AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10583 OF 2013

DHANPAL TATYA KHOT,
Adult, Occupation: Social Service,
Residing at Main Road, Kupwad, Sangli …Petitioner

Versus

1. **STATE OF MAHARASHTRA**,
Through Hon'ble the Chief Minister
having his office at Mantralaya, Mumbai
– 400 032
2. **SANGLI MIRAJ AND KUPWAD CITY MUNICIPAL CORPORATION,**
having its office at Sangli, through its
Commissioner.
3. **SMC INFRASTRUCTURE PVT. LTD.,** 101, "Ackruti SMC", Khopat,
LBS Marg, Thane (W) ...Respondents.

Mr. Shriniwas Sudhir Patwardhan, *for the Petitioner*.
Mr. V.S. Gokhale, *AGP, for Respondent No. 1.*
Mr. N.V. Walawalkar, Senior Advocate, *i/b Mr. G.H. Keluskar, for Respondent No. 2.*
Mr. S.M. Gorwadkar, Senior Advocate, *for Respondent No. 3.*

CORAM: **A.S. OKA & G.S. PATEL, JJ.**
DATED : **15th December 2015**

<u>JUDGMENT:</u> (Per G.S. Patel, J.)

1. We have heard Mr. Patwardhan, learned Advocate for the Petitioner, Mr. Gokhale, AGP, for the 1st Respondent, Mr. Walawalkar, learned Senior Advocate for Respondent No. 2 and Mr. Gorwadkar, learned Senior Advocate on behalf of Respondent No. 3. With their assistance, we have considered the material on record.

2. The Petitioner, a Councillor with the 2nd Respondent, the Sangli Miraj and Kupwad City Municipal Corporation, challenges the award of work for underground drainage systems to Respondent No. 3, one SMC Infrastructure Private Limited. The case of the Petitioner is that the contract for the work in question was awarded to the 3rd Respondent at rates well above the tender rates without inviting fresh tenders or allowing other tenderers to participate in the tender process; and that the 2nd Respondent Corporation unlawfully negotiated with the 3rd Respondent to the exclusion of other tenderers/bidders after the bids were opened.

3. A few facts are necessary. The 2nd Respondent had admittedly undertaken an underground drainage system project to be implemented in Sangli and Miraj. There were two drainage schemes, one for Sangli and one for Miraj. These were sanctioned by the Government of Maharashtra on a recommendation of the State Level Sanctioning Committee. These recommendations are, respectively, of 6th August 2011 and 1st August 2011. Both projects are within the jurisdiction of the 2nd Respondent Corporation. Both projects had remained pending implementation for quite some time. Since 2005-2006, the 2nd Respondent Corporation had been attempting to obtain an approval and a grant for these drainage schemes from the Central Government and the State Government. Both projects were essential to meet the health and hygiene needs of the citizens within the command area of the 2nd Respondent Corporation. Approval and grant in aid for both schemes was finally obtained only after a gap of about six years in 2011. By that time, the drainage problem and the associated health issues had considerably increased. In the meantime, the Maharashtra Pollution Control Board had been demanding that the 2nd Respondent Corporation establish a full-fledged Sewage Treatment Plant ("**STP**") and proper disposal arrangements for municipal sewage from the 2nd Respondent's command area on a priority basis.

4. The Executive Engineer of the 2nd Respondent initially proposed a clubbing of these projects. The 2nd Respondent's Municipal Commissioner made a recommendation on 30th November 2011 to its Standing Committee to implement the work in parts or phases, viz., (i) sewer lines in extended areas and rising main; (ii) sewer lines in the remaining areas; and (iii) a STP; and (iv) pumping machinery and allied works for each scheme. The matter was discussed in a Standing Committee meeting on 5th March 2012. At this meeting, it was apparently finally decided that, having regard to the nature of the work, a single comprehensive tender comprising all components of the scheme for each city should be called for in order to facilitate a better implementation of the scheme. A corresponding resolution of the Standing Committee of the 2nd Respondent was passed on 5th March 2012 for floating a single comprehensive tender for each scheme comprising of the constituent parts mentioned above.

