



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.15376 OF 2023

M/s. Ram Infrastructure,
Through Authorised Person,
Mr. Abhijeet Ashok Thorat,
Age-30 years, Occu:Business,
R/o-Plot No.34, Harisiddhi Society,
Mayur Park, Aurangabad

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Department of Urban Development,
Mantralaya, Mumbai-32,
- 2) The Principal Secretary,
Department of Urban Development,
Mantralaya, Mumbai-32,
- 3) The Municipal Corporation,
Chhatrapati Sambhajanagar,
Through Administrator @
Municipal Commissioner,
Chhatrapati Sambhajanagar,
- 4) The Executive Engingeer,
The Municipal Corporation,
Chhatrapati Sambhajanagar,
Chhatrapati Sambhajanagar,
- 5) M/s. Shaikh Constructions,
Through its Proprietor,
Mr. Shaikh Miraj,
Age-46 years, Occu:Business,
R/o-Bunglow No.1-5,
Bassaiye Nagar, Aurangabad.

...RESPONDENTS

...
Mr. D.P. Palodkar Advocate for Petitioner.
Mr. S.K. Shirse, A.G.P. for Respondent Nos.1 and 2.
Mr. S.S. Tope Advocate for Respondent Nos. 3 and 4.
Mr. A.S. Bayas Advocate for Respondent No.5.
...

**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE : 8th FEBRUARY, 2024

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Rule. Rule made returnable forthwith. Heard learned counsel appearing for the respective parties finally, by consent.
2. The petitioner challenges the communication issued by respondent No.4 on 7th December 2023, thereby dividing the tender work pertaining to tender ID No. 2023_AMCA_919149_1 between the petitioner and respondent No.5 who were the L-1 (Lowest-1) and L-2 (Lowest-2) Bidders, respectively.
3. Affidavit-in-reply has been filed on behalf of respondent Nos.3 and 4 as well as on behalf of respondent No.5.
4. The pleadings emerging before this Court unequivocally

suggests the admitted fact that respondent No.4 had issued tender notice i.e. e-Tender on 23rd June 2023 in respect of supply of drinking water in the Municipal Limits of Municipal Corporation, Chhatrapati Sambhajnagar through tankers. The petitioner as well as respondent No.5 participated in the same. The technical bid of the petitioner was accepted upon scrutiny. Thereafter the financial bid was also opened and the petitioner was the lowest bidder i.e. declared as L-1. The petitioner communicated readiness and willingness to carry out the complete work in adherence to the tender notice. Respondent No.4 had invited respondent No.5 by referring to clause regarding Empanelment. Thereafter the impugned communication came to be issued on 7th December 2023 dividing the work in between the petitioner and respondent No.5. Hence this Petition.

5. Heard learned Advocate Mr. Palodkar for the petitioner, learned APP Mr. Shirse for respondent Nos.1 and 2, learned Advocate Mr. Tope for respondent Nos.3 and 4 and learned Advocate Mr. Bayas for respondent No.5. Perused the affidavit-in-reply by one Kashinath Murlidhar Phalak, Executive Engineer (Water Supply), Chhatrapati Sambhajnagar Municipal

Corporation, on behalf of respondent Nos. 3 and 4 and affidavit-in-reply filed on behalf of respondent No.5.

6. All the parties have laid their hands on the tender conditions. The relevant condition is the Condition No.47, which runs thus:-

" ४७. Empanelment पद्धत :

- i) विहीत पद्धतीने एल-१ निविदेचे दर अंतिम झाल्यानंतर सदर एल-१ च्या दरामध्ये काम करण्यास तयार असणा-या इतर पात्र सहभागी ठेकेदारांसह जास्तीत जास्त तिन ठेकेदारांचे पॅनल निश्चीत करण्यात येईल.
- ii) ठेकेदारांचे पॅनल निश्चीत करतांना एल-२, एल-३, एल-४ या पद्धतीने प्राधान्यक्रम देण्यात येईल.
- iii) आवश्यकते नुसार पॅनलमधील ठेकेदारांना काम विभागून देण्यात येईल.
- iv) कोणाला किती काम द्यावे याचे सर्व अधिकार प्रशासक / आयुक्त, छत्रपती संभाजीनगर महानगरपालिका यांना राहतील."

