

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

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THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 07TH DAY OF JANUARY 2021 / 17TH POUSHA, 1942

WP(C) .No.27408 OF 2017(S)

PETITIONER:

M.K. SALIM

AGED 61 YEARS, S/O. HAJI M.K. AHMEDKUNJU,HAJI
MANZIL, MAIN ROAD, KOLLAM - 691 001.

BY ADV. SRI. M.K. SALIM (PARTY - IN - PERSON)

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY CHIEF SECRETARY
SECRETARIAT,THIRUVANANTHAPURAM-695001.
- 2 PRINCIPAL SECRETARY
PORTS, SECRETARIAT, THIRUVANANTHAPURAM-695001.
- 3 MR.GAUTHAM ADANI
CHAIRMAN, ADANI VIZHINJAM PORTS PVT LTD, 2ND
FLOOR, VIPANCHIKA TOWERS,
THYCAUD,THIRUVANANTHAPURAM. CORPORATE OFFICE:
CHAIRMAN,ADANI HOUSE, NEAR MITHAKHAIL SIX
ROADS,NAVARANGPURA, AHAMEDABAD, GUJARATH - 380
09
- 4 SHRI.OOMMENCHANDY
MLA EX CHIEF MINISTER, PUTHUPALLY HOUSE,
JAGATHY,THIRUVANANTHAPURAM - 695 001.

-2:-

5 SHRI.K.BABU
EX. MINISTER, KANNUVARAMPATHU HOUSE, SANSKRIT
COLLEGE ROAD,
THRIPUNITHURA, ERNAKULAM - 682 031.

6 SUPERINTENDENT OF POLICE CBI
COCHIN UNIT, KATHRIKADAVU KALOOR,
ERNAKULAM - 682 017.

R1 AND R2 BY SRI.K.V.SOHAN, STATE ATTORNEY
R5 BY ADV. SRI. PAUL C. THOMAS
R5 BY ADV. SRI.C.S.AJITH PRAKASH
R3 BY ADV. SRI.K.M.ANEESH
R3 BY ADV. SRI.ADARSH KUMAR
R3 BY ADV. SRI.BIJU VARGHESE ABRAHAM
R5 BY ADV. SRI.BIJITH S.KHAN
R5 BY ADV. SRI.M.BAIJU NOEL
R4 BY ADV. SRI.K.P.DANDAPANI SR.
R5 BY ADV. SRI.T.K.DEVARAJAN
R3 BY ADV. SRI.DILEEP CHANDRAN
R5 BY ADV. SRI.A.T.JOSE
R4 BY ADV. SRI.MILLU DANDAPANI
R4 BY ADV. SRI.ROSHEN.D.ALEXANDER
BY ADV. SRI.K.SANTHOSH KUMAR KALIYANAM
R3 BY ADV. SRI.SHASHANK DEVAN
R6 BY ADV. SRI. SASTHAMANGALAM S. AJITHKUMAR,
SPL.P.P. FOR C.B.I.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
18-12-2020, THE COURT ON 7-1-2021 DELIVERED THE FOLLOWING:

J U D G M E N T

Dated this the 7th day of January, 2021

Shaffique, J.

Writ petition has been filed pro bono *inter alia* seeking the following reliefs.

“i) To issue a writ of mandamus order or direction to the Official respondents to take effective steps to protect the interest of the State by making necessary modifications in the agreement entered upon by the Kerala Government and ADANI Vizhinjam Harbour Seaport.

ii) To issue an order or direction to the then Chief Minister, Shri. Oommen Chandy, Ports Minister Shri. K. Babu, Ports Minister to owe the responsibility for the loss to the State Government and for not protecting the State interest and to giving away all the benefits to the concessionaire running away with all the benefits as pointed out by the Accountant General and for responsible in catering the agreement and mainly responsible for the signing of the M.O.U and entrusting the decision only with the respondent no.1 & 2 who was the Principal Secretary, Ports, Kerala Government to take a decision against the interest of the State as pointed out by the C.A.G in all the meeting took place in Delhi for the sanctioning of the agreement between the State and ADANI GROUP.

iii) To issue an order or direction to the 6th respondent or any national investigating agency to probe into all the lapses and file charge sheet before this Hon'ble Court within a stipulated time under the supervision of this Court to

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probe whether any kickbacks were paid to anybody for entering into such an agreement with the Concessionaire which has put the State under heavy loss and the State interest are not taken care off as per the C.A.G report. An expert committee to be set up by the court to rectify the losses to the State through the M.O.U which to be altered accordingly.

iv) To declare the enquiry commission constituted to probe the CAG findings may be dissolved as the CAG has equivalent powers of Judge of Supreme Court."

