IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 384 OF 2017

Ganesh Vishal Infra Engineering Pvt. Ltd.,
A public limited company incorporated
under the Indian Companies Act, 1956
with registered office at Dina Building
Marinelines, Mumbai 400002.
Represented herein by its
Authorized Signatory Sangeeta Karkera ... 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. This petition takes exception to the decision taken by the respondent no.1 rejecting the technical bid of the petitioner on the ground that the petitioner is a share holder in the defaulter company

M/s. Ganesh Benzoplast Limited.

5. Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner has pointed out that the respondent no.1 on arbitrary and untenable ground rejected the bid of the petitioner. The learned Senior Counsel further submits that the bid has been rejected on a spacious ground that the petitioner are shareholders of the said company which according to the respondent no.1 has outstanding dues. The learned Senior Counsel further pointed out that in fact the shares of the petitioner in such company were transferred way back in April, 2016 and the subject bid was submitted in March, 2017. The learned Senior Counsel further points out that the transfer document as well as the endorsement of such transfer before the Registrar of Company was endorsed on 26.04.2016. It is further pointed out that the tender committee appointed by the respondent no.1 did not even seek any query or clarification with regard to such aspect before arbitrarily proceeding to reject the bid of the petitioner. The learned Senior Counsel further submits that the whole exercise on the part of the respondent no.1 was to reject

the bid of the petitioner on untenable ground and proceed to grant the bid in favour of the respondent no.2 by an artificial bidding process with a sister concern of the respondent no.2. The learned Senior Counsel further pointed out that in the reply filed by the respondent no.1, a xerox copy of an alleged downloaded record from the Registrar of Companies has been produced whose authenticity is seriously disputed by the petitioner as the particulars therein are contrary to the actual records with the Registrar of Companies. It is further pointed out that the petitioner have also downloaded the information from the official website of the Registrar of Companies which clearly shows that the petitioner had already transferred the shares of the said company M/s. Ganesh Benzoplast Limited. The learned Senior Counsel further submits that in such circumstances, the decision of the respondent no.1 that the petitioners are disqualified on the ground that they were owning shares of such company is totally misplaced, erroneous and deserves to be quashed and set aside. In support of his submissions, the learned Senior Counsel has relied upon the judgment of this Court reported in ***2011 (6) BomCR 866*** in the case of ***Shalby***

Limited V/s The State of Goa.

6. On the other hand, Mr. Y. V. Nadkarni, learned counsel appearing for the respondent no.1 has pointed out that the balance sheet submitted by the petitioner discloses that they were the share holders of the said company though they were in respect of the Financial Year 2015-16. The learned counsel further points out that in the provisional balance sheet submitted by the petitioner for the period ending November, 2016, it was pointed out that such shares in the said company no longer existed. The learned counsel further submits that though a clarification was sought from the petitioner, such clarification only discloses that no shares of such company were held by the petitioner as on 31.12.2016 and in fact no certificate was produced by the petitioner to show the position as on date of the application. The learned counsel further submits that the downloaded information obtained by the petitioner from the official website of the Registrar of Companies shows that on the date of such downloading i.e. on 20.04.2017, the petitioner was holding shares in the said company. The learned counsel as such

points out that the respondents have rightly disqualified the technical bid of the petitioner in terms of 3.5.(i)(f) of the Tender Conditions. The learned counsel in support of his submissions 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.***

7. Mr. S. G. Desai, learned Senior Counsel appearing for the respondent no.2 points out that as there is no conclusive material produced by the petitioner that they had in fact conveyed the shares in such company in favour of the third party, it is not open to this Court to sit in appeal over the decision taken by the committee constituted by the respondent no.1. The learned Senior Counsel further points out that the respondent no.1 has rightly rejected the bid of the petitioner. The learned Senior Counsel as such points out that the petition be accordingly rejected.

8. We have considered the submissions of the learned counsel and we have also gone through the records. The records reveal that the petitioner has participated in the e-tender floated by

the respondent no.1 for lease for its three plots of land for a period of 30 years with an intention to set up storage tanks and installations for the handling and storage of liquid cargo within the Mormugao Port Trust. The records further reveal that the petitioner was disqualified in terms of clause 3.5.(i)(f) as the M/s. Ganesh Benzoplast Limited was shareholders of the petitioner company who owed monies to the Mormugao Port Trust. It is however, contended by the petitioner that when the scrutiny committee met on 27.03.2017 as on the date of the tender issue i.e. 10.02.2017 there was no material to show that M/s. Ganesh Benzoplast Limited was a shareholder of the petitioner. The scrutiny committee also did not have any credible or authentic material to show that there was any shareholder of the petitioner company which was stated by the respondent no.1 to be in default of dues to the Mormugao Port Trust and therefore, the disqualification of the petitioner deserves to be struck down.