5. The project was sanctioned by the Government of Maharashtra under a scheme known as "Maharashtra Suvarna Jayanti Nagaroothal Maha Abhiyan" in the year 2011. On the basis of the sanction granted by the 2nd Respondent's Standing Committee, a tender notice was issued on 29th April 2012 in various state-level newspapers inviting e-tenders. The notices met with a response from nine bidders at the pre-qualification stage. On scrutiny at that stage it was found that only four of these, the 3rd Respondent among them, were qualified for commercial bids for each scheme.

6. It appears that in the meantime there were doubts raised about some of the qualified bidders at a General Body meeting of the 2nd Respondent held on 12th June 2012. Under the directions of the Mayor, the facts and details of the tendering processes of both schemes were placed before the Standing Committee at its meeting held on 17th July 2012. These were approved and the commercial bid process was then taken to its conclusion.

7. It is necessary to note that there was a pre-bid clarification issued for the work of underground drainage system for Sangli. In this, the tender cost was placed at Rs. 64,71,54,681/- and that for Miraj was placed at Rs. 50,45,60,058/-.

8. The tenders submitted by the qualified bidders were opened on 21st August 2012. Three of the four bidders had quoted their commercial bids for each scheme. The 3rd Respondent was "L1", i.e., the lowest bidder for each scheme. Copies of the commercial valuations made on 21st August 2012 are annexed to the 2nd

Respondent's Affidavit in Reply. The project received its grants-in-aid on 1st November 2011 (for Sangli) and 31st March 2012 (for Miraj) and the 2nd Respondent was directed to start work on top priority. Several members of the 2nd Respondent's General Body insisted on a quick completion of the schemes.

9. At this stage, it is necessary to note that the estimated rates mentioned in the tenders were based on the District Schedule Rates ("**DSR**") for 2010-2011 of the Maharashtra Jeevan Pradhikaran ("**MJP**"). This is a State Level Technical Authority for the valuation *inter alia* of water supply and drainage projects in Maharashtra. At the time when the tenders were accepted, the MJP's DSR rates for 2012-2013 were in fact the ones applicable although these had not been made known in the tender since they were not available at that time. The Chief Engineer of the MJP, on the request of the 2nd Respondent, provided the DSR 2012-2013 by his letter dated 13th February 2013, a copy of which is Exhibit "2" to the 2nd Respondent's Affidavit in Reply.

10. It is also necessary to note that the Central Vigilance Commission has issued guidelines on 20th January 2010, which, among other things, prescribe that negotiations are permissible only with the L1 or lowest bidder. Given the differences in the DSR, the 2nd Respondent Corporation therefore had two choices. The first was to cancel the entire process and call for fresh tenders; and the second was to negotiate with the lowest bidder in accordance with the Central Vigilance Commission's guidelines. The 2nd Respondent had said in its Affidavit that calling for fresh tenders would have resulted in a loss of time and a further increase in rates, without any assurance or guarantee that in respect of any such fresh tender the rates then applicable would be lower than the rate presently offered by the 3rd Respondent as L1. For these reasons, the 2nd Respondent Corporation opted to negotiate with the 3rd Respondent. The 3rd Respondent was called to a negotiations meeting on 12th March 2013. At that meeting, the 3rd Respondent's representative said that the market rates of material had increased significantly, and given that the tender rates were on the basis of MJP DSR 2011-2012, those rates could not possibly be made to apply. The submission was for the award of a contract at what the 2nd Respondent describes as a marginal and entirely acceptable increase of only 9.72% over the then current MJP DSR of 2012-2013. This percentage increased was applicable to both the Sangli and the Miraj projects. The 2nd Respondent renegotiated with the 3rd Respondent after a complete technical evaluation of both standards based on the MJP DSR 2012-2013. In fact, the DSR 2012-2013 was published even while the tender process was under way. It is also to be noted that by this time the Government grants have been received. As is well known, all such grants have a limited and specified utilization period after which they lapse. To regain that grant would have meant a further loss of time.