2. The substantial contention urged by the petitioner is that the Comptroller and Auditor General of India in its report has listed out several irregularities in the conditions incorporated in an agreement between the State of Kerala and Adani Ports Private Ltd., which were unfavourable to the State. But despite such reports, no action is taken by the Government to consider whether the agreement would protect the interest of the State and therefore he seeks appropriate modification to the agreement and to ensure proper enquiry being conducted through an appropriate agency into the kickbacks if any that would have passed on between the parties while entering into the agreement.

3. The respondents have filed their counter affidavit denying the allegations. During the course of the proceedings, this Court had sought the response of the Government by an

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interim order dated 13/9/2017. By yet another interim order dated 9/10/2017, it was observed that the State Government had appointed a Commission of Enquiry under the Commission of Enquiry Act, 1952, headed by a retired Judge of this Court as per notification dated 18/7/2019 and therefore, it is not appropriate to consider the matter while awaiting for the recommendation of the Commission. By a further interim order dated 15/3/2019, it was indicated by this Court that the commission of enquiry has finalised the report and it has to be placed before the State Legislature.

4. When the above matter came up for hearing on 18/12/2020, we heard Sri.M.K.Salim, the petitioner as party in person through video conferencing, learned State Attorney Sri.K.V.Sohan, Sri.K.P.Dandapani, learned Senior counsel appearing on behalf of the 4th respondent, Sri.C.S.Ajith Prakash, learned counsel appearing on behalf of the 5th respondent and Sri.Sasthamangalam S.Ajith Kumar, learned Special Public Prosecutor appearing on behalf of the 6th respondent.

5. The petitioner reiterated his contentions in the matter. The learned State Attorney placed before us Government letter dated 2/12/2020 sent by the Additional Chief Secretary to the

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Director, Vigilance and Anti-Corruption Bureau, Thiruvananthapuram. The purport of the letter is that based on the Commission Report of Justice C.N.Ramachandran Nair and the infirmities which were pointed out, Government had decided to conduct vigilance enquiry and therefore sanction was given to conduct investigation under Section 17A of the Prevention of Corruption Act, 1988. The relevant portion of the said letter reads as under:-

"xxx

A Concession agreement has been entered into between the Government of Kerala and Adani Vizhinjam Port Private Limited for the construction of the Vizhinjam International Multi-purpose Seaport. It is reported as per the references cited (copies enclosed) that actions as elaborated below have resulted in financial advantage to the Concessionaire, which were not conceived at the time of RFP.

1. It was proposed to construct breakwater as per EPC (Engineering, Procurement and Construction) mode. This proposal was subsequently canceled and incorporated as a work to be carried-out by, the Concessionaire an amount of Rs. 1463 Crores. As the EPC tender was canceled, the market rate for the above project could not be worked out. It has resulted in huge benefit to Concessionaire.

2. As per EPC proposal, the cost required for the completion of breakwater and Fishing harbour was Rs.747 Crores, fixed by the Consultant. The same was increased to Rs.1463 crores. Though the cost of funded work was increased, since only one offer was received, the cost of the project was not meticulously analyzed and vetted at the

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Government level and the cost seems to be without considering the actual requirement. This has also resulted in benefit to the Concessionaire.

3. Extension of Concession period from 30 years to 40 years against the provisions under the Model Concession Agreement has resulted in huge benefit to the Concessionaire.

4. The construction of breakwater and Fishing Harbour as funded work, development of Port Estate, etc, were not originally contemplated at the time of RFQ. This has also made for undue benefit to the Concessionaire.

5. A comparative study of certain rates to ascertain the cost of funded works on DPR and Basic Engineering Report shows that rate calculated in the Concession agreement gives undue benefit to the Concessionaire.

