IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2949 OF 2016

M/s. Guju Ads.
Sole Proprietorship firm
Through Mr. Bhavesh Bhinde : Petitioner.
Versus
The Chief Engineer
Mumbai Port Trust aad and ors. : Respondents.

Mr.Bhavik Manek a/w Ms. Priyaamvada Gokhale i/by MDP and Partners for the Petitioner.
Mr. D J Khambata a/w Mr. Vishal Talsania and Ms. Sneha B Pandey i/by Motiwalla &Co. for the Respondent No.1.
Ms. Iram Memon i/by Mr. Shoaib I Menon for the Respondent No.2.
Mr.Amit Shastri Addl.Govt. Pleader for the Respondent No.3.

CORAM : R. M. SAVANT &
SMT. SADHANA S JADHAV, JJ.
DATE : 31st JULY 2017

P.C.

1 The writ jurisdiction of this Court is invoked for quashing and setting aside the tender conditions comprised in Tender No.CE/106/2015 and more especially eligibility criteria contained in Para No.3.1(e) and Clause 5.3.5 of the Technical bid in the Tender advertised as Tender No.CE/106/2015 by the Respondent No.1.

2 The Respondent No.1 herein which is the Mumbai Port Trust had issued a tender notice some time in April 2016 for display of advertisement on its sites at various locations in Mumbai. In terms of the said tender, 50

hoardings admeasuring 40 ft. x 40 ft. were to be put up on various sites of the Respondent No.1. The said tender was issued in the Times of India on all India Circulation basis in its issue dated 28/03/2016. Under the said tender the bids were required to be submitted on or before 29/04/2016. By Corrigendum-I dated 16/04/2016 the last date for submitting bids was extended to 10/05/2016 and by Corrigendum-II dated 07/05/2016 the last date for submitting bids was further extended to 27/05/2016. In terms of Clause 2.9(a) which deals with amendment of tender conditions it was provided that any amendment to the tender would only be published on the website of MbPT. By Clause 2.11.3 the prospective bidder was advised to register his/its postal address in the manner as prescribed to ensure that any updates in the bidding process are intimated to him/it.

3 Since the challenge in the above Writ Petition is to the eligibility criteria, it would be apposite to re-produce Para 3.1 of the tender conditions being Tender No.CE-106/2015 which sets out the eligibility criteria :-

> "3.1 Eligibility criteria shall be as under :-
>
> (a) The bidder (Advertising Agency) shall be registered under the Shop and Establishment Act.
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> (b) The bidder (Advertising Agency) shall have office in Mumbai with VAT & Service Tax registration.
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> (c) The bidder (Advertising Agency) shall have minimum three years of experience in the field of

advertising, installation and maintenance of media asserts (as on 29.02.2016). This experience shall be on permanent structures like Unipoles/ Bipoles/ Bill boards/ FOB/ street furniture or similar other structures for Government or Semi Government Department/ Public Sector Undertakings/ Corporation/ MHADA/ MSRDC/ MMRDA. To claim their experience of minimum three years, bidders shalll produce certificate(s) from the respective above mentioned bodies.

(d) The bidder (Advertising Agency) shall have media assets with above said Govt. authorities in at least 3 cities. For the purpose of this tender, "city" is defined as having municipal corporation as civic body and distance between two such cities should not be less than 200 km.

(e) The average annual financial turnover of bidder/ firm/ agency during the last three years ending 31st March 2015 shall be at least Rs.75 crores. The bidder should submit Chartered Accountant's Certificate (as per Annexure – 3) along with Audited Statement of Accounts.

(f) The bidder shall submit Solvency Certificate for at least Rs.50 lakhs from any Nationalized/ Scheduled Bank.

(g) The Net Worth of the bidder/ firm/ agency shall be at least Rs.10 crores in the last financial year i.e. 2014-2015."

(emphasis supplied)

4 Hence in terms of Para 3.1(d) bidder was required to have media assets with government authorities mentioned in clause (c) in at least three cities. In terms clause (e) a bidder was required to have annual financial turnover of Rs.75 crores in the three years, and in terms of clause (g) the Net

Worth of the bidder was required to be 10 crores in the last financial year i.e. 2014-2015.

5 The said eligibility criteria was amended vide Corrigendum-3 issued on 16/05/2016 which was uploaded on the website of the Respondent No.1. In so far as clause (d) is concerned, the modified clause was clause (c) which was to the effect that a bidder was required to have media assets with the aforesaid government authorities i.e. the authorities mentioned in original clause (c) and vide clause (d) the turnover was brought down from Rs.75 crores to Rs.30 crores and in terms of clause (f) the Net Worth was brought down from Rs.10 crores to Rs.5 crores. The Petitioner did not participate in the said tender process as the Petitioner was not fulfilling the original eligibility criteria contained in clause 3.1 i.e. having media assets in three cities, turnover of Rs.75 crores and net worth of Rs.10 crores. The bid was to be submitted in two envelopes inter-alia containing the technical bid and final bid.

6 After going through the process the Respondent No.1 found the bid of the Respondent No.2 herein acceptable being the highest at 67% above the reserve price and accordingly awarded the contract to the Respondent No.2 on 05/08/2016. The Respondent No.2 has thereafter complied with other conditions of tender and is presently in the process of utilizing the sites in

question.

7 It seems that the Petitioner had earlier filed a Writ Petition in this Court challenging the tender conditions, but however had withdrawn the said Writ Petition with liberty to challenge the tender after it is awarded to the Respondent No.2. That is how the instant Petition has been filed.

