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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1936 OF 2018

Proactive In & Out Advertising Pvt. Ltd.
A company incorporated under the provisions of Indian Companies Act, having its registered office at Samkeet Apartment, B-Wing, 3rd floor, Sant Janabai Marg, Vile Parle (E), Mumbai – 400 057, Through its Authorised Signatory Mrs. Jyoti Pillai .....Petitioner

V/s.

1. Pune Mahanagar Parivahan Mahamandal Ltd. Having office at PMT Building, Swargate, Pune – 37 Through its Managing Director.

2. The General Manager (Admin) Pune Mahanagar Parivahan Mahamandal Ltd. Having office at PMT Building, Swargate, Pune-37

3. State of Maharashtra (Through its Principal Secretary, Urban Development Department, Mantralaya, Mumbai -32) .....Respondents

Mr. Milind Sathe Senior Advocate a/w Mr. J. G. Reddy for the petitioner
Mr. Rohit P. Sakhdeo for respondent nos. 1 & 2
Mr. A. I. Patel Addl. GP for State-Respondent no. 3

CORAM : SHANTANU KEMKAR AND
NITIN W. SAMBRE, JJ.

RESERVED ON : 13th JUNE, 2018
PRONOUNCED ON : 22th JUNE, 2018

P.C. (PER: NITIN W. SAMBRE, J.)

The petition is arising out of a tender matter wherein for selection of reputed agency to manage advertisement spaces (non-AC buses in Pune Metropolitan area) was invited by respondent nos. 1 & 2.

2 It is the case of the petitioner that pursuant to his offer accepted by the respondent after negotiation on 24/01/2018, on 31/01/2018, a letter of intent came to be issued to him. Pursuant to the requirement under the letter of intent, the petitioner submitted his acceptance for selection ordered by the respondents vide communication dated 06/02/2018. According to him, clause 4.10 of the tender conditions provides for furnishing of performance bank guarantee within period of 15 business days from the date of Award. According to him before expiry of 15 working days period vide impugned order dated 08/02/2018, the tender alloted in favour of the petitioner has been

cancelled on the ground, performance bank guarantee and letter of acceptance was not received by the respondent. Vide order dated 08/02/2018, respondents have floated fresh tenders in which the petitioner is also instructed to participate.

It is this order of cancellation, tender and issuance of re-tender ordered on 08/02/2018 questioned in the present petition.

3 Heard Shri. Sathe, the learned senior counsel for the petitioner and Shri. R. P. Sakhdeo for respondent nos. 1 & 2, Additional Government Pleader Shri. A. I. Patel for respondent no. 3 State.

4 Shri. Sathe, the learned senior counsel for the petitioner would invite attention of this Court to various communications which were accepted in between petitioner and respondent nos. 1 & 2. According to Shri. Sathe, after submission of tender, vide communication dated 24/01/2018, petitioner was called for negotiation and petitioner attended the meeting for negotiation on 25/01/2018. He submits that on 30/01/2017, petitioner submitted the clarification on rates as were

negotiated in the meeting held on 25/01/2018. He would then urge that petitioner was issued letter of intent on 31/01/2018 whereby it was informed to the petitioner that he is declared as successful bidder in the tender in question for managing advertisement spaces on the non-AC buses of the respondent. He was directed to submit performance bank guarantee and acceptance letter. According to Shri. Sathe, petitioner responded to the said communication dated 31/01/2018 vide communication dated 06/02/2018. According to him, petitioner in categorical terms acknowledged the letter of intent which was based on bid and re-negotiation dated 25/01/2018 and re-negotiated proposal submitted through E-mail dated 29/01/2018 and 30/01/2018. Shri. Sathe then would urge that the petitioner has tendered monthly licence fees of Rs. 39,56,582/- for Solus buses at the rate of Rs. 4001/- per bus, per month and Rs. 2501/- per bus per month including Midi buses, for total 1582 buses. He would also submit that the petitioner has consented for incremental @ 5% per annum on the last payment made towards licence fees and requested for clarification on two issues. Shri. Sathe then would urge that the compliance of clause 4.10 *qua* performance bank guarantee particularly sub clause 2 (b) was very much reported as the said clause provides for 15 working days time to furnish bank guarantee. According to him, the petitioner has shown his bonafides by tendering cheques of the amount on bank guarantee towards security and also informed that issuance of bank guarantee is taken up with its banker and will be submitted the moment it will be received which will be replaced by cheques which were already tendered. According to Shri. Sathe, the impugned communication dated 08/02/2018 is issued by the respondent before expiry of 15 business days as provided under the clause performance bank guarantee. According to him, the said communication of cancellation of the letter of intent issued in favour of the petitioner is followed with order of re-tender. Shri. Sathe then would urge that if order of re-tender dated 08/02/2018 is appreciated in the background of cancellation of letter of intent and the tender dated 08/02/2018, it is ex-facie clear that respondents with a biased and *malafide* approach have eliminated the petitioner from a concluded contract by cancelling the tenders and issuing fresh.

5 Shri. Sathe, the learned counsel for the petitioner then would

invite attention of this Court to the impugned communication dated 08/02/2018 so as to point out that said communication was received by E-mail in the afternoon at around 1.00 p.m. whereas the decision of re-tender and advertisement thereof was taken prior to the said communication. He would try to draw support from the extract of the advertisement for re-tender published in the Pune edition of Indian Express on 08/02/2018 so as to substantiate his contention. According to him, the said conduct of the respondent nos. 1 & 2 speaks voluminous about their malafide approach and pre-determined view of cancellation of the letter of intent in favour of the petitioner. Shri. Sathe, the learned senior counsel then would urge that once the letter of intent was issued in favour of the petitioner, on 06/02/2018 petitioner by communicating acceptance of the work in question, it can be inferred that there is a concluded contract and as such, before cancellation of the contract the least that was accepted of respondent nos. 1 & 2 was to grant an opportunity of hearing. As such, according to him, both orders viz. cancellation of letter of intent/tender and order of re-tender dated 08/02/2018 needs to be quashed and set aside with consequential relief.

6 So as to substantiate his contention Shri. Sathe would rely upon the Judgment of the Apex Court in the matter of **Poddar Steel Corporation *V/s.* Ganesh Engineering Works and Ors**[1]**.** so as to claim that the essential conditions of eligibility which are ancillary or subsidiary with the main tender condition may not be required to be enforced rigidly and it is open for the Authority to deviate from the same. In addition, he would also draw support from the Judgment of the Apex Court in the matter of **Sterling Computers Limited and Ors. *V/s.* M & N Publications Limited and Ors.**[2] so as to claim that the judicial review of the decision taken by Public Authority in contractual matters like that of tender in question is permissible and open for review when the decision making process of the Authority is violative of Article 14 of the Constitution of India. He would also rely upon the latest Judgment of the Apex Court in the matter of **Municipal Corporation, Ujjain and another V/s. BVG India Limited and others**[3] so as to claim that the judicial scrutiny of the

1 **[1991 (3) SCC 273]**
2 **[1993 (1) SCC 445]**
3 **[2018 SCC online Supreme Court 278]**

administrative decision in a contractual matter is permissible.

7 *Per contra* the learned counsel for the respondent Shri. R. P. Sakhadeo would support the decision of the respondent nos. 1 & 2 and would strenuously urge that the tender conditions particularly clause 2.5 provides for pre-bid queries. According to him, if the acceptance of tender by the petitioner in response to letter of intent dated 31/01/2018, if appreciated, the acceptance appears to be conditional. He would then urge that the clause 4.10 of the tender notice provides for performance bank guarantee and such bank guarantee is required to be furnished by the selected bidder, i.e. petitioner in the present case, within period of 15 business days from the issuance of letter of Award. According to him, instead of making genuine efforts for furnishing bank guarantee pursuant to the aforesaid clause 4.10, the petitioner has substituted furnishing of bank guarantee by furnishing cheques and has not assured the period within which the bank guarantee will be furnished. According to him, the object with which the clause about furnishing of bank guarantee is inserted is to secure the satisfactory performance of contract in

question. The clause performance bank guarantee provides for security in favour of the respondent Authority, in case if the parties like the petitioner fail to perform their part of contract. He would urge that the said condition has to be read as mandatory. There cannot be any deviation from such conditions. He would then urge that the petitioner can compete afresh in the new tender process which is floated by the respondents as the petitioner will given fresh opportunity and is not estopped from participating in the fresh tender process. According to him as the final Agreement is not entered into, there is no concluded contract, hence question of granting opportunity of hearing to the petitioner or issuance of show cause notice is of hardly any consequences. The learned counsel would urge that there is very limited scope of judicial review of administrative actions *qua* the contractual matters like present one.

8 The learned Addl. GP supports the claim of the respondents and all the respondents sought dismissal of the writ petition.

9 Considered rival submissions.

10 It is not in dispute that the tender in question came to be published for the third time as the earlier two tender notices were remained unfruitful. The petitioner, after submission of his tender appears to have quoted higher amount of revenue, in return of the rights offered by the respondents *qua* the advertisement to be placed on the non-AC buses of the respondents.

11 Such process of acceptance of tender and issuance of letter of intent was preceded with calling the petitioner for negotiation which took place on 25/01/2018. The petitioner, pursuant to such negotiation submitted his revised highest rates on 30/01/2017.

12 The nature of work which the petitioner was called upon to execute is to manage advertisement spaces of non-AC buses in Pune Metropolitan area which is managed by respondent nos. 1 & 2. The validity period of the bid which was submitted by the petitioner was 180 days and the petitioner was required to furnish performance bank guarantee pursuant to clause 4.10.

13 The petitioner was issued order dated 31/01/2018 by respondent nos. 1 & 2 and was directed to submit performance bank guarantee and acceptance letter. Pursuant to letter of intent issued by the respondent, it appears that petitioner has submitted his acceptance of letter of intent. He has also tendered monthly licence fees of Rs. 39,56,582/- for Solus buses at the rate of Rs. 4001/- per bus per month and Rs. 2501/- per bus per month for other buses for in all 1582 buses. The petitioner also agreed to give incremental @ 5% per annum. He has in clear terms mentioned in the said communication that the petitioner accepts the letter of intent based on the bid submitted. He has then tendered two cheques towards the security and assured that issuance of performance bank guarantee is under process with the banker and same will be submitted in due course. There appears to be an acknowledgment by the respondent to the said letter. Though there is categorical statement on affidavit made by the petitioner that letter of intent was accepted by the respondent, the respondent by issuing impugned communication dated 08/02/2018 has cancelled the tender and ordered for re-tender. Needless to say

that re-tender was published on the very same day in the morning before the impugned letter came to be issued in the Indian Express Newspaper.

14 From the aforesaid conduct of the respondent, it is *ex-facie* clear that respondent nos. 1 & 2 have taken decision to cancel the letter of intent and issued re-tender by cancelling earlier tender before 08/02/2018. It is worth to note hear that clause 4.10 of the tender conditions reads thus:

> "***4.10 Performance Bank Guarantee***
>
> *1 Performance Bank Guarantee is governed for supplies and services as follows:*
>
> ***RFP for Selection of Reputed Agency to Manage Advertisement Spaces (Non-AC Buses in Pune Metropolitan Area)***
>
> *a) The bidder shall carry out the services in conformity with the requirements of the RFP, generally accepted professional and technically accepted norms relevant to such projects and to the satisfaction of TIA.*
>
> *b) The Earnest Money deposited at the time of bid submission would be given back to the bidder on payment of Performance Bank Guarantee in the form of a Bank Guarantee.*

> *2 The selected bidder shall deposit the Performance Security as follows:*
>
> *a) The successful bidder shall at his own expense, deposit with PMPML, and Performance Bank Guarantee of (an amount equivalent to the 10^{th} years last six months advertisement fee) or (as decided at the time of signing the contract). The bidder should submit the Performance Bank Guarantee as per the format provided in Annexure – 5 of this RFP document.*
>
> *b) The Performance Bank Guarantee should be furnished within 15 Business Days from the date of issue of Letter of Award/Work Order.*
>
> *c) The Performance Bank Guarantee may be discharged/returned by TIA upon being satisfied that there has been due performance of the obligation of the successful bidder under the contract. However, no interest shall be payable on the Performance Bank Guarantee."*

15 The reading of the said condition makes it amply clear that the performance bank guarantee was to be furnished within period of 15 working days from the date of issuance of letter of intent. It is the case of the petitioner that he received letter of intent dated 31/01/2018 on the same day late in the night. In any case, even if it is presumed that letter of intent was served on the petitioner on 31/01/2018 pursuant to the provisions of clause 4.10 of the tender conditions, the petitioner

was required to furnish performance bank guarantee within 15 working days i.e. by 17/02/2018. Instead of waiting for said period after issuance of letter of intent, respondent, pre-maturely, in a hurried manner, cancelled the tender and ordered its re-issuance.

16 Though Shri. Sakhdeo, the learned counsel for respondent nos. 1 & 2 has tried to justify the said decision of cancellation of tender and issuance of re-tender dated 08/02/2018 on the ground that the petitioner has failed to furnish the performance bank guarantee, as he has furnished the cheques, in our opinion, the said cause/reason which is cited by the respondent to justify their action of cancellation of tender and re-tender is not germain to the cause. When the tender condition contemplates that respondent should give 15 days working days time to furnish performance bank guarantee, there is no material on record to infer that petitioner had any time refused to or has failed within 15 working days to furnish performance bank guarantee.

17 Apart from above, it is required to be noted that cancellation of tender and issuance of fresh tender, the impugned decision was taken

earlier to the impugned communication dated 08/02/2018. As such, it appears that respondents were pre-determined in cancelling the earlier tender and issuance of new tender.

18 This Court hardly notices any justifiable reasons coming forth from the respondents in support of their impugned order of cancellation of tender and issuance of re-tender.

19 Apart from above, the fact remains that once the letter of intent issued by the respondent was accepted by the petitioner and petitioner has promised the respondent of furnishing bank guarantee, it was not open for the respondent to cancel the tender and issue fresh tender. Such act on the part of the respondent suffers from vice of arbitrariness and violates Article 14 of Constitution of India.

20 In the aforesaid background, if the law cited before this Court in the matter of **Municipal Corporation, Ujjain and another** [*cited supra*] if appreciated, this Court is sensitive to the fact about the limitations in the matter of review of administrative decision in extra

ordinary jurisdiction, but such review of decision in contractual matter is very much permissible.

21 It is no more *res-integra* that the principles of judicial review would apply to the exercise of powers in contractual matteres by the Government bodies in order to prevent arbitrariness. It is required to be noted that the Government is the guardian of the finances of the State and while protecting the financial interest of the State, though power vest with the Authority to refuse the lowest or any tender, however, the same has to be within the framework of principle laid down under Article 14 of the Constitution of India. Such powers cannot be exercised arbitrarily or for co-lateral purposes, and if so noticed, this Court can struck down.

22 This Court is sensitive to the fact that the administrative decisions cannot be corrected which are taken by experetise body. However, the review of the administrative decision is permitted, if it is noticed that the above principles of fair play or arbitrariness are violated.

23 Appropriate support can also be drawn from the Judgment of the Apex Court *qua* the aforesaid principles in the matter of **Tata Cellular V/s. Union of India**[4].

24 If the infirmity noticed in the decision making process *qua* the contractual matters, needless to say that judicial review is permissible. All that is expected of the respondent Authorities is to give fair and reasonable treatment to the participants. The aforesaid view is also supported from the Judgment in the matter of **Sterling Computers Limited and Ors** [*cited supra*].

25 It is required to be noted that this Court cannot sit in appeal over the Judgment of Executive Authority in a judicial review, but certainly can review the decision on considering the aforesaid terms as per the law laid down by the Apex Court.

26 In the present case, what is noticed is, the respondents, while

4 **[1994 (6) SCC 651]**

issuing impugned communication of cancellation of tender and further issuance of re-tender, acted in unfair and unreasonable manner. There are no justifiable reasons so as to cancel the tender when the letter of intent was already issued and accepted by the petitioner.

27 It is not the case of the respondents that essential conditions, performance bank guarantee were not satisfied as per clause 4.10 of tender conditions by the petitioner or the petitioner has sought any relaxation.

28 In the aforesaid background of legal proposition as laid down by the Apex Court, if the decision of respondent Authorities is appreciated, in our opinion, the same is not sustainable. The impugned communications speak of cancellation of tender and issuance of re-tender based on non receipt of acceptance/acknowledgment of terms of letter of intent whereas it is demonstrated that before the expiry of 15 working days, petitioner has communicated acceptance and also assured furnishing of bank guarantee.

29 For the aforesaid reasons, in our opinion, writ petition needs to be allowed.

30 Writ petition is allowed in terms of prayer clause (b) and (c).

31 It is directed that if the petitioner furnishes performance bank guarantee within period of 7 working days from the date of pronouncement of this order, the respondent Authority should accept the same and shall proceed with the acceptance of tender of the petitioner, provided he is not otherwise disqualified.

32 Petition stands allowed in the above terms.

[NITIN W. SAMBRE, J.] **[SHANTANU KEMKAR, J.]**