IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 380 OF 2017

Ganesh Benzoplast Limited,
A public limited company incorporated
under the Indian Companies Act, 1956
with registered office at Dina Building,
Marinelines, Mumbai 400002.
Represented herein by its
Vice President Mr. Elton Rodrigues. ... Petitioner

Versus

1. Mormugao Port Trust,
   a statutory body established under
   the Major Port Trust Act, 1963,
   with office at 'Administrative Building',
   Headland Sada, Mormugao, Goa.

2. Aegis Logistics Limited,
   a Company registered under the
   Companies Act, 1956 and having its
   registered office at 502, 5th Floor,
   Skylon, G.I.D.C., Char Rasta,
   Vapi 396195, Dist. Valsad,
   Gujarat represented through
   its authorized signatory
   Sudhir O. Malhotra. ... Respondents

Mr. S. S. Kantak, Senior Advocate with Mr. Ethelwald Olimpio Mendes, Advocate for the petitioner.

Mr. Y. V. Nadkarni, Advocate for the respondent no.1.

Mr. S. G. Desai, Senior Advocate with Mr. P. Rao and Ms. A. Lobo, Advocates for the respondent no.2.

Coram:- F. M. REIS &
NUTAN D. SARDESSAI, JJ.

Date:- 19th July, 2017

ORAL JUDGMENT (Per F. M. Reis, J)

Heard Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner, Mr. Y. V. Nadkarni, learned counsel appearing for the respondent no.1 and Mr. S. G. Desai, learned Senior Counsel appearing for the respondent no.2.

2. Rule. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respective respondents waive service.

4. The above petition takes exception to the decision taken by the respondent no.1 rejecting the technical bid of the petitioner/e-tender process for allotment of plots belonging to the respondent no.1.

5. Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner has pointed out that the petitioner had taken on lease another plot belonging to the respondent no.1 in the vicinity of the subject plot and in fact in view of a dispute between the parties with regard to the action taken by the respondent no.1 terminated such lease a suit was filed by the petitioner against the respondent no.1 in connection therewith. It is further submitted that the suit was dismissed by the learned Trial Judge and is under challenge before this Court in First Appeal No.114/2009 which has been admitted and is awaiting final hearing wherein an interim order has been passed protecting the occupation of the petitioner of such plot subject to deposit of a sum of Rs.60 lakhs per annum. It is further pointed out that the said order is being complied with by the petitioner in terms thereof and as such the occupation of the petitioner of such plot is legal. The learned Senior Counsel further points out that the petitioner submitted a bid for leasehold right of three plots belonging to the respondent no.1 by submitting his bid in accordance with e-tender. It is further pointed out that the

requisite amount was paid along with such bid by the petitioner. The learned Senior Counsel further submits that to their surprise the petitioner were not called to open the financial bid and the petitioner thereafter learnt that the bid of the petitioner came to be rejected. The learned Senior Counsel further submits that the respondents have invoked clause 3.5.(i)(f) of the tender conditions which inter alia provides that the self certificate has to be issued by the petitioner that there are no outstanding dues payable by the petitioner. The learned Senior Counsel further submits that the petitioner have duly complied with the interim order in operation passed by this Court that there are no outstanding dues payable by the petitioner in terms of the lease agreement in respect of the plot which was the subject matter of First Appeal before this Court. The learned Senior Counsel has also brought to our notice the guidelines issued by the Central Government to the effect that unless there is a determination of dues, the tender bid of the prospective tenderer cannot be rejected on such count. The learned Senior Counsel thereafter has essentially taken us through the terms and conditions of the e-auction and pointed out that the whole action on the part of the respondent no.1 in rejecting the bid of the petitioner is arbitrary and unsustainable in law and deserves to be set aside. The learned Senior Counsel further submitted that after excluding the petitioner from such e-tender auction, the respondents proceeded to open the bid of the respondent no.2 and proceeded to attempt to grant a lease in favour of the respondent no.2. It is further pointed out that after the two financial bids were opened, an artificial bidding was resorted to between the respondent no.2 and another party which according to the petitioner is a subsidiary of the respondent no.2. The learned Senior Counsel has further pointed out that the respondents have resorted to a mock exercise of increasing the bid amount while allotting the lease to the respondent no.2 in a high handed and arbitrary manner by rejecting the bids of the other bidders. The learned Senior Counsel thereafter has taken us through the relevant terms of the e-auction to point out that the whole action on the part of the respondent no.1 is malafide only to deprive the petitioner of his legal right to be considered in such e-auction.

The learned Senior Counsel in support of his submissions has relied upon the judgment of this Court reported in ***2011(6)Bom CR 866*** in the case of ***Shalby Limited V/s The State of Goa***, to contend that in case there was any clarification to be taken, it was incumbent upon the committee to seek such clarification from the petitioner. The learned Senior Counsel as such points out that the rejection of bid of the petitioner be accordingly quashed and set aside.