8 On behalf of the Respondent No.1 an Affidavit in Reply dated 27/02/2017 is filed dealing with the claims and contentions raised in the Petition. The Petitioner has filed a rejoinder thereto which is dated 27/07/2017.

9 On behalf of the Petitioner the eligibility criteria as contained in the tender as originally invited in April 2016 and thereafter modified by Corrigendum-3 dated 16/05/2016 is sought to be challenged on the ground that when the Expression of Interest was invited in April 2015, the stringent eligibility criteria as contained in the original bid document was absent. It was the contention of the learned counsel appearing on behalf of the Petitioner that the criteria in so far as turnover is concerned, the same was only Rs.100 lakh. It was further the submission of the learned counsel for the Petitioner that it is on the basis of the said eligibility criteria that the Petitioner had participated in the Expression of Interest which has been recorded in the schedule showing the

names of the respective parties which had participated in the Expression of Interest. It was the submission of the learned counsel for the Petitioner that the change in criteria as contained in the original tender is arbitrary without taking into confidence the parties who had participated in the Expression of Interest. It was his submission that the endeavour of the Respondent No.1 which is a public body ought to be to see to it that the eligibility criteria is such that there is maximum participation so that the Respondent No.1 gets the best offer in the tender in question.

10 Per contra, the learned Senior Counsel appearing on behalf of the Respondent No.1 Shri D J Khambata would submit that the criteria which has been fixed is one which is suited to the tender in question as also the Respondent No.1. The learned Senior Counsel would question the challenge raised by the Petitioner to the eligibility criteria as according to him it is for the authority inviting tenders to fix such criteria which it deems appropriate considering the nature of the tender and also considering that the offers that it would expect to receive in the tender in question. The learned Senior Counsel would also contend that the scope of judicial review in such matters is very restricted. The learned Senior Counsel would place reliance on the judgments of the Apex Court reported in ***(1994) 6 SCC 651*** in the matter of ***Tata Cellular v/s. Union of India*** and ***(2012) 8 SCC 216*** in the matter of ***Michigan Rubber (India) Limited v/s. State of Karnataka and others***.

11 Having heard the learned counsel for the parties, in our view there is no merit in the above Writ Petition. The reliance on the Expression of Interest and the conditions on the basis of which the Expression of Interest is evinced is misplaced. The Expression of Interest is a modality which is adopted by a public authority to see the response that it would get to a particular tender. The eligibility criteria in the Expression of Interest would therefore not bind the public authority. In the instant case it is explicitly made clear by the preface to the Expression of Interest which reads thus :-

> “This notice is issued only to elicit an Expression of Interest from Parties interested in the Project and does not constitute any binding commitment from Mumbai Port Trust to proceed with the Project or invite any or all the Parties in the subsequent bidding process"

The Expression of Interest can be said to be by way of testing the waters as it were, in so far as the tender for a particular property or work is concerned. After the Expression of Interest the Respondent No.1 came out with the tender in April 2016 for the hoarding sites at its various locations. In the said tender the eligibility criteria as indicated above is comprised in Para 3.1, namely that the bidder should have turnover of Rs.75 crores, that it should have media assets in three cities and its net worth should be Rs.10 crores in the preceding financial year i.e. 2014-2015. The Respondent No.1 thereafter took a conscious decision to lower down the turnover to Rs.30 crores as also dilute the condition as regards the media assets as also diluted the condition of the

Net Worth from Rs.10 crores to Rs.5 crores. However, as indicated herein above, the Petitioner had not satisfied the eligibility criteria as per the original tenders conditions and thereafter even as per the amended conditions introduced by Corrigendum-3. The contention raised on behalf of the Petitioner that the conditions should be such that would amount to maximum participation cannot be accepted in the teeth of the judgments of the Apex Court (supra). In ***Michigan Rubber (India) Limited's*** case (supra) the Apex Court held that the Government and their undertakings must have a free hand in setting terms of the tender and only if they are arbitrary, discriminatory, mala fide or actuated by bias, would courts interfere. Nor would court interfere because it feels some other terms in the tender would have been fairer, wiser or more logical.

In ***Tata Cellular's*** case (supra) the Apex Court after adverting to its previous judgments culled out the principles which were deducible, same are as under:-

> “(1) The modern trend points to judicial restrain in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
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> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

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

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

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

12 In the instant case as indicated above the terms of the tender are challenged on the ground that the said terms were more onerous than the terms on the basis of which the Expression of Interest was invited. That the parties like the Petitioner were not taken into confidence prior to inviting the tender based on the said terms. However in the rejoinder the ground of the guidelines fixed by the Central Vigilance Commission ("CVC" for short) being violated is taken. We have already dealt with the said submissions as urged on behalf of the Petitioner except the submission based on the CVC guidelines. In our view having regard to the legal position as enunciated by the Apex Court in ***Tata Cellular's*** case (supra) and ***Michigan Rubber (India) Limited's*** case (supra), no interference is called for in our writ jurisdiction. In so far as the

guidelines laid down by the CVC are concerned, we fail to understand as to how the guidelines laid down by the CVC have been violated in any manner. The said guidelines have been issued to ensure transparency and fairness in the tender process. In our view in the facts of the present case it cannot be said that transparency and fairness was comprised in any manner by the Respondent No.1.

In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[SMT. SADHANA S JADHAV, J] **[R.M.SAVANT, J]**