7. There is no need to refer to other conditions of the tender as the petitioner as well as respondent No.5, both were qualified in the technical bid and in the financial bid. The petitioner was declared as L-1 and respondent No.5 was L-2. Learned Advocate for the petitioner submits that above Condition No.47 has been misinterpreted. When the petitioner was ready and willing to

comply with all the terms and conditions, there should not have been Empanelment.

8. Whereas the learned Advocate for respondent Nos.3 and 4 submits that there is no ambiguity as such and the reason behind the said condition or speculation for Empanelment was that the Corporation wanted to see that none of the area in the jurisdiction of the Corporation remains without water supply and there should not be the only burden or responsibility on one agency. He also pointed out that the petitioner was given tender in the earlier years and the Corporation had received many complaints regarding non-supply of the water and therefore, the panel was created and the distribution is made amongst the L-1 and L-2 and the rights were reserved with the Municipal Commissioner. He also relied on the decision in *Dhananjay Malik and others vs. State of Uttaranchal and others, 2008 DGLS (SC) 365* to support his contention that when the candidate submits himself to the selection process without any demur, then he is estopped from complaining that the selection process was not in accordance with the rules, and on the same analogy when the petitioner herein has taken part in the entire process, he cannot challenge the term at a later stage. Further, the learned counsel

relied on the decision in ***Writ Petition No.9519 of 2023 (Babarrao Vitthalrao Thorat vs. the State of Maharashtra and others)*** decided by this Court on 4th November 2023, which is on the same analogy and also to support the contention that only in exceptional circumstances judicial review in the matter of Government contracts is permissible. There are no *mala fides* attributed or alleged in the Petition.

9. Learned Advocate appearing for respondent No.5 submitted that even the work order has been issued in favour of respondent No.5 whereas it has not been so issued in favour of the petitioner up-till now and respondent No.5 has started the work as per the work order.

10. It is to be noted that the work order has been issued in favour of respondent No.5 by respondent Nos.3 and 4 on 11th December 2023, still it was not challenged in the present Petition. Further, no work order was issued in favour of the petitioner by that time. This is the further fact that has to be considered by this Court.

11. Now, turning towards the interpretation of Term/Condition

No.47, reproduced supra, it does not say as to when and under which circumstance the said situation would be implemented. It should have been the endeavour of respondent Nos. 3 and 4 that they should not have left any term for interpretation. It appears that on 16th October 2023 a written communication was made by the petitioner stating that in respect of Clause No.47, he is ready to comply with the tender but if the work is not done by him then L-2 can be called. This is the interpretation that has been put by the petitioner. After the financial bid was opened and he was declared as L-1, if there was any doubt about any of the conditions, then it ought to have been got clarified before submitting himself to the tender. The tender has been floated by respondent Nos.3 and 4 and therefore the suitable interpretation can be made by them and in that situation it cannot be by this Court under its writ jurisdiction. Of course respondent Nos.3 and 4 could not have justified themselves in submitting that due to their past experience with the petitioner they have put that condition. Of course that would have been the situation compelling them to have the said clause, but at the same time they could have even rejected the tender of the petitioner on the ground of their past experience.

12. As regards the prayer for issuance of work order to the petitioner is concerned, it is subject to compliance with the further conditions, if any, i.e. upon the submission of the documents and therefore, it cannot be monitored by this Court. Further, as per the prayer clause the petitioner wants his work order without carrying out division of work, which directions again cannot be issued by this Court under its writ jurisdiction as the work order to respondent No.5 has already been issued and there is no challenge to the same in the present Petition.

13. We would like to rely on the decision in **M/s. N. G. Projects Limited Vs. M/s. Vinod Kumar Jain and Others, [2022 LiveLaw (SC) 302]**, wherein it has been observed that :-

"23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not

to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a *mala fide* manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the state and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.”

14. For the aforesaid reasons, we do not find this is to be a fit case where we should exercise our constitutional powers. The Writ Petition stands dismissed. Rule stands discharged.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE