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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8999 OF 2015**

Pioneer Foundation Engineers Pvt. Ltd. Petitioner.

V/s

The Maharashtra State Road
Development Corporation Ltd. & Ors. Respondents.

Mr. Anil Anturkar, Senior Counsel with Mr. Kezer Kharawalla, Pradosh Patil, Mr. Sandip Phathak i/b Lex Juris for the Petitioner.

Mr. Prashant Chavan i/b Reshmarani Nathani for Respondent Nos. 1 to 3

Mr. Vineet Naik Senior Counsel with Mr. Rahul Totala i/b Equip Legal for Respondent No.4.

**CORAM: V. M. KANADE &
B.P. COLABAWALLA, JJ.**

DATE: 16th March, 2016

P.C.:- (Per V.M. Kanade, J.)

1. By this Petition which is filed under Article 226 of the Constitution of India, Petitioner is seeking appropriate writ order or direction for quashing the entire tender process conducted by Respondent No.1 - MSRDC and for further direction, directing Respondent No.1 to again initiate fresh process by inviting bids to carry out the remedial work of installing net to protect landslides in Khandala Borghat.

2. After the Petition was filed, Petitioner made an application for grant of interim relief. However, interim relief was not granted since the tender was already awarded to Respondent No.4. Leave to amend was, however, granted. Thereafter, Petitioner amended the Petition and also now prayed for a declaration that the letter dated 02/09/2015 awarding contract to Respondent No.4 should be quashed and set aside.

3. Brief facts which are relevant for the purpose of deciding this Petition are as under:-

4. On or about 19/07/2015, a major landslide took place in Khandala Ghat near Adoshi Tunnel situated near Lonavala, which resulted in death of two motorists who were plying their motor cycles on the said road. Respondent No.1, on account of the said incident, took a decision to carry out remedial work and also decided to take permanent remedial measures to avoid landsliding in future.

5. Respondent No.1 - MSRDC therefore decided to publish short tender notice of seven days in order to start remedial work at the earliest and the said tender notice was published in Times of India News Paper all over India on 06/08/2015. Time for completion of the work was of five months. Accordingly, after the tender notice was published, Petitioner and Respondent No.4 inter alia submitted their

tender bids. Respondent No.1 held pre-bid meeting on 11/08/2015 in which Petitioner's representative was present. The queries raised by the bidders in the pre-bid meeting were duly answered by Respondent No.1 vide communication dated 17/08/2015. Thereafter, Petitioner – Pioneer Foundation Engineers Pvt. Ltd., Thane, Respondent No.4 - Maccaferri Environmental Solutions Pvt. Ltd., Pune and one Ferro-Concrete Const. (India) Pvt. Ltd., Indore submitted their tender bids.

6. Respondent No.1 – MSRDC appointed an independent Expert Consultant M/s Upham International Corporation for evaluating the technical bids submitted by the bidders. Respondent No.1 also requested IIT, Mumbai to evaluate the efficacy of the system in the light of the Special Report No.23 of Indian Road Congress Highway Research Board, 2014. Accordingly, the IIT, Mumbai submitted its Report on 25/08/2015 mentioning therein the nature of remedial work which was to be carried out by the successful bidder. Thereafter, bid of the Petitioner was rejected on technical ground and Respondent No.4 was declared to be successful bidder and the letter of acceptance was given to Respondent No.4 dated 02/09/2015 and the work order was issued on 25/09/2015.

7. Petitioner filed Petition in this Court on various grounds. Application for interim relief was filed and this Court by order dated 16/09/2015 declined to grant interim relief. It, however, observed that all further steps taken by Respondent Nos. 1 and 2 would be

subject to further orders passed by this Court. The matter was posted for hearing soon thereafter. However, the matter was finally heard today by this Bench.

8. Mr. Anturkar, the learned Senior Counsel appearing on behalf of the Petitioner submitted that the entire decision making process was vitiated because the tender conditions were not followed by Respondent No.1. He submitted that tender condition No.3.1.1 envisaged examination of the product by the named Technical Expert which has not been carried out in the present case. He submitted that this examination was to be conducted by the Technical Expert viz Department of Earth Science and Rock Mechanic IIT, Mumbai. He submitted that the work order was issued on 25/09/2015 and the letter regarding examination of product was written to completely different authority on 19/08/2015 and the approval was also given on 25/08/2015. He submitted that since the approval was given by completely different authority, the said approval was illegal. Secondly, he submitted that the approval which was given by the Department of Earth Science through one Mr. T.N. Singh dated 10/12/2015 was much after the work order dated 25/09/2015 was issued by Respondent No.1. Thirdly, he submitted that even the Technical Expert viz. Department of Earth Science and the Rock Mechanic had relaxed the tender condition and the parameters regarding the product which was to be used. He submitted that the said Department had stated that the rock bolt mentioned in the tender

notice was of 32 mm dia and it was relaxed to 25 mm dia, thus changing the condition in the tender. He submitted that the Expert Authority had no power to change the said tender condition. Fourthly, he submitted that an attempt was made to fabricate another letter dated 08/10/2015 issued by the Technical Expert since no reference to the said letter was made in the Respondent No.4's affidavit-in-reply which was filed after 08/10/2015. He then submitted that the said letter was also issued after the letter of acceptance dated 02/09/2015 and the work order dated 25/09/2015. He then invited our attention to the reply filed by Respondent No.4 and submitted that in the said reply, Respondent No.4 has mentioned that their product was already manufactured. He therefore submitted that Respondent No.4 was absolutely confident of being awarded the tender in their favour. He then submitted that the remedial work was essential and important as lives of number of motorists depended on that work and, therefore, IIT, Mumbai may be asked to find out whether the quality of work carried out by Respondent No.4 was proper. He invited our attention to letter dated 25/10/2010 written by Chief Engineer, CI&D Wing, JKSPDC, Jammu to the Project Manager, Larsen & Toubro. He submitted that in the said letter, reference was made to the material which was supplied by Respondent No.4. He submitted that in the said letter it was clearly mentioned that the material supplied by Respondent No.4 was substandard.

