from the date on which the selection notice itself was issued. According to respondents there is no violation of PWD Manual. It is also pointed out that there is no provision for hearing either under the PWD Manual or otherwise since this is a matter relating to contract. Relying on the judgments in Elektron Lighting Systems Private Limited and another : (2015) 15 SCC 137, Michigan Rubber (India) Limited vs. State of Karnataka and others : (2012) 8 SCC 216, judgment in W.A.No.684/2020, Uttar Pradesh Avas Evam Vikas Parishad and others vs. Om Prakash Sharma : (2013) 5 SCC 182, Bakshi Security and Personnel Services Private Limited vs. Devkishan Computed

Private Limited and others : (2016) 8 SCC 446 and Meerut W.P.(C) No.19703 of 2020 Development Authority vs. Association of Management Studies and another : 2009 6 SCC 171 it was argued that judicial review under Article 226 is very limited in contractual matters/selection of tenderers, etc. The fact of being L1 alone would not confer on him any right to insist that he should be permitted to execute agreement. Similarly it is also settled law that there is no fundamental right conferred on anybody to have business with Government or anybody else. The judgment in Civil Appeal No.2197/2020 was also relied on in support of the contentions. It was argued that even assuming that there were any procedural lapse that cannot be a reason for interfering with the tender awarded to the 4th respondent and especially when the work has progressed to about 40% after the fresh selection notice was issued to the 4th respondent.

10. Heard Sri.George Mecheri, the learned Counsel for the petitioner, Sri.K.V.Manojkumar, learned Senior Government Pleader and Sri.Abraham Mathew Vettoor, learned counsel for the 4th respondent.

11. Even though the main contention of the petitioner is regarding violation of clause 2009.6 of the PWD Manual, W.P.(C) No.19703 of 2020 it is relevant to note that even in Ext.P1 selection notice, issued on 11.06.2020, petitioner was informed that in case the agreement was not executed within a period of 14 days from the date of registration of the communication of selection notice in the post office, he would be given a further extension by 10 days, on payment of fine of Rs.1% of the PAC subject to a minimum of Rs.1,000/- and maximum of Rs.25,000/-. It was further stated that in the event of failure to execute the agreement within 24 days from the date of registration of the selection notice the proposed contract would be cancelled forfeiting the EMD and the work would be rearranged with the next lowest tenderer, in accordance with rules. Ext.P1 notice was followed by Ext.P3 letter informing the petitioner that the 14 days' time was expiring and he has to execute the agreement by 16.07.2020, on payment of fine pointing out the urgency involved for completing the work. Petitioner submits that his further request was on 04.08.2020 much after the time was over on 16.07.2020. In Ext.P5 letter dated 12.08.2020 the 3rd respondent again warned the petitioner that in case he did not execute the agreement within 7 days selection would be cancelled without any further notice. Petitioner thereafter W.P.(C) No.19703 of 2020 sent his son to the 3rd respondent with the stamp papers, the treasury deposit and bank guarantee dated 09.09.2020 only on 11.09.2020, after the 7 days' ultimatum was given in Ext.P5 letter. All along the petitioner was seeking time on the ground of his age and the Covid-19 pandemic. But Ext.R4 (a) to (k) proceedings, which the petitioner has not disputed, would show that the said ground stated by him is factually incorrect. Petitioner had been requesting to permit him to commence work without executing agreement without taking any steps to produce even the stamp paper or performance guarantee in the meanwhile.

12. The petitioner challenges Ext.P8 proceedings on the ground that a fresh selection notice shall be preceded by cancellation of selection notice issued to him. Clause 2009.6 reads as follows:

After it is decided to accept the tender, selection notice in the form of letter of acceptance as per bidding documents shall be issued to the bidder by the tendering authority within seven days or before the expiry of firm period whichever is earlier.

The officer who is competent to enter into the contract shall send the notice through registered post/courier service/e-mail. The date of registration shall be the date of acceptance of the tender irrespective of the date when the communication is actually delivered to the bidder.

