Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION (L) NO. 51 OF 2016

Jayshree Ramakant Khadilkar - Pande .. Petitioner
Vs.
Municipal Corporation of Greater
Mumbai and ors. .. Respondents

Mr.Mihir Desai, Senior Counsel, Amicus Curiae, for the Petitioner.

Mr.A.Y.Sakhare, Senior Counsel a/w Ms. Geeta Joglekar, for Respondent No.1 – BMC.

Mr. M.P. Jadhav, AGP for State – Respondent No.2.

Mr.Shekhar Naphade, Senior Advocate a/w Dr.Abhinav Chandrachud, Mr.S.D.Shetty, Mr.Kunal Chheda i/b M/s. M.V.Kini & Co., for Respondent No.3.

Mr.Aspi Chinoy, Senior Counsel a/w Mr.Mahesh Londhe i/b M/s.Sanjay Udeshi & Co., for Respondent No.4.

Mr.Amol Bavare a/w Mr. Yogesh Chawak and Mr.Chirag Dave i/b Legasis Partners for Respondent No.5.

Mr. G.W.Mattos, for Respondent No.8.

CORAM : SHANTANU.S.KEMKAR &
M.S.KARNIK, JJ.
RESERVED ON : 23rd JUNE, 2016
PRONOUNCED ON : 05th JULY, 2016

JUDGMENT (PER M.S.KARNIK, J.) :

. Heard Mr.Mihir Desai, learned Senior Counsel appointed Amicus Curiae, Mr.A.Y.Sakhare, learned Senior Counsel for respondent No.1, Mr.M.P.Jadhav, learned AGP for respondent no.2, Mr.Shekhar Naphade, learned Senior Counsel for respondent no.3, Mr.Aspi Chinoy, learned Senior Counsel for respondent no.4, Mr.Chirag Dave, learned Counsel for Respondent no.5, Mr.G.W.Mattos, learned Counsel for respondent no.8. Respondents no. 6 & 7 are not represented, in any case, their presence is not necessary for deciding the present controversy.

2. This PIL was first moved on the 27/05/2016 before the Vacation Court. By an interim order dated 27/05/2016, the contracts awarded by respondent no.1 to the respondents no. 3 & 4 are stayed. The said ad-interim order is made operative for a limited period i.e. till the regular Bench hears the matter.

3. Thereafter it was heard for admission on

09/06/2016 when the objection was raised as regards locus of the petitioner. Instead of going into same as agreed to in place of the petitioner prosecuting the matter, Mr.Mihir Desai was requested to act as '*Amicus Curiae*' in the matter to assist the Court.

4. The subject of the present PIL pertains to awarding of 4 contracts to respondents no.3 & 4 on 06/05/2016 by respondent no.1 – Municipal Corporation of Greater Mumbai (hereinafter referred to as 'MCGM' for short). In the PIL, it is alleged that respondents no. 3, 4, 5, 6 & 7 are the contractors to whom a number of road works approximately 200 works (of which most are over Rs. 5 Crores each) during the period 2013-14, 2014-15, 2015-16 were awarded by MCGM across Mumbai. Pursuant to a complaint of corruption received by respondent no.1, various irregularities were noticed as regards the quality of the works and thereby causing heavy financial loss to respondent no.1. Based on the interim reports submitted from time to time by the committee appointed by the Municipal

Commissioner, on 01/04/2016, the Additional Municipal Commissioner by a detailed note proposed criminal action as well as that of black-listing the contractors which included respondents no.3 & 4 also. The Municipal Commissioner by order dated 25/04/2016 directed filing of FIR including action of black-listing / suspension of registration of respondents no.3 & 4. FIR was registered on 26/04/2016. It is therefore alleged that despite the interim reports indicating large scale irregularities and despite filing of FIR and the proposed action of black-listing / suspension of registration, respondent no.1 awarded the contracts to respondents no.3 & 4.

5. Respondent no.1 – MCGM by filing a detailed reply and also additional reply defended its decision of awarding the contracts to respondents no.3 & 4. According to respondent no.1, respondents no.3 & 4 cannot be debarred from participating in the tender process as on the date of issuance of work order, there was no order of black-listing or suspension of registration. Respondent no.1 has taken every possible action

against respondents no.3 & 4 including criminal prosecution. The contracts awarded to respondents no.3 & 4 are pursuant to a tender process which progressed in the normal and legitimate course of things.

6. Respondent no.3 by filing a detailed affidavit supported the stand of respondent no.1. Respondent no.3 prayed for dismissal of PIL as it is motivated to tarnish the reputation of respondent no.3.

SUBMISSIONS OF THE LEARNED AMICUS CURIAE

7. The learned Amicus Curiae has invited our attention to the various interim enquiry reports enclosed along with the PIL. According to him, respondent no.1 – MCGM which is a statutory body is responsible for carrying out maintenance and construction of municipal roads in the MCGM area. Respondent no.1 awarded approximately 200 road works during the period 2013-14, 2014-15 and 2015-16 in which grave irregularities and corruption has come to light. He highlighted various

irregularities which have been observed with respect to 34 out of these 200 road works. The decision of conducting enquiry into these irregularities in the road works done in the MCGM area was taken pursuant to the complaint and then the Municipal Commissioner Mr.Sitaram Kunte, by his order dated 16/10/2015 directed the formation of a two-member committee to examine in detail the various complaints of irregularities in the road works.

8. According to the learned Amicus Curiae, the first such interim report was submitted on 23/12/2015. However, looking at the vast scope of the inquiry required to be undertaken, an extension was sought and time was granted to the two-member committee to file the interim report by 10/02/2016.

9. The learned Amicus Curiae invited our attention to the letter dated 04/01/2016 suggesting the formation of technical teams for carrying out site visits, scrutiny of RA bills,

final bills, challans, verification of documents etc. Accordingly, technical teams in terms of the proposal of the Chief Engineer (Vigilance) were formed by the Assistant Municipal Commissioner. On 15/01/2016, it was decided in a meeting held by the Municipal Commissioner to take trial pits on internal roads in the presence of the respondent no.1's roads staff and representations of Third Party Quality Auditors (TPQA) with the help of Municipal labourers. Accordingly, on 10/02/2016, 34 roads (selected as sample out of the total 200 road works) were inspected and an interim report dated 24/02/2016 was filed by the two-member committee.

10. Learned Amicus Curiae has invited our attention to the interim report dated 24/02/2016 and to the conclusions thereunder wherein discrepancies are found in base layers. These discrepancies included the Wet Mix Macadam being of lesser thickness than the design, lesser thickness of Granular sub base, lesser overall design curst, asphaltic layers of roads have lesser thickness than design etc.

11. According to the learned Amicus Curiae, seriousness of the major discrepancies can be discerned from the fact that the interim report showed that in W-266 road work, the overall crust was only 18% of the design crust. Similarly, in W-271, it was found that the entire Sand blanket was not laid and the overall crust was a mere 34% of the design crust. In several cases, the thickness of various sub-base layers was found to be 100% deficient which means that the corresponding component of work had not been executed at all by the concerned contractors.

12. The interim report concluded that most of the discrepancies are found in the sub-base layers of the road and that all the road works in the work code allotted to the contractors needs to be verified by respondent no.1. The interim report also suggested that five teams be formed to do the complete examination of the entire road works and to quantify the total financial loss caused to the respondent no.1.

13. The learned Amicus Curiae invited our attention to the interim report dated 18/03/2016 of the trial pits. In the said report, at point number 8 is a road workwise chart showing the extent of major discrepancies for each of the 34 roads. This chart also mentions the contractors responsible for each road work and financial loss caused to respondent no.1 with respect to the non -execution of each road work or a part thereof.

14. The Amicus Curiae pointed out that in the interim report on trial pits of 18th March 2016, the Deputy Municipal Commissioner (Z-III) recommended that the inspection of remaining of the 200 road works of cost above Rs. 5 Crores should be carried out in a similar manner.

15. The learned Amicus Curiae further invited our attention to the preliminary report dated 01/04/2016 of the Additional Municipal Commissioner. The said report dated 01/04/2016 mentions that it can be seen that these roads have not been constructed to the designed strength and that there has

been a large scale deficiency in quality and its manipulation thereof. The Additional Municipal Commissioner concluded thus:

> A) From the above it is clearly seen that the officers of all levels of Roads and Traffic department engaged in execution of these works have failed to perform their duties in spite of having knowledge of irregularities/malpractices and responsibilities need to be fixed on them.
>
> B) Third Party Quality Auditors (TPQA) though having knowledge that the works are not carried out as per design and BOQ have given false certification to the works which are actually not carried out enabling the contractors to claim the amount for the same. Action including blacklisting and filing a police complaint may be taken against them.
>
> C) The contractors with full knowledge and intention have prepared false record of the work not actually executed by them as per design and BOQ and have submitted these claims for obtaining payments and received them. Action including blacklisting and filing a police complaint may be taken against them.

16. Our attention is invited to the noting of the Municipal Commissioner dated 18/04/2016 which reads thus :

> "From the report it appears that general responsibility is fixed. While it is appreciated that it will take time to fix individual charges, however in view of the gravity of the irregularity a first stage responsibility and action that needs to be taken should be enumerated. Please put up with proposal for action to be taken."

17. A proposal was accordingly put up by the Additional

Municipal Commissioner on 20/04/2016 for initiating disciplinary proceedings against all officers who are involved in the execution of the works and reports. Apart from other actions recommended, proposal was also put forward for initiating action of filing FIR and black-listing the contractors and Third Party Quality Auditors which may be taken by the Chief Engineer (Roads).

18. The learned Amicus Curiae invited our attention to the noting dated 25/04/2016 of the Municipal Commissioner on the said proposal dated 20/04/2016 which are as under :

> "The enquiry report has brought out serious irregularities in the execution of road works in the MCGM. From the report it is clear that all 34 roads taken up for inspection have irregularities of a serious nature and all 6 contractors are found to be guilty. Not only this, even the third party auditors have completely failed in their duties and are involved in perpetuating this irregularity. This large irregularity could not have taken place without the active and passive involvement of senior officials and officials at all ranks.
>
> In view of the outcome of the report the following action be taken to ensure that all guilty are punished and further systems are put in place to ensure that public money is spent with due care and achieves stated out comes.
>
> 1. The then C.E (Roads) Shri A.Pawar should be placed under suspension forthwith. The C.E (Vigilance) has already been suspended in another case. DMC (GA) to

> take action.
>
> 2. The responsibility on other officials be fixed and action of suspension and other disciplinary action be taken in stages. DMC (GA) to coordinate.
>
> 3. The process of blacklisting/deregistration of contractors and third party auditors to begin immediately. This action will be taken by Director (E.S.P) by following due process of law.
>
> 4. In view of the magnitude of public money involved and the large scale irregularity FIR be filed forthwith against contractors and Third Party Auditors (TPA) by C.E. (Roads) in consultation with DMC (GA).
>
> 5. The tender documents and tender procedure need to be revamped. The C.B.(Roads) under supervision of the Addl.M.C.(E.S.) will take up work of further revising of tender documents. Further a stringent system will be put in place to ensure quality of work being executed.
>
> 6. It is also observed that the road plan drawn up has included roads that do not need repairs or upgradation. The Addl. MC (E.S.) will take up work of viewing the road works plan based on strict technical criteria.
>
> 7. The AMC (W.S) to draw up a schedule for the remaining roads in view of the fact that the first stage of enquiry has shown serious irregularity."

19. The learned Amicus Curiae pointed out that on the basis of the above, FIR under Sections 120B, 197 and 420 of the Indian Penal Code came to be filed against all the 6 contractors including respondents no. 3 and 4 on 25/04/2016.

20. The learned Amicus Curiae submitted that despite the aforementioned findings and the proposed action against the 6 contractors including respondents No.3 and 4, respondent no.1 by Standing Committee resolution dated 04/05/2016 awarded the contracts to respondents no.3 and 4. He contends that the awarding these contracts to respondent no.3 and 4 is contrary to the action proposed by the Municipal Commissioner and the same is palpably against the public interest. According to him the undue haste with which the contracts are awarded to the contractors and the consequential delay in issuance of show cause notice and taking appropriate action for blacklisting the contractors by the MCGM is only with a view to favour the contractors and therefore, action of respondent no.1 is arbitrary and the same is against the public interest.

21. The learned Amicus Curiae would contend that it was in public interest for the Corporation to have aborted the contracts instead of hurriedly awarding the same. The MCGM ought to have first proceeded with the action against the

contractors including that of black-listing and then considered the award of contracts.

22. The learned Amicus Curiae argued that in respect of one of the contracts, the tender notice is published as far back on 16/05/2015 and packet 'C' was opened on 04/09/2015 and in respect of another contract, tender notice was published on 18/11/2015 and the packet 'C' was opened on 19/01/2016 and therefore, the submission of the Corporation in its affidavit that the delay in awarding the contracts of work nature will cause great hardship and inconvenience to the public at large is not justified. According to the learned Amicus Curiae year after year, the public money is wasted as a result of shoddy and tardy road works undertaken by these contractors. Moreover, in the face of preliminary report and the action proposed, the manner in which and the speed with which the MCGM has moved to award the contracts reflect the arbitrariness of its decision.

23. The learned Amicus Curiae therefore, contends that

despite glaring major discrepancies being found in the road works executed by respondents no.3 and 4, action of awarding further contracts to respondents no.3 and 4 in such a hurried and hasty manner is wholly unreasonable and arbitrary.

SUBMISSIONS ON BEHALF OF RESPONDENT NO. 1.

24. Per contra, the learned Senior Counsel Mr.A.Y.Sakhare for respondent no.1 – BMC justified the decision of respondent no.1 in awarding contracts to respondents no. 3 and 4. Learned Senior Counsel would contend that all the aforesaid works are of utmost urgent and important nature and any delay of whatsoever nature will cause great hardship and inconvenience to the public at large. The contract and work order granted to the contractors for the 4 works enumerated is within the framework of the law and that while carrying out the said 4 works through the said contractors, total vigil will be kept as far as quality of work is concerned. From the date of the issuance of show cause notice (16/05/2016), the MCGM has not issued any further work order to the said contractors and no

new work will be granted to them, till the final order is passed on the show cause notice.

25. Learned Senior Counsel for the MCGM invited our attention to the chart which is at page 113 of the affidavit in reply of respondent no.1 reproduced in paragraph 52 of this order to show the manner in which the tenders progressed. According to the learned Senior Counsel, in case of widening and reconstruction of bridge across Mithi river at Dharavi near Drive-in-theatre in H/East Ward, packet 'C' was opened as far back on 04/09/2015 i.e. even before the decision was taken to hold the preliminary enquiry in respect of road works. In other cases, the tender notices are published on 25/01/2016, 21/01/2016 and on 18/11/2015. The tenders were processed in its usual course and the same proceeded in the normal course of the things as per the procedure for awarding work contracts which culminated in the issuance of the work order on 06/05/2016.

26. According to the learned Senior Counsel, the Corporation is seized of the matter as regards action to be taken against the contractors and various reports placed on record would clearly go to show that respondent no.1 is taking all possible steps against the contractors with utmost urgency.

27. According to learned Senior Counsel, the awarding of the work contracts permitting participation of the respondents no. 3 & 4 in the tender process has nothing to do with the action initiated against the respondents no.3 & 4 and the same cannot be interlinked. Learned Senior Counsel would submit that respondent no.1 is bound to follow due process of law. In view of Rule 8.1.2(a) of the Registration Rules of 2015 (for short 'Rules of 2015') as there was no show cause of blacklisting /de-registration issued to the contractors on the date when the work order was issued, therefore, as per the law laid down by the Apex Court and this Court, MCGM could not have prevented respondents no. 3 and 4 from participating in the said tender process and taking it to its logical conclusion.

28. Mr.Sakhare, learned Senior Counsel invited our attention to the additional affidavit in reply filed by respondent no.1. The relevant paragraphs are as under :

> "2) "I say that on 25.4.2016 the Municipal Commissioner took decision to lodge FIR and start process of black-listing the contractors. I say that 5 departments are involved and after co-ordinating with all departments, after taking legal advise from the Law Officer and the Sr.Advocates, show cause notice was prepared and served on the contractors on 16.5.2016. I say that the following dates and events will show that without wasting any time in shortest possible time show cause notice was prepared, got approved and served upon the contractors.
>
> 3) I say that the officers of the MCGM have not wasted any time in preparation of the show cause notice. I say that the administration while issued show cause notice has to give the facts and keep in mind legal provisions. I say that there was no attempt or intention to delay the issuance of show cause notice. I, therefore, submit that the Respondents herein cannot be faulted. I crave leave to refer to and rely upon the office record as and when produced.
>
> 4) I say that on 22.04.2016 draft letter to Municipal Secretary for the proposal to be placed before Standing Committee was approved by the Municipal Commissioner, copy thereof is enclosed herewith and marked as Exhibit 1."

29. Learned Senior Counsel for MCGM categorically submitted that a conscious decision was taken to go ahead with the tender process and the Municipal Commissioner as well as the Standing Committee was aware of the proposed action of black-listing. The specific stand of the respondent No.1 is that once the tender notice is published, the cases then have to be

considered and taken to its logical end. Based on some allegations or some findings in preliminary enquiry, the Rules do not permit non consideration of the said tenders. As there was nothing adverse against them till the issuance of work order, the respondent no.1 had no alternative but to award these contracts to respondents no.3 & 4 is the submission of the learned Senior Counsel.

30. The learned Senior Counsel for the respondent no.1 submitted that the decision of the MCGM to initiate the process of black-listing was taken only on 25/04/2016 and even on that date, there was no suspension of registration and therefore, the MCGM was justified in awarding the contract in respect of which work order was issued on 06/05/2016. According to the learned Senior Counsel, the reading of the said Rules of 2015, more specifically, 8.1.2 clearly mentions that by suspension of registration it is meant that the contractors will not be considered for award of works for bids in progress. In the present case, decision of suspension of the registration was

taken only on 16/05/2016 and therefore, it will not affect the contract in respect of which the work order has already been issued so the Senior Counsel would submit.

31. Learned Senior Counsel would contend that as the show cause notice is issued only on 16/05/2016, it is only thereafter that respondents no. 3 and 4 will not be issued any further work order till the final order is passed on the said show cause notice. Learned Senior Counsel would further contend that action of the Corporation is bonafide and in accordance with law.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.3.

32. Learned Senior Counsel Mr.Naphade on behalf of respondent no.3 invited our attention to the reliefs claimed in the PIL and contended that most of the reliefs are worked out as the process of blacklisting has commenced against the respondents and the FIRs have also been registered and action taken is with promptitude. Nothing survives in prayer clauses (a), (b),

(d). Insofar as prayer clause (c) is concerned, learned senior Counsel would submit that the contracts are awarded after following due procedure and therefore, no relief can be granted. Insofar as prayer clause (e) is concerned, now appropriate action of blacklisting and departmental as well as criminal action has been taken and therefore, there is no reason to distrust the Corporation that it will not take the proposed action to its logical end. There is further no material placed on record which would go to show that the Corporation is not acting against the respondents.

33. Learned Senior Counsel invited our attention to the affidavit in reply dated 27/05/2016 filed on behalf of respondent no.3. According to the learned Senior Counsel, respondent no.3 is having unblemished credibility in civil contractual works for over 30 years and it is one of the leading contractors to have successfully completed very prestigious projects of the cumulative value of more that Rs.1000 Crores per annum for the last five years. He invited our attention to the

various projects successfully completed. Learned Senior Counsel invited our attention to the prestigious clients for whom, respondent no.3 has successfully completed various projects and in fact, respondent no.3 has been awarded with various awards by reputed institutions. It is further brought to our notice that respondent no.3 has on its direct payroll over 4,500 employees and there are equal number of contract workers and sub-contract workers. All these employees are skilled, semi skilled and non skilled employees and they are all fully dependent upon respondent no.3 company.

34. Learned Senior Counsel for respondent no.3 submitted that any hindrance as attempted by the petitioner shall necessarily delay the contractual work which has chain reactions of multiplying the cost and consequently project derailment. The learned Senior Counsel would further contend that allegations and contentions in the Petition are nothing but an attempt made to defame and malign the name and goodwill of the respondent no.3 by certain persons with vested interest.

The learned Senior Counsel invited our attention to the interim enquiry report at Exhibit 'C' which specifies that there was a decision taken by the MCGM to collect samples/trial pits in the presence of the contractor or the authorised officers of the contractor, but, factually no intimation was given to the respondent no.3 nor respondent no.3 was aware of the same. Thus, learned Senior Counsel would submit that principles of the natural justice had not been followed and that these test reports cannot be relied upon against the respondents as they have no evidentiary value. The tests conducted and reports prepared are behind the back of the respondent no.3.

35. Learned Senior Counsel would further contend that the said Rules have no statutory force and are but in the nature of guidelines. He would, therefore, submit that it is only when the proposed action of black-listing is taken to its logical conclusion then the respondent no.3 can be prohibited from participating in the further tender process. In the present case, since the contract has already been awarded, Rule 8.1.2, in any

case, has no application.

36. According to learned Senior Counsel, all the works were executed under the strict and direct control and supervision of respondent no.1 and therefore, the entire action on the part of respondent no.1 in proceeding against respondent no.3 is apparently because of newspaper reports scandalizing the affairs without any grounds. According to the learned Senior Counsel there is a very limited scope of judicial review of government contracts and the Court will only see whether there is any infirmity in the decision making process. The fact finding enquiry, action of black listing and the criminal trial is yet to conclude and therefore, the petition as regards decision of the Corporation to award the contract to respondent no.3 cannot be faulted with or interdicted by this Court.

37. According to the learned Senior Counsel the scope of public interest litigation cannot be enlarged and though it is termed as public interest litigation, proceedings continues to be

one under Article 226 of the Constitution of India and therefore, the limited scope of judicial review in contractual matters as applicable to writ petition under Article 226 equally applies to a public interest litigation.

38. Learned Senior Counsel has invited our attention to the Statement which is at paragraph 52 of this order. Respondent no.3 is concerned with the reconstruction of Hancock Bridge and construction of Vehicular Bridge of Yari Road. The tender notice was published on 25/01/2016 culminating in the issuance of work order which is issued on 06/05/2016. As on the date of the work order, there was no order suspending registration and there was no show cause notice and order suspending the registration of respondent no.3. The show cause notice keeping the registration of the respondents under suspension was issued only on 16/05/2016 and therefore, prior to that date, there was no impediment for the Corporation to have considered the bid of the respondents and consequentially awarding of the contract.

39. Learned Senior Counsel invited our attention to the Rules governing the registration of contractors for Civil, Mechanical, Electrical and Electronic Engineering Works 2015. He invited out attention to the following relevant provision of Rule 2.11 which reads thus :

> "Suspension" shall mean temporary prevention in participating in any of the tender activity."

Rule 8.1.2 - Suspension Of Registration reads thus :

> "Suspension of Registration is meant that no new tender copy will be issued to the contractor/s and he will not be considered for award of works for the bids in process. Registration of contractor/s may be suspended as following, as the case may be.
>
> (a) Whenever any Show Causes Notice is issued to the contractor/s calling for the explanation on the alleged lapses by him, the registration of contractor/s may be suspended up to the arrival of final outcome of the said Show cause notice, depending on the seriousness of the reasons for which show cause notice is issued by the officer (not below the rank of Executive Engineer) of MCGM, Director (E.S. & P.) or concerned Deputy Municipal Commissioner (Engineering wing) is the competent authority to suspend the registration in such cases. Circular of suspension of registration till further orders shall be circulated to all departments of MCGM by Head of the executing department i.e. Chief Engineer of concerned department / Zonal Deputy Chief Engineer of concerned Ward.
>
> The registration of the contractor/s will be restored depending on the final outcome of the process of the said Show Cause Notice and circular to that effect shall be issued by concerned Head of the Department."