9. The contention of the learned Senior Counsel appearing for the respondent no.2 that there are common shareholders in both

the companies and as such the disqualification is justified cannot be accepted. On plain reading of clause 3.5.(i)(f) of the tender conditions which does not contemplate such situation to disqualify the petitioner. At page 1133 of the petition, the petitioner have produced Form No. SH-4 which inter alia discloses that the shares of the company were transferred. The said document discloses that it was presented in the office of the Registrar of Company (ROC) on 26.04.2016. Besides the said document, the petitioner have also produced the provisional balance sheet as on November, 2016 which inter alia shows that the shares held by the said Company had already been transferred. The certificate from the Chartered Accountant after examining the records also points out that as on 31.12.2016 the said Company did not hold any shares with the petitioner. The petitioner have also produced the downloaded information from the website of the Registrar of Companies on 20.04.2017 which inter alia shows that M/s. Ganesh Benzoplast Limited are not holding shares with the petitioner company. On the basis of such overwhelming evidence on record, we find that the committee was not justified to reject the technical bid of the petitioner on the ground that the said Company were having shares in the petitioner company. Merely on the basis of the downloaded information whose authenticity prima facie is in doubt cannot be a base for rejecting the technical bid of the petitioner. In case the petitioner had any doubt with that regard, it was open to the committee to call the petitioner to give such clarification. Once it is shown that the clarification sought was duly submitted by the petitioner, in case of any doubt with that regard, the committee could have called the petitioner to give such clarification. This has also been considered by this Court in the said judgment in the case of ***Shalby Limited*** (supra) wherein it has been observed at para 22 thus :

> "**22**. The petitioner also relied on the judgment of this Court in **A 2 Z** *Maintenance & Engineering Services Ltd. vs Maharashtra State Electricity Distribution Co. Ltd. & Anr. 2010 (5) ALL MR 4* where this Court took a view that a tender ought not to have been considered as non responsive because the Power of Attorney submitted was not in conformity

> with a clause in the tender document. The Court observed that "the Bidder ought to have been given an opportunity to cure the defect as was done in the case of any other bidder"
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> Further, we are of the view that in a case where two views are possible, the view holding that a party should not be disqualified should be accepted since disqualification prevents the applicant from participating in the budding process and affects fundamental rights under Article 19 (1) (g) of the Constitution of India, which also affects finances of the State."

10. In such circumstances, we find that the respondent no.1 has not acted fairly in rejecting the bid of the petitioner on the ground that the defaulter company were holding shares of the petitioner. The action on the part of the respondent no.1 as such cannot be sustained being arbitrary and consequently deserves to be quashed and set aside. It is now well settled that the Court before interfering in tender or contractual matters in exercise of power of judicial review should pose to itself the different questions as to

whether the process adopted or decision made by the authority is malafide 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 the relevant law could have reached; and whether the public interest is affected in the present case by excluding the petitioner on the grounds which are untenable. It is contended by the petitioner that by excluding the petitioner from such bidding process an artificial bidding has taken place to ultimately attempt to give the bid to the respondent no.2. The decision taken by the committee is on an erroneous ground that the shares of the petitioner are held by the company M/s. Ganesh Benzoplast Limited.

11. The judgment of the Apex Court relied upon by Mr. Nadkarni, learned counsel appearing for the respondent no.1 is not applicable to the facts of the present case. On the basis of the admitted document on record, we find that the decision taken by the committee constituted by the respondent no.1 to evaluate the

technical bid is unsustainable in law and deserves to be quashed and set aside.

12. In view of the above, we pass the following :

O R D E R

(i) The decision of rejecting the technical bid of the petitioner in respect of the subject e-tender is quashed and set aside.

(ii) The respondent no.1 shall proceed to open the financial bid of the petitioner in accordance with law.

(iii) The Registry is accordingly directed to refund the amount, if any, deposited by the petitioner along with interest accrued thereon.

(iv) Rule is made absolute in the above terms.

(v) The petition stands disposed of accordingly.

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

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