In urgent cases acceptance of a tender can also be communicated by telegram/and or SMS to be followed by selection notice in proper form. In such cases the date of filing of telegram/sending SMS shall be the date of acceptance of the tender. Copy of the W.P.(C) No.19703 of 2020 tender shall also be sent to the subordinate officer under the control of the work. In the selection notice the selected contractor would be notified to execute an agreement within a maximum period of fourteen days from the date of acceptance of the tender. Fine at the rate of 1% of contract amount subject to a minimum amount of Rs.1000 and a maximum amount of Rs.25000 shall be levied if agreement is not executed within ten days after the notified period of fourteen days.

The successful bidder shall execute the agreement within 14 days or with fine within next 10 days from the date of selection notice. In case of failure to execute the agreement within this period the tendering authority shall cancel the offer of contract forfeiting the EMD and take such other actions as mentioned in the bidding document. After canceling the offer of contract forfeiting the EMD and taking such other action as mentioned in the bidding document. After cancelling the offer of contract in the above case, the tendering authority may negotiate with the next lowest bidder and award the work to him if he expresses his willingness in writing to execute the work at the accepted the rate of the default bidder. Otherwise the work will be re-tendered.

13. It is relevant to note that in the present case the tendering authority has already informed the petitioner about the consequences of failure to execute the agreement within the first 14 days, after the further 10 days on fine as well as after expiry of 24 days of the registration of the selection notice. At the same time, such a provision is not seen in clause 2009.6. The bidder comes to know about that only when he receives the cancellation. It is in such circumstances that it was provided, that the negotiation and selection of L2 shall be after cancellation of W.P.(C) No.19703 of 2020 selection notice. On the other hand, in the present case it is seen that right from the issuance of selection notice petitioner was being warned of the consequences on failure to execute agreement within 24 days out of which the last 10 days was to be given only on penalty. He was also given the ultimatum in Ext.P5 notice warning cancellation without further notice. Ext.R3(b) cancellation as well as negotiation, issuance of selection notice to 4th respondent and execution of agreement with 4th respondent are all done after the period prescribed in those notices in which petitioner was informed of cancellation without further notice. Even assuming that the allegation of the petitioner that Ext.R3(b) cancellation was not issued before Ext.P8 or that the petitioner has not received the same so far, I am of the view that there was substantial compliance of the provisions before inviting the 4th respondent for negotiation. Petitioner does not have a case that he did not receive Ext.P5 notice or that he reported for execution of agreement within the period specified therein. If at all there was any procedural lapses in issuing or communicating Annexure R3(b) order, that by itself would not be a reason for interference, as held by the Apex Court in the judgment W.P.(C) No.19703 of 2020 dated 18.03.2020 in Civil Appeal No.2197 of 2020 : The Bharat Coking Coal Ltd & others V AMR Dev Prabha & Ors., where it was held that minor deviation from explicit terms of NIT would

not by itself be sufficient to set aside the tender in the absence of any allegation of malafides.

14. The 3rd respondent had informed the petitioner about the emergency involved for completing the work on account of pressure due to complaint and demand of public as well as people's representative in the matter.

15. The only ground raised in the Writ Petition is as against Ext.P8 order and that is with respect to violation of clause 2009.6 and the speed within which the negotiation was conducted with 4th respondent and the agreement executed with the 4th respondent. The tender was with regard to a work relating to a road. In view of the nature of work and urgency involved in it for executing the same, it cannot be said that the respondents have shown any undue haste. Moreover, petitioner has not alleged any malafides on the part of any of the respondents. Ext.P8 is seen issued in accordance with the conditions stipulated in the selection notice.

16. Though the petitioner has stated that 3 rd W.P.(C) No.19703 of 2020 respondent has permitted him to commence the work without executing agreement with respect to Ext.P11 work, it is seen that Ext.P11 is not issued by the 3rd respondent. It is issued by the Superintending Engineer, PWD N.H (North) Circle, Kozhikode; whereas the 3rd respondent is Superintending Engineer, PWD Roads, (North Circle).