40. Learned Senior Counsel would contend that without

prejudice to the submission that said Rule 8.1.2 do not have any statutory force, even then, this Rule specifically provides that by suspension of registration is meant that no new tender copy will be issued to the contractor/s and he will not be considered for award of works for the bids in process. According to the learned Senior Counsel, the work order was already issued on 04/05/2016 and suspension order was issued only on 16/05/2016 and therefore, award of contract is in accordance with the provision of law.

41. Learned Senior Counsel relied upon various decisions of the Apex Court on the issue of blacklisting. He relied upon the decision in the case of **M/s.Erusian Equipment & Chemicals Ltd., Vs. State of West Bengal and anr., (1975) 1 Supreme Court Cases 70.** The learned Senior Counsel took us through paragraph 5 of the said decision. He also invited our attention to paragraph 13 to 15 and 17 to 20 which read thus :

> "13. But for the order of blacklisting, the petitioner would have been entitled to participate in the purchase of cinchona. Similarly the respondent in the appeal would also have been entitled but for the order of blacklisting to tender competitive rates.

14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion

17. The Government is a government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do as fairly without discrimination and without unfair procedure. Reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods by discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary similarly exclusion of a person who offers the highest price from participating at a public auction would also have, the same aspect of arbitrariness.

19. Where the State is dealing with individuals in

> transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised the nature of sanctions involved therein.
>
> 20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

42. Learned Senior Counsel also relied upon the decisions of the Apex Court in the case of **Joseph Vilangandan Vs. The Executive Engineer, (PWD), Ernakulam and ors. (1978) 3 Supreme Court Cases 36 and** in the case of **Raghunath Thakur Vs. State of Bihar and ors. (1989) 1 Supreme Court Cases 229** which reiterated the principle of law in the case of **M/s.Erusian Equipment & Chemicals Ltd.** *(supra)*.

43. Learned Senior Counsel also relied upon the decision of this Court in the case of **State Bank of India Vs. Kalpaka Transport Company Private Ltd., The Bombay Law Reporter, Vol. LXXXII, page 318.** The Division Bench of this Court was pleased to uphold the order of the learned Civil Judge which had held thus :

> "On these pleadings, and after hearing the parties, the learned trial Judge came to the conclusion that the State Bank of India is a "State" or "other authority" within the meaning of that expression used in Article 12 of the Constitution of India. He further held that the respondents were already on the approved list of the Bank. To remove them from the list amounts to black-listing. The wholesale ban to deal with the Kalpaka Transport Company amounted to blacklisting of the said Company. It affected the reputation of the respondents and also their business, and such a decision by the State Bank of India was not valid without following the principles of natural justice and without giving reasonable opportunity to the respondents to present their case before the Bank authorities. In this view, the learned single Judge allowed the petition and issued a direction to the appellant-Bank to give a reasonable hearing to the respondents before delisting them from the approved list of transport operators".

44. Learned Senior Counsel invited our attention to Section 69(c) of the Mumbai Municipal Corporation Act which read thus:

> "69. With respect to the making of contracts under or for any purpose of this Act, the following provisions shall have effect namely : –
> (a) …

> (b)..
> (c) no contract, other than a contract relating to the acquisition of immovable property or any interest therein or any right thereto, which involves an expenditure exceeding rupees [fifty lakhs but not exceeding rupees seventy-five lakhs], shall be made by the Commissioner, unless the same is previously approved by the Mayor. For contracts involving expenditure in [excess of seventy-five lakh rupees], approval of the Standing Committee shall be necessary:
> [Provided that, every contract made by the Commissioner involving an expenditure exceeding five lakh rupees and not exceeding seventy-five lakh rupees shall be reported by him within fifteen days after the same has been made to the Standing Committee:]
> [Provided further that], the total amount of all sanctions granted by the Mayor shall not exceed [seven crore fifty lakh rupees] during a year."

45. Learned Senior Counsel would contend that statutory power of awarding the contract is with the Standing Committee's approval for contracts involved in excess of Rs. 75 Crores. Learned Senior Counsel would therefore, contend that once the statutory duty conferred on the respondent no.1 is discharged in accordance with provisions of Section 69(c) , the same cannot be interfered with by this Court while exercising its limited power of judicial review. The statutory function has to be discharged by the concerned statutory authority alone in accordance with the provisions of law. Learned Senior Counsel relied upon the decision of the Apex Court in the case of

Supreme Court Bar Association Vs. Union of India and anr., (1998) 4 Supreme Court Cases 409 and invited our attention to the provisions of paragraphs 47, 48 and 58. Paragraphs 48 & 58 read thus :

> "48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice " between the parties in any cause or matter pending before it." The very nature of the power must lead the court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute settling. It is a "problem solver in the nebulous areas". [See. K. Verraswami vs. Union of India (1991) (3) SCC 655] but the substantive statutory provisions dealing with the subject matter of a given case, cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject.
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> 58. After the coming into force of the Advocates Act, 1961, exclusive power for punishing an advocate for "professional misconduct " has been conferred on the State Bar Council and the Bar Council of India. That Act contains a detailed and complete mechanism for suspending or revoking the licence of an advocate for his "professional misconduct". since, the suspension or revocation of licence of an advocate has not only civil consequence but also penal consequences, the punishment being in the nature of penalty, the provisions have to be strictly construed. Punishment by way of suspending the licence of an

> advocate can only be imposed by the competent statutory body after the charge is established against the Advocate in a manner prescribed by the Act and the Rules framed thereunder."

46. Learned Senior Counsel thus, would contend relying upon the decision of the **Supreme Court Bar Association** *(supra)* that even the Apex Court while exercising its power under Article 142 has observed that the constitutional power cannot, in any way, be controlled by any statutory provisions, but at the same time, these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject. In paragraph 58, it has been held that punishment by way of suspending the licence of an advocate can only be imposed by the competent statutory body after the charge is established against the advocate in a manner prescribed by the Act and the Rules framed thereunder. Learned Senior Counsel, therefore, submitted that respondent no.1 has exercised its statutory functions in accordance with the provisions of law and hence, decision of MCGM cannot be held to be arbitrary.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.4.

47. Learned Senior Counsel Mr.Aspi Chinoy on behalf of respondent no.4 took us through the statement reproduced in paragraph 52 to contend that if the tender process is normal, legitimate and as per the procedure, the Court must act with restraint while exercising judicial review.