9. On the other hand, Mr. Chavan, the learned Counsel appearing

on behalf of Respondent Nos. 1 and 2 submitted that in such matters the scope and power exercised by this Court under Article 226 is very limited. He, however, submitted that this Court is entitled to examine whether the tender process was properly followed or complied with by Respondent Nos. 1 and 2. He invited our attention to the judgment of the Supreme Court in *Tata Cellular vs. Union of India*¹. He then invited our attention to the affidavit-in-reply in which steps which were taken by Respondent Nos. 1 and 2 were mentioned. He submitted that the Petitioner had attended the pre-bid meeting and all his queries were answered. He then invited our attention to the grounds which have been raised by the Petitioner in the Petition and submitted that the Petitioner has now relied on the grounds which have been raised by him for the first time in the affidavit in rejoinder. He submitted that the contention of the learned Senior Counsel for the Petitioner that the tender conditions were not complied with is not correct. He submitted that condition No.3.1.1 was to be complied with by the successful bidder after the tender was awarded and not before that. He submitted that after the tender was awarded to Respondent No.4 on 25/09/2015, survey as contemplated under condition No.3.1.1 was conducted and the letter dated 10/12/2015 was issued by the Technical Expert approving the design of Respondent No.4. There appears to be some substance in the submissions made by the learned Counsel for Respondent Nos.1 and 2.

¹ (1994) 6 SCC 651

10. So far as the submission made by the learned Senior Counsel for the Petitioner regarding approval being obtained of different authority and not of Department of Earth Science and the Rock Mechanic is concerned, we have perused the said Report submitted by Dr. D.N. Singh. The learned Counsel for Respondent Nos. 1 and 2 submitted that the letter was written by Respondent Nos. 1 and 2 to Dr. D.N. Singh of the Department of Civil Engineering, seeking his advise on technology which was to be used for the purpose of preventing landsliding in the said area. The letter records that two technologies were proposed in this mitigation work and thereafter Respondent Nos. 1 and 2 requested him to evaluate the efficacy of systems proposed by bidders. He submitted that in view of this letter, Dr. D.N. Singh who is an expert in Department of Technical Engineering, Indian Institute of Technology, Powai, Mumbai, gave an opinion that Single Twisted Mesh (chain link type construction) which was a technology to be used by the Petitioner was not advisable and he further gave an opinion that the technology which was to be used by Respondent No.4 was better suited for rock fall mitigation. Perusal of these two letters indicate that Respondent Nos. 1 and 2 therefore have taken an opinion of the expert in geo-technical engineering who was competent to advise Respondent Nos. 1 and 2 regarding the technologies which were being used by the two bidders. The contention of the Petitioner that approval of some other technical expert was obtained is therefore without any substance. On the contrary, Department of Earth Science by its letter dated 10/12/2015

clearly approved the design and drawings submitted by Respondent No.4 and also gave an opinion that Respondent No.4 could use 25 mm dia of bolt also wherever it was necessary.

11. We are therefore satisfied that no breach of the conditions has been committed by Respondent Nos. 1 and 2 and the tendering process followed by them was transparent and fair in awarding the contract to Respondent No.4. It is well settled that the scope of judicial review in such cases is very limited. The Apex Court in *Tata Cellular* (supra) has observed in para 94 as under:-

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract.

In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

12. We are of the view that there was no arbitrariness in the tender process which was followed by Respondent Nos. 1 and 2 and the decision to accept the tender was reached after the process of negotiations and after technical approval of experts in the field.

13. We are therefore not inclined to interfere with the decision taken by Respondent Nos. 1 and 2 for awarding the contract to Respondent No.4. Moreover, another fact which is to be noted is that almost 80% of the work has been completed by Respondent No.4 and only 20% work remained to be completed. The question of now cancelling the contract awarded to Respondent No.4 does not arise.

14. So far as the concern expressed by the learned Senior Counsel for the Petitioner regarding quality of the work carried out by Respondent No.4 is concerned, we are afraid, we would not be in a position to consider this question in this Petition which is restricted to examination of decision making process in awarding contract to Respondent No.4.

15. After we have fully heard Mr. Anturkar, the learned Senior Counsel appearing on behalf of the Petitioner and the learned Counsel for the Respondents, the Advocate on record for the Petitioner requested us that he may be permitted to argue some more points. We, however, have not permitted him to do so since the matter was reserved for orders in the morning session and before we started dictation in the afternoon session, this request was made. We declined this request since permitting advocate on record to argue again after his Counsel has completed his submissions is not the practice followed in this Court. We must point out that we have heard Mr. Anturkar, the learned Senior Counsel appearing for the Petitioner at great length.

16. Writ Petition is accordingly dismissed. However, there shall be no order as to costs.

(B.P. COLABAWALLA, J.)

(V.M. KANADE, J.)