6. The rate of rock which is a substantial component of breakwater is based on the rates fixed by AECOM & the rate assessed by the C&AG on the rate fixed by HED shows huge difference. While fixing such rates no proper scrutiny has been made.

I am directed to inform you that the Government have decided to conduct a Vigilance Enquiry on the above aspects. Accordingly, sanction is also given to conduct the Enquiry under Section 17A of the Prevention of Corruption Act,1988. I am also to request you to take expeditious steps to conduct the Vigilance Enquiry."

6. As far as the relief sought for by the petitioner is concerned, it is substantially met when the Government had ordered enquiry through a Commission who was a former Judge of this Court. On the basis of the report submitted by the Commission, the Vigilance Wing of the State had also been

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directed to conduct investigation.

7. In the light of the aforesaid factual situation, we do not think that there is any necessity to keep the matter pending as the grievance brought to the notice of the court to a certain extent had been taken care of by the Government itself while appointing a Commission of Enquiry as well as by directing a vigilance investigation to be held in the matter. Once the vigilance investigation is complete, the law shall take its own course.

Therefore, we do not think that any further directions are required in the matter. Writ petition is disposed of taking note of the above facts.

Sd/-

A.M. SHAFFIQUE

JUDGE

Sd/-

GOPINATH P.

JUDGE

Rp

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF THE MINUTES MEETING BY
DEPARTMENT OF ECONOMIC AFFAIRS (PPP
CELL) ON AUGUST 19TH , 2014.
- EXHIBIT P2 TRUE COPY OF THE C.A G REPORT.
- EXHIBIT P3 NEWS PAPER REPORTS ON THE C.A.G REPORT.

RESPONDENT'S EXHIBITS:

- EXHIBIT R4 (A) TRUE COPY OF THE GO (MS) NO.36/2014/F&PD
DATED 12/05/2014.
- EXHIBIT R4 (B) TRUE COPY OF THE REPLY DATED 03/07/2017
ISSUED UNDER THE RTI ACT ALONG WITH THE
ENCLOSED DOCUMENT.
- EXHIBIT R4 (C) TRUE COPY OF THE LETTER WRITTEN BY THE
4TH RESPONDENT TO THE COMPTROLLER AND
AUDITOR GENERAL OF INDIA (CAG) BEARING
REFERENCE NO. 296/OC/17 DATED
09/06/2017.
- EXHIBIT R4 (D) TRUE COPY OF THE GO (MS) NO.75/10/F&PD
DATED 18/10/2010.
- EXHIBIT R4 (E) TRUE COPY OF THE GO (RT)
NO.800/2010/F&PD DATED 22/09/2010.
- EXHIBIT R4 (F) TRUE COPY OF THE GO (MS) NO.26/2014/F&PD
DATED 31/03/2014.
- EXHIBIT R4 (G) TRUE COPY OF THE MINUTES OF THE 23RD
MEETING OF THE EMPOWERED COMMITTEE HELD
ON 07/05/2015.
- EXHIBIT R4 (H) TRUE COPY OF THE NOTE ON SELECTION
PROCESS PUBLISHED IN THE WEBSITE OF
VIZHINJAM INTERNATIONAL SEAPORT.

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EXHIBIT R4 (I) TRUE COPY OF THE GO (MS) NO.35/2015/F&PD
DATED 13/07/2015.

EXHIBIT R4 (J) TRUE COPY OF THE ORDER DATED 03/02/2015
ISSUED BY THE GOVERNMENT OF INDIA,
MINISTRY OF FINANCE.

EXHIBIT R4 (K) TRUE COPY OF THE GO (MS ())
NO.15/2017/F&PD DATED 18/07/2017.

EXHIBIT R1 (A) TRUE COPY OF THE GO (MS) NO.
15/2017/F&PD DATED 18/07/2017
APPOINTING THE COMMISSION ALONG WITH
TERMS OF REFERENCE PUBLISHED ON
20/07/2017.

EXHIBIT R1 (B) TRUE COPY OF THE GO (RT)
NO.674/2017/F&PD DATED 25/08/2017.

EXHIBIT R1 (C) TRUE COY OF THE GO (RT) NO.707/2017/F&PD
DATED 15/09/2017.

True Copy

PS to Judge

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