48. Learned Senior Counsel invited our attention to the affidavit in reply filed by respondent no.1 – MCGM. According to him, the tender process insofar as respondent no. 4 started way back on 16/05/2015 and 18/11/2015 culminating into issuance of the work order on 06/05/2016. Till the issuance of the work order, there was no embargo in law to prevent respondent no. 4 from participating in the tender process. The show cause notice was issued only on 16/05/2016 from which date respondent no. 1, at the highest, may be justified in not awarding the work contract if the tender was not finalised. According to the learned Senior Counsel, the MCGM is proactive and well seized of the matter as appropriate action, criminal as

well as black-listing is already initiated. The learned Senior Counsel would contend that if the subjective satisfaction of the statutory authority is based on materials on record, it is not the scope of the writ Court to arrive at its own independent findings based on the same material. The decision to award the contract was a conscious decision as the respondent no.1 was aware of the proposed action at all stages. Respondent no.1 was aware of all the reports and there has been no suppression of any kind whatsoever. The decision of the respondent no.1, therefore, does not warrant any interference. The MCGM will take these actions to its logical conclusion . At this stage, therefore, there is no reason to invoke the extraordinary writ jurisdiction.

49. Learned Senior Counsel relied upon the decision of this Court in the case of **Dalichand G.Shah Vs. The Municipal Corporation of Greater Mumbai, 2016 SCC On Line Bom 338 in Writ Petition (L) No. 3565 of 2015** to support the submission that mere direction of commencement of process of blacklisting will not dis-entitle the respondent no. 4 from

participating in the tender process.

50. Learned Senior Counsel also relied upon the decision of the Punjab & Haryana High Court in the case of **M/s. KCC Buildcon Private Limited Vs. State of Haryana, 2014 SCC On Line P&H 11393 in Writ Petition No. 1832 of 2014 and ors and other companion matters** to contend that unless the process of blacklisting attains finality, it cannot be an impediment for awarding of contract.

<u>CONSIDERATIONS :</u>

51. Having given our anxious consideration to the submissions canvassed on behalf of the respective parties, we find that insofar as the contentions of learned Senior Counsel for respondents no. 1, 3 & 4 on the issue of black-listing, there is no disputing the proposition that till the order of blacklisting or suspension of registration is passed, respondents no.3 and 4 cannot be prevented from participating in the tender process. The law laid down by the Apex Court is well settled.

52. For the sake of convenience, we are listing herein below the sequence of the events which have taken place as regards : -

(A) Initiating action against respondents no.3 and 4 culminating into the order of suspension of registration on 16/05/2016 :

	A complaint is received by respondent no.1 pertaining to the irregularities in the road works done in the MCGM area during the period 2013-14, 2014-15, 2015-16 approximately 200 works (almost Rs.5 Crores each).
16/10/15	The Municipal Commissioner formed two-member committee to examine the complaint.
23/12/15	The first interim report of the two-member committee was submitted to the Municipal Commissioner. However, looking at the vast scope of the inquiry required to be undertaken, an extension was sought.
04/01/16	The Chief Engineer (Vigilance) suggested the formation of technical teams for carrying out site visits, scrutiny of RA bills, final bills, challans, verification of documents etc. Accordingly, technical teams were formed.
15/01/16	In the meeting held by the Municipal Commissioner, it was decided to take trial pits on iternal roads in the presence of the respondent no. 1's roads staff and representations of Third Party Quality Auditors.
10/02/16	34 roads (selected as sample) were inspected. The total cost of inspected road works was to the tune of Rs.352.16 Crores.
24/02/16	An interim report (concerning the 34 road works) was filed by the two member committee. Major discrepancies were found in all the inspected roads. The interim report concluded that most of the discrepancies are found in the sub-base layers of the

	road and that all the road works in the work code allotted to the contractors needs to be verified by respondent no.1. It also suggested that five teams be formed to do the complete examination of road works.
18/03/16	A further interim report on trial pits (concerning 34 road works) was prepared. At point no. 8 of the said interim report, is a road work-wise chart showing the extent of major discrepancies for each of the 34 road works. Serious major discrepancies are found in road works awarded to respondents no.3 & 4.
01/04/16	On consideration of the interim reports, the Additional Municipal Commissioner put up his report to the Municipal Commissioner observing that the roads have not been constructed to the designed strength and there are large scale deficiencies in quality and manipulation thereof.
18/04/16	The Municipal Commissioner noted that individual responsibility be fixed and proposal be put up for action to be taken.
20/04/16	The Additional Municipal Commissioner submitted a note for taking action against the officials of the Corporation. The note also provided for taking action of suspension and other disciplinary action in stages and for beginning process of black-listing/ de-registration of contractors and Third Party Quality Auditors. (The detailed note is at paragraph 34).
25/04/16	The Municipal Commissioner directed process of black-listing/ de-registration of contractors and filing FIR. (The detailed note is at paragraph 36).
27/04/16	1. FIR lodged. 2.Ch. Officer Enquiry sent the copy of direction of the Municipal Commissioner to Director (ES&P).
29/04/16	Receipt of paper from the Enquiry Officer to the Director (ES&P).
30/04/16	Dir (ES&P) informed Ch.Eng (Rds & Tr) to prepare draft show cause notice in consultation with Ch.Officer Enquiry, Ch.Eng (Vig), Law Officer.
04/05/16	Meeting held in the office of Director (ES&P) with Ch. Eng (Rds&Tr), Ch.Eng (Vig), City Engineer,

	Ex.Engineer (M&R) and Ch.Officer Enquiry (in person or their representative) to discuss the issues for preparation of show cause notice.
05/05/16	Meeting with Sr. Counsel to finalise the format of show cause notice.
12/05/16	Ch.Eng (Rds & Tr) submitted the draft show cause notice to Director (ES&P).
13/05/16	Director (ES&P) personally discussed the matter with A.M.C. (WS) and Municipal Commissioner about the draft show cause notice.
16/05/16	Show cause notices issued to the contractors.

and

(B) steps indicating how the tender progressed:

<u>Statement</u>

Name of the work	Tender Notice published on	Packet "A" opening date	Packet "B" opening date	Packet "C" opening date	DL to MS Sanction date	SCR No. and date	Work order issued	Remarks
Reconstruction of Hancock Bridge at Shivdas Chapsi Marg, Mazgaon in "B" Ward.	25/01/16	22/02/16	22/02/16	22/03/16	22/04/16	139 dt. 04/05/16	06/05/16	Work started
Widening and reconstruction of Bridge across Mithi River at Dharavi near Drive-in-Theater in H/East ward.	16/05/15	28/07/15	12/08/15	04/09/15	22/04/16	141 dt. 04/05/16	06/05/16	Work started
Construction of Vehicular Bridge at Junction of Yari Road and Lokhandwala back Road near Amernath Towar building K/West ward.	21/01/16	24/02/16	10/03/16	31/03/16	22/04/16	138 dt. 04/05/16	06/05/16	Work started
Construction of ROB in lieu of L.C.No. 14 at Vikhroli Railway Station (Excl. Railway Span and Slip Road Work.)	18/11/15	29/12/15	08/01/16	19/01/16	22/04/16	140 dt. 04/05/16	06/05/16	Work started

53. While referring to the above statement, the relevant portion of which is reproduced from the Chart Exhibit 'I' at page 113 of the affidavit in reply filed by respondent no. 1, learned Senior Counsel Mr.Aspi Chinoy invited our attention to one date which is not reflected in the said Chart. He points out that on 07/04/2016, the tender committee meeting is held to evaluate and make recommendations on the bid.

54. From the above, what can be deciphered is that till the opening of packet 'C', the tender progressed in a normal and legitimate course. The tender notices in respect of these 4 separate and distinct contracts were published on 25/01/2016, 16/05/2015, 21/01/2016 and 18/11/2015. The opening dates of packet 'C' are 22/03/2016, 04/09/2015, 31/03/2016 and 19/01/2016. At least in 2 cases, packet 'C' was opened as far back as on 04/09/2015 and one on 19/01/2016. The interim report about major discrepancies noted in the work contracts is dated 24/02/2016. Further interim report indicating major discrepancies after a detailed inspection is dated 18/03/2016.

The report of the additional Municipal Commissioner recommending action including black-listing and filing of police complaint is dated 01/04/2016. On 18/04/2016, the Municipal Commissioner called upon the concerned to put up proposal for action to be taken. At this stage, it is pertinent to note that tenders in process were all considered together on 07/04/2016 when the tender committee met to evaluate and made their recommendations on the bids. Thereafter, on 22/04/2016 itself, in respect of all these tenders, draft letter was sent to the Municipal Secretary for approval. On 04/05/2016, the Standing Committee passed a resolution and on 06/05/2016, work order came to be issued.

55. The sequence of events therefore indicates that till opening of packet 'C', the tenders did proceed in the normal and legitimate course of things as observed earlier. All these tenders were processed separately. It is only after 01/04/2016 when the Additional Municipal Commissioner proposed action against the contractors that suddenly from 07/04/2016 onwards all tenders

of respondents no. 3 & 4 were processed on the same dates.

56. A profitable reference can be made to the decision of the Apex Court in the case of **S.R.Tewari Vs. Union of India, reported in 2013(6) Supreme Court Cases 602.** The parameters of the Court's power of judicial review of administrative or executive action on which the Court can interfere is set out in the following paragraphs which read thus :

> 19. In CIT v. Mahindra & Mahindra Ltd., AIR 1984 SC 1182, this Court held that various parameters of the court's power of judicial review of administrative or executive action on which the court can interfere had been well settled and it would be redundant to recapitulate the whole catena of decisions. The Court further held: (SCC p.402, para 11)
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>> "11...it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same."
>
> 20. The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from mala fide, dishonest or corrupt practices, for the reason, that the order had been passed by the

authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegality, irrationality and procedural impropriety before it interferes. The court does not have the expertise to correct the administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure. (Vide: Tata Cellular v. Union of India, People's Union for Civil Liberties v. Union of India and State (NCT of Delhi) v. Sanjeev.

21. In Air India Ltd. v. Cochin International Airport Ltd., this Court explaining the scope of judicial review held that the court must act with great caution and should exercise such power only in furtherance to public interest and not merely on the making out of a legal point. The court must always keep the larger public interest in mind in order to decide whether its intervention is called for or not.

22. There may be a case where the holders of public offices have forgotten that the offices entrusted to them are a sacred trust and such offices are meant for use and not abuse. Where such trustees turn to dishonest means to gain an undue advantage, the scope of judicial review attains paramount importance. (Vide: Krishan Yadav v. State of Haryana).

23. The Court must keep in mind that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority. Thus, the court is devoid of the power to re-appreciate the evidence and come to its own conclusion on the proof of a particular charge, as the scope of judicial review is limited to the process of making the decision and not against the decision itself and in such a situation the court cannot arrive on its own independent finding. (Vide: High Court of Judicature at Bombay v. Udaysingh, State of A.P. v. Mohd. Nasrullah Khan and Union of India & Ors. v. Manab Kumar Guha."

57. A useful reference can also be made to the decision

of the Apex Court in the case of **Kumari Shrilekha Vidyarthi Vs. State of U.P. reported in (1991) 1 Supreme Court Cases 212**. The scope of judicial review in contractual matters has been laid down in the said decision. The relevant paragraph read thus :

> 24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.
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> 27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public

office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

29. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See Ramana Dayaram Shetty v. International Airport Authority of India and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir. In Col. A.S. Sangwan v. Union of India while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

58. The above mentioned list of dates and events would

clearly reveal that on 18/04/2016, upon consideration of various preliminary enquiry reports which reveal large scale irregularities in the works performed by respondents no.3 & 4, the Municipal Commissioner had on 18/04/2016 taken a decision for fixing individual responsibilities and for proposal to be put up for action to be taken. On 20/04/2016, a proposal was put up for initiating the action of black-listing/de-registration of respondents no. 3 & 4 by the Additional Municipal Commissioner.