17. Though the learned Counsel for the petitioner argued that Annexure R3(b) is issued in violation of the principles of natural justice; the files do not contain the draft of Annexure R3(b); it is not received so far, etc. as rightly pointed out by Sri.Manojkumar, the learned Senior Government Pleader, no such grounds are raised in the Writ Petition. Though Annexure R3(b) was challenged filing I.A.No.2/2020 on 11.11.2020, no additional grounds are incorporated in the Writ Petition. The selection notice issued to the 4th respondent is also not challenged. Therefore, the contentions raised at the time of hearing regarding violation of principles of natural justice or about the procedural lapses and with respect to the issuance of Annexure R3(b) do not deserve any consideration.

18. However, I find that the contention as to W.P.(C) No.19703 of 2020 violation of principles of natural justice would not apply to the present case where petitioner was informed of the impending cancellation even in EXts.P1 and P5 notices and even then he did not choose to execute the agreement.

19. The contention of the learned Counsel for the petitioner that Annexure R3(b) is not binding on the petitioner since the same is not communicated to him is also not borne out by any pleadings on records. However, it is seen that the judgments in *Bachhittar Singh v. State of Punjab*: AIR 1963 SC 395, *State of Punjab v. Amar Singh Harika*: AIR 1966 SC 1313, *Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd*: (2012) 6 SCC 384, relied on by the learned Counsel for the petitioner, were rendered in entirely different circumstances. The Apex Court held that an order would be binding on a person affected by it only on communication of the order, observing that until and unless it was communicated, the authorities could alter the decision. But in this case petitioner has admittedly received Ext.P8 order and a decision was already taken issuing selection notice to 4th W.P.(C)

No.19703 of 2020 respondent. Those judgments would not apply to the present case. The judgment in Bachchithar Sing's case was rendered in respect of an order in appeal against the dismissal of the appellant. Amar Hasarika's case was in respect of his dismissal. Bipromasz Bipron Trading Sa's case was relating to interpretation of Section 3(2) of Arbitration and Conciliation Act 1996, relating to communication of a letter appointing the Arbitrator. The proposition that if an order is passed but not communicated to the party concerned, it does not create any legal right which can be enforced through the court of law, as it does not become effective till it is communicated, is not liable to be considered in this Writ Petition, in view of the fact that petitioner has not raised any such contention in the Writ Petition.

20. It is pertinent to note that in the judgment in Dharampal Satyapal Ltd. v. CCE: (2015) 8 SCC 519 relied on by the petitioner, the Apex Court after discussing various case laws on the principles of natural justice found that in that case no hearing was required as no prejudice was W.P.(C) No.19703 of 2020 caused to the appellants therein because it was not heard. In the judgment in Daffodil's Manufacturing & another V State of UP & another: 2020(1) KLT SN 2 the matter was related to a decision of Government not to purchase medicine from the petitioner therein, when it was already supplying medicine. The question of observance of principles of natural justice and the judgments relied on by Sri.George Mecheri will not apply, in the circumstances of this case, in view of the circumstances arising in a case relating to a proposed contract.

21. At the same time, in the judgment in Elektron Lighting Systems (P) Ltd. v. Shah Investments Financial Developments & Consultants (P) Ltd.: (2015) 15 SCC 137 the Apex Court while considering a case where the High Court set aside the work order given to the appellants on grounds which were not pleaded against the same, reiterated the dictum laid down in Jagdish Mandal v. State of Orissa: (2007) 14 SCC 517 where it was held as follows:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance.