11. The 2nd Respondent's case is that this is not the first time that the 2nd Respondent has had to approve of a similar project. A previous project was passed by resolution dated 20th March 2010 and that too, as in the present case, involved the 2nd Respondent taking a loan for this scheme. The Petitioner himself was a party to that resolution but did not object to it.

12. The Affidavit in Reply filed by one Omprakash Rajaramji Diwate, the Deputy Commissioner of the 2nd Respondent, Municipal Corporation set outs the background and details of this project.

13. Returning to the project in question, the proposal by the 3rd Respondent was duly submitted for a decision of the Special General Body at its meeting held on 6th April 2013. The 2nd Respondent's Affidavit in Reply in paragraph 6 clearly states that the Petitioner raised his objections in the meeting and that these were considered and unanimously rejected. It is also stated that the tenders of the 3rd Respondent were accepted by the majority in the General Body at the rates that the Petitioner now impeaches. We note that there is no Affidavit in Rejoinder nor any denial to the statements made in paragraph 6 of the 2nd Respondent's Affidavit in Reply. It is true that the Petitioner has, by an amendment, sought to impeach the resolution dated 6th April 2013. However, in the absence of any Rejoinder or denial to the categorical and unambiguous statement of paragraph 6 of the 2nd Respondent's Affidavit in Reply, we do not see how any such challenge can possibly be said to survive.

14. Mr. Walawalkar has also placed on record a further Affidavit dated 8th December 2015. Attached to this Affidavit are colour photographs of the state of progress of work. It is at once apparent from these annexures that the work has considerably progressed and it is not possible to say that the money spent on the project has been shown to have been wasted or squandered. According to the 2nd Respondent and amount in excess of Rs.12 to 15 crores has already been spent on the project. To cancel the scheme at this stage would involve a colossal waste of public funds and a reversal of the entire process resulting in considerable loss not only to the exchequer but also a delay in the implementation of the project itself.

15. The 3rd Respondent also filed an Affidavit in Reply. In this, apart from anything else, it is also stated that the Petitioner himself had participated in the resolution No. 222 dated 13th March 2010 which related to the aforesaid two schemes and which was on that date placed before the General Body of the 2nd Respondent.

16. The Petition itself contains in paragraphs 7 a wholly unsubstantiated and bald set of averments without any demonstrated basis. It is necessary to reproduce paragraph 7 of the Petition in its entirety.

> "7. The Petitioner states that he has learnt from the reports in the Press that Respondent no. 2 has issued the work order to Respondent no. 3. Hereto annexed and marked as Exhibit I is the copy of the said press report. The Petitioner has applied for copy of the work order, if any, issued to Respondent no. 3. The Petitioner has still not received any document in that regard. The Petitioner states that the grant of work for Underground Drainage System to Respondent no. 3 at a rate of 50% over the tender rate is illegal. Attempt of Respondent no. 2 to show that it is only 9.72% above the

current market rate is jugglery with figures. The Petitioner states that the current market rate i.e. rate of 2012-13 is arbitrarily fixed by Respondent no. 2. Though purportedly it is recommended by Maharashtra Jeevan Pradhikaran, such violation of tendered rate is illegal. If as a result of inflation such exercise of revision of rates is deemed necessary then the same must be done either by issuing fresh tender or at least by allowing all participants in the tender process to revise their bids. Negotiations with only one chosen contractor from out of all participants on the so called current market rates are arbitrary and illegal. It causes serious financial loss to the exchequer of the Respondent no. 2 and its citizens also. The Petitioner states that Respondent no. 3 has been awarded the contract at the rate higher than the market rate on account of pressure exerted by the several councillors and their groups which is reported by the office of Respondent no. 2 to its General Body. Award of contracts at the rate higher than the market rate because of undue haste shown by the councillors is illegal and arbitrary and causes serious financial loss to Respondent no. 2. The Commissioner of Respondent no. 2 thus ought to have sent the said Resolution of the Special General Body to Respondent no. 1 for appropriate action under section 451 of the Bombay Provincial Municipal Corporation Act, 1949 on the Petitioner’s