59. Faced with these materials, at least prima facie indicating large scale irregularities and the decision to put up a proposal to initiate action on 18/04/2016, it is surprising that a draft letter to the Municipal Secretary for approval of the tenders is issued on 22/04/2016. Respondent no.1 in its affidavit has given reason that aforesaid works are of utmost urgent and important nature and therefore, delay of whatsoever nature will cause great hardship and inconvenience to the public at large. We cannot loose sight of the fact that at least in 2

cases, the tender notices were published as far back as on 16/05/2015 and 18/11/2015 and in other two cases, the same were published on 21/01/2016 and 25/01/2016. This clearly would go to show that the cases of respondents no. 3 & 4 for awarding and concluding the contracts gained momentum only after the report dated 01/04/2016 of the Additional Municipal Commissioner about the large scale deficiencies in quality and its manipulation thereof.

60. In the affidavit in reply dated 27th May 2016, the MCGM has stated in paragraph 27 that based on a report of March 2006 to widen the Mithi river, one of the tender is issued. In paragraph 31, it is stated that as the level crossing at Vikhroli is closed in 2012, the tenders for ROB are published. Even in respect of tenders for reconstruction of Hancock bridge, the bridge was closed almost for 3 ½ years before the tender was published.

61. Undoubtedly, the MCGM is expected to undertake

these works with utmost urgency and expedition. In this case, however, we find that the urgency shown by the MCGM is not for the public interest as projected, but only to justify the award of the contracts to respondents no.3 & 4. Having taken all steps in the right direction while ordering inquiry right upto the initiation of criminal action and black-listing, the MCGM, by delaying the suspension of registration has virtually allowed the respondents no.3 & 4 to walk away with these contracts.

62. Having regard to the materials on record and the fact that the action of suspension of registration of respondents no.3 & 4 was taken only on 16/05/2016 after the work order is issued on 06/05/2016, leaves us with no manner of doubt that the order of suspension of registration was delayed only with a view to award the contracts to respondents no.3 & 4. The decision to award the contract to the respondent no.3 & 4 is with undue haste and by so doing now a contention is raised that the situation is fait accompli in view of Rule 8.1.2. In the face of such large scale irregularities observed by the respondent

no.1 themselves, the action of suspension of registration so imminent, the hurry shown in awarding the contracts and the consequential delay in suspending the registration compels us to interdict in the decision making process.

63. According to us, therefore, the action of respondent no.1 in awarding the contract to respondents no. 3 & 4 is manifestly arbitrary. We are more than satisfied that the decision of awarding the contracts by respondent no.1 to respondents no.3 & 4 is illegal and irrational. We are pained by the thought of such important and urgent public works getting further delayed inconveniencing the public at large, however, we cannot allow the action of the MCGM to stand at the cost of larger public interest.

64. We are satisfied that larger public interest required that before actually awarding the contract, respondent no.1 ought to have awaited action of issuance of show cause notice for black-listing and/or at least the decision of suspension of

registration instead of hurriedly awarding the contract to respondents no.3 & 4 projecting public interest. While exercising the power of judicial review, we have kept in mind the larger public interest while coming to the conclusion that our intervention is called for.

65. It shocks our conscience that respondent no.1 though fully aware of the preliminary enquiry reports and the decision of the Municipal Commissioner to initiate action of black-listing and also criminal action, decision to award the contract is taken first and immediately thereafter a decision to suspend the registration. The Apex Court in the case of **M/s. Erusian Equipment & Chemicals Ltd.** *(supra)* has in paragraph 17 held that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. The activities of the government have a public element and therefore, there should be fairness and equality. The State need not enter into any contract with any

one but if it does so, it must do so fairly without discrimination and without unfair procedure.

66. In our considered opinion, respondent no.1 ought to have first decided the question, at least, that of suspension of registration as contemplated by Rule 8.1.2 of the said Rules and thereafter, proceeded with the awarding of the contracts instead of allowing the situation to be fait accompli and plead helplessness by citing Rule 8.1.2. We are of the view that the decision of respondent no.1 is against the larger public interest. Though respondent no.1 submitted that the procedure as laid down has been followed while awarding the contract, in our considered opinion, the circumstances are so compelling that we are inclined to interfere. We are of the view that power of respondent no.1 under Section 69(c) of the MMC Act to award the contract has not been exercised fairly and justly and in fact, the same has been exercised with a view to defeat the public interest.

67. Having regard to the aforesaid facts, it is clear that while awarding the contract in favour of Respondent Nos. 3 and 4, hot haste has been shown by the authority competent to award the contract. When the Commissioner had already taken a decision to issue show cause notice to these contractors and to lodge First Information Report in regard to their involvement in the alleged scam in respect of the roads inspected which are constructed at the cost of Rs.352 Crores, in all fairness, the decision which was long pending could have been deferred for few days till issuance of the show cause notice for which the decision was already taken. However, it appears that in view of the Rule 8.1.2 apprehending that if the show cause notice is issued, they would not be able to award tenders, the hurried steps for the award of contracts has been taken as if heaven were going to fall. The decision taken by the respondent no.1 in our considered view is intended to favour Respondent Nos. 3 and 4. In the circumstances the same is undoubtedly arbitrary, unreasonable and the same has been taken contrary to the larger public interest. Therefore when illegality, arbitrariness

and favoritism is apparent on the face of record, we have no option but to allow this Petition and quash the impugned decision.

68. We make it clear that we have not examined the contract awarded by respondent no.8 in favour of respondent no.3 concerning Metro VII project as apart from the fact that there is no sufficient material on record to go into the question of legality or otherwise of the contract, even the learned Amicus Curiae has not advanced any submission on this aspect.

69. We are not inclined to monitor the proceedings as prayed for as we find that the Corporation has already initiated action of black-listing and also set the criminal machinery in motion. There is nothing on record to suggest that the same will not be taken to its logical conclusion. In this view of the matter, we decline the request to monitor the proceedings.

In view of what is stated hereinabove, we pass the following order.

<u>O R D E R</u>

1. The present PIL is partly allowed.

2. The contracts awarded to respondents no.3 & 4 in respect of 4 works mentioned in the Statement in paragraph 52 are quashed and set aside.

3. No order as to costs.

(M.S.KARNIK, J.) **(SHANTANU.S.KEMKAR, J.)**