W.P.(C) No.19703 of 2020 If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

22. The very dicta was laid down in the judgment in Bakshi Security & Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd., (2016) 8 SCC 446 and in the judgment in Michigan Rubber (India) Ltd. v. State of Karnataka: (2012) 8 SCC 216, relied on by the learned Government Pleader, wherein the Apex Court while considering the challenge against the pre-qualification criteria notified in a tender floated by Karnataka SRTC, after analysing various judgments it was held that in the matter of awarding a contract, greater latitude is required to be conceded to the State authorities and that 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.

It was held as follows in para 24:
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"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."

23. In the judgment in U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma: (2013) 5 SCC 182 the Apex Court held that there is no vested right upon the plaintiff/bidder until the bid is accepted by the competent authority and that being the highest bidder and having deposited a certain percentage of bid amount without there being approval of the same by the competent authority it would not amount to a concluded contract.

24. Even though learned counsel for the petitioner argued that that there is no intimation regarding Ext.R3(b) cancelling the selection notice issued to him, such a contention is not available in the Writ Petition or in any of the pleadings placed before this Court. Even though the learned counsel for the petitioner argued that Annexure R3(b) is not binding on the petitioner since it is not issued, when such a contention is not raised in the Writ W.P.(C) No.19703 of 2020 Petition it is not necessary for this Court to take a decision on that.

25. From the pleadings available it is seen that the petitioner was L1 and 4th respondent was L2. It is also seen that the petitioners did not appear before the Superintending Engineer though sufficient time was granted for the same. Selection notice is cancelled only after the petitioner was informed of the proposed cancellation in the event of failure to execute the agreement. It is seen that the 3rd respondent has only protected public interest by awarding the work to the 4th respondent at the same rate quoted by the petitioner who was L1. The mere fact that the petitioner did not get a separate communication before the selection notice was issued to the 4th respondent cannot itself

be a ground for cancelling the work awarded to the 4th respondent, especially when the work has progressed to about 30% to 40%, that too, within a period of less than two months. There is no allegation of malafide, extraneous consideration etc. against the selection of the 4th respondent.

26. As argued by the learned Government Pleader, the scope of judicial review in matters of contracts as well as W.P.(C) No.19703 of 2020 finalisation of tenders is very limited. In the present case there was not even a concluded contract between the petitioner and the department.

In the circumstances of the case, the petitioner does not deserve any relief. Hence the Writ Petition is dismissed.

Sd/-

P.V.ASHA

rkc

JUDGE

WP (C) .No.19703 OF 2020 (K)

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	TRUE COPY OF THE SELECTION NOTICE ISSUED BY THE 3RD RESPONDENT ON 11-06-2020
EXHIBIT P2	TRUE COPY OF THE REQUEST DATED 29-06-2020
EXHIBIT P3	TRUE COPY OF THE COMMUNICATION DATED 06-07- 2020 OF THE 3RD RESPONDENT
EXHIBIT P4	TRUE COPY OF LETTER DATED 4-08-2020
EXHIBIT P5	TRUE COPY OF THE COMMUNICATION DATED 12-08- 2020 ISSUED BY 3RD RESPONDENT
EXHIBIT P6	TRUE COPY OF THE REQUEST DATED 21-08-2020 SUBMITTED BEFORE THE 3RD RESPONDENT
EXHIBIT P7	TRUE COPY OF THE COVERING LETTER DATED

09.09.2020 AND ITS ENCLOSURE SUCH AS TREASURY DEPOSIT RECEIPT, MEDICAL CERTIFICATE, ORDER OF THE DISTRICT COLLECTOR DATED 2-09-2020 EXHIBIT P8 TRUE COPY OF THE PROCEEDINGS OF THE 3RD RESPONDENT DATED 16 09-2020 EXHIBIT P9 TRUE COPY OF THE RELEVANT PORTION OF THE PWD MANUAL, 2012 EXHIBIT P10 TRUE COPY OF THE ORDER DATED 29-08-2020 OF THE MINISTRY OF HOME AFFAIRS EXHIBIT P11 TRUE COPY OF ONE OF SUCH SANCTION ORDER DATED 29-04-2020 ISSUED IN FAVOUR

OF THE PETITIONER HIMSELF EXHIBIT P12 TRUE COPY OF SELECTION NOTICE VIDE ORDER NO.

DBI-2019/6942/IA) DATED 16-07-2020 RESPONDENT'S/S EXHIBITS:

EXHIBIT R4(a) A TRUE COPY OF THE PROCEEDINGS OF THE SUPERINTENDING ENGINEER, NORTH CIRCLE, KOZHIKODE UNDER ORDER NO. DC 02/PRICE/2017/4315 DATED 18-06-2020.

EXHIBIT R4(b) A TRUE COPY OF THE HAND RECEIPT EXECUTED PETITIONER IN THE OFFICE IF THE EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA ON 03-06-2020.

WP(C).No.19703 OF 2020(K) EXHIBIT R4(c) A TRUE COPY OF THE REFUND ORDER ISSUED FROM THE OFFICE OF THE EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA TO THE PETITIONER ON 09-06-2020.

EXHIBIT R4 (d) A TRUE COPY OF THE ORDER NO.A7/1670/2020 AS PER WHICH THE EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA HAS ORDERED THE REFUND DATED 03-06-2020.

EXHIBIT R4(e) A TRUE COPY OF THE REFUND ORDER FOR AN AMOUNT OF RS. 17,16,800/- RECEIVED BY THE PETITIONER FROM THE OFFICE OF THE EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA, DATED 11-09- 2020.

EXHIBIT R4(f) A TRUE COPY OF THE HAND RECEIPT EXECUTED BY THE PETITIONER IN THE OFFICE OF THE EXECUTIVE ENGINEER, PWD ROADS DIVISION WAYANAD, KALPETTA DATED 07-09-2020.

EXHIBIT R4(g) A TRUE COPY OF THE PROCEEDINGS OF THE EXECUTIVE ENGINEER UNDER ORDER NO. A6/1750/2020 DATED 07- 09-2020 ORDERING REFUND OF RS.17,16,800/- IN FAVOUR OF THE PETITIONER.

EXHIBIT R4(h) A TRUE COPY OF THE REFUND ORDER WITH RESPECT TO RS. 35,80,700/- RECEIVED BY THE PETITIONER FROM THE EXECUTIVE ENGINEER,PWD ROADS DIVISION, WAYANAD, KALPETTA ON 30.06.2020.

EXHIBIT R4(i) A TRUE COPY OF THE ORDER DATED 29-07-2020 RECEIVED BY PETITIONER FROM THE EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA ON 04-08-2020.

EXHIBIT R4(j) A TRUE COPY OF THE ORDER A4/978/2020 DATED 19-

06-2020 ISSUED BY EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA, SANCTIONING REFUND OF THE PERFORMANCE GUARANTEE AMOUNT OF RS.13,93,700/-

EXHIBIT R4(k) A TRUE COPY OF THE REFUND ORDER AND THE HAND RECEIPT EXECUTED BY THE PETITIONER IN THE OFFICE OF THE EXECUTIVE ENGINEER, PWD ROADS DIVISION, WAYANAD, KALPETTA DATED 19.06.2020. EXHIBIT R4(l) A TRUE COPY OF THE NOTICE DATED 07-09-2020 ISSUED BY THE 3RD RESPONDENT SEEKING 4TH RESPONDENTS WILLINGNESS TO UNDERTAKE THE WORK AT THE RATE QUOTED BY THE PETITIONER.

EXT.R4M TRUE COPY OF THE AGREEMENT NO.SE(K) 59/2020-21 EXECUTED BY 4TH RESPONDENT WITH THE 3RD WP(C).No.19703 OF 2020(K) RESPONDENT ON 9.9.2020 ANNEX.R3A TRUE COPY OF THE PRELIMINARY AGREEMENT ANNEX.R3B TRUE COPY OF THE PROCEEDINGS DT.7.9.2020 ANNEX.R3C THE RELEVANT PAGE OF THE PWD MANUAL