6. On the other hand, Mr. Y. V. Nadkarni, learned counsel appearing for the respondent no.1 has submitted that on plain reading of clause 3.5.(i)(f) of the tender conditions, it clearly provides that the bidders cannot have any outstanding dues payable to the respondent no.1. It is further pointed out that the interim order in operation was only concerning the rent payable in terms of the lease agreement and no other dues payable in terms of the clauses of such lease agreement. The learned counsel further submits that on going through the clauses of such lease agreement, it clearly contemplate that after

four years the petitioner were liable to pay a fixed amount as referred to therein which admittedly the petitioner have failed to pay or deposit before this Court. The learned counsel further submits that as such the certificate issued by the petitioner was contrary to the records of the respondent no.1, and as such the respondent no.1 was justified to reject the technical bid of the petitioner. The learned counsel further submits that this Court cannot sit in appeal over the decision taken by the committee and as such the question of invoking jurisdiction under Article 226 of the Constitution of India in the context that the petitioner admittedly has a litigation with regard to the previous transaction entered into between the petitioner and the respondent no.1 and as such entering into a fresh transaction would not at all be justified. The learned counsel further submits that it is well settled that this Court can only consider the validity of the decision making process and not the ultimate decision taken and as such according to him as the decision has been taken to reject the technical bid on the basis that the petitioner is having outstanding dues payable to the respondent no.1 cannot be faulted. The learned counsel in support of his submission has relied upon the judgment of the Apex Court reported in ***(2007)14 SCC 517*** in the case of ***Jagdish Mandal V/s State of Orissa and others***. The learned counsel as such points out that the petition be accordingly rejected.

7. Mr. S. G. Desai, learned Senior Counsel appearing for the respondent no.2 has also supported the submissions of the learned counsel appearing for the respondent no.1. The learned Senior Counsel further pointed out that the respondent no.2 is a successful bidder of the leasehold right of the subject plot and as such the question of this Court interfering in such allotment would not at all be justified. It is further submitted that past experience with the petitioner with regard to the earlier leasehold right granted by the respondent no.1 would definitely be in the mind of the committee in rejecting the bid of the petitioner. The learned Senior Counsel as such points out that the petition be accordingly rejected.

8. We have given our thoughtful consideration to the rival contentions and we have also gone through the records. Though Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner may be justified to contend that in terms of the guidelines issued by the Central Government with regard to rejection of the bid on the ground that no outstanding dues are payable could be prima facie justified, nevertheless, the fact remains that as far as the petitioner are concerned a litigation is pending between the petitioner and the respondent no.1 in connection with the previous transaction of lease executed by the respondent no.1 in favour of the petitioner. The question as to whether the petitioner are liable to pay the amount as claimed by the respondent no.1 in terms of the previous lease agreement is a matter which cannot be adjudicated in the present writ petition as it is not in dispute that in fact an appeal is pending before this Court. This aspect, if any, would have to be decided in such pending appeal before this Court.

9. In such circumstances, we shall proceed to consider whether the tender committee constituted by the respondent no.1

is justified to reject the technical bid of the petitioner on the ground that there were outstanding dues payable by the petitioner. The Apex Court in the said judgment in the case of ***Jagdish Mandal*** (supra) has observed at para 22 thus :

> "**22**. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is

made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.”

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

10. Taking note of the said observations to the facts of the present case, we find that irrespective as to whether the self certificate presented by the petitioner is correct or not, the fact remains as pointed out herein above that litigation is pending

between the petitioner and the respondent no.1 with regard to the earlier transaction. The suit filed by the petitioner came to be dismissed by the learned Trial Judge though an appeal is pending before this Court. The amounts which are ordered to be deposited in fact are not the total amount which the respondent no.1 has otherwise claimed to be the dues payable by the petitioner to the respondent no.1. In such circumstances, a prudent person who wants to enter into a transaction with a person who has pending litigation would be a matter of subjective satisfaction of such prudent person. We need not go into the contention of Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner that based on the interim order passed by this Court, no further dues are payable by the petitioner to the respondent no.1. This Court can exercise jurisdiction under Article 226 of the Constitution of India in extraordinary circumstances looking into the conduct and the background of the petitioner. In the present case, the petitioner is admittedly involved in a litigation with the respondent no.1 and in such circumstances, the question of exercising extraordinary jurisdiction in favour of the petitioner in a contractual matter when the respondent no.1 contend that large dues are payable by the petitioner would not at all be justified. The question as to whether any dues at all are payable are due or not is seriously disputed in the present case which cannot be decided in the present Writ Petition. In the background of this admitted fact, we find that the question of interfering in our extra ordinary jurisdiction under Article 226 of the Constitution of India in such contractual matter would not at all be justified. The petitioner, if so advised are at liberty to take recourse in law in case they establish that their bid was terminated on unjustifiable reason. Reserving such right, we find that there is no case made out for interference in the impugned decision in the present petition under Article 226 of the Constitution of India. Subject to the above, the petition stands rejected. Rule stands discharged.

NUTAN D. SARDESSAI, J. **F. M. REIS, J.**

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