> application. Respondent No. 1 has shown apathy for reasons unknown to law. The Petitioner states that if the Special General Body Resolution No. 1 dated 6th April 2013 of Respondent no. 2 Corporation is not quashed, Respondent no. 2 will suffer from serious monetary loss. Even going by the standards of loss ascertained by the Commissioner, it is the loss because of increase of 9.72% of the alleged market rate. In fact the same is more than 50% of the tendered rates. As a result thereof Respondent no. 2 Corporation is having to avail the loan of Rs. 125 crores which could have been easily avoided. The Petitioner states that award of contract to Respondent no. 3 by the process as above is initiated by fraud and malice. The same, therefore, deserves to be quashed and set aside. The Petitioner has, therefore, approached this Hon'ble Court by way of the present writ petition under Articles 226 and 227 of the Constitution of India on the grounds as aforestated.

17. This paragraph does not contain any substantial material whatsoever. It is stated only in vague generalities. Further, to say, that the rate only 9.72% above the current market rate is jugglery with figures or that the current market rate of 2012-2013 is arbitrarily fixed by the 2nd Respondent is clearly misleading. We find from the record that the 2nd Respondent appears to have used not random figures or those available from the private sector but has used the figures and rates prescribed annually by a state level authority, viz., the Maharashtra Jeevan Pradhikaran. It has been careful to use the most recent rates while carrying its renegotiations with the lowest bidder. That these post tender negotiations are permitted by the Central Vigilance Commission is also not disputed by the Petitioner.

18. We are also mindful of the fact that both these projects are evidently essential for both these cities. Time is critical in such matters. In our experience, there are daily Petitions being filed against Corporations demanding that such projects being taken up and implemented on a priority basis. The reasons given in these Petitions are many, but most of them relate to environmental and health issues. The 2nd Respondent Corporation has clearly directed itself towards achieving the necessary goals. We are unable to appreciate why a project that is clearly and manifestly in the public interest and the rates for which are demonstrably based on those prescribed by a public authority should be allowed to be stopped midstream in this fashion. We also find that the Petitioners' non-disclosure of his participation in the 22nd March 2010 resolution relating to these two projects is not insignificant.

19. This is not a matter of expediency being allowed to trump public interest or public policy. We might have been moved to intervene in exercise of our writ jurisdiction under Article 226 of the Constitution of India had the Petitioner been able to make out even a semblance of a case of illegality, impropriety or the award of work in an impermissible manner. The record points to the contrary. As we have noted, other than vague and unsubstantiated allegations, the Petitioner has placed nothing on record to substantiate his case.

20. The Petitioner has, by amendments, also challenged an order dated 8th October 2014 by which the Petitioner's representation dated 2nd May 2013 under Section 451 of the Maharashtra Municipal Corporation Act, 1949 ("**the MMC Act**") was rejected. By that order, the 1st Respondent, the State Government, found the resolution dated 6th April 2013 not to be against the interest of the Corporation. According to the Petitioner, there is no basis for this finding. The Petitioner also says that no reasons are given for the rejection of these objections.

21. We are unable to appreciate these submissions. Section 451 of the MMC Act is an enabling Section that allows the State Government to suspend the execution of any resolution or prohibit of doing any act provided it forms an opinion *inter alia* that the execution of that resolution or the order of the Corporation is in contravention or in excess of power, is likely to lead to abuse or misuse or cause waste of municipal funds against the financial interests of the Corporation. No person can as of right demand such a finding. In his representation, except substantially the same vague generalities that are placed before us today, the Petitioner adduced no further material. We do not believe that it was open to the State Government to arrive at any finding other than the one it did or to hold in favour of the Petitioner. For Section 451 to be properly invoked, cogent and compelling material must be placed. The challenge on this count must also fail.

22. We find no merit in the Petition. It is accordingly rejected. In the circumstances of the case, there will be no order as to costs.

(G. S. PATEL, J.) **(A.S. OKA, J.)**